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ISSN 2663-3248

African Court Law Report
Volume 3 (2019)

PULP

Report of judgments,
orders and advisory opinions of the
African Court on Human and Peoples' Rights

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Volume 3 (2019)

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African Court Law Report
Volume 3 (2019)

Pretoria University Law Press
PULP

2021

Report of judgments, orders and advisory opinions of the African Court on Human and Peoples' Rights
African Court Law Report Volume 3 (2019)

Published by:

Pretoria University Law Press (PULP)

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ISSN: 2663-3248

Table of contents

Editorial

This is the third volume of the *Report of judgments, orders and advisory opinions of the African Court on Human and Peoples' Rights*. This volume covers decisions from 2018 to 2019.

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.

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 reports indicates which cases discuss a particular issue. This index is divided into sections on general principles and procedure, and substantive issues.

User Guide

This third volume of the *African Court Law Report* includes 54 decisions of the African Court on Human and Peoples' Rights. Decisions are sorted chronologically with decisions dealing with the same case (eg procedural decisions, orders for provisional measures, merits judgments and reparations judgments) sorted together. 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 indicates the year of the decision, the number before *AfCLR* the volume number (3), while the number after *AfCLR* indicates the page number in this *Report*.

Acknowledgment

The support of the following persons in the process of publication of this *Report* is acknowledged with much appreciation:

- Mr. Nouhou Madani Diallo, Deputy Registrar
- Mr. Raymond Diouf, Principal Legal Officer
- Dr Zelalem Teferra, Senior Legal Officer
- Mr. Victor Lowilla, Legal Officer
- Mr. Aliou Diallo, Legal Officer
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- Mme Irène Yankemadje, African Union Volunteer Lawyer
- Mme Syrine Ghorbel, Legal Intern

Alphabetical Table of Cases

Subject Index

GENERAL PRINCIPLES AND PROCEDURE

Admissibility

Consideration of admissibility requirements
Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482

Disparaging language
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

Exhaustion of remedies
Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73
Josiah v Tanzania (merits) (2019) 3 AfCLR 83
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
Mango and others v Tanzania (merits and reparations) (2019) 3 AfCLR 439
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Rajabu and others v Tanzania (merits and reparations) (2019) 3 AfCLR 539
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Bunyerere v Tanzania (merits and reparations) (2019) 3 AfCLR 702

Availability
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

Form and content of Application
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593

Identification of Applicants
Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73

Issues first raised before the Court
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629

Evidence

Interpretation

Jurisdiction

Procedure

Provisional measures

Reparations

Fair trial

Instruments Cited

AFRICAN UNION INSTRUMENTS

African Charter on Human and Peoples' Rights

Article 1

Article 2

Rajabu and others v Tanzania (merits and reparations) (2019) 3 AfCLR 539
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Koutché v Benin (provisional measures) (2019) 3 AfCLR 725
XYZ v Benin (2019) (provisional measures) 3 AfCLR 750

Article 3

Nhabi v Tanzania (provisional measures) (2019) 3 AfCLR 10
Josiah v Tanzania (merits) (2019) 3 AfCLR 83
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Chalula v Tanzania (provisional measures) (2019) 3 AfCLR 232
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Kakobeka v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 537
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Koutché v Benin (provisional measures) (2019) 3 AfCLR 725
Suy Bi and others v Côte d'Ivoire (provisional measures) (2019) 3 AfCLR 732
XYZ v Benin (2019) (provisional measures) 3 AfCLR 750

Article 4

Nhabi v Tanzania (provisional measures) (2019) 3 AfCLR 10
Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99
Chalula v Tanzania (provisional measures) (2019) 3 AfCLR 232
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Rajabu and others v Tanzania (merits and reparations) (2019) 3 AfCLR 539
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
XYZ v Benin (2019) (provisional measures) 3 AfCLR 750

Article 5

Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405

Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Koutché v Benin (provisional measures) (2019) 3 AfCLR 725
XYZ v Benin (2019) (provisional measures) 3 AfCLR 750

Article 6

Ajavon v Benin (merits) (2019) 3 AfCLR 130
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Koutché v Benin (provisional measures) (2019) 3 AfCLR 725

Article 7

Nhabi v Tanzania (provisional measures) (2019) 3 AfCLR 10
Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73
Josiah v Tanzania (merits) (2019) 3 AfCLR 83
Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Chalula v Tanzania (provisional measures) (2019) 3 AfCLR 232
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Thomas v Tanzania (reparations) (2019) 3 AfCLR 287
Nganyi and others v Tanzania (reparations) (2019) 3 AfCLR 308
Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334
Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411

Article 8

Article 9

Article 10

Article 12

Article 13

Article 14

Article 15

Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
XYZ v Benin (2019) (provisional measures) 3 AfCLR 750

Article 16

Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73

Article 17

African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
Suy Bi and others v Côte d'Ivoire (provisional measures) (2019) 3 AfCLR 732

Article 18

Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

Article 19

Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405

Article 21

African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411

Article 22

African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
XYZ v Benin (2019) (provisional measures) 3 AfCLR 750

Article 24

Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73

Article 26

Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73
Ajavon v Benin (merits) (2019) 3 AfCLR 130

Article 28

Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405

Article 34

Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522

Article 50

Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

Article 56

Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73
Josiah v Tanzania (merits) (2019) 3 AfCLR 83
Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Bunyerere v Tanzania (merits and reparations) (2019) 3 AfCLR 702

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

Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
Kakobeka v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 537
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

Article 3

Article 5

Article 6

Article 8

Article 10

Article 22

Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
Charles and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 529
Kalilou and Ibrahim v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 533
Kakobeka v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 537
African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Taudier and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 722
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Suy Bi and others v Côte d'Ivoire (provisional measures) (2019) 3 AfCLR 732
Aka Yao and Sanogo v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 739
Diomandé and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 741
Aguehi and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 743

Article 27

Nhabi v Tanzania (provisional measures) (2019) 3 AfCLR 10
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
Josiah v Tanzania (merits) (2019) 3 AfCLR 83
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Chalula v Tanzania (provisional measures) (2019) 3 AfCLR 232
Thomas v Tanzania (reparations) (2019) 3 AfCLR 287
Nganyi and others v Tanzania (reparations) (2019) 3 AfCLR 308
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Koutché v Benin (provisional measures) (2019) 3 AfCLR 725
Suy Bi and others v Côte d'Ivoire (provisional measures) (2019) 3 AfCLR 732
XYZ v Benin (2019) (provisional measures) 3 AfCLR 745
XYZ v Benin (2019) (provisional measures) 3 AfCLR 750
XYZ v Benin (2019) (provisional measures) 3 AfCLR 754

Article 28

Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405
Charles and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 529
Kalilou and Ibrahim v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 533
African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593

Article 30

Suy Bi and others v Côte d'Ivoire (provisional measures) (2019) 3 AfCLR 732
Thomas v Tanzania (reparations) (2019) 3 AfCLR 287
Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334

Article 31

Ajavon v Benin (merits) (2019) 3 AfCLR 130

Article 33

African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411

Article 34

Nhabi v Tanzania (provisional measures) (2019) 3 AfCLR 10
Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73
Josiah v Tanzania (merits) (2019) 3 AfCLR 83
Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Chalula v Tanzania (provisional measures) (2019) 3 AfCLR 232
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Kakobeka v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 537
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Koutché v Benin (provisional measures) (2019) 3 AfCLR 725
Suy Bi and others v Côte d'Ivoire (provisional measures) (2019) 3 AfCLR 732
XYZ v Benin (2019) (provisional measures) 3 AfCLR 745
XYZ v Benin (2019) (provisional measures) 3 AfCLR 750

African Charter on the Rights and Welfare of the Child

Article 6

African Charter on Democracy, Elections and Governance

Article 10

Article 17

Constitutive Act of the African Union

Article 3

Article 4

Rules of Court of the African Court on Human and Peoples' Rights

Rule 1

Rule 2

Rule 3

Rule 4

Rule 7

Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593

Rule 26

Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498

Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593

Rule 27

Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334
Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411

Article 28

Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

Rule 30

Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Thomas v Tanzania (reparations) (2019) 3 AfCLR 287
Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334
Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689

Rule 33

African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593

Rule 34

Ajavon v Benin (merits) (2019) 3 AfCLR 130
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593

Rule 35

Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73
Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99
Chalula v Tanzania (provisional measures) (2019) 3 AfCLR 232
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Nhabi v Tanzania (provisional measures) (2019) 3 AfCLR 10

Rule 38

African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411
Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498

Rule 39

Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73
Josiah v Tanzania (merits) (2019) 3 AfCLR 83
Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99
Ajavon v Benin (merits) (2019) 3 AfCLR 130
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629

Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655
Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689
Koutché v Benin (provisional measures) (2019) 3 AfCLR 725
Suy Bi and others v Côte d'Ivoire (provisional measures) (2019) 3 AfCLR 732
Bunyerere v Tanzania (merits and reparations) (2019) 3 AfCLR 702

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Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
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Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
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Article 2

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Article 3

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Article 5

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Article 6

Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405
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Article 7

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Article 9

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Article 10

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Article 11

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Article 13

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Article 15

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Article 17

Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
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Article 21

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Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629
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Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73
Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389

Article 6

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Article 7

Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99

Article 9

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Article 11

Article 12

Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593
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Article 14

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Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
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Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99

Ajavon v Benin (merits) (2019) 3 AfCLR 130
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367
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Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498

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Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
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Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235
Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522
Thomas v Tanzania (reparations) (2019) 3 AfCLR 287
Nganyi and others v Tanzania (reparations) (2019) 3 AfCLR 308
Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334
Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498

Isiaga v Tanzania
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
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Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498

Ivan v Tanzania
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Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498

Johnson v Ghana
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Thomas v Tanzania (reparations) (2019) 3 AfCLR 287
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Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378
Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
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Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356
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Wangoko v Tanzania
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
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Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470
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William v Tanzania
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Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389
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Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482

Melin v France
Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48
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Ajavon v Benin (merits) (2019) 3 AfCLR 130

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Application 015/2016, *Habiyalimana Augustino and Miburo Abdulkarim v United Republic of Tanzania*

Order, 31 January 2019. Done in English and French, the English text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

Request by the Applicant to amend the Application and file further evidence granted by the Court.

Procedure (leave to amend; leave to file submissions)

I. The Parties

1. The Applicants, Habiyalimnana Augustino (hereinafter referred to as "the first Applicant") and Miburo Abdulkarim, (hereinafter referred to as "the second Applicant") are nationals of Burundi. They were convicted of murder contrary to Section 196 of the Penal Code of the United Republic of Tanzania and on 31 May 2007, were sentenced to death by hanging by the High Court of Tanzania at Bukoba. Their conviction and sentence were upheld by the Court of Appeal of Tanzania sitting at Mwanza on 2 March 2012.

2. The Respondent State, the United Republic of Tanzania, became a party to the African Charter on Human and Peoples' Rights (the Charter) on 21 October 1986 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 (the Protocol) on 10 February 2006. On 29 March 2010, the Respondent State deposited its declaration as prescribed under Article 34(6) of the Protocol.

II. Prayers of the Parties

3. The Applicants have both requested for the leave of Court for their applications to be considered separately and have also made specific prayers to the Court as follows:

A. First Applicant's Prayers

4. The first Applicant prays the Court for:

"i. Permission to amend or supplement Application No 015/2016;

ii. Permission to file additional evidence in support of the Application pursuant to Rule 50 of the Rules of the Court;

iii. Defer drafting of the judgment in this matter until Mr. Augustino has had the opportunity to make the contemplated further submissions and provide additional evidence."

B. Second Applicant's Prayers

5. The second Applicant prays the Court for:

"i. Permission from the Court to file further evidence in his defence, pursuant to Rule 50 of the Rules of Court;

ii. Permission to amend and supplement the Joint Application No. 015 of 2016 and Petitioners' Reply so as to include, inter alia, a request for reparations pursuant to Rule 34 of the Rules of the Court;

iii. That the Court defer drafting judgment in this matter until the Applicant has had the opportunity to make the contemplated further submissions; and

iv. That these matters be addressed at an oral proceeding, pursuant to Rules 27 and 71 of the Rules of Court."

C. Respondent State's Response

6. In its observations to the first Applicant's request, the Respondent State avers as follows:

"i. That the Applicant's Application for leave to amend Application No. 015 of 2016 is a total an after though (sic). We are also of the observation that, the said application intends to empty prejudice the Respondent's Reply and nothing more (sic).

ii. However, on the prayer of filing additional evidence pursuant to Rule 50 of the Rules of the Court (sic). We do not object provided that, the Respondent will also be granted time to respond on the new evidence to be filed (sic).

iii. We also do not object the prayer which request the Court to defer drafting of the judgment in this matter until Mr. Augustino has had the opportunity to file additional evidence and the Respondent has filed her comments on the new evidence filed (sic)."

III. The Court hereby orders:

i. On the request to separate the Applicants:

That the Application shall not be separated and it will be considered as currently registered and as filed jointly by the Applicants.

ii. On the request for leave to amend the Application and submit new evidence:

1. Reopens the proceedings in Application 015/2015 *Habiyalimana Augustino & Miburo Abdulkarim v United Republic of Tanzania*; and
2. Grants the Applicants leave to amend their application and submit further evidence in support thereof, within thirty (30) days of notification of this Order.

iii. On the request for a public hearing:

The Court shall decide whether or not there should be oral proceedings upon receipt and consideration of the Parties' submissions following the reopening of pleadings.

iv. On reparations:

Allows the Applicants to file their submissions on reparations within thirty (30) days of notification of this Order.

Lazaro v Tanzania (leave to amend) (2019) 3 AfCLR 4

Application 003/2016, *John Lazaro v Tanzania*

Order, 7 February 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

Request by the Applicant to amend the Application granted by the Court.

Procedure (leave to amend, 4; leave to file submissions, 4)

I. The Parties

1. The Applicant, John Lazaro (hereinafter referred to as "the Applicant") was convicted of murder contrary to Section 196 of the Penal Code of the United Republic of Tanzania and on 6 August 2010, and sentenced to death by the High Court of Tanzania at Bukoba in Criminal Session 88/2004. His conviction and sentence were upheld by the Court of Appeal of Tanzania sitting at Mwanza on 28 November 2011, in Criminal Appeal 230/2010.

2. The Respondent State, the United Republic of Tanzania, became a party to the African Charter on Human and Peoples' Rights (the Charter) on 21 October 1986 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 (the Protocol) on 10 February 2006. On 29 March 2010, the Respondent State deposited its declaration as prescribed under Article 34(6) of the Protocol.

II. Prayers of the Parties

3. The Applicant prays:

"i. That the Applicant be permitted to amend or file a supplement to his Notice of Appeal.

ii. That the Applicant be permitted to file further evidence in his defence, pursuant to Rule 50 of Rules of Court;

iii. That the Applicant be allowed 90 days from the date of filing this motion, (taking into account the fact that the holiday period will result in delays) to submit these additional documents

iv. That drafting or issuing of judgment in this matter be deferred until

the Applicant has had an opportunity to make the contemplated further submissions; and

v. That the case be heard in oral proceedings, pursuant to Rules 27 and 71 of the Rules of the Court."

4. The Motion to amend the Application and file further evidence was sent to the Respondent State on 10 December 2018 but it did not respond to the Request.

The Court,

i. Grants the Applicant leave to amend the Application and submit further evidence in support of the Application, within fifteen (15) days of notification of this Order.

ii. Grants the Applicant leave to file amend his submissions on reparations within fifteen (15) days of notification of this Order if need be.

iii. Reserves its decision on the holding of a public hearing.

Juma v Tanzania (leave to amend) (2019) 3 AfCLR 6

Application 024/2016, *Amini Juma v United Republic of Tanzania*

Order, 13 February 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

Request by the Applicant to amend the Application and file further evidence granted by the Court.

Procedure (leave to amend, 4; leave to file submissions, 4)

I. The Parties

1. The Applicant, Mr Amini Juma is a national of the United Republic of Tanzania. He was convicted of the offence of murder on 18 September 2008 by the High Court of Tanzania and sentenced to life imprisonment, subsequently on appeal, his original sentence was substituted with a death sentence by the Court of Appeal of Tanzania at Bukoba on 17 December 2011.

2. The Respondent State, the United Republic of Tanzania, became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol 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 February 2006. On 29 March 2010, it deposited the declaration required under Article 34(6) of the Protocol.

II. Prayers of the Parties

3. The Applicant prays the Court to Order:

"1. That the Applicant be permitted to amend or file a supplement to his Application in accordance with the application filed on 19 October 2018;

2. That the Applicant be permitted to adduce additional evidence under Rule 50 of the Court's Rules in accordance with the Application filed on 19 October 2018;

3. That the Applicant be permitted to file such evidence and submissions on 18 January 2019;

4. That the Applicant be permitted to file the Reparation submissions

on 18 January 2019;

5. That drafting or issuing of the judgment in this matter be deferred until the Applicant has had the opportunity to make the contemplated further submissions."

4. The Respondent State did not reply to the prayers of the Applicant.

The Court

i. Grants the Applicant leave to amend his application and submit further evidence in support of the same to be filed within fifteen (15) days of notification of this Order.

ii. Grants the Applicant leave to file his submissions on reparations within fifteen (15) days of notification of this Order.

Damian v Tanzania (leave to amend) (2019) 3 AfCLR 8

Application 048/2016, *Dominick Damian v United Republic of Tanzania*

Order, 13 February 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

Request by the Applicant to amend the Application and file further evidence granted by the Court.

Procedure (leave to amend, 4)

I. The Parties

1. The Applicant, Dominick Damian, is a national of the United Republic of Tanzania (hereinafter referred to as "the Applicant"). He was convicted of murder contrary to Section 196 of the Penal Code of the United Republic of Tanzania and on 14 December 2012, was sentenced to death by the High Court of Tanzania sitting at Bukoba. His conviction and sentence were upheld by the Court of Appeal of Tanzania sitting at Mwanza on 17 March 2014.

2. The Respondent State, the United Republic of Tanzania, became a party to the African Charter on Human and Peoples' Rights (the Charter) on 21 October 1986 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 (the Protocol) on 10 February 2006. On 29 March 2010, the Respondent State deposited its declaration as prescribed under Article 34(6) of the Protocol.

II. Prayers of the Parties

3. The Applicant prays:

"i. permission from this Honourable Court to amend Application No. 048/2016 (the 2016 Application") or submit a supplement to the 2016 Application;

ii. permission to file further evidence in his defence, pursuant to Rule 50 of Rules of Court;

iii. that the Court defer drafting judgment in this matter until the Applicant has made the contemplated further submissions; and

iv. that these matters be addressed at an oral proceeding, pursuant to Rules 27 and 71 of the Rules of Court."

4. The Respondent State did not respond to the prayers of the Applicant.

The Court

i. Grants the Applicant leave to amend his Application and submit further evidence in support of the same within fifteen (15) days of notification of this Order.

ii. Reserves its decision on the request to hold a public hearing.

Nhabi v Tanzania (provisional measures) (2019) 3 AfCLR 10

Application 004/2018, *Ngasa Nhabi v United Republic of Tanzania*

Order, 20 March 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant had been convicted of murder and sentenced to death in 2008. He argued that the trial both before the High Court and the Court of Appeal had been marred by irregularities. At his request, the Court issued provisional measures to the Respondent State to refrain from executing the death penalty until the Application was heard and determined on the merits.

Provisional measures (death penalty, 17)

I. Subject of the Application

1. On 2 March 2018, the Court received an Initial Application filed by Ngasa Nhabi (hereinafter referred to as "the Applicant," against the United Republic of Tanzania (hereinafter referred to as "the Respondent State," for alleged violation of his human rights.

2. The Applicant, currently imprisoned in Uyui Central Prison, was convicted of murder and sentenced to death by hanging on 7 March 2008, by the High Court of Tanzania sitting in Tabora. On 24 June 2011, the Court of Appeal in Tabora, Tanzania's highest court, upheld the sentence. The Applicant lodged an appeal for review before the Court of Appeal in Tabora, which was also dismissed on 5 October 2015.

3. The Applicant alleges, *inter alia*, that the trial before the High Court was marred by irregularities, and that both the High Court and the Court of Appeal erred in their assessment of prosecution and visual identification evidence.

4. In the Application, the Court was requested to order provisional measures.

II. Proceedings before the Court

5. The Application was received at the Court's Registry on 2 March 2018.

6. In accordance with Rule 35 of the Rules of Court, the Application

was served on the Respondent State on 23 July 2018.

III. Jurisdiction

7. When seized of an application, the Court conducts a preliminary examination of its jurisdiction, pursuant to Articles 3 and 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights (hereinafter referred to as "the Protocol").

8. However, before ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but needs to simply ensure that it has *prima facie* jurisdiction.[1]

9. Article 3(1) of the Protocol stipulates 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. On 9 March 2006, the Respondent State became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Protocol on 10 February 2006. It also made the Declaration on 29 March 2010 accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations in accordance with Articles 34(6) and 5(3) of the Protocol read together.

11. The alleged violations which form the subject of the Application concern the rights protected in Articles 3(2), 4 and 7(1)(c) of the Charter. The Court therefore has jurisdiction *rationae materiae* to entertain the Application in the present case.

12. In light of the foregoing, the Court has satisfied itself that it has *prima facie* jurisdiction to examine the Application.

IV. Provisional measures

13. As stated in paragraph 4 above, the Applicant requests the Court to order provisional measures.

14. According to Article 27(2) of the Protocol and Rule 51(1) of the Rules of Court "in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court

1 See Application 002 /2013*, African Commission on Human and Peoples' Rights v Libya* (Order of provisional measures, 15 March 2013) and Application 006/2012, *African Commission on Human and Peoples' Rights v Kenya* (Order of provisional measures, 15 March 2013); Application 004/2011, *African Commission on Human and Peoples' Rights v Libya* (Order of provisional measures, 25 March 2011).

shall adopt such provisional measures as it deems necessary" or "any interim measure which it deems necessary to adopt in the interest of the parties or of justice".

15. It lies with the Court to decide in each situation whether, in light of the particular circumstances of the case, it must exercise the jurisdiction conferred upon it by the afore-cited provisions.

16. It is apparent from the case-file that the Applicant has been sentenced to death.

17. In view of the circumstances of this case which bear the risk that execution of the death sentence may impair the enjoyment of the rights set forth in Articles 3(2), 7(1)(c) of the Charter, the Court decides to exercise its powers under Article 27(2) of the Protocol.

18. Accordingly, the Court finds that the circumstances require an Order of Provisional Measures pursuant to Article 27(2) of the Protocol and Rule 51 of the Rules of Court, so as to preserve the *status quo,* pending the determination of the main Application.

19. To remove any ambiguity, this Order is provisional and in no way prejudges the decision of the Court as to its jurisdiction, admissibility of the Application and the merits of the case.

V. Operative part

20. For these reasons,

The Court,

unanimously orders the Respondent State:

i. to stay execution of the death sentence, subject to the decision on the main Application, and

ii. to report to the Court within sixty (60) days of receipt of this Order, on the measures taken to implement it.

Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13

Application 009/2015, *Lucien Ikili Rashidi v United Republic of Tanzania*

Judgment, 28 March 2019, done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, and ANUKAM

Recused under Article 22: ABOUD

The Applicant, his wife and children were arrested and detained as illegal immigrants. The Applicant alleged that he had lost his passport, which contained a valid visa, but that he was in possession of a certificate of loss of passport from the police of the Respondent State. He further claimed that an anal search was conducted on him in violation of his right to dignity. The Court held that the Respondent State should have taken measures to ascertain the legal status of the Applicant before arresting him and his family. The Court also held that the Applicant's arrest violated his right to residence and that the anal search violated his right to dignity and physical integrity. The Court further held that the process to determine the Applicant's immigration status had been inordinately long.

Admissibility (exhaustion of remedies, 45; submission within reasonable time, 55, 56)

Residence (arbitrary arrest in violation of right to residence and freedom of movement, 77-81)

Dignity (anal search, 94-96)

Physical integrity (anal search, 97)

Fair trial (time to determine immigration status, 108-109)

Reparations (compensation, evidence of material loss, 129; non-material loss, 131, 138)

I. The Parties

1. Mr Lucien Ikili Rashidi (hereinafter referred to as the "Applicant") is a national of the Democratic Republic of Congo (DRC) who lived in Dar es Salaam, United Republic of Tanzania. He currently lives in Bujumbura, Republic of Burundi.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the "Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986 and the Protocol on 10 February 2006. It also deposited, on 29 March 2010, the declaration under Article 34(6) of the Protocol through

which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. This Application arose from the arrest, detention and deportation of the Applicant, his wife and children for allegedly residing illegally in the territory of the Respondent State. The Applicant alleges that the Respondent State violated his rights to residence and movement by arresting him while he was in possession of a certificate issued by the Tanzanian police attesting to the loss of his passport. The Applicant also alleges that anal search performed on him at the time of his detention violated his dignity.

A. Facts of the matter

4. The Applicant alleges that he entered the Respondent State's territory in 1993 on a temporary visa. Thereafter, in 1999, his wife and children entered the country as refugees but did not go to the designated refugee camps. They rather lived with him in Dar es Salaam.

5. In 2005, following a dispute with a retail trader, a certain Mussa Ruganda Leki, who owed him money, the Applicant filed Civil Case 263 of 2005 at the Resident Magistrate's Court of Kisutu, Dar es Salaam.

6. On 1 June 2006, the Applicant submitted a request to the DRC Embassy in Dar es Salaam for replacement of his passport, which he had lost. On 2 June 2006, the Embassy confirmed the ongoing process in writing and issued a related notice addressed to the Respondent State's Police. On 5 June 2006, the Tanzanian Police in Dar es Salaam issued the Applicant with a certificate of loss of his passport, which was still valid and contained a visa to stay in the Respondent State up to September 2006.

7. On 9 June 2006, the Tanzanian Immigration authorities arrested the Applicant for residing illegally in the country while he attended proceedings in Civil Case No. 263 of 2005 referred to above in which a debt judgment had been rendered in his favour.

8. The Applicant's wife and children were also arrested and they were all detained for five (5) days until they were taken to court on 15 June 2006 and charged with illegal stay, in Criminal Case 765 of 2006. The DRC Embassy became aware of the matter and obtained an authorisation from the Tanzanian authorities that the Applicant be released and allowed to stay to pursue his cases but on the understanding that his family would exit Tanzania within

seven (7) days and the illegal stay case be dropped. On 16 June 2006, the Applicant's family left and the Applicant remained as agreed, to pursue Civil Case 263 of 2005 referred to earlier. The Applicant was then granted several extensions of visa to stay in Tanzania up to 28 March 2007.

9. In September 2007, the Applicant filed Civil Case 118 of 2007 at the High Court of Tanzania against Mussa Ruganda Leki and Jerome Msemwa (immigration officer) for illegal arrest and degrading treatment. In August 2010, the Applicant joined more parties to Civil Case 118 of 2007, that is, the Permanent Secretary of the Ministry of Home Affairs and the Attorney General of Tanzania.

10. In September 2010, the High Court of Tanzania heard Civil Case 118 on the Applicant's arrest for illegal stay arising from the events in June 2006. On 2 January 2014, the High Court delivered its judgment and found that the Applicant's arrest in 2006 was lawful since he was then residing illegally in Tanzania for lack of a valid passport and visa. On 3 January 2014, the Applicant was issued with a Notice of Prohibited Immigrant and ordered to leave Tanzania within seven (7) days, which he duly complied with.

11. On 6 January 2014, having left Tanzania, the Applicant filed a request with the High Court to be availed a copy of the judgment of 2 January 2014 authorising his deportation in order to be informed of the basis of the decision and to facilitate his appeal, if he so wished. On 8 January 2014, the Applicant also requested the Minister of Home Affairs to waive the Notice of Prohibited Immigrant to allow him return and proceed with his cases, including the appeal against the judgment that resulted in his deportation. None of these authorities responded until an Application was filed before this Court, on 19 February 2015.

B. Alleged violations

12. The Applicant alleges that:

i. His arrest and detention in 2006 at the time he stayed legally in Tanzania were in violation of his rights to residence and free movement guaranteed under Article 12(1) of the Charter and Article 13 of the Universal Declaration of Human Rights.

ii. The anal search performed on him in the presence of his two (2) sons at the time of detention constituted a violation of his right to dignity protected under Article 5 of the Charter.

iii. The seven (7) year wait before the High Court delivered its judgment in Civil Case No. 118 of 2007 involving his illegal stay in Tanzania

violated his right to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter.

III. Summary of procedure before the Court

13. The Registry received the Application on 19 February 2015.

14. On 9 June 2015, the Application was transmitted to the Respondent State and the Legal and Human Rights Centre was requested to provide the Applicant with representation on a *pro bono* basis. On the same date, the Application was also notified to the Chairperson of the African Union Commission and to other State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.

15. On 6 July 2015, the Respondent State filed the list of its representatives. On 9 September 2015, the Respondent State filed its Response to the Application.

16. On 24 September 2015, the Applicant requested for judgment in default on the grounds that the deadline for the Respondent State to respond to the Application had lapsed. On 25 September 2015, the Applicant was informed that the Respondent State's Response was being translated into French and would be served on him once the translation was completed. On 29 September 2015, the Applicant requested to be served with the English version of the Response pending translation and this was done on the same day. On 14 October 2015, the Applicant reiterated his request for a default judgment. On 26 November 2015, the Registry served the Applicant with the French version of the Respondent State's Response.

17. On 24 November 2015, the Pan African Lawyers Union (PALU) was requested to represent the Applicant as the Legal and Human Rights Centre did not respond to the Court's request to that effect. On 14 December 2015, PALU agreed to represent the Applicant and was availed a copy of the file accordingly.

18. Due to difficulties faced by PALU in communicating with the Applicant who lived in Burundi, the Court granted several extensions of time for the filing of the Applicant's Reply to the Respondent State's Response. The Reply was filed on 28 July 2016 and on the same day it was served on the Respondent State for information.

19. On 9 August 2016, the Respondent State's attention was drawn to the Applicant's additional arguments. After several extensions of time granted by the Court *suo motu*, the latter filed its Rejoinder on 27 April 2017 and it was transmitted to the Applicant on 28 April 2017 for Reply within fifteen (15) days. The Applicant

subsequently filed several additional documents in support of the Application, which were served on the Respondent State.

20. Having been seized afresh of the Applicant's request dated 18 August 2017 to engage with the Respondent State towards an amicable resolution of the matter, the Court, on 22 September 2017, requested the Applicant to indicate whether such engagement should lead to halting the proceedings before the Court. On 2 November 2017, the Applicant informed the Court that he wishes to pursue the case. Pleadings were then closed with effect from 15 November 2017 and the Parties were informed accordingly.

21. On 5 April 2018, the Parties were informed that, in accordance with Rule 27(1) of the Rules, the Court would determine the matter on the basis of the written pleadings without holding a public hearing.

22. On 25 June 2018, the the Parties were informed that the Court had decided during its 49th Ordinary Session (16 April to 11 May 2018) to combine and deal with reparations at the same time as the merits of the Application. The Applicant was therefore requested to file his submissions on reparations within thirty (30) days.

23. On 13 July 2018, the PALU was requested to assist the Applicant prepare his submissions on reparations. On 23 August 2018, PALU filed written submissions on reparations on behalf of the Applicant. On 29 August 2018, the Registry served these submissions on the Respondent State for Response within thirty (30) days. On 16 October 2018, the Registry informed the Respondent State that it had been granted an extension of thirty (30) days to file its Response on reparations. On 21 November 2018, the Parties were informed that the Court would proceed and deliver judgment in the matter.

IV. Prayers of the Parties

24. In the Application, the Applicant prays the Court to:

"i. Grant him free legal aid;

ii. Rule that his claim is founded and declare it admissible;

iii. Find that the acts inflicted on him violate his rights as spelt out above;

iv. Order the Respondent State to compensate him to the amount of TZS 800 million;

v. Order the Respondent State to ship to the Court File No. 118/07 Civil Case and File No. 57/09 Civil Case, Baraza Kata/Segelea, Dar es salaam, for attachment to this Application."

25. In a correspondence dated 5 May 2016, the Applicant further prays the Court to:

"i. Quash the conviction and sentence imposed and/or release him from custody;

ii. Grant an order for reparations as follows:

- Tsh Twenty Million (20,000,000) being the value of his artefacts and damage;
- Tsh Fourty Five Million (45,000,000) being the value of his personal effects that were confiscated by agents of the Respondent State; and
- FBU Eighty Million (80,000,000) being a compensation for damage suffered by his family following arbitrary and unjust prosecution, especially in Case No. 765/2006."

26. Finally, as part of his additional submissions, the Applicant prays the Court to grant him the following:

i. The amount of US Dollars Twenty Thousand Dollars ($20,000) for moral prejudice suffered as a direct victim;

ii. The amount of US Dollars Fifteen Thousand Dollars ($15,000) for moral prejudice suffered by his family members as indirect victims;

iii. The amount of US Dollars Twenty-Two Thousand Dollars (USD 20,000) for legal fees incurred in the proceedings before this Court;

iv. The amount of US Dollars Five Hundred Dollars (USD 500) for other expenses;

v. An order that the Respondent State guarantees non-repetition of the violations and reports back to the Court every six months; and

vi. An order that the Respondent State publishes the judgment in the national Gazette within one month of its delivery as a measure of satisfaction.

27. In response, the Respondent State prays the Court to find that:

"i. The Application has not evoked the jurisdiction of the Court;

ii. The Application is not admissible as it has not met the admissibility requirement under Rule 40(5) of the Rules of the Court, that is, exhaustion of local remedies;

iii. The Application is not admissible as it has not met the admissibility requirement under Rule 40(6) of the Rules of the Court, that is, being filed within a reasonable time after exhausting local remedies;

iv. The Respondent has not violated any of the provisions of the Charter and other instruments as alleged by the Applicant;

v. The Applicant's request for reparations is denied."

28. The Respondent State did not respond to the Applicant's additional submissions on reparations.

V. Jurisdiction

29. Pursuant to Article 3 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."

30. In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction … ".

31. The Respondent State contends that the Application has not invoked the jurisdiction of the Court but does not specify which aspect of jurisdiction is referred to.

32. The Applicant on his part avers that the Court has jurisdiction without substantiating his contention.

***

33. Having conducted a preliminary examination of its jurisdiction and noting futher that there is no indication on file that it does not have jurisdiction, the Court holds that:

i. It has material jurisdiction given that the Application raises alleged violations of the Charter to which the Respondent State is a party.

ii. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the declaration prescribed under Article 34(6) of the Protocol, which enabled the Applicant to bring this Application directly before this Court, pursuant to Article 5(3) of the Protocol.

iii. It has temporal jurisdiction as the alleged violations which gave rise to this Application occurred before the Respondent State became a party to the Protocol and deposited the declaration but continued thereafter.

iv. It has territorial jurisdiction given that the facts of the matter and alleged violations occurred within the territory of the Respondent State.

34. In light of the foregoing, the Court holds that it has jurisdiction to hear the instant case and therefore finds that the Respondent State's objection is unfounded.

VI. Admissibility

35. Pursuant 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".

36. In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with article … 56 of the Charter and Rule 40 of [the] Rules".

37. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, 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 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;
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".

38. While some of the aforementioned conditions are not in contention between the Parties, the Respondent State raises objections regarding the exhaustion of local remedies and the filing of the Application within a reasonable time.

A. Conditions of admissibility in contention between the Parties

i. Objection based on failure to exhaust local remedies

39. The Respondent State avers that the Applicant did not attempt to exhaust local remedies that were available to challenge his

Prohibited Immigrant status.

40. With respect to the Applicant's claim that, due to his Prohibited Immigrant status, he was prevented from returning to Tanzania to appeal against the decision rendered in Civil Case No. 118 of 2007, the Respondent State contends that the Applicant had the available remedy of submitting an Application to the Minister of Home Affairs to waive or annul the Notice of Prohibited Immigrant and permit him to re-enter the country for his intended purpose. It is the Respondent State's submission that the Minister would have then considered the waiver application together with the reasons therein and rendered a decision.

41. The Applicant on his part alleges that the existing remedies, which the Respondent State refers to, were not made available to him. He states that after leaving the country in compliance with the Notice of Prohibited Immigrant, the High Court did not respond to his request to be availed a copy of the proceedings and judgment in Civil Case No. 118 of 2007, to determine whether and on what grounds he should appeal. He further avers that, similarly, the Minister of Home Affairs did not respond to his request for a waiver of the Notice of Prohibited Immigrant and to allow him return to Dar es Salaam to pursue his case. It is the Applicant's contention that by not responding to those two requests, authorities of the Respondent State prevented him from exhausting local remedies.

42. The Applicant also avers that, in any event, applying to the Minister of Home Affairs should be considered an extraordinary remedy, which he had attempted to exhaust nonetheless.

***

43. The Court considers that, as it has held in the matter of *Lohé Issa Konaté v Burkina Faso*, the requirement set out in Article 56(5) of the Charter is to exhaust remedies that exist but also are available.[1] In the same case, this Court further held that "a remedy can be considered to be available or accessible when it may be used by the Applicant without impediment".[2] As such,

1 See Application 004/2013. Judgment of 5 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso* (hereinafter referred to as "*Lohé Issa Konaté v Burkina Faso* (Merits)"), para 77.

2 *Lohé Issa Konaté v Burkina Faso* (Merits), para 96.

remedies to be exhausted within the meaning of Article 56(5) of the Charter and Rule 40(5) of the Rules must be available not only in law but also be made available to the applicant.[3] Where a remedy exists but is not accessible to the applicant, the said remedy will be considered as exhausted.[4]

44. In the instant matter, the Parties concur that the appropriate remedy was to file a request with the Minister of Home Affairs for a waiver of the Notice of Prohibited Immigrant. However, as this Court has held in the case of *Alex Thomas v United Republic of Tanzania*, an applicant is only required to exhaust ordinary and judicial remedies within the meaning of Article 56(5) of the Charter.[5] The request to the Minister of Home Affairs does not qualify as such a remedy.

45. The Court considers that, in the circumstances of this case, the actual remedy was to appeal against the judgment rendered by the High Court on 2 January 2014 in Civil Case 118 of 2007, in implementation of which the relevant authorities issued the Notice of Prohibited Immigrant and proceeded to deport the Applicant as recounted above. The Court notes that the fact that neither the Minister of Home Affairs nor the High Court responded to the Applicant's requests made it impossible for him to access the appeal remedy. The Court thus finds that though the remedy of the appeal existed, the Applicant was unable to utilise it. This situation was compounded by the fact that the Applicant was no longer in the territory of the Respondent State. The Court therefore deems it that local remedies have been exhausted.

46. As a consequence, the Court dismisses the Respondent State's objection to the admissibility of the Application for lack of

3 See Application 002/2013. Judgment of 3 June 2016, ***African Commission on Human and Peoples' Rights (Saïf Al-Islam Gaddafi) v Libya*** (Merits), para 69.

4 See Application 006/2016. Judgment of 7 December 2018 (Merits), ***Mgosi Mwita Makungu v United Republic of Tanzania***, para 41. See also ***Geneviève Mbiankeu v Cameroon*** (hereinafter referred to as "***Genevieve Mbiankeu v Cameroon***") Communication 389/10 (ACHPR 2015), paras 48, 72, 82; Article 19 v Eritrea Communication 275/03 (2007) AHRLR 73 (ACHPR 2007), para 48; ***Anuak Justice Council v Ethiopia*** Communication 299/05 (2006) AHRLR 97 (ACHPR 2006); and ***Dawda Jawara v Gambia*** Communication 147/95-149/96 (2000) RADH 107 (2000), para 31.

5 See Application 005/2013. Judgment of 20 November 2015 (Merits), ***Alex Thomas v United Republic of Tanzania*** (hereinafter referred to as "***Alex Thomas v Tanzania*** (Merits)"), para 64. See also, Application 007/2013. Judgment of 3 June 2016 (Merits), ***Mohamed Abubakari v United Republic of Tanzania*** (hereinafter referred to as "***Mohamed Abubakari v Tanzania*** (Merits)"), para 64.

exhaustion of local remedies.

ii. Objection based on failure to file the Application within a reasonable time

47. In computing the time within which the Applicant filed his Application after exhausting local remedies, the Respondent State considers the period between the date of the High Court judgment, which is 2 January 2014, and the filing of the present Application on 28 January 2015. The Respondent State avers that the said period, which is more than one (1) year, cannot be considered a reasonable time against the standard of six (6) months set out by the African Commission in the case of *Michael Majuru v Republic of Zimbabwe*.[6]

48. While agreeing with the Respondent State on the dates to be taken into account and the period of time within which the Application was filed, as reflected above, the Applicant challenges the inference made by the Respondent State as to what constitutes a reasonable time as per Article 56(6) of the Charter. It is the Applicant's contention that, in line with the jurisprudence of this Court, what constitutes a reasonable time should be assessed on a case-by-case basis.

49. The Applicant argues that, after filing the two aforementioned requests to the Minister of Home Affairs and the High Court, he was obviously waiting to receive responses before considering his next step. He avers that, considering the extreme delays he had already experienced while awaiting the delivery of the judgment in Civil Case 118 of 2007, waiting a year before filing this Application should be found to be reasonable.

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50. The Court notes that the High Court judgment in Civil Case 118 of 2007 that led to the issuance of the Notice of Prohibited Immigrant and deportation of the Applicant was delivered on 2 January 2014, while the present Application was filed on 19 February 2015. The relevant question is whether the period of one (1) year and

6 See Communication 308/2005 (2008) *AHRLR* 146 (ACHPR 2008).

twenty-six (26) days that elapsed between the two events can be considered as reasonable within the meaning of Article 56(6) of the Charter and within the context of the instant case.

51. The Respondent State's consistent contention is that, based on the African Commission's view in the *Majuru* case, a period of more than six (6) months should be considered as unreasonable.

52. The Court considers that such contention is not well-grounded. First, the Respondent State's reliance on the decision in the *Majuru* Communication is partial as it is limited to paragraph 108 of the Commission's reasoning, which was merely demonstrative but not conclusive. As a matter of fact, the relevant portion of the decision, which is also the conclusive one, is paragraph 109 where the Commission took the view that:

"Going by the practice of similar regional human rights instruments, such as the inter-American Commission and Court and the European Court, six months seem to be the usual standard. *This notwithstanding, each case must be treated on its own merit. Where there is good and compelling reason why a Complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice*."

53. In light of the above, this Court notes that, in the *Majuru* Communication, the Commission applied a case-by-case approach and not the six-month standard as averred by the Respondent State in the present Application.

54. Second, this Court has consistently held that the six-month time limit expressly provided for in other international human rights law regimes is not set out in Article 56(6) of the Charter, which rather refers to a *reasonable time*. As a matter of course, the Court has thus adopted a case-by-case approach in assessing what constitutes a reasonable time within the meaning of Article 56(6) of the Charter.[7]

55. The Court recalls that by its consistent case-law, in circumstances where there is uncertainty as to whether the time is reasonable, determining factors may include the Applicant's situation.[8] In the present case, the Applicant was deported within a week of the High Court's Judgment and issuance of the Notice of Prohibited Immigrant. He therefore lacked the proximity that was necessary

7 Application 013/2011. Judgment of 21 June 2013 (Preliminary Objections), ***Norbert Zongo and others v Burkina Faso*** (hereinafter referred to as "***Norbert Zongo and others v Burkina Faso*** (Preliminary Objections)"), para 121; ***Alex Thomas v Tanzania*** (Merits), paras 73-74.

8 See for instance, ***Alex Thomas v Tanzania*** (Merits), para 74.

to follow up on his requests to the domestic authorities.[9]

56. In light of the foregoing, the Court finds that the period of one (1) year and twenty-six (26) days in which the Applicant filed this Application is reasonable within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules. As a consequence, the Court dismisses the Respondent State's objection in respect of the filing of the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

57. The Court notes that whether the Application meets the conditions set out in Article 56 subsections (1),(2),(3),(4), and (7) of the Charter and Rule 40 sub-rules (1),(2), (3), (4) and (7) of the Rules regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language used in the Application, the nature of evidence adduced, and the previous settlement of the case, respectively, is not in contention.

58. Noting further that the pleadings do not indicate otherwise, the Court holds that the Application meets the requirements set out under those provisions.

59. As a consequence of the foregoing, the Court finds that the Application fulfils all the admissibility requirements set out under Article 56 of the Charter as restated in Rule 40 of the Rules and accordingly declares it admissible.

VII. Merits

60. The Applicant alleges that the Respondent State violated his rights to residence, freedom of movement, dignity and to be tried within a reasonable time.

A. Alleged violation of the rights to residence and freedom of movement

61. The Applicant avers that his right to freedom of movement was violated because he was arrested and detained while legally staying on the territory of the Respondent State. In support of this submission, the Applicant first contends that the Respondent

9 See Application 012/2015. Judgment of 22 April 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania*, para 58.

State's admission that his visa was severally extended confirms his lawful stay.

62. The Applicant further alleges that the Respondent State's arguments are contradictory in the sense that, on the one hand, it qualifies him as an illegal immigrant but, on the other hand, it withdrew Criminal Case No. 795 of 2006 against him and his family, and allowed him to stay on humanitarian grounds for the purpose of pursuing his case. It is the Applicant's contention that the absence of evidence on file to support the hypothesis of a discretionary authorisation by the Minister of Home Affairs to reside for almost seven (7) years without proper documentation should only lead to the conclusion that he was residing legally in the country at the time of his arrest.

63. The Applicant consequently submits that the absence of proper documents was the result of their loss, which he diligently reported to the Tanzanian Police and was issued a certificate of loss in that regard.

64. In his Application and subsequent submissions, the Applicant contends that the Immigration Services "in complicity with lawyers from the Office of the Attorney General and the presiding Judge in Civil Case 118 of 2007," decided to deport him so that he would not be able to continue with the judicial proceedings he had initiated. However, in his Reply, he states that he no longer wishes to argue violations based on this claim and his initial claim that his documents were torn by agents of the Respondent State.

65. On its part, the Respondent State submits that the right to freedom of movement is subject to limitations provided by law, which it has duly observed in the instant case. The argument of the Respondent State in this respect is two-fold.

66. First, the Respondent State avers that it acted "in accordance with the law" as prescribed under Article 12(1) of the Charter by following the relevant provisions of its Constitution and Immigration Act, which prescribe respectively that:

i. "No person shall be arrested, imprisoned, confirmed, detained, deported or otherwise be deprived of his freedom save only a) under circumstances and in accordance with procedures prescribed by law; or b) in the execution of a judgment, …" (Article 15(2) of the Constitution);

ii. "Any immigration officer may, without warrant, arrest a person whom he reasonably suspects to be a prohibited immigrant or to have

contravened … any of the provisions of this Act". (Section 8(1) of the Immigration Act);

iii. "The expression 'prohibited immigrant' means a person whose presence … into Tanzania is unlawful under any law for the time being in force". (Section 10(1)(h) of the Immigration Act);

iv. "… any immigration officer or any police officer may … without warrant, arrest any prohibited immigrant …" (Section 12(1) of the Immigration Act);

v. "Subject to subsections 2 and 3, no person to whom this section applies shall enter Tanzania … or remain in Tanzania unless a) he is in possession of a valid passport; and b) he is the holder of … a residence permit issued under the provisions of this Act; or c) he is the holder of … a pass issued under the provisions of this Act." (Section 15(1) of the Immigration Act).

67. Second, the Respondent State alleges that it did not curtail the Applicant's freedom of movement arbitrarily as it acted to implement the High Court judgment in Civil Case 118 of 2007 *Lucien Ikili Rashid v Musa Rubanda, Jerome Msewa, Permanent Secretary, Ministry of Home Affairs, and Attorney General*, where that Court held that "… at the time of his arrest, even during hearing of this case, the plaintiff had no valid passport, a resident permit or pass" and that he "therefore, was and still is a prohibited immigrant within the meaning of Section 10(1)(h) of the Immigration Act".

68. Finally, the Respondent State challenges two more claims by the Applicant. The first claim relates to the destruction of the Applicant's documents by agents of the Respondent State, which the latter submits must be dismissed as the Applicant failed to discharge the onus of proof. Concerning the second claim by the Applicant that he was deported to prevent him from pursuing his case, the Respondent State contends that it is baseless and should be dismissed since the Applicant admitted in Civil Case 118 of 2007 that he does not have the required documents.

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69. The issue for determination is whether the Applicant's arrest at the time and in the circumstances recounted earlier constitutes a violation of his right to freedom of movement protected by Article 12(1) of the Charter, which provides that "Every individual shall have the right to freedom of movement and residence within the

borders of a State provided he abides by the law".

70. Prior to examining that issue, the Court notes that the Applicant no longer wishes to pursue his two allegations that agents of the Respondent State destroyed his documents and deported him to prevent him from pursuing his cases in domestic courts. The Court will therefore not dwell into issues that the Applicant himself has dropped.

71. Turning to the issue being determined, the Court observes that although the submissions by both Parties on whether the Applicant was wrongly arrested are framed as alleging the violation of his right to "freedom of movement", the preliminary question which arises is that of the Applicant's right to residence. This is due to the fact that, in the instant case, the issue of freedom of movement will only arise after and if it is established that the Respondent State breached the Applicant's right to reside in the country.

72. Furthermore, the Court considers that this determination must be made as at the time of the Applicant's arrest, which was on 9 June 2006, since he has complained of the arrest as being the act that allegedly violated his rights.

73. Regarding the right to residence, the Applicant avers that he was legally residing in the Respondent State as the loss of his valid documents was duly reported to the police who issued him with a certificate of loss. On its part, the Respondent State submits that at the time of his arrest, the Applicant was illegally in its territory, as confirmed by the 2 January 2014 High Court's judgment in Civil Case 118 of 2007, because he had no valid passport, residence permit or a pass as required under the Immigration Act. In the Respondent State's view, a mere certificate of loss, be it delivered by the Tanzanian police, cannot make his stay legal.

74. The Court notes that pursuant to the provisions of the Tanzania Immigration Act, to reside legally in the country, a foreigner must hold a passport together with an express authorisation to stay in the form of a permit or a pass. The Applicant does not deny that, at the time of his arrest, he had neither of the above.

75. However, the Court considers that, the fact that the Applicant did not hold the documents expressly required in the Act, did not automatically render his stay illegal. A contrary position would amount to a narrow interpretation of the law, which would not be appropriate for a human rights based determination. A purposive interpretation of the law is further called for where there is a risk of a subsequent action by the Respondent State that is likely to have a critical impact on the life of the person involved.

76. The Court is of the view that, in such circumstances, the determinant should be the reasonable expectation of a certain

course of action which is required when an authority or the law has induced in a person, who may be affected by subsequent decisions, a reasonable expectation that he or she will retain the said benefit or will be seen as having obtained the same by law.[10]

77. In the instant matter, the Court notes that, at the time of his arrest on 9 June 2006, the Applicant held two documents of probative value, that is, a cerficate of loss of his passport issued by the Tanzanian Police and an official correspondence from the Embassy of his country to the Respondent State confirming that he was in the process of obtaining a new passport. While in possession of these documents, the Applicant could legitimately expect that the Respondent State would not issue a Notice of Prohibited Immigrant against him because the certificate of loss was meant to replace the documents expressly provided for in the law and was valid, having been issued by the competent authorities.

78. In the Court's view, reasonable expectation required that when presented with the aforementioned documents, the Respondent State's agents should have conferred with the issuing authorities to ascertain their validity.

79. The position of the Court is premised on the fact that the documents referred to were issued on 2 June and 5 June 2006 respectively, four (4) days prior to the Applicant's arrest by the Respondent State's immigration officers, that is, on 9 June 2006. The obvious conclusion is that the Applicant did not obtain these documents to preempt his arrest.

80. On this specific point, the Court's position is reinforced by the decision of the concerned authorities made on 16 June 2006 to withdraw the illegal residence case filed against the Applicant, to release him and his family members, and to allow him to stay in Tanzania to pursue his cases before domestic courts. This demonstrates that the Respondent State had alternatives to the issuance of a Notice of Prohibited Immigrant followed by arrest and deportation.

81. In light of the above, the Court holds that the Applicant's arrest in the circumstances of this case constitutes a violation of his right to

10 See *Stretch v United Kingdom* (Merits and Just Satisfaction), 44277/98, paras 32-35, ECHR, 24 June 2003.

residence and, consequently, of his freedom of movement.

82. As a consequence of the foregoing, the Court finds the Respondent State in violation of Article 12(1) of the Charter.

B. Alleged violation of the right to dignity

83. The Applicant alleges that the fact that the Respondent State's prison officers undressed him before his children and made him bend over to search into his anus for marijuana and money constitutes cruel, inhuman and degrading treatment and violated his right to dignity guaranteed under Article 5 of the Charter.

84. In reply to the Respondent State's submission that "cavity searches" are a current practice in its prisons, the Applicant avers that such is not an acceptable justification and cannot in any case apply indiscriminately to all persons, without first determining the penalties faced in specific circumstances. He further submits that he should not have been treated like any other criminal even if he was presumed to be an illegal immigrant.

85. In its Response to the Application, the Respondent State does not deny the facts as recounted by the Applicant but justified the same by stating that "… cavity searches are a security measure performed upon entry and exit of most prisons in the Respondent State". In its Rejoinder, the Respondent State restates its position, putting the Applicant to strict proof to show that he was subject to any such treatment.

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86. Article 5 of the Charter, which the Applicant alleges has been violated, provides as follows:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

87. The issue for determination is whether the anal search performed on the Applicant by agents of the Respondent State in the presence of his children constitutes a violation of his right to dignity.

88. The Court observes that, in assessing generally whether the right to dignity protected by Article 5 of the Charter was violated, the African Commission considered three main factors. First, Article

5 has no llimitation clause. The prohibition of indignity manifested in cruel, inhuman and degrading treatment is thus absolute.[11] Second, the prohibition must be interpreted to extend to the widest possible protection against abuse, whether physical or mental.[12] Finally, personal suffering and indignity can take various forms and assessment will depend on the circumstances of each case.[13]

89. With respect to body search that bears on the intimacy of the person as arose in the instant matter, the European Court of Human Rights (ECHR) has held that the fact of prison guards forcing a person to bend over and squat while they undertake a visual inspection of his anus constitutes an encroachment on dignity, which exceeds reasonable procedures and amounts to degrading treatment.[14]

90. The Inter-American Commission of Human Rights (IACHR) has taken the view that while restrictive measures might be necessary where threat to security is obvious, "… a vaginal search is more than a restrictive measure as it involves the invasion of a woman's body". The IACHR proceeded to set out that "… lawfulness of a vaginal search or inspection, in a particular case, must meet a four-part test: 1) it must be absolutely necessary to achieve the security objective in the particular case; 2) there must not exist an alternative option; 3) it should be determined by judicial order; and 4) it must be carried out by an appropriate health professional".[15]

91. The Court considers that, of these criteria, those of necessity and availability of alternative options apply in the instant matter.

92. With respect to necessity, the Respondent State does not contend that the Applicant posed any security threat. The Court notes that he was only accused of not being in possession of his passport and a visa to stay in Tanzania.

93. In the Court's view, the Respondent State's submission that "cavity search" is the standard practice upon entry and exit

11 See *Huri-Laws v Nigeria* Communication 225/98 (2000) AHRLR 273 (ACHPR 2000), para 41.

12 See *Media Rights Agenda v Nigeria* Communication 224/98 (2000) AHRLR 262 (ACHPR 2000), para 71.

13 See *John Modise v Botswana* Communication 97/93 (2000) AHRLR 30 (ACHPR 2000), para 91.

14 See *El Shennawy v France* (Merits), 51246/08, paras 45-47, ECHR, 20 January 2011. See also, *Frerot v France (Merits),* 70204/01, paras 35-48, ECHR, 12 June 2007.

15 *Ms X v Argentina (Merits)* Case 10.506, Judgment of 15 October 1996, Report No. 38/96, IACHR, paras 71-74.

from its prisons can only be read as an admission of degrading treatment in the instant matter. In the light of the wording of relevant provisions of the Charter and case law in reference, the systematic nature of that practice, especially anal search, cannot justify its performance.

94. Regarding the availability of alternatives to the anal search, which was conducted on the Applicant in this case, this Court notes that the objective of preventing the introduction of items such as drugs, money or weapons into prisons is legitimate, as it ensures safety of those in custody. Searching accused persons for such items in that context might thus be acceptable only within strict checks but should never be to the extent of breaching dignity. There surely exists a wide range of alternative means of effectively achieving the same result such as purge, scanning and others.

95. In the case at hand, even assuming there was need for anal search, conducting it on a father in the presence of his children certainly added to the Applicant's anguish and humiliation. Such instance inevitably impacted on the Applicant's authority and tarnished his reputation in the eyes of his family.

96. In light of the above, the Court holds that the anal search conducted on the Applicant constituted a violation of his right to dignity and not to be subjected to degrading treatment. The Court consequently finds the Respondent State in violation of Article 5 of the Charter.

97. The Court further considers that the search performed on the Applicant constitutes an interference with his physical integrity. As stipulated under Article 4 of the Charter, "Human beings are inviolable. Every human being shall be entitled to respect for … the integrity of his person".

98. The Court notes that full body search has come under thorough scrutiny in human rights case law. This is exemplified among others in the case of *Frérot v France* where the ECHR held that systematic search, especially anal search that is not justified and duly authorised by a judicial authority, constitutes a breach of Article 3 of the European Convention on Human Rights.[16] This Court is of the view that the same principle underlines the prohibition in Article 4 of the Charter. The breach of physical integrity is also prohibited in international human rights instruments as is the case in Article 5 of the Universal Declaration of Human Rights

16 *Frérot v France*, *op cit*. Article 3 of the European Convention reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

(UDHR),[17] Article 7 of the International Convenant on Civil and Political Rights (ICCPR)[18] and Article 1 of the United Nations Convention against Torture.[19]

99. In light of the circumstances of this case and based on the determination made earlier with respect to the violation of the Applicant's right to dignity, the Court is of the view that the anal search that he was subjected to constitutes a violation of his right to the integrity of his person. The Court, therefore, finds the Respondent State in violation of Article 4 of the Charter.

C. Alleged violation of the right to be tried within a reasonable time

100. The Applicant alleges that for him to have waited almost seven (7) years before the High Court delivered its judgment in Civil Case No. 118 of 2007, violated his right to be tried within a reasonable time. It is the Applicant's contention that, "this undue prolongation of the trial further increased the prejudice he was originally seeking redress for", which is a "lowered reputation with devastating effects on his personal and professional life".

101. The Respondent State challenges the Applicant's claim and avers that the delay in completing the case was caused by him. It submits that after filing the case in September 2007, in August 2010, the Applicant amended the plaint to join the Ministry of Home Affairs and Attorney General, and this resulted in the case commencing again in September 2010. The Respondent State further submits that after completion of the filing of the pleadings thereafter, the matter went through mediation as required by the Civil Procedure Code before the hearing began.

102. The Respondent State also avers that the Applicant severally requested for the recusal of the judges handling the matter, which led to the case being referred to the judge in charge for re-assignment and consequently resulted in further delays. By the Respondent State's calculation, the completion of the case actually lasted only three (3) years and three (3) months and the Applicant's actions account for the delay amounting to the

17 Article 5 of the UDHR provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

18 Article 7 of the ICCPR provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

19 See also the position of the Inter American Commission of Human Rights in the case of *Miguel Castro-Castro Prison v Peru*, 25 November 2006, para 312.

remaining part of the period of seven (7) years.

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103. Article 7(1)(d) of the Charter provides that "Everyone shall have the right to have his cause heard. This comprises: … d) The right to be tried within a reasonable time by an impartial court or tribunal".

104. The Court notes that, while Civil Case No. 118 of 2007 was filed in September 2007, it was heard only in September 2010 and judgment was delivered on 2 January 2014. Therefore, it took the High Court a period of six (6) years and four (4) months to complete the Applicant's case relating to the legality of his stay in Tanzania. The issue for determination is whether that time is reasonable within the meaning of Article 7(1)(d) of the Charter.

105. Before making that determination, the Court must consider the Respondent State's contention that the Applicant caused part of the delay by amending his initial application in August 2010 and severally requested the recusal of the Judges handling the matter. In that respect, the Court first considers that the Applicant cannot be sanctioned for merely exercising his rights by amending the applications and calling for the Judges' recusals. Second, the Respondent State does not provide justification for why the case was not completed between the date of its filing in September 2007 and when the Applicant caused the proceedings to start afresh in September 2010, a period of about three (3) years.

106. Consequently, if the case started afresh in September 2010 as the Respondent State submits, and judgment was delivered on 2 January 2014, it took the High Court six (6) years and four (4) months in total to complete the matter. This Court will therefore make its determination on the basis of that timeframe.

107. When it comes to assessing reasonable time in the administration of justice, this Court has adopted a case-by-case approach, based on several factors, including the Respondent State's behavior, especially the operation of its courts.[20]

108. In the instant matter, this Court observes that the Respondent State had already arrested and detained the Applicant for illegal

20 See *Alex Thomas v Tanzania* (Merits), paras 100-110. See also, *Buchholz v Germany* (Merits), no. 7759/77, para 49, ECHR, 6 May 1981; *Abubakar v Ghana*

residence in 2006, which is seven (7) years prior to the 2014 High Court judgment that led to his eventual deportation. The Respondent State thus had ample knowledge of the Applicant's status. Furthermore, as reflected in the proceedings, during the June 2006 actions, it took the Respondent State only a few days to establish the Applicant's alleged illegal status and deport his family. In such circusmtances, this Court is of the view that a period of six (6) years and four (4) months to determine whether a person is an illegal immigrant in light of the Respondent State's Immigration Act is inordinately long.

109. In light of the above, this Court holds that the time of six (6) years and four (4) months that it took the High Court to complete the case cannot be considered a reasonable period to deliver justice.

110. The Court consequently finds the Respondent State in violation of Article 7(1)(d) of the Charter.

VIII. Reparations

111. 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".

112. In his Application, the Applicant prays the Court to order the Respondent State to compensate him to the amount of Tanzania Shillings Eight Hundred Million (TZS 800,000,000).

113. In a subsequent pleading filed on 5 May 2016, the Applicant further requests the Court to: Quash the conviction and sentence imposed and/or release him from custody; and grant an order for reparations as follows:

i. Tanzania Shillings Twenty Million (TZS 20,000,000) being the value of his artefacts and damage suffered as a result of their loss;

ii. Tanzania Shillings Fourty Five Million (TZS 45,000,000) being the value of his personal effects that were confiscated by agents of the Respondent State; and

iii. Burundian Franc Eighty Million (FBU 80,000,000) being a compensation for damage suffered by his family following arbitrary and unjust prosecution especially in Criminal Case No. 765/2006.

114. The Applicant, in subsequent submissions on reparations, prays

Communication 103/93 (2000) AHRLR 124 (ACHPR 1996), paras 10-12. See also *Beaumartin v France*, 24 November 1994, where the European Court of Human Rights found in violation of the Convention long delays in proceedings before the the French *Conseil d'Etat*.

the Court to grant him the following:

i. The amount of US Dollars Twenty Thousand ($20,000) for moral prejudice suffered as a direct victim;

ii. The amount of US Dollars Fifteen Thousand ($15,000) for moral prejudice suffered by his family members as indirect victims;

iii. The amount of US Dollars Twenty-Two Thousand ($ 20,000) [sic] for legal fees incurred in the proceedings before this Court;

iv. The amount of US Dollars Five Hundred ($ 500) for other expenses;

v. An order that the Respondent State guarantees non-repetition of the violations and reports back to the Court every six months; and

vi. An order that the Respondent State publishes the judgment in the national Gazette within one month of its delivery as a measure of satisfaction.

115. The Respondent State, in its Response to the Application, prays the Court to dismiss the Application and rule that the Applicant is not entitled to reparations. The Respondent State did not respond to the the Applicant's additional submissions on reparations.

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116. In line with its case-law, the Court considers that for reparations to be awarded, the Respondent State should be internationally responsible, there should be a nexus between the wrongful act and the harm, and where it is granted, reparation should cover the full damage suffered. Furthermore, the Applicant bears the onus to justify the claims made.[21]

117. As this Court has earlier found, the Respondent State violated the Applicant's rights to residence and freedom of movement, to integrity, to dignity and to be tried within a reasonable time protected under Articles 12(1), 4, 5 and 7(1)(d) of the Charter, respectively. Responsibility and causation have therefore been

21 See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), ***Armand Guehi v United Republic of Tanzania (Republic of Côte d'Ivoire Intervening)*** (hereinafter referred to as "***Armand Guehi v Tanzania (Merits and Reparations***)"), paras 157. See also, Application 013/2011. Judgment 5 June 2015 (Reparations), ***Norbert Zongo and others v Burkina Faso*** (hereinafter referred to as "***Norbert Zongo and others v Burkina Faso*** (Reparations)"), paras 20-31; Application 004/2013. Judgment of 3 June 2016 (Reparations), ***Lohé Issa Konaté v Burkina Faso*** (hereinafter referred to as "***Lohé Issa Konaté v Burkina Faso*** (Reparations)"), paras 52-59; and ***Reverend Christopher R Mtikila v Tanzania*** (Reparations), paras 27-29.

established. The prayers for reparation are being considered against these findings.

118. The Court notes that the Applicant requests for reparations with respect to both material and non-material damages. The Applicant's claims for material damage must be supported by evidence. The Court has also previously held that the purpose of reparations is *restituo in integrum*, which is to place the victim, as much as possible, in the situation prior to the violation, not richer or poorer.[22]

119. With respect to non-material damage, as this Court has previously held, prejudice is assumed in cases of human rights violations[23] and evaluating the quantum of non-pecuniary damage must be made in fairness and taking into account the circumstances of the case.[24] The Court has adopted the practice of affording lump sums in such circumstances.[25]

120. The Court notes that the Applicant's claims for reparations are made in different currencies. In this respect, the Court is of the view that, taking into account the principle of fairness and considering that the Applicant should not be made to bear the fluctuations that are inherent in financial activities, the choice of currency will be made on a case-by-case basis. As a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.[26] Given that, in the present case, the Respondent State does not object to the fact that the Applicant's claims are in different currencies, the currency of award will be determined taking into account the above mentioned factors.

A. Pecuniary reparations

121. In the Application, the Applicant requests to be compensated in the amount of Tanzania Shillings Eight Hundred Million (TZS 800,000,000) for suffering cruel, inhuman and degrading treatment, illegal arrest and undue delay in the trial of the case involving his stay in Tanzania. The Applicant submits that as a result of these violations, he suffered humiliation and monetary loss due to the suspension of his trading activities, lost time in

22 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 57-62.

23 *Idem*, para 55; and *Lohé Issa Konaté v Burkina Faso* (Reparations), para 58.

24 See N*orbert Zongo and others v Burkina Faso* (Reparations), para 61.

25 *Idem*, para 62.

26 See Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda*, para 45.

the lengthy proceedings before domestic courts and his family suffered separation.

122. The Applicant, in his subsequent submissions on reparations, prays to be awarded Tanzania Shillings Twenty Million (TZS 20,000,000) being the value of his lost artefacts and damages related thereto, Tanzania Shillings Forty Five Million (TZS 45,000,000) being the value of his personal effects confiscated by agents of the Respondent State, and US Dollars Twenty Thousand ($ 20,000) for the pain and anguish, disruption of his life plan, lack of contact with his family, chronic illness and poor health suffered.

123. The Court decides that although some of the amounts claimed are for both material and moral prejudice, the related claims will be dealt with separately.

i. Material loss

124. The Court notes that the Applicant's claims for material prejudice are with respect to the loss incurred due to the suspension of his activites, time lost in proceedings before domestic courts, loss of his artefacts and damage that ensued therefrom, loss of his personal belongings, disruption of his life plan, chronical illness and poor health.

125. Regarding the prayer for compensation due to the loss that allegedly occurred due to the suspension of his trading activities, the Applicant claims that he has suffered material damage owing to the loss of his business as an exporter and importer of products, which included exporting artwork to Europe and importing *vitenge* (cotton fabrics) to the DRC. However, the Applicant does not support the claim with evidence or prove the existence of the said business, such as a business licence, payment receipts or business contracts. This prayer is consequently dismissed.

126. As to the time lost in proceedings before the High Court, this Court notes that time lost may be proved by adducing evidence as to the financial income that would have been made.[27] In the instant case, loss caused by lengthy court proceedings could also have been evidenced by the payment of legal fees, costs in proceedings and other related costs.[28] The Applicant does not provide any such evidence to support his claims. The prayer is

27 See *Lohé Issa Konaté v Burkina Faso* (Reparations), paras 38-43.

28 *Idem*, para 46.

therefore dismissed.

127. The Applicant also prays this Court to award him Tanzania Shillings Twenty Million (TZS 20,000,000) being the value of the artefacts that were allegedly sold to a certain Mussa Ruganda Leki as mentioned in the proceedings of Civil Case No. 263 of 2005 referred earlier in this judgment. Regarding this prayer, the Court notes that the Appliant did not link his claim with any of the human rights violations found in this judgment. Furthermore, the claim is not in relation to an alleged violation of his right to property protected under Article 14 of the Charter. Finally, the Applicant did not establish the Respondent State's responsibility for the loss of the value of those items as a result of the private dispute settled in Civil Case No. 263 of 2005. The prayer is consequently dismissed.

128. With respect to the claim for payment of Tanzania Shillings Fourty Five Million (TZS 45,000,000) as compensation for the confiscation of his personal belongings by agents of the Respondent State, the Court notes that the issue was not raised as an alleged violation in the Application. Furthermore, the Applicant did not substantiate his claim. This prayer is equally dismissed.

129. Regarding the Applicant's prayer for compensation due to the disruption of his life plan, as well as chronic illness and poor health that he suffered, the Court notes that the claim is not supported with evidence. The prayer is consequently dismissed.

ii. Non-material loss

a. Loss incurred by the Applicant

130. The Court notes that the Applicant requests for compensation in the tune of Tanzania Shillings Eight Hundred Million (TZS 800,000,000) for inhuman and degrading treatment, and US Dollars Twenty Thousand ($ 20,000) for the pain and anguish he suffered.

131. The Court recalls that violation of the right to dignity is a grave breach that diminishes humanity. In the instant matter, the conditions in which the Applicant was arrested and the consequences that ensued, especially with respect to his family, were detrimental to his well-being, reputation and honor. However, the amounts claimed by the Applicant are excessive. The Court deems it fair to grant the amount of Tanzania Shillings Ten Million

(TZS 10,000,000).

b. Loss incurred by the Applicant's family

132. The Applicant requests for compensation in the tune of Burundian Franc Eighty Million (FBU 80,000,000) for the arbitrary prosecution of his family in Criminal Case No. 765 of 2006 in respect of their residence.

133. The Court observes that upon the intervention of the DRC Embassy in Dar es Salaam, the Respondent State withdrew the case and allowed the Applicant to stay for seven (7) years while he agreed to his family leaving the country. The Court is of the view that it runs contrary to that agreement and good faith to find against the Respondent State while it brought the said prosecution to an end to the satisfaction of the Applicant. Furthermore, that claim was not substantiated as a consequential violation. The Court therefore declines the request for compensation.

134. The Applicant also prays the Court to award US Dollars Fifteen Thousand ($ 15,000) to the identified indirect victims namely: Ms. Adele Mulobe (wife), and Seraphin Mutuza Ikili, Papy Ikili, Berthe Ikili, Frederic Ikili, Azama Ikili, Carine Ikili, Lucien Ikili, Marie Ikili, Peter Ikili, Faustin Ikili, Asha Ikili, Kisubi Ikili and Julienne Ikili (children), for the loss suffered, including the emotional pain and anguish as a result of the Applicant's arrest, detention, torture and deportation, considering he was the breadwinner of the family.

135. The Court considers, regarding this prayer, that as it has held in the *Zongo* case, indirect victims must prove their relation to the Applicant to be entitled to damages. Spouses should produce their marriage certificate and life certificate or any other equivalent proof, and children should produce their birth certificate or any other equivalent evidence to show proof of their filiation.[29]

136. The Court notes that, in support of this claim, the Applicant provides a list, which includes the names of his wife and children as earlier reproduced without adducing any of the aforementioned pieces of evidence of relation to the alleged indirect victims.

137. The Court considers however that in the instant case, the fact that the Applicant had a wife and children at the time of the violations is established. This fact is expressly and consistently acknowleged by the Respondent State in its submissions. The same fact is confirmed in the judgment delivered by the High Court of Tanzania in Civil Case No. 118 of 2007, although this decision referred to

29 *Idem*, para 54.

only "seven children"[30] and expressly identified the wife as "Adela Lucien", and two of the children as "Rashid Kazimoto" and "Vicent Rashid".[31] As a consequence, there is a *prima facie* relation of the Applicant to these alleged victims, and the latter are therefore entitled to reparation if any is granted by this Court.

138. The Court considers that, as earlier found, the violations established have certainly affected the Applicant's wife and children, more particularly as he was their breadwinner and the degrading treatment suffered was in the presence of some of his children. However, the amount claimed is excessive. In the circumstances and based on equity, the Court grants Tanzania Shillings One Million (TZS 1,000,000) to each of the indirect victims.

B. Non-pecuniary reparations

i. Restitution

139. The Applicant prays the Court to quash his conviction and sentence, and/or order that he should be released.

140. The Applicant also prays the Court to make an order for restitution. He avers that compensation should be paid in place of restitution given that he cannot be returned to the situation before his deportation.

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141. The Court notes, with respect to the prayer for the conviction and sentence to be quashed, and/or the Applicant be released, that the Applicant was arrested on 9 June 2006, charged in court on 15 June 2006 and released on 16 June 2006 without being convicted. The related claims have consequently become moot.

142. Regarding the prayer for compensation in place of restitution, the Court considers that the generally accepted purpose of restitution

30 See *Lucien Ikili Rashid v Musa Rubanda, Jerome Msewa, Permanent Secretary, Ministry of Home Affairs, and Attorney General*, High Court of Tanzania, Dar es Salaam, Civil Case 118 of 2007, Judgment of 2 January 2014, page 8.

31 *Idem*, page 7.

is to bring ongoing violations to an end and restore the Applicant in the state prior to the violations. This remedy is therefore applicable where other measures such as compensation are not relevant or sufficient. Measures ordered to that effect include, for instance, the return of property or nullification of judgments.[32]

143. This Court has also held, in the judgment it rendered in the *Konaté* case, that "… 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 circumstance of each case". In the same case**,** the Court ordered the Respondent State to, *inter alia*, "expunge from the Applicant's judicial records, all criminal convictions pronounced against him".[33]

144. The Court notes that, in the instant case, the Applicant requests for compensation and other forms of reparations for the concerned violations. Given that the prayers for compensation and other forms of reparations have been duly considered earlier and remedies granted where it was deemed proper, this Court considers that they are sufficient and an order for the Applicant to be placed in the situation before his deportation is not warranted. The prayer is therefore dismissed.

ii. Non-repetition

145. The Applicant prays the Court to order that the Respondent State guarantees non-repetition of the violations against him and reports back to the Court every six (6) months until the orders are implemented.

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146. The Court considers that, as it has held in the matter of *Armand*

32 *Loayza-Tamayo v Peru*, Inter-American Court of Human Rights, Judgment on Reparations and Costs (27 November 1998); *Papamichalopoulos v Greece*, 14556/89, European Court of Human Rights, Judgment (Article 50) (31 October 1995); *Mohammed El Tayyib Bah v Sierra Leone*, Suit ECW/CCJ/APP/20/13, ECOWAS Community Court of Justice, Judgment (4 May 2015); and *Genevieve Mbiankeu v Cameroon*.

33 *Lohé Issa Konaté v Burkina Faso* (Reparations), para 58.

Guehi v United Republic of Tanzania, guarantees of non-repetition seek to address systemic and structural violations rather than to remedy individual harm.[34] The Court has however further held that non-repetition would be relevant in individual cases where the violation will not cease or is likely to occur again.[35]

147. In the instant case, the Court is of the view that non-repetition is not warranted in the circumstances given that the Applicant and his family are no longer living in the territory of the Respondent State and the orders sought do not include their return. As such, the likelihood of a fresh deportation and repetition of the violations found in this judgment is non-existent.

148. Having said that, the Court notes that, in its Response to the Application, the Respondent State submits that "… cavity searches are security measures performed upon entry and exit of most prisons in the Respondent State".[36] In light of that submission, the Court considers that the violation found with respect to the Applicant has the potential for wider or structural violations, and therefore holds that an order for non-repetition is warranted in this respect.

149. As a consequence, the Court orders the Respondent State to take all necessary measures to ensure that anal search as in the instant case and its kind, are conducted in strict compliance with its international obligations and principles earlier set out in the findings of the Court on the violation of the right to dignity.

iii. Publication of the Judgment

150. The Applicant prays the Court to order that the Respondent State should publish in the national Gazette the decision on the merit of the main application within one (1) month of the delivery of judgment as a measure of satisfaction. He further prays the Court

34 *Armand Guehi v Tanzania* (Merits and Reparations), para 191. See also *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106; African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), para 10 (2017). See also Case of the "Street Children" *Villagran-Morales et al v Guatemala*, Inter-American Court of Human Rights, Judgment on Reparations and Costs (26 May 2001).

35 *Armand Guehi v Tanzania* (Merits and Reparations), para 191; and *Reverend Christopher R. Mtikila v Tanzania* (Reparations), para 43.

36 'Reply to the Application by the Respondent' dated 3 September 2015 and received at the Registry of the Court on 9 September 2015, para 60.

to order that:

i. The official English summary developed by the Registry of the Court, of this judgment, 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; and

ii. This judgment, in its entirety in English, on the official website of the Respondent State, and remain available for a period of one (1) year.

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151. The Court considers that even though a judgment in favor of the Applicant, *per se*, can constitute a sufficient form of reparation for moral damages, such measure can also be ordered where the circumstances of the case so require.[37]

152. In the present case, the Court notes that, as it has earlier found, the violation of the right to dignity was established beyond the individual case of the Applicant and is illustrative of a systemic practice. The Court further notes that its findings in this judgment bear on several rights protected in the Charter, which are those to the integrity of the person, dignity, residence and movement as well as to be tried within a reasonable time.

153. As a consequence of the foregoing, the Court finds that the prayer for the judgment to be published is warranted, however with a variation from the Applicant's request in order to enhance public awareness. The Court therefore grants the prayer that this Judgment be published on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and remains accessible for at least one (1) year after the date of publication.

IX. Costs

154. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs".

155. The Court considers that, in line with its previous judgments, reparation may include payment of legal fees and other expenses

37 *Armand Guehi v Tanzania* (Merits and Reparations), para 194; See *Reverend Christopher R. Mtikila v Tanzania* (reparations), paras 45 and 46(5); and *Norbert Zongo and others v Burkina Faso* (reparations), para 98.

incurred in the course of international proceedings.[38] The Applicant must provide justification for the amounts claimed.[39]

A. Legal fees for Counsel

156. The Applicant prays the Court to award him US Dollars Twenty Thousand ($ 20,000) in legal fees, which is for the 300 hours of legal work, of which 200 hours for Assistant Counsel and 100 hours for Lead Counsel, charged at US Dollars Fifty ($50) per hour for Assistant Counsel and US Dollars One Hundred ($100) per hour for Lead Counsel; which amounts to US Dollars Ten Thousand ($ 10,000) for the Assistant counsel and US Dollars Ten Thousand ($ 10,000) for the Lead Counsel.

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157. The Court notes that the Applicant was represented by PALU throughout the proceedings under the Court's legal aid scheme. Given that the legal aid arrangement is *pro bono* in nature, the Court declines to grant this prayer.

A. Other expenses

158. The Applicant also seeks compensation for other costs incurred pertaining to the case, including the payment of: US Dollars Two Hundred ($ 200) for postage, US Dollars Two Hundred ($ 200) for printing and photocopying, and US Dollars One Hundred ($ 100) for communication costs.

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159. The Court notes that these claims are not backed with supporting

38 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 79-93; and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 39.

39 *Norbert Zongo and others v Burkina Faso* (Reparations), para 81; and *Reverend R Mtikila v Tanzania* (Reparations), para 40.

documents. The related prayer is therefore dismissed.

X. Operative part

160. For these reasons:
The Court,
Unanimously:
On jurisdiction
i. *Dismisses* the objection on jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objections on the admissibility of the Application;
iv. *Declares* that the Application is admissible.
On the merits
v. *Finds* that the Respondent State violated the Applicant's right to the integrity of his person protected under Article 4 of the Charter;
vi. *Finds* that the Respondent State violated the Applicant's right to dignity protected under Article 5 of the Charter;
vii. *Finds* that the Respondent State violated the Applicant's right to be tried within a reasonable time protected under Article 7(1)(d) of the Charter;
viii. *Finds* that the Respondent State violated the Applicant's rights to residence and freedom of movement protected under Article 12(1) of the Charter.

On reparations
Pecuniary reparations
ix. *Does* not grant the Applicant's prayers for compensation due to the damage caused by the alleged suspension of his trading activities, the time lost in proceedings before domestic courts, the loss of his artefacts, the confiscation of his belongings, the disruption of his life plan, lack of contact with his family, chronic illness, poor health and arbitrary prosecution of his family for lack of evidence;
x. *Grants* the Applicant the sum of Tanzania Shillings Ten Million (TZS 10,000,000), free from taxes, for the moral damage that ensued from the anal search conducted on him, particularly in the presence of his family members, and which resulted in the violation of his rights to the integrity of his person and dignity as well as damage to his reputation and honour;
xi. *Grants* the Applicant's wife and children the sum of Tanzania Shillings One Million (TZS 1,000,000) each, free from taxes, for the moral damage suffered;
xii. *Orders* the Respondent State to pay the amounts under

sub-paragraphs (x) and (xi) within six (6) months, effective from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

xiii. *Finds* that the Applicant's prayer for the Court to quash his conviction and sentence, and/or order his release has become moot;

xiv. *Does not grant* the Applicant's prayer for restitution as it not warranted;

xv. *Does not grant* the prayer for non-repetition of the violations found with respect to the Applicant as it not warranted;

xvi. *Orders* the Respondent State to take all necessary measures to ensure that anal search as in the instant case and its kind are conducted, if at all, in strict compliance with its international obligations and principles earlier set out in the present Judgment;

xvii. *Orders* the Respondent State to publish this Judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the Judgment is accessible for at least one (1) year after the date of publication.

xviii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this Judgment, a report on the status of implementation of the decision set forth herein.

On costs

xix. *Does not grant* the Applicant's prayers related to payment of legal fees and other expenses incurred in the proceedings before this Court;

xx. *Decides* that each Party shall bear its own costs.

Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48

Application 025/2016, *Kenedy Ivan v United Republic of Tanzania*

Judgment, 28 March 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, and ANUKAM

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced for armed robbery. He claimed that the Magistrate Court failed to summon his witnesses and that that he had no legal assistance, depriving him of his right to fair trial. The Court, based on the record of proceedings at the national court, dismissed the Applicant's claim that the Magistrate Court failed to summon his witnesses. In respect to his claim that he had no legal representation, the Court stated that considering the gravity of the crime he was accused of, he should have been provided with free legal assistance. Consequently, it found violation of the right to free legal assistance and ordered the Respondent to pay compensation to the Applicant.

Admissibility (exhaustion of local remedies, constitutional petition, 42; submission within reasonable time, 53)

Fair trial (free legal assistance, 83)

Reparations (compensation, 90)

Separate opinion: TCHIKAYA

Jurisdiction (substantive, 13)

I. The Parties

1. Mr Kenedy Ivan (hereinafter referred to as "the Applicant") is a national of Tanzania, currently serving a 30 years prison sentence at the Butimba Central Prison for the offence of armed robbery.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, through which it accepts the jurisdiction of the Court to receive applications from

individuals and NGOs.

II. Subject of the Application

A. Facts of the matter

3. The Application originates from the judgment of 8 February 2006 in Criminal Case 157 of 2005 in the District Court of Ngara; judgment of 23 May 2007 in Criminal Appeal 31 of 2006 of the High Court of Tanzania and judgment of 17 February 2012 in Criminal Appeal 178 of 2007 of the Court of Appeal of Tanzania sitting at Mwanza. The Applicant alleges violation of his human rights and fundamental freedoms arising from these proceedings.

4. The record before this Court indicates that "…on 03/07/2004 on or about 8:15 pm in Murugwanza village", the Applicant together with others stole "cash Tshs. 35,000/=, a radio make Panasonic valued at Tshs. 20,000/=, the property of one Jesca d/o Nyamwilahila". It is alleged that the Applicant "used a fire arm and a machete in order to steal or overcome resistance" from Jesca Nyamwilahia.

5. Three (3) of the Prosecution Witnesses, that is, PW1, PW2 and PW3 testified in the District Court that they were in the house that was the subject of the robbery mentioned above. Furthermore, they identified the Applicant and one Baraka as being among the assailants on the day of the robbery.

B. Alleged violations

6. The Applicant alleges that he was deprived of a fair hearing when the Magistrate failed to summon his witnesses in spite of his request and that this violates his rights under Article 6(a) of the Constitution of the United Republic of Tanzania 1977 and Section 231 (4) of the Criminal Procedure Act (2002).

7. He also alleges that he had no legal representation at both the initial trial and appeal stages of his case, noting that this violates his fundamental rights under Article 7(1)(c) of the Charter.

III. Summary of the procedure before the Court

8. The Application was filed at the Court on 22 April 2016 and transmitted to the Respondent State on 7 June 2016. On 14 June 2016, a notification of the Application was sent to the State Parties to the Protocol, the Executive Council and the Assembly of the African Union through the Chairperson of the

African Union Commission.

9. The Respondent State filed its Response on 31 January 2017 within time after extensions in this regard by the Court and this was transmitted to the Applicant on 3 February 2017. Subsequently, the Applicant, on 21 February 2017 filed a Reply within time and this was transmitted to the Respondent State on 28 June 2017.

10. On 11 July 2018, the Applicant was requested to file submissions to substantiate his claim for reparations in accordance with the Court's decision at its 49th Ordinary Session (16 April to 11 May 2018) to combine judgment on merits with reparations**.** The Court notes that the Applicant did not submit this detailed claim.

11. On 8 November 2018, written pleadings were closed with effect from that date and the Parties were notified.

IV. Prayers of the Parties

12. The Applicant prays the Court to:

"i. Find violations of his rights done by the judiciary of the Respondent State and order his release;

ii. Be provided with free legal representation under Rule 31 of the Rules and Article 10(2) of the Protocol;

iii. Grant any other orders or relief the Court may deem fit in the circumstances."

13. In his Reply, the Applicant prays the Court to dismiss the objections to its jurisdiction and admissibility and to determine the case on its merits.

14. The Respondent State prays the Court to:

"i. Declare that it is not vested with jurisdiction to adjudicate the Application.

ii. Declare the Application inadmissible and dismiss the same.

iii. Hold that the Government of Tanzania has not violated any of the rights alleged by the Applicant.

iv. Declare that the cost of this Application be borne by the Applicant."

V Jurisdiction

15. 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".

16. In accordance with Rule 39(1) of the Rules of Court (hereinafter referred to as Rules), "the Court shall conduct preliminary

examination of its jurisdiction …"

A. Objections to material jurisdiction

17. The Respondent State raises two objections relating to the material jurisdiction of the Court: first, that the Court is being asked to act as a Court of first instance, and second, that the Court is being requested to sit as an appellate Court.

i. Objection on the ground that the Court is being requested to sit as a Court of first instance

18. In its objection, the Respondent State avers that the Applicant has raised three allegations before this Court for the first time and is asking the Court to adjudicate on them. According to the Respondent State, the allegations raised for the first time are:

"i. Allegation that the Respondent State violated the Applicant's right to be represented by a legal counsel;

ii. Allegation that the Applicant's conviction and sentence was determined on the strength of evidence which was not thoroughly evaluated;

iii. Allegation that the Applicant's right to a fair hearing was violated as a result of the magistrate failing to "summon his defence witnesses."

19. The Applicant's reply to these objections is that the Court's jurisdiction is invoked "in so far as the applicant's complaints hinge on the adherence to the principles of human and peoples' rights and freedoms contained in the declaration".

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20. The Court recalls its established jurisprudence on the issue and reaffirms that its material jurisdiction is established if the Application brought before it raises allegations of violation of human rights; and it suffices that the subject of the Application relates to the rights guaranteed by the Charter or any other

relevant human rights instrument ratified by the State concerned.[1]

21. The Court notes that this Application invokes violation of the human rights protected by the Charter and other human rights instruments ratified by the Respondent State.

22. Consequently, the Court dismisses the Respondent State's first objection herein.

ii. Objection on the ground that the Court is being requested to sit as an appellate Court

23. The Respondent State alleges that this Court is being requested to consider matters already settled in the national courts and therefore exercise an appellate jurisdiction. It especially contends that the Court of Appeal already settled the examination of the visual and voice identification evidence and the evidence regarding the source and intensity of the light relied upon to convict the Applicant.

24. According to the Respondent State, this Court lacks jurisdiction to hear the Application and it should thus be dismissed.

25. The Applicant's reply is that the Court's jurisdiction is invoked "in so far as the applicant's complaints hinges on the adherence to the principles of human and peoples' rights and freedoms contained in the declaration".

***

26. This Court reiterates its position in the matter of *Ernest Francis*

1 See: Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania* (Merits) *(hereinafter referred to as "Alex Thomas v Tanzania* (Merits)*"*), para 45; Application 001/2012. Ruling of 28 March 2014 (Admissibility), *Frank David Omary and others v United Republic of Tanzania (hereinafter referred to as "Frank Omary v Tanzania* (Admissibility)"), para 115; Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania (hereinafter referred to as "Peter Chacha v Tanzania* (Admissibility)"), para 114; Application 20/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v United Republic of Tanzania (hereinafter referred to as "Anaclet Paulo v Tanzania* (Merits and Reparations)"), para 25; Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania (hereinafter referred to as "Armand Guehi v Tanzania* (Merits and Reparations)*"*), para 31; Application 024/15. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania (hereinafter referred to as "Werema Wangoko v Tanzania* (Merits and Reparations)"), para 29.

Mtingwi v Republic of Malawi, in which it noted that it is not an appellate body with respect to decisions of national courts.[1] However, the Court emphasised in the matter of *Alex Thomas v United Republic of Tanzania,* that, "... this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[2]

27. This Court exercises jurisdiction as long as "the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the Respondent State".[3] In the instant Application, by exercising this mandate, the Court is not acting as an appellate Court.

28. The Court therefore dismisses the objections raised by the Respondent State in this regard, and finds that it has material jurisdiction over the Application.

B. Other aspects of jurisdiction

29. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on the record indicates that it lacks such jurisdiction. The Court therefore holds that:

i. it has personal jurisdiction given that the Respondent State is a party to the Protocol and has made the Declaration prescribed under Article 34(6) thereof, which enabled the Applicant to file this Application pursuant to Article 5(3) of the Protocol.

ii. it has temporal jurisdiction in view of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers as irregularities;[4] and

1 Application No. 001/2013. Decision of 15 March 2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*, para 14.

2 *Alex Thomas v Tanzania* (Merits), para 130. See also Application 010/2015, Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania (hereinafter referred to as "Christopher Jonas v Tanzania* (Merits)"), para 28; Application 003/2014, Judgment of 24 November 2017 (Merits), *Ingabire Victoire Umuhoza* v *Republic of Rwanda (hereinafter referred to as (hereinafter referred to as "Ingabire Umuhoza v Rwanda* (Merits)"), para 52; Application 007/2013, Judgment of 3 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, (hereinafter referred to as "*Mohamed Abubakari v Tanzania* (Merits)"), para 29.

3 *Alex Thomas v Tanzania* (Merits), para 45.

4 See Application 013/2011. Ruling of 21 June 2013, (Preliminary Objections), *Norbert Zongo and others v Burkina Faso*, paras 71 to 77.

iii. it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.

30. In light of the foregoing, the Court holds that it has jurisdiction to hear the case.

VI. Admissibilty

31. In terms of 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".

32. Pursuant to Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with Article…56 of the Charter and Rule 40 of the Rules".

33. Rule 40 of the Rules, which in substance restates the content 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 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;
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."

A. Conditions of admissibility in contention between the Parties

34. The Respondent State submits that the Application does not comply with two admissibility requirements, that is, Rule 40(5) of the Rules regarding exhaustion of local remedies and Rule 40(6) of the Rules on the requirement to file applications within a

reasonable time after exhaustion of local remedies.

i. Objection on non-exhaustion of local remedies

35. The Respondent State avers that the Application does not comply with the admissibility condition prescribed under Article 56(5) of the Charter and Rule 40(5) of the Rules.

36. It submits that it has enacted the Basic Rights and Duties Enforcement Act, to provide the procedure for the enforcement of constitutional and basic rights as set out in Section 4 thereof.[5]

37. According to the Respondent State, the right to a fair hearing is provided for under Article 13(6)(a) of the Constitution of Tanzania of 1977, noting that though the Applicant is contesting that his right under the Constitution has been violated; he did not refer the violation to the High Court during the trial as required under Section 9(1) of the Basic Rights and Duties Enforcement Act.[6]

38. The Respondent State avers that the Applicant's failure to refer the violations of his rights to the High Court or to raise them during appeal, denied it the chance to redress the alleged violation at the domestic level.

39. Citing the African Commission on Human and Peoples' Rights in Communication 263/2002 – *Kenyan Section of the International Commission of Jurist, Law Society, Kituo Cha Sheria v Kenya (2004)*, the Respondent State concludes in this regard that, the Applicant seized the Court prematurely as he ought to have exhausted all the local remedies.[7]

40. The Applicant argues that the Application is admissible as it was filed after exhausting local remedies; that is, after the dismissal of Criminal Appeal No. 178 of 2007 on 17 February 2012 by the Court of Appeal of Tanzania, the highest and final appellate Court

5 "If anybody alleges that any of the provisions of Section 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."

6 "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."

7 *Kenyan Section of the International Commission of Jurists, Law Society, Kituo Cha Sheria v Kenya* (2004) AHRLR 71 (ACHPR 2004).

in the Respondent State.

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41. The Court notes from the record that the Applicant filed an appeal against his conviction before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State and that the Court of Appeal upheld the judgments of the High Court and the District Court.

42. This Court has stated in a number of cases involving the Respondent State that the remedies of constitutional petition and review in the Tanzanian judicial system are extraordinary remedies that the Applicant is not required to exhaust prior to seizing this Court.[8] It is thus clear that the Applicant has exhausted all the available domestic remedies.

43. For the above reasons, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

ii. Objection on failure to file the Application within a reasonable time

44. The Respondent State contends that the Applicant has not complied with the requirement under Rule 40(6) of the Rules that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. It submits that the Applicant's case at the national courts was concluded on 17 February 2012, and it took three (3) years for the Applicant to file his case before this Court.

45. Noting that Rule 40(6) of the Rules does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws this Court's attention to the fact that the African Commission has held a period of six (6) months to be the reasonable time.[9]

8 See ***Alex Thomas v Tanzania*** (Merits), ***op cit*** para 65; ***Mohamed Abubakari v Tanzania*** (Merits) op cit, paras 66-70; ***Christopher Jonas v Tanzania*** (Merits), para 44.

9 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

46. The Respondent State avers further that the Applicant has not stated any impediments which caused him not to lodge the Application within six (6) months, and submits that for these reasons, the Application should be declared inadmissible.

47. In his Reply, the Applicant avers that he filed the Application within a reasonable time as his perceived delay was caused by his application for review of the Court of Appeal's judgment.

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48. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply states: "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".

49. The records before this Court show that local remedies were exhausted on 17 February 2012, when the Court of Appeal delivered its judgment. Therefore, this should be the date from which time should be reckoned regarding the assessment of reasonableness as envisaged in Rule 40(6) of the Rules and Article 56(6) of the Charter.

50. The Application was filed on 22 April 2016, that is, four (4) years and thirty-six (36) days after exhaustion of local remedies. Therefore, the Court shall determine whether this time is reasonable.

51. The Court recalls its jurisprudence in *Norbert Zongo and others v Burkina Faso* in which it concluded that: "… the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis".[10]

52. The Applicant avers that he filed an application for review before the Court of Appeal but was unsuccessful; the Respondent State does not dispute this fact. In the Court's view, the Applicant pursued the review procedure even though it was an extraordinary remedy. The time spent by the Applicant in attempting to exhaust the said remedy should thus be taken into account when assessing the

10 Application 013/2011. Judgment of 28 March 2014 (Merits), *Norbert Zongo v Burkina Faso* (Merits) para 92. See also *Alex Thomas v Tanzania (*Merits) *op cit*, para 73.

reasonableness of time according to Rule 40(6) of the Rules and Article 56(6) of the Charter.[11]

53. From the record, the Applicant is in prison, restricted in his movements and with limited access to information; he is indigent and unable to pay for a lawyer. The Applicant also did not have free assistance of a lawyer throughout his initial trial and appeals; and was not aware of the existence of this Court before filing the Application. Ultimately, the above mentioned circumstances delayed the Applicant in filing his claim to this Court. Thus, the Court finds that the four (4) years and thirty six (36) days taken to file the Application before this Court is reasonable.

54. Accordingly, the Court dismisses the objection relating to the non-compliance with the requirement of filing the Application within a reasonable time after exhaustion of local remedies.

B. Conditions of admissibility not in contention between the Parties

55. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 40, Sub-rules1, 2, 3, 4 and 7 of the Rules on, the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively, and that nothing on the record indicates that these requirements have not been complied with.

56. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

57. The Applicant claims the violations of his right to fair trial and sets out the following elements of this right:

a. The evidence relied upon to convict him was defective;

b. The failure to summon the defence witnesses; and

c. The failure to provide the Applicant with free legal aid.

11 See *Armand Guehi v Tanzania* (Merits and Reparations), para 56; Application 024/2015. *Werema Wangoko v United Republic of Tanzania* (Merits and Reparations), para 49.

A. Allegation that the evidence relied upon to convict him was defective

58. The Applicant alleges that the national courts solely relied upon defective voice and visual identification evidence to uphold his conviction. He avers that the evidence was not properly evaluated and that the quality of the light used by the witnesses to identify him during the commission of the alleged crime was questionable.

59. The Respondent State refutes all the allegations raised by the Applicant, noting that the Applicant's conviction was based on credible identification evidence. It also avers that over and above the identification evidence, the Court of Appeal found that the said witnesses had done their identification at the earliest possible opportunity which gave even more credence to their testimony.

60. The Respondent State submits that the evidence was analysed in all the domestic proceedings, adding that the Applicant was convicted not only as a result of voice evidence and visual evidence and the fact that witnesses were able to name the Applicant, whom they knew before the incident, to be the assailant. The Respondent State adds that other evidence, apart from voice and visual identification placed the Applicant at the scene of the crime at the material date and time when the crime was committed.

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61. The Court notes that it does not have the power to evaluate matters of evidence that were settled in national courts. Nevertheless, the Court has the power to determine whether the assessment of the evidence in the national courts complies with relevant provisions of international human rights instruments.

62. The Court further reiterates its position in the matter of *Kijiji Isiaga v Tanzania* that:

> "…domestic courts enjoy a wide margin of discretion in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings."[12]

12 Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania* (hereinafter referred to as "*Kijiji Isiaga v Tanzania* (Merits)"), para 65.

63. On the evidence used to convict the Applicant, the Court restates its position in the matter of *Mohamed Abubakari v Tanzania,* that: "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 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."[13]

64. Further, the Court has previously stated[14] that when visual or voice identification is used as evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certitude. This demands that the identification should be corroborated by other circumstantial evidence and must be part of a coherent and consistent account of the scene of the crime.

65. In the instant case, the record before this Court shows that the national courts convicted the Applicant on the basis of evidence of visual identification tendered by three (3) Prosecution Witnesses, who were at the scene of the crime. These witnesses knew the Applicant before the commission of the crime, since they were neighbours. The national courts assessed the circumstances in which the crime was committed, to eliminate possible mistaken identity and they found that the Applicant was positively identified as having committed the crime.

66. The Applicant's allegation that there was not enough light to properly identify him as the assailant so as to warrant his conviction are all details that concern particularities of evidence, the assessment of which must be left to the national courts.

67. In view of the above, the Court is of the opinion that the manner in which the national courts evaluated the facts and evidence and the weight they gave to them does not disclose any manifest error or miscarriage of justice to the Applicant which requires this Court's intervention. The Court therefore dismisses this allegation of the Applicant.

13 *Mohammed Abubakari v Tanzania* (Merits), *op cit*, paras 26 and 173. See also *Kijiji Isiaga v Tanzania* (Merits), *op cit*, para 66.

14 *Ibid*.

B. Allegation of failure to summon the defence witnesses

68. The Applicant alleges that he was deprived of his right to a fair trial because the trial magistrate did not exercise the power to summon his witnesses even after the Applicant notified the trial court of the said witnesses. He avers that he also raised this complaint on appeal at the High Court.

69. The Respondent State avers that the right to a fair hearing is provided for under Article 31(6)(a) of the Constitution of Tanzania and was granted to the Applicant at every stage of the case. It submits further that Section 231(4) of the Criminal Procedure Act (2002) mandates the trial magistrate to summon defence witnesses where the lack of attendance by the witnesses was not occasioned by the fault or neglect of the accused.

70. According to the Respondent State, the Applicant did not give notice of any witnesses in his defence but preferred to testify on his own.

71. The Respondent State concludes in this regard that the Applicant's allegation is an afterthought and should be disregarded, and that, the Application therefore, lacks merits and should be dismissed.

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72. The Court notes that Article 7(1)(c) of the Charter provides 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".

73. In its judgment in the matter of *Ingabire Victoire v Rwanda*, this Court held that "an essential aspect of the right to defence includes the right to call witnesses in one's defence".[15]

74. In the instant case, the Applicant claims that at both the trial court and the High Court, he requested his witnesses to be summoned. The Respondent State refutes this assertion, arguing that the Applicant "did not give notice of any witness appearing to

15 *Ingabire Victoire Umuhoza v Rwanda* (Merits), para 94.

testify in his defence".

75. In view of the contradictory statements, the Court can only rely on the information on record. In this regard, the Court notes that the Applicant does not give any information on the names of witnesses that he allegedly notified the national courts to summon and when he made the request**.** Further, there is nothing on record to show that the Applicant made any request for the summoning of the defense witnesses and that the courts refused to grant it.

76. In view of the above, the Court dismisses the allegation of the Applicant that the trial magistrate failed to summon his witnesses.

C. Allegation on failure to provide the Applicant with free legal aid

77. The Applicant contends that the Respondent State has violated Article 7(1)(c) of the Charter, claiming that he was not provided with free legal representation at both the trial and appeal stages of his case.

78. The Respondent State submits that the fact that the Applicant had no legal representation does not mean that he was discriminated against or denied the right to be represented by a legal counsel of his choice. It further contends that it is not clear from Article 7(1)(c) of the Charter that it is required to provide legal aid for all criminal trials. Furthermore, the Respondent State contends that the right is not absolute and depends on availability of resources.

79. Citing Article 7(1)(c) of the Charter, the Respondent State avers that the Applicant made a deliberate decision to defend himself. The Respondent State refers to the Case of *Melin v France* in which the European Court of Human Rights held that an accused who decides to defend himself is required to show diligence;[16] and contends that the Applicant did not do so. The Respondent State therefore argues that it did not violate the Applicant's right to legal aid. The Respondent State also refers to Article 8(2)(d) and(e) of the American Convention on Human Rights in this regard.[17]

* * *

16 *Melin v France*, Appl 12914/87, 22 June 1993, ECtHR, Series A, 261.

17 "it is clear that an accused may choose to defend himself or engage counsel of his own choice", adding that "in our case at hand, the Applicant defended himself and there was no evidence that he could not engage a legal counsel of his own choice."

80. Article 7(1)(c) of the Charter provides:
"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."

81. The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal aid. Nevertheless, in *Alex Thomas v Tanzania,*[18] the Court underlined that Article 7(1)(c) of the Charter**,** interpreted in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR)[19]**,** establishes the right to free legal aid where a person is charged with a serious criminal offence, who cannot afford to pay for legal representation and where the interests of justice so require.[20] The interest of justice is required in particular, if the Applicant is "indigent, the offence is serious and the penalty provided by the law is severe".[21]

82. The Court notes that the Applicant was not afforded free legal aid throughout the proceedings in the national courts. The Court further notes that the Respondent State does not dispute that the Applicant is indigent, that the offence is serious and the penalty provided by law is severe, it only contends that he did not make a request for legal aid.

83. Given that the Applicant was charged with a serious offence, that is, armed robbery, carrying a minimum punishment of thirty (30) years imprisonment; the interests of justice required that the Applicant should have been provided with free legal aid

18 *Alex Thomas v Tanzania* (Merits), para 114.

19 The Respondent State acceded to the International Covenant on Civil and Political Rights on 11 June 1976.

20 "in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality: …to defend himself in person or through legal assistance of his own choosing, to be informed if he does not have legal assistance assigned to him, in any case where the interest of justice so require, and without payment by him in any such case, if he does not have sufficient means to pay for it."

21 *Alex Thomas ibid*, para 123, see also *Mohammed Abubakari v Tanzania* (Merits), paras 138-139; Application 027/2015. Judgment of 21 September 2018 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania* (hereafter referred to as "*Minani Evarist v Tanzania* (*Merits and Reparations*)"), para 68; Application 016/2016. Judgment of 21 September 2018 (Merits and Reparations), *Diocles Williams v United Republic of Tanzania* (hereafter referred to as "*Diocles William v Tanzania* (Merits and Reparations)"), para 85; Application 020/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v Tanzania* (Merits and Reparations), para 92.

irrespective of whether he requested for such assistance.

84. The Court therefore finds that the Respondent State has violated Article 7(1)(c) of the Charter.

VIII. Reparations

85. The Applicant prays the Court to find a violation of his rights and set him free and order such other measures or remedies as it may deem fit.

86. On the other hand, the Respondent State prays the Court to find that it has not violated any of the rights of the Applicant and that the Application should be dismissed.

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87. 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."

88. In this respect, Rule 63 of the Rules 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."

A. Pecuniary Reparations

89. The Court notes its finding in paragraph 84 above that the Respondent State violated the Applicant's right to a fair trial due to the fact that he was not afforded free legal aid in the course of the criminal proceedings against him. In this regard, the Court recalls its position on State responsibility in *Reverend Christopher R Mtikila v United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation".[22]

90. The Court notes that the violation it established caused moral prejudice to the Applicant. The Court therefore, in exercising

22 See Application 011/2011. Ruling of 13 June 2014 (Reparations), *Reverend Christopher Mtikila v Tanzania*, para 27 and Application 010/2015. Judgment of 11 May 2018, *Amiri Ramadhani v The United Republic of Tanzania* (Merits), para 83.

its discretion, awards an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[23]

B. Non-Pecuniary Reparations

91. Regarding the order for release prayed by the Applicant, the Court has stated that it can be ordered only in specific and compelling circumstances.[24] Examples of such circumstances include "if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice".[25]

92. In the matter of *Armand Guehi v United Republic of Tanzania*, this Court observed that the determination of whether factors in a given case are special or compelling must be done with a goal of maintaining fairness and avoiding double jeopardy.[26]

93. It is the Court's view that the Applicant has not demonstrated specific or compelling circumstances to warrant an order for release.

94. Therefore, the Court rejects the Applicant's request to be released from prison.

IX. Costs

95. In their submissions, both parties prayed the Court to order the other to pay costs.

96. Pursuant to Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

97. The Court has no reason to depart from the provisions of Rule 30 of the Rules; consequently, it rules that each party shall bear its own costs.

23 See *Anaclet Paulo v Tanzania* (Merits and Reparations) para 107; *Minani Evarist v Tanzania* (Merits and Reparations), para 85.

24 *Alex Thomas v Tanzania* (Merits) *op cit*, para 157; *Diocles William v Tanzania* (Merits), para 101; *Minani Evarist v Tanzania* (Merits and Reparations), para 82*;* Application 006/2016. Judgment of 7 December 2018 (Merits), *Mgosi Mwita v United Republic of Tanzania*, para 84; *Kijiji Isiaga v Tanzania* (Merits), para 96*; Armand Guehi v Tanzania* (Merits and Reparations), para 164.

25 *Minani Evarist v Tanzania* (Merits and Reparations), para 82.

26 See *Armand Guehi v Tanzania* (Merits and Reparations), para 164.

X. Operative part

98. For these reasons:
The Court
Unanimously,
On jurisdiction
i. *Dismisses* the objections on material jurisdiction of the Court;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objections on admissibility;
iv. *Declares* the Application admissible.

On merits
v. *Finds* that the Respondent State has not violated Article 7(1) of the Charter as regards the trial Court's alleged reliance on defective evidence and the failure to summon the defence witnesses;
vi. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter by failing to provide the Applicant with free legal aid.

On reparations
Pecuniary reparations
vii. *Orders* the Respondent State to pay the Applicant the sum of Tanzania Shillings Three Hundred Thousand (TZS 300,000) free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.
viii. *Orders* the Respondent State to submit a report on the status of implementation of the decision set forth herein within six (6) months from the date of notification of this Judgment.

Non-pecuniary reparations
ix. *Dismisses* the Applicant's prayer for release from prison, without prejudice to the Respondent State applying such a measure *proprio motu*.
On costs
x. *Orders* each party to bear its own costs.

Separate opinion: TCHIKAYA

1. The African Court in Arusha has been asked to rule, once again, on a case of breach of Article 7 of the African Charter on Human and Peoples' Rights on the right to a fair trial. In this case of *Kenedy Ivan v Tanzania*,[1] I expressed my concurrence with the operational part adopted by the Court. My support stems from the fact that this operational part, in essence, recognizes that the Respondent State failed in its obligations in this regard and should award compensation to the Applicant, excluding his release.[2]

2. The fact remains that, without originality and almost incidentally, the *Ivan* case called on the Court to develop the real powers of the African human rights judge in relation to the powers exercised by the first judges, that is, the judges of the domestic courts. Two related aspects of the same question in the *Ivan* case will therefore be addressed in this opinion. On one hand, the capacity of the Court as an appellate court and on the other hand, it will consider the link between the jurisdictions exercised by the Court with the provisions of international instruments. These aspects stem from paragraphs 23 to 29 of the Judgment.

I. The Arusha African Court, an Appeal Court?

3. This question is not new. In fact, in the jurisprudence of 2018 in the matter of *Evarist Minani*,[3] Judge Ben Achour underscored the following position in his opinion: that "the Court reiterates its decision in paragraph 81 that it… is not an appellate Court", adding that "this is more than obvious in as much as we are in the presence of a continental court whose 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 States concerned''. The Court is not an appeal Court, and this is a legally obvious fact.

4. What can one make of this legally obvious fact, given that the Court repeatedly reverts to it with different reasons? The requisite explanations lie naturally in the founding act of the Court,

1 The Applicant was sentenced to 30 years in prison for the offence of armed robbery and alleges that he was deprived of his right to a fair trial.

2 AfCHPR, Judgment *Kenedy Ivan v Tanzania*, 28 March 2019, para 98 *et seq*.

3 AfCHPR, Judgment *Evariste Minani v Tanzania*, 27 September 2018, Separate Opinion, para 2.

the Protocol which, in its Article 3 sub-article 1 on Jurisdiction stipulates that: "The jurisdiction of the Court shall extend to all cases and disputes…". This provision, as it stands, does not pronounce itself on the entire regime attached to the Statute of the Court. If we combine this provision with the Preamble to the Protocol,[4] we can read the international and conventional character of the functions exercised by the Court. This basis is primarily internationalist.[5] It is in these terms that paragraph 27 of the judgment should be understood: "This Court exercises jurisdiction as long as the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the Respondent State".

5. This current position has its justification,[6] but it needs to be further explained and understood. From the standpoint of domestic law, the appellate judge determines an appeal seeking to have a judgment rendered by a lower court overturned or annulled. The appellate court is required, where appropriate, to review cases in fact and in law. Accordingly, it may overturn a decision, partially or completely, or uphold the same. It also has the possibility of changing the reasons, without necessarily changing the operative part of the judgment, which is the function of the Arusha Court. In terms of the Protocol, these are functions of judicial superiority, functions of re-establishment of the law for the sake of the right of individuals.

6. The question already came up in the mid-1950s, when, in light of a matter before the General Assembly at the International Court of Justice,[7] Louis Cavaré concluded that "it is of considerable

4 Moreover, in regard to the Protocol: "Member States note that the African Charter on Human and Peoples' Rights reaffirms adherence to the principles of Human and Peoples' Rights, freedoms and duties contained in the declarations, conventions, and other instruments adopted by the Organization of African Unity and other international organizations".

5 It may be noted in the case of *Vapeur Wimbledon* (PCIJ, *Vapeur Wimbledon, France and others* 23 August 1923) pertaining the application of the principle of the superiority of international law over domestic acts In this case, it related to the German Orders banning the use of the Kiel canal. The first question to which the judge at the Hague had to provide an answer is that which pertained the scope of the German decision of 21 March 1921 which denied access to and passage through the Kiel canal; a decision which the Court found to be in contradiction with the treaty.

6 Christina (C.), recent decisions of the Inter-American Human Rights Commission (1983-1987), AFDI, 1987. pp. 351-369; she notes therein the position of Judge Hector Gros Espiell: "the submission of a (contentious) matter to the Court does not constitute an appeal" v Wittenberg, *Admissibility of claims before international courts, RCADI,* 1932, t. III, p. 1 *et seq*.

7 ICJ, Advisory Opinion, *Effects of the Awards of Compensation made by United Nations Administrative Tribunal*, 13 July I954, Recueil 1954, p. 47: the Court infers

practical interest and easily discernible to do so. In the face of the decision of an organ, governments must know whether such decision offers the authority of a mandatory sentence or whether it boils down to a mere proposal, a recommendation or an advice. Their attitude in both cases must be fundamentally different.[8]"

7. The principle is established in international law, but it is also important for domestic law. This is emphasized hereunder as regards international jurisdictions in the following terms: "Today, especially in ..., the multiplicity of organizations has also posed this problem which is essentially practical since its solution depends on the nature of the jurisdictions they exercise and the possibility or impossibility of certain appeals against the decisions of these authorities"[9]. In any event and in the words of the International Court of Justice in its opinion on the Reparation for Injuries Suffered in the Service of the United Nations *(Advisory Opinion, ICJ Reports 1949, p 182):* "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties". It follows that this type of jurisdiction established on the basis of an international convention can render only decisions induced by the founding treaty, and has authority over domestic judgments

8. This analysis is present in the position expressed by the Inter-American Court of Human Rights, which states that: "Where a State is party to an international treaty such as the American Convention, all its organs, including its judges, are also subject to that treaty, and hence subject to an obligation to ensure that the effects of the provisions of the Convention shall not be diminished by the application of rules that are variance with its object and purpose". It goes on to say in this report that: "Judges and bodies related to the administration of justice at all levels are obliged to exercise *ex officio* a "control of conventionality" between the internal rules and the American Convention, obviously within the framework of their respective competences and the corresponding procedural rules".[10] These elements impact on the constitution of a jurisdictional power, be it the power of appeal or that of simple

from the judicial character of the United Nations Administrative Tribunal that the General Assembly is supposed to give effect to its judgment.

8 L Cavaré *The Notion of International Jurisdiction, AFDI*, 1956. pp 496 *et seq*.

9 *Idem*, pp 499 *et seq*.

10 IACHR, Report 2012, p 62 ***et seq***.

control.

9. Article 1 of the European Convention on Human Rights states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." In this case, the jurisdiction of the Member State is interpreted in light of international law. This tends to enshrine the status of the appeal judge. In the important ECHR decision, *Bankovic et al v Belgium et al,* 12 December 2001,[11] it may be noted that: "The obligation of the Court in this respect is to take into account the particular nature of the Convention, a constitutional instrument of a European public order for the protection of human beings, and its role, as it emerges from the Article 19 of the Convention, is to ensure compliance by the Contracting Parties with the undertakings they have entered into."[12] This jurisdiction of the Court is certainly defined by the consent of the parties to the Convention, but it acquires *ipso jure,* a real authority, a power comparable to that of a court of appeal, a full appellate jurisdiction. It is therefore natural to consider that the Court of Arusha has such a jurisdictional power in an internationalist hierarchy of the jurisdictions involved here, national as well as international.

II. A jurisdiction resolutely tied to international instruments

10. It may happen that States refuse the intervention of an international judge to re-try a dispute, even if they have adopted the arbitration clause in an international convention. This hypothesis does not affect the Arusha Court, but it remains a possibility that international law leaves open to States or to parties. The global trend in this regard has been to challenge or restrict the devolution of international jurisdiction. In the 1960 Case of the arbitral award rendered by the King of Spain on 23 December 1906,[13] The Hague Court specified this occurrence: "The Court is not called upon to say whether the arbitrator has correctly or badly adjudicated. These considerations and those thereto attached are irrelevant to the functions which the Court is called upon to perform in the present proceedings and which are to determine whether it is proven that the award is null and void".[14] The fullness

11 ECHR, *Bankovic and others v Belgium and others*, 12 December 2001, 52207/99.

12 *Idem*, para 80.

13 *ICJ, Reports*, 1960, p 192.

14 *Idem*, p 26.

of the devolution of appeal was thereby excluded.

11. States may indeed choose, in sovereignty and exceptionally, that an international judge, seized by them in a case, does not consider himself as an appeal judge. This was the case in the dispute over the *Arbitral Award of 31 July 1989, Guinea-Bissau v Senegal*, in respect of the decision of the International Court of Justice.[15] The Court found that "the two parties were in agreement that the present proceedings constitute an action in non-existence and nullity of the award rendered by the Tribunal, and not an appeal against that award or an application for review thereof; as the Court has had occasion to point out in connection with the complaint of nullity presented in the case of the Arbitral Award rendered by the King of Spain on 23 December 1906".[16]

12. This same restriction is found in the present *Case of Ivan* at the Court in paragraph 26; The Court reiterates its position in the matter of *Ernest Francis Mtingwi v Republic of Malawi*,[17] in which it noted that it is not an appellate body with respect to decisions of national courts". On the other hand, the Court's response in the *Alex Thomas* case should be clarified.

13. The Court states "however, as it pointed out in the case of *Alex Thomas v United Republic of Tanzania*[18] that "while the African Court is not an appeal body for decisions rendered by national courts, this does not preclude it from examining the relevant procedures before the national authorities to determine whether they are in consonance with the standards prescribed in the Charter or with any other instrument ratified by the State concerned".[19] The Court may be reminded of two elements: a) to declare that "this does not preclude it from examining the relevant procedures before the national authorities", is not in consonance with the current exercise of the judicial function of the Court, the purpose of which is to examine domestic procedures used by national courts in matters of human rights; (b) to declare that "the African Court is not an appellate body for decisions rendered by the national courts" may lead to a voluntarist dimension of

15 ICJ, *Arbitral Award of 31 July 1989, Guinea-Bissau v Senegal*,12 November 1991.

16 *Idem*, para 25

17 AfCHPR, *Ernest Francis Mtingwi v Malawi*, 15 March 2013, para 14.

18 AfCHPR, *Alex Thomas v Tanzania*, 20 November 2015, paras 60 to 65.

19 *Op cit, Alex Thomas v Tanzania*, para 130; see also AfCHPR, *Christopher Jonas v Tanzania*, 28 September 2017, para 28; AFCHPR, *Ingabire Victoire Umuhoza v Rwanda*, 24 November 2017, para 52; and AfCHPR *Mohamed Abubakari v United Republic of Tanzania*.

the Court, whereas the Court exercises jurisdiction determined à priori by interstate conventions and protocols. The Court has a resolutely special jurisdiction, specifically recognized by the contracting parties to the Protocol establishing the Court. This jurisdiction, where established, is a legal and objective *datum.*

14. The Arusha Court does not seem to call to question the so-called notion of national assessment which is now recognized in international human rights law. This concept indeed combines the national powers with the judicial powers that the Court derives from the Protocol; a national determination of issues such as property, religious freedom, freedom of expression, the notion of public danger ... and many others for which States' laws have also provided common provisions.

Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali (jurisdiction and admissibility) (2019) 3 AfCLR 73

Application 042/2016, *Collectif Des Anciens Travailleurs Du Laboratoire ALS v Mali*

Ruling, 28 March 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicants are a group of former workers at Australian Laboratory Services (ALS), a company domiciled in the Respondent State. The workers claimed to have suffered lead poising as a result of their work but despite their complaint to the government authorities, they received no redress. For this reason, they alleged the violation of, inter alia, their right to health and right to a fair trial. The Court dismissed their Application holding that the Applicants had failed to exhaust local remedies.

Admissibility (identification of Applicants, 23; exhaustion of local remedies, 36-38; conditions are cumulative, 39)

I. The Parties

1. The *Collectif des anciens travailleurs du laboratoire ALS* (hereinafter referred to as "the Applicants") are an informal group of one hundred and thirteen (113) out of one hundred and thirty-five (135) former workers of the Australian Laboratory Services (ALS), a limited liability company, all domiciled in Mali.

2. The Respondent State is the Republic of Mali which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 24 January 2004. The Respondent State, deposited on 19 February 2010, the Declaration through which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. According to the records, on 1 February 2012, the Applicants, who claim to have been victims of lead poisoning during their service, seized the Prosecutor at the Commune III Court of First Instance of the District of Bamako of a criminal complaint, followed by a letter addressed to the Attorney General at the Court of Appeal of Bamako on the same subject. The Applicants allege that the Australian Laboratory, which specializes in the chemical analysis of samples to determine the content of gold and other metals, used in this respect, toxic products such as acid, butyl diisobutyl (DIBK), and solvents such as nitrate, sodium, lithium, borax, sodium carbonate, sodium oxide and lead.

4. Having received no information from the Prosecutor General on the progress of the case one year after the referral, they concluded that the proceedings had been unduly prolonged by the judicial authorities of the Respondent State. They therefore decided to file the case before this Court.

B. Alleged violations

5. The Applicants assert that their rights to the enjoyment of the highest attainable standards of health set out in Articles 16 and 24 of the Charter and 12 of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ICESCR"), have been violated.[1]

6. They further submit that the undue delay in the examination of the case constitutes a violation of their rights under Articles 7(1) and 26 of the Charter and Articles 2(3) and 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR").[2]

III. Summary of the Procedure before the Court

7. The Application was filed on 1 July 2016, and served on the Respondent State on 27 September 2016. In accordance with Rule 35(3) of the Rules of the Court (hereinafter, 'the Rules'), the Application was transmitted, on 30 September 2016, to the Chairperson of the African Union Commission, and through him, to the Executive Council of the African Union and the State Parties to the Protocol.

8. After exchange of written submissions, the Court decided to close written pleadings on 14 June 2017 and not to hold a public hearing.

9. On 13 August 2018, in accordance with the decision of the Court at its 49th Ordinary Session, the Registry requested the Applicants to file their submissions on reparations within thirty (30) days of receipt of the notification.

10. On 20 November 2018, the Applicants filed their submissions on reparations and these were served on the Respondent State on 21 January 2019, requesting the latter to submit its Response within thirty (30) days. On 29 January 2019, the Respondent State received the Applicants' submissions on reparations and submitted its Response thereon on 4 March 2019, but this Response was rejected by the Court for having been filed out of time.

IV. Prayers

11. In the Application, the Applicants prayed the Court to:

i. admit the Application and declare that the Respondent State has violated the afore-mentioned provisions;

ii. rule that the Respondent State must publicly acknowledge its responsibility not only for the alleged violations from the occupational illnesses suffered by the Applicants as a result of lead poisoning, but also for the right to medical treatment of the contaminated employees and to bear the costs of the said treatment in a way that offers sick workers, the best possible living conditions;

iii. order the Respondent State to conduct an investigation to identify the private institutions responsible for violating the regulations in force at the time of the alleged facts, that is, intoxication and non-assistance to persons in danger;

iv. order the Respondent State to forthwith pay cash compensation to the victims and ensure that the amounts due are fully paid to them;

v. order such other measures deemed necessary to remedy the alleged violations;

vi. order the Respondent State to publish the judgment of the Court in the Official Gazette and in local dailies.

12. In their submissions on reparations, the Applicants pray the Court to order the Respondent State to pay:

i. Fifty million (50,000,000) CFA Francs to each of the victims as compensation for medical expenses, loss of income arising from the dismissal or sick leave, occupational illness, funeral expenses and loss of income for their beneficiaries; and

ii. Fifty million (50,000,000) CFA Francs to each of the victims for the direct and indirect moral damages suffered.

13. In its Response, the Respondent State prays the Court to:

i. On the form, declare the Application inadmissible as the Applicants lack legal capacity to seize the Court and for failure to exhaust local remedies; or

ii. On the merits, dismiss the Application as unfounded.

V. 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". In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction ..."

A. Objection to personal jurisdiction

15. The Respondent State contests the legal capacity of the Applicants to file the Application, on the basis that access to the Court should only be available to individuals rather than to a group of individuals. The Applicants dispute the submission of the Respondent State and aver that they have legal standing before the Court.

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16. The Court observes that, as stated in paragraph 1 of this judgment, the Applicants are an informal group of one hundred and thirteen (113) individuals. The Court recalls that the Republic of Mali is party to the Protocol and has deposited the Declaration

prescribed under Article 34(6), allowing individuals to seize the Court directly, in accordance with Article 5(3) of the Protocol. Accordingly, the Applicants are entitled to file their Application before this Court. Therefore, the Respondent State's objection in this regard is dismissed.

B. Other aspects of jurisdiction

17. With regard to material, temporal and territorial jurisdiction, the Court notes that they have not been challenged by the Respondent State and that nothing on file indicates that it has no jurisdiction in this regard. It therefore finds that it has:

i. material jurisdiction, since the Applicants allege the violation of the right to health provided under Articles 16 and 24 of the Charter, and 12 of the ICESCR; the right to a fair trial under Articles 7(1) and 26 of the Charter, and of the right to be tried without delay as provided under Articles 2(3) and 14 of the ICCPR; all instruments to which the Respondent State is a party, thus, giving the Court the power to interpret and apply them in accordance with Article 3 of the Protocol;

ii. temporal jurisdiction, insofar as the alleged violation in the present case, namely, the fact that the national courts have not adopted measures to remedy the violations committed against the Applicants, is continuous;

iii. territorial jurisdiction, insofar as the facts occurred in the territory of the Respondent State, a State Party to the Protocol.

18. In light of the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

19. In terms of 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". In accordance with Rule 39(1) of the Rules: "The Court shall conduct preliminary examination of … the admissibility of the application in accordance with Articles … 56 of the Charter and Rule 40 of these Rules".

20. Rule 40 of the Rules, which restates the content of Article 56 of the Charter, reads as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, in order to be examined, applications 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 the procedure in 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".

21. The Respondent State raises two objections on admissibility relating to the identity of the Applicants and to the requirement of exhaustion of local remedies.

A. Conditions of admissibility in contention between the Parties

i. Objection based on the identity of the Applicants

22. The Respondent State raises an objection to the admissibility of the Application based on the lack of proper identification of the members of the group who have filed the Application. In their Reply, the Applicants submitted a list of the names of the one hundred and thirteen (113) former workers of ALS who are part of the group.

23. The Court notes that with the submission of the above mentioned list of the members of the group, the Applicants are properly identified in accordance with Rule 40(1) of the Rules and hence, the Respondent State's objection in this regard is dismissed.

ii. Objection based on failure to exhaust local remedies

24. The Respondent State alleges that the Application should be declared inadmissible on the ground that local remedies were not exhausted, because in the absence of a judgment on the criminal complaint as is the case in this matter, the Applicants should have gone on appeal before the investigating judge and filed a civil suit, which they failed to do.

25. The Respondent State also states that the Applicants seized the State Prosecutor, whereas the competent authority in such matters is the Labour Court which deals with all issues relating to

disputes between employers and employees.

26. The Respondent State reiterates that the Office of the Prosecutor General lacks jurisdiction to deal with the matter. The Respondent State further alleges that the complainants in the said criminal matter are different from the group of former workers that are before this Court.

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27. In their Application, the Applicants aver that they sought administrative and political solutions to the matter which yielded no results, and that accordingly, on 1 February 2012, they filed a complaint before the Prosecutor of Commune III Court of First Instance, Bamako District. They allege that "[P]recisely a little over a year after the complaint, on 17 May 2013, they addressed a letter to the Attorney General at the Bamako Court of Appeal, giving an overview of the case and enclosing the various correspondence and measures realized ... ".

28. The Applicants argue that even though local remedies are available in the Respondent State to deal with the situation, the said remedies "… were in practice inaccessible, inefficient and insufficient". Citing the jurisprudence of other courts, they argue that the requirement of exhaustion of local remedies can be valid only if the remedies are effective, and the requisite timeframes are not unduly prolonged.[3]

29. In their Reply, the Applicants refute the Respondent State's argument that they ought to have filed a civil suit before the investigating judge, contending that the criminal complaint was aimed at ensuring that the violation of the rights guaranteed by the Respondent State are recognised.

30. The Applicants submit that filing of a civil suit before the investigating judge would require a decision from the Prosecutor General. Accordingly, in the absence of such a decision, the process could not proceed and they were obliged to wait for a response, which has been pending for five (5) years.

31. As regards continuation of the proceedings before the Labour Court, the Applicants submit that the fact of bringing a civil action

3 *Askoy v Turkey*, Application 21987/93. ECHR (1812/1996), cited in D Sulivan, *Présentation de la règle sur l'épuisement des voies de recours internes en vertu du Protocole facultatif à la CEDAW* (*Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW),* (2008) 4. See also *ZT v Norway*, Application 2238/2003, Committee against Torture (2006), para 8.1; *Rosendo Radilla Pacheco v Mexico* Application 777/01, Inter-American Commission on Human Rights (12 October 2005), para 20.

does not preclude criminal proceedings.

32. The Applicants allege that the time between the filing of the criminal complaint and the date of referral of the case to the Court attest to the undue delay in processing appeals. This renders inapplicable the requirement of exhaustion of local remedies set out in Rule 40(5) of the Rules and Article 56(5) of the Charter.

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33. The issue to be addressed is whether there is a remedy in the Respondent State's judicial system which the Applicants ought to have pursued to address the delay of the Prosecutor General's decision over their complaint.

34. In this regard, the Court recalls that in the matter of *Diakité Couple v Republic of Mali,*[4] it held that under Article 62[5] of the Mali Code of Criminal Procedure, "the petitioners had at least the opportunity to appeal directly to the investigating judge by filing a civil suit."

35. The Court found in that case that referral to the investigating judge was an effective and satisfactory remedy under Article 90 of the Mali Code of Criminal Procedure, which provides that: "The investigating judge shall, in accordance with the law , take all such acts of information as it deems useful for the manifestation of the truth",[6] and Article 112[7] of the same Code which gives the civil parties the right to participate in the procedure, including to appeal against the decisions of the investigating judge.

36. The Court has held in conclusion, that if the Applicants were not satisfied with the prolongation of the proceedings in respect of their criminal complaint before the Prosecutor General, they had the opportunity to appeal to the investigating judge or to file a civil

4 Application 009/2016. Judgment of 28 September 2017 (Admissibility), *Diakité Couple v Republic of Mali* (hereinafter referred to as *Diakité Couple v Mali* (Admissibility)), para 45.

5 Anyone who claims to be wronged by a crime or an offense may, by filing a complaint, bring a civil action before the competent investigating judge.

6 *Diakité Couple v Mali* (Admissibility), para 47.

7 Counsel for an accused person and the civil party, may both during investigation and after having communicated the proceedings to the registry, submit in writing at the hearing of new witnesses, adversarial pleadings, expert opinions and any such acts of investigation as they deem useful for the defense of the accused and in the interest of the civil party. The judge must justify the order by which he refuses to take additional measures of investigation requested of him.

suit.[8]

37. In the instant case, the Court notes that the Applicants filed a criminal complaint with the Respondent State's Office of the Attorney General on 1 February 2012, but until 1 July 2016, the date of the filing of their Application to this Court, their criminal complaint did not give rise to any decision. As far as this Court is concerned, in accordance with its abovementioned jurisprudence on the subject, the Applicants could have seized the investigating judge to avoid the alleged delay in the Attorney General's handling of the complaint. Having failed to pursue this remedy, the Applicants were not justified in submitting that the domestic proceedings were unduly prolonged.

38. In view of the foregoing, the Court finds the Applicants have not exhausted local remedies.

B. Conditions of admissibility not in contention between the Parties

39. Having concluded that the Application is inadmissible due to failure to exhaust local remedies, the Court does not have to pronounce itself on whether other conditions of admissibility enumerated in Rule 40 of the Rules have been met, in as much as the conditions of admissibility are cumulative.[9]

40. Based on the above, the Court declares the Application inadmissible.

VII. Costs

41. The Court notes that the parties did not submit on costs. However, Rule 30 provides that: "Unless otherwise decided by the Court, each party shall bear its own costs."

42. In view of the aforesaid provision, the Court decides that each party shall bear its own costs.

VIII. Operative part

43. For these reasons,
The Court
Unanimously:
On Jurisdiction
i. *Dismisses* the objection regarding the lack of legal capacity of the Applicants;
ii. *Declares* that it has jurisdiction.

On Admissibility
iii. *Upholds* the Respondent State's objection that the Application is inadmissible for failure to exhaust local remedies;
iv. *Declares* the Application inadmissible.

On Costs
v. *Rules* that each party shall bear its own costs.

Josiah v Tanzania (merits) (2019) 3 AfCLR 83

Application 053/2016, *Oscar Josiah v United Republic of Tanzania*

Judgment, 28 March 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIŽUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced to death for murder. He claimed that the courts relied on evidence that was inconsistent and false and that his right to defence had been violated. The Court found that the inconsistencies in witness testimonies were minor and that the court record showed that his right to defence had been respected. The Court thus held that the Applicant's right to fair trial had not been violated.

Admissibility (exhaustion of local remedies, constitutional petition, 39)

Fair trial (evaluation of evidence, 63; defence, 67, 68)

I. The Parties

1. Mr Oscar Josiah, (hereinafter referred to as "the Applicant"), is a national of Tanzania who is imprisoned at Butimba Central Prison in Mwanza, Tanzania after being convicted of murder and sentenced to death.

2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, and to the Protocol on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the Declaration required under Article 34(6) of the Protocol, through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the file that the Applicant, Oscar Josiah and his wife, were married in 2011 and were living together at Chankila village in the North West of Tanzania. At the time of their marriage, the Applicant's wife was pregnant by another man but apparently,

the Applicant did not have any problem with this situation.

4. The couple stayed together until 2 July 2012 when the wife gave birth to a child. On the same day, it is alleged that the baby died of unnatural causes after having been abandoned in the bush**.** A subsequent post-mortem medical examination revealed that the cause of the death was *Hypoglycemia* (lack of sugar in the blood) and *Hypothermia* (lack of bodily warmth).

5. The Applicant and his wife were later arraigned in the High Court of Tanzania at Bukoba and charged with the offence of murder, contrary to Section 196 of the Penal Code.

6. On 2 October 2015, the High Court acquitted the wife but convicted the Applicant and sentenced him to death. The Applicant subsequently appealed to the Court of Appeal of Tanzania, but the Court dismissed his appeal for lack of merit, in its judgment delivered on 25 February 2016.

B. Alleged violations

7. The Applicant alleges that the Court of Appeal's judgment was rendered on the basis of evidence derived from statements of Prosecution Witnesses which were marred by inconsistencies and "manifest errors patent in the face of the records". In this regard, he contends that the Court of Appeal misdirected itself by dismissing his grounds of appeal without giving them due consideration by relying on incriminating evidence obtained from an "untruthful" witness.

8. The Applicant consequently submits that the Court of Appeal's wrongful dismissal of his Appeal violated his rights under Article 3(1) and (2) and Article 7(1)(c) of the Charter.

III. Summary of the procedure before the Court

9. The Applicant filed his Application before the Court on 2 September 2016 and the same was served on the Respondent State on 15 November 2016.

10. On 18 November 2016, the Court, *suo motu,* issued an Order for Provisional Measures, directing the Respondent State to refrain from executing the death penalty against the Applicant pending the determination of the Application. The Court also requested the Respondent State to report to it within sixty (60) days from the date of receipt, on the measures taken to implement the Order.

11. On 9 February 2017, the Court, *suo motu,* granted an extension of time by thirty (30) days for the Respondent State to respond to the Application and this was again extended by thirty (30) days on

22 March 2017.

12. The Court received the Respondent State's Response to the Application on 22 May 2017 and transmitted it to the Applicant on 28 May 2017.

13. On 28 June 2017, the Court received the Respondent State's report on the implementation of the Order for Provisional Measures. On the same day, the Court also received the Applicant's Reply to the Respondent State's Response.

14. The Registry transmitted the Reply to the Respondent State on 27 July 2017.

15. On 4 October 2017, the pleadings were closed and the Parties were duly informed.

IV. Prayers

16. The Applicant prays the Court to:

"a. Set him free from custody by quashing the decision and sentence under article 27 of the Protocol to the Charter.

b. Restore justice where it is overlooked.

c. Order any other measure of benefit to him in the circumstances."

17. The Respondent State prays the Court to grant the following orders regarding the Application's admissibility and jurisdiction:

"1. That the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this Application.

2. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court.

3. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of the Court.

4. That the Application be declared inadmissible.

5. That the Application be dismissed in accordance with Rule 38 of the Rules of Court.

6. That the costs of this Application be borne by the Applicant."

18. The Respondent State further prays the Court to grant the following orders regarding the merits:

"1. That the Government of the United Republic of Tanzania did not violate Article 3(1) and (2) of the African Charter on Human and Peoples' Rights.

2. That the Government of the United Republic of Tanzania did not violate Article 7(1) (c) of the African Charter on Human and Peoples' Rights.

3. That the Application be dismissed for lack of merit.

4. That the Applicant's prayers be dismissed.

5. That the costs of this Application be borne by the Applicant."

V. Jurisdiction

19. Pursuant to Article 3(1) of the Protocol, the material jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned". In terms of Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction…"

20. The Respondent State raises an objection to the material jurisdiction of the Court.

A. Objection to material jurisdiction

21. The Respondent State avers that this Court has no appellate jurisdiction to determine matters of fact and law which are finalised by the Court of Appeal, the highest court in Tanzania. In this regard, it claims that the matters relating to the credibility of the witnesses that the Applicant mentioned in his Application were issues of evidence which were determined with finality by the Court of Appeal. The Respondent State argues that this Court thus has no jurisdiction to review such a decision of the Court of Appeal or quash the Applicant's conviction and order his release from prison.

22. The Applicant contends that although this Court is not an appellate court, it has jurisdiction to determine matters of fact and law when the rights violated by the Respondent State are protected by the Charter and other human rights instruments to which the Respondent State is a party. The Applicant avers that this Court has jurisdiction to examine the relevant proceedings in the domestic courts in order to determine whether such proceedings were in accordance with the standards set out in the Charter and other human rights instruments ratified by the Respondent State.

23. The Applicant submits further that this Court has jurisdiction to quash his conviction and order his release from prison.

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24. The Court has previously held that Article 3 of the Protocol gives it the power to examine an Application submitted before it as long as the subject matter of the Application involves alleged violations of rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.[1]

25. The Court also observes that it is not an appellate court.[2] Nevertheless, even where allegations of violations of human rights relate to the assessment of evidence by the national courts, the Court retains the power to ascertain whether such assessment is consistent with international human rights standards and it has not occasioned a miscarriage of justice to an Applicant.[3]

26. In the instant case, the Court notes that the Applicant's complaints relate to the alleged violations of human rights, namely, the right to equality before the law and equal protection of the law and the right to a fair trial, guaranteed under Article 3 and Article 7 of the Charter, respectively.

27. The Court further notes that the Applicant's allegations substantially relate to the way in which the Respondent State's courts evaluated the evidence that resulted in his conviction. However, this does not prevent the Court from making a determination on the said allegations and ascertaining whether the domestic courts' evaluation of evidence is compatible or otherwise with international human rights standards. This would neither make the Court an appellate court nor is it tantamount to exercising an appellate jurisdiction. The Respondent State's objections in this regard lack merit and are thus dismissed.

28. In light of the foregoing, the Court finds that it has material jurisdiction over the instant Application.

1 Application 003/2014. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania* para 114.

2 Application No 001/2013. Ruling of 15 March 2015 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi* para 14. Application 024/2015. Judgment of 7 December 2018 (Merits), *Werema Wangoko Werema and Waisiri Wangoko Werema v United Republic of Tanzania,* para 29.

B. Other aspects of jurisdiction

29. The Court notes that the personal, temporal and territorial aspects of its jurisdiction are not disputed by the Respondent State and that nothing on the record indicates that the Court lacks personal, temporal or territorial jurisdiction. The Court accordingly holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the declaration prescribed under Article 34(6) of the Protocol, which enabled the Applicant to bring this Application directly before this Court, pursuant to Article 5(3) of the Protocol;

ii. It has temporal jurisdiction because the alleged violations occurred subsequent to the Respondent State's ratification of the Protocol establishing the Court;

iii. It has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

30. In light of the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility

31. Pursuant 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". Rule 39(1) of the Rules also provides that "the Court shall conduct preliminary examination of … the admissibility of the application in accordance with Articles … 56 of the Charter and Rule 40 of these Rules".

32. Rule 40 of the Rules, which in substance restates Article 56 of the Charter, stipulates that Applications filed before the Court shall be admissible if they fulfil 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".

33. While some of the above conditions are not in contention between the Parties, the Respondent State has raised an objection regarding the requirement of exhaustion of local remedies.

A. Condition of admissibility in contention between the Parties

Objection based on non-exhaustion of local remedies

34. The Respondent State argues that it was premature for the Applicant to bring this matter before this Court because there were judicial remedies yet to be exhausted within its judicial system. In this vein, the Respondent State submits that the Applicant could have sought a review or revision of the Court of Appeal's decision or filed a constitutional petition before the High Court of Tanzania by claiming that his fundamental rights had been or are still being violated, but he did not pursue both remedies before he filed his Application before this Court.

35. The Applicant claims that the Application meets the requirement stipulated in Rule 40(5) of the Rules. He asserts that he has exhausted local remedies because his rights were violated by the Court of Appeal, the highest court of the Respondent State and his appeal to that Court was the last necessary step that he could take to exhaust local remedies.

36. The Applicant further submits that he had filed an application for review or revision of the Court of Appeal's decision but it was denied. As regards the possibility of filing a constitutional petition in the High Court, the Applicant argues that since the violations were committed by the highest Court of the Respondent State, the matter cannot be successfully resolved by a lower court.

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37. The Court notes that in accordance with Article 56(5) of the Charter and Rule 40 (5) of the Rules, in order for any application before the Court to be admissible, local remedies must have

been exhausted, unless the domestic procedure to pursue them is unduly prolonged.

38. In its established jurisprudence, the Court has consistently held that an Applicant is only required to exhaust ordinary judicial remedies.[4] With respect to similar applications against the Respondent State, the Court, after having examined the domestic laws of the Respondent State, has further observed that the filing of a constitutional petition in the High Court and an application for review of the Court of Appeal's judgment are extraordinary remedies in the Tanzanian judicial system, which an applicant is not required to exhaust prior to filing an application before this Court.[5]

39. In the instant case, the Court notes from the records that the Applicant went through the required trial and appellate processes up to the Court of Appeal, which is the highest Court in the Respondent State, before filing his Application before this Court. The Court thus finds that the Applicant has exhausted the local remedies available in the Respondent State's judicial system. In line with this Court's abovementioned established position, the Applicant was also not required to pursue the constitutional petition in the High Court and the review procedure in the Court of Appeal of the Respondent State before seizing this Court, as both procedures are extraordinary remedies.

40. Accordingly, the Court dismisses the Respondent State's objection that the Applicant did not exhaust local remedies.

B. Conditions of admissibility not in contention between the Parties

41. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 40, Sub-rules1, 2, 3, 4, 6 and 7 of the Rules, on the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case respectively, and that nothing on the record

4 *Alex Thomas v Tanzania* (Merits), para 64. See also Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 95.

5 *Alex Thomas v Tanzania* (Merits), paras 63-65.

indicates that these requirements have not been complied with.

42. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

43. The Court notes that the Applicant alleges violation of the right to equality before the law and equal protection of the law, and the right to fair trial as provided under Articles 3 and 7 of the Charter, respectively. Considering that the Applicant's allegation of violation of Article 3 essentially stems from the alleged violation of his right to a fair trial, the Court will first examine the allegations relating to Article 7.

A. Alleged violations of the right to a fair trial

44. The Applicant makes two allegations which would fall within the scope of the right to a fair trial enshrined under Article 7 of the Charter.

i) The Court of Appeal's judgment had manifest errors

45. The Applicant claims that the Court of Appeal's judgment had manifest errors "patent in the face of records that resulted in the miscarriage of justice". He elaborates his allegation by stating that the Court of Appeal misdirected itself by dismissing his second ground of appeal while it was argued that the evidence presented before it concerning the cause of the death of the baby had contradictions and inconsistencies. The Applicant in this regard claims that one of the prosecution witnesses first indicated that the deceased baby was strangled and carried on a plate but another witness mentioned that he saw a spear in the bush where the baby was abandoned, suggesting that the baby was killed with a spear.

46. The Applicant also cites the testimony of his wife, and the mother of the deceased baby (DW2), who at first is reported to have said that the baby slipped into a pit latrine but later changed her statement, and said that the Applicant snatched the baby and threw it in the bush. Despite this inconsistency and the fact that the Court of Appeal itself declared this witness as unreliable, the Applicant alleges that her testil)mony was used as an incriminating evidence to convict him and that the Court of Appeal expunged part of her statements that were exculpatory.

47. According to the Applicant, the said contradictions and inconsistencies were the root of the matter, as they related to the evidence on the cause of death of the baby and were contrary to the medical report (exhibit 1), submitted by Prosecution Witness (PW1), the medical doctor who undertook the *post-mortem* examination on the deceased baby. The Applicant concludes by asserting that his conviction on the basis of the testimony provided by an unreliable witness and without consideration of the exculpatory evidence occasioned a miscarriage of justice.

48. On its part, the Respondent State disputes the Applicant's allegations and prays the Court to put him to strict proof. It states that the Court of Appeal thoroughly assessed and determined all contradictions that were pointed out by the parties during the appeal and concluded that the contradictions were minor and did not go to the root of the case. The Respondent State reiterates its earlier position that, if the Applicant believed that there were errors in the judgment of the Court of Appeal, he could have requested for a review of the judgment at the Court of Appeal or filed a constitutional petition at the High Court to seek redress for the violation of his fundamental rights.

49. In his Reply, the Applicant reiterates that he was not required to seek a review of the Court of Appeal's judgment, because it is the same Court, the highest Court in the Respondent State, which violated his rights. He adds that he was also not required to file the constitutional petition at the High Court and that it is unlikely that the High Court, presided by a single Judge, would reverse the decision of the Court of Appeal rendered by a panel of three (3) Judges.

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50. Article 7 of the Charter provides that:

"Every individual shall have the right to have his cause heard. This comprises:

1. 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;
2. The right to be presumed innocent until proved guilty by a competent court or tribunal;
3. The right to defence, including the right to be defended by counsel of his choice;

4. The right to be tried within a reasonable time by an impartial court or tribunal."

51. The Court observes that the right to a fair trial and specifically, the right to presumption of innocence requires that a person's conviction on a criminal offence which results in a severe penalty and in particular to a heavy prison sentence, should be based on solid and credible evidence.[6]

52. The Court also recalls its jurisprudence in the *Matter of Kijiji Isiaga v United Republic of Tanzania*, where it held that:

"Domestic courts generally enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court does not and should not replace itself for domestic courts and investigate the details and particularities of evidence used in domestic proceedings."[7]

53. However, the Court reiterates its position in paragraph 27 above that, the fact that the Court is not concerned with detailed assessment of evidentiary issues does not prevent it from examining whether the manner in which domestic courts assessed evidence is compatible with international human rights standards. Consequently, the Court retains, for instance, the power to examine "whether the evaluation of facts or evidence by the domestic courts of the Respondent [State] was manifestly arbitrary or resulted in a miscarriage of justice to the Applicant".[8]

54. In the instant Application, the Court observes from the judgment of the Court of Appeal that the Applicant had raised five grounds of appeal, namely:

"1. That, the prosecution evidence was not proved beyond reasonable doubt;
2. That the evidence for cause of death has contradictions;
3. That the evidence of DW2, the co-accused of the appellant, was not credible as the witness had confused and contradicted itself;
4. That exhibits P2 and P3 were illegally admitted and considered as their recording was done contrary to the law; and
5. That the Court did not comply with section 231 (1) (Sic. 293 (2)) of the Criminal Procedure Act (CPA) by failure to explain to the accused (appellant) the rights expressed therein."

55. The Court notes from the record that the Court of Appeal

6 *Mohamed Abubakari v Tanzania* (Merits), para 174.

7 Application 023/2015. Judgment of 23 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania*, (hereinafter referred to as *Kijiji Isiaga v Tanzania* (Merits)), para 61.

8 *Ibid*, para 62; See also *Mohamed Abubakari v Tanzania* (Merits), paras 26, and 173; *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 38.

considered all of the above grounds of appeal and reached the conclusion that the Applicant was responsible for the death of the baby. With respect to the first ground of appeal, the Court of Appeal held that the testimonies of PW2, PW3 and PW4 dispelled any reasonable doubt as to the culpability of the Applicant and provided adequate evidence to sustain his conviction.

56. As regards the second ground of appeal, the Court of Appeal noted that there were some contradictions between the testimonies of PW2, PW3, and PW4. Whereas PW2 stated that the appellant showed them a plate in the bush which was used to carry the baby, the other two witnesses did not mention this. Furthermore, only PW 4 testified about the spear.

57. However, the Court of Appeal held that these were minor contradictions that did not go to the root of the matter, that is, the baby's cause of death. The Court of Appeal emphasised that all the three witnesses testified that it was the Applicant who led them to the bush from where they recovered the baby's corpse and that he would not have known where the baby was abandoned if he was not involved in the commission of the crime.

58. Concerning the third ground of appeal, the Court of Appeal agreed with the Applicant that DW2, the wife of the Applicant and the mother of the deceased baby, was not a reliable witness as she contradicted her statements when questioned by the other witnesses concerning the whereabouts of the baby, first indicating that the baby slipped into the latrine and later, stating that the Applicant snatched the baby from her and threw the baby in the bush. Nevertheless, the Court of Appeal noted that her second statement was subsequently found to be true and it considered it relevant as corroborating evidence. The Court of Appeal also indicated that the Applicant's conviction withstood the inconsistent testimony of DW2.

59. As regards the fourth and fifth grounds of appeal, the Court of Appeal also considered them in detail and decided that the procedural irregularities and omissions pointed out by the Applicant were justified under the Tanzanian laws and in the circumstances surrounding his case.

60. From the foregoing, this Court observes that the manner in which the Court of Appeal assessed the evidence reveals no apparent or manifest errors that occasioned a miscarriage of justice to the Applicant. In this regard, this Court notes, as the Court of Appeal did, that the discrepancies in the witnesses' testimony were minor and that the most important issues for determination were consistent in the testimonies of PW2, PW3, and PW4. All three witnesses narrated that the Applicant took them to the place

where the baby was abandoned, whereas his wife only went part of the way before needing to have rest. This was substantiated by the *post mortem* examination report of PW 1, which disclosed that the cause of the death was hypoglycaemia (lack of sugar in the blood) and hypothermia (lack of warmth).

61. The Court also notes that the alleged inconsistencies in the testimonies of PW2, PW3, and PW4 were not in direct contradiction to each other, but rather certain details were only mentioned by one witness and not by the others.

62. The Court thus dismisses the allegations of the Applicant that the Court of Appeal failed to properly examine his grounds of appeal and that the evidence that was used to uphold his conviction was not watertight.

63. In light of the above, the Court therefore holds that the Respondent State has not violated the Applicant's right to a fair trial with respect to the alleged inconsistencies among witnesses' testimonies and the alleged lack of proper evaluation of evidence and of his grounds of appeal by the Court of Appeal.

ii) The right to defence

64. In his Application, the Applicant alleges a violation of Article 7(1) (c) of the Charter by the Respondent State.

65. The Respondent State reiterates its submission that all the Applicant's grounds of appeal were examined and determined by the Court of Appeal and thus, there was no violation of Article 7(1) (c) of the Charter.

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66. The Court notes that Article 7(1) (c) of the Charter as indicated above, provides for the right to defence, including the right to be defended by counsel of one's choice. This Court has consistently interpreted this provision in light of Article 14(3) (d) of the International Covenant on Civil and Political Rights(ICCPR),[9] which establishes the right to free legal counsel and determined that the right to defence includes the right to be provided with free legal assistance in circumstances where the interest of justice so

9 The Respondent State became a State Party to ICCPR on on 11 June 1976.

require.[10]

67. In the instant Application, the Applicant makes a mere allegation, without substantiation, that the Respondent State violated his right to defence. The Court notes from the record that the Applicant had defence counsel at the trial and appellate levels and also that, he was able to testify and call witnesses in his defence. As observed above, the Court of Appeal also addressed all his grounds of appeal, as submitted by his counsel.

68. In view of the above, the Court dismisses the Applicant's allegation that the Respondent State has violated his right to defence under Article 7(1)(c) of the Charter.

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

69. In his Application, the Applicant claims that the Respondent State has violated his rights enshrined under Article 3(1) and (2) of the Charter by convicting him on the basis of contradictory and "incriminating" evidence.

70. The Respondent State contests the Applicant's claim and prays the Court to declare that it has not violated Article 3(1) and (2) of the Charter.

* * *

71. The Court notes that Article 3 of the Charter guarantees the right to equal protection of the law and to equality before the law as follows:

"1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law"

72. With regard to the right to equal protection of the law, the Court observes that this right is recognised and guaranteed in the Constitution of the Respondent State. The relevant provisions (Articles 12 and 13) of the Constitution protect the right in terms similar to the Charter, including prohibiting discrimination. In this regard, the Applicant has not indicated in his submissions any other law that runs counter to the essence of the right to equal protection of the law.

73. With respect to the right to equality before the law, the Court notes from the record that the Court of Appeal examined all the

10 *Alex Thomas v Tanzania* (Merits), para 114; see also *Kijiji Isiaga v Tanzania* (Merits), para 72, *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 104.

Applicant's grounds of appeal and found that they lacked merit. As specified in paragraph 60 above, this Court has not found that the Court of Appeal's assessment of the evidence was done in a manner that infringed on the Applicant's rights to equality before the law and to equal protection of the law. Furthermore, the Court has found no evidence showing that the Applicant was treated differently, as compared to other persons who were in a situation similar to his.[11]

74. In view of the foregoing, the Court dismisses the Applicant's allegation that the Respondent State has violated Article 3(1) and (2) of the Charter.

VIII. Reparations

75. In his Application, the Applicant, among others, prays the Court to order his release from custody by quashing his conviction. The Applicant also requests the Court to issue any other order for his benefit.

76. Article 27(1) of the Protocol stipulates 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."

77. The Court, having found that the Respondent State has not violated the rights of the Applicant, dismisses the Applicant's prayers that the Court should quash his conviction and order his release.

IX. Costs

78. The Court notes that the Applicant made no submission on costs, but the Respondent State prays that the costs of the Application be borne by the Applicant.

79. Rule 30 or the Rules states that "unless otherwise decided by the Court, each Party shall bear its own costs"**.**

80. In the present Application, the Court decides that each Party shall bear its own costs.

X. Operative part

81. For these reasons,
The Court,
Unanimously
On jurisdiction
i. *Dismisses* the objection to its material jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objection on the admissibility of the Application;
iv. *Declares* that the Application is admissible.

On merits
v. *Finds* that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law guaranteed under Article 3(1) and (2) of the Charter;
vi. *Finds* that the Respondent State has not violated the right to a fair trial of the Applicant under Article 7(1) of the Charter.

On reparations
vii. *Dismisses* the prayers of the Applicant for reparation to quash his conviction and order his release.

On costs
viii. Decides that each Party shall bear its own costs.

Johnson v Ghana (jurisdiction and admissibility) (2019) 3 AfCLR 99

Application 016/2017, *Dexter Eddie Johnson v Republic of Ghana*

Judgment, 28 March 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicant was convicted of murder and sentenced to death. After his conviction and sentence was confirmed by the Court of Appeal he submitted a petition to the United Nations Human Rights Committee (HRC) which held that imposition of mandatory death penalty violated the right to life in Article 6(1) of the International Covenant on Civil and Political Rights. Subsequently, the Applicant approached the Court since the Respondent State did not implement the Views of the HRC. The Court held the case inadmissible since the HRC had already settled the same issues within the meaning of Article 56(7) of the Charter.

Admissibility (matter settled, 46-56; consideration of admissibility requirements, 57)

Separate opinion: BENSAOULA

Admissibility (consideration of admissibility requirements, 11)

Dissenting opinion: BEN ACHOUR

Admissibility (submission within reasonable time, 2; matter settled, 3)

Dissenting opinion: TCHIKAYA

Admissibility (matter settled, 13, 19, 22, 23)

I. The Parties

1. Dexter Eddie Johnson (hereinafter referred to as "the Applicant"), is a dual national of the Republic of Ghana and Great Britain who was convicted and sentenced to death for murder and is currently on death row awaiting execution.

2. The Application is filed against the Republic of Ghana (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 1 June 1989 and to 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") on 16 August 2005. It deposited, on 10 March 2011, a Declaration under Article 34(6) of the Protocol, through which it accepts the jurisdiction of the

Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject matter of the Application

A. Facts of the matter

3. It emerges, from the Application that on 27 May 2004, an American national was killed near the village of Ningo in the Greater Accra region of Ghana. The Applicant was accused of committing this crime and brought to trial. He denied the offence. On 18 June 2008, the Fast Track High Court in Accra, convicted the Applicant of the murder and sentenced him to death.

4. The Applicant appealed against his conviction and sentence before the Court of Appeal, arguing that while the death penalty *per se* is authorised by Article 13(1) of the Constitution of Ghana, the mandatory imposition of the death sentence, on which the Constitution was silent, was unconstitutional. To buttress this assertion, the Applicant argued that the mandatory death penalty violates the right not to be subjected to inhuman and degrading treatment or punishment, the right not to be arbitrarily deprived of life and the right to a fair trial, all of which are protected by Ghana's Constitution.

5. On 16 July 2009, the Court of Appeal dismissed the appeal both on the conviction and sentence.

6. The Applicant further pursued his appeal against both the conviction and sentence before the Supreme Court and on 16 March 2011 his appeal was**,** again**,** dismissed.

7. Subsequently, in December 2011 and April 2012, respectively, the Applicant made two clemency petitions to the President of Ghana**.**

8. In July 2012, the Applicant filed a communication to the United Nations Human Rights Committee (hereinafter referred to as "the HRC") under the First Optional Protocol to the International Covenant on Civil and Political Rights.

9. On 27 March 2014, the HRC found, in its Views, that since the only punishment for murder under Ghanaian law was the death penalty, courts had no discretion but to impose the only sentence permitted by law. The HRC held that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life contrary to Article 6(1) of the International Covenant on Civil

and Political Rights (hereinafter referred to as "the ICCPR").[1] It thus ordered the Respondent State to provide the Applicant with an effective remedy including the commutation of his sentence. The HRC also reminded the Respondent State that it was under a duty to avoid similar violations in future, including by adjusting its legislation in line with the provisions of the ICCPR.

10. The HRC requested the Respondent State to file, within one hundred and eighty (180) days, information about the measures taken to give effect to its Views and also requested the Respondent State to publish the HRC's Views and have them widely disseminated in the Respondent State. The HRC also reminded the Respondent State that by becoming a party to the First Optional Protocol to the ICCPR, it had recognised the competence of the HRC to determine whether there had been a violation of the ICCPR and to provide an effective and enforceable remedy when a violation is established.[2]

11. The Respondent State has not implemented the Views of the HRC. The Applicant remains on death row and his death sentence has not been commuted.

12. Since the Respondent State has not acted on the Views of the HRC, the Applicant decided to apply to this Court for the protection of his rights. The Applicant, while acknowledging the fact that there is a long-standing *de facto* moratorium on carrying out executions in the Respondent State, argues that this has no bearing on the merits of this Application.

B. Alleged violations

13. The Applicant alleges that the imposition of the mandatory sentence of death, without consideration of the individual circumstances of the offence or the offender, violates the following rights:

a. The right to life under Article 4 of the Charter**;**

b. The prohibition of cruel, inhuman or degrading treatment or punishment under Article 5 of the Charter;

c. The right to a fair trial under Article 7 of the Charter;

d. The right to life under Article 6(1), the right to protection from inhuman punishment under Article 7, the right to a fair trial under Article 14(1) and the right to a review of a sentence under Article 14(5) of the ICCPR; and

1 Article 6(1) provides as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".

2 Communication 2117/2012 *Dexter Eddie Johnson v Ghana*, 27 March 2014 (hereinafter referred to as "*Dexter Johnson v Ghana" (HRC)).*

e. The right to life, and the protection of cruel, inhuman or degrading treatment or punishment under Article 5 of the Universal Declaration of Human Rights (hereinafter referred to as the "UDHR ").

14. The Applicant also submits that by failing to give effect to the rights cited above the Respondent has also violated Article 1 of the Charter.

III. Summary of the procedure before the Court

15. The Application was filed on 26 May 2017 and served on the Respondent State by a notice dated 22 June 2017, directing the Respondent State to file the names and addresses of its representatives and its Response to the Application within thirty (30) and sixty (60) days of receipt of the notice, in accordance with Rules 35(2) (a) and 35(4) (a) of the Rules of the Court (hereinafter referred to as "the Rules").

16. On 28 September 2017, the Court, upon the Applicant's request, ordered Provisional Measures directing that the Respondent State should refrain from executing the Applicant pending the determination of the Application.

17. On 28 May 2018**,** the Registry received the Respondent State's Response to the Application and the Respondent State's Report on Implementation of Provisional Measures. On 31 May 2018 the Registry transmitted these to the Applicant and requested him to file his Reply, if any, within thirty (30) days of receipt of the notice. The Applicant's Reply was received by the Registry on 5 July 2018.

18. On 10 August 2018**,** the Registry received the Applicant's submissions on reparations and transmitted these to the Respondent State by a notice dated 14 August 2018 requesting it to file the Response thereto within thirty (30) days of receipt of the notice.

19. On 11 September 2018**,** the Registry received a letter from the Applicant requesting to file further written submissions on the admissibility of the application and also providing a list of counsel who would appear for the public hearing, if any.

20. On 7 November 2018**,** the Registry sent a letter to the Applicant, copied to the Respondent State, informing the Applicant that the Court had denied his request to file additional submissions on the admissibility of the Application.

21. On 14 December 2018**,** the Registry received the Respondent State's Response to the Applicant's Submissions on Reparations and on 19 December 2018, this was transmitted to the Applicant

for information.

22. On 4 February 2019, the Parties were informed that the pleadings had formally been closed.

23. On 20 March 2018 the Registry informed the Applicant that the Court would not hold a public hearing in the matter.

IV. Prayers of the Parties

24. The Applicant prays the Court for the following:

On merits

"a. grant a declaration that the imposition of the mandatory death penalty on the Applicant violates Articles 4, 5 and 7 of the Charter, Articles 6(1), 7, 14(1) and 14(5) of the ICCPR and Articles 3, 5 and 10 of the UDHR.

b. For the Court to grant a declaration that by failing to adopt legislative or other measures to give effect to the Applicant's rights under Article 4, 5 and 7 of the Charter, the Respondent State also violated Article 1 of the Charter.

c. order the Respondent to take immediate steps to effect the prompt substitution of the Applicant's sentence of death with a sentence of life imprisonment or such other non-capital sentence as reflects the circumstances of the offence and the offender and the violations of his rights under the Charter.

d. order the Respondent State to take legislative or other remedial measures to give effect to the Court's findings in their application to other persons".

On reparations

"e. An order for the Respondent State not to carry out the death penalty imposed on the Applicant and to take immediate remedial measures, by commutation or otherwise, to effect the prompt substitution of the Applicant's sentence of death with a sentence of life imprisonment or such other non-capital sentence as reflects the circumstances of the offence and the offender and the violations of his rights under the Charter and other relevant instruments.

f. An order for the Respondent State to amend its laws in order to bring them in line with the relevant provisions of the applicable international instruments, including Articles 3(2), 4, 5 and 7 of the Charter, Articles 6(1), 7, 14(1) and 14(5) of the ICCPR and Articles 3, 5, 7 and 10 of the UDHR, by amending section 46 of the Criminal Offences Act, 1960 (Act 29) so that the death penalty is not stipulated as the mandatory sentence for the offence of murder.

g. An order for the Respondent State to review within six months from the date of this judgment the sentences of all prisoners in the Respondent State who have been mandatorily sentenced to death

and to adopt remedial measures by commutation or otherwise to ensure that such sentences are compatible with this judgment.

h. An order that the judgment of the Court represents a form of reparation for the moral prejudice suffered by the Applicant as a result of the imposition of an unlawful mandatory death sentence and his subsequent incarceration on death row pending execution of sentence and an order that, in addition, the Respondent State shall pay the Applicant a sum in such amount as the Courts sees fit as reparations for the said prejudice.

i. An order for such other reparations as the Court sees fit.

j. An order for the Respondent State to publish within six months from the date of the judgment:

- a summary in English of the judgment as prepared by the Registry of the Court in the Ghana Gazette;
- the summary in English of the judgment as prepared by the Registry of the Court in a widely read national daily newspaper; and
- the full text of the judgment in English on the official website of the Respondent State, to remain available for a period of at least one year.

k. An order for the Respondent State to submit to the Court within six months from the date of this judgment a report on the status of compliance with all the orders contained within it.

l. An order that each party bear its own costs".

25. The Respondent State prays the following declarations from the Court:

On merits

"a. That the death penalty was imposed on the Applicant in accordance with the proper judicial process in Ghana and was therefore not in violation of Articles 4, 5 and 7 of the Charter.

b. That the Respondent State has not violated Article 1 of the Charter.

c. That the Application be dismissed in its entirety.

d. That all the reliefs sought by the Applicant be denied".

On reparations

"e. That the death penalty was imposed on the Applicant in accordance with the proper judicial process in Ghana and was therefore not in violation of Article 4, 5 and 7 of the Charter;

f. That the Respondent State has not violated Article 1 of the Charter.

g. That Applicant has not established any grounds for reparations and as such the reparations sought by the Applicants should be denied".

V. Jurisdiction

26. Under 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". Further, in terms of Rule 39(1) of the Rules "the Court shall conduct preliminary examination of its jurisdiction …".

27. The Applicant submits that the Court has previously ruled that as long as the rights alleged by the Applicant(s) are protected by the Charter or any other human rights instrument ratified by the State in question, then the Court will have jurisdiction over the matter.[3] In the present Application, the Applicant set out the specific provisions of the Charter, the ICCPR and the UDHR that he alleges have been violated by the Respondent State and submitted that the Court has material jurisdiction to hear this matter.[4]

28. The Applicant further avers that the Court has personal jurisdiction, temporal jurisdiction and territorial jurisdiction in the present matter.

29. The Respondent State did not make any submissions regarding the Court's jurisdiction to hear this case.

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30. Notwithstanding the absence of any objection to the Court's jurisdiction by the Respondent State, the Court must satisfy itself that it has jurisdiction before it proceeds.

31. In this Application, the Court finds that it has:

i. material jurisdiction given that the Application invokes violations of human rights protected under the Charter and other human rights instruments ratified by the Respondent State;

ii. personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the declaration prescribed under Article 34(6) thereof, allowing individuals to institute cases directly before it, in accordance with Article 5(3) of the Protocol;

iii. temporal jurisdiction since the alleged violations are continuous, given that the Applicant remains sentenced on the basis of what he

3 Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi & others v United Republic of Tanzania*, para 57.

4 The Applicant alleges that the Respondent State has violated Articles 4, 5 and 7 of the Charter together with Articles 6(1), 7, 14(1) and 14(5) of the ICCPR and Articles 3, 5 and 10 of the UDHR.

considers as not being in line with the provisions of the Charter and other human rights instruments;[5]

iv. territorial jurisdiction because the alleged violations took place in the Respondent State's territory and the Respondent State is a State Party to the Protocol.

32. In view of the foregoing, the Court holds that it has jurisdiction to hear the instant Application.

VI. Admissibility

33. In terms of 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". Pursuant to 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".

34. Rule 40 of the Rules, which in essence restates Article 56 of the Charter, stipulates that Applications shall be admissible if they fulfil the following conditions:

"1. Indicate their authors even if the latter request 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 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 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 provision of the present Charter".

35. The Applicant submits that the Application discloses the Applicant's identity since he did not request anonymity. Furthermore, he avers that the Application accords with the objectives of the African Union because it invites the Court to consider whether the Respondent State is meeting its obligations to protect the

5 Application 013/2011. Judgment of 21 June 2013 (Merits), *Beneficiaries of Late Norbert Zongo and others v Burkina Faso*, paras 73-74 (hereinafter referred to as "*Norbert Zongo v Burkina Faso"*).

Applicant's rights under the Charter. In support of his submission, he cites the case of *Peter Chacha v Tanzania,* where the Court held that an application will be admissible if its facts reveal a *prima facie* violation of a protected right.[6]

36. The Applicant also submits that the Application does not contain disparaging or insulting language and the Application is not based on news disseminated through the mass media.

37. The Applicant further submits that local remedies have been exhausted since he has taken his appeal against the imposition of the mandatory death penalty as far as possible within the Respondent State's domestic courts, namely the Supreme Court of Ghana which is the highest court in Ghana from which no further appeal can be brought.

38. The Applicant further avers that he is lay, indigent and incarcerated and after exhausting local remedies, he unsuccessfully attempted to use "extraordinary measures" by pursuing an application for clemency and then filing an application to the HRC before turning to this Court. The Applicant, therefore, submits that the Application was filed within a reasonable time since he explored "extraordinary measures" before bringing the Application to the Court. The Applicant relies on the case of *Alex Thomas v Tanzania* in support of his submission.[7]

39. Lastly, the Applicant submits that the Application does not raise matters 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.

40. In this regard, the Applicant submits that the fact that the HRC has adopted Views in his case does not preclude the admissibility of the present Application under Rule 40(7) of the Rules since the HRC did not address any matter or issue 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 and the Views of the HRC were based on the ICCPR which contains its own detailed provisions on human rights, which are separate and distinct from the Charter of the United Nations and the other instruments listed

6 Application 003/2012. Ruling of 28 March 2014 (Jurisdiction and Admissibility), *Peter Chacha v United Republic of Tanzania*, para 123.

7 Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania*, (hereinafter referred to as "*Alex Thomas v Tanzania"*), paras 73 -74.

in Rule 40(7) of the Rules.

41. Furthermore, the Applicant avers that none of the issues in the HRC proceedings have been settled by the parties because the Respondent State has chosen to ignore the HRC's Views such that the issues remain entirely unsettled and unresolved.

42. The Respondent State submits that in determining the admissibility of the Application the Court should be guided by the provisions of Article 56(5) of the Charter, Article 6(2) of the Protocol and Rule 40 of the Rules.

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43. The Court notes that with regard to the admissibility of the Application, the Respondent State merely notes that in determining admissibility, the Court should be guided by the provisions of Article 56(5) of the Charter, Article 6(2) of the Protocol and Rule 40 of the Rules. The Respondent State did not raise any objection to the admissibility of the Application.

44. Nevertheless, the Court will, *suo motu*, and as empowered by Rule 39 of the Rules, examine whether the Application meets the admissibility requirements set out in Rule 40 of the Rules and Article 56 of the Charter.

45. The Court notes that the Application discloses the identity of the Applicant; is compatible with the Constitutive Act of the AU and the Charter because it invites the Court to determine whether the Respondent State meets its obligations to protect the Applicant's rights enshrined in the Charter; is not written in disparaging or insulting language directed at the Respondent State and its institutions or the African Union; is not based exclusively on news disseminated through mass media; and was sent after the Applicant exhausted local remedies since the Applicant's appeal was dismissed by the Supreme Court, which is the highest appellate court in the Respondent State; and was also filed with this Court within a reasonable time after the exhaustion of local remedies.[8] The Court, therefore, finds that the Application meets the admissibility requirements under Article 56(1) to 56(6) of the Charter, which are reflected in Rule 40(1) to 40(6) of the Rules.

46. The Court, however, notes that in terms of Article 56(7) of the Charter, which is reiterated by Rule 40(7) of the Rules, Applications shall be considered if they "do not deal with cases which have

8 *Norbert Zongo v Burkina Faso*, (Preliminary Ruling) para 121; *Alex Thomas v Tanzania*, para 73-74 and Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking and Another v United Republic of Tanzania,* para 61.

been settled … 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".

47. The Court further notes that examining compliance with this provision requires it to make sure that this Application has not been "settled" and that it has not been settled "in accordance with the principles" of the Charter of the United Nation or the Constitutive Act of the African Union or the provisions of the Charter.[9]

48. The Court observes that the notion of "settlement" implies the convergence of three major conditions: (i) the identity of the parties; (ii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and (iii) the existence of a first decision on the merits.[10] This position has also been confirmed by the African Commission which has held that for a matter to fall within the scope of Article 56(7) of the Charter, it should have involved the same parties, the same issues and must have been settled by an international or regional mechanism.[11]

49. With respect to the first condition, it is not in dispute that the Applicant, Dexter Eddie Johnson, is the same person who filed a communication against the Respondent State before the HRC. The Court, therefore, finds that the parties, in this Application and the communication before the HRC, are identical and, therefore, the first condition has been met.

50. With regard to the second and third conditions, the Court notes that in the communication examined by the HRC, the Applicant claimed that a mandatory death penalty for all offences of a particular kind, such as murder, prevents the trial court from considering whether this form of punishment is appropriate and thus, the death penalty amounts to a violation of his right to life under Article 6(1) of the ICCPR. The Applicant further claimed that the imposition of the death penalty, with no judicial discretion to

9 Application 038/2016. Judgment of 22 March 2018 (Merits)*, Jean-Claude Roger Gombert v Cote d Ivoire (hereinafter referred to as "Jean-Claude Gombert v Cote d Ivoire"),* para 44.

10 See, ACHPR Communication 409/12, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and thirteen others* para 112; EACJ Reference 1/2007 *James Katabazi et al v Secretary General of the East African Community and Another* (2007) AHRLR 119, paras 30-32; IACHR Application 7920, Judgment of 29 July 1988, *Velasquez-Rodriguez v Honduras* para 24(4); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Serbia-and-Montenegro*) Judgment of 26 February 2007, ICJ Collection 2007, p. 43

11 ACHPR Communication 266/03, *Kevin Mgwanga Gunme and others v Cameroon*, para 86.

impose a lesser sentence, violates the prohibition of inhumane or degrading treatment or punishment under Article 7 of the ICCPR and that the imposition of this sentence violated his right to a fair trial since part of this right is the right to review his sentence by a superior court contrary to Article 14(1) and (5) of the ICCPR. Lastly, the Applicant averred that the Respondent State failed in its obligations under Article 2(3) of the ICCPR to provide an effective remedy to the above-mentioned violations of his rights and he requested the HRC to make a finding to that effect.

51. In the present Application, the Court notes that there is a decision on the merits of the communication that was brought before the HRC and neither of the parties deny the existence of such a decision.[12] The Court observes that although the Respondent State may have opted not to follow the Views of the HRC this does not mean that the matter has not been considered and consequently settled within the meaning of Rule 40(7) of the Rules or Article 56(7) of the Charter. What is crucial is that there must be a decision by a body or institution that is legally mandated to consider the dispute at international level.

52. The Court further notes that although the communication at the HRC and the Views of the HRC were based on the ICCPR and not on the Charter of the United Nations or the Constitutive Act of the African Union, or the provisions of the Charter, the principles contained in the provisions of the ICCPR that the HRC gave its Views on are identical to the principles provided for in the provisions of the Charter.[13] Substantively, therefore, the HRC adjudicated on the same issues that the Applicant has brought before this Court.

53. As has been noted by the Court, if the subsequent claim is not detachable from the claim(s) earlier examined by another tribunal, then it follows that the matter will be deemed to have been settled especially since "the identity of the claims extends to their additional and alternative nature or whether they derive from a claim examined in a previous case".[14] Applying the foregoing reasoning, it follows that the present Application has been settled by the HRC within the meaning of Article 56(7) of the Charter and

12 *Dexter Eddie Johnson v Ghana* (HRC).

13 By way of example, Article 6(1) of the ICCPR provides for the right to life and this is mirrored by Article 4 of the Charter; Article 7 of the ICCPR prohibits torture, cruel, inhuman or degrading treatment and punishment and this is captured by Article 5 of the Charter; and the right to a fair trial under Article 14 of the ICCPR finds its equivalent in Article 7 of the Charter.

14 *Jean-Claude Gombert v Cote d'Ivoire,* para 51.

Rule 40(7) of the Rules.

54. In the Court's view, and in respect of the admissibility requirement under Article 56(7) of the Charter, it does not matter that the decision of the HRC has been implemented or not. It also does not matter whether the said decision is classified as binding or not. In its jurisprudence, the Court has consistently refused to deal with any matter that is pending before the Commission or one that has been settled by the Commission, this notwithstanding the fact that the findings of the Commission are termed "recommendations", which are not binding.[15] In the present case, the Applicant elected to file his case before the HRC, and not before this Court, over a year after Ghana had deposited its Declaration under Article 34(6) of the Protocol. In the circumstances, the Applicant cannot, therefore, claim that the forum he chose does not make binding decisions and that since the Views of the HRC have not been implemented then the matter has not been settled in line with Article 56(7) of the Charter.

55. The Court wishes to reiterate the fact that the rationale behind the rule in Article 56(7) of the Charter is to prevent States from being asked to account more than once in respect of the same alleged violations of human rights. In the words of the African Commission:

"This is called the *non bis in idem* rule (also known as the Principle or Prohibition of Double Jeopardy, deriving from criminal law) and ensures that, in this context, no state may be sued or condemned [more than once] for the same alleged violation of human rights. In effect, this principle is tied up with the recognition of the fundamental *res judicata* status of judgments issued by international and regional tribunals and/or institutions such as the African Commission. (*Res judicata* is the principle that a final judgment of a competent court/ tribunal is conclusive upon the parties in any subsequent litigation involving the same cause of action.)"[16]

56. In conclusion, the Court finds that the present Application does not fulfil the admissibility requirement under Article 56(7) of the Charter, which is also reflected in Rule 40(7) of the Rules.

57. The Court recalls that the conditions of admissibility under Article 56 of the Charter are cumulative and as such, when one of them is not met, then the entire Application cannot be considered.[17] In the

15 Cf Application 003/2011. Judgment of 21 June 2013 (Jurisdiction and Admissibility), *Urban Mkandawire v Republic of Malawi,* para 33.

16 ACHPR Communication 260/02 *Bakweri Land Claims v Cameroon,* para 52.

17 See, ACHPR, Communication 277/2003, *Spilg and others v Botswana,* para 96 and ACHPR, Communication 334/06 *Egyptian Initiative for Personal Rights and Interights v Egypt*, para 80.

instant case, since the Application does not meet the requirement set forth in Article 56(7) of the Charter the Court, therefore, finds the Application inadmissible.

VII. Costs

58. The Applicant prays that the Court order each party to bear its own costs.

59. The Respondent State did not make any submissions pertaining to costs.

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60. According to Rule 30 of the Rules of Court, "Unless otherwise decided by the Court, each party shall bear its own costs".

61. The Court, in this matter, does not see any reason why it should depart from the position in Rule 30 and as such it orders each Party to bear its own costs.

VIII. Operative part

62. For these reasons:

The Court,

Unanimously:

On jurisdiction

i. *Declares* that it has jurisdiction to hear the Application;

On admissibility

By a majority of Eight (8) for, and Two (2) against, Justices Rafaâ BEN ACHOUR and Blaise TCHIKAYA dissenting:

ii. *Declares* that the Application is inadmissible;

On costs

iii. *Orders* that each Party shall bear its own costs.

Separate Opinion: BENSAOULA

[**1.**] I share the opinion of the majority of the judges regarding the admissibility of the Application, the Court's jurisdiction and the Operative Part.

[**2.**] I believe, however, that the way in which the Court dealt with the admissibility of the Application runs counter to:

- the Respondent State's request and
- the provisions of Articles 56 of the Charter, 6(2) of the Protocol and Rules 39 and 40 of the Rules.

1. Counter to the Respondent State's request

[**3.**] In effect, in terms of Rule 39 of the Rules, the Court is required to conduct preliminary examination of its jurisdiction and the conditions of admissibility laid down in Articles 50 and 56 of the Charter and Rule 40 of the Rules.

[**4.**] This clearly implies that:

A. If the parties raise objections concerning the conditions governing jurisdiction and admissibility, the Court must examine the same.
   - if it turns out that one of the conditions is founded, the Court will so declare.
   - if, on the other hand, none is founded, the Court has the obligation to discuss the other elements of admissibility not discussed by the parties and make a ruling accordingly.

B. If the parties do not discuss the conditions, the Court is obliged to do so, and in the order set out in Article 56 of the Charter and Rule 40 of the Rules.

[**5.**] It seems to me illogical that the Court should select one of the conditions such as reasonable time, for example, whereas there are issues with identity and therefore not covered.

[**6.**] In the present case, subject of separate opinion, it is clear that if the defendant asked "that the Court be guided by Articles 56(5) of the Charter, 6(12) of the Protocol and Rule 40 of the Rules" (paragraph 43 of the Judgment), this request quite simply means that the Court is required to ensure that each condition set out by Rule 40 is covered.

[**7.**] In responding to the defendant's request in paragraph 43 of the Judgment "that the defendant simply indicated that, in making a ruling on admissibility, the Court takes into account Articles 56(5) of the Charter, 6(2) of the Protocol and Rule 40 of the Rules" and hence that "it did not raise particular objection on the Application's

admissibility", the Court misinterpreted the defendant's statement.

2. And to the provisions of Articles 56 of the Charter, 6(2) of the Protocol and Rules 39 and 40 of the Rules

[**8.**] It is noteworthy that, in its paragraph 45, the Court in seeking to "determine" whether the Application fulfilled the conditions set forth in paragraph 44 of the Judgment, only reiterated the conditions enumerated under the afore-cited Articles without really analyzing most of them (paragraphs 45 and 46 of the Judgment); and in contrast the Court dwelt at length on condition No. 7 of Rule 40 of the Rules in paragraphs 50 *et seq.* of the Judgment, thus giving the impression that the conditions enumerated surpass one another in terms of importance or purpose; which is obviously not the spirit of the Articles in question and the intention of the legislator.

[**9.**] In Rule 40(6) of the Rules, it is clearly indicated that, for Applications to be admissible, they must 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".

[**10.**] It is clear that the legislator has set down two options as to how to define the commencement of reasonable time:

a. the date local remedies were exhausted which the Court could have set as the date of the Supreme Court Judgment of March 2011, and would have entailed a timeframe of 6 years and 2 months from 27/05/2017, the date of submission of the Application.

b. the date set by the Court as the commencement of the period within which it shall be seized with the matter, such as the date of the decision rendered by the human rights committee or any other date that the Court would have decided to take into consideration.

[**11.**] By not taking this date into account and merely saying in paragraph 45 of the Judgment that "it was brought before this Court within a reasonable time after local remedies were exhausted" and to hold in conclusion "that the Application fulfills the conditions of admissibility set forth in Article 56(1) to (6) of the Charter reiterated under Rule 40(1) to (6) of the Rules", the Court failed in its obligation to determine the legal and juridical basis of its decisions.

Dissenting opinion: BEN ACHOUR

1. I voted against the above Judgment *(Dexter Eddie Johnson v Republic of Ghana)* for two reasons.

2. I consider that the Court should have declared the Application inadmissible, not on the basis of Article 56(7)[1] of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and Rule 40(7) of the Rules of Court (hereinafter referred to as "the Rules"), but rather on the basis of Article 56(6)[2] of the Charter and Rule 40(6) of the Rules, that is, for failure by the Applicant, Dexter Eddie Johnson (hereinafter referred to as "the Applicant") to file his Application before the Court within a reasonable time after the exhaustion of local remedies (hereinafter referred to as "LR") (**I**).

3. Furthermore, and assuming that the said timeframe is reasonable, as held by the Court in paragraph 45 of the Judgment, the Court should have declared the Application admissible and proceeded to the merits of the case, because, in my opinion, the case has not been "settled in accordance with the principles of the United Nations Charter, the Charter of the Organization of African Unity and the provisions of the present Charter." The Views of the UN Human Rights Council (hereinafter referred to as "HRC") do not, in my opinion, "settle" the case. (**II**)

I. Non-observance of reasonable time for seizure of the Court

4. The requirement of the Charter, also reflected in the Rules of Court, to file the application within a reasonable time, is a requirement based on the need for legal safeguards. This requirement is enshrined in the instruments of the three regional human rights Courts. However, whereas the Inter-American and European conventions have set the deadline at six months as from the date of exhaustion of local remedies,[3] the Charter left it first at the discretion of the Commission, and later, that of the

1 For commentary on this article: See F Ouguergouz 'Article 56' in M Kamato (ed) *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of an African Court of Human and Peoples' Rights: Article-by-article Commentary* (2011) 1044.

2 For commentary on this article: See *idem*, p 1043.

3 Art 35(1) of European Convention and article 46(1)(b) of the Inter-American Convention.

Court, taking into consideration the circumstances of each case.

5. It should be recalled that, in the instant case, the Application was brought before the Court on 26 May 2017, whereas the Supreme Court of Ghana, the apex court of the Ghanaian judicial system, delivered its final judgment, dismissing the Applicant's appeal and upholding the death sentence imposed on him on 16 March 2011.[4] Thus, a period of six years and two months elapsed between the date of delivery of the Judgment of the Supreme Court of Ghana and the filing of the Application before the Court. Are there any objective and subjective justifications for such a delay?

6. The Court did not even try to justify the Applicant's delay in filing his Application. It glanced through, and without the slightest analysis, all the admissibility requirements enumerated in Articles 56 (from paragraph 1 to paragraph 6) of the Charter and Rule 40 (from paragraph 1 to paragraph 6) of the Rules. The Court dealt with the six grounds of inadmissibility in one *lump*, noting "that the Application discloses the identity of the Applicant; is compatible with the Constitutive Act of the AU and the Charter because it invites the Court to determine whether the Respondent State meets its obligations to protect the Applicant's rights enshrined in the Charter; is not written in disparaging or insulting language directed at the Respondent State and its institutions or the African Union; is not based exclusively on news disseminated through mass media; and was sent after the Applicant exhausted local remedies since the Applicant's appeal was dismissed by the Supreme Court, which is the highest appellate court in the Respondent State; and was also filed with this Court within a reasonable time after the exhaustion of local remedies". Accordingly, "the Court [found] that the Application meets the admissibility requirements under Article 56(1) to 56(6) of the Charter, which are reflected in Rule 40(1) to 40(6)".

7. It is unfortunate that, in dealing with such an important issue, the Court simply states that "[…] and was also filed with this Court within a reasonable time." Thus, the Court turns a blind eye to the time taken by the Applicant to bring his application before it and provides no justification, from this point of view, for the admissibility of the Application.

8. However, the Court substantiated its stance, albeit cursorily, with respect to other grounds of admissibility of the Application. Such was the case when it talked of the Application being compatible with the Constitutive Act of the AU and the Charter because,

4 Judgment, para 26.

according to the Court, the Application "invites the Court to determine whether the Respondent State meets its obligations to protect the Applicant's rights enshrined in the Charter". Similarly, as regards the exhaustion of local remedies, the Court notes that "the Applicant's appeal was dismissed by the Supreme Court, which is the highest appellate court in the Respondent State". Yet no justification is given, no matter how brief, with respect to "reasonable time".

9. The fact that the Respondent State did not raise any objection to admissibility is no justification for such a quick glance, reduced in just one sentence, through six admissibility requirements that the Court has a duty to analyse. The Court seems to have been in a hurry to dwell only on one requirement, namely the one provided for in Articles 56(7) of the Charter and 40(7) of the Rules.

10. However, it would have been of utmost importance, for the proper administration of justice and in compliance with the Protocol and the Rules, for the Court to focus more on the issue of timeframe, as it has always done in its settled jurisprudence.

11. In other cases, however, where the timeframes for bringing an application were shorter, the Court had always analysed the reasons which could have prevented the applicants from being more diligent in respect of the "reasonable time".

12. Indeed, in its settled jurisprudence, the Court has always been very sensitive to the personal circumstances of the applicants (indigence, illiteracy, detention, extraordinary or non-judicial remedies, etc.), and has always shown great flexibility in computing reasonable timeframe.[5]

13. The Court has always had to rule, and very rightly so, on a case-by-case basis, in order not to be stuck in a very rigid and strict arithmetical consideration.[6] In *Werema Wangoko and Waisiri Wangoko Werema of 7 December 2018,* the Court considered 5 years and 5 months as a reasonable timeframe. It, however, justified its generosity in the following words: "The Court further notes that the Application was filed on 2 October 2015, that is,

5 The European Court of Human Rights, though bound to respect the six months timeline, also stated: "The reasonableness of the length of proceedings is to be determined in the light of the circumstances of the case and with reference to the criteria laid down in the Court's case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and what was at stake for the applicant in the dispute". Judgment, *Comingersoll SA v Portugal,* Application 3532/97, Grand Chamber, 6 April 2000.

6 In *Zongo & others v Burkina Faso*, the Court stated: "The reasonableness of timelines for referral of cases to the Court depends on the circumstances of each case and must be determined on a case-by-case basis". Preliminary Objections, Application, 21 June 2013, para 121.

after five (5) years and five (5) months from the date of the deposit of the said declaration. In the intervening period, the applicants attempted to use the review procedure at the Court of Appeal, but their application for review was dismissed on 19 March 2015 as having been filed out of time. In this regard, the key issue for determination is whether the five (5) years and five (5) months' time within which the Applicants could have filed their Application before the Court is reasonable".[7] The Court further noted that "the Applicants do not invoke any particular reason as to why it took five (5) years and five (5) months to seize this Court after they had the opportunity to do so, the Respondent having deposited the declaration envisaged under the Protocol, allowing them to directly file cases before the Court. Nonetheless, although they were not required to pursue it, the Applicants chose to exhaust the above-mentioned review procedure at the Court of Appeal. It is evident from the record that the five (5) years and five (5) months delay in filing the Application was due to the fact that the Applicants were awaiting the outcome of the [review proceedings] and at the time they seized this court, it was only about six (6) months that had elapsed after their request for review was dismissed for filing out of time".[8]

14. Whereas this is the first time that it has been seized of a case within a timeframe of six years and two months after the exhaustion of local remedies, the Court now pushes its liberalism to the point of emptying the "reasonable time" requirement of all its content, thus opening the door to legal insecurity, which the Charter and the Rules seek to prevent. The Court's total silence on such an issue of public order leaves the litigation open-ended. In allowing a period as long as six years and two months without conclusive factual reasons, the Court has gone too far beyond the margin, thereby denying Article 56(6) of the Charter and Rule 40(6) of the Rules of Procedure any meaningful effect. It has widely opened a door that will be very difficult for it to close and, moreover, this would not encourage States to make the Declaration accepting the competence of the Courts to receive petitions from individuals and NGOs, pursuant to Article 34(6) of the Protocol.

15. In the instant case, it should be noted that the Applicant did not hasten to seize the Court. He waited until 26 May 2017 to do so. Throughout this period, he spent time seeking other

7 Judgment, para 48.

8 Judgment, para 49.

remedies internally (request for presidential pardon)[9] and before an international tribunal (The Human Rights Committee), which are not considered by the African Court as remedies that had to be exhausted. This is clearly pointed out in paragraph 57 of the Judgment.

16. According to the Court's settled case-law, the request for presidential pardon is not considered as a LR to be exhausted by applicants. Consequently, the date on which the request for pardon was denied cannot be considered as a starting point for the calculation of the time limit for bringing an application before the African Court. In its judgment of 3 June 2016, in *Mohamed Abubakari v United Republic of Tanzania*, the Court held that "the remedies that must be exhausted [by the Applicants] are ordinary judicial remedies". Obviously, the request for presidential pardon does not fall into this category.

17. Similarly, recourse to an international, universal or regional judicial or non-judicial body cannot constitute a LR. It is by definition an external remedy whose admissibility is predicated upon the exhaustion of LRs. In its Views, on 27 of March 2014, the CDR noted that [The Committee has ascertained, as it is required to do in accordance with the provisions of article 5(2)(a) of the Optional Protocol, that the same question was not under consideration before another international body for purposes of investigation or settlement. It notes that domestic remedies have been exhausted. The State Party has not challenged this finding. The requirements set forth in Article 5(2)(a) of the Optional Protocol are therefore fulfilled.]

18. In fact, the Applicant, weary of the dilatory tactics of the Respondent State, decided to seize this Court six years and two months after the delivery of the Supreme Court judgment dismissing his appeal and upholding his sentence, and more than four years later, the

9 The Republic of Ghana is one of the 29 States that respected the moratorium on executions. In case of a death penalty, it is customary to seek a presidential pardon.
The President of Ghana has always commuted death penalties to life imprisonment. Thus, in 2009, the outgoing President of Ghana, John Agyekum Kufuor, commuted the penalties of all those who had been sentenced to death to life imprisonment, or to an imprisonment term of twenty years for those who had spent a decade on death row. In the same vein, those who had received a death penalty but had fallen seriously ill were released following a medical report to that effect. We have no information as to whether Applicant Dexter Eddie Johnson benefitted from such a measure. https://www.peinedemort.org/document/3481/Grace_presidentielle_Ghana_condamnes_mort
Also, in 2014, on the occasion of the 54th anniversary of the Republic of Ghana, President John Dramani Mahama commuted the death penalties of 21 inmates to life imprisonment. *https://www.peinedemort.org/document/7564/grace_presidentielle_commue_peines_21_condamnes_mort_Ghana*

Views of the HRC. For this Court, all these facts are of no moment!

19. In my opinion, not only does the six years and two months' timeframe for bringing an application before the Court exceeded all the reasonable time limits, but that fact also deserved to be noted. Until this Judgment, never had the African Court stretched its indulgence to such limits and never had it dealt with an issue in such a rapid and uncontested manner.

II. Settlement of the case by the Human Rights Committee

20. Just like Article 56(6) of the Charter and Rule 40(6) of the Rules, Article 56(7) and Rule 40(7) of the Rules are aimed at preserving judicial safeguards by ensuring that a case of human rights violation is not considered by several international courts at the same time. Pursuant to these Articles and Rules, for an application to be admissible, it must "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 any legal instrument of the African Union". These articles and Rules fail to mention cases where the principle of "*non bis in idem*" has to apply. It simply presents a laconic formula which refers to the principles of the UN Charter.

21. Considering the deadline of six years and two months as reasonable, the Court declared the Application admissible pursuant to Article 56(7) of the Charter and Rule 40(7) of the Rules. It held that the case has been settled "in accordance with either 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." In making such a finding (the HRC's settlement of the case), the Court refers to *Gombert* v *Côte d'Ivoire* of 22 March 2018 in which it stated that: "The Court also notes that the notion of "settlement" implies the convergence of three major conditions: (i) the identity of the parties; (ii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and (iii) the existence of a first decision on the merits."[10]

22. In the instant case, in scrutinising the said three conditions, the Court failed to note that the *Gombert* case was settled by a sub-regional judicial body, namely, the Community Court of Justice of the Economic Community of West African States (ECOWAS),

10 Judgment, para 48.

whereas the *Dexter* case was before a quasi-judicial body, the HRC, whose "decisions" do not constitute res *judicata*.

23. In my opinion, the case has not been "settled" by the HRC. The findings made by the HRC are legally called "Views." As the name suggests, the Views of the HRC merely "note," "observe," "identify" a situation of human rights violations contrary to the International Covenant on Civil and Political Rights. This explains why the Committee uses diplomatic and non-authoritative language at the end of its decision, in that it "*requests* the Respondent State to file, within 180 days, information about the measures taken to give effect to its views, and also *requests* the Respondent State to publish the HRC's Views and have them widely disseminated in the Respondent State". The requests do not create a legally binding obligation on the Respondent State. As a party to the Covenant, the Respondent State must do its utmost to stop the violation.

24. On the contrary, a court decision "settles" the case, that is, it closes the hearing. It settles the dispute by stating the law as it is and, thus, places on the Respondent State an absolute obligation which produces a specific result, and not a best efforts obligation.

25. Since the Court held that the Application was admissible because it was filed within a reasonable time, it should have made an analysis of the notion of settlement for its finding that the Application is admissible and, then, proceeded to consider the merits of the case.

26. Thus, the one and only reason for the inadmissibility of the Application arises from the Applicant's non-observance of the reasonable time to file his Application and not from the HRC's settlement of the case.

***

27. Having demonstrated extreme flexibility with respect to the requirement of Article 56(6) of the Charter and Rule 40(6) of the Rules on reasonable time, the Court should also have found the Application admissible pursuant to Article 56(7) of the Charter and Rule 40(7) of the Rules, since the Views of HRC did not amount to a settlement of the case.

Dissenting opinion: TCHIKAYA

Introduction

1. I beg to disagree with the Court's decision of 29 March 2019, as well as the *rationes decidendi* in *Dexter Eddie Johnson v Ghana.* I would have added my vote to the majority opinion, but the arguments in support thereof seem to be insufficient. The reasons for this dissenting opinion are stated below:

2. My dissent focusses on the outcome of the Court's line of reasoning as a whole and on its findings in the operative part. Moreover, as sufficiently shown by the Court, it pays particular attention to matters concerning the protection of the essential aspects of human rights, particularly the integrity of persons and the right to life; *Eddie Johnson* afforded us that opportunity.

3. I regret to disagree with the majority here; yet my dissent reflects my commitment to the protection of the rights in question. My desire to formally record this inevitable sentiment, born out of compelling respect for human rights in accordance with continental legal instruments, is thus aroused. As noted by the Human Rights Committee, Dexter Eddie Johnson was sentenced to death, and should Ghana, the Respondent State proceed[1] to carry out the death sentence, it would violate his rights under Articles 2(1), 3, 6, 5, 7, 14 of the International Covenant on Civil and Political Rights (1966).

4. On 27 May 2004, a US national was killed near Accra, Ghana. Dexter Eddie Johnson was brought to trial, having been charged with committing the crime, which charge he denied. The High Court of Accra convicted him of murder and sentenced him to death on 18 June 2008. Following lengthy internal proceedings marked by Mr. Dexter's challenge to the merits of the death penalty, he brought the matter before the Human Rights Committee.

5. In its Communication in Communication 2177/2012, the 110th Session of the Human Rights Committee of 28 March 2014, in accordance with article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, considers that the facts presented to it show a violation of Article 6, paragraph 1 of the Covenant. The Committee stressed that "the State party is under an obligation to provide the author with an effective remedy, including the commutation of the author's

1 The Optional Protocol entered into force in Ghana on 7 December 2000.

death sentence. The State party is under an obligation to avoid similar violations in the future, including by adjusting its legislation to the provisions of the Covenant".[2] The Respondent State did not take further action. It is in these circumstances that Mr Dexter brought his Application before the Court, which, in its Decision of 30 March 2019, dismissed the Application as inadmissible, a refusal to re-adjudicate on the matter.

6. This Opinion seeks to establish, on the one hand, that it was possible to invoke an exception to *non bis in idem* in the Decision in order to render the *Dexter* Application admissible (I) and, on the other hand, that the decision taken is a setback for the development of the law (II).

I. An exception to *non bis in idem* was possible

7. The Court's interpretation of *non bis in idem* in the *Dexter* case is literal and does not reflect the current position of the principle. I will consider its inappropriate meaning (A), and then discuss the known exceptions which he could be entitled to (B).

A. Literal and inappropriate interpretation of "*non bis in idem*"

8. The Court's reasoning is articulated around the application of Article 56. The Court reiterates: "the fact that the rationale behind the rule in Article 56(7) of the Charter is to prevent member States from being faulted twice in respect of the same alleged violations of human rights."[3] The African Commission has held on the same rule that "this is the *non bis in idem* rule (also known as the principle of prohibition of double jeopardy for the same act, deriving from criminal law) which ensures in this context that no State may be twice prosecuted or convicted for the same alleged violation of human rights". "In fact, this principle is tied up with the recognition of the fundamental *res judicata* status of judgments issued by international and regional tribunals".

9. The Court considers this principle to mean, based on its criminal and roman origins, that "no one shall be prosecuted or punished criminally (for a second time) for the same elements of law and fact. The Court further considers that *res judicata* effectively removes

2 HRC, Communication 2177/2012, ***Dexter Eddie Johnson v Ghana***, 28 March 2014, para 9 *et seq*.

3 AfCHPR, *Dexter Edddie Johnson v Ghana*, 30 March 2019, para 59.

any new lawsuit against the same person for the same elements.[4] According to Article 56(7), applications shall be considered if they "do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity […]" Such are the words of Article 56(7) that impacted the Court's deliberation. Since the Respondent State had already been tried in this case, it will no longer be tried a second time by this Court.

10. There are questions which are very relevant to understanding the present case. A reading of the *Dexter* decision does not provide answers thereto. However, the principle invoked by the Court is not absolute. It admits of exceptions, nuances; in fact, exceptions in many already mentioned cases.

11. The ECHR in the Case of *A and B v Norway*, on 15 November 2016, noted that "An individual should have the certainty that when an acquittal or conviction had acquired the force of *res judicata*, he or she would henceforth be shielded from the institution of new proceedings for the same act. This consideration did not apply in a situation where an individual was subjected to foreseeable criminal and administrative proceedings in parallel, as prescribed by law, and certainly not where the first sanction (tax penalties) was, in a foreseeable manner, taken into account in the decision on the second sanction (imprisonment)".[5] Such reasoning of the European court is germane to The *Dexter Eddie Johnson* case. This case, per its determination by the Human Rights Committee, called for additional judicial proceedings. It is not affected by *non bis in idem*, to say the least. Having interpreted the principle literally, the Majority departed from the now well-known exceptions to this principle.

B. The known exceptions to *non bis in idem* should have applied

12. According to the Decision, it is desirable that: "no state may be sued or condemned [more than once] for the same alleged violation of human rights". The *Dexter* case provided at least

4 Art 14(7) of the International Covenant on Civil and Political Rights; Art 4 of the European Convention on Human Rights, para 1 of Additional Protocol 7: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

5 ECHR, Grand Chamber, *A and B v Norway,* 15 November 2016, para 79.

three reasons for raising an exception to the "*non bis in idem"* principle, guaranteed by Article 56(7) of the Charter.

13. The first reason is that the "*bis*" which implies a resumption of an identical case, is absent, is not actually present in the instant case. The facts and the law are different. The Applicant's requests before the Court were underpinned by the Committee's Communication.[6] Requests for compliance with the Committee's views, requests for legislative amendments to the death penalty and requests for damages. The Inter-American Court of Human Rights states it bluntly: "The Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *non bis in idem* principle".[7] The Inter-American Court added that "the *non bis in idem* principle, even if it is a human right recognized under Article 8.4 of the American Convention, is not an absolute right". The most striking fact remains the Respondent State's stubborn refusal to acknowledge the violation noted by the Committee. This alone would have justified a different decision by the Court.

14. The second reason is that it was dictated by the context. The conceptual and legal rigour of human rights was compelling. It was necessary to consider, as did the Committee, that the facts in issue concerned an essential aspect of human rights. As was emphasized by the Inter-American Court of Human Rights in *Rodriguez Velasquez,*[8] relying on Article 4(1), which provides that: "Every person has the right to have his life respected. This right shall be protected by law […]. No one shall be arbitrarily deprived of his life," as well as Articles 5 and 7 of the American

6 On the substance, the Applicant requests the Court to: "a) Find that the mandatory death sentence imposed on the Applicant is a violation of Arts 4, 5 and 7 of the Charter, 6(1), 7, 14(1) and 14(5) of the ICCPR and 3, 5 and 10 of the UDHR. b) Find that the Respondent State has violated Article 1 of the Charter by failing to adopt legislative or other measures to give effect to the Applicant's rights under Articles 4, 5 and 7 of the Charter."

7 IACHR, *Almonacid Arellano and others v Chile*, (Preliminary objections, substance, reparations, fees and costs), 26 September 2006, para 154 *et seq*., The Inter-American Court further notes: "The State cannot, therefore, rely on the *non bis in idem* principle to avoid complying with the order of the Court." para 155.

8 IACHR, *Velasquez Rodriguez v Honduras*, Preliminary Objections, 26 June 1987; the merits, 29 July 1988, Case No. 7920, Inter-Am. CHR, Res. No. 22/86, OEA/ Ser. L/V/II.61, Doc. 44 ; ILM, 1989, p 294.

Convention on Human Rights which guarantee the "right to life and physical integrity". The execution of the sentence which one of the competent organs of the international system (the HRC)[9] had just considered as improper should be considered by the other organs of the system.

15. This major factor explains, in part, why the Applicant resorted to some kind of "foreign shopping", so as to bring his case before "many" international human rights courts. The application was brought before the Court on 26 May 2017, after the Committee had given its decision on 27 March 2014. In conformity with its jurisprudence, whereby reasonable delay is determined on a case-by-case basis and according to the law governing the matter,[10] it allowed it. It should have examined it fully, rather than find it inadmissible.

16. There is a third reason. The Court seems to give the Respondent State "more than its due". The irregularities noted by the Committee persist. The Respondent State should have been ordered by this new tribunal to comply with the norms of international human rights law.[11] According to the law as it is, the operative part of the Committee's judgment still remains, in the instant case, the applicable law. As pointed out by Fatsa Ouguergouz[12] in his commentary on Article 56(7), this provision does not, in any manner whatsoever, prohibit the operation of *lis alibi pendens;* international human rights judges may be called upon, each one in accordance with their competence, to complement each other. On the one hand, this case would enable this Court to lay down its judicial opinion on the *non bis id idem* rule and the basis thereof, as framed in Article 56(7) and, on the other hand, it would have been an opportunity for the Court to make a major judicial contribution to "respect for the right to life" which, as the

9 The HRC stated in its communication: "the automatic imposition of the death penalty in the author's case, by virtue of Section 46 of the Criminal and Other Offences Act, violated the author's rights under article 6, paragraph 1, of the Covenant. The Committee also reminds the State party that by becoming a party to the Covenant it undertook to adopt legislative measures in order to fulfill its legal obligations," para 7.3.

10 AfCHPR, *Minani Evarist v Tanzania*, 21 September 2018: In Beneficiaries of late *Norbert Zongo and others v Burkina-Faso*, the Court stated as follows: " ……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", para 51.

11 ECHR, *Margus v Croatia*, 27 May 2014: [A State cannot refuse to execute an order of the Court on grounds of the principle of non bis in idem].

12 F Ouguergouz *The African Charter on Human and Peoples' Rights and the Protocol relating thereto on the establishment of an African Court, Article by article Commentary* (2011) 1024 and following.

International Court of Justice stated, "is a provision that cannot be derogated from".[13]

II. The decision taken is a setback for the development of the law

17. The decision taken is a setback, in view of the development of the law on the subject. On the one hand, it leads to a complete loss of the opportunity to control the rights which would emerge from this case (A) and, on the other hand, it highlights the peculiarities of the case in view of the recent *Gombert* Judgment, rendered in 2018 (B).

A. Lost opportunity of expected control

18. There can be no doubt that a judgment on the merits by this Court would have made its mark in this dispute, rather than in its present form which limits itself to inadmissibility. The Human Rights Committee in its Decision, and in accordance with its applicable law, puts into perspective the idea of control of the Respondent State. Indeed, the decision states in its operative part: "the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the State party". It would not be an overstatement to say that the Court could draw inspiration from certain points in the operative part of the Committee's decision to take a stand. The means that could be available to the Court are dashed by this inadmissibility ruling.

19. Judicial bodies and quasi-judicial bodies that contribute to the effectiveness of human rights in the international sphere have an obligation to complement each other.[14] The Court, in the instant *Dexter* case, can apply regional instruments, in addition to international human rights law. This is, moreover, the useful interpretation that can be made of certain provisions of the Protocol: "The Court shall apply the provisions of the Charter

13 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep 1996, p 226, para 25.

14 See the analyses of RJM Ibáñez *Le droit international humanitaire au sein de la jurisprudence de la Cour interaméricaine des droits de l'Homme [International humanitarian law in the jurisprudence of the Inter-American Court of Human Rights], Revue des droit de l'homme*, 2017, No 11.

and any other relevant human rights instruments ratified by the States concerned". Indeed, conventional drafters expect ordinary interpretation of their instruments; yet, these provisions allow undeniable complementarity of legal means.

20. The Court therefore had the means of controlling rights unknown to the Respondent State and of making them applicable. In addition, there was a new legal basis, namely the findings made by the Human Rights Committee and its orders. The *Dexter* case differs from the Court's jurisprudence in *Jean-claude Roger Gombert v Cote d'Ivoire,* 22 March 2018.

B. The Dexter case has peculiarities that *Jean-claude Roger Gombert*[15] of 2018 did not have

21. For the Court, the conditions of admissibility provided for in Article 56 of the Charter are cumulative. A condition would be deemed fulfilled only if the application is fully considered.[16] The Court considered that this was not the case in the instant case, as it was in the recently decided case of *Jean-Claude Roger Gombert*. In the case at bar, the Application did not meet the conditions set forth in Article 56(7) of the Charter, so the Court declared it inadmissible.[17]

22. A number of factors immediately show that the *Gombert* case and the *Dexter* case have different contexts. *Gombert* concerns the sale of commercial property, unlike *Dexter*. Willy-nilly, the urgency and degree of seriousness are not the same with respect to the issues at stake. This is apparent from the Committee's request "to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the State party".[18] This aspect of urgency and time limit could have informed the Court.

23. Another factor, purely legal, is that the Application should be admissible because it was possible for the Court to consider that

15 AfCHPR, *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, 28 March 2018. See Joint Separate Opinion of Judge Ben Kioko and Judge Angelo V Matusse.

16 ACHPR, Communication 277/2003, *Spilg and others v Botswana* (hereinafter referred to as "*Spilg v Botswana"*), para 96 and ACHPR, Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Egypt* (hereinafter referred to as *"Egyptian Initiative v Egypt")*, para 80.

17 The Court upheld the preliminary objection of inadmissibility under Article 56(7) of the Charter, para 25.

18 HRC, *Dexter Eddie Johnson Communication*, *supra*, para 10.

the issue in *Dexter*, as circumscribed by the Committee, had not yet been settled. There is still a perpetuation of the violation and a mandatory death penalty is still part of the domestic law of the Respondent State. At paragraph 7.3 of its Communication, the Committee clarified this point, referring to its jurisprudence to the effect that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant", reiterating that this is so "where the death penalty is imposed without regard to the defendant's personal circumstances or the circumstances of the particular offence.[19] The existence of a *de facto* moratorium on the death penalty is not sufficient to make a mandatory death sentence consistent with the Covenant".[20] The Court could have shown a sense of initiative.

In the light of the foregoing, I append this dissenting opinion.

19 HRC, ***Communication, Mwamba v Zambia***, 10 March 2010, para 6.3; ***Chisanga v Zambia***, 18 October 2005, para 7.4; ***Kennedy v Trinidad and Tobago***, 26 March 2002, para 7.3; ***Thompson v Saint Vincent and the Grenadines***, 18 October 2000, para 8.2.

20 HRC, Communication *Weerawansa* v *Sri Lanka*, 17 March 2009, para 7.2.

Ajavon v Benin (merits) (2019) 3 AfCLR 130

Application 013/2017, *Sébastien Germain Ajavon v Republic of Benin*

Judgment, 29 March 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant, a businessman and politician, was prosecuted for drug trafficking but acquitted. The Respondent State subsequently obstructed the operation of three companies in which the Applicant is a majority shareholder. The Applicant was then charged with the same crime before a newly established court named Anti-Economic Crimes and Terrorism Court which convicted and sentenced him to twenty (20) years imprisonment. The Applicant claimed that the Respondent State violated his rights to life, equal protection of the law, non-discrimination and equality before the law, dignity, liberty and security, fair trial, property, freedom of expression, privacy, freedom of association, and the independence of the judiciary. The Court held that the Respondent State violated the Applicant's rights to fair trial, property, dignity, and its obligation to guarantee the independence of courts.

Jurisdiction (status, French Declaration of the Rights of Man and of the Citizen, 45)

Admissibility (disparaging statements, 72-76; exhaustion of local remedies, effectiveness, 116)

Fair trial (competent court, 131-141; defence, 153, 154, 173, 174; information about charges, access to record of proceedings,162, 163; right not to be tried again for an offence he has already been acquitted, 180-184; presumption of innocence, 194, 198; appeal, 213-215; equality of arms, 224-226;

Dignity (honour, reputation and dignity, 253-255)

Property (prevention of commercial activity, 266-269, closure of media, 271, 272)

Independent judiciary (executive interference, 281-282)

Dissenting opinion: BENSAOULA

Admissibility (conditions not raised by Parties, 8)

Separate opinion: NIYUNGEKO

Fair trial (defence, 5, presumption of innocence, 7, 8, 17; appeal, 10-12)

Independent judiciary (executive interference, 15)

I. The Parties

1. Mr Sébastien Germain Ajavon, (hereinafter referred to as "the Applicant") is a businessman and politician of Benin nationality.

He was prosecuted for cocaine trafficking before the Cotonou First Class Court of First Instance which acquitted him; he was subsequently sentenced to twenty (20) years in prison by the newly created Anti-Economic Crimes and Terrorism Court hereinafter referred to as "CRIET".

2. The Republic of Benin (hereinafter referred to as "the Respondent State") became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), on 22 August 2014. Furthermore, the Respondent State deposited the Declaration provided under Article 34(6) of the Protocol by which it accepts the jurisdiction of the Court to receive Applications directly from individuals and NGOs, on 8 February 2016.

II. Subject of the Application

A. Facts of the matter

3. The documents on file show that between 26 and 27 October 2016, the *Gendarmerie* (para-military force) of the Autonomous Port of Cotonou and the Benin Customs Department received warnings from the Intelligence and Documentation Services at the Office of the President of the Republic about the presence of a huge quantity of cocaine in a container of frozen goods imported by the company – *Comptoir Mondial de N*égoce (COMON SA) of which the Applicant is the Chief Executive Officer. Based on this information, a judicial inquiry was, on 28 October 2016, instituted against the Applicant and three of his employees for the trafficking of eighteen kilogrammes (18kgs) of pure cocaine.

4. After eight (8) days in custody, the Applicant and three of his employees were arraigned before the Criminal Chamber of the Cotonou First Class Court of First Instance. By Judgment No. 262/IFD-16 of 4 November 2016, two of the employees were acquitted outright; but the Applicant and one of the employees were acquitted on the benefit of the doubt.

5. Two weeks later, the Customs Administration suspended the licence of the container terminal of the *Société de Courtage de Transit et de Consignation* (SOCOTRAC). Then, on 28 November 2016, the High Authority for the Audio-visual and Communication (HAAC) cut the signals of the radio station SOLEIL FM and those of the TV channel SIKKA TV. The Applicant has alleged that he is

the majority shareholder in all these companies.

6. On 2 December 2016, the Applicant requested and obtained from the Registry of the Cotonou Criminal Chamber of the First Class Court of First Instance, an attestation that no appeal or complaint has been filed against the Judgment No. 262/IFD-16 of 4 November 2016. Furthermore, the Applicant avers that, in January 2017, he learnt from rumours that the Prosecutor General had lodged an appeal against the said judgment, but that no notice thereof was served on him.

7. On 27 February 2017, believing that the issue of international drug trafficking and the subsequent proceedings were a "conspiracy" by the Respondent State against him and violated his rights guaranteed and protected by international human rights instruments, the Applicant decided to bring the case before this Court.

8. In October 2018, following the establishment of a Court named *"Cour de Répression des Infractions Economiques et du Terrorisme*" (Anti-Economic Crimes and Terrorism Court hereinafter known as "CRIET"), the Applicant was once again tried by this new Court for the same crime of international drug trafficking and sentenced to twenty years in prison, and to pay five million CFA Francs in fines with an international arrest warrant. The Applicant contends that this new procedure also violated his rights guaranteed by international human rights instruments and prays this Court to find that there have been the said violations in the case already pending before it.

B. Alleged violations

9. In his Application filed on 27 February 2017, the Applicant alleges that the Respondent State violated his rights guaranteed by the Charter and by the 1789 Declaration of the Rights of Man and of the Citizen, particularly his rights as follows:

"i. the right to equal protection of the law guaranteed by Articles 3(2) of the Charter and 12 of the 1789 Declaration of the Rights of Man and of the Citizen;

ii. the right to respect for the dignity inherent in the human person guaranteed by Article 5 of the Charter, notably the trespass on his honour and his reputation;

iii. the right to liberty and to his security enshrined in Article 6 of the Charter and Article 7 of the 1789 Declaration of the Rights of Man and of the Citizen;

iv. the right to have his cause heard guaranteed by Article 7 of the Charter;

v. the right to presumption of innocence until proven guilty by a competent court, guaranteed by Articles 7(1)b of the Charter and 9 of the 1789 Declaration of the Rights of Man and of the Citizen;

vi. the right to property guaranteed under Article 14 of the Charter;

vii. the duty of the State to guarantee the independence of the courts guaranteed by Article 26 of the Charter".

10. In his new allegations filed before this Court on 16 October 2018 after the CRIET Judgment, the Applicant contends that, by that procedure, the Respondent State violated his rights as listed hereunder:

"i. the right to be informed of the charges preferred against him;

ii. the right to access the record of proceedings;

iii. the right for his cause to be heard by competent national courts;

iv. the right for his case to be heard within a reasonable time;

v. the right to respect for the principle of independence of the judiciary;

vi. the right to be assisted by Counsel ;

vii. the right to respect for the principle of *non bis in idem* ;

viii. the right to respect for the principle of two-tier jurisdiction (right of appeal)."

11. In further submissions dated 27 December 2018 titled "Additional Submissions" received at the Registry on 14 January 2019, the Applicant alleges that the Respondent State, through a series of laws at variance with international conventions, violated his rights as follows:

"i. the right to an independent and impartial tribunal;

ii. the right to an effective and meaningful trial ;

iii. the principle of equality of arms and equality of the parties;

iv. the principle of equality before the law;

v. the principle of prior legality;

vi. the right to freedom of association;

vii. the right to non-discrimination and equality before the law;

viii. the right to private life and to the secrecy of private correspondence;

ix. the right to freedom of expression;

x. the right to equal protection of the law given the lack of independence and impartiality of the National Intelligence Control Commission."

III. Summary of the procedure before the Court

12. The Application was received at the Registry on 27 February 2017 and on 31 March was served on the Respondent State which filed

its Preliminary Objections Brief on 1 June 2017.

13. After exchange of the written submissions between the parties on the preliminary objections and on the merits, the Registry, on 27 November 2017, notified the parties that the written proceedings in the case were closed.

14. On 3 April 2018, the Registry further notified the parties that the Court would hold a public hearing on the case on 30 April 2018, and accordingly requested them to submit their briefs on the merits no later than 16 April 2018.

15. On 9 May 2018, the Court held the public hearing on the matter and commenced deliberation.

16. In a letter dated 15 October 2018 received on 16 October 2018, the Applicant filed new allegations by which he informed this Court that the State of Benin recently established a special court named "Anti-Economic Crimes and Terrorism Court" (CRIET) to once again hear the case of international drug trafficking in which he was involved. According to the Applicant, this new procedure generated new violations of his rights and prayed the Court to issue an Order requesting the Respondent State to stay his trial before the CRIET.

17. On 26 October 2018, the Applicant informed the Court that the CRIET had on 18 October 2018 rendered Judgment No. 007/3C. COR sentencing him to twenty years of imprisonment and to pay five million CFA francs in fines, and issued an international arrest warrant against him; he requested an Order for a stay of execution of the said Judgment. On 12 November 2018, the Applicant reiterated his request for a stay of execution of the CRIET Judgment. Notified thereof on 20 November 2018, the Respondent State on 14 November 2018 submitted its observations on admissibility of the new allegations and on the Application for a stay of execution.

18. On 5 December 2018, the Court issued an Order staying the deliberation and reopening written proceedings in the case. It also declared admissible the new evidence filed by the parties after commencement of the deliberation.

19. By another Order issued on 7 December 2018, the Court ordered the Respondent State to stay execution of the CRIET Judgment No. 007/3C.COR pending this Court's final determination on this matter. The Court also allowed the Respondent State fifteen (15) days to submit to the Court, a report on the measures taken to implement the Order for stay of execution of the aforesaid CRIET Judgment.

20. On 7 January 2019, the Applicant requested the Court to bring to the attention of the Assembly of Heads of State and Government

of the African Union, the non-compliance with the Order issued by this Court staying execution of the CRIET Judgment No. 007/3C. COR.

21. On 14 January 2019, the Applicant submitted additional claims to the Court and sought an order for provisional measures to enable him to return to Benin to continue with his political and economic activities and to take part in the 2019 legislative elections.

22. In reaction to that request, the Respondent State on 16 January 2019, contended that implementation of the Order of 7 December 2018 was impossible, that such a measure would amount to a violation of its sovereignty and that it did not intend to implement the Order. The Registry communicated that document to the Applicant on the same day, for information.

23. Pursuant to Article 31 of the Protocol, at the 32nd Ordinary Session of the Assembly of the African Union held in Addis Ababa on 10 and 11 February 2019, the Court reported to the Executive Council of the Union on the non-implementation by the State of Benin**,** of the Order of Provisional Measures issued on 7 December 2018.

24. On 21 February 2019, the Registry after exchange of pleadings and evidence, notified the parties that written submissions had come to a final close and that the matter had been set down for deliberation effective from that date.

IV. Prayers of the Parties

25. The Applicant prays the Court to :

"i. find that it has jurisdiction;

ii. declare the Application admissible;

iii. find and declare that the alleged violations are founded;

iv. find that he, the President of the Association of Benin Businessmen, has seen his reputation tarnished in business circles;

v. find that he is a political figure, candidate at the last presidential elections of March 2016 who scored a total of 23% of the votes and came third in the overall ranking just behind the current Head of State of Benin who had 24%;

vi. find that the matter of drug trafficking has discredited him and caused him diverse damages valued at five hundred and fifty thousand million (550, 000, 000, 000) CFA francs which he claims as reparation".

26. In his further additional pleadings, the Applicant prays the Court to order the Respondent State to suspend the following laws until the Respondent State amends them for compliance with

international human rights instruments to which it is a party:

"i. Law No. 2018-13 of 2 July 2018 amending and supplementing Law No. 2001-37 of 27 August 2002 on judicial organization in the Republic of Benin as amended and creating the Anti-Economic Crimes and Terrorism Court;

ii. Organic Law No. 2018-02 of 4 January 2018, amending and supplementing Organic Law No. 94-027 of 18 March 1999 on the High Judicial Council;

iii. Law No. 2017-05 of 29 August 2017 setting the conditions and procedure for employment, placement of workers and termination of labour contracts in the Republic of Benin;

iv. Law No. 2018-23 of 26 July 2018 on the Charter of Political Parties in the Republic of Benin;

v. Law No. 2018-031 on the Electoral Code in the Republic of Benin;

vi. Law No. 2017-044 of 29 December 2017 on Intelligence in the Republic of Benin;

vii. Law No. 2017-20 of 20 April 2018 on the Digital Code in the Republic of Benin".

27. In its response to the Application and to the allegations made by the Applicant after the CRIET Judgment, the Respondent State prays the Court to:

"i. find that it lacks jurisdiction because the Application is inconsistent with Article 3(1) of the Protocol;

ii. adjudge and declare that the African Court on Human and Peoples' Rights does not have the jurisdiction to entertain cases requiring the Application of a legal instrument which has never been ratified by the State of Benin;

iii. adjudge and declare that even if the Applicant is the owner of the companies in question, he does not have the capacity to seek reparation for the so-called damages suffered by moral entities distinct from his person;

iv. declare the Application inadmissible for manifestly using disparaging language towards the Head of State and the Benin judiciary and for non-exhaustion of local remedies as enshrined in Articles 56(3) and (5) of the Charter and Rules 40(3) and (5) of the Rules of Court;

v. find that the Applications filed by the Applicant are still pending before domestic courts in Benin;

vi. dismiss the prayer for a stay of execution of CRIET Judgment;

vii. adjudge and declare that all the allegations of the Applicant's human rights violations raised in this matter are unfounded;

viii. dismiss all the prayers for reparation made by the Applicant;

ix. hold the Applicant liable to pay the sum of one billion five hundred and ninety-five million eight hundred and fifty thousand (1,595,850,000) CFA francs as damages".

V. Jurisdiction

28. Article 3(1) of the Protocol stipulates 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".

29. Pursuant to Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction ..."

A. Objection to the jurisdiction of the Court raised by the Respondent State

30. The Respondent State raises two objections on jurisdiction: one on material jurisdiction, and the other on personal jurisdiction.

i. Objection to material jurisdiction

31. The Respondent State relies on the provisions of Article 3(1) of the Protocol to challenge the material jurisdiction of the Court on grounds that the violations alleged by the Applicant are political and economic in nature, and are in no way related to a fundamental law contained in the Charter, the Protocol or any other relevant human rights instrument to which it is a party.

32. It argues that, to the extent that the jurisdiction of the Court "opens and closes" on violations of the rights guaranteed in the African Charter, the Protocol or other relevant human rights instrument ratified by the States concerned, political rights such as the right to stand for election and stay in power do not fall within the ambit of Article 3(1) of the Protocol.

33. The Respondent State also contends that the prayers for reparation and for damages resulting from the allegations that the conduct of the Respondent State's services tarnished the Applicant's reputation, do not fall within the jurisdiction of the Court.

34. The Respondent State further contends that the Applicant's reference to the French Declaration of the Rights of Man and of the Citizen is not binding on the Republic of Benin and deprives this Court of jurisdiction, given that the said Declaration has never been ratified by the Republic of Benin.

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35. The Applicant refutes the Respondent State's objection to material jurisdiction and argues that the court may be seized of cases of violation of rights covered by the Charter and other regional and international human rights instruments, where such violations are perpetrated by State parties to the Protocol.

36. He further avers that the violations he has suffered are human rights violations which relate to the manner in which the judicial investigations were conducted; notably: the right to liberty, the right to own property, the presumption of innocence and the right to a fair trial, rights enshrined under Articles 6, 7, and 14 of the Charter to which Benin is a party.

37. The Applicant lastly contends that the Court has jurisdiction to hear cases of violation raised by him because it is not the nature of the damage that determines the Court's jurisdiction but rather the nature of the rights violated.

38. Regarding the reference made to the French Declaration of the Rights of Man and of the Citizen of 26 August 1789, the Applicant avers that it does not diminish the value of his Application in terms of human rights violation disputes even though the instrument is not ratified by the Respondent State. This Declaration, according to him, is the founding text in the recognition of human rights in the world and constitutes, to date, a reference document and source of inspiration for all human rights protection instruments.

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39. The Court notes that the objection to its material jurisdiction raised by the Respondent State hinges on two arguments: on the one hand, whether or not it has jurisdiction to adjudicate human rights violations which may lead to reparation of damages of commercial and political nature; and, on the other, whether or not jurisdiction is established where the alleged violations are based on an instrument which does bind the Respondent State.

40. The Court first notes that it is vested with a general mission to protect all human rights enshrined in the Charter or any other relevant human rights instruments ratified by the Respondent

State.[1]

41. The Court holds that human rights violations may, in different degrees, lead to diverse prejudices for the victim which include economic, financial, material and moral or other forms of prejudice. Prejudice is therefore a consequence of the violation of a right and the nature of such prejudice does not determine the material jurisdiction of the Court.

42. As it has already established in the case of *Peter Joseph Chacha v United Republic of Tanzania* that, "as long as the rights allegedly violated come under the purview of the Charter or any other human rights instrument ratified by the State concerned",[2] the Court will exercise its jurisdiction. In the instant case, the Court notes that the "commercial and political" prejudice for which the Applicant seeks reparation relate to the rights guaranteed under the Charter *inter alia*: presumption of innocence, the right to liberty, the right to own property, the right to the dignity of the human person and to reputation and the right to equal protection of the law.

43. The Court consequently notes that its material jurisdiction is established to consider a matter in which the Applicant requests it to find that there has been violation of his rights as referred to herein-above (paragraphs 9, 10 and 11) and to order reparation of the attendant prejudices, regardless of their commercial or political nature.

44. The Court also affirms that, in the instant case, its jurisdiction is established because political rights, such as the right to stand for election and to remain in power are covered by Article 13(1) of the Charter.

45. As to whether or not the Court has jurisdiction to consider violations based on non-compliance with the 1789 Declaration of the Rights of Man and of the Citizen, the Court notes that this Declaration is not an international instrument, but is rather a text of French internal law which does not impose any obligation on the Respondent State. The Court cannot therefore extend its

1 Application 009/2011. Judgment of 14 June 2013 (Merits), *Reverend Christopher Mtikila v United Republic of Tanzania* (hereinafter referred to as "*Christopher Mtikila v Tanzania* (Merits)") para 82.1.

2 Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania (*hereinafter referred to as *"Peter Joseph Chacha v Tanzania* Judgment (Admissibility)"), para 114.

jurisdiction to cover that Declaration.

46. Accordingly, the Court dismisses the objection to its material jurisdiction raised by the Respondent State.

ii. Objection to personal jurisdiction

47. The Respondent State takes issue with the Applicant for bringing his case before the Court in order to obtain reparation for prejudice suffered by companies that have a legal personality distinct from his. Thus, the Court cannot find the Application admissible, since, in the instant case, it has been seized in respect of violations against a private legal entity that does not fulfil the requirements set forth in Article 5(3) of the Protocol.

48. It also submits that the alleged prejudice resulting from the suspension of SOCOTRAC's customs agent license, the suspension of the container terminal of the same company and the closure of "SOLEIL FM" radio station and "SIKKA TV" television outlet was not personally suffered by the Applicant.

49. The Respondent State consequently contends that, since the Applicant personally sought reparation for damages suffered by companies, the Application must be found inadmissible for lack of *locus standi.*

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50. In his Response, the Applicant asserts that he is clearly entitled to bring the Application against the State of Benin in his capacity as the General Manager of COMON SA, manager and majority shareholder of SOCOTRAC, Chief Executive Officer of SIKKA INTERNATIONAL, promoter of SIKKA TV and General Manager of SOLEIL FM radio station. He submits in conclusion that he has direct interest in all the companies in which he is majority shareholder.

51. He also submits that it is on the basis of that capacity that he has pleaded economic prejudice resulting from the Respondent State's determination to really ostracise him and to ruin him economically.

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52. The Court notes that its personal jurisdiction covers *locus standi,* which is the legal title under which a person is vested with the power to submit a dispute to a court.[3]

53. In this respect, the Court recalls that it has already held that: "… as a human and peoples' rights court, it can make a determination only on violations of the rights of natural persons and groups mentioned in Article 5 of the Protocol, to the exclusion of private or public law entities."[4]

54. In the instant case, the Court notes that the Applicant brought his Application before the Court in his personal capacity and not as a representative of legal entities and that the rights alleged to have been violated are individual rights. It further notes that, despite the fact that the Applicant is a majority shareholder and chief executive officer of the companies, his action does not concern the other shareholders nor the business relations that link them, nor any irregularity in the existence or functioning of the said companies. The Applicant's action tends to presume that his rights have been violated and to seek reparation of the consequences thereof or of the direct damage that he might have suffered personally as a result of the said violations.

55. In light of the foregoing, the Court holds in conclusion that all the requirements set out in Articles 5(3) and 34(6) of the Protocol on personal jurisdiction are fulfilled given that the Applicant is a natural person and acted in that capacity.

56. Consequently, the Court dismisses the objection to personal jurisdiction raised by the Respondent State.

B. Other aspects of jurisdiction

57. The Court notes that its temporal and territorial jurisdiction are not contested by the Respondent State. Moreover, nothing in the case file indicates that its jurisdiction does not extend to these two aspects. The Court therefore notes that, in the case at issue, it has:

i. temporal jurisdiction, insofar as the alleged violations occurred after the Respondent State had ratified the Charter and the Protocol;

3 See Dictionary of international public law *(Dictionnaire de droit international public*) (2001) 916.

4 Application No 038/2016. Ruling of 22 March 2018 (admissibility), *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, (hereinafter referred to as the "*Jean-Claude Roger Gombert v Republic of Côte d'Ivoire* Judgment (Admissibility)") para 47.

ii. territorial jurisdiction, insofar as the facts of the case took place in the territory of a State Party to the Protocol, in this case, the Respondent State.

58. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

On admissibility of the additional submissions

59. On 14 January 2019, the Applicant alleges that the Benin laws in force in the Respondent State listed in paragraph 26 of this Judgment are not in conformity with international conventions and violate the rights of Benin's citizens.

60. The Applicant prays the Court to order the Respondent State to suspend all such laws until they are amended for conformity with the international instruments to which Benin is a party. He also prays the Court to order the Respondent State to submit to it a report on the execution of its decision on the non-conformity of the said laws within a timeframe that would serve as a moratorium.

61. Invoking Rule 34(4) of the Rules of Court, the Respondent State argues that this text establishes the immutability of the dispute and that the claims of the parties which form the subject of the dispute are set out in the original Application. Acknowledging however, that even though the subject of the dispute may be modified in the course of the proceedings by supplementary Applications, the Respondent State contends that such amendment must have sufficient nexus, a connection with the initial claims.

62. The Respondent State further submits that the Applicant does not plead violation of his rights by any of the laws of which he seeks annulment or suspension and that, besides, the said laws were adopted and incorporated into Benin legal *corpus* long after the Applicant's referral of the case to the Court. It therefore prays the Court to declare the Applicant's additional submissions unfounded and dismiss the same.

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63. The Court notes that, among the laws submitted to it for examination of conformity, the one establishing CRIET has

connection with the initial Application, but the same cannot be said of the others.

64. Accordingly, the Court declares inadmissible the additional submissions which are not connected with the instant Application, except for the law creating CRIET.

Admissibility of the Application

65. In terms of 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".

66. In accordance with Rule 39(1) 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 ".

67. Rule 40 of the Rules, which in substance restates Article 56 of the Charter, sets out the criteria for admissibility of Applications as follows:

"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 the procedure in 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."

A. Conditions of admissibility in contention between the parties

68. The Respondent State raises two objections to the admissibility of the Application: one, in relation to the use of disparaging language and, the other, in relation to the non-exhaustion of local remedies.

i. Objection based on the use of disparaging language in the Application

69. The Respondent State contests the admissibility of the Application on the ground that the words used by the Applicant are grossly disparaging, dishonourable to the dignity inherent in the function of Benin Head of State and degrading towards the Benin judiciary. In his view, the Applicant's use of the terms "machination", "obvious interference with the principle of separation of powers", "interferences with domestic judicial decisions", and "mockery of a trial" is inconceivable and outrageous to the Head of State and Benin justice system. The Respondent State adds that the said remarks with regard to Benin judiciary are unsustainable since, procedurally, the Applicant was entitled to a fair trial, equitable and respectful of his rights. It submits for this reason that the Application must be declared inadmissible.

70. For his part, the Applicant affirms that the terms used in the Application are a reflection of the serious attacks he suffered; that the remarks termed as disparaging are well measured and in no way affect the dignity, reputation or integrity of the Head of State.

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71. The Court notes that, generally, disparaging or insulting language is that which is meant to soil the dignity, reputation or integrity of a person.[5]

72. In determining whether a remark is disparaging or insulting**,** the Court has to "satisfy itself as to whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or 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 in the administration of justice. The language must be aimed at undermining the integrity and status

5 Application 004/2013. Judgment of 5 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso*, (hereinafter referred to as "*Lohé Issa Konaté v Burkina Faso* Judgment (Merits)") para 71**;** ACHPR, Communication 268/03 – *RADH v Nigeria* (2005) paras 38-40; Communication 284/03 *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* (2005) paras 51-53.

of the institution and bringing it into disrepute".[6]

73. The Court further finds that public figures including those who hold the highest government positions are legitimately exposed to criticism such that for remarks to be regarded as being disparaging to them, the remarks must be of extreme gravity and manifestly affect their reputation.[7]

74. In the instant case, the Respondent State fails to show how the use of terms like "machination" and "manifest interference" affects the reputation of the Head of State. It also fails to show how the use of terms such as "interference in the decisions of the judiciary" by the Applicant are aimed at corrupting the minds of the public or any other reasonable person, or undermining the integrity and the status of the President of the Republic of Benin or that they were used in bad faith.[8]

75. The Court notes that, in the instant case, taken in their ordinary meaning, the impugned statements are aimed simply at giving a presentation of the facts of the Application and do not translate to personal hostility on the part of the Applicant, neither are they insulting to the person of the Head of State of Benin or the Benin judiciary.

76. Accordingly, the statements made by the Applicant in this Application cannot be termed as disparaging or an attack on the Head of State of Benin and the judiciary of that country.

77. In view of the foregoing, the Court dismisses the objection based on the use of disparaging language in the Application.

ii. Objection based on non-exhaustion of local remedies

78. The Respondent State submits that the present Application does not meet the conditions of admissibility set out in Articles 56(5) of the Charter and Rule 40(5) of the Rules. It refers to three types of remedies supposedly open to the Applicant who chose not to exhaust them: the remedy before the Constitutional Court for violation of human rights, the remedy provided under Article 206 of the Benin Code of Criminal Procedure and the appeal for annulment of administrative decisions on grounds of abuse of

6 *Lohé Issa Konaté v Burkina Faso,* Judgment (Merits), *op cit* para 70.

7 See also Human Rights Committee: Communication 1128/2002: *Rafael Marques de Morais v Angola,* Views of 14 March 2005 para 6.8

8 *Lohé Issa Konaté v Burkina Faso* (Merits) *op cit* para 72.

power.

79. It contends that the Applicant should have seized the Constitutional Court which is empowered by the Benin Constitution to hear all allegations of human rights violation. It affirms that for having ignored this effective and available procedure under Benin law, the Applicant has not exhausted the local remedies, pursuant to the provisions of the Charter.

80. The Respondent State further contends that regarding reparation of damages resulting from an abusive judicial procedure, the Applicant could have exercised the remedy provided under Article 206 of the Benin Code of Criminal Procedure.[9]

81. It also submits that the violations alleged by the Applicant before this Court, notably, the right to presumption of innocence, the right to fair trial and the right to freedom, could have been redressed in the domestic Courts pursuant to the above-mentioned Article 206; if, the Applicant claims that the said violations occurred subsequent to the judicial proceedings which resulted in the Judgment of 4 November 2016. For the Respondent State, in so far as the Applicant has not made use of the remedy provided under Article 206 of the Benin Code of Criminal Procedure before bringing the case before this Court, his complaint must be dismissed for failure to exhaust the local remedies.

82. It further contends that the Judgment rendered on 4 November 2016 is undergoing an appeal lodged by the Attorney General, pursuant to Article 518 of the Benin Code of Criminal Procedure.

83. The Respondent State submits that the matter of suspected drug trafficking has not been definitively determined through a final or irrevocable judgment since it has been invoked before CRIET leading to a judgment on 18 October 2018. It argues that Counsel for the Applicant having lodged cassation appeal against the Judgment of CRIET, local remedies have not been exhausted.

84. The Respondent State presents that the appeal against the decision to withdraw the customs agent licence of SOCOTRAC, the suspension of the container terminal as well as the cutting of the radio and TV signals should have been exhausted before the Courts in Benin.

85. It expressly cites Article 818 of Law No. 2008/07 of 28 February 2011 on the Commercial, Social, and Administrative and

9 Art 206 of the Benin Code of Criminal Procedure provides that: "Any person who had been remanded in custody or any abusive detention may, when the Judgment ends in dismissal, release or discharge or acquittal which constitutes *res judicata* obtain compensation if he proves that as a result of the detention or the remand in custody, he suffered particularly serious current damages".

Accounting Procedure in the Republic of Benin which provides that: "Administrative Courts shall have jurisdiction over all cases arising from all acts emanating from all administrative authorities in their area of jurisdiction. The following may result from such cases: 1. Application to set aside a judgment for abuse of power by administrative authorities; 2…"

86. The Respondent State contends that pursuant to this Article 818, decisions rendered by the Directorate of Customs and Indirect Taxes on the withdrawal of SOCOTRAC customs agency licence and the suspension of the container terminal of the same company are administrative decisions which may be challenged in administrative courts.

87. Regarding the disruption of radio and TV signals by the Higher Audio-visual and Communication Authority (HAAC), the Respondent State invokes Article 65 of Organic Law No 92-021 of 21 August 1992 which provides that "Apart from disciplinary action, the decisions of the Higher Audio-visual and Communications Authority are subject to appeal before the Administrative Chamber of the Supreme Court".

88. It contends that in regard to the afore-mentioned two complaints, the Applicant seized the Administrative Chamber of the Cotonou First Class Court of First Instance, with an Application for annulment, and that this action is still pending before the said Chamber.

89. For the Respondent State, the arguments adduced by the Applicant are null and void in as much as the matter has neither been unduly prolonged nor are the remedies ineffective; it prays the Court to declare the Application and all subsequent requests inadmissible.

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90. Contesting the objection to the admissibility of his Application on grounds of non-exhaustion of local remedies, the Applicant submits that, although the country has in place a number of remedies, all of them may not be applicable to all situations, and that, if a remedy is inadequate in a given case, it is obvious that it does not need to be exhausted.

91. The Applicant also submits that there are exceptions to the rule of prior exhaustion of local remedies and that this Court has already

held that where the local remedies are inapplicable, ineffective and unavailable or where they do not offer prospects of success or cannot be used without hindrance by the Applicant, the latter is not required to exhaust the remedies in question. He cites the case of the Constitutional Court and argues that the interference of political power in the affairs of the judicial authorities and the fact that the decisions of the Constitutional Court have never been executed, are all elements that make the remedy before that Court ineffective.

92. The Applicant further refutes the Respondent State's assertion that the procedure to obtain reparation under Article 206 of the Benin Code of Criminal Procedure was available to him. He submits that, in as much as the Attorney General lodged an appeal for the sole purpose of unreasonably prolonging the proceedings and preventing him from obtaining redress, he was no longer able, in that state of confusion, to exercise the remedy set out in Article 206 of the Benin Code of Criminal Procedure.

93. He further avers that, given the total lack of an independent and impartial judiciary, the remedies provided under Article 206 of the Benin Code of Criminal Procedure, mentioned by the Respondent State, must be considered ineffective and insufficient.

94. With regard to the appeal against the CRIET Judgment of 18 October 2018, the Applicant submits that he filed cassation appeal against the decision even though, under the law establishing the special court, cassation appeal does not offer him the possibility of re-examination of the merits of the case. He argues in conclusion that this is an extraordinary remedy which he does not necessarily have to exhaust.

95. In view of the above observations, the Applicant prays the Court to take into consideration the unavailability, ineffectiveness and the unsatisfactory nature of the remedies that he is supposed to have exhausted and declare his Application admissible.

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96. The Court notes that, in the instant case, the Respondent State alleges the existence of several remedies, some of which he contends the Applicant has not exhausted, and others that have been requested in the course of the procedure.

97. The Court notes that it has always insisted that in order for the rule of exhaustion of local remedies to be fulfilled, the remedies

which have to be exhausted must be ordinary judicial remedies.[10]

98. The Court recalls that exhaustion of local remedies means that the case which the Applicant wishes to bring before the international court has been brought, at least in substance, before the national courts, where such courts exist, and the remedies are sufficient, accessible and effective.

99. The Court, therefore, is seeking to establish whether, at national level, the remedies available before the Constitutional Court, those provided under Article 206 of the Benin Code of Criminal Procedure, those before the administrative courts and the cassation appeal, exist and are available.

a. On the existence and availability of local remedies

100. In terms of Article 114 of the Benin Constitution of 11 December 1990, "The Constitutional Court is the highest court of the State in constitutional matters. It shall rule on the constitutionality of laws and shall guarantee basic human rights and fundamental freedoms. It is the regulatory body for the functioning of institutions and the action of public authorities". It follows that the Constitutional Court also adjudicates human rights violations.

101. The Court notes that, with respect to the protection of human rights, the Constitutional Court of Benin makes a determination, at first instance on alleged violations of human rights, as guaranteed by the Constitution of Benin, the Universal Declaration of Human Rights and the Charter.[11] It further notes that the Constitutional Court has jurisdiction to adjudicate applicants' right to compensation.[12]

102. On the basis of this finding, the Court notes that the remedy before the Constitutional Court of Benin is available.

103. With regard to reparation for damages resulting from abusive judicial proceedings provided in Article 206 of the Benin Code of Criminal Procedure, the Court notes that it is open to any person who has been subject to police custody or improper detention

10 Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania* (hereinafter referred to as "*Alex Thomas v United Republic of Tanzania"* (Merits)"), para 64.

11 See Articles 7, 114 and 117 of the 11 December 1990 Constitution.

12 Since 2002, the Constitutional Court no longer limited itself to noting violations of human rights, but also pronounces on reparations as was the case in Decisions: DCC 02-052 of 31 May 2002, *Fanou Laurent, Rec*, 2002,para 217; Decision DCC 13-053 of 16/5/2013, *Serge Prince Agbodjan*. Decision DCC 02-058 of 4/6/2002 *Favi Adèle* and Judgment 007/04 of 9 February 2004 of the Cotonou First Instance Court.

and whose proceedings have resulted in a decision of dismissal, release or acquittal, to seek compensation for the damage caused by the said proceedings. The recourse provided under Article 206 of the Benin Code of Criminal Procedure is**,** in addition to the one before the Constitutional Court, an internal remedy and is available to the Applicant.

104. The Court notes, moreover, that for the purposes of appeal, the Applicant submitted to the administrative courts issues concerning the withdrawal of the customs' agency licence and the closure of SOCOTRAC container terminal.

105. The Court lastly notes that the Applicant also lodged cassation appeal against the CRIET's Judgment of 18 October 2018.

106. In light of the foregoing, the Court finds that at national level, there were remedies available to the Applicant which the latter could have exhausted.

107. The Court notes, however, that the Applicant's reaction to the Respondent State's objections relate mainly to the effectiveness of these local remedies and their ability to remedy the violations he alleges.

108. In the instant case, the Applicant relies on the lack of independence or the dysfunction of the justice system, and also on the slowness of the system, to buttress the objections invoked.

b. On effectiveness of the local remedies

109. The Court notes that it has already stated that, as regards the exhaustion of local remedies, it does not suffice for the remedy to exist just to satisfy the rule. The local remedies that the Applicant is supposed to exhaust should not only be found to exist, but must also be effective, useful and offer reasonable prospects of success or be capable of providing redress for the alleged violation.[13]

110. The Court considers that the rule of exhaustion is neither absolute nor applicable automatically.[14] In the same vein, international jurisprudence, in particular the European Court, has affirmed that in interpreting the rule of exhaustion of local remedies, it has regard to the circumstances of the case, such that it realistically takes into account not only the remedies provided in theory in the national legal system of the Respondent State, but also the legal and political context in which the said remedies are positioned

13 *Norbert Zongo and others v Burkina Faso* (Merits), *op cit* para 68. *Lohé Issa Konaté v Burkina Faso* (Merits), *op cit* para 108.

14 *Rev. Christopher Mitikila v Tanzania* (Merits), *op cit* para 82.1.

and the personal situation of the Applicant.[15]

111. The Court notes that the judicial proceedings conducted in 2016 and the proceedings before the CRIET in 2018 have a nexus of continuity and the Court will consider the issue of exhaustion of local remedies globally on account of this link.

112. The Court notes that generally and as concerns all the remedies that the Applicant could have exercised in 2016 (remedy before the Constitutional Court, remedy on the basis of Article 206 of the Code of Criminal Procedure, remedy before administrative jurisdictions) the circumstances surrounding the Prosecutor General's appeal and the CRIET's Judgment in 2018 confirm the Applicant's apprehensions regarding their effectiveness.

113. With regard, in particular, to the remedy provided under Article 206 of the Benin Code of Criminal Procedure, the Court notes that there was evidence of judicial malfunction to the point of making the said remedy unavailable to the Applicant. The Court holds that the parties acknowledged that the appeal lodged by the Prosecutor General against the Judgment of 4 November 2016 had not been served on the Applicant, and that the recording of the same in the register of appeals in the Court Registry was done on 26 December 2016, after the Applicant had received an attestation precluding him from appealing or filing an Application to set aside the judgment. Hence, it is apparent that the Prosecutor General's appeal in the end placed the Applicant in a state of confusion, such that he could not utilise the remedy provided under Article 206 of the Benin Code of Criminal Procedure, and this, *ipso facto* rendered the remedy unavailable. Thus, failure in the obligation to effect service was transformed into an impediment for the Applicant to exercise the local remedies and exhaust them.

114. Regarding the remedies before administrative courts, the Court notes that, against the decisions taken by HAAC and the customs administration, the Applicant brought two actions for annulment for abuse of power. The Court further notes that the two appeals filed, respectively, under No. COTO/2017/RP/01759 dated 15 February 2016, did not generate any court decision, at least until the Applicant's trial before CRIET, thus contributing to fuelling the mistrust or suspicion over the effectiveness of the justice system.

115. The impediments to the exercise of the remedies available to the Applicant were also illustrated after the CRIET Judgment of 18 October 2018. It is apparent from the documents on file that the

15 ECHR, Application 21893/93, *Akdivar and others v Turkey,* Judgment of 16 September 1996, para 50. See also Application 25803/94, *Selmouni v France,* Judgment of 28 July 1999, para 74.

cassation appeal by the Applicant was never engaged, because the Special Prosecutor before the CRIET failed to transmit the Applicant's case file to the Supreme Court.

116. On the basis of these findings, the Court holds that the prospects of success of all the proceedings for reparation of the damages resulting from the Judgment of 4 November 2016 are negligible. The Court finds that, even though domestic remedies were there to be exhausted, the particular context of the present case rendered the said remedies inaccessible and ineffective for the Applicant who thus sees himself exempted from the obligation to exhaust the local remedies.[16]

117. The Court holds in conclusion that the present Application cannot be dismissed for non-exhaustion of local remedies.

B. Admissibility conditions not in contention between the parties

118. The conditions regarding the Applicant's identity, the Application's compliance with the Constitutive Act of the African Union, the nature of evidence, reasonable time from the date local remedies were exhausted, and the principle that the Application should not raise any matter or issues previously settled by the parties in accordance with the principles of the United Nations Charter or the Constitutive Act of the African Union, or the provisions of the Charter or any other legal instrument of the African Union as required under paragraphs 1, 2, 4, 6 and 7 of Rule 40 of the Rules are not in contention between the parties.

119. The Court also notes that nothing on file shows that any of the said conditions has not been met in the present case. Accordingly, the Court considers that the conditions set out above have been fully met.

120. In light of the foregoing, the Court declares that this Application is admissible.

VII. The Merits

A. Alleged violation of the right to a fair trial

121. The Applicant alleges that his rights guaranteed and protected under Article 7(1) of the Charter have been violated in several

16 *Lohé Issa Konaté v Burkina-Faso* (Merits), *op cit*. para 114.

respects and successively enumerates his rights to be tried by a competent court, to be notified of the charges preferred against him, to access the case file, not to be tried twice for the same act, to be tried within a reasonable time, to be assisted by counsel, to exercise an effective and meaningful remedy and the right to the presumption of innocence.

122. The Court notes that Article 7(1) of the Charter invoked by the Applicant, 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 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."

123. As for Article 14(7) of ICCPR, this reads as follows: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

124. The Court notes that the provisions of Article 7(1) above relate to the overall requirement of procedural fairness such that they are interrelated and do frequently overlap, even if they are distinct and can be assessed differently.

i. Alleged violation of the right to be tried by a competent court

125. The Applicant argues that if the law confers on the CRIET the jurisdiction to hear certain cases and prescribes that those cases undergoing investigation or inquiry be transferred to it, cases already adjudicated are not affected by this prescription. He further argues that this would be otherwise only where the law created the CRIET as a second-instance court or a court of appeal for decisions rendered in cases within its jurisdiction prior to the entry into force of the law that established it, which for the

Applicant is not the case.

126. Invoking Article 20[17] of Law 2018-13 of 2 July 2018 creating CRIET, the Applicant argues that, in accordance with this law, no mention is made that the CRIET can be seized of cases already tried, but rather of cases under investigation and inquiry.

127. He submits that, as far as he is concerned, the facts brought before the CRIET have already been adjudicated at first instance, that the Judgment became definitive and that, in the circumstances, the CRIET is in no way competent to retry the case. He avers in conclusion that the Respondent State has violated Article 14(1) of ICCPR in as much as the Respondent State has caused him to be tried by an incompetent court.

128. The Respondent State submits that in the present case, the CRIET had full jurisdiction, as a court of appeal, to hear the appeal lodged by the Attorney General of the Cotonou Court of Appeal against Judgment No. 262/1FD-16 of 4 November 2016.

129. It states that the fact that the Applicant challenges the jurisdiction of the CRIET by suggesting that the latter has been seized of a case that has already been tried, is unfounded. The Respondent State also submits that, in the first instance, the case that involved the Applicant was tried in *flagrant delicto* proceedings and that, pursuant to Articles 447 *et seq.* of the Benin Code of Criminal Procedure, the CRIET has jurisdiction to hear any appeal, and that in the circumstances, the investigation should be conducted before the court of appeal or before the CRIET.

130. Also relying on the provisions of Article 20 of Law No. 2018-13 of 2 July 2018, the Respondent State maintains that the CRIET is competent to hear the procedure up to delivery of decision.

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131. The Court notes that the question of the competence of the CRIET

17 This text reads as follows: "Upon the establishment of the Anti-Economic Crimes and Terrorism Court, the procedures within the ambit of its jurisdiction, including investigations or inquiries pending before the competent courts shall, upon requisition by representatives of the competent public prosecutor's office, be transferred to the Special Prosecutor of the court for continuation, as the case may be, of the prosecutor's investigation by the Special Prosecutor, of the investigation by the commission of inquiry, the resolution of litigations in matters of freedoms and detention by the chamber of liberties as well as detention and Judgment by the court".

challenged by the Applicant is based on whether the case of high-risk international drug trafficking brought before it in September 2018 was pending before the Cotonou Court of Appeal within the meaning of article 5 *in fine* of Law No. 2018-13 of 2 July 2018 according to which the cases pending before the courts shall be transferred by the latter to the CRIET.

132. In the present case, the Court notes that while the Applicant alleges that Judgment No. 262/1FD-16 of 4 November 2016 has become *res judicata,* for lack of appeal or opposition, the Respondent State submits that the judgment has been appealed.

133. The Court notes that in order to declare itself competent, the CRIET considered that the case of international drug trafficking which involved the Applicant and was the subject of Judgment No. 262/1FD-16 of 4 November 2016, is an ongoing case insofar as the said Judgment was appealed by the Attorney General.

134. In accordance with Article 20 of Law No. 2018-13 of 2018 establishing CRIET, the latter hears drug-trafficking cases and, apart from flagrancy cases and referral orders, a court which, at the time of setting up the CRIET, is seized of a case within the latter's jurisdiction, must transfer such a case to the CRIET.

135. It is clear from the pleadings before this Court that, following a statement dated 27 December 2016, the Attorney General of the Cotonou Court of Appeal appealed the Judgment No. 262/1FD-16 of 4 November 2016 delivered by the First Instance Court of Cotonou, but without getting the appeal registered in that Court's Register of Appeals and without notification thereof to the Respondent State, in this case, the Applicant.

136. The Court notes that in all judicial proceedings, and even more so in criminal matters, the launch of a procedure is actualized by notification thereof to the adverse party. It is by such action of notification that a fact, an act or a procedure is brought to the knowledge of the person concerned. Notification is of crucial importance in the procedure especially as it "alerts" the addressee who therefrom sees himself concerned by the procedure and offers him the opportunity to participate therein[18]. In view of international jurisprudence, the Court considers that it is "the official notification, issued by the competent authority levelling an accusation of committal of a criminal offence" which constitutes

18 *Georg Brozicek v Italy,* Judgment of 19 December 1989, *op cit* paras 57 and 58.

the accusation and triggers the criminal action.[19]

137. In the instant case, notification of the appeal against the Judgment of 4 November 2016 was essential and was supposed to be the starting point for the Appellant's bid to have the case reopened. Notification is not just an act of information; it produces legal effects. The absence of notification of the appeal to the Applicant renders the Attorney General's appeal ineffective, and the Court has already established that an effective remedy is one that produces the desired effect.[20]

138. The Court notes, moreover, that since 26 December 2016 up to the referral to the CRIET in September 2018, the Attorney General's appeal was never invoked before the Cotonou Court of Appeal and no procedural act was accomplished thereon**.** The Attorney General did not attempt to forward the appeal for inclusion in the register of appeals at the Registry of the First Instance Court of Cotonou; and did not, either, proceed to enrol the case before the criminal chamber of the Court of Appeal as required by the Rules of Procedure. Besides, it is apparent from the documents on file that, apart from the rumours in circulation, it is sequel to the summons issued by the CRIET on 26 September that the Applicant was seized of a notification emanating from a judicial authority to re-open the case on which judgment had been rendered on 4 November 2016.

139. In view of the foregoing, the Court considers that, for having not been filed according to the rules set by law, the Attorney General's appeal of 26 December 2016 has no effect on the Applicant. Consequently, the CRIET was seized of a case that cannot be characterized as "ongoing before" the Court of Appeal and cannot be binding on the Applicant. As at the date of seizure of the CRIET, the Judgment that the Respondent State said has been appealed, had already acquired the authority of *res judicata.*

140. The Court finds that even though the CRIET has the material jurisdiction to hear cases of drug trafficking, the case as concerned the Applicant, did not fall under the jurisdiction of the CRIET as of the date on which it was seized. It follows therefore that the CRIET had no jurisdiction to hear the case.

141. From the foregoing, the Court finds that the Applicant's right to be tried by a competent court guaranteed by Article 7(1)(a) of the

19 *Idem* para 38.

20 *Akdivar and others v Turkey* Judgment, *op cit* para 73.

Charter has been violated.

ii. Alleged violation of the right to defence

142. The Applicant alleges that his right to defence guaranteed by Article 7(1)(c) of the Charter was violated by the Respondent State in several respects, namely: the right to present evidence, receive notification of the charges, access the record of the proceedings and to be represented by counsel.

a. The right to full investigation and to present evidence

143. The Applicant complains about the summary trial procedure to which he was subjected. According to him, this procedure is exceptional and was brought against him for the sole purpose of violating his right to defence and having him sentenced swiftly.

144. He alleges that the Judgment of 4 November 2016, which ended up in his acquittal on the benefit of the doubt, did not offer him the means to fully demonstrate his innocence, because according to him, the Cotonou First Instance Court refused to admit his evidence as regards the conspiracy of which he was victim.

145. The Applicant also submits that the investigation was conducted in such a way that traces of the "conspiracy" which he has always denounced were wiped away. He contends in that regard that, fingerprints on the seals and the sachets containing the drugs were not taken; that these were erased and that the cocaine was swiftly destroyed. He also contends that the investigating officers should have taken the temperature of the frozen gizzards and that of the cocaine to determine whether both types of product were introduced into the container at the same time.

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146. The Respondent State submits that the Applicant is unfounded in arguing that his summary trial was intended to violate his rights, and that he has never been prevented from tendering any evidence; none of his rights have been violated, the trial having been conducted in strict compliance with the law. It asserts that the summary trial procedure was initiated with the aim of preserving the Applicant's rights in the best possible way by

avoiding provisional detention which might not be justified.

147. Referring to the operative part of the Cotonou First Instance Court Judgment No. 262/1FD-16 of 4 November 2016 ruling on *flagrante delicto,* the Respondent State contends that, contrary to the Applicant's allegations, the seized drugs were first sealed and placed in the hands of the law at the Registry of the Cotonou First Instance Court before it was destroyed.

148. The Respondent State also affirmed that the Mediterranean Shipping Company (MSC) Benin SA, which transported the container with the drugs on behalf of the company COMON SA, was indeed heard in the context of the investigation by the joint judicial commission of inquiry set up specifically for the needs of the case, and that it appeared before the CRIET as a civil party.

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149. The right to defence set out in Article 7(1)(c) of the Charter is a key component of the right to a fair trial and reflects the potential of a judicial process to offer the parties the opportunity to express their claims and submit their evidence. The Court notes that the domain of Article 7(1)(c) of the Charter applies to all stages of the proceedings in a case, from the preliminary investigation to the pronouncement of judgment, and is not limited solely to the conduct of hearings.

150. The Court notes that, to buttress his allegations, the Applicant makes reference to both the summary trial and the investigation procedure.

151. Regarding the argument that the summary trial procedure supposedly affected the Applicant's right of defence, the Court notes that the summary trial *per se* does not violate the right to defence.

152. On the question of investigation, the Court reiterates that the exigency of the right to defend oneself also implies the possibility for the accused to adduce evidence contrary to that invoked by the other party, interrogate the witnesses brought against him or call his own witnesses.

153. The Court further holds that, had the investigation been conducted as described in paragraph 144, the Applicant would have had the chances of being acquitted outright rather than on the benefit of

the doubt.

154. The Court considers that the investigation as it was conducted did not allow the Applicant to organize his defence.

155. It is apparent from the case file that, at the preliminary investigation stage, the Applicant's wish that the investigation cover the entire chain of the container transport, from the point of departure to the Autonomous Port of Cotonou or be extended to other investigations of scientific nature which would have been decisive in determining the origin of the illicit product, was not taken into account.

156. The Court holds in conclusion that, having failed to meet the above requirements, the Respondent State violated the Applicant's right to defence guaranteed by Article 7(1)(c) of the Charter.

b. Alleged violation of the right to receive notification of the charges and to access the record of proceedings

157. Challenging the proceedings before the CRIET, the Applicant submits that the principle of the right to a fair trial includes the right to be timely informed of the facts and the charges to be presented at the proceedings. He alleges that in this case, he was summoned before the CRIET by an act of the CRIET Special Prosecutor which indicated neither the facts nor the charges relevant to the proceedings.

158. He also states that as of 21 September 2018 up to 4 October 2018, the day of the hearing, he tried in vain to look into the file but without any chance of ever succeeding.

159. The Applicant thus submits that, given that the procedure was likely to give rise to a heavy sentence, the Respondent State deprived him of his right to prepare his defence.

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160. The Respondent State submits that, in appeal, it is superfluous to re-notify the charges, the notification or the right to information having been satisfied at the preliminary inquiry or before the court. It asserts that the Applicant was notified of the role of the CRIET as it was clearly stated that he was being prosecuted for "high-risk international drug trafficking". It alleges that in practice, the elements of a criminal case are not portable, but rather are to

be requested, and that it is up to each party, at its own expense, to request from the registry, either the transmission of the documents on file, or the possibility of consulting the file on the spot.

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161. The Court notes that, in all proceedings, even more so in criminal cases, the purpose of notification of charges is to enable the accused to be informed of the nature of the charges brought against him to enable him to properly prepare his defence. The right to acquire knowledge of the record of proceedings is also an important aspect of the right to a fair trial and is related to the right to defence, more particularly the principle of equality of arms between the parties. Courts therefore, have an obligation to strike a fair balance between the parties with a view to enabling them to be aware of and comment on all the evidence tendered by the adverse party.

162. The Court notes that, in this case, the Respondent State does not contest that, before the CRIET, not only did the Applicant not receive the file but also that his lawyers were refused on-site consultation. In the circumstances, the Court considers that the Applicant was deprived of the opportunity to be fully informed of the proceedings and of the charges levelled against him and to understand the stakes involved in the case. The Court also considers that mentioning the role of the Court before which the Applicant was arraigned for "high-risk international drug trafficking offence" is not sufficient to relieve that court of the obligation to disclose the record, regardless of whether or not such record is portable or is available on request**.** The Court finds that, in so doing, the CRIET totally deprived the Applicant of the facilities necessary for preparation and presentation of his arguments in conditions which guarantee for him an equitable and balanced trial.

163. Consequently, the Applicant's rights to be informed of the charges brought against him and to gain access to the record of the proceedings, guaranteed under Article 14(3)(a) of ICCPR, were violated.

c. Alleged violation of the right to be represented by counsel

164. Invoking Article 14(3)(d) of ICCPR, the Applicant alleges that before the CRIET, his right to counsel was violated. He argues that, in criminal matters, the accused may request to be tried in his absence by being represented by his lawyer or by a public defender, adding that, in both investigative and criminal cases, even in the absence of a letter, the tribunal and the Assize Courts are obliged to hear the lawyer who comes forward to defend the accused or the detainee, the absence of a letter affecting only the characterization of the judgment; that being the case, the Applicant had before the date of 18 October 2018, apologised and indicated that he did not intend to appear.

165. The Applicant alleges that despite the above correspondence, the CRIET against all expectation, refused to receive his panel of lawyers on the pretext that the CRIET should first indict him.

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166. The Respondent State refutes the Applicant's allegations and asserts that the Applicant's right to counsel has not been violated. It submits that the Applicant enjoyed all his rights to defence before the First Instance Court of Cotonou, in as much as he was assisted by at least twenty-six (26) lawyers; and that the said lawyers did not at any time during the procedure, request a postponement thereof so as to better prepare their defence.

167. The Respondent State contends that it was rather the Applicant who, in deciding not to appear before the CRIET, failed to fulfil the legal conditions for him to be assisted in his absence. The Respondent State submits that examination of the case before the CRIET was not limited to issues of civil interest or objections but also concerned matters relating to the merits of the case.

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168. The Court notes that, in the instant case, the Applicant complains

of the violation of his right to be represented by counsel in his absence as guaranteed by Articles 7(1)(c) of the Charter and 14(3)(d) of ICCPR.[21]

169. It is apparent from the above text that to ensure the fairness of trial, every accused person or detainee may provide his own defence or be assisted by a counsel he himself designates or has accepted, where the latter has been appointed by the court, and this, at any stage of the proceedings.

170. The Court also notes that the national law, in this case, Article 428 of the Benin Code of Criminal Procedure recognises for individuals the same right to be represented when it provides that, "Whatever the penalty incurred, the accused may, by letter addressed to the President and attached to the record of the proceedings, apply to be tried in his absence. He can be represented by counsel and the trial shall be deemed to be adversarial. ... .However, where the court deems it necessary to have the accused appear in person, he shall again be summoned at the instance of the public prosecutor, for a hearing the date of which shall be set by the court ..."

171. The Court holds that the right to be represented by a lawyer, the purpose of which is to ensure the adversarial nature of the proceedings is practical and effective, such that its exercise allows the defendant the latitude to appear personally or to be represented. Any limitation to the exercise of this right must meet the exigency of necessity.

172. In the instant case, the Respondent State does not adduce reasons as to why it was deemed necessary that the Applicant should appear in person, to the point of depriving him of the right to be represented by counsel for his defence in proceedings that earned him a sentence of twenty years in prison. In this case, the Court finds that the Applicant had previously addressed to the CRIET a letter indicating that he did not intend to appear in person and requested to be tried in his absence.

173. The Court notes that the right to be assisted by counsel is practical and effective such that its exercise is not to be subjected

21 Article 7(1)(c) of the Charter provides 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". Article 14.3(d) of the ICCPR provides that: " In the determination of any criminal charge against him, everyone 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".

to excessive formalism. Given the effectiveness of the Applicant's right to defence, the CRIET needed to avoid such formalism, and by so doing preserve the fairness of the proceedings. The Court considers that in the instant case, the proportionality between the CRIET's order for the Applicant to appear in person and safeguarding the rights of the defence has not been observed, and holds that failure by a duly summoned accused to appear cannot deprive him of his right to be represented by counsel.

174. The Court holds in conclusion that the Applicant's right to be represented by counsel before CRIET, guaranteed by Article 14(3)(d) of ICCPR has been violated.

iii. Alleged violation of the principle of "*non bis in idem*"[22]

175. Invoking Article 14(7) of ICCPR, the Applicant submits that the Respondent State's justice system tried him twice for the same facts, in breach of the principle of *"non bis in idem".*

176. He argues that no provision of Law No. 2018-13 amending and supplementing Law No. 2001-37 of 27 August 2002 on Judicial Organization in the Republic of Benin has made the CRIET a superior court to retry offences within its jurisdiction, as well as offences tried before the entry into force of the law that established it. He also argues that, in this case, the facts referred to the CRIET, had already been the subject of a judgment at the first instance and that the CRIET could not therefore, retry the case. The Applicant submits that the Respondent State clearly violated Article 14(7) of ICCPR.

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177. The Respondent State, for its part, submits that it has not violated the principle of *non bis in idem*, for the simple reason that, the judgment rendered at first instance was appealed by the Attorney General and is therefore not definitive. It argues that this principle is used in law only to express the fact that an accused tried and acquitted or convicted by a decision not subject to appeal can no longer be prosecuted for the same act. It contends that this

22 See Art 4 of Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984.

principle applies only in cases where the decision has become *res judicata.*

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178. The Court notes that although the Charter does not contain any specific provision on the principle of *"non bis in idem",* this constitutes a general principle of law as reiterated by Article 14(7) of ICCPR which stipulates that: **"**[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

179. The principle of *"non bis in idem"* literally means that a person cannot be prosecuted and tried twice by the courts of the same State for an offence for which he has been acquitted or convicted. To assess whether, before the CRIET, the Applicant was tried for the same case as that which had been tried by the Cotonou First Class Court of First Instance, the Court takes into account the factual and legal aspects of the matter.[23]

180. As regards the facts, the Court notes that the proceedings before the CRIET involved the same parties as those that appeared before the Cotonou First Class Court of First Instance, namely: the Public Prosecutor's Office as prosecutor, the Benin Customs as a civil party, the Applicant and three of his employees as the party accused. Additionally, seized by the Special Prosecutor, the CRIET essentially adjudicated the facts and complaints heard by the First Instance Court. Definitively, the two courts heard the same case, that is, the international trafficking of 18 kilogrammes of cocaine.

181. In terms of compliance or otherwise with the principle, the Court notes that it is for reasons of the identity of the two procedures that the CRIET, in the operative part of its Judgment, declared that it reversed "in all its provisions the Judgment 262/1FD-16 of 4 November 2016".

182. The Court also notes that the term *idem* relates not only to the identity of the parties and the facts, but also to the authority of *res judicata*. On this point, the Court has already noted that the appeal against the Judgment of 4 November by the Attorney General cannot be binding on the Applicant. As at the date of

23 The European Court held that the principle of *non bis in idem* must be understood as "prohibiting the prosecution or trial of a person for a second "offence" in so far as it originated from identical facts or facts which are the same in substance. See ECHR, Applications 18640/10; 18647/10; 18663/10; 18668/10; 18698/10: *Great Stevens et al v Italy*, Judgment of 4 March 2014, para 219.

seizure of the CRIET, the said Judgment had already acquired the authority of *res judicata* and the Respondent State could no longer rely on any ongoing case.

183. It follows that the proceedings before the CRIET were in violation of the prohibition of prosecution or criminal punishment in a case for which the Applicant had already been tried and acquitted by a final Judgment that became definitive in accordance with the extant laws and procedures of the Respondent State.

184. The Court finds that the principle of *"non bis in idem"* under Article 14(7) of ICCPR has been violated.

iv. Alleged violation of the right to presumption of innocence

185. The Applicant contends that from the moment of his arrest, and throughout the investigation up to the trial before the Cotonou Court of First Instance, the Customs, the *Gendarmerie* and the Prosecutor's Office in Cotonou violated his right to presumption of innocence by leading the Benin public to believe that he was a drug trafficker.

186. He submits further that the fact that the Court acquitted him on the benefit of the doubt rather than outright acquittal helped to nurture suspicion in regard to his guilt and doubts over his innocence. The Applicant believes that the Attorney General's appeal arbitrarily kept him in a state of *"presumption of guilt",* thus violating Article 7(1)(b) of the Charter.

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187. Refuting the Applicant's contentions, the Respondent State submits that the presumption of innocence is a "... principle which implies that the accused person must be acquitted on the benefit of the doubt by the trial court where his guilt is not proven and that during the trial itself, the person must be held not guilty and respected as such".

188. The Respondent State submits that, while in police custody, the Applicant who was not regarded as a detainee or an indictee, remained at the disposal of the Maritime *Gendarmerie* Company of the Autonomous Port of Cotonou for the purposes of investigation; adding that he was never presented as a

perpetrator, co-perpetrator of, or an accomplice in, the offence of international high-risk drug trafficking and that his right to be presumed innocent has not been violated.

189. Article 7(1)(b) of the Charter provides that: "(1) [e]very individual shall have the right to have his cause heard. This comprises: (b) The right to be presumed innocent until proved guilty by a competent court or tribunal".

190. The presumption of innocence means that any person prosecuted for an offence is presumed, à priori, not to have committed it, so long as his guilt is not established by an irrevocable Judgment. It follows that the scope of the right to presumption of innocence embraces the entire procedure from the time of examination to the pronouncement of final judicial decision, and that violation of the presumption of a person's innocence "may be ascertained even in the absence of final conviction where the judicial decision concerning the person reflects the feeling that he is guilty".[24]

191. In the instant case, the Applicant submits that his right to presumption of innocence was violated throughout the judicial process and also by the fact that his acquittal was based on the benefit of the doubt, and by the abusive appeal of the Attorney General.

192. With respect to the allegation that the Applicant's right to presumption of innocence was violated throughout the investigation process up until the Judgment of 4 November 2016, the Court notes that; respect for the presumption of innocence is binding not only on the criminal judge but also on all other judicial, quasi-judicial and administrative[25] authorities.

193. It is apparent from the documents on file that, as far back as 28 October 2016, the Commandant of the *Gendarmerie* Brigade of the Port of Cotonou held a press conference at which he accused the Applicant of importing cocaine valued at nine billion CFA Francs. Moreover, in June 2017, other former senior officers of the Port of Cotonou unequivocally asserted that "he is the cause of his misfortunes; it is he that placed his drugs to provoke popular insurrection in the event of arrest, and this was denounced by his friends in a video. ... They are all aware that the Ajavon family is

24 ECHR, Application 8660/79; *Minelli v Switzerland,* Judgment of 25 March 1983, paras 27 and 37, Series A No 62.

25 See ECHR, Application 15175, Matter of *Allenet de Ribemont v France,* 10 February 1995, para 41.

in this business ".

194. In the present case, the public statements of certain high level political and administrative authorities on the case of international drug trafficking prior to the Judgment and even after the 4 November 2016 acquittal Judgment on the benefit of the doubt were susceptible to creating in the mind of the public, suspicions regarding the Applicant's guilt, and indeed the sustenance of the said suspicion.

195. With respect to the Applicant's allegation that his acquittal on the benefit of the doubt violates his right to the presumption of innocence, the Court notes that a decision to acquit on the benefit of the doubt does not violate the presumption of innocence. This would only be the case if the terms of the acquittal decision on the benefit of the doubt leaves room to believe that the person being discharged is guilty.

196. In the instant case, the Court notes no ambiguity in the terms of the Judgment of 4 November 2016 and holds that the said judgment of acquittal on the benefit of the doubt does not violate the right to the presumption of the innocence of the Applicant.

197. As regards the allegation that the Attorney General's appeal violated the Applicant's right to presumption of innocence, the Court considers that an appeal against a judgment, even an outright acquittal decision, is a right and cannot be considered an infringement of the presumption of innocence. However, the non-notification to the Applicant, of the Attorney General's appeal before the matter was transferred to the CRIET, was such that the Applicant was kept under suspicion of guilt.

198. In view of the foregoing, the Court holds in conclusion that, in this case, the acquittal judgment on the benefit of the doubt does not violate the Applicant's right to presumption of innocence. However, the statements of the public authorities violated the Applicant's right to presumption of innocence as provided under Article 7(1)(b) of the Charter.

v Alleged violation of the right to be tried within a reasonable time

199. The Applicant asserts that the drug trafficking case that involved him has been marked, in procedural terms, by incomprehensible incidents that border on the denial of justice. He regards as unreasonable the two-year period between the appeal lodged stealthily by the Attorney General and the proceedings before the

CRIET.

200. The Applicant also submits that the Attorney General's desire to bury the case pending establishment of the CRIET is manifest, because similar cases that occurred after his acquittal judgment were already adjudicated both at first instance and on appeal. He considers that the dysfunction of the judicial public service, the duration and the blocking of the appeal procedure did not respect the requirement of reasonable time for rendering a judgment, and violates the international conventions ratified by the Respondent State.

201. In refuting the Applicant's allegations, the Respondent State asserts that, while it is recognized that litigants are entitled to have their case tried within a reasonable time, no specific timeframe has been set by law or by international jurisdictions. The Respondent State contends that it cannot be validly argued that the right to a trial within a reasonable time has not been respected; adding that, in the circumstances of the proceedings, there is nothing indicating that the parties to the proceedings or the authorities are at the root of the prolonged delay invoked by the Applicant.

202. It contends that since the appeal lodged by the Attorney General, one year, nine months and twenty-two days elapsed, and that in Benin's practice, this timeframe is more than reasonable, especially in the instant case, given that the functioning of the justice system was disrupted during the judicial years 2016-2017 and 2017-2018 by several strikes which considerably slowed down the course of the proceedings.

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203. The Court reiterates that the reasonableness of a procedure is assessed according to the circumstances of each case, and that such assessment requires a global evaluation of the said circumstances.[26] In similar cases, the Court assessed the duration of the proceedings taking into account certain criteria particularly the complexity of the case, the Applicant's conduct, that of the competent authorities and the stakes inherent in the litigation for

26 *Norbert Zongo and others v Burkina Faso* (Merits) *op cit* para 92; Application 007/2013. Judgment of 3 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, para 91; Application 011/2015. Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania*, para 52.

the parties.[27]

204. In the instant case, the Court notes that the Applicant complains about the length of time that elapsed between the Judgment of 4 November 2016 and the proceedings before the CRIET, which was the same as the proceedings before the Court of Appeal on appeal by the Attorney General. On this point, the Court has already noted that before the Court of Appeal, no procedural act was accomplished since the alleged appeal of the Attorney General, and that in the very absence of notification of the appeal to the Applicant, the said appeal has no effect on the latter.

205. In this respect, the Court holds that it cannot draw any inference from a procedure marred by substantial procedural flaws or examine whether it has complied with the requirements of reasonable time.

206. The Court therefore holds in conclusion that the Applicant's allegation is baseless.

vi. Alleged violation of the right to two-tier jurisdiction

207. The Applicant contends that the principle of two-tier jurisdiction guaranteed by Article 14(5) of ICCPR, is a component of the right of defence, and is clearly a constitutional principle in Benin law. He argues however that, Article 19(2)[28] of Law No. 2018-13 of 2 July 2018 amending and supplementing Law No. 2001-37 of 27 August 2002 on Judicial Organization in the Republic of Benin as amended, and the creation of the CRIET, deprived him of the right to invoke the rule of two-tier jurisdiction.

208. He alleges that the only remedy available to him against the CRIET's decision is the cassation appeal. However, according to him, in ruling on the cassation appeal, the Supreme Court of Benin has no jurisdiction to re-try the facts, but rather to verify the same and determine whether the law has been respected.

209. The Applicant argues that the absence of a two-tier jurisdiction runs counter to the international conventions that the Respondent State has ratified and that, as such, the point must be made that the law establishing the CRIET does not take into consideration the principle of a two-tier jurisdiction and violates his right to a fair

27 *Idem*.

28 Article 19 paragraph 2 provides as follows: "The Judgments of the Anti-Economic Crimes and Terrorism Court shall be reasoned. They shall be pronounced in open court, and shall be subject to cassation appeal by the convicted person, the public prosecutor and the civil parties".

trial.

210. The Respondent State submits that, in the present case, the principle of a two-tier jurisdiction has been meticulously observed because the Applicant's case has been heard not only by the Cotonou First Instance Court, but also on appeal by the CRIET. It further submits that in the instant case, the CRIET, acting as an appellate court, heard the appeal prior to entering a guilty verdict, adding that the appeal procedure is not absolute, and that the fact that the litigant is offered the opportunity to file the cassation appeal amounts to an opportunity to have his case reconsidered.

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211. The Court notes that the right to have a case heard by a higher court is provided by Article 14(5) of ICCPR which reads as follows: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

212. The Court notes that the requirement of a two-tier jurisdiction is absolute in criminal matters and is obligatory regardless of the degree of seriousness of the offence or the severity of the penalty incurred by the individual.[29]

213. In the instant case, the Court finds that whereas, before the CRIET, the Applicant was tried for a criminal offence and sentenced to twenty years imprisonment, it was impossible for him to have the facts and the conviction examined by a higher court. The Court notes that, in this case, only the cassation appeal was open to the Applicant. In this respect, the Court notes that it does not at all appear from the provisions of Article 20 of the law establishing the CRIET, cited above[30], that it adjudicates as an appeal court. Besides, a cassation appeal which seeks to "examine the formal or legal aspects of a verdict without considering the facts, is not sufficient under Article 14(5) of ICCPR".[31]

214. In the instant case, the lack or absence of possibility of an appropriate review of the conviction or sentence pronounced by

29 General Comment 32 *op cit* para 45.

30 See Note 17 under para 120 of this Judgment.

31 HRC Communication 2783/206: *Karim Meïssa Wade v Senegal*, para 12.4.

the CRIET is contrary to the right guaranteed under Article 14(5) of ICCPR.

215. From the foregoing, the Court finds that, the provisions of Article 19(2) of the Law establishing the CRIET constitute a violation by the Respondent State of the Applicant's right to have his conviction and sentence reviewed by a higher court.

B. Alleged violation of the right to equal protection of the law, equality before the law and the right to non-discrimination

216. The Applicant submits that the services that alerted the *Gendarmerie* of the Autonomous Port of Cotonou to the discovery of the cocaine in the container belonging to him were those of General Intelligence acting outside their area of competence. According to him, only the agents of the Central Office for *the Suppression of the Illegal Traffic of Drugs and Precursors in Benin (OCERTID)* were empowered to take appropriate action in such circumstances, which was not the case in the domestic proceedings instituted against him whereby the General Intelligence Service substituted itself for the Narcotics and Drugs Police Service.

217. The Applicant infers that by not placing the investigation within the ambit of the offices of OCERTID, he has been treated differently from other litigants in the same situation; and this for him represents a violation of his right to equal protection of the law and to non-discrimination.

218. In his pleadings dated 27 December 2018 received at the Registry on 14 January 2019, the Applicant also argued that the law creating the CRIET, particularly Article 12 thereof, establishes an unequal and discriminatory system between the litigants of the same country by granting to certain persons referred to it the rights which it does not recognize for others. The Applicant submits that this provision violates Articles 3 of the Charter and 26 of ICCPR, and prays the Court to order the Respondent State to suspend the Application of the law until it is amended for compliance with the international instruments to which the Respondent State is a party.

219. Refuting the Applicant's allegation, the Respondent State submits that the fact of having set up an *ad hoc* commission of inquiry is in consonance with the law since criminal investigation which is generally conducted by criminal police officers may also be carried out by any other entity duly constituted by the Public Prosecutor's Office. It further submits that, in the instant case,

the joint commission set up by the State Attorney was intended to preserve the Applicant's rights in the best possible way, adding that the Applicant's allegations are in reality intended to claim special treatment for himself, and that the issue is in no way that of substantiating any violation of his right to equal protection of the law. With regard to the allegation that section 12 of CRIET Act is discriminatory, the Respondent State prays the Court to disregard this additional submission.

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220. The Court notes that the allegations of violation of the Applicant's right to equal protection of the law as well as the right not to be discriminated against are perceived as being at two levels: that is, the level of the preliminary investigation conducted in October 2016, and at the level of Application of the law establishing the CRIET.

221. The Court reiterates that equal protection of the law and non-discrimination presupposes that the law provides for everyone and that it is applicable to everyone in equal measure without discrimination. The Court also reiterates that violation of the rights to equal protection of the law and non-discrimination presupposes that persons in a similar or identical situation have been treated differently.[32]

222. At the level of preliminary investigation, the Court notes that as far back as 29 October 2016, the day after the Applicant's arrest, the Public Prosecutor, by office memorandum, set up a Joint Judicial Commission of Inquiry with the mission "to take over the entire procedure on the facts related to the discovery of drugs in a container at the Port of Cotonou and for which the Cotonou Maritime *Gendarmerie* Company had initiated an investigation on 28 October 2016".

223. It is also apparent from the said office memorandum setting up the Joint Judicial Commission of Inquiry that the latter comprised three (3) members of the Public Prosecutor's Office, three (3) officers of the *Gendarmerie*, one of whom is an officer of the

32 *Alex Thomas v Tanzania* (Merits) *op cit* para 140; Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania*, (hereinafter referred to as "*Kijiji Isiaga v Tanzania* (Merits)") para 85.

maritime *gendarmerie*, and three (3) members of OCERTID, all falling under the category of services entitled to conduct preliminary investigations as prescribed by Articles 13 to 16 of the Benin Code of Criminal Procedure. In the instant case, the intervention of the General Intelligence Services was limited to the alert issued on 27 October 2016 to the *Gendarmerie* of the Autonomous Port of Cotonou regarding the existence of drugs in a container aboard the ship "MSC Sophie". As a result, the Court does not find any form of discrimination or inequality before the law at this level.

224. With regard to the discriminatory nature of the law creating the CRIET, particularly, Article 12 thereof, the Court notes that the said text provides that: "the decisions of the Investigating Commission[33] shall not be subject to ordinary appeal. However, the judgment of discharge can be appealed before CRIET. Depending on the case, the Court admits and determines the case or dismisses the appeal".

225. It is apparent from the above text that the law establishes, in the same procedure, two completely different systems depending on whether the rights of the prosecution or those of convicted persons are at issue. In this regard, the Court notes that while the findings of the Public Prosecutor's Office indicting defendants cannot be appealed, discharge decisions in favour of the person or persons prosecuted are subject to appeal. Thus, the law visibly breaks the balance between the parties to a trial and the equality of all before the law which, in this case, translates into the absence of equality of arms.

226. The Court holds that the provisions of Article 12 of Law No. 2018-13 of 2 July 2018 amending and supplementing Law No. 2001-37 of 27 August 2002 on Judicial Organization in the Republic of Benin as amended, and creating the CRIET, constitute a violation of the Applicant's right to equality before the law and to equal protection of the law.

C. Alleged violation of the Applicant's right to liberty and to security of his person

227. Invoking Article 6 of the Charter, as well as Articles 3 and 9 of the Universal Declaration of Human Rights, the Applicant argues

33 According to Article 10 of the law establishing the CRIET, an Investigating Commission shall be set up, composed of a President and two (02) magistrates with the task to investigate cases.

that his right to liberty has been violated. He considers his arrest and detention in the case of the discovery of the 18 kilogrammes of cocaine in a container of goods he ordered, inappropriate, unjust and arbitrary, adding that although he is the recipient of the container, at no stage in the transport chain did he intervene and that, consequently, his arrest and detention do not meet the legal conditions and guarantees on the deprivation of freedom as protected by international human rights law and international jurisprudence.

228. Referring to his social and political status, the Applicant affirms that as a "food processing business tycoon" and a politician ranked 3rd in the 2016 presidential elections just behind the current President of the Republic who came 2nd, the standard would have been to make him report to the authorities as *per* their dictates, rather than subject him to eight days in custody during which he was interrogated only once whereas he presented all the guarantees of representation.

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229. The Respondent State submits that the Applicant's detention was lawful because it was executed in accordance with the law which provides that the duration of police custody may be up to eight days maximum, adding that in this case, the Benin justice system took all the necessary care and did not go beyond the maximum of eight days.

230. It asserts that police custody is a measure that reduces a person's freedom to come and go during an ongoing procedure, particularly in the case of police investigation; that the measure applies to everyone and the Applicant is not justified to invoke his social or political position to evade the measure.

231. The Respondent State also invokes the provisions of Article 58 of the Benin Code of Criminal Procedure and contends that the Applicant's arrest and detention are not arbitrary in so far as they are legal and well-founded.

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232. Article 6 of the Charter stipulates 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 ". Articles 3 and 9 of the Universal Declaration of Human Rights provide, respectively, that: "Everyone has the right to life, liberty and security of person" (Article 3) and "[n[o one shall be subjected to arbitrary arrest, detention or exile" (Article 9).

233. It is clear from this text that deprivation of liberty is an exception that is subject to strict requirements of legality and legitimacy, such that arrest or detention is considered as arbitrary where it has no legal basis or contravenes the law.

234. On this point, the Court notes that Article 58 of the Benin Code of Criminal Procedure enshrines freedom as a principle and provides that a person may be detained only where the measure guaranteeing the person's maintenance at the disposal of the investigators is the only way to achieve one of the objectives listed as: 1) allow for the execution of investigations involving the presence or participation of the person; 2) guarantee the presentation of the person before the State Attorney for the purpose of enabling the latter to evaluate the outcome of the investigation; 3) prevent the person from modifying proofs or physical evidence; 4) prevent the person from putting pressure on witnesses or victims and their families; (5) prevent the person from consulting other persons susceptible to being his co-perpetrators or accomplices; 6) ensure implementation of measures to put an end to inordinate actions.

235. It is clear from this Article 58 that, while certain restrictions are intended to ensure the appearance and participation of persons in proceedings, others seek to avoid possible obstacles to investigation, including pressures, popular actions, and deletion or modification of evidence. In the present case, the Court considers that in view of the grounds mentioned in this text and given the Applicant's position as businessman and politician, the judicial authority could reasonably be apprehensive of pressures from him or consultations between the various actors of the export-import chain or indeed popular actions, and opt for custody rather than freedom. Custody could be justified in the circumstances.

236. As regards the duration of the remand in custody, the Applicant argues that for the eight days, he was heard only once. The Court notes that whereas extension of the detention period to a maximum of eight days is provided by law, the opportunity for a hearing is assessed according to the progress of the investigation

procedure and its needs. The law, à priori, does not set the number of times a person in police custody must be heard.

237. The Court holds in conclusion that the Applicant's right to liberty and security of his person guaranteed by Articles 6 of the Charter, 3 and 9 of the Universal Declaration of Human Rights, has not been violated.

D. Alleged violation of the right to respect for dignity and reputation

238. The Applicant alleges that he was brutally arrested without explanation as to why he was arrested. He further alleges that the arrest was carried out instantly, without consideration, and in a high-handed and brutal manner without prior notice.

239. He also alleges that the acquittal judgment on the benefit of the doubt represents an affront to his honour; that, besides, the procedure of summary trial to which he was subjected is an exceptional procedure intended only to arbitrarily deprive him of his liberty and damage his reputation.

240. The Applicant accuses the Benin Head of State of presenting him, both to the public and to the media, as guilty even when he was acquitted. According to him, the statements of the Head of State are intended to publicly tarnish his reputation by denying his innocence.

241. The Applicant further alleges that in April 2017, the Head of State in answer to the questions put by journalists came back on the attack in the programme "African debates" on RFI and France 24, declaring that: "the guy is in a mess. He got himself caught up in a drug trafficking case and the only defence he found is to accuse me. I had kept quiet in his own interest so as not to aggravate his situation because, as you said, he was an ally."

242. He considers that the Judgment of 4 November 2016 against him is in fact an "acquittal-guilty" Judgment which inexorably taints his reputation by making the people of Benin to take him for a real international drug trafficker.

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243. The Respondent State contends that the Applicant's detention was more than respectful of his rights. It affirms that on 28

October 2016, the Applicant was arrested in his capacity as the Chief Executive Officer of the company COMON SA, recipient of the container in which the cocaine was found. It also affirms that at the time of his arrest, the Applicant refused to board the pickup truck of the Maritime *Gendarmerie* Company officers who did not object to his preference to take his own car.

244. The Respondent State refutes the Applicant's allegations that the proceedings were aimed at tarnishing his reputation and that the judgment of acquittal in no way detracts from the Applicant's reputation. It considers the allegations unfounded and without substance.

245. The Respondent State further submits that the Applicant is ill-founded when he alleges that the Head of State "spoke of his guilt in the drug trafficking case, whereas he had been acquitted", because in its view, the Benin Head of State, who is concerned about and respectful of the fundamental principle of separation of powers, did in no way make any statement regarding the case, let alone meddle in it.

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246. The Court notes that the Applicant avers not only that the conditions of his arrest and the acquittal judgment have undermined his dignity, but also that the remarks made by the Head of State cast a slur on his reputation and honour.

i. Allegation that the conditions of the Applicant's arrest undermined his dignity

247. The Court notes that, as the Charter does not specify the time, form and content of the information to be given to a person to explain the reasons for his arrest, international jurisprudence considers that information must be complete and intelligible and must be provided within a very short time frame. The arrest must therefore be based on plausible grounds, that is, on facts or information capable of persuading an objective observer that the person arrested may have committed the offence. For this reason, the Court undertakes a case-by-case analysis based on

the specific circumstances of each case.

248. In the instant case, the Applicant was arrested on 28 October 2016 at the end of a press conference he had conducted on the case of the discovery of cocaine. In the circumstances, the Court notes that even in the absence of prior notice, the Applicant, at the time of his arrest, was not unaware of the reasons as to why the officers of the *Gendarmerie* of the Port of Cotonou, who initiated the investigation, came for him. The Court also holds that the lack of prior notice cannot be considered as a violation of the right of the individual where the circumstances of a case, the gravity of the offence or the speed of the proceedings may justify instant arrest. The reasons for arrest, in such cases, may be given verbally and on-the-spot at the time of arrest.

249. The Court notes, moreover, that the Applicant invokes the brutalities he allegedly suffered without providing a description of the acts that supposedly constituted such brutalities, and that, having refused to board the police pick-up van, the Applicant arrived at his place of detention in his own car.

250. The Court therefore holds in conclusion that the conditions of the Applicant's arrest did not violate Article 5 of the Charter.

ii. The allegation that the remarks made by the Head of State tainted the Applicant's reputation and dignity

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

252. It is apparent from the documents on file, particularly the transcript of audio and audio-visual recordings, that on several occasions after the Judgment of 4 November 2016, the Head of State had, for example, on 11 November 2016, made statements regarding the case of cocaine trafficking without equivocation as to the fact that he had been acquitted on the benefit of the doubt.

253. In this respect, on 11 November 2016, that is a few days after the judgement acquitting the Applicant, the Head of State stated as follows: "from the events that occurred a few days ago, I realised the amount of pressure coming from my citizens, and from a good number of political authorities as well as important personalities to accept what is not admissible. Are we ready to fight against impunity? Me, I do not have the impression… When you are involved in wrongful acts which are apparent in the community,

the global community will sanction you". Speaking on the RFI radio station on 16 April 2017 in response to questions put by a journalist, he stated that "Mr.Ajavon finds himself faced with what you have just mentioned (involved in the case of 18 kilograms of cocaine) and did not find anything better".

254. The Court considers that the statements of the Head of State on the media and during the "meetings" on the case of international drug trafficking, after the acquittal judgment were such that would compromise the Applicant's reputation and dignity in the eyes of his partners and in the public at large.

255. Accordingly, the Court concludes that the Applicant's honour, reputation and dignity have been tarnished in violation of Article 5 of the Charter.

iii. Allegation that the acquittal judgment soiled the Applicant's reputation and honour

256. The Court notes that, in law or in fact, a court decision cannot be regarded as a reason to tarnish the honour or reputation of an individual, and the Applicant cannot validly rely on the reason that the acquittal on the benefit of the doubt did not sufficiently remove the equivocation on the not-guilty verdict.

257. The Court finds in this regard that the acquittal judgment on the benefit of doubt does not tarnish the Applicant's honour, reputation and dignity, and does not constitute a violation of Article 5 of the Charter.

E. Alleged violation of the right to property

258. The Applicant alleges that the Respondent State used the "acquittal-guilt" decision of 4 November 2016 to destroy his companies, namely: SOCOTRAC, his radio station and television channel. He submits that the withdrawal of the customs agent licence from his company followed by the cutting of the signals of his radio and television stations were clearly used by the State services to prevent him from carrying on with his business activities.

259. He considers that the ban on broadcasting imposed on his radio and television stations is unfair and infers therefrom a flagrant violation of his right to property guaranteed by Article 14 of the Charter.

260. The Applicant further submits that the prohibition and suspension measures taken by the various administrative services resulted in the loss of the value of his shares in the afore-mentioned

companies and stifled his activities which represent the main source of his income.

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261. Refuting the Applicant's allegations, the Respondent State contends that there has been no infringement of the Applicant's right to property, adding that the companies the Applicant claims to be the owner have not been nationalized or expropriated by the State. Moreover, since licence is granted only to companies that fulfil the requisite legal conditions, the withdrawal of SOCOTRAC's customs agent licence cannot be analysed as a violation of an alleged right to property.

262. As regards the cutting of the signals of the Applicant's media stations, the Respondent State affirms that it is a precautionary measure aimed at regularizing the situation of the two media stations, and that as at the time the Court made its ruling, the said media stations had resumed broadcasting pending the outcome of the contentious proceedings on this issue before Benin courts.

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263. Article 14 of the Charter provides that: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of the appropriate laws."

264. The Court reiterates that it has already held that the right of property in its classic sense, comprises the right to use the thing which is the subject of the right *(usus),* the right to enjoy its fruits *(fructus)* and the right to dispose of it (*abusus).*[34]

265. In the instant case, the Applicant alleges that the measures taken by the administrative authorities against his companies are intended to prevent him from carrying on his commercial activities

34 Application 006/2012. Judgment of 26 May 2017 (Merits), *African Commission on Human and Peoples' Rights v Kenya* (hereinafter referred to as "*Commission v Kenya* (Merits)"), para 124.

and benefiting therefrom. It is apparent that the Applicant mainly invokes his rights to use *(usus)* his companies and to enjoy the income therefrom *(fructus).*

i. Alleged violation of Article 14 of the Charter in respect of SOCOTRAC

266. With regard to the withdrawal of SOCOTRAC's customs agent licence, the Court notes that the Respondent State merely asserts that it was a penalty for non-compliance with the requisite conditions, without explaining the nature of the conditions to be fulfilled and whether the conditions in question emanate from a new regulation or existed at the time of incorporation of the company in 2004. The Respondent State also does not indicate whether, in the present case, a formal notice of default accompanied by a moratorium had previously been served on SOCOTRAC.

267. The Court notes, moreover, that contrary to the Respondent State's contention, the letters dated 21 and 23 November 2016, respectively, suspending SOCOTRAC's container terminal and withdrawing its customs agent licence expressly indicate that the said measures were taken "following the discovery of 18 kgs cocaine, a banned substance, in a container said to contain turkey gizzards imported by the company COMON for transfer to the Applicant's container terminal".

268. On the basis of the two letters cited above, the Court considers that the customs authorities were in the wrong regarding the two decisions taken on 21 and 23 November 2016, respectively, whereas already on 4 November 2016, the Cotonou First Class Court of First Instance ruling in the case of 18 kilogrammes of cocaine had acquitted the Applicant.

269. The Court holds in conclusion that the Respondent State violated Article 14 of the Charter for having prevented the Applicant from exercising his commercial activity and to derive income from the said activity.

ii. Alleged violation of Article 14 of the Charter as concerns radio Soleil FM and SIKKA TV

270. With regard to cutting of the signals of the Soleil FM radio and the SIKKA TV channel, the Court notes that the decisions giving rise to the alleged violations were taken by the media regulatory

authority in contravention of the extant rules and procedures.[35]

271. It emerges from the documents on file that prior to HAAC's decision to terminate the activities of the media facilities in question and to seal off SIKKA TV, HAAC did not comply with the extant regulation which provides that the Applicant, holder of the licences, be served with notice of default and that HAAC await findings of non-compliance with the set conditions.

272. The Court holds in conclusion that in closing the Soleil FM and SIKKA TV, the Respondent State violated the Applicant's rights as spelt out in Article 14 of the Charter.

F. Alleged violation of the State's duty to guarantee the independence of the courts

273. The Applicant submits that the Respondent State violated Article 26 of the Charter by breaching its obligation to guarantee the separation of powers, particularly the independence of the judiciary. He denounces political power interference in the conduct of the judicial proceedings against him and speaks of "a plot and machination at the highest echelon of the State" where the jury has turned itself into judge.

274. He contends that the dysfunction and the numerous irregularities that have marked the investigation represent proof that his country's justice system is being exploited and that he has quite simply become a most welcome target.

275. The Applicant asserts that the Head of State himself perpetrated the confusion between his prerogatives and those of the judicial authorities by meddling in the procedure which, in the final analysis, was nothing but a mockery of a trial having resulted in a judgment of acquittal. Buttressing his allegations, the Applicant cited the terms of a press release issued on 4 May 2018 by Benin's main union of magistrates denouncing "the strangle-hold or the 'takeover'" of the judiciary by the executive.

276. The Applicant further submits that after the adoption of the law establishing the CRIET, the Minister of Justice and Legislation and the Officer for Special Duties in the Office of the President of the Republic, at a press conference on 2 October 2018, and on AFRICA 24 television channels, respectively, affirmed that the

35 According to the Organic Law establishing the High Authority for the Audiovisual and Communication (HAAC) in the Republic of Benin, "in case of non-compliance with the recommendations, decisions and formal notices by the holders of licenses for the installation and operation of private sound and television broadcasting companies ... ".

CRIET had jurisdiction to hear the "Ajavon case".

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277. Refuting the Applicant's allegations insinuating that the Head of State was involved in the proceedings against him, the Respondent State submits that the judiciary in Benin is independent and that the Applicant's comments calling to question the independence of the judiciary and insinuating an alleged interference by the Head of State in the said case constitutes an insult against the Head of State and casts a slur on Benin judiciary.

278. The Respondent State also submits that Mr. Edouard LOKO did not intervene in AFRICA 24 in his capacity as the Officer for Special Duties in the Office of the President of the Republic, but rather as an ordinary citizen of Benin. It further stated that the same is true of the Minister of Justice who, as a lawyer, took the pains to make clear that Benin has "sovereign judges who had the freedom to interpret the law."

279. Article 26 of the Charter stipulates that: "The 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".

280. The Court notes that guaranteeing the independence of the courts imposes on States, not only the duty to enshrine this independence in their legislation but also, the obligation to refrain from any interference in the affairs of the judiciary at all levels of the judicial process.

281. In the instant case, the Court has already noted that the remarks made by senior officers of the executive in this case of international drug trafficking were such that would influence the investigation procedure as well as the opinion of the Judge. This was particularly the case when, on 2 October 2018, while the proceedings initiated against the Applicant before the CRIET were in progress, the Minister of Justice publicly declared that "in regard to the Ajavon case, the CRIET has jurisdiction to hear the matter". In terms of content, the statement of the Minister does not amount to a general statement on the competence of the CRIET; it is rather an affirmation on the competence of the CRIET in connection with a specific case pending before it. The

fact that the Minister further stated that sovereign judges would have the opportunity to interpret the law does not detract from the affirmative nature of his comments on the jurisdiction of the CRIET. Accordingly, the Court finds that the executive interfered with the functions of the judge, the only authority empowered to pronounce on its own jurisdiction.

282. The Court holds in conclusion that by declaring that the CRIET has the jurisdiction to hear a specific case brought before it, the Minister of Justice, member of the executive, interfered in the judge's functions in violation of Article 26 of the Charter.

VIII. Reparations

283. The Applicant alleges that the purported drug trafficking case caused him a series of losses estimated at five hundred and fifty billion (550,000,000,000) CFA Francs for which he seeks compensation. He also alleges that he suffered economic and moral losses, and claims that the case caused him a loss of business opportunities and tarnished his image and reputation.

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284. The Respondent State refutes any idea of reparation for the Applicant and argues that none of the conditions required by law to obtain compensation has been fulfilled. The Respondent State further argues that it is not enough to invoke prejudices to obtain compensation, but this must be sufficiently certain and there must be a link between the damage and the facts generating the damage. It prays the Court to order the Applicant to pay it the sum of one billion, five hundred and ninety-five million, eight hundred and fifty thousand (1,595,850,000) CFA francs in damages.

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285. 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".

286. In this respect, Rule 63 of the Rules provides that: "The Court shall 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' rights or, if circumstances so require, by a separate decision".

287. In the instant case, pursuant to the provisions of Rule 63 above cited, the Court decides that it will make a ruling on reparations at a later stage of the proceedings.

IX. Costs

288. The Applicant requests the Court to order the Respondent State to reimburse him the procedural costs incurred by him in the domestic proceedings and in this Court.

289. The Respondent State refutes all the Applicant's claims and prays the Court to declare the same unfounded.

290. Rule 30 of the Rules provides that; "Unless the Court decides otherwise, each party shall bear its own costs".

291. In the instant case, the Court decides that it will rule on the cost of proceedings at a later stage.

X. Operative part

292. For these reasons

The Court,

Unanimously

On jurisdiction:

i. *Dismisses* the objections to its jurisdiction*;*

ii. *Declares* that it has jurisdiction;

On admissibility:

iii. *Dismisses* the objections to admissibility;

iv. *Declares* the Application admissible;

v. *Declares* that the additional submissions on the law creating the CRIET and the procedure before the CRIET filed on 14 January 2019, with the exception of those mentioned in paragraph (vi) hereunder, have a nexus with the initial Application and are admissible;

vi. *Declares* that the other additional submissions filed on 14 January 2019 are unrelated to the original Application and are therefore inadmissible;

On merits:

vii. *Declares* unfounded the Applicant's allegation that he was not tried within a reasonable time;

viii. *Finds* that the Respondent State did not violate the Applicant's right to equality before the law guaranteed by Article 3 of the Charter, before the Cotonou Court of First Instance;

ix. *Finds* that the Applicant's arrest and detention conditions were not in violation of Article 5 of the Charter;

x. *Finds* that the Respondent State did not violate the Applicant's right to liberty and security of his person provided under Article 6 of the Charter;

xi. *Finds* that the Respondent State violated the Applicant's right to equal protection of the law guaranteed by Article 3 of the Charter, given that Article 12 of the 2 July 2018 Law creating the CRIET did not establish equality between the parties;

xii. *Finds* that the Respondent State has violated Article 5 of the Charter by undermining the Applicant's reputation and dignity;

xiii. *Finds* that the Respondent State violated the Applicant's right to be tried by a competent court provided under Article 7(1) (a) of the Charter;

xiv. *Finds* that the Respondent State violated the Applicant's right to presumption of innocence enshrined in Article 7(1)(b) of the Charter;

xv. *Finds* that the Respondent State violated the Applicant's right to defence provided under Article 7(1)(c) of the Charter;

xvi. *Finds* that the Respondent State violated the Applicant's right to be notified of the charges and to access the record of the proceedings within the meaning of Article 7(1)(c) of the Charter;

xvii. *Finds* that the Respondent State violated the Applicant's right to be represented by Counsel as provided under Article 14(3)(d) of ICCPR;

xviii. *Finds* that the Respondent State violated the Applicant's right of property provided under Article 14 of the Charter;

xix. *Finds* that the Respondent State violated Article 26 of the Charter for having failed in its duty to guarantee the independence of the Courts;

xx. *Finds* that the Respondent State violated the Applicant's right to a two-tier jurisdiction guaranteed by Article 14(5) of ICCPR, given that Article 19, paragraph 2 of the 2 July 2018 Law establishing the CRIET provides that the decisions of this court are not subject to appeal;

xxi. *Finds* that the Respondent State violated the principle of *"non bis in idem"* provided under Article 14(7) of ICCPR;

On reparations:

xxii. *Orders* the Respondent State to take all the necessary measures to annul judgment No. 007/3C.COR delivered on 18 October 2018 by the CRIET in a way that erases all its effects and to report thereon to the Court within six (6) months from the date of notification of this Judgment.

xxiii. *Declares* that it will rule on other claims for reparation at a later stage;

On costs:

xxiv. Declares that the Court will make a ruling on the issue of reparation at a later stage.

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Dissenting opinion: BENSAOULA

1. I concur with the opinion of the majority of judges in regard to the admissibility of the Application, the jurisdiction of the Court and the operative part of the Judgement.

2. However, I am of the view that the manner in which the Court dealt with the admissibility of the Application is not in tandem with the provisions of Articles 6(2) of the Protocol, 50 and 56 of the Charter, and Rules 39 and 40 of the Rules of Court.

3. In terms of Rule 39(1) of the Rules, "the Court shall conduct a 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 the Rules".

4. This clearly implies as follows:
If the parties raised objections to the jurisdiction of the Court and the admissibility of the Application, the Court shall decide.

- If one of the objections is founded, the Court shall deal with it …. Because they are cumulative.
- If on the contrary neither of the objections is founded, the Court will be obliged to discuss the other issues on admissibility not discussed by the Parties and will conclude.

Where the Parties do not raise any objection

5. The Court has the obligation to analyse all of them and to do so in the order in which they are presented. It indeed seems to me to be illogical that the Court should select one of the conditions... (reasonable time) for instance… whereas the identity of the Applicant may pose problems and therefore not covered ; or any other condition enumerated earlier.

6. It emerges from the judgement which is the subject of this separate opinion, that after discussing the objections raised by the Respondent State to the admissibility of the Application and after finding that the objections were unfounded (objection to the use of disparaging language in the Application and that of failure to exhaust local remedies) the Court limited itself in paragraph 112 to citing the other conditions stating that they were not in contention between the Parties.

7. And in paragraph 113 the Court notes, "That nothing in the file indicates that any of the conditions had not been met in the instant case". "And that consequently the Court finds that the above mentioned conditions have been entirely met".

8. In my view, this expedited approach of discussing the other conditions of admissibility not in contention between the Parties goes contrary to the spirit of Articles 56 of the Charter, 6 the Protocol and Rule 40 of the Rules which require the Court to discuss those conditions.

9. Especially because after having discussed the objection to the exhaustion of local remedies and found in paragraph 110 "that the chances of success of all cases for reparation of damages resulting from the alleged violations are negligible" and that "even where the local remedies to be exhausted exist the particular circumstances surrounding the case make them inaccessible and inefficient……"

10. The Court invariably should have focused on the condition of reasonable time linked to the above mentioned objection pursuant to paragraph 6 of Article 56 of the Charter and Rule 40 of the Rules.

11. And that declaring as we see in paragraph 113 that "the Court notes that nothing in the file indicates that any of the conditions have not been met ….." has as a consequence, made the operative part of the judgement on admissibility baseless at least in relation to the conditions which were not in discussion between the Parties and consequently the Court.

Provisions of Article 56 of the Charter, 6(2) the Protocol and Rules 39 and 40 of the Rules

12. It should be noted that with regard to the objection raised by the Respondent State on the failure to exhaust local remedies, the Court found that the particular circumstances surrounding this case made the said remedies inaccessible and ineffective for the Applicant who is therefore not required to exhaust the local remedies.

13. Meanwhile, the Court should also have determined on the issue of reasonable time of the filing of the Application, because in terms of Article 56 of the Charter paragraph 6 and Rule 40 of the Rules, applications must 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 is shall be seized of the matter".

14. Having found grounds for failure to exhaust local remedies and having excused the Applicant for failing to exhaust them, the Court should have, pursuant to the above-mentioned article, retained a date as the beginning of its own seizure….such as the date of the of the CRIET judgement, 18 January 2018 for instance.

15. In my opinion, by failing to deal with this condition the Court weakened its finding on the admissibility of the Application.

16. Thus, if in the Court's jurisprudence it interpreted "local remedies" which are binding to the Applicant such as ordinary remedies, this jurisprudence is not binding to the Applicant in determining reasonable time because in my opinion the Court could compute reasonable time as from the date an extraordinary remedy is filed or on the date the judgement is rendered. And that in this way the Court could have applied the second rule enshrined in Articles 56(6) of the Charter, 6(2) the Protocol and Rules 39 and 40(6) of the Rules.

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Separate Opinion: NIYUNGEKO

1. I concur with the findings and the Judgment of the Court, as seen in the operative part of the Judgment [paragraph 292]. However, I am of the view that on certain issues, the reasoning in the Judgment could have been strengthened (I) Furthermore, I find

that the Court failed to make a finding on one issue (II) Again, it failed to reflect in the operative part some findings made in the body of the Judgment (III) Lastly, it also included in the operative part measures which were not specifically analysed in the body of the judgment (IV).

I. On certain issues, the reasoning of the Judgment could have been stronger

2. As we are all aware, the 10 June 1988 Protocol establishing the Court obliges the latter in its Article 28(6), to give reasons for all its Judgments without exception.[1] In my opinion, on certain issues, the reasoning of the Court is erroneous and insufficient.

3. This is the case with the allegation made by the Applicant that the procedure of immediate appearance to which he was subjected in 2016 was a violation of his right to defence [paragraph 143].

4. On this allegation, the Court responded in a paragraph as follows: "Regarding the argument according to which the summons to appear immediately would have been a violation of the right to defence of the Applicant, *the Court notes [that] immediate appearance in itself is not a violation of the right to defence*" [paragraph 151. Italics added].

5. In doing so, the Court did not at all explain the finding it made. The Court ought to have indicated, based on the information contained in the file on the legislation of the Respondent State, that the procedure of immediate appearance is simply an expedited procedure, within which the right to defence may be guaranteed. This strangulating conclusion of the Court is astonishing.

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6. It is same with the allegation made by the Applicant according to which his right to presumption of innocence was violated. In paragraph 194, the Court declares as follows:
"In the instant case, the *public statements made by some high political and administrative officials* on the issue of international drug trafficking, before and after the acquittal judgment on the benefit of the doubt of 4 November 2016, could raise suspicion of guilt of the Applicant in the

1 This article has: "the judgment of the Court is motivated". See also Article 61(1) of the Rules of Procedure of the Court

minds of individuals or *even a survivor of the said suspicion of guilt*" [Italics added. See also paragraph 198].

7. On the one hand however, the Court did not use the relevant excerpts of declarations made by political and administrative authorities in support of its position. The only declarations referred to by the Court are those of the Brigade Commander of the Gendarmerie of the Port of Cotonou, and former senior officials of the Port of Cotonou [paragraph 193], they are neither political nor administrative authorities. In particular, the Brigade Commander of the Gendarmerie in Cotonou made his declaration simply to explain to the media and the public the reasons for the Applicant's arrest, which in itself should not necessarily constitute a violation of the right to presumption of innocence. As regards the former senior officials of the port of Cotonou, the Court failed to state whether or not they were still in active service, or else why should their statements be put in the mouth of the Respondent State. In that regard, to be more convincing, the Court ought to have clearly indicated the excerpts of the incriminating public declarations of "some senior and administrative officials" of the Respondent State.

8. On the other hand, in the same paragraph 194 above, the Court finds that even the public declarations of political and administrative authorities made *after* the acquittal Judgment on the benefit of the doubt could constitute a violation of the presumption of innocence. Article 7(1)(b) of the Charter however is clear and refers to the presumption of innocence "until his guilt is proven by a competent court". The Court cannot even rely on the appeal of the Prosecutor General against the acquittal judgment of 4 November 2016 to consider that the issue of the guilt of the Applicant had not been determined, because, it considers elsewhere that this appeal is not impugned by the Applicant [paragraph 139]. On this issue, the Court ought to have limited itself to the declarations eventually made *before* the judgment of 4 November 2016.

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9. There is a similar problem faced concerning the alleged violation of the right to a two-tier jurisdiction. In that regard, the Applicant complains that the establishment of "the Court for the repression of Economic Crimes and Terrorism" (CRIET) whose judgments

are non-appellate, "*deprive* him of the right to make use of the rule of the two-tier jurisdiction" [paragraph 207. Italics added], and that "the law establishing CRIET ignores the principles of a *two-tier* jurisdiction and is a violation of his right to fair trial" [paragraph 209. Italics added].

10. In determining these issues, the Court finds that "the provisions of Article 19(2) of the law establishing CRIET is a violation by the Respondent State of the *right of the Applicant* to challenge the declaration of guilt and his sentence by a higher court" [paragraph 215. Italics added].

11. Here the fact is, the Applicant seems to be contradicting himself by contending on the one hand, that the Judgment of the Court of First Instance, First Class of Cotonou dated 4 November 2016 granting his acquittal on the benefit of the doubt is itself not subject to any appeal and that it is *res judicata* [paragraphs 125-127]**,** and on the other hand, as this was stated earlier, the law establishing the CRIET prevents him from going on appeal against the decision of the latter which sentenced him to a twenty year term. In the face of such a situation, in my opinion, the Court ought to have taken note of this contradiction, and finally decided that what is at stake here is not the *rights of* the Applicant himself to a two-tier jurisdiction, but the *law establishing the CRIET*, in its Article 19(2) and make findings on the inconsistency of this provision with Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR), without considering the peculiar situation of the Applicant.[2]

12. Failing to do so, the Court finds a violation which does not exist [paragraph 215]. The Court should rather have drawn an appropriate conclusion, that through Article 19(2) of the law establishing the CRIET, the Respondent State violated Article 14(5) of the ICCPR.

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13. Lastly, the situation is not different regarding the allegation of violation of the duty incumbent on the Respondent State to

2 It is well known in this regard that in the Charter system, the Applicant is not required to prove a personal interest in having a *locus standi*. See especially: African Commission on Human and Peoples' Rights, Communication 277/2003 *Brian Spilg et al v Botswana*, paras 73-85, and the jurisprudence cited.

guarantee the independence of the judiciary. On this issue, the Applicant complains about the language used by the Head of State [paragraph 275], as well as the language used by the Chargé de mission at the Presidency of the Republic and by the Minister of Justice [paragraph 276].

14. By dealing with these allegations, the Court finds that there is violation of the obligation of the Respondent State to guarantee the independence of the judiciary by relying only on the statements of the Minister of Justice [paragraphs 281 and 282]. In so doing, the Court fails to explain why it does not discuss and does not also take into consideration the statements made by the Head of State (which as a matter of fact have not been put in the passage), as well as the statements made by the Chargé de mission at the Presidency of the Republic.

15. In my opinion, the Court should also have reflected on the impugned statements made by the Head of State, and ought to have decided in one way or the other on how they affect the independence of the judiciary and should have proceeded in the same manner to deal with the statements made by the Chargé de mission in question. This approach would have made it possible not only to deal with all the arguments and counter arguments of the parties, but would also have made it possible to consider the Executive as a whole, and not only through one of its representatives without any kind of justification.

II. The Court failed to make a clear finding on this issue

16. In paragraph 197 of the Judgment, after noting and rightly so, that the appeal against a judgment "should not be considered as a violation of the presumption of innocence", the Court however went on to consider that "the absence of a notice of appeal of the Prosecutor General before the seizure of the CRIET maintained the latter in a position of suspicion of guilt".

17. The Court however does not draw any inference, in terms of violation of the right to presumption of innocence in paragraph 198 where it explains its position. The result is that finally we do not really know whether the Respondent State violated the right of the Applicant in that regard. On this issue, the Court should have made a finding in one way or the other, instead of leaving the latter in suspense and shrouded in ambiguity.

III. The Court failed to reflect in the operative part on certain findings made in the body of the judgment

18. This is the case, first of all with regard to the allegation of the right of the Applicant for the investigation to be complete and for his right to adduce evidence.

19. In paragraph 151 cited above in the Judgment, the Court finds that there is no violation in the following terms:
"Regarding the argument that immediate appearance would have violated the rights of the Applicant to defence, the Court notes [that] *immediate appearance in itself is not a violation of the right to defence*" [Italics added].

20. This finding is however not indicated anywhere in the operative part of the Judgment.

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21. It is same with regard to the allegation of violation of the right to defence on the grounds that the Applicant was acquitted by the Court of First Instance, First Class of Cotonou *on the benefit of the doubt*. In paragraph 198 of the Judgment, the Court makes the following findings:
Based on the forgoing, the Court finds that in the instant case, "*the acquittal Judgment on the benefit of the doubt is not a violation of the right to presumption of innocence".* [Italics added. See also paragraph 196]

22. Once again, this finding is not reflected in the operative part of the Judgment.

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23. This is once again the case with regard to the allegation of the right to have his honour, his reputation and his dignity respected. In paragraph 257 of the Judgment, the Court makes the following findings:
"On this issue, the Court finds that the acquittal judgment on the benefit of the doubt is not a violation of the honour, the reputation or the dignity

of the Applicant *and is not a violation of Article 5 of the Charter*" [Italic added].

24. Once again, the operative part of the Judgment does not consider this finding.

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25. All these omissions are problematic because we all know the importance of the operative part of the Judgment. The operative part contains only the decisions of the Court and a measure or a finding not contained in the operative part is considered not to be part of the decision of the Court.

IV. The Court included a measure in the operative part which was not discussed in the body of the Judgment

26. In the same manner, a decision or a finding which is contained in the operative part, but which has not been discussed in the body of the Judgment could constitute a problem.

27. In that regard, the measure found in paragraph (xxii) of the operative part and which orders the Respondent State to take all necessary measures to annul the sentence of the Applicant of twenty years in prison, was not discussed in the body of the Judgment.

28. We understand without doubt that this measure is a logical and direct consequence of the finding that the Applicant's right to be tried by a competent court was violated (the CRIET was not the appropriate court in this case) [paragraph 140]**.** Meanwhile, the Court ought to have stated and explained it clearly in the part of the Judgment dealing with reparations as it is usually done.

29. In all, these lacunae or shortcomings in the reasoning of the Court on certain issues, in addition to the lack of coherence between the reasoning and the operative part in some areas unfortunately leave a vague impression that the Court was in a haste to produce its Judgment and judgments generally need not be prepared in haste.

Ajavon v Benin (reparations) (2019) 3 AfCLR 196

Application 013/2017, *Sébastien Germain Ajavon v Benin*

Judgment, 28 November 2019, done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, and BENSAOULA

The Court had in a merits judgment held that the Respondent State had violated the Applicant's rights to fair trial, property, dignity, and its obligation to guarantee the independence of courts. The Applicant, a businessman and politician, sought and was granted reparations for various financial damages caused by the Respondent State as well for moral prejudice.

Reparations (full reparation, 16, 19; evidence of link between violation and damage, 17, 39; loss of profit, 38, devaluation of shares, 42; loss of real opportunity, 58, 59, 61-66; legal fees, 69, 71; expenditure in exile, family members, 79, 81, 82; moral prejudice, 91-95; moral prejudice of family members 99-101; lifting of seizure of bank accounts, 110, 111, 116, 117; lifting of suspension of operations, 120, 121; evidence for reimbursement of costs, 141, 142)

Separate opinion: NIYUNGEKO

Reparations (compensation, 14)

I. Subject of the Application

1. The Application was filed by Sébastien Germain Ajavon (hereinafter referred to as "the Applicant"), a businessman and politician of Benin nationality. The Application is filed against the Republic of Benin (hereinafter referred to as the "Respondent State").

2. In his Application dated 27 February 2017, the Applicant alleged a number of violations of his rights and also submitted claims for reparations. In its Judgment on the merits rendered on 29 March 2019[1] the Court held as follows:

"O*n the merits*:

xi. Finds that the Respondent State violated the Applicant's right to equal protection of the law guaranteed by Article 3 of the Charter, given that Article 12 of the 2 July 2018 Law creating CRIET did not establish equality between the parties;

1 See Application 013/2017. Judgment of 29 March 2019 (Merits), *Sébastien Germain Ajavon v Republic of Benin* (hereinafter referred to as "*Sébastien Germain Ajavon v Republic of Benin* (Merits)", paras 287 and 291.

xii. Finds that the Respondent State has violated Article 5 of the Charter by undermining the Applicant's reputation and dignity;

xiii. Finds that the Respondent State violated the Applicant's right to be tried by a competent court provided under Article 7(1)(a) of the Charter;

xiv. Finds that the Respondent State violated the Applicant's right to presumption of innocence enshrined in Article 7(1)(b) of the Charter;

xv. Finds that the Respondent State violated the Applicant's right to defence provided under Article 7(1)(c) of the Charter;

xvi. Finds that the Respondent State violated the Applicant's right to be notified of the charges and to access the record of the proceedings within the meaning of Article 7(1)(c) of the Charter;

xvii. Finds that the Respondent State violated the Applicant's right to be represented by Counsel as provided under Article 14(3)(d) of ICCPR;

xviii. Finds that the Respondent State violated the Applicant's right of property provided under Article 14 of the Charter;

xix. Finds that the Respondent State violated Article 26 of the Charter for having failed in its duty to guarantee the independence of the Courts;

xx. Finds that the Respondent State violated the Applicant's right to two-tier jurisdiction guaranteed by Article 14(5) of ICCPR, given that Article 19, paragraph 2 of the 2 July 2018 Law establishing CRIET provides that the decisions of this court are not subject to appeal;

xxi. Finds that the Respondent State violated the principle of *"non bis in idem"* provided for under Article 14(7) of ICCPR;

On reparations

xxii. Orders the Respondent State to take all the necessary measures to annul judgment No. 007/3C.COR delivered on 18 October 2018 by CRIET in a way that erases all its effects and to report thereon to the Court within six (6) months from the date of notification of this Judgment;

xxiii. Declares that it will rule on other claims for reparation at a later stage;

On costs:

xxiv. Declares that the Court will make a ruling on the issue of reparation at a later stage."

3. Having found in its judgment on the merits that the Respondent State violated the Applicant's rights and ruled partly on the reparations, the Court deferred its decision on other forms of reparation. It will rule on the said forms of reparation in this judgment pursuant to Article 27(1) of the Protocol.

II. Brief background of the case

4. On 27 February 2017, the Applicant filed an Application with this

Court alleging that in the course of the legal proceedings against him for alleged international drug trafficking, the Respondent State violated a number of his rights guaranteed by international human rights instruments.

5. He averred that following those proceedings, the Cotonou Court of First Instance rendered a Judgment on 4 November 2016, acquitting him *on the benefit of doubt* for the alleged offence of international drug trafficking. In October 2018, he was subsequently tried and sentenced to twenty years in prison by the newly established Anti-Economic Crimes and Terrorism Court referred to as "CRIET", for the same offence.

6. The Applicant also added that in the wake of the said trial on alleged international drug trafficking, the customs administration suspended the container terminal of his brokerage, transit and consignment company (SOCOTRAC SARL), while the High Audio-visual and Communication Authority, for its part, cut the signals of the *Soleil FM* radio station and those of the SIKKA TV television channel, of which he is the majority shareholder.

7. The Respondent State challenged the admissibility of the Application and also prayed the Court to dismiss all the claims for reparations sought by the Applicant.

III. Summary of the procedure before the Court

8. By an Order of 1 October 2019, the Court decided to suspend deliberations and re-open pleadings. The Court addressed to the parties a number of questions on the issue of reparations for the damages arising from the failure of the investment in the oil sector, inviting them to provide all relevant information to substantiate their claims on this point.

9. The parties filed their responses as ordered by the Court.

IV. Prayers of the Parties

A. The Applicant

10. The Applicant prays the Court to:

"i. find that he, the President of the Association of Benin Businessmen, has seen his reputation tarnished in business circles;

ii. find that he is a political figure, candidate at the last presidential elections of March 2016, who scored a total of 23% of the votes and came third in the overall ranking, just behind the current Head of State of Benin who had 24%;

iii. find that the matter of drug trafficking has discredited him and caused him various losses valued at five hundred and fifty thousand million (550, 000, 000, 000) CFA Francs, which he claims as reparation;

iv. order the Respondent State to suspend the following laws until they are amended to be compliant with international human rights instruments to which it is a party:

- Law No. 2018-13 of 2 July 2018, amending and supplementing Law No. 2001-37 of 27 August 2002, on judicial organization in the Republic of Benin as amended and creating the Anti-Economic Crimes and Terrorism Court;
- Organic Law No. 2018-02 of 4 January 2018, amending and supplementing Organic Law No. 94-027 of 18 March 1999 on the High Judicial Council;
- Law No. 2017-05 of 29 August 2017, setting the conditions and procedure for employment, placement of workers and management of employment contracts in the Republic of Benin;
- Law No. 2018-23 of 26 July 2018 on the Charter of Political Parties in the Republic of Benin;
- Law No. 2018-031 on the Electoral Code in the Republic of Benin;
- Law No. 2017-044 of 29 December 2017 on Intelligence in the Republic of Benin;
- Law No. 2017-20 of 20 April 2018 on the Digital Code in the Republic of Benin".

11. In his additional submissions dated 11 October 2019, the Applicant prayed the Court to grant him, in addition to his previous claim for compensation, the sum of ten billion (10,000,000,000) CFA Francs as legal costs and to note PHILLIA's claim for compensation.

12. He further prayed the Court to note that the Respondent State has not complied with the Court Order of 7 December 2018 and the Judgment of 29 March 2019, particularly:

- the refusal to annul the judgment issued by CRIET and to issue him with a clean criminal record and all the "statutory State instruments";
- the ban on his political party, the Social Liberal Union, and on other opposition political parties from running for the legislative elections of 28 April 2019 and the denial of political pluralism in Benin;
- the refusal to lift the seizures of his property;
- the bloody crackdown on demonstrations and the arrest of opposition leaders;
- the criminal prosecution against Messrs. Yayi Boni and Lionel

Zinsou.

B. The Respondent State

13. The Respondent State prays the Court to:

- dismiss the Applicant's requests to annul or stay the application of certain laws enacted by the Respondent State in accordance with its Constitution;
- dismiss any idea of prejudice resulting from a criminal conviction under a law;
- declare inadmissible the claim for reimbursement of expenses incurred in exile;
- dismiss all the prayers for reparation made by the Applicant;
- as a counterclaim, hold the Applicant liable to pay the sum of one billion five hundred and ninety-five million eight hundred and fifty thousand (1,595,850,000) CFA Francs as damages.

14. The Respondent State also prays the Court to:

- note that, despite the temporary licenses, BENIN OIL SA and WAF ENERGY had not imported any petroleum product;
- find that PHILIA is not a party to the lawsuit and to dismiss its claim for compensation;
- dismiss the request for payment of the sum of ten billion (10,000,000,000) CFA francs for additional legal costs;
- rule that the new submissions of the parties must remain within the ambit of the re-opened pleadings.

V. Reparations

15. Article 27(1) of the Protocol provides that "If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

16. The Court recalls its previous Judgments[2] in matters of reparation and reiterates that in considering claims for compensation for prejudice resulting from human rights violations, it takes into account the principle that the State recognized as the perpetrator of an internationally wrongful act has the obligation to make full reparation of the consequences in a way that covers all the

2 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (Reparation) (2015) 1 AfCLR 258 para 20; *Lohé Issa Konaté v Burkina Faso* (Reparation) (2016) 1 AfCLR 346 para 15.

damage suffered by the victim.

17. The Court also considers as a principle the existence of a causal link between the violation and the alleged damage and places the burden of proof on the Applicant, who must provide the evidence to justify his claim.[3]

18. In its Judgment on the merits of 29 March 2019, the Court already noted the causal link between the Respondent State's liability and the violations found, namely violation of Article 3, 5, 7(1)(a), (b) and (c) as well as 26 of the Charter and Article 14(3)(d), 14(5) and 14(7) of the ICCPR.

19. The Court has also established that "reparation must, as far as possible, 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."[4] In addition, reparation must, depending on the particular circumstances of each case, include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-recurrence of the violations.[5]

20. In addition, the Court reiterates that it has already established that reparation measures for prejudice resulting from human rights violations must take into account the circumstances of each case and the Court will make its assessment on case-by-case basis.[6]

A. Reparations claimed by the Applicant

21. In the instant case, the Court notes that some of the claims for damages made by the Applicant are pecuniary while others are not.

i. Pecuniary reparations

22. The Applicant submits that the violation of his rights by the Respondent State has caused him enormous economic damage,

3 *Reverend Christopher R Mtikila v Tanzania* (Reparation) (2014) 1 AfCLR 72 para 40.

4 PCIJ *Chorzow Factory, Germany v. Poland*, Jurisdiction, Decision on compensation and the merits, 26 July 1927, 16 December 1927 and 13 September 1928, Rec. 1927, para 47.

5 Application 003/2014. Judgment of 7 December 2018 (Reparations) *Ingabire Victoire Umuhoza v. Republic of Rwanda* (hereinafter referred to as *"Ingabire Victoire Umuhoza v Rwanda* (Reparation)*"*, para 20.

6 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (Reparation) (2015) 1 AfCLR 258, para 20; *Lohé Issa Konaté v Burkina Faso* (Reparation) (2016) 1 AfCLR 346, op cit, para 49.

such as depreciation of his capital assets and the loss of business opportunities. He also submits that he suffered severe moral prejudice as a result of the attacks on his honour and reputation, and that the reparation for all the prejudices is estimated at Five hundred and fifty billion (550,000,000,000) CFA Francs.

23. The Respondent State challenges the overall *quantum* of reparations and argues that in the original Application the total amount of the reparation stood at Two hundred and fifty billion (250,000,000,000) CFA Francs and not Five hundred and fifty billion (550,000,000,000) CFA Francs as reflected in the Applicant's submissions of 27 December 2018. The Respondent State notes that the amount claimed corresponds to half its annual domestic budget and is sufficient on its own to establish the grotesque and whimsical nature of the Applicant's claims.

ii. Material prejudice

24. The Applicant submits that the judicial proceedings brought by the courts of the Respondent State against him in the international drug trafficking case have ruined his once prosperous business. He explains that the losses suffered are the result of the drop-in turnover and the loss of the business opportunities with his partners. He also prays the Court to order the Respondent State to reimburse him for expenses relating to domestic judicial proceedings and those incurred during his stay in exile in France.

a. Prejudice relating to the drop-in turnover

25. The Applicant submits that since the commencement of the international drug trafficking case he experienced a decline in turnover on all of his companies, in particular the following ten: SOCOTRAC SARL, SOLEIL FM SARL, SIKKA TV SA, COMON SA, JLR SA, SGI L' ELITE, CAJAF SA, AGRO PLUS SA, IDEAL PRODUCTION SARL and BENIN OIL ENERGY SA.

26. He asserts that the decline in the turnover of COMON SA and SOCOTRAC SARL led to the devaluation of his company shares at the rate of 60% and 45% respectively, that is, a loss of One billion eight hundred and twenty-one million fifty-five thousand six hundred and sixty-nine (1,821,055,669) CFA Francs for the former, and One hundred and thirty-nine million four hundred and seventy-one thousand and twenty-three (139,471,023) CFA Francs for the latter; hence an estimated loss of One billion nine hundred and sixty million five hundred and twenty-six thousand six hundred and ninety-two (1,960,526,692) CFA Francs as of 31

December 2017.

27. The Applicant argues that the decline in his business is mainly due to the loss of confidence from his partners who terminated their goods supply contracts or cancelled credit facilities. He adds that all the companies in which he held shares were subjected to serious and arbitrary attacks causing him significant economic losses.

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28. The Respondent State refutes any idea of reparation for the Applicant and argues that none of the conditions required by law to obtain reparation has been fulfilled. The Respondent State further argues that it is not enough to invoke prejudices to obtain reparation, but this must be sufficiently certain and there must be a link between the prejudice and the acts causing the prejudice.

29. On the basis of the foregoing, the Respondent State prays the Court to dismiss all the Applicant's claims for compensation as baseless and unjustified.

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30. The Court notes that claims in respect of the material prejudice resulting from the violation of a right of the Applicant must be supported by sufficient evidence and backed by explanations that establish the link between the alleged loss and the noted violation.

31. In the instant case, the Court notes that the Applicant attached to his Application several documents including copies of the balance sheet of COMON SA and SOCOTRAC SARL, market research documents and the Articles of Association of other companies in which he holds shares.

32. The Court further notes that the Applicant also attached to his Application a letter dated 31 March 2017 by which Atradius-Assurance-Crédit, that provided credit insurance for orders on behalf of COMON SA, notified the Applicant of the reduction of its coverage to Four hundred thousand (400,000) Euros instead of Two million five hundred thousand (2,500,000) Euros, explaining

that it was because of the international drug trafficking case in which he was implicated.

33. Following what they called an "alert confirming that all events relating to news in Benin, talk of the 2016 drug case", other credit insurers, in this case, *La Coface, Groupama* and *Euler Hermes* also cancelled their credit insurance and demanded the immediate payment of outstanding amounts. For its part, *Heidemark GmbH* reduced its credit insurance from One million three hundred thousand (1,300,000) Euros to Four hundred thousand (400,000) Euros, while *Vim Busschaert* limited its coverage to Twenty thousand (20,000) Euros.

34. The Court notes that the devaluation of the Applicant's shares in COMON SA and SOCOTRAC SARL is linked to the loss of trust on the part of his partners because of the drug trafficking case as well as the suspension of the SOCOTRAC SARL container terminal and the withdrawal of its license as a customs broker.

35. In the Judgment on the merits, the Court held that the Respondent State's suspension of SOCOTRAC SARL's container terminal and the withdrawal of customs brokerage license violated Article 14 of the ICCPR. It further notes that a link between the violations of Articles 5 and 7(1)(c) of the Charter and the prejudice suffered by the Applicant was established in the judgment on the merits.

36. The Court notes that the decrease in turnover of COMON SA and SOCOTRAC SARL caused the Applicant loss of profit and loss of asset valuation of his shares.

Loss of profit

37. Regarding profit losses, evidence adduced by the Applicant dated 13 August 2018 and received by the Registry on 17 August 2018 shows that between 2015 and 2017, COMON SA and SOCOTRAC SARL respectively, recorded a net profit loss of seven billion two hundred million five hundred and sixty-eight thousand seven hundred and sixty-four (7,200,568,764) CFA Francs and eighty-seven million three hundred and seventy-eight thousand nine hundred and five (87,378,905) CFA Francs, calculated on the basis of the profit made by each of them in 2015.

38. In this regard, and in view of the fact that these losses result from violations of the Applicant's rights, the Court awards him the benefit of the *pro rata* reparation of his shares which represent respectively, 60% in COMON SA and 40% in SOCOTRAC, that is, a total of Four billion three hundred and fifty-nine million six hundred and sixty-one thousand seven hundred and sixty-five

(4,359,661,765) CFA Francs.

39. On the other hand, regarding the drop-in turnover and profit losses in JLR SA, SGI L'ELITE, CAJAF SA and IDEAL PRODUCTION SARL, the Court notes that the Applicant merely produced supporting documents and the Articles of Association of the said companies without stating the losses he suffered and the numerical value thereof. As the Applicant did not substantiate his claims with documentary evidence, the said claims are dismissed.

Devaluation of shares

40. Regarding the devaluation of the Applicant's shares, the documents on file, particularly copies of the balance sheets, show that their value dropped by One billion eight hundred and twenty-one million fifty-five thousand six hundred and sixty-nine (1,821,055,669) CFA Francs for COMON SA, and One hundred and thirty-nine million four hundred and seventy-one thousand and twenty-three (139,471,023) CFA Francs for SOCOTRAC SARL.

41. In order to grant the applicant company payment for the entire drop in its shareholding in Sovtransavto-Lugansk, the European Court in its judgment in the matter of *Sovtransavto Holding v Ukraine*[7] held that although it cannot speculate on what the outcome of the trial would have been had the State complied with its obligations under Article 1 of Protocol 1, it will in determining the remedy take into account the situation of the Applicant whose right to a fair trial has been violated.

42. Drawing from the afore-cited judgment, and since the devaluation of the Applicant's shares is related to the drug trafficking case and the violations of his right to a fair trial, the Court grants him reimbursement of the entire loss recorded, namely, One billion nine hundred and sixty million five hundred and twenty-six thousand six hundred and ninety-two (1,960,526,692) CFA Francs as reparation.

b. Prejudice arising from the loss of business opportunities in the oil sector

43. The Applicant submits that, from the beginning of 2016, in

7 ECHR, *Sovtransavto Holding v Ukraine*, Application 48553/99. Judgment of 02 October 2003, paras 55 and 57. In that case, the European Court had taken into account the interventions of the President of Ukraine in the judicial proceedings and other procedural violations in determining the amount of compensation.

partnership with GROUP PLILIA Ltd, he undertook a series of negotiations and initiatives for the purpose of marketing petroleum products, lubricants, domestic and industrial gas within Benin and the landlocked countries through two entities.

44. The first, BENIN OIL ENERGY SA, with the Applicant as the sole shareholder,[8] was to be established in 21 locations in Benin, with sidewalk pumps, 21 service stations and 11 outlets for petroleum by-products, lubricants, domestic and industrial gas. In the short-term, between 2016 and 2018, BENIN OIL ENERGY SA envisaged the construction of 3 service stations with a capacity of 500 to 20,000m^3 and 3 outlets. It estimated acquiring and marketing locally 22,000 metric tons of gasoil per month with a turnover of Ten billion seven hundred and ninety-seven million nine hundred and thirty-seven thousand nine hundred and twenty (10,797,937,920) CFA Francs and a profit of Seven hundred and ninety-five million three hundred and fifty-two thousand six hundred and forty (795,352,640) CFA Francs per month, i.e. at 36.15 CFA Francs per litre.

45. The second, WAF ENERGY SA, of which PHILIA GROUP LTD is the sole shareholder[9] and holds all the social shares, covers 8 localities and has 105 service stations and 93 sale points for petroleum based products, lubricants and domestic and industrial gas. In the short-term, between 2016 and 2018, it was to have 30 service stations, 23 outlets, and estimated that it would acquire and market locally 20,000 metric tons of gasoil per month and export to neighbouring countries 60,000 metric tons of gasoil for a monthly turnover estimated at Thirty-nine billion two hundred and sixty-nine million two hundred and twenty-eight thousand eight hundred (39,269,228,800) CFA Francs and an estimated profit of ten billion two hundred and thirty-eight million seven hundred and twenty-eight thousand eight hundred and seventy-two (10,238,728,872) CFA Francs, that is, 127.98 CFA Francs per litre according to the joint venture platform.

46. The Applicant submits that, under a partnership agreement between his company, COMON SA and PHILIA GROUP LTD, they first signed a Confidentiality Agreement to cover all confidential information exchanged between the two structures as regards oil commercialization projects and then a Memorandum

8 BENIN OIL ENERGY SA was constituted on 9 August 2016 by the Applicant who holds the entire share capital of 300 million CFA F.

9 WAF ENERGY SA was constituted on 3 August 2016 by the PHILIA GROUP LTD which holds all the shares.

of Understanding (MOU) for the establishment of a roadmap to carry out all the activities related to the two projects through a joint venture platform (JV). The two parties agreed on the principle of costs and revenue sharing as follows: 75.5% for COMMON SA and 24.5% for PHILIA GROUP Ltd.

47. The Applicant submits that following the commencement of the international drug trafficking case, he lost the trust of the partner who terminated the said agreement. For the prejudice caused by this loss of business opportunity, he is claiming the amount of One hundred and fifty billion (150,000,000,000) CFA Francs.

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48. The Respondent State recognises the licenses and authorizations granted to the companies WAF ENERGY SA and BENIN ENERGY OIL SA to import, store and distribute petroleum products in Benin, but declines any responsibility for the failure on the part of the Applicant to implement the projects. It contends that since the Applicant and his partner obtained the licences, it did not take any action to either withdraw or annul the said licences, and the Applicant and his partner remained free to carry out, at all times, the activities in respect of their projects separately or jointly.

49. The Respondent State also argues that, with regard to the letter suspending the partnership between the Applicant and PHILIA GROUP, it expresses serious doubts as to the authenticity of the said letter, and states that it is an invention of the Applicant for the purposes of the case. The Respondent State further rejects any responsibility for the termination of the partnership between PHILIA GROUP LTD and COMON SA, arguing that the criminal proceedings instituted against the Applicant resulted in his release on 4 November 2016 after judgment 26/1FD, and as such, it was open to the Applicant to resume its partnership with PHILIA GROUP LTD or to seek out other reputable partners in the oil business.

50. The Respondent State further submits that the amount of the relief claimed by the Applicant is neither substantiated nor justified and prays the Court to dismiss the same.

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51. The Court notes that, to justify the alleged damage, the Applicant attached to the file a letter dated 2 November 2016, which reads as follows: "... In view of the recent judicial proceedings against Mr Sébastien Ajavon regarding certain suspected criminal matters, we regret to inform you that all negotiations and discussions concerning the MOU and/or any other commercial discussion between a subsidiary and/or parent company of Philia and a subsidiary and/or parent company of COMON CAJAF, are suspended with immediate effect". The same correspondence states further that for reason of the ethics observed by Philia Group, it is no longer in a position to pursue any business relationship or discussions with COMON CAJAF.

52. The Court also notes that that letter by which PHILIA GROUP announces the suspension with immediate effect of all commercial negotiations or discussions with the Applicant gives as ground for such suspension, the criminal proceedings instituted by the Respondent State against the Applicant in the context of the alleged case of drug trafficking.

53. The Court also notes that even after the Applicant's acquittal and despite the provisional licenses obtained on 9 December 2016, the Applicant remained the subject of a series of actions and measures taken by administrative and judicial authorities against his companies and his property, and was handed down 20 years prison sentence by CRIET.

54. The Court further notes that in the judgment on the merits, it held that the judicial proceedings instituted by the Respondent State were unfair and violated the Applicant's right to the presumption of innocence and his right to defence guaranteed under Article 7(1)(b) and (c) of the Charter. The Court consequently finds in conclusion that the failure of the investment plan in the petroleum sector is linked to the drug trafficking case and to the legal proceedings initiated by the Respondent State against the Applicant which the Court held to be unfair.

55. Therefore, the question before the Court is whether or not, in the circumstances, the Applicant is entitled to pecuniary reparation by way of compensation for the loss of business opportunity, given that the sale of petroleum products under the aforesaid projects, had not taken off.[10]

56. The Court is persuaded by the definition given by the *Cour de Cassation* in France, that the loss of opportunity "implies the

10 ECHR, Application 25444/94. Judgment of 25 March 1999, *Pélissier and Sassi v France,* paras 77 and 80.

deprivation of a potential with a reasonable probability and not a certainty. It is necessary for the damage suffered to have removed the probability that a positive event will occur or that a negative event will occur".[11] The Supreme Court of Portugal,[12] follows the same line of reasoning as the judgments of the supreme courts of Italy, Germany, Austria, The Netherlands and the United Kingdom, has adopted the same definition in several judgments.

57. Moreover, in the case of *Société Benin Control SA v State of Benin*, the OHADA[13] Arbitral Tribunal, taking into account the fact that the unilateral suspension of the contract by the State of Benin resulted in a loss of profit for the company, concluded that the said loss of profit must be remedied.[14]

58. In the instant case, the Court holds that prior to the PHILIA GROUP LTD decision to suspend its partnership with the Applicant, the likelihood of actualizing the investment in the oil sector was real given the agreement of 28 September 2016, such that both partners could have a reasonable expectation of realizing the expected benefits. The probability of carrying out such project was further confirmed with the obtaining of the requisite licenses on 9 December 2016, but this probability was soon dissipated by the criminal proceedings before CRIET which forced the Applicant into exile. The Court consequently finds that the Applicant actually lost a business opportunity.

59. Accordingly, this Court holds that the Applicant is entitled to appropriate compensatory relief for loss of real opportunity[15].

60. The Applicant estimates the amount of the damage suffered at One hundred and fifty billion (150,000,000,000) CFA Francs, which represents, according to him, a quarter of what the projects WAF ENERGY SA and BENIN OIL ENERGY SA would have realized as profit between 2017 to 2021 under their joint venture

11 Civil Chamber of the Court of Cassation in France, Judgment of 7 April 2016. Appeals 15-14.888 and 15-11.342.

12 Supreme Court of Portugal, Judgment 9 July 2015, Appeal 5105/12.2TBXL.L1. S1 with references to several countries' jurisprudence.

13 Organization for the Harmonization of Business Law in Africa

14 Arbitral Award of 13 May 2014.

15 The European Court had also stated that "the loss of real prospects justifies the award of fair satisfaction"…. "at times evaluated in pecuniary compensation": ECHR, Matter of *Sovtransavto Holding v Ukraine*, *op cit*, para 51; ECHR, Application 42317/98. Judgment of 16 November 2004, *Hooper v United Kingdom*, para 31; Application 45725/99. Judgment of 14 March 2002, *Malveiro v Portugal*, para 30.

platform.

61. The Court notes that, in assessing the amount of reparation for loss of opportunity, it takes into account the amounts claimed by the Applicant at the moment when the Applicant's expectation arose and the bases of the calculation that led to the amount claimed. In the instant case, the Court's calculation base is the profit that can be earned as shown in the business plan of the so-called "joint venture" platform estimated at Ten billion two hundred and thirty-eight million seven hundred and twenty-eight thousand eight hundred and seventy-two (10 238 728 872) CFA Francs per month for an estimated monthly sale of eighty-two million (82,000, 000) liters.

62. With regard to the time reference, the Court notes that upon the signing of the Memorandum of Understanding (MOU) between PHILIA GROUP LTD and COMON SA on 28 September 2016, the Applicant's expectation to benefit from the "solid experience of PHILIA GROUP LTD in the oil trading and logistics sector" was real and marks the beginning of its chances of success in the sector. The period to be considered therefore runs from that date.

63. However, the Court considers that compensation for damages resulting from loss of opportunity is a lump sum that cannot be equal to the benefit that would have been earned had the intervening event not occurred and, hence, could not to be equal to the entire expected gain.

64. In assessing the amount of the compensation, the Court also takes into account the circumstances of this case. In this respect, the Court considers the Applicant's financial capacity to acquire and sell the estimated volumes as *per* the business plan, his knowledge of the business world, and his business experience which led him to develop business strategies in companies that built its reputation.

65. The Court further takes into account the fact that the expected benefits in the business plan are forecasts which may, during implementation of the project, undergo significant changes on account of the hazards inherent in any commercial activity, as well as the unpredictability and changes in the cost of petroleum products on the world market.

66. The Court lastly takes into account fairness and reasonable proportionality[16], and awards the Applicant a lump sum

16 Application 003/2014. Judgment of 7 December 2018 (Reparation), *Ingabire Victoire Umuhoza v Republic of Rwanda* (hereinafter referred to as *"Ingabire Victoire Umuhoza v. Rwanda (Reparation)*", para 72. See also ECHR: Application 40167/06. *Sargsyan v Azerbaijan* and Application 13216/05. *Chiragov and others*

compensation of Thirty billion (30,000,000,000) CFA Francs, tax free, for the loss of business opportunity in the oil sector.

c. Expenditure arising from national judicial proceedings

67. The Applicant prays the Court to order the Respondent State to reimburse him all the expenses incurred before the national courts, including the costs of preparation of documents, the fees of ten (10) lawyers engaged for his defence before CRIET, travel expenses and subsistence allowance for ten (10) lawyers and bailiff's fees.

68. The Respondent State did not comment on this request.

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69. The Court notes that for the claims in respect of preparation of court documents, the fees for ten lawyers, their travel expenses and subsistence allowance, no supporting documents were submitted by the Applicant to buttress the said claims.

70. Consequently, the Court rules in conclusion that the Applicant's request for reimbursement is dismissed.

71. With regard to bailiff's fees, the Court notes that it is clear from the documents on file that the Applicant had to pay several fees for the transcription of audio and video materials, bailiff's reports and bailiff services.

72. The Court notes that the bailiff's fees amounting to Two million three hundred and twenty-two thousand nine hundred and ninety (2,322,990) CFA Francs were incurred by the Applicant in the domestic proceedings on the international drug trafficking case up to the filing of the cassation appeal against the CRIET Judgment of 18 October 2018. Therefore, the said expenses, of which the supporting documents are provided on file, have a causal link with the violations of the Applicant's right to a fair trial guaranteed by Article 7 of the Charter, and his right not to be tried twice for the

v Armenia. Judgment on just satisfaction, Grand Chamber, 12 December 2017. In this jurisprudence, the European Court states that "it is guided by the principle of equity, which above all implies a degree of flexibility and an objective examination of what is fair, equitable and reasonable in light of all the circumstances of the case, that is, not only of the situation of the applicant but also of the general context in which the violation was committed."

same offence provided under Article 14(7) of the ICCPR and must be fully reimbursed.

73. Accordingly, the Court holds in conclusion that the Respondent State must reimburse the Applicant the sum of Two million three hundred and twenty-two thousand nine hundred and ninety (2,322,990) CFA Francs being the amount of various bailiff's fees.

d. Expenditure incurred in exile

74. The Applicant avers that it is the violation of his rights by the Respondent State, especially by having him tried a second time by CRIET, which pushed him into exile and resulted in the expenses that he would not have incurred had he not been in exile. He summarizes the said expenses as purchase of travel documents, hotel expenses and communication charges to discuss with his family and political supporters in Benin.

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75. The Respondent State submits that with regard to the purchase of travel documents not used by the Applicant to return from exile, the Applicant has not sufficiently proven that he was prevented from travelling to Benin. The Respondent State claims that asking the Respondent State to reimburse the amounts of the said travel documents would tantamount to asking the Respondent State to pay for the holidays or leisure trips of a citizen who flouts the law by refusing to assume the criminal consequences of his actions.

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76. The Court notes that for fear of the consequences of the criminal proceedings against him before CRIET, the Applicant found himself in exile in France with four (4) members of his family. The Court, having found that this procedure, which resulted in the Applicant being sentenced to 20 years in prison violated his right to a fair trial and the right not to be tried twice for the same cause,

holds that the Applicant is entitled to appropriate reparation.

77. The Court notes that the reparation being claimed includes the expenses incurred on behalf of four other members of his family. With regard to the latter, the Court deems it necessary to determine the links between them and the Applicant.

78. Generally, to award reparation to persons other than the Applicant, the latter must prove the relationship between the said persons and herself or himself.

79. The Court notes that no identification document to justify the kinship ties between the Applicant and the persons whom he claims are members of his family was tendered for the appreciation of the Court. However, it is apparent from the copies of air tickets attached to the file that Goudjo Ida Afiavi is Ajavon's wife and that Ronald, Evaella and Ludmilla are named as Ajavon Ronald and Misses Evaella and Ludmilla Ajavon. The Court also notes that according to the medical report prepared by the medical psychologist of the *Groupement Hospitalier de Territoire de Saint-Denis* in France, Sébastien Ajavon, Ida Afiavi, Ronald, and Ludmilla were received at the clinic in their respective capacity as father, wife and children. The Court concludes that these four persons have direct family ties with the Applicant and the alleged expenses must be taken into account.

80. The Court notes that in its remarks on this request, the Respondent State did not challenge the direct family link between the persons concerned and the Applicant.

81. In the present case, the Court notes that the Applicant submits as evidence of the expenses relating to his exile, five (5) air tickets at the price of One million five hundred and eighty-one thousand nine hundred (1,581,900) CFA francs each, bought on behalf of the Applicant himself, his wife Ajavon Goudjo Ida Afiavi, his son Ajavon Ronald, as well as his daughters Ajavon Evaella and Ajavon Ludmilla.

82. Accordingly, the Court awards the Applicant reimbursement of the sum of Seven million nine hundred and nine thousand five hundred (7,909,500) CFA Francs, being the total amount spent on the purchase of the five (5) air tickets.

iii. Moral prejudice

a. Moral prejudice suffered by the Applicant

83. The Applicant submits that he suffered significant reputation damage for being presented by Benin's public authorities as a

drug trafficker and, to this effect, attached newspaper clippings with headlines of insulting and defamatory titles with contents that reflect all the fury unleashed against his person on the part of public authorities.

84. The Applicant submits that the violation of his rights by the Respondent State tarnished his reputation as a "business magnate", President of Benin Businessmen's Association and as a politician on the national arena, who obtained 23% of the votes at the first round of the March 2016 presidential elections and ranked 3rd just after the current Head of State of Benin who scored 24%.

85. He refers to numerous administrative measures taken by the customs and tax administrations as well as the *Préfecture de l'Atlantique* to strip him of his movable and immovable property, and alleges that since the commencement of the case against him, he lives in grief, anxiety and dismay, seeing his businesses destroyed and his family attacked.

86. The Applicant states that the judicial proceedings before CRIET forced him into exile where he lives with his family in fear of extradition for the purpose of being imprisoned. He alleges that his trials and subsequent criminal convictions have tarnished his image and dealt a severe blow on his reputation both domestically and with his international business partners.

87. The Applicant claims payment of the sum of One hundred billion (100,000,000,000) CFA Francs as reparation for the damage to his image and his reputation vis-à-vis his economic partners as well as the physical and psychological prejudice that he and members of his family have suffered.

88. The Respondent State refutes the very idea of non-pecuniary prejudice suffered by the Applicant and members of his family. It argues that if the Applicant had suffered morally from the publications of those he describes as "glorifiers of the powers that be", it would be better for him to go after them, instead of claiming reparations from the State of Benin.

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89. The Court recalls its jurisprudence according to which there is a presumption of moral prejudice suffered by an Applicant when the Court finds that his rights have been violated, such that it is no longer necessary to seek to establish the link between

the violation and the damage.[17] The Court also held that the assessment of the amounts to be awarded as reparation for non-pecuniary damage should be made on equitable basis taking into account the circumstances of each case.[18]

90. In the instant case, the Applicant's claim for reparation for non-pecuniary damage resulted from the violation of Articles 5 and 7(1)(a) and (b) of the Charter on respect for dignity and the right to a fair trial established in the Judgment of 29 March 2019.

91. The Court recalls that in its Judgment of 29 March 2019, it concluded that the statements made by certain political authorities, the media propaganda on the drug trafficking case and the resumption of the trial by CRIET tarnished the image of the Applicant, just as they damaged his reputation and the high personality as a politician and businessman he enjoys on the national and international scene. The Court also notes that the Applicant stated that since the beginning of the case against him, he lost the confidence of his business partners and that he is living in anguish seeing all his businesses destroyed and in fear of being imprisoned for twenty years. The Court notes that the Applicant has also been deeply terrified since the CRIET Judgment and the convictions against him, and suffered from being the victim of arbitrariness.

92. In its Judgment of 29 March 2019, the Court ordered the Respondent State to quash the CRIET Judgment 007/3C.COR rendered on 18 October 2018, in a way that wipes out all its effects. That being the case, the Court considers such a measure as a source of moral satisfaction which, however, does not exclude the possibility of reparation in the form of pecuniary compensation.

93. In this respect, the Court notes, for example, that in the case of *Société Benin Control SA v State of Benin*,[19] the OHADA Arbitral Tribunal[20] considered that the unsubstantiated fraud charges brought against Benin Control SA caused the latter non-pecuniary prejudice in the eyes of its partners, and awarded the said company the tax-free lump sum of Two billion (2,000,000,000) CFA Francs

17 *Ingabire Victoire v Rwanda*, op cit, para 59 ; *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (Reparation) (2015) 1 AfCLR 258, op cit, para 10. *Lohé Issa Konaté v Burkina Faso* (Reparation) (2016) 1 AfCLR 346, op cit, para 61.

18 *Ibid*, Judgment *Beneficiaries of late Norbert Zongo v Burkina Faso* (Reparation) para 61.

19 Arbitral Award of 13 May 2014 *op cit*.

20 Organization for the Harmonization of Business Law in Africa.

in reparation for the non-pecuniary prejudice suffered.

94. Having regard to these findings, the Court notes that the amount of the reparation to award the Applicant in the instant case, must be commensurate with the gravity of the charge levelled against him and the degree of humiliation and moral suffering he must have endured as a businessman and politician, President of the Employers' Association and a candidate who ranked 3rd in the 2016 presidential election in his country.

95. For all the above reasons, the Court awards the Applicant reparation in a lump sum of Three billion (3,000,000,000) CFA Francs for the non-pecuniary damage he personally suffered.

b. Moral prejudice suffered by the Applicant's family members

96. The Applicant alleges that his wife Ajavon Goudjo Ida, Afiavi and all his children Ajavon Ronald, Ajavon Evaella and Ajavon Ludmilla were affected and traumatized by these judicial setbacks and taunts from neighbours and friends. He argues that since their exile in France, his family members have fallen into a severe depression marked by insomnia and seizures in the children, in the form of agitation and hysterical howling, notwithstanding the antidepressant care they are given.

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97. The Court reiterates that it has already ruled that members of the immediate or close family who have suffered physically or psychologically from the situation may be entitled to reparation for the moral prejudice caused by the said suffering.[21] However, in order to award reparation for the moral prejudice to the Applicant's family members, they must show proof of kinship.

98. In the instant case, the Court, taking as evidence the copy of the air tickets and the medical report attached to the file, in paragraph 80 of the present Judgment, has already held that Goudjo Ida

21 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (Reparations) (2015) 1 AfCLR 258, para 20; *Lohé Issa Konaté v. Burkina Faso* (Reparation) (2016) 1 AfCLR 346, op cit, para 47.

Afiavi, Ronald, Evaella and Ludmilla are the wife and the children of the Applicant, respectively.

99. The Court notes that the Applicant submits that the conditions and lifestyle of his wife Goudjo Ida Afiavi and his children Ronald, Evaella and Ludmilla, have deteriorated since the seizure of their accounts. The Court also notes that according to the medical report made out on 4 December 2018 by the psychologist of the *Groupement Hospitalier de Territoire de Saint-Denis* in France, the Applicant, his wife Ida and his children Ronald and Ludmilla, who were received in emergency on 11 October and 28 November 2018, "suffer from a major psychological trauma that was complicated by insomnia, headaches and behavioural crises that require neuroscience investigation".

100. The Court also notes that the exile of the Applicant's family members is linked to the violations of the Applicant's rights before CRIET, such that the alleged psychological distress or sufferings are established.

101. In this respect, the Court, ruling on the basis of equity, grants the claim for reparation for the moral prejudice suffered by the Applicant's family members and awards them the lump sum of Fifteen million (15,000,000) CFA Francs for the wife and Ten million (10,000,000) CFA Francs for each child.

i. Non-pecuniary reparation

102. In the instant case, the Applicant submits that since the initiation of the international drug trafficking case, he and his family members have been facing numerous difficulties resulting from the seizure of their bank accounts and from prohibition from carrying out transactions on the accounts.

103. Following the reopening of the proceedings on the prejudice resulting from the failure of the investment in the petroleum sector, the Applicant prays the Court to find that the Respondent State has refused to implement the Court's judgment of 29 March 2019.

ii. Reparation inferred from violation of the "*Non bis in idem"* principle

104. In terms of Article 27 of the Protocol, if the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation. In the present case, the Court recalls that in its judgment of 29 March 2019, following the finding that the Respondent State violated the principle of *"non bis in idem",* it ordered the latter to take all the necessary measures

to annul judgment 007/3C.COR rendered on 18 October 2018 by CRIET in a way to erase all its effects and to report to the Court within six (6) months from the date of notification of that judgment.

105. The Court no longer deems it necessary to make a fresh ruling on this reparation which stems from the dual finding regarding CRIET's lack of jurisdiction[22] to try the Applicant and the fact of trying him twice for the same offence, in violation of the "*Non bis in idem*" principle.

iii. Prejudice resulting from the freezing of bank accounts

a. Seizure of the Applicant's bank accounts and those of his family members

106. The Applicant avers that following the proceedings instituted against him in the international drug trafficking case, the tax administration on 14 August 2017, carried out tax adjustments on his companies resulting in seizures amounting to Two hundred and fifty-four million (254,000,000) Euros in his bank accounts, the accounts of JRL SA, SGI ELITE and COMON SA, as well as those of his children who have since been experiencing serious economic difficulties, and thus shrinking their recreational space. The Applicant prays the Court to consider the prejudice caused by the measure and award him reparation.

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107. The Respondent State submits that the tax procedures against the Applicant's companies are quite legal and prays the Court to dismiss the claim for reparation sought by the Applicant.

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22 IACHR: *Cantoral Benavides v Peru* (Reparation) Judgment of 3 December 2001, Series C No 88, paras 77 and 78.

108. The Court notes that the tax adjustments followed by the seizure effected on the Applicant's accounts, those of his family members and all the other seizures consequent upon the fiscal procedures triggered in the wake of the international drug trafficking case, cover the accounting and financial years 2014, 2015, 2016 and 2017 of the companies JRL SA, SGI ELITE and COMON SA, the latter involved in the importation of frozen products and is, besides, the sole shareholder of SGI ELITE. As for JLR SA, it operates in the frozen food business just like COMON SA.

109. The documents on file reveal that the said seizures were made in all the local banks where the Applicant and members of his family have accounts as well as in the accounts of JLR SA, SGI ELITE and COMON SA without specifying the amount representing the portion exempt from legal attachment.

110. The Court notes that such a seizure which disregards the non-sizeable portion, notwithstanding the reason, is clearly unlawful and places the Applicant in a situation which prevents him from carrying on his normal economic activities and deprives his family of the means of subsistence. The Court is of the opinion that in these circumstances, the Applicant suffered real prejudice arising from the violation of his right to a fair trial guaranteed under Article 7 of the Charter.

111. Accordingly, the Court, ruling on the basis of equity, finds that the Respondent State must take the necessary measures, including lifting forthwith the seizures of the Applicant's accounts and those of his family members.

b. Lifting of the ban on executing transactions in the accounts of AGROPLUS

112. The Applicant submits that following the money laundering proceedings instituted against AGROPLUS, the National Financial Information Processing Unit (*CENTIF*) objected to the execution of transactions in the accounts of the said company for a period of one year. On expiry, the Applicant claims to have requested, but did not obtain, the lifting of the ban on execution of transactions. However, on 2 May 2018, the Examining Magistrate ordered the 14 banks concerned to extend the period of the ban on execution of transactions in the accounts opened in their books and belonging to AGROPLUS. The Applicant submits that this was a measure taken by the Respondent State with the intent

to liquidate his property.

113. The Respondent State submits that the Applicant's claim lacks legal basis and asserts that it deserves to be dismissed.

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114. The Court notes that the ban on the execution of transactions in the bank accounts opened in the name of AGROPLUS, ordered in 2017 and extended in 2018, came just after the drug trafficking case which implicated the Applicant and is perceived as one of the direct consequences of the case.

115. To that end, it is noteworthy that in the instant case, several important services of the Respondent State, upon the commencement of the international drug trafficking case, initiated various proceedings relating in particular to the Applicant's companies and property. The action taken by CENTIF could be seen within this generalized context. In any case, the doubt as to the reputation of the Applicant and the ensuing mistrust are the outcome of the violation of his right to a fair trial noted in the Judgment of 29 March 2019.

116. Thus, the Court holds in conclusion that the link between the ban on the execution of banking operations and the violations noted in its Judgment on the merits has been established and entitles the parties to reparation for the prejudice suffered.

117. Accordingly, the Court holds that the Respondent State must lift the ban on execution of banking operations in the accounts opened in the name of AGROPLUS.

iv. Lifting the suspension of the container terminal and the closure of the radio station Soleil FM and television channel SIKKA TV

118. The Applicant submits that by two decisions dated 28 November 2016, the High Audio-Visual and Communication Authority cut the signals of the radio station Soleil FM and those of the television channel SIKKA TV. He contends that the prohibitions have never been lifted and prays the Court to consider the prejudice caused to him by the aforesaid prohibitions and award him reparation.

119. The Respondent State asserts that the decisions of the media regulatory authority are lawful and official and that, consequently,

the Applicant cannot claim any reparation.

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120. The Court recalls that in regard to the suspension of SOCOTRAC SARL container terminal, the closure of the radio station Soleil FM and the TV channel SIKKA TV, it had concluded in the Judgment of 29 March 2019 that by suspending the activities of those companies, the Respondent State had violated the Applicant's right to property enshrined in Article 14 of the Charter.

121. Accordingly, the Court holds that the Respondent State must reopen the said media outfits and lift the suspension of SOCOTRAC SARL container terminal.

v. Guarantee of non-repetition

122. The Applicant prays the Court to order the Respondent State to stay the application of certain domestic laws considered unconstitutional and inconsistent with international human rights instruments ratified by the Respondent State.

123. The Respondent State submits that the laws invoked by the Applicant were adopted by a sovereign State in accordance with its laws and thus, no authority can order a stay of their application or their nullity.

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124. The Court recalls that in its Judgment of 29 March 2019, it found that the provisions of Sections 12 and 19(2) of Law 2018-13 of 2 July 2018 establishing CRIET are not consistent with international human rights instruments ratified by the Respondent State, notably Article 3(2) of the Charter and Article 14(5) of the ICCPR.

125. The Court noted in particular that the Respondent State violated the Applicant's right to equal protection of the law guaranteed under Article 3 of the Charter for the reason that Section 12 of the Law of 2 July 2018 establishing CRIET does not establish

equality between the parties.

126. With regard to the non-compliance of Section 19(2) with the provisions of ICCPR, the Court recalls that it held that the Respondent State violated the Applicant's right to appeal guaranteed by Article 14(5) of the ICCPR for the reason that Section 19(2) of the 2 July 2018 law establishing CRIET provides that the decisions of that court are not subject to appeal.

127. On the above two points, the Court considers that the Respondent State must take the necessary measures to review the two provisions of the law establishing CRIET to have them comply with the provisions of Articles 3(2) of the Charter and 14(5) of the ICCPR. [23]

vi. Non-application of the judgment of 29 March 2019 and the censure of opposition political parties or their leaders

128. The Applicant submits that despite the measures required by the Court in its Order of 7 December 2018 and in its judgment of 29 March 2019, the Respondent State obstinately failed to comply with the measures ordered and has, instead, taken measures against him, thereby continuously violating his rights.

129. He further alleges that the Respondent State, by a series of acts, violates his civil and political rights as well as those of the leaders of the opposition parties in Benin. The Applicant requests the Court to note the said violations against him and the other leaders of the opposition political parties, including Thomas Yayi Boni and Lionel Zinsou.

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130. The Respondent State objects to the examination of the Applicant's

23 See ACHPR, Communication 231/99. *Lawyers without Borders v Burundi*, November 2000 (28th Session); Communication 218/98. *Civil Liberties Organization, Legal Defense Centre, Legal Defense and Assistance Project v Nigeria*, May 2001 (29th Session).
See also HRC, *Suárez de Guerrero v Colombia*, 30 March 1982, CCPR/C/15/D/45/1979, para 15; Cesario Gómez Vázquez v Spain, 11 August 2000, CCPR/C/69/D/701/1996, para 13.

new allegations and prays the Court to disregard them.

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131. The Court reiterates that in its Order of 1 October 2019 on the reopening of the pleadings, it clearly specified the purpose of the Order and the points on which the parties should provide further clarification. The Court cannot, thus, receive and consider, in the instant case, new allegations which do not fall within the ambit of that Order.

b. The Respondent State's counterclaim

132. The Respondent State submits that the proceedings instituted by the Applicant in this Court are abusive, void of any serious grounds, tend to satisfy a neurosis and weaken the State of Benin financially. It avers that the Applicant seized this Court for the sole purpose of harming the State. Accordingly, the Respondent State prays the Court to order the Applicant to pay the sum of One billion five hundred and ninety-five million eight hundred and fifty thousand (1,595,850,000) CFA Francs as damages.

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133. The Applicant challenged the Respondent State's claim for reparation. He asserted that the proceedings he brought against the Respondent State before this Court are founded and prays the Court to dismiss its counterclaim.

***

134. The Court recalls that in the Judgment of 29 March 2019, it declared that it had jurisdiction to hear the present case and also concluded that the Application fulfilled all the statutory conditions

of admissibility and was thus admissible. The Court also found a series of violations of the Applicant's rights by the Respondent State, and consequently, it rests on the Respondent State to make good the prejudice suffered by the Applicant. Thus, the Application filed before this Court is in order and is not abusive.

135. Accordingly, the Respondent State's counterclaim for damages is unfounded and therefore dismissed.

VI. Costs

136. The Applicant seeks reimbursement of the expenses incurred in the course of the judicial proceedings before this Court. He pleads for reimbursement of the costs of administrative processing of his documents, DHL shipping costs and those of procedural deeds, the fees of three (3) lawyers, as well as the expenses for their travel and stay in Arusha. The Applicant further requests the Court to order the Respondent State to pay the costs.

137. He also claims reimbursement of the sum of Ten billion (10,000,000,000) CFA Francs for additional legal costs occasioned by the partial reopening of proceedings.

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138. The Respondent State requests the Court to dismiss all the Applicant's claims and order him to pay the costs.

***

139. In terms of Rule 30 of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs".

140. As regards the costs of administrative processing of documents, procedural deeds and their dispatch by DHL, the Court holds that even though these expenses were incurred for the purposes of the proceedings before it, the Applicant did not provide any supporting documents. The same obtains for the Applicant's claim for reimbursement of additional procedural costs following the partial reopening of the proceedings in the wake of the Order

of 1 October 2019.

141. As the Court reiterates in this Judgment, reimbursement of the costs of proceedings must be substantiated by evidence.

142. In the instant case, the Court cannot order the reimbursement of lawyers' fees, the cost of administrative processing of documents, procedural deeds and their dispatch by DHL, for lack of justification of the said expenses.[24]

143. In view of the circumstances of this case, the Court decides that each party shall bear its own costs.

VII. Operative part

144. For these reasons,

The Court,

On the reparations claimed by the Applicant

Pecuniary reparations

Material prejudice:

Unanimously

i. *Dismisses* the request for reimbursement of the cost of administrative processing of documents, lawyers' fees and travel expenses before domestic courts;

ii. *Dismisses* the request for reparation of the losses suffered by JLR SA, SGI L'ELITE, CAJAF SA and IDEAL PRODUCTION SARL;

iii. *Orders* the Respondent State to pay the Applicant the sum of thirty-six billion three hundred and thirty million four hundred and forty-four thousand nine hundred and forty-seven (36,330,444,947) CFA Francs, made up as follows:

   1. Four billion three hundred and fifty-nine million six hundred and sixty-one thousand seven hundred and sixty-five (4,359,661,765) CFA Francs for loss of profit on COMON SA and SOCOTRAC SARL between 2016 and 2017;
   2. One billion nine hundred and sixty million five hundred and twenty-six thousand six hundred and ninety-two (1,960,526,692) CFA Francs for the depreciation of the Applicant's shares in COMON SA and SOCOTRAC SARL;
   3. Two million three hundred and twenty-two thousand nine hundred and ninety (2,322,990) CFA Francs being the costs of bailiff's deeds;
   4. Seven million nine hundred and nine thousand five hundred (7,909,500) CFA Francs representing the total amount expended for the purchase of five air tickets;

By a majority of 6 votes for and 4 against, Justices Gérard Niyungeko,

24 Judgment *Ingabire Victoire Umuhoza v Rwanda* (Reparation), op cit, paras 48, 49, 52.

Suzanne Mengue, M-Thérèse Mukamulisa and Chafika Bensaoula dissenting,

iv. Thirty billion (30,000,000,000) CFA Francs as compensation for the loss of investment opportunity in the oil sector;

On moral prejudice
Unanimously

v. *Orders* the Respondent State to pay the following amounts:
   1. Fifteen million (15,000,000) CFA Francs to the Applicant's wife;
   2. Ten million (10,000,000) CFA Francs to each of the Applicant's children – Ajavon Ronald, Ajavon Evaella and Ajavon Ludmilla – for the moral prejudice they suffered;

By a majority of 7 votes for and 3 against, Justices Gérard NIYUNGEKO, M-Thérèse MUKAMULISA and Chafika BENSAOULA dissenting,

vi. Three billion (3,000,000,000) CFA-Francs to the Applicant;

On non-pecuniary reparations
Unanimously

vii. *Declares* that the request for a declaration that the Respondent State has not complied with its obligations resulting from the judgment of 29 March 2019, is dismissed;

viii. *Orders* the Respondent State to take the necessary measures to:
   1. lift forthwith the seizure of the accounts and property of the Applicant and those of members of his family;
   2. lift forthwith the prohibition to carry out operations in the accounts opened in the name of AGROPLUS;
   3. lift forthwith the suspension of SOCOTRAC SARL's container terminal and the closure Soleil FM radio station and SIKKA TV, and report thereon within three (3) months from the date of service of this judgment;

On the guarantee of non-repetition
Unanimously

ix. *Orders* the Respondent State to amend Sections 12 and 19(2) of Law No. 2018-13 of 2 July 2018, establishing CRIET in order to make them compliant with the provisions of Articles 3(2) of the Charter and 14(5) of the ICCPR;

On the counterclaim
Unanimously

x. *Dismisses* the Respondent State's counterclaim.

On the costs of the proceedings and legal costs
Unanimously
xi. *Rules* that each party shall bear its own costs;

On implementation and reports
Unanimously
xii. *Orders* the Respondent State to pay all the net amounts specified in sub-paragraphs iii and iv of this Operative Part, exclusive of tax, within six (6) months from the date of service of this Judgment, failing which it will also have to pay default interest calculated on the basis of the applicable rate set by the Central Bank of West African States (BCEAO) for the entire period of delay and until full payment of the amounts due;
xiii. *Orders* the Respondent State to submit to the Court a report on the status of implementation of point (vii) of this Operative Part within a period of one (1) year from the date of service of this Judgment;
xiv. *Orders* the Respondent State to submit to the Court a report on the status of implementation of the decisions taken in this Judgment in respect of sub-paragraphs iii, iv and vi.1 and 2 of this Operative Part, within six (6) months from the service of this Judgment.

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Separate opinion: NIYUNGEKO

1. I concur with the decisions of the Court on reparations in favour of the Applicant, except for the amount of Thirty Billion (30 000 000 000) CFA Francs granted as reparation of the prejudice for loss of business opportunity in the oil sector on the one hand (paragraph iii.5 of the operative part), and on the other, in regard to the amount of Three Billion (3 000 000 000) CFA Francs granted as reparation for moral prejudice suffered by the Applicant (paragraph iv.3 of the operative part). In my opinion, these amounts are exorbitant and cannot be objectively justified.

I. Reparation of prejudice relating to the loss of business opportunity in the oil sector

2. It emerges from the case file, that in 2016, the company belonging

to the Applicant, *Common SA,* reached an agreement with *Philia Group Ltd*, within the framework of a partnership, a confidential agreement aimed at covering every confidential information that had been exchanged in relation to the projects of the marketing of petroleum products and further a memorandum of understanding for the establishment of a roadmap to guide all the activities relating to the said projects through a *joint-venture* platform [paragraph 46 of the Judgement].

3. It further emerges from the case file that as a result of criminal proceedings against the Applicant by the Respondent State in the matter of presumed drug trafficking, *Philia Group Ltd* announced the suspension, with immediate effect, of all negotiations or ongoing commercial discussions with the Applicant in relation to these projects [paragraphs 51 and 52 of the Judgement].

4. As the Court noted, there is no doubt that the Applicant suffered a loss in business opportunities [paragraphs 54 and 55 of the Judgement]. Furthermore, there is no doubt that the Applicant is entitled to reparation, in this regard [paragraph 59 of the Judgement].

5. The Applicant claims pecuniary reparation of the amount of One Hundred and Fifty Billion (150 000 000 000) CFA Francs [paragraph 60 of the Judgement]. However, as we have noted, the Court granted him a lump sum of Thirty Billion (30 000 000 000) CFA Francs. To justify its decision, the Court stated that it based its decision, *inter alia,* on the following: the amounts claimed by the Applicant and the calculation to justify them; the amount or anticipated profits; the lump sum nature of this type of reparation; the particular circumstances of the case; (the financial clout of the Applicant; his knowledge of the business world and his reputation); the risky nature of any commercial activity; as well as the criteria of reasonable equity and proportionality [paragraphs 61 and 66 of the Judgement].

6. It is precisely the reasonable nature of the amount granted which however poses a problem. In my opinion, in the assessment of these decisive criteria, the Court omitted: (i) to give the full weight of the risky nature of the investment project initiated by the Applicant, and (ii) to take into consideration the amounts claimed by the same Applicant in regard to other claims for reparation for material prejudice.

7. Regarding *the risky nature of the Applicant's investment project*, it would have been necessary, in my view, to seriously consider that the said project was still at the embryonic stage, and that as the Court itself admits, "no sale of petroleum products had been made in this project" [paragraph 55 of the Judgement]. At this stage

and under such conditions, an investor may make skyrocketing plans which may be realised or may not be realised. The investor may also gain or lose. These forecasts are only at the level of imagination. The observation is valid for all investments, and it has not been proven that the oil sector is an exception. So, we cannot therefore rely on this type of forecast, to make a reliable calculation even if it is to grant a given percentage of the amount claimed implicitly.

8. As regards consideration *of the amounts claimed by the same Applicant in relation to the other claims for reparation for material prejudice*, the Court, in my opinion, could have considered the amount that the same Applicant claimed for reparation for loss in profit and a reduction in his shares, in relation to his companies, stemming from the violation of his rights by way of comparison. From this dual perspective, the Applicant claims a total amount of Six Billion CFA Francs (4 359 661 765 + 1 960 526 692 = 6 320 188 457), and the Court, based on affidavits, granted him these amounts, rightly [paragraphs 38 and 42 of the Judgement]. From thereon, it is difficult to understand how someone who claims, unjustifiably so, a reparation of an amount of Six Billion CFA Francs for such a damage relating to his companies which have been functioning for many years and were very prosperous (making him a "prosperous businessman" and a "business magnet" in the country), can at the same time claim for a project which is still at the level of negotiation and which has not gone operational, reparation of an amount *twenty five times higher* [One Hundred and Fifty Million], and that the Court goes as far granting him an amount *five times higher* [Thirty Billion]! How can we also consider in the circumstances such an amount as being reasonable, equitable and proportionate? Asking the question is a way of providing an answer to the very question.

9. In my opinion, by taking into account the risky nature of a project which has not yet seen the light of day, on the one hand, and the amounts claimed and granted in relation to the ongoing prosperous projects for several years, on the other, it would have been reasonable to grant the Applicant, for reparations of the prejudice resulting from the loss of business opportunities, an amount clearly lower to the one granted in relation to his existing running projects.

II. Reparation of moral prejudice suffered by the Applicant

10. The Applicant contends, and the Court notes correctly, that he suffered moral prejudice at two levels [paragraphs 83 to 87;

91]. First of all, as a result of the damage to his reputation and his image as an important political figure, and a successful businessman at the national and international level, as a result of criminal proceedings instituted against him for drug trafficking, and finally as a result of his sentence to twenty years imprisonment. Furthermore, as a result of the moral suffering he underwent, sadness, anxiety and pain to see his enterprises destroyed and to live in exile and the fear to be imprisoned for a period of twenty years.

11. Considering these two aspects, the Applicant claims pecuniary reparation of an amount of One Hundred Billion (100 000 000 000) CFA Francs [paragraph 87], but the Court grants him a lump sum of Three Billion (3 000 000 000) CFA Francs [paragraph 95]. In this regard, the Court holds that "the amount of reparation to be granted to the Applicant, in the instant case, has to be accessed based on the gravity of the accusation made against him, the degree of humiliation and moral suffering which he must have felt as a businessman and politician, Chief Executive Officer of a company and a candidate who came third in the presidential elections of his country in 2016". [paragraph 94 of the Judgement].

12. In my opinion, this amount, though clearly lower than what the Applicant claimed, remains exorbitant, taking into consideration the circumstances of the case. Regarding the *prejudice resulting from the damage to his image and his reputation as a politician and businessman*, this was more or less repaired through the judgement of this Court on the merits of the case on 29 March 2019 [paragraph 292 xxii] which ordered the Respondent State to annul judgement No. 007/3C.COR rendered on 18 October 2018 by CRIET so as to erase all the effects. The Court itself admits "such a measure as a source of moral satisfaction" [paragraph 92], but in my opinion, it fails to take into consideration all the consequences. As a matter of fact, the image and reputation of the Applicant, which had been tarnished by the cases on drug trafficking and the sentences which followed were completely restored in the eyes of his partners following the above mentioned judgement of this Court, ordering the cancelling of the sentences and the material prejudice resulting from the same facts had already been taken into account by the Court, to the extent that no other pecuniary compensation should have been granted to him.

13. The only pecuniary compensation for the Applicant should have been only the second aspect of the alleged moral prejudice, that is, *the moral suffering underwent by the Applicant as a result of the pain in the risk of the destruction of his enterprises, his life in*

exile and the risk of imprisonment if he returned to the Country. And in our opinion, the amount of reparation for this aspect of moral prejudice should have been symbolic and far lower than the amount granted by the Court. Here once more, in my opinion the Court had shown proof of unjustified generosity.

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14. In conclusion on the two issues of disagreement, I hold the view that pecuniary reparation for prejudice legitimately found by the Court must remain what it is, that is, a measure of simple compensation,[1] and not a source of enrichment for the beneficiary.

1 See, inter alia, *Dictionary of International Law*, Jean Salmon, ed., Bruxelles, Bruylant, 2001, p. 975 : "In its general meaning, reparation consists in re-establishing an earlier situation after a prejudice either by reinstating things as they were before or through compensation for the prejudice suffered"

Chalula v Tanzania (provisional measures) (2019) 3 AfCLR 232

Application 003/2018, *Ladislaus Chalula v United Republic of Tanzania*

Order, 17 May 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

The Applicant had been convicted of murder and sentenced to death in 2008. He argued that the trial both before the High Court and the Court of Appeal had been marred by irregularities. At his request, the Court issued provisional measures to the Respondent State to refrain from executing the death penalty until the Application was heard and determined on the merits.

Recused under Article 22: ABOUD

Provisional measures (death penalty, 17)

I. Subject of the Application

1. On 2 March 2018, the Court received an Initial Application filed by Ladislaus Chalula (hereinafter referred to as "the Applicant", against the United Republic of Tanzania (hereinafter referred to as "the Respondent State", for alleged violation of his human rights.

2. The Applicant, currently imprisoned in Uyui Central Prison, Tabora, was convicted of murder and sentenced to death by hanging on 17 March 1995, by the High Court of Tanzania sitting in Tabora. On 10 June 1999, the Court of Appeal in Tabora, Tanzania's highest court, upheld the sentence.

3. The Applicant alleges, *inter alia*, that the trial before the High Court was marred by irregularities, and that both the High Court and the Court of Appeal erred in their assessment of prosecution and visual identification evidence.

4. In the Application for interim measures dated on 6 May 2019, the Court was requested to order provisional measures.

II. Proceedings before the Court

5. The Application was received at the Court's Registry on 2 March

2018.

6. In accordance with Rule 35 of the Rules of Court, the Application was served on the Respondent State on 23 July 2018.

III. Jurisdiction

7. When seized of an application, the Court conducts a preliminary examination of its jurisdiction, pursuant to Articles 3 and 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights (hereinafter referred to as "the Protocol").

8. However, before ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but needs to simply ensure that it has *prima facie* jurisdiction.[1]

9. Article 3(1) of the Protocol stipulates 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. On 21 October 1986, the Respondent State became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Protocol on 7 February 2006. It also made the declaration on 29 March 2010 accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations in accordance with Articles 34(6) and 5(3) of the Protocol read together.

11. The alleged violations which form the subject of the Application concern the rights protected in Articles 3(2), 4 and 7(1)(c) of the Charter. The Court therefore has jurisdiction *rationae materiae* to entertain the Application in the present case.

12. In light of the foregoing, the Court has satisfied itself that it has *prima facie* jurisdiction to examine the Application.

IV. Provisional measures

13. As stated in paragraph 4 above, the Applicant requests the Court

1 See Application 002 /2013*, African Commission on Human and Peoples' Rights v Libya* (Order of provisional measures, 15 March 2013) and Application 006/2012, *African Commission on Human and Peoples' Rights v Kenya* (Order of provisional measures, 15 March 2013); Application 004/2011, *African Commission on Human and Peoples' Rights v Libya* (Order of provisional measures, 25 March 2011).

to order provisional measures.

14. According to Article 27(2) of the Protocol and Rule 51(1) of the Rules of Court "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" or "any interim measure which it deems necessary to adopt in the interest of the parties or of justice".

15. It lies with the Court to decide in each situation whether, in light of the particular circumstances of the case, it must exercise the jurisdiction conferred upon it by the afore-cited provisions.

16. It is apparent from the case-file that the Applicant has been sentenced to death.

17. In view of the circumstances of this case which bear the risk that execution of the death sentence may impair the enjoyment of the rights set forth in Articles 3(2), 7(1)(c) of the Charter, the Court decides to exercise its powers under Article 27(2) of the Protocol.

18. Accordingly, the Court finds that the circumstances require an Order of Provisional Measures pursuant to Article 27(2) of the Protocol and Rule 51 of the Rules of Court, so as to preserve the *status quo,* pending the determination of the main Application.

19. To remove any ambiguity, this Order is provisional and in no way prejudges the decisions of the Court as to its jurisdiction, admissibility of the Application and the merits of the case.

V. Operative part

20. For these reasons,

The Court,

unanimously orders the Respondent State:

i. to stay execution of the death sentence, subject to the decision on the main Application, and

ii. to report to the Court within sixty (60) days of receipt of this Order, on the measures taken to implement it.

Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235

Application 001/2017, *Alfred Agbesi Woyome v Republic of Ghana*

Judgment, 28 June 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant obtained a monetary judgment against the State related to a contract that was later declared unconstitutionally awarded by the Supreme Court. The Applicant alleged that his right to non-discrimination, equality before the law and right to have one's cause heard had been violated by the Supreme Court and that its impartiality was called into question as a result of remarks made by one of the judges. The Court held that the Applicant's right to be heard had not been violated as the Applicant did participate in the hearings and Supreme Court acted within its powers. The Court also held that the inclusion of judges, on the Review Bench, of judges from the Ordinary Bench did not violate the Applicant's rights.

Jurisdiction (domestication, 31, 32)

Admissibility (exhaustion of local remedies, effectiveness, 65-68); submission within reasonable time, 80-82)

Fair trial (right to be heard, 104-106; review, composition of court, 116-119; impartiality, 120, 128, 129)

Dissenting opinion: NIYUNGEKO

Fair trial (impartiality, 1)

Dissenting opinion: BEN ACHOUR

Fair trial (impartiality, 3)

Dissention opinion: MENGUE

Admissibility (exhaustion of local remedies, 28)

Separate opinion: BENSAOULA

Admissibility (conditions not raised by Parties, 8, 9; reasonable time, 16)

I. The Parties

1. The Applicant, Alfred Agbesi Woyome, is a national of the Republic of Ghana. He is also a businessman, a Board Chairman and Director in three (3) companies, namely, Waterville Holding (BVI) Company, Austro-Investment Company and M-Powapak Gmb Company.

2. The Respondent State is the Republic of Ghana, which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 1 March 1989, to 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") on 16 August 2005. The Respondent State also deposited on 10 March 2011, the Declaration by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that in July 2004, the Respondent State won the bid to host the 2008 edition of the Africa Cup of Nations. In 2005, the Central Tender Review Board of the Respondent State accepted the bid of M-Powapak Company and Vahmed Engineering Gmbh & Company to undertake the construction and rehabilitation of two stadia for the tournament. Following this, Vahmed Engineering Gmbh & Company assigned its rights and responsibilities to Waterville Holding Ltd Company (BVI).

4. On 30 November 2005, the Respondent State and Waterville signed a Memorandum of Understanding (MOU) to *inter alia* secure funding for the project on behalf of the Respondent State from Bank Austria Creditanstalt Credit Consalt AG.

5. In December 2005, the Applicant, in alliance with Waterville Ltd Holding (BVI) Company and Austro Investment Company, where he was Board Chairman, engaged M-Powapak Gmb Company, where he was Director, through a contract to provide financial services in respect of rehabilitation and construction services of the two stadia.

6. On 6 February 2006, the Ministry of Education and Sports authorised the construction of the two (2) stadia by Waterville Holding Ltd (BVI) Company.

7. On 6 April 2006, the Respondent State abruptly terminated the contract of December 2005 with Waterville Holding Ltd (BVI) Company, citing high costs and the fact that Waterville Holding Ltd (BVI) Company had failed to secure the funding as agreed in the MOU concluded on 30 November 2005.

8. Waterville Holding Ltd (BVI) Company, through the Applicant, initially protested the termination of the contract but later on conceded and claimed the money for work already done as authorised by the Ministry of Education and Sports. The Respondent State agreed and paid Waterville Holding Ltd (BVI) Company a total of 21.5 million (twenty-one million, five hundred thousand) Euros for certified work up to the point of termination. Following this payment, the company is said to have fully paid the Applicant, as its agent, bringing the relationship between Waterville Holding Ltd (BVI) Company and the Applicant to an end. This payment is not a subject of dispute before this Court.

9. Following a change of government of the Respondent State in 2009, the Applicant, in his personal capacity, claimed from the new government payment of 2% as the total cost for the distinct role he played in raising funds for the project. On 6 April 2010, the Respondent State through the Ministry of Finance agreed to pay the Applicant. This payment is different from the 21.5m Euros payment made to Waterville Holding Ltd (BVI) Company for certified work done in the construction and rehabilitation of the stadia before the termination of the contract. This payment is the one relevant to the dispute before this Court.

B. Procedure at the national level

10. On 19 April 2010, the Applicant, having not received payment of the 2% as agreed with the Ministry of Finance, instituted a suit at the High Court (Commercial Division) against the Respondent State. On 24 May 2010, the Respondent State having failed to file any defence, the High Court rendered a judgment in default in favour of the Applicant.

11. Following negotiations which led to an Out-of-Court Settlement, the default judgment was later substituted for a consent judgment and the Applicant was paid a total sum of Ghana Cedi Fifty-One Million, Two Hundred and Eighty-Three Thousand, Four Hundred and Eighty and Fifty-Nine pesewas (GH₵ 51,283,480.59) in fulfilment of the 2% claimed for raising funds for the project.

12. Following the consent judgment, the former Attorney General of the Republic of Ghana, Mr Martin Amidu, in his personal capacity,[1] invoked the jurisdiction of the Ordinary Bench of

1 Article 2(1)(b) of the Constitution of Republic of Ghana states that "A person who alleges that… any act or omission of any person, is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect" …"

the Supreme Court and challenged the constitutionality of the agreements entered into by the Respondent State and Waterville Holding (BVI) Ltd Company and the Applicant, in relation to the construction of the stadia. Mr Amidu averred that the agreement was in breach of Article 181(5) of the Constitution of Republic of Ghana, because the contracts, being of an international nature, ought to have been approved by Parliament.[2]

13. On 14 June 2013, the Ordinary Bench of the Supreme Court found that the contracts were unconstitutionally awarded and therefore invalid and that the Applicant was not a party to the contracts. The Ordinary Bench, however did not order the Applicant to refund the money already paid to him by the Respondent State, but directed Waterville Holding Ltd (BVI) Company to refund the Respondent State all sums of money paid to it. The Ordinary Bench further directed the Plaintiff, Mr Martin Amidu, to seek redress before the High Court with respect to the issues regarding the Applicant.

14. Dissatisfied with the decision of the Ordinary Bench, with respect to the Applicant, Mr Martin Amidu filed an Application for Review before the Review Bench of the Supreme Court. By a unanimous decision, the Review Bench, in its Judgment of 29 July 2014, confirmed the decision of the Ordinary Bench on the issue of unconstitutionality of the contracts. In addition, it ordered the Applicant to refund the money to the Respondent State.

C. Alleged violations

15. The Applicant alleges that in relation to the judgment of the Review Bench of the Supreme Court, the following rights protected by the Charter have been violated:

i. Right to non-discrimination, guaranteed under Article 2;

ii. Right to equality before the law and equal protection of the law, guaranteed under Article 3; and

iii. Right to have one's cause heard, guaranteed under Article 7.

III. Summary of the procedure before the Court

16. The Application was received at the Registry on 16 January 2017 and transmitted to all entities stated under Rule 35(3) of the Rules

2 Article 181(5) provides that this article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

on 30 June 2017.

17. The Parties were notified of the pleadings and filed their submissions within the time stipulated by the Court.

18. Upon the request of the Applicant filed on 4 July 2017, the Court issued an Order for Provisional Measures dated 24 November 2017, in which it ordered the Respondent State to stay the attachment of the Applicant's property, to take all appropriate measures to maintain the *status quo* and to avoid the sale of the property until the determination of this Application.

19. On 14 March 2018, the Registry informed the Parties that written pleadings were closed.

20. On 8 May 2018, the Court held a public hearing where the Parties were duly represented.

IV. Prayers of the Parties

21. The Applicant prays the Court to:

"i. Find that the Respondent State violated his rights under Articles 2, 3 and 7 of the Charter.

ii. Order interim measures in the interest of justice to forestall irreparable damage being occasioned on the Applicant in refunding the money paid as ordered by the Review Bench of the Supreme Court."

22. On Reparations, the Applicant prays the Court

"i. Find that he is entitled to the sum of Ghana Cedi 51,283,490.59 to be paid to him by the Respondent State as an outcome of the mediation process between the parties and therefore there is no need for him to refund it as ordered by the Review Bench of the Supreme Court;

ii. Order the Respondent State to pay the remaining amount of Ghana Cedi 1, 246, 982.92 of the judgment debt as at 19 October 2010 together with its cumulative interest from 7 October 2010 till date the date of final payment to the Applicant;

iii. Order the Respondent State to refund all monies paid by the Applicant as a result of the Supreme Court orders together with interest;

iv. Order the Respondent State to return with immediate effect all monies seized from the Applicant's accounts through garnishee proceedings to the Ghanaian Banks where the Applicant holds an account;

v. Find that he is entitled to loss of business due to the Review Bench decision, execution process and freezing of company shares – $ 15,000,000.00 for commission, $10,000,000.00 interest from 8 June 2017 to date of the final payment on the basis of the charging order in Civil Motion J8/102/2017 and Ghana Cedi 20,000 per month with interest using the cumulative commercial rate on the basis of the charging order in Civil Motion J8/102/2017;

vi. Order damages to the tune of $ 45,000,000.00 resulting from the comments made by Justice Dotse in his concurring opinion in Case J7/10/2013 of the Ordinary Bench of the Supreme Court;

vii. Order reparations for the defamatory statements by AFAG and the publications by lawyer Ace Anan Akomah on his Facebook page;

viii. Order the Respondent State to expunge from all internet sites, internet search engines such as google, yahoo etc. and other media outlets, any defamatory statements and publications about the Applicant;

ix. The Applicant prays that the Court order the Respondent State to pay legal fees/miscellaneous fees (stationary, secretariat, courier, air tickets, boarding and lodging) for Arbitration fee for the International Chamber of Commerce – $ 1, 100,710.00 and Trip cost for 7 people – $ 14, 700.00; and

x. Any other order that the Court deems fit."

23. In its Response, with regard to the admissibility of the Application, the Respondent State prays the Court to rule:

"i. That the Application has not met the admissibility requirements provided under Article 56 (5) and (6) of the Charter and Rule 40(5) and (6) of the Rules.

ii. That the Application is inadmissible and be duly dismissed."

24. With regard to the merits of the Application, the Respondent State prays the Court to:

"i. Find that the Respondent State did not violate the Applicant's rights as provided under Articles 2, 3 and 7 of the Charter.

ii. Find that the Applicant is not entitled to the sum of Ghana Cedi 51,283,490.59 paid to him by the Government of Ghana and should refund it as ordered by the Review Bench of the Supreme Court…"

25. The Respondent State further prays the Court to find that the proceedings before this Court are a ruse to deflect and frustrate the execution of lawful orders of the laws of the Respondent State and to avoid payment of the monies owed to the tax payers.

26. With regard to the Reparations, the Respondent State prays the Court to:

"i. Find that the Applicant is not entitled to the sum of Ghana Cedi 51,283,490.59 paid to him by the Government of Ghana and should refund it as ordered by the Review Bench of the Supreme Court as the actions taken to recover the said amount were made pursuant to an order to recover made by the Supreme Court of Ghana on grounds that the payments to the Applicant were unconstitutional;

ii. Find that the Applicant is not entitled to loss of business due to the Review Bench decision, execution process and freezing of company shares;

iii. The Respondent State prays the Court to find that the Respondent State cannot be held liable for the defamatory statements by AFAG

and the publications by lawyer Ace Anan Akomah on his Facebook page because there are available avenues under the Ghanaian legal system for the Applicant to seek redress if he so wishes;

iv. Find that the Applicant is not entitled to damages to the tune of $ 45,000,000.00, with respect to Justice Cecil Jones Dotse, the Respondent State submits that the Judge is a justice of the Supreme Court of Ghana and by virtue of that position, he enjoys immunity from any form of legal action or suit in respect of acts or omissions by him in the exercise of judicial power as enshrined in Article 127 (3) of the 1992 Ghanaian Constitution; and

v. Find that the Respondent State in not responsible for the actions of the persons who are not acting on behalf of the State."

V. Jurisdiction

27. 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." In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction…"

A. Objections to material jurisdiction

28. The Respondent State raises four objections to the material jurisdiction of the Court as follows:

i. That the Protocol has not been domesticated;

ii. The Application does not raise human rights claims;

iii. That domestic courts have jurisdiction over human rights matters and;

iv. That this Court cannot review decisions of the Respondent State's Supreme Court.

i. Objection that the Protocol has not been domesticated.

29. The Respondent State contends that its courts are not bound by the Protocol because, although it has ratified the Protocol, it is yet to domesticate it into its laws.

30. The Applicant avers that the Court has jurisdiction because the Respondent State has ratified the Protocol and deposited the Declaration required under Article 34(6) of the Protocol.

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31. The Court notes that Article 34 of the Protocol does not make domestication a condition for its entry into force. It only requires[3] the deposit of instruments of ratification or accession for entry into force of the Protocol as far as the State is concerned.[4] Ratification by the Respondent State and the deposit of instruments of ratification signify its final will to be bound by the Protocol. Furthermore, having deposited the Declaration under Article 34(6) which expresses its commitment to the jurisdiction of this Court after ratification, the Respondent State cannot now claim that the non-domestication of the Protocol ousts the jurisdiction of this Court.

32. In any case, according to general international law, a State cannot invoke its domestic legislation to exempt itself from performing its treaty obligations as codified in Article 27 of the Vienna Convention on the Law of Treaties 1986.[5] The Court concurs with the International Court of Justice that Article 27 reflects "a well-established rule of customary law".[6] Consequently, whether or not the Respondent State has domesticated the Protocol, is immaterial as it remains bound by the provisions of the Protocol which it voluntarily ratified**.**

33. In light of the foregoing, the objection of the Respondent State is dismissed.

ii. Objection that the Application does not raise human rights claims

34. The Respondent State contends that the Applicant's claims are not human rights-related and therefore cannot be considered by this Court.

35. The Applicant for his part submits that the allegations of the violations are based on provisions guaranteed under the Charter, as outlined above.

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3 Article 34(3) Protocol.

4 This Protocol enters into force thirty (30) days after the deposit of fifteen instruments of ratification or accession."

5 Article 27 of the Convention stipulates that a State Party to a Treaty "cannot invoke the provisions of its domestic law to justify the non-execution of the Treaty…"

6 Matter of Pulp Mills (*Argentina v Uruguay*) [2010] ICJ Rep, 20 April 2010, para 121.

36. The Court recalls its jurisprudence in the Matter of Frank *David Omary v United Republic of Tanzania* in which it held that it "… has the power to exercise its jurisdiction over alleged violations, in relation to the relevant human rights guaranteed by instruments ratified by the Respondent".[7] The Court also held similar positions in subsequent cases.[8] The Court notes that the Applicant alleges violations of rights guaranteed by the Charter, specifically, Articles 2, 3 and 7 thereof.

37. Based on the foregoing, the Court dismisses this objection.

iii. Objection that domestic courts have jurisdiction over human rights matters

38. The Respondent State avers that its Constitution explicitly spells out the procedure by which domestic courts exercise their jurisdiction over alleged human rights violations which the Applicant was free to pursue.

39. For his part, the Applicant contends that this Court has jurisdiction to hear this matter on the basis of the rights violated in the Charter and other instruments to which the Respondent State is a party to.

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40. This Court affirms the jurisdiction of the Respondent State's courts to adjudicate human rights issues. Indeed, sub-Rule 40(5) of the Rules require that before any Application is filed in this Court, local remedies must have been exhausted. This means that the Applicant must have seized the Respondent State's courts before filing an Application before this Court. However, as stated in paragraph 37 above, the Court has held in *Frank David*

7 Application 001/2012. Ruling of 28 March 2014 (Jurisdiction and Admissibility) *Frank David Omary v United Republic of Tanzania*, para 75.

8 Application 001/2012, Ruling of 28 March 2014 (Jurisdiction and Admissibility) *Frank David Omary v United Republic of Tanzania*, para 75; see also Application 005/2015 Judgment of 20 November 2015 (Merits) *Alex Thomas v Tanzania*, para 45; Application 046/2016, Judgment of 11 May 2018 (Merits and Reparations), *APDF and IHRDA v Republic of Mali*, para 27; Application 001/2015, Judgement of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania,* para 31; Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania*, para 27.

Omary v United Republic of Tanzania that it has jurisdiction when human rights violations have been alleged. Therefore, the fact that domestic courts have jurisdiction over human rights issues cannot oust the jurisdiction of this Court which it exercises by virtue of Articles 3, 5 and 34(6) of the Protocol. The Respondent State cannot therefore claim that such jurisdiction is limited only to its domestic courts.

41. Based on the above, the Court dismisses this objection.

iv. Objection that the Court cannot review decisions of the Supreme Court

42. The Respondent State avers that decisions of its Supreme Court cannot be subject to an appeal or review by an international tribunal, including this Court, because the Respondent State is sovereign.

43. The Applicant did not address this issue.

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44. The Court recalls its decision in *Ernest Francis Mtingwi v Republic of Malawi*,[9] in which it noted that it is not an appellate body with respect to decisions of national courts. However, the Court emphasised in the matter of *Alex Thomas v United Republic of Tanzania* that "this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned".[10]

45. Consequently, the objection of the Respondent State is dismissed.

46. From the foregoing, the Court concludes that it has material jurisdiction over this matter.

9 Application 001/2013. Decision of 15 March 2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*, para 14.

10 *Alex Thomas v Tanzania* Judgment (Merits) para 130. See also Application 010/2015. Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania*, para 28; Application 003/2014. Judgment of 24 November 2017 (Merits), *Ingabire Victoire Umuhoza v Republic of Rwanda*, para 52;

B. Other aspects of jurisdiction

47. The Court notes that its personal, temporal and territorial jurisdiction are not in contention between the Parties and nothing on file indicates that it does not have jurisdiction. Consequently, it holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has filed the Declaration prescribed under Article 34(6) of the Protocol to allow individuals and Non-Governmental Organisations to institute cases directly before it;

ii. It has temporal jurisdiction given that the alleged violations happened between 14 June 2013 and 29 July 2014, after the Respondent State had ratified the Charter and the Protocol and deposited the Declaration under Article 34(6) of the Protocol, accepting applications from individuals.

iii. It has territorial jurisdiction given that the alleged violations occurred in the territory of the Respondent State.

48. In view of the foregoing, the Court holds that it has jurisdiction to hear this case.

VI. Admissibility

49. In terms of 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". Pursuant to Rule 39(1) of the Rules, "The Court shall conduct a preliminary examination of … the admissibility of the Application in accordance with Article 56 of the Charter and Rule 40 of these Rules".

50. Rule 40 of the Rules which in substance restates the provisions of Article 56 of the Charter sets outs the requirements for admissibility of applications 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;

Application 007/2013. Judgment of 3 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, para 29.

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 mater 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."

51. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections on the admissibility of the Application, that is, the non-exhaustion of local remedies and that the Application has not been filed within a reasonable time after exhaustion of local remedies.

A. Conditions of admissibility in contention between the Parties

i. Objection based on failure to exhaust local remedies

52. The Respondent State contends that the Application does not meet the admissibility requirements stipulated under Article 56(5) of the Charter and Rule 40(5) of the Rules as local remedies had not been exhausted prior to its filing. It substantiates this by pointing to the on-going execution proceedings of Ghana Cedis Fifty-One Million, Two Hundred and Eighty-Three Thousand, Four Hundred and Eighty and Fifty-Nine Pesewas (GH₵ 51, 283, 480.59).

53. The Respondent State also submits that it is simplistic and misleading for the Applicant to say that merely because the decision on which he is aggrieved was rendered by the Supreme Court in exercise of its review jurisdiction, he could not have resorted to the lower courts of the Respondent State for redress. It avers that even after the Supreme Court renders its decision, subordinate courts, in exercise of their specific jurisdictions, have given judgments in favour of claimants.

54. The Respondent State emphasises that if the Applicant was not confident of the subordinate courts handling this matter, he could have invoked the human rights jurisdiction of the Supreme Court. It states that, by the Applicant failing to do so, the Supreme Court was never availed an opportunity to determine whether the

Applicant's human rights were breached.

55. According to the Respondent State, the matter before the Supreme Court concerned the constitutionality of the two contracts and was not related to a violation of human rights. It argues that the Applicant therefore did not exhaust local remedies with respect to the alleged human rights violations.

56. The Respondent State submits further that remedies for the enforcement of human rights are expressly provided for under Article 33 of its Constitution.[11] It avers that the procedure for the enforcement of human rights is fairly simple, can be completed in a timely manner and meets the international standards of availability, effectiveness and sufficiency.

57. The Respondent State, referring to the Court's jurisprudence,[12] contends that the Applicant cannot rely on the exception provided under Article 56(5) of the Charter because he neglected to pursue domestic remedies.

58. The Applicant states that the procedure for seeking redress for human rights violations provided under Article 33 of the Constitution of the Republic of Ghana is discretionary and accordingly, there is no need for him to exhaust this remedy.

59. The Applicant also states that Article 33(3) of the Constitution of the Republic of Ghana provides that a person aggrieved by the decision of the High Court may appeal to the Court of Appeal and further appeal to the Supreme Court. He contends that it is inconceivable that the High Court or Court of Appeal would reverse a decision of the Review Bench of the Supreme Court, noting that in any case, the Supreme Court would have the final say on appeals from those subordinate courts, in this case, to determine whether it violated the Applicant's rights.

60. The Applicant further avers that his rights guaranteed under Articles 2, 3 and 7 of the Charter have been violated by the Supreme

11 Article 33 of the Constitution of Republic of Ghana states that "where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress. 2. The High Court may, under clause (1) of this article, issue such directions or orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warranto as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person, concerned is entitled. 3. A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court…"

12 Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania* (hereinafter referred to as "*Peter Joseph Chacha v Tanzania* Judgment (admissibility)"), para 142.

Court, the highest and final appellate court of the Respondent State and therefore he has exhausted local remedies.

61. In light of the above, the Applicant argues that the procedure under Article 33(1) of the Constitution of the Republic of Ghana is not capable of addressing his complaint. According to him, this is because the procedure envisaged therein is ineffective due to the constitutional impediment posed in challenging a decision of the Supreme Court, (the highest court) at the High Court. He cites *Dawda Jawara v The Gambia*[13] to buttress this point.

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62. The Court notes that the High Court of Ghana has original jurisdiction to consider claims for enforcement of human rights by virtue of Article 33(1) of the Constitution of the Respondent State.

63. The issue for determination before this Court is whether filing a claim at the High Court regarding the alleged violation of the Applicant's human rights by the Supreme Court would have been an effective remedy if the Applicant pursued it before bringing the Application before this Court.

64. In *Norbert Zongo v Burkina Faso* this Court held that "in ordinary language, being effective refers to that which produces the expected result… the effectiveness of a remedy is therefore measured in terms of its ability to solve the problem raised by the Applicant."[14] The Court reaffirmed this in the case of *Lohé Issa Konaté v Burkina Faso* where it also noted that a remedy is effective if it can be pursued by the Applicant without any impediment.[15]

65. The Court finds that, in the circumstances of this case, even though the High Court has original jurisdiction on human rights, it would have been unreasonable to require the Applicant to file a claim before it to call into question, a decision of the Supreme

13 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

14 Application 013/2011. Judgment of 28 March 2014 (Merits), *Beneficiaries of the Late Norbert Zongo and others v Burkina Faso,* para 68.

15 Application 004/2013. Judgment of 5 December 2014 (Merits) *Konate v Burkina Faso* paras 92 and 96.

Court, whose decisions are binding on subordinate courts.

66. This position is buttressed by the fact that in its decision of 29 July 2014, the Review Bench of the Supreme Court indicated that it assumed jurisdiction over the matter to avoid the High Court rendering a contrary decision from its own. It noted as follows "[a]s matters stand now, there is a real danger of the High Court, which is the appropriate forum that this Court referred to may itself give a contrary and conflicting decision quite apart from what this Court has given. The review application in our opinion is an opportunity for the Supreme Court to level up the playing field and give one harmonious judgement for all the persons connected with the 26th April, 2006 CAN 2008 Stadia Agreements and other related matters to know their positions and bring everything to closure."

67. It should also be noted that the Respondent State did not provide proof of decisions showing that the High Court has considered claims of violations of human rights committed by the Supreme Court, as is alleged in the instant case.

68. The Court is therefore of the view that pursuing such a claim at the High Court would not have been capable of addressing the Applicant's grievances and would have therefore been an ineffective remedy. The Court finds that although local remedies were available they would not have been effective to address the Applicant's grievances.

69. Regarding the claim that the execution proceedings relating to the judgment debt of Ghana Cedi Fifty-One Million, Two Hundred and Eighty-Three, Four Hundred and Eighty and Fifty-Nine pesewas (GH₵ 51, 283, 480.59) was pending before domestic courts when this Application was filed, the Court notes that, the basis of the Applicant's claim before it is the decision of the Review Bench of the Supreme Court which was delivered on 29 July 2014. The execution proceedings are immaterial to the Court's determination of whether or not the Applicant exhausted local remedies.

70. The Court therefore finds that the Respondent State's objection that the Applicant failed to exhaust local remedies has no merit and is dismissed.

ii. Objection on the ground that the Application was not filed within a reasonable time

71. The Respondent State contends that the Application was not filed within a reasonable time after exhaustion of local remedies and is therefore not compliant with Article 56(6) of the Charter and Rule

40(6) of the Rules.

72. The Respondent State submits that practice and precedent in international human rights law dictates that a period of six (6) months after exhaustion of local remedies is considered to be a reasonable time for filing such applications and this was not the case with the present Application.

73. The Respondent State argues that the assessment of reasonableness of time for filing this Application should be based on the date of the delivery of the judgment of the Review Bench of the Supreme Court, that is, 29 July 2014,

74. The Respondent State avers that the period of almost three (3) years that the Applicant took after the said judgment to file this Application is an unreasonable delay as there were no impediments in this regard. It adds that the Applicant was neither detained, in custody or under house arrest. According to the Respondent State, the Applicant slept on his rights and his human rights were not violated, rather he was aggrieved by the change in Government which further changed his circumstances.

75. The Respondent State notes that between 2015 and 2016 the Applicant won two criminal cases, Criminal Case Suit No FTRM/115/12 in the High Court of Republic of Ghana, Accra and Criminal Case Suit No H2/17/15 in the Court of Appeal of Republic of Ghana.

76. The Respondent State avers that subsequently, the Applicant filed an action against the Attorney General at the Court of Appeal challenging a Report of a Commission of Inquiry into inordinate payments made from public funds in satisfaction of judgment debts. The Commission of Inquiry examined, inter alia, the payments made to the Applicant and companies associated with him however, these payments did not relate to the substance of his claim before this Court. The Respondent State submits that it is therefore untrue that the Applicant was unable to file an Application before this Court from July 2014 to January 2017.

77. The Applicant insists that the Application was filed within a reasonable time after the exhaustion of local remedies since the decision of the Ordinary Bench of the Supreme Court was delivered on 14 June 2013 and the judgment of the Review Bench of the Supreme Court was rendered on 29 July 2014, whilst the Application before this Court was filed on 5 January 2017.

78. Furthermore, the Applicant contends that before seizing this Court he had to engage with the Commission of Inquiry into inordinate payments made from public funds in satisfaction of judgment debts. He avers that he appealed against these findings before

the Court of Appeal in June 2016[16] on the grounds that neither he nor his lawyer were invited to appear before the Commission to be heard before the determination of the matter.

79. The Applicant submits that he did not "sleep on his rights". He avers that in considering what constitutes reasonable time the Court must take cognisance of the fact that the Charter does not define what constitutes reasonable time and submits that the above-mentioned reasons are adequate justification for the delay in filing the matter before this Court and in the interest of justice and fairness, the Court should admit and consider the Application.

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80. The Court recalls its jurisprudence in the matter of *Norbert Zongo v Burkina Faso*, where it established 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"[17]

81. In determining whether this Application was filed within a reasonable time, the Court considers that ordinary judicial remedies related to the present matter were exhausted when the Review Bench of the Supreme Court rendered its judgment on 29 July 2014.

82. Other proceedings were instituted by the Respondent State relevant to the subject of this Application. In this regard, the Court observes that after the Review Bench of the Supreme Court's judgment, between 2014 and 2017, there were two criminal cases which were instituted by the Respondent State against the Applicant for allegedly defrauding the Government by false pretences and for causing financial loss to the State. The judgment was rendered on 12 March 2015 by the High Court. Subsequently, following an appeal to the Court of Appeal by the Attorney General, the Court of Appeal rendered its judgment in this matter on 10 March 2016. The Court is of the view that it was reasonable for the Applicant to wait for the final determination of these criminal proceedings as they related to the subject matter of the Application before this Court.

83. In addition, the Court notes that, the Respondent State established a Commission of Inquiry with a mandate to look into the inordinate payments made from public funds in satisfaction of judgment

16 *Alfred Woyome v Attorney General* Case H1/42/2017 (Court of Appeal, page 11, Vol. VI attachment AAW1).

17 *Norbert Zongo v Burkina Faso* (Merits), para 92.

debts since the 1992 Constitution came into force, including those made to the Applicant and companies associated with him. The record before this Court shows that the Commission of Inquiry completed its work on 20 May 2015 and submitted its report to the President of the Republic of Ghana on 21 May 2015. The Respondent State published the Commission's report together with the White Paper in 2016.

84. The proceedings of the Commission of Inquiry being quasi-judicial in nature, offered remedies that the Applicant was not required to exhaust. Nonetheless, he had a reasonable expectation that the Commission's findings would have resulted in a decision that was favourable to him and thereby dispensing with the need to file the Application before this Court. The Court considers that despite this expectation, in June 2016, he challenged the findings of the Commission of Inquiry before the Court of Appeal on the basis of the lack of his representative's involvement in the process.

85. The Court notes that although local remedies were exhausted on 29 July 2014 at the Supreme Court, the Applicant had a reasonable expectation that the criminal proceedings filed against him and the proceedings of the Commission of Inquiry would be concluded in his favour.

86. The Court further notes that the time the Applicant spent awaiting the determination of the criminal proceedings instituted against him as well as the case at the Court of Appeal challenging the findings of the Commission of Inquiry is sufficient justification for filing the Application two (2) years, five (5) months and seventeen (17) days after local remedies were exhausted.

87. The Court finds that in the circumstances of this case, the Application has been filed within a reasonable time as envisaged under Article 56(6) of the Charter and Rule 40(6) of the Rules.

88. The Court therefore dismisses the objection on admissibility on the ground of failure to file the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

89. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 40, Sub-rules 1, 2, 3, 4 and 7 of the Rules on, the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively, and that nothing on the record indicates that these requirements have not been complied

with.

90. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

91. It emerges from the file that the Applicant alleges his rights guaranteed under Articles 2, 3 and 7 of the Charter were violated. In as much as the allegations of violations of Articles 2 and 3 are related to the allegation of the violation of Article 7, the Court will begin its assessment of the latter.

A. Alleged violation of Article 7 of the Charter

92. The Applicant makes two allegations which fall under Article 7 of the Charter: namely, the alleged violation of the right to be heard by a competent tribunal and the alleged violation of the right to be tried by an impartial tribunal.

i. The right to be heard by a competent tribunal

93. The Applicant alleges that if the Review Bench of the Supreme Court had allowed the case to continue in the High Court as ordered by the Ordinary Bench of the Supreme Court, the facts of the case would have been determined on the merits and the Applicant's role and claims would have been established. Instead the Review Bench of the Supreme Court assumed jurisdiction thus denying the Applicant the right to be tried by the competent tribunal. Furthermore, the Applicant submits that the said claims filed against him before the Review Bench of the Supreme Court did not involve matters for constitutional interpretation, and thus, did not fall within the jurisdiction of that Bench of the Court.

94. The Applicant further contends that even though the Supreme Court has supervisory jurisdiction over decisions made by other courts, including its Ordinary Bench, invoking the review jurisdiction of the Supreme Court is a specialised procedure. Moreover, the decision of the Review Bench of the Supreme Court to truncate the proceedings and assume jurisdiction over the matter denied him the opportunity to present his case on the merits before the High Court.

95. The Respondent State for its part submits that the Review Bench of the Supreme Court rightly assumed jurisdiction over the matter. According to the Respondent State, the Supreme Court, for purposes of hearing and determining any matter

within its jurisdiction, is vested with the power to exercise any authority vested in all courts established by the Constitution of Ghana as provided under Article 129(4) of the Constitution.[18]

96. The Respondent State further contends that the Supreme Court has the power and authority under the Constitution as provided under Articles 2, 130 and 133, to determine matters relating to land, contract or crime which raise issues of constitutionality including review of decisions of its Ordinary Bench. The Respondent State avers further that when courts deliberate over matters that raise issues of constitutionality, they must halt such deliberations and refer the matter to the Supreme Court.

97. In this regard, the Respondent State asserts that the first case determined at the Ordinary Bench was a constitutional matter where Mr. Amidu, sought various declarations regarding the constitutionality of the contracts between the Respondent State and companies associated with the Applicant and the violation of Article 181(5) of the 1992 Constitution.[19] It contends that the Application before this Court is hinged on a wrong assumption that the Supreme Court's jurisdiction is limited to determining constitutional matters and that its exercise of its review power was undue usurpation of the powers of the High Court.

98. In conclusion, the Respondent State contends that the Applicant had the opportunity to be heard, to present and prosecute his case through legal counsel. It maintains that even if the Applicant disagrees with the judgment of the Supreme Court, it is "ill" for him to interpret it as a violation of his human rights, especially because the Supreme Court in its review decision assumed jurisdiction provided under the Constitution to deal with the Applicant's outstanding issues.

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18 Article 129(4) states that "For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law".

19 Article 181(5) provides that this article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

99. The Court notes that Article 7(1)(a) of the Charter provides, *inter alia*, 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 regulations and customs in force…."

100. The Court notes that in the present case, the key issue is whether the Applicant's right to be heard by a competent tribunal was violated as a result of the decision of the Review Bench of the Supreme Court hearing the matter rather than referring it to the High Court.

101. The Court observes that the determination on whether a domestic court is competent to hear a matter depends on the legal system of the State concerned. In this regard, domestic courts have the power to interpret the laws and determine their jurisdiction.

102. In the instant case, the Court notes that Article 133(1) of the Respondent State's Constitution provides that "The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court". On the other hand, Article 130 of the Constitution stipulates that the Supreme Court has original jurisdiction over matters regarding constitutional disputes. The Court further notes that the Ordinary Bench of the Supreme Court declared that it lacked jurisdiction because it was incompetent to examine the claims relating to the Applicant, as they did not raise a constitutional dispute.

103. The Court observes that, on the contrary, the Review Bench reversed this decision invoking its review jurisdiction, noting that the Ordinary Bench by declaring that it lacked jurisdiction with respect to the Applicant's claims resulted in a grave miscarriage of justice. The Review Bench stated that "As the matter stands now, there is a real danger that the High Court which is the appropriate forum that this court referred the matter to, may itself give a contrary and conflicting decision quite apart from what this court has given".

104. Considering the margin of discretion domestic courts enjoy in interpreting their own jurisdiction, this Court holds that, on the face of it, there is nothing erroneous or arbitrary in the Supreme Court's Review Bench interpretation of its own jurisdiction. This is significant given that the Supreme Court is the highest court in

the Respondent State.

105. Furthermore, the Applicant has also not demonstrated how the Supreme Court violated any specific legal procedures or acted arbitrarily in assuming its review jurisdiction.

106. Lastly, the Court observes that the Applicant does not contest that he participated in the proceedings at both Ordinary and Review Benches of the Supreme Court and was assisted by a team of lawyers. In both Benches, he challenged the claims of Mr Amidu and at all stages of the proceedings, he was given the opportunity to file his submissions and seek redress.

107. In these circumstances, the Court holds that the Applicant's right to be heard by a competent tribunal, guaranteed under Article 7(1) of the Charter was not violated by the Respondent State.

ii. The right to be tried by an impartial tribunal

108. The Applicant alleges that his right to be tried by an impartial court has been violated on two grounds namely:

a. Whether the participation of eight judges at both the Ordinary and Review Benches casts doubt on the impartiality of the Supreme Court and;

b. Whether the remarks made by Justice Dotse call into question the impartiality of the Review Bench of the Supreme Court

a. Whether the participation of eight judges at both the Ordinary and Review Benches casts doubt on the impartiality of the Supreme Court

109. The Applicant alleges that the Review Bench of the Supreme Court was composed of eleven (11) judges, eight (8) of whom had previously heard the matter at the Ordinary Bench of the Supreme Court resulting in the violation of right to be tried by an impartial tribunal.

110. The Applicant avers that both the Ordinary Bench and the Review Bench of the Supreme Court agreed that the High Court was the proper forum to hear the matter. The Review Bench further reasoned that there would be a real danger if, it allowed the High Court to hear the matter on the merits and the High Court reached a different position or conclusion from that of the Ordinary Bench.[20]

20 The Review Bench of the Supreme Court in its judgment …noted that…As the matters stands now, there is a real danger that a High Court which is the appropriate forum that this court referred to may itself give a contrary and conflicting decision quite apart from what this court has given…".

The Applicant further alleges that by truncating the proceedings in the High Court, the Review Bench of the Supreme Court assumed a jurisdiction it did not have, thereby violating his fundamental rights to a fair trial and hearing by an impartial court.

111. The Applicant contends that based on the concurring decision of the Review Bench, the Court cannot be said to have been impartial.

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112. The Respondent State submitted that the Applicant only alluded to the bias on the part of Justice Dotse, noting that the judgment that the Applicant complained about was unanimously rendered by all eleven (11) judges, including the eight (8) judges who heard the matter at the Ordinary Bench of Supreme Court. The Respondent State also contends that the judgment of the Ordinary Bench of the Supreme Court was mostly in favour of the Applicant.

113. The Respondent State avers that the eight (8) judges who sat on both Benches of the Supreme Court ruled seemingly in the Applicant's favour at the Ordinary Bench which prevented the recovery of the money that the Applicant had unconstitutionally obtained from the State. In this circumstance, the Respondent State questions why the Applicant now makes an allegation of bias simply because the same judges had on the second occasion exercised their review powers to order the reimbursement of the monies paid to him.

114. Furthermore, the Respondent State submits that the Supreme Court was not specifically constituted to try this matter and there is no evidence of manipulation or influence from the Executive. The Respondent State consequently contends that neither the composition of the Court nor an examination of the entire proceedings at the Supreme Court discloses a violation of the Applicant's right to be tried by an impartial tribunal.

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115. The Court notes that it is not in dispute between the parties that eight (8) of the judges of the Ordinary Bench also sat in the Review Bench and participated in the consideration of the same matter in question. The point of disagreement between the Parties and the main issue for determination by this Court is whether the composition of the Review Bench, the majority members who were also part of the Ordinary Bench, casts doubt on the impartiality of the tribunal to the extent that one could not reasonably expect a fair decision.

116. The Court observes that in order to determine the issue at hand, it should recall the common distinction between appeal and review proceedings. While an appeal involves a petition to a higher court or tribunal, a review relates to a petition before the same tribunal which made the decision being challenged in the petition, often with changes in the number of judges constituting the bench. The right to appeal presupposes that the appellate tribunal is higher in authority and different in its composition from the tribunal whose decision is appealed against, but in contrast, a review is usually considered by a special bench of a court which has already examined a matter with a view to correcting any error found.

117. In this regard, the Court notes that it is common amongst those jurisdictions[21] having review procedures for review benches to involve in the review proceedings, judges who previously considered the matter. In such circumstances, the mere fact that a judge or some of the judges participated in the review proceedings does not necessarily imply the absence of impartiality even if this may give rise to an apprehension on the side of one of the parties.

118. The Court notes from the records, that the Review Bench of the Supreme Court was constituted in accordance with the Constitution of the Respondent State which stipulates that the Supreme Court of Ghana is composed of a Chief Justice and not less than nine (9) other justices and when it sits as a Review Bench, it shall be fully composed with not less than seven (7) judges.[22] In line with this, the *Practice Direction* on the practice and procedure of empanelment in the Supreme Court in constitutional cases empowers the Chief Justice to empanel all available justices of

21 Constitution of Kenya, 2010 article 47(3)(a) and Part III of the Fair Administrative Action Act No. 4 Of 2015; Rule 66 of the Tanzania Court of Appeal Rules, 2009; Malawi has (a) judicial review of administrative action-Order 53 and of the Rules of the Supreme Court, 1965 or Order 54 of the Civil Procedure Rules, 1998 and (b) constitutional judicial review Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(1)(a) and 199 of the Constitution.

22 Article 128(1) and Article 133(2) of the Constitution of Ghana.

the Supreme Court or at least seven (7) justices in constitutional matters, This was affirmed by the Supreme Court in the case of *Ghana Bar Association and others v Attorney General and others*.[23]

119. The Court observes that the implications of the above-mentioned provisions of the Constitution of Ghana, together with the practice and jurisprudence, are that the judges of the Supreme Court who considered the matter at the Ordinary Bench may form part of the Review Bench as long as the criteria for the minimum number of judges is observed. There is thus no irregularity or a breach of law as far as the composition of the Review Bench is concerned. Furthermore, an objective assessment of the nature of the composition, involving judges who sat at the Ordinary Bench, does not per se raise any reasonable doubt as to the impartiality of the Review Bench to correct any errors found.

120. On the personal bias of judges, the Court notes that there is no evidence on record showing that the judges were predisposed or had preconceived bias against the Applicant, which would lead to a reasonable conclusion they would not render a fair decision. In fact, the judges who sat at the Ordinary Bench and later at the Review Bench were the same judges who unanimously rendered the decision, which was interpreted by the Applicant to be in his favour, when they ruled that his matter should be examined by the High Court. Therefore, the Applicant's contention that the Review Bench was partial is based on a misapprehension that is neither justified nor objective.

121. In view of the above, the Court concludes that the composition of the Review Bench of the Supreme Court by judges who had participated in the Ordinary Bench does not call into question the impartiality of the Review Bench.

b. Whether the remarks made by Justice Dotse call into question the impartiality of the Review Bench of the Supreme Court

122. The Applicant alleges that his right to be tried by an impartial court has been violated by the Respondent State because the lead judgment of the Review Bench was drafted by Justice Dotse who had expressed biased opinions in a concurring judgment, at the Ordinary Bench. In this regard, the Applicant avers that in his concurring opinion at the Ordinary Bench of the Supreme Court,

23 J1/26/2015) [2016] GHASC (20 July 2016).

Justice Dotse alleged that the Applicant had no contract with the Respondent State and as such, was not entitled to the money that was paid to him. Moreover, in the same opinion, Justice Dotse stated that the Applicant had formed an alliance with another party, Waterville to "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise." and further referred to the Applicant as being at the centre of "the infamous Woyome payment scandal".

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123. The Respondent State submits that the Applicant only alluded to the bias on the part of Justice Dotse, noting that the judgment that the Applicant complained about was unanimously rendered by all eleven judges, including eight judges of the Ordinary Bench of Supreme Court. The Respondent also contends that the judgment of the Ordinary Bench of the Supreme Court was mostly in favour of the Applicant.

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124. The Court observes from the record and it is not in contention between the Parties that Justice Dotse in his concurring opinion at the Ordinary Bench referred to the Applicant as having formed an alliance with another party, Waterville Holding Ltd to "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise" and further referred to the Applicant as being at the centre of "the infamous Woyome payment scandal".

125. The issue for determination is thus whether the remarks of Justice Dotse disclose a perception of bias and in light of the circumstances, call into question the impartiality of the Review Bench of the Supreme Court as a whole.

126. According to the *Dictionnaire de Droit International Public*, impartiality signifies the '"absence of bias, prejudice on the part of a judge, referee or expert in dealings with parties appearing

before him."[24]

127. The Court notes that according to the Commentary on the Bangalore Principle of Judicial Conduct;

"A judge's personal values, philosophy, or beliefs about the law may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from sitting. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable."[25]

128. The Court considers that, to ensure impartiality, any Court must offer sufficient guarantees to exclude any legitimate doubt.[26] However, the Court observes that the impartiality of a judge is presumed and undisputable evidence is required to refute this presumption. In this regard, the Court shares the view that "the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge"[27] and that "whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding".[28]

129. In the instant case, the Court notes that Judge Dotse's statements were made on the basis of his assessment of the facts of the matter. The Court is of the view that, although the said statements were unfortunate, and went beyond what can be considered as an appropriate judicial comment they however did not give an impression of preconceived opinions and do not reveal bias.

130. Justice Dotse statements concurred with the unanimous decision of the Ordinary Bench in referring the determination of his matter to the High Court.

131. The Court notes that even though Justice Dotse wrote the lead Judgment rendered by the Review Bench which was constituted of eleven (11) Judges, Judge Dotse was only one (1) out of eleven (11) Judges on that Bench. The Court is of the opinion that a

24 J Salmon (ed) *Dictionnaire de droit international public* (Bruyant, Bruxelles, 2001) 562. See also Application 003/2014. Judgment of 24 November 2017, *Ingabire Victoire Umuhoza v Republic of Rwanda,* paras 103 and 104 and *Black's Law Dictionary* (2nd ed 1910).

25 Commentary on The Bangalore Principles of Judicial Conduct, para 60.

26 *Findlay v UK* (1997) 24 EHRR 221 para 73. See also NJ Udombana, 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' 2006(6) *African Human Rights Law Journal* Vol 6/2.

27 *Wewaykum Indian Band v Canada* 2003 231 DLR (4th) 1 (*Wewaykum*).

28 Okpaluba and Juma 'The problems of proving actual or apparent bias: An analysis of contemporary developments in South Africa' 2011 (14) 7 *PELJ* 261.

single judge's remarks cannot be considered sufficient to taint the entire Bench. Furthermore, the Applicant has not illustrated how the judge's remarks at the Ordinary Bench later influenced the decision of the Review Bench.

132. The Court therefore concludes that the Respondent State has not violated the Applicant's right to be heard by an impartial tribunal guaranteed under Article 7(1)(d) of the Charter.

B. The alleged violation of the right to non-discrimination and the right to equality before the law and equal protection of the law

133. The Applicant argues that his right to non-discrimination and right to equality were violated as a result of Justice Dotse's remarks and by the Supreme Court truncating the proceedings.

134. The Respondent State contends that the Applicant has not demonstrated how he has been discriminated against based on race, ethnic, group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Furthermore, it avers that the Applicant has not demonstrated how he was not accorded equal protection of the law.

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135. Article 2 of the Charter states that "Every individual shall be entitled to the enjoyment of 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."

136. Article 3 of the Charter guarantees the right to equality and equal protection of the law in the following terms:

"1. Every individual shall be equal before the law

2. Every individual shall be entitled to equal protection of the law."

137. In the Matter of *Tanganyika Law Society and Legal and Human*

Rights Centre and Rev Christopher Mtikila v Tanzania[29] the Applicants alleged that the constitutional provisions which prohibited independent candidature had the effect of discriminating against the majority of Tanzanians because only those who are members of and are sponsored by political parties can seek election to the Presidency, Parliament and Local Government positions therefore violating the right to freedom from discrimination enshrined in Article 2 of the African Charter. This Court held that the same grounds of justification do not legitimise the restrictions to not be discriminated against and the right to equality before the law therefore found a violation of Articles 2 and 3(2) of the Charter.

138. In the instant case, the Court holds that the Applicant has not demonstrated or substantiated how he has been discriminated against, treated differently or unequally, resulting into discrimination or unequal treatment based on the criteria laid out under Article 2 and 3 of the Charter.

139. In view of the foregoing, the Court finds that the Applicant's rights to non-discrimination, his right to equality before the law and to equal protection of law as guaranteed under Articles 2 and 3 of the Charter were not violated by the Respondent State.

VIII. Reparations

140. The Applicant prays for several reliefs reflected in paragraph 22 above while the Respondent State's prayers are reflected in paragraph 26 above.

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141. 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."

142. The Court notes that since no violation has been established, the issue of reparation does not arise. Consequently, the Applicant's

29 Application 011/2011. Judgment of 14 June 2013 (Merits), *Christopher Mtikila v United Republic of Tanzania* paras 116-119.

prayers for reparation are dismissed.[30]

IX. COSTS

143. The Applicant did not pray for costs with respect to the Application before this Court.

144. The Respondent State prays that each Party bears its own expenses and costs.

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145. The Court notes that Rule 30 of the Rules provides that "unless otherwise decided by the Court, each Party shall bear its own costs".

146. The Court finds that there is nothing in the instant case, to allow it to decide otherwise. Accordingly, each Party shall bear its own costs.

X. OPERATIVE PART

147. For these reasons,

The Court,

On jurisdiction

Unanimously:

i. Dismisses the objections on the jurisdiction of the Court;

ii. Declares that it has jurisdiction.

On admissibility

By a majority of eight (8) for and one (1) against, Judge Suzanne MENGUE dissenting:

iii. Dismisses the objections on the admissibility of the Application;

iv. Declares that the Application is admissible.

30 *Werema Wangoko Werema and Waisiri Wangoko Werema v Tanzania* (Merits), para 99.

On merits

Unanimously:

v. Finds that the Respondent State has not violated Article 2 of the Charter on the right to non-discrimination;

vi. Finds that the Respondent State has not violated Article 3 of the Charter on equality before the law and equal protection of the law.

vii. Finds that the Respondent State has not violated Article 7 (1) of the Charter on the right to have one's cause heard by a competent tribunal.

viii. Finds that the Respondent State has not violated Article 7 (1) (d) of the Charter on the right to be tried by an impartial tribunal in respect to the composition of the Review Bench of the Supreme Court.

By a majority of seven (7) for and two (2) against, Judges Gérard NIYUNGEKO and Rafaâ BEN ACHOUR dissenting:

ix. Finds that the Respondent State has not violated Article 7(1)(d) of the Charter in respect to the remarks made by Justice Dotse in his concurring opinion before the Ordinary Bench of the Supreme Court.

On reparations,

By a majority of seven (7) for and two (2) against, Judges Gérard NIYUNGEKO and Rafaâ BEN ACHOUR dissenting:

x. Rejects the reliefs sought by the Applicant.

On costs

Unanimously:

xi. Decides that each Party shall bear its own costs.

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Dissenting opinion: NIYUNGEKO

1. I agree with the findings and decisions of the Court, as reflected in the operative part of the judgment*, except* the finding regarding the non-violation of the right to be heard by an impartial judge, as concerns the comments made by Judge Dotse of the

Respondent State's Supreme Court. In my opinion, this Court should have found that there has been a violation in this respect, not only because of the perception of the Judge's partiality in the circumstances (II), but also because of the perceived partiality on the part of the Review Bench of the whole Supreme Court of which he was a member (III). Before explaining myself on these two points, it is necessary to briefly recall the context in which the question of impartiality arose (I).

I. Update of the facts

2. Judge Dotse who had sat at the Ordinary Bench of the Supreme Court in the matter concerning the Applicant, had at the time attached to the judgment of that Court a concurring opinion in which he had referred to the Applicant as having formed an alliance with another party, Waterville Holding Ltd to "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise", and further referred to the Applicant as being at the center of the "infamous Woyome payment scandal" (paragraph 124 d the judgment). Subsequently, Judge Dotse sat in the same case, but this time in the Review Bench of the Supreme Court, along with other Judges, most of whom, like him, had sat at the Ordinary Bench of the Supreme Court. He even drafted the *lead judgment* of the Review Bench.

3. The question which arises in the circumstances is whether or not Judge Dotse's participation in the Supreme Court Review Bench, after having made the aforesaid comment while sitting at the Supreme Court Ordinary Bench, calls to question, first, his impartiality, and then the impartiality of the Supreme Court as a whole.

II. The question of Judge Dotse's impartiality

4. On this point, this Court holds that although the impugned statements of the Judge were "unfortunate", and "went beyond what can be considered as an appropriate judicial comment, they however did not give an impression of preconceived opinions and do not reveal bias" (paragraph 129 of the judgment). To arrive at this conclusion, the Court relies on two main arguments, (i) that the personal philosophy and moral convictions of a judge cannot be regarded as constituting bias (paragraph 127); and (ii) that the impartiality of a judge is presumed, and undisputable evidence is required to refute this presumption (paragraph 128). The problem is that these arguments, in themselves valid in principle, are not

applicable in the instant case.

5. As to the argument invoking the philosophy and moral convictions of a Judge, Judge Dotse's statements have nothing philosophical or moral in them. To say that the Applicant is a looter of the country's resources and that he is at the heart of a scandal, is an opinion on purported or real facts, whichever, and is not an expression of a philosophical or moral principle. The statements are subjective assessments of the Applicant's conduct and actions, assessments which express the negative feelings he has towards the Applicant and which, as the Court acknowledges, were misplaced. As stated in the *Commentary on the Bangalore Principles on Judicial Conduct*, "A judge's personal values, philosophy or beliefs about the law" refers to "an opinion on a legal or social matter directly related to the current case ...".[1] In this case, however, the Judge concerned expresses, through his remarks, no general opinion on a legal and social question, but only a specific and detailed opinion on pure facts.

6. With regard to the presumption of the Judge's impartiality, this in the instant case is clearly refuted by his undisputed statements. The said statements show, without any shadow of doubt that the Judge concerned had a negative opinion of the acts of the Applicant, acts which were at the center of the case in respect of which he subsequently sat at the Supreme Court Review Bench.

7. In any event, what is at stake here is not the actual partiality of the Judge – which is not established in this case – but the *perception of bias* that his words may have generated in the eyes not only of the party concerned, but also of any reasonable observer. According to the *Commentary on the Bangalore Principles of Judicial Conduct* referred to above:

"Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. Impartiality must exist both as a matter of fact and *as a matter of reasonable perception*. *If partiality is reasonably perceived*, that perception is likely to leave a sense of grievance and of injustice, thereby destroying confidence in the judicial system. *The perception of impartiality* is measured by the standard of a reasonable observer." [2]

8. In the same vein, the Commentary further indicates that:

"Impartiality is not only concerned with the actual absence of bias and prejudice, but also with the *perception of their absence*. This dual aspect

1 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct,* September 2007, para 60, italics added.

2 *Ibidem*, para 52. Italics added.

is captured in the often repeated words that justice must not only be done, *but must manifestly be seen to be done*".[3]

9. As regards the conduct of a Judge, the Commentary provides examples of the following acts of bias:

"…A judge must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice. Unjustified reprimands of advocates, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgments and intemperate and impatient behaviour may destroy the appearance of impartiality, and must be avoided".[4]

10. Lastly, on the same point, the said Commentary makes the following clarification:

"Depending on the circumstances, a reasonable apprehension of bias might be thought to arise in the following cases: … (d)If the judge has expressed views, particularly in the course of the hearing, on any question at issue in such strong and unbalanced terms that they cast reasonable doubts on the judge's ability to try the issue with an objective judicial mind…".[5]

11. In light of the foregoing, one is obliged to conclude that Judge Dotse's statements in his individual opinion at the Ordinary Bench of the Supreme Court gave rise to a perception of partiality when he sat at the Review Bench of the Supreme Court, and that consequently, in accordance with the general principles of law in judicial matters, the Judge should thereafter have refrained from sitting at the Review Bench. As noted by the very *Bangalore Principles of Judicial Conduct*:

"A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially"[6].

12. The fact that the Judge persisted in sitting, despite the risk of perception of bias, must be regarded as a violation of the Applicant's right to be heard by an impartial court, within the meaning of Article 7(1)(d) of the Charter, a violation attributable to the Respondent State of which the court is an organ.

13. I am conscious that Judge Dotse's comments were made in a concurring opinion, at least partially favorable to the Applicant, but this does not change the perception of bias on his part, in as much as he accepted to subsequently sit at the Review Bench of

3 *Ibidem*, para 56. Italics added.

4 *Ibidem*, para 62.

5 *Ibidem*, para 90.

6 *Bangalore Principles of Judicial Conduct,* Annex to the Resolution of the UN Economic and Social Council, ECOSOC 2006/23, 27 July 2006, para 2.5.

the Supreme Court on the same case.

III. The issue of the impartiality of the Supreme Court sitting as the Review Bench

14. It now remains to be determined whether the fact that Judge Dotse was a member of the Supreme Court Review Bench affected the impartiality of the entire Bench. In this respect, the Court replies in the negative, relying mainly on the arguments (i) that the statement of a single judge cannot call to question the impartiality of the other Judges (ten judges in this case), even though the Judge concerned wrote the *lead judgment* (paragraph 131); and (ii) that the Applicant did not show how Judge Dotse's remarks at the Ordinary Bench of the Supreme Court subsequently influenced the decision of the Court's Review Bench (paragraph 131). Neither argument is really convincing.

15. With regard to the argument that the bias of a single judge cannot affect the impartiality of the entire bench, it is important to again distinguish between the *actual impartiality* of a jurisdiction – which is not at issue here – and the *perception of the impartiality* of that jurisdiction. In the instant case, what is at issue is not the impartiality of all the other Judges, but rather the perception of impartiality of the Bench of the Court, arising from the perception of partiality of one of its members.

16. It is generally accepted that the perception of partiality of a member of a Court will also affect, indirectly, the perception of impartiality of the Bench in its entirety. The African Commission on Human and Peoples' Rights established a link between these two situations in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. In its view, the impartiality of a judicial body may be called to question, *inter alia*, "1. if the position of the judicial officer allows him or her to play a crucial role in the proceedings; 2. the judicial officer may have expressed an opinion which would influence the decision-making…"[7]

17. It follows from this principle that where a judge has expressed an opinion that might influence decision-making by the judicial body, there is a problem of impartiality, not just of the judge concerned, but of the judicial body as a whole.

18. With respect to the argument that the Applicant did not provide proof that Judge Dotse's remarks influenced the decision of the

7 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principles Applicable to All Legal Proceedings, 2003, para 5.c.

Supreme Court Review Bench, this requirement is impossible to prove. The Applicant cannot in fact be asked to provide such proof, since by definition he cannot access the deliberations of the Court which occur naturally in private session and are covered by the principle of confidentiality.

19. It follows from the foregoing that Judge Dotse's participation in the Supreme Court Review Bench may have given rise in any reasonable person, to a perception of bias on the part of the entire Bench, even though the other judges honestly adjudicated on the basis of absolute impartially.

20. For all these reasons, this Court to my mind should have found that the Applicant's right to be tried by an impartial tribunal within the meaning of Article 7(1)(d) of the Charter has been violated. Consequently, the Court could have, in the process, determined the nature and form of the reparation to be awarded to the Applicant solely in connection with this violation.

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Dissenting opinion: BEN ACHOUR

1. In the case of *Alfred Agbesi Woyome v Republic of Ghana*, I concur with all the grounds and the operative part except on one issue and its impact on the claims for reparation.

2. Indeed, I do not share the view of the majority of the Court on "[t]he question of whether Justice Dotse's observations call into question the impartiality of the Review Chamber of the Supreme Court".[1] According to the Court, the remarks made by one of the judges of the Supreme Court of the Respondent State about the Applicant were "[r]egrettable and went beyond what can be considered an appropriate judicial comment".[2] and that consequently "[t]he Respondent State has not violated the right of the Applicant to be tried by an impartial tribunal, as required by

1 Paras 122 – 132.

2 Para 129 of the Ruling.

section 7(1)(d) of the Charter".[3]

3. I consider that the Court should have found a violation of Article 7(1)(b) of the African Charter on Human and Peoples' Rights (hereinafter the Charter), since the tenor of the judge's remarks in question gave rise to a perception of impartiality not only with regard to the author of the remarks but also with regard to the entire bench.

4. It should be recalled that in his concurring opinion dated 14 June 2013, at the hearing before the Ordinary Chamber of the Supreme Court, Judge Dotse found that the petitioner had formed an alliance with others. The Court "deduced from the record that there is no dispute between the Parties; that Judge Dotse, in his concurring opinion before the Ordinary Court, stated that the Petitioner formed an alliance with another party, namely Waterville Holding Ltd, to "create, plunder and share the resources of the country as if a brigade had been assembled to do so", later adding that the Petitioner was at the centre of the "notorious Woyome payments scandal".[4]

5. In analysing the effects of the observations of the Honourable Justice Dotse on the impartiality of the Review Chamber of the Supreme Court, the Court began by setting out the relevant criteria for resolving this problem. It stressed that "In order to ensure impartiality, the court must offer sufficient guarantees to exclude any legitimate doubt in this regard.[5] However, it points out that a judge's impartiality is presumed and that indisputable evidence is required to rebut this presumption. In this regard, the Court was of the view that "this presumption of impartiality is of considerable importance and the law should not imprudently raise the possibility of bias on the part of the judge.[6] and that "whenever an allegation of bias or a reasonable apprehension of bias is made, the decision-making integrity, not only of an individual judge, but of the court administration as a whole is called into question".[7] Subsequently, the Court appears to be moving in the direction of bias, holding in paragraph 129 of the judgment that

3 Para 132 of the Ruling.

4 Para 124 of the Ruling.

5 *Findlay v the United Kingdom* (1997) 24 EHRR 221, para 73. See also NJ Udombana, 'La Commission africaine des droits de l'homme et des peuples et le développement de normes de procès équitable en Afrique' (2006) 6/2 *Revue africaine de Droit des droits de l'homme*.

6 *Wewaykum Indian Band v Canada* 2003 231 DLR (4th) 1 (*Wewaykum*).

7 Para 128 of the Ruling.

"[w]hile these remarks are regrettable and went beyond what may be considered an appropriate judicial commentary, they did not give the impression of the existence of preconceived ideas and did not reveal any bias".

6. Before setting out the reasons for our dissent, and whether or not these comments are of such a nature as to create an impression of bias that permeates the entire judiciary, namely the Review Division of the Supreme Court of the Republic of Ghana, it is necessary to return to the definition of impartiality (I) and to compare the comments of the judge in question with the criteria of impartiality codified in a number of international instruments (II).

I. The notion of impartiality

7. Aware of the fragility of its position, the Court took the trouble to give the doctrinal definition of impartiality [8] on the basis of the definition given in the Dictionary of Public International Law and the commentary on the Bangalore Principles. However, these definitions are in line with the solution contrary to the position adopted by the Court, ie, bias, or at least the impression of bias of Judge Dotse.

8. More precisely, that is to say, in its legal sense, impartiality is the attitude which must make it possible to eliminate all subjectivity in a judgment. It implies that the judge must set aside his feelings of sympathy or antipathy for all those he is going to judge and get rid of any preconceived ideas, prejudices based on any reason for discrimination (gender, religion, color, morals, opinion, etc.) or stereotypes and that he must pronounce himself as objectively as possible. As the Court itself states, impartiality implies "[t]he absence of bias, prejudice, conflict of interest on the part of a judge, arbitrator, expert or similar person with respect to the parties appearing before him or her or with respect to the issue before him or her".[9]

9. In its *Piersack v Belgium* judgment of 1 October 1982,[10] the European Court of Human Rights (hereinafter the ECHR) has identified impartiality "[b]y the absence of prejudice or bias, it may be assessed in a variety of ways, in particular in light of Article 6(1) of the Convention. In this connection, a distinction can be

8 Para 126 of the Ruling.

9 J Salmon (Dir) *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, 562.

10 Judgement 8692/79, Series A No 53.

drawn between a subjective approach, which seeks to determine what a particular judge was thinking in his or her own mind in the circumstances, and an objective approach, which seeks to ascertain whether he or she offered sufficient guarantees to rule out any legitimate doubt in this respect".[11]

10. In the same *Piersack v Belgium* case brought before the ECHR by the Commission, the Applicant had complained that the President of the Assize Court who convicted him had dealt with his case during the investigation in his capacity as Deputy Public Prosecutor. In its judgment of 1 October 1982, the ECHR found an infringement of Article 6(1)[12] of the Convention: the impartiality of the "court" which, on 10 November 1978, had ruled "on the merits" of a "criminal charge" against the person concerned, namely the Assize Court of Brabant, "could appear questionable".[13]

11. In another case, *Daktaras v Lithuania*[14], the ECHR "calls for two aspects in the requirement of impartiality laid down in Article 6(1) of the Convention. Firstly, the tribunal must be subjectively impartial, that is to say, none of its members must manifest any personal bias or prejudice. Personal impartiality is presumed until proven otherwise. Second, the tribunal must be objectively impartial, that is to say, it must offer sufficient guarantees to exclude any legitimate doubt in this regard.[15] With regard to the second aspect (objective impartiality), "[i]t leads to the question whether there are verifiable facts which give rise to a suspicion of the impartiality of the judges" and the European Court adds "[I]n this matter, even appearances may be important. It is a matter of the confidence that the courts in a democratic society have to inspire in their

11 Para 30 of the ECHR judgment.

12 "Everyone has the right to a fair and impartial hearing ... by an independent and impartial tribunal established by law, in the determination of ... any criminal charge against him. (...)".

13 According to the ECHR "[The Belgian Court of Cassation] dismissed Mr Piersack's appeal on the ground that the documents in its possession did not appear to reveal any such intervention by Mr Van de Walle as first substitute for the public prosecutor in Brussels, even if in any form other than a personal statement or a given act of prosecution or investigation (para 17 above).
d) Even with the latter clarification, such a criterion does not fully meet the requirements of Art 6(1). If the courts are to inspire the necessary public confidence, account must also be taken of considerations of an organic nature. If a judge, after having held an office in the public prosecutor's office which is such as to require him to deal with a certain case within the scope of his powers, finds himself seized of the same case as a sitting judge, litigants are entitled to fear that he does not offer sufficient guarantees of impartiality".

14 ECHR. Third Section, Judgment of 10 October 2000, Application 42095/98.

15 Para 30 of the judgment of the ECHR.

citizens, starting with the parties to the proceedings".[16] In the case in question, the president of the Criminal Division of the Supreme Court had submitted a petition for cassation to the judges of that Division, at the request of the judge of first instance, who was dissatisfied with the decision of the Court of Appeal. The President proposed that the appeal judgement be quashed and the judgement of the court of first instance upheld. He then appointed the judge-rapporteur and formed the panel to examine the case. At the hearing, the prosecution supported the president's petition for cassation, which was ultimately upheld by the Supreme Court. According to the Court, "[t]his opinion cannot be regarded as neutral from the point of view of the parties: by recommending the adoption or reversal of a given decision, the President necessarily becomes the defendant's ally or adversary".[17]

12. Furthermore, in the *Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa*, adopted by the African Commission on Human and Peoples' Rights in 2003,[18] In assessing impartiality or bias, it is recommended that three criteria be taken into account:

- Whether the judge is in a position to play an essential role in the proceedings;
- If the judge may have a preconceived opinion that could weigh heavily on the decision;
- Whether the judge must rule on a decision he or she has made in the exercise of another function; and**.**

13. Under these Guidelines, an adjudicative body is impartial if:

(1) A former prosecutor or lawyer shall sit as a judge in a case in which he or she served as a prosecutor or lawyer;

- The magistrate participated secretly in the investigation of the case;
- There is a connection between the judge and the case or any part of the case which may prejudice the decision;
- A judge sits as a member of an appellate court to hear a case which he has already decided or in which he has been involved in a lower court.

16 Para 32 of the judgment of the ECHR.

17 Para 35 of the ECHR judgment.

18 *Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa*, adopted in 2003 by the African Commission on Human and Peoples' Rights (DOC / OS (XXX) 247).

14. In its *Ingabire v Rwanda* (Merits) judgment of 24 November 2017, the Court referred to these same guidelines when deciding whether the Applicant had been tried by a neutral and impartial court or not.[19] and concluded that "[I]n this case, the evidence presented by the Applicant does not sufficiently demonstrate that any of the above factors existed at her trial".

15. Furthermore, *the Bangalore Principles*[20] on Judicial Ethics, cited by the Court in the present Judgment, establish an international standard of judicial ethics for the conduct of judges and provide a framework for regulating their conduct. In the commentaries on the Bangalore Principles, impartiality is recognized as "the fundamental quality required of a judge and the essential attribute of the judiciary. A reasonable appearance of bias may create a sense of unfairness that destroys confidence in the judicial system. The appearance of impartiality is measured by the reasonable observer. A judge may appear to be biased for a number of reasons, such as an apparent conflict of interest, conduct in the courtroom," or "the judge may appear to be biased for a number of reasons".[21]

16. In addition, "[a] judge shall perform his judicial duties without favour, bias or prejudice. Where a judge appears to be biased,[22] public confidence in the justice system is eroded. ... Impartiality is not only about the actual absence of bias and prejudice, but also about their apparent absence. This dual aspect is captured by the often-repeated formula that justice must not only be done but must also be seen to be done".[23] The test usually adopted is whether a reasonable observer, looking at the matter realistically and pragmatically, would (or might) perceive a lack of impartiality on the part of the judge. It is from the perspective of the reasonable observer that one must consider whether or not there are grounds for apprehension of bias.[24] "A judge's personal values, philosophy

19 Application 003/2014, Judgment of 24 November 2017, *Ingabire Victoire Umuhoza v the Republic of Rwanda*, paras 103 and 104.

20 *Bangalore Draft 2001 on a Code of Judicial Ethics*, adopted by the Judicial Group on Strengthening the Integrity of Justice and revised at the Round Table of First Presidents held at the Peace Palace in The Hague on 25 and 26 November 2002. https://www.unodc.org/documents/corruption/bangalore_f.pdf

21 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007, para 52.

22 It is we who point out.

23 United Nations Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, para 52.

24 Commentary on the Bangalore Principles of Judicial Conduct, paras 55 and 56.

or beliefs about the law cannot constitute bias. The fact that a judge has formed a general opinion on a legal or social issue directly relevant to the case at hand does not render the judge unfit to preside. The opinion, which is acceptable, should be distinguished from bias, which is not acceptable".[25]

II. Judge Dotse's attitude reveals a perception of bias that permeates the entire composition of the Review Chamber

17. The crucial question which arises in relation to the words and attitude of Dotse J is not so much that of the influence exerted by this judge on his other colleagues in the Review Chamber but, above all, that of the appearance or perception of bias. In other words, the issue is not whether the judge in question influenced his other colleagues but whether Dotse J. exceeded the obligation of neutrality which must be his. Even if it is assumed that the opinion of this judge did not directly influence the other judges, the fact remains that the mere fact that this senior judge expressed an opinion that appears to be directed against the Applicant exceeds the limits and characteristics of a legal opinion on the case under consideration.

18. In the instant case, the Court observes moreover that Judge Dotse played a crucial role in the proceedings, both before the Ordinary Chamber, on whose judgment he wrote the concurring opinion, and before the Review Chamber, in which he wrote the main judgment. Furthermore, he expressed his opinion when he referred to the Applicant as having formed an alliance with another party, Waterville, to "create, plunder and share the resources of the Republic of Ghana", and that the applicant was at the centre of the notorious Woyome payments scandal.

19. As indicated above, the Court appears, as a first step, to support the bias of the said judge when it "considers ... that these remarks were regrettable and went beyond what can be considered an appropriate judicial commentary".[26] However, the Court is quick to retract, disregarding the criteria of impartiality, when it considers that the statements "did not give the impression of preconceived ideas and did not reveal any bias".[27] Furthermore, the Court adds

25 Commentary to the Bangalore Principles of Judicial Conduct, para 60.

26 Para 129 of the Ruling.

27 *Idem*.

that "[w]here it is clear from the record that there is no dispute between the Parties that Judge Dotse, in his concurring opinion before the Ordinary Chamber, stated that the Petitioner had formed an alliance with another party, namely Waterville Holding Ltd, to "create, plunder and share the resources of the country as if a brigade had been assembled to do so", only to add later that the Petitioner was at the centre of the "notorious Woyome payments scandal".[28]

20. It is impossible to subscribe to this reasoning. In the present case, Judge Dotse clearly demonstrated his bias against the Applicant by his remarks in the concurring opinion before the Ordinary Chamber. It may well be that Judge Dotse merely expressed views without necessarily being biased. However, it is rather regrettable that the Honourable Judge made these remarks while the Petitioner's case was still pending before the High Court, before which judgment was delivered on 12 March 2015, after the judgment of the Review Chamber of the Supreme Court. The findding reached by the Court seems to me questionable: "The Court notes that Judge Dotse prepared the main judgment rendered by the Review Chamber which was composed of eleven (11) judges, [...]. The Court considers that the remarks of a single judge cannot be regarded as sufficient to influence the Chamber as a whole. Nor has the Applicant shown how the remarks made by the judge in the Ordinary Chamber influenced the decision of the Review Chamber downstream.[29]

21. The Court's reasoning does not, in my view, hold water: however acceptable and logical it is in its premises, it is illogical and contradictory in its conclusions.

22. It would appear that the opinion expressed by Judge Dotse, despite the fact that it was expressed in an opinion appended to the Judgment, goes far beyond what is common in the expression of dissenting or individual opinions on a judicial or quasi-judicial decision. This practice, inherited from Anglo-Saxon law by international courts, enables a judge to express his or her position in legal terms. It does not make it possible to attack one of the litigants at trial and pass a value judgment on him or her.

23. A dissenting or separate opinion is defined as "an expression of personal opinion which the members of a court or tribunal may attach to the decision of the court or tribunal". In this regard "a separate opinion is that of a judge who has voted with the majority

28 Para 124 of the Ruling.

29 Para 131 of the Ruling.

with regard to the operative part of a judgment, but who does not accept all or part of the statement of reasons. By attaching a separate opinion to the judgment, the judge can justify his or her partial dissent and state the reasons for accepting the operative part of the judgment anyway.[30] A "dissenting opinion" is that of a judge who did not vote with the majority because he or she disagrees with the operative part of the decision and, therefore, with its reasons. In the dissenting opinion, he or she may give reasons for dissent and thus make public the points that have been the subject of controversy among the judges.[31]

24. Disagreeing with point (ix) of the operative part, I could only dissent from the Court's decision not to award the applicant any compensation for the damage suffered. In the logic of my position, having been convinced of a violation of a human right, I would have awarded the Applicant fair and adequate reparation.

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Separate opinion: MENGUE

1. On 29 July 2017, at the request of Mr Martin Amidou, the Review Bench of the Supreme Court of Ghana unanimously upheld the decision of the Ordinary Bench of that Court on the question of the constitutionality of the construction contract for stadia, and ordered Mr Woyome to reimburse to the State the monies collected.

2. Not satisfied with this decision, Mr Woyome brought the matter before this Court by an Application received at the Registry on 16 January 2017

3. In that Application, he alleges the violation of the following fundamental rights:

- Right not to be discriminated against guaranteed under Article 2 of the Charter,
- Right to equality before the law and equal protection of the law guaranteed under Article 3 of the Charter,

30 J Salmon (Dir). *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, 781.

31 *Idem*, 782.

- Right to have his cause heard guaranteed under Article 7 of the Charter.

4. He also claimed compensation for the damages resulting from these violations.

5. After prior examination of its jurisdiction pursuant to Articles 3(1) of the Protocol establishing the African Court and Rule 39(1) of its Rules, the Court examined the admissibility of the Application, while scrutinizing the inadmissibility objections raised by the Respondent State and the other conditions of admissibility set out in Article 6 (2) of the Protocol and Rule 40 of the Rules.

6. It is the objection on the non-exhaustion of local remedies which will receive attention here, for I remain convinced that, had the Court dug further into this objection, it would have come up with a solution different from the one contained in the judgment.

7. It should be recalled that exhaustion of local remedies means that the case which the Applicant intends to bring before the international forum has been raised, at least in substance, before national bodies where they exist, if such remedies are adequate, accessible and effective.

8. The question that arises in this case is whether, after the decision of the Review Bench of the Supreme Court of Ghana, the Applicant had other remedies at the national level to raise the issue of violation of his fundamental rights and seek redress for the damages suffered.

9. In this regard, Articles 2(1), 33, 130 and 133(1) of the Constitution of Ghana provide as follows:

- Article 2(1): "A person who alleges that any act or omission of any person is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect".
- Article 33:

(1) "Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

(2) The High Court may, under clause (1) of this article, issue such directions or orders or writs including rites or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warrant as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled.

(3) A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court..."

- Article 130: "Original jurisdiction of the Supreme Court:

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in –

(a) all matters relating to the enforcement or interpretation of this Constitution…"

- Article 133: "Power of the Supreme Court to review its decisions:

(1) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court… ".

10. It is clear from the above-mentioned constitutional provisions that the Ghanaian judicial system provides two specific remedies for the violation of fundamental rights: appeal before the High Court and appeal before the Supreme Court.

11. But are these remedies, although available, effective particularly in this case?

12. The Court in *Nobert Zongo v Burkina Faso* concluded that "the effectiveness of an appeal is its ability to remedy the situation complained of by the person exercising it",[1] measured in terms of the ability to resolve the problem raised by the Applicant. It reaffirmed this in the matter of *Lohé Issa Konate v Burkina Faso,* noting that a remedy is effective if it can be pursued by the Applicant without impediment.[2]

Appeal before the High Court

13. In assessing the effectiveness of the remedy before the High Court, "the Court finds that in the circumstances of this case, it would have been unreasonable to require the Applicant to file a claim at the High Court to call into question a decision of the Supreme Court, whose decisions bind subordinate courts, in respect of a violation of his fundamental rights by the Supreme Court. It would be highly unlikely that the High Court would overturn this decision. "

14. The Court therefore considers that to lodge such an appeal before the High Court could not have settled the Applicant's complaint and that the remedy would therefore have been ineffective.

1 Application No 013/2011. Judgment of 28 March 2014. *Norbert Zongo v Burkina Faso* (on preliminary objections and the merits), para 68.

2 Application No 004/2013. Judgment of 5 December 2014, *Lohé Issa Konaté v Burkina Faso* (preliminary objections), para 111.

The Court finds that remedies were certainly available but that they were not effective in terms of responding to the Applicant's complaints"(see paragraphs 65-66 of the judgment).

15. This analysis does not seem to be relevant. Firstly, the lower court is bound by the decision of the Supreme Court where there is a similarity of subject and cause between the case decided by the Supreme Court and the case newly brought before the lower court. In that case, the decision of the Supreme Court is binding by virtue of the principle of *res judicata.*

16. On the other hand, where the same parties raise a new problem different from that initially settled by the Supreme Court, the lower court can validly adjudicate since there is no similarity of subject or cause. This is the case here.

17. The Supreme Court was seized and it made a final determination on the constitutionality of the contracts at issue. This however did not prevent the parties from undertaking other proceedings at national level, in which the Applicant has often been successful (Here, I am referring to the judgment of 14 June 2013 whereby the Ordinary Bench held that Mr Martin Amidu should appeal to the High Court to seek redress. It is also noted here that it is indeed the Supreme Court judge who indicated that, following his own decision, the aggrieved party should seize the High Court to obtain compensation).

18. Thus, the Applicant who complains of the violation of his fundamental rights, a violation committed in the course of the proceedings before the Supreme Court, had the latitude to appeal to the High Court under the provisions of Article 33 of the Constitution. There is no similarity of subject or cause between this new case and the case originally settled by the Review Bench of the Supreme Court on the constitutionality of the contracts.

19. Secondly, the High Court seized of an application for human rights violation is not required to re-examine the decision of the Supreme Court for invalidation or confirmation. It is required to pronounce on the conformity of the proceedings before the Supreme Court with the provisions of the Constitution as regards fundamental human rights and/or international human rights standards.

20. That is exactly the point of view of the European Court which states in *Gäfgen v Germany* that: exhausting domestic remedies not only requires the use of effective remedies to challenge decisions already rendered, but that the complaint to be made before the Court must first be raised, at least in substance, in the form and within the time limits prescribed by national law before

the appropriate national courts.[3]

21. It follows, therefore, that the High Court could, without prejudice to the principle of *res judicata*, hear Mr Woyome's Application on violation of his fundamental rights, in substance, as presented before this Court.[4]

22. The number of human rights decisions handed down by this Court sufficiently demonstrates the effectiveness of this remedy, that is, the Court's ability to provide solutions to the problems of fundamental rights violation; and the possibility of remedies: the appeal against the decisions of the High Court and the appeal to the Supreme Court constitute a double guarantee of human rights protection.

23. In its conclusion "the Court finds that domestic remedies were available but not effective in responding to the Applicant's complaints".

24. This shows that the Court recognizes that, in addition to the appeal to the High Court, there were other remedies it found to be ineffective without demonstrating this. What exactly is this remedy before the Supreme Court?

Appeal to the Supreme Court

25. If one relies on the hierarchy of jurisdictions to determine that the High Court could not reasonably examine the procedure before the Supreme Court (what we have just demonstrated to be unfounded), should we deduce therefrom that violations committed at the level of the Supreme Court are unassailable at national level? That they cannot be raised or established for the purposes of reparation?

26. Besides, the Court's assertion that "it would be highly impossible for the High Court to overturn that decision" suggests that, in admitting that the Applicant seised the latter in these

3 ECHR, *Gäfgen v Germany*, Application 22978/05, Judgment of 1 June 2010. para 142.

4 In the case of ***Gäfgen v Germany***, ***idem***, the Applicant complained before the Court about the unfairness of his criminal trial based on the violation of Article 6 of the Convention. He alleged that the evidence admitted at his trial had been obtained as a result of the confessions extorted from him. In determining whether the Applicant had exhausted the local remedies, the Court took into account the fact that before the Regional Court, the Applicant prayed the latter to declare that he was totally forbidden from using the various evidence from the criminal trial of which the investigating authorities were aware through the unlawfully obtained statements. The Applicant, in his appeal before the Federal Court, also referred to this application. The Court thus held that the complaint lodged before it had been raised in substance before the national courts and so declared the application admissible.

circumstances, it is the Court (this Court)) which may invalidate or uphold the decision in question, which is contrary to its own case-law according to which it "is not an appellate or cassation court for decisions emanating from the national courts, but that that does not preclude it from examining the relevant procedures before the national authorities to determine whether they are in conformity with the standards prescribed in the Charter or any other human rights instrument ratified by the Respondent State". This is indeed what the High Court, vested with the mission of protecting fundamental rights, was required to do. The violations which the Applicant raises before this Court and which fall within the ambit of its material jurisdiction are those which he was required to raise, even if in substance only, before the national human rights protection authority.

27. To that end, the case-law is sufficiently abundant that exhaustion of domestic remedies does not mean that the Applicant has exercised a remedy likely to culminate in the reversal of a disputed measure or decision, but to bring before the competent national body the complaint which he believes is a violation of his right[5].

28. All in all, in declaring the Application in this case admissible on the ground that the High Court, a lower court, cannot make a determination on fundamental rights violations committed before the Supreme Court, the Court opens a dangerous hiatus, in as much as, henceforth, any victim of human rights violation at that stage (Supreme Court) would now lodge an appeal directly before this Court without having to exhaust the local remedies.

29. It is apparent from the afore-mentioned texts (Articles 2 and 133 of the Ghanaian Constitution) that the Supreme Court adjudicates matters of human rights as a trial court, and as an appellate jurisdiction in respect of its own decisions.

30. In this case, following the decision of the Review Bench of the Supreme Court, the Ghanaian Constitution offers the Applicant the opportunity to exercise his remedy for violation of his fundamental rights before the Supreme Court.

5 ECHR: *Vückovic and others v Turkey* (Preliminary Objections), Application 17153/11 ***et seq***. Judgment of 25 March 2014, para 75. See also ECHR: *Nicklinson and Lamb v United Kingdom,* Application Nos 2478/15 and 1787/15. Decision on Admissibility dated 23 June 2015, para 90; *Ahmet Sadik v Greece*, Application 18877/91. Judgment of 15 November 1996 para 33; *Fressoz and Roire v France*, Application 29183/95. Judgment of 21 January 1999, paras 38 and 39; *Cardot v France* (Preliminary Objections), Application 11069/84. Judgment of 19 March 1991, para 34; *Azinas v Cyprus,* Application 56679/00. Judgment of 28 April 2004, paras 40 and 41.

Separate opinion: BENSAOULA

[**1.**] I share the opinion of the majority of the Judges regarding the admissibility of the Application, the Court's jurisdiction and the Operative Part.

[**2.**] I believe, however, that the way in which the Court dealt with the admissibility of the Application runs counter to the provisions of Articles 56 of the Charter, 6(2) of the Protocol and Rules 39 and 40 of the Rules.

[**3.**] It is noteworthy that, after discussing the Respondent State's objections to the admissibility of the Application (non-exhaustion of local remedies and the filing of the Application within a unreasonable time), the Court held in conclusion in its paragraph 96, that all the other conditions are not in contention between parties and "that the court finds that nothing on the record indicates that any of these conditions has not been fulfilled in this case."

[**4.**] And for that, the Court only reiterated the conditions listed in Articles 56 of the Charter, 6(2) of the Protocol and in Rule 40(6) of the Rules without any discussion or analysis which, in my opinion, is contrary to the very spirit of the afore-cited texts.

[**5.**] In effect, under Rule 39 of the Rules, the Court is required to conduct preliminary examination of its jurisdiction and the conditions of admissibility laid down in Articles 50 and 56 of the Charter and Rule 40 of the Rules.

[**6.**] This clearly implies that:

- If the parties raise objections concerning the conditions governing jurisdiction and admissibility, the Court must examine the same.
- if it turns out that one of them is founded, the Court will so declare, because the said conditions are cumulative.
- if, on the other hand, none is found, the Court has the obligation to discuss the other elements of admissibility not contested by the parties and adjudicate accordingly.
- if the parties do not dispute the conditions, the Court is obliged to do so, and in the order set out in Article 56 of the Charter and Rule 40 of the Rules.

[**7.**] Indeed, it seems to me illogical that the court should select one of the conditions such as reasonable time, for example, whereas identity or any other condition afore-listed may be problematic and therefore not covered.

[**8.**] In the present case, the subject of separate opinion, it is clear that if the Respondent State raised objection in respect to local remedies and reasonable time, which the Court considered

unfounded, the latter did not analyze the other conditions, limiting itself to a quick response, because the said conditions have not been discussed, and nothing on file shows that there are issues regarding compliance therewith.

[**9.**] In my opinion, this quick response in regard to the other conditions not discussed by the parties and the Court, has weakened the Court's decision in respect of the admissibility of the Application.

And as regards assessment of reasonable time

[**10.**] The Court found that the local remedies were exhausted when the Review Bench of the Supreme Court issued its judgment on 29 July 2014 and that as at the date of filing the Application on 5 January 2017, the period of seizure was reasonable.

[**11.**] It is however apparent that in reaching this conclusion, the Court took into consideration the facts which occurred subsequent to the date considered as evidence of the exhaustion of local remedies (2014), the criminal proceedings brought against the Applicant, and the report of the commission of inquiry.

[**12.**] In Rule 40(6) of the Rules, it is clearly stipulated that for an application to be admissible, it must "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."

[**13.**] It is clear that the drafters set down two options as to how to define the commencement of reasonable time.

- date of exhaustion of the local remedies which the Court has set as the date of the judgment of the Review Bench of the Supreme Court, that is, 29/07/2014, the Application having been filed on 5/01/2017.
- the date set by the Court as the commencement of the period within which it shall be seized with the matter. Although the Court set the date of commencement of the referral (date of the judgment of the Review Chamber) it has taken into account the facts that occurred after that date (2014/2017) as "factors that could be taken into account in assessing the reasonableness of the referral period..."

[**14.**] I believe that this way of interpreting the Article referred to above is erroneous and does not respond to the spirit of the text, because the Articles of the Charter and the Rules clearly stipulate the date chosen by the Court and not the facts retained ..... to set the time limit for referral.

[**15.**] In my opinion, in retaining the date of the judgment of the Review Bench (2014) and the date of filing the Application (2017) and taking into account the facts that occurred after the date of the

judgment of the Review Bench, the Court departed from the very meaning of the Article because, by this way of doing things, it has not determined any date as commencement of the time limit for its own referral and has, rather, mixed up the two options offered by the afore-cited Articles. And since the drafters recognize this option for the court, it would have been more logical to consider the date of the judgments rendered between 2014 and 2017 or the date of submission of the report of the commission (2015), and the timeframe for seizure would have been more reasonable, by so doing.

[**16.**] Thus, if the Court in its jurisprudence interpreted the local remedies binding on the Applicant as ordinary remedies, that jurisprudence does not bind it in determining the reasonableness of time since it can, in my opinion, calculate the said reasonable time from the date on which an extraordinary remedy was pursued or a decision was received or other proceedings instituted in close connection with the facts of the Application before the court and that, by so doing, the court would have applied the second rule set forth in Articles 56 of the Charter, 6(2) of the Protocol and Rules 39 and 40(6) of the Rules.

Thomas v Tanzania (reparations) (2019) 3 AfCLR 287

Application 005/2013, *Alex Thomas v United Republic of Tanzania*

Judgment, 4 July 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant filed an Application for reparations following the Court's Judgment on merits, in which the Court found that the Respondent State had violated the Applicant's rights by concluding his trial for a criminal charge in his absence and for not providing him with legal aid. The Applicant claimed pecuniary reparations for himself and for indirect victims of the violation of his rights, counsel's legal fees, transport fees and stationery, restitution of liberty, and measures of satisfaction and guarantee of non-repetition. The Court dismissed the Applicant's claim for material damages, but awarded moral damages to him, his mother and his siblings. The Applicant's wife and son were not granted moral damages as he did not have contact with them.

Reparations (material damages, 26; moral damages to Applicant, 39-42, moral damages to Applicant's wife and son, 52-53; moral damages to Applicant's mother, 56, 57; moral damages for Applicant's siblings, 59, 60; non-repetition, 69; publication of Judgment, 74)

I. Subject of the Application

1. The Application for reparations was filed by Mr. Alex Thomas (hereinafter referred to as the Applicant) against the United Republic of Tanzania (hereinafter referred to as "the Respondent State") following the Judgment of the Court on the merits of 20 November 2015. In the said Judgment, this Court found that the Respondent State violated Articles 1, 7(1) (a), (c) and (d) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter" and Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"), by concluding the trial on the charge of armed robbery in the Applicant's absence and not providing him free legal representation at any stage of the proceedings.

2. Having found these violations, the Court consequently ordered the Respondent 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".

3. Pursuant to Rule 63 of the Rules, the Court directed the Applicant to file his submissions on reparations within thirty (30) days of the judgment of 20 November 2015 and the Respondent State to file the submissions in response thereto within thirty (30) days of receipt of the Applicant's submissions.

II. Brief background of the matter

4. The above-mentioned Judgment of the Court of 20 November 2015 was on the merits of the Application filed by the Applicant on 2 August 2013. In the Application, he alleged that his rights to a fair trial had been violated by the Respondent State contrary to the Charter in the course of proceedings, following which he was convicted of the offence of armed robbery and sentenced to thirty (30) years imprisonment.

III. Summary of the procedure before the Court

5. On 27 November 2015, the Registry transmitted a certified true copy of the Judgment on merits to the Parties.

6. The Parties filed their submissions on reparations within the time stipulated by the Court.

7. Pleadings on reparations were closed on 2 November 2017 and the Parties were duly notified.

IV. Prayers of the Parties

A. Applicant's Prayers

8. The Applicant prays the Court to grant him the following reparations:

"a. Pecuniary reparations

For Alex Thomas as a Direct Victim:

i. Moral prejudice: calculated at one thousand dollars (US$1000) a month for each month from when he was first arrested. He was first arrested on 22 December 1996. This is a total of 19 years and two months which equates to two hundred and thirty thousand dollars (US$230,000).

ii. Fifty-five thousand eight hundred and ninety dollars (US$55,890) for the material prejudice that the Applicant suffered. The current taxable wage in Tanzania is US$81 * 230 months (since he was first

arrested)* 3 (he was earning at least 3 times the minimum wage) = US$55,890.

For indirect victims:

…

iii. Amount of twenty five thousand dollars (US$25,000) payable to his son, Emmanuel Alex Mallya,

iv. Amount of forty two thousand dollars (US$42,000) payable to his wife,

v. Amount of seventeen thousand dollars (US$17,000) payable to his mother,

vi. Amount of seventeen thousand dollars (US$17,000) payable to his sister Flora Amos Mallya,

vii. Amount of seventeen thousand dollars (US$17,000) payable to his sister Anna Elinisa Swai,

viii. Amount of seventeen thousand dollars (US$17,000) payable to his younger brother John Thomas Mallya.

For Counsel's legal fees:

ix. Legal aid fees for 400 hours of legal work: 300 hours for two Assistant Counsels and 100 hours for the lead Counsel. This is charged at two hundred dollars (US$200) per hour for lead Counsel and one hundred and fifty dollars (US$150) per hour for the Assistants. The total amount for all this being twenty thousand (US$20,000) for the lead Counsel and forty-five thousand dollars (US$45,000) for the two Assistants.

x. Nine hundred and fifty two dollars (US$952) as costs for the Advocate who assisted with the investigation and drafting and preparation of Affidavits.

Transport, fees and stationery:

xi. Printing, photocopying and binding amounts to one thousand dollars (US$1,000),

xii. The lead Counsel and his assistant travelled to Addis Ababa, Ethiopia in December 2014 for the public hearing. The flights, taxi, hotel and per diem amounts to two thousand nine hundred and forty seven dollars (US$2,947),

xiii. The transportation costs to and from the Seat of the African Court from the PALU Secretariat amount to one hundred and thirty nine dollars (US$139),

xiv. Communication costs amount to one thousand dollars (US$1,000),

xv. Trips to and from Karanga prison amount to three hundred and eighty dollars (US$380),

xvi. Transporting Alex Thomas's relatives to Arusha to swear Affidavits amounts to fifty two dollars (US$52),

xvii. Any other reparations this Court shall deem necessary.

b. Restitution of Liberty

[T]hat the Court orders for the restitution of Mr. Alex Thomas' liberty.

c. Principle of proportionality

The Applicant prays that the Court applies the principle of proportionality when considering all the Applicant's submissions.

d. Measures of satisfaction and guarantees of non-repetition

[T]hat the government publishes in the national gazette the decision of 20 November, 2015 in both English and Swahili as a measure of satisfaction."

B. Respondent State's Prayers

9. The Respondent State prays the Court to make the following orders and declarations:

"1. That the Judgment that the Court delivered on 20 November 2015 is sufficient reparations (sic)…,

2. That the Applicant be ordered to submit to the Court and the Respondent verification and evidence of the amounts sought,

3. That the Applicant's claims for lawyers' fees should be set at the scale of the legal aid scheme which should be estimated by the Court for the main case and the subsidiary case on reparations,

4. That the prayer for restitution of the Applicant's liberty be denied as per the Judgment of the Court at paragraph 161 on merits at item viii,

5. That the prayer for restoration of the Applicant's liberty is contemptuous of the Judgment of this Court,

6. …,

7. …,

8. A declaration that the steps taken by the Government of Tanzania to remedy delays and endeavours towards the provisions of legal aid is sufficient reparation,

9. That the Applicant should not be granted reparations,

10. That the Applicant's claim for reparations be dismissed in its entirety with costs,

11. That the Court grants any other relief it deems fit."[1]

1 With regard to prayer (4) of the Respondent State's prayers, it should be noted that in Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania (hereinafter referred to as "Alex Thomas v Tanzania* (Merits)*")*, para 161 (viii) states that, "The Court holds…on the Merits… that the Applicant's prayer for release from prison be denied".

V. Reparations

10. Article 27(1) of the Protocol provides, "If the Court finds that there has been violation of a human or peoples' right it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation".

11. The Court recalls its earlier judgments[2] and restates its position that, "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".[3]

12. The Court also restates that, the purpose of reparation being *restitutio in integrum* it "…must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed".[4]

13. Measures that a State must take to remedy a violation of human rights must include restitution, compensation and rehabilitation of the victim, satisfaction and measures to ensure non-repetition of the violations taking into account the circumstances of each case.[5]

14. The Court reiterates that with regard to material prejudice, the general rule is that there must be existence of a causal link between the alleged violation and the prejudice caused and the burden of proof is on the Applicant who has to provide evidence to justify his prayers.[6] Exceptions to this rule include moral prejudice, which need not be proven, presumptions are made in favour of the Applicant and the burden of proof shifts to the

2 Application 007/2013, Judgment of 3 June 2016 (Merits), *Mohamed Abubakari v United Republic of Tanzania* (hereinafter referred to as "Mohamed Abubakari v Tanzania (Merits)"), para 242 (ix).

3 Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda* (hereinafter referred to as "*Ingabire Umuhoza v Rwanda* (Reparations), paras 19.

4 PCIJ, Chrozow Factory Case, *Germany v Poland*, Jurisdiction, Determination of Indemnities and Merits, Rec 1927, p 47.

5 *Ingabire Umuhoza v Rwanda* (Reparations), para 20.

6 Application 011/2011. Ruling of 13 June 2014 (Reparations), *Reverend Christopher R Mtikila v United Republic of Tanzania* (hereinafter referred to as *"Reverend Christopher R Mtikila v Tanzania* (Reparations)"), para 40; Application 004/2013. Judgment of 3 June 2016 (Reparations), *Lohé Issa Konaté v Burkina Faso* (hereinafter referred to as *"Lohé Issa Konaté v Burkina Faso* (Reparations)*"),* para 15.

Respondent State.

15. As a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.[7] Taking into account fairness and considering that an Applicant should not be made to bear the adverse fluctuations that are inherent in financial activities, the Court determines the quantum and currency of the award.

16. In the instant case, the Court notes that the Applicant requests to be paid compensation in United States Dollars (USD). The Court observes that since the Applicant is a Tanzanian national, resident in Tanzania where the violations occurred and the legal tender in Tanzania is Tanzanian Shillings, his claims of compensation in United States dollars is not justified. The Court therefore will award compensation in Tanzanian Shillings.

17. The Applicant prayed the Court to grant pecuniary reparations for (a) material loss he suffered, (b) moral prejudice for himself and indirect victims and non-pecuniary reparations in the form of (a) restitution of liberty (b) guarantees of non-repetition and (c) measures of satisfaction.

A. Pecuniary reparations

i. Material loss-loss of income and life plan

18. The Applicant states that even though the Judgment of 20 November 2015 is to an extent a form of reparation, the Court should consider granting him monetary compensation, based on the principle of equity to give him a feeling of a fair reparation for the prejudice he suffered.

19. In this regard, he avers that he was a businessman and provider for his son, wife, mother and siblings and were he to be released from prison, he would have no source of income and would have to learn how to survive in a world that is significantly different from what it was when he was imprisoned. He relies on the jurisprudence of the Inter-American Court of Human Rights in *Aloeboetoe v Suriname*[8] to support his argument that he should

7 *Ingabire Umuhoza v Rwanda* (Reparations), para 45.

8 Inter-American Court of Human Rights (IACtHR) *Case of Aloeboetoe et al v Suriname,* Judgment of 10 September 1993, (Reparations and Costs), para 68.

be awarded reparations for loss of income.

20. Furthermore, the Applicant claims that his life plan has been severely disrupted and that he has been unable to achieve his plans and goals as a result of his arrest, trial and imprisonment. The Applicant relied on the Inter-American Court of Human Rights' case of *Loayza-Tamayo v Peru*,[9] to support the claim that he is entitled to reparations for the loss of his life plan.

21. Consequently, he prays that the Court to award him United States Dollars Fifty Five Thousand Eight Hundred and Ninety (US$55,890) as material damages for loss of income and life plan.

22. The Respondent State disputes the Applicant's claim, and argues that he has failed to prove the material prejudice he suffered, and the amounts claimed are not based on any justifiable computation.

23. The Respondent State argues that it would be unlawful to allow the Applicant to enrich himself for a crime that he committed, for which he is being lawfully held in custody. The Respondent State avers that this is against public policy, contrary to the principle of just compensation and that the principle of equity would not be applicable. The Respondent State states that life plans cannot be quantified in monetary terms. The Respondent State concludes that the loss of income and loss of life plans were consequences of the Applicant's lawful imprisonment and the Applicant's claim should be dismissed.

* * *

24. The Court recalls its position in the *Zongo* case, where it stated 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".[10]

25. The Court also recalls its jurisprudence in the *Mtikila* case where it stated that:

"It is not enough to show that the Respondent State has violated a provision of the Charter; it is also necessary to prove the damage that the Respondent State is being required by the Applicant to indemnify. In

9 IACtHR *Case of Loayza-Tamayo v Peru,* Judgment of 17 September 1997*,* para 150.

10 Application 013/2011. Judgment of 05 June 2015 (Reparations), *Norbert Zongo and others v Burkina Faso* (hereinafter referred to as *"Norbert Zongo and others v Burkina Faso (Reparations)")* para 24.

principle, the existence of a violation of the Charter is not sufficient *per se*, to establish a material damage".[11]

26. The Court notes that the Applicant has not established the link between the violations established in the Judgment on the merits and the material loss which he claims he suffered. Moreover, he has neither elaborated on his occupation nor provided evidence of his earnings before his arrest.

27. The Applicant has not justified his claim for United States Dollars, Five Thousand Eight Hundred and Ninety (US$55,890) for material prejudice resulting from the loss of income and life plan.

28. In light of this consideration, the prayer regarding material damages is dismissed.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicant

29. The Applicant claims that he has suffered a long imprisonment following an unfair trial and emotional anguish during his trial, appeals and application for review which bore no fruit. He states that he has lost relations with his wife who has since remarried and his son whom he has not seen since the year 2002. The Applicant further states that he lost the relationship with his mother and his family and he has been tortured terribly by the inability to be there for them and provide for them as the head of the family and sole provider following his father's death.

30. The Applicant avers that he has lost contact with his relatives and that his life plan was disrupted and lost. The Applicant also states that his health has deteriorated while in prison due to the prison conditions and he suffers ailments not limited to, bronchial asthma with constant attacks, back pains, degenerative joint disease, plantar warts, atopic eczema, allergic rhinitis, deteriorating eye sight and breathlessness. The Applicant further complains that he has lost his social status.

31. The Applicant prays that the Court, in calculating the moral damages, should apply equity and take into account the severity of the violations, the impact these have had on him and the overall damage to his health. He further asks the Court to consider the period he has been imprisoned and grant reparations that would

11 *Christopher Mtikila* v Tanzania" (Reparations), para 31.

alleviate the suffering he has endured.

32. Consequently, the Applicant urges the Court to grant him an award of United States Dollars Two Hundred and Thirty Thousand (US$ 230,000) as reparation for the moral prejudice he suffered for the violations established.

33. The Respondent State submits that there is no proof that the Applicant suffered from emotional harm. The Respondent State contends that the Applicant's incarceration followed his lawful conviction and sentencing and this necessarily results in discomfort and anguish to the prisoner. The Respondent State argues that it cannot refrain from prosecuting persons for fear that the accused would be emotionally hurt. The Respondent State submits that the Applicant has no pending appeals.

34. The Respondent State further avers that the Applicant's loss of relations and contact with his wife, son, mother, family and other relatives are private rather than legal matters. The Respondent State contends that there is no guarantee that the Applicant would still be with his wife, were he not imprisoned and his son and relatives could visit him in prison at any time. The Respondent State contends that the disruption of the Applicant's relations with his mother and relatives and loss of his social status was as a result of his own illegal act.

35. The Respondent State argues that the Applicant suffered from illness even before his conviction and sentencing and there is no proof that his ill health is attributable to the conduct of the Respondent State. On the contrary, the Respondent State has ensured that the Applicant gets medical attention at its expense.

36. The Respondent State submits that there is no proof that it caused the Applicant any loss of earnings, suffering, hardship or emotional stress. The Applicant's crime is what has placed him in the position he is in and the Respondent State was merely implementing its laws by holding him in lawful custody. The Respondent State argues that there is no basis for computation for the amounts claimed and they should be dismissed.

* * *

37. The Court notes that, moral prejudice is that which results from the suffering, anguish and changes in the living conditions for the

victim and his family.[12]

38. In its judgment on the merits, the Court concluded that there was a violation of the Applicants' right to a fair trial as a result of the Respondent State's decision to continue with the defence case during the trial in the Applicant's absence and without providing him free legal representation during those proceedings.[13]

39. The Court notes however, that the conclusion of the Applicant's trial in his absence and the non-provision of legal aid caused him anguish and despair due to the resulting unfairness. This caused moral prejudice to the Applicant.

40. The Court finds that this entitles the Applicant to compensation. The Court has also held that the assessment of quantum in cases of moral prejudice must be done in fairness and taking into account the circumstances of the case.[14] In such instances, affording lump sums would generally apply as the standard.[15]

41. The Court considers that the Applicant's claim for compensation amounting to United States Dollars Two Hundred and Thirty Thousand (US$ 230,000) is excessive**.**

42. In light of these considerations and based on discretion, the Court therefore awards the Applicant an amount of Tanzanian Shillings Two Million (TZS 2,000,000).

b. Moral prejudice to indirect victims

43. Relying on *Zongo* case, the Applicant seeks compensation for his family as indirect victims as follows:

i. United States Dollars twenty five thousand dollars (US$25,000) payable to his son, Emmanuel Alex Mallya,

ii. United States Dollars forty two thousand dollars (US$42,000) payable to his wife,

iii. United States Dollars seventeen thousand dollars (US$17,000) payable to his mother, Ester Marmo Maley,

iv. United States Dollars seventeen thousand dollars (US$17,000) payable to his sister Flora Amos Mallya,

v. United States Dollars seventeen thousand dollars (US$17,000) payable to his sister Anna Elinisa Swai, and

vi. United States Dollars seventeen thousand dollars (US$17,000) payable to his younger brother John Thomas Mallya.

12 *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 34.

13 *Alex Thomas v Tanzania* (Merits) paras 86-99 and paras114-124.

14 See *Norbert Zongo and others v Burkina Faso* (Reparations), para 61.

15 *Ibid*, para 62.

44. The Applicant requests that the Court should consider the fact that his son was barely two (2) years old when he was arrested, and his son was denied the opportunity to be raised by his father, know him and enjoy his company. The Applicant states that he is currently not aware of his son's whereabouts and that his son suffers the stigma of having a father who is associated with criminal activities and lacked a good education due to his father's imprisonment. The Applicant states that his wife was also heavily affected by the sudden loss of her husband.

45. As regards the Applicant's mother, he states that she lost almost twenty (20) years with her son, suffered the anguish and social stigma of knowing he has been implicated in something criminal, lost his financial support and suffered great financial strain as a result. The Applicant claims that his siblings suffered tremendously as a result of losing their brother, friend and confidant and had to travel severally to visit the Applicant in prison. The Applicant's brother, John Thomas, was left without a mentor in the conduct of business, he has had to incur expenses to buy the Applicant's medication which is not available in prison and had to provide the Applicant with money to use while in prison. The Applicant states that his brother has suffered the stigma of being related to a convict. With regard to the Applicant's sisters, Anna Elinisa Swai and Flora Amos, he claims that they had to stop their education following the Applicant's arrest since he was the one educating them and they also suffered the stigma of being associated with a convict.

46. Relying on Inter-American Court of Human Rights' case of *Aloeboetoe v Suriname*,[16] the Applicant prays that the Court, in assessing the moral prejudice suffered by the indirect victims, should take into consideration that the nature of relationship between the Applicant and the indirect victims provides a basis for the assumptions that the support he provided to them would have continued had he not been imprisoned.

47. The Respondent State disputes the claim for reparations for indirect victims and states that it has not been proven how the alleged victims are related to, or were being supported by the Applicant for them to be able to claim the amounts indicated.

48. The Respondent State also disputes the amounts claimed because the Applicant is unaware of the whereabouts of his alleged son, his wife is no longer in his life and broken family relations may

16 *Case of Aloeboetoe et al v Suriname* Judgment of 10 September 1993, (Reparations and Costs).

have existed prior to his conviction. The Respondent State avers that there is also no proof that the Respondent State is in any way responsible for the disruption of the Applicant's family relations as alleged by the Applicant. The Respondent State concludes that there is no basis for the computation of the amount sought.

* * *

49. The Court recalls that compensation for non-material loss also applies to relatives of the victims of a human rights violation as a result of the indirect suffering and distress. As held in the *Zongo* 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".[17]

50. In this regard, the Court, in the *Zongo* case, noted that spouses, children and parents may claim the status of indirect victims.[18] On this basis, the persons who might be entitled to claim fo**r** moral damages are the Applicant's son, Emmanuel Alex Mallya, his wife[19] and his mother, Ester Marmo Maley.

51. The Court has stated that spouses should produce marriage certificates or any equivalent proof, children are to produce their birth certificates or any other equivalent evidence to show proof of their affiliation and parents must produce an attestation of paternity or maternity or any other equivalent proof.[20]

52. The Court notes with regard to the Applicant's wife that, her identity has not been indicated anywhere in the submissions. The Applicant states that he lost his wife who has since remarried. Furthermore, in a letter dated 27 November 2015 to PALU, which was annexed to his submissions on reparations, the Applicant elaborates that he lost contact with his wife since the year 2000 when his first appeal was dismissed by the High Court. In view of these circumstances, the Applicant cannot therefore maintain that

17 *Norbert Zongo and others v Burkina Faso* (Reparations), para 49.

18 *Norbert Zongo and others v Burkina Faso* (Reparations), para 50(i)-(iii).

19 The Applicant's wife's identity is not indicated anywhere in the Applicant's submissions.

20 *Norbert Zongo and others v Burkina Faso* (Reparations), para 50(i)-(iii).

his wife suffered moral prejudice as a result of the violations found and his incarceration. This claim is consequently dismissed.

53. The Applicant provided a certified true copy of a birth certificate for his son, Emmanuel Alex Mallya. In his submissions however, the Applicant stated that he last saw his son in the year 2002 and does not know his whereabouts. In these circumstances, the Applicant cannot therefore maintain that his son suffered moral prejudice as a result of the violations found and his incarceration. This claim is consequently dismissed.

54. With regard to the Applicant's mother, Ester Marmo Maley, the Court notes that the Applicant has not provided a copy of his birth certificate or any other document attesting that she is his mother.

55. The Court notes however, that the Applicant's mother swore an affidavit on 26 February 2016 attesting that, following the death of her husband, Thomas Mallya in 1984, the Applicant, being their first child, became the family's breadwinner taking care of her and his four (4) siblings. In addition to this affidavit, the Applicant filed a certified true copy of his mother's Voter Registration Card. The Respondent State did not contest the veracity of this evidence. The Court is of the view that the certified true copy of the Voter Registration Card proves the Applicant's mother's identity and that the affidavit she swore is sufficient proof as regards her affiliation to the Applicant.

56. Having determined that the Applicant has proven that Ester Marmo Maley is his mother, the Court is of the view that she endured emotional anguish arising from the violations endured by the Applicant and which inherently and naturally follows the incarceration of a child, as was the case with the Applicant. This suffering was exacerbated by the fact that the Applicant's mother was widowed and relied on his emotional support, being the eldest child in the family.

57. With regard to the issue of quantum of the damages to be awarded for the moral prejudice suffered by the Applicant's mother, the Court therefore considers that an amount of Tanzanian Shillings One Million and Five Hundred Thousand (TZS 1,500,000) is fair compensation.

58. On the issue of the moral prejudice suffered by the Applicant's two (2) sisters, Flora Amos Mallya and Anna Elinisa Swai and brother, John Thomas Mallya, the Court recalls its position that their victimhood must be established to justify damages.[21] They all swore affidavits dated 26 February 2016 attesting to their fraternal

21 *Norbert Zongo and others v Burkina Faso* (Reparations), paras 45-54.

relationship to the Applicant. The Applicant also provided certified true copies of their Voter Registration Cards. The Respondent State did not contest the veracity of these documents. The Court notes that the certified true copies of the Voter Registration Cards prove the Applicant's siblings' identity and the affidavits they swore are sufficient proof of their fraternal relationship with the Applicant.

59. Similar to the Applicant's mother, his sisters and brother suffered emotional anguish and their social conditions deteriorated following the Applicant's imprisonment. This occasioned them moral prejudice which entitles them to compensation.

60. The Court therefore considers that an amount of Tanzanian Shillings One Million (TZS 1,000,000) is fair compensation to be awarded to each of his siblings, namely, Flora Amos Mallya, Anna Elinisa Swai and John Thomas Mallya.

Non-pecuniary reparations

i. Restoration of Applicant's liberty

61. Relying on the jurisprudence of the Inter-American Court of Human Rights that, where a victim has been convicted as a result of an unfair trial, his right to reparation includes an obligation for the State to declare all records of the trial and conviction "null and void", the Applicant prays the Court to make orders for the restitution of his liberty.[22]

62. The Applicant cites the decision of the African Commission on Human and Peoples' Rights that, where conditions of the trial are found to be unfair, the State can be ordered to release detainees[23] and argues that this should be applicable in the instant case.

63. The Applicant further states that restitution of liberty in cases involving arbitrary arrest and detention is an important measure of reparation that can also assist in the prevention of further violations. The Applicant submits that the violations are of a continuous nature because he is still being held on the basis of a conviction which was based on several violations of his human

22 Case of *Loayza-Tamayo v Peru* Judgment of 17 September 1997.

23 Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt,* Views of 1 March 2011, para 233(VI).

rights.

64. The Respondent State contests the Applicant's request for the restitution of his liberty. The Respondent State argues that the Applicant is in prison for a justifiable reason, that is, the commission of a serious offence and that where an individual such as the Applicant has caused suffering to victims by committing armed robbery and he is lawfully tried, convicted and sentenced, then he is not entitled to restitution since any prejudice he has suffered is of his own doing. The Respondent State argues that since the Court did not order the Applicant's release in the Judgment on merits, then such a request has been overtaken by events and is actually in contempt of the Court's orders.

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65. Regarding the prayer for the Applicant's release from prison, the Court notes from the Applicant's correspondence to the Court received on 3 December 2018, that the Applicant was released from prison on 2 June 2018 following the completion of his sentence. Consequently, the prayer to be released is moot.

ii. Guarantees of non-repetition and report on implementation

66. The Applicant requests that the Court make an order that the Respondent State guarantees the non-repetition of violation of his rights. He also requests that the Court should order the Respondent State to report on measures taken to implement the orders of the Court, every six (6) months, until it satisfies the orders the Court shall make in this regard.

67. The Respondent State disputes the Applicant's requests and submits that it is not clear which violations are being referred to, since the findings on the rights alleged to have been violated were made by the Court when it delivered its Judgment on 20 November 2015. Furthermore, the Respondent State submits that the Court already ordered the Respondent State to take necessary measures to remedy the violations found, precluding the reopening of the Applicant's defence or his retrial.

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68. The Court considers that, as it has held in the matter of *Armand Guehi v Tanzania*, while guarantees of non-repetition generally apply in cases of systemic violations,[24] these remedies would also be relevant in individual cases where the violations will not cease, are likely to reoccur or are structural in nature.[25]

69. Considering that the Applicant has already been released, the Court does not deem it necessary to issue an order regarding non-repetition of the violations of the Applicant's rights since there is no possibility of such violations being repeated in relation to the Applicant.[26] The Court also notes the Respondent State's report on implementation of the Judgment on merits, field on 3 January 2017, that the Respondent State has through the preparation of a Legal Aid Bill taken measures to establish a comprehensive legal aid framework for indigent litigants, in both civil and criminal matters. The Legal Aid Bill was enacted by the Respondent State's Parliament on 21 February 2017 and published in the Official Gazette in March 2017. The Court notes that this is a remedy which guarantees non-repetition of failure to provide legal aid to indigent litigants. The claim is therefore dismissed.

70. With respect to the order for report on implementation of this Judgment, the Court reiterates the obligation of the Respondent State as set out in Article 30 of the Protocol. The Court notes that such an order is inherent in its judgments when it directs the Respondent State or any other party to carry out a specific action.

iii. Measures of satisfaction

71. The Applicant requests an order that the Respondent State publish in the national Gazette in both English and Swahili, the Judgment of 20 November 2015 as a measure of satisfaction.

72. The Applicant contends that the Respondent State should be ordered to report to the Court every six (6) months until it satisfies the orders this Court shall make when considering the submissions for reparations.

73. The Respondent State argues that the Judgment issued by the Court was a just measure of satisfaction and the Applicant is

24 *Armand Guehi v Tanzania* (Merits and Reparations), para 191; See also *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106;

25 *Armand Guehi v Tanzania* (Merits and Reparations), para 191 and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 43.

26 *Armand Guehi v Tanzania* (Merits and Reparations), paras 191 and 192.

therefore not entitled to further measures of satisfaction.

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74. Though the Court considers that a judgment, *per se*, can constitute a sufficient form of reparation,[27] it can, *suo motu*, order further measures of satisfaction as it deems fit. The circumstances warranting the Court to make such further orders in the instant case are the need to emphasise on and raise awareness of the Respondent State's obligations to make reparations for the violations established with a view to enhancing implementation of the judgment. In order to ensure that the Judgment is publicised as widely as possible, the Court therefore, finds that the publication of the Judgment on merits and this Judgment on reparations on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs to remain accessible for at least one (1) year after the date of publication, is an appropriate additional measure of satisfaction.

VI. Costs

75. In the judgment on merits, the Court held that it would decide on the issue of costs when dealing with reparations.[28]

76. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

77. The Court recalls that, in line with its earlier judgments, reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.[29] The Applicant must provide justification for the amounts claimed.[30]

A. Legal fees related to proceedings before this Court

78. The Applicant prays that the Court grants the following reparations for legal fees:

i. Legal fees for 400 hours of legal work: 300 hours for two Assistant Counsels and 100 hours for the lead Counsel. This is charged at United States Dollars Two Hundred (US$200) per hour for lead Counsel and United States Dollars One Hundred and Fifty Dollars (US$150) per hour for the Assistant Counsels. The total amount being United States Dollars Twenty Thousand (US$20,000) for the lead Counsel and Forty-Five Thousand Dollars (US$45,000) for the two Assistant Counsels

ii. Legal costs of the Advocate who assisted with investigation and drafting and preparation of Affidavits sworn by the Applicant's mother and siblings amounting to United States Dollars Nine Hundred and Fifty Two Dollars (US$952)

iii. The total amount for legal fees (for lead Counsel, assistant Counsels and the Advocate) is United States Dollars Sixty Five Thousand, Nine Hundred and Fifty Two (US$65,952)

79. The Respondent State disputes the claim for counsel's legal fees on the basis that the Applicant's counsel was provided by the Court and therefore this claim is misplaced.

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80. With regard to legal fees, this Court, in the *Zongo* case, stated that "…the reparation paid to the victims of human rights violations may also include the reimbursement of lawyers' fees".[31]

81. The Court notes that PALU represented the Applicant on a *pro bono* basis under the Court's current legal aid scheme.[32] This claim is therefore unjustified and is hereby dismissed.

B. Transport and stationery costs

82. Using the precedent in the *Zongo* case, the Applicant prays the Court to grant the following reparations with regard to transport and stationery costs incurred:

i. Printing, photocopying and binding costs amounting to United States Dollars One Thousand Dollars only (US$1,000)

ii. Travel costs for the lead Counsel and his assistant who travelled to Addis Ababa, Ethiopia in December 2014 for the public hearing. The costs for flights, taxi, hotel and per diem amounting to United

States Dollars two thousand nine hundred and forty seven dollars (US$2,947), transportation costs to and from the Seat of the African Court from the PALU Secretariat amounting to United States Dollars one hundred and thirty nine dollars (US$139,00) and communication costs amounting to one thousand dollars (US$1,000)

iii. Travel costs for trips to and from Karanga prison amounting to United States Dollars three hundred and eighty dollars (US$380)

iv. Transporting the Applicant's relatives to Arusha to swear Affidavits amounting to fifty two dollars (US$52).

83. The Respondent State disputes these claims and relying on the *Mtikila* case, argues that the Applicant was represented on a *pro bono* basis and as such the transport fees and stationery costs claimed would be unjustified. The Respondent State further states that when representing a client on a *pro bono* basis the Court pays the legal representative sufficient funds to cover the costs incurred and the legal fees and the legal representative is based at the seat of the Court in Arusha.

84. The Respondent State maintains, albeit erroneously, that since the Court ordered, in its judgment on 20 November 2015, that the Applicant should bear his own costs, the Court should issue the same order regarding reparations.

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85. The Court recalls its position in the *Mtikila case* where it noted that "expenses and costs form part of the concept of reparation".[33]

86. The Court considers that transport costs incurred for travel within Tanzania, and stationery costs are fall under the "Categories of expenses that will be supported in the Legal Aid Policy of the Court".[34] Since PALU represented the Applicant on a *pro bono* basis, the claims for these costs are unjustified and are therefore dismissed.

87. With regard to the transport and accommodation costs for the Applicant's Counsels' travel to Addis Ababa, Ethiopia, to attend the hearing of the matter, the Court recalls its position in *the Zongo case* that "the reparation payable to victims of human rights violation can also include reimbursement of the transport

33 *Lohe Issa Konate v Burkina Faso* (Reparations), para 39.

34 African Court on Human and Peoples' Rights *Legal Aid Policy* 2013-2014, Legal Aid Policy 2015-2016, and Legal Aid Policy from 2017.

fares and sojourn expenses incurred for the purposes of the case by the representatives at the Seat of the Court".[35]

88. The Court scheduled the public hearing of the case at the session held in Addis Ababa, Ethiopia, and these costs were necessary and were actually incurred as evidenced by the proof of payments and supporting documentation provided by the Applicant's Counsel amounting to United States Dollars Two Thousand Nine Hundred and Forty Seven (US$2,947). The Court finds that in these circumstances, these expenses**,** amounting to United States Dollars Two Thousand Nine Hundred and Forty Seven (US$2,947) should be covered under the Legal Aid Scheme of the Court rather than by the Respondent State.

89. As a consequence of the above, the Court decides that each Party shall bear its own costs.

VII. Operative part

90. For these reasons:

The Court,

Unanimously:

On pecuniary reparations

i. *Does not grant* the Applicant's prayer for material damages for loss of income and life plan.

ii. *Does not grant* the Applicant's prayer for damages for moral prejudice to his son, Emmanuel Alex Mallya and wife as indirect victims.

iii. Grants the Applicant's prayers for moral damages suffered by him and the indirect victims and awards compensation to them as follows:

   a. Tanzanian Shillings Two Million (TZS 2,000,000) to the Applicant

   b. Tanzanian Shillings One Million, Five Hundred Thousand (TZS 1,500,000) to the Applicant's mother, Ester Marmo Maley

   c. Tanzanian Shillings One Million (TZS) each to the Applicant's sisters, Flora Amos Mallya and Anna Elinisa Swai and brother John Thomas

iv. *Orders* the Respondent State to pay the amounts indicated *under (iii* (a), (b) and (c) free from taxes, effective six (6) months from the date of notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of the United Republic of Tanzania throughout the period of delayed payment until the amount is fully paid.

35 *Norbert Zongo and others v Burkina Faso* (Reparations), para 91.

On non-pecuniary reparations

v. *Does not grant* the Applicant's prayer for his release from prison as this is moot.

vi. *Does not grant* the Applicant's prayer for an order regarding non-repetition of the violations.

vii. *Orders* the Respondent State to publish, as a measure of satisfaction, this judgment on reparations and the judgment of 20 November 2015 on the merits of the case within three (3) months of notification of the present judgment on the official websites of the Judiciary and the Ministry of Constitutional and Legal Affairs and ensure that the judgments remain accessible for at least one (1) year after the date of such publication.

On implementation and reporting

viii. *Orders* the Respondent State to submit to it within six (6) months of the date of notification of this judgment, a report on measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

ix. *Does not grant* the Applicant's prayer related to legal fees, costs and other expenses incurred in the proceedings before this Court.

x. *Decides th*at each Party shall bear its own costs.

Nganyi and others v Tanzania (reparations) (2019) 3 AfCLR 308

Application 006/2013, *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*

Judgment, 4 July 2019. Done in English and French, the English text being authoritative.

Judges: ORE KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicants filed an Application for reparations following the Court's Judgment on merits, in which the Court found that the Respondent State had violated the Applicants' rights to be tried within reasonable time and be provided with legal assistance. The Applicants claimed compensation, release of those still serving prison sentences, guarantees of non-repetition, regular reporting by the Respondent State to the Court on implementation of the reparations and publication of the merits judgment in the national Gazette. The Court dismissed the convicted Applicants' claim for compensation for material damages and legal fees but provided compensation for material loss and legal fees to those acquitted or their next-of-kin for proved material damages. The Court further ordered compensation for moral damages to all the Applicants and their next of kin and that the merits judgments and the judgment on reparations should be published on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs. The Court dismissed the request for an order of release and non-repetition and noted that reporting on implementation of judgment by the Respondent State is inherent in the Judgment.

Reparations (material damages, 26, 27, 32, 33, 37, 38, 40, 43-45: legal fees, 52, 53; reparations for expenses incurred by Applicants aquited 53; moral damages, 65-67; moral damages, indirect victims, 73-74; release, 78; non-repetition, 82; reporting to Court, 83; publication of judgment, 87)

I. Subject of the Application

1. This Application for reparation was filed pursuant to the Judgment on the merits delivered by the Court on 18 March 2016.[1] In the said Judgment, the Court unanimously found that the Respondent State violated the Applicants' rights to be tried within a reasonable time and to legal aid protected under Article 7(1)(c) and (d) of the African Charter on Human and Peoples' Rights (hereinafter

1 See Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi and others v United Republic of Tanzania* (hereinafter referred to as *"Wilfred Onyango Nganyi and others v Tanzania* (Merits)"), para 190.

referred to as "the Charter") respectively.

2. Having found these violations, the Court ordered the Respondent State to:

i. Provide legal aid to the Applicants for the proceedings pending against them in the domestic courts.

ii. Take all necessary measures within a reasonable time to expedite and finalise all criminal appeals by or against the Applicants in the domestic courts.

iii. Inform the Court of the measures taken within six months of the Judgment.

3. In accordance with Rule 63 of the Rules, the Court also directed the Applicants to file submissions on the request for other forms of reparation within thirty (30) days of receipt of the certified true copy of the Judgment on the merits and the Respondent State to reply thereto within thirty (30) days of the receipt of the Applicants' submissions.

II. Brief background of the matter

4. As recounted in the above mentioned Judgment of the Court rendered on the merits of the case, the Applicants who are ten (10) nationals of the Republic of Kenya brought an Application to this Court on 23 July 2013 alleging that their rights to a fair trial had been violated in the course of proceedings before the courts of the Respondent State. The case in domestic courts arose from the Applicants' arrest in Mozambique and their transfer to the territory of the Respondent State where they were detained and prosecuted on charges of murder and armed robbery.

5. Of the ten (10) Applicants, five (5) were acquitted and released on 5 March 2014 after the murder charge was withdrawn for lack of evidence. These are Michael Mbanya Wathigo, David Ngugi Mburu, Boniface Mwangi Mburu, Peter Gikura Mburu and Simon Githinji Kariuki. Two (2) of these five (5) Applicants passed away on 17 September 2015. These are Boniface Mwangi Mburu and Simon Githinji Kariuki. The other five (5), Wilfred Onyango Nganyi, Jimmy Maina Njoroge, Patrick Muthe Muriithi, Gabriel Kungu Kariuki and Simon Ndung'u Kiambuthi were convicted of armed robbery and were each sentenced to a thirty (30) year prison term.

6. Having challenged their unlawful arrest and detention in domestic courts, the Applicants brought their matter to this Court, which found the Respondent State in violation of their rights to a fair trial, and directed the Parties to make submissions with regard to

reparation as earlier stated.

III. Summary of procedure before the Court

7. On 18 March 2016, the Registry transmitted to the Parties a certificed true copy of the Judgment on the merits.

8. The Parties filed their submissions on reparations within the time stipulated by the Court.

9. Pleadings were closed on 28 January 2019 and the Parties were duly notified.

IV. Prayers of the Parties

10. The Applicants pray the Court to grant them the following reparations:

"i. Monetary compensation as detailed in claims made under paragraphs 163-180 of the Applicant's written submission on reparation;

ii. Restoration of those incarcerated, that is, their release from prison where they are currently serving an unlawful sentence;

iii. Application of the principle of proportionality when considering the award for compensation;

iv. An order that the Respondent State guarantees non-repetition of these violations against the Applicant;

v. An order that the Respondent State should report to this Court every six months until it satisfies the orders this Court shall make when considering the submissions for reparations;

vi. An order that, as a measure of satisfaction, the Respondent State should publish in the national Gazette, in both English and Swahili, the judgment dated 3 June 2016, [sic] delivered by this Court on the merits of the matter;

vii. Any other reparations this Honourable Court shall deem necessary."

11. The Respondent State prays the Court to make the following orders and declarations:

"i. That, the judgment of the Court dated 18th March, 2016 is sufficient reparation to the prayers found in the Applicants submission for reparations.

ii. That, the Applicants be ordered to submit to the Court and the Respondent the affidavits and other documents which they allege to have attached to his application, but have not attached.

iii. That, the Applicants be ordered to submit to the Court and the Respondent verification and evidence of the computated amount sought.

iv. That, the Applicants' claims for lawyers' fees 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 reparations.

v. That, the prayer for restoration of the Applicants' liberty be denied.

vi. That, the prayer for restoration of the Applicants' liberty is contemptuous of the judgment of the Honourable African Court on Human and Peoples' Rights.

vii. That, the Honourable Court be pleased to order that there was no gross violation of international human rights law and international humanitarian law.

viii. That, the Applicants not be granted reparations.

ix. That, the Applicants' claim for reparations be dismissed in its entirety with costs.

x. That, since all the alleged violations occurred before the Respondent State deposited its declaration to accept complaints from individuals then the Honourable Court has no mandate to order reparations for acts committed before 29th March 2010."

V. Reparations

12. The Court notes that Article 27(1) of the Protocol provides: "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" and pursuant to Rule 63 of the Rules, "The Court shall rule on the request for the reparation … by the same decision establishing the violation of a human or peoples' right or, if the circumstances so require, by a separate decision".

13. In line with its earlier judgments on reparations, the Court considers that for reparation claims to be granted, the Respondent State should be internationally responsible, causation must be established and where it is granted, reparation should cover the full damage suffered. Furthermore, the Applicant bears the onus to justify the claims made.[2]

14. The Court notes that the responsibility of the Respondent State and causation has been established in the Judgment on the

2 See Application 013/2011. Judgment of 5 June 2015 (Reparations), *Norbert Zongo and others v Burkina Faso* (hereinafter referred to as *"Norbert Zongo and others v Burkina Faso* (Reparations)"), paras 20-31; Application 004/2013. Judgment of 3 June 2016 (Reparations), *Lohé Issa Konaté v Burkina Faso* (hereinafter referred to as *"Lohé Issa Konaté v Burkina Faso* (Reparations)"), paras 52-59; and Application 011/2011. Judgment of 13 June 2014 (Reparations), *Reverend Christopher R Mtikila v United Republic of Tanzania* (hereinafter referred to as *"Reverend Christopher R Mtikila v Tanzania* (Reparations)"), paras 27-29.

merits.

15. With respect to the extent of damage to be covered for the violation of the right to be tried within a reasonable time, the Court observes that, as it has found in the Judgment on the merits, prejudice was sufferred for the period during which the case was put on hold before the trial commenced. The applicable period is therefore of two (2) years, six (6) months and fourteen (14) days or thirty (30) months and fourteen (14) days.[3]

16. The Court further notes that the Applicants' prayers for reparation relate to both material and non-material damages. As stated earlier, claims for material damage must be supported by evidence. The Court has also held that the purpose of reparation is mainly to ensure *restituo in integrum*, which is to place the victim, as much as possible, in the situation prior to the violation.[4]

17. With respect to non-material damage, as this Court has previously held, prejudice is assumed in cases of human rights violations[5] and assessment of quantum must be done in fairness and taking into account the circumstances of the case.[6] In line with the consistent practice of the Court, lump sums are awarded in such circumstances.[7]

18. The Court notes that the claims with respect to the two deceased Applicants Boniface Mwangi Mburu and Simon Githinji Kariuki are made by Winnie Njoki Mwangi and Margaret Nyambura Githinji. The claimants provide valid documents proving that they are the wives of the respective Applicants. The Court considers that, in the circumstances and as is accepted practice in international human rights proceedings,[8] the claimants have substituted these deceased Applicants as the legal representatives of their

3 See *Wilfred Onyango Nganyi and others v Tanzania* (Merits), paras 124 and 155.

4 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 57-62.

5 *Ibid*, para 55; and *Lohé Issa Konaté v Burkina Faso* (Reparations), paras 58.

6 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 61. See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania (Republic of Côte d'Ivoire Intervening)* (hereinafter referred to as *"Armand Guehi v Tanzania* (Merits and Reparations)"), para 177.

7 See *Norbert Zongo and others v Burkina Faso* (Reparations), para 62.

8 See for instance, as in the practice of the European Court of Human Rights, *Raymond v Italy*, 22 February 1994, para 2 series A no 281 A; *Stojkovic v The Former Yugoslav Republic of Macedonia*, no 14818/02, 8 November 2007, para 25; *X v France*, 31 March 1992, para 26, series A no 234 C; and *MP and others v Bulgaria*, 22457/08, 15 November 2011, paras 96-100.

beneficiaries in the present proceedings on reparation.

19. The Court further notes that, in the present case, the Applicants make their claims in different currencies. In this respect, the Court is of the considered opinion that, taking into account fairness and considering that an applicant should not be made to bear the fluctuations that are inherent in financial activities, determination of the quantum of damages should be made on a case-by-case basis. As a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.[9]

20. In the instant matter, the Applicants being nationals of the Republic of Kenya where they conducted their activities, the alleged loss of income should have been assessed in Kenya Shillings. However, given that the Respondent State does not challenge the fact that the Applicants framed their claims in United States (US) Dollar, damages, if any, will be awarded in the latter currency.

A. Pecuniary reparations

i. Material loss

21. The Applicants claim compensation for both loss of income and costs incurred in the proceedings before domestic courts.

a. Loss of income

22. The Applicants in the present case, relying on the amount awarded to the Applicant for loss of income in the *Konaté* case referred to earlier, pray the Court to award them US Dollars Fifty Thousand (US$ 50,000) annually to each of those who were acquitted, that is, Michael Mbanya Wathigo, David Ngugi Mburu, Boniface Mwangi Mburu, Peter Gikura Mburu and Simon Githinji Kariuki, and for the entire period of almost six (6) years during which they were in custody, making it a total amount of US Dollars Two Hundred Eighty Eight Thousand Eight Hundred and Eighty Nine (US$288,889) each.

23. With regard to those who were convicted, that is Onyango Nganyi, Jimmy Maina Njoroge, Patrick Muthe Muriithi, Gabriel Kungu Kariuki and Simon Ndung'u Kiambuthi, the Applicants pray this Court to grant an amount of US Dollars Three Hundred Sixty

9 See Application 003/2014. Judgment of 07 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda*, para 45.

Three Thousand Eight Hundred and Eighty Nine (US$ 363,889) to each of them for loss of income.

24. The Respondent State challenges these claims as baseless, misconceived and untenable. It submits that unlike in the *Konat*é case where the loss of income resulting from the suspension of the newspaper's publication was not in contention, the Applicants have not provided tangible proof of the business activities they were conducting and the income derived from such activities.

25. The Respondent State further submits that even if their source of income was proven, the Applicants are still not entitled to any compensation for loss of income since they were prosecuted for armed robbery and murder, and imprisoned by the competent courts of law.

* * *

26. The Court notes that, as it had held in the Judgment on the merits, the violations found did not affect the outcome of domestic proceedings as far as the Applicants who were convicted are concerned. In fact, these Applicants' case before this Court was not that of their illegal arrest and detention. Furthermore, the prejudice caused to them has been remedied in the Judgment on the merits where the Court ordered the Respondent State to provide legal aid for the pending domestic proceedings and take all measures within a reasonable time to expedite and finalise criminal appeals by or against the Applicants.

27. As a consequence of the foregoing, the claim of compensation for material damage with respect to the Applicants who were convicted is not justified and is therefore dismissed.

28. With respect to the Applicants who were acquitted, the Court notes that their acquittal was based on lack of evidence. The delay of thirty (30) months and fourteen (14) days mentioned earlier has necessarily caused some loss, which must be remedied.

29. The Court however considers that the *Konat*é standard relied upon by the Applicants must be applied *in casu*, given that material prejudice will necessarily be commensurate to personal income and loss which should be proven. This position is confirmed by the discrepancies in figures between affidavits submitted by the Applicants. Each Applicant's affidavit showed that he had his own business which generated different income and therefore this

claim must be assessed on a case-by-case basis.

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30. With respect to Peter Gikura Mburu, the Applicant in his affidavit avers that he ran a chicken supply business and the net annual income derived from this business was approximately US Dollars Forty-One Thousand Two Hundred and Fifty (US$ 41,250). He tenders evidence to that effect that is, a contract for services and a letter terminating that contract due to non-delivery of goods as agreed. The Applicant prays the Court to award him the sum of US Dollars Two Hundred and Eighty-Eight Thousand, Eight Hundred And Eighty-Nine Dollars (US$ 288,889) for the loss suffered over the entire period of his incarceration.

31. He further submits that his health deteriorated significantly due to his imprisonment and as such his family had to spend a sum of approximately US Dollars Nine Hundred (US$ 900) to provide him with medical attention. He provides receipts in support of this claim.

32. The Court notes, regarding the alleged loss of income suffered due to the termination of his business contract, that the contract for supply and termination letter adduced by the Applicant are *prima facie* evidence of the existence of a contract but not of the actual income flowing from such a contract. Furthermore, there is no correlation between the termination of the contract and the loss of annual income as quantified by the Applicant to the tune of US Dollars Forty-One Thousand Two Hundred and Fifty (US$ 41,250). The Court is of the considered opinion that further evidence in the form of bank statements or tax certificates attesting to taxes paid with respect to the alleged annual income and the gross income received from the performance of this specific contract or other such contracts should have been tendered. In the absence of these documents, there is insufficient proof of the alleged loss and related compensation claim. The prayer is consequently dismissed.

33. With regard to the claim for money spent for the Applicant's medication amounting to US Dollars Nine Hundred (US$ 900), the Court finds that the amount exceeds that appearing on the receipts attached. Consequently, based on the proven figure the Court awards the amount of US Dollars Two Hundred and Fifty

(US$ 250).

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34. With respect to Simon Kariuki Githinji (deceased), through the affidavit sworn by Margaret Nyambura Githinji, the deceased's wife, the latter avers that her husband ran a scrap metal business which earned him approximately US Dollars Seven Thousand (US$7,000) annually. A certified true copy of business licence to that effect is attached.

35. The Court notes that with regard to the claim of loss of income to the tune of US Dollars Seven Thousand (US$7,000), there is no evidence to support the same. The Court is of the considered opinion that, although the deceased's wife submitted a business licence, that document alone does not suffice to justify the amount claimed as it only shows the existence of the said business. The prayer is therefore dismissed.

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36. With respect to David Ngugi Mburu, he alleges in his affidavit that he ran a scrap metal and salvage business, and was also farming and keeping livestock. The Applicant avers that his net annual income was approximately US Dollars Thirty Two Thousand and Five Hundred (US$ 32,500). He annexes a business license and delivery notes for the scrap metal business. The Applicant avers that due to his prolonged absence as a result of the trial his business collapsed. He claims a total US Dollars Two Hundred and Eighty-Eight Thousand Eight Hundred and Eighty-Nine (US$ 288,889).

37. The Court considers that the provision of a business license and delivery notes serves as evidence of the existence of the business and the fact that it was operational. The same documents do not however provide comprehensive and detailed indications on the income it generated in order to justify the amount being claimed.

38. Taking into account the period of incarceration and based on its discretion, the Court decides to award the amount of US Dollars Two Thousand (US$ 2, 000) to the Applicant.

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39. With respect to Boniface Mwangi Mburu (deceased), through the affidavit sworn by Winnie Njoki Mwangi, the deceased's wife, the latter avers that her husband ran a clothes import business which earned him approximately US Dollars Six Thousand (US$6,000) annually. She provides a certified copy of his travel record to Dubai.

40. The Court notes that the travel record does not give any indication as to the nature of the business the deceased engaged in. The air ticket submitted neither proves the existence of the business nor does it prove the purpose of the trip involved. The claim is therefore dismissed.

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41. With respect to Michael Mbanya Wathigo, the Applicant avers that he ran a school transport and waste paper recycling business. He further states that he travelled to different countries and used to go to Dubai twice a year for various orders from clients. The Applicant claims that his net annual income derived from the said business was approximately US Dollars Fifty-Eight Thousand, Four Hundred and four (US$ 58,404). He tenders evidence showing the business he had. He prays to be awarded the sum of US Dollars Three Hundred and Sixty Three Thousand, Eight Hundred and Eighty-Nine (US$ 363,889). He also provides evidence that he was once denied visa to Turkey.

42. The Court notes that there is no evidence to the effect that the Applicant used to travel to Dubai for business. Furthermore, it is not clear whose property the transport business was and documents submitted to that effect show that the Applicant was

only a coordinator of the business.

43. The Court conversely notes that the business licence tendered is evidence that the Applicant had a business of waste paper recycling. However, there is no other supporting document such as business transactions which prove that he was actually doing the said business so as to justify how much he could have earned in a month or year. The business licence alone does not justify his income of approximately US Dollars Fifty Thousand, Four Hundred and Two (US$ 50,402) per year.

44. Finally, the Court notes that there is no connection between the present case and the fact that the Applicant was denied a visa to go to Turkey as the two scenarios are different and therefore the claim is unfounded.

45. In light of these considerations, the Court dismisses the claim.

b. Legal fees related to domestic proceedings

46. The Applicants pray the Court to grant them reparation for the legal fees that they incurred in the proceedings before domestic courts. They aver that, after over ten (10) years, some of the receipts that were issued have been misplaced and at times counsel did not issue receipts when they received payments. The Applicants further submit that their counsel contacted Advocate Ojare and Advocate Mwale who represented them in the domestic proceedings, and these lawyers informed their counsel that they no longer have any of the receipt books for the said period.

47. The Applicants also submit that they have however provided correspondence from Advocate Ojare's Chambers stating that each Applicant was to pay Tanzanian Shillings Fifty Thousand (TZS 50,000) for each appearance. They claim that, therefore in Criminal Case No. 2 of 2006, there were 137 appearances making it a total amount of 137 x 8 (Applicants) x 50,000 Tanzanian Shillings Fifty Four Million and Eight Hundred Thousand (TSZ 54,800,000). They submit that in this case only eight (8) of them were affected namely: Wilfred Onyango Nganyi; Jimmy Maina Njoroge; Patrick Muthee Muriithi; Gabriel Kungu; Simon Ndung'u Kiambuthi; Michael Mbanya Wathigo; David Ngugi Mburu; and Boniface Mwangi Mburu.

48. In Criminal case 7 of 2006, Miscellaneous Criminal Application 16 of 2006, Criminal Appeal 353 Criminal Appeal 79 of 2011, there were 35 appearances, making it a total amount of 35 x 50,000 x 10 (Applicants) = Tanzanian Shillings Seventeen Million and Five Hundred Thousand (TZS 17,500,000). This case involved all the

Applicants.

49. The Applicants further aver that in Criminal Session No. 10 of 2006, they have not received the full proceedings from the Registry of the relevant court and are not able to provide information on the number of appearances involved. Thus, they pray this Court to order the Respondent State to provide the proceedings of that case. This case affected seven (7) of the Applicants: Wilfred Onyango Nganyi; Jimmy Maina Njoroge; Patrick Muthee Muriithi; Simon Kariuki Githinji; David Ngugi Mburu; Boniface Mwangi Mburu; and Peter Gikura Mburu.

50. The Respondent State submits that the Applicants are not entitled to any reparations for legal fees paid in the proceedings before domestic courts as there is no proof of payment in many instances. The Respondent State further submits that, where evidence is provided for such payments, the amounts claimed are manifestly excessive and inflated.

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51. The Court reiterates the position taken in its previous judgments that reparation may include payment of legal fees and other expenses incurred in the course of domestic proceedings.[10] In such cases, the Applicant is required to provide documents in support of the claims made.[11]

52. The Court notes that, in the instant case, based on the findings made earlier in the present Judgment with respect to the Applicants who were convicted, claims for payment of legal fees incurred in domestic proceedings can be justified only as far as the Applicants who were acquitted are concerned. The latter presented the applicable scale of fees for lawyers who represented them in domestic proceedings. The Court however notes that the Applicants did not submit any supporting document to prove the costs allegedly incurred in many of the instances. They maintain that the receipts were misplaced due to long passage of time. The Court finds that the explanation provided is not sufficient proof

10 See *Armand Guehi v Tanzania* (Merits and Reparations), para 188; and *Norbert Zongo and others v Burkina Faso* (Reparations), para 79.

11 See *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 39.

and the claim for these expenses is therefore dismissed.

53. With respect to expenses that were proved by proper document such as receipts or equivalent documents, compensation is warranted. The Court therefore awards compensation as follows: David Ngugi Mburu who paid Tanzanian Shillings One Million and Eight Hundred Thousand (TZS 1,800,000) to Loom – Ojare & Co. Advocates; Michael Mbanya Wathigo who paid Tanzanian Shillings Fifty Thousand (TZS 50,000) to Loom – Ojare & Co. Advocates; and Peter Gikura Mburu who paid Tanzanian Shillings Two Million (TZS 2,000,000) to J.J. Mwale & Co. Advocates.

ii. Non-material loss

a. Loss incurred by the Applicants

54. The Applicants make a claim for reparation essentially on account of the pain, physical and emotional suffering and trauma, which the Applicants suffered throughout the duration of the lengthy criminal proceedings as a consequence of which some of them are still imprisoned.

55. They pray this Court to grant an amount of US Dollars One Hundred Fifteen Thousand Five Hundred and Fifty-Six (US$ 115,556) to each Applicant who was acquitted and the amount of US Dollars One Hundred and Forty-Five Thousand Five Hundred and Fifty-Six (US$145,556) to those who were convicted.

56. The Applicants who were acquitted refer to the Judgment of the Court in the *Konaté* case[12] where the Applicant was awarded US Dollars Twenty Thousand (US$ 20,000) for moral damages for the entire period of eighteen (18) months that he spent in prison. Based on the same standard, the Applicants in this case aver that they spent a period of eight (8) years and eight (8) months (104 months) in custody and, should the Court decide to evaluate damages on a *prorata* basis, this gives the total of US Dollars One Hundred Fifteen Thousand Five Hundred and Fifty-Six (US$ 115,556) stated earlier.

57. The Applicants who were convicted submit that a period of one hundred and thirty (131) months has since passed and their criminal appeals are yet to be concluded. Similarly, relying on the *Konaté* judgment, they pray the Court to grant US Dollars One Hundred Forty-Five Thousand Five Hundred and Fifty-Six (US$

12 See *Lohé Issa Konaté v Burkina Faso* (Reparations), para 59.

145,556) to each of them based on evaluation of the damages on a *prorata* basis.

58. The Respondent State avers that the Applicants did not suffer any moral prejudice since they have received adequate care from the government from the date of their arrest and incarceration to date. The Respondent State submits that the Applicants are therefore not entitled to any reparation.

59. The Respondent State further submits that the prayer for US Dollars One Hundred Fifteen Thousand Five Hundred and Fifty-Six (US$ 115,556) to be awarded to each of the Applicants who were acquitted is baseless and a mere afterthought as the Applicants never suffered any loss of income.

60. The Respondent State contends that unlike in the case of *Konaté* case where there was evidence of loss of income, the Applicants in the present case do not provide evidence of a lawful source of income.

* * *

61. The Court notes that, as it has held in its judgment on reparation in the case of *Reverend Christopher R Mtikila v Tanzania*, moral damage is one involves suffering and afflictions to a victim, emotional distress to family members as well as non-material changes in the living conditions of the victim and his family.[13]

62. In its Judgment on the merits, the Court found a violation of the Applicants' right to be tried within a reasonable time owing to the undue delay in the proceedings.[14] As restated earlier in the present Judgment, the delay is of thirty (30) months and fourteen (14) days and not eight (8) years as claimed by the Applicants. Assessment of quantum will therefore be based on the delay of thirty (30) months and fourteen (14) days.

63. In the same vein, the *Konaté* standard referred to by the Applicants is distinguishable from their case due to the difference in the nature of the offences being prosecuted. Furthermore, in the Judgment on merits, the Court made a determination to the effect that the violations found did not fundamentally impact on the outcome of

13 See *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 34.

14 See *Wilfred Onyango Nganyi and others v Tanzania* (Merits), para 155.

the proceedings. Due to these considerations, and recalling that the Applicants obtained certain forms of reparations awarded in the Judgment on the merits, proportionality requires that similarity should not apply with the *Konaté* case in assessing the quantum of reparation for moral prejudice.

64. With respect in particular to the Applicants who were convicted, the Court notes that, as at 20 August 2018 when the Applicants replied to the Respondent State's submissions on reparation, there was no indication that measures had been taken "within a reasonable time to expedite and finalise" cases pending against them in the domestic courts as ordered by the Court in its Judgment on the merits.[15] Given that the time spent without completing the proceedings was already found to be unreasonable at the time this Court ruled on the merits, the Court is of the considered opinion that unreasonableness has been aggravated by non-completion of the proceedings more than two years later. It proceeds from the ongoing that while all the Applicants suffered the initial delay in the commencement of the trial, those against whom proceedings are still pending have suffered additional prejudice.

65. Having said that, the Court is of the view that the amounts claimed by the Applicants are excessive. In equity and based on the circumstances stated above, the Court grants US Dollars Three Thousand (US$3,000) to the Applicants who were acquitted, including the representatives of the deceased; and US Dollars Four Thousand (US$ 4,000) to the Applicants who were convicted and are still awaiting completion of their appeals, given the additional prejudice suffered.

66. With regard to the claims made by the Applicants who were convicted alleging that as a result of their trial and long imprisonment they suffered emotional anguish, disruption of life plan as well as loss of social status, the Court notes that the prejudice averred is the lawful consequence of their conviction and sentencing. As earlier recalled, the violations found in the Judgment on the merits did not fundamentally affect their conviction and sentencing. Furthermore, the Court has remedied the violations by ordering that they should be afforded legal counsel during their appeals and that these proceedings be expedited. Finally, prayers for other reparations are addressed in the present Judgment. The related claims are therefore dismissed.

67. The Court notes that, in the Judgment on the merits of the present case, it had ordered that the Applicants who were convicted should

15 *Ibid*, para 193(x).

be granted legal aid during their appeals. However, that order does not address the violation that ensued from the lack of legal aid during their trial as established by the Court. The latter violation caused non-pecuniary prejudice to the concerned Applicants who make claims for reparation. The Court therefore awards the Applicants who were convicted an amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) each.

b. Loss incurred by the indirect victims

68. The Applicants pray the Court to grant compensation to the indirect victims as they suffered emotional harm as a result of the violation and prejudice suffered by the Applicants.[16] Relying on the judgment in the *Zongo* case,[17] the Applicants pray the Court to grant indirect victims the following amounts calculated on a *prorata* basis:

i. US Dollars Two Hundred and Eight Thousand Eight Hundred and Eighty-Nine (US$ 288,889) each to the spouses of the Applicants who were acquitted.

ii. US Dollars Three Hundred and Sixty-Three Thousand Eight Hundred and Eighty-Nine (US$363,889) each to the spouses of the Applicants who were convicted.

iii. US Dollars One Hundred and Forty-Five Thousand Five Hundred and Fifty-Six (US$145, 556) each to the children of the Applicants who were convicted ; and US Dollars One Hundred and Fifteen Thousand Five Hundred and Fifty-Six (US$ 115,556) each to the children of those who were acquitted.

iv. US Dollars One Hundred and Forty-Five Thousand, Five Hundred and Fifty-Six (US$ 145,556) each to the siblings of the Applicants who were convicted; and US Dollars One Hundred and Fifteen Thousand Five Hundred and Fifty-Six (US$115,556) each to the siblings of those who were acquitted.

v. US Dollar One Hundred and Forty-Five Thousand Five Hundred and Fifty-Six (US$ 145,556) each to the parents of the Applicants who were convicted; and US Dollars One Hundred and Fifteen Thousand Five Hundred and Fifty-Six (US$ 115,556) each to the parents of those who were acquitted.

69. The Respondent State challenges all the Applicants' claims on reparations as baseless. According to the Respondent State,

16 The list of indirect victims as reflected in para 71 of this judgment is that resulting from the assessment of this Court after considering the list of indirect victims as submitted by the Applicants.

17 *Norbert Zongo and others v Burkina Faso* (Reparations), para 111 (ii).

victimhood is not established and there is no reason why the stated persons should be granted reparation.

* * *

70. The Court recalls that compensation for moral prejudice applies to relatives of the victims of a human rights violation as a result of the indirect suffering and distress. As the Court held in the *Zongo* 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".[18]

71. In the context of this case, there is hardly any doubt that the close relatives of the Applicants suffered moral damage arising from the breaches attributable to the Respondent State as determined in the Judgment on the merits. In the absence of contrary submissions and in light of the circumstances, the Court considers that compensation is warranted only for the closest relatives being the spouses, children, fathers and mothers of the Applicants. These are therefore persons who, in the instant case, can claim the status of victim. For the spouses, they should produce a marriage certificate or any other equivalent proof, and children have to produce a birth certificate or any other equivalent evidence to show proof of their filiation. As regards fathers and mothers, they must produce an attestation of paternity as well as a birth certificate or any other equivalent proof.[19]

72. The Court notes that in the present case, the Applicants produce the required evidence. On that basis, the persons entitled to moral damages are listed herein below:

i. As regards the dependants of Michael Mbanya Wathigo, the victims are his children Brian Ng'ang'a Mbanya and Sally Mwikali Mbanya; and his mother Prisca Wangeci.

ii. As regards the dependants of David Ngugi Mburu, the victims are his wife Jane Wangare Mukami; his children Eric Mburu Ngugi; Linet Wanjiku Ngugi, and Lensey Mukami Ngugi; and his mother Wanjiku Mburu Mwenda.

18 *Ibid*, para 49.

19 See *Norbert Zongo and others v Burkina Faso* (Reparations), para 54.

iii. As regards the dependants of Peter Gikura Mburu, the victims are his wife Mary Wanjiru Njoroge; his children Loise wambui Gikura and Lucy Waceke Gikura; and his mother Loise Wambui Mburu.

iv. As regards the dependants of Boniface Mwangi Mburu, the victims are his wife Winnie Njoki Mwangi and his child Ryan Mburu.

v. As regards the beneficiaries of Simon Kariuki Githinji, the victims are his wife Margret Kariuki Githinji; his children Teresia Wambui Githinji and John Bosco Kariuki; his father John Bosco Kariuki; and his mother Teresia Wambui Kariuki.

vi. As regards the dependants of Wilfred Onyango Nganyi, the victims are his wife, Irene Muthoni Wanjiku; his daughter Ashley Atieno Onyango; and his mother Margaret Atieno Nganyi.

vii. As regards the dependants of Jimmy Maina Njoroge, the victims are his wife Marion Njoki; his children Brian Waiguru Maina, Leila Wamaitha Maina and Taliah Waithera Maina.

viii. As regards the dependants of Patrick Muthee Muriithi, the victims are his wife Catherine Wangui Wanjohi; his children Joe Moses Wanyeki, Bryan Muriithi, and Marc Ribai; and his mother, Zipora Nyaguthi.

ix. As regards the dependants of Gabrile Kungu Kariuki, the victims are his wife Carol Wanjiku Mwangi his children Teresia Wambui Kungu and Carlyn Bosco Kariuki Kungu; and his parents John Bosco Kariuki and Teresa Wambui Kariuki.

x. As regards the dependants of Simon Ndung'u Kiambuthi, the victims are his wife Susan Njeri Mbugua; and his children Rose Wanjiru Ndung'u and Michelle Ngawaro Ndung'u.

73. With respect to quantum, the Court considers that compensation to be awarded to the indirect victims should be commensurate to the loss suffered by the direct victims. The amount requested by the Applicants with regard to the indirect victims is therefore excessive.

74. Against these considerations, the Court notes that the Applicants and beneficiairies do not allege a differentiated level of prejudice. On the basis of equity, the Court awards compensation as follows:

i. An amount of US Dollars One Thousand (US$ 1,000) to each spouse;

ii. An amount of US Dollars Eight Hundred (US$ 800) to each child; and

iii. An amount of US Dollars Five Hundred (US$500) to each father and mother.

B. Non-pecuniary reparations

i. Release of the Applicants

75. The Applicants pray this Court to "order the restoration of those incarcerated, that is liberty by their release from prison where they are currently serving an unlawful sentence".

76. The Respondent State submits that the prayer that the Applicants should be released is vexatious and frivolous since the cases against them are still ongoing and they have appealed to the Court of Appeal, which is expected to rule on their release or otherwise.

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77. The Court reiterates its well-established case law that a measure such as the release of the Applicant can only be ordered in special or compelling circumstances.[20] The said circumstances must be determined on a case-by-case basis, taking into consideration mainly proportionality between the measure of restoration sought and the extent of the violation established.[21] This position is well exemplified in the matter of *Mgosi Mwita Makungu v United Republic of Tanzania* where this Court held that an order for release would be warranted for instance where the conviction is based entirely on arbitrary considerations and continued detention would occasion a miscarriage of justice.[22]

78. As the Court concluded earlier, the violations found in the Judgment on the merits did not fundamentally affect the outcome of the proceedings before domestic courts. Furthermore, the Court did not find that the conviction and sentencing of the Applicants who are serving their prison term were unlawful and they have been granted a remedy in the present Judgment regarding the delayed proceedings. In light of these considerations, the prayer is not justified and is therefore dismissed.

ii. Non-repetition of the violations and report on implementation

79. The Applicants pray the Court to order the Respondent State to guarantee non-repetition of the violations against them and report

back every six (6) months until the orders made by this Court on reparations is implemented.

80. The Respondent State contends that this prayer should be denied as they were already canvassed in the Judgment on the merits.

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81. The Court considers that, as it has held in the matter of *Armand Guehi v Tanzania*, while guarantees of non-repetition generally apply in cases of systemic violations,[23] these remedies would be relevant in individual cases where the violation will not cease or is likely to re-occur.[24]

82. The Court notes that, as earlier recalled, the violations found in the Judgment on the merits did not fundamentally affect the outcome of the proceedings before domestic courts as far as the Applicants who were convicted are concerned. Regarding the Applicants who were released, the Court observes the likelihood of repetition of the violations is non-existent. Taking into account that the violations have ceased and remedy has been duly afforded to the Applicants as appropriate, this Court does not deem it necessary to issue an order regarding non-repetition.[25] The prayer is therefore dismissed.

83. With respect to the order for report on implementation of this Judgment, the Court is of the considered opinion that such an order is inherent in its judgments when it directs the Respondent State or any other party to carry out a specific action.

iii. Publication of the decision

84. The Applicants pray the Court to order the Respondent State to publish in the national Gazette, in both English and Swahili, the Judgment on the merits as a measure of satisfaction.

85. The Respondent State submits that the Court should deny this prayer given that the Judgment on the merits of this Application is

23 *Armand Guehi v Tanzania* (Merits and Reparations), para 191. See also *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106; African Commission on Human and Peoples' Rights, General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), para 10 (2017). See also Case of the "Street Children" *Villagran-Morales et al v Guatemala*, Inter-American Court of Human Rights, Judgment on Reparations and Costs (26 May 2001).

24 *Armand Guehi v Tanzania* (Merits and Reparations), para 191; and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 43.

25 See *Armand Guehi v Tanzania* (Merits and Reparations), paras 191 and 192.

already widely available through this Court's website.

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86. The Court considers that although a judgment, *per se*, can constitute a sufficient form of reparation for moral damage, other measures, including publication of the decision, can be ordered as the circumstances warrant.[26] The Court restates that, as its case-law exemplifies, a measure such as publication would apply for instance in cases of grave or systemic violations that affect the domestic system of the Respondent State; where the Respondent State has not implemented a previous order of this Court in relation to the same case; or where there is need to enhance public awareness of the findings in the case.[27]

87. In the instant case, the Court notes that, more than two (2) years after it delivered its Judgment on the merits where it ordered the Respondent State to expedite the appeals of the Applicants who were convicted, it is yet to do so. The Court considers that, in the circumstances, publication of the Judgment is warranted. The Court consequently orders that the present Judgment and the Judgment on the merits are published on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs, and that the Judgments remain accessible for at least one (1) year after the date of publication.

VI. Costs

88. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs".

89. The Court recalls that, in line with its earlier judgments, reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.[28] The Applicant must

26 *Ibid*, para 194; and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 45.

27 *Armand Guehi v Tanzania* (Merits and Reparations), 191. See also *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 45; and *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106.

28 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 79-93; and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 39.

provide justification for the amounts claimed.[29]

A. Legal fees related to proceedings before this Court

90. The Applicants pray the Court to order the payment of the following being the legal fees incurred in the proceedings before the African Court:

i. PALU Secretariat Legal fees: 800 hours of legal work; 600 hours for four Assistants at US Dollars One Hundred and Fifty (US$ 150) an hour amounting to US Dollars Ninety Thousand (US$ 90,000); 200 hours for the lead counsel at US Dollars Two Hundred (US$ 200) per hour amounts to US Dollars Forty Thousand (US$ 40,000), which makes it a total of US Dollars One Hundred and Thirty Thousand (US$ 130,000);

ii. Payment to Arnold Laisser: US Dollars Three Hundred (US$ 300);

iii. Facilitation fees to William Kivuyo: US Dollars Four Hundred and One (US$ 401);

iv. Faciliation fees to Cynthia Kimaro: US Dollars Eight Hundred and Twenty-Five (US$ 825); and

v. Facilitation fee to Grace Mbogo: US Dollars Five Hundred and Fifty Two (US$ 552).

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91. The Respondent State avers that the Applicants' prayer to be paid legal fees for proceedings before this Court should not be granted as there is no evidence in support thereof. The Respondent State submits that the working period alleged are not explained, the figures are excessive and the involvement of Arnold Laisser, William Kivuyi, Cynthia Kimaro, and Grace Mbogo in the proceedings is not explained. The Respondent State also submits that the prayer should be denied since the Applicants were provided legal aid by this Court and there is a discrepancy between costs prayed for in the Application and subsequent

29 *Norbert Zongo and others v Burkina Faso* (Reparations), para 81; and *Reverend R Mtikila v Tanzania* (Reparations), para 40.

submissions of the Applicants.

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92. The Court notes that the Applicants were duly represented by PALU throughout the proceedings under the Court's legal aid scheme.[30] Noting further that its legal aid scheme is *pro bono* in nature, the Court rejects the claim.

B. Other expenses related to proceedings before this Court

93. In their joint written submissions, the Applicants pray the Court to order the reimbursement of transport costs and accommodation expenses incurred in the proceedings before this Court.

94. The Respondent State submits that the prayer should be denied since the Applicants were provided legal aid by this Court. The Respondent State also avers that the prayers related to other costs are an afterthought and misconceived since they were not made in the Application.

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95. The Court notes that, in the proceedings before it, the Applicants were represented by PALU under the legal aid scheme. Consequently, the considerations relied on in examining the claim for payment of legal fees before this Court apply to the present claim. The claim is therefore dismissed.

96. As a consequence of the above, the Court decides that each Party shall bear its own costs.

30 See African Court on Human and Peoples' Rights Legal Aid Policy 2013-2014, Legal Aid Policy 2015-2016, and Legal Aid Policy from 2017.

VII. Operative part

97. For these reasons:
The Court,
Unanimously:
Pecuniary reparations
On material loss

i. *Does not grant* the prayer for material damages sought by:
   a. Peter Gikura Mburu;
   b. Michael Mbanya Wathigo;
   c. Margaret Nyambura Githinji who is the wife of Applicant Simon Kariuki Githinji (deceased); and
   d. Winnie Njoki Mwangi who is the wife of Applicant Boniface Mwangi Mburu (deceased).

ii. *Awards* damages and compensation as follows:
   a. US Dollars Two Thousand (US$ 2,000) to David Ngugi Mburu for loss of income;
   b. US Dollars Two Hundred and Fifty (US$ 250) to Peter Gikura Mburu for medical expenses;
   c. Tanzanian Shillings One Million and Eight Hundred (TZS 1,800,000) to David Ngugi Mburufor the fees incurred in the proceedings before domestic courts;
   d. Tanzanian Shillings Fifty Thousand (TZS 50,000) to Michael Mbanya Wathigo for the fees incurred in the proceedings before domestic courts; and
   e. Tanzanian Shillings Two Million (TZS 2,000,000) to Peter Gikura Mburu for the fees incurred in the proceedings before domestic courts.

On non-material loss

iii. *Does not grant* the prayer for damages to the Applicants who were convicted with respect to long imprisonment, emotional anguish during trial and imprisonment, disruption of life plan, and loss of social status;

iv. *Awards* moral damages as follows:
   a. US Dollars Three Thousand (US$3,000) to each of the Applicants who were acquitted, that is Michael Mbanya Wathigo, David Ngugi Mburu, and Peter Gikura Mburu; and to each of the representatives of beneficiaries of the deceased Applicants Boniface Mwangi Mburu and Simon Githinji Kariuki, who are Winnie Njoki Mwangi and Margaret Nyambura Githinji;
   b. US Dollars Four Thousands (US$ 4,000) to each of the Applicants who were convicted, that is Wilfred Onyango Nganyi, Jimmy Maina Njoroge, Patrick Muthe Muriithi, Gabriel Kungu Kariuki and Simon

Ndung'u Kiambuthi;

c. US Dollars One Thousand (US$1,000) to each of the wives, that is Jane Wangare Mukami, Mary Wanjiru Njoroge, Winnie Njoki Mwangi, Margret Kariuki Githinji, Irene Muthoni Wanjiku, Marion Njoki, Catherine Wangui Wanjohi, Carol Wanjiku Mwangi, and Susan Njeri Mbugua;

d. US Dollars Eight Hundred (US$800) to each of the children, that is Brian Ng'ang'a Mbanya, Sally Mwikali Mbanya, Eric Mburu Ngugi; Linet Wanjiku Ngugi, Lensey Mukami Ngugi, Loise wambui Gikura, Lucy Waceke Gikura, Ryan Mburu, Teresia Wambui Githinji, John Bosco Kariuki, Ashley Atieno Onyango, Brian Waiguru Maina, Leila Wamaitha Maina, Taliah Waithera Maina, Joe Moses Wanyeki, Bryan Muriithi, Marc Ribai, Teresia Wambui Kungu, Carlyn Bosco Kariuki Kungu, Rose Wanjiru Ndung'u and Michelle Ngawaro Ndung'u;

e. United States Dollars Five Hundred (US$500) to each of the fathers and mothers, that is Prisca Wangeci, Wanjiku Mburu Mwenda, Loise Wambui Mburu, John Bosco Kariuki, Teresia Wambui Kariuki, Margaret Atieno Nganyi, Zipora Nyaguthi, John Bosco Kariuki and Teresa Wambui Kariuki; and

f. Tanzanian Shillings Three Hundred Thousand (TZS 300,000) to each of the Applicants in relation to non-provision of legal aid during the proceedings before domestic courts.

v. *Orders* the Respondent State to pay the amounts indicated under sub-paragraphs (ii) and (iv) free from taxes within six (6) months, effective from the notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

vi. *Does not grant* the order for release of the Applicants;

vii. *Does not grant* the order regarding non-repetition;

viii. *Orders* the Respondent State to publish this Judgment on reparations and the Judgment of 18 March 2016 on the merits within a period of three (3) months from the date of notification of the present Judgment, on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs and ensure that the judgments remain accessible for at least one (1) year after the date of such publication.

On implementation and reporting

ix. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this Judgment, a report on the measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that

there has been full implementation thereof.

On costs

x. *Does not grant* the prayer related to payment of the costs and other expenses incurred in the proceedings before this Court;

xi. *Decides* that each Party shall bear its own costs.

Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334

Application 007/2013, *Mohamed Abubakari v United Republic of Tanzania*

Judgment, 4 July 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant filed a claim for reparations following the Court's Judgment on merits, in which the Court found that the Respondent State had violated the Applicant's rights to defence and free legal assistance. The Applicant prayed the Court to order his release, grant material and moral damages, order the Respondent State to guarantee non-repetition of violation of his rights, and publish the Judgment. The Court awarded moral damages for the Applicant, his wife and son, and ordered the Respondent State to publish the Judgment. It dismissed Applicant's prayers for material damages, legal fees, moral damages for other indirect victims and release.

Reparations (material damages, 35, 36; moral damages, 45-47, indirect victims, 62-64; release, 68; non-repetition, 72-73; report on implementation, 74; publication of Judgment, 79; legal fees, 86)

I. Subject of the Application

1. The Application for reparations was filed by Mr Mohamed Utolu Abubakari (hereinafter referred to as "the Applicant") against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), pursuant to the Judgment of the Court on the merits delivered on 3 June 2016. In the said Judgment, the Court decided that the Respondent State violated Article 7 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"), in respect of:

i. the Applicant's alleged right to defend himself and to have the benefit of a Counsel at the time of his arrest;

ii. the Applicant's right to obtain free legal assistance during the judicial proceedings;

iii. the Applicant's right to be promptly given the documents in the records to enable him defend himself;

iv. the Applicant's right to 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;

v. the Applicant's right not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade; and

vi. the Applicant's right to have his *alibi* defence given serious consideration by the Respondent State's police and judicial authorities.[1]

2. Having found these violations, the Court ordered the Respondent State to take all appropriate measures within a reasonable time frame to remedy the violations established, excluding a reopening of the trial and to inform the Court of the measures so taken, within six (6) months from the date of the Judgment.

3. Pursuant to Rule 63 of the Rules, the Court ordered the Applicant to file his submissions on reparations within thirty (30) days of the judgment of 3 June 2016 and the Respondent to file submissions in response thereto within thirty (30) days of receipt of the Applicant's submissions.

II. Brief background of the matter

4. The above-mentioned judgment of the Court of 3 June 2016 was on the merits of the Application filed by the Applicant on 8 October 2013. In the Application, he alleged that his rights to a fair trial had been violated by the Respondent State during his trial at the domestic courts, following which he was convicted of the offence of armed robbery and sentenced to thirty (30) year imprisonment.

III. Summary of the procedure before the Court

5. On 6 June 2016, the Registry transmitted a certified true copy of the judgment on the merits to the Parties.

6. The Parties filed their submissions on reparations within the time stipulated by the Court.

7. On 28 September 2018, pleadings were closed and the Parties were duly notified.

IV. Prayers of the Parties

A. Applicant's Prayers

8. The Applicant prays the Court to grant him the following reparations:

"i. Monies as detailed in the claims in paragraph 63-68;

ii. That this Honourable Court orders for the restoration of Applicant's liberty by his release from prison where he is currently serving an unlawful sentence;

iii. We pray that this Honourable Court applies the principle of proportionality when considering the award for compensation to be granted;

iv. That this Honourable Court makes an order that the Respondent guarantees non-repetition of these violations against the Applicant. The Respondent State should also be requested to report back to this Honourable Court every six months until they satisfy the orders this Court shall make when considering the submissions for reparations;

v. We also ask that the government publishes in the national Gazette the decision of 3 June 2016 in both English and Swahili as a measure of satisfaction.

vi. Any other reparations this Honourable Court shall deem necessary."

9. In paragraph 63-68 of the Applicant's submissions on reparations, he requested that the Court should grant him pecuniary reparations as follows:

a. On moral prejudice, the Applicant, prays the Court to award him the sum of United States Dollars, two hundred and sixty one thousand, one hundred and eleven (US$261,111), for being imprisoned for nineteen (19) years and seven (7) months;

b. On loss of income, the Applicant prays the Court to award him the sum of United States Dollars, six hundred and fifty-two thousand, seven hundred and seventy eight (US$652,778).

c. On legal fees, the Applicant prays the Court to award legal fees for 400 hours of legal work, comprising 300 hours for two Assistant Counsel and 100 hours for the lead Counsel, calculated at United States Dollars two hundred (US$200) per hour for the lead Counsel and United States Dollars one hundred and fifty (US$150) per hour for the Assistant Counsel. This amounts to United States Dollars twenty thousand (US$20,000) for the lead Counsel and United States Dollars forty five thousand (US$45,000) for the two Assistant Counsel.

d. On moral damages for indirect victims, the Applicant prays the Court to grant members of his family the following:

i. United States Dollars, six hundred and fifty two thousand, seven

hundred and seventy eight ($652,778), paid to his wife, Lucresia Laurent Mohamed;

ii. United States Dollars, three hundred and ninety one thousand, six hundred and sixty seven ($391,667), paid to his son, Ibrahim Mohamed;

iii. United States Dollars, two hundred and sixty one thousand, one hundred and eleven thousand ($261,111), paid to his sister, Judith Nelson;

iv. United States Dollars, two hundred and sixty one thousand, one hundred and eleven thousand ($261,111), paid to his sister, Sara Chirumba;

v. United States Dollars, two hundred and sixty one thousand, one hundred and eleven thousand ($261,111), paid to his younger brother, Mbaraka Abubakari;

vi. United States Dollars, two hundred and sixty one thousand, one hundred and eleven thousand ($261,111), paid to his nephew, Abiola Mansuri.

e. On award for other costs incurred, that is, transport, postage and stationery, the Applicant, urges the Court to order reimbursement, totalling United States Dollars, one thousand, three hundred and ninety nine ($1,399), broken down as follows:

i. Postage – United States Dollars, seventeen (US$17);

ii. Printing and photocopying – United States Dollars, two hundred and sixty two (US$262);

iii. Trips to and from Karanga Prison – United States Dollars, one thousand, one hundred and twenty (US$1,120).

B. Respondent State's Prayers

10. The Respondent State in its Response, prays the Court to make the following orders and declarations:

"i. That, the judgment of the Court dated 3 June, 2016 is sufficient reparation to the prayers found in the Applicant's submission for reparations;

ii. That, the Applicant be ordered to submit to the Court and the Respondent, verification and evidence of the computed amount sought;

iii. That, the Applicant's claims for lawyer's fees 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 reparations;

iv. That, the prayer for restoration of the Applicant's liberty be denied;

v. That, the prayer for restoration of the Applicant's liberty is contemptuous of the judgment of the African Court;

vi. That, the African Court be pleased to order that there was no gross violation of international human rights law and international humanitarian law;

vii. That, the Applicant should not be granted reparations;

viii. That, the Applicant's claim for reparations be dismissed in its entirety with costs;

ix. Then, justice would be done;

x. That since all the alleged violations occurred before Tanzania deposited its declaration to accept complaints from individuals then the Court has no mandate to order reparations for acts committed before 29 March 2010. "

V. Jurisdiction

11. The Respondent State raises a preliminary objection to the jurisdiction of the Court and challenges its competence to make orders on reparations. The Respondent State contends that "the African Court has no jurisdiction to grant reparations for acts/violations which occurred before the United Republic of Tanzania deposited its Declaration accepting the jurisdiction of the Court to receive complaints from individuals and Non-Governmental Organisations".

12. The Respondent State avers that the last decision of its domestic court was delivered on 5 October 2004, while Tanzania deposited its Declaration on 29 March 2010. According to the Respondent State, the Court has no mandate to order reparations for acts that were committed before 29 March 2010.

13. The Applicant in response prays the Court to dismiss the preliminary objection. He states that Rule 52(2) of the Rules provide for when preliminary objections should be raised.

14. He argues that raising a preliminary objection after a judgment has been delivered is redundant and a waste of time. He also maintains that the violation of rights are continuous in nature and therefore, the State became bound through its action of depositing its Declaration, thereby giving the Court jurisdiction over the Application and powers to order reparations.

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15. 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".

16. The Court notes that it established its jurisdiction in the merits judgment of this Application, where it found violations of Article 7 of the Charter and Article 14 of the ICCPR.[2] The Court is of the opinion that its jurisdiction also extends to the reparations part of the Application because it involves the same Parties and same facts. The Court considers that following its finding of violation, it is empowered under the Protocol to determine the reparations that should be awarded to the Applicant.

17. The Court therefore finds that it has jurisdiction to decide on reparations in this Application and dismisses the Respondent State's objection to that effect.

VI. Reparations

18. Article 27(1) of the Protocol provides that "If the Court finds that 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**"**.

19. The Court recalls its earlier judgments,[3] and restates its position that,

"To examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".[4]

20. The Court also restates that, the purpose of reparation being *restitutio in integrum,* it "…must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been

2 *Mohamed Abubakari v Tanzania* (Merits), paras 233 and 242 (xiii).

3 Application 013/2011. Judgment of 5 June 2015 (Reparations), Beneficiaries of the Late *Norbert Zongo and others v Burkina Faso* (hereinafter referred to as "*Norbert Zongo and others v Burkina Faso* (Reparations)") para 20; Application 004/2013. Judgment of 3 June 2016 (Reparations), *Lohé Issa Konaté v Burkina Faso*, (hereinafter referred to as "*Konate v Burkina Faso* (Reparations)"), para 15.

4 Application 003/2014, Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda* (hereinafter referred to as "*Ingabire Victoire v Rwanda* (Reparations)") paras 20-22.

committed".[5]

21. Measures that a State must take to remedy a violation of human rights include restitution, compensation and rehabilitation of the victim, measures of satisfaction, as well as measures to ensure non-repetition of the violations, taking into account the circumstances of each case.[6]

22. The Court reiterates that with regard to material prejudice, there must be an existence of a causal link between the alleged violation and the prejudice caused, and the burden of proof is on the Applicant who has to provide evidence to justify his prayers[7]. The exception to this is that the burden of proof may shift to the Respondent State, when there is a presumption of moral prejudice to the Applicant as a result of the violation found.

23. The Applicant has made claims in United States Dollars. As a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.[8] Taking into account fairness and considering that the Applicant should not be made to bear the adverse fluctuations that are inherent in financial activities, the Court will determine the quantum and currency of the award.

24. The Court notes that the Applicant's request to be paid compensation in United States Dollars, is not justified. The Court considers that the Applicant is a Tanzanian national, resident in Tanzania where the violations occurred and the legal tender is Tanzanian Shillings, it will therefore award compensation in Tanzanian Shillings.

25. The Applicant has prayed for pecuniary reparations for (a) material loss, (b) moral prejudice that he and indirect victims suffered and non-pecuniary reparations in the form of (a) restitution of liberty (b) guarantees of non-repetition and (c) measures of satisfaction.

A. Pecuniary reparations

i. Material loss – Loss of income and life plan

26. The Applicant states that even though the Judgment of 3 June 2016 is a form of reparation, the Court should consider granting him monetary compensation for losses he suffered, based on the principle of equity.

27. In this regard, the Applicant avers that he was a businessman and financially supported his wife, son, parents and siblings. He claims that he lost all his businesses following his imprisonment and if released from prison, he would have no source of income. He relies on the jurisprudence of the Inter-American Court in *Aloeboetoe v Suriname*[9] to support his argument that he should be awarded reparations for loss of income.

28. Furthermore, the Applicant claims that his life plan has been disrupted and that he has been unable to achieve his plans and goals because of his arrest, trial and imprisonment. He relied on the Inter-American case of *Loayza-Tamayo v Peru*,[10] to support his claim that he is entitled to reparations for the loss of his life plan.

29. Consequently, he requests that the Court should award him the sum of United States Dollars, six hundred and fifty two thousand, seven hundred and seventy eight ($652,778), as material damages for loss of income and life plan.

30. The Respondent State contests the submission of the Applicant, stating that he was charged, prosecuted, convicted and sentenced due to his criminal acts. Furthermore, that his sentence is legal and in accordance with the laws in force in the United Republic of Tanzania.

31. The Respondent State asserts that the loss of the Applicant's source of income is of his own making for trying to make quick money without working for it. The Respondent State also avers that the Applicant's life plan was disrupted by his illegal act which at the same time disrupted the lives of the victims of the armed robbery who suffered considerable loss and trauma as a result of the Applicant's actions.

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32. The Court recalls its position in the *Zongo* case, where it stated 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".[11]

33. The Court also recalls its jurisprudence in the *Mtikila* case where it stated that:

"It is not enough to show that the Respondent State has violated a provision of the Charter; it is also necessary to prove the damage that the Respondent 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."[12]

34. The Court notes that the Applicant's claims that he was a businessman prior to his arrest and sentence are not supported by evidence. The Court also recalls that in its judgment on the merits, it had noted that nothing in the Applicant's records showed that he had a regular income prior to his arrest.[13] It also emerges from the Applicant's submission that the failure of the Respondent State to grant him legal aid was because of discrimination on the grounds that he was poor.

35. The Court is therefore of the considered opinion that the Applicant, having no source of regular income, has not sufficiently proved his claim for compensation amounting to United States Dollars, six hundred and fifty two thousand, seven hundred and seventy eight ($652,778.00), for material prejudice resulting from the loss of income and life plan.

36. In light of this consideration, the Court does not find justifiable grounds to grant this request. This prayer regarding material damages is therefore dismissed.

11 *Norbert Zongo and others v Burkina Faso* (Reparations), para 24.

12 *Christopher Mtikila v Tanzania* (Reparations), para 31.

13 *Mohamed Abubakari v Tanzania* (Merits), para 143.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicant

37. The Applicant in his affidavit claims that he suffered emotional, physical and financial strain due to the judicial processes, his imprisonment, and from his inability to exercise his conjugal rights with his wife. He also states that he lost his social status in the community, which has resulted in embarrassment to him, as he is now regarded as a criminal and no longer recognised as a credible business man.

38. The Applicant further claims that his health deteriorated significantly as he now suffers from ailments that are not limited to, a broken arm, deteriorating eye sight, haemorrhoids, anal fissures and skin diseases.

39. The Applicant prays that the Court, in calculating the moral damages, should apply equity and take into account the severity of the violation and the impact it has had on him. He further asks the Court to give weight to the period of time he was imprisoned and make reparations that would at least alleviate the suffering that he endured. Citing the decision of the Court in the *Konate*[14] case, where the Applicant was awarded twenty thousand US Dollars (US$20,000.00), as moral damages for eighteen (18) months imprisonment, he is of the view that what he suffered is of a higher gravity and the period he was imprisoned nineteen (19) years and seven (7) months), is also significantly longer than that of the Applicant in the *Konate* case.

40. Consequently, the Applicant urges the Court to grant him an award of two hundred and sixty one thousand, one hundred and eleven US Dollars ($261, 111.00), as compensation for moral prejudice to him, as a direct victim.

41. The Respondent State contests the submission of the Applicant and states that even before his conviction, he was suffering from ill health and there is no proof that if he was not imprisoned, he would not have become ill. The Respondent State also avers that, the loss of his social status is self-inflicted because of the armed robbery he was involved in.

42. The Respondent State further states that the emotional anguish the Applicant suffered was as a result of his unlawful act, that any trial was bound to be emotional and the State cannot refrain from prosecuting persons for crimes for fear that their feelings would be hurt. The Respondent State further asserts that loss of contact with his relatives is a personal issue that has nothing to do with

the law and that the said relatives had the opportunity to visit him in prison. Furthermore, his denial of conjugal rights with his wife was due to his imprisonment, which was as a result of his criminal acts of armed robbery, for which he was sentenced to prison.

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43. The Court recalls that moral prejudice to an Applicant is presumed when a violation of his rights has been found, without the need for him to demonstrate with evidence, a link between the violation and the prejudice.[15]

44. Furthermore, the Court has also held that the evaluation of amounts to be awarded for non-material damage must be done in fairness and taking into account the circumstances of the case.[16] In such instances, awarding lump sums would generally apply as the standard.[17]

45. The Court notes in the instant case that the Applicant's claim for moral damages, arises as a result of the decision of the Court, that his rights to a fair trial and defence were violated by the Respondent State.

46. The Court however, considers that the amount sought by the Applicant as compensation for moral prejudice, that is, United States Dollars two hundred and sixty one thousand one hundred and eleven (US$261,111), is excessive.

47. In light of these considerations, the Court finds that the Applicant is entitled to compensation for moral prejudice, and awards him the sum of two million Tanzanian Shillings (TZS 2,000,000).

b. Moral prejudice to indirect victims

48. The Applicant, relying on the *Zongo case*, seeks compensation for his family as indirect victims as follows:

i. United States Dollars six hundred and fifty two thousand, seven hundred and seventy eight ($652,778), paid to his wife, Lucresia Laurent Mohamed;

15 *Norbert Zongo v Burkina Faso* (Reparations) para 61; *Ingabire Victoire v Rwanda* (Reparations), para 59.

16 *Ibid*, para 61.

17 *Ibid*, para 62.

ii. United States Dollars three hundred and ninety one thousand, six hundred and sixty seven ($391,667), paid to his son, Ibrahim Mohamed;

iii. United States Dollars two hundred and sixty one thousand, one hundred and eleven thousand ($261,111), paid to his sister, Judith Nelson;

iv. United States Dollars two hundred and sixty one thousand, one hundred and eleven thousand ($261,111), paid to his sister, Sara Chirumba;

v. United States Dollars two hundred and sixty one thousand, one hundred and eleven thousand ($261,111), paid to his younger brother, Mbaraka Abubakari;

vi. United States Dollars two hundred and sixty one thousand, one hundred and eleven thousand ($261,111), paid to his nephew, Abiola Mansuri.

49. The Applicant requests that the Court should consider the fact that his son was barely two years old when he was arrested, and his son never had the opportunity to be raised by his father and have a good education due to his father's imprisonment. He states that his wife suffered from his incarceration as she was left without her best friend, confidant and sole source of income and had to fend for their son alone. He claims that she also had to face the emotional trauma and stigma of having a convict as a husband and suffered mental, emotional, physical and financial losses.

50. He further states that his parents also suffered as a result of their son's absence. He states that they went through emotional, physical and mental distress as a result of his imprisonment and his father passed away in 2003 after battling with pulmonary tuberculosis and hypertension. His mother struggled to survive living with the social stigma of having a son who is a convicted criminal. She also passed away in 2015 after struggling to find money to put food on the table.

51. The Applicant also claims that his siblings Judith Nelson, Mbaraka Abubakari and Sara Chirumba suffered and continue to suffer as a result of his imprisonment. He stated that they had to travel to visit him numerous times in the prisons he was detained during his imprisonment and suffered financial, mental, emotional and physical anguish as a result of this. He claims that his siblings were also left to cater for his expenses while in prison, including the purchase of medicines and other basic necessities while he was in prison. They have also had to provide for his wife and son as a result of his absence.

52. The Applicant further claims that his nephew Abiola Mansuri should also be granted compensation, due to the fact that prior

to his imprisonment, he was his nephew's sole provider. The Applicant claims that his nephew Abiola faced a lot of struggles as a result of his arrest – he lost a provider, his role model and the financial and other support provided by his uncle. He also suffered from the stigma of being related to a convict.

53. The Applicant prays that the Court, in evaluating the non-material damages, should apply equity and take into account the severity of the violation and the impact it has had on the indirect victims.

54. The Respondent State contends that, all consequences suffered by the Applicant's family are expected consequences of his crimes. The Respondent State further asserts that he was convicted by competent courts and his appeals were completed in Tanzania, his separation from his wife and other relatives were self-inflicted by the Applicant and is personal to him and not a legal issue.

55. The Respondent State further avers that compensation for indirect victims cannot be quantified as the Applicant cannot assess their suffering since, he claimed that he had no contact with them during his imprisonment and awarding compensation to them would be unjustly enriching the Applicant.

56. The Respondent State also challenges the identity of the Applicant's relatives, on the grounds that the Applicant failed to provide any proof that he is the father of Ibrahim Mohamed; no marriage certificate is attached to show that he is married to Lukresia Kimario; and no birth certificate linking him to the siblings and his nephew, all of whom he mentioned in his submission as being indirect victims. The Respondent State further maintains that the national identification cards do not prove their kinship to the Applicant, neither has he shown proof of the damage he alleges they suffered.

57. The Respondent State further states that the death of the Applicant's parents cannot be connected to his imprisonment because the Applicant's father died of pulmonary tuberculosis and his mother died fifteen (15) years after the Applicant was imprisoned.

58. The Respondent State therefore prays the Court, to dismiss the Applicant's claim for reparations for moral prejudice to the indirect victims.

59. In respect of moral damages to his relatives, the Court has established that the determination of moral damages to those closest to an applicant will be done on a case-by-case basis.[18] In this case, the Court recognises that the Applicant's wife, child and parents are his immediate next of kin. They are the most likely to have suffered moral prejudice as a result of his imprisonment.[19]

60. However, before the Court can order reparations for moral damage to these persons, there must be proof of affiliation between them and the Applicant. The Court also recalls that victimhood must be established in order to justify damages.[20]

61. The Court recalls that a marriage certificate or other equivalent is sufficient proof of marriage and a birth certificate or other equivalent certificate, is sufficient to prove the affiliation of a child to an applicant. In the same vein, "fathers and mothers of direct victims must produce only an attestation of paternity or maternity as well as life certificate or any other equivalent proof."[21]

62. The Court notes that the Applicant did not provide a formal marriage certificate that indicates he is married to Lukresia L Kimario. The Court however notes the existence of the common law marriage, where a couple is considered married legally, without formally registering their relationship as a civil or religious marriage. The marriage laws of the Respondent State provide for the presumption of marriage, where there has been cohabitation between a man and woman and also recognises that the failure to register a marriage does not affect the validity of the marriage.[22] In addition, such presumption is further buttressed by the fact that on the birth certificate of their son, Lukresia L Kimario is designated as the mother of Ibrahim Mohamed and the Applicant is designated as the father, which clearly establishes a link between him and Lukresia L Kimario. The Court therefore finds that Lukresia L. Kimario is entitled to compensation for moral prejudice as an indirect victim and awards Tanzanian Shillings one million, five hundred thousand (TZS 1,500,000), to her as compensation.

63. Concerning the Applicant's claim for moral damages for his son, Ibrahim Mahamadu Ulotu, the Court notes that the Applicant supported the claim with a birth certificate, which is formal evidence that he is the boy's father. In the light of this, the Court decides that Ibrahim Mahamadu Ulotu is entitled to compensation for moral prejudice as an indirect victim and awards Tanzanian Shillings one million (TZS 1,000,000), to him as compensation.

64. The Court notes, concerning the Applicant's siblings and nephew, that the Applicant did not present any formal document as evidence that they are related by birth or by blood. The national identity cards and birth certificates attached in support of his claim

do not show proof of their affiliation to the Applicant, as these documents only attest to their identity. His request for reparations for moral damage to his siblings and nephew namely, Sarah Cirumba, Judith Nelson, Mbaraka A. Ulotu and Abiola Mansuri Olotu is therefore not established and the claim is dismissed.

B. Non-pecuniary reparations

i. Restoration of Applicant's liberty

65. The Applicant in his submission states that although he cannot be returned to the state he was before his incarceration, his liberty can be restored as a second best measure under the circumstances. He supports his prayers by citing the decisions of the African Commission in the *COHRE*[23] and *Egyptian Initiative for Personal Rights*[24] *cases*.

66. The Respondent State contests the Applicant's submission and argues that the Applicant was imprisoned by competent courts in Tanzania for his criminal acts, which were in violation of Sections 285 and 286 of the Penal Code, Article 26 of the Constitution of the Respondent State and Article 27 and 28 of the Charter.

67. Further, the Respondent State avers that the incarceration of the Applicant was "legal, proper and lawful", which is why this Court in its judgment on the merits did not grant his prayer to be released from prison.

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68. The Court notes that on 13 November 2019, the Applicant's representative (PALU) informed the Court by letter that the Applicant was released from prison on 28 July 2017 after completing his sentence. The Court therefore dismisses this

23 Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, 27 May 2009.

24 Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt* 1 March 2011, para 233(VI).

prayer.

ii. Guarantees of non-repetition and report on implementation

69. The Applicant prays the Court to make an order that the Respondent State guarantees the non-repetition of violation of his rights. He also requests that the Court should order the Respondent State to report to the Court every six (6) months, until it satisfies the orders the Court shall make in its judgment on reparations.

70. The Respondent State disputes the Applicant's prayer for an order to guarantee non-repetition, stating that the prayer is "untenable, awkward, baseless and misconceived." Regarding the Applicant's request that the Respondent State should be ordered to report to the Court every six months, the Respondent State contests this prayer, stating that it is untenable because the Applicant "is requesting the Respondent State to report to the Court for orders which have never been granted."

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71. The Court recalls that guarantees of non-repetition generally apply in cases of systemic violations.[25] However, this remedy is only relevant in individual cases, where the violation has not ceased**,** is likely to re-occur or is structural in nature.[26]

72. The Court considers that the criminal proceedings are finalized and the Applicant was convicted. Therefore**,** the Court does not deem it necessary to issue an order regarding non-repetition of the violations of the Applicant's rights, since there is no possibility of such violations being repeated.[27]

73. The Court also notes that in the Respondent State's report on implementation of the Court's judgment on the merits, filed on 3 January 2017, the Respondent State informed the Court

25 *Armand Guehi v Tanzania* (Merits and Reparations), para 191; *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106.

26 *Armand Guehi v Tanzania* (Merits and Reparations), para 191; and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 43.

27 *Armand Guehi v Tanzania* (Merits and Reparations), paras 191 and 192.

of the Legal Aid Bill, which was being proposed to establish a comprehensive legal aid framework for indigent litigants, in both civil and criminal matters. The Legal Aid Bill was enacted by the Respondent State's Parliament on 21 February 2017 and published in the Official Gazette in March 2017. Consequently, the publication of this law constitutes a measure of guarantee of non-repetition. The claim is therefore dismissed.

74. With respect to the Applicant's prayers for the Respondent State to report on the implementation of the Judgment, the Court notes that such an order is inherent in its judgments. However, the Court reiterates the obligation of the Respondent State as set out in Article 30 of the Protocol and enjoins the Respondent State to take appropriate measures to implement the Judgment on reparations and report same to the Court.

iii. Measures of satisfaction

75. The Applicant requests the Court to order the Respondent State to publish the Judgment of 3 June 2016 in the National Gazette of the United Republic of Tanzania, in both English and Swahili as a measure of satisfaction.

76. The Respondent State contends that there is no need to publish the decision of the Court and that it would not be possible to publish a decision of 74 pages in the Official Gazette.

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77. Regarding the publication of the Court's judgment, the Court recalls its decision in the *Zongo judgment* where it noted that the publication of decisions of international human rights courts, as a measure of satisfaction is a current practice.[28] The Court also recalls the *Mtikila* judgment where it decided by its own motion to order the publication of its decisions as a measure of satisfaction.[29]

78. The Court considers that although a judgment can constitute a form of satisfaction, it can order other forms of satisfaction as it deems fit, which include publication of the judgment. The

28 *Nobert Zongo and others v Burkina Faso* (Reparations) *op cit* para 98.

29 *Christopher R Mtikila v United Republic of Tanzania* (Reparations) paras 45 & 46(5).

publication would also serve as a tool for the enhancement of public awareness of the decisions of the Court.

79. However, taking into consideration the contention of the Respondent State that it would be practically impossible to publish a seventy four (74) page judgment in the Official Gazette, the Court decides that the Respondent State should take advantage of technology and disseminate, the judgments on the merits, and *suo motu* including this Judgment on reparations, through websites of the Judiciary and Ministry of Constitutional and Legal Affairs of the Respondent State and remain accessible for at least one (1) year after the date of publication.

VII. Costs

80. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

81. The Court recalls that in line with its earlier judgments, reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.[30] However, the Applicant must provide justification for the amounts claimed.[31]

A. Legal fees relating to proceedings before this Court

82. The Applicant, relying on *Zongo case,*[32] where the Court held that reparations paid to victims may include reimbursement of lawyers' fees, prays the Court to grant reparations for legal fees in relation to the proceedings before the Court, as follows:

i. Legal fees for 100 hours of legal work at United States Dollars, two hundered (US$200) per hour, for the lead counsel, totaling United States Dollars, twenty thousand (US$20,000); and

ii. Legal fees for 300 hours of legal work at United States Dollars, one hundred and fifty (US$150) per hour, for two legal assistants respectively, totalling United States Dollars forty-five thousand (US$45,000).

83. The Respondent State disputes the claims for legal fees made by the Applicant, stating that the Applicant applied for, and was granted legal aid by the Court. Hence, he did not engage a Counsel of his own, and did not incur any legal expenses in the

30 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 79-93; and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 39.

31 *Norbert Zongo and others v Burkina Faso* (Reparations), para 81; and *Reverend R Mtikila v Tanzania* (Reparations), para 40.

32 *Nobert Zongo and others v Burkina Faso* (Reparations) *op cit* para 79.

proceedings before this Court.

84. The Respondent State further argues that the Pan African Lawyers Union (PALU) agreed to provide legal assistance to the Applicant and amount claimed as legal fees is exceedingly inflated. Furthermore, the Respondent State asserts that the unnamed two assistant Counsel mentioned in the claim are an afterthought because throughout the proceedings, only one Counsel's name, that is, Donald Deya, has featured as representing the Applicant.

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85. The Court recalls its position in the *Zongo* case**,** where it stated that "…the reparation paid to the victims of human rights violations may also include the reimbursemnt of lawyers' fees".[33]

86. The Court notes that in this case, the Counsel from the Pan African Lawyers Union (PALU), represented the Applicant before the Court on a *pro bono* basis under the Court's current legal aid scheme.[34] The Court therefore finds no basis to grant the claim for legal fees by PALU. The prayer for legal fees is therefore rejected and the claim is dismissed.

33 *Nobert Zongo and others v Burkina Faso* (Reparations), para 79.

34 The Pan African Lawyers Union accepted to represent the Applicant on a pro bono basis, upon the Court's request.

B. Other expenses before this Court

87. The Applicant, relying on the *Zongo* case where the Court held that reparations can also include a reimbursement of transport fares and sojourn expenses,[35] prays the Court to grant reparations for expenses incurred by his representatives on transportation, stationery and other costs, totalling United States Dollars, one thousand, three hundred and ninety-nine (US$1,399). With receipts attached, his claims are broken down as follows:

i. On postage – United States Dollars, Seventeen (US$17);

ii. On printing and photocopying – United States Dollars, two hundred and sixty two (US$262);

iii. On trips to and from Karanga Prison – United States Dollars, one thousand, one hundred and twenty (US$1,120);

88. The Respondent State disputes the claims of the Applicant for reparations for other expenses incurred, stating that the Applicant was granted legal aid by the Court and therefore the Counsel who represented him on a *pro bono* basis are not entitled to other costs.

89. The Respondent State further argues that, the Applicant did not pray to be awarded costs in his application on the merits; there is no need for postage costs because the Counsel resides in Arusha; that all expenses for service and postage were borne by the Court and that the legal aid allowance paid by the Court is sufficient to cover all costs incurred, bearing in mind that the Counsel resides in Arusha.

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90. The Court recalls its position in the *Mtikila Case* where it noted that: " Expenses and costs form part of the concept of reparation". However, the Applicant must provide justification for the amounts claimed.[36]

91. The Court is of the considered opinion that expenses such as transport, postage and stationery costs fall under the "Categories of expenses that will be supported" in the current Legal Aid Policy

of the Court, under which PALU represented the Applicant.[37]

92. The Court notes, however, that the amount being claimed by the Applicant and the receipts presented to support the claims exceed the amount granted by the Court, as a token amount to the Counsel who represented the Applicant before the Court to cover expenses.[38] The Court finds that under these circumstances, these expenses amounting to United States Dollars Three Hundred and Ninety Nine, should be covered under the Legal Aid Scheme of the Court and not by the Respondent State.

93. Based on the above considerations, the Court decides that each Party shall bear its own costs.

VIII. Operative Part

94. For these reasons:

The Court,

Unanimously:

On jurisdiction

i. *Dismisses* the objection on jurisdiction;

ii. *Declares* that it has jurisdiction.

On pecuniary reparations

iii. *Does not grant* the Applicant's prayer for material damages for loss of income and loss of life plan;

iv. *Does not grant* the Applicant's prayer for reparations for moral prejudice to his siblings Sarah Chirumba, Judith Nelson, Mbaraka A. Ulotu and his nephew, Abiola Mansuri Olotu;

v. *Grants* the Applicant's prayers for moral damages suffered by him and the indirect victims and awards compensation to them as follows:

   a. Tanzanian Shillings Two Million (TZS 2,000,000), to the Applicant;

   b. Tanzanian Shillings One Million, Five Hundred Thousand (TZS 1,500,000), to the Applicant's wife, Lukresia L. Kimario; and

   c. Tanzanian Shillings One Million (TZS 1,000,000), to the Applicant's son Ibrahim Mahamadu Ulotu,

vi. *Orders* the Respondent State to pay the amounts indicated under (v) (a), (b) and (c), free from taxes effective six (6) months, from the date of notification of this Judgment, failing which, it will pay

37 African Court on Human and Peoples' Rights Legal Aid Policy 2013-2014, 2015-2016 and from 2017.

38 Under the Court's Legal Aid Scheme, counsel designated to represent Applicants are given United States Dollars one thousand (USD$1000) as a token amount to cover expenses.

interest on arrears calculated on the basis of applicable rates of the Central Bank of the United Republic of Tanzania, throughout the period of delayed payment and until the amount is fully paid;

On non-pecuniary reparations

vii. *Does not grant* the Applicant's prayer to be released from prison as this is moot;

viii. *Does not grant the* Applicant's prayer for an order regarding non-repetition of the violations;

ix. *Orders* the Respondent State to publish this judgment on reparations and the judgment of the Court of 3 June 2016 on the merits, within three (3) months of notification of the present judgment, on the official websites of the Judiciary and the Ministry of Constitutional Affairs, as a measure of satisfaction and ensure that the judgments remain accessible for at least one (1) year after the date of such publication.

On implementation and reporting

x. *Orders* the Respondent State to submit to it, within six (6) months of the date of notification of this judgment, a report on measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xi. *Does not grant* the Applicant's prayer related to legal fees, costs and other expenses incurred in the proceedings before this Court;

xii. *Decides* that each Party shall bear its own costs.

Malengo v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 356

Application 030/2015, *Ramadhani Issa Malengo v United Republic of Tanzania*

Judgment, 4 July 2019. Done in English and French, the English text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA and ANUKAM

Recused under Article 22: ABOUD

The Applicant alleged that the Respondent State violated his rights by denying him justice in national courts. The Court found that it had jurisdiction, but dismissed the case for lack of exhaustion of local remedies.

Jurisdiction (material jurisdiction, 22, 23)

Admissibility (nature of application 32; exhaustion of local remedies, 41-43)

I. The Parties

1. Ramadhani Issa Malengo (hereinafter referred to as the "Applicant") is a national of the United Republic of Tanzania and a tobacco farmer. He resides in Kigwa village, Tabora region and alleges that the Respondent State violated his rights by denying him justice in the national courts.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, 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 10 February 2006. On 29 March 2010, it also deposited the Declaration under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the file that in 1996, the Applicant had an oral agreement with DIMON Tanzania Ltd for a loan of one million, three hundred and ninety thousand Tanzanian shillings (TZS 1,390,000) and agricultural inputs in return for him selling his tobacco to DIMON Tanzania. However, he was only advanced the sum of seven hundred thousand Tanzanian Shillings (TZS 700,000) and agricultural inputs.

4. Therefore, the Applicant instituted a suit against DIMON Tanzania Ltd and its successor DIMON Morogoro Tobacco Processors Ltd for *inter alia*[1] a claim of six hundred and seventy five million, six hundred and thirty-five thousand and nine hundred and twenty-one Tanzanian shillings (TZS 675,635,921) being special and general damages for breach of contract. The suit was filed on 26 September 2000 as Civil Case No. 163 of 2000 before the High Court of Tanzania at Dar es Salaam (hereinafter referred to as "the High Court").

5. The High Court dismissed the suit with costs on 19 August 2008 holding that there was no contract between the parties. Nevertheless, upon appealing to the Court of Appeal of Tanzania sitting at Dar es Salaam (hereinafter referred to as "the Court of Appeal") in Civil Appeal No. 108 of 2009, the Applicant partly succeeded because the Court of Appeal held that there was a contract between him and DIMON Tanzania Ltd which was breached and the case was then remitted back to the High Court for assessment of general damages.

6. The High Court awarded the Applicant general damages of six million Tanzanian shillings (TZS 6,000,000) together with 10% interest per annum until the date of full payment. Aggrieved on account of this amount**,** the Applicant filed Civil Appeal No. 76 of 2011 at the Court of Appeal. On 20 December 2011, the Court of Appeal dismissed the appeal with costs.

7. The Applicant further filed an application for taxation of the bill of costs which was struck out by order dated 28 November 2012 on the ground of it being time barred.

8. Subsequently on 23 November 2015, the Applicant filed Application 030 of 2015 before this Court.

B. Alleged violations

9. The Applicant alleges the following violations:

"i. The Courts subordinate to this Honourable Court erred in law by awarding a trivial amount of damages which is contrary to the laws of the Land of Tanzania…

ii. The Courts subordinate to this Honourable Court denied my right by deciding that the Applicant was not defamed…;

iii. The Applicant has not been paid costs incurred in prosecuting the case despite being awarded costs by the High Court…;

iv. The Applicant was confined in Tabora in the RCO's office for the period of 8 hours on 30th April, 1997, without justification;

v. The case before the High Court took 9 years while only three witnesses testified on either side…;

vi. That the Court of Appeal erred in law in not making an assessment [of damages but rather]…remitted the file to the High Court for such assessment…"

III. Summary of the procedure before the Court

10. The Application was filed at the Registry on 23 November 2015 and supplemented by the submissions filed on 12 April 2016 at the request of the Court. These were served on the Respondent State on 9 June 2016.

11. On 24 May 2017, the Registry received the Respondent State's Response and this was transmitted to the Applicant on the same date. The Applicant submitted his Reply to the Respondent State's Response on 5 December 2017.

12. On 5 July 2018, the Registry requested the Parties to submit on reparations. On 2 August 2018, the Registry received the Applicant's submission on reparations and it was transmitted to the Respondent State on 3 August 2018. The Respondent State failed to make its submissions in spite of several reminders.

13. On 26 June 2019, the pleadings were closed and the Parties notified thereof.

IV. Prayers of the Parties

14. The Applicant prays the Court to:

"i. Allow his Application;

ii. Award him General damages to the tune of two billion, five hundred million Tanzanian Shillings (TZS 2, 500,000,000);

iii. Order the Respondent State to issue an apology;

iv. Offer him legal assistance;

v. Order that his bill of costs be settled; and

vi. Order any other relief that the Court deems fit and proper to grant."

15. In respect to reparations, the Applicant prays the Court to:

"i. order the Respondent State to pay him the sum of four billion, two hundred and seventy two million, four hundred and eighty-six thousand and six hundred Tanzanian shillings (TZS 4, 272, 486, 600) as compensation for the material loss arising from the breach of contract and the delay occasioned by the domestic courts;

ii. order the Respondent State to pay him the sum of two billion, four hundred million Tanzanian shillings (TZS 2,400,000,000) as compensation for loss related to prosecuting his case in the domestic courts;"

16. The Respondent State prays the Court to find that:

"i. this Court is not vested with jurisdiction to adjudicate this Application;

ii. the Application is not admissible as it has not met the admissibility requirement under Rule 40(2) of the Rules of the Court (hereinafter referred to as "the Rules"), that is complying with the Constitutive Act of the Union and the Charter;

iii. that the Application is not admissible as it has not met the admissibility requirement under Rule 40(6) of the Rules, that is being filed within a reasonable time after exhausting local remedies;

iv. the Government of the United Republic of Tanzania has not violated the Applicant's human rights;

v. the Government of the United Republic of Tanzania has not violated any procedure laid down by the law;

vi. all aspects of the civil litigations were conducted lawfully;

vii. the Applicant's request for reparations is denied;

viii. the Application is dismissed for lack of merit in accordance with Rule 38 of the Rules of Court;

ix. the costs of this Application be borne by the Applicant".

V. Jurisdiction

17. 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." In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction…".

A. Objection to material jurisdiction

18. The Respondent State contends that the jurisdiction of this Court has not been invoked because the Applicant has neither made

reference to nor asked for the interpretation or application of the Charter, the Protocol or any relevant human rights instruments ratified by the Respondent State. Further, it contends that the Applicant has not met any of the other requirements listed in the Rule 26(1) (b-e) of the Rules.

19. The Respondent State avers that the Applicant has merely listed his perceived grievances with the application of the Civil Procedure Act in relation to the originating Civil Case No. 163 of 2000, Civil Appeal No. 108 of 2009 and Civil Appeal No. 76 of 2011. The Respondent State further argues that the Court cannot exercise its jurisdiction by relying on the alleged misuse of the Civil Procedure Act during the hearing of the trial case.

20. The Applicant contends that this Court has jurisdiction to hear and determine this matter. This is because it has the competence to intervene in the event of violations of human rights which is the position he finds himself, his rights having been violated by the domestic courts.

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21. It is clear from the Court's jurisprudence that an Application is properly before it as long as the subject matter of the Application raises alleged violations of rights protected by the Charter or any other international human rights instrument ratified by the Respondent State.[2]

22. In the instant case, the Court notes that the Applicant enumerates various grievances against the application of the Civil Procedure Act as submitted by the Respondent State. Nevertheless, he also

2 See: Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania (hereinafter referred to as "Alex Thomas v Tanzania* (Merits)*"*), para 45; Application 001/2012. Ruling of 28 March 2014 (Admissibility), *Frank David Omary and others v United Republic of Tanzania (hereinafter referred to as "Frank Omary v Tanzania* (Admissibility)"), para 115; Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania (hereinafter referred to as "Peter Chacha v Tanzania* (Admissibility)"), para 114; Application 20/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v United Republic of Tanzania (hereinafter referred to as "Anaclet Paulo v Tanzania* (Merits and Reparations)"), para 25; Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania (hereinafter referred to as "Armand Guehi v Tanzania* (Merits and Reparations)*"*), para 31; Application 024/15. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania (hereinafter referred to as "Werema Wangoko v Tanzania* (Merits and Reparations)"), para 29.

alleges that it took nine years in the High Court for his case to be determined even though a total of only three witnesses testified. The Court holds that this alleged violation concerns the field of application of the provisions of Article 7(1)(d) of the Charter in respect of the "right to be tried within a reasonable time by an impartial court or tribunal".

23. Consequently, the Court holds that its material jurisdiction is established and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

24. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on record indicates that it lacks such jurisdiction. The Court therefore holds that:

i. it has personal jurisdiction given that the Respondent State is a party to the Protocol and has made the Declaration prescribed under Article 34(6) thereof, which enabled the Applicant to file this Application pursuant to Article 5(3) of the Protocol.

ii. it has temporal jurisdiction in view of the fact that by the time of the alleged violations, the Respondent State had already ratified the Charter and therefore bound by it.[3]

iii. it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.

25. In light of the foregoing considerations, the Court holds that it has jurisdiction to hear the Application.

VI. Admissibility of the Application

26. In terms of 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". Pursuant to Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with Article…56 of the Charter and Rule 40 of the Rules".

27. Rule 40 of the Rules, which in essence restates Article 56 of the Charter, stipulates 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:

3 Application 011/2011. Judgment of 14 June 2013 (Merits), *Reverend Christopher Mtikila v United Republic of Tanzania* (Merits) para 84.

"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 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;
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, Organization of African Unity or the provision of the present Charter."

28. The Respondent State raises two objections, that is; non-compliance of the Application with the Constitutive Act of the African Union and the Charter and also the timeframe for seizure of the Court.

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A. Objection based on non-compliance with the Constitutive Act of the African Union and the Charter

29. The Respondent State avers that the Application does not comply with the Constitutive Act of the African Union as well as the provisions of the Charter as stipulated in Article 6 of the Protocol and Rule 40(2) of the Rules of Court. The Respondent State contends that the Applicant merely concentrates on the technicalities of the civil case against him.

30. The Applicant did not address this issue in his written submissions.

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31. The Court notes that the key objective of the Constitutive Act that relates to its admissibility procedure is "promote and protect human and peoples' rights in accordance with the African Charter

on human and peoples' rights and other relevant human rights instruments".[4]

32. The Court further notes that the Applicant claims violations of his rights guaranteed by the Charter, rather than basing his claim merely on the technicalities of the civil case. The violations alleged in the Application are related to the right to a fair trial which falls within the ambit of the Charter which guarantees such rights. Also, the Respondent State has not demonstrated how the Application is not in conformity with the Constitutive Act of the African Union or the Charter.

33. In light of the foregoing, the Court dismisses the Respondent State's objection.

B. Objection on failure to file the Application within a reasonable time

34. The Respondent State avers that the Application has not been filed within a reasonable period as required by Rule 40(6) of the Rules and therefore is not admissible. It alleges that the relevant period of time is that between the decision of the Court of Appeal in Civil Appeal No. 76 of 2011 on 20 December 2011 and 17 June 2016, the date on which the Respondent State received the Application. The Respondent State therefore computes that period to five (5) years and six (6) months and argues that this cannot be considered reasonable time.

35. The Respondent State further contends that developments in international human rights jurisprudence have established a period of six (6) months as reasonable time, and refers to the case of *Majuru v Zimbabwe* (2008), before the African Commission on Human and Peoples' Rights. The Respondent State goes on to aver that the Court was already in existence when the Applicant submitted his appeal to the Court of Appeal and therefore the Applicant could have instituted his application before this Court within a period of six (6) months.

36. Finally, according to the Respondent State, the reasonableness of a time period must be assessed on a case-by-case basis and as the Applicant was neither imprisoned nor indigent, but rather was able to pay and had access to a lawyer and "could be aware of the existence of this Court", the Applicant has let a reasonable

4 Article 3(h) of the Constitutive Act.

time elapse.

37. The Applicant contends that his case at the domestic courts ended on 18 June 2013, referring to the civil procedure of taxation of his bill of costs vide receipt No. 50456103. He points out that the Application before this Court was filed on 23 November 2015 and believes the time lapse was only two (2) years.

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38. The Court notes that the Respondent State contests the admissibility of the Application on the basis of it not having been filed within a reasonable time after exhaustion of local remedies. The Court observes however, that it is incumbent on the Court to first satisfy itself that local remedies have been exhausted before determining the requirement of filing within a reasonable time after exhaustion of the said remedies. This is because an adverse finding as to the exhaustion of local remedies would render the exercise of determining whether the Application was filed within a reasonable time superfluous. Therefore, the Court will decide whether the Applicant exhausted local remedies.

39. The Court recalls its jurisprudence that an Applicant is only required to exhaust ordinary judicial remedies so as to be in compliance with Rule 40(5) of the Rules where such remedies are available and not unduly prolonged.[5] In this regard, the Respondent State has submitted previously to this Court that it has a mechanism where aggrieved parties can challenge violations of human rights. The Respondent State has stated that it enacted the Basic Rights and Duties Act to empower the High Court with jurisdiction over petitions of human rights violations.[6]

40. In the instant Application, the Court notes that the Applicant filed a civil case concerning breach of contract in the High Court in Civil Case 163 0f 2000 on 19 August 2008. The Applicant further filed an appeal against the High Court's decision to the Court of Appeal on 21 September 2010. The case was referred to the High Court for assessment of damages and the High Court, on

5 See *Mtikila v Tanzania* (Merits) para 82.1; *Alex Thomas v Tanzania* (Merits) para 64.

6 *Armand Guehi v Tanzania* (Merits and Reparations) para 44, *Kennedy Ivan v Tanzania* (Merits and Reparations) para 37.

4 April 2011, made an award of six million Tanzanian Shillings (TZS 6,000,000) in favour of the Applicant. Dissatisfied with the amount, the Applicant challenged the High Court's decision in a second appeal to the Court of Appeal, which was dismissed on 20 December 2011. Following these proceedings, the Court observes that the Applicant seized the highest Court of the Respondent State, however, the seizure was concerned only with a contractual dispute.

41. With regard to the alleged delay of the proceedings before the High Court, the Applicant did not provide proof that he tried to exhaust the local judicial remedies; he only states that he petitioned the Chief Justice for him to provide a solution. The Court notes that petitioning the Chief Justice is not a judicial but administrative remedy.[7] Moreover, the Applicant did not aver that the remedies to be exhausted were unavailable, ineffective or insufficient and there is nothing on record to support such a finding.

42. The Court observes that the Applicant also has not shown how he exhausted local remedies with regard to the "false imprisonment" of 30 April 1997. Based on the records, the Court notes that the Applicant raised the issue of "false imprisonment as "malicious prosecution" in line with his submission of defamation in the High Court, that the false imprisonment made "co-villagers consider him fraudulent" and thus it was submitted not as a human rights violation but as a civil law matter.

43. In light of the foregoing, the Court holds that the Applicant has not exhausted local remedies and thus failed to comply with Rule 40(5) of the Rules. Consequently, the Application is inadmissible.

44. In light of the Court's finding that the Application is inadmissible due to failure to exhaust local remedies, the Court finds that the issue as to whether the Application was filed within a reasonable time does not arise, in as much as the conditions of admissibility are cumulative.[8] Similarly, the Court does not need to deal with other conditions of admissibility enumerated in Rule 40 of the Rules.

VII. Costs

7 *Mtikila v Tanzania* (Merits) para 82.3.

8 See Application 042/2016. Ruling of 28 March 2019 (Jurisdiction and Admissibility), *Collectif des anciens travailleurs du laboratoire ALS v Republic of Mali*, para 41; Application 024/2016. Judgment of 21 March 2018 (Admissibility), *Mariam Kouma and Ousmane Diabaté v Republic du Mali,* para 63; Application 022/2015. Judgment of 11 May 2018 (Admissibility), *Rutabingwa Chrysanthe v Republic of Rwanda,* para 48.

45. The Court notes that the parties did submit on costs. However, Rule 30 provides that: "Unless otherwise decided by the Court, each party shall bear its own costs".

46. In view of the aforesaid provision, the Court decides that each Party shall bear its own costs.

VIII. Operative Part

47. For these reasons,

The Court

Unanimously

On Jurisdiction

i. *Dismisses* the objection to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

On Admissibility

iii. *Dismisses* the objection on admissibility based on non-compliance with the Constitutive Act of the African Union and the Charter;

iv. *Declares* that the Applicant failed to exhaust local remedies;

v. *Declares* the Application inadmissible.

On Costs

vi. *Decides* that each Party shall bear its own costs.

Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 367

Application 006/2017, *Fidele Mulindahabi v Republic of Rwanda*

Judgment, 4 July 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM, and ABOUD

Recused under Article 22: MUKAMULISA

The Applicant alleged that the Respondent State violated his right to property. The Respondent State notified the Court of the withdrawal of the Declaration it had made under Article 34(6) of the Protocol and that it would not participate in the proceedings before the Court. The Court held that it had jurisdiction since the Application was submitted before the withdrawal of the Respondent State took effect. The Court, however, dismissed the Application on the ground of lack of exhaustion of local remedies.

Procedure (default judgment, 17)

Jurisdiction (personal jurisdiction, 23)

Admissibility (exhaustion of local remedies, 35, 36)

Dissenting opinion: BENSAOULA

Procedure (default judgment, 5, 14)

I. The Parties

1. The Applicant, Fidèle Mulindahabi, a national of the Republic of Rwanda (hereinafter referred to as "the Respondent State") residing in Kigali, complains that he has been a victim of violations in connection with the exercise of his urban transport activity.

2. The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 25 May 2004. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 11 January 2013, by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. However, on 29 February 2016, the Respondent State notified the African Union Commission of its withdrawal of the said Declaration. On 3 January 2016, the Court issued an order indicating that the effective date of the

Respondent State's withdrawal would be 1 March 2017.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges that before 2013, he worked in the urban passenger transport sector and on 18 June 2013, he approached the Services Control Authority in Rwanda to request a transport licence, but his request was turned down on the grounds that licences are granted to companies and not to individuals.

4. He also claims to have contacted STELLA transport services agency which prepared a licence application for him, placing the logo and telephone number of the agency as well as the telephone number of the control authority on the bus so that passengers may contact them in the event of a problem.

5. The Applicant asserts that the licence was denied because STELLA agency was not the owner of the bus. As a result, in partnership with others, he founded the Simba Express Limited.

6. On 16 November 2013, the Vehicle Control Authority issued him a ticket for having pasted a telephone number on the rear screen of the vehicle. The yellow card (a temporary card issued to the purchaser of a new vehicle) was impounded subject to payment of the fine and rectification of the telephone number. The Applicant alleges that the documents were not returned to him even after he paid the fine, corrected the telephone number and replaced the STELLA logo with that of his new company, Simba Express Limited.

7. The Applicant asserts that any vehicle without a yellow card or a record of the ticket attesting that the yellow card has been impounded is prohibited from circulation. Accordingly, the Applicant stopped using the bus pending a solution to his problem. On 28 February 2014, his vehicle was confiscated because it was parked near the passage way of the presidential convoy. The Vehicles Control Authority ordered the cancellation of his membership of Simba Express Limited, thus preventing him

1 Application 003/2014. Ruling of 3 June 2016 (Ruling on Jurisdiction) *Ingabire Victoire Umuhoza v Republic of Rwanda*, regarding the withdrawal by the Respondent State of the Declaration filed under Article 34(6) of the Protocol.

from continued exercise of his activity as a transporter.

B. Alleged violations

8. The Applicant claims that the Respondent State:

"i. violated his right to property provided under Article 17(2) of the Universal Declaration of Human Rights and Article 14 of the Charter;

ii. failed to [grant him] access [to] the requisite internal redress mechanism pursuant to Article 2(3)(c) of the International Covenant on Civil and Political Rights (ICCPR)".

III. Summary of the procedure before the Court

9. The Application was received at the Registry of the Court on 24 February 2017 and served on the Respondent State on 31 March 2017 with a request to the latter to file within (30) days a list of its representatives, and its Response to the Application within sixty (60) days from the date of receipt of the notification pursuant to Rules 35(2)(a) and (4)(a) of the Rules of Court.

10. On 9 May 2017, the Registry received a letter from the Respondent State on the withdrawal of the Declaration it made under Article 34(6) of the Protocol, and notifying the Registry that it would not participate in any proceedings before the Court. It therefore requested the Court to desist from transmitting any information on the cases concerning the Respondent State.

11. On 22 June 2017, the Court replied to the above-mentioned Respondent State's letter noting that "as a judicial body and in accordance with the Protocol and the Rules, the Court shall communicate all the documents of the proceedings to the parties concerned. Accordingly, all the documents of the proceedings in matters related to Rwanda before this Court must be served on the Respondent State, until the final decisions of those cases".

12. On 30 June 2017, the Application was transmitted to the State Parties to the Protocol and to the Executive Council through the Chairperson of the African Union Commission in accordance with Rule 35(3) of the Rules.

13. On 25 July 2017, the Court initially granted the Respondent State forty-five (45) days extension to submit its Response. On 23 October 2017, the Court granted a second 45-day extension, indicating that it would proceed with a judgment in default after the expiry of this extension if a Response was not submitted.

14. In accordance with Rule 63 of the Rules, the Court decided at its Forty-Ninth Ordinary Session held from 16 April to 11 May 2018, to rule on both the merits of the case and on reparation

in a single decision. Accordingly, on 12 July 2018, the Applicant was requested to submit his claims on reparation within (30) thirty days, but he did not respond.

15. On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 45-day extension and that, after that deadline, it would enter a judgment in default in accordance with Rule 55 of its Rules, in the interest of justice. The notification was sent by courier and received on 16 October 2018 by the Respondent State.

16. Although the Respondent State received all the submissions, it did not respond to any of them.

17. Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules.[2]

18. On 28 February 2019, the written procedure was closed and the parties were notified accordingly.

IV. Prayers of the Parties

19. The Applicant prays the Court to:

"i. order the Respondent State to pay damages for the prejudices he suffered;

ii. order the Respondent State to return his vehicle to him or compensate him with a similar vehicle;

iii. declare that the State of Rwanda has violated the human rights legal instruments that it has ratified.»

20. The Applicant did not make a detailed request for reparation.

21. The Respondent State refused to participate in the proceedings and did not make any prayers.

V. Jurisdiction

22. 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 instrument ratified by the States concerned". Furthermore, in accordance with Rule 39(1) of its Rules, "the Court shall conduct preliminary

2 Application 003/2014. Judgment of 7 December 2018 (Reparations*), Ingabire Victoire Umuhoza v Republic of Rwanda*, paras 14, 15 and 17.

examination of its jurisdiction ..."

23. Having conducted a preliminary examination of its jurisdiction, and noting that nothing on file indicates that it does not have jurisdiction, the Court therefore holds that:

i. it has personal jurisdiction as the Respondent State is Party to the Protocol and deposited the Declaration prescribed in Article 34(6) of the Protocol which enabled the Applicant to seize the Court in accordance with Article 5(3) of the Protocol. Moreover, the Application was filed within one (1) year from the time set by the Court to give effect to the withdrawal of the Declaration by the Respondent State;

ii. it has material jurisdiction in as much as the Applicant alleges violation of Articles 1 and 14 of the Charter, Article 2(3)(c) of the International Covenant on Civil and Political Rights, Article 6(1) of the International Covenant on Economic, Social and Cultural Rights, and Article 17(2) of the Universal Declaration of Human Rights. All these instruments have been ratified by the Respondent State and the Court has the power to interpret and apply them by virtue of Article 3 of the Protocol.

iii. it has temporal jurisdiction, since the alleged violations are continuing in nature.

iv. it has territorial jurisdiction given that the facts of the case occurred in the territory of a State Party to the Protocol, namely, the Respondent State.

24. Based on the above, the Court holds that it has jurisdiction to hear this case. .

VI. Admissibility

25. 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".

26. In accordance with Rule 39(1) 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.»

27. Rule 40 of the Rules, which essentially 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) of the Protocol refers, for an Application to be admissible, the following conditions shall be met:

"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 mater 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".

28. The Court notes that the admissibility requirements set forth in Rule 40 of the Rules are not in contention between the Parties, the Respondent State having not participated in the proceedings. However, in accordance with Rule 39(1) of the Rules, the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the Application.

29. It is clear from the case file that the Applicant's identity is known as well as his nationality. The Application is not incompatible with the Constitutive Act of the African Union and the Charter. It does not contain disparaging or insulting language, nor is it based exclusively on news disseminated through the mass media.

30. With regard to the exhaustion of local remedies, the Applicant asserts that he contacted the highest political and administrative authorities in the State, including the Police, the Public Prosecution, the Ministry of Transport, the Ministry of Internal Security, the Ministry of Justice, the Parliament, the Senate, the President, the National Commission for Human Rights and Civil Society to find a solution to his problem, but all to no avail.

31. The Applicant further submits that "seizure of judicial bodies was not contemplated in view of the fact that the presidential guard is supposed to be involved in it and so, has no chance of reaching a judicial outcome. Furthermore, this case is inadmissible today, in view of the timeframes provided under article 339 of Act No. 18/2004 of 20 June 2006, concerning the Code of Civil, Commercial, Social and Administrative Procedure".

32. As it previously affirmed, the Court holds that: " ... the local remedies to be exhausted by applicants are the ordinary judicial remedies",[3] unless it is obvious that these remedies are

3 Application 007/2013. Judgment of 3 June 2016 (Merits) *Mohamed Abubakari v United Republic of Tanzania,* para 64. See also Application 005/2013. Judgment of 20 November 2015 (Merits) *Alex Thomas v United Republic of Tanzania*, (*Alex Thomas v Tanzania* (Merits) para 64 and Application 006/2013. Judgment of 10

unavailable, ineffective, and insufficient or that the procedures therein are unduly prolonged.[4] It follows, therefore, that the non-judicial remedies exercised by the Applicant in the instant case are irrelevant as regards the exhaustion of local remedies.

33. In this case, the Applicant clearly stated that he had not exhausted the domestic remedies, claiming that:

i. such remedies would not be feasible because a member of the Republican Guard was involved.

ii. the time limit for filing a case before national jurisdictions elapsed upon the completion of the proceedings before the administrative and political authorities.

34. With regard to the first allegation, the Court holds that the Applicant alleges that the proceedings before the Respondent State's judicial authorities are not feasible, without adducing evidence in support of this allegation. The Court, therefore, dismisses this allegation.[5]

35. With regard to the second allegation, the Court notes that the Applicant did not file his case before the national courts, as he claims to have sought to settle the dispute before the administrative and political authorities. However, there was nothing preventing him from exercising both judicial and non-judicial remedies at the same time, and should therefore have utilised the requisite judicial remedies so as to exhaust the local remedies.

36. In light of the foregoing, the Court holds in conclusion that the Applicant has not exhausted the local remedies available to him in the Respondent State, and his failure to do so does not fall within the exceptions set out in Rule 40(5) of the Rules.

VII. Costs

37. The Court notes that Rule 30 of the Rules provides that: "Unless otherwise decided by the Court, each party shall bear its own costs".

38. In view of the circumstances of this case, the Court decides that each Party shall bear its own costs.

March 2016 (Merits) *Wilfred Onyango Nganyi & 9 others v United Republic of Tanzania,* para 95.

VIII. Operative part

39. For these reasons,
The Court:
Unanimously,
i. *Declares* that it has the jurisdiction to hear this case;
ii. *Declares* that the Application is inadmissible;
iii. *Rules* that each Party shall bear its own costs.

***

Dissenting opinion: BENSAOULA

1. I share the opinion of the majority of the Judges regarding the jurisdiction of the Court and the inadmissibility of the Application.

2. On the other hand, I think that the way the Court treated "the default" is at variance with:
- the provisions of Rule 55 of the Rules of Court;
- Article 28(6) of the Protocol;
- its jurisprudence and comparative law.

3. Indeed, Rule 55 of the Rules states in Paragraph 1 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, render a judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertaining to the proceedings".

It is clear from the foregoing Paragraph 1 that a decision to render a Judgement in default must meet certain criteria:
- absence of one of the parties or;
- failure to defend its case;
- rendered on the application of the other party;
- service of the application on the defaulting party;
- service of the other documents pertaining to the proceedings.

4. The key element in this paragraph is that the default must be

pronounced "on the application of the other party".

Therefore, making a decision in default can be a mere issue of form no doubt, but not of procedure that requires a substantive discussion regarding the elements of appreciation and a legal basis.

However, neither the case file nor the Applicant's application reveals that he prayed the Court to hand down a judgement in default.

5. And that the Court not only inserted its decision to render the Judgment in default in the chapter on Proceedings before the Court, but also did not give any legal basis to this decision to render the Judgment in default without the application of the other party, contenting itself with declaring in paragraph 15 under the Summary of the Procedure before the Court that, "On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 45 days extension and that, after that deadline, it would enter a ruling in default in accordance with Rule 55 of its Rules in the interest of justice..." and concluding in paragraph 17 on the same grounds that, "Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules".

6. No reference to the basis of this "interest of justice" or how rendering a judgment in default was fundamental to the Court, especially since such judgments are not subject to opposition or appeal, and how such a decision taken on the basis of its discretionary power could refer to Rule 55 of the Rules, which does not apply to discretion.

7. Moreover, reference to the *Ingabiré* Judgment is in no way a basis for the decision in default because in that Judgement, at no point in the body of the Judgement or in its operative part is there mention of a judgement in default, as no party had requested for it and the chapter 17 cited in this reference states as follows: "Consequently, in the interest of justice, the Court will examine the instant brief for reparation in the absence of any response from the Respondent State".

8. To render a judgment in the absence of the respondent is in no way the legal definition of default which, under the provisions of the aforementioned Rule 55, meets conditions which must be controlled by the Court.

9. It is clear and, as mentioned above, that the default judgment must meet certain conditions and that the Court is under the obligation to give reasons for any decision it makes, even more so when it is at variance with the clear provisions of a provision of the Rules.

By ruling in this way, the Court breached the provisions of Article 28(6) of the Protocol which obliges it to give reasons for its judgments.

10. In comparative law, there is a wealth of case law supporting this

reasoning, such as the Judgment of 30 November 1987, *H v Belgium,* where the European Court of Human Rights recognised, for the first time, the right to give reasons in judicial decisions in these terms: "…this very lack of precision made it all the more necessary to give sufficient reasons for the two impugned decisions on the issue in question. Yet in the event the decisions merely noted that there were no such circumstances, without explaining why the circumstances relied on by the applicant were not to be regarded as exceptional" (para53) and in the Judgment of 16 December 1992, *Hadjianastassiou v Greece*, the Court noted that "the obligation to state reasons constitutes a minimum guarantee which is limited to the requirement of sufficient clarity of the grounds on which the judges base their decisions". [*Translation by Registry*]

11. It is therefore unquestionable that taking the decision to render a judgment in default requires a clear reasoning and may in no way suffice in one line of the chapter "Procedure before the Court", thus ignoring the conditions required by the aforementioned Rule 55.

12. It is clear from reading the aforementioned Rule that default is not part of the procedure and that it is still a matter of form to which the Court must respond in relation to its jurisdiction, the admissibility and basis of the Applicant's claims.

13. And that even if the Court chooses to use its discretionary power to hear the case *suo motu* and rule by default, it cannot do so by considering this point of law as one of the elements of the procedure and simply base its decision on the interest of justice without specifying and explaining how making a judgment in default is in the interest of justice.

14. In comparative law, many human rights courts treat the default decision as a formal decision that comes well after jurisdiction and admissibility. To quote just one rendered by the Court of Justice of the Economic Community of West Africa States on 16 February 2016, Judgment ECW/CCJ/JUGG/03/16, the Court, in Chapter III: Reasons for the decision: On the form, after dealing with the admissibility of the application and jurisdiction, addressed the issue of default against the Republic of Guinea and later, on the merits, handled the allegations of human rights violations. In its operative part, it stated that "the Court ruling publicly, by default against the Republic of Guinea, in the matter of human rights violations, in the first and last resort'" [*Translation by Registry*]

In adjudicating as it did, the Court delivered a judgement devoid of any legal basis and contrary to the provisions of the aforementioned Rules and Articles regarding default, especially

as this provision of default does not appear in its operative part either.

Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 378

Application 007/2017, Fidele Mulindahabi v Republic of Rwanda

Judgment, 4 July 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: MUKAMULISA

The Applicant alleged that his vehicle was unjustly confiscated by police, and later returned to him after more than two months, the police having admitted that the confiscation was illegal. The Applicant was compensated for the illegal confiscation of his vehicle. He alleged that the Presidential Guard subsequently confiscated his vehicle again and charged him with driving under the influence which was later changed to non-presentation of a driver's licence. He further claimed that his efforts to seek remedy from the President and Senate were futile and prayed the Court for reparations for the violations caused including, returning his vehicle to him or compensating him. The Court held that the Applicant had sought administrative and not judicial remedies. Thus, he had not exhausted domestic remedies.

Procedure (default judgment, 19)

Admissibility (exhaustion of local remedies remedies, 34, 38)

Dissenting opinion: BENSAOULA

Procedure (default judgment, 5, 14)

I. The Parties

1. The Applicant, Fidèle Mulindahabi, a national of the Republic of Rwanda (hereinafter referred to as "the Respondent State") residing in Kigali, complains that he has been a victim of violations in connection with the exercise of his urban transport activity.

2. The Respondent State became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 25 May 2004. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 11 January 2013, by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations. On 29 February 2016, the Respondent State notified the African Union Commission of its withdrawal of the said Declaration. On 3 January 2016, the Court issued an order indicating that the effective date of the

Respondent State's withdrawal would be 1 March 2017.[1]

II. Subject matter of the Application

A. Facts of the matter

3. The Applicant alleges that his Toyota mini bus vehicle was unjustly impounded by RAWMAGANA police from 28 January 2009 to 7 May 2009. After the end of the period, the police service admitted that the confiscation was illegal and provided him compensation in the amount of thirty-four thousand, two hundred (FRw 34,200) Rwandan Francs.

4. The Applicant submits that on 7 May 2009, immediately after the handover of the impounded bus, he drove it directly to the garage to repair it. On 31 May 2009, the vehicle was again confiscated by soldiers of the presidential guard.

5. He also submits that the police first fabricated an offence of driving under the influence, and then re-adjusted it to the offence of non-presentation of the driver's licence. In the Applicant's view, this contradiction shows that the vehicle was confiscated arbitrarily.

6. He further alleges that, even if one of these two offences was committed, the penalty for the offence would not be the confiscation of the vehicle, in accordance with the provisions of Articles 24, 25 and 26 of Act No. 34/1987 of the Rwandan Traffic Police Act.

7. The Applicant alleges that on 8 May 2010, he made a complaint to the President of the Republic, who was then visiting Kigali. The President ordered the Police Commissioner to follow up on the case. During the investigation, the police noticed the involvement of the presidential guard and the investigation into matter was stopped.

8. The Applicant asserts that on 6 April 2011, his vehicle was sold by auction, a fact confirmed by the Attorney General's letter 1535/D11/A/ONPJ/INSP dated 19 July 2011.

9. The Applicant also stated that by letter No. 0873/SEN/SG/DC/AA/ME/2015 dated 11 June 2015, the Senate wanted to force him to accept the auction value of the vehicle without further compensation. When he expressed dissatisfaction with the contents of the offer in the Senate's letter on 16 June 2015, he was imprisoned for allegedly insulting and defaming the President

1 Application 003/2014. Ruling of 3 June 2016 (Jurisdiction), *Ingabire Victoire Umuhoza v Rwanda*; regarding the withdrawal by the Respondent State of the declaration it made under Article 34(6) of the Protocol.

of the Respondent State.

B. Alleged violations

10. The Applicant claims that the Respondent State:

"i. violated his right to property provided under Article 17(2) of the Universal Declaration of Human Rights and Article 14 of the Charter;

ii. failed in its obligation to provide the requisite remedies pursuant to Article 2(3)(c) of the International Covenant on Civil and Political Rights)."

III. Summary of the procedure before the Court

11. The Application was received at the Registry of the Court on 24 February 2017 and served on the Respondent State on 31 March 2017 with a request to the latter to file within (30) days a list of its representatives, and its response to the Application within sixty (60) days from the date of receipt of the notification pursuant to Rules 35(2)(a) and 35(4)(a) of the Rules.

12. On 9 May 2017, the Registry received a letter from the Respondent State on the withdrawal of the Declaration it made under Article 34(6) of the Protocol and notifying the Registry that it would not participate in any proceedings before the Court. The Respondent State accordingly requested the Court to desist from transmitting to it any information on the cases concerning it.

13. On 22 June 2017, the Court sent a reply to the Respondent State indicating that:

"as a judicial body and in accordance with the Protocol and the Rules, the Court shall communicate all the documents of the proceedings to the parties concerned. Accordingly, all the documents of the proceedings in matters related to Rwanda before this court must be served on the Respondent State, until the final decisions of those cases.»

14. On 30 June 2017, the Application was transmitted to the States Parties to the Protocol and to the Executive Council through the Chairperson of the African Union Commission in accordance with Rule 35(3) of the Rules.

15. On 25 July 2017, the Court initially granted the Respondent State forty-five (45) days extension to submit its Response. On 23 October 2017, the Court granted a second forty-five (45) days extension, indicating that it would proceed with a judgment in default after the expiry of this extension if a Response was not submitted.

16. In accordance with Rule 63 of the Rules, the Court decided at its Forty-Ninth Ordinary Session held from 16 April to 11 May 2018,

to rule on both the merits of the case and on reparations in a single decision. Accordingly, on 12 July 2018, the Applicant was requested to submit his claims on reparations within (30) thirty days, but he did not respond.

17. On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final forty-five (45) days extension and that, after that deadline, it would enter a ruling in default in the interest of justice in accordance with Rule 55 of its Rules. The notification was sent by courier to the Respondent State, which received the same on 16 October 2018.

18. Although the Respondent State received all the notifications, it did not respond to any of them.

19. Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules.[2]

20. On 28 February 2019, the written procedures were closed and the parties were notified accordingly.

IV. Prayers of the Parties

21. The Applicant prays the Court to:

"i. Order the Respondent State to pay damages for the prejudices he suffered;

ii. Order the Respondent State to return his vehicle to him or compensate him with a similar vehicle;

iii. Declare that the State of Rwanda has violated the human rights legal instruments that it has ratified."

22. The Applicant did not make a detailed request for reparations.

23. The Respondent State refused to participate in the proceedings and did not make any prayers.

V. Jurisdiction

24. 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 instrument ratified by the States concerned." Furthermore, in accordance with Rule 39(1) of its Rules, "the Court shall conduct a preliminary

2 Application 003/2014. Judgment of 7 December 2018 (Reparations*), Ingabire Victoire Umuhoza v Rwanda*, paras 14, 15 and 17.

examination of its jurisdiction «.

25. Having conducted a preliminary examination of its jurisdiction, and noting that nothing on file indicates that it does not have jurisdiction, the Court therefore holds that:

i. it has personal jurisdiction as the Respondent State is party to the Protocol and deposited the Declaration prescribed in Article 34(6) of the Protocol which enabled the Applicant to seize the Court in accordance with Article 5(3) of the Protocol. Moreover, the Application was filed within one (1) year from the time set by the Court to give effect to the withdrawal of the Declaration by the Respondent State;

ii. it has material jurisdiction in as much as the Applicant alleges violation of Articles 1 and 14 of the Charter, Article 2(3) (c) of the International Covenant on Civil and Political Rights (ICCPR), Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 17(2) of the Universal Declaration of Human Rights (UDHR). All these instruments have been ratified by the Respondent State and the Court has the power to interpret and apply them by virtue of Article 3 of the Protocol.

iii. it has temporal jurisdiction, since the alleged violations are continuing in nature.

iv. it has territorial jurisdiction given that the facts of the case occurred in the territory of a State party to the Protocol, namely, the Respondent State.

26. Based on the above, the Court concludes that it has jurisdiction to consider this case.

VI. Admissibility

27. 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».

28. In accordance with rule 39(1) 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 the Rules.»

29. Rule 40 of the Rules, which essentially 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) of the Protocol refers, for an Application to be admissible, the following conditions shall be met:

"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 mater 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".

30. The Court notes that the admissibility requirements set forth in Rule 40 of the Rules are not in contention between the parties, the Respondent State having not participated in the proceedings. However, in accordance with Rule 39(1) of the Rules, the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the Application.

31. It is clear from the case file that the Applicant's identity is known as well as his nationality. The Application is not incompatible with the Constitutive Act of the African Union and the Charter. It does not contain disparaging or insulting language, nor is it based exclusively on news disseminated through the mass media.

32. With regard to the exhaustion of local remedies, the Applicant asserts that he contacted the highest political and administrative authorities in the State, including the police, the Public Prosecution, the Ministry of Transport, the Ministry of Internal Security, the Ministry of Justice, the Parliament, the Senate, the President, the National Commission for Human Rights and Civil Society to find a solution to his problem, but all to no avail.

33. The Applicant further submits that:

"seizure of judicial bodies was not contemplated in view of the fact that the presidential guard is supposed to be involved in it and so, has no chance of reaching a judicial outcome. Furthermore, this case is inadmissible today, in view of the timeframes provided under article 339 of Act No. 18/2004 of 20 June 2006, concerning the Code of Civil, Commercial, Social and Administrative Procedure»

34. As it previously held, the Court is of the opinion that: "... the local remedies to be exhausted by applicants are the ordinary judicial remedies",[3] unless it is obvious that these remedies are

3 Application 007/2013. Judgment of 3 June 2016, *Mohamed Abubakari v United Republic of Tanzania,* para 64. See also Application 005/2013. Judgment of 20 November 2015, ***Alex Thomas v Tanzania***, para 64 and Application 006/2013. Judgment of 10 March 2016, *Wilfred Onyango Nganyi & 9 others v United Republic of Tanzania,* para 95.

unavailable, ineffective, insufficient or that the procedures therein are unduly prolonged.[4] It follows, therefore, that the non-judicial remedies exercised by the Applicant in the instant case are irrelevant as regards the exhaustion of local remedies.

35. In the instant case, the Applicant clearly stated that he had not exhausted the domestic remedies, claiming that:

i. Such remedies would not be feasible because a member of the Republican Guard was involved.

ii. The time limit for filing a case before national jurisdictions has elapsed upon the completion of the proceedings before the administrative and political authorities.

36. With regard to the first allegation, the Court holds that the Applicant affirms that the proceedings before the Respondent State's judicial authorities are not feasible, without adducing evidence in support of this allegation. The Court, therefore, dismisses the allegation.[5]

37. With regard to the second allegation, the Court notes that the Applicant did not file his case before the national courts, as he claims to have sought to settle the dispute before the administrative and political authorities. However, there was nothing preventing him from exercising both judicial and non-judicial remedies at the same time, and should therefore have exercised the requisite judicial remedies so as to exhaust the local remedies.

38. In light of the foregoing, the Court holds in conclusion that the Applicant has not exhausted the local remedies available to him in the Respondent State, and his failure to exhaust local remedies does not fall within the exceptions set out in Rule 40(5) of the Rules.

VII. Costs

39. The Court notes that Rule 30 of the Rules provides that: " Unless otherwise decided by the Court, each party shall bear its own costs".

40. In view of the circumstances of this case, the Court decides that each party shall bear its own costs.

4 Application 004/2013. Judgment on 5 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso,* para 77. See also Application 003/2012. Ruling of 28 March 2014 (Admissibility and Jurisdiction), *Peter Chacha v Tanzania*, para 40.

5 *Alex Thomas v Tanzania,* para 140.

VIII. Operative part

41. For these reasons,
The Court:
unanimously
i. *Declares* that it has jurisdiction;
ii. *Holds* that local remedies have not been exhausted;
iii. *Declares* that the Application is inadmissible;
iv. *Rules* that each party shall bear its own costs.

***

Dissenting opinion: BENSAOULA

1. I share the opinion of the majority of the Judges regarding the jurisdiction of the Court and the inadmissibility of the Application.

2. On the other hand, I think that the way the Court treated "the default" is at variance with:

- the provisions of Rule 55 of the Rules of Court;
- Article 28(6) of the Protocol;
- its jurisprudence and comparative law.

3. Indeed, Rule 55 of the Rules states in Paragraph 1 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, render a judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertaining to the proceedings".

It is clear from the foregoing Paragraph 1 that a decision to render a Judgment in default must meet certain criteria:

- absence of one of the parties or;
- failure to defend its case;
- rendered on the application of the other party;
- service of the application on the defaulting party;
- service of the other documents pertaining to the proceedings.

4. The key element in this paragraph is that the default must be

pronounced “on the application of the other party”.

Therefore, making a decision in default can be a mere issue of form no doubt, but not of procedure that requires a substantive discussion regarding the elements of appreciation and a legal basis.

However, neither the case file nor the Applicant’s application reveals that he prayed the Court to hand down a judgment in default.

5. And that the Court not only inserted its decision to render the Judgment in default in the chapter on Proceedings before the Court, but also did not give any legal basis to this decision to render the Judgment in default without the application of the other party, contenting itself with declaring in paragraph 15 under the Summary of the Procedure before the Court that, “On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 45 days extension and that, after that deadline, it would enter a ruling in default in accordance with Rule 55 of its Rules in the interest of justice...” and concluding in paragraph 17 on the same grounds that, “Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules”.

6. No reference to the basis of this “interest of justice” or how rendering a judgment in default was fundamental to the Court, especially since such judgments are not subject to opposition or appeal, and how such a decision taken on the basis of its discretionary power could refer to Rule 55 of the Rules, which does not apply to discretion.

7. Moreover, reference to the *Ingabiré* Judgment is in no way a basis for the decision in default because in that Judgment, at no point in the body of the Judgment or in its operative part is there mention of a judgment in default, as no party had requested for it and the chapter 17 cited in this reference states as follows: “Consequently, in the interest of justice, the Court will examine the instant brief for reparation in the absence of any response from the Respondent State”.

8. To render a judgment in the absence of the respondent is in no way the legal definition of default which, under the provisions of the aforementioned Rule 55, meets conditions which must be controlled by the Court.

9. It is clear and, as mentioned above, that the default judgment must meet certain conditions and that the Court is under the obligation to give reasons for any decision it makes, even more so when it is at variance with the clear provisions of a provision of the Rules.

By ruling in this way, the Court breached the provisions of Article 28(6) of the Protocol which obliges it to give reasons for its judgments.

10. In comparative law, there is a wealth of case law supporting this

reasoning, such as the Judgment of 30 November 1987, *H v Belgium,* where the European Court of Human Rights recognised, for the first time, the right to give reasons in judicial decisions in these terms: "…this very lack of precision made it all the more necessary to give sufficient reasons for the two impugned decisions on the issue in question. Yet in the event the decisions merely noted that there were no such circumstances, without explaining why the circumstances relied on by the applicant were not to be regarded as exceptional" (para53) and in the Judgment of 16 December 1992, *Hadjianastassiou v Greece*, the Court noted that "the obligation to state reasons constitutes a minimum guarantee which is limited to the requirement of sufficient clarity of the grounds on which the judges base their decisions". [*Translation by Registry*]

11. It is therefore unquestionable that taking the decision to render a judgment in default requires a clear reasoning and may in no way suffice in one line of the chapter "Procedure before the Court", thus ignoring the conditions required by the aforementioned Rule 55.

12. It is clear from reading the aforementioned Rule that default is not part of the procedure and that it is still a matter of form to which the Court must respond in relation to its jurisdiction, the admissibility and basis of the Applicant's claims.

13. And that even if the Court chooses to use its discretionary power to hear the case *suo motu* and rule by default, it cannot do so by considering this point of law as one of the elements of the procedure and simply base its decision on the interest of justice without specifying and explaining how making a judgment in default is in the interest of justice.

14. In comparative law, many human rights courts treat the default decision as a formal decision that comes well after jurisdiction and admissibility. To quote just one rendered by the Court of Justice of the Economic Community of West Africa States on 16 February 2016, Judgment ECW/CCJ/JUGG/03/16, the Court, in Chapter III: Reasons for the decision: On the form, after dealing with the admissibility of the application and jurisdiction, addressed the issue of default against the Republic of Guinea and later, on the merits, handled the allegations of human rights violations. In its operative part, it stated that "the Court ruling publicly, by default against the Republic of Guinea, in the matter of human rights violations, in the first and last resort'" [*Translation by Registry*]

In adjudicating as it did, the Court delivered a judgment devoid of any legal basis and contrary to the provisions of the aforementioned Rules

and Articles regarding default, especially as this provision of default does not appear in its operative part either.

Mulindahabi v Rwanda (jurisdiction and admissibility) (2019) 3 AfCLR 389

Application, 009/2017, *Fidele Mulindahabi v Republic of Rwanda*

Judgment, 4 July 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: MUKAMULISA

The Applicant alleged that his vehicle was unlawfully confiscated and auctioned by the Respondent State. He claimed that the Respondent State violated his right to property, violated its obligation to provide redress, failed to adopt legislative and other measures to give effect to international instruments that it is party to, and violated his right to work. The Court dismissed the Application on the basis that the Applicant, by his own admission, failed to exhaust local remedies.

Procedure (default judgment, 15)

Admissibility (lack of evidence, 31; exhaustion of local remedies, 32, 33)

Dissenting opinion: BENSAOULA

Procedure (default judgment, 5, 14)

I. The Parties

1. Fidèle Mulindahabi (hereinafter referred to as "the Applicant") is a national of the Republic of Rwanda, residing in Kigali, who complains that he has been a victim of violations as regards his urban transport business.

2. The Respondent State is the Republic of Rwanda which acceded to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 25 May 2004. Furthermore, on 22 January 2013, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 29 February 2016, it notified the African Union Commission of its decision to withdraw the aforesaid Declaration, and on 3 March 2016, the African Union Commission notified the Court in this regard. On 3 June 2016, the Court issued an Order stating that the withdrawal of the Declaration would take

effect on 1 March 2017.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges that on 21 March 2009, a police officer seized his vehicle on the grounds that it had no motor vehicle licence and a spare tyre. He was fined twenty thousand Rwandan francs (FRw 20,000) and "as security for this payment the police seized the yellow card.[2]" The Applicant avers that on 23 March 2009, he paid the fine of Twenty Thousand Rwandan Francs (FRw 20,000) but the yellow card was not given back to him.

4. He further alleges that "in complicity, his driver … declared that he had lost the police charge sheet and the receipt, while the police declared verbally to him that they had lost his yellow card." Thereafter, the Applicant went to the tax office to obtain the duplicate of the yellow card but his efforts were all in vain. He argues that "later, through a conveyor [he] was able to recover the original of the charge sheet ... and that of the receipt".

5. The Applicant alleges that "pursuant to the provisions of Article 40 of Rwandan Law No. 34/1987 of 17/9/1987 on the road transport and traffic police, the payment of the fine puts an end to the government action. Consequently, the fine of twenty thousand Rwandan Francs (FRw 20.000) paid on 23/03/2009 erased the offence and [he] should have been re-established in [his] rights…". He states that "…However, this was not the case, the vehicle was not returned to him, but was rather parked for lack of a yellow card at a place where the soldiers of the Presidential Guard impounded the vehicle and confiscated it from the police."

6. The Applicant alleges that he spoke to the President of the Republic who was visiting the population on 8 June 2010, and that in spite of this initiative, the said vehicle was auctioned on 6 April 2011.

B. Alleged violations

1 See Application 003/2014. Order of 3 June 2016 (Jurisdiction), *Ingabire Victoire Umuhoza v Rwanda*; on the withdrawal by the Respondent State of the declaration it made under Article 34(6) of the Protocol.

2 "Yellow Card" means "Vehicle Registration Card".

7. The Applicant avers that the Respondent State:

i. violated his right to property provided under Articles 17(2) of the Universal Declaration of Human Rights (UDHR) and 14 of the Charter;

ii. failed in its obligation to provide the requisite remedies pursuant to Article 2(3)(c) of the International Covenant on Civil and Political Rights;

iii. failed in its obligation to adopt legislative and other measures to give effect to the international instruments ratified, as provided under Article 1 of the Charter;

iv. violated his right to work provided under Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

III. Summary of the procedure before the Court

8. The Application was filed on 27 February 2017 and served on the Respondent State on 16 March 2017 with the request that it file its Response to the Application within sixty (60) days of receipt of the notice.

9. On 11 May 2017, the Registry received a letter from the Respondent State reminding the Court of its withdrawal of the Declaration made under Article 34(6) of the Protocol and informing the Court that it would not take part in any proceedings before the Court. It consequently requested the Court to desist from transmitting any information on cases concerning it until it finalises the review of the declaration and communicates its position to the Court.

10. On 22 June 2017, the Court sent a reply to the Respondent State, noting that "by virtue of the Court being a judicial institution and pursuant to the Protocol and Rules of Court, the Court is required to exchange all procedural documents with the parties concerned."

11. On 30 June 2017, the Application was transmitted to the Chairperson of the African Union Commission and, through him, to the Executive Council of the African Union and to the State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.

12. On 5 October 2017, the Court *proprio motu* granted forty-five (45) days extension to the Respondent State to file its Response, indicating that it would proceed to issue a judgment in default should the Response not be filed.

13. Pursuant to Rule 63 of the Rules, the Court at its 49th Ordinary Session (16 April to 11 May 2018) decided that the merits of a case would be considered together with reparations. On 6 August 2018, the Applicant filed its submission on reparations and this was served on the Respondent State on 9 August 2018. The latter

was invited to respond within thirty (30) days.

14. On 9 October 2018, the Court *proprio motu* granted thirty (30) days extension to the Respondent State to file its Response, indicating that that extension of time would be the final, and that it would proceed to render a judgment in default should the Response not be filed. The notification was sent by courier service to the Respondent State, which received the same on 11 October 2018.

15. Although the Respondent State received all the notifications, it did not respond to any of them. Consequently, in accordance with Rule 55 and in the interest of justice, the Court renders this judgment in default.[3]

IV. Prayers of the Parties

16. The Applicant prays the Court to take the following measures:

i. order the State of Rwanda to pay him damages;

ii. order the restitution of his vehicle or pay an equivalent amount in lieu;

iii. recognisee that Rwanda has violated the relevant legal human rights instruments which it ratified.

17. The Applicant also prays the Court to grant the following in terms of reparation:

i. Return the minibus taxi, Toyota Hiace RAA 417H in its prior state or pay compensation in the amount of 40,349,100 FRw;

ii. Pay daily compensation in the amount of 111,540 FRw from 23 March 2009 up to the date the vehicle is returned;

iii. The amount of 23,043,236,533 FRw being revenue on reinvestment;

iv. Payment of 7.4% interest on income not received;

v. The sum of 40,000,000 FRw as damages for the suffering endured;

vi. The sum of 5,000,000 FRw for procedural costs in domestic courts and 3,000,000 FRw before this Court;

vii. Lawyers' fees before this Court.

18. The Respondent State having refused to participate in the proceedings did not make any prayers.

V. Jurisdiction

19. In terms of Article 3(1) of the Protocol the "jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning

3 Application 003/2014. Judgment of 7 December 2018 (Reparation), *Ingabire Victoire Umuhoza v Rwanda*, paras 14, 15 and 17.

the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned." Furthermore, according to Rule 39(1) of the Rules "the Court shall conduct preliminary examination of its jurisdiction …"

20. Having conducted a preliminary examination of its jurisdiction, and noting that nothing on file indicates that it does not have jurisdiction, the Court therefore holds that:

i. it has personal jurisdiction, given that the Respondent State is a party to the Protocol and has deposited the Declaration under Article 34(6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol. On the other hand, the Application was filed within the one-year period set by the Court for the withdrawal of the Declaration by the Respondent State to take effect;

ii. it has material jurisdiction as it alleges the violation of Articles 1 and 14 of the Charter; Article 2(3)(c) of the International Covenant on Civil and Political Rights (ICCPR); Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESC); Article 17(2) of the Universal Declaration of Human Rights (UDHR), all instruments ratified by the Respondent State, of which the Court is endowed with the power to interpret and apply, as *per* Article 3 of the Protocol;

iii. it has temporal jurisdiction given that the alleged violations are continuous in nature since the Applicant's car remains confiscated;[4]

iv.

v. it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

21. In view of the aforesaid, the Court finds that it has jurisdiction to consider the instant application.

VI. Admissibility

22. Pursuant 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". In accordance with 39(1) of the Rules: "the Court shall conduct preliminary examination of … the admissibility of the application in accordance with articles 50 and

4 See Application 013/2011. Ruling of 21 June 2013 (Preliminary objections), *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablassé, Ernest Zongo, Blaise Ilboudo & The Burkinabè Movement on Human and Peoples' Rights v Burkina Faso,* paras 71 to 77.

56 of the Charter and Rule 40 of these Rules."

23. Rule 40 of the Rules, which in substance restates the provisions 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 the 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."

24. The Court notes that the requirements set forth in Rule 40 are not in contention between the parties because the Respondent State did not take part in the proceedings. However, pursuant to Rule 39(1) of the Rules, the Court shall examine the conditions for admissibility of the Application.

25. The Court notes that the Applicant alleges that all the conditions of admissibility set out in Sub-Rules (1 to 7) of Rule 40 of the Rules have been met.

26. It is clear from the case file that the Applicant's identity is known as well as his nationality. The Application is not incompatible with the Constitutive Act of the African Union and the Charter. It does not contain disparaging or insulting language, nor is it based exclusively on news disseminated through the mass media.

27. Regarding exhaustion of local remedies, the Applicant avers that he took steps to meet senior political and administrative authorities of the country, notably, the Police department, the Office of the Prosecutor, the Ministry of Infrastructure in charge of Transport, the Ministry of Internal Security in charge of the Police, the Ministry of Justice, the Ombudsman, the Prime Minister's Office, the Parliament, the Senate, the President of the Republic, the National Human Rights Commission, the Rwanda Transparency

and the civil society.

28. The Applicant further contends that:

"seeking redress from courts was not envisaged because when presidential guards are involved in a matter, such a matter runs the risk of not being determined by the courts, and today the Application would have been inadmissible following the deadline after the remedy provided under Article 339 of Law No. 18/2004 of 26/6/2004 on the Civil, Commercial, Social and Administrative Procedure Code".

29. The Court notes that only ordinary judicial remedies must be exhausted[1] and this requirement may be dispensed with only if the said remedies are unavailable, ineffective, insufficient, or if the domestic procedures to pursue them are unduly prolonged.[2] In effect, the non-judicial remedies pursued by the Applicant are not considered material to the exhaustion of local remedies.

30. In the instant case, the Court notes that the Applicant has clearly acknowledged that he has not pursued local remedies alleging that, firstly, that such remedy would not yield any results because the soldiers of the Presidential Guard were involved and, secondly, that the deadline for filing an appeal had already lapsed as at the time the proceedings before the administrative and political authorities were concluded.

31. On the first allegation, the Court notes that, without any supporting evidence, the Applicant simply argues that the proceedings before the Respondent State's jurisdictions were futile because the soldiers of the Presidential Guard were involved. This Court has held that "general statements … are not enough. More substantiation is required."[3] The Court therefore dismisses this allegation.

32. On the second allegation, the Court notes that the Applicant has not submitted his appeal before the domestic courts within reasonable time because, as he claims, he was attempting to seek a resolution before the administrative and political bodies. However, nothing prevented the Applicant from pursuing non-judicial avenues at the same time as he pursued judicial

1 Application 007/2013. Judgment of 3 June 2016 (Merits), *Mohamed Abubakari v United Republic of Tanzania* (*hereinafter referred to as* "*Mohamed Abubakari v Tanzania* (Merits)"), para 64. See also Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania (hereinafter referred as to* "*Alex Thomas v Tanzania* (Merits)"), para 64; Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi & 9 others v United Republic of Tanzania*, para 95.

2 Application 004/2013. Judgment of 05 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso*, para 77; See also Application 004/2013. Ruling of 24 March 2014. (Jurisdiction and Admissibility), *Peter Chacha v Tanzania*, para 40.

3 *Alex Thomas v Tanzania* (Merits), para 140.

remedies. He ought to have exercised the requisite remedies so as to exhaust the local remedies.

33. In light of the foregoing, the Court finds that the Applicant has not exhausted the remedies available in the Respondent State, and that none of the grounds adduced for failing to do so, falls within the exceptions provided under Rule 40(5) of the Rules.

34. Having found that domestic remedies have not been exhausted, and considering that the conditions for admissibility are cumulative, the Court will not proceed to examine the other conditions of admissibility set out in Rule 40 of the Rules.[1]

35. Based on the foregoing, the Court declares the application inadmissible.

VII. Costs

36. The Court notes that Rule 30 of its Rules provides that: "unless otherwise decided by the Court, each party shall bear its own cost."

37. In view of the above circumstances, the Court rules that each party shall bear its own costs.

VIII. Operative

38. For these reasons,

The Court,

Unanimously:

i. *Declares* that it has jurisdiction;

ii. *Declares* that local remedies have not been exhausted;

iii. *Declares* that the Application is inadmissible;

iv. *Declares* that each Party shall bear its own costs.

***

Dissenting opinion: BENSAOULA

1. I share the opinion of the majority of the Judges regarding the

1 Application 022/2015. Judgment of 11 May 2018 (Jurisdiction and Admissibility), *Rutabingwa Chrysanthe v United Republic of Tanzania*, para 48.

jurisdiction of the Court and the inadmissibility of the Application.

2. On the other hand, I think that the way the Court treated "the default" is at variance with:

- the provisions of Rule 55 of the Rules of Court;
- Article 28(6) of the Protocol;
- its jurisprudence and comparative law.

3. Indeed, Rule 55 of the Rules states in Paragraph 1 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, render a judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertaining to the proceedings".

It is clear from the foregoing Paragraph 1 that a decision to render a Judgment in default must meet certain criteria:

- absence of one of the parties or;
- failure to defend its case;
- rendered on the application of the other party;
- service of the application on the defaulting party;
- service of the other documents pertaining to the proceedings.

4. The key element in this paragraph is that the default must be pronounced "on the application of the other party".
Therefore, making a decision in default can be a mere issue of form no doubt, but not of procedure that requires a substantive discussion regarding the elements of appreciation and a legal basis.

However, neither the case file nor the Applicant's application reveals that he prayed the Court to hand down a Judgment in default.

5. And that the Court not only inserted its decision to render the Judgment in default in the chapter on Proceedings before the Court, but also did not give any legal basis to this decision to render the Judgment in default without the application of the other party, contenting itself with declaring in paragraph 15 under the Summary of the Procedure before the Court that, "On 12 October 2018, the Registry notified the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 45 days extension and that, after that deadline, it would enter a ruling in default in accordance with Rule 55 of its Rules in the interest of justice..." and concluding in paragraph 17 on the same grounds that, "Consequently, the Court will enter a judgment in default in the interest of justice and in conformity with Rule 55 of the Rules".

6. No reference to the basis of this "interest of justice" or how rendering a judgment in default was fundamental to the Court, especially since such judgments are not subject to opposition or appeal, and how such a decision taken on the basis of its

discretionary power could refer to Rule 55 of the Rules, which does not apply to discretion.

7. Moreover, reference to the *Ingabiré* Judgment is in no way a basis for the decision in default because in that Judgment, at no point in the body of the Judgment or in its operative part is there mention of a judgment in default, as no party had requested for it and the chapter 17 cited in this reference states as follows: "Consequently, in the interest of justice, the Court will examine the instant brief for reparation in the absence of any response from the Respondent State".

8. To render a judgment in the absence of the respondent is in no way the legal definition of default which, under the provisions of the aforementioned Rule 55, meets conditions which must be controlled by the Court.

9. It is clear and, as mentioned above, that the default judgment must meet certain conditions and that the Court is under the obligation to give reasons for any decision it makes, even more so when it is at variance with the clear provisions of a provision of the Rules.

By ruling in this way, the Court breached the provisions of Article 28(6) of the Protocol which obliges it to give reasons for its judgments.

10. In comparative law, there is a wealth of case law supporting this reasoning, such as the Judgment of 30 November 1987, *H v Belgium,* where the European Court of Human Rights recognised, for the first time, the right to give reasons in judicial decisions in these terms: "…this very lack of precision made it all the more necessary to give sufficient reasons for the two impugned decisions on the issue in question. Yet in the event the decisions merely noted that there were no such circumstances, without explaining why the circumstances relied on by the applicant were not to be regarded as exceptional" (para53) and in the Judgment of 16 December 1992, *Hadjianastassiou v Greece*, the Court noted that "the obligation to state reasons constitutes a minimum guarantee which is limited to the requirement of sufficient clarity of the grounds on which the judges base their decisions". [*Translation by Registry*]

11. It is therefore unquestionable that taking the decision to render a judgment in default requires a clear reasoning and may in no way suffice in one line of the chapter "Procedure before the Court", thus ignoring the conditions required by the aforementioned Rule 55.

12. It is clear from reading the aforementioned Rule that default is not part of the procedure and that it is still a matter of form to which the Court must respond in relation to its jurisdiction, the

admissibility and basis of the Applicant's claims.

13. And that even if the Court chooses to use its discretionary power to hear the case *suo motu* and rule by default, it cannot do so by considering this point of law as one of the elements of the procedure and simply base its decision on the interest of justice without specifying and explaining how making a judgment in default is in the interest of justice.

14. In comparative law, many human rights courts treat the default decision as a formal decision that comes well after jurisdiction and admissibility. To quote just one rendered by the Court of Justice of the Economic Community of West Africa States on 16 February 2016, Judgment ECW/CCJ/JUGG/03/16, the Court, in Chapter III: Reasons for the decision: On the form, after dealing with the admissibility of the application and jurisdiction, addressed the issue of default against the Republic of Guinea and later, on the merits, handled the allegations of human rights violations. In its operative part, it stated that "the Court ruling publicly, by default against the Republic of Guinea, in the matter of human rights violations, in the first and last resort'" [*Translation by Registry*]

In adjudicating as it did, the Court delivered a judgment devoid of any legal basis and contrary to the provisions of the aforementioned Rules and Articles regarding default, especially as this provision of default does not appear in its operative part either.

Chrysanthe v Rwanda (review) (2019) 3 AfCLR 400

Application 001/2018, *Rutabingwa Chrysanthe v Republic of Rwanda*

Judgment of 4 July 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM and ABOUD

Recused under Article 22: MUKAMULISA

The Applicant filed an Application for review following the Court's Judgment on merits, which was dismissed as inadmissible on the ground of lack of exhaustion of local remedies. In his Application for review, the Applicant requested the Court to review its Judgment claiming that he had exhausted local remedies. The Court found that the Application for review was inadmissible as the Applicant had not provided new evidence that warranted review as required under the Rules of Court, and dismissed the request for review.

Review (conditions for review 13-15, failure to provide new evidence, 17-18, time for filing of Application for review, 19)

I. The Parties

1. Mr Rutabingwa Chrysanthe (hereinafter referred to as "the Applicant") filed an Application on 10 November 2014 against the Republic of Rwanda (hereinafter referred to as the "Respondent State") alleging the violation of his rights guaranteed by the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") as well as the Rwandan Constitution and Labour Code. On 11 May 2018, the Court rendered its Judgment on the merits in the matter.

II. Subject matter of the Application

2. Following the Court's judgment of 11 May 2018 on the merits, in the matter of *Rutabingwa Chrysanthe v Republic of Rwanda*, the Applicant on 11 July 2018, filed an Application for Review of that judgment attaching thereto the letter of the General Secretariat of the Rwandan Parliament dated 26 February 2014, in which he denounced a plot against him on the part of the State with the aim of dissuading him from bringing the matter before this Court.

3. The Applicant challenges the Court's decision to dismiss his case on the ground that he failed to exhaust local remedies. He asserts that the subject of the Judgment of the First Instance Court of

Kigali was changed by the Respondent State, as he never sought compensation before the Court of First Instance but, rather, requested reinstatement before both the Tribunal of First Instance and the High Court of Justice of Kigali.

4. He alleges that the Court, in paragraph 43 of its Judgment, made reference to the High Court Judgment, which relied on Law 18/2004 passed on 20 June 2004, without indicating that this law was enacted subsequent to his dismissal, and hence could not apply to his case by virtue of the principle of non-retroactivity of a law.

5. He contends that, the Court also infringed the principle of non-retroactivity, not only by referring in paragraph 44 of the Judgment, to Organic Law 03/2012 of 13 June 2012 which confers on the Supreme Court of Rwanda jurisdiction to adjudicate "appeals against judgments rendered at first instance by the High Court ..."; but also by declaring at paragraph 46 that the Application is inadmissible for failure to exhaust local remedies. According to him, this law was enacted subsequent to his case, having been adopted six (6) years after his seizure of the High Court.

III. Brief background of the matter

6. By an Application filed before this Court on 10 November 2014, the Applicant alleged that he was dismissed on 27 February 2001 by Decision 116/PRIV/BR/RU of the Executive Secretary of the Privatisation Board for disclosure of confidential documents. Believing that the decision to dismiss him was unfair and unconstitutional, he then filed an Application before this Court which was registered as Application 022/2015.

7. In its Judgment delivered on 11 May 2018, the Court declared the Application inadmissible for failure to exhaust the local remedies.[1]

IV. Summary of the procedure before the Court

8. Further to his Application for Review, on 27 September 2018, the Applicant tendered before the Court a letter dated 5 March 2001 used in the hierarchical appeal filed with the Ministry of the Economy and a memorandum of understanding as evidence for payment of his wages, as concluded after the Court of First Instance's decision condemning the Executive Secretariat for

1 Application 022/2015. Judgment of 11 May 2018 (Merits), *Rutabingwa Chrysanthe v Republic of Rwanda*.

Privatization for wrongful dismissal.

9. On 8 November 2018, the Court acknowledged receipt of the Applicant's request for review and served the same on the Respondent State, indicating that the latter had thirty (30) days to submit its Response to the Court. The Respondent State failed to respond to the various procedural documents sent.

10. On 19 December 2018, the Applicant enquired on the status of his request, attaching thereto a copy of the mediation remedy before the Ombudsman dated 11 March 2003. The Court acknowledged receipt thereof on 18 January 2019 and assured the Applicant that his request was under consideration.

11. On 22 May 2019, the Court notified the parties of the closure of pleadings and that it would proceed with a judgment on the Application.

V. Applicant's Prayer

12. The Applicant requests the Court to review the decision of 11 May 2018 on the ground that he exhausted local remedies and hold the Respondent State liable for the violations raised in his original complaint.

VI. On the conditions for review of the Judgment

13. Article 28(3) of the Protocol empowers the Court to review its decisions under conditions to be set out in its Rules. Rules 67(1) of the Rules provides that the Court may review its judgment "in the event of the discovery of evidence, which was not within the knowledge of the party at the time judgment was delivered. Such application shall be filed within six (6) months after that party acquired knowledge of the evidence so discovered". In addition, Rule 67(2) provides that "[T]he application shall specify the judgment in respect of which revision is requested, contain the information necessary to show that the conditions laid down in sub-rule 1 of this Rule have been met, and shall be accompanied by a copy of all relevant supporting documents. The application as well as the supporting documents shall be filed in the Registry".

14. The onus is thus on an Applicant to demonstrate in his application the discovery of new evidence of which he had no knowledge of at the time of the Court's judgment and the exact time when he came to know of this evidence. The Application must be submitted within six (6) months of the time when the Applicant obtained such

evidence.

15. It is recalled that the review requested and the evidence adduced concern the conclusions of the initial Judgment which, in its Operative Part, states that the Application is inadmissible for non-exhaustion of local remedies. The Applicant essentially raises three grounds in support of his Application:

i. A challenge to paragraph 40 of the Judgment, which states that "the Court notes from the records that the Applicant brought two different cases" before the domestic Courts; to paragraph 41 which states that "on 22 May 2002, the Applicant filed an action before the Kigali Court of First Instance for compensation in case No. RC 37604/02"; and to paragraph 42 of the Judgment which indicates that "on 23 January 2006, Chrysanthe Rutabingwa seized the Kigali High Court of Justice with another civil suit referenced R.Ad/0011/06/HC/KIG for annulment of the Decision in respect of his dismissal";

ii. A challenge to paragraph 43 which states that: "on 21 July 2006, the High Court of Justice found that the Application for annulment of Decision 361/PRIV/SV/AM of 27 February 2001, filed by Chrysanthe Rutabingwa was not in conformity with the law and therefore declared the Application inadmissible". The paragraph in question simply reiterated the Decision of the High Court which, according to the Applicant, had violated the principle of non-retroactivity.

iii. Violation of the principle of non-retroactivity in paragraph 44 by invoking Organic Law No. 03/2012 of 13 June 2012, which confers on the Supreme Court of Rwanda jurisdiction to hear "appeals against Judgments rendered at first instance by the High Court ...". The Court subsequently found that he had not appealed to the Supreme Court; and, consequently, in paragraph 46 held that: "the Application of 10 November 2014 is inadmissible on the ground that the Applicant has not exhausted local remedies". The Applicant believes that the law under reference was passed six (6) years after the Judgment of the High Court, and, therefore, cannot apply to his case.

16. The Court recalls that, in its Judgment of 11 May 2018, it declared the Application inadmissible for failure to exhaust local remedies.

17. The Court notes that the Applicant failed to provide new evidence that he exhausted local remedies. No information contained in the submissions tendered by the Applicant constitute "evidence" of which the Court was not aware at the time of its judgment.

18. The Court finds that the information provided does not constitute new "evidence" within the meaning of Rule 67(1) of the Rules.

19. As the Applicant has failed to provide evidence to justify the review of the judgment, the Court shall not consider the six (6) month deadline for filing a review provided in Rule 67(1) of the Rules. Therefore, the Court sees no merit in the request for review of the

judgment of 11 May 2018.

VII. Costs

20. The Court notes that the Applicant did not make submissions on costs. However, Rule 30 of the Rules of Court provides that "Unless otherwise decided by the Court, each party shall bear its own costs".

21. The Court therefore rules that each Party should bear its own costs.

VIII. Operative part

22. For these reasons,

The Court,

unanimously,

i. *Declares* that the information submitted by the Applicant does not constitute new "evidence";

ii. *Declares* that the Application for the review of Judgment of 11 May 2018 is inadmissible and is dismissed;

iii. *Decides* that each Party shall bear its costs.

Mango and Mango v Tanzania (review) (2019) 3 AfCLR 405

Application 002/2018, *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania*

Decision, 4 July 2019. Done in English and French, the English text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA and ANUKAM

Recused under Article 22: ABOUD

The Applicants filed an Application for review of the judgment on merits in which the Court found that the Respondent State violated Articles 7(1)(c) and 1 of the Charter and dismissed other allegations on the ground that they were not substantiated. The Court found that the claims of the Applicants were just a repetition of what they had claimed in the merits judgment with the exception of their claim that the Court of Appeal based its judgment on erroneous findings. The Court held that this particular information was new information but did not constitute new evidence as it only sought to substantiate the claims raised in the merits judgment.

Review (time for filing Application for review, 13, lack of new information, 16, 17, 24-26)

I. The Parties

1. Messrs Thobias Mang'ara Mango and Shukurani Masegenya Mango (hereinafter referred to as "the Applicants"), filed an Application on 11 February 2015 against the United Republic of Tanzania (hereinafter referred to as "the Respondent State") alleging that the Respondent State violated their rights under the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), the Universal Declaration of Human Rights, the Constitution and Penal Code of the Respondent State. On 11 May 2018, the Court delivered its judgment on the merits of the matter.

II. Subject matter of the Application

2. Following the Court's judgment of 11 May 2018 on the merits, in the matter of *Thobias Mang'ara Mango and Shukurani Masegenya Mango and Another v United Republic of Tanzania*, on 6 November 2018, the Applicants filed an Application for Review of that judgment.

3. In the Application for Review, the Applicants reiterated some of the claims of violation of their rights by the Respondent State that

were stated in their initial Application to the Court and reproduced on paragraphs 11 and 12 of the Court's judgment of 11 May 2018. They request the review on the basis of the following grounds:

"i. The principles of law and practice governing the matter of visual identification were neither met nor considered by the Trial Court;

ii. They were denied a chance to be heard when the presiding Magistrate was changed;

iii. No actual weapon was discovered or tendered in Court to support the charge of armed robbery and the owner of the Bureau de Change mentioned on the charge sheet was never called before the court to testify;

iv. The judgments of the trial Court and the first and second Appellate Courts were defective due to the contradiction between the evidence of Prosecution Witness 2 and Prosecution Witness 3;

v. The Trial Court tried the case to its finality without considering or according weight to the written submissions;

vi. The Court of Appeal relied on misconceived findings to convict them;

vii. Their Application for Review at the Court of Appeal was dismissed on grounds that it should have been raised in an Appeal;

viii. The sentence meted against them following their conviction is contrary to Sections 285 and 286 of the Penal Code of Tanzania as this sentence did not exist at the time the offence was committed and it was harsh."

III. Brief background of the matter

4. This Application seeks the review of the Court's judgment of 11 May 2018 in Application 005/2015 *Thobias Mang'ara and Shukurani Masegenya Mango v United Republic of Tanzania* in which it found that the Respondent State violated Article 7(1)(c) of the Charter for failure to provide the Applicants with legal assistance, with copies of some witness statements and for the delay in providing them some witness statements; and consequently that the Respondent State violated Article 1 of the Charter. The Court further found that the allegations of violations of Articles 2, 3, 5, 19 and 28 of the Charter and Articles 1, 2, 3, 5, 6 and 7 of the Universal Declaration of Human Rights in relation to their trial and conviction in the courts of the Respondent State were not established.

IV. Summary of the procedure before the Court

5. The Applicants filed the Application on 6 November 2018, and this was transmitted to their representatives, PALU, on 7 November 2018 for observations if any, to be filed within thirty (30) days of receipt thereof.

6. The Application was served on the Respondent State on 24 January 2019 for its submissions within thirty (30) days of receipt thereof.

7. On 26 February 2019, PALU requested an extension of time to make submissions in support of the Application.

8. On 5 April 2019, the Court notified PALU of the grant of its request for extension of time to file submissions in support of the Application. PALU did not file these submissions.

9. The Respondent State has not filed submissions in response to the Application.

10. Pleadings were closed on 11 June 2019 and the Parties were duly notified.

V. Applicants' Prayers

11. The Applicants pray the Court to allow their Application for review in its entirety, order their release from custody, order the Respondent State to pay them reparations for the violation of their rights and grant any other relief deemed suitable.

VI. On the conditions for review of the Judgment

12. Article 28(3) of the Protocol empowers the Court to review its decisions under conditions to be set out in its Rules. Rule 67(1) of the Rules provides that the Court may review its judgment "in the event of the discovery of evidence, which was not within the knowledge of the party at the time judgment was delivered. Such application shall be filed within six (6) months after that party acquired knowledge of the evidence so discovered". In addition, Rule 67(2) provides that "[T]he application shall specify the judgment in respect of which revision is requested, contain the information necessary to show that the conditions laid down in sub-rule 1 of this Rule have been met, and shall be accompanied by a copy of all relevant supporting documents. The application as well as the supporting documents shall be filed in the Registry".

13. The onus is thus on an Applicant to demonstrate in his application the discovery of new evidence of which he had no knowledge of at the time of the Court's judgment and the exact time when he

came to know of this evidence. The Application must be submitted within six (6) months of the time when the Applicant obtained such evidence.

14. The Court notes that the Application for Review is submitted in respect of its judgment of 11 May 2018 judgment delivered in Application 005/2015 *Thobias Mang'ara and Shukurani Masegenya Mango v United Republic of Tanzania.* The Applicants urge the Court to review that judgment on the grounds set out earlier in this judgment.

15. The Court notes that the Applicants merely restate some allegations that were considered by the Court in the said judgment.

16. The Court further notes that apart from the Applicants' allegation that the "Court of Appeal relied on misconceived findings to convict them" in respect of which they provide new information, all other grounds on which the Application is based are the same in form and substance as what they stated in their Application on the merits.

17. All the grounds that form the basis of the Application for Review, except for the claim that "the Court of Appeal relied on misconceived findings to convict them" are, restatements of some grounds of their Application on the merits. These cannot qualify as new evidence as envisaged under Rule 67(1) of the Rules.

18. The Applicants allege that the findings of the Court of Appeal which upheld their conviction and sentence were misconceived, invented and not based on existing court records.

19. The Applicants contend that the Court of Appeal's findings vary with the information contained in the record of the Trial Court. They contend that in its judgment, the Court of Appeal inferred that the second Applicant collected and put the stolen money in his bag, yet the Trial Court's record shows that it was the 5th accused in the trial, Mgendi James Edson, 'who had a bag and took all the money'.

20. They aver that the finding of the Court of Appeal that, a jacket and sunglasses which fits the description given by PW4 was found in the guest room occupied by the second Applicant was contradictory to the Trial Court's record that nothing was found in the second Applicant's room.

21. The Applicants deny any involvement in the crime and state that the finding of the Court of Appeal which inferred that there was a confession statement from the second Applicant which admits to the participation of the first Applicant, was contradictory to the Trial Court's record which notes that the second Applicant was

interrogated but he denied any involvement.

22. The Applicants allege further contradictions and state that whereas the Court of Appeal infers that the attire which the second Applicant had on during the robbery was found in his room, the Trial Court's record states that the said attire a T-shirt, was found in Wilfred Wilbard, the 3rd accused's room. They aver that the Trial Court's record had further stated that the said T-shirt was given to the 3rd accused by the 4th accused, Badru Babylon.

23. The Applicants thus conclude that premised on the above elaboration, the Respondent State's Court of Appeal upheld their conviction and sentence on 'mixed up', misapprehended and 'inverted' evidence.

24. The Court recalls that in the judgment of 11 May 2018 as regards the allegation relating to misconstrued and misapplied evidence by the national courts, it found that the Applicants had failed to establish the alleged violation due to the lack of substantiation of this claim.

25. The Court notes that though the substantiation provided in this Application for review was not in the Application on the merits, it does not qualify as new evidence that would not have been in the fore knowledge of the Applicants at the time of filing the Application on the merits. The Applicants could have substantiated on this ground while filing their Application on the merits because the record of the Trial Court and the judgment of the Court of Appeal were available to them by then and they ought to have pointed out the discrepancies.

26. The Court therefore finds that the information provided does not constitute new evidence as envisaged under Rule 67(1) of the Rules.

27. Having found that the Applicants have not filed new evidence, the Court does not deem it necessary to determine whether such information was filed within the six (6) months envisaged under Rule 67(1) of the Rules.

28. The Court consequently dismisses the Application for Review.

VII. Costs

29. The Applicants have not made any submissions on costs.

30. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

31. The Court therefore rules that each Party should bear its own costs.

VIII. Operative part

32. For these reasons,
The Court,
unanimously,
i. *Declares* that the information submitted by the Applicants does not constitute new "evidence";
ii. *Declares* that the Application for Review of the judgment of 11 May 2018 is inadmissible and is dismissed;
iii. *Decides* that each Party shall bear its own costs.

African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 411

In the Applications for intervention by Wilson Barngetuny Koimet and 199 others and Peter Kibiegon Rono and 1300 others in the matter of African Commission on Human and Peoples' Rights v Republic of Kenya

Order, 4 July 2019. Done in English and French, the English text being authoritative.

Judges: BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, and ABOUD

Recused under Article 22: KIOKO

The Court had in a merits judgment held that Kenya had violated the Charter in relation to the Ogiek Community. The Court declared the Applications for intervention inadmissible as, under the Rules of Court, individuals were not allowed to join ongoing proceedings.

Procedure (joinder, 4; intervention, 14-16)

I. Brief background

1. On 26 May 2017, the Court delivered its judgment on merits in an Application filed by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") against the Republic of Kenya (hereinafter referred to as "the Respondent State"). In its judgment, the Court found that the Respondent State had violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") in its relations with the Ogiek Community of the Greater Mau Forest.

2. The Court reserved its determination on reparations while permitting the parties to file submissions on reparations. The parties have filed their submissions on reparations and pleadings were closed on 20 September 2018. The matter is currently under deliberation by the Court.

3. On 16 April 2019, the Court received two Applications: the first Application was filed by Wilson Barngetuny Koimet and 119 others, being residents of Amalo, Ambusket and Cheptuech in the Respondent State and the second Application was filed by Peter Kibiegon Rono and 1300 others, being residents of Sigotik, Nessuit, Ngongongeri, Kapsita and Marioshoni also being locations within the Respondent State. (hereinafter these

individuals will collectively be referred to as "the Applicants").

4. Given that the two Applications deal with the same subject matter and are requesting similar reliefs, to wit, whether the Applicants can be allowed to intervene in the present case, the Court holds that it will deal with both Applications at the same time.

II. Subject matter of the Applications

A. Facts of the matter

5. In the Application filed by Wilson Barngetuny Koimet and 119 others, the Applicants aver that they are the registered owners of land in Amalo, Ambusket and Cheptuech since 1958. It is their further averment that their lands fall within the Greater Mau Forest Complex, which was the subject matter of the case between the Applicant and the Respondent State.

6. In the Application filed by Peter Kibiegon Rono and 1300 others, the Applicants state that they are residents and legal owners of parcels of land in Sigotik, Nessuit, Ngongongeri, Kapsita and Marioshoni. They further state that their lands are part of the land that formed the dispute between the Applicant and the Respondent State before this Court.

7. In both Applications, the Applicants raise the following issues:

i. The Court's Judgment of 27 May 2017 is likely to affect their interests as owners of land within the Greater Mau Forest Complex even though it was delivered without according any of them an opportunity to be heard.

ii. Members of the Ogiek Community misled the Court and obtained the Judgment of 27 May 2017 through fraud and concealment of material facts, for example, that some members of the Ogiek Community have over the years sold their land to non-Ogiek, including the intended intervenors.

iii. The Court's Judgment on merits has disadvantaged and prejudiced them since the Court made findings without according them an opportunity to be heard.

iv. The Court's Judgment on reparations is likely to irreparably and fundamentally violate their rights, especially if it is made without hearing them.

v. It is in the interests of justice to allow the Applicants to join the present case since this would enable them to protect their rights.

B. The Applicants' prayers

8. The Applicants pray the Court to order:

"1. THAT this matter be certified as urgent and service be dispensed with in the first instance.

2. THAT this Honourable court be pleased to enjoin the applicants herein as interested parties in this matter.

3. THAT this Honourable court be pleased to make any order and or give any directions as it may deem just and fair in the interests of justice."

9. The Court observes that although there are two Applications, the reliefs sought by the Applicants are framed exactly as reproduced above in both Applications.

III. Admissibility of the Applications

10. The Court notes that the issue for determination is whether or not the Applicants' claims are admissible. In resolving this issue the Court must determine whether or not the Charter, the Protocol, the Rules and other applicable rules permit the granting of the prayers made by the Applicants.

11. The Court observes that Article 5(2) of the Protocol provides as follows: "When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join."

12. The Court notes that Article 5(2) of the Protocol is reiterated in Rule 33(2) of the Rules which provides as follows: "In accordance with article 5(2) of the Protocol, a State Party which has an interest in a case may submit a request to the Court to be permitted to join in accordance with the procedure established in Rule 53 of these Rules."

13. The Court further notes that Rule 53 of the Rules provides as follows:

"1. An application for leave to intervene, in accordance with article 5(2) of the Protocol shall be filed as soon as possible, and in any case, before the closure of written proceedings.

2. The application shall state the names of the Applicant's representatives. It shall specify the case to which it relates, and shall set out:

a. The legal interest which, in the view of the State applying to intervene, has been affected;

b. The precise object of the intervention; and

c. The basis of the jurisdiction which, in the view of the State applying to intervene exists between it and the parties to the case.

3. The application shall be accompanied by a list of the supporting

documents attached thereto and shall be duly reasoned

4. Certified copies of the application for leave to intervene shall be communicated forthwith to the parties to the case, who shall be entitled to submit their written observations within a time-limit to be fixed by the Court, or by the President if the Court is not in session. The Registrar shall also transmit copies of the application to any other concerned entity mentioned in Rule 35 of these Rules-
5. If the Court rules that the application is admissible it shall fix a time within which the intervening State shall submit its written observations. Such observations shall be forwarded by the Registrar to the parties to the cases who shall be entitled to file written observations in reply within the timeframes fixed by the Court.
6. The intervening State shall be entitled, in the course of oral proceedings, if any, to present its submissions in respect of the subject of the intervention."

14. From the totality of the above provisions, it is clear that neither the Protocol nor the Rules provide a mechanism permitting a third party, which is not a State party, to intervene in on-going proceedings. Additionally, it is also clear that even where States are permitted to intervene in on-going proceedings, this has to be done before the close of pleadings — Rule 53(1) of the Rules.

15. The Court wishes to observe that the genesis of the case between the Commission and the Respondent State lies in an Application that was filed before it on 12 July 2012. Before that, a communication had been lodged before the Commission on 14 November 2009. As earlier pointed out, the Court's judgment on merits was delivered on 26 May 2017. From the time the judgment on the merits was delivered, to the time the Applicants lodged their Applications for intervention, a period of one (1) year and eleven (1 1) months elapsed. It is also notable that a period of six (6) years and eight (8) months elapsed between the time the case was filed before the Court to the filing of the Applications for intervention. The Court takes judicial notice of the fact that the litigation between the Commission and the Respondent State has continued to generate media attention within the Respondent State such that its subsistence can safely be assumed to be common knowledge, at least within the Respondent State particularly in the areas where the present Applicants reside. Against this background, the Applicants have not proffered any explanation for the delay in filing their Applications.

16. Consequently, the Court, bearing in mind the provisions of the Protocol and the Rules, holds that there is no basis for admitting the Applications for intervention and accordingly dismisses them.

IV. Costs

17. The Court recalls that in terms of Rule 30 of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs." In the present case, the Court, decides that each party shall bear its own costs..

V. Operative part

18. For these reasons
The Court
By a majority of Nine (9) for, and One (1) against (Judge Bensaoula dissenting):
i. Declares that the Applications are inadmissible;
On costs
ii. Orders that each party shall bear its own costs

***

Dissenting opinion: BENSAOULA

1. I reject in its entirety the operative part and the grounds of the order made by the Court with regard to the application filed by the applicants Wilson Barngetuny Koimet and 119 others and Peter Kibiegon Rono and 1300 others.

2. It should be noted that the Court in considering the inadmissibility of the Application on the basis of Article 5(2) of the Protocol on the pretext that only a State Party which considers to have an interest in a case can submit an Application to the Court to intervene and not individuals, misinterpreted the article referred to above and completely far from the spirit of the text and principles that the Charter defends.

3. Indeed, on reading Article5(2) of the Protocol:

- In its paragraph 1 the legislator determined the entities that have a standing to seize the Court citing them as:
- The Commission, the State Party that seized the Commission, the State Party against which a complaint has been lodged, the State Party of which the national is a victim of a violation of human rights and African Inter-Governmental Organizations.
- But in paragraph 2 this right of referral is also granted to the

State Party which considers itself to have an interest in a case pending before the Court within the context of an application because it has not itself seized the court and having an interest in a matter that an individual or a State may have started.

- In its paragraph 3 the legislator also gives *locus standi* of referral to the Court to individuals and NGOs with this condition referred to in article 34(6) of the Protocol concerning the declaration.

The reflection of the Court goes in the direction or if the legislator had wanted to grant the right to intervene to individuals and NGOs, it would have explicitly stated it in paragraph 3 as it was in article 5(2) Protocol.

It is clear that the Court's interpretation in its judgment of this section is erroneous and even contrary:

- With respect to the principles upheld by the Charter.
- Regarding the very essence of the text.
- To its jurisprudence.
- And to comparative law

Principles of the Charter

Indeed, it remains inconceivable that many of the principles enacted by the Charter such as equality before the law, protection by law, recourse to courts competent to defend rights, applied by the court are flouted by an article of the Protocol!

A restricted reading of Article 5(3) would have as immediate effect non-equality between the State and the individual, a non-protection of this individual and the refusal of *locus standi* to the same individual the right of appeal to a court of competent jurisdiction in. human rights within the context of an application.

Regarding the essence of the text

If in its paragraph 1 the legislator determined the quality of applicants before the court and that of the interveners, in its paragraph 2 it goes in the same direction to determine the quality of individuals and NGOs for this same referral. Although this paragraph does not explicitly mention the right to intervene in relation to individuals and NGOs, it follows from the very logic that intervention is a recourse granted to a third party who has an interest in a matter pending before the Court and cannot be excluded from individuals and NGOs that may also have an interest in intervening in a matter or rights related to applicants' allegations in the pending matter would have been flouted or could be violated.

Its jurisprudence

4. It is unequivocal that in its past case law the Court has already

ruled on this point of law in these terms:
"By letter dated 13 June 2011, the Pan African Lawyers Union ("PALU") applied to the Court for leave to intervene as an *amicus curiae* and at its twenty-fourth ordinary session, the Court granted PALU the request" (Application 004-2011, *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*).

Thus, in granting PALU's application, the Court explicitly recognizes the right of NGOs and individuals to intervene before it as participants. Therefore, intervention is not reserved exclusively to States.

Comparative law

- Article 36 of the European Convention on Human Rights, as amended by Protocol 14 (in force since 1 June 2010), reads as follows:

"1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings".

- The second type of intervention, provided for in Article 36(2), concerns *" any High Contracting Party which is not a party to the proceedings",* but this is not an acquired right: it is the President of the Court who is responsible for authorizing the intervention of this person "in the interest of the proper administration of justice". The initiative can come from either the President of the Court or (in almost all cases) from the person concerned. Since Article 36(2) makes no distinction between natural and legal persons, NGOs naturally fall within the scope of this provision.

On this point the Court could have, instead of completely removing individuals and NGOs from the right to intervene in application of its interpretation of Article 5(2) of the Protocol, used its discretion and declare, for example, inadmissible for lack of interest (essential condition) or for having been filed late granting intervener status to the applicants which would have been more appropriate to the principles of the Charter.

Comparative Jurisprudence:

5. I will cite the references of certain decisions taken in respect of the admissibility of interventions such as the ECHR, the

case of *Lambert and others v France* (Application 46043/14). Intervention of the Human Rights Clinic (NGO) as a third party in the proceedings pursuant to Articles 36(2) of the European Convention on Human Rights and Rule 4(3) of the Rules of Court of the European Court of Human Rights.

- *Tahsin Acarv v Turkey* (preliminary issue), [GC], 26307/95, ECHR 2003-VI: Amnesty International (on whether to strike the Application off the role and on the effectiveness of appeals).
- *Blokhin v Russia* [GC], 47152/06, ECHR 2016: Centre for the Defense of People with Intellectual Disabilities (NGOs) (on how to treat minors with disabilities in conflict with the law);

Regarding Rule 53 of the Rules

6. Articles 8 and 33 of the Protocol clearly specify that "The Rules of Procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before ….The Court shall draw up its Rules and determine its own procedures."

7. In application of the articles cited above, the African Court on Human and Peoples' Rights in Rule 53 devoted to Intervention has only confirmed the erroneous reading of Article 5(6) of the Protocol by insisting in the 6 paragraphs that make up this article that only the State has the *locus standi* to seize the court in the context of an intervention procedure.

8. Therefore, to use this ground as source to further strengthen its position in the order subject of the opinion does not contribute in any way to strengthen the legal basis of its position and that review of this article of this rule would be more in harmony with the principles of the human rights defended by the Court.

9. It is clear from reading the judgment that the Court has cited all the conditions of Article 5(2) of the Protocol repeated in Rule 33(2) and 53 of the Rules in its analysis of those provisions. It passes from one condition to another without recognizing the quality of interveners on the basis of its interpretation of article 53(1) of the Rules that only the State can do it and lingering on the time of deposit of the request for intervention before the closing of the procedure as too late whereas declaring lack of quality as the first and fundamental condition would have been enough. This abundance undermined the clarity and legal basis of the judgment.

African Commission on Human and Peoples' Rights v Kenya (review) (2019) 3 AfCLR 419

Application for review by Wilson Barngetuny Koimet and 119 others of the order of 4 July 2019 in the matter of *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application 006/2012 (reparations)

Order, 11 November 2019. Done in English and French, the English text being authoritative.

Judges: BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, ABOUD

Recused under Article 22: KIOKO

The Court had in a merits judgment held that Kenya had violated the Charter in relation to the Ogiek Community. The Applicants' application to intervene in relation to the reparations hearings was declared inadmissible by the Court. In this Application, the Court dismissed the request for review of the inadmissibility order as the Applicants had not presented any new evidence.

Review (new evidence, 15)

I. Brief background

1. On 26 May 2017, the Court delivered its judgment on merits in an Application filed by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") against the Republic of Kenya (hereinafter referred to as "the Respondent State"). In its judgment, the Court found that the Respondent State had violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") in its relations with the Ogiek Community of the Greater Mau Forest.

2. The Court reserved its determination on reparations while permitting the parties to file submissions on reparations. The parties have filed their submissions on reparations and pleadings were closed on 20 September 2018.

3. On 16 April 2019, the Court received two Applications for intervention: the first Application was filed by Wilson Barngetuny Koimet and 119 others, being residents of Amalo, Ambusket and Cheptuech in the Respondent State and the second Application was filed by Peter Kibiegon Rono and 1300 others, being residents of Sigotik, Nessuit, Ngongongeri, Kapsita and Marioshoni also

being locations within the Respondent State.

4. On 4 July 2019 the Court delivered an Order in which it dismissed the two applications for being inadmissible.

II. Subject matter of the Application

A. Facts of the matter

5. On 29 August 2019, Wilson Barngetuny Koimet and 119 others, (hereinafter referred to as "the Applicants") filed an Application for Review of the Court's Order of 4 July 2019.

6. The Applicants raise two grounds in support of their Application: firstly, that "this honourable court erred in law and in fact by dismissing the intended intervenors application on the basis of delay in filing the application for intervention." Secondly, that "this honourable court erred in law and in fact by allowing itself to be handicapped by procedural technicalities by holding that neither the Protocol nor the Rules provide a mechanism permitting a third party, which is not a state party, to intervene in on-going proceedings."

B. The Applicants' prayers

7. The Applicants pray the Court for orders:

"1. THAT this honourable court be pleased to review and/or set aside its ruling dated 4th July 2019.

2. THAT this honourable court be pleased to grant leave to the applicants herein to intervene in the present suit as interested parties.

3. THAT this honourable court be pleased to grant any other order it may deem just in the administration of justice."

III. On the request for review of the Court's order

8. The Court notes the power to review its own decisions stems from Article 28 of the Protocol which power is further explained in Rule 67 of the Rules.

9. The Court recalls that Article 28(3) of the Protocol provides as follows:

"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."

10. The Court further recalls that Rule 67, in so far as is material,

provides as follows:

"1. 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 that party acquired knowledge of the evidence so discovered.

2. The application shall specify the judgment in respect of which revision is requested, contain the information necessary to show that the conditions laid down in sub-rule 1 of this Rule have been met, and shall be accompanied by a copy of all relevant supporting documents. The application as well as the supporting documents shall be filed in the Registry."

11. A combined reading of Article 28(3) of the Protocol and Rule 67 of the Rules confirms that in an application for review, the Applicant must demonstrate "the discovery of evidence, which was not within the knowledge of the party at the time the judgment was delivered." [1] It is also clear, from Article 28(3), that an application for review cannot be used to undermine the principle of finality of judgment which is enshrined in Article 28(2) of the Protocol.[2]

12. As previously confirmed by the Court, the onus is on the applicant to demonstrate, in his application, the discovery of new evidence of which he had no knowledge of at the time of the Court's judgment and the exact time when he came to know of this evidence.[3] The application for review itself, must be filed within six (6) months of the time when the Applicant obtained such evidence.

13. The Court observes that the Application for Review is supported by an affidavit sworn by Wilson Barngetuny Koimet, ostensibly on behalf of all the Applicants. The affidavit, and the Applicants' arguments, the Court further observes, revolve around two grounds. These two grounds, the Court recalls, relate to the alleged error by the Court in respect of its finding as to the time it took the Applicants to file for intervention and also the allegation that the Court erred by "handicapping" itself with technicalities in

1 Rule 67(1) and *Urban Mkandawire v Malawi* (review and interpretation) (2014) AfCLR 299 para 12.

2 Art 28(2) of the Protocol Provides as follows: The judgment of the Court decided by majority shall be final and not subject to appeal." See, also *Urban Mkandawire v Malawi*, *supra*, para 14.

3 Application 002/2018. Judgment of 4 July 2019 (Review), *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* para 13 and Application 001/2018. Judgment 4 July 2019 (Review) *Rutabingwa Chrysanthe v Republic of Rwanda* para 14.

its disposal of the Applicant's request for intervention.

14. The Court notes that in paragraph thirteen (13) of the affidavit sworn by Wilson Barngetuny Koimet, the Applicants allege that they are bringing before it evidence to prove that the three land sections forming part of the Olenguruone are not part of the Mau Forest Complex. Attached to this affidavit are, among other things, the following: a map of the Mau Forest Complex allegedly obtained from the Kenya Forest Service, a letter dated 15 March 2012 from the Chief Land Registrar to the District Land Registrar, Nakuru, various letters obtained from the Kenya National Archives dating back to 1941; and a research paper submitted to the University of Nairobi in 2009.

15. It is the above referred to evidence that the Applicants submit in support of their Application for Review. The Court, focusing on the evidence submitted by the Applicants, observes that the Applicants have not demonstrated that this evidence was not within their knowledge at the time the Court delivered its Order of 4 July 2019. Neither have the Applicants demonstrated that their Application for Review was filed within six (6) months of them becoming aware of the existence of this evidence. As a matter of fact, the Court notes that the "new" evidence is generically similar to the evidence that the Applicants filed before the Court in their Application for intervention. The Applicants have, therefore, failed to fulfil the requirements in Rule 67(1) of the Rules.

16. The Court also notes that the Applicants have questioned the fact that the Court, allegedly, disposed of the Application for intervention without hearing them. The Applicants aver that this is a violation of Article 7 of the African Charter on Human and Peoples' Rights. In this regard, the Court notes that Rule 27(1) of the Rules provides that "[t]he procedure before the Court shall consist of written, and if necessary, oral proceedings". Evidently, the Court is not obliged to hold public hearings in each and every application. The absence of a public hearing, however, does not mean that a party's case has not been heard. The Court merely disposes of any such application on the basis of the written pleadings. Additionally, the Court also observes that under Rule 38 of the Rules, it has been given the power to dismiss non-meritorious applications without having to summon the parties for a hearing. The Court, therefore, does not find any merit in the Applicants' contention on this point.

17. In view of the reasons outlined hereinbefore, the Court finds the Application for Review inadmissible and accordingly dismisses it.

IV. Costs

18. The Court recalls that in terms of Rule 30 of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs." In the present case, the Court, decides that each party shall bear its own costs.

V. Operative part

19. For these reasons
The Court,
Unanimously:
i. *Declares* that the information submitted by the Applicants does not constitute new "evidence";
ii. *Dismisses* the Application for Review.

On costs
iii. *Orders* that each party shall bear its own costs

African Commission on Human and Peoples' Rights v Kenya (intervention) (2019) 3 AfCLR 424

Application 001/2019, Application for intervention by Kipsang Kilel and others in Application 006/2012, *African Commission on Human and Peoples' Rights v Republic of Kenya*

Order, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORE, BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, TCHIKAYA and ABOUD

Recused under Article 22: KIOKO

The Court had in a merits judgment held that Kenya had violated the Charter in relation the Ogiek Community. Other members of the Ogiek community requested to intervene at the reparations stage. The Court declared the Application for intervention inadmissible as intervention by individuals was not permissible under its Rules in ongoing proceedings.

Procedure (intervention, 20)

Dissenting opinion: BENSAOULA

Procedure (intervention, 2)

I. Background

1. On 26 May 2017, the Court delivered its judgment on the merits in an Application filed by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") against the Republic of Kenya (hereinafter referred to as "the Respondent State").

2. In its judgment, the Court found that the Respondent State had violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") in its relations with the Ogiek Community of the Greater Mau Forest. The Court reserved its determination of the claims for reparations and this aspect of the proceedings is still pending.

3. On 10 October 2019, the Court received an "application to intervene at the reparations stage" filed by Kipsang Kilel and others (hereinafter referred to as "the Applicants"), being members of the Ogiek community residing in the Tinet Settlement Scheme

which is in South West Mau Forest.

II. Subject matter of the Application

A. Facts of the matter

4. The Applicants allege that they are genuine members of the Ogiek Community who reside in the Tinet Settlement Scheme which is within the South West Mau Forest. It is the Applicants' further allegation that the Ogiek Community has lived in the Tinet area in the South-West Mau Forest since time immemorial.

5. The Applicants aver that the Tinet Settlement Scheme was established by the Respondent State for purposes of settling members of the Ogiek Community and that in 2005, the Ogiek of Tinet Settlement Scheme, were given title deeds to their parcels of land by the Respondent State.

6. The Applicants further aver that the commencement of Application 006/2012 before the Court has prejudiced them since one of the interim reliefs granted by the Court was to order the Respondent State to freeze any further transactions involving land in the Mau Forest. According to the Applicants, due to the interim relief ordered by the Court on 15 March 2013, they have been constrained since they cannot charge their land to lending institutions "in order to obtain finances to support their economic activities as well as their livelihood."

7. The Applicants also allege that the Order for provisional measures issued by the Court and also the Judgment on the merits of 26 May 2017, were obtained fraudulently for the following reasons:

"a. By concealment from the court of the material fact that members of the Ogiek of Tinet had in fact been settled by the government on the aforesaid settlement and that the government that already issued them with individual title deed in respect of their parcels of land.

b. By not disclosing to this honourable court that some members of the Ogiek community who were settled by the government in Tinet Settlement scheme opted to sell their parcels of land and moved the adjacent areas of Bararget, Marioshoni, Teret, Nessuit and Likia settlements.

c. That the present suit was filed by the aforesaid non-governmental organisations without the authority and blessings of the Ogiek of Tinet." [sic]

8. The Applicants also allege that they are "contented with their parcels of land whose Title Deeds were lawfully issued to them the government of Kenya in year 2005 and have absolutely no

desire to convert the same to community land," [sic]

B. The Applicants' prayers

9. The Applicants pray the Court to order:

"1. THAT this matter be certified as urgent and service be dispensed with in the first instance.

2. THAT this Honourable court be pleased to invoke its inherent jurisdiction and grant leave to the intended intervenors/applicants to intervene in the present suit being Application No. 006 of 2012.

3. THAT this Honourable court be pleased to make any other order and or give any directions as it may deem just and fair in the interest of justice."

III. Jurisdiction

10. Pursuant to Article 3(1) of the Protocol, the jurisdiction of the Court 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 States concerned." Further, in terms of Rule 39 of the Rules, "[t]he Court shall conduct preliminary examination of its jurisdiction …" .

11. The Court recalls that even where none of the Parties has raised any objection(s) to its jurisdiction, it is duty bound to examine whether or not it has jurisdiction in the particular matter.[1] In this regard, the Court recalls that jurisdiction has four dimensions and these are: personal (*ratione personae*), material (*ratione materiae*), temporal (*ratione temporis*) and territorial (*ratione loci*).

12. he Court notes that in respect of applications brought by individuals, its personal jurisdiction is governed by Articles 5(3) and 34(6) of the Protocol. Article 5(3) of the Protocol provides that:

"The Court may entitle relevant Non-Governmental Organisations with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol."

13. Article 34(6) of the Protocol is in the following terms:

"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."

1 *Lohe Issa Konate v Burkina Faso* (merits) (2014) 1 AfCLR 314, para 30.

14. The Court notes that a combined reading of Articles 5(3) and 34(6) of the Protocol requires it to assess personal jurisdiction from at least two perspectives and these are: firstly, from the angle of the respondent, that is, against what entities does the Protocol permit applications to be lodged; and, secondly, from the perspective of the applicant, that is to say, who is permitted to be an applicant before the Court.

15. In terms of personal jurisdiction from the perspective of the respondent, the Court notes that, generally, Applications can only be filed against States that are parties to the Protocol. In the present case, the Court notes that the Respondent State is a party to the Protocol and that as a result of this the first perspective of its personal jurisdiction is established.

16. In terms of the second perspective to the Court's personal jurisdiction, the Court notes that the Application has been filed by individuals in a matter that involves a State that has not deposited the Declaration under Article 34(6) of the Protocol. While this would ordinarily have deprived the Court of its jurisdiction, the Court finds that the present Application is not the genesis of the proceedings before it. The original action before the Court was commenced by the Commission, which is permitted under Article 5(1)(a) of the Protocol, to bring cases against States that have ratified the Protocol even where such States have not deposited the Declaration under Article 34(6) of the Protocol. The Court, therefore, confirms that the Respondent State is properly before this Court.

17. The above notwithstanding, the Court notes that the present Application is one for intervention. In this regard, the Court considers that it is important to look beyond Article 5(1) of the Protocol in order to determine whether the Applicants are properly before this Court. The Court notes that there are several provisions in the Protocol that deal with the question of intervention. Firstly, Article 5(2) of the Protocol provides as follows: "When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join."

18. The Court also notes that Article 5(2) of the Protocol is reiterated in Rule 33(2) of the Rules which provides as follows: "In accordance with article 5(2) of the Protocol, a State Party which has an interest in a case may submit a request to the Court to be permitted to join in accordance with the procedure established in Rule 53 of these

Rules."

19. The Court further notes that Rule 53 of the Rules provides as follows:

"1. An application for leave to intervene, in accordance with article 5(2) of the Protocol shall be filed as soon as possible, and in any case, before the closure of written proceedings.

2. The application shall state the names of the Applicant's representatives. It shall specify the case to which it relates, and shall set out:

a. The legal interest which, in the view of the State applying to intervene, has been affected;

b. The precise object of the intervention; and

c. The basis of the jurisdiction which, in the view of the State applying to intervene exists between it and the parties to the case.

3. The application shall be accompanied by a list of the supporting documents attached thereto and shall be duly reasoned.

4. Certified copies of the application for leave to intervene shall be communicated forthwith to the parties to the case, who shall be entitled to submit their written observations within a time-limit to be fixed by the Court, or by the President if the Court is not in session. The Registrar shall also transmit copies of the application to any other concerned entity mentioned in Rule 35 of these Rules.

5. If the Court rules that the application is admissible it shall fix a time within which the intervening State shall submit its written observations. Such observations shall be forwarded by the Registrar to the parties to the case, who shall be entitled to file written observations in reply within the timeframes fixed by the Court.

6. The intervening State shall be entitled, in the course of oral proceedings, if any, to present its submissions in respect of the subject of the intervention. "

20. The Court notes that, the provisions cited above are the only provisions dealing with intervention both in the Protocol and the Rules. The Court further notes that, the totality of the provisions on intervention, both in the Rules and the Protocol, do not permit an individual(s) to intervene in on-going proceedings before it.[2] The Applicants, being individuals seeking to intervene in ongoing proceedings, are, therefore, not permitted by the Rules to intervene. For the preceding reason, the Court holds that it lacks

2 Application 006/2012. Order of 4 July 2019 (Intervention) *In the Applications for intervention by Wilson Bargetuny Koimet and 119 others and Peter Kibiegon Rono and 1300 others, In the matter of the African Commission on Human and Peoples' Rights v Kenya*.

personal jurisdiction to deal with the Application.

21. Since the Court has found that it lacks personal jurisdiction to entertain the Application, it does not consider it necessary to examine the other dimensions of jurisdiction and accordingly dismisses the Applicants' Application for intervention.

IV. Costs

22. The Court recalls that in terms of Rule 30 of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs." In the present case, the Court, decides that each party shall bear its own costs.

V. Operative part

23. For these reasons

THE COURT

By a majority of Nine (9) for, and One (1) against (Judge Bensaoula dissenting):

i. *Declares* that it has no jurisdiction to consider the Application for intervention and accordingly dismisses it;

On costs

ii. *Orders* that each party shall bear its own costs

***

Dissenting opinion: BENSAOULA

1. I refute in its totality the Operative Part and the legal basis of the Court's Order in respect of the Application for Intervention filed by the Applicants Kipsang Kilel and others.

2. It is noteworthy that, in ruling that the request for intervention was inadmissible on the basis of Article 5 paragraph 2 of the Protocol, on the pretext that only a State Party which considers itself as having an interest in a case may bring before the Court a request for intervention and not individuals, the Court misinterpreted the afore-cited Article and completely strayed from the very spirit of

the text and the principles upheld by the Charter.

3. In fact, a reading of Article 5 paragraph 2 of the Protocol shows that:

In its paragraph 1, the legislator set forth the entities entitled to submit cases to the Court, listing them as:

The Commission; the State Party which had 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; and African Intergovernmental Organizations.

However, in its paragraph 2, this right of access is also recognized for the State Party which considers itself as having an interest in a case ongoing before the Court in the context of an intervention procedure**,** given that having not itself seized the Court, it has an interest in a case supposedly initiated by an individual or a State.

In paragraph 3 of the same Article 5, the legislator also entitles individuals and NGOs to bring cases before the Court, under the condition set out in Article 34 paragraph 6 of the Protocol regarding the filing of a Declaration.

4. The direction of the Court's thinking is that, had the legislator intended to recognize the right to intervention for individuals and NGOs, it would have explicitly stated so in paragraph 3, as it did in paragraph 2, Article 5 of the Protocol.

It is clear that the Court's interpretation of the aforesaid Article in this Order is erroneous and indeed in breach of:

- respect for the principles upheld by the Charter,
- the very essence of the text,
- its jurisprudence,
- and of comparative law

a. In breach of the principles upheld by the Charter

5. It is, as a matter of fact, inconceivable that many of the principles enunciated by the Charter such as equality before the law, protection of the law, recourse to competent jurisdictions to defend the rights applicable by the Court, have been flouted by an Article of the Protocol!

6. A narrow reading of Article 5(3) would have as immediate effect, the absence of equality between the State and the individual, the failure to protect that individual and the denialthat same individual ofthe right of appeal to a competent jurisdiction in matters of human rights in the context of an intervention procedure.

b. In breach of the very essence of the text

7. If in its paragraph 1, the legislator has determined the standing

of the Applicants before the Court and that of the interveners in its paragraph 2, it also adopts the same option of determining the standing of individuals and NGOs as regards this same issue of seizure, although this paragraph does not explicitly mention the right to intervention in relation to individuals and NGOs.

It follows even from logic that intervention, being a recourse granted to a third party with an interest in a case ongoing before the Court, cannot be denied to individuals and NGOs which also would have an interest in intervening in a case or where the rights relating to Applicant's allegations in the pending proceedings have supposedly been or could be flouted. The only condition *sine qua non* to be met is "the declaration" in as much as the concerned individuals must be citizens of a Respondent State which has filed the Declaration entitling the said individuals to bring cases before the Court.

c. In breach of its jurisprudence

8. It is unequivocal that in its previous jurisprudence, the Court had ruled on this point of law in the following terms:

"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".(Application 004-2011, *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*).

Thus, in granting PALU's application, the Court explicitly recognizes the right of NGOs and individuals to appear before it as an intervener. Consequently, intervention is not reserved exclusively for States.

d. Comparative law

9. Article 36 of the European Convention on Human Rights, as amended by Protocol No. 14 (in force since 1 June 2010), reads as follows:

"1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings".

10. The second type of intervention provided under the second paragraph of Article 36, concerns "any person concerned who is not the applicant", but the issue here is not that of an acquired right: it lies with the President of the Court to grant leave for intervention to such a person "in the interest of the proper administration of justice". The initiative can come from either the President of the Court or (as in almost all cases) or from the person concerned. Since Article 36 para 2 makes no distinction as to natural and legal persons, NGOs naturally fall within the ambit of this provision.

11. On this point, the Court could, instead of completely keeping individuals and NGOs away from the right to intervene as perits interpretation of Article 5(2) of the Protocol, use its discretionary power and declare, for example, the application inadmissible for lack of interest (the core condition) or for having been filed out of time, by granting the Applicants the status of intervener – which would have been more appropriate vis-à-vis the principles enshrined in the Charter – if the country of which the applicant is a national has made the Declaration.

e. Comparative jurisprudence

12. I will cite the references to certain decisions taken with regard to the admissibility of interventions such as:in the ECtHR, the case of *Lambert and others v France* (Application 46043/14). Intervention of the Human Rights Clinic (an NGO) as a third party in the proceedings pursuant to Article 36(2) of the European Convention on Human Rights and Article 44(3) of the Rules of the European Court of Human Rights.

- *Tahsin Acar v Turkey* (preliminary issue), [GC], No. 26307/95,
- ECHR 2003-VI: Amnesty International (on whether to strike theApplication off the role and on the effectiveness of the appeals).
- *Blokhin v Russia* [GC], No. 47152/06, ECHR 2016: Center for the Defense of People with Intellectual Disabilities (NGOs) (on how to treat disabled minors in conflict with the law).

f. Regarding Rule 53 of the Rules of Court

13. Articles 8 and 33 of the Protocol clearly specify that: "The court shall draw up detailed conditions under which the Court shall consider cases brought to it, and determine its own procedures ..."

14. In the execution of the afore-cited articles, the African Court on Human and Peoples' Rights in Rule 53 on Intervention only

confirmed the erroneous reading of Article 5(2) of the Protocol by insisting in the second paragraph making up this Article, on the fact that only the State is entitled to bring a case before the Court in the context of an intervention procedure.

15. Therefore, relying on this source to further entrench its position in the Order that is the subject of this opinion in no way contributes to strengthening the legal basis of its position, and reviewing this Rule would be more in harmony with the very human rights principles upheld by the Court.

16. It is apparent from the judgment that the Court resigned itself to citing all the conditions set out in Article 5(2) of the Protocol reiterated in Rules 33(2) and 53 of the Rules of Court; and in its analysis of those Rules, it oscillates from one condition to another not recognizing the intervener's capacity on the basis of its interpretation of Rule 53(1) of the Rules that only the State can have that capacity, and based on its personal jurisdiction; whereas to declare lack of capacity would be sufficient because the primary and fundamental condition for intervention of individuals is the Declaration cited in Article 5(3) of the Protocol and 33(f) of the Rules, a procedure not effected by the State of Kenya to date. The foregoing actions undermined the clarity of the Order and its legal basis.

17. For these reasons, I voted against this Order.

XYZ v Benin (joinder of cases) (2019) 3 AfCLR 434

Application 021/2019 and Application 022/2019, *XYZ (identified as such after requesting anonymity) v Republic of Benin*

Order, 4 July 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, CHIKAYA, ANUKAM and ABOUD

The Court decided to join the cases considering the identity of the applicant and the subject matter of the cases.

Procedure (joinder of cases)

1. Having regard to the Application dated 13 May 2019, received at the Registry of the Court on the same date, by which XYZ (hereinafter referred to as "the Applicant") instituted proceedings against the Republic of Benin (hereinafter referred to as "the Respondent State");

2. Having regard to the Application dated 27 May 2019, received at the Registry on the same date, by which the same Applicant, XYZ instituted a second proceeding against "the Respondent State";

3. Considering Rule 54 of the Rules of Court which provides that: "the Court may at any stage of the pleadings either on its volition or in response to an application by any of the parties, order the joinder of interrelated cases and pleadings where it deems it appropriate, both in fact and in law";

4. Considering the identity of the Applicant, the Respondent State and the subject matter of the Applications in both cases;

5. Considering that a joinder of the cases is appropriate in fact and in law;

Operative Part

For these reasons, The Court
unanimously,
orders:

i. The joinder of the cases and the proceedings in the Applications brought by the Applicant against the Respondent State;

ii. That the Application shall henceforth be titled Applications 021/2019 and 022/2019 - *XYZ (identified as such after requesting anonymity) v Republic of Benin.*

Kisase v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 435

Application 005/2016, *Sadick Marwa Kisase v United Republic of Tanzania*

Decision, 19 August 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Court ordered the re-opening of pleadings after having received the Respondent State's pleadings on reparations after pleadings had been closed.

Procedure (re-opening of pleadings, 8)

I. The Parties

1. Sadick Marwa Kisase, (hereinafter referred to as "the Applicant") is a national of Tanzania, who was arrested and convicted for the offence of armed robbery and sentenced to thirty (30) years imprisonment by the District Court of Geita. He filed an appeal at the High Court, Mwanza (Criminal Appeal No 85 of 2009) and later at the Court of Appeal of Tanzania, Mwanza (Criminal Appeal No 83 of 2002). Both Appeals were dismissed, with the Court of Appeal upholding the decision of the lower courts on 26 July 2013. The Applicant is currently serving a thirty (30) years' imprisonment sentence at Butimba Central Prison, Mwanza.

2. The Respondent State is the United Republic of Tanzania, which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986, and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepts the jurisdiction of the Court to receive applications from individuals and NGOs.

II. Subject matter of the Application

3. The Application, filed on the 13 January 2016, is based on the Respondent State's alleged violations of the Applicant's right to be heard, equal protection before the law and failure to provide

legal assistance during the proceedings at the domestic courts, as provided for under Articles 1, 7(1)(c), (d), 3(1), (2) of the Charter, as well as Articles 107A(2)(b) of the Tanzanian Constitution of 1977.

III. Summary of the procedure before the Court

4. The Parties filed their submissions on the merits within the time stipulated by the Court, which were duly exchanged between them.

5. The Applicant filed his submission on reparations on 27 September 2018, which was transmitted to the Respondent State on 28 September 2018.

6. After extensions of time granted to the Respondent State on 12 December 2018; 18 February 2019 and 15 March 2019, on 13 June 2019, pleadings were closed and the Parties were duly notified.

7. On 5 August 2019, the Respondent State filed its Response to the Applicant's submission on reparations.

8. The Court:

i. Orders that the proceedings in *Application No. 005/2016 – Sadick Marwa Kisase United Republic of Tanzania* be and are hereby reopened;

ii. Rules that, in the interests of justice, the Respondent State's Response to the Applicant's submissions on reparations be deemed as properly filed; and

iii. Orders the Applicant to submit his Reply to the Respondent State's Response, if any, within thirty (30) days of receipt thereof.

Jeshi v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 437

Application 017/2016, *Deogratius Nicolaus Jeshi v United Republic of Tanzania*

Order, 19 August 2019. Done in English and French, the English text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, and ANUKAM

Recused under Article 22: ABOUD

Pleadings re-opened in the interests of justice at the request of the Respondent State.

Procedure (re-opening of pleadings, IV)

I. The Parties

1. Mr Deogratius Nicholaus Jeshi, (hereinafter referred to as "the Applicant") is a national of Tanzania, who was arrested and convicted for the crime of murder and sentenced to death by the High Court Tanzania at Karagwe on the 22 June 2010. He filed an appeal at the Court of Appeal of Tanzania at Bukoba (Criminal Appeal 211 of 2010), and on 7 March 2012, the Court of Appeal upheld the decision of the High Court. The Applicant is currently on death row at Butimba Central Prison, Mwanza.

2. The Respondent State is the United Republic of Tanzania, which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986, and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepts the jurisdiction of the Court to receive applications from individuals and NGOs.

II. Subject matter of the Application

3. The Application, filed on 22 March 2016, is based on the Respondent State's alleged violations of the Applicant's rights to fair trial, equality before the law and equal protection by the law, the right to defence, including the right to be defended by counsel of his choice, as provided for under Articles 2, 3(1) and (2) and

7(1)(c) of the Charter, as well as Articles 13(6)(a) and 107(a)(2)(b) of the Respondent State's Constitution of 1977.

III. Summary of the procedure before the Court

4. The Court issued an Order for Provisional Measures on 3 June 2016, directing the Respondent State to refrain from executing the death penalty against the Applicant pending the determination of the Application.

5. The Parties filed their submissions on the merits within the time stipulated by the Court, which were duly exchanged between them.

6. The Applicant filed his submission on reparations on 6 August 2018, which was transmitted to the Respondent State on 30 August 2018.

7. After extensions of time granted to the Respondent State on 4 October 2018; 18 February 2019 and 15 March 2019, on 13 June 2019, pleadings were closed and the Parties were duly notified.

8. On 5 August 2019, the Respondent State filed its Response to the Applicant's submission on reparations.

The Court

i. Orders that the proceedings in Application 017/2016 - *Deogratius Nicolaus Jeshi v United Republic of Tanzania* be and are hereby reopened;

ii. Rules that, in the interests of justice, the Respondent State's Response to the Applicant's submissions on reparations be deemed to have been properly filed; and

iii. Orders the Applicant to submit his Reply to the Respondent State's Response, if any, within thirty (30) days of receipt thereof.

Mango and others v Tanzania (merits and reparations) (2019) 3 AfCLR 439

Application 008/2015, *Shukrani Masegenya Mango and others v United Republic of Tanzania*

Judgment, 26 September 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

Seven Applicants, five of whom were convicted and sentenced for murder, alleged discrimination in the granting of the presidential prerogative of mercy. In addition, two of the Applicants who were convicted of armed robbery and sentenced to 30 years imprisonment, alleged that they were given a heavier sentence than what the domestic laws at the time of their conviction provided for. The Court declared the claim in relation to the prerogative of mercy inadmissible for failure to exhaust local remedies and found no violation in relation to the convictions meted out for the armed robbery.

Jurisdiction (material jurisdiction, 30)

Admissibility (exhaustion of local remedies, 51, 52, constitutional petition, 57)

Fair trial (legality, 64)

Separate opinion: TCHIKAYA

Admissibility (exhaustion of local remedies, 9)

Dissenting opinion: BENSAOULA

Admissibility (joint Application, 19)

Dissenting opinion: BEN ACHOUR

Admissibility (joint Application, 15; constitutional petition, 17, 18)

I. The Parties

1. Shukrani Masegenya Mango, Ally Hussein Mwinyi, Juma Zuberi Abasi, Julius Joshua Masanja, Michael Jairos, Azizi Athuman Buyogela, Samwel M Mtakibidya (hereinafter referred to as "the Applicants") are all nationals of the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The First Applicant, Shukrani Masegenya Mango, and the Seventh Applicant, Samwel M Mtakibidya, were both convicted and sentenced for armed robbery while the rest of the Applicants were convicted and sentenced for murder. Although the Applicants

were convicted in different cases and at different times, they filed this Application jointly raising one major common grievance which relates to the exercise of the presidential prerogative of mercy by the Respondent State. With the exception of the Second Applicant, who died on 11 May 2015, all the Applicants are serving their sentences at Ukonga Central Prison in Dar es Salaam.

2. The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It also deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the Application that the First Applicant, Shukrani Masegenya Mango, was charged with the offence of armed robbery before the District Court at Mwanza. On 7 May 2004, he was convicted and sentenced to serve a term of thirty (30) years imprisonment. The Seventh Applicant, Samwel M Mtakibidya, was also charged with the offence of armed robbery before the District Court of Handeni at Tanga. He was convicted and sentenced to thirty (30) years imprisonment on 5 August 2002.

4. The Second Applicant, Ally Hussein Mwinyi, was charged with the offence of murder before the High Court at Dar es Salaam. He was convicted and sentenced to death on 15 February 1989. On 21 September 2005, his sentence was commuted to life imprisonment. The Third Applicant, Juma Zuberi Abasi, was charged with the offence of murder before the High Court at Dar es Salaam and on 27 July 1983, he was convicted and sentenced to death. On 14 February 2012, his sentence was commuted to life imprisonment.

5. The Fourth Applicant, Julius Joshua Masanja, was charged with the offence of murder before the High Court at Dodoma. On 11 August 1989, he was convicted and sentenced to death. On 13 February 2002, his sentence was commuted to life imprisonment. The Fifth Applicant, Michael Jairos, was charged with the offence of murder before the High Court at Morogoro. On 25 May 1999, he was convicted and sentenced to death. On 12 February 2006, his sentence was commuted to life imprisonment. The Sixth

Applicant, Azizi Athuman Buyogela, was charged with the offence of murder before the High Court at Kigoma. In 1994 he was convicted and sentenced to death. His sentence was commuted to life imprisonment on 28 July 2005.

6. The Applicants have filed a joint Application since they all claim to be aggrieved by the manner in which authorities in the Respondent State have exercised the prerogative of mercy which is vested in the President of the Respondent State. Additionally, the First Applicant and the Seventh Applicant are complaining about the legality of their sentence for the offence of armed robbery.

B. Alleged violations

7. All the Applicants submit that the Respondent State discriminates against prisoners serving long term sentences in the manner in which it implements the prerogative of mercy under Article 45 of its Constitution. In the Applicants' view, the Respondent State automatically excludes prisoners serving long term sentences from the prerogative of mercy thereby violating Article 2 of the Charter and Article 13(1) (2) (3) (4) and (5) of the Respondent State's Constitution. The Applicants further contend that, prisoners serving long term sentences are "isolated" and discriminated against based on their social or economic status; since they do not earn a pardon on the basis of their good behaviour after serving one third of their sentences unlike all other prisoners. This, the Applicants contend, is in violation of Articles 3, 19 and 28 of the Charter.

8. The Applicants further submit that the Respondent State treats prisoners convicted of corruption and other economic crimes lightly and favourably compared to other prisoners since they can access the presidential pardon twice, a condition, which is not afforded to other convicts. The Applicants contend that this violates Article 3(1) and (2) of the Charter, Article 7 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 107A 2(a) of the Respondent State's Constitution.

9. The Applicants also submit that the Respondent State's implementation of the prerogative of mercy discriminates among prisoners who were convicted for the same offence since some are released while others are condemned to life in prison. In the Applicants' view, this amounts to a violation of Article 4 of the Charter.

10. It is also the Applicants' submission that sections 445 and 446 of the Prison Standing Orders (4th Edition) 2003, direct that

every case involving a sentence of life imprisonment should be submitted to the President for review. The Applicants aver that these provisions are not being implemented by the Respondent State especially in connection with prisoners serving long term sentences. The Applicants further submit that the Respondent State applies parole discriminately only benefitting those convicted of minor offences. According to the Applicants, this distinction in the implementation of the law, and the denial of parole is cruel and amounts to a violation of Article 9(1) and (2) of the Charter and Article 5 of the UDHR.

11. The Applicants also submit that prisoners do not get paid for the work they do while in prison and that upon release they are not given a starting capital or pension but simply abandoned, which is in violation of Article 15 of the Charter.

12. The Applicants further submit that their rights were violated by the lengthy period that they spent on remand pending the conclusion of their trials. They submit that the period that they spent on remand was not considered and/or deducted from their sentences which is in violation of Article 5 of the Charter and Article 5 of the UDHR.

13. The Applicants further submit that it is pointless to file a constitutional case in the High Court of the Respondent State because it is not independent, fair and just especially when it adjudicates cases that implicate failures in the judicial system. In the Applicants' view, the Respondent State discredits all such matters without hearing the merits thereby violating Articles 8 and 10 of the UDHR.

14. In addition to the above claims, which relate to all the Applicants, the First Applicant and the Seventh Applicant submit that the sentences imposed on them, thirty (30) years imprisonment, was heavier than the penalty in force at the time of their conviction. It is their submission, therefore, that their sentences are contrary to Article 13(6)(c) of the Respondent State's Constitution and section 285 and 286 of the Respondent State's Penal Code. It is also the contention of the Applicants, that sections 4(c) and 5(a) of the Minimum Sentences Act are invalid as they contravene Article 64(5) of the Constitution of the Respondent State, hence, the sentences imposed upon them are illegal, unconstitutional and in violation of Article 7(2) of the Charter.

III. Summary of the procedure before the Court

15. The Application was filed on 17 April 2015 and on 28 September 2015 it was served on the Respondent State.

16. On 22 September 2016, the Registry received the Respondent State's Response to the Application.

17. On 26 September 2017, the Registry received the Applicant's Reply to the Respondent State's Response and this was transmitted to the Respondent State on 2 October 2017.

18. On 10 May 2018, the Registry received the Applicant's submissions on reparations and these were transmitted to the Respondent State on 22 May 2018.

19. Notwithstanding several reminders and extensions of time, the Respondent State did not file submissions on reparations.

20. On the 11 April 2019, pleadings were closed and the Parties were duly informed.

IV. Prayers of the Parties

21. Although the First Applicant and the Seventh Applicant have an additional claim which is distinct from the allegations that all the Applicants have jointly made, the Applicants have not desegregated their prayers and they have jointly prayed the Court for the following:

"i. An order that the Application is admissible;

ii. An order declaring that their basic rights have been violated through the unconstitutional acts of the Respondent State;

iii. An order that they "regain and enjoy" their fundamental rights in respect of the violations perpetrated by the Respondent State;

iv. An order that the Respondent State recognise the rights and duties enshrined in the Charter and take legislative and other measures to give effect to them;

v. An order nullifying the Respondent State's decisions violating the Applicants rights and ordering their release from custody;

vi. An order for reparations;

vii. Any other order(s)/relief(s)/remedies as the Court may be pleased to grant and as seems just in the circumstances of the case."

22. In respect of the jurisdiction and admissibility of the Application, the Respondent State prays the Court to grant the following orders,:

"i. That, the African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this matter.

ii. That, the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court or Article 56 and Article 6(2) of the Protocol.

iii. That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court or Article 56 and Article 6(2) of the Protocol.

iv. That, the Application be deemed inadmissible.

v. That, the Application be dismissed with costs."

23. In respect of the merits of the Application, the Respondent State prays the Court to order the following:

"i. That, the Respondent has not violated Articles 13(1) (2) (3) (4) and (5), 13(6)(c) and 107A(2) (a) of the Constitution of the United Republic of Tanzania.

ii. That, the Respondent has not violated Article 2, 3(1)(2), 4,5,7(2), 9(1)(2), 15,19 and 28 of the African Charter on Human and Peoples' Rights.

iii. That, the Respondent has not violated Articles 5, 7, 8 and 10 of the Universal Declaration of Human Rights.

iv. That, the Respondent State is not unlawfully detaining the Applicants and has not violated their fundamental rights.

v. That, the Respondent State does not discriminate between long term and short term prisoners.

vi. That, Sections 4(c) and 5(a) of the Minimum Sentence Act are valid and do not infringe the fundamental rights of the Applicants.

vii. That, Section 4(c) and 5(a) of the Minimum Sentence Act are in conformity with Articles 64(5) of the Constitution of the United Republic of Tanzania, 1977.

viii. That, the sentence of Thirty years imprisonment for the offence of Armed Robbery was lawful.

ix. That, the Application lacks merits and should be dismissed.

x. That, the Applicants should not be awarded reparations.

xi. That, the costs of this Application be borne by the Applicants."

V. Jurisdiction

24. 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 instrument ratified by the States concerned". Further, in terms of Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction …"

A. Objections to material jurisdiction

25. The Respondent State raises two objections relating to the material jurisdiction of the Court: firstly, that the Applicants are asking the Court to act as a court of first instance, and, secondly, that in so far as the First Applicant is concerned, this action is an abuse of process and it amounts to commencing multiple actions over the same facts.

i. Objection on the ground that the Court is being asked to sit as a court of first instance

26. The Respondent State submits that the Applicants are asking the Court to act as a court of first instance and deliberate over matters that have never been adjudicated on by its municipal courts. The Respondent State further submits that the Court does not have jurisdiction to sit as a court of first instance. In support of its contention, the Respondent State points out that all the Applicants are challenging the constitutionality of Section 51 of the Prisons Act, 1967; sections 445 and 446 of the Prison Standing Orders and also the Parole Act. Additionally, the First Applicant and the Seventh Applicant, are also challenging the constitutionality of Sections 4(c) and 5(a) of the Minimum Sentences Act. All the Applicants are also alleging a violation of Article 13 of the Respondent State's Constitution. It is the submission of the Respondent State that all the Applicants have never raised any of these challenges before its domestic courts.

27. The Applicants, in their Reply, contend that the Court has jurisdiction as per Article 3 of the Protocol and Rule 26(a) of the Rules. It is the Applicants' submission that the essence of their prayers give the Court jurisdiction since their Application is inviting the Court to review the conduct of the Respondent State in light of the international standards and human rights instruments that it has ratified.

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28. The Court notes that the crux of the Respondent State's objection is that it is being asked to sit as a court of first instance. Although the Respondent State has raised this objection as relating to the

Court's material jurisdiction, the Court notes that the Respondent State has, essentially, argued that the matter is not competently before the Court since all the Applicants never attempted to activate domestic mechanisms to remedy their grievances.

29. In so far as the Respondent State's objection relates to exhaustion of domestic remedies, the Court will address this issue later in this judgment. Nevertheless, the Court recalls that, by virtue of Article 3 of the Protocol, it has material jurisdiction in any matter so long as "the Application alleges violations of provisions of international instruments to which the Respondent State is a party".[1] In the instant Application, the court notes that all the Applicants are alleging violations of the Charter, to which the Respondent State is a Party, and the UDHR. In respect of the UDHR, the Court recalls that in *Anudo Ochieng Anudo v United Republic of Tanzania*, it held that while the UDHR is not a human rights instrument subject to ratification by States, it has been recognised as forming part of customary law and for this reason the Court is enjoined to interpret and apply it.[2]

30. In light of the above, the Court, therefore, finds that it has material jurisdiction in this matter.

ii. Objection alleging that the Application violates the rules on *res judicata*

31. The Respondent State submits that the First Applicant, Shukrani Masegenya Mango, already filed an Application before the Court – Application 005 of 2015 – in which he raised the same matters that he is raising now. For this reason, the Respondent State

1 See, Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania* (hereinafter referred to as "Kenedy Ivan v Tanzania (Merits and Reparations)"), paras 20-21; Application 024/2015. Judgment of 7 November 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania*, para 31; Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*, para 36.

2 Application 012/2015. Judgment of 23 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* para 76.

contends that the Court does not have jurisdiction to hear the same matters that were already raised before it.

32. The Court notes that the Applicants' did not make any submission on this point.

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33. The Court notes that this objection only relates to the First Applicant in this Application. The Court recalls that the Applicants in Application 005/2015 were Thobias Mang'ara Mango and Shukrani Masegenya Mango. It is clear, therefore, that the First Applicant in the present matter was indeed party to earlier litigation before the Court. The Court recalls that Application 005/2015 was filed on 11 February 2015 and judgment was delivered on 11 May 2018. As earlier pointed out, the Applicants filed the present Application on 17 April 2015. Clearly, therefore, as at the time the present Application was being filed, the Applicant had a separate but subsisting claim, pending before the Court.

34. The Court also notes, however, that in Application 005/2015 the Applicants raised a range of alleged violations of their rights pertaining to the manner in which they were detained, tried and convicted by the judicial authorities of the Respondent State.[3] Admittedly, as part of the claims, in Application 005/2015, the First Applicant also argued that he was condemned to serve a sentence of thirty (30) years imprisonment for armed robbery when this was not the applicable sentence at the time the offence was committed, which is also exactly the same claim that he is jointly raising with the Seventh Applicant in this matter.

35. The Court observes that although the Respondent State raises this issue as an objection to the Court's material jurisdiction, it is an allegation contesting the admissibility of the First Applicant's claim on the basis that it violates the rules on *res judicata* as captured under Article 56(7) of the Charter. The Court will, therefore, consider this objection, if need be, when it is dealing with the admissibility of the matter.

3 Application 005/2015. Judgment of 11 May 2018 (Merits), ***Thobias Mang'ara Mango and Another v United Republic of Tanzania***, paras 11-12.

B. Other aspects of jurisdiction

36. The Court notes that the other aspects of its jurisdiction are not contested by the Parties and nothing on the record indicates that the Court lacks jurisdiction. The Court thus holds that:

i. It has personal jurisdiction given that the Respondent State is a party to the Protocol and it deposited the required Declaration.

ii. It has temporal jurisdiction as the alleged violations were continuing at the time the Application was filed, which is after the Respondent State became a party to the Protocol and deposited its Declaration.

iii. It has territorial jurisdiction given that the alleged violations occurred within the territory of the Respondent State.

37. In light of the foregoing, the Court finds that it has jurisdiction to hear the Application.

VI. Admissibility

38. In terms of 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". Pursuant to Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with Article 50 and 56 of the Charter, and Rule 40 of these Rules".

39. Rule 40 of the Rules, which in essence restates Article 56 of the Charter, stipulates that Applications shall be admissible if they fulfil the following conditions:

"1. Indicate their authors even if the latter request 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 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 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 provision of the present Charter."

40. While the Parties do not dispute that some of the admissibility requirements have been fulfilled, the Respondent State raises two objections. The first one relates to the exhaustion of domestic

remedies, and the second one relates to whether the Application was filed within a reasonable time after the exhaustion of domestic remedies.

41. The Respondent State avers that the Applicants did not exhaust local remedies because they never raised the allegations presented to this Court before any of its municipal courts. The Respondent State submits that the Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act challenging the alleged violations of their rights especially in relation to the alleged discrimination by virtue of the exercise of the presidential prerogative of mercy.

42. The Respondent State further submits that except for the First Applicant, the Fifth Applicant and the Sixth Applicant, all the other Applicants never applied for review of their original cases though they lodged appeals at the Court Appeal which were dismissed.

43. The Applicants assert that, convicts serving long term sentences who exhaust all local remedies in their original cases have no other available domestic remedy and that the only opportunity to address their grievances is found under Article 45 of the Constitution of the Respondent State which refers to the prerogative of mercy by the President of the Respondent State.

44. The Applicants also submit that it is useless for them to utilise the avenue provided by the Basic Rights and Duties Enforcement Act, since the Respondent State's courts are not independent, fair and just in adjudicating matters that involve the judicial system itself.

45. In their Reply, the Applicants further submit that all of them except the Second Applicant appealed to the Court of Appeal against their convictions but their appeals were dismissed. They further contend that there is no other judicial avenue, in the Respondent State, for pursuing a remedy after the Court of Appeal.

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46. The Court notes that the crux of the Respondent State's objection is that the Applicants should have first filed a constitutional petition challenging, among other things, the constitutionality of the Prisons Act and the Parole Act.

47. The Court also notes that the gravamen of the Applicants' case revolves around the manner in which Respondent State has implemented the presidential prerogative of mercy. All the other

violations alleged by the Applicants have, in one way or the other, been linked to the exercise of the prerogative of mercy.

48. In resolving the admissibility of this Application the Court considers it apposite to make a distinction among the Applicants before pronouncing itself on this issue. On the one hand, all the Applicants are, primarily, alleging a violation of their rights to equality and non-discrimination by reason of the exercise of the presidential prerogative of mercy and, on the other hand, the First Applicant and the Seventh Applicant, in addition to the claims made by everyone else, are also challenging the legality of their sentences for armed robbery. The Court will proceed to deal with these allegations seriatim.

49. In relation to the alleged violation of the Applicants rights by reason of the exercise of the presidential prerogative of mercy, the Court notes that the Applicants do not dispute that the avenue offered by the Basic Rights and Duties Enforcement Act was available to them whereby they could have challenged, before the High Court, the alleged violation of their rights. Instead, the Applicants contend that "it is so useless and senseless to refile an application to the high court of the respondent state" since "the tribunal/court is not independent, fair and just in adjudicating justice to the parties particularly to which refers to judicial system …"

50. The Court recalls that in *Diakite Couple v Republic of Mali*, it held that "exhausting local remedies is an exigency of international law and not a matter of choice; that it lies with the Applicant to take all such steps as are necessary to exhaust or at least endeavour to exhaust local remedies; and that it is not enough for the Applicant to question the effectiveness of the State's local remedies on account of isolated incidents".[4]

51. In this Application, the Court finds that all the Applicants could have approached the High Court to challenge the legality of the exercise of the presidential prerogative of mercy, the Prisons Act, the Parole Act and other laws which they perceive to be implicated in the discrimination that they allegedly suffered. It was not open

4 Application 009/2016. Judgment of 26 September 2017 (Jurisdiction and Admissibility), ***Diakite Couple v Republic of Mali***, para 53.

to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them.

52. In the circumstances, the Court finds that the Applicants failed to exhaust local remedies as stipulated under Article 56(5) of the Charter and as restated in Rule 40(5) of the Rules.

53. The Court recalls that admissibility requirements under the Charter and the Rules are cumulative such that where an Application fails to fulfil one of the requirements then it cannot be considered.[5] In the circumstances, therefore, the Court does not consider it necessary to examine the other admissibility requirements in so far as they relate to the allegation by all the Applicants that their rights were violated as a result of the exercise of the presidential prerogative of mercy.

54. In light of the above, the Court finds that the Application, in so far as it relates to all the Applicants and their allegation of a violation of their rights due to the exercise of the presidential prerogative of mercy, is inadmissible for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules.

55. The above notwithstanding, the Court recalls that the First Applicant and the Seventh Applicant made an additional allegation which is distinct from the allegations made by all the Applicants jointly and this pertains to the legality of their sentence for armed robbery. In this connection the Court notes, firstly, that the legality of their sentence for robbery implicates their right to fair trial.

56. The Court further notes that both the First Applicant and the Seventh Applicant appealed their convictions and sentences to the Court of Appeal which dismissed the appeals. The question of the legality of their conviction and sentence, therefore, was enmeshed in the bundle of rights and guarantees due to the Applicants which the Court of Appeal could have pronounced itself on during the hearing of the appeals. The Court of Appeal, therefore, which is the highest court in the Respondent State, had the opportunity to pronounce itself on the allegation pertaining to the legality of the Applicants' sentences.

57. Secondly, the Court, recalling its jurisprudence, reiterates its position that the remedy of a constitutional petition, as framed in the Respondent State's legal system, is an extraordinary remedy that an applicant need not exhaust before approaching

5 Application 016/2017. Ruling of 28 March 2019 (Jurisdiction and Admissibility), *Dexter Johnson v Ghana*, para 57.

the Court.[6] For this reason, the Court holds that the First Applicant and Seventh Applicant need not have filed a constitutional petition before approaching the Court.

58. The Court, therefore, holds that the Application is admissible in so far as it relates to the allegations by the First Applicant and the Seventh Applicant. The Respondent State's objection is, therefore, dismissed.

59. The Court, having declared inadmissible the joint allegations by all the Applicants and having only admitted the allegation by the First Applicant and the Seventh Applicant will now proceed to examine the merits of this allegation.

VII. Merits

60. The First Applicant and the Seventh Applicant submit that their fundamental rights under Article 13(6)(c) of the Respondent State's Constitution have been violated since they were sentenced to a penalty of thirty (30) years imprisonment when the said penalty was heavier than the penalty in force at the time they were convicted of the offence. They further submit that the offence of armed robbery came into existence via the enactment of Section 287A under Act No. 4 of 2004 which amended the Penal Code.

61. The First Applicant and the Seventh Applicant also submit that Section 4(c) and 5(a)(ii) of the Minimum Sentences Act are invalid as they contravene Article 64(5) of the Constitution.[7] They thus submit that the penalty imposed on them is unconstitutional for violating Article 7(2) of the Charter.

62. The Respondent State submits that the applicable sentence for the offence of armed robbery is a term of thirty (30) years as stipulated under Section 5 of the Minimum Sentences Act. The Respondent State further avers that the offence of armed robbery

6 Application 053/2016. Judgment of 28 March 2019 (Merits), *Oscar Josiah v United Republic of Tanzania*, paras 38-39 and Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 95.

7 Section 4(c) provides thus: "Where any person is, after the date on which this Act comes into operation, convicted by a court of a scheduled offence, whether such offence was committed before or after such date, the court shall sentence such person to a term of imprisonment which shall not be less than– (c) where the offence is an offence specified in the Third Schedule to this Act, thirty years." And Section 5(a)(ii): "Notwithstanding the provisions of section 4-(a) (ii) if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to imprisonment to a term of not less than thirty years.

was in existence before the enactment of Section 287A of the Penal Code.

63. The Respondent State further submits that Sections 4(c) and 5(a) of the Minimum Sentences Act are valid since they do not in any way contravene Article 64(5) of the Respondent State's Constitution.

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64. The Court notes that notwithstanding the submissions by the First Applicant and the Seventh Applicant, on the alleged violation of their right to fair trial by reason of their sentence, in their Reply the Applicants stated that they did not dispute the Respondent State's prayers on the legality of sentences under the Minimum Sentences Act. Nevertheless, the Court recalls that it has consistently held that thirty (30) years imprisonment has been the minimum legal sentence for armed robbery in the Respondent State since 1994.[8] The Court, reiterating its jurisprudence, therefore, holds that the sentence of the Applicants to a prison term of thirty (30) years is in accordance with the applicable law in the Respondent State.

65. The allegation by the First Applicant and Seventh Applicant of a violation of Article 7(2) of the Charter by reason of their thirty (30) year sentence is thus dismissed.

VIII. Reparations

66. The First Applicant and the Seventh Applicant pray the Court to order reparations to redress the violations of their fundamental rights in accordance with Article 27(1) of the Protocol and Rule 34(1) of the Rules and to grant any remedy that it deems fit in the circumstances.

67. The Respondent State prays the Court to dismiss the request for reparations.

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8 Application 011/2015. Judgment of 28 September 2017, *Christopher Jonas v Tanzania* (Merits), para 85.

68. 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".

69. In this respect, Rule 63 of the Rules of Court provides that "the Court shall rule on the request for the reparation… by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".

70. The Court notes that, in the instant case, no violation has been established and therefore the question of reparations does not arise. The Court, therefore, dismisses the prayer for reparations.

IX. Costs

71. The Applicants pray that costs should be borne by the Respondent State.

72. The Respondent State prays the Court to dismiss the Application with Costs.

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73. The Court notes that Rule 30 of the Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".

74. In view of the above provision, the Court holds that each Party shall bear its own costs.

X. Operative part

75. For these reasons,

The Court,

Unanimously;

On jurisdiction

i. *Dismisses* the objections on lack of jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

By a majority eight (8) for, and two (2) against, Justices Rafaâ BEN ACHOUR and Chafika BENSAOULA dissenting:

iii. *Declares* that the Application is inadmissible in relation to all the Applicants, for failure to comply with the requirement under Article

56(5) of the Charter which is restated in Rule 40(5) of the Rules, in so far as it relates to the allegation of violation of the Applicants' rights by reason of the exercise of the presidential prerogative of mercy;

iv. *Declares* the Application admissible in respect of the allegation by the First Applicant and the Seventh Applicant in relation to the legality of their sentence for armed robbery;

On merits

v. *Finds* that the Respondent State has not violated the First Applicant's and Seventh Applicant's right to fair trial under Article 7(2) of the Charter by reason of their sentences for armed robbery.

On reparations

vi. *Dismisses* the prayer for reparations.

On costs

vii. Decides that each Party shall bear its own costs.

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Separate Opinion: TCHIKAYA

1. Like my honourable colleagues, I subscribe to the Operative Part of this Judgment (*Shukrani Masegenya Mango and others v United Republic of Tanzania*). The Application which brought the case before this Court was, after lengthy deliberations, ultimately inadmissible. I hereby wish to explain the reasons for this and also show that the Court should have given further consideration to the argument drawn from the presidential pardon which was, in the instant case, heavily impugned. It is true that whatever the consideration, I share the opinion that the Operative Part would have been the same because of the prior inadmissibility. However, the law applicable to the issue of "presidential pardon" in international human rights law deserved to be clarified.

2. Messrs Shukrani Masegenya Mango, Ally Hussein Mwinyi, Juma Zuberi Abasi, Julius Joshua Masanja, Michael Jairos, Azizi Athuman Buyogela, Samwel M. Mtakibidya, nationals of Tanzania, were convicted of murder and armed robbery in various cases. With the exception of Ally Hussein Mwinyi, who died on 11

May 2015, the Applicants are serving their sentences at Ukonga Central Prison in Dar es Salaam. It was a joint Application. The Applicants all claimed therein, without particular legal data, "to be aggrieved by the manner in which authorities in the Respondent State have exercised the prerogative of mercy which is vested in the President of the Respondent State".[1]

3. The case will not renew the jurisprudence of the Court. It is a unique case. Being inchoately in the *Yogogombaye* case (15 December 2009),[2] but obviously present in *African Commission on Human and Peoples' Rights v Libya* of 3 June 2013,[3] the prior consideration of cases has taken a decisive place in the work of the Court. The *Shukrani and others* Judgement confirms a judicial trend: on the one hand, many cases, like the instant case, stumble over the prior requirement of admissibility and, on the other hand, the judge is left only with the duty of jurisdiction, that is to say, the decision to exclude from consideration on the merits cases which do not fulfil the conditions of admissibility.

I. Confirmation of the preliminary rules of admissibility of cases (Article 56 of the Charter and Article 6 of the Protocol)

4. The *Shukrani Masegenya Mango and others* case confirms the doctrine of the African Court on the admissibility of applications, pursuant to Article 56 of the African Charter on Human and Peoples' Rights, Article 6(2) of the Protocol on the establishment of the Court and Rule 40 of the Rules of Court. This aspect of the proceedings also constituted the Respondent State's defence base. Tanzania argued, inter alia, that "the Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act".[4] It was thus emphasizing the Applicants' failure to exhaust domestic remedies. It further submitted, unlike the Applicants, that "except for the first Applicant, the fifth Applicant

1 Application 008/2015. Judgment of 26 September 2019, *Shukrani Masegenya Mango and others v Tanzania*, para 6.

2 Application 001/2008. Judgment of 15 December 2009, *Yogogombaye v Senegal*, 15 December 2009; Dissenting opinion of Judge Fatsa Ouguergouz; see B Tchikaya 'The first decision on the merits of the African Court on Human and Peoples' Rights: the *Yogogombaye v Senegal* case (15 December 2009)' (2018) 2 *African Yearbook of Human Rights* 509.

3 Application 002/2013. Judgment of 3 June 2016, *African Commission on Human and Peoples' Rights v Libya,* Dissenting opinion of Judge Fatsa Ouguergouz.

4 *Shukrani Masegenya Mango and others v Tanzania* (Merits), *op cit*, para 41.

and the sixth Applicant, all the other Applicants never applied for review of their original cases though they lodged appeals at the Court of Appeal which were dismissed".[5] In its reply, the Court confirms the rule, which is constantly recalled in its case-law. It notes that in *Diakite Couple v Republic of Mali,*[6] it held that "exhausting local remedies is an exigency of international law and not a matter of choice; that it lies with the Applicant to take all such steps as are necessary to exhaust (…) and that it is not enough for the Applicant to question the effectiveness of the State's local remedies on account of isolated incidents".[7] The Court concluded, as in the instant case, that the Application was inadmissible.

5. This *Shukrani and others* case had a peculiarity. Two of the seven Applicants had filed an additional application. The first and the seventh Applicants had filed a separate application from the joint grievances. They challenged the legality of the sentence handed down for armed robbery. Thus, for them, there is an issue of the applicants' right to a fair trial. Both of them appealed their convictions and sentences to the Court of Appeal, which dismissed their appeals. As the highest court of the Respondent State, the Court of Appeal therefore had the opportunity to rule on the legality of the sentences invoked by the Applicants. As a result, the application of the first and seventh Applicants was admissible. The Respondent State's objection on that point was therefore dismissed.[8] The Court concluded that "the Respondent

5 *Ibid* para 42.

6 Application 009/2016. Judgment of 28 September 2017 (Jurisdiction and Admissibility), ***Diakité Couple v Republic of Mali***, para 53; see also Application 016/2017. Judgment of 28 March 2019 (Jurisdiction and Admissibility), ***Dexter Johnson v Ghana***, para 57.

7 ***Shukrani Masegenya Mango and others v Tanzania*** (Merits), ***op cit***, para 50.

8 ***Ibid***, para 55, 57 and 75(v).

State has not violated any law",[9] that it remained in line with its previous decisions[10] and that of the relevant international law.[11]

6. The late Jean Rivero[12] saw the rules of prior exhaustion of local remedies as an influence of domestic law on the international judicial order. This is an instructive paradox, since it is international judicial law that requires the national judiciary to consider supremely and overtly the alleged violations by a national petitioner. The purpose of this being to correct the breach of the law at the place of its commission. This is the main purpose of this rule of prior exhaustion of local remedies. The question is undoubtedly different and special for those rules that affect the reserved areas of the State (*The Westphalian State,* according to Alain Pellet[13]), as it was in the instant case of *Shukrani and others*, with the question raised by the conditions of use of the "presidential prerogative of mercy".

9 *Ibid*, para 75.

10 *African Commission on Human and Peoples' Rights v Libya* (Merits), *op cit*, 158; Application 003/2011. Judgment of 21 June 2013 (Admissibility), *Urban Mkandawire v Malawi*; Application 001/2012. Judgment of 28 March 2014 (Admissibility), *Frank David Omary and others v Tanzania* (Admissibility); Application 003/2014. Judgment of *Peter Joseph Chacha v Tanzania* (Admissibility).

11 Application 004/2013. Judgment of 5 December 2014 (Merits), ***Lohé Issa Konaté v Burkina Faso***. The Court echoed the Communication on ***Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe*** and stated as follows: "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 remedy from the national authorities. It must be shown that the State was 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 victims of human rights violations."(See African Commission on Human and Peoples' Rights, ***Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe***, communication 293/04, 7-22 May 2008, para 60.

12 J Rivero *Le problème de l'influence des droits internes sur la Cour de Justice de la Communauté* Européenne du Charbon et de l›Acier [The problem of the influence of internal rights on the Court of Justice of the European Coal and Steel Community], *AFDI*, 1958, 295-308.

13 This concept of a Westphalian State, in that it reinforces the juxtaposition of States, gives an extension of this reserved area even more important: A Pellet 'Histoire du droit international: Irréductible souveraineté?' G Guillaume *(dir), La vie internationale* [History of international law: Irreducible sovereignty? G Guillaume (ed) ***International Life***], Hermann, Paris, 2017, 7-24.

II. Presidential prerogative of mercy, applicable law

7. In a clear statement, the Court goes on to state that: "in so far as it relates to all the Applicants and their allegation of a violation of their rights due to the exercise of the presidential prerogative of mercy, it is inadmissible for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules".[14] Thus, admissibility conditions being cumulative, consideration of the elements drawn from the presidential pardon was superfluous.

8. This power to annul a sentence, or even the annulment of a prosecution procedure, is conferred on the highest political authority in the country. It is a monarchical "snub", and even an infringement on the law, against the power of the judiciary. This power of mercy exists in almost all democratic systems.[15] In the instant case, the Applicants are not disputing the basis, but "primarily alleging a violation of their rights to equality and non-discrimination by reason of the exercise of the presidential prerogative of mercy".[16] The arguments used by the Applicants were even more explicit. They stated that "the Respondent State treats prisoners convicted of corruption and other economic crimes lightly and favourably compared to other prisoners since they can access the presidential pardon twice, a condition which is not afforded to other convicts. The Applicants contend that this violates Article 3(1) and (2) of the Charter, and Article 7 of the Universal Declaration of Human Rights...". The Applicants were thus denouncing an allegedly arbitrary exercise of the presidential pardon. In the instant case, did this Court need to hear it?

9. The international justiciability of the discretionary acts of Heads of State remains debatable.[17] The application of international law, including human rights law, is essentially based on a principle

14 See *Shukrani Masegenya Mango and others v Tanzania*, *op cit*, para 54.

15 F Laffaille '*Droit de grâce et pouvoirs propres du chef de l'État en Italie, Revue internationale de droit comparé'*, [Right of Pardon and Powers of the Head of State in Italy], *International Journal of Comparative Law*, 59, 2007, 761- 804.

16 See *Shukrani Masegenya Mango and others v Tanzania* (Merits), *op cit*, para 48.

17 M Cosnard 'Les immunités du chef d'État' SFDI, *Le chef d'État et le droit international. Colloque de Clermont*" [M Onsard 'Immunities of the head of state' in Colloquium of SFDI, *The head of state and international law. Clermont Conference* (2002) 201.

that dates back as far as the 1927 *Lotus*[18] case, namely: "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty". It follows that the issue is whether the internal acts regarding the presidential pardon are detachable or not from the Office of the President. It is an office whose legal regime belongs globally to the internal sovereignty of States. The law applicable to the exercise of presidential pardon, except arbitrary controlled by international law, is subject to the domestic law of States. It was up to the Applicants, not the Court, to add the elements, the nature of which varies according to the national legal systems. It is indisputable that the control of international law on this aspect is not worthless. But the *Shukrani*

10. Acts of the executive, attached to the power, do not fall within the jurisdiction of the judicial powers normally exercised by the local judge because of the separation of powers. Louis Favoreu[19] proposed to submit them to constitutional power. This seems to be an illusion, since constitutional power remains dependent on the domestic law, which remains under the control of the sovereign power. Supranational law integrated into international law would exercise control over those acts to which would be subjected, not the presidential pardon itself, but its administration or exercise, under two conditions, however: that such acts are detachable from the exercise of the reserved area of the State, and that after validation of the conditions of admissibility, the acts are really tainted with arbitrariness.

11. As a result, even though in the *Shukrani and others* case the Applicants submitted that the Respondent State "automatically excludes prisoners serving long term sentences from the prerogative of mercy thereby violating Article 2 of the Charter and Article 13(1), (2), (3), (4) and (5) of the Respondent State's Constitution",[20] this Court refused to grant the request, as the procedural and substantive elements are not strictly associated.

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18 See PCIJ, the "*Lotus*" case, France, Judgement of 7 September 1927, Series A, No 10, p 19.

19 D Mauss & L Favoreu 'A constitutional law missionary' (2004) *Revue Francaise De Droit Constitutionnel* 461-463.

20 *Shukrani Masegenya Mango and others v Tanzania, op cit*, para 7.

Dissenting opinion: BENSAOULA

1. I would have shared the opinion of the majority of the Judges with regard to the Operative Part of the Judgment. Unfortunately, the manner in which the Court treated the admissibility of the Application is at variance with the principles governing joint applications.

2. It is clear from the joint Application filed on 17 April 2015 that the Applicants, seven in all, alleged human rights violations by the Respondent State, but it should be noted that: Although Shukrani Masegenya Mango and Samuel Mtakibidya were both convicted and sentenced for armed robbery, the sentences condemning them were not rendered by the same court. The proceedings that led to the conviction of one and the other are completely distinct in dates, in facts and in law. Shukrani Masegenya Mango was prosecuted for armed robbery before the Mwanza District Court, convicted on 7 May 2004 and sentenced to 30 years' imprisonment.

3. While Samuel Mtakibidya was prosecuted for armed robbery before the Handeni District Court in Tanga. He was found guilty and sentenced to 30 years' imprisonment on 5 August 2002.

4. As for Applicants, Ally Hussein Mwinyi and Juma Zuberi Abasi, the former charged with murder before the Dar es Salaam High Court, was convicted and sentenced to death on 15 February 1989 and on 21 September 2005, his sentence was commuted to life imprisonment. The latter charged with murder was convicted by the High Court of Dar es Salam on 27 July 1983 and sentenced to death; his sentence was commuted to life imprisonment on 14 February 2012.

5. As for Applicants Julius Joshua Masanja and Michael Jairos, the former was tried for murder before the Dodoma High Court, convicted and sentenced to death on 11 August 1989, and his sentence commuted to life imprisonment on 13 February 2002. The latter was prosecuted for murder before the Morogoro High Court, convicted and sentenced to death on 25 May 1999, with his sentence commuted to life imprisonment on 12 February 2006. Lastly, Applicant Azizi Athuman Buyogela prosecuted for murder before the Kigoma High Court, was found guilty and sentenced to death, sentence commuted to life imprisonment on 28 July 2005.

6. Although all the Applicants are indeed accusing the Respondent State of human rights violations, Applicants Shukrani and

Samwel are, in addition, challenging the legality of the sentence pronounced against them.

7. It is clear from the foregoing that each Applicant was prosecuted and convicted by different judicial authorities, on different dates, for different events, even though some of the charges have the same characterization and others the same convictions.

8. A reading of the definitions of joint application leads to summarizing it into one action or one legal proceeding or one procedure that allows a large number of persons to sue a legal or natural person in order to obtain an obligation to do, not to do or give.

9. Originally from the United States, the first joint application took place in the 1950s after the explosion of the cargo ship at Texas City, where 581 people perished and the beneficiaries of the victims filed a lawsuit for reparation by joint application. This procedure is now widespread in several Common Law countries and also in several European countries.

10. The advantage of this remedy is that a large number of individual complaints are tried in a single trial when the facts and standards are identical, to avoid repetition over days with the same witnesses, the same evidence and the same issues from trial to trial.

11. It also solves the problem of paying lawyers when the compensation is modest, ensures all applicants the payment of compensation by avoiding that the first to file an application are served first without leaving anything for subsequent applicants, centralizes all the complaints and equitably shares the compensation between claimants in case of victory and, lastly, it avoids discrepancies between several decisions.

12. Victims are of a similar situation, the damage caused by the same person with a common cause, the prejudice must be common, the issues on which the judges should rule must be common in fact and in law.

13. The choice between joint application and individual application must be assessed on a case-by-case basis, since major damages are generally not appropriate for collective processing because the complaint almost always involves issues of rights and facts that will have to be tried again on an individual basis.

14. It follows from comparative law, as well as from certain decisions of international human rights bodies, that a joint application is subject to conditions other than admissibility and jurisdiction over the existence of a sufficient link drawn from the following elements:

- identity of the facts,
- identity of jurisdiction,
- identity of procedure leading to the conviction of the applicants.

15. In its Grand Chamber Judgment on *Hirsi Jamaa and others v Italy* delivered on 23 February 2012, the European Court of Human Rights (ECtHR) was seized by 24 claimants (11 Libyans and 13 Eritreans).

16. In that case, more than 200 migrants had left Libya in three boats bound for the Italian coasts. On 6 May 2009, while the boats were 35 miles south of Lampedusa in international waters, they were intercepted by Italian coast guards and the migrants were taken back to Tripoli. The Applicants (11 Somalians and 13 Eritreans) argued that the Italian authorities' decision to send them back to Libya had, on the one hand, exposed them to the risk of being subjected to ill-treatment and, on the other hand, to the risk of being subjected to ill-treatment if repatriated to their countries of origin (Somalia and Eritrea). They thus invoked the violation of Article 3 of the European Convention on Human Rights. They also felt that they had been subjected to collective expulsion prohibited by Article 4 of Protocol 4. Lastly, they invoked the violation of Article 13 of the ECHR since they considered that they had no effective remedy in Italy to complain about alleged breaches of Articles 3 and 4 of Protocol 4.

17. The application was lodged with the European Court of Human Rights on 26 May 2009. In the judgment rendered, the European Court of Human Rights observed that the applicants were all within the jurisdiction of Italy within the meaning of Article 1 the ECHR, since they complained of the same facts and alleged the same violations. It unanimously concluded on the admissibility of the joint application and the violation of Article 4 of the Protocol.

18. Similarly, in *Wilfried Onyango Nganyi and 9 others v Tanzania*, the African Court on Human and Peoples' Rights considered on 18 March 2016 that the application fulfilled the conditions of admissibility of a joint application cited above, because they were prosecuted for identical facts in an identical procedure before the same courts and in a single judgment at national level.

19. Faced with this state of affairs, the Court in its Judgment which is the subject of this dissenting opinion, declaring the application admissible without basing its decision on legal grounds for the admissibility of the joint application and by ignoring this peculiarity of the application, breached the principles of reasoning decisions

set forth in Rule 61 of the Rules and has completely shifted from its jurisprudence and that of international human rights courts.

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Dissenting opinion: BEN ACHOUR

1. In the above judgment, *Shukrani Masegenya Mango and others v United Republic of Tanzania*, I do not subscribe to the decision of the majority of the judges of the Court declaring the application inadmissible, on the one hand, "in relation to all the Applicants for failure to comply with the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules, in so far as it relates to the allegation of violation of the Applicants' rights by reason of the exercise of the presidential prerogative of mercy"[1] and, on the other hand, declaring "[t]he Application admissible in respect of the allegation by the First and Seventh Applicant in relation to the legality of their sentence for armed robbery"[2] and consequently to rule on the merits of the first and seventh Applicants' claims, which are, by the way, the common claims of all the Applicants. In my opinion, the Application as a whole should have been declared admissible and not inadmissible for some and admissible for others.

2. By using this legal apparatus of treating the same applicants differently, the Court breached the unity of the application submitted by the seven applicants at the same time. Furthermore, and beyond this first objection, by declaring the Application concerning all the Applicants inadmissible as to "the manner in which the right of presidential pardon has been applied", the Court ignored its established case law on extraordinary remedies, in particular the appeal for unconstitutionality before the Tanzanian courts.

1 Point (iii) of the operative part.

2 Point (iv) of the operative part.

I. Insufficient understanding of the unity of the Application

3. It is important to note from the outset that on 17 April 2015, the Court received the same and only Application, filed by seven individuals "jointly raising one major common grievance, which relates to the exercise of the presidential prerogative of mercy".[3] Two of them (first and seventh Applicants) were convicted and sentenced for armed robbery, while the other five were convicted and sentenced for murder. All these Applicants, with the exception of one of them (second Applicant), are serving their respective sentences at Dar es Salaam Central Prison.[4]

4. It is important to emphasize that none of the seven Applicants has invoked a single grievance of his own, that is, a grievance separate from the one invoked by all the others. In addition to the unity of the Applicants, the Application is also characterized by the unity of its subject-matter and the unity of the grievances invoked.

5. First of all, in examining the admissibility of the Application, as stipulated by Article 6(2) of the Protocol and Rule 39(1) of its Rules, the Court considers the examination of the objections to admissibility raised by the Respondent State, including the recurring objection to the non-exhaustion of local remedies.

6. The Respondent State's main submission is that "[t]he Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act, challenging the alleged violations of their rights, especially in relation to the alleged discrimination by virtue of the exercise of the presidential prerogative of mercy".[5] It should be noted that, in its submission, the Respondent State did not distinguish between the Applicants. It treated the Application as a whole and sought to dismiss it as a block on the grounds of inadmissibility.

7. In response to this objection of the Respondent State, the Court contends that "in resolving the admissibility of this Application the Court considers it apposite to make a distinction among the Applicants before pronouncing itself on this issue".[6]

8. In this paragraph, the Court's reasoning moves from form to substance. Indeed, the Court is not interested in the issue

3 Para 1 of the judgment.

4 *Idem*.

5 Para 41 of the judgment.

6 Para 48 of the judgment (emphasis added).

of exhaustion of domestic remedies and decides to make a distinction between the Applicants on the basis of their claims before deciding on admissibility. For the Court, while the seven applicants "primarily alleging a violation of their rights to equality and non-discrimination by reason of the exercise of the presidential prerogative of mercy..., the first and seventh Applicants, in addition to the claims made by everyone else, are also challenging the legality of their sentences imposed on them for armed robbery"; and the Court concludes that it "will proceed to deal with these allegations seriatim".[7]

9. However, admissibility does not apply to "allegations" but to the requirements of the format of the application. As stated in Rule 40 of the Rules of the Court, entitled "Conditions for Admissibility of Applications", for the application to be considered, it must "be filed after exhausting local remedies, if any [...]". The question is therefore whether the Applicants, before bringing the case before the African Court, have made use (or at least attempted to make use of) what domestic law provides them with as a judicial means of asserting their rights.

10. Carrying on with its reasoning, the Court states "in relation to the alleged violation of the Applicants' rights by reason of the exercise of the presidential prerogative of mercy, the Court notes that the Applicants do not dispute that the avenue offered by the Basic Rights and Duties Enforcement Act was available to them whereby they could have challenged, before the High Court, the alleged violation of their rights".[8] In so doing, the Court suggests that it is ruling on the merits of the case.

11. In the following paragraphs, the Court revisits the issue of exhaustion of local remedies, first recalling its case law in *Couple Diakité v Republic of Mali,*[9] and further noting that "[t]he Applicants could have approached the High Court[...] It was not open to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them",[10] and then concluding that "in light of the above, the Court finds that the Application, in so far as it relates to all the Applicants and

7 Para 48 of the Judgment (underscored by the author).

8 Para 49.

9 "the exhaustion of local remedies is a requirement of international law and not a matter of choice and it is incumbent on the complainant to take all necessary measures to exhaust or at least attempt to exhaust local remedies; it was not enough for the complainant to question the effectiveness of the State's domestic remedies because of isolated incidents".

10 Para 51.

their allegation of a violation of their rights due to the exercise of the presidential prerogative of mercy, is inadmissible, for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules". The judgment could have stopped at that point and dismissed the application in its entirety.[11]

12. At this juncture, a question arises, to which we unfortunately do not have an answer: what is the causal relationship between paragraphs 46 and 47 of the judgment on the one hand, and paragraphs 48, 49 and 50 of the judgment on the other?

13. However, and despite the finding that the application is inadmissible, as reiterated in paragraphs 51 and 52 of the judgment, the Court retracts at paragraphs 53 to 56 with the exception of the case of Applicants Nos 1 and 7. For the Court, the said Applicants "made an additional allegation which is distinct from the allegations made by all the Applicants jointly".[12] This is no longer an issue of admissibility but one of merits. This is evidenced by the fact that the Court "notes, firstly, that the legality of their sentence for robbery implicates their right to fair trial".[13]

14. It is therefore not understandable why the Court considers, for the case of five Applicants, that they should have brought this action and not ignored it "offhandedly" and exempted the two other Applicants from the action because they had made additional allegations in relation to their co-Applicants.

15. Thus, after distinguishing where there was no need to distinguish, the Court severed the unity of the Application and did not really consider the objection raised by the Respondent State.

II. Is the appeal for unconstitutionality an extraordinary remedy?

16. Under Article 56(6) of the Charter as reiterated in Rule 40(6), the Court has always held that local remedies must be exhausted before the Application has been brought, including judicial remedies and that such remedies must be available, effective and sufficient.

17. In these particular cases of appeals for review and unconstitutionality before the Court of Appeal in the Tanzanian judicial system, the Court has a wealth of consistent case law. It has always considered that these two remedies are "extraordinary

11 Para 54 of the Judgment

12 Para 55 of the judgment.

13 *Idem*.

remedies" which are neither necessary nor mandatory and that, consequently, the exhaustion requirement of the Charter and the Rules does not apply to them.[14]

18. In the above judgment, the Court gives the impression that it has reversed its case law, or at least partially reversed it. Indeed, the Court considers that, with regard to five of the Applicants, "[t]he Applicants could have approached the High Court to challenge the legality of the exercise of the presidential prerogative of mercy, the Prisons Act, the Parole Act and other laws which they perceive to be implicated in the discrimination that they allegedly suffered". The Court adds that "it was not open to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them".[15] It should be noted that the laws cited in this paragraph do indeed constitute the remedy for unconstitutionality provided for in the Basic Rights and Duties Enforcement Act of the United Republic of Tanzania.

19. It follows from this ground of inadmissibility held by the Court against the five Applicants that the appeal for unconstitutionality is no longer considered by the Court as an extraordinary remedy from which the Applicants are exempted, but now as a necessary and compulsory remedy. However, and unlike the treatment meted out on these five Applicants, the Court refrains from sanctioning the first and seventh Applicants for failure to bring the same action for unconstitutionality. With regard to these two Applicants, the Court reiterates its traditional position. It recalls its position that the remedy of a constitutional petition, as framed in the Respondent State's legal system, is an extraordinary remedy that an Applicant need not exhaust before approaching

14 Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania*; Application 006/2013. Judgment of 18 March 2016, *Wilfred Onyango Nganyi v United Republic of Tanzania*; Application 007/2013. Judgment of 3 June 2016, *Mohamed Abubakari v United Republic of Tanzania;* Application 003/2015. Judgment of 28 September 2017, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*; Application 005/2015. Judgment of 11 March 2018, *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania*; Application 006/2015. Judgment of 23 March 2018, *Nguza Viking (Baba Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*; Application 011/2015. Judgment of 28 September 2017, *Christopher Jonas v United Republic of Tanzania*; Application 027/2015. Judgment of 21 September 2018, *Minani Evarist v United Republic of Tanzania United Republic of Tanzania*; Application 006/2016. Judgment of 7 December 2018, *Mgosi Mwita Makungu v United Republic of Tanzania*; Application 020/2016. Judgment of 21 September 2018, *Anaclet Paulo v United Republic of Tanzania*; Application 016/2016. Judgment of 21 September 2018, *Diocles William v United Republic of Tanzania*.

15 Para 51.

the Court. For this reason, the Court holds that the first Applicant and seventh Applicant need not have filed a constitutional petition before approaching the Court".[16]

20. The underlying reason for this differential treatment of the Applicants seems to be the consequence of what we have developed above, namely the combination of elements of a different nature concerning the merits of the case on the one hand and the procedure on the other hand.

21. For these reasons, I have voted against this judgment.

16 Para 54 of the judgment.

Anthony and Kisite v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 470

Application 015/2015, *Godfred Anthony and Ifunda Kisite v United Republic of Tanzania*

Judgment, 26 September 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicants were convicted of armed robbery and sentenced to thirty (30) years imprisonment. They alleged that the sentence passed on them was excessive and illegal and that their right to free legal assistance had been violated. The Court dismissed the Application on the ground that the Applicants did not justify why it took them over five (5) years to file their case before the Court. The Application was, therefore, adjudged to have not been filed within reasonable time.

Jurisdiction (material jurisdiction, 21, 22)

Admissibility (submission within reasonable time, 44-52)

I. The Parties

1. Messrs Godfred Anthony and Mr Ifunda Kisite, (hereinafter referred to as "the Applicants") are nationals of the United Republic of Tanzania, each currently serving thirty (30) years' prison sentence following their conviction of conspiracy to commit a felony and for armed robbery.

2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, and to the Protocol on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the Declaration required under Article 34 (6) of the Protocol, by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the file that the Applicants were charged before the Songea District Court on 7 May 1999 in Zanzibar Street, Songea Municipality, with one count of conspiracy to commit a crime and one count of armed robbery for threatening the cashier named Sophie Mwalango with a pistol, before snatching a box containing Tanzanian shillings twenty thousand (TZS 20,000) and 5 receipt booklets belonging to Steven Martin. The crimes are provided for and punishable under Articles 384 and 285 as read together with 286 of the Penal Code of the Respondent State respectively.

4. The District Court found the first Applicant guilty and sentenced him to three (3) years' imprisonment for conspiracy to commit a crime and fifteen (15) years' imprisonment for armed robbery, to be served concurrently. The second Applicant was acquitted on the ground that the evidence against him was mere suspicion.

5. The first Applicant appealed against his conviction and the fifteen (15) year sentence, while the Prosecution appealed against the acquittal of the second Applicant to the High Court of Tanzania at Songea. By a single Judgement rendered on 19 May 2003, the first Applicant's appeal was dismissed and his sentence was instead increased from fifteen (15) to thirty (30) years in accordance with the amended Minimum Sentences Act of 1972. In respect of the second Applicant, the Judge granted the Prosecution's appeal and sentenced him to thirty (30) years for armed robbery, a sentence to be served concurrently with the three (3) years' imprisonment for conspiracy to commit a crime.

6. Dissatisfied with the decision of the High Court, the Second Applicant appealed to the Court of Appeal of Tanzania sitting at Mbeya. On 21 May 2004, the Court of Appeal upheld the decision of the High Court. Although it found that the consolidation of the cases by the High Court at the judgment stage after they were heard separately was procedurally wrong, it noted, that this error did not prejudice the Applicants' rights.

B. Alleged violations

7. The Applicants allege that the Respondent State violated their rights under the Respondent State's Constitution and the Charter

as follows:

a. The conviction and the sentence imposed on them were non-existent and unconstitutional and therefore contravene Article 13(b), (c) of the Constitution of the United Republic of Tanzania.

b. The Respondent State violated their right under Article 7(1) of the Charter as they did not benefit from free legal assistance.

c. They were not equally protected of the law by the Respondent State and this violates Article 3 of the Charter.

d. The Respondent State inflicted upon them mental and physical suffering by imposing on them a sentence which is excessive and illegal thereby violating the Charter.

III. Summary of procedure before the Court

8. The Application was filed on 13 July 2015 and was served on the Respondent State on 29 October 2015.

9. The Parties filed their pleadings within the time limits stipulated by the Court and these were duly exchanged.

10. On 25 March 2019, the Parties were notified that written pleadings were closed.

IV. Prayers of the Parties

11. The Applicants pray the Court to:

"i. Make a declaration that the Respondent State violated their rights as guaranteed under Articles 1, 2, 3, 4, 5, 6 and 7(1) (c) and (2) of the Charter.

ii. Issue an order compelling the Respondent State to release them from prison.

iii. Order reparations should the Court find merit in the Application.

iv. Supervise implementation of the Court`s orders and any other decisions that the Court may make in their favour."

12. With regard to jurisdiction and admissibility, the Respondent State prays the Court to grant the following orders:

"1. That the Application has not invoked the jurisdiction of the Honourable African Court on Human and Peoples' Rights

2. That the application has not met the admissibility requirements stipulated under Rule 40(5) and (6) of the Rules of Court, be declared inadmissible and duly dismissed.

3. That the costs of this Application be borne by the Applicants."

13. With regard to merits, the Respondent State prays the Court to find that it has not violated Articles 1, 2, 3, 6, 7(1) (c) and 7(2) of the Charter. Moreover, it prays that the Court should deny the Applicants' prayer for reparations and order them to pay costs.

V. Jurisdiction

14. Pursuant to Article 3(1) of the Protocol, the jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned". In terms of Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction…".

15. The Respondent State raises an objection to the material jurisdiction of the Court.

A. Objection to material jurisdiction

16. The Respondent State asserts that Article 3(1) of the Protocol and Rule 26 of the Rules only affords the Court jurisdiction to "deal with cases or disputes concerning the application and interpretation of the Charter, the Protocol and any other human rights instruments ratified by the concerned State".

17. Accordingly, the Respondent State submits that "the Court is not afforded unlimited jurisdiction to sit as a court of first instance or an appellate court and reanalyse the evidence already analysed by the highest domestic court".

18. The Applicants contend that their Application is in conformity with Article 3 of the Protocol and Rule 26 of the Rules concerning the interpretation and application of the Charter, the Protocol and any relevant human rights instruments ratified by the Respondent State. The Applicants argue therefore, that, the Court should exercise its jurisdiction and consider the Application.

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19. The Court has held that Article 3 of the Protocol gives it the power to examine an Application submitted before it as long as the subject matter of the Application involves alleged violations of rights protected by the Charter, the Protocol or any other international human rights instruments ratified by a Respondent

State.[1]

20. The Court reiterates its well established jurisprudence that it is not an appellate body with respect to decisions of national courts.[2] However, the Court also emphasised, that, "[t]his does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned".[3]

21. The Court notes that the instant Application raises allegations of human rights violations protected under Articles 2, 3 and 7 of the Charter and by considering them in light of international instruments, it does not arrogate to itself the status of an appellate court or court of first instance. Accordingly, the Respondent State's objection in this regard is dismissed. The court will not discuss the limits of its jurisdiction here contrary to the Respondent State's submission. The terms of Article 3 of the Protocol, reproduced by Rule 26 of the Rules, amply explain the extent of the Court's jurisdiction.

22. In light of the foregoing, the Court holds that it has material jurisdiction.

B. Other aspects of jurisdiction

23. The Court notes that the personal, temporal and territorial aspects of its jurisdiction are not disputed by the Respondent State and

1 Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania*, para 114; Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania, (*hereinafter referred to as *"Alex Thomas v Tanzania* (Merits)*"*), para 45; Application 053/2016**.** Judgment of 28 March 2019 (Merits), *Oscar Josiah v United Republic Tanzania* (hereinafter "*Oscar Josiah v United Republic of Tanzania* (Merits)"), para 24.

2 Application 001/2013. Decision of 15 March 2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*, para 14; Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania* (hereinafter referred to as "*Kenedy Ivan v Tanzania* (Merits and Reparations)") para 26; Application 024/2015. Judgment of 7 November 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* para 33; Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*, para 35.

3 *Alex Thomas v Tanzania* (Merits), para 130. See also Application 011/2015. Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania (*hereinafter referred to as *"Christopher Jonas v Tanzania* (Merits)*"*), para 28; Application 003/2014. Judgment of 24 November 2017 (Merits), *Ingabire Victoire Umuhoza v Republic of Rwanda (*hereinafter referred to as *"Ingabire Umuhoza v Rwanda* (Merits)"), para 52; Application 007/2013. Judgment of 03 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, (hereinafter referred to as "*Mohamed Abubakari v Tanzania* (Merits)"), para 29.

that nothing on the record indicates that the Court lacks such jurisdiction. The Court accordingly holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the Declaration prescribed under Article 34(6) of the Protocol, which enabled the Applicants to file this Application directly before this Court, pursuant to Article 5(3) of the Protocol;

ii. that it has temporal jurisdiction on the basis that the alleged violations are continuous in nature, in that the Applicants remain convicted and are serving a sentence of thirty (30) years' imprisonment on grounds which they consider are wrong and indefensible.[4]

iii. It has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

24. In light of the foregoing, the Court holds that it has jurisdiction to consider the Application.

VI. Admissibility

25. Pursuant 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". In addition Rule 39(1) of the Rules 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".

26. Under Rule 40 of the Rules, which in essence restates the provisions of Article 56 of the Charter, Applications filed before the Court shall be admissible if they fulfil 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

4 See Application 013/2011. Ruling of 21 June 2013 (Preliminary Objections), *Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Abiasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples' Rights v Burkina Faso*, (hereinafter referred to as, "Zongo and others judgment (Preliminary Objections)"), paras 71-77.

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".

27. The Respondent State raises two objections to the admissibility of the Application; the first one relates to the requirement of exhaustion of local remedies and second, the filing of the Application within a reasonable time under sub-Rules 40(5) and (6), of the Rules, respectively.

A. Objection based on the non-exhaustion of local remedies

28. The Respondent State contends that the Applicants should have sought redress at the High Court of Tanzania for their alleged human rights violations by filing a constitutional petition in accordance with its Constitution and its Basic Rights and Duties Enforcement Act.[5]

29. The Respondent State also asserts that the first Applicant, Mr Godfred Anthony, never appealed against the decision of the High Court even though he had the opportunity to seize the Court of Appeal. The Respondent State further argues that the second Applicant, Mr Ifunda Kisite, could have applied for a review of the decision of the Court of Appeal as provided by law. It therefore concludes that the Applicants filed the Application before this Court without exhausting the available local remedies.

30. The Applicants aver that the first Applicant appealed against his conviction and sentence to the High Court, while the Prosecutor also appealed against the second Applicant's acquittal to the same court; with both appeals going in favour of the Prosecutor. Subsequently, the second Applicant filed an appeal before the Court of Appeal which while dismissing it, the Court of Appeal referred to the first Applicant as well. Therefore, the Applicants concluded that they exhausted local remedies.

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31. The Court notes that pursuant to Article 56 (5) of the Charter and

5 Chapter 3 of the laws of Tanzania.

Rule 40(5) of the Rules, in order for an application before the Court to be admissible, local remedies must have been exhausted, unless the procedure to pursue them is unduly prolonged**.**

32. In its jurisprudence, the Court has underscored that an applicant is only required to exhaust ordinary judicial remedies.[6] In relation to applications against the Respondent State, the Court has determined that the constitutional petition procedure in the High Court and the use of the review procedure at the Court of Appeal are extraordinary remedies in the Tanzanian judicial system, which are not required to be exhausted prior to filing an application before this Court.[7]

33. In the instant case, the Court notes from the record that the second Applicant, Mr Ifunda Kisite appealed to the highest court in the Respondent State, that is, the Court of Appeal, which upheld his conviction and sentence.

34. The first Applicant, Mr Godfred Anthony appealed only to the High Court following his conviction by the District Court. However, while considering the appeal of the second Applicant, the Court of Appeal observed that all the three co-accused persons, including the two Applicants, committed the crimes in concert and deserved the same sentence.

35. Consequently, the Court is of the view that, despite the fact that the first Applicant did not appeal to the Court of Appeal, his matter was addressed by the Court of Appeal, albeit incidentally, and any appeal he could have filed would have been unlikely to result in a different outcome.

36. In this regard, the Court recalls its position in *African Commission on Human and Peoples' Rights v Kenya*, where it held that for purpose of ascertaining exhaustion of local remedies, the most pertinent issue that should be considered is whether a State against which an application is filed, has been accorded the opportunity to rectify alleged human rights violations prior to the

6 *Alex Thomas* v *Tanzania* (Merits), para 64. See also Application 006/2013. Judgment 18 March2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 95; *Oscar Josiah v United Republic of Tanzania* (Merits), para 38; Application 016/2016. Judgment of 7/12/2018 (Merits and Reparations), *Diocles William v United Republic of Tanzania*, para 42.

7 *Alex Thomas v Tanzania* (Merits), paras 63-65.

filing of an application before the Court.[8]

37. Accordingly, the Court dismisses the Respondent State's objection that the Applicants did not exhaust local remedies.

B. Objection based on failure to file the Application within a reasonable time

38. The Respondent State argues that the Application was not filed within a reasonable time after local remedies were exhausted because the first Applicant's case at the High Court was concluded on 19 May 2003 and the second Applicant's case in the Court of Appeal was concluded on 27 February 2006.

39. The Respondent State avers that despite the fact that it deposited the Declaration required under Article 34 (6) of the Protocol in 2010, it took the Applicant five (5) years to seize the Court, that is, in 2015.

40. It further submits that even though Rule 40(6) of the Rules does not prescribe a time limit for filing an application before the Court, international human rights jurisprudence has established six (6) months as a reasonable time-limit after domestic remedies are exhausted for filing such applications. The Respondent State contends that the Applicants failed to seize the Court within six (6) months without having been hindered from doing so.

41. The Applicants did not address this objection specifically but submit that their Application meets the admissibility requirement specified under Article 56 of the Charter, and Rule 40 of the Rules.

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42. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply mentions "…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

8 Application 006/2012. Judgment of 26 May 2017 (Merits), *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 94.

which it shall be seized with the matter".

43. In the matter of *Norbert Zongo and others v Burkina Faso*, the Court held 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."[9] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance[10], indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal[11] and the use of extra-ordinary remedies.[12]

44. In the instant Application, the Court observes that the judgment of the Court of Appeal in Criminal Appeal 47 of 2003 was delivered on 21 May 2004. However, the Applicants were able to file their Application before this Court only after 29 March 2010, the date that the Respondent State deposited the Declaration required under Article 36(4) of the Protocol for individuals to have direct access to the Court. Nearly five (5) years and four (4) months elapsed between 29 March 2010 and 13 July 2015 when the Applicants filed their Application before this Court. The issue for determination is whether the five (5) years and four (4) months that the Applicants took to file their Application before the Court is reasonable.

45. The Court recalls its jurisprudence in the matter of the *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and mouvement burkinabe des droit de l'homme* where it held that the purpose of Rule 40(6) of the Rules is to guarantee "[j]udicial security by avoiding a situation where authorities and other concerned persons are kept in a situation of uncertainty for a long time".[13] Also, "to provide the Applicant with sufficient time for reflection to enable him appreciate the

9 *Norbert Zongo and others* (Preliminary Objections), para 92. See also Application 023/2015. Judgment of 23 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania*, (hereinafter referred to as "*Kijiji Isiaga v Tanzania* (Merits)"), para 56.

10 *Alex Thomas v Tanzania* (Merits), para 73, *Christopher Jonas v Tanzania* (Merits), para 54, Application 010/2015. Judgment of 11 May 2018 (Merits), *Amiri Ramadhani v United Republic of Tanzania*, para 83.

11 Application 046/2016. Judgment of 11 May 2018 (Merits), *Association Pour le Progrès et la Défense Des Droits Des Femmes Maliennes* v Republic of Mali, para 54.

12 *Armand Guehi v Tanzania* (Merits and Reparations), para 56; Application 024/2015. Judgment of 7 December 2018, *Werema Wangoko v United Republic of Tanzania* (Merits and Reparations), para 49; Application 001/2017. Judgment of 28 June 2019, *Alfred Agbes Woyome v Republic of Ghana* (Merits and Reparations), paras 83-86.

13 *Norbert Zongo* v *Burkina Faso*, *op cit*, para 107.

opportunity of bringing a matter to court if necessary" and finally, "to enable the Court to establish the relevant facts relating to the matter".[14]

46. Further in *Amiri Ramadhani v Tanzania*[15] and *Christopher Jonas v Tanzania,*[16] the Court decided that the period of five (5) years and one month was reasonable owing to the circumstances of the Applicants. In these two cases the Court took into consideration the fact that the Applicants were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not have assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court.

47. Moreover in *Werema Wangoko and another v United Republic of Tanzania,*[17] the Court decided that the Applicants having used the review procedure, were entitled to wait for the review judgment to be delivered and that this justified the filing of their Application five (5) years, five (5) months after exhaustion of local remedies.

48. In the instant case, the Court notes that although the Applicants are also incarcerated and thus restricted in their movement, they have not asserted or provided any proof that they are illiterate, lay, or had no knowledge of the existence of the Court. The Applicants have simply described themselves as "indigent".

49. The Court further notes that the Applicants were represented by legal counsel in their trial and appeals at the domestic level but they did not file for review of their final judgments. Overall, while the Court has always considered the personal circumstances of applicants in determining the lapse of reasonable time taken before being seized of a matter, the present Applicants have not provided the Court with any material evidence on the basis of which the Court can conclude that the period of five (5) years and four (4) months was a reasonable period of time taken to file their application before this Court. In the circumstances, the Court finds that the Application does not comply with the requirement under Rule 40(6) of the Rules.

50. In light of the foregoing, the Court holds that the Applicants have failed to comply with Rule 40(6) of the Rules and upholds the

14 *Ibid*.

15 *Amiri Ramadhani v Tanzania* (Merits), para 50.

16 *Christopher Jonas v Tanzania* (Merits), para 54.

17 *Werema Wangoko v Tanzania* (Merits and Reparations), para 49.

Respondent State's objection in this regard.

51. Having concluded that the Application was not filed within a reasonable time, the Court does not have to pronounce itself on whether other conditions of admissibility enumerated in Rule 40 of the Rules have been met, in as much as the conditions of admissibility are cumulative.[18]

52. Based on the above, the Court declares the Application inadmissible.

VII. Costs

53. Rule 30 of the Rules provides that: "Unless otherwise decided by the Court, each party shall bear its own costs".

54. The Applicants have not made any submissions on costs. However, the Respondent State has prayed the Court to order that the Applicants bear the costs of the Application.

55. In the instant case, the Court decides that each Party shall bear its own costs.

VIII. Operative part

56. For these reasons:

The Court,

U*nanimously:*

On *jurisdiction*

i. *Dismisses* the objections to its jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objection to the admissibility of the Application based on the lack of exhaustion of local remedies;

iv. *Declares* that the Application was not filed within a reasonable time;

v. *Declares* that *the* Application is inadmissible.

On costs

vi. *Decides that* each Party shall bear its own costs.

18 See Application 024/2016. Judgment of 21 March 2018 (Admissibility), *Mariam Kouma and Ousmane Diabaté v Republic du Mali,* para 63; Application 022/2015. Judgment of 11 May 2018 (Admissibility), *Rutabingwa Chrysanthe v Republic of Rwanda,* para 48.

Mallya v Tanzania (merits and reparations) (2019) 3 AfCLR 482

Application, 018/2015, *Benedicto Daniel Mallya v United Republic of Tanzania*

Judgment, 26 September 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant was convicted of rape of a minor and sentenced to life imprisonment. He alleged that he was not provided with the trial records to prepare his appeal. His conviction was overturned fifteen (15) years and nine (9) months later, after he filed his Application before this Court. The Court found that the Respondent State had violated the Applicant's right to fair trial and the right to liberty and reserved its judgment on reparations.

Admissibility (consideration when not challenged, 24)

Fair trial: (appeal, 45; trial within reasonable time, 53, 54)

Personal liberty and security (procedural guarantees against arbitrary detention, 65)

Reparations (moral damages, 73, 74)

I. The Parties

1. Mr Benedicto Daniel Mallya (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania. He was convicted on 16 May 2000 of the rape of a seven (7) year old girl and sentenced to life imprisonment in Criminal Case No 1142 of 1999 before the District Court of Moshi. He was fifteen (15) years old at the time he was sentenced.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples 'Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals

and Non-Governmental Organisations (NGOs).

II. Subject of the Application

A. Facts of the matter

3. The Applicant was convicted by the District Court of Moshi, Tanzania on 16 May 2000, of the rape of a seven (7) year old girl and sentenced to life imprisonment. On 19 May 2000, he filed a Notice of Appeal to the High Court of Tanzania at Moshi challenging his conviction and sentence.

4. He further states that since filing the Notice of Appeal, he was not provided with certified true copies of the record of proceedings and judgment to enable him to file his appeal at the High Court. He asserts that he sent several letters to the District Registrar of the High Court of Tanzania at Moshi, to follow up on the provision of these documents, to no avail.

5. The Applicant submits that he filed a constitutional petition at the High Court of Tanzania seeking to enforce his constitutional rights under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, but that the process was hindered by difficulties. It emerges from the record**,** that the Applicant did not indicate the date he filed the constitutional petition to the High Court.

6. The Applicant avers that on 1 September 2015, he filed this Application before this Court and it is only after filing, that in February 2016, the Respondent State provided him the certified true copies of the record of proceedings and the judgment of Criminal Case 1142 of 1999 before the District Court of Moshi.

7. On 9 February 2016, the High Court at Moshi, of its own motion, in Criminal Appeal 74 of 2015, called for the Applicant's records. Subsequently, on 15 February 2016, the court ordered a hearing of the appeal and ordered that the memorandum of appeal be served on the Applicant. According to the Respondent State, on 22 February 2016, the appeal was considered in the Applicant's presence and the Prosecution did not object to the appeal. The High Court then allowed the appeal, quashed the conviction, set aside the sentence, cast doubt on the evidence relied upon by the District Court of Moshi and ordered release of the Applicant. The Applicant alleges that after serving fifteen (15) years and nine (9) months in prison, he was released sometime in May 2016.

B. Alleged violations

8. The Applicant alleges the following:
That the Respondent State violated his rights to have his cause heard, specifically his right to appeal as provided under Article 7(1)(a) of the Charter and that his right to a fair and expeditious trial was denied.

"i. With respect to the notice of appeal he filed three days after the judgment in order to be supplied with copies of proceedings and judgment for him to file an appeal was never done in order to hear his appeal.

ii. This was a deliberate intention of frustrating the Applicant, disenabling him from preparing a proper defence and denying him the right to liberty and to a fair trial.

iii. The Applicant was denied the right to be tried within a reasonable time.

iv. The Applicant's efforts to seek redress before the municipal courts of the Respondent were fraught and hindered by complexities and unnecessary technicalities."

v. That the Respondent State violated his right to equality before the law, provided under Article 13(6) (a) of the Constitution of the United Republic of Tanzania 1977."

III. Summary of the procedure before the Court

9. The Application was filed on 1 September 2015 and on 28 September 2015, served on the Respondent State and transmitted, through the Chairperson of the African Union Commission to all the entities provided under the Rules.

10. The Parties filed their submissions on the merits within the time stipulated by the Court and thereafter, on 20 April 2018 they were notified of the close of pleadings. On 2 October 2018, pleadings were re-opened to enable the Parties file submissions on reparations, pursuant to the decision of the Court during its 49th Session (16 April to 11 May 2018) to determine the merits and reparations in the same judgment.

11. On 4 June 2019, the Applicant's representative informed the Court about his inability to locate the Applicant and his family and requested for extension of time to locate the Applicant. Thereafter, on 12 June 2019, the Court granted the Applicant a forty-five (45) day extension of time to file his submission on reparations.

12. On 15 July 2019, the Applicant's representative informed the Court that they were still unable to reach the Applicant, as he and his family had relocated from Moshi and they were unable to file the Applicant's submissions on reparations. The Applicant's

representative prayed the Court to take a decision on the way forward.

13. On 1 August 2019, the Parties were notified of the close of pleadings.

IV. Prayers of the Parties

14. The Applicant, prays for the following reliefs:

"a. A Declaration that the Respondent State was in violation of Article 7(1)(a) of the African Charter on Human and Peoples´ Rights

b. An Order for reparations and compensation; and

c. Any other Order that the Court may deem fit and just to grant."

15. The Respondent State prays that the Court should grant the following orders:

"1. That, the Application be struck out of the record of the Court for being overtaken by events;

2. That, the Court declares that the Respondent have (sic) acted in good faith;

3. That, the Court refrains from ordering reparations since the act of the Respondent is sufficient reparation;

4. Any other order the Court may deem right and just to grant."

V. Jurisdiction

16. Pursuant to Article 3 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" in accordance with Rule 39(1) 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".

17. The Court notes that its jurisdiction is not contested by the Parties.

18. With regard to material jurisdiction, the Court notes that the Applicant has sought some reliefs based on allegations relating to the violation of his rights under Articles 7(1)(a) of the Charter and 13(6)(a) of the Constitution of the Respondent State.

19. The Court having examined the Application, finds that it has jurisdiction to hear the Application.

20. With regard to other aspects of jurisdiction the Court thus holds that:

i. It has personal jurisdiction over the Parties because the Respondent State deposited the Declaration under Article 34(6) of the Protocol on 29 March 2010, which enabled the Applicant to file the present

Application pursuant to Article 5(3) of the Protocol.

ii. It has temporal jurisdiction because the alleged violations are continuous in nature and took place after the ratification of the Protocol by the Respondent State.

iii. It has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.

21. Based on the foregoing, the Court declares that it has jurisdiction to hear the instant case.

VI. Admissibility

22. Pursuant to Rule 39(1) of the Rules, "The Court shall conduct a 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."

23. Rule 40 of the Rules which, in substance, restates the provisions of Article 56 of the Charter sets outs the requirements for the admissibility of applications 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 the matter; and
7. Not raise any mater 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."

24. The Court notes that the Respondent State does not challenge the admissibility of the Application. However, the Court will, in conformity with the provisions of Rule 39(1) of the Rules above, examine the Application to ensure that it meets the requirements of admissibility under Rule 40 of the Rules, which restates the

provisions of Article 56 of the Charter.

25. The Court further notes that nothing on record indicates that the admissibility requirements of Rules 40(1), (2), (3), (4) and 7 of the Rules have not been met.

26. The Court notes that the requirement of exhaustion of local remedies under Article 56(5) of the Charter, as restated in Rule 40(5) of the Rules must also be complied with before an Application is considered by this Court. However, this condition may be dispensed with if local remedies are not available, they are ineffective, insufficient or the domestic procedures to pursue them are unduly prolonged. Furthermore, the remedies to be exhausted must be ordinary judicial remedies.[1]

27. The Court notes that, in the instant case, the Applicant attempted to make use of the available remedies, by filing a Notice of Appeal on 19 May 2000 in respect of Criminal Case No. 1142 of 1999. Thereafter, he requested that certified true copies of the records of proceedings and judgment in respect of the case be provided to him to enable him file his appeal at the High Court. The Applicant also submits that he made concerted efforts through correspondences to the District Registrar of the High Court of Moshi to obtain the certified true copy of the record of proceedings and judgment, but his requests went unanswered.

28. Despite having filed the Notice of Appeal indicating his intention to appeal, the Applicant could not pursue his appeal for lack of the certified true copies of the record of proceedings and judgment. As a result, although the remedy was available in theory, the Applicant was prevented from pursuing it.

29. In this regard, the Court recalls its position that, for remedies to be considered available, it is not enough that they should be established in the domestic system, but also available for use to individuals without hindrance.[2] In the instant case, the Court notes that although local remedies were established in the domestic system, due to the Respondent State's failure to provide the Applicant with the relevant documents, he was unable to utilise them. The Court therefore finds that this admissibility requirement

1 Application 003/2015. Judgment of 28 September 2017 (Merits), *Kennedy Owino Onyachi & Another v United Republic of Tanzania,* (hereinafter referred to as "*Kennedy Onyachi v Tanzania* (Merits)"), para 56; Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania*, para 45.

2 Application 013/2011. Judgment of 28 March 2014 (Merits), *Beneficiaries of Late Norbert Zongo & others v Burkina Faso*, para 68 (hereinafter referred to as "*Norbert Zongo & others v Burkina Faso* (Merits)"); Application 001/2014. Judgment of 18 November 2016 (Merits) *Action Pour La Protection Des Droits De L'Homme (APDH) v Republic of Cote d'Ivoire*, paras 94-106.

has been fulfilled.[3]

30. Article 56(6) of the Charter, as restated in Rule 40(6) of the Rules, requires that cases should be submitted to the Court within a reasonable time after local remedies are exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter. The Court notes that since the Applicant was unable to access domestic remedies, the issue of reasonableness does not arise.

31. In light of the foregoing, the Court finds that the Application meets all admissibility requirements under Article 56 of the Charter and Rule 40 of the Rules and accordingly declares the Application admissible.

VII. Merits

32. The Applicant alleges violation of the right to appeal, the right to be heard within a reasonable time and the right to liberty as provided for under Articles 7(1)(a) and (d) and Article 6 of the Charter, respectively.

33. The Court notes that the instant Application raises three (3) issues namely:

i. whether the right to appeal has been violated;

ii. whether the right to be tried within a reasonable time has been violated and;

iii. whether the right to liberty has been violated

A. Alleged violation of the right to appeal

34. The Applicant avers that the Respondent State violated his right to appeal under Article 7(1)(a) of the Charter by not giving him an opportunity to appeal against the judgment of the District Court of Moshi in Criminal Case No. 1142 of 1999, by which he was convicted of rape and sentenced to life imprisonment.

35. The Applicant submits that his right to a fair and expeditious trial was violated due to the fact that though he filed his Notice of Appeal three (3) days after the judgment of the District Court, he was never supplied with the certified true copies of the record of proceedings and of the judgment. He alleges that he also made attempts to get these documents, by sending several letters to the District Registrar of the High Court of Moshi yet they were

3 Application 006/2016. Judgment of 7 December 2018 (Merits) *Mgosi Mwita Makungu v United Republic of Tanzania*, para 49.

not provided to him. He states that he remained incarcerated in prison for fifteen (15) years and nine (9) months while waiting to be provided the necessary documents to pursue his appeal.

36. The Applicant further asserts that he was also deprived of the opportunity to file a petition to the High Court of Tanzania at Moshi under Sections 4 and 5 of the Basic Rights and Duties Enforcement Act in order to enforce his constitutional rights under Article 13(6) (a) of the Constitution of Tanzania.

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37. The Respondent State submits that on 9 February 2016, the High Court of Tanzania at Moshi, of its own motion, called for the Applicant's records in Criminal Appeal No. 74 of 2015 and the Applicant's appeal was mentioned. Subsequently, on 15 February 2016, the Court ordered a hearing of the appeal and ordered that he should be served.

38. The Respondent State further avers that on 22 February 2016, the appeal was considered in the Applicant's presence and the Prosecution did not object to the appeal. The High Court then allowed the appeal, quashed the conviction and set aside the sentence. Additionally, it ordered the release of the Applicant on the basis that the "Respondent did not support the conviction and sentence during appeal and cast doubts on the evidence" that was relied upon by the District Court.

39. The Respondent State submits that the matter has been finalised by the High Court when it allowed the appeal, quashed the Applicant's conviction, set aside his sentence and ordered his release and that the Prosecution has chosen not to appeal against the High Court´s decision. The Respondent State alleges that by doing so, it has acted in good faith and provided sufficient remedy to the Applicant.

40. The Respondent State denies that it prevented the Applicant from pursuing a constitutional petition and puts the Applicant to strict proof of this allegation, which it maintains is not supported with evidence and should be dismissed for lack of merit.

41. The Respondent State made no submissions in response to the Applicant's assertion that he was in prison for over fifteen (15) years before his appeal was heard, even after his Notice of

Appeal was filed three (3) days after his conviction.

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42. Article 7(1) (a) of the Charter 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 of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; and (…)"

43. With respect to the right to appeal, the Court notes that, it requires that individuals are provided with an opportunity to access competent organs, to appeal against decisions or acts violating their rights. It entails that States should establish mechanisms for such appeal and take necessary action that facilitate the exercise of this right by individuals, including providing them with the judgments or decisions that they wish to appeal against within a reasonable time. [4]

44. The Court notes that a State, such as Tanzania, which has courts of this kind, is under an obligation to ensure that individuals enjoy the fundamental guarantees offered by those courts. It must provide litigants with an effective right of access to the courts to verify the merits of all charges, including criminal cases.[5]

45. The Court, therefore, finds that the Respondent State violated the Applicant's right to appeal under Article 7(1) (a) of the Charter.

B. Alleged violation of the right to be tried within a reasonable time

46. The Applicant submits that he was denied the right to be tried within a reasonable time. Furthermore, he reiterates the submission that the Respondent State's failure to provide him with the copies of proceedings and judgment hindered his progress to file an appeal. He further alleges without substantiating, that other efforts to seek

4 *Kennedy Onyachi v Tanzania* Judgment (Merits), para 117-118.

5 ECHR, Series A no 11, Judgment of 17 January 1970, *Delcourt v Belgium,* para 25; and ECHR Application 71658/10 Judgment of 9 January 2014*, Viard v France,* para 30.

redress before the domestic courts were hindered by difficulties.

47. The Respondent State submits that the Applicant's violations have been overtaken by events and it has acted in good faith in releasing him from custody and quashing his conviction and setting aside his sentence.

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48. The Court recalls that the right to be tried within a reasonable time is one of the cardinal principles of the right to a fair trial and unduly prolonging a case at the appellate level is contrary to the letter and spirit of Article 7(1) (d) of the Charter.[6] In *Wilfred Onyango Nganyi & 9 others v United Republic of Tanzania* the Court held that:

"… 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."[7]

49. The Court lays emphasis that the right to be tried within a reasonable time covers all stages of judicial proceedings, from the initial trial to the appellate courts.

50. In determining the reasonableness of time within which a trial must be concluded, the Court follows a similar approach as the Inter-American Court of Human Rights and the European Court of Human Rights.[8] Under this approach, three elements should be taken into account to assess reasonableness of time to conclude judicial proceedings. These elements are: (a) the complexity of the matter, (b) the procedural activities carried out by the interested

6 Application 005/2013. Judgment of 20 December 2015 (Merits), *Alex Thomas v United Republic of Tanzania,* (hereinafter referred to as *"Alex Thomas v Tanzania* (Merits)") para 103.

7 Application 006/2013. Judgment of 1 March 2016 (Merits), *Wilfred Onyango Nganyi & 9 others v United Republic of Tanzania*, para 127; *Kennedy Onyachi v Tanzania* (Merits), paras 118-121.

8 ECHR, Application 17140/05, Judgment of 24 April 2008, *Kempf and others v Luxembourg,* para 48; and ECHR Application 21444/11, Judgment of 5 November 2015, *Henrioud v France,* para 58.

party and (c) the conduct of judicial authorities.[9]

51. In the instant case, the Court notes that for a case that is not complex, there was an inordinate and unexplained delay of over fifteen (15) years before the Applicant's appeal was heard. The Applicant filed a Notice of Appeal three (3) days after the judgment of the District Court. He alleges that while in prison, he persistently requested for certified true copies of the record of proceedings and judgment to enable him to file his appeal. The Court also notes that the Applicant was unable to exercise his right to appeal for over fifteen (15) years because the Respondent State failed to furnish him with the necessary documents to pursue his appeal.

52. The Court further notes that sometime in February 2016, the High Court, of its own motion, decided to call for his records and consider his appeal. This led to the High Court quashing his conviction, setting aside his sentence and ordering his release.

53. The Court notes that, the Respondent State's failure to provide the Applicant with certified true copies of the record of proceedings and judgment, within a reasonable time, prevented him from exercising his right to appeal and this consequently also led to a violation of his right to be tried within a reasonable time.

54. The Court, therefore, finds that the Respondent State violated the Applicant's right to be tried within a reasonable time under Article 7(1)(d) of the Charter.

A. Alleged violation of the right to liberty

55. The Applicant states that the Respondent State violated his right to liberty, due to his inability to appeal against his conviction and sentence because of the Respondent State's failure to provide him with the required documents to do so, which led to his continued arbitrary imprisonment.

56. The Applicant avers that after filing this Application before this Court, and by which time he had spent fifteen (15) years and nine (9) months in prison, he was released in May 2016, on the order of the High Court of Tanzania at Moshi following the quashing of his conviction and sentence on 22 February 2016.

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9 *Alex Thomas v Tanzania* (Merits) para 104.

57. The Respondent State submits that the matter has been determined by the High Court of Tanzania, which quashed the Applicant's conviction, set aside his sentence and ordered his release. The Respondent State further submits that it has chosen not to appeal against the Applicant's release and having been satisfied with this decision, the Applicant has not pursued this matter further. The Respondent State avers that it acted in good faith and the matter has been finalised.

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58. 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."

59. The Court recalls that there are "three criteria to determine whether or not a particular deprivation of liberty is arbitrary, namely, the lawfulness of the deprivation, the existence of clear and reasonable grounds and the availability of procedural safeguards against arbitrariness. These are cumulative conditions and non-compliance with one of them makes the deprivation of liberty arbitrary."[10]

60. In the instant case, the Court notes that the Respondent State did not take the necessary measures to avail the Applicant with documents and certified true copies of the record of proceedings and the judgment, which would have enabled him to appeal his conviction.

61. In comparative jurisprudence, notably that of the European Court, life imprisonment is considered to be inconsistent with the spirit of the European Convention of Human Rights.[11] The Court is of the view that a State is at liberty to choose its form of criminal justice system, including the review of sentences and the terms of release, provided that the chosen system does not violate the Charter. The Respondent State therefore had, in this case, a

10 *Kennedy Onyachi v Tanzania* Judgment *(*Merits), para 131.

11 ECtHR Judgment, *Vinter & others v United Kingdom* [GC], 66069/09, 130/10, and 3896/10 Judgment of 9 July 2013; ECtHR Judgment, *Kafkaris v Cyprus*, 21906/04, Judgment of 12 February 2008 [GC].

margin of appreciation to determine the appropriate length of the prison sentence.

62. The Court also notes that the Applicant could have been released earlier by an order of the High Court if his appeal had been heard on time, in particular because, when the appeal was eventually heard, his conviction was quashed on the ground that the evidence relied upon by the District Court was flawed. It turned out that the requested documents were only provided after he filed this Application before this Court.

63. The Court, however, notes that the Respondent State did not object to the appeal on 22 February 2016 at the High Court, which quashed the Applicant's conviction, set aside his sentence and ordered his release. The Court also notes that the Applicant has not buttressed his claims for reparations.

64. There is jurisprudence that "measures to release or to repeal laws do not in any way change the violations which have been committed and do not absolve governments of their responsibilities vis-à-vis such violations."[12] It therefore follows that the mere fact of having subsequently quashed the Applicant's conviction and sentence and restoring his freedom after fifteen (15) years and nine (9) months in prison does not negate the culpability from the Respondent State for failing to ensure procedural guarantees because the Applicant was not heard on appeal.

65. The Court therefore finds that the Respondent State violated the Applicants right to liberty guaranteed by Article 6 of the Charter by failing to place at his disposal, procedural guarantees which would have made it possible to avoid his continued arbitrary imprisonment.

VIII. Reparations

66. The Applicant in his submissions on the merits, prays the Court to order reparations and just compensation.

67. The Respondent State prays that the Court should declare that it has acted in good faith by releasing the Applicant and refrain from ordering reparations since this act by the Respondent State

12 Inter-American Court of Human Rights, Judgment of 2 July 2004 on (Preliminary Objections, Merits, Reparations and Costs), *Case of Herrera-Ulloa v Costa Rica*.

is sufficient reparation.

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68. Article 27(1) of the Protocol provides that "if the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

69. In respect, Rule 63 of the Rules provides that: "The Court shall 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' rights or, if the circumstances so require by a separate decision".

70. The Court recalls its position on State responsibility as stated in *Reverend Christopher R Mtikila v United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation".[13]

71. Concerning the Applicant's prayer on other forms of reparations, the Court notes that although the Applicant made a prayer for reparations in his submissions on the merits, neither of the Parties have made detailed submissions.

72. The Court notes that, although the Applicant has not made detailed submissions on reparations, the seriousness of the violations established entitle him to an award of reparations for the harm he suffered.

73. The Court recalls that there is a presumption of moral prejudice to an Applicant where his rights have been found to be violated, without the need for him to show a link between the violation and the prejudice.[14] The Court further recalls that in assessing the amounts to be awarded for moral prejudice, the Court must show fairness and deal with each matter on a case by case basis.

13 Application 011/2011. Judgment of 13 June 2014 (Reparations), *Reverend Christopher R Mtikila v United Republic of Tanzania,* para 27.

14 Application 013/2011. Judgment of 5 June 2015 (Reparations), *Beneficiaries of the Late Norbert Zongo and others v Burkina Faso* (hereinafter referred to as *"Norbert Zongo and others v Burkina Faso* (Reparations)"), para 61; Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda* (hereinafter referred to as *"Ingabire Victoire v Rwanda* (Reparations)"), para 20-22. para 59; Application 007/2019. Judgment of 4 July 2019 (Reparations), *Mohamed Abubakari v United Republic of Tanzania* (hereinafter referred to as *Mohamed Abubakari v Tanzania* (Reparations)) para 43.

The Court in awarding compensation in such cases, would, as a general standard, award lump sums to victims.[15]

74. The Court notes from the records that at the time of his conviction, the Applicant was a boy of fifteen (15) years of age. The Court is of the considered opinion that given the unjust incarceration of the Applicant in prison for almost sixteen years, the better part of his youth is already lost and he has also been prevented from enjoying other rights in the Charter, including the right to education, the right to family, right to work, right to privacy and the right to participate freely in the government of his country. In addition, the Applicant suffered moral prejudice as a result of his conviction, sentence and imprisonment, including emotional and psychological trauma.

75. In the instant case, pursuant to the provisions of Rule 63 cited above, the Court decides that it will make a ruling on reparations at a later stage of the proceedings.

IX. Costs

76. Rule 30 of the Rules provides that "unless otherwise decided by the Court, each Party shall bear its own costs".

77. The Court notes that neither Party made submissions in respect of costs.

78. In the instant case, the Court decides that it will rule on costs at a later stage.

X. Operative part

79. For the above reasons,

The Court**,**

Unanimously:

On jurisdiction

i. *Declares* that the Court has jurisdiction.

On *admissibility*

ii. *Declares* that the Application is admissible.

On merits

iii. *Finds* that the Respondent State violated the Applicant's rights to appeal and to be heard within a reasonable time contrary to Article 7(1)(a) and (d) of the Charter, respectively, as regards the

15 *Mohamed Abubakari v Tanzania* (Reparations) para 44.

failure to provide the Applicant with certified true copies of the record of proceedings and of the judgment in Criminal Case No 1142/99 heard at the District Court of Moshi;

iv. *Finds* that the Respondent State violated the Applicant's right to liberty under Article 6 of the Charter, for not making available, adequate procedural safeguards to prevent the continued detention of the Applicant.

On reparations

v. *Declares* that it will rule on reparations at a later stage.

On costs

vi. *Reserves* its decision on costs.

Vedastus v Tanzania (merits and reparations) (2019) 3 AfCLR 498

Application 025/2015, *Majid Goa alias Vedastus v United Republic of Tanzania*

Judgment, 26 September 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, BENSAOULA, TCHIKAYA, and ANUKAM

Recused under Article 22 of the Protocol, ABOUD

The Applicant was convicted and sentenced to thirty (30) years imprisonment for rape. He alleged that the Respondent State violated his rights by disregarding his defence of *alibi* and by neglecting contradictions and discrepancies in witness statements. He also alleged that he was not provided with free legal assistance. The Court dismissed his allegation in relation to the evalution of the evidence. However, it found a violation in relation to the Applicant's right to legal aid.

Admissibility (exhaustion of local remedies, constitutional petition 32; submission within reasonable time, 41, 42)

Fair trial (evaluation of evidence, 56; 65; legal aid, 71, 72)

Reparations (moral damages, 89)

I. The Parties

1. Majid Goa alias Vedastus (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who is currently serving a sentence of 30 years following his conviction for rape of a twelve (12) year old minor.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the "Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986, and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the file that on 20 December 2005, the District Court of Tarime, in Criminal case 418 of 2005 convicted the Applicant of rape of a twelve (12) year old minor and sentenced him to thirty (30) year imprisonment.

4. The Applicant appealed in Criminal Appeal No 35 of 2006 against both the conviction and sentence to the High Court of Mwanza, which confirmed the decision of the District Court on 11 October 2006.

5. The Applicant further appealed to the Court of Appeal of Tanzania sitting at Mwanza, in Criminal Appeal No. 303 of 2013 which was dismissed on 13 August 2014. Dissatisfied with the Court of Appeal's decision, he lodged an application for Review of the Court of Appeal's decision being, Misc. Criminal Application 11 of 2014 in the Court of Appeal of Tanzania at Mwanza which was rejected.

6. On 2 October 2015, the Applicant seized this Court.

B. Alleged violations

7. The Applicant alleges that the Respondent State has violated his rights under Articles 2, 3(1) and (2) and 7(1)(c) and (d) of the Charter by failing to consider his defence of *alibi* and various contradictions and discrepancies in the witness statements. He also alleges that he was denied the right to be heard, as he did not benefit from free legal assistance during the trial and before the appellate courts.

III. Summary of the procedure before the Court

8. The Application was received on 2 October 2015 and served on the Respondent State and the entities listed under Rule 35(3) of the Rules on 4 December 2015.

9. The parties were notified of the pleadings and filed their submissions within the time stipulated by the Court.

10. On 7 December 2018, the Court informed the parties that written pleadings were closed.

IV. Prayers of the Parties

11. The Applicant prays the Court to:

"a. …restore justice where it was overlooked and quash both conviction and sentence imposed upon him and set him at liberty;

b. grant him reparations pursuant to Article 27(1) of the Protocol of the Court;

c. that the conviction and sentence meted upon him be quashed and he be set free;

d. …be facilitated with free legal representation or legal assistance under Rule 31 of the Court and Article 10(2) of the Protocol, and

e. grant any other order the Court may deem fit in the circumstances of the complaint."

12. The Respondent State prays the Court to declare:

"a. That the Court is not vested with jurisdiction to adjudicate over this Application;

b. That the Application has not met the admissibility requirements stipulated under Rule 40(1-7) of the Rules of the Court or Article 56 and Article 6(2) of the Protocol;

c. That the Application be dismissed in accordance with Rule 38 of the Rules of court;

d. That the costs of the Application be borne by the Applicant; and

e. That no reparation be awarded in favour of the Applicant."

13. The Respondent State thus prays the Court to find that it has not violated Articles 2, 3(1), 3(2), 7(1) (c) and 7(1)(d) of the Charter.

14. In his Reply, the Applicant prays the Court to dismiss the Respondent State's objections averring that the Application has merit and should be determined.

V. Jurisdiction

15. 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." In accordance with Rule 39(1) of the Rules, "[t]he Court shall conduct preliminary examination of its jurisdiction…"

16. The Respondent State raises an objection to the material jurisdiction of the Court.

A. Objection to material jurisdiction

17. The Respondent State avers that the jurisdiction of the Court has not been properly invoked by the Applicants. In this regard, it

asserts that Article 3(1) of the Protocol and Rule 26 of the Rules only affords the Court jurisdiction to deal with cases or disputes concerning the application and interpretation of the Charter, the Protocol and any other human rights instruments ratified by the concerned State. Accordingly, the Respondent State submits that the Court is not afforded jurisdiction to sit in the instant Application as a court of first instance or an appellate court.

18. The Applicant submits that his Application concerns the violations of fundamental human rights which is within the jurisdiction of this Court.

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19. The Court has held that Article 3 of the Protocol gives it the power to examine an Application submitted before it as long as the subject matter of the Application involves alleged violations of rights protected by the Charter, the Protocol or any other international human rights instruments ratified by a Respondent State.[1]

20. The Court reiterates its well established jurisprudence that it is not an appellate body with respect to decisions of national courts.[2] However, the Court has also emphasised, that, "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

1 Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania*, para 114, Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania, (*hereinafter referred to as *"Alex Thomas v Tanzania* (Merits)*"*), para 45, Application 053/2016**.** Judgment of 28 March 2019 (Merits), *Oscar Josiah v United Republic Tanzania* (hereinafter "*Oscar Josiah v Tanzania* (Merits)"), para 24.

2 Application 001/2013. Decision of 15 March 2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*, para 14, Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania* (hereinafter referred to as "*Kenedy Ivan v Tanzania*") para 26; Application 024/2015. Judgment of 7 November 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* para 33; Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania,* para 35.

instruments ratified by the State concerned."[3]

21. The Court notes that the instant Application raises allegations of human rights violations protected under Articles 2, 3 and 7 of the Charter and by considering them in light of international instruments, it does not arrogate to itself the status of an appellate court or court of first instance. Accordingly, the Respondent State's objection in this regard is dismissed.

22. In light of the foregoing, the Court holds that it has material jurisdiction.

B. Other aspects of jurisdiction

23. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on record indicates that it does not have jurisdiction. The Court therefore holds that:

i. it has personal jurisdiction given that the Respondent State is a party to the Protocol and has deposited the declaration required under Article 34(6) thereof, which enables individuals to institute cases directly before it, in terms of Article 5(3) of the Protocol.

ii. it has temporal jurisdiction in view of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers as irregularities;[4] and

iii. It has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.

24. From the foregoing, the Court holds that it has jurisdiction.

VI. Admissibility

25. In terms of 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". Pursuant to Rule 39(1) of the Rules, "the Court

3 *Alex Thomas v Tanzania* (Merits), para 130. See also Application 010/2015. Judgment of 28 November 2017 (Merits), *Christopher Jonas v United Republic of Tanzania (*hereinafter referred to as *"Christopher Jonas v Tanzania* (Merits)"), para 28, Application 003/2014. Judgment of 24 November 2017 (Merits), *Ingabire Victoire Umuhoza* v *Republic of Rwanda (*hereinafter referred to as *"Ingabire Umuhoza v Rwanda* (Merits)"), para 52, Application 007/2013. Judgment of 3 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, (hereinafter referred to as "*Mohamed Abubakari v Tanzania* (Merits)"), para 29, *Kenedy Ivan, op cit*, para 26.

4 See Application 013/2011. Ruling of 21 June 2013 (Preliminary Objections), *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights movement v The Republic of Burkina Faso* (hereinafter referred to as "*Zongo and others v Burkina Faso* (Preliminary Objections)"), paras 71-77.

shall conduct preliminary examination of … the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of the Rules."

26. Rule 40 of the Rules, which in essence restates the content 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 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;
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."

A. Conditions of admissibility in contention between the Parties

27. The Respondent State submits that the Application does not comply with two admissibility requirements, namely, exhaustion of local remedies provided for under Rule 40(5), and the need for applications to be filed within a reasonable time after exhaustion of local remedies provided for under Rule 40(6) of the Rules.

i. Objection based on non-exhaustion of local remedies

28. The Respondent State contends that the Applicant raises allegations of violations of his rights to equality before the law, equal protection of the law and the right to a fair hearing, both of which are guaranteed and protected in Articles 12-29 of the Constitution of the United Republic of Tanzania.

29. The Respondent State submits also that it has enacted the Basic Rights and Duties Enforcement Act, which provides for the enforcement of constitutional and basic rights as set out in Section

4 thereof.[5] Furthermore, it argues that this Act is enforceable at the High Court and the failure of the Applicant to use this procedure denied it the chance to redress the alleged violations.

30. The Applicant avers that the Application satisfies the admissibility requirement because it was filed after the Applicant had already exhausted local remedies that is, he had seized the Court of Appeal in a case that was determined on 13 August 2014. He also contends that following the dismissal of his appeal, he filed for review of that judgment. The Applicant concludes that he "did pursue all available legal remedies".

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31. The Court notes from the records that the Applicant filed an appeal against his conviction before the High Court which was decided against him on 11 October 2006 following which he seized the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and the Court of Appeal upheld the judgment of the High Court on 13 August 2014.

32. Moreover, this Court has stated in a number of cases involving the Respondent State that the remedies of Constitutional petition and review in the Tanzanian judicial system are extraordinary remedies that the Applicant is not required to exhaust prior to seizing this Court.[6] It is thus clear that the Applicant has exhausted all the available domestic remedies.

33. For this reason, the Court dismisses the objection that the Applicant has not exhausted local remedies.

ii. Objection based on the ground that the Application was not filed within a reasonable time

34. The Respondent State argues that the Application was not filed within a reasonable time pursuant to Rule 40(6) of the Rules. It submits that the Applicant's case at the domestic courts was concluded on 13 August 2014, and it took one (1) year and one (1) month for the Applicant to file his case before this Court.

35. Noting that Rule 40(6) of the Rules does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws the Court's attention to the fact that the African Commission has held a period of six (6) months to be reasonable time.[7]

36. The Respondent State avers further that the Applicant has not explained the reason why he could not lodge the Application within six (6) months, and submits that for these reasons, the Application should be declared inadmissible.

37. The Applicant argues that the decision on his Appeal to the Court of Appeal was delivered on 13 August 2014 and he subsequently filed an Application for the review of the Court of Appeal's judgment. Therefore, the Applicant avers that he has filed his Application within a reasonable time.

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38. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply mentions "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".

39. The Court recalls its jurisprudence in which it held: "…that the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on

a case-by-case basis".[8]

40. The record before this Court shows that local remedies were exhausted on 13 August 2014, when the Court of Appeal delivered its judgment while the Application was filed on 2 October 2015, that is, one (1) year, one (1) month and twenty (20) days after exhaustion of local remedies. Therefore, the Court is required to decide whether the time taken to file the Application is reasonable.

41. The Court notes that the Applicant is in prison, restricted in his movements and with limited access to information.[9] The Applicant also did not benefit from free legal assistance throughout his initial trial and appeals. He chose to use the review procedure of the Court of Appeal on 8 September 2014.[10] even though, it is not a remedy required to be exhausted so as to file an Application before this Court. These circumstances taken together contributed to the Applicant seizing the Court one (1) year, one (1) month and twenty (20) days after exhaustion of local remedies.

42. Consequently, the Court observes that the time taken by the Applicant to seize it, that is, one (1) year, one (1) month and twenty (20) days after the exhaustion of local remedies is reasonable and accordingly dismisses the objection raised.

B. Conditions of admissibility not in contention between the Parties

43. The conditions in respect of the identity of the Applicant, incompatibility with the Constitutive Act of the African Union and the Charter, the language used in the Application, the nature of the evidence adduced and the principle that an application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other

8 *See Zongo and others v Burkina Faso* (Merits) o*p cit*, para 121, *Kenedy Ivan v Tanzania* (Merits and Reparations), para 51, *Oscar Josiah v Tanzania* (Merits), para 24, Application 009/2015. Judgment of 28 March 2019 (Merits and Reparations), *Lucien Ikili Rashidi v United Republic Tanzania* (hereinafter "*Lucien Ikili Rashidi v Tanzania* (Merits and Reparations)"), para 54.

9 See *Alex Thomas v Tanzania* (Merits), para 74*, Kenedy Ivan v Tanzania* (Merits and Reparations), para 56.

10 See Application 024/2015. Judgment of 7 December 2018 (Merits and Reparations), Application 024/2015. Judgment of 7 December 2018 (Merits), *Werema Wangoko v United Republic of Tanzania* (hereinafter referred to as "*Werema Wangoko v Tanzania* (Merits)"), para 49, Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* (hereinafter referred to as "*Armand Guehi v Tanzania* (Merits and Reparations)"), para 56.

legal instruments of the African Union (Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules), are not in contention between the Parties. The Court notes that nothing on record indicates that any of these conditions have not been fulfilled in this case.

44. In light of the foregoing, the Court finds that this Application meets all the admissibility conditions set out in Article 56 of the Charter and Rule 40 of the Rules and declares the Application admissible.

VII. Merits

45. The Applicant alleges his rights guaranteed under Articles 2, 3 and 7 of the Charter were violated. In as much as the allegations of violations of Articles 2 and 3 stem from the allegation of the violation of Article 7, the Court will begin its assessment from the latter.

A. Alleged Violation of Article 7 of the Charter

46. The Applicant alleges the violation of his right to a fair trial as the domestic courts failed to take into consideration the inconsistencies in the identification evidence relied upon to convict him, and the failure to consider his defence of *alibi* and right to be provided with free legal assistance.

i. Allegation concerning the inconsistencies in the evidence

47. The Applicant avers that the testimony proffered by the four prosecution witnesses did not properly identify him as the perpetrator of the offence of rape. He also avers that there were clear inconsistencies in the testimonies of the prosecution witnesses as to the identity of the perpetrator of the offence of rape.

48. He also asserts that because the offence took place at night, it was not possible for the witnesses to properly identify the perpetrator and he avers that the trial court should not have relied on the testimony of the prosecution witnesses to convict him.

49. The Respondent State refutes all the allegations raised by the Applicant as baseless. It states that the Applicant was properly identified, especially, because the witnesses knew the Applicant before the commission of the crime and they had a good look at him at the scene of the crime.

50. The Respondent State contends that one of the prosecution witnesses was the Applicant's uncle as well as brother-in-law to

the victim; they both knew him well and thus easily identified him as the perpetrator. It further avers that the evidence proffered by the prosecution witnesses was sound and corroborative.

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51. Article 7 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, 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."

52. The Court reiterates its established position that:
"… domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence, and as an international court, this court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings."[11]

53. Moreover, the Court restates its position with regards to evidence relied upon to convict an Applicant, that:
"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 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."[12]

11 Application 032/2015. Judgment of 21/03/2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania* (hereinafter referred to as "*Kijiji Isiaga v Tanzania* (Merits)"), para 65. *Oscar Josiah v Tanzania* (Merits) para 52.

12 *Mohamed Abubakari v Tanzania* (Merits), *op cit*, paras 26 and 173. See also *Kijiji Isiaga v Tanzania* (Merits) *op cit*, para 66. *Oscar Josiah v Tanzania* (Merits) para 53.

54. The Court notes that when visual or voice identification is used as evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certitude.[13] This demands that the identification should be corroborated by other circumstantial evidence and must be part of a coherent and consistent account of the scene of the crime.

55. In the instant case, the record before this Court shows that the domestic courts convicted the Applicant on the basis of evidence of visual identification tendered by four prosecution witnesses. On the fateful day, these witnesses rushed to the scene of the crime in response to the cries of the victim. Furthermore, the witnesses knew the Applicant before the commission of the crime, since they were neighbours and even some were his relatives. The domestic courts assessed the circumstances in which the crime was committed to eliminate possible mistaken identity and found that the Applicant was properly identified as having committed the alleged crime.[14]

56. In view of the above, the Court is of the opinion that the manner in which the domestic courts evaluated the facts and the weight they attached to the evidence does not disclose any manifest error or miscarriage of justice to the Applicant which requires the Court's interference. The Court therefore dismisses the allegation of the Applicant that the domestic courts failed to consider the inconsistencies in the identification evidence relied upon to convict him.

ii. Allegation of failure to consider the defence of *alibi*

57. The Applicant alleges that he was deprived of his right to a fair trial at the trial court and subsequently at the appellate courts as the domestic courts failed to take into account his defence of *alibi*.

58. The Respondent State disputes the allegations of the Applicant. According the Respondent State, the trial court reached its verdict after satisfying itself that the Applicant had failed to raise doubt to the prosecution's watertight proof of evidence.

59. Likewise, the Respondent State contends that the Applicant's defence of *alibi* was fully considered in the appellate courts but

13 *Kijiji Isiaga v Tanzania* (Merits) *op cit*, para 68, *Mohamed Abubakari v Tanzania* (Merits), para 175; *Kenedy Ivan v Tanzania* (Merits and Reparations), para 64.

14 *Kenedy Ivan v Tanzania* (Merits and Reparations), para 60.

found wanting.

60. The Respondent State concludes in this regard that the Applicant's alleged defence of *alibi* was "found to be of no evidential value" and was therefore an afterthought which should be disregarded, and for the given reasons, the Application lacks merits and should be duly dismissed.

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61. The Court notes that Article 7(1) of the Charter provides that: "Every individual shall have the right to have his cause heard".

62. This Court has in the past noted "that a fair trial requires that the imposition of a sentence in 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 the presumption of innocence also enshrined in Article 7 of the Charter".[15]

63. The Court further recalls its previous decision that "where an *alibi* is established with certitude, it can be decisive on the determination of guilt of the accused".[16]

64. The Court notes that the Applicant's defence of alibi is premised on the fact that he was at Busulwa market selling sugarcane at the material time that the crime was committed. This however, was rebutted by PW1, a neighbour who on cross-examination stated that the Applicant could not have been at Busulwa market on 19 August 2005 because it was a Friday and thus not a market day. Further, the Applicant did not provide any corroboration for his defence of *alibi*. Also, the Court notes that there's nothing on record to show that the domestic courts made manifest errors in their judgment which would require its intervention.

65. In view of the above, the Court dismisses the allegation of the Applicant that the domestic courts failed to consider his defence of *alibi* and declares that the Applicant's right to a fair trial was not

15 *Mohamed Abubakari v Tanzania* (Merits) para 174; Application 016/2016. Judgment of 21 September 2018 (Merits and Reparations), *Diocles Williams v United Republic of Tanzania*, para 72.

16 *Mohamed Abubakari v Tanzania* (Merits), para 191, Application 016/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking and Johson Nguza v United Republic of Tanzania*, para 104.

violated.

iii. Allegation of failure to provide the Applicant with free legal assistance

66. The Applicant contends that the Respondent State has violated Article 7(1)(c) of the Charter, claiming that he did not benefit from free legal assistance at both the trial and appeal stages of his case.

67. The Respondent State submits that the Applicant's lack of legal representation did not occasion miscarriage of justice. Citing Article 7(1)(c) of the Charter, the Respondent State avers that the Applicant made a deliberate decision to defend himself. The Respondent State refers to the Case of *Melin v France* in which the European Court of Human Rights held that an accused who decides to defend himself is required to show diligence;[17] and contends that the Applicant did not do so. The Respondent State therefore argues that it did not violate the Applicant's right to legal aid.

68. Therefore, according to the Respondent State, it is not sufficiently clear from the provisions of Article 7(1)(c) that the State must provide free legal aid for every criminal trial, and that if an Applicant wants legal representation he is required to make such an application to the State or non-governmental organisations. It contends further, that the right to legal representation is not an absolute right but it is subject to a request of an accused person and the availability of financial resources.

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69. The Court notes that Article 7(1) (c) of the Charter does not provide explicitly for the right to free legal assistance. This Court has however, interpreted this provision in light of Article 14(3) (d) of the International Covenant on Civil and Political Rights (ICCPR),[18] and determined that the right to defence includes the right to be

17 *Melin v France*, 2914/87, 22 June 1993, ECtHR, Series A, 261.

18 The Respondent State became a State Party to ICCPR on on 11 June 1976.

provided with free legal assistance.[19] The Court has also held that an individual charged with a criminal offence is entitled to the right to free legal assistance without having requested for it, provided that the interests of justice so require. This will be the case where an accused is indigent and is charged with a serious offence which carries a severe penalty.[20]

70. The Court notes that the Applicant was not afforded free legal assistance throughout the proceedings in the national courts. The Court further notes that the Respondent State does not dispute that the offence is serious and the penalty provided by law is severe, it only contends that he did not make a request for legal aid.

71. Given that the Applicant was charged with a serious crime, that is, rape of a twelve (12) year old minor, carrying a severe mandatory punishment of 30 years' imprisonment.[21] Therefore**,** the interest of justice warranted that the Applicant be provided with free legal assistance and this should not have been contingent on the availability of financial resources. Also, whether he made such a request or not is immaterial.

72. The Court therefore finds that the Respondent State has violated Article 7(1)(c) of the Charter by failing to provide free legal assistance.

B. The alleged violation of the rights to non-discrimination, equality before the law and equal protection of the law

73. The Applicant contends that the violations of his right to a fair trial also demonstrate that he was not treated equally before the law and that the national courts discriminated against him.

74. The Respondent State refutes these allegations and prays the Court to put the Applicant to strict proof.

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19 *Alex Thomas v Tanzania* (Merits), para 114; *Kijiji Isiaga v Tanzania* (Merits), para 72, Application 003/2015. Judgment of 28 September 2018 (Merits), *Kennedy Owino Onyachi and Another v United Republic of Tanzania*, para 104.

20 *Alex Thomas Ibid*, para 123, see also *Mohammed Abubakari* v *Tanzania* (Merits), paras 138-139.

21 The Judge has no discretion in the imposition of the sentence

75. Article 2 of the Charter states that "every individual shall be entitled to the enjoyment of 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".

76. Article 3 of the Charter guarantees that "every individual shall be equal before the law" and "…entitled to equal protection of the law".

77. The Court observes that the Applicant has not demonstrated or substantiated how he has been discriminated against, treated differently or unequally, resulting to discrimination or unequal treatment based on the criteria laid out under Article 2 and 3 of the Charter.

78. In view of the foregoing, the Court finds that the Applicant's rights to non-discrimination, his right to equality before the law and to equal protection of law as guaranteed under Articles 2 and 3 of the Charter were not violated by the Respondent State.

VIII. Reparations

79. Article 27(1) of the Protocol stipulates 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".

80. The Court recalls its earlier judgments and restates its position that, "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".[22]

81. The Court also restates that the purpose of reparation being *restitutio in integrum* it "…must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been

22 *Mohamed Abubakari v Tanzania* (Merits), para 242(ix), Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda* (hereinafter referred to as *Ingabire Umuhoza v Rwanda* (Reparations)"), para 19.

committed."[23]

82. Measures that a State must take to remedy a violation of human rights must include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.[24]

83. The Court further reiterates that the general rule with regard to material prejudice is that there must be a causal link between the established violation and the prejudice suffered by the Applicant and the onus is on the Applicant to provide evidence to justify his prayers.[25] With regard to moral prejudice, the requirement of proof is not as rigid rather the Court can make assumptions in the Applicant's favour.

A. Pecuniary Reparations

84. The Applicant in his submissions on reparations avers that prior to his incarceration, he was a sugarcane farmer and his income from the sale of the sugarcane was one (1) million Tanzanian Shillings (TZS) per month.

85. According to the Applicant he had a family before his incarceration but now does not know where they are. He further alleges that he had a house which was destroyed by unknown people. Lastly, the Applicant alleges that he was framed and his conviction was for the sole purpose of destroying him and therefore prays the Court to grant him a total amount of one (1) billion Tanzanian shillings (TZS) as "compensation".

86. The Respondent State prays the Court to reject the Applicant's prayer for reparations.

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23 Application 007/2013. Judgment of 4 July 2019 (Reparations), *Mohamed Abubakari v United Republic of Tanzania*, para 21, Application 005/2013. Judgment of 4 July 2019 (Reparations), *Alex Thomas v United Republic of Tanzania*, para 12, Application 006/2013. Judgment of 4 July 2019 (Reparations), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 16.

24 *Ingabire Umuhoza v Rwanda* (Reparations), para 20.

25 Application 011/2011. Ruling of 13 June 2014 (Reparations), *Reverend Christopher R Mtikila v United Republic of Tanzania (hereinafter referred to as "Reverend Christopher R Mtikila v Tanzania* (Reparations)*"*), para 40, Application 004/2013. Judgment of 3 June 2016 (Reparations), *Lohé Issa Konaté v Burkina Faso (hereinafter referred to as "Lohé Issa Konaté v Burkina Faso* (Reparations)*"*), para 15.

87. The Court notes its finding that the Respondent State violated the Applicant's right to a fair trial due to the fact that he was not afforded free legal assistance in the course of his trials in the domestic courts. In this regard, the Court recalls its position on State responsibility that: "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation".[26]

88. The Court further notes that the Applicant did not adduce any evidence to support his claim for reparations. He merely enumerates them. The Court thus rejects the prayer for one (1) billion Tanzanian shillings as it was not substantiated.

89. The Court however, notes that the violation it established caused moral prejudice to the Applicant and therefore, in exercising its discretion, awards an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[27]

B. Non-pecuniary Reparation

90. The Applicant prays the Court to order his release from prison.

91. The Respondent State prays the Court to hold that the Applicant was lawfully sentenced and should thus dismiss his prayer for release.

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92. Regarding the order for release prayed by the Applicant, the Court has stated that it can be ordered only in specific and compelling circumstances.[28] This would be the case "if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings

26 See *Reverend Christopher Mtikila v Tanzania* (Reparations), para 27 and Application 010/2015. Judgment of 11 May 2018 (Merits), *Amiri Ramadhani v United Republic of Tanzania*, para 83. *Kenedy Ivan* v *Tanzania* para 89. *Lucien Ikili Rashidi v Tanzania* (Merits and Reparations), para 116.

27 See Application 020/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v United Republic of Tanzania*, para 107, Application 027/2015. Judgment of 21 September 2018 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania*, para 85.

28 *Alex Thomas v Tanzania* (Merits) *op cit*, para 157, *Diocles William v Tanzania* (Merits), para 101; *Minani Evarist v Tanzania* (Merits and Reparations), para 82*,* Application 006/2016. Judgment of 07 December 2018 (Merits), *Mgosi Mwita v United Republic of Tanzania*, para 84; *Kijiji Isiaga v Tanzania* (Merits), para 96*; Armand Guehi v Tanzania* (Merits and Reparations), para 164.

that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice".[29]

93. In the instant case, the Applicant has not demonstrated specific or compelling circumstances nor has the Court found the same to warrant an order for release. The Court further notes that the Applicant's right to free legal assistance was violated but this did not affect the outcome of his trial.[30]

94. In view of the foregoing, the Court dismisses the Applicant's prayer for release.

IX. Costs

95. Pursuant to Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs".

96. In their submissions, both parties prayed the Court to order the other to pay costs.

97. In the instant case, the Court rules that each party shall bear its own costs.

X. Operative part

98. For these reasons:

The Court

Unanimously,

On Jurisdiction:

i. *Dismisses* the objection on the material jurisdiction of the Court.

ii. *Declares* that it has jurisdiction.

On Admissibility:

iii. *Dismisses* the objections to the admissibility of the Application

iv. *Declares* it admissible.

On Merits:

v. *Holds* that the Respondent State has not violated Article 7(1) of the Charter in evaluating the identification evidence and the defence of alibi;

vi. *Holds* that the Respondent State has not violated the rights of the Applicant in Articles 2 and 3 of the Charter by convicting and sentencing him;

29 *Minani Evarist v Tanzania* (Merits and Reparations), para 82.

30 *Ibid,* para 84.

vii. *Holds* that the Respondent State has violated the Applicant's right to a fair trial by failing to provide him with free legal aid, contrary to Article 7(1)(c) of the Charter and Article14 (3)(d) of the ICCPR.

On Reparations:

On Pecuniary Reparations

viii. Grants the Applicant's prayer for reparation for moral prejudice suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300, 000);

ix. *Orders* the Respondent State to pay the sum awarded above free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interests on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully paid.

On Non-Pecuniary Reparations

x. *Dismisses* the Applicant's prayer for the Court to order his release from prison.

On Implementation and Reporting

xi. *Orders* the Respondent State to submit a report on the status of implementation of this decision set forth herein within six (6) months from the date of notification of this Judgment.

On Costs

xii. *Orders* that each party shall bear its own costs.

Hassani v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 518

Application 029/2015, *Yusuph Hassani v United Republic of Tanzania*

Order, 6 September 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused in terms of Articles 22 : ABOUD

The Court ordered the re-opening of pleadings after having received the Respondent State's pleadings on reparations after pleadings had been closed.

Procedure (re-opening of pleadings)

I. The Parties

1. The Applicant, Mr Yusuph Hassani is a national of the United Republic of Tanzania. He was convicted of the offence of armed robbery on 31 August 2006 and sentenced to thirty (30) years imprisonment which he is currently serving.

2. The Respondent State, the United Republic of Tanzania, became a party to, the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol 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 February 2006. On 29 March 2010, the Respondent State deposited the Declaration as prescribed under Article 34(6) of the Protocol.

II. Subject matter of the Application

3. The Application, filed on 23 November 2015, is based on the Respondent State's alleged violations of the Applicant's right be heard in the course of his trial and appeals on the charge of armed robbery.

III. Summary of procedure before the Court

4. The Parties exchanged pleadings on the merits. The Applicant filed his submissions on reparations. On 8 June 2019 the Parties

were notified of the close of pleadings.

5. On 26 August 2019 the Respondent State filed a request for extension of time to file its response to the Applicant's submissions on reparations on the basis that the delay in responding was due to the reforms in the State Law Offices. The Respondent State filed the response to the submissions together with the request for extension of time.

6. On 29 August 2019 the Respondent State's request was sent to the Applicant for his observations to be submitted within fifteen (15) days.

IV. The Court

i. Orders that, in the interests of justice, proceedings in Application 029/2015 *Yusuph Hassani v United Republic of Tanzania* be and are hereby re-opened

ii. The Respondent State's Response to the Applicant's submissions on reparations is deemed as duly filed and to be served on the Applicant.

iii. The Applicant's Reply, if any, should be filed within thirty (30) days of receipt of the Respondent State's Response.

Benyoma v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 520

Application 001/2016, *Chrizostom Benyoma v United Republic of Tanzania*

Order, 26 September 2019

Judges: ORÉ, KIOKO, BEN ACHOURMATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

Pleadings re-opened in the interests of justice at the request of the Respondent State.

Procedure (re-opening of pleadings, IV)

I. The Parties

1. The Applicant, Mr Chrizostom Benyoma is a national of the United Republic of Tanzania. He was convicted of the offence of rape on 28 February 2002 and sentenced to life imprisonment which he is currently serving.

2. The Respondent State, the United Republic of Tanzania, became a party to, the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol 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 February 2006. On 29 March 2010, the Respondent State deposited the Declaration as prescribed under Article 34(6) of the Protocol.

II. Subject matter of the Application

3. The Application, filed on 4 January 2016, is based on the Respondent State's alleged violations of the Applicant's right to equal protection before the law under Article 3(2) of the Charter and the right to be heard in the course of his trial and appeals on the charge of rape.

III. Summary of procedure before the Court

4. The Parties exchanged pleadings on the merits. The Applicant

filed his submissions on reparations. On 12 June 2019 the Parties were notified of the close of pleadings.

5. On 26 August 2019 the Respondent State filed a request for extension of time to file its Response to the Applicant's submissions on reparations on the basis that the delay in responding was due to the reforms in the State Law Offices. The Respondent State filed the response to the submissions together with the request for extension of time.

IV. The Court

i. Orders that, in the interests of justice, proceedings in Application 001/2016 *Chrizostom Benyoma v United Republic of Tanzania* be and are hereby re-opened

ii. The Respondent State's Response to the Applicant's submissions on reparations is deemed as duly filed and to be served on the Applicant.

iii. The Applicant's Reply, if any, should be filed within thirty (30) days of receipt of the Respondent State's Response.

Ndajigimana v Tanzania (provisional measures) (2019) 3 AfCLR 522

Application 024/2019, *Jean de Dieu Ndajigimana v United Republic of Tanzania*

Order, 26 September 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant was detained at the United Nations Detention Facility in the Respondent State on suspicion of having interfered with the administration of justice in relation to the appeal process of a Rwandan national before the International Residual Mechanism for Criminal Tribunals in Arusha. The Applicant claimed that his detention was arbitrary and requested the Court to issue provisional measures for his release onto the territory of the Respondent State. The Court dismissed the request for provisional measures as it had become moot following the Applicant's release to Rwanda.

Jurisdiction (*prima facie*, 13-17)

Provisional measures (moot, 25)

I. The Parties

1. The Applicant, Jean de Dieu Ndajigimana, is a national of Rwanda who at the time of filing the Application was detained at the United Nations Detention Facility (hereinafter referred to as "the UNDF") in Arusha, United Republic of Tanzania. His detention follows from his indictment for knowingly and wilfully interfering with the administration of justice with intent to secure Augustin Ngirabatware's acquittal during the appeal proceedings before the International Residual Mechanism for Criminal Tribunals (hereinafter referred to as "the IRMCT").

2. The Respondent State is the United Republic of Tanzania which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. This request for provisional measures is included in the Application filed on 15 July 2019 wherein the Applicant alleges that the Respondent State prevented his release onto its territory, thereby creating a situation of arbitrary detention and a violation of his right to liberty as guaranteed under various instruments. In his Application, the Applicant states that the Respondent State's action is contrary to the Charter, the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"), the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR"), the Agreement between the United Nations and the United Republic of Tanzania, concerning the Headquarters of the IRMCT (hereinafter referred to as "the Host Agreement"), the Treaty for the Establishment of the East African Community (hereinafter referred to as "the EAC Treaty") and the Protocol on the Establishment of the East African Community Common Market (hereinafter referred to as "the EAC Protocol").

4. It emerges from the Application that following the conviction by the IRMCT of a Rwandan national named Augustin Ngirabatware for genocide, the Applicant and four other individuals (hereinafter referred to as "the co-accused") were suspected of interfering with witnesses allegedly with intent to secure Augustin Ngirabatware's acquittal during the appeal proceedings before the IRMCT. On 24 August 2018, a judge of the IRMCT confirmed an indictment against the Applicant and his co-accused charging them with contempt of the IRMCT and/or incitement to commit contempt.

5. As a result of the indictment, on 3 September 2018, the Applicant and his co-accused were arrested in the Republic of Rwanda and on 11 September 2018, were transferred to the UNDF in Arusha.

6. On 25 February 2019, the Applicant filed a confidential motion before a judge of the IRMCT for his provisional release to Rwanda or, alternatively, to an IRMCT safe house in the Respondent State pending determination of the charges against him.

7. On 29 March 2019, a judge of the IRMCT granted the Applicant's request for provisional release to Rwanda but dismissed the alternative request for release to an IRMCT safe house within the Respondent State.[1] The IRMCT Office of the Prosecutor (hereinafter referred to as "the IRMCT-OTP") appealed against this decision in so far as it relates to the provisional release in the Republic of Rwanda but did not oppose the Applicant's request for release within the Respondent State. The IRMCT-OTP, nevertheless, solicited submissions from the Government of the Respondent State about the feasibility of the Applicant's release

onto its territory.

8. By a *Note Verbale* dated 9 April 2019, the Government of the Respondent State, in response to a communication by one of the Applicant's co-accused, Anselme Nzabonimpa, who had also been granted provisional release, communicated its refusal to permit provisional release onto its territory and conveyed the position that accused persons under the custody of the IRMCT should remain within the UNDF. As a result of this communication, a judge of the IRMCT held that he neither has the authority to provisionally release Anselme Nzabonimpa into an IRMCT safe house in the Respondent State nor to modify his conditions of detention.[2]

9. The Applicant believes that these findings have equal application to him since his case is similar to Anselme Nzabonimpa and he has been jointly charged with him.

III. Summary of the procedure before the Court

10. The Application was filed on 15 July 2019 and served on the Respondent State by a notice dated 24 July 2019, which notice also requested the Respondent State to submit its observations on the Applicant's request for provisional measures within fifteen (15) days of receipt thereof.

11. On 14 August 2019, the Respondent State filed its observations in response to the Applicant's request for provisional measures and also its List of Representatives which was transmitted to the Applicant through a notice dated 16 August 2019.

IV. Jurisdiction

12. In dealing with any Application filed before it, the Court must conduct a preliminary examination of its jurisdiction pursuant to Articles 3 and 5 of the Protocol.

13. However, in considering whether or not to order provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply that it has *prima facie*

2 IRMCT, *The Prosecutor v Maximilien Turinabo, Anselme Nzabonimpa, Jean de Dieu Ndagijimana, Marie Rose Fatuma, Dick Prudence Munyeshuli*, Decision on Anselme Nzabonimpa's Second Motion for Provisional Release, 19 June 2019.

jurisdiction over the case.[3]

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. The Court notes that the Respondent State is party to both the Charter and the Protocol and that it has also accepted the competence of the Court to receive cases from individuals and Non-Governmental Organisations under Article 34(6) of the Protocol, read together with Article 5(3) thereof.

16. The Court also notes that the violations alleged by the Applicant relate to rights protected in instruments to which the Respondent State is a party. Specifically, the Applicant has pleaded the following: Articles 1, 6, 7(1)(b) and 12(1) of the Charter; Articles 9(1), 9(3), 12(1) and 14(2) of the ICCPR;[4] Article 38(2) of the Host Agreement; Articles 2 and 104 of the EAC Treaty;[5] and Articles 7(1), (2)(a)-(c) and 9 of the EAC Protocol.[6] The Applicant has also pleaded a violation of Articles 3, 9, 11(1) and 13(1) of the UDHR.[7] The Court, therefore, concludes that it has jurisdiction *ratione materiae* to hear the Application.

17. In the light of the above, the Court is satisfied that it has *prima facie* jurisdiction to examine the Application.

V. Provisional measures requested

18. In his application for provisional measures, the Applicant prays the Court to:

"a. Provide him with an award of provisional measures pursuant to Article 27(2) of the Protocol and Rule 51(1) of its Rules ordering his

3 See, Application 001/2018, Order of 11 February 2019 (Order for Provisional Measures) *Tembo Hussein v United Republic of Tanzania*, para 8; *African Commission on Human and Peoples' Rights v Libya (Provisional Measures)* (2011) 1 AfCLR 17 para 15; and *African Commission on Human and Peoples' Rights v Kenya (Provisional Measures)* (2013) 1 AfCLR 193 para 16.

4 Tanzania acceded to the ICCPR on 11 June 1976.

5 Tanzania ratified the EAC Treaty on 7 July 2000.

6 Tanzania ratified the EAC Protocol on 1 July 2010.

7 In Application 012/2015. Judgment of 23 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* para 76 the Court held that while the UDHR is not a human rights instrument subject to ratification by States, it has been recognised as forming part of customary law and for this reason the Court is enjoined to interpret and apply it. The Court is also mindful that Article 9(f) of the Respondent State's Constitution refers to the UDHR as a directive principle of national policy.

liberty. The measures requested by the Applicant include:

i. An order to the State of Tanzania to consent to and facilitate the provisional release of the Applicant on its territory;

ii. An order to the State of Tanzania to allow the Applicant free movement in Tanzania subject to complying with any conditions that may be imposed by the IRMCT for the duration of provisional release; and

iii. To give a report, within 15 days of receipt of the order, of the measures it has taken to ensure the Applicant is provisionally released in its territory."

19. The Applicant argues for the order of provisional measures "due to the imminent threat of irreparable harm … were he to remain in pre-trial detention." According to the Applicant, "the implementation of urgent provisional measures will prevent [his] continued arbitrary detention caused by Tanzania's failure to respect its international and regional obligations."

20. The Respondent State opposes the request for provisional measures on three grounds. First, it submits that the IRMCT took over the role of the International Criminal Tribunal for Rwanda (hereinafter referred to as "the ICTR") with jurisdiction to deal with crimes committed during the Rwandan Genocide of 1994. According to the Respondent State, the jurisdiction of the IRMCT is distinct from that of the Court and, specifically, "Article 3(1) of the Protocol to the Court, does not confer it with International Humanitarian Jurisdiction over crimes committed in the period between January 1994 and 31 December 1994 on Rwandese Citizens under the ICTR in which the Court can grant the release of the Applicant as one of the provisional measures available in that mechanism." Second, the Respondent State also submits that the Applicant's case is still pending before the IRMCT and, therefore, is not admissible before the Court under Article 56(7) of the Charter. Third, the Respondent State submits that the Applicant has failed to demonstrate that he is faced with a situation of extreme gravity and urgency, where he could possibly suffer irreparable harm. In support of this submission, the Respondent State has highlighted the fact that the Applicant is lawfully detained by the IRMCT.

21. The Court acknowledges that under Article 27(2) of the Protocol and Rule 51(1) of the Rules, it is empowered to order provisional measures "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."

22. 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.[8]Nevertheless, the Court must always be satisfied of the existence of a situation of extreme gravity and urgency before it orders provisional measures.

23. The Court observes that in his request for provisional measures, the Applicant has requested the Court to order the Respondent State to consent to and facilitate his provisional release onto its territory and to allow his free movement subject to his compliance with the conditions for his provisional release.

24. The Court notes that on 4 September 2019, the Registry wrote the Applicant's legal representative inquiring as to the current status of the Applicant. Specifically, the Applicant's legal representative was asked to indicate whether the Applicant was still in detention at the UNDF, or in an IRMCT safe house or if he had been released to the Republic of Rwanda. In response to this inquiry, the Applicant's legal representative informed the Court that the Applicant was released to the Republic of Rwanda on 21 August 2019 and that he arrived at his home on 22 August 2019. Attached to the communication by the Applicant's legal representative was a copy of a decision by a single judge of the IRMCT which confirms that the Applicant has indeed been released after the Government of the Republic of Rwanda agreed to implement the order for provisional release.

25. In respect of the Applicant's request for provisional measures, the Court notes that the Applicant prayed the Court for an order directing his release from the UNDF to the Respondent State. The Court also notes that before the IRMCT, the Applicant had prayed for provisional release to either the Respondent State or the Republic of Rwanda. Given that the Applicant, as confirmed by his own legal representative, has already been released to the Republic of Rwanda, the Court finds that his prayer for release has become moot. With regard to the Applicant's prayer for an order to allow him to move freely within the Respondent State, the Court notes that this prayer is also reflected in the reliefs that the Applicant is seeking in his substantive action before the Court. In order not to risk prejudging the substantive issues that the Applicant has raised, the Court refrains from commenting on this prayer at this juncture. In light of the preceding, the Applicant's prayer that the Respondent state must report on measures taken to implement the provisional measures within fifteen (15) days does not arise. The Court accordingly dismisses this application

8 *Armand Guehi v United Republic of Tanzania (Provisional Measures)* (2016) 1 AfCLR 587 para 17.

for provisional measures.

26. Having dismissed the application for provisional measures, the Court does not consider it necessary to pronounce itself on the requirements in Article 27(2) of the Protocol or any of the conditions in Article 56 of the Charter so far as they relate to this matter.

27. 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.

VI. Operative Part

28. For these reasons,

The Court,

Unanimously,

i. *Dismisses* the Applicant's request for provisional measures.

Charles and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 529

Applications 028/2019, 030/2019, 031/2019, 033/2019, *Fea Charles and others v Republic of Côte d'Ivoire*

Order (joinder of cases), 26 September 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Recused under Article 22: ORE

The Applicants, who had all been sentenced to 20 years imprisonment for robbery, were represented by the same lawyer and made the same claims in relation to violations of the Charter. The Court decided to join the cases.

Procedure (joinder of cases, 9)

Separate opinion: BENSAOULA

Procedure (joinder of cases, 12)

1. Considering the Application dated 28 June 2019, received at the Registry of the Court on 22 July 2019, from Mr Fea Charles (hereinafter referred to as "the Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as "Respondent State");

2. Considering the Application dated 28 June 2019, received at the Registry of the Court on 22 July 2019, from Mr Baddienne Moussa (hereinafter referred to as "the Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as "Respondent State");

3. Considering the Application dated 28 June 2019, received at the Registry of the Court on 22 July 2019, from Mr Gueu Louapou Christian (hereinafter referred to as "the Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as "Respondent State");

4. Considering the Application dated 28 June 2019, received at the Registry of the Court on 22 July 2019, from Mr Albert Damas (hereinafter referred to as "the Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as "Respondent State");

5. Considering that Rule 54 of the Rules provides: "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 interrelated cases and pleadings where it deems it appropriate, both in fact and in law.";

6. Considering that, while the Applicants are different as above stated, they are represented by the same lawyer, and the Applications are filed against the same Respondent State, which is the Republic of Côte d'Ivoire;

7. Considering that the facts supporting the Applications are similar as they originate from the trial of the Applicants and their sentencing to twenty (20) years imprisonment by the Tribunal of First Instance of Yopougon for robbery, without being represented by a lawyer; and that the said judgment was upheld by the Court of Appeal of Abidjan;

8. Considering that in all four (4) Applications, the Applicants allege that the Respondent State has violated their rights to a fair trial, equality and dignity as protected in the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights and that the reliefs sought are similar in nature;

9. Considering therefore that the facts supporting the Applications, the alleged violations and prayers made are similar, and given the identity of the Respondent State; and

10. As a consequence of the above, a joinder of cases and pleadings in relation to these Applications is appropriate in fact and in law, and for the good administration of justice pursuant to Rule 54 of the Rules.

I. Operative Part

11. For these reasons,

The Court

Unanimously,

Orders:

i. The joinder of cases and proceedings in the Applications filed by the Applicants against the Respondent State;

ii. That henceforth the Applications be referred to as "Consolidated Applications 028/2019, 030/2019, 031/2019 and 033/2019 – *Fea Charles and others v Republic of Côte d'Ivoire*";

iii. That consequent upon the joinder, this Order and the pleadings relating to the above referred Matters shall be served on all the Parties.

***

Separate opinion: BENSAOULA

1. I share the opinion of the majority of the judges as to the jurisdiction of the Court and the joinder of cases and proceedings with regard to the applications filed by the Applicants against the Respondent State.

2. On the other hand, I think that the manner in which the Court dealt with the joinder runs counter to the notion of joinder.

3. Article 54 of the Rules of Court provides that "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 interrelated cases and pleadings where it deems it appropriate, both in fact and in law".

4. The Rules do not state anything about what is meant by joinder of cases or the procedure to be followed for such joinder.

5. It appears from the case file that the four Applicants referred to above seized the Court with separate applications dated 28 June 2019, entered on the cause list under different numbers.

6. That the four Applicants were sentenced by the same court of first instance to 20 years' imprisonment, a sentence upheld on appeal.

7. That the Applicants all have claims against the Republic of Côte d'Ivoire.

8. That, in fact and in law, the joinder is in order in the instant case.

9. However, although the Court, in its Judgment (cover page and facts) made the distinction between each application regarding the merits and, by citing the number of each application, it reproduced the four numbers in the operative part, insisting on the fact "That henceforth the Applications be referred to as "Consolidated Applications 039/2019, 040/2019 and 041/2019 - Fea Charles and others v Republic of Côte d'Ivoire".

In my opinion, this is wrong for the following reasons:

10. According to *Dictionnaire de droit international*, the joinder decision is a "decision by which a court brings together two or more proceedings that were instituted separately."

11. In other words, the purpose of the joinder leads us to conclude that in the event of joinder of proceedings, the joined case becomes part of the principal case since the cases are related. Since the ancillary case becomes part of the principal to make it a single procedure, the number of the principal is retained and becomes

the first case in the operative part. The reasoning may include the different case numbers depending on the role, for purposes of explaining their existence and the reasons for the joinder. In the operative part, however, it is no longer necessary to list out the various case numbers. The number of the first case alone is valid.

12. The purpose of joining related cases is to make them one case and to treat all claims as though they were only one. As such, after being a set of applications bearing different numbers, the case becomes one bearing a single number in accordance with the principle of the good administration of justice.

13. Unfortunately, in view of the silence of the internal instruments and regulations of the various international human rights jurisdictions, although these courts render joinder decisions in their operative parts, they remain silent regarding the various details relating thereto.

14. In the light of the foregoing, I think the operative part of the joinder order is erroneous for two reasons:

To state that "That henceforth the Applications be referred to as "Consolidated Applications…" does not make sense for the simple reason that the joinder decision is an order which does not rule on the merit and which will be attached to the procedure for a good administration of justice. This will in no way not change the title of the case which will remain "the applicants v. Republic of Côte d'Ivoire".

15. And that listing out all the numbers of all the joined applications "Nos. 028/2019, 030/2019, 031/2019 and 033/2019 - *Fea Charles and others v Republic of Côte d'Ivoire*" is meaningless after the joinder decision because for a good administration of justice, the Court has decided that for the merits of the case it will rule by a single judgment and that it is against this good administration of justice to join cases and maintain all the numbers of the joined cases.

16. It would have been more logical to name the case after the number of the first application to which the others were joined, and the parties referred to as applicants against the Respondent State.

Kalilou and Ibrahim v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 533

Applications 036/2019, 037/2019, *Konate Kalilou and Doumbia Ibrahim v Republic of Côte d'Ivoire*

Order, 26 September 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Recused under Article 22: ORE

The Applicants had all been sentenced to twenty (20) years imprisonment for robbery, were represented by the same lawyer and made the same claims in relation to violations of the Charter. The Court decided to join the cases.

Procedure (joinder of cases, 7)

Separate opinion: BENSAOULA

Procedure (joinder of cases, 13)

1. Considering the Application dated 10 June 2019, received at the Registry of the Court on 22 July 2019, from Mr Konate Kalilou (hereinafter referred to as "the Applicant") filed against the Republic of Côte d'Ivoire(hereinafter referred to as "the Respondent State");

2. Considering the Application dated 10 June 2019, received at the Registry of the Court on 22 July 2019, from Mr Doumbia Ibrahim filed against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State ");

3. Considering that Rule 54 of the Rules of Procedure of the Court, provides:"The Court may, at any stage of the pleadings, of its own volition or in response to an application of one of the parties, order the joinder of interrelated cases and pleadings where it deems it appropriate in fact and in law";

4. Considering that, while the Applicants are different as above stated, they are represented by the same lawyer, and the Applications are filed against the same Respondent State, which is the Republic of Côte d'Ivoire;

5. Considering that the facts supporting the Applications are similar, since they originate from the trial of Applicants and their sentences, without representation by counsel, to twenty (20) years imprisonment by the Divo Court of First Instance for ganging up to commit armed robbery with violence; this 20-year sentence was

reduced after appeal to a fixed term of imprisonment of fifteen (15) years by judgment No 141 of 21 March2013 of the Second Criminal Chamber of the Daloa Court of Appeal, the judge of the second instance confirming judgment No. 342 of 14 June 2012;

6. Considering that in both proceedings, the Applicants allege that the Respondent State has violated their rights to a fair trial, equality and dignity, the right of access to justice and the right to an effective remedy as set out in the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rightsand that the reliefs sought are similar in nature;

7. Considering therefore that the facts in support of the Applications, the alleged violations and the measures requested are similar and taking into account the identity of the Respondent State; and

8. Mindful of all of the above, a joinder of cases and pleadings in relation to these Applications is appropriate in fact and in law, and for the good administration of justice pursuant to Rule 54 of the Rules.

I. Operative Part

9. For these reasons,

The Court,

Unanimously,

Orders:

i. the joinder of cases and proceedings in the Applications filed by the Applicants against the Respondent State;

ii. that henceforth the Applications be referred to as "Consolidated Applications 036/2019 and 037/2019 – *Konate Kalilou and Another v Republic of Côte d'Ivoire*;

iii. that consequent upon the joinder, this Order and the pleadings relating to the above referred Matters shall be served on all the Parties.

***

Separate opinion: BENSAOULA

1. I share the opinion of the majority of the Judges as to the jurisdiction of the Court and the joinder of cases and proceedings

with regard to the applications filed by the Applicants against the Respondent State.

2. On the other hand, I think that the manner in which the Court dealt with the joinder runs counter to the notion of joinder.

3. Article 54 of the Rules of Court provides that "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 interrelated cases and pleadings where it deems it appropriate, both in fact and in law".

4. The Rules do not state anything about what is meant by joinder of cases or the procedure to be followed for such joinder.

5. It appears from the case file that the four [sic] Applicants referred to above seized the Court with separate applications dated 28 June 2019, entered on the cause list under different numbers.

6. That the four Applicants were sentenced by the same court of first instance to 20 years' imprisonment, a sentence upheld on appeal.

7. That the Applicants all have claims against the Republic of Côte d'Ivoire.

8. That, in fact and in law, the joinder is in order in the instant case.

9. However, although the Court, in its Judgment (cover page and facts) made the distinction between each application regarding the merits and, by citing the number of each application, it reproduced the four numbers in the operative part, insisting on the fact "That henceforth the Applications be referred to as "Consolidated Applications 036/2019 and 037/2019 - Konate Kalilou and Doumbia Ibrahim v. Republic of Côte d'Ivoire".

In my opinion, this is wrong for the following reasons:

10. According to Dictionnaire de droit international, the joinder decision is a "decision by which a court brings together two or more proceedings that were instituted separately."

11. In other words, the purpose of the joinder leads us to conclude that in the event of joinder of proceedings, the joined case becomes part of the principal case since the cases are related. Since the ancillary case becomes part of the principal to make it a single procedure, the number of the principal is retained and becomes the first case in the operative part. The reasoning may include the different case numbers depending on the role, for purposes of explaining their existence and the reasons for the joinder. In the operative part, however, it is no longer necessary to list out the various case numbers. The number of the first case alone is valid.

12. The purpose of joining related cases is to make them one case and to treat all claims as though they were only one. As such, after being a set of applications bearing different numbers, the case becomes one bearing a single number in accordance with

the principle of the good administration of justice.

13. Unfortunately, in view of the silence of the internal instruments and regulations of the various international human rights jurisdictions, although these courts render joinder decisions in their operative parts, they remain silent regarding the various details relating thereto.

In the light of the foregoing, I think the operative part of the joinder order is erroneous for two reasons:

To state that "That henceforth the Applications be referred to as "Consolidated Applications…" does not make sense for the simple reason that the joinder decision is an order which does not rule on the merit and which will be attached to the procedure for a good administration of justice. This will in no way not change the title of the case which will remain "the applicants v. Republic of Côte d'Ivoire".

And that listing out all the numbers of all the joined applications "Nos. 036/2019 and 037/2019 - Konate Kalilou and Doumbia Ibrahim v. Republic of Côte d'Ivoire " is meaningless after the joinder decision because for a good administration of justice, the Court has decided that for the merits of the case it will rule by a single judgment and that it is against this good administration of justice to join cases and maintain all the numbers of the joined cases.

It would have been more logical to name the case after the number of the first application to which the others were joined, and the parties referred to as applicants against the Respondent State.

Kakobeka v Tanzania (re-opening of pleadings) (2019) 3 AfCLR 537

Application 029/2016, *Kachukura Nshekanabo Kakobeka v United Republic of Tanzania*

Order, 8 October 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

Procedure (re-opening of pleadings)

I. The Parties

1. The Applicant, Mr Kachukura Nshekanabo Kakobeka is a national of the United Republic of Tanzania. He was convicted of the offence of murder on 26 June 2015 and sentenced to death by the Tanzania High Court.

2. The Respondent State, the United Republic of Tanzania, became a party to, the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol 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 February 2006. On 29 March 2010, the Respondent State deposited the Declaration as prescribed under Article 34(6) of the Protocol.

II. Subject matter of the Application

3. The Application, filed on 8 June 2016, is based on the Respondent State's alleged violations of Articles 3(1) and (2) of the Charter on the right to equality before the law and equal protection of the law in the course of the Applicant's trial and appeal on the charge of murder.

III. Summary of the procedure before the Court

4. The Parties exchanged pleadings on the merits. The Applicant filed his submissions on reparations. On 12 June 2019 the Parties

were notified of the close of pleadings.

5. On 16 August 2019 the Respondent State filed a request for extension of time to file its response to the Applicant's submissions on reparations on the basis that information was being sought from various stakeholders involved in the matter. The Respondent State filed the response to the submissions together with the request for extension of time.

6. On 23 August 2019 the Respondent State's request was sent to the Applicant for his observations to be submitted within fifteen (15) days. The Applicant did not submit any observations in this regard.

7. The Court

i. *orders* that, in the interests of justice, proceedings in *Application 029/2016 Kachukura Nshekanabo Kakobeka v United Republic of Tanzania* be and are hereby re-opened;

ii. the Respondent State's Response to the Applicant's submissions on reparations is deemed as duly filed and to be served on the Applicant;

iii. the Applicant's Reply, if any, should be filed within thirty (30) days of receipt of the Respondent State's Response.

Rajabu and others v Tanzania (merits and reparations) (2019) 3 AfCLR 539

Application 007/2015, *Ally Rajabu and others v United Republic of Tanzania*

Judgment, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The five Applicants were convicted of murder and sentenced to death. The Applicants contended that the review before the Court of Appeal took unreasonably long, that there were grave variances between witness testimony, that the preliminary hearing and trial were conducted before different judges, that the mandatory death penalty violated the right to life and that hanging as a method of execution is cruel, inhuman and degrading. The Court held that there had not been any procedural deficiencies in the domestic proceedings but that the mandatory imposition of the death penalty and hanging, as a method of execution, violates the Charter. The Court ordered a rehearing in relation to the sentencing of the Applicants.

Jurisdiction (material jurisdiction, 29)

Admissibility (exhaustion of local remedies, constitutional petition, 43; submission within reasonable time, 52, 53)

Fair trial (trial within reasonable time, 72; right to be heard, consistency of witness testimony, 80-84)

Life (death penalty, fair trial standards, 104, 107, mandatory imposition, 108-114)

Cruel, inhuman or degrading treatment (hanging as method of execution, 119)

Reparations (material damages, 141, 142; costs, 144; mora damages, 150; rehearing of sentencing, 158; non-repetition, law reform, 163; publication of Judgment, 167)

Separate Opinion: BENSAOULA

Admissibility (exhaustion of local remedies, 19, 20; submission within reasonable time, 24)

Separate Opinion: TCHIKAYA

Life (death penalty, 1, 27, 28)

I. The Parties

1. Messrs Ally Rajabu, Angaja Kazeni alias Oria, Geofrey Stanley alias Babu, Emmanuel Michael alias Atuu and Julius Petro

(hereinafter referred to as the "Applicants") are nationals of Tanzania who were sentenced to death for murder and are currently detained at the Arusha Central Prison.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the "Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986 and the Protocol on 10 February 2006. It also deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

A. Facts of the matter

3. On 12 September 2006, the Applicants were arrested at Mruma Village, Mwanga District in Tanzania, for killing one Jamal Abdallah. On 24 June 2008, they were charged with murder at the High Court of Tanzania in Arusha.

4. On 25 November 2011, the High Court, found the Applicants guilty and sentenced them to death in Criminal Case 30 of 2008. Dissatisfied with that decision, they appealed to the Court of Appeal of Tanzania in Criminal Appeal 43 of 2012. On 22 March 2013, their appeal was dismissed.

5. On 24 March 2013, the Applicants then filed an application for review, which was still pending before the Court of Appeal when they filed the present Application on 26 March 2015.

B. Alleged violations

6. The Applicants allege:

i. that they were tried for murder contrary to Section 196 of the Penal Code in Criminal case No 30 of 2008;

ii. that they were convicted for murder without having their case fully heard;

iii. that they did not receive the reply to their motion for review to the Court of Appeal despite the fact that the law allows them to apply for review;

iv. that they were convicted in breach of the Constitution and Rules of the Tanzanian courts;

v. that they were sentenced on the basis of manifest error in the decision of the trial court;

vi. that they were convicted on the basis of contradictory evidence;

vii. that they were not tried in accordance with the principle of fair trial with respect to their application for review of the judgment of the Court of Appeal in respect of the fact that the same judge conducted both the preliminary hearing and trial, and the fact that a single police officer conducted the preliminary investigations;

viii. that they were convicted without their defence of *alibi* being carefully reviewed beyond reasonable doubt, infringing Section 110 of the Evidence Act;

ix. that they were convicted in violation of Section 235(1) of the Criminal Procedure Act; and

x. that they were sentenced to death in violation of their rights to life and dignity under the Charter.

III. Summary of the procedure before the Court

7. The Application was received at the Registry of the Court on 26 March 2015.

8. As instructed by the Court, the Registry requested for the services of Advocate William Kivuyo Ernest who agreed to represent the Applicants on a *pro bono* basis.

9. On 18 March 2016, the Court issued an Order for Provisional Measures in the matter enjoining the Respondent State not to implement the death sentence until this Application is concluded on the merits.

10. The Parties filed their pleadings within the time stipulated.

11. Pleadings were closed with respect to the merits of the case on 24 January 2018.

12. On 6 July 2018, the Registry informed the Parties that, during its 49th Ordinary Session, the Court had decided that it would henceforth rule on requests for reparations in the same judgment dealing with the merits of an application. The Parties were therefore requested to file their submissions on reparations.

13. The Applicants filed their submissions on reparations within the time stipulated. The Respondent State did not respond to the said submissions.

IV. Prayers of the Parties

14. The Applicants pray the Court to:

i. Critically evaluate the evidence adduced in the High Court especially on their identification in order to reach a just decision as the trial judge grossly erred in law and fact by convicting them based on unreliable evidence provided by contradicting witnesses.

ii. Declare that the failure to convict the Applicants before sentencing them violates Section 235(1) of the Criminal Procedure Act and that, therefore, they need to be given the benefit of the doubt.

iii. Declare that the Court of Appeal has failed to review its decision despite the powers conferred upon it by the Constitution of the Respondent State and the Rules of the Court of Appeal.

iv. Declare that the decision to convict them was based on manifest error on the face of the record.

v. Declare that the fact that a single police officer conducted the preliminary investigation violated their right to a fair trial.

vi. Declare that the fact that a single judge conducted both the preliminary hearing and the trial violated their right to be heard by a competent tribunal.

vii. Declare that by not amending Section 197 of its Penal Code, which provides for the mandatory imposition of the death penalty in cases of murder, the Respondent State violated the right to life and does not uphold the obligation to give effect to that right as guaranteed in the Charter.

viii. Declare that the mandatory imposition of the death penalty by the High Court and its confirmation by the Court of Appeal violates their rights to life and to dignity.

ix. Quash the conviction, set aside the sentence and release them.

x. Grant them other forms of reparation for material damage, including legal costs, and moral damage to themselves and their family members as follows:

a. United States Dollars Four Hundred Twenty Three Thousand Two Hundred and Eighty Nine (US$ 423,289) to Ally RAJABU;

b. United States Dollars Three Hundred Sixty Eight Thousand One Hundred and Seventy Two (US$ 368,172) to Angaja KAZENI alias Oria;

c. United States Dollars Three Hundred and Seventy Five Thousand (US$ 375,000) to STANLEY alias Babu;

d. United States Dollars Four Hundred Forty Six Thousand Two Hundred and Seventy Eight (US$ 446,278) to Emmanuel MICHAEL alias Atuu; and

e. United States Dollars Four Hundred Thirty Nine Thousand Four Hundred and Ninety Three (US$ 439,493) to Julius PETRO.

15. The Respondent State prays the Court to make the following orders with respect to jurisdiction and admissibility:

"i. That, the Honorable African Court on Human and Peoples' Rights lacks jurisdiction to adjudicate over this Application and it should be dismissed.

ii. That, the Honorable Court has no jurisdiction to issue an Order to compel the Respondent State to release the Applicants from prison.

iii. That, the Honorable Court has no jurisdiction to sit as an appellate Court over matters concluded and finalized by the Court of Appeal of the Respondent State.

iv. That, the Honorable Court has no jurisdiction to sit as a Court of First Instance over matters never raised within the Municipal Courts in the Respondent State.

v. That, the application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of the Court and be declared inadmissible and duly dismissed.

vi. That, the application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of the Court and be declared inadmissible and duly dismissed.

vii. That the Application be dismissed."

16. The Respondent State further prays the Court to make 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 Applicants' right to be heard.

ii. that, the government of the United Republic of Tanzania has not violated the Applicants' Right to fair trial.

iii. that, the government of the United Republic of Tanzania has not delayed the Applicants' Application to Review the Court of Appeal decision in Criminal Appeal No. 43 of 2012.

iv. that the Applicants were properly identified at the scene of the crime.

v. that there was no contravention of Section 235(1) of the Criminal Procedure Act (Cap 20, RE 2002).

vi. that the improper rendering of sentence by the High Court was cured by the Court of Appeal of Tanzania in Criminal Appeal No. 43 of 2009.

vii. that the conviction and sentence imposed on the Applicants by the High Court during trial and upheld by the Court of Appeal of Tanzania was lawful and proper.

viii. that the Application be dismissed for lack of merit."

17. With respect to reparations, the Respondent State prays the Court to dismiss the Applicants' prayers in their entirety for lack of justification or supporting documents.

V. Jurisdiction

18. Pursuant to Article 3 of the Protocol:

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 instruments ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the

Court shall decide.

19. In accordance with Rule 39(1) of the Rules, "[T]he Court shall conduct preliminary examination of its jurisdiction …".

20. The Respondent State raises two objections relating, first, to whether the Court will be exercising appellate jurisdiction and, second, to whether the Court will be acting as a court of first instance with respect to the violations alleged by the Applicants.

A. Objection to material jurisdiction

i. Objection on the ground that this Court is being requested to assume appellate jurisdiction

21. The Respondent State avers that this Court lacks jurisdiction to examine the present Application, as the latter is asking the Court to assume appellate jurisdiction with respect to the prayers for the conviction to be quashed, the sentence to be set aside, and the Applicants to be released. The Respondent State submits that doing so will require the Court to re-evaluate the evidence and the decision of the Court of Appeal, which is the supreme court of the land.

22. The Respondent State further submits that the request for the Court to assume appellate jurisdiction is specifically with respect to the fact that one of the Applicants, Geofrey Stanley, seeks to appeal in this Court against his conviction and sentencing. Finally, the Respondent State contends that the allegations referred to were sufficiently dealt with by the Court of Appeal in Criminal Appeal 43 of 2012. The Respondent State cites, in support of its contentions, the judgment of this Court in the case of *Ernest Francis Mtingwi v Republic of Malawi*.

23. The Applicants, in their Reply, submit that this Application is within the jurisdiction of the Court since the violations are constituted and the rights invoked are protected under the Charter. With respect to the Respondent State's submission that this Court is being called to sit as an appellate court, the Applicants submit that they are only seeking to assess the Respondent State's actions, which they believe are wrong. The Applicants aver that the Respondent State's reliance on the *Mtingwi* case is not relevant and that this Court should rather, in the present case, apply its case-law in the

matter of *Alex Thomas v United Republic of Tanzania*.

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24. The Court reiterates its established case-law that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[1] Having said that, the Court considers that, while it does not have appellate jurisdiction to uphold or reverse judgments of domestic courts, it retains the power to assess the propriety of related proceedings with international human rights standards.[2]

25. In the instant case, the Respondent State's objection is that the Application is asking this Court to evaluate the evidence and review the sentencing of the Applicants. The Court considers that the Applicants are requesting for an assessment of whether the manner in which domestic courts handled their case was in line with international standards, which the Respondent State is obligated to protect.[3] As such, the issues raised fall within the jurisdiction of this Court.

26. The Respondent State's objection in this regard is consequently dismissed.

ii. Objection on the ground that this Court is acting as a court of first instance

27. The Respondent State submits that the Applicants are also calling for the Court to sit as a court of first instance with respect

1 See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* (*Armand Guehi v Tanzania* (Merits and Reparations), para 33. See also *Alex Thomas v United Republic of Tanzania* (Merits) (2015) 1 AfCLR 465 (*Alex Thomas v Tanzania* (Merits)), paras 60-65; and Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (*Nguza Viking and Johnson Nguza vTanzania* (Merits), para 35.

2 See *Armand Guehi v Tanzania* (Merits and Reparations), para 33. See also Application 024/2015. Judgment of 7 December /2018 (Merits), *Werema Wangoko Werema and Another v United Republic of Tanzania* (*Werema Wangoko Werema and Another v Tanzania* (Merits)), para 29; *Alex Thomas v Tanzania* (Merits), para 130; *Mohamed Abubakari v United Republic of Tanzania* (Merits) (2016) 1 AfCLR 599 (*Mohamed Abubakari v Tanzania* (Merits)), para 26; and, *Ernest Francis Mtingwi v Republic of Malawi* (Admissibility) (2013) 1 AfCLR 190 (*Ernest Francis Mtingwi v Malawi*), para 14.

3 See *Werema Wangoko Werema and Another v Tanzania*, para 31.

to the allegation that they were denied the right to be heard. The Respondent State contends that this allegation was never raised before domestic courts and is being considered for the first time before this Court.

28. The Applicants, in their Response, contend that they are asking the Court to assess the conduct of the Respondent State through its organs in the light of international instruments to which it committed itself.

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29. The Court considers that as it has consistently held in its earlier judgments, it has material jurisdiction by virtue of Article 3 of the Protocol so long as the Application alleges violations of rights protected in the Charter or any other relevant international instrument to which the Respondent State is a party.[4]

30. The Court notes that in the present case, the Applicants allege the violation of their rights to life, to dignity, and to a fair trial protected under Articles 4, 5 and 7(1) of the Charter respectively.

31. As a consequence of the foregoing, the Court dismisses the Respondent State's objection on this point and finds that is has material jurisdiction to consider the present Application.

B. Other aspects of jurisdiction

32. The Court notes that the other aspects of its jurisdiction are not contested by the Respondent State and there is no submission on record to suggest that the Court does not have jurisdiction in these respects. The Court therefore holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and deposited the Declaration required under Article 34(6) thereof which enabled the Applicants to access the Court in terms of Article 5(3) of the Protocol;

ii. It has temporal jurisdiction on the basis that while the alleged violations began before the deposit of the Declaration required under Article 34(6), they continued thereafter; and

4 See *Armand Guehi v Tanzania* (Merits and Reparations), para 31. See also *Werema Wangoko Werema and Another v Tanzania* (Merits), para 29. See also *Nguza Viking and Johnson Nguza v Tanzania* (Merits), para 36; and *Peter Joseph Chacha v United Republic of Tanzania* (Merits) (2014) 1 AfCLR 398, para 114.

iii. It has territorial jurisdiction as the facts of the matter occurred in the territory of the Respondent State.

33. In light of the above, the Court holds that it has jurisdiction to examine the present Application.

VI. Admissibility

34. Pursuant 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." In accordance with Rule 39(1) of the 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 the Rules".

35. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, 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 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;
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."

36. While some of the above conditions are not in contention between the Parties, the Respondent State raises two objections to the admissibility of the Application.

A. Conditions of admissibility in contention between the Parties

37. The Respondent State raises two objections relating first, to the requirement of exhaustion of local remedies and second, to the

filing of the Application within a reasonable time.

i. Objection based on failure to exhaust local remedies

38. The Respondent State avers that, with respect to the allegation that they were denied the right to be heard, the Applicants could have raised the issue as a ground of appeal before the Court of Appeal in Criminal Appeal No. 43 of 2012. The Respondent State further contends that the Applicants also had the remedy of filing a constitutional petition at the High Court pursuant to the Basic Rights and Duties Enforcement Act [Cap 3 RE 2002].

39. The Applicants, in their Reply, do not make any submission with respect to the Respondent State's objection that they should have raised the issue of their right to be heard as a ground of appeal. However, they submit that filing a constitutional petition in the High Court is not an applicable remedy in the present case. In support of this contention, they refer to the judgment of this Court in the case of *Alex Thomas v United Republic of Tanzania* and aver that they were not obliged to exhaust that remedy.

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40. The Court recalls that, as it has held in its case-law, remedies to be exhausted within the meaning of Article 56(5) are ordinary remedies. The Applicant is therefore not requested to exhaust extraordinary remedies.[5]

41. With respect to the opportunity of filing an appeal, the Court considers that by its established case-law, the right whose violation is being alleged by the Applicants is part of a bundle of rights and guarantees, which formed the basis of the proceedings before the High Court and the Court of Appeal. Consequently, where the domestic judicial authorities had an opportunity to address the alleged procedural violation, even though the Applicants did not raise them explicitly, local remedies must be considered to have

5 See Application 006/2016. Judgment of 7 December 2018 (Merits), ***Mgosi Mwita Makungu v United Republic of Tanzania***, para 46. See also ***Alex Thomas v Tanzania***, (Merits), paras 60-62; ***Mohamed Abubakari v Tanzania*** (Merits), paras 66-70; and Application 011/2015. Judgment of 28 September 2017 (Merits), ***Christopher Jonas v United Republic of Tanzania*** (***Christopher Jonas v Tanzania*** (Merits)), para 44.

been exhausted.[6]

42. This Court notes that in the instant case, given that the Court of Appeal was in a position to examine several claims of the Applicants with respect to the manner in which the High Court conducted the proceedings, there was ample opportunity to assess whether the right to be heard was upheld by the lower court.

43. Regarding the constitutional petition, the Court finds that as earlier recalled in the present Judgment, this remedy as it applies in the judicial system of the Respondent State is an extraordinary remedy, which an Applicant is not required to exhaust prior to filing a case before this Court.

44. The Court notes that after being sentenced to death by the High Court on 25 November 2011, the Applicants appealed against the decision before the Court of Appeal, which on 22 March 2013, dismissed their appeal. The Court further notes that the Court of Appeal is the highest court of the Respondent State.

45. As a consequence of the foregoing, the Court finds that local remedies have been exhausted and therefore dismisses the Respondent State's objection in relation to non-exhaustion of local remedies.

ii. Objection based on failure to file the Application within a reasonable time

46. The Respondent State submits that the period of two (2) years that it took the Applicants to file the present Application after the Court of Appeal delivered its judgment on 22 March 2013 is not a reasonable time within the meaning of Article 56(5) of the Charter. Referring to the decision of the African Commission on Human and Peoples' Rights (African Commission) in the case of *Michael Majuru v Zimbabwe*, the Respondent State prays the Court to declare the matter inadmissible since the Applicants took more than six (6) months to file the Application after exhausting local remedies.

47. The Applicants on their part contend that the Application must be considered to have been filed within a reasonable time given the circumstances of the matter and their situation as they are lay,

6 See *Armand Guehi v Tanzania* (Merits and Reparations), para 50. See also *Alex Thomas v Tanzania* (Merits), paras 60-65; and Application 003/2015. Judgment of 28 September 2017 (Merits), *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (*Kennedy Owino Onyachi and Another v Tanzania* (Merits)), para 54.

indigent and incarcerated persons. They further pray the Court to take into consideration the time that they spent in trying to have their request for review heard before the Court of Appeal where the case was adjourned several times.

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48. The Court recalls that, pursuant to Article 56(6) of the Charter, applications before it are to be filed within a reasonable time after exhausting local remedies *"… 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"*.

49. The Court notes that, in the present case, the time within which the Application should be filed is to be computed from the date of the judgment of the Court of Appeal, which is 22 March 2013. Since the Application was filed before this Court on 26 March 2015, the period to be considered is of two (2) years and four (4) days.

50. It is established case-law of this Court that the requirement for an Application to be filed within a reasonable time after exhaustion of local remedies is to be assessed on a case-by-case basis.[7] Among other relevant factors, the Court has based its evaluation on the situation of the Applicants, including whether they had tried to exhaust further remedies, or if they were lay, indigent or incarcerated persons.[8]

51. The Court notes that, as earlier recalled in the facts, after filing on 24 March 2013 an application for review of the decision of the Court of Appeal dated 22 March 2013, the Applicants were expected to observe some time while awaiting the outcome of the review procedure before filing the present Application on 26 March 2015. Given that the application for review is a legal entitlement, the Applicants cannot be penalised for exercising that remedy,

7 See ***Armand Guehi v Tanzania*** (Merits and Reparations), paras 55-57. See also ***Werema Wangoko Werema and Another v Tanzania*** (Merits), paras 45-50; ***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 (***Norbert Zongo and others v Burkina Faso*** (Preliminary Objections)), para 121; and ***Alex Thomas v Tanzania*** (Merits), paras 73-74.

8 See ***Christopher Jonas v Tanzania*** (Merits), para 53. See also ***Mohamed Abubakari v Tanzania*** (Merits), para 92; and ***Alex Thomas v Tanzania*** (Merits), para 74.

and the time spent in pursing it should be taken into account while assessing reasonableness under Article 56(6) of the Charter.[9]

52. The Court further notes that, in the case at hand, the Applicants are lay, indigent and incarcerated. As a result of their situation, the Court granted the Applicants assistance by a lawyer through its legal aid scheme.

53. In the circumstances, it cannot be said that the time within which the Application was filed is unreasonable.

54. The Court therefore dismisses the Respondent State's objection based on failure to file the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

55. The Court notes that there is no contention as to whether the Application meets the conditions set out in Article 56 subsections (1),(2),(3),(4), and (7) of the Charter and Rule 40 sub-rules (1), (2), (3), (4) and (7) of the Rules regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language used in the Application, the nature of evidence adduced, and the previous settlement of the case, respectively.

56. Noting further that the pleadings do not indicate otherwise, the Court holds that the Application meets the requirements set out under those provisions.

57. As a consequence of the foregoing, the Court finds that the Application fulfils all the admissibility requirements set out under Article 56 of the Charter as restated in Rule 40 of the Rules and accordingly declares it admissible.

VII. Merits

58. The Applicants allege that the Respondent State violated their rights to a fair trial, to life and to dignity.

A. Alleged violation of the right to a fair trial

59. Alleged violations of the right to a fair trial relate to the rights (i)

9 See *Armand Guehi v Tanzania* (Merits and Reparations), paras 36-38; Application 016/2017. Judgment of 28 March 2019 (Jurisdiction and Admissibility), *Dexter Eddie Johnson v Republic of Ghana*. See also Application 038/2016. Judgment of 22 March 2018 (Jurisdiction and Admissibility), *Jean Claude Roger Gombert v Republic of Côte d'Ivoire*, para 37; and *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 65.

to be tried within a reasonable time, (ii) to be heard and (iii) to be tried by a competent court.

i. The right to be tried within a reasonable time

60. The Applicants allege that the delay incurred by the Court of Appeal in completing the review process constitutes a violation of their right to be tried within a reasonable time. The Applicants, in their Reply, submit that although the process was eventually completed, the review was not determined until the filing of the present Application on 26 March 2015 whereas the notice of review was filed on 24 March 2013.

61. The Applicants assert that, at the time of filing their Application before this Court, the hearing of the review application had not been scheduled. They further submit that the delay in completing the review process is not reasonable by any of the factors recognised by the Court, which are the complexity of the case, actions of the concerned parties and the conduct of the judicial authorities.

62. The Respondent State denies the allegation that the review case was delayed and avers that the Applicants have failed to make a copy of their review application available.

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63. Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

64. The Court recalls that, as it has held in its earlier judgments, various factors come to bear while assessing whether justice was dispensed within a reasonable time in the meaning of Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and that of the judicial authorities who bear a duty of due diligence in circumstances where severe penalties applies.[10]

65. The Court notes that, in the instant matter, the review process was completed on 24 May 2017 as evidenced by a copy on file

10 See *Armand Guehi v Tanzania* (Merits and Reparations), paras 122-124. See also *Alex Thomas v Tanzania* (Merits), para 104; *Wilfred Onyango Nganyi and others*

of a judgment of the Court of Appeal dismissing the Applicants' application. Given that the said application was filed on 24 March 2013, the review application had been pending for two (2) years at the time the Applicants brought their case to this Court. However, it took four (4) years and two (2) months in all for the process to be completed. The Court is therefore of the view that the latter period of time is to be considered when assessing reasonableness given that the allegation had remained unaddressed throughout that span of time.

66. The main issue for determination is therefore whether the period of four (4) years and two (2) months that it took the Court of Appeal to complete the review process is reasonable by the above stated factors.

67. With respect to the complexity of the case, this Court notes that, in the instant matter, the delay challenged by the Applicants was that of a review process. The said process was therefore subsequent to their trial and sentencing by the High Court, and an assessment of the outcome of that trial by the Court of Appeal. As such, the latter Court was asked to only examine afresh issues that had been determined twice in fact and in law. Furthermore, as it emerges from the judgment on review, the Court of Appeal dismissed the application for lack of merit after concluding that it did not meet the required criteria warranting the review. In light of these considerations, it appears that such a review process would not have required over four (4) years for completion. This Court is consequently of the opinion that the complexity of the matter is not of a determinant relevance in assessing reasonableness in the present case.

68. Conversely, the Court notes that the main issue in contention between the Parties is that of who bears responsibility for the delay. It is therefore proper to undertake a joint examination of the two others factors in relation to that issue, which are the behaviour of the Applicant and that of the Respondent State's judicial authorities especially in light of their duty of due diligence.

69. The Court notes in this regard, that the Applicants aver that the delay is attributable to the Respondent State as "no substantial step was taken to determine the review". They state in support of that contention that, after the notice was lodged on 24 March

v United Republic of Tanzania (Merits) (2016) 1 AfCLR 507 (***Wilfred Onyango Nganyi v Tanzania*** (Merits)), para 155; and ***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 (***Norbert Zongo and others v Burkina Faso*** (Merits)), paras 92-97, 152.

2013, the case was adjourned *sine die* on 23 May 2016 and no hearing had been scheduled more than two (2) years after the notice was filed and until the present Application was submitted. The Respondent State on its part alleges that the Applicants are responsible for the delay as they failed to avail a copy of their application for review to allow the case to be heard.

70. In light of information on file, this Court notes that the Applicants do not prove intent on the part of the Court of Appeal to delay the review process. They do not either give evidence of a timely filing of the copy of the application for review. This Court is of the opinion that intent or fault cannot be established merely by stating that substantial steps were not taken without providing evidence to that effect. Similarly, it would be improper to consider that, as the Applicants aver, adjourning a matter *sine die* automatically resulted in undue delay without assessing the reason for such decision. In any event, the review judgment was rendered on 24 May 2017, which is one year after the matter was adjourned.

71. Conversely, the Court notes that the application for review could not have been heard without a copy thereof being filed by the Applicants. From the above determination, they actually did so upon or after filing the present Application, which caused a delay of over two (2) years out of the four (4) years of the review process.

72. In the circumstances, this Court is of the opinion that, upon submission of the required document, it actually took the Court of Appeal about two (2) years to complete the review process. Such time cannot be said to be unreasonable in a case involving murder punishable by death, where the Court of Appeal required sufficient time for an ultimate ruling, and bearing in mind scheduling constraints in the domestic judicial system.

73. As a consequence of the foregoing, the Court finds that the Respondent State has not violated Article 7(1)(d) of the Charter.

ii. The right to be heard

74. The Applicants allege that there were grave variances between the testimony of two of the prosecution witnesses, which are PW1 and PW2. In support of that contention, they stress the fact that one of the witnesses testified that he "[sic] managed to get out of the house through a window (the only one without mash wire) and he stepped out a pace closer to the bandits next to the armed bandit and flashed on a torch to identify them." The Applicants submit that "[sic] this would have been an exceptional act of brevity, had it happened". The Applicants do not however state

how the evidence by the two witnesses were at variance.

75. The Applicants also aver that the manner in which the preliminary investigations were conducted allowed the police officer in charge to make up the case. They submit in that respect that, the said police officer handled the whole process alone from arresting the accused persons to recording the witnesses' statements; sending the deceased's body to hospital; drawing the sketch map of the crime; and witnessing the post-mortem examination report.

76. The Respondent State on its part avers that the Applicants' allegation is misconceived and should be dismissed. It submits that, in dealing with whether the decision to find the Applicants guilty was based on manifest error, the most important consideration should be their identification evidence. In that respect, the Respondent State contends that the Court of Appeal undertook a fresh assessment of the identification of the Applicants including conditions of the identification, credibility of the witnesses, number of witnesses required by law to prove a fact and whether identification by a single witness can lead to a conviction. It is the Respondent State's submission that no violation occurred since the Court of Appeal held that the conditions for identification were favourable and the Applicants were sufficiently identified at the scene of the crime.

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77. Article 7(1) of the Charter provides:

"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."

78. The Court observes that Article 7(1) of the Charter guarantees the protection of fair trial related rights, which extend beyond those expressly stated in the four abovementioned sub-provisions. That provision can therefore be read in light of Article 14 of the

International Covenant on Civil and Political Rights, which deals with the said rights in a greater detail.[11] The relevant excerpts of Article 14 reads: "(…) In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (…)".[12] It flows from a joint reading of the provisions of the two instruments that an accused person has the right to a fair hearing.

79. The Court considers that, as it has consistently held, upholding the right to have one's cause heard requires that, in criminal matters, conviction and sentencing should be based on a case proven beyond reasonable doubt.[13] The Court is of the opinion that such a standard applies with greater relevance, generally where a severe penalty is being imposed,[14] and particularly in instances involving the death sentence as is the case in the present Application.

80. The Court further observes that, while it does not substitute national courts when it comes to assessing the particularities of evidence used in domestic proceedings, it retains the power to examine whether the manner in which such evidence was considered is compatible with international human rights norms.[15] One critical concern in that respect is to ensure that the evaluation of facts and evidence by domestic courts was not manifestly arbitrary or did not result in a miscarriage of justice to the detriment of the Applicant.[16]

81. In the present case, the Court observes that the main question arising, regarding both issues of visual identification and the role of

11 See *Armand Guehi v Tanzania* (Merits and Reparations), para 73. See also *Wilfred Onyango Nganyi and others v Tanzania* (Merits), paras 33-36; and Application 012/2015, Judgment of 22 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* (*Anudo Ochieng Anudo v Tanzania* (Merits)), paras 100 and 106.

12 The Respondent State became a Party to the ICCPR on 11 July 1976.

13 *Armand Guehi v Tanzania* (Merits and Reparations), paras 105-111. See also *Werema Wangoko Werema and Another v Tanzania* (Merits), paras 59-64; and *Mohamed Abubakari v Tanzania* (Merits), paras 174, 193 and 194.

14 See Application 053/2016. Judgment of 28 March 2019 (Merits), *Oscar Josiah v United Republic of Tanzania* (*Oscar Josiah v Tanzania* (Merits)), para 51. See also Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania (Kijiji Isiaga v Tanzania* (Merits)), paras 78 and 79.

15 See *Mohamed Abubakari v Tanzania* (Merits), paras 26 and 173. See also *Kijiji Isiaga v Tanzania* (Merits), para 61; *Oscar Josiah v Tanzania* (Merits), paras 52-63; *Armand Guehi v Tanzania* (Merits and Reparations), paras 105-111; *Werema Wangoko Werema and Another v Tanzania* (Merits), paras 59-64.

16 See *Mohamed Abubakari v Tanzania* (Merits), paras 26 and 173; and *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 38.

a single police officer raised by the Applicants, is whether domestic courts arrived at the conviction, and subsequent sentencing, in line with standards set out earlier. In that respect, this Court notes that those issues were examined by the High Court in its judgment dated 25 November 2011 as reflected at pages 34 to 37 of the said decision. The High Court examined all evidence tendered and found them credible. Besides, the Applicants do not refer to any provision in Tanzanian domestic law proscribing the involvement of a single police officer in criminal investigations.

82. This Court also notes that, in its judgment dated 22 March 2013, the Court of Appeal stated the issue of identification of the Applicants as being the main one for determination in the appeal case.[17] The Court of Appeal then proceeded with a substantial examination based on the facts and applicable Tanzanian case-law on identification, including reliance on a single witness, and use of visual identification.[18] The Court arrived at the conclusion that the prosecution had established to the standards required under the law that the Applicants killed the deceased, and that the trial court could not be faulted in its finding.[19]

83. This Court finally observes that the Court of Appeal examined the issue whether the conviction was supported by the evidence on record. In that respect, while acknowledging that the trial judge did not enter a conviction before passing sentence, the Court of Appeal used its discretion under Section 388 of the Criminal Procedure Act to correct the irregularities being complained of. Notably, the Court of Appeal did so after determining that the error in question did not occasion a miscarriage of justice.[20]

84. In light of the foregoing, this Court considers that the manner in which the domestic courts, particularly the Court of Appeal, assessed the evidence does not reveal any apparent or manifest error, which occasioned a miscarriage of the justice to the Applicants.

85. As a consequence of the above, the Court holds that the Respondent State has not violated the Applicants' right to a fair hearing protected under Article 7(1) of the Charter.

iii. Right to be heard by a competent court

17 See *Ally Rajabu and others v The Republic*, Criminal Appeal 43 of 2012, Judgment of the Court of Appeal, 22 March 2013, page 5.

18 *Ibid*, pages 9-15.

19 *Ibid*, page 15.

20 *Ibid*, pages 15-17.

86. The Applicants allege that their right to be heard by a competent court was violated due to the fact that the preliminary hearing and trial were conducted before two different judges. It is their contention that doing so was not in compliance with the provisions of Section 192(5) of the Criminal Procedure Act, which requires that the same judge should preside over both the preliminary hearing and trial.

87. The Respondent State on its part avers that the Applicants failed to properly interpret the provisions of the law. The Respondent State submits that the law does not make it compulsory that both phases of the proceedings should be presided over by the same judge. It further submits that the Applicants should have raised the issue during the trial.

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88. Article 7(1)(a) of the Charter provides that everyone shall have "the right to an appeal to competent national organs of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force".

89. The Court notes that the provisions of Section 192(5) of the Tanzanian Criminal Procedure Act whose interpretation is in contention between the Parties reads: "Wherever possible, the accused person shall be tried immediately after the preliminary hearing and if the case is to be adjourned due to the absence of witnesses or any other cause, nothing in this section shall be construed as requiring the same judge or magistrate who held the preliminary hearing under this section to preside at the trial."

90. The Court is of the view that it is self-evident, from Section 192 of the Tanzanian Criminal Procedure Act, that the law does not make it compulsory for the preliminary hearing and trial to be presided over by the same judge. The Applicants' submission in this respect does not hold and is therefore dismissed.

91. As a consequence of the above, the Court finds that the Respondent State has not violated the Applicants' right protected under Article 7(1)(a) of the Charter in respect of the hearing of the preliminary and trial proceedings.

B. Alleged violation of the right to life

92. The Applicants allege that the Respondent State has violated Articles 1 and 4 of the Charter by failing to amend Section 197 of the Penal Code of Tanzania, which provides for the mandatory imposition of the death penalty in cases of murder. It is their contention that, had the Respondent State adopted legislative and other measures stated under Article 1 of the Charter, the High Court and Court of Appeal would have presumably used varied reasoning and arrived at different decisions. In relation to the same allegation, the Applicants also aver that the Respondent State failed to recognise that "human rights are inviolable, and that human beings, the applicants herein inclusive, are entitled to respect for their life and the integrity of person as guaranteed under Article 4 of the African Charter …".

93. The Respondent State did not respond to the Applicants' submission on this point. However, in its response to the Order for Provisional Measures issued in the present Application, the Respondent State avers that the provision for the death sentence in its laws is in line with international norms, which do not prohibit the imposition of the sentence.

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94. The Court notes that the Applicants allege a joint violation of Articles 1 and 4 of the Charter. However, as reflected in its case-law, this Court examines an alleged violation of Article 1 of the Charter only subsequent to finding violation of a substantive provision of the Charter.[21] The Court will, therefore, first examine the alleged violation of Article 4 of the Charter.

95. Article 4 of the Charter provides that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

96. Before examining the Applicants' claim in the present case, the Court notes that, raised in the context of Article 4 of the

21 See *Armand Guehi v Tanzania* (Merits and Reparations), paras 149-150. See also *Kennedy Owino Onyachi and Another v Tanzania* (Merits), paras 158-159; and *Alex Thomas v Tanzania* (Merits), para 135.

Charter, the question of the death penalty pertains to whether its imposition constitutes an arbitrary deprivation of the right to life. That is because Article 4 of the Charter does not mention the death penalty. The Court observes that, despite a global trend towards the abolition of the death penalty, including the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, the prohibition of the death sentence in international law is still not absolute.

97. Coming to the case at hand, the Court notes that the Applicants allege that the Respondent State has violated the right to life guaranteed in Article 4 of the Charter by not amending the provision of its law on the mandatory imposition of the death penalty. The said provision is Section 197 of the Penal Code of Tanzania, which stipulates that: "A person convicted of murder shall be sentenced to death". The question is therefore whether the legal provision for the mandatory imposition of the death sentence in cases of murder violates the right to life guaranteed in Article 4 of the Charter.

98. The Court notes that, while Article 4 of the Charter provides for the inviolability of life, it contemplates deprivation thereof as long as such is not done arbitrarily. By implication, the death sentence is permissible as an exception to the right to life under Article 4 as long as it is not imposed arbitrarily.

99. There is extensive and well-established international human rights case-law on the criteria to apply in assessing arbitrariness of a sentence of death. The Court notes in this respect that, in the case of *Interights and others (on behalf of Bosch) v Botswana*, the African Commission on Human and Peoples' Rights has emphasised two requirements and these are, firstly, that the sentence must be provided for by law, and, secondly, that it must be imposed by a competent court.[22]

100. The Court further notes that in the matter of *International Pen and others (Ken Saro-Wiwa) v Nigeria*, the Commission took the view that "given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of the sentences renders the resulting deprivation of life arbitrary and in violation of Article 4".[23] With greater emphasis on due process, the Commission has also concluded in the case of *Forum of*

22 See *Bosch v Botswana*, 42-48.

23 See *International Pen and others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), paras 1-10, 103.

Conscience v Sierra Leone that "… any violation of the right to life without due process amounts to arbitrary deprivation of life".[24]

101. The Court notes that the factor relating to due process is affirmed by all main international human rights bodies which apply instruments that include, like Article 4 of the Charter, an exception to the right to life that permits the imposition of the death penalty.[25]

102. With particular respect to the mandatory imposition of the death sentence for murder, it is worth referring to the matter of *Eversley Thompson v St. Vincent & the Grenadines* where the United Nations Human Rights Committee was called to determine the Applicant's claim that the mandatory nature of the imposition of the death sentence and its application in the circumstances constituted an arbitrary deprivation of life. The Committee concluded that "such a system of mandatory capital punishment deprives the complainant of the most fundamental right, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case". The Committee consequently found that the "carrying out the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of Article 6, paragraph 1, of the Covenant" because it did not take into account the particular situation of the offender.[26]

103. The Court also notes that, in interpreting Article 4 of the American Convention on Human Rights, the Inter-American Court of Human Rights has put greater emphasis on due process by holding in the matter of *Hilaire, Constantine & Benjamin v Trinidad & Tobago* that some limitations apply to states that have not abolished the death penalty. These limitations include that "… application is subject to certain procedural requirements" to be strictly observed", and "… certain considerations involving the person of the defendant …".[27] The Court concluded that by "automatically and generically mandating the death penalty for murder, the Respondent's law

24 *Forum of Conscience v Sierra Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), para 20.

25 See Article 6(1) of the ICCPR: "1. Every human being has the inherent right to life. This right shall be protected by law. *No one shall be arbitrarily deprived of his life*."; and Article 4(1) of the American Convention on Human Rights: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. *No one shall be arbitrarily deprived of his life*."

26 See Article 6(2), ICCPR; and *Eversley Thompson v St. Vincent & the Grenadines*, Comm 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000), para 8.2.

27 *Hilaire, Constantine & Benjamin v Trinidad & Tobago*, Inter-Am Ct HR (Ser C) No 94 (June 21, 2002), para 100. See also *Boyce & Joseph v Barbados*, Inter-Am Ct HR (Ser C) No 169 (Nov 20, 2007).

is arbitrary in terms of Article 4(1) of the American Convention.[28]

104. From the foregoing, this Court finds that whether deprivation of life is arbitrary within the meaning of Article 4 of the Charter should be assessed against three criteria: first, it must be provided by law; second, it must be imposed by a competent court; and, third, it must abide by due process.

105. The Court notes, with respect to the requirement of legality, that the mandatory imposition of the death sentence is provided for in Section 197 of the Penal Code of Tanzania. The requirement that the penalty should be provided for in the law is thus met.

106. Regarding the requirement of the death sentence being passed by a competent court following due process, the Court notes that the Applicants' contention is not that the courts of the Respondent State lacked jurisdiction to conduct the processes that led to the imposition of the death penalty. Their submission is rather that the High Court could impose the death sentence only because it was provided for in the law as mandatory without any discretion of the judicial officer.

107. As to whether the mandatory imposition of the death penalty meets the requirement of due process, this Court observes that, by a joint reading of Articles 1, 7(1), and 26 of the Charter,[29] due process does not only encompass procedural rights, strictly speaking, such as the rights to have one's cause heard, to appeal, and to defence but also extends to the sentencing process. It is for this reason that any penalty must be imposed by a tribunal that is independent in the sense that it retains full discretion in determining matters of fact and law.

108. In the present case, this Court, firstly, notes that the mandatory imposition of the death penalty as provided for in Section 197 of the Respondent State's Penal Code is framed as follows: "A person convicted of murder shall be sentenced to death". The automatic and mechanical application of this provision in cases of murder is confirmed by the wording of the sentence as given by the High Court as follows: "There is only one sentence which this Court is authorised by law to give, which is to suffer death by hanging. It is accordingly ordered that all the accused persons are

28 *Hilaire, Constantine & Benjamin v Trinidad & Tobago*, para 103.

29 Article 26 of the Charter reads: "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."

sentenced to suffer death by hanging".[30]

109. The Court observes in light of the above that, the mandatory imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania does not permit a convicted person to present mitigating evidence and therefore applies to all convicts without regard to the circumstances in which the offence was committed. Secondly, in all cases of murder, the trial court is left with no other option but to impose the death sentence. The court is thus deprived of the discretion, which must inhere in every independent tribunal to consider both the facts and the applicability of the law, especially how proportionality should apply between the facts and the penalty to be imposed. In the same vein, the trial court lacks discretion to take into account specific and crucial circumstances such as the participation of each individual offender in the crime.

110. The Court notes that the foregoing reasoning on the arbitrariness of the mandatory imposition of the death penalty and breach of fair trial rights, is affirmed by relevant international case-law.[31] Furthermore, domestic courts in some African countries have adopted the same interpretation in finding the mandatory imposition of the death penalty arbitrary and in violation of due process.[32]

111. As a consequence of the above, the Court finds that the mandatory imposition of the death penalty as provided for in Section 197 of the Respondent State's Penal Code and applied by the High Court in the case of the Applicants does not uphold fairness and due process as guaranteed under Article 7(1) of the Charter.

112. Having found so, the Court notes that the clause impliedly allowing for the imposition of the death penalty in Article 4 of the Charter is only appended to a provision for the right to life, which is qualified as "inviolable", and aiming at guaranteeing the "integrity", and therefore the sanctity, of human life. The Court further notes that Article 4 of the Charter does not include any mention of the death penalty. The Court therefore considers that such strongly worded

30 See *The Republic v Ally Rajabu and others*, Criminal Sessions Case No. 30 of 2008, Judgment of the High Court, 25 November 2011, Operative Part.

31 See *Thompson, op cit; Kennedy v Trinidad & Tobago*, Comm 845/1999, UN Doc CCPR/C/67/D/845/1999 (2002) (UNHRC), para 7.3; *Chan v Guyana*, Comm 913/2000, UN Doc CCPR/C/85/D/913/2000 (2006) (UNHRC), para 6.5; *Baptiste, op cit; McKenzie, op cit, Hilaire and others, op cit; Boyce and Another, op cit*.

32 See *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR; *Mutiso v Republic*, Crim App 17 of 2008 at 8, 24, 35 (30 July 2010) (Kenya Ct App); *Kafantayeni v Attorney General,* [2007] MWHC 1 (Malawi High Ct) and *Attorney General v Kigula* (SC), [2009] UGSC 6 at 37-45 (Uganda Sup Ct).

provision for the right to life outweighs the limitation clause. In the Court's view, this reading of the provision is to the effect that the failure of the mandatory imposition of the death sentence to pass the test of fairness renders that penalty conflicting with the right to life under Article 4.

113. In light of Article 60 of the Charter, the Court's position on this point receives determinant support from a joint reading of key instruments of the international and African bill of rights.[33]

114. From the foregoing, the Court holds that the mandatory nature of the imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania constitutes an arbitrary deprivation of the right to life. The Court therefore finds that the Respondent State has violated Article 4 of the Charter.

C. Alleged violation of the right to dignity

115. The Applicants allege that the execution of the death sentence by hanging constitutes a violation of the prohibition of torture and cruel, inhuman and degrading treatment under Article 5 of the Charter.

116. The Respondent State did not respond to the Applicants' submission on this allegation. However, in responding to the Order for Provisional Measures issued by the Court, the Respondent State avers that the imposition of the death penalty by its courts cannot be said to violate the Applicants' rights as it is not proscribed under international law.

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117. Article 5 of the Charter provides:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade,

33 See Art 3 of the Universal Declaration of Human Rights (which has authority in customary international law, and has inspired subsequent binding international human rights instruments); Articles 1 and 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights (which abolishes the death penalty in peacetime); Art 5(3) and 30(e) of the African Charter on the Rights and Welfare of the Child, and Art 4(2)(j) of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (both instruments place restrictions on the application of the death penalty).

torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

118. The Court notes that, in the present case, the Applicants challenge the implementation by hanging of the death penalty as imposed in their case. The Court observes that many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto.[34] In line with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should therefore be that, in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible.[35]

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

120. As a consequence of the above, the Court finds that the Respondent State has violated Article 5 of the Charter.

D. Alleged violation of Article 1 of the Charter

121. The Applicants allege that for having not amended its Penal Code to remove the mandatory imposition of the death penalty, the Respondent State has not met its obligations under Article 1 of the Charter.

122. The Respondent State did not respond to the Applicants' submissions on this allegation. However, in its report on implementation of the Court's Order for Provisional Measures,

34 See *Jabari v Turkey*, Judgment, Merits, App 40035/98, ECHR 2000-VIII (deporting a woman who risked death by stoning to Iran would violate the prohibition of torture); *Chitat Ng v Canada*, Comm 469/1991, 49th Sess., UN Doc. CCPR/C/49/D/469/1991 (5 November 1993), HR Comm, para 16.4 (gas asphyxiation constitutes cruel, inhuman and degrading treatment due to length of time to kill and available alternative less cruel methods). The United Nations Human Rights Council describes stoning as a particularly cruel and inhuman means of execution, Human Rights Council Res 2003/67, Question of the Death Penalty, E/CN.4/RES/2003/67 at para 4(i) (Apr. 24, 2003); Human Rights Council Res 2004/67, Question of the Death Penalty, E/ CN.4/RES/2004/67 at para 4(i) (21 April 2004); Human Rights Council Res 2005/59, Question of the Death Penalty, E/CN.4/RES/2005/59 at para 7(i), 4(h) (20 April 2005).

35 See *Chitat Ng, op cit*, para 16.2.

the Respondent State avers that the provision for the mandatory imposition of the death penalty by its courts cannot be considered as a violation of the Applicants' rights because that sentence is not prohibited under international law.

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123. Article 1 of the Charter provides: "The Member States of the Organisation of African Unity, parties to the present Charter 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".

124. The Court considers that, as it has held in its earlier judgments, examining an alleged violation of Article 1 of the Charter involves a determination not only of whether the measures adopted by the Respondent State are available but also if these measures were implemented in order to achieve the intended object and purpose of the Charter. As a consequence, whenever a substantive right of the Charter is violated due to the Respondent State's failure to meet these obligations, Article 1 will be found to be violated.[36]

125. In the present case, the Court found that the Respondent State violated Article 4 of the Charter by providing for the mandatory imposition of the death penalty in its law. The Court also found a consequential violation of Article 5 of the Charter in respect of the execution of that sentence by hanging. The Court notes that the Respondent State enacted its Penal Code in 1981, that is before becoming a party to the Charter but amended the same in 2002, after the Charter came into force. In the instant case, fulfilling the obligation under Article 1 of the Charter would have therefore required the Respondent State to remove it from its laws subsequent to the entry into force of the Charter. It did not do so.

126. The Court consequently finds that the Respondent State violated Article 1 of the Charter in relation to the provision of the mandatory imposition of the death penalty in the Penal Code, and

36 See *Armand Guehi v Tanzania* (Merits and Reparations), para 149-150. See also *Kennedy Owino Onyachi and Another v Tanzania* (Merits), paras 158-159; and *Alex Thomas v Tanzania* (Merits), para 135.

its execution by hanging.

VIII. Reparations

127. 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."

128. In this respect, Rule 63 of the Rules of Court provides that: "The Court shall rule on the request for reparation ... by the same decision establishing a human or peoples' right or, if the circumstances so require, by a separate decision."

129. In the present case, the Court decides to rule on both the alleged violations as well as all reliefs and other reparations sought in the present Judgment.

130. The Applicants pray the Court to grant the following:

"i. A declaration that the Respondent State violated their rights to be tried within a reasonable time, to be heard, and to be tried by a competent court protected under Article 7(1) of the Charter.

ii. A declaration that, death penalty imposed by the Respondent State on the applicants herein violates the inherent right to life and human dignity guaranteed by Articles 4 and 5 of the Charter respectively.

iii. A declaration that, by having not amended Section 197 of the Penal Code, Chapter 16 of the Laws of Tanzania (Revised Edition, 2002), the respondent State is in violation of Article 1 of the African Charter in that it has not undertaken legislative or other measures to give effect to the rights guaranteed by the African Charter in its national laws.

iv. An Order compelling the Respondent State to set aside their conviction and sentencing, and release them from detention.

v. An Order compelling the Respondent State to report to this Honorable Court every six (6) months on the implementation of its decision.

vi. An Order for reparations.

vii. Any other Order or remedy that this Honorable Court may deem fit."

131. The Applicants further pray the Court to grant compensation to them and their family members for both material and moral prejudice as stated under the section of this Judgment on the prayers of the Parties.

132. The Respondent State prays the Court to dismiss all the prayers made by the Applicants for reparation as they are unjustified and

not supported with evidence.

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133. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered. Finally, the Applicant bears the onus to justify the claims made.[37]

134. As this Court has earlier found, the Respondent State violated the Applicants' rights to life and dignity guaranteed under Articles 4 and 5 of the Charter respectively. Based on these findings, the Respondent State's responsibility and causation have been established. The prayers for reparation are therefore being examined against these findings.

135. As stated earlier, the Applicants must provide evidence to support their claims for material damage. The Court has also held previously that the purpose of reparations is to place the victim in the situation prior to the violation.[38]

136. The Court has further held, with respect to non-material damage, that prejudice is assumed in cases of human rights violations,[39] and quantum assessment must be undertaken in fairness and looking at the circumstances of the case.[40] In such instances, the

37 See *Armand Guehi v Tanzania* (Merits and Reparations), para 157. See also, *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 (*Norbert Zongo and others v Burkina Faso* (Reparations)), paras 20-31; *Lohé Issa Konaté v Burkina Faso* (Reparations) (2016) 1 AfCLR 346 (Lohé Issa *Konaté v Burkina Faso* (Reparations)), paras 52-59; and *Reverend Christopher R Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72 (*Reverend Christopher R Mtikila v Tanzania* (Reparations)), paras 27-29.

38 See *Armand Guehi v Tanzania* (Merits and Reparations); Application 009/2015. Judgment of 28 March 2019 (Merits and Reparations), *Lucien Ikili Rashidi v United Republic of Tanzania* (*Lucien Ikili Rashidi v Tanzania* (Merits and Reparations)); and *Norbert Zongo and others v Burkina Faso* (Reparations), paras 57-62.

39 See *Armand Guehi v Tanzania* (Merits and Reparations), para 55; and *Lucien Ikili Rashidi v Tanzania* (Merits and Reparations), para 58.

40 See *Norbert Zongo and others v Burkina Faso* (Reparations), para 61.

Court has adopted the practice of awarding lump sums.[41]

137. The Court notes that the Applicants' claims for reparation are made in United States Dollars. In its earlier decisions, the Court has held that, as a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.[42] In the present case, the Court will apply this standard and monetary reparations, if any, will be assessed in Tanzanian Shillings.

A. Pecuniary reparations

138. In the Application, the Applicants' request to be compensated in various amounts for "emotional anguish during their trial and imprisonment, emotional draining during the appeal processes, missing their wives by virtue of being in prison, lack of care by their children, disruption and loss of income, loss of conjugal rights and increase of baby boys and girls, loss of contact with relatives and close friends, disruption of their relationship with their mothers, deterioration of their health while in detention, and loss of social status".

139. The Applicants further pray the Court to grant compensation to their family members, as indirect victims, for the prejudice suffered given that "the wives were affected by the sudden loss of their husbands who were the sole source of income, they lived with the stigma of having a convict as a husband, they had to bring up the children by themselves, they were not able to increase the number of children"; "the Applicants' mothers have suffered losing their sons to imprisonment and the social stigma of having a son who is a criminal."

140. Finally, the Applicants pray the Court to award them various amounts in legal fees for the costs incurred in proceedings both before domestic courts and this Court.

41 See *Armand Guehi v Tanzania* (Merits and Reparations), *Lucien Ikili Rashidi v Tanzania* (Merits and Reparations); and *Norbert Zongo and others v Burkina Faso* (Reparations), para 62.

42 See *Lucien Ikili Rashidi v Tanzania* (Merits and Reparations); and Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda*, para 45.

i. Material loss

a. Loss of income

141. The Court notes, regarding the prayer for compensation due to loss of income and property, that the Applicants allege that they were business men at the time of their incarceration and lost their cows, chickens, houses, bicycle and other properties as a result. The Applicants do not provide any evidence in support of the claims.[43] The prayer is therefore dismissed.

142. The prayer for compensation due to the deterioration of their health which occasioned expenses related to hospitalisation while in prison is equally dismissed for lack of evidence.

b. Costs of proceedings before domestic courts

143. The Court considers that, in line with its previous judgments, reparation may include payment of legal fees and other expenses incurred in the course of proceedings in national courts.[44] The Applicant however must provide justification for the amounts claimed.[45]

144. The Court notes that the Applicants do not provide any evidence in support of their claim for payment of the costs allegedly incurred in the proceedings before domestic courts. Their respective prayers are therefore dismissed.

ii. Non-material loss

a. Loss incurred by the Applicants

145. With respect to damage caused due to loss of social status, and restricted interaction with their family members due to their trial and imprisonment, the Court notes that it has not made any finding in this Judgment to the effect that the Applicants' incarceration was unlawful.[46] The related claims are therefore baseless and are

43 See *Armand Guehi v Tanzania* (Merits and Reparations), para 178.

44 See *Norbert Zongo and others v Burkina Faso* (Reparations), paras 79-93; and *Reverend Christopher R Mtikila v Tanzania* (Reparations), para 39.

45 *Ibid*, para 81; and *Ibid*, para 40.

46 See *Armand Guehi v Tanzania* (Merits and Reparations), para 178.

consequently dismissed.

146. The Court however notes that it has found the mandatory imposition of the death penalty in violation of Article 4 of the Charter. When it comes to reparation of that violation, the questions that arise in the circumstances of the present Application are those of the prejudice caused by the wrongful act and how to assess the quantum thereof. On this issue, the Court recalls its earlier cited case-law to the effect that, in respect of human rights violations, moral prejudice is assumed. This notwithstanding, prejudice has to be assessed and quantified even though the Court retains discretion in determining the reparation.

147. In the instant matter, while the death sentence is yet to be carried out, damage has inevitably ensued from the established violation caused by the very imposition of the sentence. The Court is cognisant of the fact that being sentenced to death is one of the most severe punishment with the gravest psychological consequences as the sentenced persons are bound to lose their ultimate entitlement that is, life.

148. The Court further considers prejudice subsequent to the sentencing. It is recalled that the death sentence being served by the Applicants was given by the High Court on 25 November 2011 and confirmed by the Court of Appeal on 22 March 2013. This Court finds that prejudice was caused with effect from the date of sentencing. As a matter of fact, the uncertainty associated with the waiting for the outcome of the appeal process certainly added to the psychological tension experienced by the Applicants. In the eight (8) years that elapsed between the sentencing and the present Judgment, the Applicants therefore lived a life of uncertainty in the awareness that they could at any point in time be executed. Such waiting and its length not only prolonged but also aggravated the Applicants' anxiety.

149. In arriving at its finding with respect to this issue, the Court is persuaded by the conclusions of the European Court of Human Rights in the case of *Soering v United Kingdom*.[47] There, the latter Court had to say about the death penalty that the prolonged period of detention awaiting execution causes the sentenced persons to suffer "… severe mental anxiety in addition to other circumstances, including, …: the way in which the sentence was imposed; lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; … the fact that the judge does not take into

47 *Soering v United Kingdom* Judgment of 7 July 1989, Series A, Vol 161.

consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail."[48]

150. In view of the above, the Court finds that the Applicants endured moral and psychological suffering and decides to grant them moral damages in the sum of Tanzanian Shillings Four Million (Tsh 4,000,000) each.

151. Regarding damage caused due to anguish during their trial and imprisonment, the Court finds that the same reasoning applies as for the alleged loss of social status. The related prayer is therefore dismissed.

b. Loss incurred by the Applicant's family

152. The Court considers that as it has held in its earlier judgments, indirect victims must prove their relation to the Applicant to be entitled to damages.[49] Documents required include birth certificates for children, attestation of paternity or maternity for parents, and marriage certificates for spouses or any equivalent proof.[50] The Court notes that, in the present case, while the Applicants mention the names of their family members, none of the required pieces of evidence is provided to establish the relation.

153. In any event, the alleged prejudice to the Applicants' family members were as a result of their incarceration, which this Court did not find unlawful. The prayers are therefore dismissed.

B. Non-pecuniary reparations

i. Restitution

154. The Applicants pray the Court to quash the conviction, set aside the sentence and order their release. They also pray the Court to order that they should be "restored to the original situation before

48 *Ibid*, para 77.

49 See *Alex Thomas v Tanzania* (Reparations), paras 49-60; *Mohamed Abubakari v Tanzania* (Reparations), paras 59-64.

50 See *Alex Thomas v Tanzania* (Reparations), para 51; *Mohamed Abubakari v Tanzania* (Reparations), para 61.

the violation".

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155. The Court considers, with respect to these prayers, that while it does not assume appellate jurisdiction over domestic courts,[51] it has the power to make any order as appropriate where it finds that national proceedings were not conducted in line with international standards.

156. As the Court has previously held, such orders can be made only where the circumstances so require.[52] The said circumstances are to be determined on a case-by-case basis having due consideration mainly to proportionality between the measure sought and the extent of the violation established. Consequently, the violation that supports the request for a particular relief must have fundamentally affected domestic processes to warrant such a request. Ultimately, determination must be made with the ultimate purpose of upholding fairness and preventing double jeopardy.[53]

157. With respect to the prayer for the conviction to be quashed, the Court notes that, in the present case, its findings do not affect the Applicants' conviction.[54] The prayer is therefore dismissed.

158. Regarding the prayer that the sentence should be set aside, the Court found in the present matter that the provision for the mandatory imposition of the death sentence in the Respondent State's legal framework violates the right to life protected in Article

51 See *Armand Guehi v Tanzania* (Merits and Reparations), para 33; Application 027/2015. Judgment of 21 September 2018 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania (Minani Evarist v Tanzania* (Merits and Reparations), para 81; *Mohamed Abubakari v Tanzania* (Merits), op cit, para 28.

52 See for instance, *Alex Thomas v Tanzania* (Reparations), *op cit*, para 157.

53 See *Armand Guehi v Tanzania, op cit*, para 164; Application 016/216. Judgment of 21 September 2018 (Merits and Reparations), *Diocles William v United Republic of Tanzania*, para 101; *Minani Evarist v Tanzania* (Merits and Reparations), op cit, para 82; *Loayza-Tamayo v Peru*, Merits, IACHR Series C *No* 33 [1997], paras 83 and 84; *Del Rio Prada v Spain*, 42750/09 – Grand Chamber Judgment, [2013] ECHR 1004, para 83; *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon* (2000) *AHRLR* 57 (ACHPR 1997) operative provisions; and Communication 96/1998, *Lloyd Reece v Jamaica*, Views under Article 5(4) of the Optional Protocol, 21 July 2003, UN Doc CCPR/C/78/D/796/1998, para 9.

54 See Application 006/2013. Judgment of 4 June 2019 (Reparations), *Wilfred Onyango Nganyi and others v Tanzania* (Reparations), para 66.

4 of the Charter. However, in light of the Court's finding that the violations did not impact on the Applicants' guilt and conviction, the sentencing is affected only to the extent of the mandatory nature of the penalty. A remedy is therefore warranted in that respect. The Court consequently orders the Respondent State to take all necessary measures for the rehearing of the case on the sentencing of the Applicants through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

159. As for the prayer that the Applicants be released, the Court holds that in light of its earlier findings in respect of the conviction and sentencing of the Applicants, an order for release is not warranted. The prayer is consequently dismissed.

160. Regarding the prayer for restoration in the situation prior to the violations, the Court considers that the finding in respect of the prayer to be released applies. This prayer is equally dismissed.

ii. Non-repetition

161. The Applicants prays the Court to order that the Respondent State guarantees non-repetition of the violations against them and reports back to the Court every six (6) months until the orders are implemented.

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162. The Court considers that, as it has held in the case of *Lucien Ikili Rashidi v United Republic of Tanzania*, guarantees of non-repetition are generally aimed at addressing violations that are systemic and structural in nature rather than to remedy individual harm.[55] The Court has however also held that non-repetition could apply in individual cases where there is a likelihood of continued

55 See *Lucien Ikili Rashidi v Tanzania, op cit*, paras 146-149. See also, *Armand Guehi v Tanzania, op cit*, para 191; and *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106.

or repeated violations.[56]

163. In the instant case, the Court found that the Respondent State violated Article 4 of the Charter by providing for the mandatory imposition of the death penalty in its Penal Code, and Article 5 by providing for its execution by hanging. The Court finds that its earlier order that the case on the sentencing of the Applicants should be heard afresh amounts to a systemic pronouncement since it will inevitably require a change in the law. The Court therefore makes the consequential order that the Respondent State undertakes all necessary measures to repeal from its Penal Code the provision for the mandatory imposition of the death sentence.

iii. Publication of the judgment

164. The Court notes that the Applicants did not request for the publication of this Judgment.

165. Having said that, the Court considers that it can order publication of its decisions *suo motu* where the circumstances of the case so require.[57]

166. The Court observes that, in the present case, the violation of the right to life by provision of the mandatory imposition of the death penalty as earlier established is beyond the individual case of the Applicants and systemic in nature. The Court further notes that its finding in this Judgment bears on a supreme right in the Charter, that is the right to life.

167. In the circumstances, the Court deems it proper to make an order *suo motu* for publication of the Judgment. The Court therefore orders that this Judgment be published on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and remains accessible for at least one (1) year after the date of publication.

IX. Costs

168. In terms of Rule 30 of the Rules "unless otherwise decided by the

56 See *Lucien Ikili Rashidi v Tanzania, op cit*; See also *Armand Guehi v Tanzania, op cit; and Reverend Christopher R Mtikila v Tanzania* (Reparations), para 43.

57 See *Armand Guehi v Tanzania, op cit*, para 194; *Reverend Christopher R Mtikila v Tanzania* (Reparations), paras 45 and 46(5); and *Norbert Zongo and others v Burkina Faso* (Reparations), para 98.

Court, each party shall bear its own costs."

169. None of the Parties made submissions on costs.

170. In light of the above, the Court holds that in the present case, there is no reason to depart from the provisions of Rule 30 of the Rules and, consequently, rules that each Party shall bear its own costs.

X. Operative part

171. For these reasons:

THE COURT,

Unanimously:

On jurisdiction

i. *Dismisses* the objections on jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections on the admissibility of the Application;

iv. *Declares* that the Application is admissible.

On the merits

v. *Finds* that the Respondent State has not violated the Applicants' right to be heard protected under Article 7(1) of the Charter;

vi. *Finds* that the Respondent State has not violated the Applicants' right to be tried by a competent court protected under Article 7(1)(a) of the Charter;

vii. *Finds* that the Respondent State has not violated the Applicants' right to be tried within a reasonable time protected under Article 7(1)(d) of the Charter.

viii. *Finds* that the Respondent State violated the right to life guaranteed under Article 4 of the Charter in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;

ix. *Finds* that the Respondent State has violated the right to dignity protected under Article 5 of the Charter in relation to the provision for the execution of the death penalty imposed in a mandatory manner.

On reparations

Pecuniary reparations

x. *Does not grant* the Applicants' prayers for compensation on account of material damage;

xi. *Grants* Tanzanian Shillings Four Million (Tsh 4,000,000) to each of the Applicants for moral damage that ensued from their

sentencing;

xii. *Orders* the Respondent State to pay the amount indicated under sub-paragraphs (xi) free from taxes within six (6) months, effective from the notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

xiii. *Does not grant* the prayers for the conviction to be quashed and the Applicants to be released, and for restitution;

xiv. *Does not grant* the prayer for non-repetition of the violations found with respect to the Applicants;

xv. *Orders* the Respondent State to take all necessary measures, within one (1) year from the notification of this Judgment, to remove the mandatory imposition of the death penalty from its Penal Code as it takes away the discretion of the judicial officer;

xvi. *Orders* the Respondent State to take all necessary measures, through its internal processes and within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicants through a procedure that does not allow the mandatory imposition of the death sentence and uphold the full discretion of the judicial officer;

xvii. *Orders* the Respondent State to publish this Judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the Judgment is accessible for at least one (1) year after the date of publication;

xviii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xix. *Orders* that each Party shall bear its own costs.

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Separate opinion: BENSAOULA

1. I concur with the opinion of the majority of the judges on the jurisdiction of the Court and the Operative Part of the Judgment.

2. However, in my thinking, the manner in which the Court has treated admissibility of the Application in relation to the objections raised by the Respondent State on the exhaustion of local remedies and on reasonable time deserves further attention.

i. On Admissibility of the Application based on the Respondent State's objection to exhaustion of local remedies

3. In my opinion, the Court's reasoning runs counter to the tenets of the obligation to exhaust local remedies before referral of a case to the Court, and also to the prerogatives and jurisdiction of appellate Judges before national courts.

• The tenets of the obligation to exhaust local remedies before referral to the Court.

4. It is an established fact that the Court has, in its jurisprudence, restated the conclusion of the African Commission on Human and Peoples' Rights[1] according to which the condition set out in Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 on exhaustion of local remedies "reinforces and maintains the primacy of the domestic system in the protection of human rights vis à-vis the Court". The Commission thus aims to afford States the opportunity to address the human rights violations committed in their territories before an international human rights body is called upon to determine the States' responsibility for the said violations.

5. It is however apparent from the judgment under reference in this separate opinion that, in this matter, the Court appropriated the theory of "bundle of rights" to dispose of certain requirements of the obligation to exhaust local remedies.

6. Yet, the tenets of this theory show that it was created and used in matters of property rights, because often among economists,

1 Application 006/2012. Judgment of 26 May 2017 – *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 93; Application 005/2013 – *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015; Application 001/2015. Judgment of 7 December 2018 – *Armand Guéhi v United Republic of Tanzania*.

such rights were the same as private property rights. The demonstration that flows from the theory has, above all, caused common ownership to evolve by highlighting the dismemberments of property, and hence its application in matters of the rights of indigenous peoples.

7. It emerges from the Respondent State's objections that the latter criticizes the Applicants for having failed to present certain claims before the domestic court prior to bringing the same to this Court, thereby disregarding the condition of exhaustion of local remedies. This is also true for their allegations regarding their right to be heard and for the unconstitutionality of the sentence imposed.

8. In response to these allegations, the Court upheld its case-law with regard to constitutionality petition by considering that the local remedies concerned only ordinary remedies.

9. As regards the allegation that their right to be heard has been violated, the Court considers that

"by its established case-law, the right invoked by the Applicants is part of a bundle of rights and guarantees, which formed the basis of the proceedings before the High Court and the Court of Appeal. Consequently, where it is established that the domestic judicial authorities had the opportunity to address the alleged procedural violation, even though the Applicant did not raise the issue, the local remedies must be considered to have been exhausted".[2]

10. The Court further held that

"in the instant case, given that the Court of Appeal was in a position to examine several claims of the Applicants with respect to the manner in which the High Court conducted the proceedings, there was ample opportunity to assess whether the right to be heard had been examined by the lower court".[3]

11. In many of its judgments, the Court used and reiterated this "bundle of rights" theory to dispose of certain claims brought before it under the obligation to exhaust the local remedies.

12. In my opinion, applying this theory in matters of local remedies amounts to distorting its basis and tenets.

13. The Applicants' rights are diverse and different in nature and the allegations thereto related, if in the Charter, can be incorporated into a set of rights such as the right to information, freedom of expression, fair trial.

14. At the domestic level, laws, whichever they are, spell out the scope of and the rules governing each right. It lies with the

2 Para 38 of the Judgment.

3 Para 39 of the Judgment.

national judge to consider certain rights as part of a bundle and to adjudicate them as such.

15. In defining the aforesaid bundle of rights in relation to the national judge, the Court ignored the powers and prerogatives of judges in general and, more restrictively, in matters of appeal, especially as the Applicants have at no time alleged that the appellate judges have the power to do so – since the national texts confer the powers and prerogatives on them – and they could however consider requests brought for the first time before the African Court, as part of a bundle of rights.

ii. On the prerogatives and jurisdiction of appellate judges before national courts

16. It is common knowledge that appeal proceedings" are of two types:

- Appeal that has devolutive effect,, and
- Appeal that is limited to specific points of the Judgment.

* Whereas the devolutive effect of an appeal means that the Court of Appeal has full and total knowledge of the dispute and must adjudicate in fact and in law with the same powers as the trial judge, the devolution occurs only where the appeal relates to all the provisions of the first judgment.

* The scope of the devolutive effect of the appeal will thus be determined by two procedural acts, that is, the statement of appeal or the notice of appeal that will not only limit the applicant's claims, but also the submissions of the parties which may contain new claims not mentioned in the notice of appeal.

- **Limited appeal, for its part, means that the appeal is confined to specific points in the judgment.**

17. Where the judge makes a ruling outside these two types of appeal and adjudicates on claims that have not been expressed, he/she will have ruled *ultra petita*, which will legally impact on the decision.

18. The Court's conclusion as regards local remedies in relation to claims which have not been subjected to such remedies – as pointed out above touches deeply on the prerogatives of the appellate courts, the scope of their jurisdiction over the case brought before them, and on the purpose of imposing the exhaustion of domestic remedies on Applicants as a right of Respondent States to review their decisions and thus avoid being

arraigned before international courts.

19. The Court ought to have consulted the domestic texts which govern the procedure and jurisdiction of appellate judges in criminal matters, rather than rely on the elastic concept of bundle of rights which will time and again give it the power to examine and adjudicate claims that have not been subjected to domestic remedies, and thus minimize the importance of such remedies in referrals to the Court.

20. In my view, this runs counter to the tenets of the obligation to exhaust domestic remedies and to the rights of States in this regard.

iii. As for the objection regarding reasonable time, the application of this concept by the Court runs counter to the provisions of Article 56 of the Charter,,Article 6(2) of the Protocol and Rules 39 and 40 of the Rules

21. Rule 40 of the Rules in its paragraph 6, clearly states that applications must be

"submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

22. It is clear from the aforesaid that the legislator laid down two (2) options as to how to determine the starting point of reasonable time:

a. the date of exhaustion of local remedies set by the Court at 22 March 2013 – date of the judgment of the Court of Appeal. Between this date and that of referral of the matter to this Court, there was a time lapse of two (2) years.[4]

b. the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter, that is, the date the application for review was filed, ie. 24 March 2013, which the Court did not take into consideration as a date but as a fact.

23. The Court ignored this date stating only that the facts of the case show that after filing their Application for Review on 24 March 2014, the Applicants were expected to observe some time while awaiting the outcome of the review procedure before bringing the matter before this Court on 26 March 2015.. However, given that the application for review is a legal entitlement, they cannot be

4 Para 46 of Judgment.

penalized for exercising that remedy.[5].

24. Thus, the Court considered the period of two (2) years to be reasonable although it took into account the period spent awaiting the outcome of the application for review; and hence a fact that occurred after the exhaustion of local remedies. However, pursuant to the above-mentioned articles, the Court could have set the date for its referral in relation to the application for review given that the relevant judgment had not been rendered which would have resulted in a more reasonable referral time of one (1) year instead of two (2) years.

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Separate Opinion: TCHIKAYA

1. Like my Honourable colleagues, I have generally adopted the operative part of the judgment, *Ally Rajabu and others v United Republic of Tanzania*, delivered on 28 November 2019. Without opposing the operative part, it is nevertheless necessary, on my part, to say that it would have been clearer for the Court to take a more straightforward line in its motives. While invalidating Tanzania's provisions on the mandatory death penalty, it left this useless "chiaroscuro" on the law applicable to the death penalty in Africa. It missed an opportunity to strengthen international law on this point. This assessment of the law on the death penalty, by distinction of category of crimes or offences, is no longer, *de jure*, likely to be supported. This Court, the Human Rights Court, should align itself with the evolution of international law.

2. An application was presented to the Court of Arusha on 26 March 2015 by Messrs Ally Rajabu, Angaja Kazeni alias Oria, Geofrey Stanley alias Babu, Emmanuel Michael alias Atuu and Julius Petro, Tanzanian nationals sentenced to death for murder. The question of its admissibility and that of jurisdiction did not embarrass the

5 Para 48 of Judgment.

3. Court, which settled them without difficulty.[1] However, on the merits, what remained was to take a clear position on the question of mandatory sentence which was the sentence confirmed by the national judges.

4. The problem arises from the interpretation of para 112 of the judgment which reads as follows: "the Court notes that Article 4 of the Charter, while not prohibiting the death penalty, is essentially devoted to the right to life considered "inviolable" and aims to guarantee "the integrity" and therefore the sanctity of human life. The Court further notes that Article 4 of the Charter makes no mention of the death penalty".[2] However, even though it is said, the prohibitive legal elements of punishment are now legion on the international level.[3] It is up to the judge to give them the desired effect.

5. This opinion will thus undertake to show the emptiness of the so-called mandatory death penalty distinction from other death sentences (I.) which feeds the judgment of Rajabu and others; next, the fact will be examined that the Court could have acceded to a system of prohibition of capital punishment in any form, as it is abundantly suggested in our opinion, Article 4 of the African Charter on Human and Peoples' Rights (II.).

I. The emptiness of the distinction between the death penalty and the so-called compulsory sentence

6. The Applicant told the Court that "by not amending Article 197 of its Penal Code, which provides for *the mandatory death penalty in the event of murder*, the Respondent State has violated the right to life and is not respecting the obligation to give effect to this right as guaranteed by the Charter".[4] It was therefore for the Court to situate this infringement in its legal context: in addition to the right to life, the application of the death penalty was in question. As in its recent *Eddie Johnson Dexter case*, the mandatory death penalty regime was the basis for the controversy between the Applicant and the Respondent State. This distinction in this death sentence

1 AfCHPR, *Matter of Rajabu and others v United Republic of Tanzania*, 8 December 2019, paras 14-53.

2 *Idem*, para 108.

3 Resolution (A/RES/44/128) is titled "Elaboration of a Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty" was voted on 5 January 1990(A/44/PV82, p 8-9).

4 *Idem*., para 14.

is neither operational nor justified in its legal significance. It is very relative.

7. National legislators end up with an extensive criminal power over a subject that is now regulated by international criminal law. It is known that, formally, the death penalty, as a criminal sanction, was a matter of internal public order. This is a matter of the orders of the various States which determine their penal policy and the hierarchy of the penalties inscribed in their Codes. The concept of reserved area, in all its meaning in international law, applied to those "cases which are essentially within the national jurisdiction of a State" within the meaning of Article 2(7) of the Charter (1).[5] The distinction between the two kinds of death sentences in this case is only relative.

A. Relative and insufficient distinction between the two kinds of death sentences

8. Article 197 of the Tanzanian Penal Code provides that: "Any person convicted of murder shall be. sentenced to death". The adjective mandatory does not appear, but the legal language, without putting elements of procedure, interpreted these provisions as requiring capital punishment.

9. This punishment and its effective application, in any event, can only be made following a procedure subject to the judge's assessment. And these elements are as much present in the case of the non-compulsory death sentence, decided by the judge without legislative constraint. This is emphasized by the United Nations Human Rights Committee in the *Dexter case*, saying: "In this context, it recalls its jurisprudence and reiterates that the automatic and mandatory imposition of the death sentence, constitutes an arbitrary deprivation of life, incompatible with article 6(1) of the Covenant, provided that the death sentence is passed without the personal circumstances of the accused or the particular circumstances of the crime being taken into consideration. The existence of a *de facto* moratorium on executions is not sufficient to make the mandatory death penalty

5 W Schabas *The abolition of the death penalty in International Law*, Grotius, Cambridge, 1993, 384.

compatible with the Covenant"[6].

10. On reading these reasons given by the Committee, two elements can be noted: 1) mandatory death penalty is only an embodiment of the initial death penalty; it constitutes an arbitrary deprivation of life and 2) It is not compatible with the requirements of international human rights law. The distinction between the two is decidedly inadequate.

11. This opinion emphasizes that what is condemned in the death penalty is found *mutatis mutandis* in the mandatory death penalty. The latter is of no significant contribution to the distinction that should be made with regard to the initial death sentence. The mandatory death penalty would be like a super death sentence that would apply against supreme crimes. However, a death sentence is by definition a death sentence. The basis of this mandatory death sentence and its procedural elements are not sufficiently distinguishable, a single regime with the original death penalty was more appropriate.

B. A single legal regime is applicable

12. It begins with the 1966 Covenant.[7] The Covenant does not make any distinction: "1. No person subject to the jurisdiction of a State Party to this Protocol shall be executed. 2. Each State Party shall take all appropriate measures to abolish the death penalty within its jurisdiction"(article 1)[8]. As much as "the death penalty is an abomination for all the condemned"[9] (the words of Victor Hugo), the rule of international law refuses to distinguish it in its form: the mandatory death penalty or not. This distinction, which is not a creation of African states, also exists in the United States. The US Supreme Court in restricting the use of the death penalty in the United States has reserved it for murders of crimes against individuals and excluding accomplices whose participation is only

6 HRC *Dexter Eddie Johnson v Ghana Communication*, 28 March 2014, para 9 and following; see also Communication 1406/2005, *Weerawansa v Sri Lanka*, observations adopted on 17 March 2009, para 7.2.

7 *The International Covenant on Civil and Political Rights* (ICCPR) was adopted in New York on 16 December 1966 by the UNGA in resolution 2200 A (XXI), entered into force on 23 March 1976.

8 *UNGA Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, Resolution 44/128 of 15 December 1989.

9 V Hugo *The last day of a condemned man* (1829).

peripheral.[10]

13. The analyses of the United Nations Human Rights Committee on the commonality of these death sentences show this. In *Eversley Thompson v St Vincent and the Grenadines*, the Human Rights Committee ruled on the applicant's assertion that the mandatory nature of the death penalty and its application amounted to an arbitrary deprivation of life. The Committee stressed that "such a system of compulsory imposition of the death penalty deprives the individual of his most fundamental right, the right to life, without considering whether this exceptional form of punishment is appropriate in the particular circumstances of his life. his business". The result was that the mandatory death penalty was an arbitrary deprivation of life in violation of article 6(1) of the Covenant.[11]

14. It was perfectly possible for the African Court to consider in this case that the state of international law recommended a common system of prohibition applicable to all "kinds of death sentences". The European system which excludes reservations by Article 3 of its latest Protocol which prohibits the death penalty sets the tone. It is noted that "No derogations to the provisions of this Protocol shall be made under article 57 of the Convention". The Protocol takes care to stress that "The death penalty shall be abolished. No one shall be condemned to such penalty or executed".[12] It is further indicated that this constitutes "the final step in order to abolish the death penalty in all circumstances".[13]

15. In this decision the Court was very circumspect and "legalistic". It endeavored to observe scrupulously the normative sovereignty of the Respondent State. In its non-pecuniary measures, however, it ordered the Respondent State to "take all the necessary measures, within one year of notification of the present judgment, to abolish the mandatory death penalty its legal system ". Here lies the meaning of this opinion. This "chiaroscuro" maintained

10 In effect in the United States, there is a similar system. See especially the Supreme Court, *Erlich Anthony Coker v State of Georgia*, 28 March 1977; see also Supreme Court, *Patrick O Kennedy v State of Louisiana*, 25 June 2008: The Supreme Court of the United States ruled that the death penalty was unconstitutional under the Eighth Amendment when applied to crimes against individuals that did not cause death. This case involved a girl of less than 12 years old.

11 See: Art 6(2) of the ICCPR; *Eversley Thompson v Saint Vincent and the Grenadines*, Communication 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000), para 8.2.

12 Art 1, Protocol 13 to the *Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, Vilnius, 3 May 2002

13 *Idem*, Preamble to the Protocol.

on the regime of the death penalty deserves discussion. In the state of international law, there are no "death sentences" with variable qualifiers.[14] A single legal regime is applicable. The term "mandatory" does not alter the majority rejection of this sanction by the international community.[15] Moreover, the suppression called for by the judge, in any event, should usefully concern only the death penalty, without further distinction. As the International Court of Justice recalls, "there is a general obligation beyond the texts applicable to specific fields, at the behest of States to prevent the commission by other persons or entities of acts contrary to certain norms of international criminal law".[16] It is an obligation of conformity to the law of the people. Thus in this light, *Rajabu and others*, reflects a limited reading of Article 4 of the Charter.

II. A still limited reading of Article 4 of the Charter

16. This reading will be considered before referring to the remarkable wave of abolitionism that has already taken hold of the continent.

A. The almost total movement against the death penalty in Africa should be reflected in the protection of human rights

17. The international doctrine against the death penalty was built through progressive denunciation of human rights violations, cruel, inhuman and degrading treatment on the one hand and

14 The same was true of the controversial death sentence in time of war. This aspect was discussed when, on 15 December 1980, the UN General Assembly agreed on the elaboration of a draft protocol aiming at the abolition of the death penalty. It reaffirmed its will in 1981. On 18 December 1982, the UNGA requested the United Nations Commission on Human Rights to establish the Second Optional Protocol to the International Covenant on Civil and Political Rights. The Sub-Committee on the Prevention of Discrimination and Protection of Minorities therefore had the task of working on it. The Sub-Commission's rapporteur, Marc J. Bossuyt, a Belgian expert, introduced the wartime exception, because what he said: "a greater number of States will thus be able to become parties to the Second Optional Protocol". ". See Marc Bossuyt, Guide to the Preparatory Works of the International Covenant on Civil and Political Rights, Nijhoff, Dordrecht-Boston-Lancaster, 1987, 851.

15 The first International Covenant on Civil and Political Rights of 1966, which entered into force on 23 March 1976, in accordance with the provisions of Article 49, had in this respect the protection of the right was updated on the subject. The *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty 11 July 1991, in accordance with Article 8.

16 ICJ, Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide of 9 December 1948 Advisory Opinion, 28 May 1951, Rec 1951, p 496; quoted by A Pellet 'From one Crime to Another – State Responsibility for Violating Human Rights Obligations' *Studies in honour of Professor Rafâa Ben Achour – Mouvances du droit*, Konrad-Adenauer-Stiftung, 2015, tome III, 317-340.

violation of the right to life, on the other hand. It is irrefutable that the rejection of this sentence is total today[17]. This could have two complementary explanations: the socio-political complexity of its elevation as a penal sanction and the use that could be made of it, even by a judge. The latter is not exempt from miscarriage of justice.

18. The observation shows that the African continent is part of this international movement whose goal is the abolition of the death penalty. Today, out of the 55 member states of the African Union, nearly twenty do not execute death row inmates, and nearly forty countries are abolitionist in law or in practice ... It is possible to say that the majority of these states refuse this ultimate sanction.[18]

19. It was indeed desirable that a reading of the international provisions should guide the decision of the Court. This reading should be based on international or even national jurisprudence of African states, many of which have introduced moratoria on the execution of the death penalty. A reading that could have also been based on the international normative evolution in this same field.

20. Many countries in Africa have *de facto* moratoria on the death penalty.[19] They refuse the penal execution of individuals. A kind of partial death sentence is like the mandatory death penalty in that it applies to certain crimes. Those African countries that have reduced the scope of the death penalty should eliminate it. This is what Article 4 of the African Charter on Human and Peoples' Rights is already suggesting.

B. Article 4 of the African Charter allowed for an interpretation against the death penalty

21. In addition to the general opinion that the death penalty violates human rights, the right to life remains the right that is violated fundamentally and manifestly by a State order favourable to the death penalty. It is inhuman treatment and involves psychological torture. The wait between the sentence and the execution

17 D Breillat, The global abolition of the death penalty, Concerning the Second Optional Protocol of the International Covenant on Civil and Political Rights aimed at abolishing the death penalty, RSC, 1991, p. 261.

18 At this date, Congo-Brazzaville and Madagascar having abolished capital punishment in 2015 and Guinea in 2016 are the last abolitionist African States.

19 Since the United Nations General Assembly passed the first resolution calling for a moratorium on the use of the death penalty on 27 December 2007, 170 states have either abolished or introduced a moratorium on the death penalty.

constitutes a superfluous punishment. It is observed, on the contrary, that most lifers – real – do not reoffend. Upon release, they resume a normal life.[20] We regularly quote the case of Mr Maurice Philippe, who, while being particular, remains instructive. This man was sentenced to death in 1980, his conviction was commuted to life imprisonment in 1981 for the murder of two police officers. In prison, he studied history and, today on parole, he is a doctor in medieval history and researcher in a graduate school (EHESS, France).

22. The right to life remains the major element of Article 4 of the African Charter on Human and Peoples' Rights: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person: No one may be arbitrarily deprived of this right ". It is this article that is the subject of the Court's judgment. I agree with the purpose of the analysis, but the reasoning of the Court in para 96 remains unclear: "(...) Indeed, Article 4 of the Charter does not mention the death penalty. The Court observes that despite the international trend towards the abolition of the death penalty, in particular through the adoption of the *Second Optional Protocol to the International Covenant on Civil and Political Rights,* the prohibition of this penalty in international law is not yet absolute." This unexplained search for the absolute and the lack of Praetorian commitment limit the Court's power of interpretation.

23. The African Charter is not the only instrument against the capital punishment which, without mentioning the abolition of the death penalty, does not mention this suppression, but proclaims the right to life as to be protected. The Universal Declaration of Human Rights (10 December 1948) has the same approach.[21] These instruments belong to the time of the Cold War dissensions. This explains the advent of the Second Protocol, which is devoted specifically to the abolition of the death penalty. As with the 1948 Declaration, for the African Charter, the option that prevailed was "compromise". The reference to the right to life, in absolute terms,

20 The position that we find in doctrine, especially Alain Pellet, Rapporteur of the French committee chaired by Pierre Truche, wrote: "the Committee is resolutely opposed to the death penalty; as abominable as the offenses, 'to use the logic of death against terrorists, which they practice without mercy, it is for a democracy to embrace the values of terrorists'; the only thing left is perpetual imprisonment." see. in A Ascensio, E Decaux and A Pellet (eds), *Droit international pénal*, Pedone, Paris, 2000, 843.

21 The Declaration does not mention the death penalty. Article 3 states that "Everyone has the right to life, liberty and security of person". It is in the context of the right to life that the question of capital punishment was debated during the preparatory work of the Declaration.

without reference to the abolition of the death penalty.[22] This last idea was nevertheless present.

24. Nigeria, which in its periodic report to the African Commission of 1993 called for the abolition of the death penalty for drug trafficking, the illegal agreements concerning petroleum products, said that the phenomenon of "death row" was incompatible with the African Charter.[23] Finally, it should be noted that the African Charter on the Rights of the Child, which has been extensively ratified, requires that the death penalty not be imposed for crimes committed by minors under the age of 18[24] and that it cannot be executed on pregnant women, or mothers of babies or young children.

25. Despite advances in international criminal law; the judgment on *Rajabu and others* seems to retrogress. It pays little attention to the Praetorian powers of the Human Rights judge to advance the protection of the right to life. There is an interpretive function of the rule of law to be implemented in order to complete and clarify the protection of the right to life that Article 4 of the African Charter assumes. Former Judge F Ouguergouz[25] is accustomed to recalling the liberal character of the *ratione materiae* jurisdiction which States wished to give to the African Court through Article 7 of the Protocol on the Establishment of the African Court, entitled "Sources of law". It is provided that "the Court shall apply the provision of the Charter and any other relevant instruments ratified by the States concerned".

26. The dispute between the Government of Guatemala and the Inter-American Commission over the emergency tribunals established in Guatemala is sufficient illustration of this problem. These courts functioned and sat secretly. The most macabre element of these courts was that they pronounced a series of death sentences, many were executed. The Government of Guatemala justified their legality by arguing that in ratifying the Convention with a

22 A Dieng, Le droit à la vie dans la Charte africaine des Droits de l'Homme et des peuples, *Proceedings of the symposium on the right to life*, F Montant, D Premont, CIO, Geneva, 1992.

23 OAU, Doc. CAB/LEG/24.9/49 (1990), article 46.

24 Article 5: "Death sentence shall not be pronounced for crimes committed by children". Article 30(e) states that "ensure that a death sentence shall not be imposed on such mothers" (Charter of 1 July 1990).

25 F Ouguergouz, *The African Court on Human and Peoples' Rights – Focus on the first Continental Judicial Body, AFDI*, 2006, 213-240.

reservation to Article 4(4)[26] it had done so with the intention of continuing to apply capital punishment for crimes of common law of a political nature. It was necessary for the Commission to use its power of interpretation to reject this reading and to seek the opinion of the Court.[27] The question is identical in this case of *Rajabu and others.*

27. The spirit of Article 4 of the African Charter is interpreted restrictively in that judgment. This limiting interpretation is reminiscent of Article 80 of the Rome Statute of the International Criminal Court (establishing the ICC) which states that "Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part".[28] As has been said, this approach is clearly internal.

28. In this decision the African Court, by dint of the fact that it denounces only the mandatory death penalty, is out of step with the position which can be considered as constant of the United Nations International Law Commission. The International Law Commission has been "convinced that the abolition of the death penalty contributes to the enhancement of human dignity and the progressive extension of fundamental rights".[29] This development is reflected in the pronouncements of the Inter-American Court, which emphasized that the lack of consular assistance is an infringement of fundamental rights. In these circumstances, it continued "the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life, in the terms of the relevant

26 Inter-American Convention on Human Rights (San José, Costa Rica, 22 November 1969), Art 4 entitled Right to Life 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. (…) 4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

27 *Report on the Situation of Human Rights in the Republic of Guatemala*, OEA. / Ser.L/II.61, Doc. 47, Rev 1, October 1983, 43 to 60. C Cerna Inter-American Court on Human Rights-the first case, AFDI, 1983, 300-312

28 However, according to article 77 of the Statute on penalties "the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".

29 Resolution 1997/12, 3 April 1997 (24) and Resolution 1998/8, 3 April 1998.

provisions of the human rights treaties (...)".[30]

29. The Court, while asking Tanzania to review its legislation on a category of death penalty – the mandatory death penalty[31] – is refusing to direct its decision to condemn the death penalty. It allows islands of tolerance to persist. On this judgment, it departs from the trend of international criminal law. As to the universality of the abolition of the death penalty, it must be recalled, without necessarily exaggerating, that in its judgment on *the North Sea Continental Shelf*[32] the International Court of Justice had carefully examined the relationship between conventional and customary standards. It considered that international conventions could produce customary accessions that were applicable.

30 IAHRC, OC, 1 October 1999, 264, para .37 et 268, para 141.

31 Article 197 of the Penal Code of Tanzania states that "Any person convicted of murder shall be sentenced to death"

32 ICJ, North Sea Continental Shelf, ***Denmark and the Netherlands v FRG*** ICJ, 20 February 1969.

Penessis v Tanzania (merits and reparations) (2019) 3 AfCLR 593

Application 013/2015, *Robert John Penessis v United Republic of Tanzania*

Judgment, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, CHIZUMILA and BENSAOULA

The Applicant was convicted and sentenced for illegal entry and presence in Tanzania despite claiming that he was Tanzanian by birth and had resided in Tanzania since birth. The Court held that since the Applicant had shown *prima facie* that he had Tanzanian nationality, the burden of proof was on the Respondent State to show otherwise. The Applicant's mother testified before the Court and a certified copy of a birth certificate was also produced. The Court held that the Applicant's right to nationality and his right not to be arbitrarily detained had been violated. He was granted moral damages as reparation. The Court also ordered that the Applicant should immediately be released from prison as he had been detained for more than six years after the end of his prison term. The Court also granted moral damages to his mother, who was deemed to be an indirect victim

Jurisdiction (form and content of Application, 29; examining relevant proceedings, 32)

Admissibility (form and content of Application, 48, 49; exhaustion of local remedies, 61, 62; submission within reasonable time, 69)

Interpretation (Universal Declaration forms part of customary international law, 85)

Dignity (nationality, 87)

Nationality (arbitrary denial, 88, 97, 103)

Evidence (burden of proof, 91-93, witness, 99)

Personal liberty and security (arbitrary arrest and detention, 110, 111)

Movement (arbitrary arrest and detention, 127)

Reparations (material damages, 144; moral damages for the Applicant, 148, 149; moral damages for the mother of the Applicant, 157, 158; release from prison, 163, 164)

Dissenting opinion: BENSAOULA (joined by NIYUNGEKO)

Admissibility (submission within reasonable time, 7)

I. The Parties

1. Mr Robert John Penessis (hereinafter referred to as "the Applicant") was convicted and sentenced to two (2) years in prison for "illegal

entry and presence in Tanzania" in Criminal Case 35/2010 before the Kagera Resident Magistrate's Court at Bukoba. The Applicant who claims to be a national of Tanzania, has been in prison since 10 January 2010.

2. The United Republic of Tanzania (hereinafter referred to as "the Respondent State") became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol 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 February 2006. The Respondent State deposited, on 29 March 2010, the Declaration prescribed under Article 34(6) of the Protocol by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. The Application is in respect of the detention of the Applicant on the ground that he does not possess the necessary documentation to be legally present in the Respondent State. The Applicant alleges that the Respondent State has violated his rights to nationality, liberty and free movement.

A. Facts of the matter

4. It is apparent from the Application that, on 8 January 2010, Mr.John Robert Penessis was arrested by the Tanzanian immigration authorities. He was subsequently charged, convicted and sentenced on 17 January 2011 to a fine of eighty thousand Tanzanian Shillings (TZS 80,000) or in default, two (2) years in prison and ten (10) strokes of the cane by the Kagera Resident Magistrate's Court for illegal entry and irregular presence in the territory of the Respondent State.

5. The Applicant subsequently appealed before the High Court of Tanzania at Bukoba (hereinafter referred to as the "High Court") which, on 6 June 2011, upheld the conviction and sentence of imprisonment for the reason that the Applicant had not paid the eighty thousand Tanzanian Shillings (TZS 80,000) fine. The High Court also set aside the corporal punishment sentence. In addition, the High Court sentenced him to six (6) months in prison for contempt of court and issued an order for his expulsion from the territory of the Respondent State after serving the prison

sentence.

6. The Applicant then lodged an appeal before the Court of Appeal which, on 4 June 2012, upheld the two (2) years prison sentence. The Court of Appeal however set aside the six (6) months sentence for contempt of court and the expulsion order which, according to the Court, fell within the purview of the Minister of Home Affairs. Subsequently, on 4 December 2012, the Minister of Home Affairs issued the deportation and detention Orders.

7. The Applicant claims that he is Tanzanian by birth, that his father and mother are Tanzanians, and that he has been residing in Tanzania since his birth.

8. The Respondent State challenges this version of the facts and claims to have evidence showing that the Applicant was never a Tanzanian and possessed the nationality of two other countries, namely, South Africa and the United Kingdom.

B. Alleged violations

9. The Applicant alleges that his arrest and detention are unlawful and in breach of the Tanzanian Constitution, Article 59(1) of the Additional Protocol 1 to the Geneva Convention and Articles 1 to 4 of the 1949 Geneva Convention.

10. He further alleges the violation of Articles 1 and 12(1) and (2) of the Charter and of his right to nationality.

III. Summary of the procedure before the Court

11. The Court was on 2 June 2015 seized of the Application, which was served on the Respondent State on 15 September 2015, requesting it to file its Response to the Application within sixty (60) days of receipt thereof. On the same date, the Application was transmitted to the Executive Council of the African Union and all the State Parties to the Protocol, and through the Chairperson of the African Union Commission, to all the State Parties to the Protocol, pursuant to Rule 35(3) of the Rules of Court (hereinafter referred to as "the Rules").

12. The Court notes that the initial Application was filed on 2 June 2015 by Mrs Georgia Penessis, the Applicant's grandmother, on behalf of her grandson. However, all subsequent communications received by the Court emanated from the Applicant's Counsel and the Applicant himself. For this reason and to avoid confusion, the Court on 17 January 2018 issued an order to change the title of the Application and avoid a mix up of the names. The new Application was therefore retitled *Application 013/2015*

– *Robert John Penessis v United Republic of Tanzania* instead of *Application 013/2015 – Georgia J Penessis representing Robert J Penessis v United Republic of Tanzania.*

13. The Parties filed their pleadings within the time limit prescribed by the Court, and these were duly exchanged between the Parties. On 19 and 20 March 2018, the Court held a Public Hearing at which both Parties were represented.

14. Pursuant to the Court's decision at its 49th Ordinary Session held from 16 April to 11 May 2019, at which it decided to adjudicate concurrently on the merits and reparations, the Registry invited both Parties to file their submissions on reparations. On 1 August 2018, the Applicant filed his submissions and on 6 August 2018, a copy thereof was served on the Respondent State. There has since been no reaction from the latter.

15. In conformity with the decision taken at its 51st Ordinary Session held from 12 November to 7 December 2018, the Court decided to propose to the Parties to seek an amicable settlement of the matter pursuant to Rule 57 of the Rules.

16. The Parties accepted the Court's initiative for amicable settlement. The Applicant submitted issues to be considered for the amicable settlement and these were duly transmitted to the Respondent State for the latter's observations.

17. However, despite several reminders, the Respondent State did not respond to the Applicant's issues for amicable settlement. The Court consequently decided to proceed with consideration of the merits of the Application**.**

18. At its 54th Ordinary Session held from 2 to 27 September 2019, the Court decided to visit the Applicant at Bukoba prison and the coffee plantation that he claims belongs to his family, to obtain more information on the key issues.

19. On 1 October 2019, the Registry sent a letter to this effect to the Parties proposing to them to take part in the visit and giving them seven (7) days to respond to the proposal. On 7 October 2019, the Applicant's Counsel, in response, expressed his readiness to participate in the visit on the dates set by the Court. The Respondent State did not respond to the proposal.

20. In the absence of a response from the Respondent State, the Court cancelled the proposed visit and in lieu of that, on 17 October 2019, sent the Parties a list of questions to be answered within a period of ten (10) days to facilitate the work of the Court. Both Parties did not submit their answers to the questions posed by the Court.

21. On 8 November 2019, the Court notified the Parties in writing that pleadings were closed and that the Court would render judgment

on the basis of the documents at its disposal.

IV. Prayers of the Parties

22. The Applicant prays the Court to:

"i. Rule that he is a citizen of the Respondent State;

ii. Find that, for having kept him in prison in violation of his constitutional rights, the Respondent State acted in breach of Article 12(1) and (2) of the Charter;

iii. Order the Respondent State to release him for the reason that his continued detention is illegal".

23. The Respondent State, for its part, prays the Court to declare:

"i. That Mr. Robert John Penessis is also known by the name John Robert Penessis, Robert John Maitland, John Robert Maitland and Robert John Rubenstein;

ii. That Mr. Penessis is not a citizen of Tanzania;

iii. That Mr. Penessis has dual citizenship – that of South Africa and Great Britain and Northern Ireland;

iv. That the Prosecution proved its case against Mr. Penessis beyond reasonable doubt in Criminal Case No. 35/2010;

v. That the conviction and sentence pronounced in Criminal Case No. 35/2010 was lawful;

vi. That all aspects of the prosecution in Criminal Case No. 35/2010, Criminal Appeal No. 9/2011 and Criminal Appeal No. 179/2011 were conducted in accordance with the law;

vii. That the detention order issued against Mr. Penessis is lawful;

viii. That the deportation order issued against Mr. Penessis is lawful;

ix. That the Government of the United Republic of Tanzania has not violated Mr. Penessis' right to liberty;

x. That the Government of the United Republic of Tanzania has not violated Mr. Penessis' right to be heard;

xi. That the Government of the United Republic of Tanzania has not violated Mr. Penessis' right to defend himself;

xii. That the Application be dismissed."

V. Jurisdiction

24. The Court observes that Article 3 of the Protocol provides as follows:

"1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

25. The Court further observes that in terms of Rule 39(1) of the Rules: "The Court shall conduct preliminary examination of its jurisdiction …".

26. On the basis of the above-cited provisions, the Court must, preliminarily conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

A. Objection to material jurisdiction

27. The objections to the material jurisdiction of the Court raised by the Respondent State relates to two essential aspects, namely: the form and content of the Application, and the power of the Court to consider matters of evidence which had been finalized by domestic courts.

i. Objection based on the form and content of the Application

28. The Respondent State contends that the Court has no jurisdiction to entertain this Application for the reason that the document originally filed by the Applicant is not an application within the meaning of the Protocol.

29. The Court is of the opinion that the question of the form of the letter and its content relate to the issue of admissibility and hence, will address it later in the section on admissibility of the Application**.**

ii. Objection based on the power of the Court to evaluate the evidence

30. The Respondent State contends that the Application seeks to extend the jurisdiction of this Court beyond its mandate as set out under Article 3 of the Protocol and Rule 26 of its Rules and require it to sit as a supreme appellate court. In this regard, the Respondent State submits that the Application requires the Court to adjudicate on matters of evidence, already resolved and finalized by its highest court, that is, the Court of Appeal. The Respondent State therefore maintains that this Court has no jurisdiction to make a determination on matters of evidence already finalized by the highest tier of the Respondent State's justice system.

31. The Applicant, for his part, submits that this Court has jurisdiction, given that, according to its Rules, the Court is empowered to

evaluate the evidence on record concerning the Applicant's status and citizenship.

***

32. This Court recalls that, as it has consistently held,[1] it is not an appeal court with respect to decisions rendered by national courts. However, as underscored in its case-law, this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in consonance with the standards set out in the Charter or any other applicable human rights instrument to which the Respondent State is a Party.[2]

33. The Court notes that, in the instant case, the complaints raised by the Applicant pertain to the question as to whether the domestic proceedings were in conformity with international fair trial standards guaranteed in the Charter and other international instruments ratified by the Respondent State. These are matters which, pursuant to Article 3 of the Protocol, fall within the purview of this Court's jurisdiction, regardless of the fact that they may relate to the assessment of evidence determined by the domestic courts.

34. Consequently, the Court dismisses the Respondent State's objection that the Court is acting, in the instant matter, as a supreme appellate court and finds that it has material jurisdiction to hear the matter.

B. Other aspects of jurisdiction

35. The Court notes that its personal, temporal and territorial

1 See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* (*Armand Guehi v Tanzania* (Merits and Reparations), para 33. See also *Alex Thomas v Tanzania* (Merits), (2015) 1 AfCLR 465, paras 60-65; and Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (*Nguza Viking and Johnson Nguza v Tanzania* (Merits), para 35.

2 See *Armand Guehi v Tanzania* (Merits and Reparations), para 33; See also Application 024/2015. Judgment of 7 December 2018 (Merits), *Werema Wangoko Werema and Another v United Republic of Tanzania* (*Werema Wangoko Werema and Another v Tanzania* (Merits), para 29; *Alex Thomas v Tanzania* (Merits), para 130; Application 007/2013. Judgment of 3 June 2016 (Merits), *Mohamed Abubakari v United Republic of Tanzania* (*Mohamed Abubakari v Tanzania* (Merits), para 26; and *Ernest Francis Mtingwi v Malawi* (Admissibility) (2013) 1 AfCLR 190, para 14.

jurisdiction is not being challenged by the Respondent State. Besides, nothing on record indicates that the Court does not have personal, temporal and territorial jurisdiction. The Court, accordingly, holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the Declaration prescribed under Article 34(6) thereof, allowing individuals to bring cases directly before it, pursuant to Article 5(3) of the Protocol;

ii. It has temporal jurisdiction insofar as the alleged violations occurred subsequent to the Respondent State's ratification of the Protocol establishing the Court but before making the Declaration required under Article 34(6).

iii. It has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

36. In light of the foregoing, the Court holds that it has jurisdiction to hear the instant case.

VI. Admissibility

37. Pursuant 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".

38. In terms of Rule 39 of its Rules: "The Court shall conduct preliminary examination of … the admissibility of the application in accordance with Article 50 and 56 of the Charter, and Rule 40 of these Rules".

39. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, sets out the admissibility conditions of applications 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 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."

A. Conditions of admissibility in contention between the Parties

40. The Respondent State raises two objections to the admissibility of the Application, namely, failure to exhaust local remedies, and the time frame for seizure of the Court. As indicated in paragraph 29 above, the Court will also consider here the objection concerning the form and content of the Application.

i. Objection based on the form and content of the Application

41. According to the Respondent State, the Application is in fact a letter from Georgia J Penessis to the Court, asking for directions as to how to pursue her complaints.

42. Still according to the Respondent State, this Application has not been properly filed before the Court in as much as "it is not in conformity with Rule 33(1) and (4) of the Rules".[3] It is argued that the Application contains neither a summary of the facts of the case nor the evidence that the author intends to adduce; nor does it specify the alleged violation, proof of exhaustion of local remedies or whether such remedies have been unduly prolonged. The Respondent State notes further that, the petition does not mention the prayers or injunctions requested, and this is simply because it was not intended to be an Application.

43. The Respondent State submits that the jurisdiction of the Court cannot be invoked by a letter requesting from the Court the procedure to be followed, particularly in so far as the letter contains no undertaking to pursue the case before the Court. The Respondent State argues that the Application must therefore be declared incomplete and, accordingly, dismissed.

44. The Applicant refutes the Respondent State's assertion that his grandmother wrote a simple letter to the Court and not a proper application. He argues that the grievances raised by his grandmother and the information given in the letter have the

3 The reference to Rule 33 by the Respondent State is mistaken; the applicable Rule should be Rule 34 of the Rules, which provides for the form and content of an application.

force of an application because all the necessary information is contained therein.

45. Still according to the Applicant, there are no technical details governing the filing of an application before the Court. For him, any form of referral is valid, the essential thing being that the referral brings the facts and the supporting arguments to the Court's attention.

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46. The Court notes that so far as the form or modality of seizure of the Court is concerned, it has adopted a flexible approach. For example, in the case of *Anudo Ochieng Anudo v United Republic of Tanzania,*[4] the Court decided to admit an application filed by a simple email and communicated as such. In this regard, the Court always takes into account the specific conditions of each Applicant and the circumstances surrounding the filing of the Application.

47. The Court also notes that Rule 34 and Rule 40(1) of the Rules provide some additional requirements as regards the form and general content of an application. Rule 34 of the Rules requires, among other things, that any application filed before it, shall contain a summary of the facts of the case and the evidence intended to be adduced; give clear particulars of the Applicant and of the party against whom the application is brought and specify the alleged violation, show evidence of exhaustion of local remedies or of the inordinate delay of such local remedies as well as the orders or the injunctions sought; and be signed by the Applicant or his/her representative(s). Rule 40(1) of the Rules further requires that the application shall disclose the identity of the Applicant.

48. In the instant Application, the Court notes from the record that the Application contains the identity of the author, that the facts are well elaborated, and the issues raised therein are fairly precise. In addition, the Application was signed and, in his Reply, the Applicant clearly specified the alleged human rights violations,

4 Application 012/2015. Judgment of 22 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* (*Anudo Ochieng Anudo v Tanzania* (Merits) para 52.

and asserted that he has exhausted all local remedies by attaching copies of the judgments of the local courts.

49. The Court accordingly holds that the instant Application fulfils the basic requirements of form and offers sufficient details for the Respondent State to understand the content of the Applicant's grievances and for the Court to consider the matter.

50. The Court thus dismisses the Respondent State's objection based on the form and content of the Application.

ii. Objection based on non-exhaustion of local remedies

51. The Respondent State submits that given that legal remedies exist to address the grievances raised by the Applicant but were not exercised, the latter failed to comply with the conditions of admissibility relating to exhaustion of local remedies stipulated under Rule 40(5) of the Rules.

52. The Respondent State further submits that the Applicant provided no explanation as to whether local remedies were not exhausted for reasons beyond his control or whether the said local remedies are merely ineffective, insufficient and impractical.

53. The Respondent State also avers that between 2013 and 2014, the Applicant filed before the High Court at Bukoba, three criminal applications for *habeas corpus* against the Minister of Home Affairs challenging his detention. He filed a similar application before the High Court at Dar-es-Salaam. Two (2) of the first three (3) applications were struck out on 30 April 2015. The third was dismissed by the High Court at Bukoba, which found that the Applicant's detention was lawful as he was awaiting deportation. The Applicant himself withdrew the application before the High Court in Dar-es-Salaam on the ground that the same petition was already before the High Court at Bukoba. According to the Respondent State, when the last application was dismissed, the Applicant could have appealed to the Court of Appeal but failed to do so.

54. The Respondent State further contends that if the Applicant felt aggrieved by the detention order, he was and still is legally entitled to apply for judicial review to quash the order on grounds of procedural irregularity, by invoking the Law Reform Act which provides for remedies to persons aggrieved by the actions of State administrative bodies or authorities.

55. Refuting these assertions by the Respondent State, the Applicant submits that significant efforts had been made to exhaust all available remedies. In this regard, he refers to the case of *Sir Dawda Jawara v The Gambia,* wherein the African Commission

on Human and Peoples' Rights (hereinafter referred to as "the Commission") held that all domestic remedies that need to be exhausted should be available, effective, adequate and sufficient.

56. The Applicant submits that it is an established fact in international human rights law that a domestic remedy is considered available if it can be exercised without hindrance; is effective if it offers the prospect of success; and is sufficient, if it is capable of remedying the violations raised. He also avers that "no appeal has ever prospered in favour of the Applicant in the United Republic of Tanzania".

57. The Applicant consequently contends that local remedies were unavailable, ineffective and inadequate in the Respondent State, and that for this reason, he had no other choice but to file this Application before this Court, praying the latter to declare the same admissible.

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58. The Court notes that exhaustion of local remedies is one of the requirements which an Application must meet to be declared admissible. However, as this Court has held in the matter of *Wilfred Onyango Nganyi and others v Tanzania*, the remedies to be exhausted in terms of Article 56(5) of the Charter are only those provided by law and are relevant to the case of the Applicant.[5] This understanding of the provision is to the effect that not all existing remedies have to be exhausted**.** Besides, the remedies to be exhausted must be ordinary judicial remedies.[6]

59. In the instant Application, the Court observes that the Applicant was arrested on 8 January 2010 on two counts, namely, unlawfully entering and residing in Tanzania, respectively. On 17 January 2011, the Kagera Resident Magistrate's Court in Bukoba convicted the Applicant on both counts and sentenced him to pay

5 *Wilfred Onyango Nganyi and others v Tanzania* (Merits) (2016) 1 AfCLR 507, paras 88-89; *Norbert Zongo and others v Burkina Faso* (Merits) (2014) 1 AfCLR 219, para 68.

6 *Alex Thomas v Tanzania* (Merits), para 64; Application 003/2015. Judgment of 28 September 2017 (Merits), *Kennedy Owino Onyachi and Another v United Republic of Tanzania (Kennedy Owino Onyachi v Tanzania* (Merits), para 56; *Nguza Viking v Tanzania* (Merits), para 52; Application 032/2015. Judgment of 21 March 2018, *Kijiji Isiaga v United Republic of Tanzania (Kijiji Isiaga v Tanzania (Merits)*, para 45.

a fine of eighty thousand Tanzanian Shillings (TZS 80,000) or two years' jail term in default. The Court of First Instance in Kagera, Bukoba, also handed down a sentence of ten strokes of the cane.

60. In a judgment handed down on 6 June 2011, the Bukoba High Court upheld the Applicant's sentence of two (2) years imprisonment while quashing the sentence of corporal punishment. The Court also ordered his deportation from the territory of the Respondent State. Dissatisfied with this, the Applicant lodged an appeal before the Court of Appeal of Tanzania, which on 4 June 2012, upheld the conviction. The latter Court however, held that it was not the proper body to issue the deportation order since the matter fell within the jurisdiction of the Minister of Home Affairs.

61. The Court however notes the Respondent State's argument that the Applicant did not exhaust all the available remedies because he should have filed an appeal before the Court of Appeal and requested judicial review of the detention order. The Court observes in this regard that the domestic procedure relating to the Applicant's residence and deportation, and that involving his detention are so intertwined that they cannot be detached for the purposes of exhausting local remedies. This is so because the detention was in implementation of an order that ensued from judicial proceedings in respect of the Applicant's residence and deportation. The rights involved therefore form part of a bundle of rights and guarantees, which the domestic courts were necessarily aware of.

62. In addition, the Court notes from the record that the Court of Appeal, the highest court in the Respondent State, has already indicated in its judgment of 4 June 2012 that ordinary courts were not competent to issue deportation orders. As such, it would be superfluous to ask the Applicant to appeal against the detention order signed by the Minister with a view to his deportation.

63. In view of the aforesaid, the Court is of the opinion that local remedies have been exhausted and hence, the Respondent State's objection in this regard is dismissed.

iii. Objection based on failure to file the Application within a reasonable time

64. The Respondent State alleges that the Application was not filed within a reasonable time contrary to Rule 40(6) of the Rules, arguing that the Applicant seized the Court three (3) years after the decision of the Court of Appeal of Tanzania in Criminal Appeal

No. 179/2011.

65. The Respondent State also contends that, although the Charter and the Rules do not define 'reasonable time' to file an Application, international human rights jurisprudence interprets "reasonable time to mean six months from the date of the final decision which is being challenged". This is also the position adopted by the African Commission on Human and Peoples' Rights in the matter of *Michael Majuru v Zimbabwe*.[7]

66. The Applicant, for his part, submits that reasonable time ought to be assessed against the circumstances of each case. He pleads that in this case, he is still being held in Bukoba Central Prison, and that the case of *Michael Majuru v Zimbabwe* cited by the Respondent State is distinguishable from the instant case.

67. The Applicant argues that the Charter has no provision specifying the exact definition of reasonable time, and that in the absence of such provision, the Commission and the Court have been flexible, treating each case on the basis of its context, the arguments adduced, the peculiar circumstances and the notion of reasonable time. The Applicant, for this reason, prays the Court to rely on the foregoing observations and rule that the Application has been filed within a reasonable time.

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68. The Court has held in its previous judgments that the reasonableness of the period for it to be seized depends on the particular circumstances of each case and must accordingly be determined on a case-by-case basis.[8]

69. In the instant case, the Court notes that the Court of Appeal, the highest Court in the Respondent State**,** delivered its judgment on 4 June 2012 and the Applicant seized this Court on 2 June 2015. Between the date the judgment was rendered by the Court of Appeal and the date of seizure of this Court, there was a time lapse of two (2) years, eight (8) months and twenty-eight (28) days. The

7 Communication 308/2005, *Michael Majuru v Zimbabwe*.

8 ***Alex Thomas v Republic of Tanzania*** (Merits), para 73, ***Mohamed Abubakari v of Tanzania*** (Merits), para 91; Application 011/2015. Judgment of 28 September 2017, ***Christopher Jonas v United Republic of Tanzania***, para 52; See ***Norbert Zongo and others v Burkina Faso*** (Preliminary Objections) (2013) 1 AfCLR 197, para 121.

Court, however, notes that between 2013 and 2015, the Applicant filed four *habeas corpus* applications before the High Court at Bukoba and at Dar es Salaam, to challenge the lawfulness of his detention. The Court is of the view that the Applicant cannot be penalised for attempting these remedies. Taking all these facts into consideration, the Court thus considers that the time frame of two (2) years, eight (8) months and twenty-eight (28) days in filing the Application has been explained and is reasonable in terms of Rule 40(6) of the Rules.

70. The Court therefore dismisses the Respondent State's objection that the Application was not filed within a reasonable time.

B. Conditions of admissibility not in contention between the parties

71. The Court notes that compliance with sub-rules 1, 2, 3, 4, and 7 of Rule 40 of the Rules are not in contention, and that nothing on record indicates that the requirements of the said sub-rules have not been complied with.

72. In view of the foregoing, the Court finds that the admissibility conditions have been met, and hence, the Application is admissible.

VII. Merits

73. The Court notes that the instant Application raises two main issues: first, whether or not the right of the Applicant to Tanzanian nationality has been violated; and second, whether or not his arrest and detention were in conformity with the Charter.

i. Alleged violation of the Applicant's right to Tanzanian nationality

74. The Applicant submits that pursuant to the Tanzania Citizenship Act of 1995, an individual may acquire Tanzanian nationality either by birth or by naturalisation. A Tanzanian by birth is someone who was born in the Mainland Tanzania or Zanzibar before the Union (Section 4) or anyone born in the United Republic of Tanzania on Union Day or after (Section 5 of the Act).

75. The Applicant contends that he is a citizen of Tanzania by birth, adding that he holds a valid Tanzanian birth certificate which shows that he was born in Tanzania in 1968.

76. The Applicant also avers that he has never renounced his citizenship, nor has he been deprived of the same by the

Tanzanian authorities as per Section 13(1) and 14 of the Tanzania Citizenship Act (Chap 357).

77. The Applicant further submits that he was born at Buguma Estate, Muleba District in the United Republic of Tanzania, and that both his parents are Tanzanians. He states that, as a citizen, he had initiated the process to obtain a passport. While waiting for the said passport to be issued, the competent authorities of the Respondent State issued him with a temporary travel document which he still had, adding that, as a citizen, he is legally entitled to a Tanzanian passport.

78. The Applicant also argues that according to Section 3(1) of the Tanzania Citizenship Act,[9] persons born to Tanzanian parents on Tanzanian territory after the date of the Union are Tanzanians by birth. He added that he is in possession of a birth certificate which proves that he was born in the United Republic of Tanzania in 1968 that is after the creation of the Union, which makes him a Tanzanian by birth. He claims that he never obtained the nationality of another foreign country, which would have led him to lose his Tanzanian nationality, knowing that Tanzania does not recognize dual nationality.

79. The Respondent State, for its part, contends that the Applicant is not a Tanzanian citizen, invoking the fact that during the Applicant's trial in Criminal Case 35/2010, the Prosecution tendered certified true copies of the Applicant's passports issued by the United Kingdom and the Republic of South Africa. The Respondent State submits that the United Kingdom passport bore his name as Robert John Rubenstein and indicated that he is a British citizen with his place of birth being Johannesburg, South Africa, where he was born on 25 September 1968. It further argues that a copy of the Applicant's South African passport issued by the Department of Home Affairs in South Africa reflected the Applicant's nationality as South African, his place of birth as Johannesburg and date of birth as 1968.

80. The Respondent State also submits that the copies of the afore-mentioned documents were presented by the Applicant in support of his application for a Tanzanian Residence Permit, thus, raising the question as to why a Tanzanian would need a residence

9 Article 3(1) of the Tanzania Citizenship Act: "A citizen by birth is any person who is a citizen of the United Republic of Tanzania under the following conditions: by virtue of the operation of section 4 which provides that persons born in Mainland Tanzania or Zanzibar are Tanzanian. Such persons must be born before Union Day by virtue of Section 5. Any person born in the United Republic of Tanzania on or after Union Day, by virtue of his birth in Zanzibar and of the Article 4(2) ".

permit to reside in his own country.

81. The Respondent State avers that the initial criterion to prove a Tanzanian nationality or citizenship by birth, that is, to be born in Tanzania, has not been met by the Applicant in as much as the copies of passports tendered in evidence during local proceedings clearly testify to the Applicant's nationality and place of birth as being South Africa.

82. The Respondent State further submits that the Applicant has failed to discharge his burden of proof that he is Tanzanian. It argues that rather than producing unequivocal evidence of his Tanzanian nationality, the Applicant provided conflicting and contradictory information on his birth and nationality. On various occasions during the proceedings at domestic level, the Applicant failed to produce certified true copies or an original of his Tanzanian passport, which he alleges he has; rather, he produced a copy of a temporary emergency travel document.

83. The Respondent State finally asserts that, as regards nationality, the laws of Tanzania do not permit dual citizenship and once an individual, who has dual nationality, has attained the age of eighteen (18) years, he or she has to make a choice to retain or renounce his/her Tanzanian nationality. Therefore, regardless of the Applicant's claim that he is a Tanzanian citizen, the mere fact that he possesses passports of other countries proving that he is a citizen of those countries, while he is far beyond the age of eighteen (18), nullifies any contention that he is a Tanzanian.

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84. The Court notes that neither the Charter nor the International Covenant on Civil and Political Rights (ICCPR) contains any provision specifically dealing with the right to nationality. However, Article 5 of the Charter provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status ..."

85. The Court also notes that the Universal Declaration of Human Rights (UDHR) which is recognized as part of customary international law provides in its Article 15 that "Everyone shall have a right to nationality" and "No one shall be arbitrarily deprived of

his/her nationality...".[10] The Court recalls, as it has held in the case of *Anudo Ochieng Anudo v United Republic of Tanzania,* that the right to nationality as provided under the UDHR can apply as a binding norm to the extent to which the instrument has acquired the status of a rule of customary international law.[11] The Court in the same judgment noted that while deprivation of nationality has to be done in a manner that avoids statelessness, international law recognises that "… the granting of nationality falls within the ambit of the sovereignty of States and, consequently, each State determines the conditions for attribution of nationality".[12]

86. The Court further notes that the nationality provision in the UDHR has crystallised in several subsequent international law instruments whether universal or African. Such instruments include the United Nations Conventions of 1954 and 1961 devoted to preventing and reducing statelessness, which essentially obligate States to determine the granting of nationality always bearing in mind the utmost need of avoiding statelessness.[13] Under the aegis of the African Union, the African Charter on the Rights and Welfare of the Child explicitly provides in its Article 6(3) that "every child has the right to acquire a nationality".[14]

87. The Court holds that the right to nationality is a fundamental aspect of the dignity of the human person. The protection of the dignity of the human person is recognised as a cardinal principle under international law. Apart from the recognition of the norm in most international human rights instruments such as ICCPR and UDHR, the principle of respect for human dignity is enshrined in most constitutions of modern states in the world.[15] The protection of human dignity is therefore considered as a fundamental human

10 See the Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States v Iran) [1980].* ICJ page 3. Collection 1980. See also, The question of South West Africa (*Ethiopia v South Africa; Liberia v South Africa)*. (Preliminary Objection). (Separate Opinion of Judge Bustamante) ICJ, Collection 1962, page 319, Section 9(f) of the Constitution of the United Republic of Tanzania, 1977.

11 *Anudo Ochieng Anudo v Tanzania* (Merits), para 76.

12 *Ibid*, para 77-78.

13 See UN Convention Relating to the Status of Stateless Persons (1954); and UN Convention on the Reduction of Statelessness (1961).

14 Entered into force on 29 November 1999. Ratified by the United Republic of Tanzania on 16 March 2003.

15 See, for example, Art 12(2), Constitution of the United Republic of Tanzania (1977); Art 28 Constitution of Kenya (2010); Art 24, Constitution of the Federal Democratic Republic of Ethiopia (1994); Art 10, the Constitution of the Republic of South Africa (1996).

right.

88. The Court further notes that a person's arbitrary denial of his/her right to nationality is incompatible with the right to human dignity, reason for which international human instruments, including the Charter, provide that "Everyone shall have the right to have his legal status recognized everywhere"[16] and international law requires States to take all necessary measures to avoid situations of statelessness.[17]

89. The Court notes that the expression 'legal status' under Article 5 of the Charter encompasses the right to nationality**.** The same understanding is provided by the Commission in the matter of *Open Society Justice Initiative v Côte d'Ivoire*. In that case, the Commission took the view that: "The specific right protected under Article 5 of the Charter is therefore the guarantee of an obligation incumbent on every State Party to the Charter to recognize for an individual, a human being, the capacity to enjoy rights and exercise obligations ... nationality is an intrinsic component of this right, since it is the legal and socio-political manifestation of the right, as are, for example, the status of refugee or of resident granted by a State to an individual for the purpose of enjoying rights and exercising obligations".[18]

90. The Court notes that, in the instant case, the Parties' dispute over the issue as to whether the Applicant is a Tanzanian by birth. The Applicant maintains that he is a Tanzanian national while the Respondent State argues that he is not. Thus, in these circumstances, it is important to determine who bears the burden of proof.

91. In its case-law on the burden of proof, this Court has adopted the general law principle of *actor incumbit probatio* by which anyone who alleges a fact must prove it. That principle was applied for instance in the case of *Kennedy Owino Onyachi v United Republic of Tanzania* where the Court held that "it is a fundamental rule of law that anyone who alleges a fact must provide evidence to prove it"[19].

92. It flows from the foregoing that the burden of proof lies with the alleging party and shifts to the other party only when discharged. Having said that, the Court is of the view that this principle is not

16 See Art 5 of the Charter and Article 6 of the UDHR.

17 UN Convention on the Reduction of Statelessness (1961).

18 Communication 318/06, *Open Society Justice Initiative v Republic of Côte d'Ivoire*, paras 95-97.

19 *Kennedy Owino Onyachi v United Republic of Tanzania* (Merits), para 142.

static and may be subject to exceptions especially in circumstances where the alleging party is not in a position to access or produce the required proof; or where the evidence is manifestly in the custody of the other party or the latter is entrusted with the means and prerogatives to discharge the burden of proof or counter the alleging party. In such circumstances, the Respondent State may be required to rebut a *prima facie* allegation.

93. Indeed, the Court has recognized exceptions to the rule by holding for instance in the above referenced case of *Kennedy Owino Onyachi v Tanzania that* "when it comes to human rights, this rule cannot be rigidly applied" and there must be an exception among other circumstances, where "… the means to verify the allegation are likely to be controlled by the State"[20]. In such cases, the "… the burden of proof is shared and the Court will assess the circumstances with a view to establishing the facts." In the context of nationality, the Court has held in the matter of *Anudo Ochieng Anudo v Tanzania* that where "… the Applicant maintains that he is of Tanzanian nationality" and "… since the Respondent State is contesting the Applicant's nationality … the burden is on the Respondent State to prove the contrary."[21]

94. In respect of the exception to the above stated principle on the burden of proof, it is also worth referring to the case of *IHRDA* (*Nubian Community) v Kenya*[22] where the African Commission took the view that it lies with the Respondent State to prove that the Applicants were not Kenyan nationals, contrary to their claim. Owing to the restrictions imposed by the Respondent State, the Commission observed that it was virtually impossible for the Applicants to provide proof of their nationality.[23] The Commission also took a similar position in the case of *Amnesty International v Zambia*.[24]

95. The International Court of Justice (ICJ) in the *Nottebohm* Case *(Liechtenstien v Guatemala)*[25] also held that to determine a nationality link, it is necessary to take into account the very important social factors which bind the Applicant to the Respondent

20 *Kennedy Owino Onyachi v United Republic of Tanzania* (Merits), para 143.

21 *Anudo Ochieng Anudo v United Republic of Tanzania* (Merits), para 80.

22 *Institute for Human Rights and Development in Africa (On behalf of the Nubian Community in Kenya) v Kenya*, Communication, page 31, para 151

23 *Idem,* para 150

24 *Amnesty International v Zambia,* Communication 212/98, para 41.

25 *Nottebohm* Case*, Liechtenstien v Guatemala,* second phase of the judgment, April 1955, paras 22 -24.

State. Nationality must be "an effective and solid link" such as the Applicant's habitual residence, family ties and participation in public life.

96. The Court notes that, in view of the foregoing, the Applicant who alleges that he holds a certain nationality bears the onus to prove so. Once he has discharged the duty *prima facie*, the burden shifts to the Respondent State to prove otherwise. It is against these standards that the Court will settle the issue of proof of nationality in the present case, including by weighing the evidence adduced by both Parties.

97. The Court also notes that the Applicant has always maintained that he is Tanzanian by birth just like his parents. At the time of his arrest, he presented a copy of his birth certificate showing that he was born in the territory of the Respondent State and an emergency temporary travel document was issued to him, pending issuance of his passport. The Court notes that these two documents were provided by the authorities of the Respondent State, and even if the latter describes them as fraudulent, it has not adduced evidence to the contrary.

98. The Court further notes that, according to the 1995 Citizenship Act, at the time of the Applicant's birth, that is, 1968,[26] a person could acquire Tanzanian nationality by birth if that person was born in the United Republic of Tanzania after Union Day, provided either of his parents is Tanzanian.[27]

99. In the present Application, the Respondent State has challenged the Applicant's nationality by disputing his place of birth. However, a witness named Anastasia Penessis who claimed to be the Applicant's mother appeared before the Court and testified that her son, the Applicant, was born in Buguma Estate, Tanzania, in 1968, where the family has property**.** The Court notes that the same name of Anastasia Penessis is on the certified copy of the birth certificate indicated as the mother of the Applicant and recognized as Tanzanian**.** This coupled with the fact that the same birth certificate clearly shows that he was born in Tanzania, in the opinion of this Court, establishes a presumption that the Applicant is a Tanzanian by birth, and it is for the Respondent State to refute this presumption**.** Accordingly, the burden of proof has to shift to the Respondent State, which has to prove that the Applicant, in

26 The Tanzania Citizenship Act, 1961 Chap. 512, and the British Nationality Act, 1948.

27 See Article 6 of the Tanzania Immigration Act.

spite all the evidence adduced above, is not a Tanzanian national.

100. In this regard, the Court takes note of the contention of the Respondent State that the said birth certificate was fraudulent and that the Applicant has British and South African passports, attesting to the fact that he is a citizen of those countries. The Respondent State has adduced copies of those passports but the Court notes that these documents bore different names and the Respondent State has not provided compelling evidence to substantiate its averment that both passports belong to the Applicant. The Court notes also that the Applicant refused knowledge of those passports.

101. The Court further notes the Respondent State's argument that the Applicant submitted an application for residence permit and, for that purpose, used a British passport. At the public hearing held on 19 and 20 March 2019, the Court asked the Applicant whether he had actually applied for a residence permit. The Applicant's Counsel stated that his client had never undertaken such a step because he is Tanzanian and therefore does not need the permit. The Court also asked the Respondent State to provide a copy of the said application for residence permit, but the latter was not able to do so, contending that the said application was in the Applicant's possession.

102. At this juncture, the Court further notes that all the documents tendered by both Parties are copies or certified copies and that neither of the parties adduced originals of the documents used as evidence. In the circumstance, the Court is of the opinion that the Respondent State, as a depository and guarantor of public authority and custodian of the civil status registry, has the necessary means to correctly establish whether the Applicant was a Tanzanian, South African or a British citizen. The Respondent State could also have obtained and produced concrete evidence to support its assertion that the Applicant has other nationalities.

103. In view of the aforesaid, the Court considers that there is a body of documents especially the certified copy of the birth certificate and the certified temporary travel document issued by the competent authorities pending finalization of the passport, establishing that the Applicant is Tanzanian by birth and that the Respondent State has not been able to prove the contrary**.** It therefore finds in conclusion that the Applicant's right to Tanzanian nationality has been violated, contrary to Article 5 of the Charter and Article 15 of UDHR.

ii. Alleged violation of the Applicant's right to liberty

104. The Applicant contends that as a citizen of the Respondent State, he has the right to enjoy his right to liberty and not to be arrested and detained illegally. He alleges however that he was arrested and detained illegally and continues to be in prison even after having served his sentence of two years, following his conviction by the courts of the Respondent State for the offences of illegal entry and unlawful presence in Tanzania.

105. For its part, the Respondent State argues that the detention of the Applicant is consistent with its law for the reason that he does not have any documents allowing him to remain in Tanzania. In this regard, the Applicant was prosecuted and sentenced in accordance with the law.

106. The Respondent State submits further that the Applicant is still in detention because he refuses to cooperate with the authorities for his deportation order to be executed. It notes in this respect that South African authorities are willing to welcome their national, the Applicant, but could not carry out the deportation since there are certain procedural measures to be implemented, and the said measures can be applied only with the cooperation of the Applicant.

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107. The Court notes that Article 6 of the Charter guarantees the right to liberty as follows:

"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 arbitrary arrested or detained."

108. The Court notes that the right to liberty and security as enshrined above strictly prohibits any arbitrary arrest or detention. An arrest or detention becomes arbitrary if it is not in accordance with the law, lacks clear and reasonable grounds or is conducted in the absence of procedural safeguards against arbitrariness.[28]

109. In the instant case, the Court notes from the record that the Applicant was initially detained on the basis of the Respondent

28 *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 131.

State's criminal laws for having allegedly entered and stayed in its territory unlawfully. The Applicant's conviction for the same was premised on the assumption that he was not a Tanzanian national. However, the Court recalls its earlier finding above that the Respondent State has not provided evidence to substantiate that the Applicant is not a Tanzanian before or at the time of his arrest or conviction. In the opinion of the Court, this renders his arrest, conviction and detention unlawful.

110. The Court notes that the Applicant has remained in prison to date notwithstanding that he fully served two (2) years' imprisonment sentence as far back as 2012. In this regard, the Court finds that his alleged refusal to cooperate for the purpose of his expulsion is not a reasonable justification for keeping him in prison indefinitely.

111. In view of the aforesaid, the Court finds that the Respondent State has violated the Applicant's right to liberty contrary to Article 6 of the Charter.

iii. Alleged violation of the Applicant's right to freedom of movement

112. The Applicant avers that the right to freedom of movement is a fundamental human right recognised under international human rights instruments such as the UDHR, ICCPR and other human rights instruments, including the Charter. He maintains that this right involves not only movement within the country but also protection from forced expulsion or displacement.

113. The Applicant also submits that according to Article 12(1) and (2) of the Charter, every individual has the right to move freely within a country, the right to leave the same, including his or hers, and return to it, subject only to restrictions provided by law and required for the protection of national security. The Applicant avers that he has neither threatened the Respondent State's public order nor breached Article12 of the Charter.

114. In this respect, the Applicant cites the matter of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* wherein the Commission stressed that Article 12 of the Charter imposes an obligation on the contracting State to secure the rights protected under the Charter for all parties within their jurisdiction, nationals or non-nationals alike.

115. The Applicant submits that while he is a Tanzanian national by birth and thus, has the right to freedom of movement, including the right to leave and return to his country**,** the law, as reflected in the Commission's decisions in the above-mentioned case, protects both nationals and non-nationals. He also asserts that as

a citizen of the Respondent State, he is entitled to enjoy fully his rights and should not have been arrested or unlawfully detained. He avers further that his conviction and sentence to two (2) years in prison, that is, from 2010 to 2012 and his continued detention to this date, are illegal and in violation of his right to freedom of movement.

116. The Applicant further submits that the Respondent State has the primary responsibility to respect, protect and promote his right to freedom of movement; and having failed to do so, the Respondent State violated this right by unlawfully arresting and detaining him on his entry into the country.

117. The Respondent State, for its part, contends that the Applicant filed an application for residence at the Regional Immigration Bureau in Kagera using a British passport. While treating this application, the immigration officers discovered that he was also in possession of a South African passport and had no legal document justifying his presence in the territory of Tanzania.

118. According to the Respondent State, subsequent investigations led to his arrest and detention. He was sentenced by the Court for illegal entry and presence in its territory and his detention came about only after he was arrested, charged and convicted in accordance with the laws governing criminal proceedings in the Respondent State.

119. The Respondent State further submits that just as was the case before the immigration officers, the Applicant failed to tender any document to show that he entered the country lawfully. Since he did not have any class of residence permit and is not a citizen of the Respondent State, his presence in Tanzania was unlawful.

120. Consequently, the Respondent State contends that it did not violate the Applicant's right to freedom of movement.

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121. The Court notes that Article 12 of the Charter stipulates the right to freedom of movement as follows:

"1. Every individual shall have the right to freedom of movement and residence ...

2. Every individual shall have the right to leave any country, including his own, and to return to his country ..."

122. Similarly, Article 12 (1) of ICCPR provides that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence".

123. The Court thus notes that the right to freedom of movement as enunciated under Article 12 of the Charter is guaranteed to "every individual" lawfully present within the territory of a State regardless of his national status, that is, regardless of whether or not he or she is a national of that State. According to Article 12 of the Charter and of ICCPR, this right "may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

124. The Court underscores that nationals of a State, by virtue of their citizenship, are presumed to be "lawfully in the territory" of that State. However, as far as non-nationals are concerned, "the question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations".[29]

125. The Court notes that in the instant case, it has already established that the Applicant is presumed to be a national of the Respondent State. Accordingly, the Applicant is considered to have been lawfully present in the territory of the Respondent State and thus, has the right to exercise his right to freedom of movement.

126. However, as indicated above, the Applicant has been convicted, detained and sentenced for illegal entry and still continues to be in prison even after having served the two (2) years' prison sentence that was meted out to him in 2010. The Respondent State has not provided any justification for restrictions that would fall under the provision of Article 12(2) of the Charter such as protection of national security, law and order, public health or morality warranting the restriction of the Applicant's freedom of movement.

127. In view of the aforesaid, the Court holds that the Applicant's arrest and continued detention constitute a violation of Article 12 of the Charter.

iv. Alleged violation of Article 1 of the Charter

128. The Applicant submits that the Respondent State violated Article

29 United Nations Human Rights Committee, *General Comment 27: Article 12 (Freedom of Movement)*. See also Communication 456/1991, *Celepli v Sweden*, para 9.2.

1 of the Charter.

129. According to the Applicant, Article 1 confers on the Charter its legally binding character, and therefore a violation of any right under the Charter automatically means a violation of this Article.

130. He avers that the Commission has found that Article 1 had been violated even where a complainant himself had not invoked a violation of that particular Article. In this regard, the Applicant made specific mention of the case of *Kevin Mgwanga Gunme et al v Cameroon* wherein the Commission stated that, according to its well-established jurisprudence, a violation of any provision of the Charter automatically constitutes a violation of Article 1 thereof, as it depicts a failure on the part of the State Party concerned to take adequate measures to give effect to the provisions of the Charter.[30]

131. The Respondent State did not make any submissions in this respect.

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132. The Court recalls its previous decisions wherein it held that "when the Court finds any of the rights, duties and freedoms set out in the Charter is curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated."[31]

133. In the instant case, having found that the Applicant's right to liberty, nationality**,** to security of his person and the right not to be unlawfully detained have been violated, the Court holds that the Respondent State has violated its obligations under Article 1 of the Charter.

VIII. Reparations

134. The Court notes that Article 27(1) of the Protocol provides that: "If the Court finds that there has been a violation of a human and peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or

30 Communication 266/03. *Kevin Mgwanga Gunme et al v Cameroon.*

31 *Alex Thomas v Tanzania* (Merits), para 135; *Norbert Zongo and others v Burkina Faso* (Merits) (2014) 1 AfCLR 219, page 54, para 199.

reparation**".**

135. In this respect, Rule 63 of the Rules of Court provides that: "The Court shall rule on the request for reparation ... by the same decision establishing a human or peoples' right or, if the circumstances so require, by a separate decision."

136. In the instant case, the Court has already found that the Applicant's rights under Articles 1, 5, 6, and 12 of the Charter and Article 15 of the Universal Declaration of Human Rights, have been violated.

A. Pecuniary reparations

137. The Applicant alleges that his arbitrary detention led to a loss of his socio-economic activities by which he provided the needs of his family. To that end, he seeks reparation for the reason that his life plans have been shattered and that his sources of income have not only been interrupted but also definitively lost.

i. Material prejudice

138. The Applicant is claiming the sum of two hundred and eighty-three thousand three hundred and thirty-three United States Dollars (US$ 283,333) as compensation for the prejudice suffered.

139. The Respondent State for its part submitted its response to the Applicant's request for reparation on 17 January 2019; and relying on this Court's jurisprudence particularly in *Mtikila v Tanzania*, argues that the Applicant must provide evidence of his entitlement to compensation as well as of the form and estimated amount of the remedy. It also argued that the Applicant has adduced no evidence to justify such compensation.

140. The Respondent State also invokes the "burden of proof" principle according to which the Applicant must show "that it is more probable than not" that he is entitled to the remedies sought, which in its view is not the case in this matter.

141. The Respondent State also emphasizes the established principle in international law whereby there must be a link between an alleged violation and the prejudice suffered. It must be shown that the damage would never have occurred without the alleged violation. For the Respondent State, the Applicant did not provide the needed proof of a causal link in as much as the Respondent State did not commit any act, omission or negligence that would have resulted in a violation of the Applicant's rights, adding that the Applicant was instead a victim of his own attitude.

142. In view of the foregoing, the Respondent State avers that the Applicant has not provided any evidence of pecuniary or

non-pecuniary damage allegedly caused by the Respondent State, and therefore prays the Court to dismiss the Applicant's request and grant him no compensation.

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143. The Court notes that for the reparation of any material prejudice arising from the violation of any right, there must be evidence establishing a causal link between the facts and the prejudice suffered.[32]

144. In the instant case, the Court also notes from the record that the Applicant has failed to adduce evidence on his alleged material losses and does not explain how he arrived at the figures being claimed. Consequently, the Court does not grant his request.

ii. Moral prejudice

a. Prejudice suffered by the Applicant

145. The Applicant seeks reparation as direct victim for reasons of the following facts:

i. long detention after serving the prison term;
ii. a morally exhausting appeals process which yielded no fruit;
iii. long separation from his family because of the long detention;
iv. his life plans are in shambles;
v. his sources of income have not only been disrupted but definitively lost;
vi. the deterioration of his health while in prison;
vii. loss of social status;
viii. limited contact with his parents.

146. The Applicant also contends that since his arrest, until 8 August 2018, the date he filed his submissions on reparations, he has been in detention for a "period of one hundred and two (102) months". Relying on this Court's jurisprudence in *Issa Konaté v Burkina Faso,* he claims entitlement to a total amount of

32 *Reverend Christopher R Mtikila v United Republic of Tanzania* (2014) AfCLR page 24, para 30.

US$113,333 (one hundred and thirteen thousand three hundred and thirty-three dollars) in respect of moral damage.

147. The Respondent State, for its part, reiterates its contention that a link between the alleged violation and the prejudice suffered must be established and that the Applicant must bear the burden of proof in this regard.

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148. The Court notes that the Applicant has indeed been in detention since 2010 and that this is not disputed by the Respondent State. As such, the Court recalls its earlier finding that the said detention was illegal and constitutes a breach of the Applicant's right to liberty and freedom of movement. There is no doubt that such a long detention not only disrupts the normal life of a person and jeopardizes his social status but also causes him serious physical and moral anguish.

149. Accordingly, the Court grants the Applicant's prayer for reparation pursuant to Article 27(1) of the Protocol for the moral prejudice suffered during his detention. The Court considers it appropriate to award him compensation in the amount of ten million Tanzanian Shillings (TZS 10,000,000) for the moral damage he suffered to date, and three hundred thousand Tanzanian Shillings (TZS 300,000) for every month he remains in detention after this judgment is notified to the Respondent State until the date he is released.

b. Prejudice suffered by the Applicant's mother

150. The Applicant also indicated that his mother as an indirect victim suffered as a result of her son's absence on account of the unlawful detention. According to the Applicant, "it was he who managed the family's coffee plantation, BUGUMA COFFEE, which was illegally seized and exploited for other purposes during his absence. His mother suffered physical, mental and moral distress for losing her illegally imprisoned son. The moral suffering of knowing that he was involved in a criminal case is a nightmare. The social stigma of having a son labelled a criminal is morally exhausting. The financial implications of his arrest were heavy. She spent a lot of money seeking justice for her son, frequenting various ministries,

especially, that of Home Affairs".

151. The Applicant accordingly requests the Court to grant two hundred and sixty-one thousand one hundred and eleven United States Dollars (US $261,111) to his mother, Georgia Penessis, as an indirect victim.

152. For the Respondent State, the Applicant has not provided any evidence of a relationship between him and any indirect victim, and thus that there is also no evidence showing that indirect victims suffered as a result of his detention.

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153. The Court notes that according to its established jurisprudence, members of an applicant's family who suffered either physically or psychologically from the prejudice suffered by the victim are also considered as "victims" and may also be entitled to reparation.[33]

154. In the instant case, the Applicant contends that his mother suffered as a result of his prolonged detention resulting in the loss of their family coffee plantation which was their sole source of income. He also avers that she too suffered from physical, mental and moral distress as a result of the detention of her son.

155. The Court notes that in the natural and normal order of family relationships, it is reasonable to assume that a mother would suffer psychologically as a result of the arrest and long detention of her son. As long as the relationship is established, the Court will rely on this presumption, to consider and grant compensation for such suffering.

156. In the present Application, the Court takes note of the Respondent State's contention that the Applicant has not provided any evidence of relationship between him and an indirect victim. However, the Court recalls that during the public hearing, a woman named Anastasia Penessis who claimed to be the mother of the Applicant appeared before the Court.

157. The Court further notes that during the public hearing, it was indicated by the Applicant's Counsel that the woman in question was ready to undertake a DNA test to prove that she is the mother of the Applicant. The Respondent State did not take up the offer to

33 *Norbert Zongo and others v Burkina Faso* (Reparations) (2015) 1 AfCLR 258 para 46.

undertake a DNA test, pointing out that a DNA test was not proof of the Applicant's nationality or citizenship. In the circumstance and taking into account the mention of the witness's name on the Applicant's birth certificate as his mother and as a citizen of Tanzania, the Court finds that the woman who appeared before it is the mother of the Applicant and accordingly is entitled to compensation.

158. The Court is of the opinion that the unlawful and prolonged detention of the Applicant has undoubtedly had consequences on the moral condition of his mother. Consequently, Court grants the Applicant's prayers for reparation for his mother as an indirect victim and orders the Respondent State to pay her the sum of Five Million Tanzanian Shillings (TZ 5,000,000).

B. Non-monetary reparations

i. Request for release

159. Citing the unlawful nature of his detention, the Applicant prays the Court to order his release.

160. The Respondent State submits that the Applicant's detention has been in accordance with the law as it was based on a Court Order and an expulsion Order issued by the competent authority.

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161. The Court refers to its jurisprudence wherein it indicated that a measure such as the release of the Applicant may be ordered only in exceptional or compelling circumstances.[34]

162. The Court is of the opinion that the existence of such circumstances must be determined on a case-by-case basis, taking into account mainly the proportionality between the reparation sought and the extent of the violation established.

163. In the instant case, the Court notes that the fact that the Applicant is still in detention more than six (6) years after the end of his prison term, is not disputed by the Respondent State. For the Court, this unlawful detention constitutes proof of the existence of

34 *Alex Thomas v Tanzania* (Merits), *op cit* para 157.

compelling circumstances.

164. Accordingly, the Court grants the Applicant's request and orders the Respondent State to immediately release him from prison.

IX. Costs

165. The Court notes that Rule 30 of its Rules provides that: "Unless otherwise decided by the Court, each party shall bear its own costs".

166. In the instant Application, the Parties did not make any submissions on costs.

167. Based on the foregoing, the Court rules that each Party shall bear its own costs.

X. Operative part

168. For these reasons,

The Court,

Unanimously:

On jurisdiction

i. *Dismisses* the objection to its material jurisdiction;

ii. *Declares* that it has jurisdiction to hear this case.

On admissibility

iii. *Dismisses* the objections to admissibility;

iv. *Declares* the Application admissible.

On the merits

By a majority of 6 votes for and 2 against, Judges Gérard Niyungeko and Chafika Bensaoula having voted against,

v. *Declares* that the Respondent State has violated the Applicant's right to Tanzanian nationality as guaranteed by Article 5 of the Charter and Article 15 of the Universal Declaration of Human Rights;

By a majority of 7 votes for and 1 against, Judge Chafika Bensaoula having voted against,

vi. *Declares* that the Respondent State has violated Article 6 of the Charter on "the right to liberty and to the security of the person"**;**

vii. *Declares* that the Respondent State has violated Article 12 of the Charter on the "right to freedom of movement and residence" on account of the Applicant's arrest and detention;

viii. *Declares* that the Respondent State has violated Article 1 of the Charter.

On reparations

By a majority of 7 votes for and 1 against, Judge Chafika Bensaoula having voted against,

ix. *Dismisses* the Applicant's request regarding material prejudice, for lack of evidence;

x. *Orders* the Respondent State to pay the Applicant a lump sum of ten million (10,000,000) Tanzanian Shillings for his illegal detention to date and a further sum of three hundred thousand (300,000) Tanzanian Shillings for each month of illegal detention from the date of notification of this Judgment until his release;

xi. *Orders* the Respondent State to pay the Applicant's mother a lump-sum of five million (5,000,000) Tanzanian Shillings for the moral prejudice suffered;

xii. *Orders* the immediate release of the Applicant;

xiii. *Orders* the Respondent State to pay the amounts indicated under (x) and (xi) tax free, effective six (6) months from the date of notification of this Judgment, failing which it will pay interest on the arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania, throughout the period of delayed payment until the amount is fully paid;

xiv. *Orders* the Respondent State to submit to it, within six (6) months from the date of notification of this judgement, a report on the status of implementation of this judgment;

On costs

xv. *Orders* that each Party shall bear its own costs.

***

Dissenting opinion: BENSAOULA

1. I share the opinion of the majority of the Judges as regards the admissibility of the Application and the jurisdiction of the Court.

2. However, in my opinion, the manner in which the Court treated admissibility with regard to the objection raised by the Respondent State on the filing the Application within a reasonable time, runs counter to the provisions of Article 56 of the Charter, Article 6(2)

of the Protocol and Rules 39 and 40 of the Rules.

3. Under Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 6, it is clearly stated that applications must be "submitted *within a reasonable time from the date local remedies were exhausted* or from *the date set by the Court* as being the commencement of the time limit within which it shall be seized with the matter".

4. It is clear from the aforesaid that the legislator laid down two (2) options as to how to determine the starting point of reasonable period:

i. the date of exhaustion of local remedies: in the instant case, this date was set by the Court at 4 June 2012 – date of the judgment of the Court of Appeal. Between this date and that of referral of the matter to the Court, there was a time lapse of two (2) years, eight (8) months and twenty-eight (28) days.

ii. the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter: It is noteworthy in this regard that although the Court took into account the date of exhaustion of local remedies to determine the reasonableness of the time limit,[1] the Court nevertheless noted that between 2013 and 2015, the Applicant filed four (4) *habeas corpus* applications to challenge the lawfulness of his detention. The Court also noted that the Applicant could not be penalized for attempting these remedies and that, besides, he was under detention. It held in conclusion that the period cited above was reasonable.

5. This reasoning on the part of the Court runs counter to the very logic of the exception made by the legislator as to the second prerogative conferred on the Court to set a date as being the commencement of the time limit within which it shall be seized with a matter.

6. Indeed, whereas with regard to local remedies, the Court has held that Applicants are obliged to exercise only ordinary remedies, there would be no contradiction with this position had the Court, based on the fact that the Applicant filed for extraordinary remedies or "*habeas corpus*" as in the present case, retained the date of these remedies as being the commencement of the time limit within which it shall be seized with the matter, instead of determining the reasonable period relying on these remedies as facts.

7. The Court should have justified this option in the following manner: "Notwithstanding the fact that it has considered that local remedies have been exhausted as evidenced by the Court of Appeal Judgment of

1 Para 69 of the Judgment.

04/06/2012, the Court, in the spirit of fairness and justice, would take as element of assessment, the date on which the *habeas corpus* application was filed, that is 2015", which would have given a more reasonable time as it is shorter.

8. By ignoring the aforesaid date and simply citing additional elements such as the Applicant's detention to justify reasonable time[2], the Court failed to correctly apply Rule 40(6) of the Rules.

2 Para 67 of the Judgment.

Mussa and Mangaya v Tanzania (merits and reparations) (2019) 3 AfCLR 629

Application 014/2015, *Jibu Amir Mussa & Another v United Republic of Tanzania*

Judgment, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicants were convicted and sentenced to thirty (30) years imprisonment for armed robbery. The Applicants claimed the sentence was "improper" and that they were denied the right to free legal assistance and not informed of their right to legal representation. The Court held that the Applicants were convicted and sentenced based on legislation which was in force when the crime was committed. However, the Court held that the failure to provide the Applicants with free legal assistance and failure to inform them of their right to free legal representation violated the Charter.

Jurisdiction (material jurisdiction, 18)

Admissibility (exhaustion of local remedies, constitutional petition, 35, 36; issues first raised before the Court, 37; submission within reasonable time, 49-51)

Fair trial (legality, 67; free legal assistance, 77-79)

Reparations (moral damages, 94, 95)

Separate Opinion: Bensaoula

Dissenting opinion: BENSAOULA

Admissibility (exhaustion of local remedies, 18; submission within reasonable time, 23)

I. The Parties

1. Jibu Amir alias Mussa and Saidi Ally alias Mangaya (hereinafter referred to as "the Applicants") are nationals of the United Republic of Tanzania, who are currently serving thirty (30) years' prison sentence each, at the Ukonga Central Prison ,Dar es Salaam, having been convicted of the offence of armed robbery.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the

Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs.

II. Subject matter of the Application

A. Facts of the matter

3. The record before this Court indicates that on 31 December 2001, at 7 pm, the Applicants jointly with others not before this Court stole an amount of twelve thousand Tanzanian Shillings (TZS 12,000) from one, Frank Munishi, at his shop. During the robbery, one of the Applicants, that is,Jibu Amir shot Frank Munishi and his wife Gladiness Munishi with a pistol as the victims tried to flee from the scene of the crime. Frank Munishi was further stabbed by the other Applicant – Saidi Ally, with a "bush knife" to coerce him into giving the Applicants the money which he subsequently did, following which, the Applicants left the crime scene. Thereafter, neighbours of the victims converged at the crime scene and rushed the victims to Temeke Police Station and subsequently to the hospital.

4. Three (3) of the Prosecution Witnesses, that is, PW1, PW2 and PW3 testified before the District Court of Temeke, Dar es Salaam that they were at the scene of the robbery. Furthermore, PW1 testified that he served the Applicants on the material day of the crime while PW2 could only identify the second Applicant.

5. The Applicants were subsequently arraigned before the District Court of Temeke and on 25 February 2004, convicted of armed robbery in accordance with Sections 285 and 286 of the Respondent State's Penal Code and sentenced to a term of thirty (30) years' imprisonment.

6. Dissatisfied with the conviction and sentence, the Applicants jointly filed appeal**s** to the High Court and subsequently, to the Court of Appeal, which were dismissed on 21 June 2009 and14 April 2011, respectively. Then on 19 April 2011, the Applicants filed before the Court of Appeal an application for review of their case, which was also dismissed on 20 March 2015.

B. Alleged violations

7. The Applicants allege that the Respondent State pronounced an "improper" sentence on them and that it also denied them the

right to free legal assistance. The Applicants contend that as a result**,** the Respondent State has violated their rights protected by the Tanzanian Constitution and Articles 1, 2, 3, 6 and Article 7(1) (c) and (2) of the Charter.

III. Summary of the procedure before the Court

8. The Application was received on 6 July 2015 and served on the Respondent State and the entities listed under Rule 35(3) of the Rules on 23 September 2015 and 19 October 2015, respectively.

9. The Parties were notified of the pleadings and filed their submissions within the time stipulated by the Court.

10. On 24 September 2019, the Court informed the Parties that written pleadings were closed.

IV. Prayers of the Parties

11. The Applicants pray the Court the following:

"i. a declaration that the Respondent State violated their rights as guaranteed under Article 1,2,3,4,5,6 and 7(1)(c) and (2) of the African Charter;

ii. an order compelling the Respondent State to release the Applicants from detention as they have already served the term stipulated in Section 285 and 286 of the penal code. When the robbery was committed on 31 December 2001;

iii. an order for reparations should this honourable find merit in the application and in the prayers;

iv. an order of this honourable court to supervise the implementation of the court's order..."

12. The Respondent State prays the Court to grant the following orders:

"i. that the Honourable Court is not vested with jurisdiction to adjudicate the Application;

ii. that the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;

iii. that the cost of this Application be borne by the Applicants;

iv. that the sentence of 30 years imposed by the Respondent State neither contravened the Charter nor its Constitution and thus was lawful;

v. that the Respondent State has not violated any of the rights alleged by the Applicants."

V. Jurisdiction

13. Pursuant to Article 3 of the Protocol:

"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 instruments ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide".

14. In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction ….."

15. The Respondent State has raised objections to the material jurisdiction of the Court.

A. Objections to material jurisdiction

16. The Respondent State avers that the Applicants raise two allegations before this Court for the first time asking it to adjudicate on them as a court of first instance, namely, the ones relating to the constitutionality of the sentence, and the right to be represented by Counsel.

17. The Applicants assert that the Court is empowered by Article 3(1) of the Protocol to interpret and apply the Charter. Further, the Applicants argue that their Application discloses the violation of rights protected by the Charter and thus, the Court has jurisdiction.

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18. The Court, relying on Article 3 of the Protocol, has consistently held that it has material jurisdiction if the Application brought before it raises allegations of violation of human rights; and for it to exercise its jurisdiction, it suffices that the subject of the Application relates to the rights guaranteed by the Charter or any other relevant human rights instrument ratified by the State concerned.[1]

19. In the instant case, the Court notes that the Applicants raise allegations of violation of human rights protected under Articles

1 See *Alex Thomas v Tanzania* (Merits) (2015) 1 AfCLR 465 (*Alex Thomas v Tanzania* (Merits)), para 45; *Frank David Omary and others v United Republic*

1, 2, 3, 4, 5, 6 and 7 of the Charter. By virtue of Article 3 of the Protocol, the determination of the said allegations falls within the ambit of the Court's mandate of interpreting and applying the Charter and other international instruments ratified by the Respondent State.

20. Accordingly, the Court has the power to consider and make a determination on the Application.

21. Consequently, the Court dismisses the Respondent State's objection herein and holds that it has material jurisdiction.

B. Other aspects of jurisdiction

22. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and nothing on the record indicates that it lacks such jurisdiction. The Court therefore holds that:

i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has made the Declaration prescribed under Article 34(6) thereof, which enabled the Applicants to file this Application pursuant to Article 5(3) of the Protocol.

ii. it has temporal jurisdiction in view of the fact that the alleged violations are continuous in nature since the Applicants remain convicted on the basis of what they consider as irregularities[2] ; and

iii. it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.

23. In light of the foregoing, the Court holds that it has jurisdiction to hear the case.

VI. Admissibility

24. In terms of Article 6(2) of the Protocol, "the Court shall rule on the

of Tanzania (Admissibility) (2014) 1 AfCLR 358 *(Frank Omary v Tanzania* (Admissibility)),para 115; *Peter Joseph Chacha v Tanzania* (Admissibility) (2014) 1 AfCLR 398, para 114; Application 20/2016. Judgment of 21 September 2018 (Merits and Reparations), *Anaclet Paulo v United Republic of Tanzania (Anaclet Paulo v Tanzania* (Merits and Reparations)), para 25; Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania (Armand Guehi v Tanzania* (Merits and Reparations)), para 31; Application 024/15. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania (Werema Wangoko v Tanzania* (Merits and Reparations)), para 29.

2 See *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, paras 71-77.

admissibility of cases taking into account the provisions of Article 56 of the Charter. "Pursuant to Rule 39(1) of the 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 the Rules."

25. Rule 40 of the Rules, which in substance restates the content 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 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;
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."

A. Conditions of admissibility in contention between the Parties

26. The Respondent State submits that the Application does not comply with two admissibility requirements; namely, exhaustion of local remedies provided for under Rule 40(5) of the Rules and the need for applications to be filed within a reasonable time after exhaustion of local remedies provided for under Rule 40(6) of the Rules.

i. Objection relating to exhaustion of local remedies

27. The Respondent State, citing the decision of the African Commission on Human and Peoples' Rights (the Commission) of *Southern African Human rights NGO Network and others v Tanzania,* avers that the requirement of exhaustion of local

remedies is an essential principle in international law and that the principle requires a complainant to "utilise all legal remedies" in the domestic courts before seizing an international human rights body like the Court.

28. In this regard, the Respondent State submits that there were legal remedies available to the Applicants which they should have exhausted. The Respondent State contends that it enacted the Basic Rights and Duties Enforcement Act, to provide the procedure for the enforcement of constitutional and basic rights as set out in Section 4 thereof.

29. According to the Respondent State, the rights claimed by the Applicants are provided for under Article 13(6)(a) of the Constitution of Tanzania of 1977, noting that though the Applicants are alleging violations of the various rights under the Constitution; they did not refer the alleged violations to the High Court during the trial as required under Section 9(1) of the Basic Rights and Duties Enforcement Act.

30. The Respondent State submits that the Applicants' failure to refer the violations of their rights to the High Court or to raise them during the trial, denied it the chance to redress the alleged violations at the domestic level.

31. The Respondent State also reiterates its submission that the Applicants' allegations are being raised for the first time before this Court and thus it was never given an opportunity to address them in its national courts.

32. The Applicants submit that the principle of exhaustion of local remedies is indeed recognised in international human rights law. Nevertheless, they argue that having been convicted in the District Court, they filed appeals in both the High Court and the Court of Appeal. Moreover, they filed an application for review of the Court of Appeal's decision before the same Court. It is thus their contention that "all available local remedies were fully exhausted".

33. Citing the judgment of the Court in the matter of *Alex Thomas v United Republic of Tanzania*, the Applicants state that having seized the Court of Appeal, it would not have been reasonable to require them to file a new human rights case at the High Court, which is a lower court than the Court of Appeal.

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34. The Court notes that pursuant to Rule 40(5) of the Rules, an application filed before the Court shall meet the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies reinforces the primacy of domestic courts in the protection of human rights *vis-à-vis* this Court and, as such, aims at providing States the opportunity to deal with human rights violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.[1]

35. In its established jurisprudence, the Court has consistently held that an Applicant is only required to exhaust ordinary judicial remedies.[2] Furthermore, in several cases involving the Respondent State, the Court has repeatedly stated that the remedies of constitutional petition and review in the Tanzanian judicial system are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court.[3]

36. In the instant case, the Court observes from the record that the Applicants filed an appeal against their conviction and sentence before the High Court which was dismissed on 21 June 2009 and before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, which upheld the judgments of the High Court and the District Court on 14 April 2011. In addition to pursuing the ordinary judicial remedies, the Applicants have also, albeit unsuccessfully, attempted to use the review procedure at the Court of Appeal. The Respondent State therefore had the opportunity to redress their alleged violations.

37. Regarding those allegations that have been raised before this Court for the first time, namely, the illegality of the sentence imposed on the Applicants and the denial of free legal assistance, the Court observes that the alleged violations occurred in the course of the domestic judicial proceedings. They accordingly form part of the "bundle of rights and guarantees" that were related to or were the basis of their appeals, which the domestic authorities had ample opportunity to redress even though the

1 Application 006/2012. Judgment of 26 May 2017. *African Commission on Human and Peoples' Rights v the Republic of Kenya*, paras 93-94.

2 *Alex Thomas v Tanzania* (Merits), para 64. See also Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 95.

3 See ***Alex Thomas v Tanzania*** (Merits) ***op cit*** para 65; ***Mohamed Abubakari v Tanzania*** (Merits) (2016) 1 AfCLR 599 (***Mohamed Abubakari v Tanzania*** (Merits)), paras 66-70; Application 011/2015. Judgment of 28 September 2017 (Merits) ***Christopher Jonas v Tanzania*** ((Christopher ***Jonas v Tanzania*** (Merits)), para 44.

Applicants did not raise them explicitly.[4] It would be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for these claims.[5] The Applicants should thus be deemed to have exhausted local remedies with respect to these allegations.

38. In light of the foregoing, the Court dismisses the Respondent State's objection relating to the requirement of exhaustion of local remedies.

ii. Objection relating to failure to file the Application within a reasonable time

39. The Respondent State contends that the Applicants have not complied with the requirement under Rule 40(6) of the Rules that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. It asserts that the Applicants' case at the national courts was concluded on 14 April 2011, and it took four (4) years and three (3) months for the Applicants to file their case before this Court.

40. The Respondent State draws this Court's attention to the fact that, even though Rule 40(6) of the Rules does not prescribe the time limit within which individuals are required to file an application, the Commission in *Michael Majuru v Zimbabwe* (2008) as well as the Inter-American Court of Human Rights and European Court of Human Rights have held a period of six (6) months to be a reasonable time.

41. The Respondent State further avers that the Applicants have not referred to any impediments which caused them not to lodge the Application within six (6) months, and for these reasons, submits that the Application should be declared inadmissible.

42. In their Reply, the Applicants argue that the review of the decision of the Court of Appeal was dismissed on 20 March 2015, that is, three (3) months and six (6) days before filing the Application before this Court.

43. Citing the Court's jurisprudence in *Peter Joseph Chacha v United Republic of Tanzania* and *Christopher Mtikila v the United Republic of Tanzania*, the Applicants contend that the Court rejected the six (6) months period that the Respondent State considers to be

4 Application 003/2015. Judgment of 28 September 2017 (Merits), *Kennedy Owino Onyachi and Another v United Republic of Tanzania*, (*Kennedy Owino Onyachi and Another v Tanzania* (Merits)), para 54.

5 *Alex Thomas v Tanzania* (Merits), *op cit*, paras 60-65, *Kennedy Owino Onyachi and Another v Tanzania*, para 54.

the standard for reasonable time in international human rights jurisprudence.

44. The Applicants also cited the matter of *Norbert Zongo v Burkina Faso* in support of their contention that reasonable time should be considered on a case by case basis. In this regard, they aver that the Court should take their being lay, incarcerated, and having not benefitted from legal aid services in the national courts as factors in their favour when deciding on whether the Application has been filed within a reasonable time.

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45. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply states: "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter." The Court recalls its established jurisprudence that: "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[6]

46. The records before this Court show that local remedies were exhausted on 14 April 2011, when the Court of Appeal delivered its judgment. In principle, this should be the date from which reasonable time limit as envisaged under Rule 40(6) of the Rules and Article 56 (6) of the Charter, should be reckoned.

47. In the instant case, the Application was filed before this Court on 6 July 2015, that is, four (4) years, two (2) months and twenty three (23) days after exhaustion of local remedies. The key question for determination is whether such delay of four years and two months is, in the circumstances of the case, reasonable in terms of Rule

6 See *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, para 121; Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations) *Kenedy Ivan v United Republic of Tanzania* (*Kenedy Ivan v Tanzania (Merits and Reparations)*) para 51; Application 056/2016. Judgment of 7 December 2018 (Merits) *Oscar Josiah v United Republic of Tanzania* (*Oscar Josiah v Tanzania* (Merits)), para 24; Judgment of 28 March 2019 (Merits and Reparations). *Lucien Ikili Rashidi v United Republic Tanzania* (*Lucien Ikili Rashidi v Tanzania* (Merits and Reparations)), para 54.

40 (6) of the Rules.

48. The Court notes from the file that the Applicants, following the dismissal of their appeal by the same, filed an application for review before the Court of Appealon 19 April 2011, which was dismissed on 20 March 2015. The Court observes that the Applicants pursued the review procedure even though it was an extraordinary remedy.

49. In the opinion of this Court, the fact that the Applicants attempted to exhaust the review procedure should not be used to their detriment and should accordingly be taken as a factor in the determination of reasonable time limit in Rule 40 (6) of the Rules.[7] In this regard, the Court takes note that the Applicants filed their Application before this Court three (3) months after the dismissal of their application for review at the Court of Appeal on 20 March 2015.

50. In addition, the Court notes that the Applicants are lay, incarcerated, and without the benefit of free legal assistance.

51. Given the above circumstances, the Court considers that the delay of four years, two (2) months and twenty three (23) days taken to file the Application before this Court, after the judgment of the Court of Appeal, is reasonable in terms of Rule 40 (6) of the Rules and Article 56 (6) of the Charter.

52. Accordingly, the Court dismisses the objection of the Respondent State relating to the non-compliance of the Applicants with the requirement of filing the Application within a reasonable time after exhaustion of local remedies.

B. Conditions of admissibility not in contention between the Parties

53. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 40, Sub-rules1,2,3,4 and 7of the Rules on, the identity of Applicants, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively, and that nothing on the record indicates that these requirements have not been

7 See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* (*Armand Guehi v Tanzania* (Merits and Reparations)), para 56; Application 024/2015. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania* (*Werema Wangoko v Tanzania* (Merits and Reparations)), para 49.

complied with.

54. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

55. The Applicants allege the violations of Articles 1,2,3,4,5,6,7 and 9 of the Charter. The Court notes however that the Applicants' grievances can be categorised into three allegations, falling under the right to a fair trial in Article 7 of the Charter, namely:

a. Illegal conviction and sentence imposed against the Applicants;

c. The failure to provide the Applicants with free legal assistance;

d. Denial of right to information.

A. Allegation relating to the legality of the conviction and sentence

56. The Applicants allege that they were indicted and convicted for robbery with violence pursuant to Sections 285 and 286 of the Penal Code which they aver provides for a punishment of fifteen (15) years imprisonment.

57. According to the Applicants, the Respondent State's argument that Section 285 and 286 of the Penal Code should be read together with Section 5(b) of the Minimum Sentencing Act "is devoid and wants merits."(*sic*)

58. It is the view of the Applicants that the Penal Code which establishes the offence for robbery with violence provides for a lesser sentence than the Minimum Sentencing Act which provides for the thirty (30) years' imprisonment and that the Penal Code's provision as the foundation of the offence, supersedes the Minimum Sentencing Act. The Applicants thus submit that the national courts erred in sentencing them to a term of thirty (30) years' imprisonment.

59. The Respondent State refutes all the allegations raised by the Applicants, noting that a term of thirty (30) years' imprisonment is the applicable sentence for robbery with violence pursuant to Section 285 and 286 of the Penal Code as read together with Section 5(b) of the Minimum Sentences Act 1972 as amended by Act No. 10 of 1989 and Act No. 6 of 1994.

60. It is the Respondent State's contention that Section 5(b) (ii) of the Minimum Section Act is applicable to "all robberies in which the offender was armed with a dangerous weapon or instrument" or was in the company of one or more persons and caused personal

violence in the act of the robbery.

61. The Respondent State avers that the facts of this case fit perfectly in the scenario envisaged under the Minimum Sentencing Act and thus, the Applicants' allegations are groundless and should be dismissed.

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62. Article 7(2) of the Charter provides:

"No one may be condemned for an act of 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."

63. The Court notes that Article 7(2) of the Charter encapsulates the principle of legality, which among other things, proscribes the imposition of a criminal punishment except when this is prescribed by a law in force at the time of the commission of a criminalised act entailing such punishment.

64. In the instant case, the relevant question for determination is whether the thirty (30) years' penalty to which the Applicants were sentenced was provided in the laws of the Respondent State at the time the offence of which they were convicted was committed.

65. The records before this Court indicate that the incident that led to the arrest of the Applicants happened on 31 December 2001. Following their arrest, the Applicants were subsequently charged and convicted of robbery with violence pursuant to Sections 285 and 286 of the Penal Code as amended by Act No. 10 of 1989.

66. The Court notes that the penalty for robbery with violence carries a similar punishment as armed robbery in the laws of the Respondent State, which according to Section 5 (b) of the Minimum Sentences Act of 1972, as amended by the 1994 Written Laws Amendment, is a minimum of thirty (30) years' imprisonment. The Court has affirmed this in *Mohamed Abubakari v United Republic of Tanzania*[8] and *Christopher Jonas v United Republic of Tanzania,* where it stated that "thirty years has been in the United Republic of Tanzania, the minimum punishment

8 *Mohamed Abubakari v Tanzania* (Merits) para 210.

applicable for the offence of armed robbery since 1994".[9]

67. It follows that the Applicants were convicted on the basis of legislation which was in force on the date of commission of the crime, that is, 31 December 2001, and the punishment imposed on them was also prescribed in a law which was enacted prior to the commission of the crime, that is, the Minimum Sentences Act 1972 as amended by Act No. 10 of 1989 and Act No. 6 of 1994.

68. The Applicants' allegation that their conviction and punishment violates the Charter thus lacks merit.

69. The Court therefore finds that there was no violation of Article 7(2) of the Charter.

B. Allegation relating to failure to provide the Applicants with free legal assistance

70. The Applicants contend that they were not provided with free legal representation throughout their trials at the domestic court even though this is required by the International Convention on Civil and Political Rights under Article 14(3) thereof and under Article 7(1)(c) of the Charter.

71. Citing the judgment of the Court in *Alex Thomas v United Republic of Tanzania* and *Thomas Miengi v Republic* decided by the High Court of Tanzania, the Applicants argue that they were charged and convicted of "a very serious offence" which carries a "serious punishment of imprisonment", and the trials were very technical requiring legal knowledge and skills. In addition, the Applicants indicate that they did not have the financial means to hire their own lawyers while the Respondent State had the benefit of the representation of various state attorneys. According to the Applicants all these circumstances justified the provision of free legal assistance and the failure of the Respondent State to do so disadvantaged them and violated their right to a fair trial.

72. The Respondent State refutes the allegation of the Applicants and submits that the Applicants should be put to strict proof. It argues that the right of legal assistance is not mandatory in its domestic laws and that the provision of legal aid is contingent on the accused person not having the means to afford Counsel and only if the interests of justice so require.

73. Further, the Respondent State avers that the fact that the Applicants were unrepresented does not imply that they were disadvantaged in any way. In this vein, it contends that the

9 *Christopher Jonas v Tanzania* (Merits) para 85.

Applicants' right to defence was guaranteed before the District Court and the appellate courts. Citing its Criminal Procedure Act [2002], the Respondent State submits that in its jurisdiction, evidence must be taken in the presence of the accused to ensure that the accused is well informed at the stage of defence.

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74. Article 7(1)(c) of the Charter provides:
"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."

75. The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. This Court has however, interpreted this provision in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[10] and determined that the right to defence includes the right to be provided with free legal assistance.[11]

76. The Court further notes that in the present Application, the Applicants were not afforded free legal assistance throughout the trial and appeal proceedings in the national courts. This is not disputed by the Respondent State, which simply contends that the provision of free legal assistance is not automatic but depends on its and the Applicants' economic capacity.

77. On several occasions, the Court has however held that an individual charged with a criminal offence is entitled to the right to free legal assistance without having requested for it, provided that the interests of justice so require. This will be the case where an accused is indigent and is charged with a serious offence which carries a severe penalty.[12]

10 The Respondent State became a State Party to ICCPR on 11 June 1976.

11 *Alex Thomas v Tanzania* (Merits), para 114; Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v Tanzania* (*Kijiji Isiaga v Tanzania* (Merits)), para 72; *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 104.

12 *Alex Thomas v Tanzania* (Merits), para123.See also *Mohammed Abubakari v Tanzania* (Merits), paras 138-139.

78. In the instant case, the Applicants were charged with a serious offence, that is, robbery with violence, carrying a severe punishment, a minimum punishment of thirty (30) years' imprisonment. In addition, the Respondent State has not adduced any evidence to challenge the contention that the Applicants were lay and indigent, without legal knowledge and technical legal skills to properly defend their case in the course of their trial and appellate proceedings. In these circumstances, the Court is of the view that the interests of justice warranted that the Applicants should have been provided with free legal assistance.

79. The Court takes note of the Respondent State's contention that the Applicants were not in any way disadvantaged for having not been given legal assistance, as they were able to defend themselves. However, the Court observes that the Applicants do not need to show that the non-provision of legal assistance occasioned some disadvantage to them in the course of their trial and appeals at the District Court and appellate courts. In so far as the interests of justice required the provision of free legal assistance and the Respondent State had failed to afford one, its responsibility would be engaged.

80. The Court further underscores that the Respondent State's citation of its domestic laws requiring the provision of legal assistance is not sufficient to demonstrate that the Applicants have in fact got the benefit of free legal assistance. The Respondent State's contention in this regard thus lacks merit.

81. In view the above, the Court finds that the Respondent State has violated Article 7(1)(c) of the Charter.

C. Allegation relating to denial of right to information

82. According to the Applicants, the failure to be informed about their rights in the trial amounts to the denial of the right to information. The Applicants argue that they were not informed of their right to legal representation or fair trial by the national courts.

83. The Applicants further argue that the national courts have a duty to inform an accused person of all their rights at the beginning of the trial and they cited *Thomas Miengi v Republic,* decided by the High Court of Tanzania.

84. The Respondent State contends that the allegation is baseless and the Applicants have not demonstrated how they were denied the right to information.

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85. The Court notes that, the Applicants allege the violation of their right to information as a result of the Respondent State's failure to inform them of their right to legal representation. The Court is of the view that the substance of the Applicants' allegation relates more to the right to a fair trial, specifically, the right to be informed of one's right to Counsel than to the right to information and will deal with it accordingly.

86. The Court observes that although Article 7 of the Charter does not expressly provide for the right to be informed of one's right to Counsel, Article 14(3)(d) of the International Covenant for Civil and Political Rights (ICCPR)[13] require that in criminal cases, any accused shall be informed of his right to legal representation. As repeatedly affirmed by the European Court of Human Rights, the right to be informed of one's right to a lawyer is critical to the respect for one's right to defence and authorities owe a positive obligation to proactively inform accused individuals of their right to legal representation at the earliest time.[14]

87. In the instant case, the Respondent State does not dispute the Applicants' allegation that they were not informed of their right to Counsel at the time or prior to their trial, but simply argues that their contention is baseless. The Court also found nothing on the record showing that this was done by the authorities of the Respondent State. Nor are there any justifications provided by the Respondent State as to why the Applicants were not informed of their right to have Counsel of their choice. Evidently, this constrained the Applicants' capacity to defend themselves.

88. In view of the above, the Court therefore finds that the failure of the Respondent State to inform the Applicants of their right to legal representation violated Article7(1)(c) of the Charter as read

13 The Respondent State became a Party to ICCPR on 11 June 1976.

14 See for example, *Panovits v Cyprus*, Application 4268/04, Judgment of 11 December 2008, paras 72-75, *Padalov v Bulgaria*, Application 54784/00, 10 August 2006, para 61.

together with Article 14(3)(d) of ICCPR.

VIII. Reparations

89. The Applicants pray the Court to find a violation of their rights, set them free and make an order for reparations and for supervision of implementation.

90. On the other hand, the Respondent State prays the Court to find that it has not violated any of the rights of the Applicants and to dismiss the Application.

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91. 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. Pecuniary Reparations

92. The Court notes its finding above that the Respondent State has violated the Applicants' right to a fair trial by failing to provide free legal assistance and the right to be informed of the right to Counsel in the course of the criminal proceedings against them. In this regard, the Court recalls its position on State responsibility that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation".[15]

93. The Court has established in its jurisprudence that moral prejudice is presumed in the case of a violation of human rights and the quantification of the damages in this regard must be equitable taking into account the circumstances of the case.[16] The Court has adopted the practice of granting a lump sum in such

15 See *Reverend Christopher R Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72 para 27 and Application 010/2015. Judgment of 11 May 2018, *Amiri Ramadhani v The United Republic of Tanzania* (Merits), para 83.

16 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, para 55.

circumstances.[17]

94. The Court notes that the violations it has found in the instant case caused moral prejudice to the Applicants. The fact that they were not informed of their right to Counsel and that they did not get legal assistance in the course of their trial at the District Court and appellate courts evidently caused them some moral damage as a result of their lack of knowledge of court procedures and technical legal skills to defend themselves.

95. The Court therefore, in exercising its discretion, awards each Applicant an amount of Tanzania Shillings Three Hundred Thousand (TZS300,000) as fair compensation.[18]

B. Non-Pecuniary Reparations

96. Regarding the application for an order of release prayed by the Applicants, the Court has stated that it can be ordered only in specific and compelling circumstances.[19] Examples of such circumstances include "if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice."[20]

97. In the instant case, the Court established that the Respondent State has violated the Applicants' right to a fair trial relating to their right to be informed of their right legal representation and their right to free legal assistance contrary to Article 7 (1) (c) of the Charter as read together with Article 14 (3) (d) of the ICCPR. Without minimising the seriousness of these violations, it is the Court's opinion that the nature of the violations in the particular contexts of this case does not reveal any circumstance which would make their continued imprisonment a miscarriage of justice or arbitrary. Nor have the Applicants demonstrated the existence

17 *Lucien Ikili Rashidi v Tanzania*. Judgment (Merits and Reparations) *op cit*, para 119.

18 See *Anaclet Paulo v Tanzania* (Merits and Reparations), para 107; Application 027/2015. Judgment of 21 September 18 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania* (*Minani Evarist v Tanzania* (Merits and Reparations)), para 85.

19 *Alex Thomas v Tanzania* (Merits) *op. cit*, para 157;Application 016/216. Judgment of 21 September 2018 (Merits and Reparations), *Diocles William v United Republic of Tanzania*, para 101; *Minani Evarist v Tanzania* (Merits and Reparations), para 82*;* Application 006/2016. Judgment of 7 December 2018 (Merits), *Mgosi Mwita v United Republic of Tanzania*, para 84; *Kijiji Isiaga v Tanzania* (Merits), para 96*; Armand Guehi v Tanzania* (Merits and Reparations), para164.

20 *Minani Evarist v Tanzania* (Merits and Reparations), para 82.

of other specific or compelling reasons to warrant an order for release.

98. Accordingly, the Court rejects the Applicant's request to be released from prison.

IX. Costs

99. Pursuant to Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

100. In their submissions, both Parties prayed the Court to order the other to pay costs.

101. Based on the foregoing, the Court rules that each Party shall bear its own costs.

X. Operative Part

102. For these reasons,

The Court

Unanimously,

On jurisdiction

i. *Dismisses* the objections to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections on admissibility;

iv. *Declares* the Application admissible.

On merits

v. *Finds* that the Respondent State has not violated Article 7(2)of the Charter as regards the sentence imposed on the Applicants;

vi. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter in relation to the right of the Applicants to be informed of their right to Counsel and the lack of provision of free legal assistance to them.

On reparations

Pecuniary reparations

vii. *Orders* the Respondent State to pay the Applicants the sum of Tanzania Shillings Three Hundred Thousand (TZS300, 000) each,free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment until the amount is fully

paid.

viii. *Orders* the Respondent State to submit a report to it within six (6) months of the date of notification of this judgment on measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

Non-pecuniary reparations

ix. *Dismisses* the Applicants' prayer for release from prison.

On costs

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

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Separate opinion: BENSAOULA

1. I share the opinion of the majority of the Judges regarding admissibility of the Application, jurisdiction of the Court and the Operative Part.

2. However, I do not share the grounds on which the Court examined:

- Admissibility of the Application in relation to the objection by the Respondent State on exhaustion of local remedies concerning the Applicants' claims raised for the first time before the Court, namely, the illegality of the sentence inflicted on them;
- And the objection in respect of reasonable time.
- As regards the grounds for admissibility of the Application in relation to the objection raised by the Respondent State on exhaustion of local remedies concerning the Applicants' claims raised for the first time before the Court, namely, the illegality of the sentence imposed on them, the said grounds run counter to:

• The tenets of the obligation to exhaust local remedies before referral to the Court

3. It is common knowledge that, in many of its judgments, the Court restated the conclusions of the African Commission on Human

and Peoples' Rights[1] according to which the condition set out in Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 on exhaustion of local remedies *"reinforces and maintains the primacy of the domestic system in the protection of human rights vis-à-vis the Court*". As such, the Commission aims at providing States the opportunity of addressing the human rights violations committed in their territories before an international human rights body is called upon to determine the States' responsibility in such violations.

4. It is however apparent from the judgment under reference in this Separate Opinion that the Court appropriated the theory of *"bundle of rights"* to dispose of certain requirements of the obligation to exhaust local remedies.

5. Yet, the tenets of this theory show that it was created and used in matters of property rights, because often among economists, such rights were the same as private property rights. The demonstration that flows from the theory has, above all, caused common ownership to evolve by highlighting the dismemberments of property, and hence its application in matters of the rights of indigenous peoples.

6. It emerges from the Respondent State's objections that the latter criticizes the Applicants for having failed to present certain claims before the domestic court prior to bringing the same to this Court for the first time, thereby disregarding the requirement of exhaustion of local remedies. This is also true for their allegations that the thirty (30) years sentence imposed on them was unconstitutional and inappropriate, and that they were not afforded legal assistance.

7. In response to these allegations, the Court upheld its jurisprudence on constitutionality petition,[2] held that the local remedies concerned only ordinary remedies, and that in the present case, the Applicants had exhausted the said remedies.

8. The Court further stated that legal assistance is a fundamental right of the Applicants prosecuted for a crime and liable to be sentenced to a heavy penalty and, therefore, that the Court of Appeal should have discussed the issue even though the

1 Application N006/2012. Judgment of 26 May 2017, ***African Commission on Human and Peoples' Rights v Republic of Kenya***, para 93; Application 005/2013, ***Alex Thomas v United Republic of Tanzania***, Judgment of 20 November 2015; Application 001/2015. Judgment of 7 December 2018, ***Armand Guéhi v United Republic of Tanzania***.

2 Para 35 of the Judgment.

Applicant had not raised it.[3]

9. With regard to the allegation that the thirty (30) years sentence was inappropriate, the Court *"observes that the alleged violations of the rights of the Applicants occurred in the course of domestic proceedings which led to the finding of guilt and to the sentence pronounced against him. The allegations raised by the Applicant therefore form part of the bundle of rights and guarantees that were related to or were the basis of their appeals…"*[4]

10. In many of its judgments, the Court has relied on this "bundle of rights" theory to dispose of certain claims brought before it in matters of exhaustion of local remedies.[5]

11. In my opinion, applying this theory in matters of local remedies amounts to distorting its very basis and tenets. The Applicants' rights are diverse and different in nature and the allegations thereto related, if in the Charter, can be incorporated into a set of rights such as the right to information, freedom of expression, fair trial ...

12. At domestic level, all laws whatever the nature, spell out the scope of and the rules governing each right, and it lies with the national judge to consider certain rights as part of a bundle of rights and to adjudicate them as such.

13. In defining the aforesaid bundle of rights in relation to the national judge, the Court ignored the powers and prerogatives of judges in general and, more restrictively, in matters of appeal, especially as the Applicants have at no time responded to the Respondent State's allegation by proving that the appellate judges have the power to do so – since the national texts confer the said powers and prerogatives on them – but that they could consider requests brought, for the first time, before the African Court as part of a bundle of rights.

• The prerogatives and jurisdiction of appellate judges before national courts

14. It is an established fact that "appeal proceedings" are of two types:

- Appeal that has devolutive effect, and
- Appeal that is limited to specific points of the judgment.

3 Para 37 of the Judgment.

4 Para 44 of the Judgment.

5 Application 005/2013. *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November; Application 006/2015. *Nguza Viking and Johnson Nguza v United Republic of Tanzania*, Judgment of 23 March 2018; Application 003/2015. *Kennedy Owino Onyachi v United Republic of Tanzania*, Judgment of 28 September 2017.

- Whereas the devolutive effect of an appeal means that the Court of Appeal has full and total knowledge of the litigation and must adjudicate in fact and in law with the same powers as the trial judge, the devolution occurs only where the appeal relates to all the provisions of the first judgment.
- The extent of the devolutive effect of the appeal will thus be determined by two procedural acts, that is, the statement of appeal or the notice of appeal that will not only limit the applicant's claims, but also the submissions of the parties which may contain new claims not mentioned in the notice of appeal.
- Limited appeal, for its part, means that the appeal is confined to specific points in the judgment.

15. Where the judge makes a ruling outside these two types of appeal and adjudicates on claims that have not been expressed, he/she will have ruled *ultra petita*, which will generate effects as regards appreciation of the decision.

16. With respect to the allegation that the 30-year sentence was inappropriate, the Court declared *"that the alleged violations of the rights of the Applicants occurred in the course of domestic proceedings which led to the finding of guilt and to the sentence pronounced against them. The allegations raised by the Applicant therefore is part of the bundle of rights and guarantees that were related to or were the basis of their appeals. It follows that the domestic courts have had ample opportunity to address these allegations, even without the Applicants having to raise them"*.[6]

17. The Court's conclusion as regards local remedies in relation to claims which have not been subjected to such remedies touches deeply on the prerogatives of the appellate courts and the scope of their jurisdiction over the case brought before them after the appeal and also on the purpose of imposing the exhaustion of domestic remedies on the Applicants as a right of Respondent States to review their decisions and thus avoid being arraigned before international bodies.

18. In my opinion: The Court should have consulted the domestic texts which govern the procedure and the jurisdiction of appellate judges in criminal matters, rather than rely on the elastic concept of bundle of rights which will time and again give it the power to examine and adjudicate claims that have not been subjected to domestic remedies, and thus minimize the importance of such

6 Para 44 of the Judgment.

remedies in referrals to the Court.

19. In my view, this runs counter to the tenets of the obligation to exhaust domestic remedies and to the rights of States in this regard.

- **As for the objection regarding reasonable time, application of this concept by the Court runs counter to the very essence of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules**

20. It is apparent from the Judgment under reference in this Separate Opinion[7] that although the Court declared the local remedies as having been exhausted on 14 April 2011, and thus that as at the date of filing of the Application, that is 6 July 2015, four (4) years, two (2) months and twenty-three (23) days had elapsed, the Court, in its deliberation and decision on the filing of the Application within reasonable time, held in conclusion that this period remains reasonable due to the fact that the Application was filed on 6 July 2015, three (3) months after the Applicants' application for review was dismissed by judgment of 20 March 2015.[8]

21. The Court pointed out, moreover, that the Applicants are lay incarcerated persons, and did not have the benefit of assistance by counsel, while noting the fact that they had filed for a review – an extraordinary remedy – and that they were not to blame for having awaited a decision in this regard.

22. Whereas it is apparent from Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 that the Application must be filed after the exhaustion of local remedies, paragraphs 6 of these same Articles confer on the Court the prerogative to determine whether the time limit for filing the Application is reasonable after the local remedies have been exhausted or the date that it would have set as being the commencement of the time limit for its own referral.

23. In the present case, the Court, having taken into account the facts which occurred after the ordinary remedies were exhausted, namely, the review application, to justify the period of four (4) years, two (2) months and three (3) days, could simply have retained the date of the judgment rendered after the application for review. This falls within the very logic of the prerogatives

7 Para 36 of the Judgment.

8 Para 49 of the Judgment.

conferred on it by the legislator in the second part of paragraph 6 of the above-mentioned Articles and would actually have led to a reasonable referral time of three (3) months and six (6) days.

24. This would have been even more pertinent, as the Court proffered as grounds for this lengthy time frame the fact that the Applicants were laymen in prison and did not have the benefit of legal assistance[9] – information not proven given that before this Court the Applicants did not need lawyers to defend themselves.

9 Para 50 of the Judgment.

Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

Application 017/2015, *Kennedy Gihana and others v Republic of Rwanda*

Judgment, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Recused under Article 22: MUKAMULISA

The Respondent State invalidated the passports of the Applicants who were living in exile without informing them. The Applicants argued before the Court that the invalidation of their passports constituted arbitrary deprivation of nationality and rendered them stateless. The Court held that the Respondent State had arbitrarily revoked the Applicants' passports and thereby violated their freedom of movement. Since the Applicants had not been able to return to the Respondent State their right to political participation was also violated.

Jurisdiction (personal 23-28; material, 32-34)

Admissibility (identity of Applicants 42-43; nature of application, 48; disparaging language, 54, 55; exhaustion of local remedies, availability, 73)

Evidence (burden of proof, 85, 86; failure of state to provide information, 87, 91)

Movement (revocation of passports, 87-91, 108)

Nationality (revocation of passport, 97, 98, 102)

Political participation (prevention from returning to home country, 114)

Reparations (moral damages, 143, 144; reinstatement of passports, 148)

Dissenting opinion: BENSAOULA

Admissibility (exhaustion of local remedies, 1, 18, 19)

I. The Parties

1. Messrs Kennedy Alfred Nurudiin Gihana (First Applicant), Kayumba Nyamwasa (Second Applicant), Bamporiki Abdallah Seif (Third Applicant), Frank Ntwali (Fourth Applicant), Safari Stanley (Fifth Applicant), Dr. Etienne Mutabazi (Sixth Applicant) and Epimaque Ntamushobora (Seventh Applicant) are all of Rwandese origin, who were at the time of the filing of the Application, living in the Republic of South Africa.

2. The application is filed against the Republic of Rwanda

(hereinafter referred to as "the Respondent State"). The Respondent State became a State Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and the Protocol on 25 January 2004. The Respondent State deposited, on 22 January 2013, the Declaration by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations as required under Article 34(6) of the Protocol the Protocol. On 29 February 2016, it notified the African Union Commission of its decision to withdraw the aforesaid Declaration and on 3 March 2016, the African Union Commission notified the Court in this regard. On 3 June 2016, the Court issued an Order stating that the withdrawal of the Declaration would take effect on 1 March 2017.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the file that the Applicants learnt of the invalidation, by the Respondent State, of their passports and those of other Rwandan nationals when one of them was informed upon applying for a visa to travel to the United States of America, that his name appeared on a list of 14 May 2012, indicating the invalidity of the passports held by all persons included on the said list**.**

4. The Applicants were neither officially notified of the invalidation of their passports by the Respondent State nor given the opportunity to appeal against the decision on the invalidation.

B. Alleged violations

5. The Applicants allege that the invalidation of their passports is an arbitrary deprivation of nationality, it has rendered them stateless and has a significant impact on the enjoyment of a number of universally accepted fundamental human rights specifically, the right to:(i) participation in political life; (ii) freedom of movement; (iii) citizenship; (iv) liberty; (v) family life; and (vi) work.

1 Application 003/2014. Ruling on Withdrawal of Declaration of 3 June 2016, *Ingabire Victoire Umuhoza v Republic of Rwanda* (*Ingabire Victoire v Rwanda* (Ruling on Withdrawal)), para 67.

III. Summary of the procedure before the Court

6. The Application was filed on 22 July 2015 and served on the Respondent State and the entities listed under Rule 35(3) of the Rules on 7 August 2015.

7. The Parties filed their submissions within the time stipulated by the Court.

8. On 9 February 2017, the Registry received the Respondent State's letter dated 30 January 2017, informing the Court of its cessation of participation in the present Application.

9. The Applicants made a request for provisional measures regarding the reinstatement of their passports and the Court found that since the prayer for provisional measures was the same as the prayer on merits, it would deal with them jointly.

10. On 15 February 2019, the Parties were informed that following the decision of the Court to combine the consideration of merits and reparations claims, the Applicant should file detailed submissions on reparations within thirty (30) days following receipt of the notice. The Applicants not having filed these submissions, the Court decided to determine the matter on the basis of the pleadings filed.

11. Pleadings were closed on 7 June 2019 and the Parties were duly notified.

IV. Prayers of the Parties

12. The Applicants pray the Court as follows:

"a. Issuance of interim measures against the respondents ordering them to immediately reinstate the passports of the complainants;

b. Ordering respondents to compensate the complainants;

c. Any other relief the Court may so order."

13. They further pray for the:

"[G]rant of interim measures pending the substantive decision on the Case to relieve Applicants hardships this draconian decision has caused them and enable them temporary free movement as contemplated under Article 12 of the African Charter on Human and Peoples' Rights".

14. The Respondent State prays the Court to:

"a. declare that Petitioners SAFARI Stanley and KAYUMBA Nyamwasa do not have *locus standi* before this Honourable Court,

b. strike out the Application for being defective in form and substance,

c. dismiss the Application without the necessity of requiring the Respondent to appear, in accordance with Rule 38 of the Rules of the Court,

d. award costs to the Respondent;

e. make such orders as it deems fit."

V. Jurisdiction

15. By virtue of Article 3 of the Protocol**,**

"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."

16. In accordance with Rule 39(1) of the Rules "The Court shall conduct preliminary examination of its jurisdiction …"

17. On the basis of the above-cited provisions, the Court must preliminarily, conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

A. Objections to jurisdiction

18. The Respondent State has raised two (2) objections regarding the Court's jurisdiction, namely, on the lack of standing of two (2) Applicants and on the failure to disclose a *prima facie* case.

i. Objection on the Second and Fifth Applicants' lack of standing before the Court

19. The Respondent State has raised an objection that the Court lacks personal jurisdiction with regard to Kayumba Nyamwasa and Safari Stanley, the Second and Fifth Applicants, respectively.

20. The Respondent State claims that the Second and Fifth Applicants do not have *locus standi* before this Court because they were convicted in Rwanda for genocide-related crimes and crimes of threatening state security, respectively. The Respondent State further claims that they both absconded from Rwanda after their convictions and that they are thus fugitives from justice.

21. While the Respondent State acknowledges that it has made a Declaration pursuant to Article 34(6) of the Protocol, it also states that in making the Declaration, it did not envisage that persons convicted of serious crimes, such as these two Applicants, would be allowed to file matters before this Court. The Respondent State argues that it would be a travesty of justice for the Court to give *locus standi* to Applicants who have committed serious crimes. The Respondent State therefore prays the Court to deny the Second and Fifth Applicant**s** the standing before it and to

reject their Application.

22. The Applicants claim that their convictions have no relevance to the Application and that any person "even if a convict in a proper court of justice has right of standing to petition".

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23. The Court recalls that Article 5 of the Protocol lists the entities that can submit cases to the Court and sub-Article 3 thereof 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 the Protocol."

24. Furthermore, 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".

25. The Court notes that Article 5(3) of the Protocol read together with Article 34(6) thereof provides for access to the Court for individuals regardless of their status and the nature of the crimes they are alleged to have committed or to have been convicted of. The only issue for consideration is whether the Respondent State has deposited the Declaration.

26. In the instant case, the Respondent State deposited its Declaration on 22 January 2013 without any reservation.

27. The Respondent State's objection on the Second and Fifth Applicants' standing to file this Application is therefore dismissed.

28. The Court finds that it has personal jurisdiction to deal with the claims by these two (2) Applicants and those of the other five (5) Applicants.

ii. Objection that the Application fails to disclose a *prima facie* case

29. The Respondent State argues that the allegations raised in the Application are vague and do not disclose a *prima facie* case or any prejudice.

30. The Respondent State further argues that the Applicants have not produced any evidence to support the allegation that it declared their passports invalid or they suffered the alleged prejudice.

31. In their Reply, the Applicants attached a list, which they state contains the names of the people whose passports have been declared invalid.

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32. The Court notes that the objection regarding the Application not establishing a *prima facie* case for lack of evidence to support the Applicants' claims and to establish the prejudice they suffered are properly issues of material jurisdiction.

33. The Court also notes that the Applicants allege violations of their rights guaranteed under Articles 6, 12, 13 and 18 of the Charter, and in accordance with Article 3 of the Protocol, the Court has material jurisdiction to deal with the matter.

34. Based on the foregoing, the Court dismisses the Respondent State's objection and finds that it has material jurisdiction over the Application.

B. Other aspects of jurisdiction

35. The Court notes that the other aspects of the jurisdiction of the court having not been contested and nothing on record indicates that the court does not have jurisdiction:

i. It has temporal jurisdiction on the basis that the alleged violations are continuous in nature.[2]

ii. It has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

36. In view of the aforesaid, the Court finds that it has jurisdiction to consider this Application.

VI. Admissibility

37. In terms of 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." In accordance with Rule 39(1) of the Rules, "the Court shall conduct a 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".

38. Rule 40 of the Rules which in substance restates the provisions 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 the matter; and
7. Not raise any mater 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."

A. Conditions of admissibility in contention between the Parties

39. While some of the above conditions are not in contention between the Parties, the Respondent State has raised objections relating to the non-disclosure of the Applicants' identities, the incompatibility of the Application with the Constitutive Act of the African Union, the use of insulting and disparaging language and the non-exhaustion of local remedies.

i. Objection relating to non-disclosure of the Applicants' identities

40. The Respondent State argues that the Application should be declared inadmissible because it does not meet the requirement of Article 56(1) of the Charter and Rule 40(1) of the Rules on the identification of the authors of the application. It also argues that the Application is inadmissible because the Applicants state that the passports of other Rwandans were also invalidated.

41. The Applicants did not respond to this claim.

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42. The Court notes that the Application has been filed by seven (7) Applicants, Kennedy Alfred Nurudiin Gihana, Kayumba Nyamwasa, Bamporiki Abdallah Seif, Frank Ntwali, Safari Stanley, Dr. Etienne Mutabazi and Epimaque Ntamushobora, who are clearly identified. The reference to 'other Rwandans' does not negate this fact as they are not before this Court and are not part of this Application.

43. The Court finds that the seven (7) Applicants are properly identified in accordance with Article 56(1) of the Charter and Rule 40(1) of the Rules. The Respondent State's objection in this regard is therefore dismissed.

ii. Objection relating to incompatibility with the Constitutive Act of the African Union

44. The Respondent State avers that the allegations raised in the Application are not compatible with the Constitutive Act of the African Union (hereinafter referred to as the "Constitutive Act"). This position is based on the convictions against Kayumba Nyamwasa and Safari Stanley following criminal proceedings in the Respondent State. The Respondent State avers that Kayumba Nyamwasa was convicted of crimes of threatening state security, sectarianism, setting up a criminal gang and desertion from the military. The Respondent State further indicates that Safari Stanley was convicted for genocide, conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity and violations of

Article 3 common to the Geneva Conventions and Additional Protocol II.

45. The Respondent State argues that because the acts for which these Applicants were convicted are against the principles set out in Article 4(o) of the Constitutive Act, this Application does not meet the requirements of Article 56(2) of the Charter and should therefore be dismissed.

46. The Applicants have not specifically responded to the Respondent State's contention on the incompatibility of their Application with the Constitutive Act, rather they refer generally to the irrelevance of the Respondent State's objection in this regard and highlight the injustice of their convictions.

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47. Article 56(2) of the Charter, as restated in Article 40(2) of the Rules, envisages that applications before the Court shall be considered if they are compatible with the Charter of the Organisation of African Unity (OAU), now the Constitutive Act. Article 4(o) of the said Act provides that "the Union shall function in accordance with the principles of the respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities".

48. The Court notes that even though, according to the Respondent State, the First and Fifth Applicants were alleged to have been convicted of crimes which touch on some of the principles in Article 4(o)of the Constitutive Act as aforementioned, the Court is not called upon to decide on the legality or otherwise of such convictions. The Court considers that the provision in Article 56(2) of the Charter addresses the nature of an application and not the applicant's status. The prayer for reinstatement of passports does not require the Court to make a decision that would undermine the principles laid down in Article 4 of the Constitutive Act or any part thereof. On the contrary, this would be in accordance with the Court's obligation to protect the rights allegedly violated as it is required to do in accordance with Article 3(h) of the Constitutive

Act.[3]

49. Consequently, the Court finds that the Application is not contrary to the Constitutive Act and the objection is therefore dismissed.

iii. Objection relating to the use of disparaging and insulting language

50. The Respondent State argues that the Application is full of disparaging and insulting language directed at the Rwandan Judiciary and it should be declared inadmissible for failure to meet the requirements of Article 56(3) of the Charter and Rule 40(3) of the Rules.

51. The Applicants have not responded to this objection. However, in their affidavits filed in support of the Application it was alleged that the judiciary in the Respondent State is not independent because the Courts are biased in favour of the Respondent State's President and that the Courts are instruments of the ruling party.

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52. The Court reiterates its earlier decision that, mere complaints, perceptions and opinions of an applicant, on the State and its institutions in the circumstances of his case do not amount to disparaging language.[4]

53. In *Lohé Issa Konate v Burkina Faso*, this Court drew from the recommendations of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission"), which held that for language to be considered disparaging or insulting, it must be "aimed at unlawfully and intentionally violating the dignity, reputation and integrity of a judicial official or body" and

3 Article 3(h) of the Constitutive Act provides that a key objective of the Union shall be "to promote and protect human and peoples' rights in accordance with the Charter and other relevant human rights instruments.". See also Application 030/2015. Ruling of 4 July 2019 (Jurisdiction and Admissibility) *Ramadhani Issa Malengo v United Republic of Tanzania,* paras 31- 32.

4 *Lohé Issa Konaté v Burkina Faso* (Merits) (2014) 1 AfCLR 314 (*Lohé Issa Konaté v Burkina Faso* (Merits), paras 69-71. See also Communication 435/12 *Eyob B Asemie v the Kingdom of Lesotho* African Commission on Human and Peoples' Rights (ACHPR) paras 58-60.

must seek to "pollute the minds of the public".[5] The Commission has also noted that "…a Communication alleging human rights violations by its very nature should be expected to contain allegations that reflect negatively on the State and its institutions" and that the Commission "… must make sure that the ordinary meaning of the words used are not in themselves disparaging. The language used by the Complainant must unequivocally demonstrate the intention of the Complainant to bring the State and its institution into disrepute …".[6]

54. In the instant case, the Court is of the view that the language used by the Applicants to express their perceptions about the Judiciary in Rwanda, considered in its ordinary meaning is not in itself disparaging.

55. The Court further notes that the Respondent State itself failed to demonstrate how the Applicants' language was aimed at unlawfully and intentionally violating the integrity of the judiciary and polluting the minds of the public as alleged.

56. The Court therefore dismisses the objection to admissibility of the Application in relation to the use of disparaging and insulting language.

iv. Objection relating to exhaustion of local remedies

57. The Respondent State contends that the Application should be dismissed because the Applicants have not exhausted local remedies. The Respondent State cites the decisions by the Commission in *Kenyan Section of the International Commission of Jurists and others v Kenya, Jawara v The Gambia, Kenya Human Rights Commission v Kenya* and *Civil Liberties Organisation v Nigeria* which explain the mandatory nature of the requirement of exhaustion of local remedies.

58. The Respondent State avers that the Applicants' claim that they could not exhaust domestic remedies in Rwanda because they are not available and effective, lacks merit. The Respondent State refers to the Commission's decisions in *Article 19 v Eritrea and Anuak Justice Council v Ethiopia* where it has held that one cannot argue that local remedies are not available and effective if he has not attempted to make use of them. The Respondent

5 *Lohé Issa Konaté v Burkina Faso* (Merits), para 70, citing the Commission in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009), para 88.

6 Communication 435/12 *Eyob B Asemie v Kingdom of Lesotho*, African Commission on Human and Peoples' Rights (ACHPR) paras 58-60.

State argues that it is self-defeating for the Applicants to claim that remedies are not available in Rwanda yet they have made no attempt to use them. The Respondent State contends that Rwandan courts are independent and the remedies they grant are not just available but also effective.

59. The Respondent State argues that the independence of Rwandan courts has been attested to by a number of international human rights and criminal courts.The Respondent State refers to *Ahorugeze v Sweden*,[7] *Prosecutor v Jean Uwikindi*,[8] *Prosecutor v Aloys Ndimbati*,[9] *Prosecutor v Kayishema*,[10] *Prosecutor v Sikubwabo*,[11] *Norwegian Prosecution v Bandora*,[12] and *Leon Mugesera v Le Ministre de la Citoyennete et de L'emigration*, *Le Ministre de la Securite Publique et de la Protection Civile*.[13]

60. The Respondent State avers that the laws and procedures in Rwanda, specifically, Article 16 of the Law No 21/2012 relating to Civil, Commercial, Labour and Administrative Procedure, do not require a petitioner's appearance in person in order to institute proceedings and that a claim can be filed by a counsel or any other authorised representative on behalf of a claimant**.** The Respondent State argues that the Applicants could have instituted a case in the Respondent State's courts from their remote location in South Africa.

61. The Respondent State adds that Article 49 of the afore-mentioned law bind a petitioner's representatives to the same extent as they would a petitioner and that the Applicants could have designated Counsel to file the claims in the domestic courts on their behalf. The Respondent State contends that the Applicants ought to have filed an application for judicial review of the administrative decision to invalidate their passports, this being in accordance with Article 334 of Law No. 21/2012 relating to Civil, Commercial, Labour and Administrative Procedure.

62. The Respondent State avers that given the foregoing, the Applicants' arguments that they could not exhaust domestic

7 ECHR Application 37077/09. Judgment of 27 October 2011 paras 123-130.

8 International Criminal Tribunal for Rwanda (ICTR) Referral Case No ICTR-2001-75-R11bis.

9 ICTR Case No ICTR-95-1F-R11bis.

10 ICTR Case No ICTR- 01-67-R11bis.

11 ICTR Case No ICTR-95-1F-R11bis.

12 Case 11-050224ENE-OTIR/O1.

13 Canadian Federal Court Reference 2012 CF32.

remedies because their passports were revoked is without merit since they could have mandated Counsel or any other person they trust to file a claim in the domestic courts on their behalf.

63. The Respondent State supports its aforementioned position with the decisions of the Commission in *Zitha v Mozambique* and *Give more Chari (Represented by Gabriel Shumba) v Republic of Zimbabwe* where the Commission has ruled that where national laws do not require physical presence of a claimant, then the claimant should exhaust local remedies using Counsel.

64. The Applicants state that they have not referred the matter to the national jurisdiction of the Respondent State because they do not have valid passports to travel to the Republic of Rwanda to exhaust local remedies. They aver that local remedies are 'not practical' because the courts in the Respondent State are not independent.

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65. The Court notes that pursuant to Rule 40(5) of the Rules an application filed before the Court shall meet the requirement of exhaustion of local remedies.

66. The rule of exhaustion of local remedies reinforces the primacy of domestic courts in the protection of human rights *vis-à-vis* international human rights bodies. It aims at providing States the opportunity to deal with human rights violations occurring in their jurisdiction before such bodies are called upon to determine the responsibility of the States for such violations.[14]

67. In applying the rule of exhaustion of local remedies, the Commission and the Court have both developed extensive jurisprudence.[15]

68. In the case of *Gabriel Shumba v Zimbabwe*, the Commission has elaborated that, where it is impracticable or undesirable for a

14 Application 006/2012. Judgment of 26 May 2017 (Merits), *African Commission on Human and Peoples' Rights v Republic of Kenya* (*African Commission v Kenya (Merits*)), paras 93-94.

15 Communication 147/95-149/96 *Jawara v Gambia* AHRLR 107 (ACHPR 2000) para 31; Communication 389/10 *Mbiankeu Geneviève v Cameroon* (ACHPR 2015), paras 48, 72 and 82; Communication 275/03 (2007) *Article 19 v Eritrea* AHRLR 73 (ACHPR 2007) para 48; Communication 299/05 (2006) *Anuak Justice Council v Ethiopia* AHRLR 97 (ACHPR 2006); Application 009/2015. Judgment of 28 March 2019 (Merits and Reparations) *Lucien Ikili Rashidi v United Republic of Tanzania*

complainant to seize the domestic courts, the complainant will not be required to exhaust local remedies.[16]

69. The complainant in the *Gabriel Shumba v Zimbabwe* case had been charged with organising, planning or conspiring to overthrow the government through unconstitutional means and thereafter fled Zimbabwe in fear of his life after he was allegedly tortured by the Respondent State's agents.

70. The Commission applied the criteria it set out in *Jawara v The Gambia* that, "... remedies the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant". The Commission also determined that "… [T]he existence of a remedy must be sufficiently certain, not in theory but also in practice. Failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of the generalised fear for his life (or even those of relatives) local remedies would be considered to be unavailable."[17]

71. The Commission found that "the Complainant could not avail himself of the same remedy due to the principle of constructive exhaustion of local remedies, by virtue of being outside the country, due to the fear for his life.".[18] It therefore held that even though in theory the domestic remedies were available, they were not effective, and could not be pursued without much impediment.

72. This Court has, in *Lohé Issa Konaté v Burkina Faso*, also held that "a remedy can be considered to be available or accessible when it may be used by the Applicant without impediment".[19]

73. In the instant case, the Court notes that, the Second and Fifth Applicants faced charges of serious crimes and fled from the Respondent State's territory. They have indicated that they fear for their security. Furthermore, all the Applicants are outside the Respondent State's territory and their travel documents having been invalidated without formal notification. It is reasonable, in view of the manner in which the Applicants learnt of the invalidation of their passports, for them to have been apprehensive about

para 35; *Wilfred Onyango Nganyi and others v Tanzania*(Merits) (2016) 1 AfCLR 507 paras 90-92; *Lohé Issa Konaté v Burkina Faso* (Merits) paras 77 and 96-115; *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 paras 56 -106.

16 Communication 288/04 *Gabriel Shumba v Zimbabwe* (ACHPR 2012).

17 Communication 288/04 *Gabriel Shumba v Zimbabwe* (ACHPR 2012) para 73.

18 Communication 288/04 *Gabriel Shumba v Zimbabwe* (ACHPR 2012) para 74.

19 *Lohé Issa Konaté v Burkina Faso*, (Merits) para 96.

their security and fear for their lives. The serious nature of the crimes relating to the two (2) Applicants may also have resulted in difficulties in all the Applicants designating Counsel to file a claim on their behalf before the domestic courts regarding the invalidation of their passports. In the circumstances of the Applicants' case the Court therefore finds that the local remedies were not available for the Applicants to utilise.

74. The objection to the admissibility of the Application based on non-exhaustion of local remedies is therefore dismissed.

B. Conditions of admissibility that are not in contention between the Parties

75. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 40, Sub-rules, 4, 6 and 7of the Rules on the nature of the evidence adduced, the filing of the Application within a reasonable time after exhaustion of local remedies and the previous settlement of the case, respectively, and that nothing on record indicates that these requirements have not been complied with.

76. The Court therefore finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

77. The Applicants allege that the invalidation of their passports by the Respondent State (i) amounts to the arbitrary deprivation of their nationality, (ii) has rendered them stateless and (iii) violates their rights to: freedom of movement, political participation, citizenship, liberty, family life and work.

78. In view of the fact that the issue whether the Applicants were arbitrarily deprived of their passports is central to the consideration of all the alleged violations, the Court will first examine this issue.

A. Allegation relating to revocation of the Applicants' passports

79. The Applicants allege that the Respondent State revoked their passports and that this amounts to an arbitrary deprivation of their

nationality and violation of their right to citizenship.

80. The Respondent State has not responded to this allegation.

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81. The Court notes that the Applicants' allegation relating to the revocation of their passports raises two issues: (i) was the revocation of the Applicants' passports arbitrary? (ii) if the answer to the first issue is in the affirmative, is the revocation of their passports tantamount to revocation of their nationality?

i. Was the revocation of the Applicants' passports arbitrary?

82. The Court notes that the factors to be considered in determining whether the revocation of the Applicants' passports was arbitrary or not, are the same as those that apply with regard to the deprivation of nationality. Therefore, such revocation must (i) be founded on a clear legal basis (ii) serve a legitimate purpose that conforms with international law (iii) be proportionate to the interest protected (iv) respect prescribed procedural guarantees, allowing the concerned to challenge the decision before an independent body.[20]

83. The Court notes that Article 34 of the 2011 Rwandan Immigration and Emigration Law provides that "A travel document is the property of the State. It may be withdrawn from the holder in case it is evident that he/she uses it or may use it in an inappropriate manner".[21]

84. Ordinarily, since the Applicants allege that their passports have been revoked arbitrarily, they are required to prove their claim. However, considering that, it is the Respondent State's agencies which have the access to records and monopoly of regulating the issuance and revocation of passports, the Respondent State is in a position of advantage over the Applicants since its agencies have all relevant information relating to process of issuance or

20 Application 012/2015. Judgment of 22 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* (*Anudo Anudo v Tanzania* (Merits) para 79.

21 Article 34 Law 04/2011 of 21 March 2011 on Immigration and Emigration in Rwanda.

revocation of passports.[22] It would therefore be unjust to place the burden of proof on the Applicants considering that, all relevant documentation in this regard is in the Respondent State's custody.

85. On the basis of this imbalance between the individual and the State, the burden of proof will therefore shift to the Respondent State to prove that the Applicants' passports were revoked in accordance with Article 34 of the 2011 Rwandan Immigration and Emigration Law and other relevant standards and that consequently this was not done in an arbitrary manner.

86. The Court notes that by the Respondent State failing to respond to the Applicants' allegation that it revoked their passports, this amounts to the Respondent State not having denied this claim.

87. The Court finds that the Respondent State has not provided proof that its revocation of the Applicants' passport was based on their use of the passports in an inappropriate manner as required under Article 34 of its Immigration and Emigration Law.

88. The Respondent State is also required to demonstrate that the revocation of the Applicant's passports was done in line with the relevant international standards.

89. The Court notes that the pertinent aforementioned international standards are set out in Article 12(2) of the Charter as this provision provides for the right to freedom of movement to which the issue of possession of passports relates. This provision states that: "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

90. The Court further notes that Articles 12(2) and (3) of the International Covenant for Civil and Political Rights (hereinafter referred to as "the ICCPR")[23] has provisions similar to Article 12(2) of the Charter in the following terms: "2.Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

91. In view of the aforesaid provisions, the Respondent State ought to have demonstrated that the revocation of the Applicants' passports was for the purposes of the restrictions set out in Article

22 *Anudo Anudo v Tanzania* (Merits) paras 74 and 77.

23 The Respondent State became a Party to the ICCPR on 16 April 1975.

12(2) of the Charter and Article 12(2) and (3) of the ICCPR. The Respondent State has not provided any explanation regarding the revocation of the Applicants' passports.

92. In view of the foregoing, the Court finds that the Respondent State has arbitrarily revoked the Applicants' passports.

ii. Was the revocation of the Applicants' passports tantamount to arbitrary deprivation of their nationality?

93. Having found that the revocation of the Applicants' passports was arbitrary, the Court will now consider whether such revocation is tantamount to deprivation of their nationality.

94. The Court observes that one is entitled to a passport of a specific country because he or she is its national or meets the conditions provided for issuance of a passport under the applicable law.

95. A passport is, first and foremost, a travel document required for travel outside one's country, to return to the said country and to go to or leave a foreign country. It is a general principle that a passport is also an identification document in a foreign country. A passport may also prove nationality, due to the presumption that, when one carries a passport of a specific state, he or she is a national of that state and it is incumbent upon the entity claiming otherwise to rebut this presumption.

96. Article 34 of the Law No. 04/2011 of 21 March 2011 on Immigration and Emigration in Rwanda provides that Every Rwandan is entitled to a travel document. According to this law, as stated in Article 2 on definitions and Articles 23 to 30 thereof, travel documents include passport, laissez-passer, collective laissez-passer, Autorisation Spéciale de Circulation/Commmunauté Economique des Pays des Grands Lacs (ASC/CEPGL), emergency travel document, refugee travel document and border pass. It is clear from this law that a passport is one of the forms of travel documents issued in the Respondent State.

97. The Court notes further that, for people such as the Applicants who are living outside their country, the passport is their main identification document. For such persons, not having a valid passport exposes them to challenging situations, such as difficulty in securing employment, renewing their residence permit, accessing education and health services in the country they are residing in and restrictions in travel to their own country and to other countries. In such circumstances, the revocation of a passport is not tantamount to a revocation of nationality, rather it impedes the full and effective enjoyment of their civic and

citizenship rights as Rwandan nationals.

98. The Court therefore finds that the claim that the revocation of the Applicants' passports is tantamount to deprivation of their nationality has not been established and is therefore dismissed.

B. Allegation of violation of rights relating to the arbitrary revocation of passports

99. The Applicants allege that the invalidation of their passports by the Respondent State has, as a consequence, rendered them stateless and violates their rights to: freedom of movement, right to political participation, liberty, family life and work. The Court will examine these allegations in turn.

i. Allegation relating to the Applicants being rendered stateless

100. The Applicants allege that, following the revocation of their passports, they have been rendered stateless.

101. The Respondent State has not responded to this allegation.

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102. In the instant case, the Court has determined that the Applicants have not been deprived of their nationality. They are still Rwandan nationals. The Court therefore finds that the Applicants' claim that they have been rendered stateless is moot and it is consequently dismissed.

ii. Allegation relating to violation of the right to freedom of movement

103. The Applicants allege that the revocation of their passports has violated their right to freedom of movement.

104. The Respondent State has not responded to this allegation.

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105. Article 12(2) of the Charter provides that "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

106. This Court in *Anudo Ochieng Anudo v Tanzania* cited the views of the United Nations Human Rights Committee that "…there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State Party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country".[24]

107. The Court notes that Article 14 of the 1999 Rwandan Law on Immigration and Emigration states that on returning to Rwanda, wherever they are coming from, Rwandans and members of their families must be in possession of a passport or another document replacing the passport'.[25]

108. By arbitrarily revoking the Applicants' passports, the Respondent State deprived them of their traveling documents and consequently prevented them from returning to their country and traveling to other countries and thus exercising their right to freedom of movement as provided under Article 12(2) of the Charter.

109. In light of the foregoing the Court finds that the Respondent State has violated Article 12 (2) of the Charter.

iii. Allegation relating to violation of the right to political participation

110. The Applicants assert that the alleged revocation of their passports amounts to a revocation of nationality and such deprivation of nationality impacts their right to participate in political life.

111. The Respondent State has not responded to this allegation.

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112. Article 13(1) of the Charter provides that "Every citizen shall have

24 *Anudo Anudo v Tanzania (*Merits), para 98, citing the United Nations Human Rights Committee, *General Comment No 27 on Freedom of Movement*.

25 Article 14 of Rwandan Law 17/99 of 1999 on Immigration and Emigration.

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."

113. In *Purohit and Moore v The Gambia* the Commission stated that 'the right provided for under Article 13(1) of the African Charter is extended to 'every citizen' and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State.'[26]

114. The Court is of the view that the rights set out in Article 13(1) of the Charter are optimally exercised when a State's citizens are in the territory of that State and in some instances, they can be exercised outside the territory of that state. The Court notes that the arbitrary revocation of the Applicants' passports has prevented them from returning to the Respondent State thus severely restricting their right to freely participate in the government of their country.

115. The Court thus finds that by arbitrarily revoking the Applicants' passports, the Respondent State consequently violated Article13 (1) of the Charter.

iv. Allegation relating to violation of the right to liberty

116. The Applicants allege that by revoking their passports, the Respondent State has violated their right to liberty.

117. The Respondent State has not responded to this allegation.

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118. 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".

119. The Court notes that the provision relates to the issue of prolonged detention without trial and that this situation is considered as arbitrary. The standards espoused in this right require that a person who is charged with an offence should be brought promptly before a judge or other judicial officers and should be tried within a reasonable time or released. A person who is charged with

26 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 75.

an offence also has the right to access a court, to challenge the lawfulness of his or her detention.[27]

120. The Court notes that the Applicants have made general statements as regards the alleged violation of their rights to liberty. They have not provided evidence to establish that the Respondent State has arbitrarily deprived them of their liberty contrary to the afore-mentioned provisions. The Court has held that it does not suffice to make such general claims, rather, there should be a demonstration of how the rights have been violated.[28]

121. In light of the foregoing, the Court therefore dismisses the Applicants' claim as having not been established.

v Allegation relating to violation of the right to family life

122. The Applicants allege that by revoking their passports, the Respondent State has violated their right to family life.

123. The Respondent State has not responded to this allegation.

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124. The Court notes that Article 18 (1) and (2) of the Charter provides:

"1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

2. The State shall have the duty to assist the family which is the custodian or morals and traditional values recognized by the community".

125. The Court also notes the Commission's interpretation of this provision and which it finds to be of persuasive value in view of the Court's and Commission's concurrent jurisdiction to interpret the Charter.[29] In accordance with this provision, the state is required to take all necessary measures to ensure protection

27 Communication 416/12 *Jean-Marie Atangana Mebara v Cameroon* paras 119-131.

28 *Alex Thomas v Tanzania* (Merits) (2015) 1 AfCLR 465 para 140.

29 See the African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* adopted in November 2010 at the 48th Ordinary Session (Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the Charter). See also *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 212.

of the rights of individuals within families and that the family's integrity is maintained because it is recognised as the cornerstone of society.[30]

126. The Court is of the view that the Applicants have not demonstrated how the Respondent State's actions or omissions had an adverse impact on the needs and interests of their families or how it prevented them from fully benefitting from the filial and social interaction necessary for the maintenance of a healthy family life.

127. The Court therefore finds that the alleged violation of the right to family life contrary to Article 18(1) of the Charter has not been established.

vi. Allegation relating to violation of the right to work

128. The Applicants allege that by revoking their passports, the Respondent State has violated their right to work.

129. The Respondent State has not responded to this allegation.

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130. Article 15 of the Charter provides that "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".

131. The Court notes that this guarantee means that a state "has the obligation to facilitate employment through the creation of an environment conducive to the full employment of individuals within society under conditions that ensure the realisation of the dignity of the individual. The right to work includes the right to freely and voluntarily choose what work to accept". [31]

132. The Court further notes that the claims made by the Applicants as regards the alleged violation of their rights to work are general in nature. They have not elaborated on how the Respondent State has acted contrary to, or made some omissions in relation to the requirements of the provision of this Article. These being

30 Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the Charter para 94; See also *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 212.

31 Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the Charter para 58.

unsubstantiated claims, the Court consequently dismisses them.

VIII. Reparations

133. Article 27(1) of the Protocol provides, "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".

134. In this respect, Rule 63 of the Rules provides that "the Court shall rule on a 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".

135. The Court has found that the Respondent State violated the Applicants' rights to freedom of movement and their right to freely participate in the government of their country. The reparations claims will therefore only be assessed in relation to these wrongful acts.

136. The Court reaffirms its position[32] that "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim." [33]

137. The Court also restates that the purpose of reparation being *restitutio in integrum* it "…must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."[34]

138. Measures that a State must take to remedy a violation of human rights must include restitution, compensation and rehabilitation of the victim, satisfaction as well as measures to ensure non-repetition of the violations taking into account the circumstances

32 *Mohamed Abubakari v Tanzania* (Merits) (2016) 1 AfCLR 599 para 242 (ix).

33 Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda* (*Ingabire Umuhoza v Rwanda* (Reparations), para 19.

34 Application 007/2013. Judgment of 4 July 2019 (Reparations), *Mohamed Abubakari v United Republic of Tanzania*, para 21; Application 005/2013. Judgment of 4 July 2019 (Reparations), *Alex Thomas v United Republic of Tanzania*, para 12; Application 006/2013. Judgment of 4 July 2019 (Reparations), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 16.

of each case.[35]

139. The Court reiterates that with regard to material prejudice, the general rule is that there must be existence of a causal link between the alleged violation and the prejudice caused and the burden of proof is on the Applicant who has to provide evidence to justify his prayers.[36] Exceptions to this rule include moral prejudice, which need not be proven, presumptions are made in favour of the Applicant and the burden of proof shifts to the Respondent State.

A. Pecuniary reparations

i. Material prejudice

140. The Applicants made a general claim for compensation without specifying the nature thereof or providing evidence. The Respondent State did not make submissions on this issue.

141. The Court therefore dismisses this claim.

ii. Moral prejudice

142. The Applicants seek compensation and any other orders that the Court may deem fit to grant without specifying the amounts sought. The Respondent State prays that the Court dismisses the Application and make any orders it deems necessary.

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143. The Court notes that an individual's identity and sense of belonging is intrinsically tied to the social, physical and political connections that they have with their country of origin. The Court further notes that the arbitrary revocation of the Applicants' passports resulted in the violations found against the Applicants. Since 14 May 2012 when the said passports were arbitrarily revoked, the Applicants have been unable to leave their country of residence and to

35 *Ingabire Umuhoza v Rwanda* (Reparations) para 20.

36 *Reverend Christopher R Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72 para 40; *Lohe Issa Konaté v Burkina Faso* (Reparations) (2016) 1 AfCLR 346, para 15.

travel back to their country of origin and to other countries. This has adversely affected the aforementioned connections that the Applicants had with their country of origin. The Court finds that this caused them emotional anguish and despair, occasioning them moral prejudice, therefore this entitles them to reparation.

144. The Court, therefore, in exercising its discretion awards an amount of Rwandan Francs Four Hundred and Sixty Five Thousand (RWF465,000) to each of the Applicants as fair compensation for the moral prejudice caused.

B. Non-pecuniary reparations

145. The Applicants pray the Court to order the Respondent State to reinstate their passports.

146. The Respondent State has not responded to this allegation.

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147. The Court notes that the violations found were occasioned by the Respondent State's act of arbitrarily revoking the Applicants' passports. The Court considers that the reinstatement of the said passports is an appropriate measure for the Respondent State to take in order to make restitution to the Applicants.

148. The Court therefore finds that an order for reinstatement of the Applicants' passports is appropriate.

IX. Costs

149. The Applicants did not make any submissions on the costs.

150. The Respondent State submits that it should be awarded costs.

151. 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".

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152. The Court finds that in the circumstance of this case, each Party should bear its own costs.

X. Operative Part

153. For these reasons,
The Court,
Unanimously,

On jurisdiction
i. *Dismisses* the objections to the jurisdiction of the Court;
ii. *Declares* that it has jurisdiction.

By a majority of Nine (9) votes for, and One (1) against, Justice Chafika BENSAOULA Dissenting,

On admissibility
iii. *Dismisses* the objections on admissibility;
iv. *Declares* the Application admissible.

On the merits
v. *Finds* that the alleged violations of the right to liberty, the right to work and the right to family life under Articles 6, 15 and 18(2) of the Charter, respectively, have not been established;
vi. *Finds* that the Respondent State has violated the right to freedom of movement under Article 12(2) of the Charter and the right to political participation under Article 13(1) of the Charter as a consequence of arbitrarily revoking the Applicants' passports;

On reparations
Pecuniary reparations
vii. *Grants* the Applicants' prayers for compensation and awards each Applicant**,** the sum of Rwandan Francs Four Hundred and Sixty Five Thousand (RWF465,000) for the moral damages they have suffered.
viii. *Orders* the Respondent State to pay the amounts indicated in (vii) above within six (6) months from the date of notification of this Judgment, free from tax, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Rwanda throughout the period of delayed payment until the amount is fully paid.

Non-pecuniary reparations

ix. *Orders* the Respondent State to reinstate the Applicants' passports within three (3) months of the date of notification of this judgment.

On implementation of the judgment and reporting

x. *Orders* the Respondent State to submit a report on the status of implementation of the decision set forth herein within six (6) months from the date of notification of this Judgment.

On costs

xi. *Orders* that each Party shall bear its own costs.

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Dissenting opinion: BENSAOULA

[**1.**] In the above-mentioned judgment in *Kennedy Gihana and others v Republic of Rwanda*, I do not agree with the decision of the majority of the judges of the Court declaring the Applicants' application admissible and thus rejecting the objection of inadmissibility raised by the Respondent State concerning non-exhaustion of domestic remedies.

For the good reason that:

- the Court cited its extensive jurisprudence as well as that of the African Commission on Human and Peoples' Rights as the basis for its decision.
- it has made no effort to respond to the relevance of the jurisprudence cited by the Respondent State, which in my opinion, in view of the facts and allegations set out, is more convincing on the one hand.
- and disregarded its assessment of certain conditions required by Articles ...56 of the Charter, 6(2) of the Protocol and Rule 40 of the Rules.

[**2.**] It is common ground in the Court's case-law that it has taken up in many of these judgments, as in paragraph 66 of the present judgment, the conclusion in the African Commission on Human and Peoples' Rights matter (Application 006/12, Judgment of 26 May 2017 *African Commission on Human and Peoples' Rights v Republic of Kenya*) that the condition laid down in Article 56 of the Charter and Rule 40 of the Rules of Court in their paragraph

5 relating to the exhaustion of domestic remedies "reinforces the primacy of national courts over the Court ...", in the protection of human rights and fundamental freedoms aims to give States the opportunity to address human rights violations committed on their territory before an international human rights body is called upon to determine the responsibility of states for their violations"....

[**3.**] In the judgment which is the subject of the Dissenting opinion it appears that the Applicants filed their application with the Court on 22 July 2015, as it is apparent from the same file that the Applicants fled the Respondent State and have since settled in South Africa.

[**4.**] It also appears from the application that the only date in the application is the year 2012, the date on which, according to them, they learned that their names were on a list drawn up by the Respondent State and that they were therefore affected by the decision to invalidate their passports.

[**5.**] The Applicants based their reasons for not exhausting domestic remedies on the following:

- on the fact that they did not have a valid passport and therefore could not travel.
- That domestic remedies are not effective, as the Rwandan courts are not independent subsection (64)

[**6.**] On the basis of these two allegations, the Court will cite its jurisprudence, that of the African Commission on Human and Peoples' Rights (paragraphs 66 to 73), to hold that the applicants in exile were in a situation which made domestic remedies impossible, undesirable, not obvious, with the uncertainty as to the danger to their lives, and in conclusion to state in paragraph 73 that "in the circumstances and in view of the obstacles encountered by the applicants in the exercise of domestic remedies, the Court concluded that they were not available to enable the Applicants to use them".

[**7.**] However, it appears from the file that the two Applicants Kayumba and Stanley were convicted respectively in relation to Kayumba on 14 January 2011 and that an arrest warrant was issued against him on 19 January 2011, which leads to the conclusion that on that date he was already abroad.

[**8.**] As for Stanley, he was convicted on 6 June 2009 and a warrant of arrest was issued against him on 4 October 2012, which leads us to conclude that he was already abroad at that date.

[**9.**] As for the other Applicants, the Respondent State does not give any details about them and the court did not order any investigation in this regard.

[**10.**] It is apparent from the subject-matter of the dispute that the applicants allege that their passports were invalidated by the Respondent State, and as evidence of this they refer to a letter in which their names are among those whose passports were ordered invalidated by the State.

As for the fact that they did not have their valid passport and therefore could not travel.

[**11.**] It appears from the file and the documents attached that the Respondent State referred in its application. 52 to multiple jurisprudence such as Communication 147/95. 149/95 *Sir Dawda Jawara v The Gambia* as to the reasons for the requirement of domestic remedies, in which the principle often cited by the Court in its judgments is taken up, namely "the opportunity given to the Respondent State to remedy the situation through its own national system, thus avoiding the Commission's role as a court of first instance but rather as a body of last resort".

[**12.**] The Commission's case law also held in *Anuak Justice Council v Ethiopia* that if a remedy has the slightest probability of being effective, the Applicant must pursue it ... and that alleging that such domestic remedies are unlikely to succeed without trying to avail themselves of them will in no way influence the Commission".

[**13.**] In the same vein the *Article 19 v Eritrea* case concluded "that it is incumbent on each complainant to take the necessary steps to exhaust or at least attempt to exhaust domestic remedies....

When was the allegation that they could not travel to Rwanda because of the cancellation of their passports?

[**14.**] The Respondent State referred to numerous articles in the Criminal Law Code of Procedure and the fact that the law does not require the complainants to be present in court and to the impossibility of drawing on domestic remedies because they could not travel to Rwanda because of the arbitrary cancellation of their passports.

[**15.**] The Defendant State takes up the provisions of the Code of Civil Commercial, Social and Administrative Procedure, which stipulates that each court sitting at first instance shall be seized by a written or oral application submitted either by the plaintiff himself or by his lawyer or special proxy with power of attorney.

[**16.**] As the law does not oblige the parties to be physically present, and for this reason cites article 49 of the above-mentioned code,

[**17.**] And finally, Article 334, which regulates appeals against administrative decisions, or the applicants could have appealed against the alleged decision to cancel their passport either by themselves or through a lawyer.

[**18.**] Concluding that the African Commission has on several occasions observed that where national laws do not require the physical presence of the complainant, he can avail himself of existing remedies through his counsel, as in the case of *Obert Chinamo v Zimbabwe*, where the Commission concluded that "it is not necessary to be physically present in the country to have access to domestic remedies and the complainant cannot therefore claim that domestic remedies were not available to him. No attempt has been made to exhaust domestic remedies and the commission will not be influenced in any way by the fact that the victim feared for her life.

[**19.**] It is clear that the object of the dispute is the invalidation of the Applicants' passports and that appeals concerning this type of litigation fall within the jurisdiction of the judicial courts sitting in administrative litigation.

[**20.**] It is clear from the file that the Applicants fled the country of their own free will because they do not allege that they were expelled or tortured.

[**21.**] It is also clear that initiating a case of administrative litigation does not require the travel of the complainants, especially since Rwandan law allows for representation;

[**22.**] As it is proved in the application to the court that the Applicants although they have been resident in South Africa since their flight, in 2015 they delegated a lawyer from South Africa to represent them before the African Court.

With regard to the independence, effectiveness and availability of remedies

[**23.**] The Respondent State refers, in rebutting the Applicants' allegation, to the case *Ahorugeze v Sweden* application number 37077/09 where the European Court of Human Rights ruled that "Rwandan courts are not only effective and efficient but also meet international standards".

[**24.**] In the case of the *Prosecutor v Jean Uwikindi* – Referral Decision No. ICTR 2001-75-r11bis and others or the International Criminal Tribunal for Rwanda, the Prosecutor was of the opinion "that the Rwandan legal framework guarantees the independence and impartiality of the judiciary... Article 140 of the Rwandan constitution provides that the judiciary is independent and separate from the legislative and executive branches of government and enjoys administrative and financial autonomy...."

[**25.**] Case No. 11-050224ENE-otir/01 where it is said "the Court was of the opinion that given the reform of the Rwandan laws and legal system and Rwanda's guarantee that Bandora would receive a fair trial if extradited to Rwanda, there were no longer grounds to reject the request".

[**26.**] The case of *Leon Mugesera v Minister of Citizenship and Emigration*, the Ministry of Security and Emergency Preparedness or the Federal Court of Canada concluded "that the Rwandan courts are capable of holding a fair trial within a reasonable period of time" and dismissed Mugesera's application for an order against his deportation from Canada.

[**27.**] The Court did not respond to all this jurisprudence.

[**28.**] On the basis of all that follows, it appears that the Court in its judgment which is the subject of the Dissenting opinion failed to respond to the legal grounds presented by the Respondent State for the plea of exhaustion of local remedies by discussing them first and then opposing them on a contrary basis, and thus failed to ...:

- the obligation to give reasons for its judgments under Article 28/6 of the Rules of Procedure.
- The statement of reasons being the response not only to the applicants' allegations but also to those of the Respondent State.
- And to the objectives pursued by the obligation to have recourse to domestic remedies, which are the Defendant State's right to change its position, which in my opinion is an infringement of the right of States to defend themselves.

[**29.**] What I criticize the Court for is that although the Respondent State has provided a whole body of case law on the objection raised, the Court did not find it useful to respond to it, despite the fact that the case law in question is also that of the African Union, such as the African Commission on Human and Peoples' Rights:

[**30.**] The African Commission's communication in *Anuak Justice Council v Ethiopia* where it stated that "if a remedy has the slightest likelihood of being effective, the applicant must pursue it; alleging that domestic remedies are unlikely to succeed without trying to avail themselves of them will not in any way influence the Commission".

[**31.**] And in the *Article 19 v Eritrea* case "that it is incumbent on each complainant to take the necessary steps to exhaust, or at least attempt to exhaust, domestic remedies. It is not sufficient for the complainant to cast doubt on the adequacy of the State's domestic remedies on the basis of isolated incidents".

[**32.**] Finally, it is clear from the judgment cited above that the Court, after discussing the objections raised by the Respondent State as to the admissibility of the application, disregarded the other conditions set out in paragraphs 4, 6 and 7, although Articles 56 of the Charter, 6(2) of the Protocol and 40 of the Rules of Procedure.

[**33.**] Require the Court to make a preliminary examination of its jurisdiction and the conditions of admissibility as provided for in Articles 50 and 56 of the Charter and Rule 40 of the Rules of Procedure.

[**34.**] This clearly implies that:

A. If the parties raise objections to the conditions of jurisdiction and admissibility, the Court must examine them:
   - If one of them proves to be well-founded, it will rule accordingly.
   - If, on the other hand, none of them has done so, the court is obliged to discuss the other elements not discussed by the parties and to conclude accordingly.

B. If the parties do not discuss the conditions, the Court is obliged to do so in the order set out in Article 56 of the Charter and Rule 40 of the Rules.

[**35.**] In the case which is the subject of the Dissenting opinion, it is clear that if the Defendant has raised the objections of inadmissibility relating to the first, second and third paragraphs of section 40 of the Regulation and the Court has answered them in paragraphs 39 to 74.

[**36.**] It did not see fit to discuss the other conditions of the above-mentioned articles referred to in paragraphs 4, 6, 7 and paragraph 75 and merely concluded that there was no dispute as to their observance and that there was nothing in the record to indicate

that these conditions had not been complied with, thus giving the impression that the conditions listed exceeded each other in importance or purpose; this is in no way the spirit of the above-mentioned articles and the intention of the legislator;

[**37.**] Especially since in the present judgment the Court concluded that the application was admissible as regards domestic remedies and failed to file the application within a reasonable time...

[**38.**] In my opinion, this approach is also contrary to Rule 28(6) of the Rules of Court and the Court's obligation to give reasons for its judgments.

Manyuka v Tanzania (jurisdiction and admissibility) (2019) 3 AfCLR 689

Application 020/2015, *Livinus Daudi Manyuka v United Republic of Tanzania*

Ruling (jurisdiction and admissibility), 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant alleged that the Respondent State violated his rights by denying him justice in national courts. The Court found that it had jurisdiction and that the Applicant had exhausted local remedies but that he had not submitted the case to the Court within reasonable time

Jurisdiction (material jurisdiction, 23-25)

Admissibility (exhaustion of local remedies, constitutional petition, 45; submission within reasonable time, 55)

I. The Parties

1. Livinus Daudi Manyuka (hereinafter referred to as "the Applicant"), is a national of Tanzania who, at the time of filing the present Application, was serving a sentence of thirty (30) years imprisonment for the offence of robbery with violence at Ukonga Prison in Dar-es-Salaam.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the "Respondent State") which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It also deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the Application that on 4 November 1999 the Applicant, and two other individuals, were charged with the

offence of robbery with violence, before the District Court at Mbinga, Ruvuma Region. On 15 May 2000, they were convicted and each sentenced to twenty (20) years imprisonment.

4. The Applicant affirms that he and his co-accused persons filed an appeal before the High Court at Songea. On 9 August 2001, the High Court upheld the conviction but quashed the District Court's sentence and enhanced it to a term of thirty (30) years imprisonment and twelve (12) strokes of the cane. Dissatisfied with that decision they further appealed to the Court of Appeal which, on 9 April 2003, dismissed their appeal.

B. Alleged violations

5. The Applicant submits that the Respondent State has violated Article 2 of the Charter in that it has unlawfully imprisoned him for a non-existing offence hence curtailing his freedom of movement, association and of access to other amenities of life. The Applicant further submits that the Respondent State's conduct is in contravention of Articles 1 and 7(2) of the Charter and Article 13(6)(c) of the Respondent State's Constitution.

6. The Applicant contends that the enhancement of his sentence from twenty (20) years to thirty (30) years imprisonment by the High Court was an excessive order which violates his right to equality before the law as provided under Article 3 of the Charter.

7. The Applicant alleges that the Respondent State has also violated Articles 4 and 5 of the Charter through the High Court Judgment which ordered him to be caned twelve (12) strokes. The Applicant submits that the imposition of caning violates the right to respect, dignity and integrity of a person as protected under the Charter.

8. The Applicant also alleges that the Respondent State has violated the Charter by not according him "the right to legal representation."

III. Summary of the procedure before the Court

9. The Application was filed on 16 September 2015 and was served on the Respondent State on 15 October 2015. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.

10. On 5 January 2016, the Registry received the Respondent State's Response.

11. On 14 July 2016, the Registry received the Applicant's Reply.

12. After several reminders from the Registry, on 15 July 2019, the Applicant's Counsel informed the Registry that he was unable to file submissions on reparations since the Applicant could not be

traced following his release from prison and that efforts to reach him had proven futile.

IV. Prayer of the Parties

13. The Applicant prays the Court for the following reliefs:

"i. Declaration that the respondent state violated his rights as guaranteed under Article 1,Article 2,Article 3, Article 4, Article 5, and Article7 (c) and 2 of the Charter.

ii. Consequently, an order compelling the respondent state to release the applicant from prison.

iii. That the applicant also seeks an order for reparations should this Honourable court find merit in the application and in the prayers.

iv. That the applicant seeks an order of this honourable court to supervise the implementation of the court's order and any other decisions that the court may make if they go to the favours the Applicant."[sic]

14. The Respondent State prays the Court for the following orders with respect to the jurisdiction and admissibility:

"i. That the Honourable African Court on Human and Peoples 'Rights lacks jurisdiction to handle the Application and it should be dismissed.

ii. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court and be declared inadmissible.

iii. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of the Court and be declared inadmissible.

iv. That the Application be dismissed in accordance to Rule 38 of the Rules of Court"

15. The Respondent State prays the Court to find that it has not violated Articles 1, 2, 3, 4, 5, 7(c) and 7(2) of the Charter. It further prays the court to:

"i. Dismiss the Application for lacking merit.

ii. Order that the Applicant shouldnot be released from prison.

iii. Dismiss the Applicant's prayer for reparations."

V. Jurisdiction

16. The Court observes that Article 3 of the Protocol provides as follows:

"1. the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned,

2. in the event of a dispute as to whether the Court has jurisdiction, the

Court shall decide."

17. The Court further observes that in terms of Rule 39(1) of the Rules "[T]he Court shall conduct preliminary examination of its jurisdiction..."

18. On the basis of the above-cited provisions, therefore, the Court must, preliminarily, conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

A. Objections to material jurisdiction

19. The Respondent State raises two objections in relation to the Court's material jurisdiction. Firstly, that the Court is being asked to sit as a court of first instance, and, secondly, that the Court is being asked to assume appellate jurisdiction.

i. Objection on the ground that the Court is being asked to sit as a court of first instance

20. The Respondent State avers that the Applicant, by challenging the constitutionality of his sentence and claiming that it is in violation of Article 13(6) of its Constitution ,is inviting the Court to address a matter that has never been considered in the domestic courts and, therefore, inviting the Court to sit as a court of first instance.

21. The Respondent State submits that this Application is the first time that the Applicant is challenging the constitutionality of his sentence under the Minimum Sentences Act.

22. The Applicant submits that this Court has jurisdiction *ratione materiae* because the allegations in the Application raise violations of the Charter. The Applicant also avers that this Court has jurisdiction *ratione personae* as he is a citizen of the Respondent State which has ratified the Protocol and filed the Declaration under Article 34(6) thereof. The Applicant supports his submission by referring the Court to its judgment in *Frank David Omary and others v United Republic of Tanzania*.

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23. In the present case, the Court notes that the Applicant's allegations directly relate to rights guaranteed in the Charter. The Court further notes that the Applicant is not asking the Court to sit as a court of

first instance but rather invoking the Court's jurisdiction under the Charter to determine if the conduct that he is complaining of is a violation of the Charter.

24. The Court recalls that it has consistently held that so long as the Application alleges violations of rights protected in the Charter or any other international instrument to which the Respondent State is a party it possesses jurisdiction.[1] On this point**,** the Court recalls that in *Armand Guehi v United Republic of Tanzania* it expressed itself thus"…with respect to whether it is called to act as court of first instance, [the Court is of the view] that, by virtue of Article 3 of the Protocol, it has material jurisdiction so long as the Application alleges violations of provisions of international instruments to which the Respondent State is a party."[2]

25. Since the Applicant is alleging violation of the Charter, to which the Respondent State is a Party, the Court finds that it will not be sitting as a court of first instance in adjudicating on the Applicant's allegations and, accordingly, dismisses the Respondent State's objection in this regard.

ii. Objection on the ground that the Court is being requested to assume appellate jurisdiction

26. The Respondent State avers that the Court lacks jurisdiction to examine the present Application since the Applicant is asking it to sit as an appellate Court and deliberate on matters already concluded by the Court of Appeal.

27. The Respondent State cites, in support of its contentions, the judgment of the Court in *Ernest Francis Mtingwi v Republic of Malawi* where the Court held 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 courts.

28. The Applicant submits that the Court has jurisdiction as per Article 3 of the Protocol. The Applicant relies on the Court's decision in *Alex Thomas v United Republic of Tanzania* to justify the

1 See, Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations*), Kenedy Ivan v United Republic of Tanzania (Kenedy Ivan v Tanzania (Merits and Reparations)*, paras 20-21. Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (PapiKocha) v United Republic of Tanzania*(*Nguza Viking and Another v Tanzania* (Merits), para 36.

2 Application 001/2015. Judgment of 7 November 2018 (Merits and Reparations*) Armand Guehi v United Republic of Tanzania* (*Armand Guehi v Tanzania* (Merits and Reparations), para 31.

admissibility of the Application.

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29. The Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[3] Nevertheless, while it does not have appellate jurisdiction in relation to domestic courts, the Court retains the power to assess the propriety of domestic proceedings in the light of a State's international commitments.[4]

30. Regarding the Respondent State's objection, the Court notes that the essence of the objection is that the Applicant is asking the Court to deliberate on matters that were already concluded by its domestic courts. The Court further notes that the allegations by the Applicant are within the purview of its jurisdiction given that they invoke rights protected under the Charter.

31. As established by the Court's jurisprudence, examining a State's compliance with its international obligations does not amount to the Court sitting as an appellate court.[5] The Court, therefore, dismisses the Respondent State's objection in this regard.

32. Based on the foregoing, the Court finds that it has material jurisdiction to deal with the Application.

B. Other aspects of jurisdiction

33. The Court notes that other aspects of its jurisdiction are not contested by the Parties and nothing on the record indicates that the Court lacks jurisdiction. The Court, therefore, holds that:

i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and it is deposited the required Declaration.

ii. it has temporal jurisdiction as the alleged violations were continuing at the time the Application was filed, which is after the Respondent State became a Party to the Protocol and deposited its Declaration.

iii. It has territorial jurisdiction given that the alleged violations occurred within the territory of the Respondent State.

34. In light of the foregoing, the Court finds that it has jurisdiction to

3 *Armand Guehi v Tanzania* (Merits and Reparations), *ibid*, para 33. See, also, *Alex Thomas v Tanzania* (2015) (Merits) 1 AfCLR 465, (*Alex Thomas v Tanzania* (Merits)) paras 60-65.

hear the Application.

VI. Admissibility

35. Pursuant to Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter". In terms of Rule 39 of its Rules, "[t]he 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."

36. Rule 40 of the Rules, which in substance restates the provisions 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:

i. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;

ii. comply with the Constitutive Act of the Union and the Charter;

iii. not contain any disparaging or insulting language;

iv. not be based exclusively on news disseminated through the mass media;

v. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

vi. 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

vii. 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."

37. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections in relation to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies and the second objection relates to whether the Application was filed within a reasonable time or not.

A. Conditions of admissibility in contention between the Parties

i. Objection relating to non-exhaustion of local remedies

38. The Respondent State avers that, with respect to the allegation that the sentence imposed on the Applicant was unconstitutional, the Applicant could have challenged this through the procedure provided under the Basic Rights and Duties Enforcement Act. The Respondent State further contends, with regard to the allegation that the thirty (30) year sentence was inappropriate, that the Applicant had the opportunity to argue this before the Court of Appeal which he did not do despite being represented by an Advocate.

39. The Respondent State also submits that, with regard to the allegation that the Applicant was denied legal aid, the Applicant could have raised this issue before the trial court. The Respondent State thus submits that the Applicant had legal remedies at his disposal which he did not utilise and that it is, therefore, premature of him to institute this Application.

40. For his part, the Applicant submits that he took his case to the Court of Appeal which is the highest court in the Respondent State and that he, therefore, exhausted local remedies.

41. Concerning the filing of a constitutional petition for violation of his rights, the Applicant submits that the Court has consistently ruled that the application for review of a Court of Appeal decision amounts to an extraordinary measure which need not be exhausted for admissibility before the Court. In support of this argument he relies on the Court's decision in *Alex Thomas v United Republic of Tanzania*.

42. The Applicant also contends that, with regard to the Respondent State's submission that he could have raised the issue of legal aid during his trial, being a layman, he had the right to be informed of his right to free legal aid and be facilitated to access the same.

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43. The Court notes that subsequent to the Applicant's conviction by the District Court at Mbinga, Ruvuma Region, he filed an appeal before the High Court and, subsequently, before the Court of Appeal. The High Court dismissed the Applicant's appeal on 9 August 2001 and the Court of Appeal also dismissed his appeal on 9 April 2003.The Applicant, therefore, accessed the highest

court in the Respondent State with regard to his grievances.

44. The Court also notes that the alleged violations of his rights relate to the domestic judicial proceedings that led to his conviction and sentence. The allegations raised by the Applicant, therefore, form part of the bundle of rights and guarantees that were related to or were the basis of his appeals and which the domestic authorities had ample opportunity to redress even though the Applicant did not raise them explicitly. [6]

45. Concerning the filing of a constitutional petition for violation of the Applicant's rights after the Court of Appeal dismissed his appeal, the Court has already established that this remedy, in the Respondent State's judicial system, is an extraordinary remedy that an Applicant is not required to exhaust prior to seizing the Court.[7]

46. Accordingly, the Court finds that the Applicant exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 40(5) of the Rules and, therefore, dismisses the Respondent State's objection in relation to non-exhaustion of local remedies.

ii. Objection relating to failure to file the Application within a reasonable time

47. The Respondent State submits that the period of five (5) years and six (6) months that the Applicant took to file this Application, after the Court of Appeal delivered its judgment, is unreasonable within the meaning of Rule 40(6) of the Rules. In support of its argument, the Respondent State refers to the decision of the African Commission on Human and Peoples' Rights (hereinafter "the Commission") in *Michael Majuru v Republic of Zimbabwe* and prays the Court to declare the matter inadmissible.

48. The Applicant contends that the Application must be considered to have been filed within a reasonable time given the circumstances of the matter and his situation as a lay, indigent and incarcerated person.

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6 See *Alex Thomas v Tanzania* (Merits), *op cit*, paras 60-65; Application 027/2015. Judgment of 21 September 2018 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania* para 35.

7 *Alex Thomas v Tanzania* (Merits), *op cit,* paras 63-65.

49. The Court notes that Article 56(6) of the Charter does not set a limit for the filing of cases before it. The Court also notes that Rule 40(6) of the Rules simply refers to 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..."without prescribing any specific period of time.

50. As the Court has held "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." [8] A non-exhaustive list of circumstances that the Court has considered in determining the reasonableness of time before the filing of an Application include the following: imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisals and the use of extraordinary remedies.[9]

51. In the present matter, the Court notes that the Court of Appeal dismissed the Applicant's appeal on 9 April 2003 and that the Applicant filed this Application on 16 September 2015. The Court further notes that the Respondent State deposited its Declaration under Article 34(6) on 29 March 2010, allowing individuals and non-governmental organisations to directly access the Court. In total, therefore, the Applicant filed this Application five (5) years and six (6) months after the Respondent State deposited its Declaration. The question that remains, therefore, is whether, in the circumstances of the case, the period of five (5) years and six (6) months is reasonable.

52. The Court notes that in *Amiri Ramadhani v United Republic of Tanzania*[10] and *Christopher Jonas v United Republic of Tanzania*[11] it held that the period of five (5) years and one (1) month was reasonable owing to the circumstances of the Applicants. In these cases, the Court took into consideration the fact that the Applicants were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not

8 *Beneficiaries of the 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)* (2014) 1 AfCLR 197 para 121.

9 Application 015/2015. Ruling of 26 September 2019 (Jurisdiction and Admissibility), *Godfred Anthony and Ifunda Kisite v United Republic of Tanzania* (*Godfred Anthony and Another v Tanzania* (Jurisdiction and Admissibility)) para 43.

10 Application 010 of 2015. Judgment of 11 May 2018 (Merits), *Amiri Ramadhani v United Republic of Tanzania* (*Amiri Ramadhani v Tanzania* (Merits)) para 50.

11 Application 011/2015, Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania* para 54.

have the assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court. Again, in *Werema Wangoko and Another v United Republic of Tanzania*,[12] the Court decided that the Applicants, having used the review procedure, were entitled to wait for the review judgment to be delivered and that this justified the filing of their Application five (5) years and five (5) months after exhaustion of local remedies.

53. In *Godfred Anthony and another v United Republic of Tanzania*, however, the Court held that a period of five (5) years and four (4) months was an unreasonable lapse of time before the filing of an application. In the preceding case, the Court reasoned that while the applicants were incarcerated and therefore restricted in their movements they had not "asserted or provided any proof that they are illiterate, lay, or had no knowledge of the existence of the Court".[13] The Court concluded that while it has always considered the personal circumstances of applicants in assessing the reasonableness of the lapse of time before the filing of an application, the applicants had failed to provide it with material on the basis of which it could conclude that the period of five (5) years and four (4) months was reasonable.[14]

54. In the present case, the Court notes that the Applicant has indicated that he is "an indigent incarcerated person operating without legal assistance or legal representation …" The Applicant has also stated that he is a peasant. The Court observes, however, that aside from the blanket assertion of indigence the Applicant has not attempted to adduce evidence explaining why it took him five (5) years and Six (6) months to file his Application.

55. The Court notes that unlike the applicants in *Amiri Ramadhani v United Republic of Tanzania*[15] and *Christopher Jonas v United Republic of Tanzania* the Applicant in the present case had legal representation in pursuing his appeals both before the High Court and the Court of Appeal. In the absence of any clear and compelling justification for the lapse of five (5) years and Six (6) months before the filing of the Application, the Court finds that this Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter which requirement is

12 Application 024/2015. Judgment of 7 December 2018 (Merits and Reparations), *Werema Wangoko v United Republic of Tanzania* paras 48-49.

13 *Godfred Anthony and Another v Tanzania* (Jurisdiction and Admissibility) para 48.

14 *Ibid* para 49.

15 *Amiri Ramadhani v Tanzania*(Merits)*, op cit,* para 50.

restated in Rule 40(6) of the Rules.

56. The Court recalls that the conditions of admissibility under the Charter are cumulative such that if one condition is not fulfilled then the Application becomes inadmissible.[16] In the present case, since the Application has failed to fulfil the requirement under Article 56(6) of the Charter, which is restated in Rule 40(6) of the Rules, the Court, therefore, finds that the Application is inadmissible.

VII. Costs

57. Both the Applicant and the Respondent State did not make any submissions on costs.

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58. The Court notes that Rule 30 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs."

59. In the present Application, the Court decides that each Party shall bear its own costs.

VIII. Operative part

60. For these reasons,

The Court,

Unanimously,

On jurisdiction

i. *Dismisses* the objections to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objection to the admissibility of the Application based on the lack of exhaustion of local remedies;

iv. *Finds* that the Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter;

v. *Declares* that the Application is inadmissible.

16 Application 016/2017. Ruling of 28 March 2019, (Jurisdiction and Admissibility), *Dexter Johnson v Republic of Ghana* para 57.

On costs

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

Bunyerere v Tanzania (merits and reparations) (2019) 3 AfCLR 702

Application 031/2015, *Dismas Bunyerere v United Republic of Tanzania*

Judgment, 28 November 2019. Done in English and French, the English text being authoritative.

Judges: ORÉ, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA and ANUKAM

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced to thirty (30) years imprisonment for armed robbery. He alleged that the acts he was accused of constituted theft and not armed robbery, that evidence had been disregarded in the trial and that his right to equality before the law and non-discrimination had been violated. The Court held that no rights had been violated in the case and dismissed the claim for reparations.

Jurisdiction (material, 24, 25)

Admissibility (exhaustion of local remedies, constitutional review, 37; submission within reasonable time, 47, 48)

Fair trial (evaluation of evidence, 59, 60; legality, 66, 67, 74)

Separate Opinion: BENSAOULA

Admissibility (submission within reasonable time, 6, 7)

I. The Parties

1. Dismas Bunyerere (hereinafter referred to as "the Applicant"), is a national of Tanzania currently serving a sentence of thirty (30) years imprisonment following conviction for armed robbery.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the "Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986, and to the Protocol on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations (NGOs).

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that, on 22 September 2005, the Applicant was arrested at Rubaragazi village following an attack that he and five (5) other persons perpetrated around Rubaragazi Island on 7 September 2005 on Magongo William and Faida Charles who were fishing on a boat belonging to Gregory John Kazembe. They robbed the two (2) aforementioned fishermen of an out-boat engine, a fuel tank, a fuel line, an engine switch and forty seven (47) fishing nets.

4. The Applicant was charged on 26 September 2006, with the offence of armed robbery before the District Court of Sengerema at Sengerema in Mwanza, in Criminal Case No. 288 of 2005. On 14 November 2006, that Court convicted the Applicant and sentenced him to thirty (30) years imprisonment.

5. On 7 February 2007, the Applicant filed Criminal Appeal No. 52 of 2007 at the High Court of Tanzania at Mwanza. On 4 February 2009, this appeal was struck out for lack of a proper notice of appeal. By the same decision striking out the Appeal, the Court allowed the Applicant to seek leave to file his notice of appeal out of time, which he subsequently did through Miscellaneous Criminal Application No. 88 of 2009 filed at the High Court of Tanzania at Mwanza. The High Court granted the leave sought by an Order of 6 September 2010 and thereafter, on 27 September 2010, the Applicant filed Criminal Appeal 70 of 2010 at the High Court of Tanzania at Mwanza. On 8 December 2010, the High Court of Tanzania at Mwanza, dismissed the appeal.

6. On 21 December 2010, the Applicant filed an appeal which was subsequently registered as Criminal Appeal 102 of 2011 at the Court of Appeal of Tanzania at Mwanza. On 29 July 2013, the Court of Appeal dismissed the appeal and upheld his conviction and sentence. On 13 September 2013, the Applicant filed Criminal Application 16 of 2013 for Review of the Court of Appeal's judgment of 29 July 2013. This Application for review was pending at the time of filing of the Application.

7. The Applicant filed the present Application on 5 December 2015.

B. Alleged violations

8. The Applicant alleges that the Respondent State has violated his rights under Article 2 of the Charter on the right to non-discrimination

and Article 3 on the right to equality before the law and to equal protection of the law. He alleges that these violations occurred when the Court of Appeal:

"i. Disregarded the fundamental evidence tendered by the prosecution relating to his identification at the scene of the incident and the cautioned statement that he made.

ii. Upheld his conviction and sentence without altering the offence he was charged with, from armed robbery to theft, and that it consequently ought to have changed his sentence and considered the Applicant's mitigation and plea for his leniency.

iii. Delivered a judgment that was contrary to the laws of Tanzania especially the Criminal Procedure Act."

9. The Applicant alleges that the violation of his rights should be remedied pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules.

III. Summary of procedure before the Court

10. The Application was filed on 8 December 2015 and served on the Respondent State on 25 January 2016.

11. The Parties were notified of the pleadings on the merits and filed their submissions within the time stipulated by the Court. On 19 June 2017, the Parties were notified of the close of pleadings on the merits.

12. On 24 August 2018, the Registry requested the Applicant to file his submissions on reparations.

13. On 27 September 2018, the Applicant filed the submissions on reparations which were transmitted to the Respondent State on the same date for the response thereto within thirty (30) days.

14. The Court extended twice, by the letters dated 20 December 2018 and 15 February 2019, *suo motu* the time for the Respondent State to file submissions on reparations. On each extension, the Respondent State was given thirty (30) days to file these submissions but they failed to do so.

15. On 12 June 2019, the Parties were informed that Pleadings on reparations were closed.

IV. Prayers of the Parties

16. The Applicant prays the Court to:

"i. Grant this application and alter the sentence subsequent set the Applicant free from the custody by considering the period he spent imprisonment (sic).

ii. Resolve the complaint and restore justice where it was overlooked and quash both conviction and sentence imposed upon him;

iii. Grant any other order(s) or relief(s) that may deem fit to grant in the circumstance of the complaint."

17. The Applicant reiterated his prayers in the Reply and on reparations, the Applicant prays that:

"i. the Respondent shall have to compensate the applicant the sum of Tsh 3,000,000/= (three millions) per years he spent in prison as a prisoner since 2006 upto 2018 which is almost 12 years times (x) 3,000,000/= to 36,000,000/= Tsh (thirty six million Tshs)

ii. The applicant's first priority is to be free (released) from prison and any other reliefs and remedies the court may deem fit and just to grant in the circumstance at hand.

iii. The court may determine the reparation as to its accord via international reparation standard and considering the third worlders development and incomes per year (sic)."

18. The Respondent State prays that the Court grant the following orders:

"i. That the Court is not vested with jurisdiction to adjudicate over this Application.

ii. That the Application has not met the admissibility requirements stipulated under Rules 40(5) and 40(6) of the Rules of the Court or Article 56 of the Charter and Article 6(2) of the Protocol.

iii. That the Application be declared inadmissible.

iv. That the Government of Tanzania did not violate Articles 2, 3(1) and 3(2) of the Charter

v. That the Application be dismissed in accordance to Rule 38 of the Rules of court.

vi. That the Applicant's prayers be dismissed

vii. That the costs of this Application be borne by the Applicant."

V. Jurisdiction of the Court

19. The Court observes that Article 3 of the Protocol provides as follows:

"1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

20. The Court further observes that in terms of Rule 39(1) of the

Rules: "The Court shall conduct preliminary examination of its jurisdiction …".

21. On the basis of the above-cited provisions, the Court must, preliminarily conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

A. Objection to material jurisdiction

22. The Respondent State argues that the Application does not comply with the provisions of Article 3(1) of the Protocol and Rules 26 and 40(2) of the Rules as the Applicant is calling for the Court to sit as an appellate court and reconsider matters of evidence determined by the Court of Appeal of Tanzania, the highest Court in the Respondent State. The Respondent State refers to the Court's decision in *Ernest Francis Mtingwi v Republic of Malawi* that it does not have appellate jurisdiction to consider appeals on cases already decided on by domestic and regional courts.

23. The Applicant contends that his Application is within the jurisdiction of the Court as the alleged violations are based on rights protected by the Charter. The Applicant states that the Application is before the Court to vet the errors in the proceedings at the domestic courts and therefore the Court has jurisdiction to examine all contents of the domestic court's judgments and to quash his conviction and set aside the sentence.

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24. The Court has consistently held that it has material jurisdiction as long as the Applicant alleges violations of human rights protected under the Charter or other human rights instrument to which the Respondent State is a party.[1]

25. The Court further reiterates its well established jurisprudence that, while it is not an appellate body with respect to decisions of national courts,[2] nevertheless, "this does not preclude it from

1 *Peter Joseph Chacha v United Republic of Tanzania* (2014) (admissibility), 1 AfCLR 398, para 114.

2 *Ernest Francis Mtingwi v Republic of Malawi* (admissibility), (2013) 1 AfCLR 190, para 14; See also Application 025/2016, Judgment of 28 March 2019 (Merits and Reparations). *Kenedy Ivan v United Republic of Tanzania*, (*Kenedy Ivan v Tanzania* (Merits and Reparations)) para 26; Application 053/2016, Judgment of 28

examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[1]

26. In the instant case, the Court finds that the Applicant alleges that his rights under Articles 2 and 3 of the Charter have been violated.

27. Accordingly, the Respondent State's objection in this regard is dismissed and the Court therefore holds that it has material jurisdiction.

B. Other aspects of jurisdiction

28. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on record indicates that it does not have jurisdiction. The Court therefore holds that:

i. it has personal jurisdiction given that the Respondent State is a party to the Protocol and has deposited the Declaration required under Article 34(6) thereof, which enables individuals to institute cases directly before it, in terms of Article 5(3) of the Protocol.

March 2019 (Merits). ***Oscar Josiah v United Republic of Tanzania*** (***Oscar Josiah v Tanzani***a (Merits)), para 25; Application 001/2015, Judgment of 7 December 2018 (Merits and Reparations) ***Armand Guehi v United Republic of Tanzania***. (***Armand Guehi v Tanzania*** (Merits and Reparations)) para 33; Application 024/2015. Judgment of 7 December 2018 (Merits and Reparations) ***Werema Wangoko Werema and Another v United Republic of Tanzania*** (***Werema Wangoko Werema and Another v Tanzania*** (Merits and Reparations)) para 29; Application 027/2015, Judgment of 21 September 2018 (Merits and Reparations). ***Minani Evarist v United Republic of Tanzania***. (***Minani Evarist v Tanzania*** (Merits and Reparations)) para 18; Application 016/2016, Judgment of 21 September 2018 (Merits and Reparations). ***Diocles William v United Republic of Tanzania*** (***Diocles William v Tanzania*** (Merits and Reparations)) para 28; Application 002/2016, Judgment of 11 May 2018 (Merits). ***George Maili Kemboge v United Republic of Tanzania***, (***George Maili Kemboge v Tanzania*** (Merits)) para 19; Application 005/2015. Judgment of 11 May 2018 (Merits) ***Thobias Mang'ara Mango and Another v United Republic of Tanzania***, (***Thobias Mango and Another v Tanzania*** (Merits)) para 31; Application 006/2015. Judgment of 23 March 2018, (Merits) ***Nguza Viking and Johnson Nguza v United Republic of Tanzania*** (***Nguza Viking and Johnson Nguza v Tanzania*** (Merits)) para 35; Application 032/2015. Judgment of 21 March 2018, (Merits) ***Kijiji Isiaga v United Republic of Tanzania*** (***Kijiji Isiaga v Tanzania*** (Merits)) para 34; Application. 011/2015. Judgment of 28 September 2017, (Merits) ***Christopher Jonas v United Republic of Tanzania*** (***Christopher Jonas v Tanzania*** (Merits)) para 28; ***Mohamed Abubakari v Tanzania*** (merits) (2016) 1 AfCLR 599 para 25.

1 ***Alex Thomas v Tanzania*** (merits) (2015) 1 AfCLR 465 para 130; See also ***Mohamed Abubakari v Tanzania*** (merits) (2016) 1 AfCLR 599 para 29; ***Christopher Jonas v Tanzania*** (Merits), para 28, Application 003/2014, Judgment of 24 November 2017 (Merits), ***Ingabire Victoire Umuhoza v Republic of Rwanda (Ingabire Umuhoza v Rwanda*** (Merits)), para 52.

ii. it has temporal jurisdiction in view of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers as irregularities[2] ; and

iii. it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State.

29. From the foregoing, the Court holds that it has jurisdiction.

VI. Admissibility

30. In terms of 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." Pursuant to Rule 39(1) of the 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 the Rules".

31. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, 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 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;

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".

2 *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 paras 71-77.

A. Conditions of admissibility in contention between the Parties

32. The Respondent State submits that the Application does not comply with two admissibility requirements. First, on Rule 40(5) of the Rules relating to exhaustion of local remedies and second, on Rule 40(6) of the Rules on the need for applications to be filed within a reasonable time.

i. Objection relating to exhaustion of local remedies

33. The Respondent State alleges that this Application fails to comply with the requirement of Rule 40(5) of the Rules because the Applicant did not exhaust local remedies. Citing the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") in *SAHRINGON and others v Tanzania and Article 19 v Eritrea,* the Respondent State argues that the Applicant ought to have complied with the requirement of exhaustion of local remedies that applies to any international adjudication. The Respondent State avers that the Applicant ought to have instituted a constitutional petition in the High Court of Tanzania pursuant to the Basic Rights and Duties Enforcement Act, to remedy the complaints of violations of fair trial rights that allegedly occurred during the hearing of his appeal at the Court of Appeal of Tanzania.

34. The Applicant avers that local remedies were exhausted and that he sought redress at the High Court and the Court of Appeal before seizing this Court. The Applicant also states that his application for review of the Court of Appeal's judgment of 29 July 2013 was yet to be heard by the time he filed the Application before this Court.

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35. The Court notes that pursuant to Rule 40(5) of the Rules an application filed before the Court shall meet the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies reinforces the primacy of domestic courts in the protection of human rights *vis-à-vis* this Court and, as such, aims at providing States the opportunity to deal with human rights

violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.[3]

36. In its established jurisprudence, the Court has consistently held that an Applicant is only required to exhaust ordinary judicial remedies.[4] Furthermore, in several cases involving the Respondent State, the Court has repeatedly stated that the remedies of constitutional petition and application for review of a judgment of the Court of Appeal in the Tanzanian judicial system are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court.[5]

37. The Court notes from the record that the Applicant filed an appeal against his conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 29 July 2013, the Court of Appeal upheld the judgment of the High Court, which had earlier upheld the judgment of the District Court of Sengerema. In addition to pursuing the ordinary judicial remedies, the Applicant also, attempted to use the review procedure at the Court of Appeal. The Respondent State therefore had the opportunity to redress his violations.

38. It is thus clear that the Applicant has exhausted all the available domestic remedies.

39. For this reason, the Court dismisses the objection that the Applicant has not exhausted local remedies.

ii. Objection relating to failure to file the Application within a reasonable time

40. The Respondent State argues that in the event that the Court finds that the Applicant exhausted local remedies, the Court should find that the Application was not filed within a reasonable time pursuant to Rule 40(6) of the Rules.

41. The Respondent State avers that the period from 29 July 2013, when the Court of Appeal of Tanzania dismissed the Applicant's appeal to 8 December 2015 when the Applicant filed his Application

3 Application 006/2012. Judgment of 26 May 2017 (Merits), *African Commission on Human and Peoples' Rights v Republic of Kenya*, paras 93-94.

4 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465 para 64; *Wilfred Onyango Nganyi and others v Tanzania* (merits) (2016) 1 AfCLR 507 para 95.

5 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465, para 65; *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599, paras 66-70; *Christopher Jonas v Tanzania* (Merits), para 44.

before this Court, is two (2) years and five (5) months.

42. The Respondent State relies on the Commission's decision in *Majuru v Zimbabwe,* in stating that the established international human rights jurisprudence considers six (6) months as reasonable time for filing an Application after the exhaustion of local remedies. The Respondent State argues that filing the Application after a period of two (2) years is very far from being considered reasonable. The Respondent State further contends that the Applicant being in prison does not bar his access to the Court.

43. The Applicant contends that his Application complies with Rule 40 (6) of the Rules because he appealed to both the High Court and the Court of Appeal of Tanzania, which is the highest court in the Respondent State. The Applicant also argues that the delay in his filing the Application was because he filed an application for review at the Court of Appeal of Tanzania.

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44. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40 (6) of the Rules, which in substance restates Article 56(6) of the Charter, simply mentions "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."

45. The Court recalls its jurisprudence in *Norbert Zongo and others v Burkina Faso* in which it held "…that the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[6]

46. The record before this Court shows that local remedies were exhausted on 29 July 2013 when the Court of Appeal of Tanzania delivered its judgment while the Application was filed on 8 December 2015, that is, two (2) years, four (4) months and ten (10) days after local remedies were exhausted. The Court has to determine whether this period can be considered reasonable in

6 *See 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 para 121.

terms of Rule 40 (6) of the Rules and Article 56(6) of the Charter.

47. The Court notes that the Applicant is in prison and this resulted in restriction of his movements and his access to information about the existence of the Court.[7] He chose to use the review procedure of the Court of Appeal,[8] by filing an application for review on 13 September 2013, even though, it is not a remedy required to be exhausted before filing an Application before this Court**.** He had an expectation that this review would have been determined within a reasonable time. The Court further notes that the application for review was pending by the time he filed the Application. The Court is of the view that the Applicant should not be penalised for the time he spent awaiting the determination of his application for review of the Court of Appeal's judgment.

48. Consequently, the Court finds that the time taken by the Applicant to seize it, that is, two (2) years, four (4) months and ten (10) days after the exhaustion of local remedies is reasonable.

49. The objection raised in this regard is therefore dismissed.

B. Conditions of admissibility not in contention between the Parties

50. The conditions in respect of the identity of the Applicant, incompatibility with the Constitutive Act of the African Union and the Charter, the language used in the Application, the nature of the evidence adduced and the principle that an application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules), are not in contention between the Parties. The Court notes that nothing on record indicates that any of these conditions have not been fulfilled in this case.

51. In light of the foregoing, the Court finds that this Application meets all the admissibility conditions set out in Article 56 of the Charter and Rule 40 of the Rules and declares the Application admissible.

7 See *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465 para 74*, Kenedy Ivan v Tanzania* (Merits and Reparations) para 56.

8 *Werema Wangoko Werema and Another v Tanzania* (Merits and Reparations) para 49, *Armand Guehi v Tanzania* (Merits and Reparations) para 56.

VII. Merits

52. The Applicant alleges that his rights guaranteed in the Charter under Article 2 on the right not to be discriminated against and Article 3 on the right to equality before the law and to equal protection of the law were violated.

53. In so far as the allegations of violations of Articles 2 and 3 of the Charter are linked to the allegation of violation of Article 7 of the Charter, the Court will first consider the latter allegation.[9]

A. Allegations of violations relating to Article 7 of the Charter

54. The Applicant alleges violation of his rights relating to an alleged manifest error in the judgment of the Court of Appeal based on his improper identification. He also alleges that the Court of Appeal upheld his conviction and sentence based on the evidence of possession of stolen properties and that it failed to 'alter the offence to theft'.

i. Allegation relating to the manifest error in the judgment of the Court of Appeal based on Applicant's identification

55. The Applicant alleges that the Court of Appeal 'disregarded fundamental evidence of prosecution side regarding identification of the Applicant in the scene of incident and cautioned statement of the Applicant to confusion.' Hence the Court of Appeal based its judgment based on a manifest error of fact on the Applicant's identification.

56. The Respondent State argues that the issue of the Applicant's identification was one of the Applicant's grounds of appeal in the Court of Appeal which was considered and determined in his favour by the Court disregarding the Applicant's identification and his cautioned statement.

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9 *Peter Joseph Chacha v United Republic of Tanzania* (2014) (admissibility), 1 AfCLR 398, para 122.

57. 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, 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."

58. The Court reiterates its position according to which, it held that:
"…domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence, and as an international court, this court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings."[10]

59. The Court notes from the record that the domestic courts examined the evidence tendered by the prosecution and determined that the Applicant's identification by the witnesses was at most, hearsay and that the cautioned statement of the Applicant was not taken lawfully. The domestic courts therefore disregarded the evidence relating to the Applicant's identification and his cautioned statement, since these did not comply with the requirements set down in jurisprudence. The Court further notes that the issue was determined in favour of the accused, who is the Applicant before this Court.

60. The Court finds that the manner in which the domestic courts evaluated the evidence relating to the Applicant's identification and the disregarding of his cautioned statement does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation.

ii. Allegation relating to the Applicant's conviction and sentence

61. The Applicant alleges that, in view of the prosecution's evidence on the stolen properties, the Court of Appeal ought to have altered his offence from armed robbery to theft and convicted him of this

10 Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania* para 65.

lesser charge which carried a lesser sentence, rather than uphold his conviction for armed robbery and sentence of thirty (30) years' imprisonment.

62. The Applicant adds that the doctrine of recent possession was not properly invoked by the prosecution because the domestic courts did not consider the fact that the Applicant, as a canoe fisherman, could possess the same material that it was alleged he robbed the Complainant, Prosecution Witness 1 (PW1), of. He states that the prosecution failed to provide substantial proof of PW1's ownership of the property in dispute.

63. The Respondent State avers that the Applicant's conviction was based on the doctrine of recent possession which the Court of Appeal found to be in line with its jurisprudence in *Paulo Maduka & 4 others v the Republic of Tanzania*, that: "the presumption of guilt can only arise where there is cogent proof that the stolen things possessed by the accused is the one that was stolen during the commission of the offence charged…". The Respondent State argues that the said Court found this doctrine to have been properly invoked and applied by the trial court. The Respondent State further adds that it was the Applicant who led the Police to the place where the stolen goods were stored and that the owner of the alleged stolen properties identified the goods as being his property.

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64. Article 7(2) of the Charter provides that "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."

65. The Court notes from the record that, during the investigation phase, it was the Applicant who led the police to his house where the stolen goods were found and their rightful owner, Gregory John Kazembe, identified these goods as his property.

66. The Court equally notes that the Court of Appeal examined all the pleadings by the Applicant regarding the issue of the doctrine of recent possession and decided to uphold the District Magistrate's and High Court's decisions that the Applicant's conviction for armed robbery and sentence of thirty (30) years' imprisonment

should stand.

67. The Court finds that the manner in which the domestic courts determined the issue of the doctrine of recent possession does not disclose any manifest error or miscarriage of justice to the Applicant as regards his conviction for the offence of armed robbery and sentence of thirty years' imprisonment. The Court therefore dismisses this allegation.

B. Alleged violation of the right to equal treatment before the law and equal protection of the law

68. The Applicant alleges that the Respondent's State's failure to apply Section 300 (2) of the Criminal Procedure Act of 2002 (CPA) to alter the offence he was charged with, that is, armed robbery, to a minor one, after their satisfaction that his conviction was under the evidence of possession of stolen properties, constituted a violation of his right to equal treatment before the law and equal protection of the law.

69. The Applicant maintains that the Court of Appeal is governed by the Appellate Jurisdiction Act, the Court of Appeal Rules of 2009 and since, these Rules refer to 'any other written law', the Court of Appeal is also governed by the CPA .

70. The Applicant contends that the failure of the Court of Appeal to consider his application for review is a breach of his rights enshrined in the Constitution of the Respondent State and the Charter.

71. The Respondent State argues pursuant to Article 4 of the CPA, that Act does not apply in Court of Appeal proceedings and that that it is applicable in the trial and determination of offences under the Penal Code and all other offences except where the law provides otherwise. In this regard the Respondent cited Article 4 of the CPA.[11] The Respondent State further argues that the proceedings before the Court of Appeal Court are governed by the Appellate Jurisdiction Act of 2002 and the Court of Appeal Rules.

72. The Respondent State avers that the Court of Appeal considered all the Applicant's grounds of appeal. The Respondent State also states that the Applicant's appeals were heard and determined by

11 Article 4 of the Criminal Procedure Act (CPA) of 2002 provides as follows: "(1) All offences under the Penal Code shall be inquired into, tried and otherwise dealt with according to the provisions of the Act (2) All offences under any other la shall be inquired into, tried and otherwise dealt with according to the provisions of this Act except where other law provides differently for the regulation of the manner or place of investigation into; trial or d dealing in any other way with those offences.

the appellate courts and he was duly accorded his right to equality before the law as guaranteed under the Charter.

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73. Article 3 of the Charter stipulates that "(1) Every individual shall be equal before the law" and that "(2) Every individual shall be entitled to equal protection of the law."

74. With respect to the right to equality before the law, this Court has found, in paragraphs 66 and 67 above that, the Court of Appeal's assessment of the evidence relating to the doctrine of recent possession was not done in a manner that infringed on the Applicant's rights. The Court also finds that the Court of Appeal's assessment was neither manifestly erroneous, nor did it occasion a miscarriage of justice to the Applicant. Furthermore, the Court has found no evidence on record and the Applicant has not demonstrated how he was treated differently, as compared to other persons who were in a situation similar to his,[12] resulting in unequal protection of the law or inequality before the law contrary to Article 3 of the Charter.

75. The Court therefore dismisses this allegation and holds that the Respondent State has not violated Article 3 of the Charter.

C. Alleged violation of the right not to be discriminated against

76. The Applicant claims that the treatment of his matters by the Court of Appeal violated his rights under Article 2 of the Charter.

77. The Respondent State has not responded to this allegation.

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78. Article 2 of the Charter provides that "Every individual shall be

12 Application 006/2016. Judgment of 7 December 2018 (Merits), *Mgosi Mwita Makungu v United Republic of Tanzania*, para 66.

entitled to the enjoyment of the rights and freedom recognized and guaranteed in present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social original fortunate, birth or any status" .

79. The Court notes that the right to non-discrimination as enshrined under Article 2 of the Charter proscribes any differential treatment to individuals found in the same situation on the basis of unjustified grounds. In the instant Application, the Applicant makes a general allegation that he was discriminated against by the Respondent State. He neither explains the circumstances of his differential treatment nor provides evidence to substantiate his allegation. In this regard, the Court recalls its established jurisprudence that "general statements to the effect that a right has been violated are not enough. More substantiation is required."[13]

80. The Court therefore dismisses this allegation and holds that the Respondent State has not violated Article 2 of the Charter.

VIII. Reparations

81. The Applicant prays that the Court should resolve the complaint and restore justice where it was overlooked, quash both conviction and sentence imposed upon him and order his release. In addition, the Applicant prays that the Court order that the Respondent State pay compensation of Tanzania Shillings Thirty Six Million (TZS 36,000,000) and grant any other order it may deem fit.

82. The Respondent State avers that the Applicant's prayers should be dismissed but it did not file submissions in response to the Applicant's claim on reparations.

83. Article 27(1) of the Protocol stipulates 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."

84. The Court having found that the Respondent State has not violated any of the rights as alleged by the Applicant, dismisses the Applicant's prayers that the Court should quash the conviction and sentence imposed upon him, order his release and pay him compensation.

13 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465 para 140.

IX. Costs

85. The Applicant made no submissions on costs.
86. The Respondent State prays that the costs of the Application be borne by the Applicant.
87. 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".
88. The Court therefore decides that each Party shall bear its own costs.

X. Operative part

89. For these reasons:
The Court
Unanimously,
On Jurisdiction
i. *Dismisses* the objection on material jurisdiction of the Court;
ii. *Declares* that it has jurisdiction.

On Admissibility
iii. *Dismisses* the objections to the admissibility of the Application;
iv. *Declares* the Application admissible.

On the Merits
v. *Finds* that the Respondent State has not violated the Applicant's right not to be discriminated against under Article 2 of the Charter;
vi. *Finds* that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law under Article 3 of the Charter;
vii. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial under Article 7 of the Charter.

On Reparations
viii. *Dismisses* the Applicant's prayers for reparations.

On Costs
ix. Orders that each Party shall bear its own costs.

Separate Opinion: BENSAOULA

1. I concur with the opinion of the majority of the Judges as regards admissibility of the Application, jurisdiction of the Court and the Operative Part.

2. However, in my thinking, the manner in which the Court treated admissibility with regard to the objection raised by the Respondent State on the filing of the Application within a reasonable time, runs counter to the provisions of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules.

3. Under Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 6, it is clearly stated that applications must be "submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

4. It is clear from the aforesaid that the legislator laid down two (2) options as to how to determine the starting point of reasonable period:

i. the date of exhaustion of local remedies: in the instant case, this date was set by the Court at29/07/2013 – date of the judgment of the Court of Appeal. Between this date and that of referral of the matter to the Court, there was a time lapse of two (2) years, four (4) months and ten (10) days.

ii. the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter: it is noteworthy in this regard that although the Court took into account the date of exhaustion of local remedies to determine the reasonableness of the time limit,[1] it nevertheless noted certain facts that occurred between the date local remedies were exhausted and that of referral of the matter to the Court, such as the application for review.[2] The Court also noted that the Applicant was incarcerated, which would have restricted his movement and access to information.

5. This reasoning on the part of the Court runs counter to the very logic of the exception made by the legislator as to the second prerogative conferred on this Court to set a date as being the commencement of the time limit within which it shall be seized with a matter.

6. Indeed, whereas with regard to local remedies, the Court has held that Applicants are obliged to exercise only the ordinary remedies, there would be no contradiction with this position had the Court,

1 Para 47 of the Judgment.

2 Para 48 of the Judgment.

based on the fact that the Applicant filed for extraordinary remedy which is application for review in the present case, retained the date of the remedy or the date of the decision as being the commencement of the time limit within which it shall be seized with the matter, instead of determining the reasonable period relying on the review remedy as a fact.

7. The Court ought to have justified this option in the following manner: "Notwithstanding the fact that it has considered that the local remedies have been exhausted as evidenced by the Court of Appeal Judgment of 29 July2013, the Court, in the spirit of fairness and justice, would take as element of assessment, the date on which the application for review was filed, that is 13 September 2013", which would have given a more reasonable time as it is shorter.

8. By ignoring the aforesaid date and simply citing[3]elements to justify reasonable time such as the Applicant being in prison, resulting in restriction of his movements and his access to information, allegations he never made**,** as well as his ignorance of the existence of the Court, especially as it is apparent from the judgment under reference that he defended himself before this Court and did not need a counsel, the Court failed to correctly apply Rule 40(6) of the Rules.

3 Para 48 of the Judgment

Taudier and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 722

Applications 017/2019, 018/2019, 019/2019, *Goh Taudier and others v Côte d'Ivoire*

Order (joinder of cases), 2 December 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Recused under Article 22: ORE

The Applicants were sentenced to twenty (20) years imprisonment for armed gang robbery in the same trial. They were represented by the same lawyer and made the same claims and prayers in relation to violations of the Charter. The Court decided to join the cases according to its Rules.

Procedure (joinder of cases, 9, 10)

1. Considering the Application dated 17 April 2019, received at the Registry of the Court on 23 April 2019 from Mr Goh Taudier (hereinafter referred to as "the Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as the "Respondent State");

2. Considering the Application dated 17 April 2019, received at the Registry of the Court on 23 April 2019 from Mr Bamba Lamine (hereinafter referred to as "the Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as the "Respondent State");

3. Considering the Application dated 17 April 2019, received at the Registry of the Court on 23 April 2019 from Mr Coulibaly Ousmane (hereinafter referred to as "the Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as the "Respondent State");

4. Considering that, Rule 54 of the Rules provides that:"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 interrelated cases and pleadings where it deems it appropriate, both in fact and in law";

5. Considering that, while the Applicants are different as above stated, the Applications are filed against the same Respondent State, namely, the Republic of Côte d'Ivoire;

6. Considering that the facts supporting the Applications are similar as they originate from the trial of the Applicants and their sentencing to twenty (20) years imprisonment for armed gang robbery, illegal possession of firearms and death threats; that on 25 February 2015, the three Applicants' appeal was dismissed by the Abidjan Court of Appeal which upheld the judgment and the sentences handed down against them;

7. Considering that in all three Applications, the Applicants allege that the Respondent State has violated their rights to a fair trial, the right to an effective remedy, the obligation to give reasons in a criminal trial, the right to respect for dignity, the adversarial principle and the principle of proportionality of sentence as set out in Article 7(1)(a)(b) and 7(2) of the African Charter on Human and Peoples' Rights and Article 10 of the Universal Declaration of Human Rights;

8. Considering that the three Applicants also made the same prayers, namely; for the Court to order the Respondent State to grant them presidential pardon, formally commute their 20-years prison sentence to a lesser penalty, release them on parole or accept an out-of-court settlement and award them financial compensation for the damage caused to them by the "unfair judicial decisions handed down by the national courts";

9. Considering that the facts supporting the Applications, the alleged violations and the reliefs sought are similar, and taking into account the fact that the Respondent State in the three Applications is the same;

10. As a consequence of the above, a joinder of cases and pleadings in relation to the above referenced Applications is appropriate in fact and in law, and for the good administration of justice pursuant to Rule 54 of the Rules of the Court.

Operative part

For these reasons,
The Court,
unanimously,
orders:

i. The joinder of the above referred Applications and related pleadings;

ii. That henceforth the Applications be referred to as "Consolidated Applications 017/2019, 018/2019 and 019/2019 – *Taudier and others v Republic of Côte d'Ivoire*";

iii. That consequent upon the joinder, this Order and the pleadings

relating to the above referred matters shall be served on all the Parties.

Koutché v Benin (provisional measures) (2019) 3 AfCLR 725

Application 020/2019, *Komi Koutché v Republic of Benin*

Order (provisional measures), 2 December 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The Applicant, a national of the Respondent State, lived in exile in the United States. The authorities in the Respondent State accused the Applicant of criminal activity, cancelled his passport and issued an international arrest warrant. The Applicant claimed, before the Court, that his rights to freedom of movement, liberty, equality before the law, dignity and political participation had been violated and requested provisional measures. The Court noted that the process for cancellation of the Applicant's passport was still pending but granted provisional measures to stay the cancellation to prevent irreparable harm.

Jurisdiction (*prima facie*, 14-19)

Provisional measures (cancellation of passport, 30-32)

I. The Parties

1. Komi Koutché (hereafter referred to the Applicant) is a politician and national of the Republic of Benin, who states that he resides in the United States of America and has the status of an asylum seeker in Spain. Since March 2018, the Applicant has been the subject of judicial proceedings in his country of origin for the alleged misappropriation of public funds.

2. The Republic of Benin (hereinafter referred to as "the Respondent State") became party to the African Charter on Human and Peoples' Rights (hereinafter "the Charter") on 21 October 1986, to the Protocol relating to the African Charter on Human and Peoples 'Rights, establishing the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 25 May 2004. The Respondent State also, on 8 February 2016, deposited the Declaration provided for in Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive requests from individuals and Non-Governmental Organizations.

II. Subject of the Application

3. The present request for provisional measures arises from an Application submitted on 23 April 2019. It is clear from the Application that, following the advice of the Council of Ministers of 28 June 2017 and 2 August 2017, audit reports relating to the management of the cotton sector as well as the National Microfinance Fund in which the Applicant was implicated for financial misappropriation were made public.

4. The Applicant alleges that on 27 August 2018, the authorities of the Respondent State issued a letter cancelling the Applicant's ordinary passport, with instructions to arrest him if he entered the territory of the Respondent State or in the event of discovering a travel ticket on him.

5. After the cancellation of the Applicant's passport, the authorities of the Respondent State on 17 September 2018, transmitted to the International Criminal Police Organization (hereinafter referred to as "INTERPOL"), the arrest warrant of 4 April 2018 and revoked on 6 April 2018, for the arrest of the Applicant.

6. On 14 December 2018, the Applicant was arrested in Madrid on the basis of information disseminated by INTERPOL. Subsequently, the Respondent State sent a request for the extradition of the Applicant on 17 December 2018 based on the arrest warrant of 4 April 2018. On 28 January 2019, an additional request was made based on the warrant of arrest dated 27 December 2018.

7. From the foregoing, the Applicant alleges the following violations:

i. the freedom of movement in accordance with section 25 of the Benin Constitution, Article 12(2) of the Charter, Article 2 of the Protocol on the Free Movement of Persons, the Right of Residence and Establishment adopted by the States of the Economic Community of West African States; and Article 12 of the ICCPR;

ii. the right to liberty and equality before the law in accordance with Articles 2, 3 and 6 of the Charter;

iii. the right to dignity and reputation of the Applicant in accordance with Article 5 of the Charter;

iv. the right to free elections and to participate in the conduct of publicaffairs of his country as enshrined in Articles 13 of the Charter and 21 of the UDHR.

III. Summary of the procedure before the Court

8. On 23 April 2019, the Applicant filed the Application and also made a request for provisional measures against the Respondent

State. These were served on the Respondent State.

9. On 10 May 2019, the Applicant transmitted to the Court the decision of the *Audiencia Nacional de Madrid*, according to which the request for his extradition was rejected.

10. By two letters received at the Registry on 17 July 2019 and 9 September 2019, respectively**,** the Applicant informed the Court that the Respondent State had not suspended the execution of the arrest warrant of 27 December 2018.

11. On 9 September 2019, the Applicant filed an additional application for provisional measures and transmitted to the Court a decision of INTERPOL's File Control Commission and two letters from INTERPOL's Secretary General. By these letters, the Applicant informed the Court that he was no longer subject of a red notice and that his passport information had been erased from the INTERPOL database.

12. The additional request for provisional measures and the two decisions of INTERPOL's File Control Commission were served on the Respondent State, which filed its response to the initial and additional requests.

IV. Jurisdiction

13. In considering any Application, the Court must conduct a preliminary examination of its jurisdiction, pursuant to Articles 3 and 5 (3) of the Protocol and Rule 39 of the Rules of Court (hereinafter referred to as "the Rules").

14. However, as regards the provisional measures, the Court does not have to ensure that it has jurisdiction on the merits of the case, but simply that it has *prima facie* jurisdiction.

15. Article 3(1) of the Protocol provides that "[t]he 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."

16. According to Article 5(3) of the Protocol, "[t]he 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."

17. The Court notes that the Respondent State is a party to the Charter, the Protocol and has also made the Declaration accepting the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations in accordance with Article 34(6) of the Protocol read together with Article 5(3) of

the Protocol.

18. In this case, the Court notes that the rights claimed by the Applicant are all protected by the Charter and the relevant human rights instruments to which the Respondent State is a party, namely, the ICCPR,[1] the ECOWAS[2] Protocol which are all instruments that the Court is empowered to interpret and apply under Article 3(1) of the Protocol.

19. In the light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the Application.

V. Provisional measures requested

20. Citing Article 27 of the Protocol and Rule 51 of the Rules, the Applicant prays the Court to order the Respondent State to take the following provisional measures:

i. suspend its request for extradition with the Spanish authorities;

ii. suspend the pending proceedings before the *Cour de Répression des Infractions Économique et du Terrorisme* (the CRIET);

iii. cancel the arrest warrant of 27 December 2018 issued in an attempt to regularize his arrest;

iv. revoke the decision of 27 August 2018 to cancel his passport and provide him with identification and travel documents enabling him to travel across borders;

v. authorize him as well as his political party without delay to take part in the legislative elections of 28 April 2019.

21. In the additional request, the Applicant prays the Court to order the Respondent State "to rescind the Inter-Ministerial Order of 22 July 2019 which deprives the Applicant of numerous administrative documents issued by the Benin authorities, including those relating to his civil status and the exercise of his political rights."

***

22. The Court notes that under Article 27(2) of the Protocol and Rule

1 Benin became a Party to the ICCPR on 12 March 1992.

2 Benin signed the ECOWAS Protocol on 29 May 1979. According to Article 13(1), "The Protocol shall enter into force provisionally, upon signature by the Heads of State and Government, and definitively upon ratification by at least seven (7) signatory States in accordance with the constitutional rules of each signatory State."

51(1) of the Rules it is empowered to make provisional measures not only "in cases of extreme gravity or urgency, and when necessary to avoid irreparable harm to persons" but also "in the interest of the parties or of justice."

23. In the present case, the Court notes that the request for suspension of extradition by the Spanish authorities has become moot, as the *Audiencia Nacional de Madrid* rejected the request to extradite the Applicant.

24. The Court also notes that the request to allow the Applicant and his political party, without delay, to participate in the legislative elections of 28 April 2019 has been overtaken by events, as these elections have already taken place. Moreover, the Court considers that the Application having been filed a week before the elections, it was materially unable to decide on such a request at such a short period of time. The Court will thus not pronounce itself on this matter.

25. With regard to the request for suspension of the proceedings pending before the CRIET, the Court is of the opinion that this request relates to the merits of the case and is therefore dismissed.

26. With regard to the requests to order the Respondent State to rescind the arrest warrant of 27 December 2018 and the Inter-ministerial order of 22 July 2019 which deprives the Applicant of numerous administrative documents issued by the Respondent State's authorities, the Court is of the opinion that, in addition to the fact that these claims are connected with the merits of the case, the extreme gravity or urgency has not been demonstrated, as required by Article 27(1) of the Protocol. Both requests are, therefore, dismissed.

27. With regard to the request to order the Respondent State to rescind its decision to cancel the Applicant's passport of 27 August 2018 and to provide him with identification and travel documents enabling him to cross the border, the Court notes that the Applicant submits as evidence of the cancellation of his passport the following :

i. the letter from the Minister of Justice and Legislation dated 27 August 2018 requesting the Minister of the Interior to cancel the Applicant's passport;

ii. Radio-Telephone Message dated 27 August 2018 concerning the cancellation of three passports, including the Applicant's passport No. B0606668;

iii. The detention of a police officer for disclosing two confidential correspondences concerning the cancellation of the Applicant's passports and those of two other citizens of Benin.

28. The Court notes that the Respondent State does not acknowledge that it cancelled the Applicant's passport and alleges that the evidence provided by the Applicant does not demonstrate that his passport was cancelled. The Respondent State argues that the Applicant's passport is still valid and the Applicant has been using it in his travels outside the country.

29. The Court is of the opinion that the procedure for cancellation of the Applicant's passport was initiated by the letter of the Minister of Justice and Legislation of Benin addressed to the Minister of the Interior requesting the cancellation of the Applicant's passport. The Court considers that the evidence provided by the Applicant and the response of the Respondent State indicate that the said procedure is still pending.

30. The Court considers that given that the Applicant lives abroad, the passport is his main identification or travel document which gives him access to work and public services in general, necessary to his living conditions in his country of residence.

31. The Court therefore considers that the circumstances of this case reveal a situation of urgency and a risk of irreparable harm if the Court were to render a decision favourable to the Applicant on the merits. This is because the procedure for cancelling the passport can be concluded at any time and result in the cancellation of the Applicant's Passport.

32. In the present case, the Court considers it appropriate to grant a provisional measure of stay of the procedure of cancellation of the Applicant's passport.

33. For the avoidance of doubt, this order does not in any way prejudge the conclusions that the Court might draw regarding its jurisdiction, the admissibility and merits of the Application.

VI. Operative Part.

34. For these reasons,
The Court,

Unanimously,

i. *Finds* that the request for suspension of extradition by the Spanish authorities has been overtaken by events and is moot;

ii. *Does not* make a finding on the request to allow the Applicant and his political party, without delay, to participate in the legislative elections of 28 April 2019;

iii. *Dismisses* the request for suspension of the proceedings pending before the CRIET;

iv. *Dismisses* the request to order the Respondent State to rescind

the arrest warrant of 27 December 2018;

v. *Dismisses* the request to order the Respondent State to rescind the Inter-ministerial order of 22 July 2019.

Orders the Respondent State to:

vi. Stay the procedure of cancellation of the Applicant's passport until the final judgment of this Court;

vii. Report to the Court within fifteen (15) days of receipt of thisOrder, on the measures taken to implement it.

Suy Bi and others v Côte d'Ivoire (provisional measures) (2019) 3 AfCLR 732

Application 044/2019, *Suy Bi Gohore Emile and others v Côte d'Ivoire*

Ruling (provisional measures), 28 November 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Recused under Article 22: ORE

The Applicants argued that the Respondent State had failed to establish an independent National Electoral Commission in line with an earlier judgment of the Court. The Applicants requested the Court to issue an order for provisional measures that representatives of various organs of the Respondent State should not take up their seats on the Commission. The Court dismissed the request for provisional measures as the members of the Electoral Commission had already been appointed and thus deemed the request to have been overtaken by events. Furthermore, that the Applicants had not shown that such an order was needed to prevent irreparable harm.

Jurisdiction (prima facie, 18-22)

Provisional measures (evidence of risk of irreparable harm, 32-34)

I. The Parties

1. Suy Bi Gohoré Emile, Kouassi Kouamé Patrice, Kakou Guikahué Maurice, Kouadjo François, Yao N'guessan Justin Innocent, Gnokonte Gnessoa Désiré, Djedje Mady Alphonse, Soro Kigbafori Guillaume, Trazere Olibe Célestine (hereinafter referred to as "the Applicants") are professionals of Ivorian origin.

2. The said Application was filed against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State") which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter) on 31 March 1992 and to the Protocol on 25 January 2004. The Respondent State also filed the Declaration prescribed under Article 34(6) of the Protocol by which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations.

II. Subject of the Application

3. The present Application filed on 10 September 2019, is in

respect of requests for provisional measures. The substantive matter concerns a new law adopted by the National Assembly of the Respondent State in the context of the reform Law of the Independent Electoral Commission. Furthermore, this Court on 18 November 2016, already delivered on the merits of this matter a judgment on Application 001/2014 – *Action for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire* concerning the composition of the Respondent State's Independent Electoral Commission. The Court found that the composition of the Ivorian electoral body was imbalanced and that this affected its independence and impartiality. The Court also held that Law 2014-335 of 18 June 2014 violated Articles 10(3) and 17(1) of the Charter and Article 3 of ECOWAS Democracy Protocol. The Court consequently ordered the Respondent State to amend Law 2014-335 of 18 June 2014 on the Independent Electoral Commission to make it compliant with the afore-mentioned instruments.

4. On 4 May 2017, the Respondent State requested an interpretation of the judgment of 18 November 2016. On 28 November 2017, the Court declared the request inadmissible.

5. In 2019, the Respondent State decided to reform the Independent Electoral Commission (IEC). During this process, the opposition parties refused to participate in the reform process due to the absence of clear terms of reference to guide the discussion.

6. Faced with the opposition parties' refusal to participate in the process, the Respondent State pursued the exercise and introduced Bill 2019-708 of 5 August 2019 before the two houses of Parliament – the National Assembly and the Senate, both of which are controlled by the ruling political coalition, according to the Applicants. On Tuesday30 July 2019, the Bill was adopted by the National Assembly; and on Friday 2 August 2019, by the Senate.

7. On 2 August 2019, sixty-six (66) members of the National Assembly brought the matter before the Constitutional Council requesting the latter to determine, adjudge and declare that Articles 5, 6 and 17 of Law 2014-135 of 18 June 2014 are at variance with Articles 4 and 53 of the Ivorian Constitution.

8. By two decisions (CI-2019-005/DCC/05-08/CC/SG of 5 August 2019 and CI-2019-006/DCC/13-08/CC/SG of 13 August 2019) the Constitutional Council declared inadmissible the Applicants' petition regarding the constitutionality of the new law on the composition of the Independent National Electoral Commission, citing various "shortcomings" of form and on grounds that the impugned law had already been promulgated by the President of

the Republic on the night of 5 August 2019.

III. Alleged violations

9. The Applicants allege that the Respondent State violated the following:

"i. its commitment to comply with the Court's decisions to which it was a party and ensure their full implementation within a specified period, pursuant to Article 30 of the Protocol;

ii. its obligation to create an impartial and independent National Electoral Commission within the meaning of Article 17 of the African Charter on Democracy, Elections and Governance (ACDEG) and Article 3 of ECOWAS Democracy Protocol;

iii. its obligation to protect the right of citizens to participate freely in the government of their country, as provided under Article 13(1) and (2) of the Charter;

iv. its obligation to protect the right to equality before the law and equal protection of the law, pursuant to Article 10(3) of ACDEG, Article 3 (2) of the Charter and Article 26 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);

v. its obligation to comply with Article 17 of ACDEG, Article 3 of Protocol A/SPI/12/01 on Democracy and Good Governance and Articles 4 and 53 of the Respondent State's8 November 2016 Constitution".

IV. Summary of the procedure before the Court

10. On 17 September 2019, the Registry acknowledged receipt of the Application, registered and served it on the Respondent State on 19 September 2019, and granted the latter sixty (60) days to file a Response. It was also granted seven (7) days to file its Response to the request for provisional measures.

11. On 25 September 2019, the Registry acknowledged receipt of a new version of the Application which the Applicants sent in replacement of the initial version. By notice of the same date, the said Application was forwarded to the Respondent State which was given fifteen (15) days to submit its Response in respect of provisional measures.

12. On 1 October 2019, the Registry received from the Respondent State a Response to the first version of the application for provisional measures and acknowledged receipt thereof. By notice of the same date, the Registry served this Response on the Applicants for a reply thereto within fifteen (15) days.

13. On 3 October 2019, the Registry acknowledged receipt of the list of the Respondent State's representatives. On the same day,

the names of the representatives were duly transmitted to the Applicants.

14. On 15 October 2019, the Registry received a second Response from the Respondent State regarding provisional measures.

15. On 21 October 2019, the Registry received the Applicants' Reply regarding the provisional measures. On 23 October 2019, the Registry acknowledged receipt of the Applicants' Reply to the Respondent State's first Response to the request for provisional measures as well as the Respondent State's second Response. The said submissions were served on both parties for response within fifteen (15) days.

16. On 15 November 2019, the Registry acknowledged receipt of a second Response from the Respondent State in respect of the provisional measures. On the same day, the said Response was forwarded to the Applicants for a Reply within seven (7) days of the notification.

V. Jurisdiction of the Court

17. In dealing with any Application filed before it, the Court must conduct a preliminary examination of its jurisdiction, pursuant to Articles 3, 5(3) and 34(6) of the Protocol and Rules 39 and 40 of the Rules.

18. However, with regard to provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply that it has *prima facie* jurisdiction.[1]

19. 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."

20. As mentioned in paragraph 2 of this Ruling, the Respondent State is a party to the Charter and the Protocol and has also made the Declaration accepting the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations in accordance with Article 34(6) of the Protocol read in conjunction with Article 5(3) thereof.

21. In the instant case, the rights claimed by the Applicants as having been violated are protected by the Charter, ICESCR, ACDEG and ECOWAS Protocol – instruments that the Court is empowered to

1 *African Commission on Human and Peoples' Rights v Libya* (order) (2013) 1 AfCLR 21 para 10; *Amini Juma v Tanzania* (order) (2016) 1 AfCLR 658 para 8.

interpret and apply under Article 3(1) of the Protocol.

22. In light of the foregoing, the Court notes that it has *prima facie* jurisdiction to hear the Application.

VI. Provisional measures requested

23. The Applicants pray the Court to:

"i. order the Republic of Côte d'Ivoire, before any election whatsoever, to amend Law No. 2019-708 of 5 August 2019 on the Recomposition of the Independent Electoral Commission (IEC) to make it compliant with the instruments to which it is a party;

ii. order a provisional measure requiring the State of Côte d'Ivoire to temporarily stay the implementation of the decisions of the Independent Electoral Commission stemming from the impugned law, before any election, until the Court renders its decision on the merits of the matter;

iii. not set up the Independent Electoral Commission on the basis of Law No. 2019-708 of 05 August 2019 on the Recomposition the Independent Electoral Commission (IEC);

iv. enjoin the various organs of the State of Côte d'Ivoire targeted by Law No. 2019-708 of 05 August 2019, including the Presidency of the Republic and the Ministry of Territorial Administration not to proceed with the appointment of members to the Independent Electoral Commission;

v. enjoin the various organs of the State of Côte d'Ivoire, including the Presidency of the Republic and the Ministry of Territorial Administration, not to take their seat in the Independent Electoral Commission (IEC);

vi. (…) and this, until the Court renders its decision on the merits".

***

24. The Court notes that Article 27(2) of the Protocol provides that: "in cases of extreme gravity or urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

25. Furthermore, Rule 51(1) of the Rules provides that: "pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, the Commission, or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in

the interest of the parties or of justice".

26. The Court notes that it has the duty to decide in each case whether in light of the particular circumstances of a case, it has to exercise the jurisdiction conferred on it by the above-mentioned provisions.

27. The Court takes into account the applicable law with regard to provisional measures which are specific. The Court cannot issue a Ruling *pendente lite* except when the basic requisite conditions are met, i.e. extreme gravity, urgency and prevention of irreparable harm to persons.

28. In the instant case, the Court notes that the Applicants made several requests in the Application for provisional measures.

29. As the Court has already ruled that it has *prima facie* jurisdiction, it will proceed to examine the provisional measures requested.

30. The Court notes that in the instant case, the Applicants are requesting the Court, pursuant to Article 27 of the Protocol and Rule 51 of the Rules, to order the following provisional measures: to enjoin the various organs of the State of Côte d'Ivoire, including the Presidency of the Republic and the Ministry of Territorial Administration, not to take their seat in the IEC.

31. The Applicants argue that such measures are imperative as long as the Electoral Commission does not meet the requirements of independence and impartiality. Furthermore, in their view, it is necessary to bear in mind that this reform is supposed to respond to the Court's injunction to the Republic of Côte d'Ivoire to reform its law to make it compliant with the international legal instruments to which it is a party. It is noteworthy that, in 2010, the IEC was at the centre of the electoral dispute that triggered a civil war which, according to official figures, claimed the lives of over three thousand, two hundred and forty-eight (3,248) people. Moreover, Côte d'Ivoire will in October 2020 have its first major election since that unfortunate post-electoral crisis of 2010/2011.

32. The Court notes that the Respondent State seeks a ruling that the Application for provisional measures is in respect of a law already enacted, that the members of the Electoral Commission have been sworn in before the Constitutional Council, and that the Bureau of the Electoral Commission was established on Monday, 30 September 2019. The Court also notes that the Respondent State contends that the provisional measures requested do not meet the requirements set out in Article 27 of the Protocol, that the Applicants' pleas and arguments are based solely on fears without any real direct correlation with the impugned situation, and that the Applicants have not been able to sufficiently demonstrate that the conditions set forth by Article 27 of the Protocol have

been met.

33. The Court notes that the Application for provisional measures seeking to prevent the application of the said law has become irrelevant following the establishment of the Independent Electoral Commission as well as the appointment of its members and the personalities proposed by the different organs of the Respondent State.

34. The Court holds that in view of the facts as reported by the Applicants and the Respondent State, the circumstances do not reveal a situation of which the gravity and urgency would pose a risk of irreparable harm or an immediate social disorder. The Court also holds that since the Applicants have not provided evidence as to the extreme gravity of the circumstances of this case, there is no justification for the request for measures to be ordered prior to consideration of the merits. The Application is consequently dismissed.

35. This Ruling of provisional measures remains provisional in nature and in no way prejudges the Court's decisions on the merits of the case.

VII. Operative Part

36. For these reasons,

The Court,

Unanimously,

Dismisses the request for provisional measures.

Aka Yao and Sanogo v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 739

Applications 046/2019, 048/2019, *Aka Yao Bossin Fidele and Zakaria Sanogo v Republic of Côte d' Ivoire*

Order (joinder of cases), 2 December 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Recused under Article 22: ORE

The Applicants had all been sentenced to twenty (20) years imprisonment for robbery, were represented by the same lawyer and made the same claims in relation to violations of the Charter. Having considered the similarity of the parties, causes of action, claims of the Applicants and the facts supporting the Applications, the Court ordered the joinder of the cases.

Procedure (joinder of cases, 7, 8)

1. Considering the Application N46/2019 dated 16 September 2019 received at the Registry of the Court on 2 October 2019 from Aka Yao Bossin Fidèle (hereinafter referred to as the "Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State");

2. Considering the Application 48/2019 dated 16 September 2019 received at the Registry of the Court on 2 October 2019, from Zakaria Sanogo (hereinafter referred to as the "Applicant") filed against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State ");

3. Considering Rule 54 of the Rules which provides that "the Court may at any stage of the pleadings, either on its volition or in response to an application by any of the parties, order the joinder of interrelated cases and pleadings where it deems it appropriate in fact and in law';

4. Considering that while the Applicants are different as stated above, they are represented by the same lawyer and the Applications are filed against the same Respondent State, which is the Republic of Côte d'Ivoire;

5. Considering that the facts supporting the Applications are similar as they originate from the trial of the Applicants and their sentencing to twenty (20) years imprisonment by the Abidjan-Plateau Court of First Instance for theft and armed robbery, without having been

represented by a lawyer, and that the said sentence was upheld by the Abidjan Court of Appeal;

6. Considering that in both cases, the Applicants allege that the Respondent State has violated their rights to a fair trial, effective remedy, access to a Counsel, to justice and equality of arms, as enshrined in the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and in the Universal Declaration of Human Rights, and that the reliefs sought are similar in nature;

7. Considering therefore that the facts supporting the Applications, the alleged violations and the prayers made are similar, and given that the identity of the Respondent State is the same.

8. As a consequence of the above, the joinder of cases and pleadings in relation to the above referenced Applications is appropriate in fact and in law and for the proper administration of justice, in accordance with Rule 54 of the Rules.

Operative part

For these reasons,
The Court
unanimously,
Orders:

i. The joinder of the above referred Applications and related pleadings;

ii. That henceforth the Applications be referred to as "Consolidated Applications 046/2019 and 048/2019 – *Aka Yao Bossin Fidèle and Another v Republic of Côte d'Ivoire*";

iii. That consequent upon the joinder, this Order and the pleadings relating to the above referred matters shall be served on all the Parties.

Diomandé and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 741

Applications 047/2019, 051/2019, 053/2019, 028/2019, 030/2019, 031/2019, 033/2019, *Diomandé Aboubakar Sidiki and others v Republic of Côte d' Ivoire*

Order, 2 December 2019. Done in English and in French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Recused under Article 22: ORE

The Court ordered the joinder of the cases as the facts in support of the Applications, the alleged violations and the measures requested were similar while the Respondent State being the same.

Procedure (joinder of cases, 6, 7)

1. Considering the Application dated 16 September 2019, received at the Registry of the Court on 2 October 2019, from Diomande Aboubakar Sidiki (hereinafter referred to as the "Applicant") against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State") and registered as Application 047/2019;

2. Considering the Application dated 16 September 2019, received at the Registry of the Court on 11 October 2019, from Traore Aboulaye (hereinafter referred to as the "Applicant") against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State") and registered as Application 051/2019;

3. Considering the Application dated 16 September 2019, received at the Registry of the Court on 11 October 2019, from Adae Tano Alain Christian (hereinafter referred to as the "Applicant") against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State") and registered as Application 053/2019;

4. Considering the joinder of cases and pleadings in Applications 028/2019, 030/2019, 031/2019 and 033/2019 – *Fea Charles and others v Republic of Côte d'Ivoire* made by the Court by an Order of 26 September 2019;

5. Considering Rule 54 of the Rules which provides that "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 interrelated cases and pleadings where it deems it appropriate, both in fact and in law";

6. Considering that the facts in support of the Applications referenced above, the alleged violations and the measures requested are similar, the Respondent State being the same and for the same reasons as those which justified the joinder of proceedings concerning Applications 028/2019, 030/2019, 031/2019, 033/2019, *Fea Charles and others v Republic of Côte d'Ivoire*;

7. As a consequence of the above, the joinder of cases and pleadings in relation to the above-referenced Applications is appropriate in fact and in law and for the proper administration of justice, in accordance with Rule 54 of the Rules;

Operative part

For these reasons,
The Court,
unanimously,
orders:

i. The joinder of cases and pleadings in Applications 047/2019 *Diomande Aboubakar Sidiki v Republic of Côte d'Ivoire*, 051/2019 *Traore Aboulaye v Republic of Côte d'Ivoire* and 053/2019 *Adae Tano Alain Christian v Republic of Côte d'Ivoire* with those in Consolidated Applications 028/2019, 030/2019, 031/2019, 033/2019, *Fea Charles and others v Republic of Côte d'Ivoire*;

ii. That henceforth the Applications be referred to as "Consolidated Applications 028/2019, 030/2019, 031/2019, 033/2019, 047/2019, 051/2019 and 053 / 2019 – *Fea Charles and others v Republic of Côte d'Ivoire";*

iii. That consequent upon the joinder, this Order and the pleadings related to the above referred matters shall be served on all the Parties.

Aguehi and others v Côte d'Ivoire (joinder of cases) (2019) 3 AfCLR 743

Applications 049/2019, 050/2019, 052/2019, *Aguehi Ogou François and others v Republic of Côte d'Ivoire*

Order: 2 December 2019. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

Recused under Article 22: ORE

The Court, having considered that the facts in support of the Applications, the alleged violations and the measures requested were similar, and that the Respondent State is the same, decided to order joinder of the Applications.

Procedure (joinder of cases, 8, 9)

1. Considering the Application dated 16 September 2019 received at the Registry of the Court on 2 October 2019, from Aguehi Ogou François (hereinafter referred to as the "Applicant") against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State");

2. Considering the Application dated 16 September 2019, received at the Registry of the Court on 2 October 2019, from Sylla Ibrahim (hereinafter referred to as the "Applicant") against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State ");

3. Considering the Application dated 16 September 2019, received at the Registry of the Court on 11 October 2019, from Kinda Ibrahim (hereinafter referred to as the "Applicant") against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State ");

4. Considering that Rule 54 of the Rules of Court provides: "the Court may at any stage of the pleadings, either on its volition or in response to an application by any of the parties, order the joinder of interrelated cases and pleadings where it deems it appropriate in fact and in law';

5. Considering that, while the Applicants are different as above stated, they are represented by the same lawyer and are filed against the same Respondent State;

6. Considering that the facts supporting the Applications are similar, as they originate from the same trial and their sentencing to twenty (20) year imprisonment on 3 March 2013 by the Yopougon Court of First Instance following conviction for theft and armed robbery

with violence in criminal case 2615/2013; and that the said twenty (20) years imprisonment sentence was commuted to ten (10) years by the Court of Appeal of Abidjan Court in Judgment 1183 of 23 July 2014;

7. Considering that in these Applications, the Applicants allege that the Respondent State violated their rights to a fair trial, an effective remedy, access to a judge and to justice, and equality of arms, as protected in the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and in the Universal Declaration of Human Rights, and that the reliefs sought are similar in nature; and

8. Considering therefore that the facts supporting the Applications, the alleged violations and the prayers made are similar, and given the fact that the identity of the Respondent State is the same.

9. As a consequence of the above, a joinder of cases and pleadings in relation to the above referenced Applications is appropriate in fact and in law, and for the proper administration of justice, in accordance with Rule 54 of the Rules of Court.

Operative part

For these reasons,
the Court,
unanimously,
orders:

i. The joinder of the above referred Applications and related pleadings;

ii. That henceforth the Applications be referred to as "Consolidated Applications 049/2019, 050/2019 and 052/2019 – *Aguehi Ogou François and others v Republic of Côte d'Ivoire*";

iii. That consequent upon the joinder, this Order and the pleadings related to the above referred matters shall be served on all the Parties.

XYZ v Benin (provisional measures) (2019) 3 AfCLR 745

Application 057/2019, *XYZ v Republic of Benin*

Ruling, 2 December 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The anonymous Applicant claimed that a criminal conviction of the former Prime Minister of the Respondent State violated the latter's right to a fair trial and right to political participation and requested provisional measures so that the politician would be allowed to stand for the next presidential election. The Court dismissed the request since the Applicant had not provided enough information showing the existence of extreme gravity or urgency and the risk of irreparable harm to him.

Jurisdiction (*prima facie*, 16-20)

Provisional measures (evidence, 25)

I. The Parties

1. On 3 August 2019, a national of Benin (hereinafter referred to as "Applicant XYZ") who requested anonymity, filed before this Court an Application for provisional measures against the State of Benin. In the same Application, he also requested the Court to decide on the merits.

2. During its 53th Ordinary session, the Court granted the Applicant request for anonymity.

3. The Republic of Benin (hereinafter referred to as "the Respondent State") became Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, 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 22 August 2014. The Respondent State also deposited, on 8 February 2016, the Declaration prescribed under Article 34(6) of the Protocol whereby it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental organizations.

II. Subject of the Application

4. The Applicant indicates that the former Prime Minister of the

Respondent State[1] Mr Lionel Zinsou was prosecuted for making an inaccurate statement before the Accounts Chamber of the Supreme Court to seek validation of his campaign expenses in respect of the 2016 presidential election.

5. The Applicant submits that on 2 August 2019, the 3rd Direct Appeals Chamber of the Cotonou Court of First Instance found Mr Zinsou guilty of "forgery" and of exceeding the "limits of campaign expenses" and sentenced him to five years of ineligibility to contest election and six months of suspended prison sentence. He was also fined 50 million CFA Francs.

6. The Counsel for Mr Lionel Zinsou claimed to have seized the Constitutional Court of the matter, raising a constitutionality objection pursuant to Article 577 of the Code of Criminal Procedure and Article 122 of the Constitution, on the grounds that his appeal asking for documents to be put at his disposal had been turned down, in violation of his right to defence; and that the Judge also violated the principle of presumption of innocence. The Constitutional Court dismissed the appeal, declaring it inadmissible.

7. On the merits, the Applicant is challenging the afore-said decision of the Constitutional Court.

8. The Applicant contends that the objective of the procedure before Benin Courts is to prevent Mr Lionel Zinsou from running as candidate in the next presidential election. The Applicant states that, if this prohibition were to become effective, it would limit his right to elect the representative of his choice in the next presidential election in 2021, hence, his interest to act. The Applicant draws the attention of the Court to the urgency of the matter, as the candidatures for the next presidential elections are to be submitted not later than the next eighteen (18) months. He therefore prays the Court for provisional measures.

9. The Respondent State is of the view that the request for interim measures to stay execution of the judgment of the Court of the First Instance is irrelevant because, in accordance with the Criminal Procedure Code, the execution of that decision is stayed. Mr Zinsou filed his appeal on 6 August 2019 and thus, the judgment of the Court of First Instance is *ipso facto* suspended.

10. The Respondent State further argues that the conditions set out in Article 27 of the Protocol for the issuance of provisional measures, in particular, extreme gravity or urgency and the risk of

1 Under the Government led by the former President of the Respondent State, Thomas Boni Yayi.

irreparable harm, have not been met.

11. In view of the aforesaid, the Respondent State prays the Court to declare the request for provisional measures inadmissible.

III. Alleged violations

12. The Applicant alleges the violation of:

i. the right to a fair trial as protected by Article 7(1)(d) of the Charter;

ii. the right to participate freely in the government of his country, to vote and be voted for, as protected by Article 13(1) of the Charter.

IV. Summary of the procedure before the Court

13. On 3 August 2019, Applicant filed the Application requesting the Court to issue an order of provisional measures and to decide on the merit.

14. The Application was served on the Respondent State on 15 August 2019 and the Respondent State filed its response on 30 September 2019 within time, this having been extended by the Court.

V. Jurisdiction of the Court

15. In considering an application, the Court must ensure that it has jurisdiction to hear the case, pursuant to Articles 3, 5(3) and 34(6) of the Protocol.

16. However, with regard to provisional measures, the Court needs not satisfy itself that it has jurisdiction on the merits of the case, but simply that it has *prima facie*[2] jurisdiction.

17. 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."

18. As mentioned in paragraph 2 of this Ruling, the Respondent State is a Party to the Charter and the Protocol and has also made and deposited the Declaration accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations in accordance with Article 34(6) of the Protocol

2 Application 002/2013. Order of provisional measures of 15 March 2013, *African Commission on Human and Peoples' Rights v Libya*, para 10; Application 024/2016. Order of provisional measures of 3 June 2016, *Amini Juma v United Republic of Tanzania*,para 8.

read together with Article 5(3) thereof.

19. In the instant case, the rights claimed by the Applicant to have been violated are protected by the Charter, the Additional Protocol of the Economic Community of West Africa (ECOWAS) on Democracy and Good Governance to the Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security and the African Charter on Democracy, Elections and Governance (ACDEG), instruments that the Court is empowered to interpret and apply pursuant to Article 3(1) of the Protocol.

20. In light of the foregoing, the Court notes that it has *prima facie* jurisdiction to hear the Application.

VI. Provisional measures requested

21. The Applicant prays the Court to order:

i. the Respondent State to take all the necessary measures to stay execution of the correctional judgment dated 02 August 2019 of the 3rd Direct Procedures Chamber of the First Instance Court of Cotonou in the procedure referenced COTO/2018/RP/05806 between the Public Prosecutor's Office and Mr. Lionel Zinsou until the Court pronounces on the subject of the main Application;

ii. the Respondent State to report to the Court within such timeframe as the Court may deem fit to determine.

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22. The Court notes that Article 27(2) of the Protocol provides that:
"In cases of extreme gravity or urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

23. Furthermore, Rule 51(1) of the Rules provides that: "Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, the Commission, or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice".

24. Based on the foregoing provisions, the Court will take into consideration the applicable law in regard to provisional measures which are of a preventive character and do not prejudge the merits of the Application. The Court may order them only if the conditions have been met, that is, extreme gravity, urgency and prevention

of irreparable harm to persons.

25. The Court is of the view that the Applicant has not provided enough information to demonstrate the extreme gravity or urgency and the risk of irreparable harm to him.

26. The Court notes and also considers the Respondent State's argument that, according to the law, the Judgment of the first instance is stayed following the appeal filed by MrT Lionel Zinsou.

27. The Court therefore, dismisses the request for provisional measures.

VII. Operative Part

28. For these reasons,

The Court,

Unanimously,

Dismisses the application for provisional measures.

XYZ v Benin (provisional measures) (2019) 3 AfCLR 750

Application 058/2019, *XYZ v Republic of Benin*

Ruling, 2 December 2019. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM and ABOUD

The anonymous Applicant claimed that the prohibition of issuance of legal documents to certain persons sought by justice in the Respondent State violated the Charter. The Court dismissed the request to issue provisional measures holding that the Applicant had failed to provide evidence of the urgency or gravity or irreparable harm.

Jurisdiction (*prima facie*, 14-18)

Provisional measures (evidence, 23; in favour of persons not party of the case, 23)

I. The Parties

1. On 3 August 2019, the Applicant (hereinafter referred to as "XYZ"), a national of Benin who requested anonymity, applied to the Court for provisional measures against the Republic of Benin. In the same application, he also requested the Court to decide on the merits of the matter.

2. During its 53th Ordinary session, the Court granted the Applicant request for anonymity.

3. The Republic of Benin (hereinafter referred to as "the Respondent State") became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, 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 22 August2014. On 8 February 2016, the Respondent State also filed the Declaration provided for in Article 34(6) of the Protocol whereby it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations.

II. Subject of the Application

4. The Applicant submits that on 22 July 2019, the Respondent State issued Inter-Ministerial Decree 023/MJL/DC/SGM/DACPG/

SA/023SGG19 to prohibit the issuance of legal documents to certain persons sought by justice in the Republic of Benin.

5. Pursuant to the said decree, prohibited the issuance of legal documents for the benefit and on behalf of persons "whose appearance, hearing or interrogation is necessary for the purpose of a judicial police investigation, court of law or who is the subject of an enforceable decision of condemnation and who does not defer to summons and to the injunction of the authorities".

6. According to the Applicant, "legal documents" means "extracts from civil status certificates, certificates of nationality, identity cards, passports, laissez-passer, safe-conducts, Residence Cards, Consular Card, Criminal Record No. 3, Residence Certificate, Collective Life Certificate, Certificate or Attestation of State Possession, Driver's License, Voter's Card, Tax Clearance Certificate."

7. The Applicant submits that the order concerns well-known members of the political opposition in exile, such as Sébastien Ajavon, former ministers including Komi Koutché and Valentin Djenontin, former Members of Parliament and Mayors.

8. The Respondent State did not submit a response to this request for provisional measures.

III. Alleged violations

9. The Applicant alleges that the Respondent State violated:

i. Article 4 of the Charter (right to life, physical and moral integrity);

ii. Articles 2 and 3 of the Charter (right to enjoy the rights and freedoms guaranteed by the Charter);

iii. Article 5 of the Charter (right to respect for the inherent dignity of the human person);

iv. Article 7(1) of the Charter (right to have one's case heard);

v. Articles 12 and 13(1) of the Charter (right to freedom of movement);

vi. Articles 14 and 15 of the Charter (right to property and right to work);

vii. Article 22 of the Charter (right to economic development);

viii. Article 1 of the Charter.

IV. Summary of the procedure before the Court

10. On 3 August 2019, the Applicant submitted an application requesting the Court to order provisional measures and also to decide on the merits of the case.

11. The Application for provisional measures was served on the Respondent State on 15 August 2019 and granting the

Respondent State fifteen (15) days in which to respond.

12. The Respondent State did not file any response.

V. Jurisdiction of the Court

13. When considering an Application, the Court conducts a preliminary examination of its jurisdiction on the basis of Articles 3, 5(3) and 34(6) of the Protocol.

14. However, with regard to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits of the case, but simply that it has *prima facie*[1] jurisdiction.

15. Pursuant to 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".

16. As mentioned in paragraph 2 of this Ruling, the Respondent State is a Party to the Charter, the Protocol and has also made the Declaration accepting the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations in accordance with Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

17. In this case, the rights claimed by the Applicant as having been violated are protected by the Charter, the Protocol of the Economic Community of West Africa (ECOWAS) on Democracy and Good Governance in addition to the Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Securityand the African Charter on Democracy, Elections and Governance (CADEG), which are instruments that the Court is empowered to interpret and apply pursuant to Article3(1) of the Protocol.

18. In light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to consider the Application.

VI. Provisional measures requested

19. The Applicant requests the Court to order:

i. the Respondent State to take all necessary measures to stay the implementation of Decree 2019-No023/MJL /DC/SGM/DACPG/

1 Application 002/2013, Order of 15 March 2013 on provisional measures, *African Commission on Human and Peoples Rights v Libya* (hereinafter referred to as the "*African Commission on Human and Peoples' Rights v Libya, Order for Provisional Measures"*), para 10; Application 024/2016, Order of 03 June 2016 on Provisional Measures, *Amini Juma v Republic of Tanzania* (hereinafter referred to "*Amini Juma v United Republic of Tanzania, Order for Provisional Measure*s", para 8.

SA/023SGG19 prohibiting the issuance of legal documents to the persons sought by justice.

ii. the Respondent State to report to the Court within a time period that the Court may decide to set.

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20. The Court notes that Article 27(2) of the Protocol provides as follows: "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".

21. Furthermore, Rule 51(1) of the Rules of Court provides that:" the Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice".

22. Based on the foregoing, the Court will take into account the law applicable to provisional measures, which are of a preventive nature and do not prejudge the merits of the Application. The Court may order them only when the conditions have been met, that is, extreme gravity, urgency and prevention of irreparable harm to persons.

23. The Court also notes that the Applicant is asking the Court to order provisional measures in favour of persons who are not parties to the present case. Furthermore, the Applicant failed to provide evidence of the urgency or gravity or irreparable harm that the implementation of the Decree could cause him personally.

24. In the light of the above, the request for provisional measures is dismissed.

VII. Operative Part

25. For these reasons,

The Court,

unanimously,

i. *Dismisses* the application for provisional measures.

XYZ v Benin (provisional measures) (2019) 3 AfCLR 754

Application 059/2019, *XYZ v Republic of Benin*

Ruling, 2 December 2019. Done in English and French, the french text being authoritative.

Judges: ORE, KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM, ABOUD

The anonymous Applicant claimed that the Orientation and Supervisory Council (COS) set up to organize an electoral census and establish a permanent computerized electoral role was composed so as to not making it impartial. The Court did not issue the provisional measures requested as the Applicant had not provided evidence of what irreparable damage COS would cause the Applicant.

Jurisdiction (*prima facie*, 13-17)

Provisional measures (evidence, 24)

Separate opinion: BEN ACHOUR

Provisional measures (12, 19, 22)

Separate opinion: BENSAOULA

Provisional measures (11, 12)

I. The Parties

1. On 2 September 2019, the Applicant (hereinafter referred to as "XYZ") a national of Benin having requested anonymity, seized the Court with an application against the Republic of Benin.

2. On 26 September 2019, the Applicant submitted an application for provisional measures.

3. During its 53th Ordinary session, the Court granted the Applicant request for anonymity.

4. The Republic of Benin (hereinafter referred to as "the Respondent State") became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol 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 22 August 2014. On 8 February 2016, the Respondent State also filed the Declaration provided for in Article 34(6) of the Protocol whereby it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations.

II. Subject of the Application

5. The Applicant alleges that as part of the preparations for the organization of elections, the Respondent State set up an administrative structure called the Orientation and Supervisory Council (COS). This body is responsible for the implementation of Law 2009-10 of 13 May 2009 to organize the in-depth national electoral census and the establishment of the permanent computerized electoral roll.

6. The Applicant questions the neutrality of COS because, according to him, its members represent only the political parties of the presidential majority, no political party of the opposition being a member.

7. The Applicant states that because of this situation, the last parliamentary elections took place without the participation of the opposition parties, which for him is in violation of the Constitution and international instruments on democracy and elections. He believes that the biased nature of this structure also means that the local elections scheduled to be held early in 2019, cannot be free and democratic and thus a threat to the Republic of Benin's democracy.

III. Alleged violations

8. The Applicant alleges the following violations:

i. obligation by the State of Benin to establish independent and neutral electoral organs;

ii. the right to participate freely in the management of public affairs of his country;

iii. the right to equal protection of the law;

iv. the right to peace and national and international security;

v. the African Charter on Democracy, Elections and Governance.

IV. Summary of the proceedings before this Court

9. On 02 September 2019, the Court received an Application concerning the functioning of the independent administrative structure in charge of the management of the national electoral register and the establishment of the permanent electronic electoral roll called the Orientation and Supervisory Council. (COS).

10. On 26 September 2019, the Applicant submitted an application for provisional measures concerning the operation of this

administrative structure.

11. The application for provisional measures was served on the Respondent State on 4 October 2019 which was granted fifteen (15) days in which to respond. The Respondent State requested for additional time which was granted until 24 November 2019 but it did not yet submit its Response.

V. Jurisdiction of the Court

12. When considering an application, the Court conducts a preliminary examination of its jurisdiction on the basis of Articles 3, 5(3) and 34(6) of the Protocol.

13. However, with regard to provisional measures, in conformity with its constant jurisprudence, the Court does not have to ensure that it has jurisdiction on the merits of the case, but simply that it has *prima facie* jurisdiction.

14. Pursuant to 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".

15. As mentioned in paragraph 2 of this Ruling, the Respondent State is a Party to the Charter, to the Protocol and has also made the Declaration accepting the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations in accordance with Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.

16. On the merits, the rights claimed by the Applicant as having been violated are protected by the Charter, the Protocol of the Economic Community of West Africa (ECOWAS) on Democracy and Good Governance in addition to the Protocol on the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security and the African Charter on Democracy, Elections and Governance (ACDEG), which are instruments that the Court is empowered to interpret and apply under Article 3(1) of the Protocol.

17. In light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to consider the application.

VI. Provisional measures requested

18. The Applicant prays the Court to order the Respondent State:

i. to suspend the work of the administrative structure called Orientation and Supervisory Council (COS) established by the Constitutional Court on 06 September 2019 and the holding of municipal and local

elections pending the decision on the merits of the main application.

ii. to refrain from any act or action which could cause irreparable damage and which could irreparably prejudice the main application before the Court until it has decided on the said application.

iii. to send a report to the Court within a time period that the Court may decide to set.

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19. The Court notes that Article 27(2) of the Protocol provides as follows:
"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".

20. Furthermore Rule 51(1) of the Rules of Court states that:
"The Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice".

21. Based on the foregoing provisions, the Court will take into account the law applicable to provisional measures, which are of a preventive nature and do not prejudge the merits of the application. The Court may order them *pendente lite* only when the basic conditions are met: extreme gravity, urgency and the prevention of irreparable harm to persons.

22. The Court notes that the Applicant questions the functioning of the administrative structure (COS) which, because of its imbalanced composition between the ruling party and the opposition parties, would not be neutral and would cast doubts on the smooth organization of future elections.

23. The Court observes that the application for provisional measures to suspend the functioning of the administrative structure, the COS in question also touches on the question of the merits on which the Court is called upon to rule in due course.

24. The Court also observes that the Applicant does not provide evidence of the nature of the urgent and serious risk of irreparable damage that this administrative structure could cause him, as required by Article 27 of the Protocol.

25. In view of the foregoing, the request for provisional measures is rejected.

VII. Operative part

26. For these reasons,
The Court,

i. *By a majority of 9 for and 2 against, Justices Rafa*â Benachour and Chafika Bensaoula voted against,

ii. *Dismisses* the application for provisional measures.

***

Dissenting opinion: BEN ACHOUR

1. I regret not sharing the Court's decision to dismiss the request for indication of provisional measures made by Applicant XYZ in the case between him and the Republic of Benin (Application 59/2019).

2. The Applicant's prayer is that the Court should order the Respondent State to:

"i. suspend the work of the administrative structure called Orientation and Supervisory Council *(COS)* established by the Constitutional Court on 06 September 2019 and the holding of municipal and local elections pending the decision on the merits of the main application.

ii. refrain from any act or action which could cause irreparable damage and which could irreparably prejudice the main application before the Court until it has decided on the said application.

iii. send a report to the Court within a time period that the Court may decide".

3. Before turning to the present case, it is noteworthy that most international jurisdictions are empowered to pronounce provisional or protective measures.[1] This was the case with the Permanent Court of International Justice (PCIJ), and is also the case with the International Court of Justice (ICJ),[2] the European

1 Cf R Bernrahdt (ed) *Interim Measures Indicated by International Courts*, Berlin/ Heidelberg, Springer-Verlag, 1994; L Collins 'Provisional and Protective Measures in International Litigations', *Recueil des Cours de l'Académie de Droit International*, 1992, Vol 23.

2 Article 41(1) of the Statute: "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

Court of Human Rights (ECHR)[3] and the Inter-American Court of Human Rights,[4] the Court of Justice of the European Union (CJEU),[5] and the Economic Community of West African States - ECOWAS - Community Court of Justice (ECCJ).[6] This is also the case with "quasi-jurisdictional" bodies such as the Human Rights Committee,[7] the Committee against Torture[8] and the African

3 Rule 99 of the Rules of Court: 1. The chamber or, where appropriate, the president of the section or a duty judge appointed in accordance with paragraph 4 of this article may, either at the request of a party or any other interested person, or *proprio motu*, indicate to the parties any provisional measure they consider necessary to be adopted in the interest of the parties or the proper conduct of the procedure. 2. If necessary, the Committee of Ministers is immediately informed of the measures adopted in a case. 3. The chamber or, where appropriate, the president of the section or a duty judge appointed in accordance with paragraph 4 of this article may invite the parties to provide them with information on any question relating to the implementation of the interim measures indicated. 4. The President of the Court may designate vice-presidents of sections as duty judges to rule on requests for interim measures".

4 Article 63(2) of the Convention: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission".
Article 25(1) of the Rules of Procedure: 1. At all stages of the proceedings, in cases of extreme urgency and gravity, and when it becomes necessary to prevent irreparable damage to persons, the Court may order, *proprio motu*, or at the request of a party, under the conditions provided for in article 63.2 of the Convention, the provisional measures it deems relevant. "

5 Article 160 of the Rules of Procedure of the Court: "1. An application to suspend the operation of any measure adopted by an institution, made pursuant to Article 278 TFEU or Article 157 TEAEC, shall be admissible only if the applicant has challenged that measure in an action before the Court. 2. An application for the adoption of one of the other interim measures referred to in Article 279 TFEU shall be admissible only if it is made by a party to a case before the Court and relates to that case".

6 Article 79 of the Rules of Procedure: 1. An application under Article 20 of the Protocol shall state the subject- matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. 2. The application shall be made by a separate document and in accordance with the provisions of Articles 32 and 33 of these Rules.

7 Article 92 of the Rules of Procedure of the Committee: 1 "Before informing the State party concerned of its final views on the communication, the Committee may inform that State of its views on the advisability of taking interim measures to avoid irreparable harm being caused to the victim of the alleged violation. In so doing, the Committee informs the State party that the expression of its views on the adoption of the said interim measures does not imply any decision on the communication on the merits".

8 Article 114 (1) of the Rules of Procedure: 1. "At any time after the receipt of a complaint, the Committee, a working group, or the Rapporteur(s) on new complaints and interim measures may transmit to the State party concerned, for its urgent consideration, a request that it take such interim measures as the Committee considers necessary to avoid irreparable damage to the victim or victims of alleged violations."

Commission on Human and Peoples' Rights.[9]

4. The reference text for this Court in matters of provisional measures is 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 dated 9 June 1998 (hereinafter referred to as "the Protocol") which provides that:

"In cases of extreme gravity or urgency, and when it is necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

5. For its part, Article 51(1) of the Rules of Court clarified the foregoing provision of the Protocol in these terms:

"Pursuant to 27(2) of the Protocol, the Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice."

6. In the present case, the Applicant criticizes the partisan composition of the Orientation and Supervisory Council (COS), and in view of the imminent electoral deadline, scheduled, in principle, for the first quarter of 2020, he expresses the fear that by the time the Court will examine the case on the merits, it would be too late, that is, the elections would already have taken place.

7. In dismissing the request for provisional measures, the Court considers that the question of stay of the work of *COS* prejudges the merits of the case and that evidence of the urgency and seriousness of the situation has not been provided by the Applicant:

"23. The Court observes that the application for provisional measures to suspend the functioning of the administrative structure, the *COS* in question also touches on the question of the merits on which the Court is called upon to rule in due course.

24. The Court also observes that the Applicant does not provide evidence of the nature of the urgent and serious risk of irreparable damage that this administrative structure could cause him, as required by Article 27 of the Protocol.

25. In view of the foregoing, the request for interim measures is rejected."

8. We do not share the opinion of the majority, as it is apparent to us that the request for provisional measures satisfies the two criteria laid down in Article 27(2) of the Protocol, namely, on the one

9 Rule 98(1) of the Rules of Procedure of the Commission: "At any stage of the Communication, and before the decision on the merits, the Commission may, on its own initiative or at the request of a party to the Communication, indicate to the State party concerned as soon as the situation requires, the provisional measures to be adopted to prevent irreparable harm from being caused to the victim(s) of the alleged violation."

hand, "the extreme gravity or urgency" (I) and, on the other hand, the possibility of "irreparable harm" (II), it being understood that these two criteria are both cumulative and mutually connected. As for the statement that examination of the request for interim measures "also touches on the question of the merits of the matter", this is self-evident. No examination of a request for provisional measures can disregard the merits of the case, but the decision on provisional measures does not prejudge the merits (III).

I. Extreme gravity or urgency

9. Provisional measures are part of the emergency measures ordered by courts. They have been transposed from internal procedural law to international law. In the international order, they have several similarities with certain internal emergency procedures such as the stay of execution procedure, well known in administrative law. As Justice Cançado Trindade rightly points out, provisional measures have a "preventive dimension" in the international protection of human rights. He specifies that they "represent today a veritable jurisdictional guarantee of a preventive nature and constitute one of the most gratifying aspects of the international action for safeguard of fundamental human rights".[10]

10. Concerning the powers of the AfCHPR to indicate provisional measures, this character of emergency procedure is highlighted by the text of the Protocol which predicates the exercise of this power on "cases of extreme gravity or urgency". Consequently, the Court must ascertain whether there is urgency, that is, whether there is a real risk that an action prejudicial to the rights of the Applicant will be committed before the Court renders its decision on the merits. The issue is therefore that of parrying as quickly as possible to avoid any complication of the situation.

11. Urgency is obviously not assessed *in abstracto*, but rather on the basis of the facts of the case as they emerge from both the application for provisional measures and from the application regarding the merits. A request for provisional measures cannot be considered by the Court where an application on the merits has not been brought. However, in order to issue provisional measures, the Court does not need to establish the existence

10 AA Cancado Trindade "Provisional measures in the case-law of the Inter-American Court of Human Rights", Lecture delivered on 2 July 2002 as part of the round table organized in Strasbourg by the International Institute for Human Rights and the University of Paris II. http://www.corteidh.or.cr/tablas/r26311.pdf

of violations of the Charter or any other human rights instrument ratified by the Respondent State, or make a definitive ruling on the facts. Indeed, an Applicant may, within the framework of a request for provisional measures, avail himself of the rights recognized by the Charter, once it has been established that continuation of the impugned State action bears the risk of depriving the Court's judgment on the merits, of all effectiveness, thus rendering the application baseless.

12. In the present case, it is *prima facie* established that the composition of COS poses a problem insofar as no political opposition party is represented therein. Furthermore, the imminent date of the communal, municipal and local elections is a fundamental element which the Court should have taken into account in concluding that the element of urgency is established and in ordering, on this basis, the stay of the pursuit of COS work, all the more so because it is absolutely certain that the Court will not be able to rule on the merits of the case before the said elections.

II. Irreparable harm

13. The second criterion set out in Article 27(2) of the Protocol refers to the notion of "irreparable harm". The aim of the provisional measures which the Court may impose is to "avoid" such irreparable harm to persons.

14. In fact, it is needful to institute provisional measures as soon as the Respondent State's behaviour is such as may cause the Applicant harm which will subsequently be very difficult or impossible to adequately erase or repair. Consequently, the purpose of provisional measures is to avoid aggravating a dispute and allow for proper administration of justice.

15. For example, in the *Lagrand* case, the International Court of Justice on 3 March 1999, issued an order for interim measures by which it required the United States, to *inter alia* "take all the necessary measures to ensure that (the German nationals) were not (executed) until a decision is rendered on the case". The two German nationals were, however, executed by the United States.

16. In the matter of the United States diplomatic and consular staff in Tehran, the ICJ considered that "Whereas continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm", the Court finds that "the circumstances require it to indicate provisional measures, as provided by Article 41 of the Statute of

the Court, in order to preserve the rights claimed".[11]

17. Thus, and as the ICJ notes, "… the power of the Court to indicate provisional measures under Article 41 of the Statute of the Court has as its object to preserve the respective rights of the parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings before the judge, and that no initiative concerning the disputed measures must anticipate the Court's judgment"[12].

18. In the case law of all international human rights bodies, the irreparable nature of the harm is decisive for indication of provisional measures. This is the case for regional courts[13] and also for the United Nations treaty committees or for the African Commission on Human and Peoples' Rights. In most cases, provisional measures relate to deportation and extradition orders or death sentences[14].

19. In the present case - *XYZ v the Republic of Benin* - the Court did not seek to ascertain the date of the elections. It merely stated that "The Court also observes that the Applicant does not provide evidence of the nature of the urgent and serious risk of irreparable damage that this structure could cause him, as required by Article 27 of the Protocol", whereas it is incumbent on the Court itself to so, pursuant to its investigative power. By virtue of its mission to protect human rights, the Court has the duty to ensure that the alleged violation of a human right is not capable of producing irreparable harm and that the violation would be largely completed at the time the Court examines the merits. By failing to do so, the Court may find itself dealing with an application which has become purposeless. We will again quote Judge Cançado Trindade who fully agreed to this point when

11 ICJ:United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Order of 15 December1979, paras 42 and 43.

12 ICJ: *Case concerning jurisdiction over fisheries (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Request for the indication of provisional measures, Order of 17 August 1972

13 For example, the ECHR received in 2018 (1,540) requests for provisional measures as against (1,683) in 2017. The Court granted the request in 143 cases (compared to 117 in 2017, an increase of 22%) and rejected the requests in 486 cases (compared to 533 in 2017 - a decrease of 9%). The other requests fell outside the scope of Article 39 of the Regulation. 59% of the requests received concerned deportation or immigration cases. Source: ECHR, 2018 Statistical Analysis. https://www.echr.coe.int/Documents/Stats analysis_2018_FRA.pdf

14 P Olumba "International Jurisdictions and Emergency Procedures in Human Rights Matters", African Human Rights Journal 2011, pp. 341-366.

he wrote that "the object of prevention or provisional measures in international litigation (under international public law) is well known: it is to preserve the rights claimed by one of the parties as to the merits of the case, thus preventing the case from being devoid of purpose and effectiveness, and the final result of the trial from being frustrated"[15].

III. The interim measures order does not prejudge the merits

20. By definition, the measure ordered by the Court is simply provisional. This means that not only is it not final, but that it is also reviewable or even revocable at any time if, having regard to the circumstances of the case, the Court deems such action necessary. This derives from the very nature of orders for provisional measures and the Court's discretional power to make a determination.

21. In several of its orders for provisional measures, the Court made clear that its power in such matter can be exercised only in regard to the circumstances of the case. This logically means that it is impossible to consider a request for provisional measures in itself and by itself, while disregarding the elements of the merits. This, in the present case, would be an impossible exercise. To determine the relevance of a request for provisional measures, the Court must imperatively bear in mind the seriousness of the application on the merits, the nature of the alleged human rights violations, the circumstances of such violations, etc. As stated in several of its subsequent orders, "The Court observes that it is up to it to decide in each particular case whether, in light of the particular circumstances, it must exercise the jurisdiction conferred by the above provisions".[16]

22. Similarly, the Court has always made clear in all its orders that "This order deciding [on] provisional measures remains provisional in nature and does not prejudge the Court's conclusions on the merits of the case "[17] Consequently, in the order at issue, the Court did not have to dismiss the application on the ground that it "also touches on the merits". This is obvious. Any request for provisional measures also touches on the merits, but it never

15 Cancado Trindade, *op cit*, 14.

16 *Suy Bi Gohore Emile and Others v Republic of Côte d'Ivoire*, Application 44/2019, Order for provisional measures, 28 November 2019.

17 *Idem*.

prejudges the merits. It is this nuance that we would have liked to see the Court enshrine in this order.

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Dissenting opinion: BENSAOULA

1. In the above-mentioned Order *XYZ v the Republic of Benin*, I beg to disagree with the decision of the majority of the judges of the Court on two main issues, that is, deciding not to grant the provisional measures sought and I do not agree with the draft of the operative part.

i) Deciding not to grant the provisional measures sought

2. It, in fact emerges from the Order that the Applicant prayed the Court to "order the Respondent State to suspend deliberations on the administrative structure known as the Orientation and Supervision Board established by the constitutional Court in view of the municipal and local elections and to abstain from any act or action which could lead to irreparable harm".

3. Article 27(2) of the Protocol states that "in case 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". Furthermore, Rule 51(1) of the Rules of Court provide that, "the Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice".

4. By definition, provisional measures are measures taken under emergency situations without any prejudice to the merits to avoid irreparable harm and whose effects will cease with the decision rendered by the Court on the merits of the case before it. The urgency is determined by the irreparable or aggravated prejudice and the possibility of reinstating the rights on the date the decision on the merit is rendered.

5. It emerges from the facts which constitute the basis for the request for provisional measures that the Applicant, in his Application on the merits, prayed the Court to order the State of Benin to establish independent and impartial electoral organs, to find

that the Respondent State violated his rights to freely participate in the governance of the public affairs of his country, of equal protection of the law, the right to national and international peace and security and the African Charter on Democracy, Elections and Good Governance.

6. From the facts related by the Applicant which were not refuted by the Respondent who failed to reply to the Applicant's Application even though she was duly notified, it emerges that the independent administrative structure in charge of the national electoral register and the establishment of the permanent computerized electoral list, the subject of the request for provisional measures, is composed only of representatives of the presidential camp and will be used during the elections slated for the first quarter of 2020.

7. It also emerges from the annual programme of the Court sessions that the first session to be held by the Court in 2020 will be in the month of March. Based on the circumstances, the probability for the matter to be considered on the merits well after the elections should be considered on the one hand.

8. And, the Applicant questions the reliability of the organ charged with preparing the electoral register with regard to the guarantee for democratic elections where all other categories of persons of Benin nationality will be represented on the other hand. It is evident that the urgency in this matter cannot be over emphasised and that the harm which may befall the Applicant through the activities of this structure, if it remains operational in spite of the merits of the case, which questions the alleged non-democratic nature would be irreparable. Therefore, the extreme gravity and irreparable harm, key elements contained in Article 27(2) of the Protocol are established.

9. Thus the Court, by limiting itself to paragraphs 24 and 25 and finding that "the request for provisional measures which calls for the suspension of the electoral organ in question also concerns the merits of the case which the Court is called upon to decide, that is, the likely partiality of the structure" and "that the Applicant fails to provide evidence of the urgent and serious nature and the risk of irreparable harm which the structure could cause him…." failed in its obligation to provide reasons for its decisions.

10. Suspending the activities of a key structure in the electoral process in the Respondent State cannot, in any way, be prejudicial to the merits of the case because if this organ continues to elaborate on the electoral process and the elections are organised, the merits of the case would no longer be required to exist because it will be baseless. Consequently, the Court, out of lack of diligence, will make the Applicant suffer from irreparable prejudice especially

because the merits of the case will be based on the impartiality and independence of electoral organs.

11. The meaning of the expression "does not prejudge the merits of the case" does not, in any case, mean that the circumstances and facts surrounding the main application are not taken into account in determining the urgency and the irreparable damage but that the provisional measures taken do not concern the merits in the present case for example, that the composition of the organs is not independent and that, therefore, the measures taken on that basis run counter to the aforementioned rule.

12. And that, in the interest of justice, and in order that the merits of the case should not be considered baseless through the effective execution of deliberations of the organ and, therefore, the organization of the elections in the first quarter of 2020, the Court should have granted the request of the Applicant.

ii) Drafting of the operative part of the Order

13. It emerges from the operative part of the Order that the Court simply Declared as follow: "by a majority of 9 for and 2 against, decides not to grant the measures." In my opinion, this approach is inconsistent with the terms of Articles 3 and 5(3) of the Protocol and, even, the content of the Order rendered.

14. In terms of Articles 3 and 5(3) of the Protocol, when the Court is seized of an Application, it carries out a preliminary examination of its jurisdiction. This obligation of the Court was fulfilled from paragraphs 12 to 17 of the Order with references to its jurisprudence which in matters of provisional measures, does not require the Court to ensure that it has jurisdiction on the merits of the case but should simply determine that it has *prima facie* jurisdiction.

15. That, by concluding in its paragraph 17 that it has *prima facie* jurisdiction, the Court was already determining the first phase of what should have appeared in the operative part. In my opinion, the operative part should have been:

For these reasons
The Court
Unanimously,

i. Declares that it has *prima facie* jurisdiction
ii. By a majority of 9 for and 2 against
iii. Declares the Application for provisional measures unfounded