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African Court Law Report
Volume 4 (2020)

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

# African Court Law Report
## Volume 4 (2020)

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# Editorial

This is the fourth volume of the *Report of judgments, orders and advisory opinions of the African Court on Human and Peoples' Rights*. This volume covers decisions of 2020.

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 fourth volume of the *African Court Law Report* includes 59 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 (4), 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
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- Mme Irène Yankemadje, African Union Volunteer Lawyer
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Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 712
Soro v Côte d'Ivoire (provisional measures) (2020) 4 AfCLR 516

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Lyambaka v Tanzania (admissibility) (2020) 4 AfCLR 574
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Mulindahabi v Rwanda (ruling) (2020) 4 AfCLR 350

## African Commission on Human and Peoples' Rights



## ECOWAS Community Court of Justice



## Permanent International Court of Justice

## International Court of Justice

## European Court of Justice



## Inter-American Court of Justice

# Viking & anor v Tanzania (reopening of pleadings) (2020) 4 AfCLR 1

Application 006/2015, *Nguza Viking (Babu Seya) & anor v United Republic of Tanzania*

Order (reopening of pleadings), 10 February 2020. 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

This application for reopening of pleadings and for leave to file pleadings out of time was brought by the Respondent State because it had failed to respond to the application for reparations filed by the Applicants following the Court's judgment on the merit in the main matter. The Court granted the Respondent's application for leave.

**Procedur**e (reopening of pleadings, 7)

## I. Subject of the Application

**1.** The Application for reparations was filed by Messrs Nguza Viking and Johnson Nguza (hereinafter referred to as the first and second Applicant respectively) against the United Republic of Tanzania (hereinafter referred to as "the Respondent State") pursuant to the judgment of the Court on the merits of 23 March 2018. In the said judgment, this Court found that the Respondent State violated Articles 1 and 7(1)(c) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") by reason of failure to provide the Applicants with copies of witness statements, failure to call material witnesses as well as failure to facilitate the first Applicant to conduct a test as to his impotence.

**2.** Having found these violations, the Court ordered the Respondent State "to take all necessary measures within a reasonable time to restore the Applicants' rights and 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 Applicants to file their submissions on reparations within thirty (30) days of the judgment and the Respondent State to file the submissions in response thereto within thirty (30) days of receipt of the Applicants' submissions.

**4.** On 23 August 2018, the Applicants filed their written submissions on reparations and this was transmitted to the Respondent State on 24 August 2018. The Respondent State is yet to file a Response.

## II. Prayers of the parties

**5.** The Respondent State prays the Court to reopen pleadings and extend its time for filing its Response to the Applicants' submission on reparations.

**6.** The Applicants did not reply to the request of the Respondent State.

## III. The Court

**7.** The Court observes that when pleadings are closed and a party requests for the same to be reopened, it has inherent power to decide to suspend the deliberation of such an Application, reopen the pleadings and admit new evidence filed by parties in the interest of proper administration of justice.

**8.** In the present Application, the Court reopens pleadings, grants the Respondent State leave to file its Response to the submissions on reparations filed by the Applicants within seven (7) days of notification of this Order.

# Viking & anor v Tanzania (reparations) (2020) 4 AfCLR 3

Application 006/2015, *Nguza Viking (Babu Seya) & anor v United Republic of Tanzania*

Reparations, 8 May 2020. 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

In 2018, the Court delivered its judgment on the merits in the matter brought by the present Applicants. Based on the Court's finding that certain rights of the Applicants had been violated, the present request for reparations was brought. The Court granted part of the reparations sought by the Applicants.

**Reparations** (measures of, 14; material prejudice, 15, 26, 27; moral prejudice, 38, 41; indirect victims, 49-51; guarantees of non-repetition, 60-61; measures of satisfaction, 65-66)

## I. Subject of the Application

**1.** Pursuant to the judgment of the Court on the merits of 23 March 2018, Messrs Nguza Viking and Johnson Nguza (hereinafter referred to as the first and second Applicant respectively)") filed on 23 August 2018, their written submissions for reparations. In the said judgment, this Court found that the United Republic of Tanzania (hereinafter referred to as "the Respondent State) had violated Articles 1 and 7(1)(c) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").

## II. Brief background of the matter

**2.** In the Application 006/2015, the Applicants alleged that their right to a fair trial had been violated by the Respondent State by reason of failure to provide them with copies of witness statements and failure to call material witnesses as well as failure to facilitate the first Applicant to conduct a test as to his impotence. The Applicants submitted that this happened in the course of proceedings in the national courts. Further, that this resulted in their conviction for the offences of rape and unnatural acts and subsequent sentence to a term of life imprisonment.

**3.** On 23 March 2018, the Court rendered the judgement whose operative part read as follows:

"vii. Finds that the Respondent State has violated Article 7 (1) (c) of the Charter as regards: the failure to provide the Applicants copies of witness statements and to call material witnesses; the failure to facilitate the First Applicant to conduct a test as to his impotence; consequently finds that the Respondent State has violated Article 1 of the Charter; …

x. Orders the Respondent State to take all necessary measures to restore the Applicants' rights and inform the Court, within six (6) months from the date of this Judgment of the measures taken.

xi. Defers its ruling on the Applicants' prayer on the other forms of reparation, as well as its ruling on Costs; and

xii. Allows the Applicants, in accordance with Rule 63 of its Rules, to file their written submissions on the other forms of reparation within thirty (30) days from the date of notification of this judgment; and the Respondent State to file its Response within thirty (30) days from the date of receipt of the Applicants' written submissions."

**4.** This present application for reparations is based on the above mentioned judgment.

## III. Summary of the procedure before the Court

**5.** On 27 November 2018, the Registry transmitted a certified true copy of the judgment on merits to the Parties.

**6.** On 23 August 2018, the Applicants filed their written submissions for reparations and this was served on the Respondent State on 24 August 2018. On 18 March 2020, the Respondent State filed its Response to the Applicants' submissions on reparations.

**7.** The Court also notes that the Respondent State filed a notice of withdrawal of its Declaration under Article 34(6) of the Protocol allowing Non-governmental organizations and individuals to file cases before the Court on November 21, 2019, at the African Union Commission. The Court recalls its decision in *Ingabire Victoire v Republic of Rwanda*[1] that the withdrawal of a Declaration does not have a retroactive effect and therefore has no bearing on an Application pending before it. The Court thus concludes from the above that the withdrawal of the Respondent State has no bearing on the present application.

**8.** Pleadings were closed on 16 December 2019 and the Parties were duly notified. On 10 February 2020, the pleadings were

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 540 § 67.

subsequently reopened upon the request of the Respondent State of 9 January 2020 for extension of time to file a Response to the submissions on reparations. The Respondent State filed its Response on 18 March 2020.

## IV. Prayers of the parties

**9.** The Applicants pray the Court to grant them the following reparations:

" a. Pecuniary reparations

For Nguza Viking and Johnson Nguza as a Direct Victim:

i. Moral prejudice: the amount of twenty thousand dollars ($20,000) to each as a direct victim of moral prejudice suffered.

b. For indirect victims:

ii. Amount of five thousand dollars ($5,000) payable to Mr. Yannick Nguza;

iii. Amount of five thousand dollars ($5,000) payable to the Second Applicant's daughter, Asha Johnson Nguza;

iv. Amount of five thousand dollars ($5,000) payable to Nasri Ally,

v. Amount of five thousand dollars ($5,000) payable to Francis Nguza,

vi. Amount of five thousand dollars ($5,000) payable to the second Applicant's fiancé, Mariam Othman Bongi.

c. For Counsel's legal fees:

vii. Legal aid fees for 300 hours of legal work: 200 hours for two Assistant Counsels and 100 hours for the lead Counsel. This is charged at one hundred dollars ($100) per hour for lead Counsel and fifty dollars ($50) per hour for the Assistants. The total amount for all this being ten thousand ($10,000) for the lead Counsel and ten thousand dollars ($10,000) for the two Assistants.

d. Transport, fees and stationery:

viii. Postage amounting to two hundred dollars ($200),

ix. Printing and photocopying amounting to two hundred dollars ($200).

e. Principle of proportionality

x. The Applicants pray that the Court applies the principle of proportionality when considering all the Applicants' submissions.

f. Measures of satisfaction

xi. [T]hat the government publishes in the national gazette the decision on the merit of the main Application within one month of delivery of judgment as a measure of satisfaction.

g. Guarantees of non-repetition

xii. The Applicants pray that the Respondent guarantees non-repetition of these violations to them and that they are requested to report back to this Honourable Court every six months until they satisfy

the orders this Court shall make when considering submissions for reparations."

**10.** The Respondent State prays the Court to dismiss the Application in its entirety and to order any other relief in its favour that the Court deems fit.

## V. Reparations

**11.** 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".

**12.** 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."[2]

**13.** The Court also restates that reparation "…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."[3]

**14.** Measures that a State would take to remedy a violation of human rights include, notably, 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.[4]

**15.** 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/her prayers.[5] Exceptions to this rule include moral prejudice, which need not be proven, since presumptions are

2 Application 005/2013. Judgment of 4/07/2019 (Reparations), ***Alex Thomas v United Republic of Tanzania*** ("***Alex Thomas v Tanzania (Reparations)***"), § 11, ***Umuhoza v Republic of Rwanda***, (reparations) (2018) 2 AfCLR 202, § 19.

3 ***Mohamed Abubakari v Tanzania*** (Reparations), § 20, ***Alex Thomas v Tanzania*** (Reparations), § 12, ***Wilfred Onyango v Tanzania***, § 16. ***Ingabire Umuhoza v Rwanda*** (Reparations), § 20, ***Lucien Ikili v Tanzania*** (Merits and Reparations), § 118.

4 ***Mohamed Abubakari v Tanzania*** (Reparations), § 21, ***Alex Thomas v Tanzania*** (Reparations) § 13, ***Ingabire Umuhoza v Rwanda*** (Reparations), § 20.

5 ***Tanganyika Law Society, the Legal and Human Rights Centre v Tanzania,*** Application 009/2011, ***Reverend Christopher R. Mtikila v United Republic of***

made in favour of the Applicant and the burden of proof shifts to the Respondent State.

**16.** The Court having found violations of Articles 1 and 7(1)(c) of the Charter in the judgment on the merits of 23 March 2018, the Applicants, pray for pecuniary reparations for (i) material loss, (ii) moral prejudice for themselves 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

#### a. Loss of income and life plan

**17.** The Applicants submit that their music careers were disrupted as a consequence of their accusation of "rape and gang rape" which led to their arrest and imprisonment for fourteen (14) years.

**18.** According to the Applicants, they sold their "family house" in order to pay for the legal fees accrued during their appeal before the Court of Appeal of Tanzania. They further argue that prior to their imprisonment, they had musical instruments which they used during their performances but the said instruments "are now unusable due to the conditions they were in."

**19.** The Applicants further aver that their life plan was disrupted and that they have been unable to achieve their plans and goals as a result of their arrest, trial and imprisonment. They submit that they had plans to start their own school of music and open a music studio to develop the talents of the youths in Tanzania.

**20.** The Applicants submit that they were the "financial providers" for their indirect victims and that after their arrest, their indirect victims lived in deplorable conditions which would not have happened had they not been in detention.

**21.** Consequently, citing *Lohé Issa Konate v Burkina Faso*, they request that "…in the absence of documentary evidence supporting a financial monetary claim brought as a direct violation of the Charter, then it would be appropriate to consider the matter in terms of equity in awarding…" the material damages for loss of

*Tanzania*, 011/2011 (Consolidated Applications) (Reparations) (2014), 1 AfCLR 72, § 40; *Mohamed Abubakari v Tanzania* (Reparations), § 22.

income and life plan.

**22.** The Applicants did not submit a specific amount in this regard except for a request for five thousand United States Dollars (US$5,000) to Joffrey Gondwe's family for material prejudice suffered.

**23.** Citing *Christopher Mtikila v Tanzania* (reparations),[6] the Respondent State argues that it is not enough that a violation was found but rather the Applicants must prove the damages that the State is required to repair.

**24.** The Respondent State argues that the Applicants neither provided any sale agreement to prove the sale of their house nor did they provide any documentary evidence of ownership of musical instruments as alleged.

**25.** The Respondent State also argues that life plans must be expressed in terms of projects and not just in terms of thoughts. In this regard, the Respondent State submits that the Court should dismiss this prayer.

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**26.** 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/her prayers.

**27.** The Court notes that the Applicants have not established the link between the violations found in the judgment on the merits and the material loss they claim to have suffered. Moreover, they have neither provided proof of the ownership of a house or its sale, or proved that the musical instruments were unusable nor have they brought any evidence of plans to establish a school of music. Lastly, they have not adduced any documentary evidence of their earnings before their arrest.

**28.** The Court therefore holds that the Applicants have not justified their claim for compensation for material prejudice resulting from the loss of income and life plan and dismisses the prayer thereof.

6 *Mtikila v Tanzania supra* note 5.

### b. Legal fees at the national courts

**29.** The Applicants submit that they should be granted United States' Dollars twenty thousand (US$ 20,000) for legal fees that they incurred during their trial and because they had to sell their house to pay for legal fees at the Court of Appeal.

**30.** The Respondent State avers that the Applicants have not proved that they sold their house to pay for the legal fees and thus prays the Court to dismiss this prayer.

***

**31.** The Court notes that the Applicants have not justified their claim for compensation for material prejudice resulting from the legal fees incurred at the national courts and thus rejects the claim.

**32.** In light of the foregoing, the Court dismisses the Applicants' prayer for reparations resulting from the alleged material loss.

## ii. Moral prejudice

### a. Moral prejudice suffered by the Applicants

**33.** The Applicants claim that they suffered undue stress from the lack of provision of copies of the witness statements by the Respondent State. And the first Applicant claims that he suffered mental and emotional anguish as a result of the failure of the Respondent State to conduct his test for impotence. Furthermore, the first Applicant claims that he suffered a wide range of illnesses such as hypertension, diabetes and tuberculosis while the second Applicant submits that he contracted tuberculosis due to prison food, sleeping conditions and how the inmates were treated.

**34.** According to the Applicants, the nature of the offences they were charged with, that is, "rape and gang rape" also caused them undue stress especially as they were at the peak "… of their music careers and they were respected in the music industry and in the society in general." They claim that "their names were tarnished in the newspapers and televisions all across East and Central Africa and they were labelled as rapists". Further, the Applicants contend that they "lost their social status in the community due to

their imprisonment and have, in turn, lost their social standing."

**35.** The Applicants pray that the Court, in calculating the moral damages, should apply the principle of equity and take into account the severity of the violations, the impact these had on them and the overall damage to their health. They further ask the Court to consider the period they were imprisoned and grant reparations that would alleviate the suffering that they endured.

**36.** Consequently, the Applicants urge the Court to grant them an award of United States Dollars Twenty Thousand (US$20,000) each in equity as reparation for the moral prejudice they suffered for the violations established.

**37.** The Respondent State submits that the quantification of moral prejudice should be done in equity on a case to case basis as decided in *Norbert Zongo et al. v Burikna Faso*. In this regard, it contends that the Applicants requested for moral prejudice in United State Dollars even though they were working in Tanzania before their arrest and thus earning in Tanzanian shillings. Therefore, the Respondent State argues that the prayer for moral prejudice in United States Dollars is unjustified and should be dismissed.

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**38.** 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.

**39.** The Court further notes that the Applicants have invoked its equitable jurisdiction and made a claim for compensation amounting to United States Dollars Twenty Thousand ($20,000) each.

**40.** In its judgment on the merits, the Court concluded that there was a violation of the Applicants' right to defence. This is in relation to the failure of the Respondent State to provide the Applicants with copies of witness statements and failure to call material witnesses as well as failure to facilitate the first Applicant to conduct a test as to his impotence. This invariably caused the Applicants anguish and despair.

**41.** The Court finds that this entitles the Applicants to compensation for moral prejudice. 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. In such

instances, affording lump sums would generally apply as the standard.

**42.** Consequently, and based on discretion, the Court awards the first Applicant an amount of Tanzanian Shillings Twenty Million (TZS 20,000,000) given that he was denied a test as to his impotence in addition to the other violations. The Court further, awards the second Applicant, an amount of Tanzanian Shillings Five Million (TZS 5,000,000) as moral damages.

### b. Moral prejudice to indirect victims

**43.** Relying on the Zongo case, the Applicants seek compensation for their dependents as indirect victims as follows:

"i. Amount of five thousand dollars ($5,000) payable to Mr. Yannick Nguza;

ii. Amount of five thousand dollars ($5,000) payable to the Second Applicant's daughter, Asha Johnson Nguza;

iii. Amount of five thousand dollars ($5,000) payable to Nasri Ally,

iv. Amount of five thousand dollars ($5,000$) payable to Francis Nguza,

v. Amount of five thousand dollars ($5,000) payable to the second Applicant's fiancé, Mariam Othman Bongi."

**44.** The Applicants submit that the above mentioned persons who are "sons, daughters, brothers, grandchildren and nephews to the Applicants" were emotionally distressed by the physical condition that they were forced to endure throughout their arrest and incarceration. That the indirect victims depended on the Applicants for financial support and also that they acted as their role models.

**45.** According to the Applicants, the indirect victims also suffered emotional distress when they sold their house so as to pay for their legal fees as the indirect victims were forced to move from place to place in search of shelter.

**46.** According to the Applicants, Mariam Bongi who is the second Applicant's fiancé had to raise their daughter – Asha Johnson Nguza alone without the emotional and social support of the second Applicant. Further, that their close friend, Mr. Jofrey Gondwe (now deceased) assisted the Applicants with payment of the legal fees during their trial and suffered emotional distress after hearing of the "…worsening mental and emotional condition of the Applicants…"

**47.** The Respondent State submits that the Applicants have not provided proof to demonstrate that they had dependants. It further argues that "an abrupt introduction of Mr. Yannick Nguza, Asha Johson Nguza, Nasri Ally, Francis Nguza and Mariam Othman

Bongi without documentary proof does not establish their status as indirect victims."

**48.** The Respondent State further argues that the introduction of Asha Johnson Nguza as the second Applicant's daughter is not proof of filiation. Moreover, referring to the matter of *Aslakhanova v Russia* and the Basic Principles and Guidelines on the Right to a Remedy and Reparation of International Human Rights law and serious violations of International Humanitarian Law, it submits that; "for a person to enjoy the status of indirect victim, he must be a relative to the direct victim with documentary proof thereof." It thus argues that fiancées and friends do not fall within the threshold of persons accorded status as indirect victims. Consequently, it prays for the Court to dismiss the prayer herein.

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**49.** The Court recalls that compensation for non-material loss also applies to relatives of the victims of human rights violation as a result of the indirect suffering and distress. As it 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".

**50.** In this regard, the Court, in its jurisprudence has noted that spouses, children and parents may claim the status of indirect victims.

**51.** The Court has also 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.

**52.** The Court recalls that even after reopening of pleadings twice that is on 10 February 2019 and on 9 March 2020 and requesting for the parties to file further evidence, the Applicants failed to do so.

**53.** The Court further notes that the Applicants have not provided any explanation or document indicating who the indirect victims are and their actual relation to them with the exception of Mariam Othman Bongi and Asha Johnson Nguza who are described as the fiancé and daughter of the second Applicant respectively.

**54.** Consequently, the Court finds that the Applicants' claims for moral damages for Mr. Yannick Nguza, Nasri Ally and Francis Nguza

as indirect victims have not been established and therefore dismissed.

**55.** With regard to the second Applicant's fiancé, Mariam Othman Bongi and daughter – Asha Johnson Nguza, the Court notes that he has not provided a copy of the daughter's birth certificate or any other document attesting that she is his daughter. There is also no documentary evidence showing filiation between Mariam Othman Bongi and the second Applicant.

**56.** Therefore, the Court dismisses the second Applicant's claim for moral damages for Mariam Othman Bongi and Asha Johnson Nguza as indirect victims.

**57.** In light of the foregoing, the Court dismisses the claims for moral prejudice in relation to the indirect victims.

## B. Non-pecuniary reparations

### i. Guarantees of non-repetition and report on implementation

**58.** The Applicants pray the Court to make an order that the Respondent State guarantees the non-repetition of violation of their rights. They also request 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.

**59.** The Respondent State contends that the Applicants have already been released and thus the prayer for guarantees of non-repetition is unfounded.

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**60.** The Court observes 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, these remedies would also be relevant in individual cases where the violations will not cease, are likely to reoccur or are structural in nature.

**61.** The Court does not deem it necessary to issue an order regarding non-repetition of the violations of the Applicants' rights since there is no possibility of such violations being repeated in relation to them and since they have already been released. The claim is

therefore dismissed.

**62.** 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 further notes that the Respondent State has not filed any reports of implementation in line with the Court's judgment on merits despite the time for the filing of the report having elapsed on 23 September 2018 and thus holds that the Respondent State shall file its reports on the implementation of this judgment within six (6) months of its notification of thereof.

## ii. Measures of satisfaction

**63.** The Applicants' request an order that the Respondent State publishes, in the national Gazette, the judgment of 23 March 2018 as a measure of satisfaction.

**64.** The Respondent State submits that the judgment will be published in the Court's website which is accessible to everyone and thus there is no need for it to publish the same in its national gazette as that would amount to duplication.

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**65.** Though the Court considers that a judgment, per se, can constitute a sufficient form of reparation, it can 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 profile of the Applicants, the nature of their proceedings in the national courts, the media coverage of the Applicants' trials in the national courts and 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.

**66.** 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 of the Respondent State to remain accessible for at least one (1) year after the date of publication is an appropriate additional measure of satisfaction.

## VI. Costs

**67.** In its judgment on the merits, the Court held that it would decide on the issue of costs when dealing with reparations.

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

**69.** 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. The Applicant must provide justification for the amounts claimed.

### A. Legal fees related to proceedings before this Court

**70.** The Applicants in their initial submissions on reparations prayed the Court to grant them costs in respect of legal fees incurred during the proceedings before this Court as follows: 300 hours of legal work: 200 hours for two Assistant Counsels and 100 hours for the lead Counsel. This is charged at one hundred dollars (US$100) per hour for lead Counsel and fifty dollars (US$50) per hour for the Assistants. The total amount for all this being ten thousand (US$10,000) for the lead Counsel and ten thousand dollars (US$10,000) for the two Assistants.

**71.** In their Reply, the Applicants withdrew this prayer "based on the Court's recent jurisprudence."

**72.** The Respondent State submits that the Applicants enjoyed free legal representation by the Pan African Lawyers' Union before this court and thus this prayer is unfounded and should be dismissed.

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**73.** The Court notes that the Applicants withdrew this prayer and thus it will no longer pronounce itself on the same.

### B. Communication and stationery costs

**74.** Citing the precedent of the Zongo case, the Applicants in their initial submissions on reparations prayed the Court to grant the following reparations with regard to communication and stationery costs incurred:

i. Postage amounting to United States Dollars Two hundred (US$ 200);

ii. Printing and Photocopying amounting to United States Dollars Two hundred (US$ 200);

iii. Communication costs amounting to United States Dollars one hundred (US$100).

**75.** In their Reply, the Applicants withdrew this prayer "based on the Court's recent jurisprudence."

**76.** The Respondent State reiterates that the Applicants were represented by PALU under the Court's legal aid scheme and thus did not incur any costs. It therefore prays that the prayer is dismissed.

***

**77.** The Court notes that the Applicants withdrew this prayer and thus it will no longer pronounce itself on the same.

**78.** Consequently, the Court decides that each Party shall bear its own costs.

## VII. Operative part

**79.** For these reasons:

The Court,

*Unanimously:*

*Pecuniary reparations*

i. Does not grant the Applicants' prayer for material damages for loss of income, life plan and legal fees at the national courts;

ii. Does not grant the Applicants' prayer for damages for moral prejudice suffered by the indirect victims;

iii. Grants the Applicants' prayer for damages for the moral prejudice they suffered and awards the first Applicant the sum of Tanzanian Shillings Twenty Million (TZS 20,000,000) and the second Applicant the sum of Tanzanian Shillings Five Million (TZS 5,000,000);

iv. Orders the Respondent State to pay the amounts indicated under (ii) 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.

*Non-pecuniary reparations*

v. Does not grant the Applicant's prayer for an order regarding non-repetition of the violations;

vi. Orders the Respondent State to publish, as a measure of satisfaction, this judgment on reparations and the judgment of 23 March 2018 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*

vii. 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*

viii. Decides that each Party shall bear its own costs.

## Kodeih v Benin (provisional measures) (2020) 4 AfCLR 18

Application 008/2020, *Ghaby Kodeih v Republic of Benin*

Order (provisional measures), 28 February 2020. Done in English and French, the French text being authoritative.

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

The Applicants, who had been convicted of non-compliance with building permit regulations, brought this action alleging that the domestic judgment, particularly the order to demolish their building, violated their Charter protected rights. The Applicants requested for provisional measures to stay implementation of the demolition order. The Court granted the order.

**Jurisdiction** (*prima facie*, 14)

**Provisional measures** (preventive nature, 31; demolition of building irreparable harm, 34)

### I. The Parties

**1.** The Applicants, Mr. Ghaby Kodeih, a Benin national, born on 13 November 1977, businessman, residing in Cotonou, plot Q-9, les Cocotiers, Tel: +229 97 09 99 99; and Mr. Nabih Kodeih, a Benin national, residing in Cotonou, lot Q-9 les Cocotiers, P.O. Box 1342 Cotonou; (hereinafter "the Applicants").

**2.** The Republic of Benin, (hereinafter "the Respondent") became a party to the African Charter on Human and Peoples Rights (hereinafter "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, on 22 August 2014.

**3.** The Respondent State further deposited the declaration under Article 34 (6) of the Protocol on 8 February 2016 accepting the jurisdiction of the Court to receive Applications from individuals and non-governmental organizations.

## II. Subject of the Application

### A. Facts of the Matter

**4.** The Applicants affirm that, following judgement No. 044/3 rd CD of 27 September 2019, the First Class Court of First Instance, in Cotonou found them guilty of non-compliance with the building permit of their building, levied a fine of 500,000 CFA Francs and ordered the demolition of the building in question.

**5.** They contend that the above mentioned judgement violated their rights under the Charter;

**6.** They allege that the demolition ordered by this judgement will lead to irreparable harm for them because they will receive no compensation whereas they constructed this building with their own funds.

### B. Alleged violations

**7.** From the foregoing, the Applicants allege human rights violations by the Respondent State, notably the right to fair trial and the right to property, protected under Articles 7 and 14 of the African Charter on Human and Peoples Rights.

## III. Summary of the Procedure the Court

**8.** On 17 February 2020, the Applicants filed an application in the Registry of the Court on the merits and provisional measures.

**9.** On 20 February 2020, pursuant to Rule 34(1), the Registry acknowledged receipt of the above mentioned application and pursuant to Rule 36 of the Rules of Court, notified the Respondent State.

**10.** In the said correspondence, the Registry requested the Respondent State to kindly file its response to the request for provisional measures within eight (8) days and a response to the application on the merits within sixty (60) days.

**11.** The Respondent State is yet to respond to the request for provisional measures.

## IV. Jurisdiction of the Court

**12.** In support of the admissibility of the application for provisional measures, the Applicants affirmed, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules, that in matters of

provisional measures, the Court does not need to convince itself that it has jurisdiction on the case but it simply has to ensure that it has *prima facie* jurisdiction.

**13.** Referring further to Article 3(1) of the Protocol, the Applicants contend that the Court has jurisdiction because, on the one hand, the Republic of Benin has ratified the African Charter, the Protocol and made the declaration under Article 34(6) and, on the other, they allege violations protected under the Charter.

**14.** When seized of an application, the Court carries out 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 "the Rules").

**15.** However, with regard to provisional measures, the Court recalls its constant jurisprudence which provides that it does not need to ensure that it has jurisdiction on the merits of the case but simply has to ensure that it has *prima facie*[1] jurisdiction.

**16.** Article 3(1) of the Protocol provides as follows "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned"

**17.** Article 5(3) of the Protocol, provides as follows "the Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol'

**18.** The Court notes that the Respondent State has ratified the Charter and the Protocol. It has also made the declaration accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations pursuant to Articles 34(6) and 5(3) of the Protocol read jointly.

**19.** The Court further notes that the rights alleged by the Applicants to have been violated are all protected under the Charter.

**20.** In light of the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the application.

1 See Application 004/2013 ***Lohé Issa Konaté v Burkina Faso*** (Order on provisional measures dated 4 October 2013) and Application 001/2015 ***Armand Guéhi v Republic of Tanzania*** (Order on interim measures dated 18 March 2016); Application 020/2019 ***Komi Koutché v Republic of Benin*** (Order on provisional measures dated 2 December 2019)

## V. Provisional measures sought

**21.** The Applicants affirm that the Council in Cotonou issued them a building permit No.2015/N0.0094/MCOT/SG/DSEF/DAD/SAC on 6 July 2015 relatively, for a building to be constructed in Cotonou, in Djoméhountin quarter not far from the Conference Centre for the construction of a hotel named RAMADA Hotel.

**22.** They contend that before the beginning of construction works, the hotel project, which was initially a four (4) floor building, was modified to an eight (8) floor building and construction work started in compliance with the technical specifications of the Engineer and the Laboratory

**23.** Further, on 18 April 2017, there was an update of the building permit to make it consistent with the building under construction.

**24.** An expert report of LERGC Laboratory confirmed that the technical norms had been respected.

**25.** The Applicants allege that on 5 June 2019, a technical compliance check was conducted by the Council of Cotonou, which found that there were several irregularities in the building under construction.

**26.** The Applicants affirm that on this basis, without any warning for them to comply with existing measures, pursuant to Article 49 of Decree No. 2014205 of 13 March 2014 on the regulation of issuance of building permits in the Republic of Benin and without having obtained a prior annulment of the building permit, the First Class Court of First Instance of Cotonou rendered the above mentioned judgement.

**27.** The Applicants contend in fact that they were summoned to appear before a correctional chamber to respond to the violation of provisions of Article 51 of Decree No. 2014-205 of 13 March 2014 on the regulation of issuance of building permits in the Republic of Benin whereas a Decree can never define a criminal offence.

**28.** Invoking Article 27 of the Protocol and Rule 51 of the Rules, the Applicants pray the Court to order stay of the implementation of judgement No. 044/3é CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou pending consideration of the application on the merits by this Court.

**29.** The Applicants allege that the demolition ordered in the judgement will cost them irreparable harm because they will not be paid any compensation whereas they have constructed the building using their own funds.

**30.** The Court notes that Article 27(2) of the Protocol provides that: “in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such

provisional measures as it deems necessary"

**31.** The Court further recalls that Rule 51(1) of the Rules proved 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'

**32.** In view of the foregoing, the Court will take into account the applicable law in matters of provisional measures which are of a preventive nature and do not in any way prejudge the merits of the application. The Court cannot issue the order "pendente lite" except the basic conditions required have been met, notably extreme gravity or urgency and the prevention of irreparable harm on persons.

**33.** The Court recalls that the Applicants sought the stay of the implementation of judgement No. 044/3é CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou which ordered the demolition of an eight (8) floor building belonging to them.

**34.** The Court notes that it behoves on it to decide in each case if, in light of the specific circumstances surrounding the case, it has to exercise its jurisdiction conferred on it by the above mentioned provisions.

**35.** The Court is of the opinion that the demolition of a building which is an extremely radical decision will cause irreparable harm to the Applicants because not only did they invest huge sums of money in the construction, but also, they will not be paid any compensation if the judgment is implemented.

**36.** Based on the foregoing, the Court finds that the circumstances surrounding this case constitute a situation of extreme gravity and present a risk of irreparable harm to the Applicants, if the judgement rendered on 27 September 2019 were to be implemented before the judgement of this Court on the merits in the matter before it.

**37.** The Court therefore orders the staying of the execution of judgement No. 044/3é CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou pending consideration of the merits of the case before it.

**38.** To avoid any confusion, the Court wishes to state precisely that this order does not in any way prejudge its decisions on jurisdiction, admissibility and the merits of the application.

## VI. Operative part

**39.** For these reasons
The Court,
*Unanimously,*
*Orders the Respondent State to:*

i. stay the execution of judgement No. 044/3é CD rendered on 27 September 2019 by the First Class Court of First Instance of Cotonou which ordered the demolition of the building pending consideration of the merits of the case by this Court.
ii. report to the Court within fifteen (15) days as from the date of receipt of this Order, on measures taken to implement the Order.

## Kodeih v Benin (provisional measures) (2020) 4 AfCLR 24

Application 006/2020, *Ghaby Kodeih v Republic of Benin*

Order (Provisional measures), 28 February 2020. Done in English and French, the French text being authoritative.

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

The Applicant in this action alleged that the process leading up to an order for the seizure and auctioning of his property was in violation of his Charter guaranteed rights. Applicant brought this request for provisional measures to stay the auctioning of his property and any change of name of land title pending determination of the case on the merit. The Court granted the request.

**Jurisdiction** (*prima facie*, 15, 18)

**Provisional measures** (preventive nature, 40; interest of parties or justice, 42; extreme gravity or urgency, 45)

## I. The Parties

**1.** Mr. Ghaby Kodeih, (hereinafter "the Applicant") is a Benin national born on 13 November 1977, he is a businessman, residing in Cotonou, plot Q-9, les Cocotiers, sole proprietor and General Manager of the Hotel, Restaurant and Leisure Company (SHRL), a private enterprise whose capital is 120 000 000 CFA Francs with headquarters in Cotonou, C/57 Tokpa XOXO, Dako Donou Street, P.O. Box 1342 Cotonou, registered at RCCM under No. RB/COT 11 B 6968.

**2.** The Republic of Benin, (hereinafter "the Respondent") became a party to the African Charter on Human and Peoples Rights (hereinafter "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, on 22 August 2014.

**3.** The Respondent State, further, deposited the declaration under Article 34 (6) of the Protocol on 8 February 2016 thereby accepting the jurisdiction of the Court to receive applications from

individuals and non-governmental organizations.[1]

## II. Subject matter of the Application

### A. Facts of the Matter

**4.** The Applicant affirms that a seizure procedure on a building covering an area of Iha 54a and 34 ca, with land title (T F) No. 14140 in the Lands Register of Cotonou, belonging to the SHL Company where he is the sole proprietor has been initiated by Société Générale de Banque of Benin (SGB).

**5.** Within this framework, the Court in Cotonou, seating as a last resort, dismissed his arguments and fixed the date of 30 January 2020 for auction sale of the building by Jean Jacques GBEDO, the Notary.

**6.** The SHRL Company noted the appeal of the said judgement with adjournment from 31 December 2019 and notified all the parties in the said appeal as well as an application for auction.

**7.** The Applicant contends that at the auction hearing on 30 January 2020, the Court dismissed the request for postponement of auction sale and suspended the matter and the parties pending the establishment of the record of proceedings.

**8.** The Applicant affirmed that even though he received notification of the application for put off of the auction sale, the appointed Notary conducted the auction in favour of the SGB for the amount on auction sale, that is Seven Billion (7.000.000.000) CFA Francs, due to the absence of bidders and especially without awaiting the decision for the request of postponement of auction sale.

**9.** The Applicant contends that as a judgment of the last resort of 1 9 December 2019, the Benin judiciary considered wrongly, that local remedies against this decision had been totally exhausted, which constitutes, according to him, a violation of human rights.

**10.** From there on, he became worried that if the change was done in the name of the auctioneer, or any third party beneficiary, the changed land title would become final and cannot be challenged

1 The Respondent State has also ratified the International Covenant on Civil and Political Rights on 12 March 1992 as well as the African Charter on Democracy, Elections and Governance on 28 June 2022 and the ECOWAS Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security on 21 December 2001. The Respondent State is equally a party to the African Charter on Democracy, Elections and Governance ratified by law No 2022-18 of 5 September 2011.

through the application of the provisions of Article 146 (1) of Law No. 2017-15 of 10 August 2017 to amend and complete Law No. 2013-01 of 14 August 2013 on the Lands Code of the Republic of Benin.

## B. Alleged violations

**11.** The Applicant alleges the violations by the Respondent State of Articles 7-1 (a), 7-1 (d) and 14 of the African Charter on Human and Peoples Rights

## III. Summary of procedure before the Court

**12.** The Application comprising a request for provisional measures was filed at the Registry of the Court on 14 February 2020;

**13.** Pursuant to Article 34(1 ) the Registry acknowledged receipt on 18 February 2020 pursuant to Rule 36 of the Rules of Court, it was communicated on 18 February 2020 to the Respondent State requesting the latter to submit its response on the merits within sixty (60) days and on provisional measures within eight (8) days.

**14.** The Respondent State did not file any response on provisional measures.

## IV. Jurisdiction of the Court

**15.** In support of the admissibility of the application, the Applicant affirms, pursuant to Article 27(2) of the Protocol and Rule 51 of the Rules that in matters of provisional measures the Court does not have to convince itself that it has jurisdiction on the merits of the case but simply has to ensure that it has *prima facie* jurisdiction.

**16.** Referring further to Article 3(1) of the Protocol, he averred that the Court has jurisdiction because, on the one hand, the Republic of Benin has ratified the African Charter, the Protocol and has made the declaration under Article 34(6) and, on the other, it alleges the violation of rights protected by human rights instruments.

**17.** When seized of an application, the Court carries out 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 "the Rules").

**18.** Regarding provisional measures however, the Court recalls its constant jurisprudence according to which it does not have to ensure that it has jurisdiction on the merits of the case, but should

contend itself with its *prima facie*[2] jurisdiction.

**19.** Article 3(1) the Protocol provides as follows "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this protocol and any other relevant human rights instrument ratified by the States concerned".

**20.** According to Article 5(3) the Protocol, "the Court may entitle relevant nongovernmental organizations (NGOs) with observer status before the Commission and individuals to institute case directly before it in accordance with Article 34(6) of this Protocol".

**21.** The Court notes that the Respondent State is a party to the African Charter on Human and Peoples Rights and the Protocol. It has also made the declaration accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations pursuant to Articles 34(6) and 5(3) of the Protocol read jointly.

**22.** The Court further notes, that the rights alleged by the Applicant to have been violated are all protected under the Charter, and, accordingly, it has rationae materiae jurisdiction to hear this application.

**23.** In light of the above, the Court finds that it has *prima facie* jurisdiction to hear the application.

## V. Provisional measures sought

**24.** The Applicant explains that in view of constructing a five (5) star hotel, he established the company SHRL with a capital of One Hundred and twenty Billion (120 000 000 000) CFA Francs, with himself as the sole proprietor and signed an agreement with Marriott Hotels & Resorts to enable him use their license.

**25.** Within the framework of implementation of this project, was to come from the West African Development Bank (hereinafter "BOAD") to the tune of Seven Billion four Hundred million (7.400.000.000) Francs CFA Francs, from a banking consortium to the tune of Eleven Billion Nine Hundred Million (1 1 900.000.000) Francs CFA Francs and by his personal input of — Eleven Billion Seven

2 See Application no 004/2013 ***Lohé Issa Konaté v Burkina Faso*** (Order for Provisional Measures) 4 October 2013, and Application no 001/2015 ***Armand Guehi v Republic of Tanzania*** (Order for Provisional Measures) 18 March 2016; Application no 020/2019 ***Komi Koutché v Republic of Benin*** (Order for Provisional Measures) 2 December 2019.

Hundred and Fifty Three Million (11 .753.000.000) CFA Francs.

**26.** That was how by a notary agreement signed on 13 November and 16 December 2014, the banking consortium (comprising Société Générale de Banque in Côte d'Ivoire (hereinafter "SGCI"), the Société Générale de Banque of Burkina Faso (hereinafter "SGBF") and the SGB), signed an agreement with the SHRL on a long term loan of the amount of Eleven Billion Nine Hundred Thousand (11 .900.000.000) CFA Francs with an Addendum of 27 and 28 February 2017 on the mortgage of the building which has not been constructed covering an area of Iha 54a 34 ca, belonging to the company SHRL and whose land title was No. 14140 in the Lands Register of Cotonou.

**27.** The Applicant alleges that most of the suspensive conditions imposed by the BOAD for the disbursement of the loan were met by the SHRL and by himself, except those which depended directly on the SGB which were not met, being the fault of the latter, which led BOAD to annul the disbursement, whereas the construction of the hotel was almost over.

**28.** Furthermore, the Applicant affirms, that the SGB unilaterally denounced the current account binding it to the SHRL and claimed from the latter the payment of the sum of Fourteen Billion Seven Hundred and Forty Nine Million Four Hundred and Twenty Five Thousand and Eight (14.749.425,008) CFA Francs following a real seizure order of 4 September 2019 aimed at an auction sale of the building.

**29.** The SGB further deposited specifications on 11 September 2019 at the Registry of the Cotonou Trade Tribunal (Benin).

**30.** The Applicant alleges that it is within the framework of this procedure that at the eventual hearing of 19 December 2019, in which SHRL and him were parties, after the arguments made by the defence, the Court rendered judgement No. 14/19/CSl/TTC against which SHRL filed an appeal and notified all the parties to the said appeal as well as an application for a postponement of auctioning.

**31.** The Applicant contends that at the auction hearing of 30 January 2020, his request for postponement of the sale was thrown out by the Court.

**32.** The Applicant affirms that the appointed Notary conducted the auction in favour of the SGB for the amount at sale, that is, Seven Billion (7.000.000.000) CFA Francs.

**33.** The Applicant notes that in rendering the judgement as a last resort on 19 December 2019, the Benin judiciary considered, and wrongly so, that local remedies against this decision have been completely exhausted which constitutes, according to him a

human rights violation.

**34.** In this regard, he recalls that Article 300 of the OHADA Uniform Law on the Organisation of Simplified Procedures for Recovery and Execution (AUPSRVE) provides as follows "judgements rendered in matters relating to seizure of property are not subject to appeal. They shall only be subject to appeal when they deal with the same principle of debt or arguments relating to the inability of one of the parties, of the property, the impossibilities to seize or the inalienable nature of the goods seized. The decisions of the Court of Appeal shall not be subject to opposition. Local remedies are open in conditions of droit commun'.

**35.** The Applicant contends that once the Court has adjudged the principle of an impugned loan, the judgement cannot be rendered as a last resort.

**36.** Invoking Article 27 of the Protocol and Rule 51 of the Rules, the Applicant prays the Court to order the Respondent State to desist from changing the land title No. 14140 volume LXIX folio 149 of the Cotonou District in favour of the Auctioneer or any third party beneficiary and any attempt at seizing the building from the Applicant, in executing judgement ADD No. 14/19/CSl/TCC of 19 December 2019 pending the judgment on the merits of the application before this Court.

**37.** To buttress his request for provisional measures, the Applicant alleges that in case of handing it over to the Auctioneer or any other third party beneficiary, the changed land title will become final and cannot be impugned pursuant to the provisions of Article 146 (1) of Law No. 2017-15 of 10 August 2017 to amend and complement Law No. 2013-01 of 14 August 2013 of the Lands and Domain Court of Benin.

**38.** The Court notes that Article 27 (2) 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".

**39.** The Court further recalls that Rule 51 (1) of the Rules provides as follows. "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 patties any interim measure which it deems necessary to adopt in the interest of the parties or of justice".

**40.** Based on the foregoing, the Court will consider the applicable law in matters of provisional measures, which are preventive in nature and do not prejudge the merits of the application. The Court cannot order them pendente lite except the basic conditions required are met, that is, extreme gravity or urgency and the

prevention of irreparable harm on persons.

**41.** The Court notes that the Applicant is seeking a postponement of any change of name of land title No. 14140 volume LXIX folio 149 of the Cotonou District in favour of the Adjudicator or any other third party beneficiary and any other decision that will seize the building from the Applicant in the execution of judgement ADD No. 14/19/CSl/TCC of 19 December 2019, pending the judgement on the merits of the application from this Court.

**42.** The Court is of the view that it is endowed to issue orders for provisional measures not only in cases of "extreme gravity or urgency or when it is necessary to avoid irreparable harm" but also "in the interest of the parties or of justice".

**43.** To that end, the Court notes that following a property dispute in which the Applicant alleges violation of human rights, the property in question has been adjudged in favour of the Société Générale Benin.

**44.** The Court notes that pursuant to Article 146 of Law No. 2017-15 of 10 August 2017 to amend and complete Law No. 2013-01 of 14 August 2013 on the Lands and Domain Law of Benin, the land certificate is final and cannot be questioned.

**45.** In view of the following, the Court finds, that in the instant case there is a matter of extreme gravity or urgency, same as a risk of irreparable harm because the change is done through a new registration on the land title which will become final and unquestionable.

**46.** The Court therefore finds that circumstances in the instant case require it to order immediately and pursuant to Article 27(2) of the Protocol and Rule 51(1) of the Rules, the suspension of any change of ownership of the land title No. 14140 volume LXIX folio 149 of the Cotonou District in favour of the Auctioneer or any third party beneficiary and to halt any measure aimed at seizing the building from the Applicant, in execution of judgement ADD No. 14/19/csv-rcc of 19 December 2019.

**47.** To avoid any confusion, the Court wishes to state precisely that this order does not in any way prejudge its findings on the jurisdiction, admissibility and merits of the application.

## VI. Operative part

# Anudo v Tanzania (reopening of pleadings) (2020) 4 AfCLR 31

Application 012/2015, *Anudo Ochieng Anudo v United Republic of Tanzania*

Order, (reopening of pleadings), 8 September 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

In a judgment on the merits delivered in 2018 the Court held that the Respondent State had violated certain rights of the Applicant arising from the confiscation of his passport and his declaration as an illegal immigrant. The Applicant failed to submit a Reply to the Respondent State's Response on Reparations until time elapsed. This application was brought for leave to reopen pleadings on Reparations. The Court ordered that pleadings be reopened.

**Procedur**e (additional evidence requires exceptional circumstances, 10)

## I. Subject of the Application

**1.** Pursuant to the Judgment of the Court on the merits delivered on 22 March 2018, Mr. Anudo Ochieng Anudo (hereinafter referred to as 'the Applicant") filed on 1 June 2018, his written submissions on reparations. In the said judgment, this Court found that the United Republic of Tanzania (hereinafter referred to as "the Respondent State) had violated Article 7 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), Article 15(2) of the Universal Declaration of Human Rights and Articles 13 and 14 of the International Covenant on Civil and Political Rights (ICCPR).

## II. Brief background of the Matter

**2.** In the Application 012/2015, the Applicant alleged that the confiscation of his passport, the imposition of an "illegal immigrant" status and his expulsion from the Respondent State deprived him of the rights to nationality, freedom of movement ,liberty and security of person as protected under the Tanzanian Constitution

and the Universal Declaration on Human Rights.

**3.** On 22 March 2018, the Court rendered the judgment whose operative part, at paragraphs (v), (vi) and (vii), read as follows:

> … (v) declares that the Respondent State arbitrarily deprived the Applicant of his Tanzanian nationality in violation of the article 15 of the Universal Declaration of Human Rights.
>
> (vi) declares that the Respondent State violated the Applicant's right not to be expelled arbitrarily.
>
> (vii) declares that the Respondent State has violated the Articles 7 of the Charter and 14 of the ICCPR relating to the Applicant's right to be heard.

## III. Summary of the procedure before the Court

**4.** On 29 March 2018, the Registry of the Court transmitted certified true copies of the Judgment on the merits to the Parties.

**5.** The Applicant filed submissions on reparations on 1 June 2018 and this was served on the Respondent State on 19 June 2018.

**6.** The Respondent State filed its Response on 5 December 2019 and this was served on the Applicant on 17 December 2019.

**7.** The Applicant did not file a Reply to the Respondent State's Response despite an extension of time to do so, granted by the Court on 7 February 2020.

**8.** Pleadings were closed on 15 July 2020 and the parties were duly notified.

## IV. On the re-opening of pleadings

**9.** The Court observes that Rule 50(2) of the Rules provides: "No party shall file additional evidence after closure of pleadings except by leave of Court".

**10.** The Court notes that this Rule envisages that additional evidence can be admitted only with leave of court and in exceptional circumstances.

**11.** The record shows that there were some difficulties in transmitting to the Applicant's new representatives, Dignity Kwanza, the Respondent State's submissions on reparations for them to file the Reply. Furthermore, the record also shows that the Applicant's status as a refugee in Uganda has made it difficult to continue the communication with his Counsel as regards consultations on the Reply to the Respondent State's response on and to provide the necessary information in that regard.

**12.** The Court considers that in view of the afore-mentioned exceptional circumstances and in the interest of justice, it is therefore appropriate to re-open pleadings in this matter.

## V. Operative part

**13.** For these reasons:

The Court

*Unanimously,*

i. Orders that, in the interests of justice, pleadings in Application 012/2015 Anudo Ochieng Anudo vs. United Republic of Tanzania be and are hereby reopened.

ii. The Respondent State's Response to the Applicant's submissions on reparations be served again 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.

# Kajoloweka v Malawi (provisional measures) (2020) 4 AfCLR 34

Application 027/2020, *Charles Kajoloweka v Republic of Malawi*

Order (provisional measures), 27 March 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: CHIZUMILA.

The Applicant brought an action before the Court in connection with public interest litigation that he undertook in the Respondent State on the grounds that the domestic proceedings violated some of his Charter rights. Along with the main action, the Applicant also brought a request for provisional measures to stay implementation of the costs awarded against him by the domestic court. The Court ordered the provisional measures requested.

**Jurisdiction** (*prima facie*,10)

**Provisional measures** (discretionary remedy, 18; cost awarded by domestic court,19-20)

## I. The Parties

**1.** Mr. Charles Kajoloweka, (hereinafter referred to as "the Applicant") is a national of the Republic of Malawi and Executive Director of the Registered Trustees of Youth and Society of Malawi.

**2.** The Respondent State is the Republic of Malawi which became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 23 February 1990 and to the Protocol on 9 October 2008. On 9 October 2008, the Respondent State deposited the Declaration under Article 34(6) of the Protocol under which it accepts the jurisdiction of the Court to receive cases directly from individuals and non-governmental organisations.

## II. Subject of the Application

**3.** On 18 October 2019, the Applicant filed an Application before this Court alleging violation of Articles 1, 2, 3, 4, 5, 7, 16 and 22 of the Charter and other human rights instruments in connection with a public interest litigation he undertook in the Respondent State. A request for provisional measures was filed together with the

Application.

**4.** It emerges from the Application that between January 2017 and February 2019, the Applicant filed a civil suit in the Respondent State's domestic courts in connection with an alleged corruption scandal involving the purchase of maize by the Respondent State from an unnamed Zambian company and which implicated the Respondent State's Minister of Agriculture and Food Security. In the suit, the Applicant challenged the said Minister's continued performance of his duties while a Commission of Inquiry was investigating the corruption scandal. On 13 February 2019, the Supreme Court of Appeal of the Respondent State dismissed the suit and ordered the Applicant to pay costs which were later assessed at a total sum of Malawi Kwacha twenty-one million six hundred forty-eight thousand six hundred seventy-five (MWK 21.648.675,00).

**5.** In his request for provisional measures the Applicant prays the Court to order the Respondent State to stay the enforcement of the order for costs by its Supreme Court of Appeal.

## III. Summary of the procedure before the Court

**6.** The request for provisional measures was filed on 18 October 2019 together with the Application.

**7.** On 24 January 2020, the Respondent State filed the Response to the request for provisional measures and the Response to the main Application.

**8.** On 11 February 2020, the Applicant filed the Reply to the Respondent State's Response to the request for provisional measures.

## IV. Jurisdiction

**9.** 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.

**10.** Nevertheless, for the purpose of issuing an Order for Provisional Measures, the Court need not establish that it has jurisdiction on the merits of the case, but must simply satisfy itself that it has

*prima facie* jurisdiction.[1]

**11.** 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".

**12.** The Court notes that the alleged violations, subject of the present Application, are all in respect of rights protected under the Charter and human rights instruments to which the Respondent State is a party.[2] The Court, therefore, holds that it has material jurisdiction to hear the Application.

**13.** In light of the foregoing, the Court is satisfied that it has *prima facie* jurisdiction to hear the Request.

## V. On the provisional measures requested

**14.** The Applicant requests this Court to order the stay of enforcement of the order of costs by the Supreme Court of Appeal of the Respondent State against the Applicant pending determination of the present Application on the merits by this Court.

**15.** According to the Applicant enforcement of the order for costs could result in him losing immovable property and personal belongings that may otherwise never be recovered, which may cause him irreparable harm.

**16.** The Respondent State objects to the Applicant's application for stay of execution of the award of costs and urges the Court to dismiss the application for provisional measures on the basis that the Applicant did not exhaust domestic remedies.

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1 See, Application 002/2013.Order of 15/03/2013 (Provisional Measures), *African Commission on Human and Peoples' Rights v Libya* § 10; Application 006/2012. Order of 15/03/2013 (Provisional Measures), *African Commission on Human and Peoples' Rights v Kenya* § 16, and Application 020/2019. Order of 2/12/2019, *Komi Koutche v Republic of Benin* § 14.

2 The Respondent State became a State Party to the Charter on 23 February 1990, to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on 25 November 2005, to the African Charter on the Rights and Welfare of the Child on 29 November 1999, to the African Charter on Democracy, Elections and Governance on 24 October 2012 and to the International Covenant on Civil and Political Rights on 22 March 1994.

**17.** The Court recalls that in accordance with 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."

**18.** It lies with the court to decide in each case whether, in light of the particular circumstances, it must exercise the jurisdiction conferred upon it by the afore-cited provisions.[3]

**19.** In the present case, the Court notes that, should the Respondent State enforce the order of costs issued by its Supreme Court of Appeal against the Applicant, he could lose immovable property and personal belongings that may never be recovered, which may cause him irreparable harm. The Respondent State has not disputed this claim.

**20.** The Court therefore finds that a situation of extreme gravity and urgency exists necessitating the adoption of provisional measures to avoid irreparable harm to the Applicant before the Court decides on the merits of this Application.

**21.** The Court, accordingly, decides to exercise its powers under Article 27(2) of the Protocol and also Rule 51(1) of the Rules, to order the Respondent State to stay the enforcement of costs ordered by its Supreme Court of Appeal pending determination of this Application on the merits.

**22.** For the avoidance of doubt, this Order in no way prejudges the findings the Court might make as regards its jurisdiction, admissibility and merits of the Application.

## VI. Operative part

**23.** For these reasons:

The Court,

*Unanimously*, orders the Respondent State to:

*i.* Stay the enforcement of the order of costs by its Supreme Court of Appeal against the Applicant pending the determination of this Application on the merits.

*ii.* Report to the Court within fifteen (15) days from the date of receipt of this Order on the measures taken to implement it.

3 *Armand Guehi v United Republic of Tanzania* (Provisional Measures) (2016) 1 AfCLR 587 § 17.

## Koutche v Benin (provisional measures) (2020) 4 AfCLR 38

Application 013/2020, *Komi Koutche v Republic of Benin*

Ruling (provisional measures), 2 April 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought an action challenging the independence of the Constitutional Court of the Respondent State and claimed that a decision of the Constitutional Council affecting him was in violation of his Charter protected rights. The Applicant also requested provisional measures to stay a decision referring him to face a criminal trial. The Court dismissed the request for provisional measures.

**Jurisdiction** (*prima facie*, 11)

**Provisional measures** (urgency and gravity, 31-32; request based on facts in dismissed application, 36-37)

### I. The Parties

**1.** Komi Koutche (hereinafter, "the Applicant"), an economist and Benin national, residing at 120 Paramount Park Drive, MD 20979, United States of America.

**2.** The Republic of Benin (hereinafter, "Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter, the Charter) on 21 October 1986 and to the Protocol to the Charter on the Establishment of an African Human Rights Court (hereinafter, the Protocol) on 22 August 2014. The Respondent State also deposited, on 8 February 2016, the Declaration provided for in Article 34 (6) of the said Protocol by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organizations.

### II. Subject of the Application

**3.** It emerges from the Application that by Decision DCC 18 - 256 rendered on 6 December 2018, the Constitutional Council of Benin dismissed the Applicant's appeal seeking a declaration that Point 2.7.1 of Cabinet Report No.27/2017/PR/SGG/CM/OJ/ORD dated 2 August 2017, titled "Corporate Audit, Accounting and Finance Mission of the National Microfinance Fund (MNF) for

the 2013 to 2016 financial years " is unconstitutional insofar as it violated his right to defense.

**4.** The Applicant submits that this decision is at the root of all the grievances and prejudices he is suffering insofar as all the acts committed against him (international arrest warrant, extradition request, cancellation of his passport, refusal to issue a tax receipt as well as criminal proceedings initiated against him) are based on this audit.

**5.** In the instant Application on the merits, the Applicant alleges violation of Articles 7 and 26 of the Charter. He also requests the Court to find and rule that the Constitutional Court of Benin is neither independent nor impartial, as well as to annul Decision DCC 18 - 256 of 6 December 2018 rendered by the Constitutional Court and all procedures initiated against him on the basis of the said audit report, more precisely the procedure before *Cour de Repression des Infractions Economique et du Terrorisme* (anti-terrorism and economic offenses court) (CRIET).

**6.** In his Application for provisional measures, he seeks, pending the examination of the application on the merits, a stay of execution of the 25 September 2019 decision of the Investigating Committee of CRIET, which referred him to the Criminal Chamber of the said Court.

## III. Summary of the Procedure before the Court

**7.** The Application together with the request for provisional measures were filed with the Registry on 25 March 2020.

**8.** The Application was served on the Respondent State on 27 March 2020, with a request to submit its response as regards the provisional measures procedure, within five (5) days of receipt of the said notice.

**9.** The deadline for the Respondent State to submit its response has passed.

## IV. Jurisdiction

**10.** The Applicant contends, based on Article 27(2) of the Protocol and Article 51 of the Rules of Procedure, that the Court has *ratione materiae* jurisdiction over his Application insofar as, on the one hand, the Respondent State is a party to the Charter and the Protocol and has deposited the Declaration provided for in Article 34(6) of the said Protocol accepting the jurisdiction and, on the other hand, he alleges violation of rights protected by the Charter.

**11.** When it receives an application, the Court conducts a preliminary examination of its jurisdiction based on Articles 3, 5(3) and 34(6) of the Protocol. The Court need not be satisfied that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.

**12.** Article 3(1) of the Protocol provides that "*The Court shall have jurisdiction in all cases and disputes submitted to it concerning the interpretation or application of the Charter, the Protocol or any other relevant human rights instrument ratified by the States concerned".*

**13.** The Respondent State is a party to the Charter and the Protocol. It has also deposited the Declaration provided for in Article 34 (6) of the said Protocol by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organizations.

**14.** The Applicant further alleges in his Application the violation of rights protected by the Charter.

**15.** The Court concludes that it has *prima facie* jurisdiction to hear the Application for provisional measures.

## V. Provisional measures requested

**16.** The Applicant seeks a stay of execution of the 25 September 2019 judgment of the Investigating Committee of the Court for the Repression of Economic Crimes and Terrorism (CRIET), which referred him to the Criminal Division of said Court, pending consideration of the merits of the Application.

**17.** In support of his request, he submits that there is extreme gravity resulting from the fact that the procedure before CRIET flouted the basic principles of law (absence of fair trial, of double degree of jurisdiction, disregard for the principle of equal protection of the law and of the presumption of innocence).

**18.** He contends that the appointment of the members of CRIET constitutes a violation of the right to an independent and impartial tribunal insofar as they were appointed directly by the executive at the Cabinet meeting of 25 July 2018.

**19.** He opines that the fact that this appointment had the prior approval of the Superior Council of the Judiciary renders CRIET inoperative insofar ten out of its fifteen members are directly attached to the executive, in accordance with Law of 2 July 2018 amending Articles 1 and 2 of Law 94 - 17 of 18 March 1999 relating to the said Council.

**20.** He further notes that the executive branch appointed the judges of the Chamber of Liberties and Detention, which is clearly illegal

since under Article 13 of the Law of 2 July 2018 establishing CRIET, only the president of the said court is vested with this power.

**21.** Secondly, he notes that the Respondent State has not guaranteed the independence of its judiciary, in particular that of CRIET, for reasons already stated.

**22.** Thirdly, he points out that in the instant case, there is a violation of the right to an effective remedy in criminal matters, the effect of which is the obligation to establish a double level of jurisdiction.

**23.** He notes that he was unable to appeal against the decision of CRIET's Investigating Committee, since only the cassation appeal was open to him, which makes it impossible to re-examine the facts, since the Supreme Court is only a judge of the law and cannot deal with the question of guilt, which is a matter of assessing the facts.

**24.** He further contends that the fact that the remand order of 25 September 2019, was not notified to him definitively prevented him from filing an effective appeal and that it was only on 23 March 2020 that the said notification was posted at the town hall, at the same time as a summons to appear on 3 April 2020.

**25.** Fourthly, he maintains that the Director of Communication of the President of the Republic accuses him, in the media, of stealing various sums of money whereas he has not been convicted of any offence.

**26.** Fifth, he submits that the FNM report covered a period during which he was no longer its Director General but rather Minister of Information and Communication and could not, in this capacity, be judged by CRIET, as the High Court of Justice is the only court with jurisdiction to do so.

**27.** As regards irreparable harm, the Applicant submits that it will be difficult for him, in the event of conviction, to have the proceedings annulled and to have a retrial in all fairness, especially as the conviction will serve as the basis for a new arrest warrant.

**28.** He contends that there is a risk of irreparable harm if the status quo is maintained until the decision on the merits is made, since the Criminal Division of CRIET intends to rule on his case on 3 April 2020.

***

**29.** 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."

**30.** Article 51(1) of the Rules provides: "The Court may, during the course of the proceedings and at any other time the Court deems it appropriate, call upon the parties to file any pertinent document or to provide any relevant explanation. The Court shall formally take note of any failure to comply".

**31.** In view of the foregoing, the Court takes into account the laws applicable to provisional measures, which are preventive in nature and in no way prejudge the merits of the Application. It can only order provisional measures *pendente lite* if the basic requirements are met, namely, extreme gravity or urgency and the prevention of irreparable harm to persons.

**32.** The Court observes that urgency, which is consubstantial with extreme gravity, means that there is an "irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision"[1]. There is therefore urgency whenever " acts likely to cause irreparable harm may occur at any time before the Court makes a final decision in the case"[2].

**33.** The Court notes that on 23 April 2019, in Application 020/2019, (*Komi Koutche v Republic of Benin*), the same Applicant filed a request for provisional measures with the Court, asking it, inter alia, to order the respondent State to "suspend the pending proceedings before the *Cour de Repression des Infractions Economique et du Terrorisme* (CRIET)"[3].

**34.** By a Ruling of 2 December 2019, the Court dismissed this request, considering that it "relates to the merits of the case"[4].

**35.** The Court emphasizes that it is not in dispute that the judgment of 25 September 2019, for which the Applicant seeks a stay of execution, is an integral part of the procedure before CRIET, the

1 International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (***Gambia v Myanmar***), para 65, International Court of Justice, 23 January 2020; Alleged Violations of the 1955 Treaty of Amity, Commerce and Consular Rights (***Islamic Republic of Iran v United States of America***), 3 October 2018; Immunities and Criminal Proceedings (***Equatorial Guinea v France***), 7 December 2016, para 78, International Court of Justice.

2 Infra, Note 2.

3 Ruling of 2 Decembre 2020 (Application No.020/2019, ***Komi Koutche v Republic of Benin***), paragraphe 20 – ii;

4 See Note 3, paragraph 25.

suspension of which he had already requested.

**36.** The Court notes that that the Applicant is clearly seeking again a measure that had already been dismissed by the Ruling of 2 December 2019.

**37.** The Court considers that between 2 December 2019 and 25 March 2020, i.e., the date of filing of the request for provisional measures that is the subject of the instant procedure, no circumstances have occurred that are of such a nature to warrant a decision different from that of 2 December 2019.

**38.** Accordingly, the Court dismisses the Applicant's request for provisional measures.

**39.** For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, the admissibility of the Application and the merits thereof.

## VI. Operative part

**40.** For these reasons,

The Court,

*Unanimously,*

*i.* Dismisses the request for provisional measures.

## XYZ v Benin (provisional measures) (2020) 4 AfCLR 44

Application 010/2020, *XYZ v Republic of Benin*

Ruling (provisional measures), 3 April 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought this action to challenge domestic law introduced to amend the Constitution of the Respondent State on the grounds that the amendment violated certain rights. The Applicant also brought a request for provisional measures to stay implementation of the amended law. The Court declined to issue the provisional measures requested.

**Jurisdiction** (*prima facie*, 11)

**Provisional measures** (urgency and gravity, 26)

### I. The Parties

**1.** XYZ, (hereinafter referred to as "the Applicant") is a citizen of Benin, who, on his request, was granted anonymity before this Court at its 54th Ordinary session held from 2 to 27 September 2019 in Arusha, in a previous case.

**2.** On 14 November 2019, the Applicant seized the Court with an Application relating to Law No 2019-40 adopted by the National Assembly on October 31, 2019 amending Law No 90-032 of December 11, 1990 which is the Constitution of the Respondent State. The Applicant is also requesting the Court to order provisional measures.

**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 accepting the jurisdiction of the Court to receive applications directly from individuals and non-governmental organizations.

## II. Subject of the Application

**4.** In his application on the merits, the Applicant alleges that on 31 October 2019, the National Assembly of the Respondent State passed Law No. 2019-40 of 31 October 2019 amending Law No 90-032 of 11 December 1990 on the Constitution of the Respondent State.

**5.** According to the Applicant, on 6 November 2019, the Constitutional Court validated the new law following its referral to that effect by the President of the Republic.

**6.** The Applicant avers that the adoption of the said Law is based on a unilateral review of the Constitution initiated by the President of the Republic for political gains.

**7.** The Applicant further alleges that the said Constitutional amendment violates the rights protected under Articles 1, 9 (1), 13 (1), 20 (1), 22(1) of the Charter and 10(2), 23(5) of the African Charter on Democracy Elections and Governance (hereinafter referred to as "ACDEG"). He therefore prays the Court to order the stay of the application of the said law No. 2019-40 to amend Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all other laws emanating therefrom, and a return to the status quo ante.

## III. Summary of Procedure before the Court

**8.** On 14 November 2019, the Applicant filed an Application requesting the Court to issue an order for provisional measures notably, to stay the application of the new law relating to the Constitution of the Respondent State and all laws emanating therefrom and to return to status quo ante while awaiting the decision on the merits of this Application.

**9.** The Application was served on the Respondent State which filed its response on the request for provisional measures on 18 March 2020.

## IV. Jurisdiction

**10.** When seized of an application, the Court shall conduct a preliminary examination of its jurisdiction pursuant to Articles 3, 5(3) and 34 (6) of the Protocol.

**11.** However, with regard to provisional measures and in accordance with its jurisprudence, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply that it has *prima*

*facie*[1] jurisdiction.

**12.** 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"

**13.** The Court notes that the alleged violations, subject of the present Application on the merits, are in respect of the rights protected under Articles 1, 9(1), 13(1), 20(1), 22(1) of the Charter and 10 (2), 23(5) of the ACDEG, instruments to which the Respondent State is a party. The Court therefore holds that it has material jurisdiction

**14.** In light of the above, the Court finds that it has *prima facie* jurisdiction to hear the application.

## V. Provisional measures requested

**15.** The Applicant prays the Court to order the Respondent State to stay implementation of Law No. 2019-40 of 31 October 2019, to amend Law 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all laws emanating therefrom, and to return to the status quo ante, while awaiting the decision on the merits of this Application.

**16.** To support his Application for Provisional Measures, the Applicant avers that the fact that constitutional amendment is "a known practice in the world", does not prevent the Court from ruling on the present matter, especially if it is alleged that a State has done so to the extent where human rights as guaranteed in the Charter have been violated. He further submits that the Charter is an international treaty which takes precedence over the Constitution in the event of inconsistencies.

**17.** The Applicant submits that the adoption of Law No. 2019-40 of 31 October 2019, to amend Law No.90-032 of 11 December 1990 on the Constitution of the Respondent State has a "devastating" effect on democracy in the country.

**18.** He claims that irreparable harm will be caused to the people of Benin because the said new constitution legitimizes a parliament

1 Application 002/2013, Order of Provisional Measures of 15 March 2013, ***African Commission on Human and Peoples' Rights v Libya*** § 10; Application 024/2016, Order of Provisional Measures of 3 June 2016 in ***Amini Juma v United Republic of Tanzania***, § 8.

based on the violent and noninclusive elections of 28 April 2019.

**19.** According to the Applicant, evidence of extreme gravity resides in the fact that the said constitutional amendment introduces major and new reforms without the slightest consensus.

**20.** The Respondent State avers that the constitutional amendment involved all the political stakeholders of the country who decided to reshape the "partisan" system to make it "professional".

**21.** For the Respondent State, the request for provisional measures is inadmissible because it does not meet the conditions set out in Article 27, notably, the requirements of extreme gravity or urgency and the goal of avoiding irreparable harm to persons. The Respondent State explains that urgency means a situation that may, if not resolved within a short time, lead to a situation of much violence of an unprecedented nature, irreparable harm for the population.

**22.** The Respondent State concludes that the situation presented by the Applicant does not meet any of the conditions laid down in support of provisional measures.

**23.** 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".

**24.** Furthermore, Rule 51(1) of the Rules further 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".

**25.** In light of the aforementioned provisions, the Court will take into account 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 cannot issue an Order pendente lite except if or where the basic requisite conditions have been met, that is, extreme gravity, urgency and prevention of irreparable harm to persons.

**26.** The Court notes that urgency, which is linked to extreme gravity, means a [real and imminent likelihood that irreparable harm will be caused before it renders its final decision.[2] Further, there is

2 International Court of Justice: Application on the Convention for the Prevention and Punishment of the crime of Genocide (*Gambia v Myanmar*), para 65, 23 January 2020; Alleged violations of the Treaty of Friendship, Commerce and Consular Relations of 1955 (*Islamic Republic of Iran v United States of America*), 3 October 2018; Immunities and Criminal proceedings (*Equatorial Guinea v France*), 7 December 2016, para 78, (*Equatorial Guinea v France*), 7 December 2016, para 78, International Court of Justice.

urgency whenever acts that are likely to cause irreparable harm can "occur at any time" before it renders its final decision in the matter.[3]

**27.** The court notes that although the Applicant underscored the importance and scope of the said constitutional amendment and for all the citizens of the Respondent State, he failed to meet the requirements of Article 27 of the Protocol, he didn't provide proof of extreme gravity or urgency or the risk of serious and irreparable harm this constitutional amendment which he claims has a "devastating" effect on democracy in the country may cause him or others in the immediate future, before this Court rules on the merits.

**28.** In light of the above, the request for provisional measures is dismissed.

## VI. Operative part

**29.** For these reasons,

The Court,

*Unanimously,*

i. *Dismisses* the request for provisional measures.

3 *Ibid.*

# XYZ v Benin (judgment) (2020) 4 AfCLR 49

Application 059/2019, *XYZ v Republic of Benin*

Judgment, 27 November 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought this action alleging that the Respondent State had violated certain rights protected in the Charter and other human rights instruments to the extent that the national parliament was illegitimate, and the electoral commission was not independent and impartial. The Court held that the Respondent State had only partly violated some of the rights claimed.

**Jurisdiction** (annulment of elections, 28-30; material jurisdiction, 31-32)

**Admissibility** (abuse of *actio popularis*, 44, victim requirement, 55, 57; exhaustion of local remedies, 71)

**Procedure** (joinder and non-joinder, 50)

**Right to participate freely** (independence and impartiality of electoral commission, 116, 118, 120, 122, 123)

**Equal protection of law** (nature of obligation, 151-152)

**Reparation** (basis for, 158; power to annul elections 168; counterclaim, 173)

## I. The Parties

**1.** XYZ (hereinafter referred to as "the Applicant") is a national of Benin. He requested anonymity which was granted to him by the Court in accordance with Article 56(1) of the Charter and Rules 41(8) and 50(2)(a) of the Rules of the Court (hereinafter referred to as "the Rules"). He challenges the independence and impartiality of electoral bodies as well as the composition of the National Assembly.

**2.** The Application was filed against the Republic of Benin (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 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. It further made the Declaration provided for in Article 34(6)

of the Protocol (hereinafter referred to as "the Declaration") on 8 February 2016, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations. On 25 March 2020, the Respondent State deposited, with the Chairperson of the African Union Commission, the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing.[1]

## II. Subject of the Application

## A. Facts of the matter

**3.** The Applicant alleges that the Respondent State amended its electoral law No. 2019-43 of 15 November 2019 (hereinafter referred to as "the Electoral Code of 2019) less than six months before the 17 May 2020 local and municipal elections which, he contends, is contrary to the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance, supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (hereinafter referred to as the "ECOWAS Protocol on Democracy").

**4.** The Applicant submits that the National Assembly, which amended the electoral laws, is itself illegitimate because it is composed solely of members of the presidential camp, with no "serious" opposition political party being a part of it.

**5.** The Applicant further alleges that, in implementing the revised electoral laws, the Respondent State set up the "*Conseil d'orientation et de supervision de la Liste électorale permanent informatisée*" [*Guidance and Supervision Council of the Permanent Computerised Electoral List*] (hereinafter referred to as "the COS-LEPI") and the "*Commission électorale nationale autonome"* [*Independent National Electoral Commission*] (hereinafter referred to as "the CENA"), bodies in charge of organising a national electoral census and establishing the permanent computerised voters' list, as well as organising the elections.

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Ruling of 5 May 2020 (provisional measures), §§ 4-5 and the Corrigendum of 29 July 2020.

**6.** The Applicant questions the independence and impartiality of these two bodies, given that their members represent only the political parties of the presidential camp. He concludes that the municipal and local elections of 17 May 2020 could not be considered free, fair and transparent and that they must therefore be annulled by this Court.

## B. Alleged violations

**7.** The Applicant alleges the:

i. Illegitimacy and illegality of the National Assembly in amending electoral laws;

ii. Violation of the obligation to create independent and impartial electoral bodies, under Articles 13(1) of the Charter, Article 17 of the African Charter on Elections and Democracy (hereinafter referred to as "the ACDEG") and Article 3 of the ECOWAS Protocol on Democracy;

iii. Violation of the obligation to not make unilateral and substantial amendments of electoral laws less than six months before the elections, provided for in Article 2(1) of the ECOWAS Protocol on Democracy;

iv. Violation of the obligation to guarantee national and international peace and security, provided for in Article 23 of the Charter;

v. Violation of the right to equal protection of the law, guaranteed by Article 3(2) of the Charter.

## III. Summary of the Procedure before the Court

**8.** The Application on merits was received at the Registry on 2 September 2019. In his Application, the Applicant requested for anonymity, citing personal security reasons.

**9.** During its 53rd Ordinary Session held from 10 June 2019 to 5 July 2019, the Court granted the Applicant's request for anonymity and informed the parties accordingly.

**10.** The Application on merits was served on the Respondent State on 12 December 2019.

**11.** On 26 September 2019, the Applicant filed a request for provisional measures which was dismissed by an Order of the Court of 2 December 2019.

**12.** After various extensions requested by the Parties, they filed their submissions on the merits and reparations within the extended time limit set by the Court.

**13.** Pleadings were closed on 12 November 2020 and the Parties were duly notified.

## IV. Prayers of the Parties

**14.** The Applicant prays the Court to rule or find that the Respondent State violated the following:

i. The right of citizens to participate freely in the government of their country, guaranteed by Article 13(1) of the Charter;

ii. The right to equal protection of the law, guaranteed by Articles 10(3) of the ACDEG, 3(2) of the Charter and 26 of the International Covenant on Civil and Political Rights;

iii. The obligation to establish an independent and impartial electoral body in accordance with Article 17 of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy;

iv. The obligation to guarantee national and international peace and security, provided for in Article 23 of the Charter;

v. The obligation not to unilaterally amend electoral laws less than six months before the election without a "political majority";

vi. The obligation to hold transparent, free and fair elections;

vii. The electoral process of 17 May 2020 is null and void;

viii. The Respondent State shall bear the costs.

**15.** The Respondent State prays the Court to declare that it lacks jurisdiction on the following grounds:

i. The Court does not have the power to annul an election;

ii. The Applicant does not allege any human rights violations.

**16.** The Respondent State prays the Court to declare the Application inadmissible for the following reasons:

i. The Applicant is misusing the right to seize the Court;

ii. There is no link between the main Application and the Additional Application;

iii. The Applicant's lack of standing and lack of proof of victim status.

**17.** The Respondent States further prays the Court to declare the Application inadmissible for the following reasons:

i. The Application is incompatible with the Charter and the Constitutive Act of the African Union;

ii. The Applicant failed to exhaust local remedies.

**18.** The Respondent State prays the Court to find that:

i. CENA members enjoy sufficient immunity that protects them from possible pressures;

ii. Electoral Code of 2019 is the result of a consensual political consultation which led to its adoption more than six months before the municipal elections of May 2020;

iii. There is no act of the electoral process relating to the 2020 local elections that is flawed in such a way as to warrant the annulment of said elections;

iv. COS-LEPI was legally and legitimately instituted and its bureau is legitimate;

v. There is no violation by the State of Benin of the right the citizens to participate in the government of their country.

**19.** The Respondent State requests the Court to order the Applicant to pay the State two billion (2,000,000,000) CFA francs, as a counterclaim, for all damages suffered.

## V. Jurisdiction

**20.** When the Court is seized of an application, it shall undertake a preliminary examination of its jurisdiction. 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.

**21.** Furthermore, under Rule 49(1) of the Rules,[2] "[t]he Court shall ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

**22.** It follows from the above provisions that the Court must, in respect of any application, conduct a preliminary assessment of its jurisdiction and rule on the objections raised, if any.

**23.** The Court notes that, in the present case, the Respondent State has raised objections relating to the Court's material jurisdiction. It has, moreover, raised the Court's lack of personal jurisdiction to hear allegations of violations of its obligation under the ECOWAS Protocol on Democracy.

## A. Objection to material jurisdiction

**24.** The Court notes that the Respondent State raises two objections, that is, (i) its lack of jurisdiction to annul an election and (ii) the failure by the Applicant to invoke a case of violation of human rights. The Court will examine these two objections together

2 Formerly, Rule 39(1) of the Rules of 2 June 2010.

under material jurisdiction because they are linked.

**25.** The Respondent State alleges that, under Article 26 of the Rules,[3] the Court has no jurisdiction to annul municipal and local elections that have not been disputed at the domestic level, and that such a decision would be a breach of its sovereignty. The Respondent State argues that "[t]he Court's mission is to ensure the protection of human rights and not to engage in challenging the legal system of the Member States".

**26.** The Respondent State further argues that, under Article 3(1) of the Protocol, the Court has jurisdiction to entertain cases of human rights violations and that, under Article 34(4) of the Rules,[4] the Application must indicate the alleged violation. The Respondent State submits that in the instant case, the Applicant was required to "[i]ndicate in a characteristic way, the alleged violations of human rights, and not merely refer to hypothetical cases."

**27.** The Applicant did not reply.

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**28.** As regards the objection that the Court lacks jurisdiction to annul an election that has not been challenged at the national level, the Court observes that such a measure falls within the scope of the forms of reparation for human rights violations. In this regard, Article 27(1) of the Protocol provides that "[i]f the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

**29.** The Court holds that, under the above cited provision, its power to order remedies is contingent on the prior finding of a violation of human or peoples' rights and the appropriateness of such measures in the instant case, the Court is of the opinion that, contrary to the allegation of the Respondent State, its material jurisdiction cannot be conditioned on the fact that the elections have not been challenged at the national level.

**30.** Based on the foregoing, the Court finds that it has the power to order the annulment of an election if it deems this measure

3 Current Rule 29(1)(a) of the Rules of 25 September 2020.

4 Current Rule 41(1)(f) of the Rules of 25 September 2020.

appropriate to remedy the violation found. This objection is therefore dismissed.

**31.** With regard to the objection relating to the Applicant's failure to specify a human rights violation, the Court notes that, under Article 3 of the Protocol cited above, it has the power to hear any allegation of a human rights violation. The Court considers that in order for it to have material jurisdiction, it suffices that the rights which are alleged to have been violated are protected by the Charter or by any other human rights instrument ratified by the State concerned.[5]

**32.** In the instant case, and contrary to the Respondent State's objection, the Court notes that the Applicant alleges the violations by the Respondent State of human rights and obligations under the Charter, the ECOWAS Protocol on Democracy and Good Governance and ACDEG[6] which are instruments it is empowered to interpret and apply pursuant to Article 3(1) of the Protocol.[7]

**33.** Consequently, this objection is dismissed.

## B. Objection to the Court's personal jurisdiction

**34.** The Respondent State alleges that the Court does not have jurisdiction to hear the case because, in accordance with Article 10 of Additional Protocol A/SP/01/05 on the ECOWAS Court of Justice (ECOWAS Court), applications against Member States for failure to fulfil their obligations are reserved for specific entities and individuals are not included among them.

**35.** The Applicant did not reply.

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5 *Franck David Omary & ors v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 371, § 74; *Peter Chacha v United Republic of Tanzania* (ruling on admissibility) (28 March 2014) 1 AfCLR 413, §118.

6 The Respondent State became a party to the ACDEG on 11 July 2012 and the Economic Community of West African States (ECOWAS) Protocol A/SP1/12/01 on Democracy and Good Governance, supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Resolution, Peacekeeping and Security (ECOWAS Protocol on Democracy) on 20 February 2008.

7 See *Actions pour la protection des droits de l'homme v Republic of Côte d'Ivoire* (merits and reparations) (18 November 2016) 1 AfCLR 668, §§ 47-65.

**36.** The Court notes that the Respondent State raises this objection as a condition of admissibility. However, the objection relates to jurisdiction and must be examined in this section because it is an exception relating to the matter Applicant's standing before the Court.

**37.** The Court notes at the outset that the Respondent State's allegation is based on the conditions governing the jurisdiction of the ECOWAS Court and the admissibility of applications before that court, which are not applicable to this Court. The conditions of access to this Court by individuals are governed by the Protocol and its Rules. Consequently, this objection is baseless and is therefore dismissed.

## C. Other aspects of jurisdiction

**38.** Having found that there is nothing on the record to indicate that it does not have jurisdiction with respect to the other aspects of jurisdiction, the Court concludes that it has:

i. Personal jurisdiction, in so far as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and Non-Governmental Organisations to bring cases directly before the Court. In this vein, the Court recalls its earlier position that the Respondent State's withdrawal of its Declaration on 25 March 2020 does not have effect on the instant Application, as the withdrawal was made after the Application was filed before the Court.[8]

ii. Temporal jurisdiction, in so far as the alleged violations were committed, in respect of the Respondent State, after the entry into force of the applicable human rights instruments;

iii. Territorial jurisdiction, since the alleged acts occurred on the territory of a State Party to the Protocol, namely the Respondent State.

**39.** In the light of the foregoing, the Court declares that it has jurisdiction to hear the present Application.

## VI. Preliminary objections

**40.** The Court notes that the Respondent State has raised preliminary objections relating to the admissibility of the Application, namely: A) abuse of *actio popularis*, B) the lack of connection between the main Application and the additional Application, and C) lack of standing and of evidence of victim status.

8 See paragraph 2 above.

**41.** The Court points out that even though, under the Protocol and the Rules, these exceptions are not specifically provided for, it is required to examine them.

## A. Preliminary objection on abuse of *actio popularis*

**42.** The Respondent State alleges that the unknown Applicant is misusing "*actio popularis"*, by using the facilities of access to the Court to file a number of applications, including "Applications Nos. 207/2019, 218/2019, 232/2019, 316/2019, 317/2019, 232/2019 349/2019, 391/2019, and 447/2019".

**43.** The Applicant did not reply.

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**44.** The Court notes that an application is said to be abusive, among others, if it is manifestly frivolous or if it can be discerned that an applicant filed it in bad faith contrary to the general principles of law and the established procedures of judicial practice. In this regard, it should be noted that the mere fact that an applicant files several applications against a particular Respondent State does not necessarily show a lack of good faith on the part of the applicant. More substantiation regarding, for example, the applicant's intention to unjustifiably put a burden on the Respondent State to constrain its litigation capacity is required.

**45.** The Court further notes that the fact that an application was prompted by reasons of political propaganda, even if it were established, would not necessarily render the application abusive and that, in any event, that fact can only be established after a thorough examination of the merits.

**46.** The Court therefore concludes that the issue of abuse of rights, which is essentially a question of the merits, cannot be decided at the present stage of the proceedings.

## B. Preliminary objection on the lack of a link between the Main Application and the Additional Application

**47.** The Respondent State alleges that an Additional Application is admissible only if it is sufficiently linked to the main application. The Respondent State further argues that, in the present case, the main Application Nos. 020/2019 and 021/2019 relates to

the Criminal Code and the annulment of the conviction of Mr Lionel Zinsou, whereas the Additional Application relates to the annulment of the municipal and local elections." In support of its allegation, the Respondent State cites the Court's decision in the case of *Sébastien Ajavon v Republic of Benin*[9] of 29 March 2019.

**48.** The Applicant did not reply.

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**49.** The Court notes that Rule 62 of the Rules[10] provides:

1. The Court may, at any stage of the proceedings, either on its own accord or upon an Application by any of the parties, order the joinder or disjoinder of cases and pleadings as it deems appropriate.

**50.** The Court, when it deems necessary, may seek the opinion of the Parties on the joinder and disjoinder. The Court notes that pursuant to the above provision, it has the power to join and separate proceedings. However, the present case not being a case of disjoinder, the Court considers that it has, *a fortiori*, the prerogative to dismiss additional submissions and order that they be used to open new proceedings, if the interests of the proper administration of justice so require.

**51.** Contrary to what the Respondent State asserts as regards the judgment in *Sebastian Ajavon v Republic of Benin*, the Court considers that in the present case, the allegations of violations in the additional submissions filed by the Applicant warranted that these be considered as a new Application and which was registered as such. This preliminary question is therefore dismissed.

## C. Preliminary objection on lack of *locus standi* and lack of proof of victim status

**52.** The Respondent State alleges that the Applicant, who is anonymous, submitted a dozen applications to the Court, adding that "in none of the cases did the Applicant give reasons for his personal interest in bringing proceedings. He does not present

9 *Sébastien Ajavon v Republic of Benin* of 29 March 2019, ACtHPR, Application 013/2017, Judgment of 29 March 2019 (merits), §§ 63-64.

10 Formerly, Rule 54 of the Rules of 2 June 2010.

himself as a victim of human rights violations. There is however a principle that legal action is conditioned by, *inter alia*, capacity, standing and interest in bringing proceedings. The interest in taking legal action must be current, legitimate and personal."

**53.** The Respondent State argues that the Applicant's failure to demonstrate his personal stake in the litigation makes the Application an *actio popularis,* - an allegation which the Applicant refutes. In this regard, the Respondent State relies on the Dissenting Opinion of Judge Fatsah Ouguergouz in the case of *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania,* according to which "[a]n action before the Court is indeed only allowed it's the applicant justifies his or her own interest in initiating it."

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**54.** The Court notes that under Article 5(3) of the Protocol, "the Court may entitle relevant Non-Governmental Organisations (NGOs) with observer status with the African Commission and individuals to institute cases directly before it…"

**55.** The Court notes that these provisions do not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court. The only precondition is that the Respondent State, in addition to being a party to the Charter and the Protocol, should have deposited the Declaration allowing individuals and NGOs to file a case before the Court. It is also in cognisance of the practical difficulties that ordinary African victims of human rights violations may encounter in bringing their complaints before the Court, thus allowing any person to bring these complaints to the Court without a need to demonstrate a direct individual interest in the matter.[11]

**56.** In the instant case, the Court observes that the Applicant alleges that the contested provisions of Benin's electoral laws are not in conformity with the Charter, the ACDEG and the ECOWAS Protocol on Democracy.

11 African Commission on Human and Peoples Rights, Communications 25/89, 47/90, 56/91, 100/9, *World Trade Organisation Against Torture, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah (WTOAT) v Zaire*, §. 51.

**57.** The Court notes that these allegations are matters of public interest in that the contested legal provisions are of interest to all citizens as they have a direct or indirect bearing on their individual rights and the security and well-being of their society and country. Considering that the Applicant himself is a citizen of the Respondent State and that the revised provisions of the electoral laws have a potential impact on his right to participate in the government of his country, it is evident that he has a direct interest in the matter.

**58.** The Court, therefore, dismisses this objection.

## VII. Admissibility

**59.** Under 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".

**60.** In accordance with Rule 50(1) of the Rules,[12] "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules."

**61.** Rule 50(2) of the Rules,[13] which substantially incorporates Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

a. Indicate their authors even if the latter request anonymity;

b. Are compatible with the Constitutive Act of the African Union and with the Charter;

c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;

d. Are not based exclusively on news disseminated through the mass media;

e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and

g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.

12 Formerly, Rule 40 of the Rules of 2 June 2010.

13 *Ibid*.

**62.** The Respondent State raised two objections on admissibility of the Application.

## A. Conditions of admissibility in contention between the Parties

**63.** The Respondent State raises two objections to the admissibility of the Application, namely: i) that the Application is incompatible with the Charter and Constitutive Act of the African Union and ii) that local remedies have not been exhausted.

### i. Objection based on incompatibility of the Application with the Charter and Constitutive Act of the African Union

**64.** Relying on the African Commission on Human and Peoples' Rights' (hereinafter referred to as "the Commission") case law in *Fredrick Korvac v Liberia*,[14] *Hadjali Mohamed v Algeria*[15] and *Seyoum Ayele v Togo*[16] the Respondent State alleges that the Applicant's allegations are based on fears that municipal and local elections will prevent serious candidates from vying for the office of President of the Republic. It concludes that such a request is inconsistent with the Charter and the Constitutive Act of the African Union.

**65.** The Applicant did not reply.

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**66.** Regarding this condition, the Court recalls that it has held that:
> The substance of the complaint must relate to rights guaranteed by the Charter or any other human rights instrument ratified by the State concerned, without necessarily requiring that the specific rights alleged to have been violated be specified in the Application.[17]

14 Communication No. 1/88, *Hadjali Mohamed v Algeria*.

15 Communication No. 13/88, *Fredrick Korvac v Liberia*.

16 Communication No. 35/89), *Seyoum Ayele v Togo*.

17 *Peter Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 418, § 118.

**67.** The Court notes that in the present case, the request for annulment of the municipal and local elections to enable "serious opposition candidates" to vie for the office of President of the Republic", cannot be deemed to be incompatible with the Charter and Constitutive Act of the African Union. On the contrary, the Applicant prays the Court to find violations of human rights provided for in the Charter, the ACDEG and the ECOWAS Protocol on Democracy. Furthermore, Article 3(h) of the Constitutive Act of the African Union provides that one of the objectives of the African Union shall be the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments. In addition, the Court finds that the Applicant's Application states facts which relate to human and peoples' rights protected under the Charter.[18]

**68.** This objection is therefore dismissed.

## ii. The objection based on the non-exhaustion of local remedies

**69.** The Respondent State alleges that there are local remedies provided for in Article 110 of the Electoral Code of 2019, which gives jurisdiction to the Supreme Court to hear "all electoral disputes relating to local elections." It argues that the same article provides for "the possibility of a re-run if necessary", adding that "persons interested in seeking this remedy have done so and rulings have been issued by the Supreme Court".

**70.** The Applicant did not reply.

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**71.** The Court has consistently held that the requirement of exhaustion of local remedies applies only to ordinary, available and effective[19] judicial remedies. As to the existence of local remedies, the Court

18 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015 (2015) 1 AfCLR 465, § 52.

19 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015 (2015) 1 AfCLR 477, § 64. See also *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 522, § 95.

notes the Respondent State's contention that the Applicant did not seek these remedies before the Supreme Court pursuant to Article 110 (1)(2)(3) of the Electoral Code of 2019, which reads as follows:

> All electoral disputes pertaining to local elections fall under the jurisdiction of the Supreme Court.
>
> In all cases, the Supreme Court shall have a maximum of six months from the filing of any appeal, within which to render its decisions and order a re-run of elections.
>
> The re-run of legislative or local elections shall be held in two rounds maximum.

**72.** In addition, the Court notes that Article 117 of the Beninese Constitution provides that "the Constitutional Court shall, as a matter of obligation, rule on the constitutionality of organic laws and laws in general before their promulgation".

**73.** It follows from the above provisions that the existence of local remedies is not in dispute. It therefore remains to be seen whether local remedies are effective to redress the violations alleged by the Applicant.

**74.** The Court notes that the Applicant bases the alleged violations on the illegitimacy of the National Assembly, unilaterally and substantially amending the electoral laws within a period of six months prior to the elections and thus the consequences of these violations not only on national and international peace and security but also on his right to equality before the law. More specifically, the Applicant bases his request for the annulment of the local and municipal elections primarily on the fact that the Electoral Code of 2019 was amended by an illegitimate National Assembly.

**75.** The Court observes that the reasons given by the Applicant in support of his allegations of violations relate to the conformity of the contested provisions of the Electoral Codes of 2018 and 2019 with the Charter, the ACDEG and the ECOWAS Protocol on Democracy, rather than to the substantive legality of the local and municipal elections of 17 May 2020.

**76.** The Court points out that these issues were previously decided on by the Constitutional Court of the Respondent State in its Decisions DCC18-199 of 2 October 2028 and DCC19-525, of 14 November 2019. In these decisions, the Constitutional Court found the two challenged Electoral Codes to be in conformity with the Constitution.

**77.** The Court observes that a constitutional review in the Respondent State involves both a review of the procedure followed for the

adoption of the law and a review of its content,[20] and that the declaration of conformity of a law with the constitution also implies its conformity with the Charter. In this case, the declaration of constitutional conformity of the Electoral Code, including the procedure for its adoption, presupposes its conformity with the Charter and its additional instruments.

**78.** In the light of the foregoing, the Court considers that it would not be reasonable to ask the Applicant to submit to the Constitutional Court matters on which the said Court has previously ruled on.

**79.** The Court consequently dismisses the objection of non-exhaustion of local remedies raised by the Respondent State.

## B. Other conditions of admissibility

**80.** The Court notes that the Parties do not dispute that the Application meets the requirements set out in Articles 56(1)(3)(4)(6) and (7) of the Charter and Rules 50(2) (a)(c)(d)(f) and (g) of the Rules.[21] However, the Court must examine whether these conditions are met.

**81.** The Court notes that the condition set out in Rule 50(2) (a) of the Rules[22] has been met, as the Applicant has clearly indicated his identity even though the Court granted anonymity.

**82.** The Court observes that the Application is not drafted in disparaging or insulting language and thus, meets the requirement specified in Rule 50(2) (c) of the Rules of Court.

**83.** The Court observes that the present Application is not based exclusively on news disseminated by the mass media but rather concerns legislative provisions of the Respondent State, and therefore satisfies the requirement set out in Rule 50(2)(d) of the Rules.

**84.** The Court notes that the Electoral Code of 2018 which is contested by the Applicant was promulgated on 9 October 2018, following the decision by the Respondent State's Constitutional Court of its conformity with the constitution (DCC 18-199 of 02 October 2018). The Application was filed on 2 September 2019, that is, ten (10) months and twenty-four (24) days later. The 2019 Electoral Code, invoked by the parties in their submissions following the filing of

20 Article 35 of the Rules of the Constitution provides, within the context of control of conformity with the Constitution: "The Constitutional Court shall take decisions regarding the law as a whole, with respect to both its substance and drafting procedure."

21 Formerly, Rule 40 of the Rules of 2 June 2010.

22 Formerly, Rule 40(1) of the Rules of 2 June 2010.

the Application, was promulgated on 15 November 2019, after the filing of the Application, thus, not relevant in the computation of reasonable time.

**85.** Given the fact that the adoption of the Electoral Code of 2018 was followed by attempts to find local remedies by political actors over its annulment, the Court is of the view that ten (10) months and twenty-four (24) days are reasonable to file an Application before it, in accordance with rule 50(2)(f) of the Rules .

**86.** Lastly, the Court notes that the present Application does not concern a case that has already been settled by the Parties in accordance with either the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter or any legal instrument of the African Union. It therefore fulfils the condition set out in Rule 50(2)(g) of the Rules.

**87.** In the light of the foregoing, the Court concludes that the Application satisfies all the conditions of admissibility laid down in Article 56 of the Charter and Rule 50 of the Rules and, accordingly, declares it admissible.

## VIII. Merits

**88.** The Applicant alleges the following: A) The illegitimacy and illegality of the National Assembly in amending electoral laws; B) The violation of the obligation to establish independent and impartial electoral bodies; C) The violation of the obligation to not make unilateral and substantial amendments of the Electoral Code of 2019 laws less than six months before the elections; D) The violation of the obligation to guarantee national and international peace and security; E) The violation of the right to equal protection of the law.

### A. Alleged illegitimacy and illegality of the National Assembly.

**89.** The Applicant alleges that “Article 13 of the Charter affirms that voters, candidates and elected representatives are equal in matters relating to elections”. In this regard, he states that “[t]he Charter requires due compliance with the forms, procedures and operations that accompany it.”

**90.** The Applicant considers that “[t]he National Assembly which voted the new Electoral Code applied during the May 2020 elections is illegal and illegitimate”, as it “is not representative of the people and therefore cannot vote an electoral code that allows the holding

of free, multiparty and transparent local and municipal elections.".

**91.** He further contends that "[t]he absence of opposition political parties in the local and municipal election process is indisputable", due to the fact that "[t]he political parties that participated in the elections are all close to Mr. Patrice Talon."

**92.** By way of illustration, the Applicant notes the low turn-out in opposition strongholds, including that of former President Boni Yayi in Tchaourou or in the Cadjèhoun district of Cotonou, where participation did not exceed 10%. He also cites the low turnout (16.14%) in the Zongo district of Cotonou at the polling station where Mr. Patrice Talon voted.

**93.** As a result of the above situation and the Applicant's forced exclusion from direct participation in the government of his country as well as his inability to choose his "political status", the Applicant considers that Articles 1, 2, 13(1) and 20(1) of the Charter were violated, as were Articles 3 and 4 of ACDEG, Articles 1(i)(2) of the ECOWAS Protocol on Democracy and Chapter 4.B of the Bamako Declaration of 3 November 2000.[23]

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**94.** Responding to the request for annulment of the local and municipal elections the Respondent State disputes the above allegation in general terms, arguing in particular that "the closeness of political actors in no way detracts from the legality of democratic elections, as the Applicant does not raise any legal arguments to support his allegation of non-compliance with the substantive or formal requirements of the electoral process as provided for by the law in force."

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23 Bamako Declaration, adopted on 3 November 2000 by Ministers and Heads of Delegation of States and Governments of Francophone Countries, at the International Symposium on the review of the practices of democracy, rights and freedoms in the Francophone Countries.

**95.** The Court notes that the Applicant refers to violations of Articles 1, 2, 13(1) and 20(1) of the Charter as well as Articles 3 and 4 of the ACDEG, 1(i)(2) of the ECOWAS Protocol on Democracy and Chapter 4.B of the Bamako Declaration of 3 November 2000. However, the Court finds that the above allegations of violations fall within the scope of Article 13(1) of the Charter cited above.

**96.** The Court notes the Applicant's allegation that the National Assembly which passed a law on a new electoral code is illegal because it did not represent the Beninese people; that few strong political opposition parties were able to present candidates in local and municipal elections; and that he was excluded from direct participation in the government of his country and from choosing his "political status".

**97.** The Court notes that the issue here is whether these allegations amount to a violation of the Applicant's right to participate freely in the government of his country.

**98.** The Court notes in the instant case that the Applicant makes assertions without substantiating them. Indeed, he does not show to what extent the non-representative nature of the National Assembly affects his ability to exercise his legislative power and, consequently, how such a situation affects his right to participate directly in the government of his country and to choose his "political status". In this regard, the Court recalls, as it has previously stated, that "[g]eneral statements to the effect that these rights have been violated are not enough. More substantiation is required."[24]

**99.** In the light of the foregoing, the allegation of violation of the Applicant's right to participate directly in the government of his country is dismissed.

## B. Alleged violation of the obligation to establish independent and impartial electoral bodies

**100.** According to the Applicant, Article 13 of the Charter, Article 17 of ACDEG, the Commission's resolutions adopted between 1996 and 2008 on elections and democracy, in particular Resolution 164(XLVII) on elections in South Africa, and Article 3 of ECOWAS Protocol on Democracy point to "the obligation to establish and strengthen independent and impartial electoral bodies".

**101.** On the basis of the Public International Law Dictionary (Brussels, 2001), the Applicant defines independence as "the fact of a person or an entity not depending on any other authority than its own",

24 *Alex Thomas v Tanzania* (merits), § 140.

and impartiality as "the absence of bias, prejudice and conflict of interest". He considers "[t]hat an independent electoral body must enjoy administrative and financial independence and provide sufficient guarantees as to the independence and impartiality of its members."

**102.** The Applicant recognises that the COS-LEPI "[a]ppears to be a real electoral body in the process of organising elections in Benin". He nevertheless challenges its current composition on the grounds that the parliamentary minority that appointed the four members of COS-LEPI is not a real opposition, given that all its members support the political actions of the President of the Republic, Patrice Talon.

**103.** The Applicant further questions the independence and impartiality of the Director General of the National Institute of Statistics and Economic Analysis (INASE) and the Director of the National Civil Registry Service by virtue of the fact that they are Government appointees.

**104.** The Applicant contends that independence and impartiality require that other actors in the electoral process such as the executive have no disciplinary power over the electoral body. In this regard, he criticises the Respondent State for keeping the budget coordinator of CENA in custody for 48 hours, and for sending by the Minister of Finance of the Inspector General of Finance to CENA who revealed a cash shortfall of three hundred and twenty-five billion (325,000,000,000) billion CFA francs.

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**105.** The Respondent State alleges that, in accordance with Article 13 paragraph 1 of the Electoral Code 2019, "CENA is a legal entity. It is completely independent of the institutions of the Republic ..."

**106.** The Respondent State argues that, under Article 25 of Electoral Code of 2018 applicable at the time of the impugned acts, "[p]ersons serving on CENA may not be prosecuted, arrested, detained or tried for opinions expressed or acts committed in the performance of their duties". In the opinion of the Respondent State, this provision gives immunity to the members of CENA; and, consequently, the fear of violation alleged by the Applicant does not amount to a violation of the applicable instruments.

***

**107.** The Court notes that Article 17(1)(2) of ACDEG provides that:

> State Parties re-affirm their commitment to regularly hold transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall:
>
> 1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
> 2. Establish and strengthen national mechanisms that redress election related disputes in a timely manner.

**108.** Article 3 of the ECOWAS Protocol on Democracy provides that:

> The bodies responsible for organizing the elections shall be independent or neutral and shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organized to determine the nature and the structure of the bodies.

**109.** According to the Court, it follows from the above provisions "that an electoral body is independent when it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality".[25]

**110.** In the present case, the Court notes that the Applicant does not question the administrative and financial autonomy of COS-LEPI and CENA. The Applicant however questions the independence and impartiality of the members of COS-LEPI appointed by the parliamentary minority and the disciplinary power the government has over the members of CENA.

**111.** The Court notes that at the time of the acts alleged against the Respondent State, the Electoral Code in force was that of 2018, whose Article 137 provides that COS-LEPI was composed of: five MPs from the parliamentary majority; four MPs from the parliamentary minority; the Director General of the National Institute of Statistics and Economic Analysis; and the Director of the National Civil Registry Office.

**112.** The Court notes that the issue at hand is whether the appointment of the four members of COS-LEPI by the parliamentary minority as well as the appointment of the Director General of the National Institute of Statistics and Economic Analysis (INASE) and of the

25 *Suy Bi Gohore Emile v Republic of Côte d'Ivoire*, ACtHPR, Application 044/2017, Judgment (15 July 2020) (merits), § 200; *Actions for the Protection of Human Rights v Republic of Côte d'Ivoire* (merits and reparations) (18 November 2016), 1 AfCLR 683, § 118.

Director of the National Civil Registry Office by the Government cast doubt on its independence and impartiality. For CENA, the question is whether the Government's exercise of disciplinary power over the CENA budget coordinator constitutes a violation of its independence and impartiality. To answer these questions, one must first determine whether COS-LEPI and CENA are electoral bodies within the meaning of the above-mentioned provisions.

**113.** On this issue, the Court notes that the Applicant's assertion that COS-LEPI "[appears to be a genuine electoral body in the process of organising elections in Benin]" is not challenged by the Respondent State. The Court infers from this that the parties agree that COS - LEPI is a genuine electoral body.

**114.** As regards CENA, its nature as an electoral body is obvious [considering that its mandate] involves the "[p]reparation, organisation of the election process, supervision of voting operations and centralisation of results...", according to Article 16 paragraph 1 of the 2018 Electoral Code.

**115.** Having made this clarification, the Court will now examine the independence and impartiality of CENA and COS-LEPI.

## i. The Independence and impartiality of CENA

**116.** The Court notes that the Applicant questions the independence and impartiality of CENA, seeing that the CENA budget coordinator was kept in custody for 48 hours and that the Minister of Finance sent the Inspector General of Finance to CENA who revealed a cash shortfall of three hundred and twenty-five billion (325,000,000,000) billion CFA francs. The Applicant concludes that, as a result, the Respondent State challenged the standard that requires the executive not to have any disciplinary power over the electoral body.

**117.** On this point, the Court notes that, in accordance with paragraphs 1 and 2 of Article 20 of the Electoral Code of 2018 applicable at the time of the impugned acts, CENA was composed of: five members, appointed by the National Assembly, two by the parliamentary majority, two by the parliamentary minority and one judge.[26]

**118.** It follows from the above that the CENA budget coordinator is not a member of CENA but rather a public accountant who works at CENA under the supervision of the Ministry of Finance. The

26 Article 20: The Independent National Electoral Commission (CENA) is composed of five (05) members appointed by the National Assembly. They are chosen from among personalities recognized for their competence, probity, impartiality,

disciplinary authority to which he is subjected should therefore not be confused with control over CENA members who, according to Article 25 of the aforementioned text, "[c]annot be prosecuted, arrested, detained or tried for opinions expressed or acts committed in the performance of their duties."

**119.** Consequently, the Court is of the opinion that the allegation of CENA's lack of independence and impartiality has not been demonstrated. This allegation is therefore dismissed.

## ii. The independence and Impartiality of COS-LEPI

**120.** On the issue of lack of independence and impartiality of the four members of COS-LEPI due to their having been appointed by the parliamentary minority which does not represent a genuine opposition, the Court notes that it is not in dispute that the appointees belong to political parties that are distinct from that of the President of the Republic. It further notes their being close to the party in power or the President of the Republic is a question of their freedom to decide on matters of political alliance which, moreover, concerns the right of association provided for in Article 10 of the Charter.[27]

**121.** With regard to the two Directors General who are members of COS-LEPI, the Court notes that the Respondent State does not dispute that they are appointed by the Government. Moreover, Article 11 of Law No. 94-009 of 28 July 1994 on the creation, organisation and functioning of Offices of a social, cultural and scientific nature provides that the "Director General shall be appointed by a decree by the Council of Ministers, on the recommendation of the Supervising Minister, and after consultation with the Minister in charge of public and semi-public enterprises."

**122.** The Court notes that the two Directors General do not sit on COS-LEPI in a personal capacity but by virtue of their functions as Directors General. Given that they are appointed and dismissed by the Government, their functional independence means that in practice, they present themselves as representatives of the government on COS-LEPI. As a result, an external observer may reasonably doubt that a Director General who is appointed and could be dismissed by a government would refuse to follow the

morality, patriotism, and are appointed as follows: - two (02) by the Parliamentary Majority; - two (02) by the Parliamentary Minority; - one (01) Judge.

27 *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 113.

instructions of the one who appointed him or that he would not try to favour the appointing authority, if need be.

**123.** The Court has previously held that the composition of an electoral body must be balanced.[28] In this case, seven out of the eleven members of COS-LEPI, are under the control of the Government, namely: the five appointed by the parliamentary majority and the two Directors General who are appointed by the Government.

**124.** In the light of all the above, the Court concludes that, by virtue of its composition, COS-LEPI does not offer sufficient guarantees of independence and impartiality, and cannot therefore be perceived as providing such guarantees[29] as required by Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

**125.** Consequently, the Respondent State has violated Article 13(1) of the Charter, in addition to Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

## C. Unilateral and substantial amendment of electoral laws less than six months before the election

**126.** The Applicant submits that the Respondent State is a party to the ECOWAS Protocol on Democracy, as reaffirmed by its Constitutional Court in its decision DCC 15-086 of 14 April 2015. He concludes that the Respondent State is subject to Article 2(1) of the ECOWAS Protocol on Democracy which provides that "[n]o substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors."

**127.** The Applicant interprets Article 2(1) of the ECOWAS Protocol on Democracy as prohibiting substantial reforms of the electoral law within six months prior to elections, unless with the consent of a large majority of political actors. He alleges that in this case, "[t] he reform of the Electoral Code was voted after the non-inclusive political dialogue, thus without the consent of a large majority of the political actors."

**128.** The Applicant further alleges that, between 15 November 2019 (the date when the Electoral Code of 2019 was adopted) and 2 March 2020 (the date set by CENA for the start of the submission of applications for the local and municipal elections) less than six months had elapsed.

28 *Actions pour la protection des droits de l'homme v Republic of Côte d'Ivoire* (merits and reparations) (18 November 2016 2016) 1 AfCLR 668, § 125.

29 *Idem*, § 133.

**129.** He concludes that the aforementioned Article 2(1) of the ECOWAS Protocol on Democracy was violated as the Electoral Code was adopted less than six months before the local and municipal elections were held, and without the consent of a large majority of political actors.

***

**130.** The Respondent State refutes the Applicant's computation of the dates, arguing that the six months should be between 15 November 2019 and 17 May 2020, the date of the elections, which, according to the Respondent, is more than six months.

**131.** The Respondent State avers that the ECOWAS Protocol on Democracy was adopted "within the framework of the ECOWAS community with strict rules of control which are binding to this Court when it makes uses of it."

***

**132.** The Court notes that Article 2(1) of the ECOWAS Protocol on Democracy provides that "[n]o substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a large majority of Political actors."

**133.** The Court notes that the Respondent State ratified the ECOWAS Protocol on Democracy on 21 December 2001 and there is nothing in the record to indicate that it is no longer a party to it. In this regard, the Applicant asserts that the Constitutional Court of the Respondent State in its decision DCC 15-086 of 14 April 2015 reaffirmed that the Respondent State is still bound by this Protocol.

**134.** The Court notes that Article 2(1) cited above sets out the following requirements: i) that the reform must relate to the electoral law; ii) that it must be substantial; and (iii) that it must not take place during the six months preceding the elections, except with the consent of a large majority of the political actors.

**135.** The Court notes that the first two conditions are not discussed, and there is nothing on the record to indicate that the electoral law has not been substantially reformed.

**136.** The Court notes, on the other hand, that the Parties do not agree on the computation of the six-month period and on the consensual reform. It is therefore necessary to determine the meaning of the term «elections» in the context of the ECOWAS Protocol on Democracy and the date of departure of the computation of the six (06) month period.

**137.** The Court is of the opinion that in the context of this Protocol, "elections" means the date of voting, that is, 17 May 2020, which was the date of the local and municipal elections. The starting date of assessment of six (6) months is 15 November 2019, which corresponds to the date of publication of the Electoral Code of 2019 in the Official Gazette. Between 15 November 2019 and 17 May 2020, six months and two days elapsed.

**138.** Accordingly, the Court finds that the Respondent State did not violate its obligation not to modify the electoral law six (6) months preceding the elections.

## D. Alleged violation of the obligation to ensure national and international peace and security

**139.** The Applicant alleges that multiple violations of human rights and obligations, including the unbalanced composition of COS-LEPI affecting the independence and impartiality of this electoral body, and discrimination, constitute a threat to peace. He considers that peace is not only the absence of war.

**140.** The Applicant avers that "the weakening of human rights, justice and democratic institutions is the bedrock of terrorism". In this regard, he refers to "the coincidence of the unfortunate events of 1 and 2 May 2019 in Cadjèhoun and the abduction of French tourists in the Pendjari Park by jihadists from Burkina Faso." For the Applicant, this may result in a potential violation of Article 23(1) of the Charter by the Respondent State.

**141.** The Respondent State did not respond to this allegation.

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**142.** Article 23 of the Charter states:

1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.
2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:

i. any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;

ii. their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.

**143.** The Court notes that serious and massive violations of human rights, especially in the electoral context, can lead to the deterioration of national and international peace and security. It recalls that situations in which the poor organisation of elections, accompanied by serious and massive violations of human rights, led to disturbances that caused enormous loss of human life and material damage, are in the public domain.

**144.** The Court is convinced that while there is an ever-growing link between human rights and peace, the Applicant is making unsubstantiated allegations in the instant case. In this regard, the Court observes that "[g]eneral statements to the effect that this right has been violated are not enough. More substantiation is required."[30]

**145.** This allegation is, therefore, dismissed.

## E. Alleged violation of the right to equal protection of the law

**146.** The Applicant alleges that "[t]he composition of COS-LEPI is totally unbalanced in favour of the Government and that this imbalance affects the Independence and impartiality of this electoral body"

**147.** He alleges that "by failing to place all potential candidates on an equal footing, the current composition of COS-LEPI violates the right to protection of the law, enshrined in the various human rights instruments mentioned above and ratified by the Respondent State, particularly Article 10(3) of the ACDEG and Article 3(2) of the Charter.

30 *Alex Thomas v Tanzania* (merits), § 140.

***

**148.** The Respondent State contends that the composition of COS-LEPI does not present any element of illegality, as Article 137 of the Electoral Code of 2018 provides that COS-LEPI shall be composed of 11 members designated as follows: five members from the parliamentary majority, four from the parliamentary minority, the Director General of the National Institute of Statistics and Economic Analysis and the Director General of the national service in charge of civil status.

**149.** The Respondent State alleges that, in accordance with what was agreed with the Law, Administrative Affairs and Human Rights Commission of the National Assembly, five members of COS-LEPI were appointed by the "*Union Progressiste*", which is the parliamentary majority. The "*Republican Bloc*", which is the parliamentary minority, nominated the remaining four members. According to the Respondent State, the members of COS-LEPI were appointed in accordance with Article 137 of the Electoral Code of 2018 cited above. The composition of COS-LEPI is therefore legal and legitimate.

***

**150.** Article 3 of the African Charter provides as follows: "1. Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law."

**151.** The Court notes that the principle of equality before the law ensues from this text[31] and, as formulated, consists of two parts: the first relates to the obligation of the entities in charge of applying the law to do so equally with respect to all. The second part implies that the law itself treats people equally.[32]

31 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and Burkinabe Movement for Human and Peoples' Rights v Burkina Faso* (merits) (2014) 1 AfCLR, § 167; See also *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application 018/2018, Judgment of 15 July 2020 (merits and reparations), § 87.

32 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR, §§ 150-152.

**152.** The Court notes that, in the instant case, the provision challenged by the Applicant affords the same opportunity to all political parties - be they from the majority or minority in the National Assembly - to become members of COS-LEPI depending on their level of representation. In this regard, the Court has previously held that this principle "does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations."[33] Indeed, the difference in treatment between majority and minority parties with regard to representation in COS-LEPI stems from their differences in representation in the National Assembly.

**153.** The Court notes, based on the foregoing, that the distribution of seats in COS-LEPI is in line with Article 137 of the Electoral Code of 2018. This conclusion is, moreover, not disputed by the Applicant. Rather, he argues that the parliamentary minority does not constitute a serious opposition as it is close to the President of the Republic. However, this type of consideration falls within the political sphere that the Court is not supposed to deal with, unless they result in human rights violations.

**154.** In the light of the foregoing, the Court dismisses the Applicant's allegation.

## IX. Reparations

**155.** The Applicant requests the Court to order remedial measures for the violations of his rights, including the amendment of the electoral law and the annulment of the local and municipal elections of 17 May 2020.

**156.** The Respondent State requests the Court to deny the claim for reparations made by the Applicant and order the Applicant to pay the Respondent State two billion (2,000,000,000) CFA francs, as a counterclaim, for all the damage suffered and incurred.

***

33 *Jebra Kambole v Tanzania* (merits and reparations), § 87.

**157.** Article 27(1) of the Protocol provides that "[i]f 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."

**158.** The Court has previously held that reparations are only awarded when the responsibility of the Respondent State for an internationally wrongful act is established and a causal nexus is established between the wrongful act and the harm caused. As the Court stated earlier, the purpose of reparations is to ensure that the victim is placed in the situation he or she was in prior to the violation.[34]

**159.** The Court recalls that it had previously found that the Respondent State violated the Applicant's rights under Articles 17(1) of ACDEG, 2(1) and 3 of the ECOWAS Protocol on Democracy and, consequently, Article 13(1) of the Charter.

## A. Non-pecuniary reparations

**160.** The Applicant prays the Court to order the Respondent State to amend its Electoral Code of 2019 and to annul the 17 May 2020 local and municipal elections.

### i. Amendment of the Electoral Code

**161.** The Applicant requests the Court to order the Respondent State to amend the Electoral Code. The Respondent State objects to this request on the grounds that it is ill-founded.

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**162.** The Court notes that the prohibition to amend electoral laws less than six months prior to the elections without consensus is a principle that aims to avoid changes that favour or disadvantage certain candidates or political parties on the imminence of elections, regardless of the content of the amendment.

34 See *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application 009/2015, Judgment of 28 March 2019 (merits and reparations), §§ 116-118, and *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabe des droits de l'homme et des peuples v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR, § 60.

**163.** The Court notes that apart from the fact that it is expressly forbidden to amend electoral laws less than six months before elections, the substance of the amended law may also be at issue. In the present case, the Applicant is not challenging a specific provision of the amended Election Code, but rather the fact that it was amended less than six months before the elections.

**164.** Furthermore, the Court notes that it has not found a violation of the Respondent State's obligation not to unilaterally and substantially amend electoral laws less than six months before the election without the consent a large majority of political actors.

**165.** Accordingly, this request is rejected.

### ii. Annulment of the 17 May 2020 local and municipal elections

**166.** The Applicant asks the Court to annul the local and municipal elections of 17 May 2020 on the grounds that they were organised by non-independent and impartial electoral bodies, namely, CENA and COS-LEPI, and because the Electoral Code was amended less than six months before the elections by an illegitimate National Assembly.

***

**167.** The Court notes that it has not established the illegitimacy of the National Assembly nor the lack of independence or impartiality of CENA. However, it found that the Electoral Code was amended less than six months before the elections of 17 May 2020 and that the composition of COS-LEPI was unbalanced, given that seven of its eleven members are controlled by the Government and have decision-making powers as a majority.

**168.** The Court observes that, under Article 27(1) of the Protocol, it has sufficient powers to order a Respondent State to take measures to annul an election, if it deems it appropriate to remedy the situation. In doing so, it takes into account the gravity of the violations found, their implications for the credibility of the entire electoral process and the impact of such a measure on the security and stability of the country.

**169.** The Court notes that in the present case, the Applicant has not demonstrated that the violations found had a substantial impact

on the credibility of the entire electoral process. Nothing on the record indicates that the electoral process was affected by the said violations to such an extent as to warrant annulment of the elections as the most appropriate measure to remedy the situation.

**170.** The request is therefore denied.

## B. Counterclaim

**171.** The Respondent State prays the Court to "find that the anonymous Applicant's claims are null and void and find him liable for, and order him to pay the Respondent State's counterclaim in the sum of CFA francs two billion (2,000,000,000) as reparation for having caused the State to have a judgment against it that would adversely affect its image."

**172.** The Applicant did not reply.

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**173.** The Court notes from the record that the Respondent State's counterclaim is based on its allegation that the Applicant abused his right to seize the Court. However, the Court recalls its finding above that the Applicant has not abused his right to access the Court or the established procedures of the Court (see paragraph 45 of this Judgment). The Court has also not established that the Application is unfounded and baseless, as claimed by the Respondent State. The Court has rather found a violation of the Applicant's right, as a result of the Respondent State's failure to establish a balanced composition of the COS-LEPI. The fact that a judgment against the Respondent State is rendered by the Court, even though this may adversely affect its image, does not, *per se*, entitle the Respondent State to make a counterclaim.

**174.** Consequently, the Court finds that this prayer is unfounded and thus dismisses it.

## X. Costs

**175.** The Applicant requests that the Respondent State be ordered to pay the costs.
**176.** The Respondent State did not submit specifically on costs.

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**177.** The Court notes that Rule 32(2) of the Rules[35] provides that "Unless otherwise decided by the Court, each party shall bear its own costs, if any."
**178.** The Court rules that, in the circumstances of the case, each party shall bear its own costs.

## XI. Operative part

**179.** 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 of the admissibility of the Application.
iv. *Declares* that the Application is admissible.

*On merits*
v. *Finds* that the allegation of illegitimacy and illegality of the National Assembly has not been established;
vi. *Finds* that the allegation of lack of independence and impartiality of CENA has not been established;
vii. *Finds* that the Respondent State did not violate the Applicant's right to equal protection of the law prescribed in Article 3(2) of the Charter;

35 Formerly, Rule 30(2) of the Rules of 2 June 2010.

viii. *Finds* that the Respondent State did not violate the obligation not to modify the electoral law in the six (6) months preceding the legislative elections of 17 May 2020, provided for by Article 2(1) of the ECOWAS Protocol on Democracy;
ix. *Finds* that the Respondent State has violated the right of citizens to participate freely in the government of their country, provided for in Article 13(1) of the Charter, since the composition of COS-LEPI does not provide guarantees of independence and impartiality as required by Article 17(1) of ACDEG and Article 3 of the ECOWAS Protocol on Democracy;

*On reparations*
*Pecuniary reparations*
x. *Dismisses* the counterclaim of the Respondent State.

On non-pecuniary reparations
xi. *Dismisses* the request to annul the municipal and local elections of 17 May 2020.
xii. *Orders* the Respondent State to take necessary measures to bring the composition of COS-LEPI into conformity with the provisions of Article 17(1) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy before any election.

*Implementation and reporting*
xiii. *Orders* the Respondent State to submit to the Court, within three (3) months of the date of notification of this Judgment, a report on measures taken to implement the orders on paragraph xii herein.

*On costs*
xiv. *Rules* that each Party shall bear its own costs.

# XYZ v Benin (judgment) (2020) 4 AfCLR 83

Application 010/2020, *XYZ v Republic of Benin*

Judgment, 27 November 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought this action alleging that the Respondent State violated certain Charter guaranteed rights by illegitimately enacting a law to revise its Constitution without respect for the principle of national consensus and securing approval of the Constitutional court for the revision. The Court held that the Respondent State had violated the rights in question.

**Jurisdiction** (material jurisdiction, 25-26)

**Admissibility** (victim requirement, 48)

**Procedure** (joinder, 35 -36; abuse of process, 42-43; public interest, 49)

**Independent judiciary** (limbs of, 32; Institutional independence, 63, 66, 67; Individual independence, 63, 68-70; Impartiality, 81, 83)

**Amendment of constitution** (national consensus for, 101-103)

**Right to information** (necessity of right, 113; proof of non-violation, 118)

**Right to economic, social and cultural development** (disruption of, 126-127)

**Right to peace and national security** (nature of peace, 133-134)

**Reparations** (conditions for award, 139-140; moral damage, 146-147; forms of reparation, 149; counterclaim, 153-154)

## I. The Parties

**1.** XYZ (hereinafter referred to as "the Applicant") is a national of Benin. He requested anonymity citing personal security reasons. He challenges Law No. 2019-40 of 1 November 2019 revising Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin claiming that it violates his fundamental rights.

**2.** The Application is brought against the Republic of Benin (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 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. It further made the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") on 8 February 2016, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and non-governmental organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission, the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases and that it also has no effect on new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing.[1]

## II. Subject of the Application

### A. Facts of the matter

**3.** It emerges from the initial Application filed on 12 November 2019 that on 30 October 2019, the Parliament of Benin passed Law No. 2019-40 to amend Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin. This law was found to be in conformity with the Constitution by Constitutional Court Decision DCC 19-504 of 6 November 2019 and promulgated on 7 November 2019.

**4.** The Applicant submits that the Constitutional Court is a biased institution because its President is a close associate of the President of the Republic of Benin and he has defended, in his capacity as Minister of Justice, previous drafts prepared for the purpose of revising the Constitution which were declared unconstitutional by the Constitutional Court of Benin.

**5.** He further maintains that the impugned law was adopted in secret, without the involvement of all sections of the Beninese society, whereas international instruments to which the Respondent State has acceded oblige it to ensure that the process of amending or revising the constitution is based on national consensus.

**6.** Lastly, the Applicant submits that the constitutional revision that was adopted outside the rules of democracy, the rule of law and respect for human rights is a threat to the peace and security of the people of Benin.

1 *Ingabire Victoire Umuhoza v Republic of Rwanda*, (jurisdiction) (3 June 2016) 1 AfCLR 585, §69; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Ruling of 05 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020.

## B. Alleged violations

**7.** The Applicant alleges:

i. Violation of the right to independence and impartiality of courts and tribunals under Articles 26 and 7 of the Charter;

ii. Violation of the principle of national consensus protected by Article 10(2) of the African Charter on Democracy, Elections and Good Governance (ACDEG):

iii. Violation of the right to information enshrined in Article 9(1) of the Charter;

iv. Violation of the right to Economic, Social and Cultural Development protected by Article 22(1) of the Charter; and

v. Violation of the right to peace and security enshrined in Article 23(1) of the Charter.

## III. Summary of the Procedure before the Court

**8.** The Application was filed on 14 November 2019 together with a request for provisional measures, referred to as the "Additional Applications No 021/2019 and 022/2019.

**9.** At its 53rd Ordinary Session, the Court decided to grant the Applicant's request for anonymity and informed the Parties of its decision.

**10.** On 7 March 2020, the Registry informed the Applicant that the Court had decided to consider his Application as a separate application on the basis that the subject-matter and the facts were different from the Consolidated Applications 021/2019 and 022/2019.

**11.** The Application was served on the Respondent State on 13 March 2020.

**12.** On 3 April 2020, the Court dismissed the request for provisional measures to stay the application of Law No. 2019-40 of 07 November 2019 revising Law No. 90-032 of 11 December 1990 on the Constitution of Benin on the ground that he has not demonstrated the existence of extreme urgency or the risk of serious and irreparable harm The order was notified to the Parties on 3 April 2020.

**13.** The Parties filed their submissions on the merits and on reparations within the prescribed time-limits.

**14.** On 9 October 2020, pleadings were closed and parties were duly notified.

## IV. Prayers of the Parties

**15.** The Applicant prays the Court to:

i. Declare and rule that the Republic of Benin has violated Articles 1, 7, 9(1), 13(1), 20(1), 22(1), 23(1) and 26 of the Charter and Article 10(2) of ACDEG;

ii. Adjudge and determine that the Republic of Benin has perpetrated the crime of unconstitutional revision of the Constitution by grabbing the powers of the legislative power and tinkering with the rules on the vacancy of power without any consensus and any recourse to referendum through the 9 members of the committee of experts, the 10 parliamentarians who initiated the revision the Constitution and 4 judges of the Constitutional Court;

iii. Order the Republic of Benin to annul Decision DCC 2019-504 of 6 November 2019 and Law No. 2019-40 to revise Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all laws derived therefrom, and then urgently proceed to reinstate Law No.90-032 of 11 December 1990;

iv. Refer the situation to the Peace and Security Council of the African Union in liaison with the Chairperson of the Commission, so that appropriate sanctions are meted out against the Respondent State, the MPs who sponsored the bill and the 4 judges of the Constitutional Court.

v. Order the Respondent State to pay him the sum of 1,000,000,000 CFA francs as damages.

**16.** The Respondent State prays the Court to:

i. Declare that the Court lacks jurisdiction;

ii. Declare the application inadmissible;

iii. Establish the impartiality of the Constitutional Court of Benin;

iv. Find that the constitutional revision was carried out in conformity with the 11 December 1990 Constitution of Benin;

v. Note that the law to amend the Constitution was consensually voted by the required majority of parliamentarians;

vi. Note the vacuity of the proceedings initiated against the Respondent State by the Applicant;

vii. Consequently, order the Applicant to pay to the Respondent State, by way of compensation, the sum of one billion (1,000,000,000) FCFA for all damages suffered and incurred.

## V. Jurisdiction

**17.** The Court notes that Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights

instruments ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

**18.** According to Rule 49(1) of the Rules, "The Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules".[2]

**19.** On the basis of the above-cited provisions, the Court must, in every application, preliminarily ascertain its jurisdiction and rule on the objections to its jurisdiction, if any.

**20.** The Court notes that the Respondent State raises an objection to its material jurisdiction.

## A. Objection to material jurisdiction

**21.** The Respondent State asserts that the Applicant does not allege any human rights violations and thus, the Court lacks material jurisdiction to examine the Application.

**22.** The Applicant submits that Article 3(1) of the Protocol confers on the Court jurisdiction to entertain all cases and disputes before it concerning the interpretation and application of the Charter, the Protocol, and any other relevant human rights instruments ratified by the States concerned.

**23.** He contends that in his Application, he has expressly cited violations of its fundamental rights protected by the Charter and African Charter on Democracy Elections and Governance[3] (hereinafter referred to as "the ACDEG") and the Court has jurisdiction to consider his claims on the basis of Article 3 of the Protocol. Consequently, the Applicant argues that the objection raised by the Respondent in this regard should be dismissed.

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2 Formerly Rule 39(1) of the Rules of 2 June 2010.

3 The Respondent State became a party to the African Charter on Democracy, Elections and Governance on 11 July 2012.

**24.** The Court notes that, pursuant to Article 3(1) of the Protocol, it has jurisdiction over "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".

**25.** The Court considers that in order for it to have material jurisdiction, it suffices that the rights which are alleged have been violated be protected by the Charter or by any other human rights instrument ratified by the State concerned.[4]

**26.** The Court notes in this case that the Application contains allegations of violations of rights protected by Articles 26, 7, 22(1) 23(1) of the Charter and Article 10(2) of ACDEG. With regard to ACDEG, specifically, the Court recalls its position that this Convention constitutes a human rights instrument and thus, the Court has the competence to examine applications alleging violations of its provisions.[5]

**27.** The Court accordingly concludes that it has material jurisdiction and therefore rejects the objection raised by the Respondent State.

## B. Other aspects of jurisdiction

**28.** Having found that there is nothing on the record to indicate that it does not have jurisdiction with respect to the other aspects of jurisdiction, the Court concludes that it has:

i. Personal jurisdiction, in so far as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration which allows individuals and non-governmental organisations to bring cases directly before the Court. In this vein, the Court recalls its earlier position that the Respondent State's withdrawal of its Declaration on 25 March 2020 does not have effect on the instant Application, as the withdrawal was made after the Application was filed before the Court.[6]

ii. Temporal jurisdiction, in so far as the alleged violations were committed, in respect of the Respondent State, after the entry into force of the applicable human rights instruments.

4 *Franck David Omary & ors vUnited Republic of Tanzania*, (ruling on admissibility) (28 March 2014) 1 AfCLR 371, §74; *Peter Chacha v United Republic of Tanzania*, (ruling on admissibility) (28 March 2014) 1 AfCLR 413, §118.

5 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits and reparations) (28 November 2016) 1 AfCLR 668, §§ 57-65 ; *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire*, ACtHPR, Application No 044/2019, (merits and reparations) (15 July 2020),§ 45.

6 See paragraph 2 above.

iii. Territorial jurisdiction, in so far as the facts of the case and the alleged violations took place on the territory of the Respondent State.

**29.** Accordingly, the Court declares that it has jurisdiction to examine the instant Application.

## VI. Preliminary objections

**30.** The Respondent State raises three objections, namely the absence of a nexus between the present Application and Applications No 021/2019 and 022/2019, the Applicant's abuse of the right of standing, and the Applicant's lack of interest in bringing this Application.

**31.** The Court notes that even if these objections are not grounded in the Protocol and the Rules, as they raise issues of admissibility outside the domain of Article 56, the Court is required to examine them.

### A. Objection based on the absence of a link between the present Application and Consolidated Applications No 021/2019 and 022/2019

**32.** The Respondent State asserts that an additional application is admissible only if it is sufficiently connected to the main application. In the absence of such a link, the additional application should be declared inadmissible.

**33.** In this regard, it alleges that the present Application relates to the law amending the Constitution while Consolidated Applications Nos. 021/2019 and 022/2019 concerning the Beninese Criminal Code and the annulment of Mr Lionel Zinsou's conviction. According to the Respondent State, there is no link between the instant Application and these Consolidated Applications, thus, the Application should be declared inadmissible.

**34.** The Applicant avers that the joinder of cases is at the Court's discretion and it can decide to join or not to join cases in the interest of justice. He therefore argues that this objection should be dismissed.

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**35.** The Court notes that the joinder of the applications brought before it is a matter for its discretionary assessment. It is not bound by the title of an application.

**36.** In the present case, having found that Applications No 021/2019 and 022/2019 and the present Application are unrelated, the Court applied its discretion and decided to treat the latter as an application in its own right and to register it as such.

**37.** Consequently, the Court dismisses the Respondent State's objection in this regard.

## B. Objection based on the abuse of the right to file Application

**38.** The Respondent State submits that the Applicant has, under the cover of anonymity, filed several applications to the Court in the space of a few months using false documents and that all these proceedings were initiated solely with the aim of using the Court as a political forum. It therefore avers that the present Application is abusive and should be declared inadmissible.

**39.** The Applicant submits that neither the Charter, the Protocol nor the Court's Rules lay down a maximum number of applications which the Applicant is entitled to submit to the Court.

**40.** He asserts that the filing of several applications does not in itself constitute an abuse of procedure capable of justifying inadmissibility, insofar as the applications do not relate to the same facts and subject-matter.

**41.** The Applicant further submits that such abuse can only be established at the merits stage.

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**42.** The Court notes that an application is said to be an abuse of court process, among others, if it is manifestly frivolous or if it can be discerned therefrom that an applicant filed it in bad faith contrary to the general principles of law and the established procedures of judicial practice. In this regard, it should be noted that the mere fact that an applicant files several applications, does not necessarily show a lack of good faith on the part of the applicant.

**43.** The Court further notes that the fact that an application was prompted by reasons of political propaganda, even if it were

established, would not necessarily render the application an abuse of court process and that, in any event, that fact can only be established after a thorough examination of the merits.

**44.** The Court therefore dismisses the respondent state's objection that the instant Application is an abuse of process abusive.

## C. Objection based on lack of interest

**45.** The Respondent State contends that it is a principle that legal action is conditioned by the capacity, standing and current, legitimate, personal interest to act. It submits that since the Applicant has failed to prove his interest in bringing proceedings, the Application should be declared inadmissible.

**46.** The Applicant states that the Application relates to the Beninese Constitution, in particular the right to vote of the citizens of that country. He considers that it is in his interest to act in his capacity as a national of that country.

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**47.** The Court notes that under Article 5(3) of the Protocol, "the Court may entitle relevant Non-Governmental Organisations (NGOs) with observer status with the African Commission and individuals to institute cases directly before it…".

**48.** The Court notes that these provisions do not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court, especially in the case of public interest litigation. The only precondition is that the Respondent State, in addition to being a party to the Charter and the Protocol, should have deposited the Declaration allowing individuals and NGOs to file a case before the Court. This is also in cognisance of the practical difficulties that ordinary African victims of human rights violations may encounter in bringing their complaints before the Court, thus allowing any person to bring applications to the Court on others' behalf without a need to demonstrate victimhood or a direct vested interest in the matter.[7]

7 African Commission on Human and Peoples Rights, Communications 25/89, 47/90, 56/91, 100/9, *World Trade Organisation Against Torture, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah (WTOAT) v Zaire*, § 51.

**49.** In the instant case, the Applicant is contesting the manner and context under which the revision of the Beninese Constitution was carried out. In this regard, the Court observes that the amendment of laws such as the constitution, which is the supreme law of the land,[8] is of particular interest to all citizens as it has a direct or indirect bearing on their individual rights and the security and well-being of their society and country. Accordingly, considering that the Applicant himself is a citizen of the Respondent State and that the revised provisions of the Constitution have a potential impact on the right of every citizen to participate in the political affairs of his country, it is evident that he has a direct interest in the matter.

**50.** The Court therefore dismisses the Respondent State's objection on this point.

## VII. Admissibility

**51.** Article 6(2) of the Protocol provides that "The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."

**52.** In accordance with Rule 50(1) of the Rules,[9] "the Court shall ascertain the admissibility of an application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules".

**53.** Rule 50(2) of the Rules,[10] which in essence restates Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

a. Indicate their authors, even if the latter request anonymity;

b. Be compatible with the Constitutive Act of the African Union and with the Charter;

c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the African Union;

d. Are not based exclusively on news disseminated through the mass media;

e. Are sent after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;

f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the

8 See Article 3, Constitution of the People's Republic of Benin of 11 December 1990.

9 Formerly Rule 40 of the Rules of 2 June 2010.

10 *Ibid*.

matter;

g. Do not deal with cases which have already been settled by those States involved in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter.

**54.** The Court notes that the compliance of the present Application with the conditions set out in Rule 50(2) of the Rules is not disputed by the Parties. However, the Court must examine whether these conditions are met.

i. The Court notes that the condition set out in Rule 50(2)(a) of the Rules has been met, as the Applicant has clearly indicated his identity even though the Court granted anonymity.

ii. The Court also finds that the Application is compatible with the Constitutive Act of the African Union and the Charter in so far as it relates to allegations of violations of human rights enshrined in the Charter and therefore complies with Rule 50(2) (b) of the Rules of Court.

iii. The Court observes that the Application is not drafted in disparaging or insulting language and thus, meets the requirement specified in Rule 50(2) (c) of the Rules of Court.

iv. The Court observes that the present Application is not based exclusively on news disseminated by the mass media but rather concerns legislative provisions of the Respondent State, and therefore satisfies the requirement set out in Rule 50(2)(d) of the Rules.

v. The Court notes that the Application was filed before the Court after Law No. 2019-40 of 31 October 2019 revising the Constitution was enacted following decision DCC 2019-504 of 6 November 2019 of the Constitutional Court of the Respondent State in conformity with Article 114 of the Beninese Constitution[11] which is the highest jurisdiction of the State in constitutional matters. There is nothing in the file indicating that the Applicant had any other ordinary judicial remedy within the legal system of the Respondent State that he could have pursued to get redresses to his grievances**.** Consequently, the Court finds that the Applicant has exhausted local remedies and therefore the Application complies with Rule 50(2) (e) of the Rules.

vi. The Court further notes that following the decision DCC 2019-504 of the Constitutional Court dated 06 November 2019, the disputed law was promulgated on 7 November 2019 and published on 13 November 2019. The Application was filed before the Court on 14 November 2019, that is, eight (8) days after the Constitutional Court rendered its decision. The Court is of the view that there is no unreasonable delay on the part of the Applicant in this regard and

11 Constitution of 11 December 1990.

thus, holds that the Application was filed within a reasonable time in accordance with Rule 50(2)(f) of the Rules.[12]

vii. Lastly, the Court notes that the present Application does not concern a case that has already been settled by the Parties in accordance with either the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter or any legal instrument of the African Union. It therefore fulfils the condition set out in Rule 50(2)(g) of the Rules

**55.** In light of the foregoing, the Court concludes that the Application meets all the admissibility requirements set out in Article 56 of the Charter and Rule 50(2) of the Rules of Court.

**56.** The Court accordingly declares the Application admissible.

## VIII. Merits

**57.** The Applicant alleges the violations of (A) the right to independence of the constitutional court, (B) the right to impartial constitutional court, (C) principle of national consensus, (D) right to information, (E) the right to economic, social and cultural development, and the right to peace and security.

### A. Alleged violation of the obligation to guarantee the independence of the Constitutional Court

**58.** The Applicant submits that the lack of independence of the Constitutional Court lies in the brevity and renewable nature of the judges' mandate and a lack of financial autonomy.

**59.** The Respondent State makes no observations on this point.

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**60.** Article 26 of the Charter provides that "State Parties to the present Charter shall have the duty to guarantee the independence of the courts (...)".

**61.** The Court notes that the independence of the judiciary is one of the fundamental pillars of a democratic society. The notion

12 *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 105, § 52; *Norbert Zongo & ors v Republic of Burkina Faso*, (ruling on preliminary measures) (21 June 2013), 1 AfCLR 204, §121.

of judicial independence essentially implies the ability of courts to discharge their functions free from external interference and without depending on any other government authority.[13]

**62.** It should be noted that judicial independence has two main limbs: institutional and individual. Whereas institutional independence connotes the status and relationship of the judiciary with the executive and legislative branches of the government, individual independence pertains to the personal independence of judges and their ability to perform their functions without fear of reprisal.[14] The obligation to guarantee the independence of courts in Article 26 of the Charter thus includes both institutional and individual aspects of independence.

**63.** The Court observes that institutional independence is determined by reference to factors such as: the statutory establishment of judiciary as a distinct organ from the executive and the legislative branches with exclusive jurisdiction on judicial matters, its administrative independence in running its day to day function without inappropriate and unwarranted interference, and provision of adequate resources to enable the judiciary to properly perform its functions.[15] On the other hand, individual independence is primarily reflected in the manner of appointment and tenure security of judges, specifically the existence of clear criteria of selection, appointment, duration of term of office, and the availability of adequate safeguards against external pressure. Individual Independence further requires that States must ensure that judges are not transferred or dismissed from their job at the whim or discretion of the executive or any other government authority[16] or private institutions.

**64.** The Court notes that the Constitutional Court in the Respondent State is created pursuant to Article 114 of the Constitution as a regulatory body of all other public institutions with the highest jurisdiction on constitutional matters.[17] Similar to countries with

13 *Action pour la protection des droits de l'homme v Côte d'Ivoire*, (merits and reparations) (18 November 2016) 1 AfCLR 697, § 117. See also Dictionary of international public Law, Jean Salmon, Brulyant, Bruxelles, 2001, p. 562 and 570.

14 African Commission on Human and Peoples' Rights, Guidelines and principles on the right to fair trial in Africa, § 4 (h) (i)., See also Principles 1-7, UN Basic Principles on the Independence of the Judiciary, General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

15 *Ibid*.

16 *Ibid*. See also ECHR, *Campbell and Fell*, §78, Judgment of 28 June 1984; *Incal v Turkey*, Judgment of 9 June 1998, Reports 1998-IV, p. 1571, §65.

17 Article 114 of the Constitution of Benin of 11 December 1990

Francophone tradition, it is not part of the structure of regular courts but is placed outside a separate judicial institution distinct from the legislative and executive organs.[18]

**65.** The Court further observes that in addition to the Constitution, the Respondent State's Law No. 91-009 of 4 March 1991 on the Organic Law on the Constitutional Court contains provisions that ensure administrative and financial autonomy of the Constitutional Court.[19]

**66.** As far as its institutional independence is concerned, it is thus not apparent either from the Constitution or from the organic law of the Constitutional Court that it may be subject to direct or indirect interference or that it is under the subordination of any power or parties when exercising its jurisdictional function.

**67.** Consequently, the institutional independence of the Constitutional Court of the Respondent State is guaranteed.

**68.** As regards individual independence, Article 115 of the Constitution of the Respondent State stipulates that the Constitutional Court shall be composed of seven judges appointed for a period of five (5) years renewable once, four of whom shall be appointed by the Office of the National Assembly and three by the President of the Republic. It requires that the Judges must have the required professional competence, good morality and great probity. The Constitution also stipulates that judges are irremovable for the duration of their term of office and may not be prosecuted or arrested without the authorization of the Constitutional Court itself and the Office of the Supreme Court sitting in joint session except in cases of flagrant offence.

**69.** The Court observes that while it is true that the prohibitions in Article 115 against removability and unwarranted prosecution and the requirements of professional and ethical qualifications of members of the Constitutional Court, to some extent, guarantee individual independence, the same cannot be said about the renewable nature of their term. This is exacerbated by the fact that there is no provision in Beninese law stipulating the criteria for renewal or refusal to renew the term of office of the judges of the Constitutional Court. The President and the Bureau of the

18 L Favoreu *Les Cours constitutionnelles* (1986) Paris, PUF, Collection Que Sais-je? 18-19.

19 Article 18 of the same law, for example, stipulates that: "On the proposal of the President of the Constitutional Court, the appropriations necessary for the functioning of the said Court shall be entered in the National Budget. The President of the Court shall be the Authorising Officer for expenditure".

National Assembly retain the discretion to renew their mandate.

**70.** Indeed, for judges who are appointed, the renewable nature of the term of office, which depends on the discretion of the President of the Republic and the Bureau of the National Assembly, does not guarantee their independence,[20] especially as the President is empowered by law to refer cases to the Constitutional Court.[21]

**71.** In view of the foregoing, the Court is of the opinion that the renewable nature of the mandate of the Judges of the Constitutional Court of the Respondent State in the circumstances of this case, compromises their independence.

**72.** The Court concludes that the independence of the Constitutional Court is not guaranteed and, therefore, the Respondent State has violated Article 26 of the Charter.

## B. Alleged violation of the Respondent State's obligation to guarantee the impartiality of the Constitutional Court

**73.** The Applicant states that the impartiality of a judicial body is essential for the parties. It must be free from personal bias or prejudice and offer sufficient guarantees of objectivity.

**74.** He alleges that the Constitutional Court is a biased institution because its President, Mr Joseph Djogbenou, is close to the President of the Republic of Benin, he participated in his capacity as Minister of Justice in previous attempts to draft revisions to the Constitution, explained the merits of these revisions and defended them before Parliament.

**75.** He further states that the President of the Constitutional Court wore the double hat of a rapporteur and presiding judge who declared the constitutional revision in conformity with the constitution.

**76.** The Applicant argues that Mr Djogbenou's impartiality affects the Constitutional Court as a whole and that, consequently, the Constitutional Court could only issue a decision of conformity with this revision, the text of which violates his alleged fundamental rights.

20 D. Rousseau, la Justice constitutionnelle en Europe, Paris, Montchrétien, 1992, "The non-renewable nature of a term of office is a guarantee of independence because the appointing authorities cannot exchange a good decision for appointments and the judges themselves have no interest in seeking favours from these authorities".

21 Article 121 allows the President of the Republic refer cases to the Constitutional Court.

**77.** The Applicant concludes that decision DCC 2019-504 of 6 November 2019 violates the principle of the impartiality of courts and tribunals enshrined in Articles 7(1) (d) of the Charter.

**78.** The Respondent State asserts that the integrity of the Constitutional Court of Benin does not suffer from any contention. It is composed of magistrates, professors and legal practitioners whose competence, experience and independence are recognised.

**79.** It further argues that constitutional review is carried out in collegial formation. Suspicions of bias as well as the statements of one member cannot prejudge the conduct of the Court as a whole. In any case, the Applicant does not prove bias.

***

**80.** Article 7 of the Charter provides that:

1. Every individual shall have the right to have his cause heard. This right includes:

……

d. the right to be tried within a reasonable time by an impartial court;

**81.** The Court observes that the concept of impartiality is an important component of the right to a fair trial. It signifies the absence of bias, or prejudice and requires that "judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".[22]

**82.** The Court notes that a judicial authority must offer sufficient guarantees to exclude any legitimate doubt throughout the judicial process.[23] However, the Court recalls its previous decision on this point where it observed 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" and that "whenever an allegation of bias or a reasonable apprehension of

22 Human Rights Committee, Communication No. 387/1989, *Arvo O. Karttunen v Finland* (Views adopted on 23 October 1992), in UN Doc. GAOR, A/48/40(vol. II), § 7.2.

23 *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application 001/2017, (merits and reparations), (Judgment of 28 June 2019), § 128.

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.[24]

**83.** Accordingly, the Court notes that a mere allegation of impartiality of a judicial authority is not sufficient and any subjective perception by a party of the existence of bias on the part of a judge should be justified and substantiated by credible evidence.

**84.** In the instant case, the Court notes the Applicant's allegation that Mr Djogbenou is a friend of the President of the Republic and that he had defended the revision of the Constitution while he was a Minister of Justice, a fact which in the Applicant's opinion, is sufficient to consider him partial and by extension, the Constitutional Court.

**85.** The Court further notes that Mr Djogbenou's friendship with the President of the Republic is not contested by the Respondent State. However, the Applicant has not proved that the statements and opinions made in 2017 by Mr Djogbenou in his capacity as a Minister of Justice concern the same points disputed in the context of the constitutional revision of 31 October 2019.

**86.** The Court understands that Mr Djogbenou's previous involvement in the revision of the Constitution, which is not disputed by the Respondent State, might have created the possibility of appearance of bias. This is particularly true considering that he was the one who drafted the majority decision. However, he was only one among other judges of the Court who sat on the Bench to consider the matter and his previous involvement in the revision process does not necessarily demonstrate the existence of preconceived bias on his part. In fact, the Applicant has not adduced any evidence to this effect or to prove that Mr Djogbenou had in any way, imposed his opinions on the other members of the Court.

**87.** In view of the above, the Court concludes that the Respondent State has not violated the Applicant's right to impartial tribunal, as required by Article 7(1)(d) of the Charter.

## C. Alleged violation of the principle of national consensus

**88.** The Applicant asserts that the law revising the Constitution has not been supported by a significant part of the Beninese people and is therefore not consensual.

24 *Ibid*.

**89.** He argues that in fact, at the end of the crisis resulting from the legislative elections of 28 April 2019, the President of the Republic convened on 10, 11 and 12 October 2019, a meeting called "political dialogue" in the absence of the most significant opposition political parties.

**90.** At the end of this meeting, recommendations were adopted and submitted to the President of the Republic, including the organisation of early general elections in 2020 and 2021 preceded by the tidying up of the political parties' charter and the electoral code. As part of the implementation of these recommendations, a committee of experts was set up.

**91.** The report submitted by this committee to the President of the Republic presented several legislative proposals along the lines of the recommendations, excluding the revision of the constitution.

**92.** Further, he states that while the Beninese people were expecting corrections to the electoral code and the charter of political parties, a proposal to revise the constitution by ten (10) deputies was presented to Parliament under emergency procedure and adopted clandestinely on 1 November 2019 by a National Assembly composed solely of deputies from the President's party.

**93.** He argues that a national consensus cannot be reached in a one-party parliament, especially as it suffers from a crisis of legitimacy and lack of confidence on the part of the Beninese people.

**94.** The Applicant believes that, in accordance with human rights instruments and the case law of the Constitutional Court, the proposed revision should have been debated by the Beninese people and adopted after a national consensus, or at the very least put to a referendum, especially as it concerns 49 articles of the Constitution, some of which infringe on the fundamental rights of citizens and democratic change of government.

**95.** Finally, the Applicant states that the constitutional revision of 1 November 2019 is cyclical, unilateral and clandestine, and does not comply with the requirements of Article 10(2) of the ACDEG.

**96.** The Respondent State argues that the initiative for the constitutional revision belongs concurrently to the President of the Republic and the National Assembly. The Parliament of Benin has the right to intervene in all aspects of the constitution that it deems appropriate to revise within the limits of constitutional law and is not bound or limited by the scope or conclusions of a sitting.

**97.** It adds that a referendum is only one means of revision in the same way as a parliamentary vote. Since the National Assembly is the representation of the people, it follows that public debate has taken place between the people through their representatives.

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**98.** The Court emphasises that Article 10(2) of the ACDEG provides that: "State Parties must ensure that the process of amending or revising their Constitution is based on a national consensus including, where appropriate, recourse to a referendum.

**99.** The Court notes that prior to the ratification of the African Charter on Democracy, the Respondent State had established national consensus as a principle of constitutional value through the decision of the Constitutional Court DCC 06 - 74 of 08 July 2006, in the following terms:

> Even if the Constitution has provided for the modalities of its own revision, the determination of the Beninese people to create a state based on the rule of law and pluralist democracy, the safeguarding of legal security and national cohesion require that any revision take into account the ideals that presided over the adoption of the Constitution of 11 December 1990, particularly the national consensus, a principle with constitutional value.

**100.** Furthermore, the same Constitutional Court has given a precise definition of the term "consensus" through its decisions DCC 10 - 049 of 05 April 2010 and DCC 10 - 117 of 08 September 2010. It states that:

> Consensus, a principle with constitutional value, as affirmed by Decision DCC 06 - 074 of 08 July 2006 (...) far from signifying unanimity, is first and foremost a process of choice or decision without going through a vote; (...) it allows, on a given question, to find, through an appropriate path, the solution that satisfies the greatest number of people.

**101.** The Court observes that the expression "greatest number of people" associated with the concept of "national consensus" requires that the Beninese people be consulted either directly or through opinion makers and stakeholders including the representatives of the people if they truly represent the various forces or sections of the society. This is however not the case in the instant Application, since all the deputies of the National Assembly belong to the presidential camp.

**102.** From the record, it is apparent that Law No. 2019-40 of 7 November 2019 on constitutional revision was adopted under summary procedure. A consensual revision could only have been achieved if it had been preceded by a consultation of all actors and different opinions with a view to reaching national consensus or followed, if need be, by a referendum.

**103.** The fact that this law was adopted unanimously cannot overshadow the need for national consensus driven by "the ideals that prevailed when the Constitution of 11 December 1990[25] was adopted" and as provided under Article 10(2) of the ACDEG.

**104.** Therefore, the constitutional revision[26] was adopted in violation of the principle of national consensus.

**105.** Consequently, the Court declares that the constitutional revision, which is the subject of Law No. 2019-40 of 7 November 2019, is contrary to the principle of consensus as set out in Article 10(2) of the ACDEG.

**106.** The Court therefore concludes that the Respondent state violated Article 10(2) of the ACDEG.

## D. Alleged violation of the right to information

**107.** The Applicant submits that the State is obliged, through its various structures and institutions to guarantee to everyone access to sources of information, particularly public ones. The State services responsible for this task undertake to provide any information, to communicate any document and to ensure that, if necessary, a press kit is compiled and made available to professionals on any subject of legitimate public interest.

**108.** The Applicant asserts that the amending law was not disclosed before its adoption by the national representation. Even after the examination of its conformity with the Constitution and several days after its promulgation, it was not on the official government website, which prevented the people from appealing against the said law to the Constitutional Court.

25 These include the dawn of an era of democratic renewal, the determination to create a rule of law and a democracy in the defence of human rights, as mentioned in the preamble to the constitution.

26 The following articles have been deleted: 46 and 47. The following articles have been modified or created: 5, 15, 26, 41, 42, 43, 44, 45, 48, 49, 50, 52, 53, 54, 54-1, 56, 62, 62-1, 62-3, 62-4, 80, 81, 82, 92, 99, 11, 117, 119, 131, 132, 134-1, 134-2, 134-3, 134-4, 134-5, 134-6, 143, 145, 151, 151-1, 153-1, 153-2, 153-3, 157-1, 157-2, 157-3, Title VI(I-1 and I-2) have been modified or created.

**109.** He submits that the Respondent State consequently violated the right to information guaranteed by Article 9(1) of the Charter.

**110.** The Respondent State alleges that the right to information was not violated insofar as the disputed law was promulgated in the Official Gazette of the Republic of Benin.

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**111.** The Court notes that Article 9(1) of the Charter provides that: "Everyone has the right to information."

**112.** The Court also notes that Article 9(1) of the Charter enshrines the right to receive information in relation to the right to disseminate and disseminate one's opinions within the framework of laws and regulations.[27]

**113.** The Court concurs with the Applicant that every citizen in a democratic country has the right to access information held by the State. This right is considered necessary to ensure the respect for the principle of transparent government, which requires that the public has access to information to engage productive public debate on the conduct of government business.

**114.** In the instant case, the issue before the Court for decision is whether under the domestic legislation of Benin citizens had access to information about the proposed revision of the constitution, from the parliamentary debates before its adoption and promulgation.

**115.** The Court notes in this case that pursuant to Article 86 of the Constitution of Benin, the full record of the debates of the National Assembly must be published in the Official Gazette of the Republic of Benin.[28]

27 *Alex Thomas v United Republic of Tanzania*, (merits) (20 November 2015) 1 AfCLR 482, § 154.

28 Art. 86: Assembly sessions are only valid when they are held in the normal venue for sessions except in exceptional cases enshrined in the constitution. The entire minutes of deliberations of the National Assembly shall be published in the National Gazette.

**116.** In addition, pursuant to Article 57 of the said Constitution, the President of the Republic shall ensure the promulgation of laws within fifteen days of their transmission to him by the President of the National Assembly.[29]

**117.** The Court notes that the domestic legislation of the Respondent State guarantees the right to information. The question in these circumstances is who bears the burden of proof when the Applicant claims that the Respondent State has violated his right to information.

**118.** The Court notes that it is the responsibility of the Respondent State to ensure publication of the debates in the National Assembly relating to a proposal or draft law and its promulgation in the official gazette. Thus, in this circumstance, the burden of proof on whether or not citizens have enjoyed their right to information lies with the State.

**119.** The Court observes that the Respondent State does not dispute the allegation that the draft revision of the Basic Law has not been disseminated among the population in order to enable it to form an opinion and participate in the debate on the proposed amendments.

**120.** The Court further notes that the Respondent State does not adduce evidence to show that the debates were published in the Official Gazette.

**121.** The Court therefore concludes that the Respondent State violated the Applicant's right to information guaranteed under Article 9 of the Charter.

## E. Allegation violation of the right to economic, social and cultural development

**122.** The Applicant maintains that the Respondent State violates the right to economic, social and cultural development enshrined in Article 23(1) of the Charter by adopting a non-consensual constitutional revision which unbalances and divides the Benin society. He alleges that this situation is likely to disrupt the fundamentals of the economic, social and cultural development of his country that the people of Benin have toiled to put in place since the establishment of democracy in 1990.

29 Article 57: The President of the Republic at the behest of current laws and the members of the National Assembly. He is charged with promulgating laws within 15 days after they are tabled before him by the Speaker of the National Assembly. This dateline is reduced to 5 days in cases of emergencies declared by the National Assembly.

**123.** The Respondent State did not comment on this point.

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**124.** Article 22(1) of the Charter provides:

> 1. All peoples have the right to their economic, social and cultural development, with strict respect for their freedom and identity, and to the equal enjoyment of the common heritage of humanity.

**125.** The Court notes that the right to development is an inalienable human right by virtue of which every human person and all peoples have the right to participate in and to contribute to economic, social and cultural development in which the political development is a part.[30]

**126.** In the instant case, the Court found that the Respondent State violated fundamental human rights, in particular a constitutional revision outside the process of national consensus which was prevailing during the adoption of the constitution of Benin in 1990.

**127.** The Court is of the opinion that this situation may constitute a major disruption of the economic, social and cultural development of Benin.

**128.** The Court therefore concludes that the Respondent State has violated the right to economic, social and cultural development, protected by Article 22(1) of the Charter.

## F. Alleged violation of the right to peace and national security

**129.** The Applicant argues that the constitutional revision adopted outside of democratic rules, the rule of law and respect for human rights, threatens the peace of the people of Benin.

**130.** The Applicant therefore considers that the Respondent State violated the right to peace and national security protected by Article 23(1) of the Charter.

**131.** The Respondent State did not comment on this point.

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30 UN General Assembly, Declaration on the right to the development 41/128.

**132.** Article 23(1) of the Charter states that "Peoples have the right to peace and security, both nationally and internationally".

**133.** The Court observes that peace symbolizes the absence of worry, turmoil, conflict or violence. Its symbiosis with security contributes to social well-being. Indeed, the assurance of living without danger, without the risk of being affected in its physical integrity and its heritage gives citizens the confidence of national stability.

**134.** When considering respect for human rights as a tool for preventing the right to peace, it is necessary to take into account the full range of rights, not just civil and political rights. Discrimination and inequality can lead to significant human rights violations and thus pose a direct threat to peace.[31]

**135.** In the present case, the Court has already concluded that the Respondent State has violated Article 10(2) of ACDEG by presenting and adopting a revision of the fundamental law of Benin without a national consensus, thus putting aside a large segment of the population of Benin who may not identify with the said law.

**136.** This context thus poses a threat to the peace and stability of Benin and the security of Benin citizens.

**137.** The Court concludes that the respondent State violated the right to peace and security protected by Article 23(1) of the Charter.

## IX. Reparations

**138.** Article 27(1) of the Protocol provides that:

> If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

**139.** The Court recalls its previous judgments on reparation[32] and reaffirms that, in considering claims for compensation for damage resulting from human rights violations, it takes into account the principle that the State found to be the author of an internationally wrongful act is under an obligation to make full reparation for the consequences so as to cover all the damage suffered by the victim.

31 Report of the UN High Commission for Human Rights, "Early warning and economic, Social and Cultural rights, 13 May 2016, E/2016/58, available at https://digitallibrary.un.org/record/833331/files/E_2016_58-FR.pdf

32 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso*, (reparations) (5 June 2015) 1 AfCLR 265, § 22; *Lohé Issa Konaté v Burkina Faso*, (reparations) (3 June 2016) 1 AfCLR 359, § 15.

**140.** The Court also takes into account the principle that there must be a causal link between the violation and the alleged harm and that the burden of proof rests with the Applicant, who must provide the information to justify his or her claim.[33]

**141.** The Court also established that "reparation must, as far as possible, erase all the consequences of the unlawful act and re-establish the state that would probably have existed had the unlawful act not been committed". In addition, reparation measures must, depending on the particular circumstances of each case, include restitution, compensation, rehabilitation of the victim and measures to ensure that the violations are not repeated, taking into account the circumstances of each case.[34]

**142.** Furthermore, the Court reiterates that it has already established that reparation measures for harm resulting from human rights violations must take into account the circumstances of each case and the Court's assessment is made on a case-by-case basis.[35]

## A. Reparations requested by the Applicant

**143.** The Applicant submits that the violations of his rights by the Respondent State caused him moral suffering insofar as he was prevented from standing as an independent candidate in the local elections of 2020 as a result of the non-consensual revision of the constitution which prohibits the participation of independent candidates in local and parliamentary elections.

**144.** He seeks an order that the Respondent State pay him the sum of one billion (1,000,000,000) CFA francs as damages.

**145.** The Respondent State did not make any observations on this point.

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**146.** The Court recalls its case-law according to which there is a presumption of moral damage suffered by an applicant once the

33 *Reverend Christopher Mtikila v Tanzania*, (reparations) (13 June 2014) 1 AfCLR 74, § 31.

34 *Ingabire Victoire Umuhoza v Republic of Rwanda*, (reparations) (7 December 2018) 2 AfCLR 202, § 20.

35 *Ibid*, §22.

Court has found a violation of his rights, so that it is no longer necessary to seek evidence to establish the link between the violation and the damage. The Court has also held that the assessment of the amounts to be awarded as compensation for non-pecuniary damage should be made on the basis of equity, taking into account the circumstances of each case.[36]

**147.** The Court observes that the amount in respect of reparation to be awarded to the Applicant in the present case must be assessed in light of the degree of moral prejudice he must have suffered by not participating in the elections as an independent candidate.

**148.** In the present case, the Court finds that the non-pecuniary damage suffered by the Applicant results from the violation of Articles 9(1), 22(1) and 23(1) of the Charter and Article 10(2) of the ACDEG by Law No. 2019-40 of 7 November 2019 revising the Constitution of Benin.

**149.** The Court has also held that "the finding of the above-mentioned violations by the Respondent State is in itself already a form of reparation for the non-pecuniary damage suffered by the Applicant."[37]

**150.** In view of all these considerations the Court exercising its discretion, awards the Applicant compensation for the non-pecuniary damage he personally suffered a token amount of one (1) CFA franc.

## B. Respondent State's counter-claim

**151.** The Respondent State contends that the proceedings brought by the Applicant before the Court in this case are abusive, lacking any serious grounds. It contends that the Applicant brought the proceedings before the Court with the sole aim of harming it. Accordingly, it prays the Court to order the Applicant to pay it the sum of one billion (1,000,000,000) CFA francs by way of damages.

**152.** The Applicant contests the Respondent State's claim for reparations. He contends that the proceedings which he brought against the latter before the Court are justified and prays the Court to dismiss the Respondent State's counterclaim.

36 *Ibid*; *Beneficiaries of late Norbert Zongo & ors v Burkina Faso* § 61.

37 *Zongo & ors v Burkina Faso*, (reparations) (5 June 2015) 1 AfCLR 265, §66.

***

**153.** The Court observes that the record shows that the Respondent State's counterclaim is based on the allegation that the Applicant abused his right of referral to the Court.

**154.** The Court notes, however, that it has not established that the Application lacks merit as the Respondent State asserts. Indeed, it found violations of the Applicant's rights. Moreover, the Court observes that the Respondent State has not submitted any evidence for it to uphold its counterclaim. Furthermore, the fact that a judgment against the Respondent State is rendered by the Court, even though this may adversely affect its image, does not, per se, entitle the Respondent State to make a counterclaim. The Court therefore finds that the Applicant did not abuse his right to institute legal proceedings.

**155.** Consequently, the Court concludes that this claim is unfounded and dismisses it.

## X. Costs

**156.** Neither party made submissions on costs.

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**157.** Rule 32(2) of the Rules provides that "Unless the Court decides otherwise, each party shall bear its own costs".

**158.** In light of the above provisions, the Court decides that each Party shall bear its own costs.

## XI. Operative part

**159.** For these reasons,
The Court,
*Unanimously*,
*On jurisdiction*

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

*On preliminary objections*

iii. *Dismisses* the preliminary objections *;*

iv. *Declares* the Application admissible*.*

*On admissibility*

v. *Declares* the Application admissible*.*

*On merits*

vi. *Finds* that the Respondent state has violated the obligation to guarantee the independence of the courts provided for in Article 26 of the Charter

vii. *Holds* that the Respondent State has violated the obligation to ensure that the process of amendment or revision of its constitution reposes on national consensus, as set forth in Article 10(2) of the ACDEG*;*

viii. *Declares* that the Respondent State has violated the right to information enshrined in Article 9(1) of the Charter;

ix. *Holds* that the Respondent State violated the right to peace and the right to economic, social and cultural development protected by Articles 22(1) and 23(1) of the Charter;

x. *Finds* that the right to an impartial tribunal guaranteed under Article 7(1) has not been violated.

*On reparations*

*On pecuniary reparations*

xi. *Orders* the Respondent State to pay the Applicant the sum of one (1) CFA franc as a token amount for the moral damage he has suffered;

xii. *Dismisses* the Respondent State's counterclaim for reparation.

*On non pecuniary reparations*

xiii. Orders the Respondent State to take all legislative and regulatory measures to guarantee the independence of the Constitutional Court, in particular with regard to the process for the renewal of their term of office;

xiv. *Orders* the Respondent State to take all measures to repeal Law No. 2019-40 of 1 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws, in particular Law 2019-43 of 15 November 2019 on the Electoral Code, and to comply with the principle of national consensus set forth in Article 10(2) of the ACDEG for all other constitutional revisions;

xv. *Orders* that these measures be undertaken before any election.

*On implementation and reporting*

xvi. Orders the Respondent State to submit to the Court, within three (3) months of the date of notification of this Judgment, a report on the implementation of paragraphs xi to xv of this operative part.

*On costs*

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

# Mwita v Tanzania (provisional measures) (2020) 4 AfCLR 112

Application 012/2019, *Ghati Mwita v United Republic of Tanzania*

Order (provisional measures), 9 April 2020. 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, who was convicted and sentenced to death for murder, brought this action alleging that the domestic courts based her conviction on insufficient and unreliable evidence therefore, the Respondent State had violated her rights in articles 4, 7 and 20 of the African Charter. The Applicant requested for provisional measures to prevent her execution pending determination of her case. The Court granted the provisional measures requested.

**Jurisdiction** (withdrawal of Article 34(6) Declaration has no retroactive effect, 4, *prima facie* jurisdiction, 14)

**Provisional measures** (discretionary remedy, 20; extreme gravity, urgency and irreparable harm, 21)

## I. The Parties

**1.** Ghati Mwita (hereinafter referred to as "the Applicant) is a national of the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). She is currently imprisoned at Butimba Central Prison, Mwanza, within the Respondent State.

**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 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 directly from individuals and non-governmental organisations.

**3.** On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration under Article 34(6) of the Protocol.

## II. Effect of Respondent State's withdrawal of the Article 34(6) Declaration

**4.** The Court recalls that in Ingabire *Victoire Umuhoza v Rwanda*,[1] it held that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, as is the case of the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the instrument of withdrawal is deposited.

**5.** In respect of the Respondent State, therefore, having deposited its instrument of withdrawal on 21 November 2019, its withdrawal of the Article 34(6) Declaration will take effect on 22 November 2020.

## III. Subject of the Application

**6.** On 24 April 2019 the Applicant, acting in person, filed an Application in which she alleges that the Respondent State has violated her rights under Articles 4, 7 and 20 of the Charter. Specifically, the Applicant alleges that the Respondent State's courts erred in basing her conviction on insufficient and unreliable evidence.

**7.** It emerges from the Application that on 19 September 2011, the High Court of Tanzania sitting at Mwanza convicted the Applicant of murder and sentenced her to death. On 11 March 2013, the Court of Appeal, sitting at Mwanza, upheld the sentence of the High Court. On 19 March 2015, the Court of Appeal dismissed the Applicant's application for review of its earlier decision.

**8.** On 29 October 2019, the Applicant, through her Court appointed counsel, filed a Request for Provisional Measures in which she prays the Court:

"a. To order that the Respondent State shall not carry out the execution of the Applicant while her application remains pending before the Court;

b. An order that the Respondent shall report to the Court within thirty (30) days of the interim order on the measures taken for its implementation."

1 (2016) 1 AfCLR 562 § 67.

## IV. Summary of the Procedure before the Court

**9.** On 10 May 2019, the Registry requested the Applicant to file further pertinent documents or information in support of her Application.

**10.** On 16 August 2019, the Applicant filed further documents in support of her Application.

**11.** On 30 September 2019, the Court, suo motu, granted the Applicant legal aid under its Legal Aid Scheme.

**12.** The request for provisional measures, which was filed on 29 October 2019, was served on the Respondent State on 23 January 2020. The Respondent State was given fourteen (14) days within which to file its Response but it did not file any Response.

## V. Jurisdiction

**13.** 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.

**14.** Nevertheless, for the purpose of issuing an Order for Provisional Measures, the Court need not establish that it has jurisdiction on the merits of the Application, but must simply satisfy itself that it has *prima facie* jurisdiction.[2]

**15.** 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".

**16.** The Court notes that the alleged violations, subject of the present Application, are in respect of the rights protected under Articles 4, 7 and 20 of the Charter, an instrument to which the Respondent State is a party. The Court, therefore, holds that it has material jurisdiction to hear the Application.

**17.** In light of the foregoing, the Court is satisfied that it has *prima facie* jurisdiction to hear the Request.

2 See, Application 002/2013.Order of 15/03/2013 (Provisional Measures), ***African Commission on Human and Peoples' Rights v Libya*** § 10; Application 006/2012. Order of 15/03/2013 (Provisional Measures), ***African Commission on Human and Peoples' Rights v Kenya*** § 16, and Application 020/2019. Order of 2/12/2019, ***Komi Koutche v Republic of Benin*** § 14.

## VI. On the provisional measures requested

**18.** The Applicant submits that she is on death row and there exists a situation of extreme gravity as well as irreparable harm if the death penalty is implemented. The Applicant further submits that even though the Respondent State has observed a moratorium on the death penalty since 1994, there is nothing stopping it from recommencing executions of persons sentenced to death. The Applicant thus submits that the moratorium "does not take away the gravity of the matter at hand and irreparable harm may be occasioned to the Applicant in case the Respondent State reverses its moratorium on the death penalty."

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**19.** The Court recalls that in accordance with 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."

**20.** Notably, it lies with the court to decide in each case whether, in light of the particular circumstances, it must exercise the jurisdiction conferred upon it by the afore-cited provisions.[3]

**21.** In the present case, the Court notes that the implementation of the death penalty, with its irreversible character, could cause the Applicant irreparable harm and render nugatory any finding by the Court on the merits of the Application. The Court thus finds that a situation of extreme gravity and urgency exists necessitating the adoption of provisional measures to avoid irreparable harm to the Applicant.

**22.** The Court, therefore, decides to exercise its powers under Article 27(2) of the Protocol, and also Rule 51(1) of the Rules, to order the Respondent State to stay the execution of the Applicant's death sentence pending its determination of the Application on the merits.

3 *Armand Guehi v United Republic of Tanzania* (Provisional Measures) (2016) 1 AfCLR 587 § 17.

**23.** For the avoidance of doubt, this Order is necessarily provisional in nature and in no way prejudges the findings the Court might make as regards its jurisdiction, admissibility of the Application, and the merits of the Application.

## VII. Operative part

**24.** For these reasons:

The Court,

*Unanimously*, orders the Respondent State to:

i. Stay execution of the death sentence handed down against the Applicant, pending the Court's determination of the Application on merits; and

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

# Ajavon v Benin (provisional measures) (2020) 4 AfCLR 117

Application 027/2020, *Sébastien Germain Marie Aïkoue Ajavon v Republic of Benin*

Ruling (provisional measures), 27 November 2020. Done in English and French, the French text being authoritative.

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

The Applicant, who was facing criminal proceedings before a specialised national court, brought this action to challenge his indictment which had been upheld by an appellate chamber of the specialised criminal court. Along with the main action, the Applicant filed this request for provisional measures to stay the judgment indicting him. The Court dismissed the application for provisional measures.

**Jurisdiction** (*prima facie*, 14; withdrawal of Article 34(6) Declaration, 17)

**Provisional measure**s (application when domestic appeal has suspensive effect, 30)

## I. The Parties

**1.** Mr. Sébastien Germain Marie Aîkoué Ajavon (hereinafter referred to as "the Applicant") is a national of Benin. He challenges the criminal proceedings brought against him before the Court of Repression of Economic Offences and Terrorism (hereinafter referred to as "the CRIET").

**2.** The Application is filed against the Republic of Benin (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 22 August 2014. Furthermore, on 8 February 2016, the Respondent State deposited the Declaration provided for under Article 34(6) of the Protocol (hereafter referred to as "the Declaration") through which it accepted the jurisdiction of the Court to receive applications filed by individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission an instrument withdrawing the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal comes into

effect, one year after its filing, that is, on 26 March 2021.[1]

## II. Subject of the Application

**3.** On 22 June 2020, the Application was filed together with a request for provisional measures. In the said Application, the Applicant states that a judicial inquiry for "forgery in public writing, complicity in forgery and fraud" had been opened against him before the CRIET; which comprises of investigation and trial chambers, and these chambers have, first instance and appellate jurisdictions.

**4.** The Applicant states that the CRIET's investigation chamber rendered a first instance Judgment No. 21/CRIET/COM-I/2020 of 29 May 2020, dismissing part of the case against him and referring him to the CRIET's trial chamber. This decision was confirmed by the investigation chamber's Judgment on appeal, No.003/CRIET/CA/SI of 18 June 2020. The Applicant claims to have lodged an appeal in cassation on 18 June 2020 against the judgment confirming the investigation chamber's first Instance judgment.

**5.** It is against this background that the Applicant seeks a stay of the judgments delivered against him by CRIET and any subsequent convictions, pending a decision by this Court, on his Application on the merits.

## III. Alleged violations

**6.** In the Application, the Applicant alleges:

i. Violation of the right to a fair trial protected by Articles 7(1), 7(1)(a), 7(1)(c) of the Charter;

ii. Violation of the right to property protected by Article 14 of the Charter; and

iii. Violation of the right to adequate housing enshrined in Articles 14, 16 and 18 of the Charter.

## IV. Summary of the Procedure before the Court

**7.** On 22 June 2020, the Applicant filed the Application together with a request for provisional measures.

**8.** The Application and the request were served on the Respondent State on 22 September 2020 for its Response on the merits within

1 *Hongue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and corrigendum of 29 July 2020.

sixty (60) days and observations on the request for provisional measures within fifteen (15) days of receipt of the notification. The documents were also transmitted to the other entities provided for in Rule 42(4) of the Rules.

**9.** The Respondent State submitted its observations on the request for provisional measures on 7 October 2020.

## V. *Prima facie* jurisdiction

**10.** The Applicant asserts, pursuant to Articles 27(2) of the Protocol and Rule 51 of the Rules,[2] that in matters of provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case but merely that it has *prima facie* jurisdiction.

**11.** Referring further to Article 3(1) of the Protocol, the Applicant asserts that the Court has jurisdiction in so far as he alleges violations of rights protected by human rights instruments and as the Republic of Benin has ratified the Charter and the Protocol and made the Declaration provided for under Article 34(6).

**12.** The Respondent State has not made any observations on this point.

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**13.** Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned".

**14.** Rule 49(1) of the Rules[3] provides that "the Court shall ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules". However, with respect to provisional measures, the Court need not ensure that it has jurisdiction on the merits of the case, but only that it has *prima facie* jurisdiction.[4]

**15.** In the instant case, the rights alleged to have been violated by the Applicant are all protected under Articles 7(1), 7(1)(a), 7(1)(c), 14,

2 Rules of 2 June 2010 (rule 59 of the rules of 25 September 2020).

3 Formerly, Rule 39(1) of the Rules of Court, 2 June 2010.

4 *Komi Koutche v République of Benin*, ACtHPR, Application 020/2019, Order of 2 December 2019 (provisional measures).

16 and 18 of the Charter, an instrument to which the Respondent State is a party.

**16.** The Court further notes that the Respondent State has ratified the Protocol. It has also made the Declaration by which it accepted the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations in accordance with Articles 34(6) and 5(3) of the Protocol read jointly.

**17.** The Court observes, as stated in paragraph 2 of this Ruling, that on 25 March 2020 the Respondent State deposited the instrument of withdrawal of its Declaration made in accordance with Article 34(6) of the Protocol. The Court has held that the withdrawal of a Declaration has no retroactive effect[5] and has no bearing on pending cases and new cases filed before the withdrawal comes into effect, as is the case in the present matter. The Court reiterated this position in *Houngue Eric Noudehouenou v Republic of Benin,* and held that the Respondent State's withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal does not affect its personal jurisdiction in the present case.[6]

**18.** From the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the present Application.

## VI. Provisional measures requested

**19.** The Applicant seeks a stay of execution of Judgment No. 21/ CRIET/COM-I/2020 of 29 May 2020 of the CRIET Investigating Chamber, confirmed by Judgment No. 003/CRIET/CA/SI of 18 June 2020 of the CRIET Appeals Chamber's Investigating Chamber and of any subsequent conviction pending examination of the Application on the merits.

**20.** The Applicant submits that he is in a situation of extreme urgency, the consequences of which cannot not be erased, repaired or compensated for, not even by pecuniary reparations.

**21.** The Applicant further submits that, despite the suspensive effect of the appeal in the cassation Court brought against the above-mentioned confirming judgment, he fears that the proceedings brought against him may quickly lead to his conviction, confiscation and sale of his property, part of which has already been seized

5 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR, 562 § 67.

6 *Hongue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and corrigendum of 29 July 2020.

by the Respondent State, which refuses to release it despite the judgments of 29 March 2019 and 28 November 2019 on the merits by this Court, which have been handed down in his favour.

**22.** The Applicant adds that, if the CRIET were to convict him, it would be difficult for him to have the conviction quashed as long as President Patrice Talon's regime remains in power. He points to the failure of the Respondent State to comply with previous decisions handed down by the Court in his favour.

**23.** Lastly, the Applicant claims that the conviction could serve as a basis of a new arrest warrant to be issued against him, which would cause further harassment and risk extradition to his country, and he would automatically lose his civil and political rights, which would prevent him from standing as a candidate in the forthcoming presidential election of 2021.

**24.** The Respondent State submits that the provisional measures requested by the Applicant do not meet the requirements of Article 27 of the Protocol.

**25.** The Respondent State further submits that there is no urgency, as the Applicant has lodged an appeal in cassation which has not been exhausted and does not show that irreparable harm, in particular to his life, is imminent or that there are any concrete restrictions in connection with the proceedings against him.

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**26.** The Court notes that Article 27(2) of the Protocol provides that "in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

**27.** Furthermore, Rule 59(1) of the Rules[7] provides that:

> Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

7 Formerly Rule 51 of the Rules of Court, 2 June 2010.

**28.** The Court notes that it is for it to decide on a case by case basis whether, in light of the particular circumstances of the case, it should exercise the jurisdiction conferred on it under the above provisions.

**29.** The Court notes in the instant case, the Applicant had lodged an appeal in cassation challenging the confirmatory judgment delivered by the Investigation Section of the Appeals Chamber of the CRIET.

**30.** It also notes that pursuant to Article 578 of the Code of Criminal Procedure of Benin, the appeal in cassation has a suspensive effect,[8] so that the Applicant cannot be tried before the CRIET until the Supreme Court has ruled on the referral.

**31.** The Court therefore notes that the request to stay Judgment No. 21/CRIET/COM-I/2020 convicting him in part and upholding the judgment No. 003/CRIET/CA/SI, is baseless.

**32.** Consequently, the Court dismisses the request.

**33.** To avoid any doubt, this Ruling is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

## VII. Operative part

**34.** For these reasons.

The Court

*Unanimously,*

i. *Dismisses* the Applicant's request for provisional measures.

8 Article 578: During the time limits for the appeal in cassation and if there has been an appeal, until the delivery of the judgment of the Supreme Court, execution of the judgment is suspended, except for civil convictions.

# Ajavon v Benin (provisional measures) (2020) 4 AfCLR 123

Application 062/2019, *Sébastien Germain Marie Aïkoue Ajavon v Republic of Benin*

Order (provisional measures), 17 April 2020. Done in English and French, the French text being authoritative.

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

The Applicant who had alleged, in his main action, that the Respondent stated had violated a number of his rights, sought provisional measures to postpone pending national elections and suspend certain national laws on the grounds that the acts and omissions of the Respondent posed urgent risk to his right to participate in the affairs of his country and his right to life. The Court partially granted the provisional measures sought.

**Jurisdiction** (*prima facie*, 18, 22)

**Provisional measures** (admissibility requirements unnecessary, 30; exclusion of hypothetical risk, 62; non-execution of judgment, 67; risk of exclusion from elections, 68)

## I. The Parties

**1.** Sébastien Germain Marie Aïkoué Ajavon, (hereinafter referred to as "the Applicant"), is a national of Benin and company administrator residing in Paris, France, as a political refugee.

**2.** The Application is filed against the Republic of Benin (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 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 under Article 34(6) by virtue of which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

**3.** The Respondent State also ratified the International Covenant on Civil and Political Rights on 12 March 1992, the African Charter on Democracy, Elections and Governance on 28 June 2012, as well as the Economic Community of West African States (ECOWAS) Protocol A/SP1/12/01 on Democracy and Good Governance additional to the Protocol relating to the Mechanism

for Conflict Prevention, Management, Resolution, Peacekeeping and Security, on 21 December 2001.

## II. Subject of the Application

**4.** In his main Application, the Applicant alleges the violation of his rights enshrined in Articles 3, 4, 5, 6, 7(1)(c), 10, 11, 13, 15 and 26 of the Charter, Articles 2(2), 3(2), 4(1), 10(2), 23(5) and 32(8) of the African Charter on Democracy, Article 25 of the International Covenant on Civil and Political Rights and Article 22 of the International Covenant on Economic, Social and Cultural Rights.

**5.** In his Application for Provisional Measures, the Applicant alleges the violation of his right to participate in the public affairs of his country and his right to life. He contends that the legislative elections of 28 April 2019 were unlawful and that the Benin National Assembly elected in the said election clandestinely passed several laws at night so that the general public became aware only after the said laws were published.

**6.** He further submits that it is in this context that the election for municipal and local councillors is scheduled for 17 May 2020 (hereinafter "the elections of 17 May 2020"), following a Cabinet decision of 22 January 2020 convening the electorate. The Applicant contends that his non-participation in these elections will cause him irreparable harm.

## III. Summary of the Procedure before the Court

**7.** The Application was filed on 29 November 2019 while the Application for Provisional Measures was filed on 9 January 2020.

**8.** On 16 January 2020, the Registrar served the above-mentioned Applications on the Respondent State, pursuant to Rule 35(2) of the Rules of Court (hereinafter, "the Rules"), requesting it to submit its Response to the Application for provisional measures within fifteen (15) days of receipt.

**9.** On 20 February 2020, the Court received a request from the Respondent State for sixty (60) days' extension of time to respond to the Application for provisional measures.

**10.** The said request was notified to the Applicant to submit his observations within seven (7) days. The Applicant did not respond.

**11.** The Respondent State filed its Response to the Application for Provisional Measures on 10 March 2020.

## IV. Jurisdiction

**12.** The Respondent State raises an objection based on the Court's jurisdiction, contending that ascertaining the *prima facie* jurisdiction of the Court is objective and presupposes that plausible human right violations have occurred.

**13.** The Respondent State further contends that the criteria for the Court's material jurisdiction under Rule 34(4) of the Rules excludes all abstract assumptions or circumstances insofar as the Applicant must specify the alleged violations, which has not been done in the instant case.

**14.** Furthermore, the Respondent State notes that the Applicant is engaged in speculation when he submits that his political party, *Union Sociale Libérale* (USL), which did not exist at the time of holding the 2019 parliamentary elections, could not participate in the 2021 presidential elections.

**15.** The Respondent State avers that this election, in respect of which it has done nothing of a nature to restrict the rights of third parties, is not under consideration.

**16.** The Applicant submits, based on Article 27(2) of the Protocol and Rule 51(1) of the Rules that, in granting provisional measures, the Court is not required to satisfy itself that it has jurisdiction on the merits, but simply that it has *prima facie* jurisdiction.

**17.** Relying on Article 3(1) of the Protocol, the Applicant contends that the Court has jurisdiction insofar as Benin is a party to the Charter and the Protocol and has deposited the Declaration under Article 34(6) of the Protocol. Furthermore, he alleges violations of the right to participate in the public affairs of his country and his right to life, protected by the Charter.

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**18.** When considering an application**,** the Court conducts a preliminary examination of its jurisdiction pursuant to Article 3 and Article 5(3) of the Protocol.

**19.** Article 3(1) of the Protocol provides as follows: "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned*"*.

**20.** The Respondent State is a party to the Charter and other international instruments whose violation is alleged.[1]

**21.** The Court emphasises in relation to the Respondent State's argument that the alleged violations must be specified, that it is premature, at this stage, to examine the plausibility of the violations referred to by the Respondent State. Plausibility, which refers to the link between the provisional measures and the Application on the merits, is assessed only when there is a need to decide whether or not to grant the provisional measures requested.

**22.** In view of the foregoing, the Court dismisses the Respondent State's preliminary objection based on jurisdiction and finds that it has *prima facie* jurisdiction to hear the Application.

## V. Admissibility

**23.** The Respondent State raises an objection based on admissibility, arguing that there is no urgency or extreme gravity and no irreparable harm.

**24.** In support of its position, the Respondent State submits that urgency means "the nature of a situation likely to cause irreparable harm if not remedied immediately", while extreme gravity describes a situation of increased and of exceptional nature requiring the intervention of the Court for it to end.

**25.** Citing the jurisprudence of the European Court of Human Rights which describes provisional measures as "urgent measures which apply only when there is an imminent risk of irreparable harm", the Respondent State argues that such measures aim to contain extraordinary situations of urgency and extreme gravity.

**26.** The Respondent State contends that the Applicant's allegation that "there is extreme urgency because he came third in the legislative elections and that the Constitution of Benin requires candidates to be sponsored by elected political leaders" is merely an assumption and does not justify granting of provisional measures.

**27.** With regard to irreparable harm, the Respondent State submits that it is different from harm that is difficult to remedy and refers to acts whose consequences cannot be erased, remedied or compensated, even by payment of compensation.

**28.** The Respondent State submits that provisional measures are only envisaged in exceptional cases where an Applicant faces a real risk of irreparable harm, such as a threat to life, cruel

1 See Paragraph 3 of the Order.

treatment prohibited by international legal instruments or a grave and manifest violation of his rights.

**29.** Finally, the Respondent State contends that the laws cited by the Applicant have caused him no harm as a citizen.

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**30.** The Court emphasises that in relation to provisional measures, neither the Charter nor the Protocol spells out admissibility requirements, as the consideration of the said measures are subject only to prior determination of *prima facie* jurisdiction, which has been done in the instant case.

**31.** Article 27(2) of the Protocol and Rule 51(1) of the Rules, on which the Respondent State buttresses its objection based on the inadmissibility of the Application, are, in fact, the provisions that enable the Court to grant or dismiss the request for provisional measures.

**32.** Consequently, the Court dismisses the objection based on admissibility.

## VI. Provisional measures requested

**33.** The Applicant seeks the postponement of the elections of 17 May 2020. He also seeks an order suspending the following laws: Organic Law No. 2018 – 2 of 4 January 2018 amending and completing Organic Law No. 4 – 027 of 18 March 1999 relating to the Higher Judicial Council (4 articles); Law No. 2017 – 20 of 20 April 2018 on the Digital Code (647 articles); Law No. 2018 – 34 of 5 October 2018 amending and completing Law No. 2001 – 09 of 21 June 2002 on the Right to Strike (6 articles), Law No. 2018 – 016 on penal code and Law No. 019 – 40 of 7 November 2019 (47 articles) on the amendment of Law No. 90 – 032 of 11 December 1990 on the Constitution of the Republic of Benin, that is, a total of one thousand seven hundred and twelve (1712) articles. Lastly, he seeks an order suspending the municipal orders which, in his view, prohibit public demonstrations by way of protest.

**34.** In support of his requests, the Applicant submits that there is a situation of extreme urgency arising from the fact that he risks not being allowed to participate in the said election.

**35.** He contends that Article 44 *in fine* of the Law No. 2019-40 of 7 November 2019, amending the Constitution of Benin requires that candidates in presidential elections be sponsored by 10% of members of Parliament and local elected officials, that is, at least 16 members of Parliament and local elected officials.

**36.** The Applicant submits that owing to not having been issued a certificate of compliance, his political party, *'Union Sociale Libérale (USL)'*, was unable to participate in the legislative elections of 28 April 2019 and that, without participating in the election of May 17th 2020, he will not be able to run in the 2021 Presidential elections.

**37.** He further contends that in spite of the Ruling for Provisional Measures issued by this Court on 20 December 2018, his criminal record still features a twenty-year conviction.

**38.** According to the Applicant, a decision of the Cotonou Court of First Instance excluded his party from the legislative elections for the same reason, which, in his opinion, is evidence of lack of independence of the judiciary arising from Organic Law No. 2018-02 of 4 January 2018 amending Law No. 94-027 of 18 March 1999 on the High Judicial Council.

**39.** The Applicant further avers that Law No. 2017-20 of 20 April 2018 on the Digital Code also creates other situations of extreme gravity, by criminalising media offences and authorizing the detention of journalists for libel.

**40.** In the Applicant's view, the said gravity is further confirmed by statements made by the Prosecutor at the Cotonou Court of First Instance at a news conference that ''…. the laws in this case are not clear […] this Digital Code is like a weapon aimed at the head of each journalist or of each web activist […]''.

**41.** According to the Applicant, Law No. 2018-34 of 5 October 2018 amending Law No. 2001-09 of 21 June 2002 on the Right to Strike, drafted and declared consistent with the Constitution by the same official, Joseph DJOGBENOU, former Minister of Justice, Keeper of the Seals and current President of the Constitutional Court, undermines democracy by prohibiting all forms of protests".

**42.** The Applicant contends that Law No. 2018 – 31 of 9 October 2018 on the Electoral Code, under which the legislative elections of 28 April 2019 were held, and the Constitution was amended, is irregular.

**43.** In his view, this law also allows for Presidential elections to be held without the major opposition party candidates, owing to the sponsorship requirement, which enables the Government to ignore the decisions issued by this Court on 29 March 2019 and 28 November 2019.

**44.** The Applicant notes that Law No. 2018 – 16 on the Penal Code imposes restrictions on the freedom to demonstrate, to hold peaceful meetings and to organise political party activities.

**45.** The Applicant considers that there is a situation of extreme gravity and a risk of irremediable violations of his civil and political rights protected under the Charter, in this case, the right to participate in the public affairs of his country and the right to life.

**46.** The Applicant indicates that this postponement of elections will not be the first given that municipal and council elections were postponed for two (2) years owing to the unavailability of the permanent Computerized Voters List (*LEPI)*.

**47.** The Applicant further avers that at the Cabinet meeting of 22 January 2020, the Respondent State issued a decree convening the electorate for elections on Sunday, 17 May 2020 although the said elections were initially scheduled for the month of June 2020.

**48.** In the same vein, the Applicant avers that the National Autonomous Electoral Commission (*CENA)* released an election timetable, whereas a case had been brought before the ECOWAS Court of Justice seeking its dissolution for lack of independence and impartiality.

**49.** According to the timetable, candidates were required to submit their applications from 2 to 11 March 2020.

**50.** In the Applicant's view, this election is a violation of Article 2(1) of the ECOWAS Protocol, which provides that "No substantial modification shall be made to the electoral laws in the last six (6) months before elections, except with the consent of a majority of political actors*"*. He asserts that it is high time this electoral process, which he describes as anti-democratic, was abolished.

**51.** In his additional submissions filed on 14 February 2020, the Applicant avers that the Benin Electoral Code prohibits independent candidates from running in the election of 17 May 2020, given that it requires that every candidate to be a member of a political party.

**52.** He further avers that as a result of the non-execution of the judgment rendered by this Court on 29 March 2019, he cannot be issued "*official documents"* such as civil status documents and travel or administrative documents.

**53.** The Applicant emphasises that there is conspiracy to keep him in exile in order to exclude him from the electoral process.

**54.** The Applicant contends that, in the circumstances, his participation in the 17 May 2020 elections is thwarted, since he cannot be issued any of the documents that a candidate is required to submit to *CENA* between 2 and 11 March 2020.

**55.** In its Response, the Respondent State prays the Court to dismiss the request for provisional measures. It submits that the Applicant's allegation that the Constitutional Court lacks independence is unfounded.

**56.** It affirms that the Constitutional Court's independence and functionality have never been disputed, either in terms of the appointment of its members, most of whom are chosen by the Bureau of the National Assembly, or in terms of their competence, given that five of the seven members have extensive legal expertise.

**57.** The Respondent State notes that the number of members, their profile (requirements in terms of expertise, professional experience and probity), security of tenure, method of appointment (majority granted by parliament) and the mode of selecting the President of the Court by his peers is sufficient proof that pressure cannot be exerted on the said court.

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**58.** The Court notes that Article 27 (2) of the Protocol provides that:
"In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

**59.** Rule 51(1) of the Rules provides as follows:
"[…] 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".

**60.** In view of the foregoing, the Court takes into account the law applicable to provisional measures which are of a preventive nature. It can order them *pendente lite* only if the basic requirements are met, namely extreme gravity or urgency and the prevention of irreparable harm to persons.

**61.** The Court notes that urgency, which is consubstantial with gravity, means a ''real and imminent likelihood that irreparable harm will be caused before it renders its final decision''[2]. Therefore, there is urgency whenever acts that are likely to cause irreparable harm

2 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gambia v Myanmar*), § 65, International Court of Justice, 23 January 2020; Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (I*slamic Republic of Iran v United States of America*), 3 October

can "occur at any time" before the Court renders its final decision in the matter[3].

**62.** The Court emphasises that the risk in question must be real[4], which excludes a purely hypothetical risk to justify the necessity to remedy it immediately.

**63.** Concerning irreparable harm, the Court is of the view that there must be a ''reasonable risk of its occurrence''[5] with regard to the context and the personal situation of the Applicant.

**64.** The Court notes that, in spite of the Ruling on Provisional Measures of 7 December 2018, the Respondent State did not suspend "the enforcement of Judgement No. 007/3C.COR of 18 October 2018, rendered by the Special Court for the Repression of Terrorism and Economic Crimes, established by Law No. 2018 – 13 of 2 July 2018"[6] and also failed to take "all the necessary measures to annul Judgement No. 007/3C. COR, rendered on 18 October 2018 by CRIET, in a manner that would wipe out all its effects"[7], notwithstanding the Judgment rendered on 29 March 2019 by this Court.

**65.** The Court notes that this accounts for the fact that the Applicant's criminal record still features a twenty-year (20) conviction by *CRIET*.

**66.** The Court further notes that the Respondent State does not dispute the Applicant's allegation that the twenty-year conviction on his criminal record prevented him from taking part in the legislative elections of 28 April 2019 and that the Minister of the Interior refused to issue his political party*, Union Sociale Libérale,* a certificate of compliance which was one of the documents to be submitted by candidates.

**67.** The Court considers that the non-execution of the Judgment of 29 March 2019 caused the Applicant prejudice since without a clean criminal record, it was impossible for him, to submit his candidacy as flagbearer of his party.

**68.** The Court emphasises that it is therefore indisputable that the risk of the Applicant not being able to run in the election of 17

2018; Immunities and Criminal Proceedings (***Equatorial Guinea v France***), 7 December 2016, para 78, International Court of Justice.

3 *Idem*, Note 2 below.

4 InterAmerican Court of Human Rights, ***Cuya Levy v Peru***, 12 March 2020, § 5;

5 See note 5.

6 See the Order issued on 7 December 2018 by this court.

7 See the Operative Part of the Judgement of 29 March 2019, rendered by this Court.

May 2020 is real, so that the irreparable character of the resulting harm is indisputable.

**69.** Accordingly, the Court is of the view that in order to prevent irreparable harm to the Applicant, the elections of 17 May 2020 must be suspended until a decision on the merits is rendered.

**70.** As regards the suspension of the laws enumerated by the Applicant, the Court considers that such a measure would require an in-depth examination of the said laws, which can only be done when considering the Application on the merits, not in the instant procedure on provisional measures.

**71.** Accordingly, the Court dismisses the Applicant's request to suspend the application of the said laws.

**72.** For the avoidance of doubt, The Court clarifies that this Ruling is provisional in nature and in no way prejudges the findings the Court on its jurisdiction, on the admissibility of the Application, and the merits thereof.

## VII. Operative part

**73.** For these reasons,

The Court,

*Unanimously*,

i. *Dismisses* the preliminary objection based on jurisdiction.

ii. *Finds* that it has *prima facie* jurisdiction.

iii. *Dismisses* the objection based on admissibility.

iv. *Orders* the Respondent State to suspend the municipal and council elections of 17 May 2020 pending its decision on the merits.

v. *Dismisses* the request to suspend the application of the laws passed by the National Assembly, to wit, Organic Law No. 2018 – 02 of 4 January 2018 to amend and complete Organic Law No. 4 – 027 of 18 March 1999 relating to the Higher Judicial Council, Law No. 2017 – 20 of 20 April 2018 on the Digital Code in the Republic of Benin, Law No. 2018 – 34 of 5 October 2018 to amend and complete Law No. 2001 – 09 of 21 June 2002 on the Right to Strike in the Republic of Benin, Law No. 2018 – 016 on the Penal Code of the Republic of Benin, Law No. 2019 – 40 of 7 November 2019 on the amendment of Law No. 90 – 032 of 11 December 1990 on the Constitution of the Republic of Benin, as well as municipal orders which, according to the Applicant, prohibit public demonstrations by way of protest.

vi. *Orders* the Respondent State to submit a report to it on the measures taken to implement this Ruling within thirty (30) days of its notification

# Ajavon v Benin (judgment) (2020) 4 AfCLR 133

Application 062/2019, *Sébastien Germain Marie Aïkoue Ajavon v Republic of Benin*

Judgment, 4 December 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought this action to challenge the conduct of parliamentary elections as irregular, alleging that the national assembly that resulted from the elections was inconsistent with the Respondent State's international obligations on constitutional democracy. The Applicant further alleged that constitutional amendments, and certain laws made by the new parliament, as well as the composition and functioning of the Constitutional court were in violation of the Respondent State's human rights obligations. The Court held that the Respondent State had violated certain Charter rights.

**Jurisdiction** (material jurisdiction, 26, 27, 37, 50; appellate jurisdiction 43, 44)

**Admissibility** (objections not grounded on the Charter or the Rules, 35; victim requirement, 58 -59; abusive applications, 64; locus standi, 72; local remedies, 85-86, 99-100)

**Freedom of opinion and expression** (foundation of democracy, 119; restriction of, 119, 120, 122; general limitation clause, 123; prohibited expressions, 125)

**Right to strike** (corollary of right to work, 132; status in Charter 132, 133; non-regression, 135-136; progressive realisation, 136)

**Freedom of assembly** (limited right, 149, 151; nature of limitation, 150)

**Right to life** (link to integrity of the person, 163, 166; principle of life, 166; probative sources, 168; evidence in the public domain, 171)

**Freedom of association** (measure of state discretion, 184; unjustified limitations, 202)

**Right to participate freely** (independent candidature, 206-207; electoral alliances, 206)

**Fair trial** (link to right to effective remedy, 228; state obligation 229; amnesty laws 230-231, 233, 238)

**Democratic governance** (suspension of political parties, 245)

**Independent judiciary** (limbs of, 278; institutional independence, 279; Individual independence, 280; renewable term 236, 238; presumption of impartiality 293, 294; autonomy of judicial power, 312)

**Constitutional democracy** (national consensus, 335, 337, 339-341)

## I. The Parties

**1.** Mr. Sébastien Germain Marie Aïkoué Ajavon, (hereinafter referred to as "the Applicant"), of Beninese nationality, is a businessman residing in Paris, France, as a political refugee. He alleges the violation of various civil and political rights relating to recently promulgated laws, in particular electoral laws, in the Republic of Benin.

**2.** The Application is filed against the Republic of Benin (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 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 further deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") on 8 February 2016, by accepting the jurisdiction of the Court to receive Applications from individuals and non-governmental organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases nor on new cases filed before the withdrawal comes into effect, that is, one year after its filing, on 26 March 2021.[1]

## II. Subject of the Application

### A. Facts of the case

**3.** The Applicant claims that the Beninese parliamentary elections of 28 April 2019 were irregular and that the resulting National Assembly was established based on a series of electoral laws that are not consistent with international conventions.

**4.** The Applicant further claims that on the night of 31 October to 1 November 2019, this Parliament unanimously adopted a law revising the Constitution which, after review by the Constitutional Court of its conformity with the said Constitution, was promulgated

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (03 June 2016) 1 AfCLR 540, § 69; *Houngue Eric Noudehouenou v Republic of Benin* ACHPR, Application 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4-5 and Corrigendum of 29 July 2020.

by the President of the Republic and published in the Official Gazette. The Applicant asserts that this law and subsequent laws have been the cause of several human rights violations.

## B. Alleged violations

**5.** The Applicant alleges violation of the following rights and freedoms:

i. Freedom of opinion and expression, guaranteed by Articles 9(2) of the Charter and 19(3) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR");

ii. Violation of the right to strike, guaranteed by Article 8(1)(d)(2) of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "ICESCR");

iii. Freedom of assembly, guaranteed by Article 11 of the Charter;

iv. The right to liberty and security, guaranteed by Article 6 of the Charter;

v. The right to life and to physical and moral integrity and the right not to be subjected to torture, guaranteed by Articles 4 and 5 of the Charter respectively;

vi. The right to have one's cause heard, guaranteed by Article 7 (1) of the Charter;

vii. Freedom of association, guaranteed by Article 10 of the Charter and Article 22(1) of the ICCPR;

viii. The right to non-discrimination and the right to participate freely in the government of one's country, guaranteed respectively by Articles 2 and 13(1) of the Charter;

ix. The right to have one's cause heard, guaranteed by Article 7(1) of the Charter;

x. The right of political parties to carry out their activities freely, guaranteed by Article 1(i)(2) of the Economic Community of West African States (ECOWAS) Protocol A/SP1/12/01 on Democracy and Good Governance, Additional Protocol to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (hereinafter referred to as "the ECOWAS Protocol on Democracy").

**6.** The Applicant also claimed violation of the:

i. obligation to establish independent and impartial electoral bodies, enshrined in Articles 17(1) of the African Charter on Democracy, Elections and Governance, (hereinafter referred to as "the ACDEG") and 3 of the ECOWAS Protocol on Democracy;

ii. obligation not to unilaterally amend electoral laws less than six (6) months prior to elections, enshrined in Article 2 of the ECOWAS Protocol on Democracy;

iii. obligation to establish independent courts, enshrined in Article 26 of the Charter;

iv. obligation to establish the rule of law;

v. obligation to adopt a constitutional revision based on national consensus, enshrined in Article 10(2) of the ACDEG;

vi. obligation not to undertake an unconstitutional change of Government and the obligation not to effect a constitutional review that violates the principles of democratic change of government, enshrined respectively in Articles 1(c) of the ECOWAS Protocol on Democracy and 23(5) of ACDEG.

## III. Summary of the Procedure before the Court

**7.** The Application was received at the Registry on 29 November 2019.

**8.** Following a Application for Provisional Measures dated 9 January 2020, the Court issued on 17 April 2020 a Ruling on Provisional Measures, the operative part of which reads as follows:
"The Court,

Unanimously,

i. Dismisses the preliminary objection of lack of jurisdiction;

ii. Finds that it has *prima facie* jurisdiction;

iii. Dismisses the preliminary objection of inadmissibility;

iv. Orders the Respondent State to suspend the election of municipal and commune councillors scheduled for 17 May 2020 until the Court renders a ruling on the merits;

v. Dismisses the request to stay the Application of the laws voted by the National Assembly, namely, Organic Law No. 2018 - 02 of 4 January 2018 amending and supplementing organic law No. 4 - 027 of 18 March 1999 relating to the *Conseil supérieur de la Magistrature* [Higher Judicial Council], Law No. 2017 - 20 of 20 April 2018 on the Digital Code in the Republic of Benin, Law No. 2018 - 34 of 5 October 2018 amending and supplementing Law No. 2001 - 09 of 21 June 2002 on the exercise of the right to strike, Law No. 2018 - 016 on the Criminal Code, Law No. 2019 - 40 of 7 November 2019 revising Law 90 - 032 of 11 December 1990 on the Constitution of the Republic of Benin and the municipal orders referred to by the Applicant;

vi. Orders the Respondent State to report back to it on the enforcement of the provisional measures within one month of notification of this decision."

**9.** With regard to the merits and reparations, the parties filed their submissions within the time limits set by the Court. These were duly served on the other party.

**10.** On 12 October 2020, pleadings were closed, and the Registry duly informed the parties.

**11.** On 15 October 2020, the Applicant filed a second Application for provisional measures praying the Court to order the Respondent State to take the necessary measures to remove all obstacles preventing him from participating effectively in the presidential election of 2021 as an independent candidate.

**12.** On 12 November 2020, the Registry received the Response from the Respondent State on the Application for provisional measures.

**13.** The Court found that since the subject of the Application for provisional measures is similar to that of the prayers on the merits, it would dispose of the matter at the stage of merits.

## IV. Prayers of the Parties

**14.** The Applicant prays the Court to:

i. note the unconventional nature of the laws that led to the installation of the National Assembly during the legislative elections of 28 April 2019;

ii. note the lack of independence and impartiality of the Constitutional Court;

iii. note the violation by the Republic of Benin of the preamble, Articles 2(2), 3(2), 4(1), 10(2), 17(1), 23(5) and 32(8) of the ACDEG and 1(i) (2) of Protocol A/SP1/12/01 on Democracy and Good Governance, Additional to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security;

iv. order the State of Benin to pay the costs of the case.

**15.** For its part, the Respondent State prays the Court to:

i. find that the Application is inconsistent with the Constitutive Act of the African Union and the Charter;

ii. note the absurdity of the requests for annulment of Benin›s fundamental law;

iii. note that the Court (...) is not an appellate instance against decisions of domestic courts;

iv. find that the Applicant is seeking an abstract review of the consistency of Benin›s domestic laws with international conventions;

v. rule that the Court has no jurisdiction;

vi. find that the Applicant is bringing multiple proceedings as political propaganda;

vii. rule the Application inadmissible for abuse of process;

viii. find that the European Court of Human Rights (hereinafter referred to as «ECHR») has held that an Application is abusive when an Applicant files multiple pointless Applications;

ix. find that, as stated by the ECHR, any conduct by an Applicant which is manifestly contrary to the purpose of the right of appeal established by the Convention (here the Charter) is abusive;

x. find that the ECHR has stated that the Court may also declare that an Application which is manifestly devoid of any real substance and/or (...) generally speaking, is irrelevant to the objective legitimate interests of the Applicant is abusive [*Bock v Germany*; *SAS v France* [GC] paras 62 and 68];

xi. find that the Applicant is not a victim within the meaning of the Charter;

xii. find that the Application is abusive and frivolous;

xiii. consequently, rule the Application inadmissible;

xiv. find that a legal claim must be based on a personal interest;

xv. note that in an opinion, Judge Ouguergouz Vice President of the Court stressed that the Applicant must show how he is a victim of what he attributes to the State as a wrongful act under the Charter;

xvi. find that the Applicant does not show *locus standi*;

xvii. find that the Applicant is not a victim within the meaning of the Rules of the Court and the Charter;

xviii. find that the Applicant did not exhaust local remedies;

xix. find that the Application was not filed within a reasonable time that should have started to run after the exhaustion of local remedies;

xx. find that there was an intent of chicanery and an abuse of rights;

xxi. find that the Applicant is bringing infringement proceedings;

xxii. find that the Applicant has no *locus standi*;

xxiii. rule the Application inadmissible.

**16.** In the alternative, the Respondent State requests the Court to:

i. find that the Applicant does not raise any dispute relating to a case of violation;

ii. find that the law establishing the political parties charter does not breach the Applicant's human rights;

iii. find that the law on the electoral code in the Republic of Benin does not breach the human rights of the Applicant;

iv. find that the law on the exercise of the right to strike does not breach the human rights of the Applicant;

v. find that the law on the criminal procedure in the Republic of Benin is consistent with the international commitments of the Beninese state;

vi. find that the Respondent State has not violated its international obligations under the ECOWAS community instruments;

vii. find that the fundamental law is legal and constitutional; Consequently

viii. find that the Application is unfounded.

**17.** With respect to reparations, the Applicant seeks the following measures:

i. order the invalidation of the 8th legislature following the elections of 28 April 2019;

ii. order the invalidation of the Constitutional Court due to the President's lack of impartiality and independence;

iii. order outright annulment of Law No. 2019 - 40 of 7 November 2019 amending the Constitution of the Republic of Benin and all laws derived from it (Political Parties' Charter, electoral code, status of the opposition, financing of political parties ...);

iv. cause the Peace and Security Council (PSC) of the African Union to prosecute the perpetrators and accomplices of this unconstitutional (...) change of Government;

## V. Jurisdiction

**18.** The Court notes that Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and Application of the Charter, this Protocol and any other relevant human rights 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.** Pursuant to Rule 49(1) of the Rules (hereinafter referred to as "the Rules"),[2] " [t]he Court shall ascertain its jurisdiction […] of an Application in accordance with the Charter, the Protocol and these Rules".

**20.** On the basis of the above-cited provisions, the Court must, in every Application, preliminarily ascertain its jurisdiction and rule on the objections to its jurisdiction, if any.

**21.** The Court notes that the Respondent State raises several objections to its material jurisdiction.

### A. Objections to lack of material jurisdiction

**22.** The Respondent State raises five (5) objections to the Court's material jurisdiction based on the (i) absence of human rights violations; (ii) the incompatibility of the Application with the Constitutive Act of the African Union and the Charter; (iii) the unreasonable nature of the measures sought; (iv) review of

2 Formerly Rule 39(1) of the Rules of Court of 2 June 2010.

decisions of domestic courts; and, (v) requests for a review *in abstracto of* the consistency of domestic laws with international conventions.

## i. Objection based on the absence of human rights violations

**23.** The Respondent State submits, on the basis of Article 34 of the Rules of Court[3] (hereinafter referred to as "the Rules") that the Court may exercise its jurisdiction only if a case of human rights violation is brought before it. The Respondent State avers that the Applicant must clearly indicate the alleged violations and must not merely rely on abstract hypotheses or circumstances.

**24.** The Applicant prays the Court to dismiss the objection, pointing out that Rule 34 (4) of the Rules concerns auxiliary conditions for the admissibility of the Application and that material jurisdiction should instead be assessed by reading Article 3(1) of the Protocol together with Rule 26(1) of the Rules.[4]

**25.** The Applicant claims to have clearly indicated the violations of personal, concrete and current human rights by citing the articles that protect them.

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**26.** The Court emphasises that it has consistently held that Article 3(1) of the Protocol confers on it the capacity to consider any Application which contains allegations of violations of human rights guaranteed by the Charter or by any other relevant human rights instrument ratified by the Respondent State.[5]

**27.** In the instant case, the Applicant alleges violations of human rights guaranteed by a set of human rights instruments, namely, the

3 Corresponding to Rule 40(2) of the Rules entered in force on 25 September 2020 (new Rules).

4 Corresponding to Rule 29 of the new Rules.

5 *Yacouba Traoré v Republic of Mali*, ACtHPR, Application 010/2018, Judgment of 25 September 2020 (jurisdiction and admissibility), § 20.

Charter, the ACDEG, the ICCPR, the ICESCR and the ECOWAS Protocol on Democracy to which the Respondent State is a party.[6]

**28.** Consequently, the Court dismisses this objection of lack of material jurisdiction.

### ii. Objection based on the inconsistency of the Application with the Constitutive Act of the African Union or the Charter

**29.** The Respondent State notes that an Application that does not contain allegations of human rights violations must be found to be incompatible with the Constitutive Act of the African Union or the Charter.

**30.** The Respondent State stresses that, in asserting that the Beninese Parliament is illegitimate, that the Constitutional Court is neither independent nor impartial and that the constitutional revision took place late at night, the Applicant does not accuse the State of having disregarded his human rights.

**31.** According to the Applicant, this objection must be dismissed because the inconsistency of the Application with the Constitutive Act of the African Union or with the Charter is not a ground for lack of jurisdiction but rather a ground for inadmissibility of the Application.

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**32.** The Court notes that within the meaning of Article 56(2) of the Charter, which is restated in Rule 50(2)(b) of the Rules,[7] the consistency of the Application with the Constitutive Act of the African Union or the Charter is a condition of admissibility and not a question relating to the material jurisdiction of the Court.

6 The Respondent State became a party to the ICCPR and to the ICESCR on 12 March 1992. It became a party to the ACDEG on 11 July 2012 and to the ECOWAS Protocol on Democracy on 20 February 2008.

7 Formerly Rule 40 of Rules of 2 June 2010.

**33.** Accordingly, the Court will deal with this question at the admissibility stage.

## iii. Objection based on the unreasonable nature of the applications

**34.** The Respondent State argues on the basis of Rule 26 of the Rules[8] that the Applications are unreasonable because the Court has neither jurisdiction to annul a domestic law, including the Constitution, as this would lead to a legal vacuum, nor can the Court declare the dissolution of Parliament.

**35.** The Applicant for his part submits that the Court has jurisdiction to examine whether the legislative elections were held in conformity with the Charter and whether the Constitution and the Constitutional Court are consistent with the Charter.

**36.** He stresses that the annulment of the law revising the Constitution would not lead to a legal vacuum since the Constitution of 11 December 1990 would be reinstated, and the annulment of the legislative elections would result in their reorganisation and the rectification of the laws annulled by the new Parliament.

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**37.** The Court notes that the Court's lack of material jurisdiction is not dependent on the qualification by any of the parties of the legal facts alleged in the Application.

**38.** The Court recalls that its jurisdiction is based on Article 3(1) of the Protocol. It follows that the Respondent State's description of the claims as unreasonable cannot, therefore, preclude the exercise of the Court's material jurisdiction. Consequently, the Court dismisses this objection of lack of material jurisdiction.

8 Corresponding to Rule 29 of the new Rules.

### iv Objection based on the review of decisions of domestic courts

**39.** The Respondent State argues that the Court's case law shows that the Court is not a court of appeal with regard to decisions of national courts.

**40.** The Respondent State avers that the Court cannot hear the Application for review of decision DCC 18 - 270 issued on 28 December 2018 by the Constitutional Court of Benin, which found Law No. 2018 - 16 of 28 December 2018 on the Penal Code to be in conformity with the Constitution.

**41.** The Applicant considers that the Court has jurisdiction to assess whether the said ruling of the Constitutional Court was issued in accordance with the principles set out in the Charter and any other applicable international human rights instruments.

**42.** The Applicant explains that he is not requesting the Court to review the legality of a domestic ruling but rather to find a manifest violation of human rights contained in a judicial act. This Court would only have acted as a court of appeal if it had applied the same texts as the Constitutional Court of the Respondent State, which is not the case here.

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**43.** The Court notes that while it is established that it is not an appellate court,[9] it can, nonetheless, validly examine the relevant domestic proceedings to determine whether they comply with the international human rights standards it is mandated to interpret and apply.[10]

**44.** The Court holds that a determination whether a domestic court's decision violates human rights does not make the African Court an appellate court with respect to domestic courts. Therefore, this objection is dismissed.

9 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR, 190, §14.

10 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §130.

### v Objection based on the lack of jurisdiction to review *in abstracto* the conformity of domestic laws with international conventions

**45.** The Respondent State argues that the Court lacks jurisdiction, on the ground that no provision confers on it the power to review *in abstracto* the conformity of domestic legislation with international conventions. In particular this excludes the possibility to review Law No. 2018 - 23 of 17 September 2018 on the Charter of Political Parties (hereinafter referred to as the "Charter of Political Parties "), which the Applicant considers not to be in conformity with international conventions.

**46.** The Respondent State explains that the Applicant, can, as a first resort, refer the violations to the national court, since the African Court may only be seized of the matter in a subsidiary manner and *in concreto.*

**47.** The Applicant, for his part, seeks the dismissal of the objection, arguing that he is not asking the Court to review *in abstracto* the conformity of Charter of Political Parties with international conventions, but rather the provisions of specific laws which violate his right to participate in the government of his country.

**48.** He alleges the existence of a concrete violation because, in the middle of the electoral process, the Constitutional Court demanded from the candidates in the parliamentary elections of 28 April 2019 a certificate of conformity with the Charter of Political Parties (hereinafter referred to as "certificate of conformity") with the intention of illegally excluding political parties.

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**49.** The Court emphasises that under Article 3(1) of the Protocol, the Court is mandated to interpret and apply the Charter and any other relevant instrument ratified by the Respondent State, and to determine the existence or otherwise of violations of human rights, including where such violations result from the Application of a national law. In this regard, the Court notes that international conventions take precedence over domestic laws.

**50.** In the instant case, the Applicant alleges violations of human rights, in particular the violation of the right to participate in the government of his country, resulting from the adoption and

Application of certain laws which he has specified and which are allegedly not in conformity with international instruments ratified by the Respondent State.

**51.** The Court considers that it has the power to review whether such laws comply with international human rights instruments ratified by the Respondent State. Therefore, this objection of lack of material jurisdiction is dismissed

### B. Other aspects of jurisdiction

**52.** Having found that there is nothing on the record to indicate that it does not have jurisdiction with respect to the other aspects of jurisdiction, the Court concludes that it has:

i. Personal jurisdiction, in so far as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration. In this vein, the Court recalls its earlier position that the Respondent State's withdrawal of its Declaration on 25 March 2020 does not have effect on the instant Application, as the withdrawal was made after the Application was filed before the Court.[11]

ii. Temporal jurisdiction, in so far as the alleged violations were committed after the entry into force with respect of the Respondent State of the human rights instruments referred to in paragraph 27 of this Judgment.

iii. Territorial jurisdiction, in so far as the facts of the case and the alleged violations took place on the territory of the Respondent State.

**53.** Accordingly, the Court declares that it has jurisdiction to examine the instant Application.

## VI. Preliminary objections relating to admissibility

**54.** The Respondent State raises a number of preliminary objections relating to the admissibility of this Application. They are based on (i) the Applicant's lack of standing as a victim, (ii) the abuse of the right to file an Application, (iii) lack of standing to lodge infringement proceedings and (iv) lack of interest.

**55.** The Court notes that even if these objections are not specifically grounded in the Protocol and the Rules, the Court is required to examine them.

11 See paragraph 2 above.

## A. Objection based on lack of victim status of the Applicant

**56.** The Respondent State submits that the Applicant does not claim to be a victim of human rights violations and that it cannot be otherwise, since there was no interference with his civil rights. Moreover, he is not affected by any administrative measures.

**57.** The Applicant requests the dismissal of this preliminary objection and submits that it is established that the Respondent State interfered with his civil and political rights. According to him, the refusal by the Minister of the Interior and Public Security (hereinafter referred to as the "Minister of the Interior") to issue a certificate of compliance to his political party attests to the failure by the Respondent State to comply with the order for provisional measures issued by the Court on 7 December 2018 in Application 013-2017 *Sebastien Ajavon v Republic of Benin*.

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**58.** The Court points out that neither the Charter, nor the Protocol, nor do the Rules require that the Applicant and the victim have to be the same.

**59.** This is a peculiarity of the African regional human rights system characterised by the objective nature of human rights litigation. Consequently, the Court dismisses the preliminary objection based on lack of victim's status.

## B. Objection based on the abuse of the right to file an Application

**60.** The Respondent State submits that in less than one month, the Applicant has taken a vexatious and abusive approach by filing nine Applications which cannot be of any interest to him because of their manifest disparities.

**61.** The Respondent State points out that this is a case of manifest abuse of the right to file an Application, and that this notion must be understood in its ordinary meaning as defined by the general theory of law, namely, the fact that the holder of the right has

exercised it in a prejudicial manner, without regard for its ultimate purpose.

**62.** The Applicant, for his part, prays the Court to dismiss this claim and maintains that the proceedings indicated by the Respondent State do not concern the same violations and that, moreover, some of them were brought by third parties.

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**63.** The Court notes that the Applicant has filed three (3), and not nine (9) Applications initiating proceedings.

**64.** The Court notes that an Application is said to be abusive if, among others, it is manifestly frivolous or if it can be discerned that an Applicant filed it in bad faith contrary to the general principles of law and the established procedures of judicial practice. In this regard, it should be noted that the mere fact that an Applicant files several Applications against the same Respondent State does not necessarily show a lack of good faith. More substantiation is required to establish the Applicant's abusive intention.

**65.** Therefore, the Court dismisses this objection.

## C. Objection based on lack of standing to lodge infringement proceedings

**66.** The Respondent State argues that by invoking the violation of obligations under the ECOWAS Protocol on Democracy, including those relating to electoral bodies, the Applicant is in fact lodging infringement proceedings under Article 10(a) of Additional Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 on the ECOWAS Court of Justice.[12]

**67.** The Respondent State further argues that the Applicant does not have *locus standi* to submit such a request, hence the inadmissibility of the Application for lack of standing.

**68.** The Applicant, for his part, seeks dismissal of this preliminary objection on the ground that infringement proceedings are special proceedings before the ECOWAS Court of Justice. He stresses

12 This Article provides: "Access to the Court is open to the following: a) Member States, and unless otherwise provided in a Protocol, the Executive Secretary, where action is brought for failure by a Member state to fulfil an obligation;"

that each human rights court has its own protocol, and that the Protocol of the Court indicates that individuals can bring cases before it.

**69.** According to the Applicant, the question that arises is whether the ECOWAS Protocol on Democracy under which States are required to set up national independent and impartial election management bodies is an instrument for the protection of human rights within the meaning of Article 3(1) of the Protocol, a question which the Court has answered in the affirmative.

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**70.** The Court notes that in the light of Article 10-a Additional Protocol relating to the ECOWAS Court of Justice,[13] lodging of infringement proceedings falls within the jurisdiction of that Court of Justice.

**71.** The Court further recalls that the ECOWAS Protocol on Democracy is a human rights instrument to the extent that it enunciates human rights for the benefit of individuals or groups of individuals and prescribes obligations on State Parties to ensure the fulfilment of those rights.[14] Consequently, the violation of the rights and obligations deriving from it can validly be invoked before the Court under Article 7 of the Protocol.

**72.** In any event, neither the lodging of infringement proceedings nor the lack of standing to do so can justify the inadmissibility of an Application brought before this Court. Consequently, the Court dismisses this preliminary issue.

## D. Objection based on lack of interest

**73.** The Respondent State contends that the Applicant fails to give reasons for his personal, current, direct and concrete interest, whereas the ECOWAS Court of Justice has held that *locus standi* is subject to the status of victim of human rights violation.

**74.** The Respondent State further asserts that the Applicant had articulated claims which could only be of benefit to political parties

13 Supplementary Protocol A/SP.1/05 of 19 January 2005 amending Protocol A/P.1/7/91 on the ECOWAS Court of Justice.

14 *Actions pour la protection des droits de l'homme v Côte d'Ivoire*, (merits and reparations) (18 November 2016), 1 AfCLR 668, §§ 57 - 65.

and did not prove that he had personally suffered human rights violations.

**75.** The Applicant requests the dismissal of this preliminary objection on the basis that the case files, particularly the Application initiating proceedings, clearly show that he alleges violation of a number of his fundamental rights.

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**76.** The Court notes that, although human rights courts have a common mission to protect human rights, they do not share the same requirements, particularly with respect to questions of admissibility.

**77.** In the instant case, the Respondent State bases its preliminary objection on the requirement of victim status, a procedural expression of the interest to act, provided for in Article 10(d) of the Protocol of 2005 relating to the ECOWAS Court of Justice.[15] However, neither the Charter nor the Protocol, let alone the Rules, contain a similar provision. Consequently, the Court dismisses this preliminary objection.

## VII. Admissibility of the Application

**78.** Article 6(2) of the Protocol provides:
The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter.

**79.** In addition, Rule 50 of the Rules provides:
The Court shall ascertain the admissibility […] in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.

**80.** Rule 50(2) of the Rules, which essentially restates Article 56 of the Charter, reads as follows:
Applications filed before the Court shall comply with all the following conditions:

a. Indicate their authors even if the latter request anonymity,

b. Are compatible with the Constitutive Act of the African Union and with the Charter,

15 Article 10 of Supplementary Protocol A / SP / 01.05 of 19 January 2005 to amend Protocol A / P1 / 7/91 provides: "Access to the Court is open to the following: […] Individuals on Application for relief for violation of their human rights".

c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,

d. Are not based exclusively on news disseminated through the mass media,

e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,

f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and

g. Do not deal with cases which have been settled by those State involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.

## A. Conditions of admissibility in contention between the parties

**81.** The Respondent State raises objections of inadmissibility on the ground of non-exhaustion of local remedies and the fact that the Application was not submitted within a reasonable period of time with regard to the orders issued by the mayors of Parakou and Abomey – Calavi.

### i. Objections based on the non-exhaustion of local remedies and the filing of the Application within an unreasonable time, related to the orders issued by the mayors of Parakou and Abomey - Calavi

**82.** The Respondent State raises the inadmissibility of the Application for non-exhaustion of local remedies, with respect to the orders issued by the mayors of Parakou[16] and Abomey Calavi[17] and which, for the Applicant, violate Articles 3 and 11 of the Charter. According to him, these orders are administrative acts that may be reversed by administrative courts.

**83.** The Applicant submits that this objection must be dismissed because the judicial remedies that should be exhausted must

16 This order prohibited public protests "considering the social climate (...) and for the sake of preserving peace".

17 This decree reads as follows: "In order to prevent possible disturbances to public order, and in accordance with the radio press release dated in Abomey - Calavi 25 February 2019 prohibiting any public protest, I have the honour to notify you that the peaceful protest march you are planning to organize in Abomey - Calavi, on Friday 25 March 2019 has been banned.

be available, effective and capable of resolving disputes within a reasonable time. He asserts that appeals relating to pre-electoral disputes ensuing from the legislative elections of 28 April 2019, when these orders were issued, are still being examined before the Administrative Chamber of the Cotonou Court of Appeal. This failure by the judiciary to deal with the appeals expeditiously is symptomatic of undue prolongation and ineffectiveness of local remedies.

**84.** In the alternative, the Applicant requests a joinder of this objection to the merits since the Court cannot rule on the effectiveness of local remedies without prejudging its position on the merits of the case as regards the alleged right to independence of the judiciary.

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**85.** Based on its case-law, the Court notes that the requirement of exhaustion of local remedies prior to bringing a case before an international human rights court is an internationally recognised and accepted rule.[18]

**86.** The Court adds that the local remedies to be exhausted are judicial remedies. They must be available, that is, they must be capable of being used by the Applicant without hindrance;[19] they must also be effective and sufficient, in the sense that they are ["capable of satisfying the complainant"] or of remedying the situation at issue.[20]

**87.** The Court underlines that the courts of first instance have jurisdiction to entertain litigation pertaining to the said acts pursuant to article 53[21] of Law No. 2001 - 37 of 27 August 2002,[22]

18 *Diakite v Republic of Mali*, (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 41; *Lohé Issa Konaté v Burkina Faso*, (merits) (5 December 2014), 1 AfCLR 314, § 41.

19 *Lohé Issa Konaté v Burkina Faso*, (merits) (5 December 2014), 1 AfCLR 314, § 96.

20 *Ibid. Konaté v Burkina Faso* § 108.

21 Article 53 of Law No. 2001-37 of 27 August 2002 provides: "In administrative matters, they (the courts of first instance) shall entertain, in the first instance, disputes relating to all acts emanating from the administrative authorities within their jurisdiction".

22 Law on the organisation of the judiciary in the Republic of Benin.

including by way of appeal for abuse of authority or by a full jurisdiction appeal.

**88.** Thus, with respect to the municipal orders applicable to Parakou and Abomey – Calavi, a local remedy is available. This remedy is also effective in that it allows for the annulment of the disputed acts.

**89.** In an attempt to justify his failure to bring proceedings before the relevant court, the Applicant invoked the abnormally lengthy delays of proceedings relating to pre-electoral appeals. In the Court's opinion, this allegation is futile, as the Application does not provide evidence for this allegation.

**90.** Thus, the local remedies were not exhausted with respect to the Orders issued by the Mayors of Parakou and Abomey - Calavi which took effect from 25 February 2019. Therefore, the Court rules that any allegation relating to the said Orders is inadmissible for non-exhaustion of local remedies.

**91.** In view of the foregoing, the Court considers that it becomes superfluous to rule on the objection of inadmissibility based on the alleged failure to file the Application within a reasonable time regarding those Orders.

## B. Other conditions of admissibility

**92.** The Court notes that, in the present case, the parties are not challenging compliance with Rule 50(2)(a)(b)(c)(d)(f)(g) of the Rules.[23] However, the Court must examine whether these conditions have been met.

**93.** In the opinion of the Court, it is apparent from the records that the condition set out in Rule 50(2)(a) of the Rules has been satisfied, as the Applicant has clearly indicated his identity.

**94.** Moreover, the condition laid down in paragraph 2(b) of the same Rule has also been fulfilled, since the Application is in no way inconsistent with the Constitutive Act of the African Union, or with the Charter.

**95.** The Court further notes that the Application does not contain any abusive or insulting language with respect to the State concerned, and is thus consistent with Rule 50(2)(c) of the Rules.

**96.** As regards the condition laid down in paragraph 2(d) of the same Rule, the Court notes that it has not been established that the

23 Formerly Rule 40 of the Rules of 2 June 2010.

arguments of fact and law developed in the Application are based exclusively on information disseminated through the mass media.

**97.** Regarding the requirement of exhaustion of local remedies, provided under Rule 50(2)(e), the Court recalls that it was only raised in relation to the alleged violation of Articles 3 and 11 of the Charter as a result of the municipal orders applicable in Parakou and Abomey-Calavi. The objection raised by the Respondent State on this point was dismissed. The Court will therefore examine this condition regarding the other alleged violations. The Court recalls that the local remedies to be exhausted must be available, effective and sufficient.

**98.** With regard to the availability of remedies, the Court notes that under Articles 114[24] and 122[25] of the Constitution of the Respondent State, the Constitutional Court of the Respondent State determines the constitutionality of laws and guarantees fundamental human rights and public freedoms. It is the first and last resort in any proceedings pertaining to violation of human rights brought by any citizen in the Respondent State. Consequently, a local remedy exists and is available.

**99.** With regard to the effectiveness of the remedy the Court stresses that the existence of a remedy is not in itself sufficient to conclude that the remedies should have been exhausted. In fact, an Applicant is required to exhaust a remedy only to the extent that it is effective, efficient and is likely to succeed.[26]

**100.** The Court observes that the analysis of the usefulness of a remedy cannot be automatically applied, and is not absolute in nature.[27] In addition, the interpretation of the rule on the exhaustion of local remedies must realistically take into account the legal and political context of the case and the Applicant's personal circumstances.[28]

24 Article 114 of the Constitution of Benin stipulates that: "The Constitutional Court shall be the highest court of the State in constitutional matters. It shall be the judge of the constitutionality of laws and it shall guarantee the fundamental rights of the human person and public freedoms (…)"

25 Under Article 122 of the Constitution: ["Any citizen may complain to the Constitutional Court about the constitutionality of laws, either directly or by raising before a court of law an objection of unconstitutionality with respect to a matter which concerns him"]

26 *The Beneficiaries of the late Norbert Zongo, Aboulaye Nikiema, Alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement burkinabé des droits de l'homme et des peuples v Burkina Faso*, (merits) (28 March 2014), 1 AfCLR 219, § 68; *Ibid. Konaté v Burkina Faso* (merits) 314, § 92 and 108.

27 *Tanganyika Law Society, The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania*, Judgment (merits) (14 June 2013) 1 AfCLR 34, § 82.1

28 *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application 013/2017,

**101.** Regarding the legal context, the Court notes that under Article 117 of the Benin Constitution,[29] all laws are subject to constitutional review before promulgation at the request of the President of the Republic or any member of the National Assembly.[30]

**102.** The Court thus stresses that the Charter is an integral part of the Constitution of Benin.[31] It follows that constitutional review, which covers both the procedure followed for the adoption of the law as well as its content[32] is exercised in relation to the "*constitutional corpus ["bloc de constitutionnalité"] comprising the Constitution and the African Charter on Human and Peoples Rights.*"[33] Through this procedure, the Constitutional Court of Benin is required to ascertain the compliance of the law with Human Rights instruments.

**103.** In the instant case, the Applicant alleges human rights violations which are based on laws that were subject to prior (*ex ante*) constitutional review.

**104.** The Court emphasises that in such a case, there is very little likelihood that any case submitted *ex post* relating to human rights violations based on the laws mentioned by the Applicant would succeed before the same Constitutional Court,[34] considering that the court has already decided on the constitutionality of those laws.

Judgment of 29 March 2019 (Merits), § 110; ECHR, Application 21893/93, ***Akdivar & ors v Turkey***, Judgment of 16 September 1996, § 50. See also ECHR Application 25803/94, ***Selmouni v France***, Judgment of 28 July 1999, § 74.

29 See also Article 19 of Law No. 91-009 of 4 March 1991 relating to the Organic Law on the Constitutional Court as amended by the law of 31 May 2001.

30 Article 121 of the Benin Constitution.

31 Article 7 of the Constitution of Benin provides: "The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Benin on 20 January 1986 shall be an integral part of the (…) Constitution and the law"; See also Constitutional Court of Benin, Decision DCC No. 34-94 of 23 December 1994, 1994 Report, p. 159 et seq.; and Decision DCC No. 09-016 of 19 February 2009.

32 Article 35 of the Rules of Procedure of the Constitutional Court provides, as part of the review of conformity with the Constitution, that: "The Constitutional Court shall review and rule on the full text of the law, both on its content and on the procedure followed for its adoption".

33 High Council of the Republic (HCR) of Benin sitting as a Constitutional Court, Decision of 3 DC of 2 July 1991.

34 Article 33 of the Rules of Procedure of the Constitutional Court provides: "Referral to the Constitutional Court before the enactment of a law shall lead to the suspension of the period for enactment". Article 36 of the said Rules of Procedure stipulates that: "Where the Court confirms compliance with the Constitution, the publication of its decision puts an end to the suspension of the enactment period".

**105.** In any event, the Court had already ruled, in a matter between the same parties, that given the political context and the personal situation of the Applicant, the requirement to exhaust local remedies has to be waived because "the prospects of success of all the proceedings for reparation of the damages resulting from the alleged violations were negligible."[35]

**106.** Thus, the Application cannot be ruled inadmissible for failure to exhaust local remedies due to the ineffectiveness of the available remedies.

**107.** With regard to the requirement of filing the Application within a reasonable time limit, provided under Rule 50(2)(f), the Court recalls that it had ruled on this issue in the matter concerning the Municipal Orders (*Arrêtés*) of Parakou and Abomey-Calavi.[36]

**108.** Concerning the other facts alleged in support of the Application, that is, those that are not related to these Municipal Orders, the Court notes that they are related to the legislative elections of 28 April 2019, to the Constitutional Court and to the constitutional revision of 7 November 2019.

**109.** The Court considers the date of the legislative elections, that is 28 April 2019, is the relevant date to compute the starting date of the period for its seizure. Between that date and that of the filing of the Application, that is, on 29 November 2019, seven (7) months passed. The Court considers this period to be reasonable. Accordingly, the condition set out in Rule 50 (2)(f) has been met.

**110.** Finally, pursuant to Rule 50(2)(g), the Court notes that nothing shows that this Application raises any matter previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter.

**111.** Based on the foregoing, the Court finds the Application admissible.

## VIII. Merits

**112.** The Applicant alleges (A) human rights violations relating to or preceding the legislative elections of 28 April 2019, (B) human rights violations relating to the independence and impartiality of the courts, and (C) human rights violations in relation to the constitutional review process related to the adoption of Law No. 2019-40 of 7 November 2019 and subsequent laws.

35 *Sébastien Ajavon v Republic of Benin*, ACHPR, Application 013/2017, Judgement of 29 March 2019 (merits), §116.

36 § 91 of this Judgment.

## A. Alleged violations relating to the legislative elections of 28 April 2019

### i. Alleged violation of the right to freedom of opinion and expression

**113.** The Applicant maintains that Articles 551, 552 and 553 of Law No. 2018-20 of 20 April 2018 on the Digital Code of Benin violates Article 19(3) of ICCPR which guarantees the right to freedom of opinion and expression.

**114.** To support this, he argues that the punishment for freedom of expression offences is disproportionate and stifles public debate on matters of general interest. He underscores that these provisions do not meet the requirement of the "law" and that the purpose of such penalty is neither legitimate, necessary, nor proportional.

**115.** For its part, the Respondent State considers that there is no human rights violation in this case. The Respondent State maintains that the provisions that are being challenged are in conformity with Article 27 of the Charter.

**116.** The Respondent State notes that in the instant case the purpose of criminalising freedom of expression offences is not to restrict freedoms but to regulate them in the event of an offence.

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**117.** Article 9 (2) of the Charter provides that:

> Every individual shall have the right to express and disseminate his opinions within the law[(s) and regulations.

**118.** In addition, Article 19 of the ICCPR provides that "everyone shall have the right to hold opinions without interference" and that "everyone shall have the right to freedom of expression" subject to certain restrictions provided by law and which are necessary "for respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals".

**119.** It follows from these provisions that on the one hand, freedom of opinion and freedom of expression, the foundation of any democratic society, are closely linked, freedom of expression

being the vehicle for the exchange and development of opinions.[37] The provisions also show that freedom of expression is not absolute[38] since it must be exercised "within the framework of laws". It may, therefore, be subject to certain restrictions provided for by law, which must, moreover, have a legitimate purpose, be necessary and proportional. These elements must be assessed on a case-by-case basis and within the context of a democratic society.[39]

**120.** The issue is to determine whether the restrictions in question are prescribed by law and, if so, whether they are necessary, legitimate and proportional.

**121.** In the instant case, Articles 551, 552 and 553 of the Digital Code punish the offences of racially motivated and xenophobic insults using a computer system and that of incitement to hatred and violence on such grounds as race, colour, national or ethnic origin, or religion.

**122.** Firstly, the Court notes that the restrictions are provided for by law, within the meaning of international human rights standards, which actually require that national laws that restrict freedom of expression be clear, predictable and consistent with the purpose of the Charter and international human rights instruments. They must, moreover, be of general Application,[40] which is the case in this matter.

**123.** Secondly, with regard to the legitimacy of the purpose of the restriction, the Court notes that the general limitation clause, which is Article 27(2) of the Charter, makes mention of "regard to the rights of others, collective security, morality and common interest". The Court has previously concluded that national security, public order and public morals are legitimate restrictions.[41]

**124.** The Court is of the opinion that the acts that have been criminalised fall under the limitations set forth in Article 20 of the ICCPR and thus constitute incitement to discrimination prohibited by Article 7 of the UDHR.[42]

37 UN Human Rights Committee, General Comment No. 34, § 2.

38 *Ingabire Victoire Umuhoza v Rwanda*, (merits) (24 November 2017), 2 AfCLR 165, §132; *Ibid. Konaté v Burkina Faso*, (Merits) (5 December 2014), 1 AfCLR 314, § 145 to 166.

39 *Ibid. Konaté v Burkina Faso*, (merits) (5 December 2014), 1 AfCLR 314, § 145.

40 *Ibid*. *Umuhoza v Rwanda*, § 135.

41 *Op. cit. Konaté v Burkina Faso*, § 134 and 135.

42 This article provides that: "(…) All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

**125.** In light of the foregoing, the Court concludes that the restriction imposed pursues a legitimate purpose since it seeks to combat any form of incitement to hatred or discrimination.

**126.** Lastly, the Court notes with regard to the criteria of necessity and proportionality, that in the instant case, the forms of expression that have been criminalised, are those which incite hatred, racism, xenophobia, discrimination and violence, which are all prohibited under international human rights law.

**127.** In view of the harmful consequences such rhetoric can engender, the Court finds that the penalties are not disproportionate given their deterrent function.

**128.** Consequently, based on the foregoing, the Court concludes that the Respondent State has not violated the right to freedom of opinion and expression protected by Article 9(2) of the Charter.

## ii. On the alleged violation of the right to strike

**129.** The Applicant states that Articles 2,[43] 14[44] and 17[45] of Law No. 2018-34 of 5 October 2018 to amend and supplement Law No. 2001-09 of 21 June 2002 on the exercise of the right to strike violate the right to strike, more specifically Article 15 of the Charter and Convention No. 87 of the International Labour Organization (ILO). He adds that workers who are deprived of the right to strike should be awarded compensatory guarantees.

**130.** In response, the Respondent State maintains that the law being challenged has simply reorganised the procedures for initiating

43 This article reads thus:
"The provisions of this law shall apply to civilian personnel of the State and local governments as well as to staff of public, semi-public or private establishments, with the exception of workers who are explicitly prohibited by law to exercise the right to strike.
Due to the peculiar nature of their missions, military personnel, paramilitary personnel (police, customs, forestry and wildlife, etc.), health personnel shall not exercise the right to strike. Sympathy strike is prohibited."

44 This article provides that:
"public service personnel and staff of essential public, semi-public or private establishments, who are not prohibited by law to exercise the right to strike and whose total cessation of work could seriously jeopardize the peace, security, justice, and health of the population or the public finances of the State, are required to provide minimum services in the event of a strike.
Such workers include judges, staff of judicial and penitentiary services and the State employees working in courts, the staff of power supply, water supply, revenue agencies, air and maritime transport and telecommunications services, with the exception of private radio and television".

45 This article provides that "Civil servants and workers of essential public, semi-public or private establishments whose cessation of work could seriously jeopardize the peace, security, justice, and health of the population or the public finances of the State may be requisitioned in the event of a strike".

strike actions in accordance with its international commitments. The Respondent State explains that it is the wanton misuse of the said right that led the Government to make some adjustments, and that the major innovation on the right to strike has to do with the exceptions and derogations granted some professional groups which do not have the right to strike.

**131.** Regarding compensatory guarantees, the Respondent State points out that the ILO did not dictate their content but simply suggested a few. The Respondent State adds that in any event such guarantees are provided for in Articles 25,[46] 33[47] to 42[48] of Law No. 2015-20 of 19 June 2015 to lay down special regulations governing the personnel of public security forces and the like, as well as Articles 18 and 19 of the law governing the judiciary.

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**132.** The Court notes that the right to strike is not explicitly provided for in the Charter. It is, however, a corollary of the right to work provided for in Article 15 of the Charter. The right to strike is explicitly protected by Article 8(1)(d) and (2) of the ICESCR which provides that:

1. States Parties to the present Covenant undertake to ensure …

d) The right to strike, provided that it is exercised in conformity with the laws of the particular country

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

46 This article stipulates that: "Civil servants of the public security forces and the like shall be required to perform their duties in all circumstances and shall not exercise the right to strike".

47 This article stipulates that: "Civil servants of the public security forces and the like may join groups formed to push for professional demands or social and cultural actions".

48 This article stipulates that: "Civil servants of the public security forces and the like who die in the line of duty shall be admitted exceptionally and posthumously into the National Order of Benin".

**133.** It follows from this provision that this right is not absolute since it must be exercised "in accordance with the laws of each country" and may be subject "to legal restrictions [...]".

**134.** In the instant case, the Court notes that by virtue of Article 31 of its Constitution,[49] the Respondent State has recognised the right to strike, a collective right *par excellence* which is exercised through trade union action.

**135.** The Court notes that the fact that the right to strike is not absolute must be combined with the principle of non-regressive measures, founded on Article 5 of both the ICCPR and the ICESR and which, moreover, and permeates all of International Human Rights Law. This article provides that:

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant [ICCPR and ICESCR] pursuant to law, conventions, regulations or custom on the pretext that the present Covenant [ICCPR and ICESCR] does not recognize such rights or that it recognizes them to a lesser extent.

**136.** The corollary of the principle of non-regressive measures is for States Parties to the ICESR to act to "progressively ensure the full realization of rights."[50] The corollary of the principle of non-regression is the idea that States Parties to the Covenant must take steps with a view to "achieving progressively the full realization of the rights". The concept of progressive realisation implies that full realisation of rights will generally not be achieved in a short period of time but "should not be misinterpreted as depriving the obligation of all meaningful content."[51]

**137.** The Court considers that once a State Party recognises a basic right, any regressive measure, that is to say "any measure which directly or indirectly marks a step backwards with regard to the rights recognized in the Covenant"[52] is a violation of the ICESR itself.

**138.** The Court notes that once it has recognised the right to strike, the Respondent State can only provide a framework for its realisation. Therefore, any act aimed at prohibiting or suppressing

49 This article stipulates that: "The State shall recognize the right to strike. Every worker may defend, under the conditions provided for by law, his rights and interests, either individually, collectively or through trade union action. The right to strike shall be exercised under the conditions laid down by law".

50 Article 2(1) of the ICESCR.

51 Committee on Economic, Social and Cultural Rights, General Comment No. 3, 1990, §9.

52 Economic, Social and Cultural rights, Handbook for National Human Rights Institutions, United Nations, New York and Geneva, 2004.

it is a breach of the principle of non-regression and constitutes a violation of Article 8 of the ICESCR.

**139.** Moreover, the Constitutional Court of the Respondent State, guarantor of the *constitutional corpus* ["*bloc de constitutionnalité*"], has in several instances[53] recalled that the prohibition of the right to strike in Article 31 of its Constitution is at variance with relevant instruments. In particular, the Constitutional Court underscored that:

> Article 8(2) of the International Covenant on Economic, Social and Cultural Rights, which is part of the *constitutional corpus* ["*bloc de constitutionnalité*"], stipulates that the constitutional guarantee of the right to strike "does not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State". (...) Only the constituent body can prohibit trade union action and the right to strike, the lawmaker being empowered only to provide a framework for the exercise of such rights.

**140.** However, the Respondent State has prohibited the exercise of the right to strike, through several laws, in particular Law No. 2018-34 of 5 October 2018 to amend and supplement Law No. 2001-09 of 21 June 2001 on the exercise of the right to strike,[54] Law No. 2017-43 of 2 July 2018 amending and supplementing Law No. 2015-18 of 13 July 2017 which lays down general rules and regulations governing the public service,[55] Law No. 2017-42 of 28

53 Constitutional Court of Benin, Decision DCC No. 06-034 of 6 April 2006, Decision DCC No. 17-087 of 20 April 2017, Decision DCC No. 2018-01 of 18 January 2018, Decision DCC No. 13-099 of 29 August 2013, DCC No. 18-003 of 22 January 2018. The only decision that runs contrary to this consistent case-law is Decision DCC No. 18-141 of 28 June 2018 in *Nathaniel BA v President of the Republic*, delivered following a petition for "interpretation and review" of Decisions DCC Nos. 18-001 of 18 January 2018, 18-003 of 22 January 2018 (in which the Constitutional Court declared that Article 20 in fine of Law No. 2018-01 to lay down regulations governing the Judiciary, which prohibits the right to strike, is contrary to the Constitution) and DCC No. 18-004 of 23 January 2018 (in which the Constitutional Court declared that Article 71 of Law No. 2017-42 to lay down regulations governing the personnel of the Republican Police is contrary to the Constitution). However, on the one hand, an interpretative decision cannot be contrary to the decision being interpreted and, on the other hand, the decisions of the Constitutional Court are not subject to any appeal (Articles 124 of the Constitution and 34 of Organic Law No. 91-009 of 4 March 1991 on the organic law of the Constitutional Court, as amended by the law of 31 May 2001) and therefore cannot be subject to review. It is therefore clear that the Constitutional Court of Benin overstepped its prerogatives.

54 Article 2 of this law provides: "The provisions of this law apply to civilian staff of the State and local authorities as well as to staff of public, semi - public or private establishments, with the exception of officials to whom the law expressly prohibits the exercise of the right to strike.

55 Due to the specific nature of their missions, military personnel, paramilitary personnel (police, customs, water, forests and hunting, etc.), health service personnel cannot exercise the right to strike."

December 2017 laying down rules and regulations governing the republican police personnel.[56]

**141.** In doing so, the Respondent State deprived these workers of the exercise of a right recognised to them, thereby lowering the level of human rights protection they are entitled to; which is a breach of the principle of non-regression.

**142.** Accordingly, the Court concludes that by prohibiting the right to strike, the Respondent State has violated Article 8(1)(d)(2) of the ICESCR.

### iii. Alleged violation of the right to freedom of assembly

**143.** The Applicant maintains that the Respondent State has violated the right to freedom of assembly through Law No. 2018-016 of 2 July 2018 on the Penal Code, in particular in its Article 237(1)[57] and Article 240(1).[58]

**144.** With regard to Article 237(1) of the said Penal Code, the Applicant maintains that the ban on assembly results from an administrative decision whereas individual freedoms can only be curtailed by a judge. With regard to Article 240(1) of the Penal Code, the Applicant underscores that the organisers of a public assembly or their supporters should not be punished for acts committed by other people.

**145.** In response, the Respondent State maintains that in this case, the right to freedom of assembly has not been violated, contending that Article 237(1) of the Penal Code does not prohibit public demonstrations but rather sanctions those which are held, despite a ban issued due to the risks they pose. According to the Respondent State, the freedom to demonstrate has to be exercised in a manner compatible with the protection of public order.

56 Article 50, paragraph 5, provides: "Are excluded from the right to strike, the military, officials of the public security forces and similar organisations (gendarmes, police officers, customs officers, agents of water-forests and hunting, fire-fighters); health service personnel; justice personnel; the staff of prison administration services; the staff of the prison administration services; transmission staff operating in the field of state safety and security.

57 This article states: "Any unarmed gathering on a public road (...) that may disturb public peace shall be banned."

58 This article provides: "Any direct provocation to start an unarmed gathering, either by a speech made in public, or by written or printed material displayed or distributed, shall be punishable with imprisonment for one (1) year if it was adhered to and, otherwise, with imprisonment for two (2) months to six (6) months and a fine of one hundred thousand (100,000) CFA francs to two hundred and fifty thousand (250,000) CFA francs or only one of such penalties."

**146.** The Respondent State stresses that Article 240(1) of the Penal Code does not limit the right to public protests and that it is necessary to make a distinction between organising a protest in a public place and provoking the start of a protest without due observance of the relevant legal framework.

**147.** The Respondent State notes that the Penal Code does not restrict any public freedom but lays down penalties which courts may apply to persons who decide not to observe the rules necessary to protect the public order.

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**148.** The Court notes that Article 11 of the Charter provides:

> Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law [and regulation] in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

**149.** It follows from this provision that although the right to freedom of assembly is a fundamental right, it is not an absolute right since it may be subject to certain restrictions, especially in the interests of national security. These limitations must be prescribed by law. They must be legitimate and necessary. They must, moreover, be proportional to the intended objective.[59]

**150.** The Court notes that in the present case that the limitation of the right to freedom of assembly is provided for by law. To the extent that the limitations appear to be a preventive ban, this does not in itself infringe the right to freedom of assembly.

**151.** The Court further notes that the right to freedom of assembly must be exercised in a manner compatible with the preservation of public order and national security. Such preservation justifies the need for reasonable and proportionate sanctions for violations. Lastly, it is not demonstrated that that these limitations on the right to freedom of assembly are, in the present case, disproportionate.

59 *Lohé Issa Konaté v Burkina Faso*, (merits) (5 December 2014), 1 AfCLR, 314, §§ 125 – 138.

**152.** In light of the foregoing, the Court holds that the Respondent State did not violate the right to freedom of assembly, protected by Article 11 of the Charter.

### iv Alleged violation of the right to liberty and security

**153.** The Applicant submits that the arrest of spontaneous protesters is unjustified. He stresses that the non-arbitrary nature of detention is simply about determining whether such detention is based on a determination of guilt.

**154.** In response, the Respondent State notes that the Applicant fails to specify which arrests he is talking about, neither does he identify the persons arrested.

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**155.** The Court emphasises that the right to liberty and security is guaranteed by Article 6 of the Charter 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 arbitrarily arrested or detained.

**156.** The Court notes that although the Applicant alleged the violation of the right to liberty and security, he does not adduce any specific fact which would enable the Court to examine it. Indeed, he simply mentions the arrests without providing any further details. In such a case, the Court cannot establish a violation of human rights.

**157.** Consequently, the Court finds that the Respondent State has not violated the right to liberty and security protected under Article 6 of the Charter.

### v Alleged violation of the right to life, the right not to be subjected to torture and the right to the respect of the dignity inherent in a human being

**158.** The Applicant maintains that the Respondent State violated the right to life because on 1 May 2019, in Kilibo (Cadjèhoun) and on 2 May 2019 in Tchaourou (Savé) and in Banté, the army fired live rounds at protesters, killing dozens.

**159.** The Applicant adds that it is established that two unidentified people went to hospitals to collect the medical records of the

victims and prevent postoperative follow-up. Yet, it is the duty of the State to take measures to stop the continuing nature of these alleged acts.

**160.** The Respondent State did not respond to this point.

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**161.** The Court stresses that Article 4 of the Charter provides that:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the [physical and moral] integrity of his person. No one may be arbitrarily deprived of this right.

**162.** This provision highlights the principle of the inviolability of the human person which encompasses the right to life "an inalienable attribute of the human person"[60] and the basis of the other rights and freedoms protected by the Charter.[61]

**163.** The Court has consistently held that:

> Unlike other human rights instruments, the Charter establishes a relationship between the right to life and the inviolability and integrity of the human person (…) This wording reflects the indispensable correlation existing between these two rights.[62]

**164.** As for Article 5 of the Charter, it reads as follows:

> 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 (…) physical or moral torture and cruel, inhuman or degrading punishment and treatment shall be prohibited.

**165.** The Court underscores that these provisions enshrine the respect for human dignity, a corollary of the absolute prohibition of torture and of any cruel, inhuman or degrading treatment which may be in several forms.[63]

**166.** The Court notes that Articles 4 and 5 of the Charter are inextricably related and protect the rights relating to the integrity of human

60 ECtHR, Streletz Kessler and Krenz, Judgment of 22 March 2001, § 94.

61 *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017), 2 AfCLR 9, § 152.

62 *Ibid. ACHPR v Kenya*, § 152.

63 *Armand Guehi v United Republic of Tanzania*, (merits and reparations) (7 December 2018), 2 AfCLR 477, § 132.

beings, the purpose of which is to protect his life, integrity and dignity. They enshrine the "*protection of the principle of life*".[64]

**167.** Furthermore, the Court notes that it has the latitude to use any reliable source of evidence to establish the veracity of the allegations of the parties. Thus, the "Court may, of its own accord (…) obtain any evidence which in its opinion may provide clarification of the facts of a case".[65]

**168.** The Court considers, just like other international jurisdictions, notably the International Court of Justice (hereinafter referred to as the "ICJ") and the ECtHR, that the pluralism of probative sources, deemed "reliable and objective", includes data "obtained from United Nations agencies"[66] and extends to "facts of common knowledge".[67]

**169.** In the instant case, the Court recalls that the facts alleged and not disputed by the Respondent State concern the violence that erupted after the legislative elections of 28 April 2019. In this regard, the Court notes that the issue of the said acts of violence came under review on the occasion of the review of the Respondent State's third periodic report before the United Nations Committee against Torture[68] on 2 and 3 May 2019.

**170.** More specifically, it was revealed that after the proclamation of the results of the legislative elections, the police used excessive force, including firing live ammunition against hundreds of protesters. The Committee made it "a matter of top priority" by giving the Respondent State a period of one year, to *inter alia*, open investigations.[69]

**171.** These facts relating to violation of the right to life; torture; cruel, inhuman and degrading treatment, which featured in releases issued by the United Nations Committee against Torture and the

64 *ACHPR, Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi v Zimbabwe*, Decision of 2 May 2012, §122.

65 Rule 45 of the Rules of 2 June 2010, which is the current Rule 55 of the Rules of 1 September 2020.

66 ECtHR, *Rahimi v Greece*, Judgement of 5 April 2011, § 65.

67 ICJ, Military and paramilitary activities in Nicaragua and against the latter, (*Nicaragua v United States*), Judgements of 27 June 1986, Rec. 1986, pp 39 – 44, §§ 59 – 73; IACHR, *Velasquez Rodriguez v Honduras*, Judgment of 29 July 1998, merits, series C No. 4, § 146 ; IACHR *Espinoza Gonzales v Peru*, Judgment of 20 November 2014, Series C, No. 289, § 41 ***et seq***.

68 The Committee against Torture is the body responsible for monitoring the Convention against torture and other cruel, inhuman or degrading punishments or treatment.

69 UN News, "Bénin: des experts de l'ONU s'inquiètent de la répression post-électorale" (17 May 2019) available at https://news.un.org/fr/story/2019/05/1043671.

statements of one of the Committee experts are accessible to all[70] and are, so to speak, in the public domain.

**172.** In any case, the fact that Law No. 2019 - 39 of 7 November 2019 was passed to grant amnesty for crimes, misdemeanours, and felonies committed in the context of the legislative elections, attests to the fact that these violations were truly committed in May 2019.

**173.** Therefore, it is established that the right to life, the right not to be subjected to torture and the right to the respect of the dignity inherent in a human being were violated, protected by Articles 4 and 5 of the Charter.

**174.** In view of the foregoing, the Court holds that the Respondent State has violated the right to life, the right not to be subjected to torture and the right to the respect of the dignity inherent in a human being.

## vi. Alleged violation of the right to have one's cause heard

**175.** The Court notes that the Applicant raises questions relating to the impartiality of the Constitutional Court of the Respondent State.

**176.** The Court notes that there is a close link between this alleged violation and the alleged violation relating to duty to guarantee the independence of the courts, protected by Article 26 of the Charter. Therefore, it is more appropriate to handle these questions together in section (B) of this Judgment.

## vii. Alleged violation of the right to freedom of association

**177.** The Applicant alleges that Articles 16[71] and 48[72] of the Charter of Political Parties violate the right to freedom of association that is protected under Article 10(1) of the Charter. According to him, the Respondent State claims that the abovementioned Article 16 is intended to prevent the creation and participation in elections of regional parties, which constitute a threat to the country's national

70 *Ibid.*

71 This Article provides that: "The number of founding members of a political party must not be less than fifteen (15) per municipality".

72 This Article provides that: "Where a political party violates the provisions of this law, the Minister in charge of the Interior may report the facts to the Public Prosecutor to seek the suspension or dissolution of the political party concerned. To this end, the public prosecutor shall, in urgency procedure, refer the matter to the competent court, which shall decide without delay."

unity. However, the Applicant adds that no such threat has been demonstrated.

**178.** In addition, pursuant to the aforementioned Article 48, the Minister of the Interior is empowered, where a political party violates the provisions of the Charter of Political Parties, to report the facts to the Public Prosecutor who shall refer the matter to the competent court, in an urgent procedure, to seek the suspension or dissolution of the political party concerned. However, according to him, a political party cannot be dissolved for just any kind of violation.

**179.** In response, the Respondent State maintains that the aforementioned Article 16 does not conflict with any treaty provision since it helps to give political parties a national base given that it had decided to put an end to the micro-party system.

**180.** The Respondent State further notes that Article 48 of the said law in no way infringes the freedom of association which is the possibility to form or join a group for an extended period. It is the right to form, join or refuse to join an association. For the Respondent State, possible sanctions are left to the sovereign appreciation of the judiciary.

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**181.** The Court notes that Article 10 of the Charter provides that:

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.

**182.** The Court further observes that the relevant provision is Article 29(4) of the Charter which requires individuals "to preserve and strengthen social and national solidarity [...]."

**183.** The Court considers that this Article must be read together with the general limitation clause of the Charter, that is Article 27(2), according to which "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

**184.** The Court further notes, as it has already held in the case of *Reverend Christopher Mtikila et al. v Tanzania*, that: "[t]his provision means that State Parties to the Charter are allowed some measure of discretion [to restrict] the freedom of association

in the interest of collective security, morality, common interest and the rights and freedoms of others."[73]

**185.** In view of the foregoing, the Court is not convinced that the requirement relating to the number of founding members to constitute a political party, corroborated by the social necessities invoked by the Respondent State, is contrary to the requirements of Articles 27(2) and 29(4) of the Charter.

**186.** Accordingly, the Court finds that the Respondent State has not violated the right to freedom of association guaranteed under Article 10 of the Charter.

**187.** Furthermore, the Court finds that the opportunity granted to the Minister of the Interior to report to the Public Prosecutor any act that is inconsistent with the Charter of Political Parties to seek the dissolution of a political party, does not, in itself, constitute a violation of the right to freedom of association.

**188.** Although it is not prohibited, the dissolution of a political party should be the exception and be based on reasonable and objective grounds. Indeed, it is necessary to establish the existence of a real threat to national security and democratic order which other measures could not stop.[74] In any case, it will be up to a court of law, and not the Minister of the Interior, to assess the gravity of the breach of the law and draw conclusions once a matter has been referred to it by the Public Prosecutor.

**189.** Consequently, the Respondent State has not violated the right to the freedom of association, protected under Article 10 of the Charter, by giving the Minister of the Interior the mere opportunity to report to the Public Prosecutor any act which could constitute an infringement of the Charter of Political Parties.

## viii. Alleged violation of the right to freedom of association, right to free participation in the government of one's country and the right to non-discrimination, in connection with the provisions of Law No. 2018-31 of 9 October 2018 on the Electoral Code

**190.** The Applicant alleges that through provisions of the 2018 electoral code, the Respondent State has violated the right to the freedom

73 *Tanganyika Law Society, The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania*, Judgment (merits) (14 June 2013) 1 AfCLR 34, § 112.

74 UN Human Rights Committee, *Jeong- Eun Lee v Republic of Korea*, conclusions of 20 July 2005, Communication No. 1119/2002, §§7.2; 7.3; ECtHR, Case *Vona v Hungary,* Application 35943/10, Judgement (merits) of 9 July 2013, §§ 57 – 58.

of association, the right to participate freely in the government of his country and the right to non - discrimination.

**191.** He argues that the ban on political alliances for the purpose of nominating candidates violates the right to freedom of association. Likewise, the ban on independent candidatures is contrary to both the right to freedom of association, the right to non-discrimination and the right to participate freely in the government of one's country.

**192.** The Applicant adds that the last cited right has also been violated due the fact that certain eligibility conditions provided for by the Electoral Code need to be met, these are: a tax clearance, a bond, age requirement, residence requirement of one year for native Beninese and ten (10) years for naturalised persons.

**193.** For its part, the Respondent State notes that nothing in the 2018 Electoral Code compels a candidate to associate or not to associate.

**194.** The Respondent State maintains the Applicant does not demonstrate how Articles 44 al. 2, 46, 233, 242 al. 4, 249 al. 1, 269, 272 al. 1 of the Electoral Code violates several of his rights. It asserts that the provisions in question do not limit the human rights concerned but merely organises the modalities for their exercise.

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**195.** The Court notes that the articles in dispute are the following: 44 al. 2,[75] 46 paragraph 1,[76] 233,[77] 242 al. 4,[78] 249 al. 1,[79] 269,[80] 272 al. 1[81] of the electoral code of 2018.

**196.** The Court will examine both the alleged violations in connection with Articles 46, 249(1) and 269(1) of the electoral code of 2018 as well as those in connection with the other provisions which lay down more general conditions of eligibility.

**197.** The Court also notes that it will examine the alleged violations of these electoral rights in light of the principles according to which the right to stand for election is "inherent in the concept of a truly democratic regime"[82] and that any restriction on these rights must be justified, that is, it must be necessary, legitimate and proportionate.[83]

75 Article 44 paragraph 2 states: "electoral alliances are not authorized to present lists of candidates".

76 Article 46 states: "The declaration of candidacy must include the surname, first names, profession, date and place of birth and full address of the candidate (s). It must be accompanied by: a receipt for payment to the Public Treasury, the deposit provided for the election concerned, a certificate of nationality, a bulletin n ° 3 of the criminal record dated less than three (3) months, an extract of birth certificate or any document in lieu thereof, a residence certificate, a tax discharge from the last three (3) years preceding the year of the election attesting that the candidate is up to date with the payment of his taxes "

77 Article 233 states: "The amount of the deposit to be paid by the presidential candidate is 10% of the maximum amount authorized for the electoral campaign"

78 Article 242 paragraph 4 provides: "Only the lists having received at least 10% of the valid votes cast nationally are allocated seats, without the number of eligible lists being less than four (04). However, if the number of lists in competition is less than four (04), all lists are eligible for the allocation of seats "

79 Article 249 paragraph 1 provides: "No one may be a candidate unless he is at least twenty-five (25) years old in the year of the election, if Beninese by birth, he has not been domiciled for a (01) year at least, in the Republic of Benin, if, a naturalized Beninese foreigner, he is not domiciled in the Republic of Benin and has lived there continuously for at least ten (10) years. "

80 Article 269 states: "The declaration (of candidacy for legislative elections) must mention: the name of the party, the name, first names, profession, domicile, date and place of birth of the candidates; the colour, emblem, sign, logo that the party chooses for printing ballots "

81 Article 272 states: "The amount of the deposit to be paid per incumbent candidate in the legislative elections is 10% of the maximum amount authorized for the electoral campaign"

82 ECtHR, *Podkolzina v Latvia*, Application n°46726/99, Judgment of 09 April 2002, § 35.

83 *Tanganyika Law Society, The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania*, Judgment (merits) (14 June 2013) 1 AfCLR 34 § 107.1 and 107.2.

## a. On the alleged violations in connection with articles 44(2), 249(1) and 269(1) of the 2018 electoral code

## b. Right to freedom of Association

**198.** The Court notes that Article 10 of the Charter provides:

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

**199.** The Court recalls that, in accordance with its case-law

> [F]reedom of association is negated if an individual is forced to associate with others […] freedom of association implies freedom to associate and freedom not to associate.[84]

**200.** The Court notes that the contested provisions are Articles 44(2) of the Electoral Code under the terms of which "electoral alliances are not authorized to present lists of candidates" and article 269 of the same code which requires that the declaration of candidacy must mention the name of the party to which the candidate belongs.

**201.** The Court notes that the first of these provisions prohibit electoral alliances with a view to the submission of candidacy and prohibits citizens from associating with one another, while the second provision obliges any individual who wishes to apply to be a member of a political party to associate with other citizens.

**202.** The Court emphasizes that the Respondent State has given no justification for these restrictions other than to argue that the provisions in question do not limit the human rights concerned but merely organize the modalities for their exercise.

**203.** The Court considers that this simple assertion is not sufficient, and the limitations imposed are not justified. The Court therefore holds that the Respondent State has violated the right to freedom of association, protected under Article 10 of the Charter.

84 *Idem* § 113.

## c. Right to participate freely in the government of one's country

**204.** The Court notes that Article 13 (1) of the Charter provides:

> Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

**205.** The Court recalls that article 44(2) of the electoral code prohibits electoral alliances, while article 269(1) of the same code obliges any candidate to be a member of a political party, which constitutes a ban on independent candidates.

**206.** The Court emphasises, in accordance with its jurisprudence,[85] that making membership of a political party a requirement for standing as a candidate in presidential, legislative or local elections, and therefore prohibiting independent candidates, amounts to a violation of the right to participate freely in the government of one's country. Likewise, prohibiting electoral alliances with a view to running a candidacy violates this right.

**207.** The Court notes General Comment No. 25 of the UN Human Rights Committee on the right to participate in the conduct of public affairs, the right to vote and the right of access, under general conditions of equality, to public functions which provides in paragraph 17 that:

> The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.

**208.** The Court further notes that the Respondent State has given no justification for these limitations. Therefore, the Court considers that by prohibiting independent candidates as well as electoral alliances, the Respondent State has violated the right to participate freely in the government of one's country, protected under Article 13 of the Charter.

**209.** The Court notes, moreover, that within the meaning of Article 249(1) of the Electoral Code of 2018, any candidate for legislative elections must, if he is of Beninese origin, reside in the territory of the Respondent State one (1) year before the elections. If he

85 *Ibid*. § 111.

is a naturalised Beninese, this period is increased to ten (10) uninterrupted years.

**210.** The Court recognises that the distinction between resident and non-resident is based on the presumption that the non-resident citizen is concerned less directly or less continuously with the daily problems of his country or is less familiar with them.[86]

**211.** The Court emphasises, however, that this is only a simple presumption, especially since in the African context, many exiled opponents due to justified fears, continue, even from afar, to be interested in the situation in their countries of origin and were able, upon their return from exile, to stand for election.

**212.** The Court considers, for this reason, that in assessing the legitimate, necessary and proportional nature of such a requirement, it cannot disregard the reasons for which the person who wishes to be a candidate has not resided in the territory of the Respondent State within the prescribed period. A distinction must be made between those who voluntarily left their country and those who did so under duress.

**213.** More specifically, the Court considers that such a condition cannot be applied to those who are forced to leave the territory of their country. In this regard, the Court notes that in 2018 the Applicant was forced to leave the territory of the Respondent State to go into exile in France because of fears of human rights violations against him.

**214.** No one can dispute that the reasons for such a fear have been confirmed, since not only has this Court found that the Respondent State had committed such violations,[87] but also the Applicant obtained the political refugee status in his country of exile. Moreover, it is presented as such in the present Application, which the Respondent State does not dispute.

**215.** The Court considers that remaining in his country of origin would have been perilous for the Applicant and would have made it impossible to exercise his political rights.[88] It follows that such a residency requirement, as eligibility condition of those who have been forced to leave their country, is not justified.

86 European Commission of Human Rights, *Nicoletta Polacco and Alessandro Garofalo v Italy*, Application n°23450/94, Decision of 15 September 1997 on the Admissibility of the Application.

87 *Sébastien Germain Ajavon v Republic of Benin*, ACHPR, Judgment of 29 March 2019 (merits), § 292.

88 See, similarly, ECHR, *Melnichenko v Ukraine*, Application n ° 17707/02, Judgment of 19 October 2004, § 65.

**216.** Accordingly, the Court considers that the Respondent State has violated the right to participate freely in the government of his country, protected by Article 13 of the Charter.

### d. Right to non-discrimination

**217.** The Court observes that Article 2 of the Charter provides:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

**218.** The Court emphasises that by prohibiting independent candidates, the Respondent State created a difference in treatment between Beninese citizens who are members of a political party who may be candidates for election and those who do not belong to any political party and who are excluded.

**219.** The Court notes, as already pointed out, that the Respondent State has not justified this difference in treatment. Therefore, the Court considers that the Respondent State has violated the right to non – discrimination, protected by Article 2 of the Charter.

**220.** The Court notes that this violation also extends to the residency requirement systematically imposed on any candidate for election..

### e. On the alleged violations in connection with articles 46, 233,[89] 242(4),[90] 272(1)[91] of the Electoral Code of 2018

**221.** With regard to the other conditions relating to the elections provided for in Articles 46, 233, 242(4) and 272(1) of the electoral code of 2018, in particular, the bond, the tax discharge and age, the Court considers that it has not been demonstrated how they are unreasonable.

**222.** Accordingly, the Court considers, with regard to the said conditions, that the Respondent State has not violated the right to

89 Article 233 states: "The amount of the deposit to be paid by the presidential candidate is 10% of the maximum amount authorized for the electoral campaign".

90 Article 242 paragraph 4 provides: "Only the lists which have obtained at least 10% of the valid votes cast nationally are allocated seats, without the number of eligible lists being less than four (04). However, if the number of lists in competition is less than four (04), all lists are eligible for the allocation of seats".

91 Article 272 states: "The amount of the deposit to be paid per incumbent candidate in the legislative elections is 10% of the maximum amount authorized for the electoral campaign".

participate freely in the government of one's country, nor the right to non – discrimination, protected, respectively, under Articles 13(1) and 2 of the Charter.

## ix. Alleged violation of the right of post-election violence victims to have their causes heard

**223.** The Applicant maintains by adopting Law No. 2019-39 of 7 November 2019 to grant amnesty for crimes committed in the violence that erupted after the legislative elections of 28 April 2019, the Respondent State violated Articles 1 and 7(1) of the Charter.

**224.** He underscores that the UN Human Rights Committee, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities as well as the African Commission on Human and Peoples' Rights found that amnesty laws were an impediment for victims to obtain justice and are inconsistent with human rights.

**225.** For its part, the Respondent State prays the Court to dismiss this allegation, noting that the violence that broke out in Benin during the legislative election of 28 April 2019 was caused by a few people.

**226.** The Respondent State contends that the Republican forces contained the violence and restored public order, with several people arrested. The Respondent State adds that at the political dialogue of October 2019, it was recommended that all perpetrators of violence be pardoned. The Respondent State therefore concludes that there is no violation of human rights because the decision to grant amnesty was taken by Parliament in a bid to preserve social cohesion.

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**227.** Article 7 (1) 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 basic rights as recognized and guaranteed by conventions, laws, regulations and customs in force (…)

**228.** It follows from this provision that the right to have one's case heard corresponds to the right to an effective remedy. It is the

prerogative of anyone who claims to be a victim of violation of their basic rights to go to court.

**229.** At the same time, the right to an effective remedy entails on the one hand an obligation for the State to investigate and punish violations of human rights while securing fair redress[92] for the victims, and on the other hand, an obligation not to impede the exercise of the remedy.

**230.** The Court further underscores that 'amnesty', cause of extinction of public action,[93] is "the act by which the legislator decides not to prosecute the perpetrators of certain offences."[94]

**231.** Amnesty therefore constitutes a major obstacle to the referral to criminal courts or to the continuation of an action brought before criminal courts which, adjudicate on the criminal proceedings, and at the same time, rule on civil reparations.

**232.** In the instant case, on 7 November 2019, the Respondent State promulgated Law No. 2019-39[95] "to grant amnesty for crimes, misdemeanours and felonies committed in the context of the legislative elections of April 2019".

**233.** The Court notes, on the one hand, that the title of the law is indicative of the existence of acts of criminality, tort or other offences which were committed on the occasion of the legislative elections of 28 April 2019 and on the other hand, that its content demonstrates that no measures have been taken in favour of the victims of these acts.

**234.** The Court recalls that the African Commission on Human and Peoples' Rights has previously stated that:

> Amnesty laws cannot exempt the State which adopts them from its international obligations (…) the prohibition of the prosecution of perpetrators of serious human rights violations through amnesties would lead States not only to promote impunity, but remove any possibility of

92 IACHR, *Barrios Altos v Peru* (Merits), 14 March 2001, Series C No.15.

93 Article 7 of the Beninese Code of Criminal Procedure provides: "Public action for the Application of the sentence is extinguished by (...) amnesty (...)".

94 J. Salmon (dir.), Dictionnaire de Droit International Public, 2001, Brussels, Pub. Bruylant, p. 63.

95 This law is made up of three articles. Article 1 reads: "Are hereby pardoned, all acts constituting crimes, misdemeanours or felonies committed during the months of February, March, April, May and June 2019 during the legislative election process of 28 April, 2019"; Article 2 reads: "By Application of the provisions of Article 1 above, all proceedings initiated shall be baseless, the judgements or rulings delivered shall be null and void and persons remanded in custody or held in the enforcement of the Judgements or rulings delivered shall be released, where they are not held for other charges"; Article 3 stipulates: "This amnesty law shall be published in the Official Gazette and enforced as State law".

investigating these abuses and deprive victims of these crimes of an effective remedy for the purpose of obtaining reparations.[96]

**235.** The Court further notes that the UN Human Rights Committee stated that:

> [A]mnesties for gross violations of human rights […] are incompatible with the obligations of the State party under the [ICCPR] [That is Article 2(3)(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;][97]

**236.** As for the Inter-American Court of Human Rights, it has ruled that:

> [a]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture […] because they violate non-derogable rights recognized by international human rights law. […] This type of law […] prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.[98]

**237.** Likewise, the European Court of Human Rights has held that:

> A growing tendency in international law is to see such amnesties as unacceptable […] because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights. Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the Applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.[99]

**238.** In view of the foregoing, the Court considers that an amnesty law is compatible with human rights only if it is accompanied by restorative measures for the benefit of the victims. However, in this case, the Respondent State, which maintains that "it was

96 ACHPR, 54/91: *Malawi African Association v Mauritania*; 61/91: *Amnesty International v Mauritania*; 98/93: Ms. Sarr Diop, *Union Interafricaine des Droits de l'Homme and RADDHO v Mauritania*; 164/97 à 196/97: *Collectif des Veuves et Ayants-droit v Mauritania*; 210/98: *Association Mauritanienne des Droits de l'Homme v Mauritania*, 11 May 2000, § 83.

97 UN Human Rights Committee, *Rodriguez v Uruguay*, Communication No. 322/1988, § 12.4.

98 IACtHR, *Barrios Altos v Peru*, Judgment of 14 March 2001 § 41 – 43, See also IACHR *Gelman v Urugay*, § 195; IACHR *Gomes Lund & ors v Brazil* § 171.

99 ECHR, *Margus v Croatie* (2014), § 139.

through the political dialogue of October 2019" that the amnesty law was passed, provides no proof of such measures.

**239.** The Court considers, therefore, that by enacting Amnesty Law No. 2019 - 39 of 7 November 2019, the Respondent State violated the right to have the case of each victim of the 28 April 2019 legislative elections violence heard, protected by Article 7 of the Charter.

## x. Alleged violation of Article 1(i) of the ECOWAS Supplementary Protocol A/SP1/12/01 on Democracy and Good Governance

**240.** The Applicant submits that Article 27(2) of the Charter of Political Parties violates Article 1(i) of the ECOWAS Protocol on Democracy which gives political parties the right to participate freely and without hindrance or discrimination in any electoral process.

**241.** In response, the Respondent State submits that the provision relied on by the Applicant does not in any manner impede the recognised right of political parties to participate freely in elections, because it does not impose any prohibition or restriction on the rights of political parties. According to the Respondent State, the cited provision provides for conditions under which a political party loses the rights which it had forfeited.

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**242.** The Court observes that under Article 1.i of the ECOWAS Protocol on Democracy:

> (Political parties) participate freely and without hindrance or discrimination in any electoral process.

**243.** The Court notes that under Article 27 of the Charter of Political Parties:

> Any political party loses its legal status if it does not present candidates for two parliamentary elections.

**244.** The Court is of the opinion that the issue relates to the loss of legal status of a political party which should be approached not from the aspect of the electoral process but from the causes for dissolution or suspension of the political party in relation to the right of freedom of association.

**245.** The Court recalls that the dissolution or suspension of a political party must be exceptional and be based on reasonable and

objective grounds,[100] such as the existence of a real danger to national security and democratic order which other measures could not put a stop to.

**246.** The Court considers that the mere fact of not standing as a candidate in two consecutive legislative elections does not fall within this context and therefore does not constitute reasonable and objective grounds for suspension or dissolution a political party.

**247.** Accordingly, by making the loss of political party status possible for such a ground, the Respondent State violated the right to freedom of association, protected under Article 10 of the Charter.

## xi. Alleged violation of the duty to establish independent and impartial electoral bodies

**248.** The Applicant submits that the Respondent State has violated the duty to establish and strengthen independent and impartial electoral bodies, as provided under Article 17(1) of the ACDEG and Article 3 of the ECOWAS Protocol on Democracy.

**249.** The Applicant maintains that as a result of decision EL-19-001 of 1 February 2019 of the Constitutional Court of the Respondent State, the Minister of the Interior, who was a candidate in the legislative elections, appears to be the real electoral body. He avers that this decision empowered this Minister to issue certificates of conformity for submission of candidates for the legislative elections.

**250.** For the Respondent State, the issue before the Court is whether it is sufficient to conclude that the services a member of the Government performs are biased because he has a political affiliation. The Respondent State points out that, in response to that question, the Applicant merely refers to the concept of "legitimate fear," which cannot be equated to the said violation.

**251.** According to the Respondent State, the verification of the files led not only to the rejection of candidates of all political stripes, but also to the delivery of certificates of conformity both to the candidates of the presidential camp as well as those belonging to the opposition.

**252.** The Respondent State further submits that, in this matter, it is possible to appeal the decision of the Minister of the Interior and that the electoral body is the Independent National Electoral Commission (CENA).

100 See, similarly, § 197 of this Judgment.

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**253.** The Court notes that Article 17(1) of ACDEG provides that:
[…] State Parties shall:

1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections (…)

**254.** Article 3 of the ECOWAS Protocol on Democracy provides as follows:
The bodies responsible for organizing the elections shall be independent or neutral and shall have the confidence of all the political actors. […]

**255.** The Court notes that the mere fact that the issuance of the certificate of conformity is exercised by the Minister of the Interior does not make it an electoral body. The Court further notes that the electoral body of the Respondent State is constituted by the "*Conseil d'orientation et de supervision de la Liste électorale permanent informatisée*" [*Guidance and Supervision Council of the Permanent Computerised Electoral List*] (hereinafter referred to as "the COS-LEPI") and the "*Commission électorale nationale autonome"* [*Independent National Electoral Commission*] (hereinafter referred to as "the CENA").

**256.** In this regard, the Court recalls its jurisprudence in the matter *XYZ v Republic of Benin (Application 059/2019),* relating to the independence and impartiality of the electoral body of the Respondent State, that is the COS-LEPI and the CENA. In that matter, the Court found that the COS-LEPI does not offer sufficient guarantees of independence and impartiality, and cannot therefore be perceived as providing such guarantees.[101]

**257.** Accordingly, the Court finds that the Respondent State has violated the duty to establish independent and impartial electoral bodies, provided under Articles 17 of the ACDEG and 3 of the ECOWAS Protocol on Democracy.

## xii. Alleged violation of the duty not to unilaterally amend electoral laws within the last six (6) months before the elections

**258.** The Applicant submits that the requirement to produce a compliance certificate is not provided for either in the Charter

101 *XYZ v Bénin*, ACHPR, Application 059/2019, Judgment (merits and reparations), (27 November 2020) § 123.

of Political Parties nor in the Electoral Code as a condition to participate in elections. It is rather based on Decision EL - 19 - 001 of 1 February 2019 delivered by the Constitutional Court, less than six (6) months before the legislative elections of 28 April 2019, which is a violation of Article 2(1) of the ECOWAS Protocol on Democracy.

**259.** The Applicant further submits that the same Constitutional Court, in its Decision DCC 15-086 of 14 April 2015, reaffirmed that the Respondent State was compliant with Article 2.1 of the ECOWAS Protocol on Democracy.

**260.** In response, the Respondent State asserts that the Applicant misinterpreted the decision of the Constitutional Court with regard to the certificate of conformity.

**261.** The Respondent State points out that the Charter of Political Parties empowers the Minister of the Interior to verify compliance with the said Charter and to issue a compliance certificate or not, the decision being open to appeal.

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**262.** The Court notes that Article 2 of the ECOWAS Protocol on Democracy provides:

No substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of Political actors.

**263.** The Court underlines on the one hand that the law to be taken into account here is the Charter of Political Parties, which entered into force on 20 September 2018. It therefore cannot base its assessment on decision EL - 19 - 001 of February 1, 2019 of the Constitutional Court of Benin, invoked by the Applicant. On the other hand, the election referred to are the legislative elections of 28 April 2019.

**264.** The Court notes that between the entry into force of the Charter of Political Parties and the legislative elections of 28 April 2019, clearly more than six months had elapsed.

**265.** Accordingly, the Court considers that the Respondent State did not violate its obligation not to modify the electoral law less than six (6) months preceding the said election.

## B. Alleged violation relating to the Respondent State's failure to create independent and impartial courts

**266.** The Applicant alleges (i) that the Constitutional Court of the Respondent State is neither independent nor impartial. Furthermore, he argues that (ii) the judiciary is not independent.

### i. Alleged violation of the independence and impartiality of the Constitutional Court

**267.** The Applicant submits that the Constitutional Court is not independent nor impartial since its President, Mr. Joseph Djogbenou, is also an adviser to the Head of State who has been his client for fifteen (15) years, which presupposes that a close relationship exists between the two of them.

**268.** The Applicant submits that the partiality of the President of the Constitutional Court has been established since he was part of the Court which declared the law on the right to strike and the law on the Penal Code to be in conformity with the Constitution. When he was Minister of Justice and Legislation, Mr. Joseph Djogbenou not only held several conferences on the legality of the right to strike but also actively participated in the drafting and presentation of the draft laws (bills) on the exercise of the right to strike and on the Penal Code.

**269.** He adds that the law firm of Mr. Joseph Djogbenou, the current President of the Constitutional Court, advises the Government and represents the Respondent State in legal proceedings. According to the Applicant, there are concerns about the Constitutional Court's lack of impartiality.

**270.** In response, the Respondent State asserts that the current members of the Constitutional Court were appointed before the current Head of State came to power, by a Parliament which opposed various government bills, including the revision of the Constitution and the waiver of the immunity of a former minister.

**271.** For the Respondent State, the fact that a former Minister of Justice happens to become a judge at the Constitutional Court is neither unprecedented nor irregular. Such situation has existed in other countries. Therefore, the independence and impartiality of the Constitutional Court cannot be challenged on such grounds. Furthermore, the Respondent State asserts that the independence of judges is assessed on the basis of institutional criteria and not on the basis of the appointing authority.

**272.** The Respondent State avers that just because a Minister of Justice holds an opinion on the legality of a law initiated by the

Government, should not be interpreted as bias when the latter becomes judge since in that capacity, he is guided by a different set of principles.

**273.** The Respondent State adds that impartiality is assessed following a two-pronged process which entails determining the personal conviction of the judge and ensuring that he offers sufficient guarantees to exclude any legitimate doubt about him. However, in this case, constitutional review is conducted by a collegial court which has not been found to be partial.

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**274.** Article 26 of the Charter provides that "The States parties to the present Charter shall have the duty to guarantee the independence of the Courts (...)."

**275.** In this respect, the Court notes that the term "independence" must be understood together with the term "impartiality" and the term "court," like any judicial body.

**276.** The issue that this Court is called upon to rule on is, on the one hand, whether the Respondent State's Constitutional Court, as a collegiate court, enjoys all guarantees of independence and impartiality and, on the other hand, whether the partiality of the President of the Court, if it is established, is such that it affects the impartiality of the Constitutional Court as a whole.

## a. Independence of the Respondent State's Constitutional Court

**277.** The Court notes that the independence of the judiciary is one of the fundamental pillars of a democratic society. The notion of judicial independence essentially implies the ability of courts to discharge their functions free from external interference and without depending on any other authority.[102]

**278.** It should be noted that judicial independence has two main limbs: institutional and individual. Whereas institutional independence connotes the status and relationship of the judiciary with the

102 *Action pour la protection des droits de l'homme v Côte d'Ivoire*, (merits and reparations) (18 November 2016) 1 AfCLR 697, § 117. See also Dictionary of international public Law, Jean Salmon, Brulyant, Bruxelles, 2001, p. 562 and 570.

executive and legislative branches of the government, individual independence pertains to the personal independence of judges and their ability to perform their functions without fear of reprisal.[103] The obligation to guarantee the independence of courts in Article 26 thus includes both the institutional and individual aspects of independence.

**279.** The Court observes that institutional independence is determined by reference to factors such as: the statutory establishment of judiciary as a distinct organ from the executive and the legislative branches with exclusive jurisdiction on judicial matters, its administrative independence in running its day to day function without inappropriate and unwarranted interference, and provision of adequate resources to enable the judiciary to properly perform its functions.[104]

**280.** On the other hand, individual independence is primarily reflected in the manner of appointment and tenure security of judges, specifically the existence of clear criteria of selection, appointment, duration of term of office, and the availability of adequate safeguards against external pressure. Individual Independence further requires that States must ensure that judges are not transferred or dismissed from their job at the whim or discretion of the executive or any other government authority[105] or private institutions.

**281.** The Court notes that the Constitutional Court, which in countries with Francophone tradition, is not part of the judiciary but is placed outside the judicial power as a constitutional body,[106] is created pursuant to Article 114 of the Constitution as a regulatory body of all other public institutions with the highest jurisdiction on constitutional matters.[107]

**282.** The Court observes that in addition to the Constitution, the Respondent State's Law No. 91-009 of 4 March 1991 on the Organic Law on the Constitutional Court contains provisions that

103 African Commission on Human and Peoples' Rights, Guidelines and principles on the right to fair trial in Africa, § 4 (h) (i)., See also Principles 1-7, UN Basic Principles on the Independence of the Judiciary, General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

104 *Ibid*.

105 *Ibid*. See also ECHR, Campbell and Fell, §78, Judgment of 28 June 1984; *Incal v Turkey*, Judgment of 9 June 1998, Reports 1998-IV, p. 1571, §65.

106 L Favoreu *Les Cours constitutionnelles*(1986) Paris, PUF, Collection que Sais-je ? 18-19.

107 Article 114 of the Constitution of Benin of 11 December 1990.

ensure administrative and financial autonomy of the Constitutional Court.[108]

**283.** As far as its institutional independence is concerned, it is thus not apparent either from the Constitution or from the organic law of the Constitutional Court that it may be subject to direct or indirect interference or that it is under the subordination of any power or parties when exercising its jurisdictional function.

**284.** Consequently, the institutional independence of the Constitutional Court of the Respondent State is guaranteed.

**285.** As regards individual independence, Article 115 of the Constitution of the Respondent State stipulates that the Constitutional Court shall be composed of seven (7) judges appointed for a period of five (5) years renewable once, four of whom shall be appointed by the Office of the National Assembly and three by the President of the Republic. The provision demands that the Judges must have the required professional competence, good morality and great probity. The Constitution also provides that judges are irremovable for the duration of their term of office and may not be prosecuted or arrested without the authorisation of the Constitutional Court itself and the Office of the Supreme Court sitting in joint session except in cases of flagrant offence.

**286.** The Court observes that while it is true that the prohibitions in Article 115 of the Constitution against removability and unwarranted prosecution and the requirements of professional and ethical qualifications of members of the Constitutional Court, to some extent, guarantee individual independence, the same cannot be said about the renewable nature of their term. This is exacerbated by the fact that there is no provision in the Constitution nor in the Organic Law that stipulates the criteria for renewal or refusal to renew the term of office of the judges of the Constitutional Court. The President of the Republic and the Bureau of the National Assembly retain the discretion to renew their mandate.

**287.** For judges who are appointed, the renewal of the term of office, which depends on the discretion of the President of the Republic and the Bureau of the National Assembly, does not guarantee

108 Article 18 of the same law, for example, stipulates that: "On the proposal of the President of the Constitutional Court, the appropriations necessary for the functioning of the said Court shall be entered in the National Budget. The President of the Court shall be the Authorising Officer for expenditure".

their independence,[109] especially as the President is empowered by law to seize the Constitutional Court.[110]

**288.** The Court emphasises that the renewable nature of the term of office of the members of the Constitutional Court is likely to weaken their independence, particularly of those judges seeking reappointment. In this regard, it is important to note that the appearance is as important as the actual fact of judicial independence.

**289.** In view of the foregoing, the Court is of the opinion that the renewable nature of the mandate of the Judges of the Constitutional Court of the Respondent State does not guarantee their independence.

**290.** The Court concludes that the independence of the Constitutional Court is not guaranteed and, therefore, the Respondent State violated Article 26 of the Charter.

### b. Impartiality of the Respondent State's Constitutional Court

**291.** According to the Dictionary of Public International Law, impartiality is the "absence of party bias, prejudice and conflict of interest on the part of a judge […] in relation to the parties appearing before it".[111]

**292.** The Court notes that according to the Commentary on the Bangalore Principles on Judicial Ethics:

> 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 presiding. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable.[112]

**293.** The Court considers that, in order to ensure impartiality, the tribunal must offer sufficient guarantees to exclude any legitimate doubt in this regard. It notes, however, that the impartiality of a

109 D. Rousseau, la Justice constitutionnelle en Europe, Paris, Montchrétien, 1992, "The non-renewable nature of a term of office is a guarantee of independence because the appointing authorities cannot exchange a good decision for appointments and the judges themselves have no interest in seeking favours from these authorities".

110 Article 121 allows the President of the Republic refer cases to the Constitutional Court.

111 Dictionary of international public Law, Jean Salmon, Brulyant, Bruxelles, 2001, p. 562.

112 Commentary on the Bangalore Principles on Judicial Ethics, § 60.

judge is presumed, and that compelling evidence is needed to rebut this presumption.

**294.** In this regard, the Court is of the opinion that this presumption of impartiality is of considerable importance, and allegations relating to partiality of a judge must be carefully considered. Whenever an allegation of bias is made or a reasonable concern of bias is raised, the decision-making integrity, not only of an individual judge, but of the judicial administration as a whole is called into question.[113]

**295.** In the present case, the Court notes that the Respondent State has not contested the Applicant's allegations that before being appointed to the Constitutional Court, the current President of the said Constitutional Court, Mr. Joseph Djogbenou, publicly spoke in favour of banning the right to strike. In addition, in his capacity as Minister of Justice and Legislation, he presented and followed the preparation of the draft laws in question relating to the exercise of the right to strike and of the law establishing the penal code.

**296.** Having become president of the Constitutional Court, he sat on the bench when these laws were declared to be in conformity with the Constitution.[114]

**297.** It is therefore undeniable that he had a preconceived opinion and should, for that reason, have recused himself, in accordance with the Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa.[115] Not doing so, is deeply troubling and demonstrates an attitude symptomatic of a disregard for the principles of proper administration of justice.

**298.** However, the Court notes, as these Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa suggest:
The impartiality of a judicial body could be determined on the basis of three relevant facts:

i. that the position of the judicial officer allows him or her to play a crucial role in the proceedings;

ii. the judicial officer may have expressed an opinion which would influence the decision-making;

113 *Alfred Agbesi Woyome v Republic of Ghana*, ACHPR, Application 001/2017, Judgment (merits and reparations) (28 June 2019), § 128.

114 Decision DCC 18 - 141 of January 28, 2018 on the constitution-compliant law on the exercise of the right to strike adopted on January 4, 2018.

115 Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa, § 5(4).

iii. the judicial official would have to rule on an action taken in a prior capacity.[116]

**299.** The Court underlines, however, that none of these conditions is, fulfilled in the present case. In any event, the Court considers that the remarks or opinion of a single judge out of a bench of seven (7) judges cannot, objectively, be considered sufficient to influence the entire Constitutional Court. Furthermore, the Applicant has not shown how the comments made by the President of the Constitutional Court, when he was Minister of Justice and Legislation, could have influenced the Court's decision.

**300.** Consequently, the Court considers that it has not been proven that the Constitutional Court of Benin is not impartial.

## ii. Alleged violation of the independence of the judiciary

**301.** The Applicant alleges that based on Articles 1[117] and 2[118] of Organic Law No. 2018-02 of 4 January 2018 to amend and supplement Organic Law No. 94-027 of 18 March 1999 relating to the Higher Judicial Council (hereinafter referred to as the "Organic Law relating to the CSM" or "impugned law"), the Respondent State violates the independence of the judiciary.

**302.** According to him, these Articles reveal that the Higher Judicial Council (hereinafter referred to as the "CSM") which is composed of three (3) Supreme Court judges, one (1) parliamentarian elected by the National Assembly, one (1) personality not belonging to any of the three powers, chosen by the President of the Republic

116 *Ibid.*

117 Article 1 stipulates as follows: Established by Article 127(2) of the Constitution of 11 December 1990, the Higher Judicial Council shall comprise: (a) ex officio members: 1. the President of the Republic, 2. the President of the Supreme Court, 1st Vice-President, 3. the Minister of Justice, 2nd Vice-President, 4. the presidents of chambers of the Supreme Court, members, 5. the Public Prosecutor at the said Court, 6. a president of the Court of Appeal, member, 7. a Public Prosecutor of the Court of Appeal, member, 8. the minister in charge of the public service, member, 9. the minister in charge of finance, member; (b) other members: 10. four (4) personalities from outside the judiciary known for their intellectual and moral qualities, members, 11. two (02) magistrates including one (1) from the Public Prosecutor's Office. Apart from the ex officio members, the other members shall be appointed by decree of the President of the Republic. The President of the Court of Appeal and the Public Prosecutor, as provided for under points 6 and 7, shall be designated by drawing lots.

118 This article provides that persons from outside the judiciary and their alternates shall be appointed (...) by the Bureau of the National Assembly.

by virtue of his competence**,** now includes two (2) other members, the Minister of Economy and the Minister of the Public Service.

**303.** He points out that through Decision No. DCC 18-005 of 23 January 2018, the Constitutional Court declared Organic Law No. 2018-02 of 4 January 2018 modifying and supplementing the Organic Law relating to the CSM, partly inconsistent with the Constitution.

**304.** The Applicant submits, however, that following the renewal of its members, the Constitutional Court, by Decision No. DCC 18-142 of 28 June 2018, found the law to be in conformity with the Constitution.

**305.** The Applicant observes that the invasion of the CSM by persons appointed by the President of the Republic as well as by members of Government affects the criterion of the separation of powers and hence the independence of the judiciary.

**306.** In response, the Respondent State argues that the impugned law does not violate human rights and that Benin's judiciary is independent, as evidenced by Article 125 of the Constitution.[119] It adds that magistrates on the Bench are not to be removed or transferred and that the Respondent State had even been convicted by the national judiciary.

**307.** For the Respondent State, the amendment of the Law to institute the CSM is intended to ensure the effectiveness of this body, given that when it was dominated by representatives of the judiciary, it created mistrust suggesting that possible abuses by judges were covered up by a body made up of their peers.

**308.** Furthermore, the Respondent State argues that the fact that members of the executive (which pays the magistrates' salaries, promotes them, organizes their careers, ensures their security and advancement and protects their retirement) are present in the body responsible for magistrates' discipline is not at variance with Article 26 of the Charter.

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119 The Article provides that "The Judiciary shall be independent from the legislative power and of the executive power.

**309.** The Court recalls that Article 26 of the Charter provides that: "State Parties […] shall have the duty to guarantee the independence of the Court […]".

**310.** The Court notes that this provision does not only enshrine the independence of courts, as judicial bodies, but also that of the judiciary as a whole, similar to that of the executive power and the legislative power.

**311.** The Court notes that it follows from Articles 125 and 127 of the Respondent State's Constitution that the judicial power, exercised by the Supreme Court, courts and tribunals, is independent of the legislative and executive powers and that the President of the Republic is guarantor of the independence of the judiciary.

**312.** The Court therefore considers that judicial power should not depend on any other authority. It follows that neither the executive nor the legislative should interfere, directly or indirectly, in the making of decisions that fall within the competence of the judiciary, including those decisions concerning the management of the career of the members of the judiciary.

**313.** In this regard, the Court endorses the Commission's position which held that:

> [T]he doctrine of separation of powers requires the three pillars of the state to exercise powers independently. The executive branch must be seen to be separate from the judiciary, and parliament. Likewise in order to guarantee its independence, the judiciary, must be seen to be independent from the executive and parliament.[120]

**314.** The Court emphasizes, in the present case, that it follows from Article 11 of the Organic Law relating to the CSM, that the CSM is the body responsible for managing the careers of magistrates from the day they are sworn in until they retire.

**315.** The Court notes that according to Article 1 of the impugned law, the CSM is composed of three categories of members: ex officio members including the President of the Republic, the Keeper of the Seals, the Minister of Justice, the Minister of Public Service and the Minister of Finance, members other than the ex officio members and external personalities.

**316.** The Court further notes that ruling on the conformity with the Constitution of Law No. 2018-02 amending and supplementing Organic Law No. 94-027 of 18 March 1999 to institute CSM, the Respondent State's Constitutional Court, by Decision No. DCC

120 ACHPR, ***Kevin Mgwanga Gunme et al v Cameroon***, Communication 266/03, § 211, 45th Ordinary Session, 13 – 27 May 2009.

18-005 of 23 January 2018, declared Article 1 of the said Law inconsistent with the Constitution for the following reason:

> The composition of this council must reflect the concern for the independence of the Judiciary. By retaining the minister in charge of the public service and the minister in charge of finance as ex officio members, in addition to the President of the Republic, guarantor of the independence of the judiciary and the Minister of Justice, responsible for the management of the careers of magistrates, Article 1 of the Law is inconsistent with the Constitution.

**317.** With regard to Article 2 of the same Law, the same Constitutional Court held that:

> In the interests of the independence of the judiciary, the legislator must provide for some balance in the composition of the CSM (...). It is important to specify that the external personalities likely to be appointed by the Bureau of the National Assembly must be appointed equally on the basis of proposals from the parliamentary minority and majority.

**318.** The Court notes that the fact that the impugned law was subsequently declared to be in conformity with the Constitution by the reconstituted constitutional Court *vide* Decision No. DCC 18-142 of 28 June 2018 following an interpretation procedure is ineffective. Indeed, an interpretation decision cannot call into question the merits of the interpreted decision. This is all the more true since the decisions of the Respondent State's Constitutional Court are binding on public authorities and all authorities by virtue of Article 124(2) of the Constitution.

**319.** The Court observes that on the one hand it follows from Article 1 of the impugned law that the President of the Republic is the president of the CSM and on the other hand that the role of the CSM consists of assisting[121] the President of the Republic.

**320.** The Court considers that making the CSM an assistance body of the President of the Republic is diminishing and that, by providing such assistance, this body can only be under the control of the executive power.

**321.** Such dependence is exacerbated not only by the fact that members of Government are ex officio members of the CSM, but also since members, other than ex officio members, are appointed by the President of the Republic.

**322.** The Court considers, just like the Commission,[122] the presence within the CSM of the President of the Republic as President of

121 The instrument reveals that the CSM assists the President of the Republic in his duties as guarantor of the independence of the judiciary.

122 ACHPR, *Kevin Mgwanga Gunme et al v Cameroon*, Communication 266/03, § 212, 45th Ordinary Session, 13 – 27 May 2009.

the CSM and that of the Minister of Justice constitutes clear proof that the judiciary is not independent.

**323.** Furthermore, the Court is of the opinion that the power of appointment of external personalities who are not part of the executive nor to the legislative branch, should not belong to any other branch of government, but the judiciary.

**324.** In view of the above, the Court considers that there is an interference of the executive power of the Respondent State in the CSM.

**325.** Consequently, the Court considers that the Respondent State has violated Article 26 of the Charter.

## C. Alleged violation of the obligation to adopt a constitutional amendment on the basis of a national consensus

**326.** The Applicant submits that the National Assembly which emerged from the legislative elections of 28 April 2019 and affiliated to the Head of State had neither legitimacy nor a mandate to revise the Constitution. This revision was made without national consensus and should have been made by referendum instead.

**327.** He explains that the opposition was excluded from the parliamentary elections and that only two components of the single party that had the support of the Head of State were allowed to participate in the elections. Therefore, the election was not democratic since it was neither free nor open.

**328.** The Applicant asserts that this constitutional revision introduced a new system of general elections, instituted the post of Vice-President, elected in tandem with the President, and set up a system of sponsorship for any presidential candidate. According to him, the general election system extends the mandate of the President of the Republic by fifty (50) days.

**329.** The Applicant further argues that the revision of the Constitution is contrary to the principle of the rule of law which implies, not only good legislation in accordance with the requirements of human rights, but also proper administration of justice.

**330.** The Applicant alleges that there is seizure of power, which simply amounts to an unconstitutional change of government prohibited in Article 25 of the ACDEG.

**331.** In response, the Respondent State argues that the mere fact that a law was passed after public debates were extended does not amount to a violation of human rights. The Respondent State

further asserts that the Court cannot question the constitutional order of a State.

**332.** Moreover, with regard to the alleged extension of the presidential term by fifty (50) days, the Respondent State asserts that referendum is merely a means of revising the Constitution in the same way as the parliamentary vote by qualified majority provided for in Article 155 of the Constitution.

**333.** In this regard, the Respondent State insists that Article 155 of the Constitution provides that: "revision shall be done only after it has been approved through a referendum, unless the bill or proposal in question has been approved by a majority of four fifths of the members of the National Assembly".

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**334.** The Court considers that the issues relating to the violation of the rule of law and unconstitutional change of government are underlying the issue of the constitutional revision.

**335.** The Court underlines that the issue is not whether or not it can call into question the constitutional order of a State. Rather, it is called upon to consider whether the constitutional revision of 7 November 2019 reposes on a national consensus, as provided for in Article 10(2) of the ACDEG.[123]

**336.** The Article provides that:

> State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum.

**337.** The Court notes that prior to the ratification of the ACDEG, the Respondent State had established the national consensus as a principle of constitutional value through the decision of the Constitutional Court DCC 06 - 74 of 08 July 2006, in the following terms:

> Even if the Constitution has provided for the modalities of its own revision, the determination of the Beninese people to create a state based on the rule of law and pluralist democracy, the safeguarding of legal security

123 In its decision *APDH v Republic of Côte d'Ivoire*, this Court held that "the African Charter on Democracy, Elections and Good Governance and the ECOWAS Protocol on Democracy are human rights instruments, within the meaning of Article 3 of the Protocol and that it therefore has jurisdiction to interpret and apply the same."

and national cohesion require that any revision take into account the ideals that presided over the adoption of the Constitution of 11 December 1990, particularly the national consensus, a principle with constitutional value.

**338.** Furthermore, the same Constitutional Court has given a precise definition of the term "consensus" through its decisions DCC 10 - 049 of 05 April 2010 and DCC 10 - 117 of 08 September 2010. It states that:

Consensus, a principle with constitutional value, as affirmed by Decision DCC 06 - 074 of 08 July 2006 (...) far from signifying unanimity, is first and foremost a process of choice or decision without going through a vote; (...) it allows, on a given question, to find, through an appropriate path, the solution that satisfies the greatest number of people.

**339.** The Court observes that the expression "greatest number of people" associated with the concept of "national consensus" requires that the Beninese people be consulted either directly or through opinion makers and stakeholders including the representatives of the people if they truly represent the various forces or sections of the society. This is however not the case in the instant Application, since all the deputies of the National Assembly belong to the presidential camp.

**340.** From the record, it is apparent that Law No. 2019-40 of 7 November 2019 on constitutional revision was adopted under summary procedure. A consensual revision could only have been achieved if it had been preceded by a consultation of all actors and different opinions with a view to reaching national consensus or followed, if need be, by a referendum.

**341.** The fact that this law was adopted unanimously cannot overshadow the need for national consensus driven by "the ideals that prevailed when the Constitution of 11 December 1990 was adopted"[124] and as provided under Article 10(2) of the ACDEG.

**342.** Therefore, the constitutional revision[125] was adopted in violation of the principle of national consensus.

**343.** Consequently, the Court declares that the constitutional revision, which is the subject of Law No. 2019-40 of 7 November 2019, is

124 These include the advent of an era of democratic renewal, the determination to create a rule of law and democracy and the defence of human rights, as mentioned in the preamble to the Constitution.

125 The following articles have been deleted: 46 and 47. The following articles have been amended or created: 46 and 47: 5, 15, 26, 41, 42, 43, 44, 45, 48, 49, 50, 52, 53, 54, 54-1, 56, 62, 62-1, 62-3, 62-4, 80, 81, 82, 92, 99, 112, 117, 119, 131, 132, 134-1, 134-2, 132, 134-1, 134-2, 134-3, 134-4, 134-5, 134-6, 143, 145, 151, 151-1, 153-1, 153-2, 153-3, 157-1, 157-2, 157-3, Title VI (I-1 and I-2).

contrary to the principle of consensus as set out in Article 10(2) of the ACDEG.

**344.** The Court therefore concludes that the Respondent state violated Article 10(2) of the ACDEG.

## IX. Reparations

**345.** The Applicant prays the Court to find that the laws which facilitated the installation of the National Assembly are not in compliance with international conventions. He also requests the dissolution of the 8th legislature as a result of the 28 April 2019 elections as well as the dissolution of the Constitutional Court. The Applicant further prays the Court to annul Law 2019 - 40 of 7 November 2019 revising the Constitution and all the laws resulting from it. Lastly, the Applicant requests the Court to refer to the Peace and Security Council of the African Union, the perpetrators and accomplices of what the Applicant describes as an unconstitutional change of Government.

**346.** Furthermore, the Applicant states that he has waived his request for pecuniary reparation of one hundred billion (100,000,000,000) CFA francs.

**347.** For its part, the Respondent State submits that the Applicant's requests be dismissed in their entirety.

***

**348.** The Court notes that Article 27 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.

**349.** The Court recalls its previous judgments on reparation[126] and reaffirms that, in considering claims for compensation for damage resulting from human rights violations, it takes into account the principle that the State found to be the author of an internationally wrongful act is under an obligation to make full reparation for

126 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso*, (reparations) (5 June 2015) 1 AfCLR 265, § 22; *Lohé Issa Konaté v Burkina Faso*, (reparations) (3 June 2016) 1 AfCLR 359, § 15.

the consequences so as to cover all the damage suffered by the victim.

**350.** The Court also takes into account the principle that there must be a causal link between the violation and the alleged harm and that the burden of proof rests with the Applicant, who must provide the information to justify his or her claim.[127]

**351.** The Court also established that "reparation must, as far as possible, erase all the consequences of the unlawful act and re-establish the state that would probably have existed had the unlawful act not been committed". In addition, reparation measures must, depending on the particular circumstances of each case, include restitution, compensation, rehabilitation of the victim and measures to ensure that the violations are not repeated, taking into account the circumstances of each case.[128]

**352.** Furthermore, the Court reiterates that it has already established that reparation measures for harm resulting from human rights violations must take into account the circumstances of each case and the Court's assessment is made on a case-by-case basis.[129]

**353.** In the present case, the Court notes that the Applicant has waived his claim for pecuniary reparation.

**354.** The Court further underlines that it cannot order reparation measures based on claims where no human rights violation have been established.

**355.** With regard to the request to "refer to the Peace and Security Council of the African Union the perpetrators and accomplices" of what the Applicant describes as an unconstitutional change of Government, the Court emphasizes that this body can directly receive information from all sources, including the Applicant himself. The Court therefore need not make an order to that effect.

**356.** Regarding the request to strike down the laws, the Court considers that it cannot take the place of the legislature of the Respondent State. The Court underlines that it may, however, order measures with a view to repealing such laws or amending them so as to make them compliant with international human rights standards.

127 *Reverend Christopher Mtikila v Tanzania*, (reparations) (13 June 2014) 1 AfCLR 74, § 31.

128 *Ingabire Victoire Umuhoza v Republic of Rwanda*, (reparations) (7 December 2018) 2 AfCLR 202, § 20.

129 *Ibid*, §22.

**357.** In the present case, the Court holds that such measures, which can be considered as guarantees of non-repetition, are the most appropriate.

**358.** Accordingly, the Court orders the Respondent State to repeal within three (3) months from date of notification of the present Judgment, and in any case before any election, the following provisions:

i. Article 27 paragraph 2 of Law No. 2018 - 23 of September 18, 2018 on the Charter of Political Parties;

ii. Articles 1 and 2 of Organic Law No. 2018-02 of 4 January 2018 amending and supplementing Organic Law No. 94-027 of 18 March 1999 relating to the Higher Judicial Council;

iii. Law No. 2019 - 39 of 31 July 2019 granting amnesty for criminal acts, misdemeanours and offences committed during the legislative elections of 28 April 2019, and to conduct all necessary investigations to enable victims to obtain recognition of their rights and reparation;

iv. Constitutional Law No. 2019 - 40 of 07 November 2019 revising the Constitution and all subsequent laws, in particular Law 2019 - 43 of 15 November 2019 on the electoral code.

**359.** Furthermore, the Court orders the Respondent State to repeal, within six (6) months from the date of notification of the present Judgment, all the provisions prohibiting the right to strike. These include, in particular, Article 50(5) of Law No. 2017 - 43 of 02 July 2018 amending and supplementing Law No. 2015 - 18 of 13 July 2017 on the general statute of the public service, Article 2 of Law No. 2018 - 34 of 05 October 2018 amending and supplementing Law No. 2001 - 09 of 21 June 2001 on the exercise of the right to strike, Article 71 of Law No. 2017 - 42 of 28 December 2017 on the status of the personnel of the republican police, within six (6) months from the notification of this Judgment.

**360.** Furthermore, the Court considers that the Applicant does not provide any justification for the request for the dissolution of the Constitutional Court. In addition, the provisions governing this Constitutional Court are not part of those revised by Constitutional Law No. 2019 - 40 of 7 November 2019. Consequently, the Court dismisses this request.

**361.** On the other hand, it is established that the Respondent State has violated its obligation to ensure the independence of the Constitutional Court. Therefore, the Court orders the Respondent State to take all necessary measures to ensure that the mandate of the judges of the Constitutional Court is marked by guarantees

of independence in accordance with international human rights standards.

## X. Request for Provisional Measures

**362.** The Court recalls that on 20 October 2020, the Applicant filed a second request for provisional measures.

**363.** The Court recalls that it did not rule on the request for provisional measures as it was considered similar to that of the prayers on the merits.

**364.** However, in the present case, the Court has issued a decision on the merits, which renders the requested provisional measures moot. Consequently, it is no longer necessary to rule on the request for provisional measures.

## XI. Costs

**365.** The Applicant requested that the Respondent State be ordered to pay costs.

**366.** For its part, the Respondent State submitted that the Application be dismissed.

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**367.** The Court notes that under Rule 32(2) that "[u]nless otherwise decided by the Court, each party shall bear its own costs, if any." In the present case, the Court considers that there is no reason to depart from the principle laid down in that provision.

**368.** Accordingly, each party must bear its own costs.

## XII. Operative part

**369.** For these reasons,

The Court

Unanimously,

*On Jurisdiction*

i. *Dismisses* the objection on jurisdiction of the Court;

ii. *Declares* that it has jurisdiction;

*On preliminary objections relating to admissibility*

iii. *Dismisses* the preliminary objections;

*On Admissibility*

iv. *Dismisses* the objection on the admissibility of the Application;
v. *Declares* the Application admissible;

*On Merits*

vi. *Finds* that the Respondent State has not violated the right to freedom of opinion and expression, as provided under Article 9(2) of the Charter;
vii. *Finds* that the Respondent State has not violated the right to freedom of assembly, protected by Article 11 of the Charter;
viii. *Finds* that the Respondent State has not violated the right to freedom and security of the person, as provided under Article 6 of the Charter;
ix. *Finds* that the Respondent State did not violate the obligation not to modify the electoral law within the six (6) months preceding the legislative elections of April 28, 2018, as provided for in Article 2 of the ECOWAS Protocol on Democracy;
x. *Finds* that the Respondent State has not violated the right to non-discrimination and the right to participate freely in the government of one's country, protected, respectively, under Articles 2 and 13(1) of the Charter, by reason of the eligibility conditions relating to bond, tax clearance and age;
xi. *Finds* that the Respondent State has not violated the obligation to guarantee the impartiality of the Constitutional Court;
xii. *Finds* that the Respondent State has violated the right to strike, protected by Article 8(1)(d)(2) of the International Covenant on Economic, Social and Cultural Rights;
xiii. *Finds* that the Respondent State has violated the right to life, right to physical and moral integrity as well as the right not to be subjected to torture, protected by Articles 4 and 5 of the Charter, respectively;
xiv. *Finds* that the Respondent State has violated the right of victims of post - electoral violence to have their causes heard, protected by Article 7(1) of the Charter;
xv. *Finds* that the Respondent State has violated the right to freedom of association, protected under Article 10 of the Charter, due to the possibility of dissolution of a political party that did not participate in two successive legislative elections and the ban on electoral alliances and independent candidacies;
xvi. *Finds* that the Respondent State has violated the right to non-discrimination and the right to participate freely in the government of one's country, protected by Articles 2 and 13(1) of the Charter, respectively, as a result of the ban on independent candidates and the residency requirement imposed on all candidates;'

xvii. *Finds* that the Respondent State has violated the obligation to establish independent and impartial electoral bodies, provided for in Article 17(1) of the African Charter on Democracy, Elections and Governance and in Article 3 of the ECOWAS Protocol on Democracy and Good Governance;'

xviii. *Finds* that the Respondent State has violated the duty to guarantee the independence of its Constitutional Court and of the judiciary, as provided under Article 26 of the Charter;

xix. *Finds* that the Respondent State has violated the duty to ensure a constitutional revision based on national consensus, as provided under Article 10(2) of the African Charter on Democracy, Elections and Governance;

*On Reparations*

*Pecuniary reparations*

xx. *Acknowledges* the Applicant's waiver of his claim for pecuniary reparations.

*Non-pecuniary reparations*

xxi. *Dismisses the* Applicant's request for referral to the Peace and Security Council of the African Union;

xxii. *Dismisses* the Applicant's request for dissolution of the Constitutional Court;

xxiii. *Dismisses* the Applicant's request to invalidate the legislative elections of 28 April 2019;

xxiv. *Orders* the Respondent State to take all necessary measures, within three (3) months from date of notification of the present Judgment, and in any case before any election to repeal:

1. Article 27 paragraph 2 of Law No. 2018 - 23 of 18 September 2018 on the Charter of Political Parties;
2. Articles 1 and 2 of Organic Law No. 2018-02 of 4 January 2018 to amend and supplement Organic Law No. 94-027 of 18 March 1999 relating to the Higher Judicial Council
3. Law No. 2019 - 39 of 31 July 2019 on amnesty for criminal, tort and offences committed during the legislative elections of 28 April 2019 and to carry out all the necessary investigations that may allow victims to obtain recognition of their rights and reparation;
4. Constitutional law No. 2019 - 40 of 07 November 2019 revising the Constitution of the Republic of Benin and all subsequent laws, in particular Law No. 2019 - 43 of 15 November 2019 relating to the Electoral Code, and to comply with the principle of national consensus set forth in Article 10(2) of the African Charter on Democracy, Elections and Governance for all other constitutional revisions;

xxv. *Orders* the Respondent State to take all necessary measures, within six (6) months from the date of notification of the present Judgment, to repeal all the provisions prohibiting the right to strike, in particular, Article 50 paragraph 5 of Law No. 2017 - 43 of 02 July 2018 amending and supplementing Law No. 2015 - 18 of 13 July 2017 on the general statute of the public service, Article 2 of Law No. 2018 - 34 of 05 October 2018 amending and supplementing Law No. 2001 - 09 of 21 June 2001 on the exercise of the right to strike, Article 71 of Law No. 2017 - 42 of 28 December 2017 on the status of the personnel of the republican police, within six (6) months from the notification of this Judgment.

xxvi. *Orders* the Respondent State to take all necessary measures to fulfill its duty to guarantee the independence of the Constitutional Court and of the judiciary.

xxvii. *Orders* the Respondent State to publish the operative part of the present Judgment within a period of one (1) month from the date of notification of the present Judgment, on the websites of the Government, the Ministry of Foreign Affairs, the Ministry of Justice and the Constitutional Court, and for six (6) months.

*On implementation and reporting*

xxviii. *Orders* the Respondent State to submit to the Court a report on the measures taken to implement the orders in paragraph xxiv within three (3) months and the orders in paragraph xxv, xxvi and xxvii within six months from the date of notification of this Judgment.

*On the request for provisional measures*

xxix. *Finds* that the request for provisional measures is moot.

*On the Costs*

xxx. *Orders* that each party shall bear its own costs.

# Sandwidi v Burkina Faso & 3 ors (joinder of cases) (2020) 4 AfCLR 203

Application 014/2020, *Elie Sandwidi v Burkina Faso & 3 ors;* and

Application 017/2020, *Burkinabe for Human Rights v Burkina Faso & 3 ors*

Order (joinder of cases), 26 June 2020. 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: ORÉ

Based on submissions that the subject matter filled by the Applicants in the two separate actions was similar and both actions were against the same Respondents, the Court ordered a joinder of the two cases.

**Procedure** (joinder of cases, 5-10)

**1.** Considering the Application dated 24 February 2020 filed by Mr Elie Sandwidi (hereinafter referred to as "the First Applicant"), against Burkina Faso, the Republic of Benin, the Republic of Côte d'Ivoire and the Republic of Mali (hereinafter referred to as "the Respondent States") and registered at the Registry of the Court on 3 March 2020.

**2.** Considering the Application dated 30 April 2020 filed by the Burkinabè Movement for Human and Peoples' Rights (hereinafter referred as "Second Applicant"), against the Respondent States, and registered at the Registry of the Court on 11 May 2020.

**3.** Considering that, in its submissions of 2 May 2020 received at the Registry on 3 June 2020, the Republic of Mali requested, pursuant to Rule 54 of the Rules, the joinder of the two cases on the ground that the subject matter of the two applications was similar, namely, request for reinstatement or, alternatively, compensation of Elie Sandwidi; and thus, that the two disputes are sufficiently interrelated to allow the Court to examine them together.

**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 it follows from the above-cited provision that the Court may exercise its discretionary power to order the joinder of cases where two or more cases which are not identical are brought before it, but are such that it is in the interest of proper justice to hear and determine them at the same time in order to avoid solutions which might be irreconcilable. Such joinder must be consonant not only with the principle of the sound administration of justice but also with the imperatives of judicial economy.[1]

**6.** Considering that, in the present case, the fact remains that the said Applications are directed against the same Respondent States, namely: Burkina Faso, the Republic of Benin, the Republic of Côte d'Ivoire and the Republic of Mali.

**7.** Considering, moreover, that the facts in support of the two Applications are similar in the sense that they stem from the recruitment of the First Applicant at the Court of Justice of the West African Economic and Monetary Union (CJ - WAEMU) and his dismissal, legality of which he unsuccessfully challenged before the Advisory Committee of the WAEMU Commission (*WAEMU CCP*), the Council of Ministers and the Authority of Heads of State and Government of WAEMU as well as before the said Court.

**8.** Considering, further, that the legal characterisation drawn from the facts is the same in both cases, in that the Applicants allege the same violations, that is, violation of the right to equal protection of the law, the right to respect for the inherent dignity of the human person, the right to be heard and the right to property, respectively, as enshrined in Articles 3(2), 5, 7 and 14 of the African Charter on Human and Peoples' Rights.

**9.** Considering, lastly, that the Applicants have made the same requests on the merits and sought *pendente lite*, the same provisional measures.

**10.** Considering that it follows from the foregoing that the joinder of these two cases is appropriate in fact and in law, pursuant to the above-mentioned article, and is consistent with the principles governing the proper administration of justice.

**11.** Considering that it is therefore appropriate to order the joinder of the cases filed by the First Applicant and the Second Applicant, against the same Respondent States, namely: Burkina Faso, the Republic of Benin, the Republic of Côte d'Ivoire and the Republic of Mali.

1 ICJ, Certain Activities Carried Out by Nicaragua in the Border Area (***Costa Rica v Nicaragua***), Joint Cases, Order of 17/4/2013, § 18.

## I. Operative part

**12.** For these reasons,
The Court,
*Unanimously,*
*Orders*

i. *The* joinder of the above referred Applications and related pleadings.
ii. *That* henceforth, the Applications shall be referred to as "Consolidated Applications No. 014/2020 and 017/2020 - *Elie Sandwidi & anor v Burkina Faso and three other States*";
iii. *The* consequent upon the joinder, this Order and the pleadings relating to the above referred Matters shall be served on all the Parties.

## Sandwidi & anor v Burkina Faso & 3 ors (provisional measures) (2020) 4 AfCLR 206

Application 014/2020, *Elie Sandwidi v Burkina Faso & 3 ors*

Application 017/2020, *Burkinabe for Human Rights v Burkina Faso & 3 ors*

Ruling (provisional measure), 25 September 2020. 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: ORÉ

The Applicants in this consolidated matter alleged that the First Applicant was wrongfully dismissed from his job in violation of his rights as guaranteed in the African Charter. The Applicants filed requests for provisional measures asking the Court to order the reinstatement of the First Applicant to his job or award him a sum of money in the alternative. The Court dismissed the application for provisional measures.

**Jurisdiction** (*prima facie*, 21, 27; retroactive effect of withdrawal of Article 34(6) Declaration, 26)

**Admissibility** (exhaustion of local remedies not required for provisional measures, 40)

**Provisional measure**s (conditions for grant, 64-65, 72; prejudging the merits, 66; extreme gravity, 72; real risk, 73; irreparable harm, 74; corroborative evidence, 75)

## I. The Parties

**1.** The Applications are filed by:

i. Mr. Elie Sandwidi (hereinafter referred to as "the First Applicant"), a Burkinabé national, Magistrate, residing in Ouagadougou, Burkina Faso.

ii. The Burkinabé Movement for Human and Peoples' Rights (hereinafter referred to as "*MBDHP*" or "the Second Applicant"), a Non-Governmental Organisation (NGO) with Observer Status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission").[1]

**2.** The Applicants allege human rights violations as a result of Elie

1 This NGO was granted Observer Status by the Commission at its Sixth (6th) Ordinary Session held in Banjul, from 23 October to 4 November 1989.

Sandwidi's unlawful dismissal from his job.

**3.** The Applications are filed against:

i. Burkina Faso, 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 25 January 2004. It also deposited with the Chairperson of the African Union Commission (hereinafter referred to as "the CAUC"), on 28 July 1998, the Declaration prescribed in Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") by which it accepts the jurisdiction of the Court to receive applications from individuals and NGOs.

ii. The Republic of Benin, which became a party to the Charter on 21 October 1986 and to the Protocol on 22 August 2014. It also deposited the Declaration on 8 February 2016. On 25 March 2020, it deposited with the CAUC an instrument of withdrawal of its Declaration.

iii. The Republic of Côte d'Ivoire, which became a party to the Charter on 30 June 1992 and to the Protocol on 25 January 2004. It also deposited the Declaration on 23 July 2013. On 29 April 2020, it deposited with the CAUC an instrument of withdrawal of its Declaration.

iv. The Republic of Mali, which became a party to the Charter on 21 October 1986 and to the Protocol on 20 June 2000. It also deposited the Declaration on 19 February 2010.

## II. Subject of the Application

**4.** It emerges from the initial Applications containing requests for provisional measures that Mr. Elie Sandwidi was recruited as a professional auditor at the Court of Justice of the West African Economic and Monetary Union (hereinafter referred to as "WAEMU - CJ"). He assumed duty on 19 December 2017 and was dismissed pursuant to a decision dated 13 December 2017, which took effect on 19 December 2017.

**5.** Challenging that decision, he lodged complaints, without success, with the various bodies of WAEMU, one after the other, namely: the Joint Advisory Committee of the WAEMU Commission (hereinafter referred to as "JAC - WAEMA"), the Council of Ministers, the Assembly of Heads of State and Government and the WAEMU - CJ.

**6.** In their initial Applications, the Applicants allege the violation of the following rights:

i. The right to equal protection of the law, enshrined in Article 3(2) of the Charter;

ii. The right to the respect for the dignity inherent in a human being, enshrined in Article 5 of the Charter;

iii. The right to have his cause heard, enshrined in Article 7 of the Charter; and

iv. The right to property, enshrined in Article 14 of the Charter.

**7.** In their requests for provisional measures contained in their applications, the Applicants pray the Court:

i. To repeal the decision to dismiss Mr Elie SANDWIDI and to order his reinstatement at the WAEMU – CJ;

ii. In the alternative, to award Mr Elie Sandwidi the sum of two hundred million (200,000,000) CFA Francs.

## III. Summary of the Procedure before the Court

**8.** The two initial Applications containing the requests for provisional measures were registered at the Registry on 3 March 2020 and 11 May 2020, respectively.

**9.** The two Applications filed, on the one hand**,** by the first Applicant, and on the other hand, by the second Applicant were both served on the Respondent States on 15 May 2020. The Registry requested the Respondent States, in respect of each of the Applications, to submit their responses on the provisional measures within fifteen (15) days from the date of receipt thereof.

**10.** On 3 June 2020, the Registry received the Republic of Mali's response to the requests for provisional measures.

**11.** The time limit for Burkina Faso, the Republic of Benin and the Republic of Côte d´Ivoire to file their responses to the requests for provisional measures expired on 6 June 2020 for the first two States and on 4 June 2020 for Côte d'Ivoire. As of those dates, the Registry had not received any response from the said States.

**12.** On 19 June 2020, the Registry received from the Republic of Benin two similar submissions dated 8 June 2020, constituting responses to the two requests for provisional measures.

**13.** On 10 July 2020, the Registry received from Burkina Faso two similar submissions dated 1 July 2020 in response to the two requests for provisional measures.

**14.** Although the submissions from Benin and Burkina Faso were filed after the deadline, the Court decided, in the interests of justice, to deem them as duly filed.

**15.** On 15 July 2020, the Court ordered a joinder of the two initial Applications and duly notified the Parties.

## IV. *Prlma facie* jurisdiction

**16.** The Republic of Benin contends that this Court lacks jurisdiction in that, when seized of a request for provisional measures, it

verifies if the matter concerns a violation of human rights which may constitute the basis of its material, personal and territorial jurisdiction.

**17.** It further contends that, in the instant case, however, the Court lacks material jurisdiction because the situation described by the Applicant is not covered by any provision of the Charter, insofar as it is a labour dispute that has been definitively resolved by a community court in accordance with Article 141 of the WAEMU – CJ Staff Regulations.

**18.** The Republic of Benin also argues that the fact that a candidate recruited at a position with a probationary period is notified of the termination of his appointment during the probationary period is neither a dismissal nor a violation of human rights within the meaning of the Charter. Nor does an unfavourable opinion or an unfavourable administrative decision constitute such violation.

**19.** The other Respondent States have not raised an objection relating to the jurisdiction of the Court.

**20.** For their part, the Applicants submit that the Court has jurisdiction to hear their Applications, as they relate to the protection of human rights enshrined in the Charter.

***

**21.** When seized of an Application, the Court must conduct a preliminary examination of its jurisdiction pursuant to Articles 3 and 5 of the Protocol. However, for the purpose of issuing an Order for Provisional Measures, the Court need not conclusively establish that it has jurisdiction on the merits of the Application, but must simply satisfy itself that it has *prima facie* jurisdiction.[2]

**22.** 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 or application of the Charter, this Protocol or any other relevant human rights instrument ratified by the States concerned".

**23.** Hence the fact that a dispute arises from the termination of a labour contract is not sufficient to exclude the jurisdiction of the Court. The Court may nevertheless exercise its jurisdiction

2 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application 012/2019, Order of 9 April 2020, (provisional measures) §13.

insofar as it is seized by an Applicant or Applicants of violations of human rights protected by the Charter or by any other human rights instrument ratified by the Respondent State(s).

**24.** The Court notes that the dispute before it concerns the application or interpretation of the Charter, insofar as the Applicants raise violations of rights enshrined in the said Charter.

**25.** Furthermore, the four (4) Respondent States have ratified the Charter and have also made the Declaration.

**26.** The Court also recalls its jurisprudence according to which withdrawal of the Declaration has no retroactive effect on cases pending at the time of deposit of the instrument relating thereto and takes effect only within a period of twelve (12) months.[3] The Court stresses this position in the Order for Provisional Measures rendered in *Houngue Eric Noudéhouenou v Republic of Benin*[4] and in the Judgment rendered in *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire,*[5] and specifies that withdrawal of the Declaration takes effect, for both Respondent States, only on 26 March 2021 and 30 April 2021, respectively.

**27.** In light of the foregoing, the Court finds that it has *prima facie* jurisdiction to consider the request for provisional measures.

## V. Objections to admissibility

**28.** Burkina Faso prays the Court to declare the request for provisional measures inadmissible because the Applicant is not an employee of the Respondent State and has failed to exhaust local remedies.

### A. Objection to the admissibility of Mr. Elie Sandwidi's application, owing to the fact that he is not an employee of Burkina Faso

**29.** In its submissions of 1 July 2020, Burkina Faso raised an objection to the admissibility of the application on grounds that the Applicant is not an employee of the state.

**30.** To buttress its position, Burkina Faso argues that Elie Sandwidi was recruited by an intergovernmental organisation, (hereinafter

3 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction), (03 Juin 2016), 1 AfCLR, 562 § 67.

4 *Houngue Eric Noudehouénou v Republic of Benin*, ACtHPR, Application 003/2020, Order of 05 May 2020 (provisional measures) § 5.

5 *Suy Bi Gohore & ors v Republic of Côte d'Ivoire*, ACtHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations), § 68.

referred to as "IGO"), notably, WAEMU, to work in the Court of Justice which decided to dismiss the Applicant.

**31.** It adds that in terms of Article 9 of the WAEMU treaty, this IGO has a legal status and is subject to international law just like states, with the difference that it was established by the latter through a treaty, whereas the foundation of any state is the constitution and the constitution alone.

**32.** According to Burkina Faso, it follows that there can be no confusion between the staff of an IGO, such as the WAEMU, and those of a state and, therefore, a Member State of an IGO cannot be brought before this Court for a matter between the IGO and one of its staff because the Member State is not his employer.

**33.** Furthermore, pursuant to Rule 33 (1) of the Rules, which highlights entities which are entitled to bring cases before the Court, even though Elie Sandwidi and the MBDHP are entitled to seize the Court, the grievances raised are not imputable on Burkina Faso as a Respondent State.

**34.** In Burkina Faso's opinion, Elie Sandwidi's Application is inadmissible and should be dismissed since it is not his employer.

## B. Objection to the admissibility of the application due to failure to exhaust local remedies.

**35.** Pursuant to Articles 56 (5) of the Charter and 6 (2) of the Protocol, Burkina Faso contends that the Applicant has not adduced any evidence of exhaustion of local remedies or of attempts to exhaust the said remedies before seizing the Court.

**36.** It further notes that such a hypothesis cannot be envisaged in the instant case because for obvious reasons relating to the legal status already referred to, the matter between Mr Sandwidi and the WAEMU neither concerns Burkina Faso nor the other Member States of this organisation.

**37.** It underscores that the issue at stake is whether, in other words, the matter filed by the Applicant before the WAEMU Court may be considered as an internal remedy which, suffices in itself to free the Applicant from exhaustion of local remedies.

**38.** According to Burkina Faso, the response is "no" as it emerges from the jurisprudence of this Court that "local remedies referred to in Article 56 (5) of the Charter are remedies filed before judicial

courts".[6]

**39.** It therefore prays the Court to dismiss the request for provisional measures.

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**40.** The Court notes that in regard to provisional measures, neither the Charter nor the Protocol provided conditions for admissibility, consideration of the said measures is subject only to a prior determination of the *prima facie* jurisdiction of the Court which has already been determined in this matter.

**41.** The provisions and arguments raised by Burkina Faso are issues of admissibility which are immaterial as regards a request for provisional measures.[7]

**42.** Accordingly, the Court dismisses the objections raised by Burkina Faso on the admissibility of the request.

## VI. Provisional measures requested

**43.** The Applicants pray the Court to take all the necessary measures to cause the President of the WAEMU Commission to take an immediate decision, repealing the decision to dismiss Mr Elie Sandwidi and reinstating him in his duties as professional Auditor at the WAEMU - CJ, with effect from 19 December 2017, and also reinstating his salary forthwith.

**44.** In the alternative, the Applicants request the Court to order the Respondent States, jointly and severally, to pay Mr Elie Sandwidi the sum of two hundred million (200,000,000) CFA Francs to enable him to settle his debts and to live in dignity with his family, pending the final decision of the Court.

**45.** To buttress their requests, the Applicants plead, as a matter of urgency, the miserable situation in which Mr Elie Sandwidi unjustly finds himself and the fact that, despite the situation, he

6 *Tanganyika Law Society, The Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (merits) (14 Juin 2013), 1 AfCLR 34.

7 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2020, Order of 17 Avril 2020 (provisional measures), § 30.

must provide for his dependants.

***

**46.** In response, the Republic of Mali submits that the requests for provisional measures should be dismissed and that such measures can be granted only in exceptional circumstances, having regard to Rule 51 of the Rules. In that light, it further submits that the Applicants must show that Mr. Elie Sandwidi would be exposed to a real risk of serious and irreparable harm if the measures sought were not ordered.

**47.** The Republic of Mali further submits that the Applicants must, in particular, set out in detail the facts on which the alleged fears are based, the nature of the risks alleged and the provisions of the Charter that are alleged to have been violated.

**48.** Furthermore, the Republic of Mali points out that prior to his recruitment, Mr. Elie Sandwidi was working in the Burkinabè public service as a Magistrate and asked for secondment in order to join WAEMU, as is customary with the civil servants to go on secondment to regional and sub-regional organisations. Subsequent to his non-tenure decision, Mr. Elie Sandwidi undoubtedly resumed duty in the public service of his country and must justify his current position.

**49.** The Republic of Mali also contends that the reinstatement sought would prejudge the merits of the case, given that reinstatement is the Applicants' core substantive prayer.

***

**50.** For its part, the Republic of Benin submits that the Court should dismiss the requests for provisional measures on the ground that there is no case of urgency or of extreme gravity or of irreparable harm.

**51.** As regards gravity and extreme urgency, the Republic of Benin submits that by "urgency" is meant a situation that is likely to lead

to irreparable harm if quick action is not taken to redress it,[8] while by "extreme gravity" is meant a situation of exceptional mounting violence that warrants the Court to take interim measures to avoid it.

**52.** The Republic of Benin further submits that provisional measures are "urgent measures that are taken only when there is an imminent risk of irreparable harm".[9]

**53.** It further contends that the situation referred to the Court has none of these characteristics, especially since being a career magistrate, on secondment to the WAEMU – CJ, Mr. Elie Sandwidi has returned to his duties as a civil servant in Burkina Faso, such that his professional situation was unimpeded.

**54.** With regard to irreparable harm, the Republic of Benin submits that it differs from harm for which reparation is difficult and, rather, refers to acts, the consequences of which cannot be erased, repaired or compensated for by any means whatsoever, even by awarding damages, since irreparable harm and irreversible harm are inextricably linked.

**55.** The Republic of Benin further contends that Mr. Elie Sandwidi, who maintains his position in the Burkinabè magistracy and who experienced only one hitch in an application for a position for which he does not meet the technical requirements, cannot, as a result, claim to be in a situation of irreparable harm.

***

**56.** For its part, Burkina Faso notes that in the instant case, there is neither urgency nor irreparable harm and that the interests of Mr. Sandwidi are not entirely compromised, especially as he alleges in his submission on the merits, the violation of his fundamental rights which he wants to be cured.

**57.** According to Burkina Faso, the Applicant avers that the decision not to retain him dates back to 8 December 2017 while the judgment of the WAEMU – CJ which upheld the said decision dates back to 12 February 2020 whereas the applications were

8 Vocabulaire juridique, Gérard Cornu, PUF, 8th edition.

9 *Mamatkoulov and Askarov v Turkey* [GC], No.s 46827/99 and 46951/99, ECtHR, 4 February 2005, §104; *Aoulmi v France*, No. 50278/99 §103, 17 January 2006 and *Paladi v Moldova* [GC], No. 39806/05,ECtHR, 10 March 2009 §§ 86-90.

filed in 2020, that is, more than two (2) years after the decision not to retain him in the Court. This has had no effect on the life or physical integrity of Mr. Sandwidi, neither has it put his life in jeopardy.

**58.** Burkina Faso submits that based on the jurisdiction of the Court, provisional measures refer to "a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subjects of the application, in particular, their rights to life and to physical integrity as enshrined in the Charter."[10]

**59.** It concludes that there is no urgency to justify ordering provisional measures especially in the case of Burkina Faso which is not in any way involved in the matter between Mr. Sandwidi and the WAEMU.

**60.** It therefore follows that the requests for provisional measures should be dismissed.

**61.** The Republic of Cote d'Ivoire did not make any submissions.

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**62.** The Court notes that Article 27(2) of the Protocol provides that: "In cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary."

**63.** Furthermore, pursuant to Rule 51(1) of the Rules, "The Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measures which it deems necessary to adopt in the interest of the parties or of justice."

**64.** In view of the aforesaid, the Court can order provisional measures *pendente lite* only if the basic requirements, namely extreme gravity or urgency and the prevention of irreparable harm to persons are met.

**65.** The Court emphasises, however, that it is only required to ascertain the existence of these basic conditions if it is established that the

10 *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (25 Mars 2011) 1 AfCLR18 § 22.

measures sought do not prejudge the merits of the Applications.

## A. Repeal of the decision to dismiss Mr Elie Sandwidi and his reinstatement in his job at the WAEMU - CJ, with immediate reinstatement of his salary

**66.** The Court considers that a request for provisional measures prejudges the merits of an Application where the subject of the measures sought in the request is similar to the subject of the measures sought in the Application, where its purpose is to achieve the same result or, in any event, where it touches on an issue which the Court will necessarily have to adjudicate upon when examining the merits of the Application.[11]

**67.** The Court recalls, on the one hand, that the Applicants mainly requested the Court to order the WAEMU Member States "to take all the necessary measures to cause the President of the WAEMU Commission to take an immediate decision repealing Mr SANDWIDI Elie's dismissal decision and granting him tenure in his duties as Professional Auditor at the WAEMU - CJ, with effect from 19 December 2017, with immediate reinstatement of his salary».

**68.** The Court notes, on the other hand, that in their requests on the merits, the Applicants, in view of the would-be established violations of their rights, prayed the Court to order "the WAEMU Member States named in the Application to take all the necessary measures for the immediate restoration of Mr. SANDWIDI Elie's rights, by ensuring that the President of the WAEMU Commission takes a decision to repeal his dismissal decision and to reinstate Mr. SANDWIDI Elie in his job, after reclassification and payment of his salary arrears […] ".

**69.** The Court notes that the primary request for provisional measures also forms part of the request on the merits, in that it seeks to "repeal Elie SANDWIDI's dismissal decision and his reinstatement" at the WEAMU - CJ. The Court will of necessity have to adjudicate on this request on the merits.

**70.** It follows that the Court cannot, given that the subject of the main request for provisional measures is similar to the subject of the

11 *Jean de Dieu Ngajigimana v United Republic of Tanzania*, ACtHPR, Application 024/2019, Order of 26 September 2019 (provisional measures), § 25.

requests on the merits, order the measure sought.

**71.** Accordingly, the Court dismisses the request for the said provisional measure.

## B. Award of the sum of two hundred million (200,000,000) CFA francs

**72.** The Court reiterates that urgency, consubstantial with extreme gravity, means that there is a real and imminent risk that irreparable harm will be caused before the Court renders its final decision. There is urgency whenever acts liable to cause irreparable harm can occur at any time, before the Court renders a final decision in the case before it.[12]

**73.** In this regard, the Court stresses that the risk in question must be real, which excludes a purely hypothetical risk, and explains the need for immediate relief.[13]

**74.** As regards irreparable harm, it requires a "reasonable probability of materialisation," having regard to the context and the personal situation of the Applicant.[14]

**75.** Where these conditions are not established, the Court cannot grant an order for provisional measures.[15]

**76.** The Court notes that, to characterise the urgency, the Applicants invoked "the material situation in which he (Elie Sandwidi) unjustly finds himself " as well as the need to "settle his debts, live with his family in dignity" and cater for his dependants".

**77.** The Court notes that the Applicants have failed to prove the reality of the alleged material situation, which would expose Mr. Elie Sandwidi to a real and imminent risk, the effects of which would cause him irreparable harm.

**78.** As a matter of fact, there is no corroborative evidence on the record to show and no demonstration that the first Applicant is destitute, such that he can neither settle his debts, nor live with his family in dignity and cater for his dependants.

**79.** Such lack of cogent evidence is reinforced by the personal situation of the First Applicant. In both Applications he is presented

12 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application 062/2019 Order of 17 April 2020 (provisional measures), § 61; *Guillaume Kigbafori Soro & ors v Republic of Côte d'Ivoire*, Application 012/2020, ACtHPR, Order of 22 April 2020 (provisional measures), § 33.

13 *Sébastien Ajavon v Benin* (provisional measures), op.cit.§ 62.

14 *Ibid*. § 63.

15 *XYZ v Republic of Benin*, Application 010/2020, ACtHPR, Order of 3 April 2020 (provisional measures) § 27.

as a Magistrate, which sufficiently shows that he carries out a professional activity in his country of origin. However, in the instant case, it has not been proven that in spite of such a professional activity, he still lives in a state of poverty.

**80.** Finally, the Applicants have failed to prove, the urgency, or extreme gravity which justifies the need order provisional measures to avoid irreparable harm being caused to Elie Sandwidi.

**81.** The Court, accordingly, dismisses the requests for provisional measures.

**82.** For the avoidance of doubt, this Ruling is provisional in nature and does not prejudge in any way the decisions that the Court may take on its jurisdiction, on admissibility of the Application and on the merits.

## VII. Operative part

**83.** For these reasons,

The Court

Unanimously,

i. *Dismisses* the objections to the admissibility of the Application;

ii. *Dismisses* the Applicants' requests for provisional measures.

# Cheusi v Tanzania (judgment) (2020) 4 AfCLR 219

Application 004/2015, *Andrew Ambrose Cheusi v United Republic of Tanzania*

Judgment, 26 June 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant, who had been convicted and sentenced for multiple offences, brought this action alleging a violation of his Charter guaranteed rights on grounds that the national courts mishandled his trial. While dismissing the Applicant's other claims the Court held that the Respondent State had violated the Applicant's right to free legal assistance and the right to be tried within a reasonable time.

**Jurisdiction** (material jurisdiction, 28-32; personal jurisdiction, 37, 38)

**Admissibility** (exhaustion of local remedies, 52; extraordinary remedies, 53, 55; unduly prolonged remedies, 56; reasonable time, 65, 66, 69, 71)

**Procedure** (margin of appreciation of domestic court, 83, 98; Onus to prove, 128)

**Fair trial** (identification parade, 84, 86; right to defence, 92; alibi defence, 97; free legal assistance, 105, 108, 110; trial within a reasonable time, 116, 117; right to appeal, 116)

**Reparations** (purpose of reparations, 139; measures of reparations, 139; material prejudice, 140; proof, 145, 146; moral prejudice 150; quantum of damages, 156; indirect victims, 157; guarantees of non-repetition, 169)

Separate opinion: Bensaoula

**Admissibility** (determination of reasonable time, 1)

## I. The Parties

**1.** Mr Andrew Ambrose Cheusi (hereinafter referred to as "the Applicant"), a national of Tanzania, is currently serving a thirty (30) year prison sentence at Ukonga prison following his conviction for the offence of armed robbery. In addition, the Applicant was convicted on charges of conspiracy to commit a felony and of robbery and sentenced to seven (7) years and fifteen (15) years imprisonment, respectively.

**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. It also filed, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration.

## II. Subject of the Application

### A. Facts of the matter

**3.** It emerges from the Application that, on 6 June 2003, the Applicant was arrested for having committed armed robbery of a pick-up vehicle at a place known as Sinza Madukani, in Dar es Salaam. He was prosecuted for the offence in Criminal Case No. 95/2003 before the Kibaha District Magistrate Court.

**4.** Following his appearance in Criminal Case No. 95/2003, the Applicant was released on bail on 7 November 2003. While he was out on bail in this case, on 3 September 2004, he was again arrested and charged in a second case, that is, Case No. 194/2004, before the same Court, for conspiracy to commit a felony and for the offence of robbery. It was alleged that he had stolen a saloon car at Korogwe area in Kibaha District.

**5.** In the first case, Criminal Case No. 95/2003, he was convicted of armed robbery and sentenced to thirty (30) years imprisonment on 22 September 2005. The Applicant appealed against his conviction and sentence before the High Court of Tanzania at Dar es Salam on 28 April 2006 by Criminal Appeal No. 45/2006. The appeal was dismissed on 21 November 2006.

**6.** On 27 November 2006, he filed Criminal Appeal No. 141/2007 before the Court of Appeal of Tanzania at Dar es Salaam, against the decision of the High Court in Criminal Appeal No. 45/2006. The Court of Appeal dismissed this appeal on 29 May 2009.

**7.** In the second case, Criminal Case No. 194/2004, the Applicant was, on 3 October 2005, convicted of the count of conspiracy to commit a felony and for the offence of robbery, and sentenced to seven (7) and fifteen (15) years imprisonment, respectively.[1]

1 The judgment in this case does not appear on the record. However, in its judgment of 20 March 2017, the High Court indicated that the sentence handed down in this matter was twenty-two (22) years in prison: seven (7) years for conspiracy to commit a felony and fifteen (15) years for robbery; p. 2, lines 5 and 6.

**8.** On 27 October 2006, the Applicant filed Criminal Appeal No. 58/2006 against the sentence before the High Court of Tanzania at Dar es Salaam.

**9.** On 20 March 2017, the Court quashed the Applicant's conviction and set aside part of the unserved sentence on the grounds that the records of his case file were lost and that the Applicant had served a substantial part of his sentence. The High Court also ordered the Applicant to be set free forthwith unless lawfully held for another matter. However, the Applicant remained in prison serving his thirty (30) years sentence for the conviction of armed robbery in the first case.

## B. Alleged violations

**10.** The Applicant alleges as follows:

i. Although the prosecution called eight (8) prosecution witnesses in Criminal Case No. 95/2003, the District Magistrate Court and the Court of Appeal relied on the visual identification of PW2 and PW3 to convict him without following due process, thus violating his rights under Article 13(1) of the 1977 Constitution of the United Republic of Tanzania.

ii. The District Magistrate Court grossly violated his rights when it admitted prosecution exhibits (1-5) without considering his submissions regarding their admissibility, thus contravening his basic rights under Article 26(1) and (2) of the Respondent State's Constitution. The Applicant states that the Court of Appeal also failed to consider these violations when it upheld his conviction and sentence.

iii. He did not have legal representation throughout the trial and appeal proceedings and this violated his right under Article 7(1)(c) of the Charter.

iv. In the first case, Criminal Case No. 95/2003, he was charged with the offence of armed robbery under Section 285 of the Penal Code which provides for a sentence of fifteen (15) years upon conviction, yet he was sentenced to thirty (30) years imprisonment. This violated his rights under Article 13(6)(c) of the Respondent State's Constitution which proscribes the imposition of a sentence that was not in force at the time of commission of the crime.

v. He immediately filed an appeal in 2006, against his conviction and sentence in Criminal Case No. 194/2004. This appeal was heard in June 2007 but the judgment remained pending for almost a decade despite his sustained follow-up efforts. The Respondent State's failure to finalise his appeal for such a long time therefore violated his rights under Article 7(1)(d) of the Charter.

vi. He was kept in isolation during the trial and appeal proceedings, and this violated his right to equality before the law and equal protection of the law under Article 3 of the Charter.

vii. The Respondent State subjected him to cruel, inhuman and degrading treatment, in contravention of Article 5 of the Charter since he was beaten up by its agents when he was first arrested and he was also denied medical care while in custody.

## III. Summary of the Procedure before the Court

**11.** The Application was filed on 19 January 2015 and served on the Respondent State on 20 March 2015.

**12.** The parties filed their pleadings on the merits within the timeframe stipulated by the Court. The pleadings of the parties were duly served on the other party.

**13.** On 6 July 2018, the Registry invited the parties to file their submissions on reparations.

**14.** The parties filed their submissions on reparations within the timeframe stipulated by the Court. The submissions of the parties were duly served on the other party.

**15.** Pleadings on reparations were closed on 23 September 2019, and the parties were duly notified.

## IV. Prayers of the Parties

**16.** The Applicant prays the Court to:

i. intervene to remedy the violation of his fundamental rights;

ii. grant him free legal assistance under Rule 31 of the Rules and Article 10(2) of the Protocol;

iii. issue an order on the undue delay in disposing of his appeal No. 58/2006 at the High Court of Tanzania;

iv. re-establish justice, quash his conviction and sentence, and order his release;

v. grant him reparation pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules, in order to remedy the said violations;

vi. grant such other order(s) or relief(s) as it may deem fit.

**17.** In his Reply, the Applicant also prays the Court to:

i. declare that his rights to equality before the law and equal protection of the law, protected under Article 3 of the Charter have been violated by the Respondent State;

ii. declare that his right not to be subjected to cruel, inhuman and degrading treatment or punishment, protected by Article 5 of the Charter, has been violated by the Respondent State;

iii. declare that his right to a fair trial, protected by Article 7 of the Charter has been violated by the Respondent State;

iv. quash his conviction and sentence, and order his release from custody, given his excessive period of imprisonment by the Respondent State;

v. award him the amount of United States Dollars Twenty Thousand (US$ 20,000) as a direct victim of the moral prejudice suffered;

vi. award him the amount of United States Dollars Five Thousand (US$ 5,000) being compensation for the moral prejudice suffered by each of the indirect victims;

vii. award him the amount of United States Dollars Two Thousand (US$ 2,000) being the legal fees incurred during the domestic proceedings;

viii. award him the amount of United States Dollars Twenty Thousand (US$ 20,000) being the legal fees in the present Application;

ix. award him the amount of United States Dollars Fifteen Thousand (US$ 15,000) being reparation of the pecuniary prejudices suffered by the indirect victims;

x. award him the amount of United States Dollars One Thousand Six Hundred (US$ 1,600) for other miscellaneous expenses incurred;

xi. apply the principle of proportionality in assessing the compensation to be granted to him;

xii. order the Respondent State to guarantee the non-repetition of the aforesaid violations and accordingly report to the Court every six months until the full implementation of the Orders;

xiii. order the Respondent State to publish the Court's judgment in the Government Gazette within one month of delivery thereof as a measure of satisfaction.

**18.** The Respondent State, for its part, prays the Court to

i. declare that the Application has not invoked the Court's jurisdiction and should therefore be dismissed;

ii. declare that the Application has not met the admissibility conditions stipulated under Rules 40(5) and (6) of the Rules and should consequently be declared inadmissible, and duly dismissed;

iii. find that it has not violated Articles 3, 7(1)(c) and (d) and 7(2) of the Charter and the Application should therefore be dismissed;

iv. rule that the Applicant's prayer for release should be denied on the ground that it is s contemptuous of the judgment of the Court of Appeal;

v. dismiss with costs the Applicant's claim for reparations in its entirety;

vi. issue such other order as it may deem appropriate and fair.

## V. Jurisdiction

**19.** The Court notes that Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

**20.** The Court further notes 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, in every application, conduct preliminary assessment of its jurisdiction and dispose of objections thereto, if any.

### A. Objections to material jurisdiction

**22.** The Respondent State submits that this Court is being asked to adjudicate as a court of first instance on certain issues, and as an appellate court on other issues already decided by the Court of Appeal of Tanzania.

**23.** The Respondent State further argues that Article 3(1) of the Protocol does not confer jurisdiction on this Court to adjudicate issues of law and evidence raised before it for the first time. It is the Respondent State's contention that the Court is being asked to pronounce on matters that would oblige it to sit as a trial court, whereas remedies are available at national level that the Applicant could still exercise. In this regard, the Respondent State mentions that the following three allegations have been raised before this Court for the first time:

i. That it took nearly ten (10) years from June 2007, to deliver the judgment in Criminal Appeal No. 58 of 2006 and this constitutes a violation of Article 7(d) (*sic*) of the African Charter on Human and Peoples' Rights;

ii. That he was denied his right to legal representation in the first and second appellate Courts, in breach of Article 7(1)(c) of the African Charter on Human and Peoples' Rights;

iii. That he was illegally sentenced to serve a thirty years sentence in Criminal Case No. 95/2003 instead of fifteen (15) years, which he was supposed to serve as he was charged under Section 285 of the

Penal Code (Cap. 16 RE 2002) and this, in violation of Article 13(6)(c) of Constitution of the United Republic of Tanzania, 1977.[2]

**24.** The Respondent State also submits that this Court does not have the jurisdiction of an appellate court to hear issues of evidence and procedure that its Court of Appeal has finalised. In this regard, the Respondent State particularly points out to the following allegations:

i. That in Criminal Case No. 95 of 2003, the Courts erred by relying on the evidence of identification in the testimonies of PW2 and PW3 even though they failed to describe the Applicant, in contravention of Article 13(1) of the Constitution of the United Republic of Tanzania, 1977.

ii. That the testimonies of PW2 and PW3 on identification were uncertain given that the said testimonies were not corroborated by an independent witness, which is in violation of equality before the law.[3]

**25.** Refuting the Respondent State's contention, the Applicant asserts that, although this Court is not an appellate court, it has jurisdiction to hear any dispute pertaining to violation of the provisions of the Charter or any other relevant human rights instrument, to evaluate decisions of national courts, re-examine evidence, set aside a sentence and order acquittal of a victim of human rights violation.

**26.** The Applicant accordingly prays the Court to dismiss the Respondent State's arguments, submitting that this Court has jurisdiction to adjudicate the case by virtue of the provisions of the Charter and of the Protocol. In this regard, he contends that the Court's jurisprudence on this point is clear, in reference to its decisions in *Alex Thomas v United Republic of Tanzania*[4] and *Peter Joseph Chacha v United Republic of Tanzania*.[5]

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**27.** The Court notes that the Respondent State's objection suggests that this Court does not have jurisdiction to entertain the

2 Reproduced *in extenso* in the Respondent State's submissions

3 Reproduced *in extenso* in the Respondent State's submissions

4 *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 130.

5 *Peter Joseph Chacha v United Republic of Tanzania* (jurisdiction) (2014) 1 AfCLR, 398, §114.

Application before it, since it is neither a court of first instance nor an appellate court with respect to decisions of national courts.

**28.** As regards the objection that the Court lacks jurisdiction since it is not a court of first instance, the Court recalls that it has jurisdiction as long as the rights alleged by Applicant as having been violated fall under a bundle of rights and guarantees that form part of cases that had been heard by national courts.[6] The Court notes in the instant case that the matters at issue relate to the identification of the Applicant by two witnesses, the absence of independent witnesses and the *alibi* defence.

**29.** The Court considers that these issues fall within the bundle of the rights and guarantees, and consequently dismisses the Respondent State's objection on this point.

**30.** As for the Respondent State's allegation that the Court is being asked to sit as an appellate court, the Court notes that, pursuant to its established jurisprudence, it has consistently held that, when examining cases brought before it, it cannot be considered as exercising appellate jurisdiction in respect of decisions of national courts.[7]

**31.** In this connection, the Court notes that under Articles 3(1) and 7 of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[8]

**32.** Thus, the Court is empowered to ascertain the conformity of any act of the Respondent State and its organs with the above-mentioned instruments. It follows that, with regard to national courts, "the Court shall have jurisdiction to examine their procedures in order to determine whether they are in conformity with the standards set out in the Charter or in any other human rights instrument

6 *Alex Thomas v United Republic of Tanzania* (merits) §§ 60-65.

7 *Ernest Francis Mtingwi v Republic of Malawi* (admissibility) (2013) 1 AfCLR 190, § 14. See also *Kenedy Ivan v United Republic of Tanzania*, AfCHPR, Application No.025/2016 - Judgment of 28 March 2019 (merits and reparations), § 26; *Armand Guéhi v United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 493,§ 33 ; *Werema Wangoko Werema & ors v United Republic of Tanzania* (merits) (2018) 2 AfCLR 539,§ 29 ; *Christopher Jonas v United Republic of Tanzania* (merits) (2017) 2 AfCLR 105, § 28; and *Mohamed Abubakari vUnited Republic of Tanzania* (merits) (2016) 1 AfCLR 599, § 25.

8 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility), § 114; *Alex Thomas v United Republic of Tanzania* (merits), § 45 and *Oscar Josiah v United Republic of Tanzania*, AfCHPR, Application 053/2016 - Judgment of 28 March 2019 (merits), § 24.

ratified by the State concerned ..."[9]

**33.** The Court notes that the present Application raises allegations of violations of the human rights enshrined in Articles 3, 5 and 7 of the Charter, the examination of which falls within the Court's jurisdiction. The Court therefore considers that Respondent State's objections in this respect are unfounded and are therefore dismissed.

**34.** The Court therefore holds in conclusion that it has material jurisdiction in this case.

## B. Personal Jurisdiction

**35.** The Court notes with respect to its personal jurisdiction, that as earlier stated in this Judgment,[10] the Respondent State is a party to the Protocol and on 29 March 2010, filed the Declaration prescribed under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-governmental Organisations with Observer Status before the African Commission on Human and Peoples' Rights.

**36.** The Court also notes that on 21 November 2019 the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration.

**37.** With respect to the effects of the withdrawal, the Court recalls that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect.[11] Furthermore, the withdrawal has no bearing on matters pending prior to the filing of the withdrawal, as is the case with the present Application.

**38.** In regard to the date of entry into force of the withdrawal, the Court reaffirms its ruling in the above cited *Ingabire case* that such a withdrawal takes effect twelve (12) months after the filing of the instrument of withdrawal.

**39.** Similarly, based on its decision in the *Ingabire Case* cited above, the Court holds that the withdrawal of the declaration by the United

9 *Alex Thomas v United Republic of Tanzania* (merits), §130. See also *Mohamed Abubakari vUnited Republic of Tanzania* (merits), § 29; *Christopher Jonas v United Republic of Tanzania* (merits), § 28; *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits)(2017) 2 AfCLR 171, § 54.

10 See paragraph 2 above.

11 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdcition)(2014) 1 AfCLR 540 § 67.

Republic of Tanzania will take effect on 22 November 2020.

**40.** In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

## C. Other aspects of jurisdiction

**41.** The Court notes that its personal, temporal and territorial jurisdiction are not disputed by the Respondent State and that nothing on record indicates that the Court lacks such jurisdiction. The Court accordingly holds that:

i. It has temporal jurisdiction given that the alleged violations are continuous in nature, in that the Applicant remains convicted and is serving a sentence of thirty (30) years' imprisonment on grounds which he considers wrong and indefensible;[12]

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

**42.** In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

## VI. Admissibility

**43.** 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". Rule 39 (1) of the Rules also 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".

**44.** Rule 40 of the Rules, which in essence 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 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;

12 *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* (preliminary objections) 1 AfCLR 197, §§ 71 - 77.

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

**45.** The Respondent State raises two (2) objections to the admissibility of the Application; the first, relating to the requirement of exhaustion of local remedies and the second, to the filing of the Application within a reasonable time under Rules 40 (5) and (6) of the Rules.

### i. Objection based on non-exhaustion of local remedies

**46.** The Respondent State submits that the Application does not meet the conditions of admissibility set out in Rule 40(5) of the Rules as regards exhaustion of local remedies, adding that it was premature for the Applicant to file the present case before the Court, given that domestic remedies were available to him.

**47.** According to the Respondent State, after the judgments of the Kibaha District Magistrate Court and of the appeals at the High Court and the Court of Appeal on his conviction and sentence on the charge of armed robbery, the Applicant should have sought redress for any alleged human rights violations by filing a constitutional petition in accordance with the Respondent State's Constitution and its Basic Rights and Duties Enforcement Act.

**48.** The Respondent State also avers that the Applicant could have sought a review of the Court of Appeal's decision in Criminal Appeal No. 141/2007 in accordance with the provisions of Court of Appeal of Tanzania's Rules, 2009.

**49.** In his Reply, the Applicant did not deny the existence of local remedies as stated by the Respondent State. He argues, however, that domestic remedies were exhausted when the Court of Appeal delivered its judgment on 29 May 2009 in Criminal Appeal No. 141/2007 on the charge of armed robbery. The Applicant argues that the other remedies that the Respondent State claims he ought to have exercised are "extraordinary remedies" which he was not under obligation to exhaust. He maintains that since

the Court of Appeal is the Respondent State's highest court, and has pronounced on his appeal, he was not obliged to file a constitutional petition before the High Court, which is a lower court in relation to the Court of Appeal.

**50.** The Applicant further submits that he seized this Court in the hope that doing so would speed up the finalisation of his appeal in the second case, that is, Criminal Appeal No. 58/2006 on his conviction and sentence on the count of conspiracy to commit a felony and robbery, which had been pending before the High Court since 2007, that is for over nine (9) years.

**51.** The Applicant accordingly prays the Court to take into account his appeals before the High Court and the Court of Appeal in respect of the first case and the undue delay in the finalisation of the appeal in his second case, to consider that he has exhausted domestic remedies, and therefore declare his Application admissible.

***

**52.** The Court notes that pursuant to Article 56(5) of the Charter and Rule 40(5) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are not available, are ineffective and insufficient or the procedure is unduly prolonged.[13]

**53.** In its jurisprudence, the Court emphasised that an Applicant is only required to exhaust ordinary judicial remedies.[14] In relation to several applications filed against the Respondent State, the Court has determined that the constitutional petition procedure in the High Court and the review procedure at the Court of Appeal are extraordinary remedies in the Tanzanian judicial system, which an applicant is not required to exhaust prior to filing an application before this Court.[15]

**54.** In the instant case, the Court notes that the Applicant appealed his conviction and sentence on the count of armed robbery by filing

13 *Ibid* § 84.

14 *Alex Thomas v United Republic of Tanzania* (merits), § 64. See also *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania*, (merits)(2016) 1 AfCLR 507, § 95, *Oscar Josiah v United Republic of Tanzania* (merits), § 38, *Diocles William v United Republic of Tanzania* (merits) (2018) 2 AfCLR 426 § 42.

15 *Alex Thomas v United Republic of Tanzania* (merits), §§ 63-65.

Criminal Appeal No. 45/2006 at the High Court and thereafter Criminal Appeal No. 141/2007 at the Court of Appeal, the highest court in the Respondent State. Both the High Court and the Court of Appeal upheld the decisions of the District Magistrate Court.

**55.** The Court considers that the 29 May 2009 judgment of the Court of Appeal, the highest court in the Respondent State, demonstrates that the Applicant has exhausted local remedies as regards the first case on the conviction and sentence on the charge of armed robbery. Following this judgment, he was neither required to pursue an application for review of that decision at the Court of Appeal nor to file a constitutional petition at the High Court as these are extraordinary remedies.

**56.** Concerning the Applicant's second case, the Court notes that, on 27 October 2006, the Applicant appealed to the High Court against his conviction and sentence on the count of conspiracy to commit a felony and robbery. However, despite several correspondences to the concerned authorities to follow up on his appeal, it was still pending as at the time he filed the Application before this Court on 19 March 2015, that is, nine (9) years since he filed the appeal.[16] The Court notes that even though the remedy was available in theory, the procedure to exercise it was unduly prolonged. Therefore, pursuant to Rule 40(5) of the Rules, he is deemed to have exhausted the local remedies.

**57.** Accordingly, the Court dismisses the objection raised by the Respondent State to the admissibility of the Application on the ground of failure to exhaust the local remedies.

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

**58.** The Respondent State submits that the Applicant did not file his Application within a reasonable time as required by Rule 40(6) of the Rules. In this regard and citing the decision of the African Commission on Human and Peoples' Rights (herein-after referred as "the Commission") in the matter of *Michael Majuru v Zimbabwe,* the Respondent State argues that international courts consider a six-month timeframe as reasonable and the Court should adopt the same position.

16 See the Letters sent to the Chief Justice, dated 8 November 2013; to the Chairperson of the Judicial Service Commission, dated on 2 May 2013; to the Presiding Judge of the High Court, dated 6 August 2013 and 4 February2013; to the Judge presiding over the Appeal before the High Court, dated 25 May 2012, 2 February 2012 and 11 March 2011, respectively.

**59.** According to the Respondent State, however, since the Applicant filed his Application five (5) years after the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol, the Court must consider this timeframe unreasonable and declare the Application inadmissible.

**60.** It also contends that the Application was filed after an excessive time lapse, in relation to the date considered by the Applicant as that on which the local remedies were exhausted, namely 29 May 2009, the date of the judgment rendered by the Court of Appeal in the first case.

**61.** The Applicant, for his part, submits that he is a layman, indigent, incarcerated and without the assistance of counsel which made it impossible for him to obtain information on the existence of this Court and of its procedural and timeframe requirements. He consequently prayed the Court to admit and examine his Application by virtue of the powers vested in it.

***

**62.** 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."

**63.** In the instant Application, the Court notes that in regard to the first case, domestic remedies were exhausted on 29 May 2009 the date on which the Court of Appeal rendered its judgment. However, the Applicant was able to file the Application before this Court only after 29 March 2010, the date that the Respondent State deposited the Declaration prescribed under Article 36 (4) of the Protocol empowering individuals to directly access the Court. A period of four (4) years, nine (9) months and twenty three (23) days elapsed between 29 March 2010 and 19 January 2015 when the Applicant filed his Application before this Court.

**64.** The issue for determination is whether the four (4) years, nine (9) months and twenty three (23) days that the Applicant took to file his Application before the Court is reasonable in terms of Article 56(6) of the Charter and Rule 40(6) of the Rules and considering the circumstances of this case.

**65.** As regards the reasonableness of the time limit, the Court considers that the Respondent State erred by relying on the position adopted by the Commission in the *Majuru* Case to allege that the applicable time limit for filing an application after the exhaustion of the local remedies is six months.[17]

**66.** The Court recalls in this regard that, as it 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."[18] Some of the circumstances that the Court has taken into consideration with respect to Applicants include: imprisonment and being lay without the benefit of legal assistance.[19]

**67.** In correlating the elapsed time with the situation of the Applicants, this Court also notes that in its judgments in *Amiri Ramadhani v Tanzania*[20] and *Christopher Jonas v Tanzania*,[21] it held that the period of five (5) years and one (1) month was reasonable owing to the fact that both Applicants were in prison, were lay and were without legal assistance during their trials before the domestic courts.

**68.** Furthermore, the Court held that the Applicants having had recourse to the review procedure, were entitled to wait for the decision on their application for review and that this justified the filing of their Application five (5) years and five (5) months after exhaustion of local remedies.[22]

**69.** In the instant case, the Court notes that the Applicant was incarcerated and as an incarcerated person, he might have been unaware of the existence of the Court prior to the filing of the

17 See *Lucien Ikili Rashidi v United Republic of Tanzania* AfCHPR Application 009/2015. Judgment of 28 March 2019, (merits and reparations), § 52-53.

18 *Norbert Zongo & ors v Burkina Faso* (preliminary objections), § 121.

19 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 56; *Werema Wangoko & anor v United Republic of Tanzania* (merits) § 49; *Alfred Agbesi Woyome v Republic of Ghana* AfCHPR; Application 001/2017. Judgment of 28 June 2019 (merits and reparations), §§ 83-86.

20 *Amiri Ramadhani v United Republic of Tanzania* (merits) (2018) 2 AfCLR 344, § 50.

21 *Christopher Jonas v United Republic of Tanzania* (merits), § 54.

22 *Werema Wangoko Werema & anor v United Republic of Tanzania* (merits), § 49.

Application. The Court further notes that he did not have the benefit of legal aid during the appeal proceedings before the domestic courts.

**70.** Furthermore, it is apparent from the record that the Applicant was awaiting the outcome of his second appeal, which remained pending before the High Court of Tanzania from 27 October 2006 until 19 March 2017. In this respect, between 2011 and 2013, he did not simply sit back and wait for his matter to be considered, but rather sent several reminders to various judicial authorities requesting the finalisation of his appeal.[23] Thus, the Applicant had a legitimate expectation that his requests would be addressed and his delay in filing his Application before this Court was justified.

**71.** The Court therefore holds that the period of four (4) years, nine (9) months and twenty-three (23) days that the Applicant took to file the Application after the Respondent State filed the Declaration under Article 34(6) of the Protocol, is reasonable within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules.

**72.** Accordingly, the Court dismisses the Respondent State's objection to the admissibility of the Application on the ground that it failed to comply with the requirement of filing an Application within a reasonable time after exhaustion of domestic remedies.

## B. Other conditions of admissibility

**73.** The Court notes that the parties do not dispute the fact that the Application fulfils the conditions set out in Article 56(1), (2), (3), (4) and (7) of the Charter regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the terms used in the Application, the nature of the evidence filed and the prior settlement of the case, respectively, and that nothing on record indicates that these requirements have not been complied with.

**74.** In view of the foregoing, the Court finds that the Application meets all the conditions of admissibility under Article 56 of the Charter and as set out in Rule 40 of the Rules, and therefore declares the same admissible.

23 See footnote 17 above.

## VII. Merits

**75.** The Applicant alleges that the Respondent State has violated his rights guaranteed under Articles 3, 5, 7(1)(c) and (d) and (2) of the Charter. Considering that the allegations concerning Articles 3 and 5 of the Charter essentially arise from and are related to the Applicant's allegation of violation of his right to a fair trial, the Court will first consider the allegations regarding Article 7 of the Charter.

**76.** Article 7 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 violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b. The right to be presumed innocent until proved guilty by a competent court or tribunal;

c. The right to defence, including the right to be defended by counsel of his choice;

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

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

## A. Alleged violations of the right to a fair trial

**77.** The Applicant alleges violations of Article 7 of the Charter for the following reasons:

i. irregularities in the visual identification and hence the reliance on erroneous testimony to convict him;

ii. denial of the opportunity to challenge the prosecution's evidence;

iii. failure to allow the Applicant to present the *alibi* defence;

iv. failure to provide him with free legal assistance;

v. failure to render judgment on his appeal in Criminal Appeal No. 194/2004 within a reasonable time; and

vi. the fact of imposing a sentence for which there is no provision under the law.[24]

24 Quoted *in extenso* from the Applicant's submissions.

## ii. Alleged violation as regards identification and testimonies

**78.** The Applicant submits that in Case No. 95/2003, the District Magistrate Court did not organise an identification parade, contrary to the requirements of the law, in order to ensure respect for the principles of fair trial.

**79.** The Respondent State submits that in Case No. 95/2003, PW2 was the driver of the rented pick-up vehicle stolen by the Applicant, and that PW3 was the turn boy, that is, the driver's assistant. The Respondent State submits that on 15 April 2003, the Applicant rented the pick-up vehicle from PW2 and PW3 and that, thereafter, these two (2) witnesses were driving in the vehicle with the Applicant from 8.30 a.m. to 10 a.m. It was around 10 a.m. that the Applicant and other persons armed with rifles and knives attacked both witnesses, tied them up, abandoned them on the road side and made away with the vehicle. The witnesses thus had ample time to see, recognise and identify the Applicant.

**80.** The Respondent State avers that the District Magistrate Court, the High Court and the Court of Appeal confirmed that the Applicant's identification and the criteria applied thereon, are in line with the principles of justice and that there could be no error of identification in this case.

**81.** The Respondent State prays the Court to dismiss the allegation in its entirety, as baseless.

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**82.** Having taken note of the above submissions of the parties, the Court considers that the key issues for determination are whether the Respondent State's failure to conduct an identification parade and the domestic courts' use of PW2's and PW3's testimonies of visual identification to convict the Applicant are contrary to Article 7(1)(b) of the Charter, which guarantees the right to be presumed innocent until proven guilty.

**83.** The Court recalls its position, that domestic courts enjoy a wide margin of discretion in evaluating the probative value of evidence. As an international human rights court, the Court cannot substitute itself for the domestic courts and investigate the details and

particularities of evidence used in domestic proceedings.[25]

**84.** As regards the issue of identification parade, the Court also notes that "it is a matter of common sense that in criminal proceedings, identification parade is not necessary and cannot be carried out if witnesses previously knew or saw a suspect before the identification parade (was conducted). The Court notes that this is also the practice in the jurisdiction of the Respondent State."[26]

**85.** The Court has also consistently held in its jurisprudence 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…".[27]

**86.** In the instant case, the record shows that the domestic courts convicted the Applicant on the basis of evidence from the visual identification of two prosecution witnesses, that is, PW2 and PW3, themselves victims of the crime. These witnesses were with the Applicant in the pick-up vehicle for nearly two (2) hours on the road. According to the national courts, the witnesses recognised the Applicant during this time and were able to subsequently identify him. In the circumstances, the Court holds that the omission of the identification parade does not constitute a miscarriage of justice, and therefore is not a violation to the Applicant's right to a fair trial.

**87.** As regards the credibility of the witnesses, the Court notes that the national courts carefully examined the circumstances of the crime, ruled out any risk of error and concluded that the Applicant was indeed identified as the perpetrator of the alleged crime. The Court considers that the assessment of the facts or evidence by the domestic courts reveals no manifest error nor did it result in any miscarriage of justice for the Applicant. It accordingly dismisses the Applicant's allegation that the testimony regarding the visual identification was marred by irregularities.

**88.** For this reason, the Court holds in conclusion that there has been no violation of Article 7(1)(b) of the Charter as regards the issue of visual identification and the related testimonies and consequently, dismisses the allegation.

25 *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 AfCLR 218, §65; *Armand Guehi v United Republic of Tanzania* (merits and reparations), §-§ 107-108.

26 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (2017) 2 AfCLR 65, § 86.

27 *Mohamed Abubakari v United Republic of Tanzania* (merits), §174; *Armand Guehi v Tanzania* (merits and reparations), §105.

### ii. Alleged denial of opportunity to challenge the prosecution's evidence

**89.** The Applicant alleges that, in the first case, the Respondent State had not properly notified him of the exhibits it would tender for him to have the opportunity to contest their admission. The Applicant contends that, despite this, the District Magistrate Court admitted Exhibits 1 to 5 tendered by the Prosecution. The Applicant argues that, by these acts, the Respondent State violated his fundamental rights enshrined in Article 26(1) and (2) of the Constitution of the United Republic of Tanzania.

**90.** The Applicant further states that he made multiple requests for the witness statements to be disclosed to him so that he could effectively prepare his defence and that none of his requests was fulfilled until the end of the trial process. He avers that he raised this lack of disclosure of evidence in his Memorandum of Appeal in Criminal Appeal No. 45 of 2006. The Respondent State admitted that it did not disclose the witness statements, and that the Court of Appeal had held that this omission did not constitute a ground for appeal. The Applicant however submits that this omission infringed upon his right to a fair trial under Article 7 of the Charter.

**91.** Refuting these allegations, the Respondent State asserts that the Applicant had his counsel during part of the trial before the Kibaha District Magistrate Court, adding that the counsel was never prevented from tendering exhibits or evidence in support of the Applicant's case. The record of proceedings shows that the Applicant's counsel raised only one objection at the time of examination of the prosecution exhibits. The Respondent State, consequently, prays the Court to dismiss this allegation as unfounded.

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**92.** The Court notes that in criminal cases, the right to defence as enshrined in Article 7(1)(c) of the Charter, includes the right to be supplied with prosecution evidence and the right of the accused to challenge the said evidence. In the instant case, the main issue for determination is whether the Respondent State's alleged failure to provide the Applicant with witness statements is a violation of

the Applicant's right to defence.

**93.** The Court further notes from the record that, during the trial stage at the District Magistrate Court, the Applicant was represented by counsel and had the opportunity to challenge the tendering of exhibits by the prosecution. He was also provided with records of witness testimony. There is nothing on record showing that he was prevented in any manner from challenging the admissibility of the exhibits in question or disputing the witness testimony.

**94.** Accordingly, the Court finds that there has been no violation of Article 7(1)(c) of the Charter in relation to the Applicant's right to question the admissibility of prosecution's evidence and consequently dismisses the allegation.

### iii. Alleged failure to allow the Applicant's to present an *alibi* defence

**95.** The Applicant alleges that he informed the District Magistrate Court of his intention to call a witness to corroborate his *alibi*, but the request was refused. He further asserts that he was deprived of his right to a fair trial in as much as the District Magistrate Court, the High Court and the Court of Appeal did not take his *alibi* defence into account.

**96.** The Respondent State did not respond to this allegation.

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**97.** The Court notes that an *alibi* can be an important element of evidence for one's defence. The *alibi* defence is implicit in the right of a fair trial and should be thoroughly examined and possibly set aside, prior to a guilty verdict.[28] In its judgment in *Mohamed Abubakari v Tanzania*, this Court observed that:

> Where an alibi is established with certitude, it can be decisive in the determination of the guilt of the accused. This issue was all the more crucial especially as, in the instant case, the indictment of the Applicant relied on the statements of a single witness, and that no identification parade was conducted.[29]

28 *Mohamed Abubakari v United Republic of Tanzania* (merits), § 191, and *Kennedy Owino Onyachi & anor v United Republic of Tanzania* (merits), § 93.

29 *Ibid*, § 93.

**98.** In the instant case, the Court notes from the District Magistrate Court's judgment in the first case, that the Applicant had raised the *alibi* defence alleging that he was at work at the time when the pick-up vehicle was allegedly stolen. The Court further notes that the District Magistrate Court, the High Court and the Court of Appeal considered his *alibi* defence but found that it lacked merit in view of the irrefutable testimony of PW2 and PW3. Considering the wide margin of discretion that domestic courts enjoy in this regard, the Court does not see any reason for it to intervene or conclude otherwise.

**99.** In view of the foregoing, the Court dismisses the Applicant's allegation that he was not allowed to call witnesses to corroborate his *alibi* defence and, therefore, finds that the Respondent State has not violated Article 7(1)(c) of the Charter.

## iv Alleged violation of the right to free legal assistance

**100.** The Applicant further alleges that he did not receive free legal assistance before the High Court and the Court of Appeal, which would have enabled him to better understand the legal and procedural issues arising during the appeals. He argues that by not granting him such assistance, the national courts failed to fulfil their obligation under Article 3 of the Criminal Procedure Act of the Respondent State and hence violated Article 7(1)(c) of the Charter.

**101.** The Applicant cites, in this regard, the judgment in *Wilfred Onyango Nganyi & 9 ors v Tanzania* wherein the Court noted that in view of the seriousness of the charges levelled against the Applicants, the Court held that the Respondent State was under the obligation to provide them with free legal assistance; and to inform the Applicants of their right to free legal assistance, as soon as it became clear that they were no longer being represented.

**102.** The Respondent State asserts that whereas the right to defence is absolute in domestic law, the right to legal aid is obligatory only in homicide, murder or manslaughter cases, and that for all other criminal cases, legal aid is granted only at the request of the accused if it is proved that he is indigent and unable to pay the counsel's fees. Refuting the Applicant's allegations, the Respondent State contends that at no point in the proceedings did he make such a request, but rather he opted to take charge of his own defence.

**103.** The Respondent State further asserts that the Applicant's counsel remained available to the Applicant between 3 November 2003 and 24 November 2004 and withdrew from the case after that

date due to lack of instructions from the Applicant. The counsel remained at the Applicant's disposal during the evidentiary period and did not challenge the evidence adduced before the Court throughout that stage of the trial.

**104.** The Respondent State also submits, with regard to the Applicant's allegation that he was deprived of the right to counsel, that the Applicant had the opportunity to apply for legal assistance as provided under Section 3 of the Legal Aid (Criminal Proceedings) Act. The Respondent State also avers that the Applicant had the opportunity of raising this issue during his appeals at the High Court and the Court of Appeal.

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**105.** The Court notes that Article 7(1)(c) of the Charter mentioned above[30] does not provide explicitly for the right to free legal aid. This Court has however, interpreted this provision as read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR")[31] and determined that the right to defence includes the right to be provided with free legal assistance.[32] The Court has also held that an individual charged with a criminal offence is entitled to the right to free legal assistance without requesting for it, provided that the interest of justice so requires.[33]

**106.** This Court further notes that:

In assessing these conditions (i.e., indigence and interest of justice), the Court considers several factors, including i). the seriousness of the crime; ii). the severity of the potential sentence; iii). the complexity of the case; iv). the social and personal situation of the defendant and, in cases of appeal, the substance of the appeal (whether it contains a contention that requires legal knowledge or skill); and the nature of the "entirety

30 See § 77 above.

31 The Respondent State became a party to ICCPR on 11 June 1976.

32 *Alex Thomas v United Republic of Tanzania* (merits), §123; *Kijiji Isiaga v United Republic of Tanzania*, § 72; *Kennedy Owino Onyachi and Charles Mwanini Njoka v United Republic of Tanzania* § 104, Application 025/2015. Judgment of 26 September 2019 (merits and reparations), *Majid Goa v United Republic of Tanzania*, AfCHPR, Application 025/2015. Judgment of 26 September 2019 (merits and reparations § 69.

33 *Alex Thomas v United Republic of Tanzania* (merits), § 123; *Mohamed Abubakari v United Republic of Tanzania* (merits), §§ 138-139.

of the proceedings", for example, whether there are considerable disagreements on points of law or fact in the judgments of lower courts.[34]

**107.** In the instant Application, the Court notes from the record that in the first case before the District Magistrate Court, the Applicant was represented by counsel whom he engaged. However, this was not the case with respect to proceedings before the High Court and the Court of Appeal. With regard to the second case, there is nothing on record to establish whether or not the Applicant was represented by counsel during his trial before the District Magistrate Court and at his appeal before the High Court. In view of this, the Court will limit its assessment only to the first case and determine whether the Applicant's right to free legal assistance has been violated.

**108.** The records show that the Applicant was charged with a serious offence carrying a heavy custodial sentence of a minimum of thirty (30) years. Besides, the case involved eight (8) prosecution witnesses, two (2) defence witnesses and five (5) prosecution exhibits, which shows the complexity of the matter. In the circumstances, it is evident that the interest of justice required the provision of free legal assistance so as to ensure that the Applicant's trial and appeals proceeded fairly.

**109.** In this connection, the Court takes note of the Respondent State's contention that the Applicant had counsel at the District Magistrate Court, that the lawyer withdrew his services for lack of cooperation from the Applicant, and that in any event, the Applicant was supposed to request for legal assistance if he felt he needed one. The Court also notes the Respondent State's argument that the Applicant was able to defend himself at all stages of his trial.

**110.** The Court notes from the file that, during part of his trial, the Applicant was indeed represented by counsel, whom he had personally engaged. However, this was not the case throughout the trial and appellate proceedings. In any case, the failure of the Respondent State to provide the Applicant with free legal assistance at appellate levels is inconsistent with international human rights standards.

**111.** Accordingly, the Court finds that the Respondent State has, by failing to provide the Applicant with free legal assistance during part of his trial and appeals in respect of the first case, Criminal Case No. 95/2003, violated the Applicant's right to free legal assistance as guaranteed by Article 7(1)(c) of the Charter as read

34 *Kennedy Owino & anor v United Republic of Tanzania* (merits) § 105.

together with Article 14(3)(d) of the ICCPR.

## v Alleged violation of the right to be tried within a reasonable time in Criminal Case No. 194/2004

**112.** The Applicant alleges that immediately after his conviction in Criminal Case No. 194/2004, he filed an appeal before the High Court under Criminal Appeal No. 58/2006, challenging the decision of the District Magistrate Court. He indicates that the appeal was heard in June 2007 and scheduled for delivery of judgment but this had not happened by the time he filed his Application before this Court, on 19 January 2015. In his Reply, he further asserted that this appeal was pending until 20 March 2017. The Applicant contends that this delay is excessive for a criminal case and constitutes a violation of the right to be tried within a reasonable time contrary to Article 7(1)(d) of the Charter.

**113.** The Applicant asserts also that the multiple attempts he made to exercise his fundamental rights enshrined in the Constitution of the United Republic of Tanzania regarding finalisation of the appeal remained unsuccessful.

**114.** The Applicant reiterates that between 2011 and 2013, he repeatedly sent letters, complaints and requests to judicial authorities regarding the finalisation of his appeal, but all these attempts were fruitless.

**115.** The Respondent State, for its part, contends that the Applicant is making the aforesaid allegation for the first time, and that this issue has been resolved by the High Court's judgment of 20 March 2017, quashing the Applicant's conviction and part of the outstanding sentence in Criminal Case No. 194/2004.

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**116.** The Court reiterates that the right to appeal is a fundamental element of the right to a fair trial as enshrined under Article 7(1)(a) of the Charter stated above.[35] Appeal proceedings offer an opportunity for an accused to challenge the findings of the lower court on matters of law and fact and this lies in the very essence

35 See § 77.

of the right to a fair trial. The right to a fair trial also includes the principle that judicial proceedings should be finalised within a reasonable time.

**117.** In the determination of the right to be tried within a reasonable time, the Court has adopted a case-by-case approach, whereby it takes into consideration several factors, including the nature and complexity of the case, the length of the domestic proceedings and whether the national authorities exercised due diligence in the circumstances of the case, for the finalisation of the matter.[36]

**118.** Regarding the nature and complexity of the case, the Court notes that in its Judgment of 20 March 2017, the High Court considered that, since the original case file could not be traced, the Court had to rely on a copy of the said file. The Court thus holds in conclusion that the delay noted was not caused by the nature and complexity of the case, but by factors extraneous to the Applicant's will and stemming from the malfunctioning of the Respondent State's judicial system.

**119.** With regard to the duration of the proceedings and the obligation on the part of the Respondent State's judicial authorities to exercise due diligence, the Court notes that, in the second case, No. 194/2004, a period of ten (10) years, four (4) months and twenty three (23) days had elapsed between 27 October 2006, the date on which the Applicant filed his appeal No. 58/2006, and 20 March 2017, the date on which the High Court rendered its Judgment. The question that arises is whether or not such a timeframe is reasonable.

**120.** On this point, the Court notes that, according to the record, a period of more than nine (9) years had elapsed between the time the Applicant lodged his appeal and the time he filed the present Application on 19 January 2015; and this was despite the numerous requests to the national authorities for a determination on the criminal case No. 194/2004.[37] It was only on 20 March 2017 that the High Court finalised the appeal proceedings by rendering a Judgment; and this, after this Court had been seized of the present Application.

36 *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, § 152; *Wilfred Onyango Nganyi & ors v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507, § 155. *Armand Guéhi v United Republic of Tanzania* (merits and reparations), §122; *Lucien Ikili Rashidi vUnited Republic of Tanzania* (merits and reparations) § 107.

37 See footnote 16 above.

**121.** By the said Judgment, the High Court quashed the conviction and part of the sentence and acquitted the Applicant. However, this occurred only more than ten (10) years after the filing of the appeal. The Respondent State did not provide justification for such considerable delay and nothing on record indicates that such a long period of time was necessary to adjudicate on an appeal.

**122.** In light of the foregoing, the Court holds that the period of ten (10) years four (4) months and twenty-three (23) days taken to determine the Applicant's appeal at the High Court in respect of Criminal Appeal No. 58/2006 is excessive and cannot be regarded as a reasonable time. The Court thus finds that the Respondent State has violated the Applicant's right to be tried within a reasonable time as guaranteed by Article 7(1)(d) of the Charter.

### vi. Alleged violation arising from the illegality of the sentence

**123.** The Applicant alleges that the thirty (30) years prison sentence imposed on him in Criminal Case No. 95/2003 is unlawful as the applicable penalty was fifteen (15) years imprisonment in accordance with the law in force at the time of his conviction in 2005 by the District Magistrate Court. He claims that the thirty (30) years sentence did not exist and is a violation of Article 13(6) of the Constitution of the United Republic of Tanzania and Article 7(2) of the Charter.

**124.** However, in his Reply, the Applicant states that he no longer wished to maintain this claim. For this reason, the Court will not address this issue.

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

**125.** The Applicant alleges that he was isolated by the fact-finding procedure and the examination of his appeal, contrary to the principle of equality before the law. He contends that, by this act, his rights as enshrined in Article 3(1)(2) of the Charter have been violated.

**126.** The Respondent State did not respond to this allegation but it asserts in general that its Constitution guarantees full equality before the law, equal protection of the law and the right to a fair trial in accordance with Article 13(1)(6) thereof.

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**127.** Article 3 of the Charter provides that: "1. Every individual shall be equal before the law; 2. Every individual shall be entitled to equal protection of the law".

**128.** In its jurisprudence, the Court has established that the *onus* is on the Applicant to demonstrate how the guarantees of equality before the law and equal protection of the law have resulted in a violation of Article 3 of the Charter.[38]

**129.** In the instant case, the Court notes that the Applicant has failed to show how he was treated differently from other litigants in the same situation as he was. In this regard, the Court reiterates its position that "General statements to the effect that his right has been violated are not enough. More concrete evidence is required".

**130.** Accordingly, the Court holds that the Respondent State has not violated Article 3(1) and (2) of the Charter.

## C. Alleged violation of the right not to be subjected to cruel, inhuman and degrading treatment

**131.** The Applicant alleges that the Respondent State has violated his right not to be subjected to cruel, inhuman and degrading treatment, because he was beaten up by agents of the Respondent State when he was first arrested and that he was intimidated and tortured at the police station during the investigations in order to make him confess his guilt. He also alleges that he was denied medical care while in custody.

**132.** According to the Applicant, such treatment constitutes a violation of Article 5 of the Charter.

**133.** The Respondent State did not respond to this allegation.

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38 *Alex Thomas v United Republic of Tanzania* (merits), § 140; *Armand Guehi v United Republic of Tanzania* (merits and reparations) §157.

**134.** The Court notes that 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. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

**135.** The Court recalls its position that "General statements to the effect that his right has been violated are not enough.[39] More concrete evidence is required". In the instant case, the Applicant has not provided evidence in support of this allegation.

**136.** Accordingly, the Court finds that the Respondent State has not violated Article 5 of the Charter.

## VIII. Reparations

**137.** 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".

**138.** The Court recalls its established jurisprudence 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".[40]

**139.** The Court also reiterates that, the purpose of reparation is to "… 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."[41] Measures that a State could take to remedy a violation of human rights 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.[42]

39 *Alex Thomas v United Republic of Tanzania* (merits), § 140.

40 *Mohamed Abubakari v United Republic of Tanzania* (merits), § 242 (ix); *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations), (2018) 2 AfCLR 202, § 19.

41 Application 007/2013. Judgment of 04 July 2019 (reparations), *Mohamed Abubakari v United Republic of Tanzania*, § 21, Application 005/2013. Judgment of 04 July 2019 (reparations), *Alex Thomas v United Republic of Tanzania*, § 12; Application 006/2013. Judgment of 04 July 2019 (reparations), *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania*, § 16.

42 *Ingabire Umuhoza v Rwanda* (reparations), § 20.

**140.** 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.[43] With regard to moral prejudice, presumptions are made in favour of the Applicant.[44]

**141.** The Court will consider the Applicant's claims for compensation on the basis of these principles.

## A. Pecuniary reparations

**142.** The Court has already found that the Respondent State violated the Applicant's rights to free legal assistance, and the right to be tried within a reasonable time contrary to Article 7(1)(c) and (d) of the Charter, respectively.

### i. Material prejudice

**143.** The Applicant claims that as a result of his incarceration, his health declined, that he lost his job as a metal mechanic, and suffered financial loss and that his life plans have been severely disrupted. He claims that the indirect victims he has listed in his claim for reparations, that is, his wife, son, mother, two (2) sisters, and two (2) brothers incurred financial loss by constantly visiting him in prison. The Applicant claims United States Dollars Five Thousand (US$ 5,000) as material prejudice suffered by his wife. He also prays the Court to grant him United States Dollars two thousand (US$ 2,000) for legal fees he incurred during the proceedings in the domestic courts.

**144.** The Respondent State contends that the Applicant has not adduced any evidence to substantiate the life plan he had and how this was disrupted; the Applicant has not adduced any document to substantiate the ownership of any property that has been disposed of; and the Applicant has neither adduced nor established any social status he had prior to his arrest. The Respondent State further avers that the Applicant cannot claim to have lost his social status while he has not even produced any evidence to show what social status he had prior to his arrest

43 *Reverend Christopher R. Mtikila v United Republic of Tanzania (reparations) (2*014) 1 AfCLR 72 § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346, § 15.

44 *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) § 55.

and imprisonment. The Respondent State also argues that the Applicant did not provide any evidence to support his claim that he incurred legal costs in the national courts.

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**145.** The Court reiterates its position that, as regards the income lost due to the proceedings before the High Court[45] and the claim for lawyers' fees during domestic proceedings, such loss should be proven before this Court with evidence of financial returns that could have been realised as well as evidence of payments to his counsel. In the instant case, the prejudice resulting from the lengthy judicial proceedings could also have been supported by proof of payment of lawyers' fees, as well as procedural and other related costs. The Court notes that, the Applicant provided no such evidence in support of his claims. Consequently, these claims are dismissed.

**146.** With respect to the claim for compensation based on the disruption of his life plan, chronic illness and poor health, the Court notes that the Applicant's allegation is simply a general statement that is not supported by any evidence. Consequently, this claim is also dismissed.

## ii. Moral prejudice

### a. Moral prejudice suffered by the Applicant

**147.** In his claims for reparations, the Applicant argues that he suffered undue stress from the lack of provision of legal assistance during the various stages of his case, as a result of the failure of the Respondent State to recognise the rights, duties and freedoms enshrined in the Charter. The Applicant further argues that the Respondent State's failure to try him within a reasonable time and provide him with equal protection of the law and its violation of his dignity by degrading him through torture, caused him serious stress.

45 *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations), § 126.

**148.** The Applicant adds that he suffered a wide range of injuries during his arrest and sickness since his incarceration such as hypertension and cardiomegaly. He further submits that he lost his social status and standing in the community due to his imprisonment. Citing the Court's jurisprudence in *Lohé Issa Konaté v Burkina Faso*, the Applicant prays the Court to grant him United States Dollars Twenty Thousand (USD $20,000) in moral damages. The Applicant requests the Court to also take into account the thirteen (13) years he spent in prison.

**149.** In its Response, the Respondent State contends that for moral damages to be claimed, the alleged moral prejudice should be directly caused by the facts of the case. It asserts that it is not the duty of the Court to speculate on the existence, seriousness and magnitude of the moral damages claimed. In this regard, the Respondent State argues that the Applicant has not adduced any proof of emotional anguish or chronic diseases suffered due to imprisonment or in relation to his rights. To substantiate its contention, the Respondent State claims that there is no medical certificate showing the existence of a chronic disease suffered or emotional anguish the Applicant encountered while in prison or following the violation of his rights.

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**150.** The Court notes that, moral prejudice involves the suffering, anguish and changes in the living conditions of an Applicant and his family.[46] As such, the causal link between the wrongful act and moral prejudice "can result from the human rights violation, as a consequence thereof, without a need to establish causality as such".[47] The Court has held previously that the evaluation of *quantum* in cases of moral prejudice must be done in fairness and taking into account the circumstances of the case.[48] In such instances, awarding lump sums would generally apply as the

46 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (2014) 1 AfCLR 72 § 34.

47 *Beneficiaries of late Norbert Zongo* (reparations) § 55; and *Lohé Issa Konaté v Burkina Faso* (reparations), § 58.

48 *Armand Guehi v United Republic of Tanzania*, § 157; *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258, § 61.

standard.[49]

**151.** The Court has already found that the Respondent State has violated the Applicant's rights to free legal assistance, and the right to be tried within a reasonable time contrary to Article 7(1)(c) and (d) of the Charter. Accordingly, there is a presumption that the Applicant has suffered some form of moral prejudice as a result of such violation.

**152.** With respect to the currency in which the *quantum* of damages will be assessed, the Court is of the view that, taking fairness into account and considering that the Applicant should not be made to bear the fluctuations inherent in financial activities, determination should be made on a case-by-case basis. As a general rule, damages should be awarded, as far as possible, in the currency in which the loss was incurred.[50]

**153.** Accordingly, the Court exercising its discretion awards the Applicant an amount of Tanzanian Shillings Five Million Seven Hundred and Twenty-Five Thousand (TZS 5,725,000) as compensation.

## b. Moral prejudice to indirect victims

**154.** The Applicant alleges that his wife, Mrs Fatuma Bakari; son, Azizi Andrew Ambrose; mother, Ms Altha Lukwandali; his sisters Esther Ambrose and Donata Ambrose; and brothers Benjamin Ambrose and Barnabas Ambrose have indirectly been affected by his incarceration. He argues that they were emotionally distressed, suffered from emotional pain and anguish as a result of the physical condition he was forced to endure. Accordingly, he prays the Court to grant him United States Dollars Five Thousand (US$ 5,000) as moral damages for the prejudice suffered by each indirect victim.

**155.** The Respondent State argues that any claim for compensation for suffering that the indirect victims might have undergone is not justifiable because the Applicant has not submitted any document to prove the existence of a relationship between him and the indirect victims and there is no connection between the prejudice suffered by the indirect victims and the violation suffered by the Applicant.

49 *Lucien Ikili Rashidi vUnited Republic of Tanzania* (merits and reparations), § 116-117; *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258, § 62.

50 *Lucien Ikili Rashidi v United Republic of Tanzani*a (merits and reparations) § 120.

**156.** Relying on the Court's judgment in *Lucien Ikili Rashid v Tanzania*, the Respondent State further asserts that indirect victims must prove their relation to the Applicant in order to be entitled to damages. The Respondent State submits that, since the Applicant failed to submit a marriage certificate, birth certificate or any document showing the level of dependency or previous record of dependency of the alleged indirect victims on him, there is no causal link between the said indirect victims and the prejudice suffered.

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**157.** With regard to the moral prejudice suffered by indirect victims, the Court reiterates its jurisprudence as established as regards indirect victims that, to be entitled to reparations, the indirect victims must prove their filiation with the Applicant. An Applicant's parentage should be proved with a birth certificate or any other equivalent proof; spouses must produce their marriage certificate or any other equivalent proof; the siblings must provide a birth certificate or any other equivalent document attesting to their filial link with the Applicant.[51]

**158.** In the instant case, the Court notes that the Applicant provided the names of his wife, son, mother and siblings, but has not provided any evidence of their identification and proof of his filiation with the alleged indirect victims.

**159.** In light of the foregoing, the Court holds that the Applicant has failed to provide evidence of filiation between him and the alleged indirect victims. Consequently, the Court dismisses the claims for compensation for the alleged moral prejudice suffered by the indirect victims.

51 *Ibid* § 135; *Alex Thomas v United Republic of Tanzania* (reparations), § 51; *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania* § 71; *Mohamed Abubakari v United Republic of Tanzania*, § 60; *Armand Guehi v United Republic of Tanzania* (merits and reparations) §§ 183 and 186.

## B. Non-pecuniary reparations

### i. Restitution

**160.** The Applicant prays the Court to quash his conviction and sentence and order his release.

**161.** The Applicant also prays the Court to make a restitution order, arguing that compensation should be paid in lieu of restitution, given that he cannot return to the position in which he was prior to the decisions of the Respondent State's courts.

**162.** The Respondent State, for its part, submits that the Applicant is serving the prison sentence legally and in accordance with the laws in force in the United Republic of Tanzania for the crimes he committed.

**163.** The Respondent State avers that the Applicant's prayer to have his liberty restored is misconceived and that the Court lacks jurisdiction to restore the Applicant's liberty.

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**164.** With respect to the Applicant's request for the conviction and sentence to be quashed, the Court reiterates its previous jurisprudence that it does not examine details of matters of fact and law that national courts are entitled to address.[52]

**165.** As for the Applicant's request for a direct order for his release or to set aside the sentence, as the Court stated in its previous cases, such a measure may be ordered by the Court itself only in special and compelling circumstances.[53] Regarding the quashing of the sentence, the Court has held that this would be warranted only in cases where the violation noted was such that it had necessarily vitiated the conviction and sentencing. Regarding the question of release, in particular, the Court has held that this would be the case "if an Applicant sufficiently demonstrates or the Court itself establishes from its findings that the Applicant's arrest or

52 *Mohamed Abubakari v United Republic of Tanzania* (merits) (2016) 1 AfCLR 599, § 28; *Minani Evarist v United Republic of Tanzania* (merits) 2 RJCA 415, § 81.

53 *Alex Thomas v United Republic of Tanzania* Judgment (merits), § 234. *Armand Guéhi v United Republic of Tanzania* (merits and reparations) § 160.

conviction is based entirely on arbitrary considerations and that his continued imprisonment would occasion a miscarriage of justice."[54]

**166.** In the instant case, the Applicant has not proven the existence of such exceptional circumstances, and given that the Court has not established the said circumstances *proprio motu,* it dismisses the prayer for release.

## ii. Guarantees of non-repetition and report on implementation

**167.** The Applicant prays the Court to order the Respondent State to guarantee the non-repetition of the violations of which he has been a victim and to report to the Court every six (6) months until its orders are fully implemented.

**168.** The Respondent State argues that the Applicant's prayer for a guarantee of non-repetition of the violations is untenable, baseless and misconceived.

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**169.** The Court has already noted that, if the set objective is to prevent future violations, guarantees of non-repetition are usually ordered in order to eradicate structural and systemic violations of human rights. Such measures are therefore not generally intended to repair individual prejudice but rather to remedy the underlying causes of the violation. However, the Court considers that guarantees of non-repetition may also be relevant, particularly in individual cases where it is established that the violation will not cease or is likely to reoccur. These entail cases where the Respondent State has challenged or has not complied with the previous findings and orders of the Court.[55]

**170.** In the instant case, the Court notes that the nature of the violations found, that is, the Applicant's rights to free legal assistance and to be tried within a reasonable, are unlikely to recur as

54 *Mgosi Mwita Makungu v United Republic of Tanzania*, § 84, *Diocles William v United Republic of Tanzania* § 101; Application 027/2015, Judgment of 21 September 2018, *Minani Evarist v United Republic of Tanzania* (merits) § 82.

55 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 191.

the proceedings in respect of which they arose have already been completed. Furthermore, the Court has already awarded compensation for the moral prejudice the Applicant suffered as a result of the said violations. The Court therefore holds that in the circumstances, the request is not justified and the same is therefore dismissed.

### iii. Measures of satisfaction

**171.** The Applicant prays the Court to order the Respondent State to publish the decision on the merits of the Application in the Official Gazette within one (1) month from the date of delivery of the judgment as a measure of satisfaction.

**172.** The Respondent State did not make any submission in this respect.

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**173.** Even though the Court considers that a judgment in itself, can constitute a sufficient form of reparation, it can *suo motu*, order such other measures of satisfaction as it deems fit.[56]

**174.** In the instant case, the Court considers that there is need to emphasise and raise awareness as regards the Respondent State's obligations to make reparations for the violations established with a view to enhancing implementation of the judgment. To ensure that the judgment is publicised as widely as possible, the Court finds that the publication of the judgment on the merits on the websites of the Judiciary and the Ministry of Constitutional and Legal Affairs to be accessible for at least one (1) year after the date of publication, is an appropriate additional measure of satisfaction.

56 *Armand Guéhi v United Republic of Tanzania*, § 194; *Reverend Christopher Mtikila v United Republic of Tanzania* (reparations) §§ 45 and 46 (5) and *Beneficiaries of late Norbert Zongo*, (reparations) (2015) 1 AfCLR 258 § 95; *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations), §151; *Wilfred Onyango Nganyi v United Republic of Tanzania* (reparations) § 86; *Alex Thomas v United Republic of Tanzania* (reparations), § 74.

## IX. COSTS

**175.** In accordance with Rule 30 of the Rules, "Unless otherwise decided by the Court, each party shall bear its own costs".

**176.** The Court reiterates, as has already been established, that reparations may include legal costs and other costs incurred in international proceedings.[57] It is up to the Applicant to provide justification for the sums claimed.[58]

### A. Legal fees related to proceedings before this Court

**177.** The Applicant prays the Court to award him United States Dollars Twenty Thousand (US$ 20,000) as lawyers' fees for the proceedings before this Court. This is calculated on the basis of 300 hours of legal work, of which 200 hours are for the assistant counsel and 100 hours for the lead counsel, thus accounting for United States Dollars Fifty (US$ 50) an hour for the assistant counsel, and United States Dollars One Hundred (US$ 100) an hour for the lead counsel, and totalling United States Dollars Ten Thousand (US$ 10,000) for the assistant counsel and United States Dollars Ten Thousand (US$ 10,000) for the lead counsel.

**178.** For its part, the Respondent State avers that the Applicant was provided legal assistance by PALU, hence, he did not incur any legal expenses in conducting his case. Relying on the *Norbert Zongo v Burkina Faso* Case, the Respondent State argues that it is not sufficient to remit probative documents, rather, the parties must develop the reasons that relate the evidence to the facts under consideration, and in the case of alleged financial disbursement, the items and justification must be clearly described. The Respondent State submits that the claims for legal fees should be disregarded.

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**179.** With regard to legal fees, "while the reparation paid to the victims of human rights violations may also include reimbursement

57 *Armand Guéhi v United Republic of Tanzania* (merits and reparations) §188; and *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) § 77-93.

58 *Armand Guéhi v United Republic of Tanzania* (merits and reparations) §197.

of lawyer's fees",[59] the Court notes in the instant case that the Applicant was represented by PALU throughout the proceedings under the Court's legal assistance scheme. As the Court has previously held,[60] the Court's legal assistance scheme is *pro bono* in nature and thus this claim lacks merit and is dismissed.

## B. Transport and stationery costs

**180.** The Applicant also seeks compensation for other costs incurred in this case, that is, United States Dollars Two Hundred (US$ 200) for postage costs, United States Dollars, Two Hundred (US$ 200) for printing and photocopying costs, United States Dollars One Thousand (US$ 1,000) for transportation costs to and from the seat of the Court and from the PALU secretariat to Ukonga prison and United States Dollars Two Hundred (US$ 200) representing communication costs.

**181.** The Respondent State avers that the Applicant has not provided evidence to substantiate his allegations as regards these expenses. The Respondent State argues that all the charges for service and postage of pleadings were borne by the Court.

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**182.** The Court recalls its position in Reverend *Christopher Mtikila v Tanzania* case, whereby it noted that: "expenses and costs form part of the concept of reparation." The Court considers that transport costs incurred for travel within Tanzania, and stationery costs fall under the "categories of expenses that will be supported in the Legal Aid Policy of the Court".[61] Since PALU represented the Applicant on a *pro bono* basis, the claims for these costs are unjustified and are therefore dismissed.

59 *Beneficiaries of late Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258 § 79.

60 *Alex Thomas v United Republic of Tanzania* (reparations) § 81.

61 African Court on Human and Peoples' Rights Legal Aid Policy 2013-2014, ***Legal Aid Policy*** 2015-2016, and ***Legal Aid Policy*** 2017.

**183.** Accordingly, the Court holds in conclusion that each party shall bear its own costs.

## X. OPERATIVE PART

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

*On admissibility*
iii. *Dismisses* the objections to the admissibility of the Application;
iv. *Declares* that the Application is admissible;

*On the merits*
v. *Holds* that the Respondent State has not violated the Applicant's right to equality before the law and the right to equal protection of the law under Article 3 (1) and (2) of the Charter;
vi. *Holds* that the Respondent State has not violated the Applicant's right not to be subjected to cruel, inhuman and degrading treatment under Article 5 of the Charter;
vii. *Holds* that the Respondent State has not violated the Applicant's right to a fair trial under Article 7(1) of the Charter in terms of the alleged irregularities in the visual identification, and the denial of the opportunity to challenge the prosecution's evidence and the alibi defence;
viii. *Holds* that the Respondent State has violated the Applicant's right to a fair trial, provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR by failing to provide him with free legal assistance;
ix. *Holds* that the Respondent State has violated the Applicant's right to be tried within a reasonable time as regards Criminal Appeal No 58/2006 examined by the High Court of Tanzania in Dar es Salaam, contrary to Article 7(1)(d) of the Charter;

*On reparations*
*Pecuniary reparations*
x. *Does not* grant the Applicant's prayer for damages arising from material loss of income, loss of life plan, financial losses incurred by himself and his wife, and for legal costs incurred in the proceedings before the domestic courts;
xi. *Does not* grant the Applicant's prayer for damages for moral

prejudice suffered by his wife, mother, sisters, and brothers;

xii. *Grants* the Applicant's prayer for reparation for the prejudice suffered as a result of the violations found and awards him the sum of Tanzanian Shillings Five Million Seven Hundred and Twenty Five Thousand (TZS 5, 725,000);

xiii. *Orders* the Respondent State to pay the above sum tax free as a fair compensation, 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 accrued amount is fully paid.

*Non-pecuniary reparations*

xiv. *Dismisses* the Applicant's prayer for his conviction to be quashed.

xv. *Dismisses* the Applicants' prayer for the Court to order his release from prison;

xvi. *Dismisses* the Applicant's prayer for an order regarding non-repetition of the violations.

xvii. *Orders* the Respondent State to publish, as a measure of satisfaction, the present Judgment within three (3) months of its notification, on the official websites of the Judiciary and the Ministry of Constitutional and Legal Affairs, and ensure that the Judgment remains accessible for at least one (1) year after the date of such publication.

xviii. *Orders* the Respondent State to submit to it within six (6) months of the date of notification of this Judgment, a report on the status of implementation of the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On costs*

xix. *Does not* grant the Applicant's prayer in respect of legal fees, costs and other expenses incurred in the proceedings before this Court;

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

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## Separate opinion: BENSAOULA

**[1]** I concur with the view of the majority of the judges as to the admissibility of the application, the jurisdiction of the Court and the operative part on certain points.

**[2]** On the other hand, I believe that the manner in which the Court has:

1. dealt with the objection raised by the Respondent State as to the filing of the application within a reasonable time,
2. concluded in the same paragraph on the two cases which are the subject of the Applicant's allegations
3. dismissed the claim for reparations in respect of the material damage and the damage concerning the indirect victims alleged by the Applicant …

is inconsistent with the provisions of Article 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules of Court as regards the first point, the legal logic that would require this period to be calculated for each application before the Court and Article 61 as regards the last.

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### 1. As to the objection raised by the Respondent State to the filing of the application within a reasonable time

**[3]** Under Article 56 of the Charter and Rule 40 (6) of the Rules of Court, it is clearly stated that applications must be submitted within a reasonable time from the exhaustion of domestic remedies or from the date fixed by the Court as the date on which the time-limit for its own seizure begins to run. In the instant case, as regards the first case, the Court has set the date for the exhaustion of domestic remedies as 29 May 2009.

**[4]** As to the assessment of the reasonable time limit, the Court found that the period of four (4) years, nine (9) months and twenty-three (23) days that had elapsed since the Respondent State's filing of the declaration under Article 34(6) of the Protocol on 29 March 2010 and the date of referral to the Court of the Application dated 19 January 2015 was reasonable, as the Applicant was imprisoned with the likelihood of being unaware of the very existence of the

Court. The Applicant had not benefited from legal assistance during the appeal proceedings before the domestic courts[62] and was awaiting the outcome of his second appeal pending before the High Court until 19 March 2017, by which time he had already brought his case before the Court. In this regard, the Court noted that "between 2011 and 2013 he had not remained inactive and, pending the examination of his case, had sent several reminders to the various judicial authorities ...".[63]

**[5]** In light of Rule 40(6) of the Rules of Court, it is clearly stated that applications must be "filed within a reasonable time from the date 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. It therefore follows that there are two *(2)* options as to how to define the starting point of the reasonable time. These are:

- Either from the date of exhaustion of domestic remedies, set, in this case, by the Court, for 29 May 2009, the date of the judgment of the Court of Appeal which also took into consideration the date of the Declaration made by the Respondent State on 29 March 2010, which gave rise to a time-limit of four (4) years, nine (9) months and twenty-three (23) days on the date of the filing of the application on 19 January 2015. Or;
- The date chosen by the Court as the starting date for the commencement of the period of its own seizure. Although it has set the date on which the period of its own seizure, the date of the Declaration, begins to run, the Court has taken into consideration facts occurring after that date (2010 and 2013) "reminders to the various judicial authorities ...." as factors that could be taken into account in assessing the reasonableness of the time limit for referral under Article 56(6)....

**[6]** I am of the view that this manner of interpreting the above-mentioned Article is erroneous and does not meet the spirit of the text, since the Articles of the Charter and the Rules clearly state the date chosen by the Court and not the facts....

**[7]** In my opinion, by taking the date of the Court of Appeal's judgment and the date of the filing of the declaration made by the Respondent State (29 March 2010) and by taking into account events occurring after that date, the Court has departed from the very meaning of the Article, since by this approach, it has not determined any date as the starting date for the commencement of the time-limit for its own seizure and has, on the other hand,

62 § 69 of the Judgement.

63 § 70 of the Judgement.

confused the two choices afforded to it by the above-mentioned Articles...

**[8]** It would have been more logical to consider, since the legislator recognizes this option for the Court, the date on the letters sent to the Chief Justice, November 8, 2013,[64] which would have made the time limit more reasonable since it would have been two *(*2) *y*ears.

Such an approach would have been more consistent with Article 56(6) of the Charter, which clearly specifies this choice by using the conjunction "or" and not the words "failing that".

## 2. The conclusion in the same paragraph made by the Court in two separate cases that were the subject of the Applicant's allegations

**[9]** It is clear that, in its analysis of the facts, the Court distinguished between two cases brought before it by the Applicant and that for each case it concluded.

What is surprising is that, although the Court considered each case separately and found a violation in each of them on the basis of legal reasoning, when it came to the reasonable time limit, it did not specify that time limit in relation to each case. Indeed, with regard to domestic remedies, it is clear from paragraph 56 of the judgment that the Court did specify that in the second case "the Applicant did appeal to the High Court and that, despite several communications to the authorities concerned, the case was still pending at the time he brought the matter before to the Court .... The Applicant should be deemed to have exhausted local remedies".

**[10]** As to the discussion on reasonable time, in paragraphs 62 to 72 of the Judgment, the Court discussed this condition, which was raised by the Respondent State in relation to the first case, but failed to do so in relation to the second. It concluded[65] on the basis of the four (4) years, nine (9) months and twenty (20) days' time limit, the time limit used for the first case,[66] that if it refers[67] to the second case, it is just to consider it as a fact which will lead it to conclude that the time limit is reasonable in relation to the first case.

64 This date was referred to in § 56 of the judgment.

65 § 71 of the judgment.

66 § 71 of the judgment.

67 § 71 of the judgment.

**[11]** With regard to the second case, it is clear that after having concluded that domestic remedies had been exhausted as of the date of the appeal of 27/10/2006, pending before the High Court until 19 March 2017, the date on which the Court of Appeal ruled, and well after the filing of the application in this Court, the Court should have considered the time limit reasonable, as it was open until the day of the filing of the application in this Court. By concluding in the same paragraph for both cases, the Court failed in its obligation to give reasons for its judgments as set out in Rule 61 of the Rules of Court.

## 3. The rejection of the application for reparation in respect of the material and moral damage to the Applicant and the indirect victims alleged by the Applicant

**[12]** In its operative part on monetary reparations,[68] the Court concluded that the application was dismissed on the basis of insufficient information. I do not agree with this conclusion for the following reasons:

- On reading Rule 39(2) of the Rules, it is clearly stated that "the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".
- As for Rule 41 of the same Rules, it provides in turn that "the Court may, before or during the course of the proceedings, call on the parties to file any pertinent document or to provide any relevant explanations. The Court shall formally note any refusal to comply".

**[13]** Finally, it follows from Rule 45 of the said Rules that "the Court may, either on its own motion or at the request of a party or, where appropriate, of the representatives of the Commission, obtain any evidence which it deems relevant to the facts of the case. It may, notably, ...".

**[14]** It is apparent from paragraph 139 of the Judgment that the Court confirmed that it had established the Applicant's alleged right to free legal assistance and the right to be tried within a reasonable time. However, in paragraphs 142 and 143, the Court dismissed the Applicant's claims for material damages on the ground that he had not adduced any evidence of the alleged damages with documents proving financial income from his occupation, payments to the Advocate, costs of proceedings and the like.

**[15]** However, it is not apparent from the reasons for the judgment that, in accordance with the above-mentioned articles, the Court

68 Paragraph VI and VII.

asked the Applicant to submit the documents proving the harm suffered, thereby failing to comply with the rule requiring it to adduce reasons for its judgments

**[16]** Moreover, in relation to the non-pecuniary damage suffered by the indirect victims, the Court also considered the lack of evidence in relation to the Applicant's allegations, as it had not proved the identification or filiation of the indirect victims.[69]

**[17]** In my opinion, this approach is contrary to the spirit of the above-mentioned instruments and to the positive role that a judge must play for the proper administration of justice.

**[18]** It is worthy to mention in this respect that the application was registered on 19 January 2015 and that between 6 July 2018 and September 2019, the Respondent State had already raised this lack of evidence on the part of the Applicant and that on the closing date of the reparations proceedings, 29 September 2019, the Court could have responded by asking the Applicant to file the documents. If such a request had not been complied with, the Court would have based the dismissal of the applications on Rule 41 of the Rules.

**[19]** By doing so, the Court has failed in its obligation to give reasons for its judgments within the meaning of Rule 61 of the Rules of Court.

69 § 154 and ss of the judgment.

# Elisamehe v Tanzania (judgment) (2020) 4 AfCLR 265

Application 028/2015, *Kalebi Elisamehe v United Republic of Tanzania*

Judgment, 26 June 2020. 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, convicted and serving terms for the rape of a minor, brought this action alleging that aspects of the proceedings before the national courts violated some of his Charter protected rights. The Court held that Applicant's right to free legal assistance was violated.

**Jurisdiction** (scope, 18,19; personal jurisdiction 23; continuous violations, 25)

**Admissibility** (exhaustion of local remedies 35, 36; submission within reasonable time, 41-43, 47)

**Fair trial** (free legal assistance 55, 57; evaluation of evidence 65, 78; right to appeal 69,70)

**Reparation**s (basis for, 95; purpose of,97; measures 96; material prejudice, 97; moral damage, 97; non-pecuniary reparations, 110,111)

## I. The Parties

**1.** Kalebi Elisamehe (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania who, at the time of filing this Application, was serving a thirty (30) year prison sentence at Maweni Central Prison in Tanga for the rape of a twelve (12) year old girl.

**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 by which it accepts the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration.

## II. Subject of the Application

### A. Facts of the matter

**3.** It emerges from the record that, on 6 March 2004, the Applicant was convicted and sentenced by the District Magistrate's Court of Monduli at Monduli District, (hereinafter referred to as "the District Court") to a thirty (30) year prison sentence for the rape of a twelve (12) year old minor, in Criminal Case No. 39/2003. He was also ordered to pay the victim one cow valued at Tanzania Shillings Two Hundred Thousand (TZS 200,000) as compensation.

**4.** The Applicant appealed against the judgment by Criminal Appeal No. 03/2006 before the High Court of Tanzania at Arusha (hereinafter referred to as "the High Court"). He subsequently appealed against the decision of the High Court by Criminal Appeal No. 315/2009 before the Court of Appeal of Tanzania at Arusha (hereinafter referred to as the "Court of Appeal"). The High Court and the Court of Appeal upheld the conviction and the sentence on 9 July 2009 and 24 February 2012, respectively.

**5.** On 9 January 2013, the Applicant allegedly lodged a Notice of Motion for Review of the Court of Appeal's judgment, which was still pending at the time of filing the Application before this Court.

### B. Alleged violations

**6.** The Applicant alleges:

i. That the Court of Appeal delayed in hearing his Application for Review to date;

ii. That he was wrongly deprived of the right to be heard, specifically that:

a. He was deprived of his right to legal assistance throughout the trial and appeals, contrary to Article 13 of the Tanzanian Constitution, Section 310 of Criminal Procedure Act (Cap 20 R.E. 2002) (hereinafter referred to as "the CPA"), and Articles 1, 2, 3, 5, 7(1)(b), 13 and 18(I) of the Charter;

b. He was wrongly deprived of the right to be heard and to defend himself;

c. The charge sheet was defective under Section 132 of the CPA, because of the variance between the charge sheet and evidence; and the charge sheet also bore no stamp or signature of the public prosecutor;

d. The appellate courts based their decisions on the findings of the lower courts, which, in his view, violates his right to have his sentence reviewed.

iii. That the decision of the Court of Appeal was contrary to Rule 66(1) of the Court of Appeal Rules due to the following:

a. "the court failed to evaluate the evidence of PW1 and PW2 to reach a just decision…";

b. the decision was based on uncorroborated evidence by the prosecution witnesses;

c. throughout the trial, there was no investigator of the case and the PF 3 form[1] was not listed during the preliminary hearing or in the charge sheet nor were the authors of the documents (police officer and doctor) called as witnesses;

d. the burden of proof was shifted to the defence contrary to Section 110(2) of the Evidence Act 1967 (Cap. 6 R.E. 2002);

e. there was insufficient evidence to connect the Applicant with the offence of rape because of the quarrel with PW3 who testified before the trial court that she bore grudges with the Applicant;

f. the "trial Court and Appellate Court erred in law and fact when they discarded the Applicant's unshaken defence and believed the prosecution's theory."

## III. Summary of the Procedure before the Court

**7.** The Application was filed at the Registry on 23 November 2015 and was served on the Respondent State on 25 January 2016. The Applicant filed an amended Application on 28 January 2016, which was served on the Respondent State on 15 February 2016.

**8.** Following various extensions of time at the parties' request, they filed their pleadings on the merits and reparations within the time stipulated by the Court. The said pleadings were duly exchanged.

**9.** On 5 March 2020, the pleadings were closed and the Parties were duly notified.

## IV. Prayers of the Parties

**10.** The Applicant prays the Court to "… allow [his] submission of complaints of violations of Human Rights and Justice by quashing decision of Lower courts and set aside the conviction imposed against [him]."

**11.** On reparations, the Applicant prays the Court to issue an order for pecuniary and non-pecuniary damages.

1 Police Form (PF) 3 is a form by which the Police request for Medical Examination.

**12.** The Respondent State prays the Court to:

i. declare that it has no jurisdiction and the Application has not met the admissibility requirements under Rule 40(5) and (6) of the Rules;

ii. declare that it has not violated Article 7(1), 7(1)(c) and 7(1)(d) of the Charter;

iii. dismiss the Application for lack of merit;

iv. dismiss the Applicant's prayers;

v. rule that the Applicant shall bear the costs.

## V. Jurisdiction

**13.** The Court notes that Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

**14.** In accordance with Rule 39(1) of the Rules "[t]he Court shall conduct preliminary examination of its jurisdiction …"

**15.** 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. Objection to material jurisdiction

**16.** Citing the Court's decision in the matter of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State claims that by praying the Court to review the points of fact and law already examined by the domestic courts, the Applicant is asking the Court to sit as an appellate court. According to the Respondent State, this is not within its jurisdiction as set out in Article 3(1) of the Protocol and Rule 26 of the Rules.

**17.** The Applicant states that "It is common knowledge that this Court is not an Appellate Court in terms of the decisions rendered by the national Courts. However, this position does not preclude the jurisdiction of this … Court to examine whether the procedures before the national courts are consistent with the international standards required by the applicable human rights instruments." Citing the Court's judgment of 3 June 2016, in the matter of *Mohamed Abubakari v United Republic of Tanzania*, the Applicant concludes that the "Court has jurisdiction over the matter under Article 3 and 5 of the Protocol…"

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**18.** With respect to the Respondent State's objection that this Court is being asked to act as an appellate court, the Court notes that Article 3(1) of the Protocol states that it has jurisdiction to consider any Application filed before it provided that it contains allegations of violation of rights protected by the Charter, or any other human rights instruments ratified by a Respondent State.[2] Moreover, in accordance with Article 7 of the Protocol, it applies the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned.

**19.** The Court has previously underlined that it is empowered by the above cited Articles of the Protocol to examine the conformity of the proceedings of the Respondent State's courts with human rights standards set out in the instruments ratified by a State.[3]

**20.** In the instant case, the Applicant alleges violation by the Respondent State of rights protected by the Charter. Therefore, the Court, as it has consistently held, cannot be said to exercise appellate jurisdiction with respect to decisions of national courts. Consequently, the Court holds that it has material jurisdiction.

**21.** In view of the foregoing, the Court holds that it has material jurisdiction.

## B. Personal jurisdiction

**22.** While the Respondent State has not raised any objection to the personal jurisdiction of the Court, the Court notes that, on 21 November 2019, it filed with the Chairperson of the African Union Commission, a notice of withdrawal of the Declaration, as referred to in paragraph 2 of this Judgment, of which the Court was informed by the Legal Counsel of the African Union Commission, on 4 December 2019.

2 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (2014) 1 AfCLR 398, § 114.

3 *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 130. See also *Mohamed Abubakari v United Republic of Tanzania* (merits) (2016) 1 AfCLR 599, § 29; *Christopher Jonas v United Republic of Tanzania* (merits) (2017) 2 AfCLR 101, § 28; and *Ingabire Victoire Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165, §§ 53 and 54.

**23.** The Court recalls that in *Andrew Ambrose Cheusi v United Republic of Tanzania*,[4] it held, reaffirming its earlier decision in *Ingabire Victoire Umuhoza v Rwanda*,[5] that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the Declaration, as is the case of the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is filed. In respect of the Respondent State, therefore, its withdrawal will take effect on 22 November 2020.

**24.** In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

## C. Other aspects of jurisdiction

**25.** The Court notes that nothing on file indicates that the Court does not have jurisdiction in respect of the temporal and territorial aspects thereof. The Court therefore holds that:

i. it has temporal jurisdiction in as much as the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[6]

ii. it has territorial jurisdiction given that the facts of the matter occurred in the territory of the Respondent State.

**26.** In view of the aforesaid, the Court holds that it has jurisdiction to hear the instant case.

# VI. Admissibility

**27.** 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 undertake a preliminary examination of … the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of the Rules."

4 *Andrew Ambrose Cheusi v United Republic of Tanzania*, AfCHPR, Application 004/2015, Judgment of 26 June 2020, §§ 35-39.

5 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (procedure) (2016) 1 AfCLR 562, § 67.

6 See *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* (preliminary objections) (2013) 1 AfCLR 197, §§ 71-77.

**28.** Rule 40 of the Rules, which in essence restates 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 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.

**29.** While some of the above conditions are not in contention between the parties, the Respondent State has raised two (2) objections to the admissibility of the Application.

## A. Conditions of admissibility in contention between the Parties

**30.** The Respondent State raises two (2) objections to the admissibility of the Application, the first one relating to the requirement of exhaustion of local remedies and the second one to the filing of the Application within a reasonable time under Rules 40 (5) and (6) of the Rules, respectively.

### i. Objection based on non-exhaustion of local remedies

**31.** The Respondent State submits that the right to seek review of a judgment of the Court of Appeal is not automatic. It depends on the conditions set out in Rule 66 of the Rules of Procedure of the Court of Appeal. They claim that one of the conditions to be met is that an application for review must be filed within sixty (60) days of the decision which is sought to be reviewed. The Respondent State argues that the Applicant has not produced any evidence to prove that he has complied with this condition and further, he has

not attached any evidence to prove that he sought leave of the Court of Appeal to file the application for review.

**32.** Citing the African Commission on Human and Peoples Rights' decision in the Communication *SAHRINGON & ors v Tanzania*, *Article 19 v Eritrea and Kenyan Section of the International Commission of Jurists & ors v Kenya*, the Respondent State submits that the exhaustion of domestic remedies is a fundamental principle in international law. Therefore, the Applicant may still file a constitutional petition under the Basic Rights and Duties Enforcement Act or apply for review under the Appellate Jurisdiction Act.

**33.** The Respondent State argues that the Applicant is raising the claim of denial of legal assistance for the first time before this Court whereas he ought to have raised it before domestic courts. It states that if the "court entertains this matter it will be unclothing the domestic court of the jurisdiction to adjudicate on domestic issues and clothing itself with jurisdiction of a first instance domestic court which is contrary to the command of the Charter, Protocol and Rules of the Court."

**34.** Concerning the application for review, the Applicant avers that according to the Court's judgment of 3 June 2016, in the matter of *Mohamed Abubakari v United Republic of Tanzania*, it "… is an extraordinary remedy because the granting of leave by the Court of Appeal of Tanzania to lodge an Application for Review of its decision is based on specific grounds and is granted at the discretion of the Court..." The Applicant did not submit on the issue of constitutional petition as maintained by the Respondent State.

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**35.** The Court notes that the issue for determination is whether the Applicant exhausted local remedies as required under Rule 40 of the Rules. On this issue, the Court recalls that the local remedies that must be exhausted are judicial remedies.[7] In the instant case, the Court notes that the Applicant went up to the Court of Appeal,

7 *Tanganyika Law Society, the Legal and Human Rights Centre v United Republic of Tanzania* and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (merits) (2013) 1 AfCLR 34, § 82.1.

the highest court in the Respondent State which delivered its judgment on the Applicant's case on 24 February 2012.

**36.** In relation to the filing of the constitutional petition and an application for review, the Court has held that regarding the Respondent State, these are extraordinary remedies which the Applicant is not required to exhaust.[8]

**37.** Concerning the allegation that the Respondent State failed to grant the Applicant legal assistance, the Court has previously stated that this is part of the bundle of rights relating to fair trial.[9]The judicial authorities of the Respondent State therefore had the opportunity to address this matter in the course of proceedings before the domestic courts and the Respondent State cannot therefore claim that it became aware of the claim relating to legal assistance for the first time in this Court.

**38.** In light of the above, the Court dismisses the objection herein and holds that the Applicant has exhausted all the available domestic remedies.

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

**39.** The Respondent State argues that the period of sixteen (16) months, from the time the Court of Appeal delivered its judgment, to when the Applicant filed this Application is way beyond the reasonable time of six (6) months suggested by the Commission in *Majuru v Zimbabwe (2008).*

**40.** The Applicant does not make a specific response to this allegation but maintains that he filed the Notice of Motion for Review before the Court of Appeal on 9 January 2013, which the Respondent State dismisses by contending that, the Applicant failed to submit before this Court the copy of the said notice.

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8 See *Alex Thomas v Tanzania* (merits), § 65; *Mohamed Abubakari v Tanzania* (merits), §§ 66 – 70; *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507, § 95; *Christopher Jonas v United Republic of Tanzania* (merits) (2017) 2 AfCLR 101, § 44.

9 See *Alex Thomas v Tanzania* (merits), § 60. See also *Minani Evarist v Tanzania* (merits) 2018) 2 AfCLR 402, § 35; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v Tanzania* (merits), (2018) 2 AfCLR 314, § 46; and *Diocles William v United Republic of Tanzania* (merits) (2018) 2 AfCLR 426, § 43.

**41.** The Court notes that Article 56(6) of the Charter does not stipulate a precise time limit within which an Application shall be filed before the Court. Rule 40(6) of the Rules 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 of the matter."

**42.** The Court has established that the reasonable period to seize the Court in accordance with Article 56(6) of the Charter and Rule 40(6) of the Rules depends on the particular circumstances of each case and must be determined on a case-by-case basis.[10] Among the relevant factors, the Court has based its evaluation for this assessment, on the situation of the Applicants, including whether they attempted to exhaust extraordinary remedies, or if they were lay, indigent, incarcerated persons who had not benefited from free legal assistance.[11]

**43.** The Court has also taken into consideration the fact that the Applicant attempted to exhaust extraordinary remedies. In the instant case, the Court notes that the Applicant claims to have submitted the Notice for Review before the Court of Appeal on 9 January 2013. The Respondent State rebuts this allegation, claiming that the Applicant has not submitted before this Court the copy of the said Notice.

**44.** According to the general principle of law espoused in the Court's jurisprudence, the Court has consistently held that the burden of proof lies with the person who alleges a fact.[12] In the instant case, the Applicant alleges that, on 9 January 2013, he filed a Notice for Review through the District Registrar of the High Court of Tanzania at Tanga, with Ref. No. TAN/209/TAN/I/IV54. The Court notes that the Applicant has not furnished the Court with a copy of the said notice nor has he provided any justification for not doing so. The Court further notes that the Notice for Review to which the Applicant refers was filed at the High Court on 9 January 2013,

10 *Nobert Zongo v Burkina Faso* (preliminary objections), § 121. See also *Armand Guehi v United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477, §§ 55-57; *Werema Wangoko Werema & anor v United Republic of Tanzania* (merits) (2018) 2 AfCLR 520, §§ 40-50; and *Alex Thomas v Tanzania* (merits), §§ 73-74.

11 See *Alex Thomas v Tanzania* (merits), § 74. See also *Jibu Amir Mussa and Saidi Ally alias Mang'ara v United Republic of Tanzania*, AfCHPR, Application 014/2015, Judgment of 28 November 2019 (merits), § 50; *Christopher Jonas v Tanzania* (merits), § 53; and *Mohamed Abubakari v Tanzania* (merits), § 92.

12 See *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (2017) 2 AfCLR 65, § 142; *Robert John Penessis v United Republic of Tanzania*, AfCHPR, Application 13/2015, Judgment of 28 November 2019, § 91; and *Alex Thomas v Tanzania* (merits), § 140.

and not the Court of Appeal as the Applicant alleges.

**45.** The Court considers therefore that the allegation that the Applicant filed a Notice for Review at the Court of Appeal has not been established. Accordingly, this factor cannot be considered in establishing whether or not the Application was submitted within a reasonable time.

**46.** From the aforesaid, the time within which the Application should have been filed is to be computed from the date of the judgment of the Court of Appeal, which is 24 February 2012. Since the Application was filed before this Court on 23 November 2015, the period to be assessed is three (3) years, eight (8) months and twenty-nine (29) days.

**47.** The Court notes that, in the instant case, the Applicant is lay, indigent, incarcerated and was not represented by a lawyer before the national courts. As a result of his situation, the Court granted the Applicant legal assistance through its legal aid scheme.

**48.** In these circumstances, the Court holds that the Application was filed within a reasonable time and therefore, dismisses the Respondent State's objection.

### B. Other conditions of admissibility

**49.** The Court notes that the parties do not dispute the fact that the Application fulfils the conditions set out in Articles 56 sub-articles (1),(2),(3),(4) and (7) of the Charter and Rule 40, sub-rules 1, 2, 3, 4 and 7 of the Rules, on the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language of the Application, the nature of the evidence adduced and the previous settlement of the case, and that nothing on the record indicates that these requirements have not been complied with.

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

## VII. Merits

**51.** The Applicant alleges a number of violations of the right to a fair trial, namely: i) the right to legal assistance, ii) the right to defence, iii) alleged defectiveness of the charge sheet, iv) failure to review decisions of the lower courts, v) poor assessment of the evidence, vi) delay in determining the request for review.

## A. Alleged violation of the right to legal assistance

**52.** The Applicant alleges that he was deprived of his right to legal assistance during the trial and appeals, contrary to Article 13 of the Tanzanian Constitution, Section 310 of CPA , and "Articles 1, 2, 3, 5, 7(1)(b), 13 and 18(I) of the African Charter on Human and People's Rights". He further alleges that "the charge against him was a serious offence and carried a heavy custodial sentence."

**53.** The Respondent State claims, on the contrary, that, in accordance with the Legal Aid (Criminal Proceedings) Act, legal aid is provided based on the request of the accused and the Applicant did not make such a request. The Respondent State citing Article 107A of its Constitution which, *inter alia*, empowers the national judiciary with the final decision in the dispensation of justice in its territory, prays the Court to respect its Constitution and to exercise restraint on the issue of legal assistance.

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**54.** The Court notes that apart from the provisions of Tanzanian law, the Applicant cites Article 7(1)b of the Charter to support his allegation of the violation of his right to legal assistance. For the Court, the relevant provision for the alleged violation is Article 7(1)(c) of the Charter, which 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".

**55.** The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. Nevertheless, the Court held that Article 7(1)(c) of the Charter as read together with Article 14(3)(d)[13] of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR"),[14] establishes

13 "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 requires, and without payment by him in any such case, if he does not have sufficient means to pay for it."

14 The Respondent State became a party to the International Covenant on Civil and Political Rights on 11 June 1976.

the right to free legal assistance where a person cannot afford to pay for legal representation and where the interest of justice so requires.[15] The interest of justice includes where the Applicant is indigent, the offence is serious and the penalty provided by the law is severe.[16]

**56.** 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 Applicant is indigent, that the offence he was charged with is serious and that the penalty provided by law is severe. It only contends that he did not make a request for legal assistance.

**57.** Given that the Applicant was charged with the serious offence of rape, carrying a minimum sentence of thirty (30) years imprisonment, and his assertion of indigence was not contested by the Respondent State, the interest of justice required that the Applicant should have been provided with free legal assistance, regardless of whether or not he requested for such assistance.

**58.** The Court therefore finds that the Respondent State has violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

## i. Alleged violation of the right to defence

**59.** The Applicant alleges the deprivation of his right to a fair trial on the basis that judgment was delivered without him being given an opportunity to be heard and to defend himself. The Respondent State disputes this allegation without substantiation.

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**60.** The Court notes that the relevant provision relating to the alleged violation is Article 7(1)(c) of the Charter, which 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

15 *Alex Thomas v Tanzania* (merits), § 114.

16 *Alex Thomas v Tanzania* (merits), § 123. See also *Mohamed Abubakari v Tanzania* (merits), §§ 138-139; *Minani Evarist v Tanzania* (merits), § 68; *Diocles William v Tanzania* (merits), § 85; *Anaclet Paulo v United Republic of Tanzania* (merits) (2018) 2 AfCLR 446, § 92.

defended by Counsel of his choice."

**61.** The Court notes that in the instant case, the Applicant makes a general allegation without demonstrating how he was not accorded the opportunity to be heard or to defend himself. On the contrary, the record shows that the Applicant was heard and had the opportunity to defend himself at all levels of the proceedings. The Applicant listed the absence of proof of his guilt beyond reasonable doubt, the lack of credibility of the prosecution witnesses and the collusion between PW1, PW2 and PW3 to incriminate him, as the grounds of appeal. He also appeared in person during the hearing of his appeal during which he supplemented his written submissions with the assertion that the victim's parents and the police officers were never called to testify.

**62.** This Court notes that the Court of Appeal observed that the Applicant's case "… rests wholly on the credibility of witnesses. All things being equal, the credibility of a witness is always in the province of a trial court". Considering, *inter alia*, the case of *Godi Kasenegala v the Republic* – Criminal Appeal No. 10 of 2008, the Court of Appeal noted that "It is now settled law that the proof of rape comes from the victim herself. Other witnesses who did not witness the incident, such as doctors, may provide corroborating evidence."

**63.** For the above reasons, the Court finds that the Applicant's claim is unfounded and is consequently, dismissed.

## ii. Alleged defective charge sheet

**64.** The Applicant alleges that the charge sheet was defective, it was at variance with the evidence and was neither stamped nor signed by the public prosecutor. The Respondent State disputes this allegation without substantiation.

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**65.** The Court notes that the main issue for determination is whether the assessment of the prosecution's evidence against the Applicant complied with the international standards required by Article 7(1) of the Charter, which provides that "Every individual shall have the right to have his cause heard". The Court considers that such a determination falls within the competence of the domestic courts when they examine the various pieces of evidence that constitute

proof of commission of an offence. The Court's intervention will only be necessary where there are irregularities in the domestic courts' determination resulting in a miscarriage of justice.[17]

**66.** The Court notes that the High Court found the admission of PF3 into the evidence was irregular because it contravened the procedure provided under Section 240 (3) of the CPA but that this irregularity was not fatal to the prosecution's case. Furthermore, the Court notes that as already stated in paragraphs 61 and 62 of this judgment, the Court of Appeal also found that these irregularities did not have any adverse impact on the prosecution's case given that the main testimony to prove the case came from the victim herself.

**67.** In view of the above, the Court is of the view that the manner in which the domestic courts examined the evidence as regards the proof of the offence that the Applicant was charged with did not constitute a miscarriage of justice. Consequently, the Court holds that the alleged violation has not been established and accordingly dismisses it.

### iii. Alleged failure to review decisions of lower courts

**68.** The Applicant alleges that the appellate courts based their decisions on the findings of the lower courts without reviewing them, thus violating his right to have his sentence reviewed by appellate courts. The Respondent State disputed the Applicant's allegation generally without substantiation.

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**69.** The Court notes that the right to have one's case heard by a higher court is provided for under Article 14(5) of ICCPR which provides that: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

17 *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (2018) 2 AfCLR 287, § 89.

**70.** The Court notes that Article 14(5) of ICCPR, cited above, empowers appellate courts to review contested decisions, which they may or may not decide to uphold. In the instant case, the record indicates that the High Court and the Court of Appeal reviewed the decisions of the lower courts and decided to uphold them.

**71.** The Court further notes that the Applicant does not demonstrate how the upholding of the decisions of the lower courts by the appellate courts constitutes a violation of his right to appeal.

**72.** The Court therefore finds that the alleged violation has not been established and accordingly dismisses it.

## iv Alleged poor assessment of evidence

**73.** The Applicant alleges that the judgment of the Court of Appeal was contrary to Rule 66(1) of its Rules due to the court's failure to evaluate the evidence of PW1 and PW2 to reach a just decision. He states that the decision was based on prosecution witnesses' uncorroborated evidence. He further states that the investigating officer was never summoned to testify in the course of the trial; the PF3 was not listed as part of the evidence during the preliminary hearing or on the charge sheet, and the police officer and doctor who were the authors of the documents to be relied on as evidence were never called as witnesses.

**74.** The Applicant further submits that the burden of proof was shifted to the defence contrary to Section 110(2) of the Evidence Act. He states that there was insufficient evidence to connect the Applicant with the commission of the offence of rape because PW3 who testified before the District Court bore grudges with the Applicant. The Applicant claims that the District Court and Appellate Courts erred in law and in fact when they discarded the Applicant's unshaken defence and believed the prosecution's view.

**75.** The Respondent State rebuts the Applicant's claims and submits that the Court of Appeal examined all the Applicant's claims except those which had not previously been raised before the lower courts and were therefore, disregarded.

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**76.** The Court notes that the Applicant did not specify the provision of the Charter or any other relevant human rights instrument violated as a result of this allegation. Nevertheless, it will examine the matter under Article 7(1) of the Charter, which stipulates that "Every individual shall have the right to have his cause heard".[18]

**77.** The Court notes that the question that arises is whether the domestic courts assessed the evidence in accordance with guarantees to the Applicant's right to a fair trial. It thus recalls that,

> [a]s 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.

**78.** The Court has held that it would intervene regarding the assessment of evidence by domestic courts only if such domestic assessment resulted in a miscarriage of justice.[19] In the instant case, the Court notes that, as per the Judgment of the Court of Appeal, the Applicant raised three grounds in his appeal, namely: that the offence was not proven beyond reasonable doubt; the credibility of the Prosecution witnesses was not assessed; and the lack of consideration of the fact that PW3 was the one who persuaded PW1 and PW2 to trump up the case against him in order to avenge past disagreements between them.

**79.** The Court notes that the Applicant alleges that the investigating officer, the police officer and doctor who filled out the PF3 were not called as witnesses during the trial. He argues that this meant that the burden of proof was shifted to the defence contrary to Section 110(2) of the Evidence Act.

**80.** The Court notes that these are elements that were examined by the domestic courts and that there is no reason for it to interfere with that examination since these are evidentiary details, the assessment of which an international court should intervene in only if it constitutes a situation of miscarriage of justice.[20] The Court finds that this is not the case in the instant matter.

**81.** The Court also notes that the Court of Appeal upheld the lower courts' determinations on the credibility of the Prosecution

18 *Mohamed Abubakari v Tanzania* (merits), § 26.

19 *Nguza Viking & anor v Tanzania* (merits), § 89.

20 *Ibid*.

witnesses PW1, PW2, and PW3. The PW1 was the victim, PW2 was the victim's friend who claims to have witnessed the rape and PW3 was the neighbour whom the Applicant claimed fabricated the case against him because of a disagreement she had with him. The Court notes that the Court of Appeal found no reason for it to conclude that the three (3) witnesses colluded to incriminate the Applicant.

**82.** The Court further notes that the Court of Appeal examined the Applicant's *alibi* that, on the material day, the Applicant was outside the area where the crime was committed and he did not return until about 7:05 p.m. The crime was allegedly committed after 5:00 p.m. The Court of Appeal upheld the findings of the lower courts that, although the Applicant had been outside the area of the crime, by the time he left the house of his *alibi* witness, a primary court magistrate, he would still have had time to arrive at the scene of the crime, since he had a bicycle and the distance was not far.

**83.** The Court recalls that "a fair trial that requires the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on strong and credible evidence".[21] In the instant case, the Court is of the view that nothing on the record shows that the evidence on which the domestic courts relied to convict the Applicant was not solid or credible.

**84.** In view of the aforesaid, the Court accordingly considers that the Applicant's right to a fair trial provided for in Article 7(1) of the Charter has not been violated, as the conviction was based on sufficient evidence and the circumstances of the crime were clarified.

## v Alleged undue delay of the decision on the review application

**85.** The Applicant alleges that "the Court of Appeal …delayed to review its decision … regarding (his) Application which (he) made to the court since 9 January 2013[22] although constitutional and appellate jurisdiction Act allow (him) to do so."

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21 *Mohamed Abubakari v Tanzania* (merits), § 174.

22 The Applicant mistakenly indicated 9 January 2019.

**86.** The Respondent State submits that Rule 66(2) to (6) of the Court of Appeal Rules sets conditions for the review of its judgment, one of them being the filing of the motion of appeal within six (6) months after the decision sought to be reviewed. The Respondent State alleges that in accordance with the Applicant's submissions, the notice of motion for review was filed on 21 March 2014,[23] that is, sixteen (16) months after the Court of Appeal's judgment was delivered on 26 July 2013. The Respondent State maintains that the Applicant did not submit a copy of the said notice of motion of review.

**87.** The Respondent State further submits that the Applicant ought to have filed a constitutional petition before the High Court to seek remedies for the alleged violations of his rights.

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**88.** The Court notes that there are two issues arising for determination. One concerns the delay by the Court of Appeal to decide on the application for review allegedly filed by the Applicant, and the other is on the filing of a constitutional petition regarding the alleged violation of the Applicant's rights which the Respondent State claims the Applicant ought to have filed.

**89.** Concerning the constitutional petition, the Court is of the view that this question was examined under the admissibility of the Application and it was deemed to be immaterial to the requirement of compliance with the requirement for exhaustion of local remedies. As regards the delay in the hearing of the Applicant's review of the Court of Appeal's judgment, the Court considers that, although the application for review is considered to be an extraordinary remedy, if used by the Applicant, the competent court should determine the application for review within a reasonable time, in accordance with Article 7(1) of the Charter, which provides that: "Every individual shall have the right to have his cause heard. This comprises: d) The right to be tried within a reasonable time ...".

**90.** The Court considers that in order to determine whether an application for review has been examined within a reasonable time or whether the timeframe is unduly prolonged, it is a

23 The correct date alleged by the Applicant is 9 January 2013.

prerequisite for an application to have actually been filed before the competent court. In the instant case, the Court notes that it has already examined this matter and found that the Applicant has not proved that he actually filed the application for review before the Court of Appeal. Nevertheless, the Court reiterates, as indicated in paragraph 36 above, that the filing of the application for review is an extraordinary remedy the Applicant allegedly decided to consider.

**91.** For these reasons, the allegation that there was an undue delay in the examination of the application for review is moot and, the claim is therefore dismissed.

## VIII. Reparations

**92.** The Applicant prays the Court to quash the conviction for rape, annul the sentence imposed, release him from prison immediately, grant him pecuniary reparations and any other order that it may deem fit and just to grant.

**93.** The Respondent State prays the Court to dismiss the Applicant's request for reparations.

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**94.** 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."

**95.** The Court recalls its established jurisprudence 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".[24]

**96.** The Court also restates that, the purpose of reparation is to "… as far as possible, erase all the consequences of the wrongful

24 *Ingabire Victoire Umuhoza v Rwanda* (reparations) (2018) 2 AfCLR 202, § 19. See also *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, § 20; *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346, § 15(b); and *Mohamed Abubakari*

act and restore the state which would presumably have existed if that act had not been committed."[25] Measures that a State could take to remedy a violation of human rights 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.[26]

**97.** The Court 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 and the onus is on the Applicant to provide evidence to justify his prayers.[27] With regard to moral damages the requirement of proof is not as rigid[28] since it is assumed that there was prejudice caused when violations are established.[29]

**98.** The Court will consider the Applicant's claims for compensation on the basis of the above-mentioned principles.

## A. Pecuniary reparations

**99.** The Court has already found that the Respondent State has violated the Applicant's right to free legal assistance contrary to Article 7(1)(c) of the Charter.

### i. Material prejudice

**100.** The Applicant claims that his parents who are, originally from Kilimanjaro, settled in Mto wa Mbu, Monduli District since 1951. In 1974, on the Government's directive, they moved to Majengo,

*v United Republic of Tanzania*, AfCHPR, Application 007/2013, Judgment of 4 July 2019 (reparations), § 19.

25 *Mohamed Abubakari v Tanzania* (reparations), § 20; *Alex Thomas v United Republic of Tanzania*, AfCHPR, Application No 005/2013, Judgment of 4 July 2019 (reparations), § 12; and *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania*, AfCHPR, Application 006/2013, Judgment of 4 July 2019 (reparations), § 16.

26 *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 20.

27 See *Kennedy Gihana & ors v Republic of Rwanda*, AfCHPR, Application 017/2015, Judgment of 28 November 2019, § 139; See also *Tanganyika Law Society, the Legal and Human Rights Centre v United Republic of Tanzania* and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v Burkina Faso* (reparations), § 15(d).

28 *Norbert Zongo v Burkina Faso* (reparations), § 55.

29 See *Ally Rajabu & ors v United Republic of Tanzania*, AfCHPR, Application 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania*, AfCHPR, Application 009/2015, Judgment of 28 March 2019 (merits and reparations), § 58; *Norbert Zongo & ors v Burkina Faso* (reparations), § 55.

where they lived until 1990, when they returned to their home village in Kilimanjaro, where his father gave him "the family plot measuring 58m by 39m" which had a rustic building. The Applicant claims that he also received from his brother, Mr. Samwel Elisamehe, "a farm with permanent crops as banana plants and mango trees measuring 94m [by] 56m".

**101.** The Applicant claims that, following his conviction, his wife had to return to her village, which led to the loss of the aforementioned rustic building which he had started rehabilitating. According to the Applicant, under Tanzanian law, leaving a rustic building unoccupied for ten (10) years shall result in its loss and all inherent rights.

**102.** The Applicant claims to have lost both the rustic building and the farm; two (2) houses with their respective furnishings; furniture; the foundation of a house which was to have had three (3) bedrooms, construction materials and various utensils; profits from banana cultivation (for fifteen (15) years), onions, rice and the lease for the farm. The Applicant claims that the total loss incurred amounts to one hundred and thirty-three million, seven hundred and sixteen thousand and five hundred Tanzanian Shillings (TZS 133, 716, 500).

**103.** The Respondent State prays the Court to dismiss the Applicant's prayers as baseless and for not complying with the applicable principles of reparation, namely: providing evidence that damage has occurred to establish the causal link between the damages and the violation and the demonstration of the status of the victim of the violation. The Respondent State relies on the judgments of this Court in the matter of *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) and *Norbert Zongo & ors v Burkina Faso* (reparations), of the ECOWAS Court of Justice in the Case No. ECW/CCAJ/11/07, *Saidykhan v The Gambia*, and of the International Criminal Court in the Case No. ICC-01-05-01/08, *Prosecutor v Bemba.*

***

**104.** The Court notes that, the Applicant's prayer for pecuniary reparations for material prejudice is based on his imprisonment. The Court is of the view that there is no link between the violations established and the material loss which the Applicant claims he

suffered as a result of his imprisonment.[30] The Applicant has also not provided evidence of his earnings before his arrest. Furthermore, and most importantly, even though the Court has found violations of the Applicant's right to a fair trial, it has not concluded that he should not have been imprisoned.

**105.** Consequently, this prayer is dismissed.

### ii. Moral prejudice

**106.** The Applicant claims that his arrest led to the dissolution of his marriage and called into question his reputation, since no one in Tanzania would believe him and as such he would not be able to find a job or apply for any position, including that of village chief. He claims that all these issues caused him suffering, especially, after he learned of the death of his former wife.

**107.** The Respondent State argues that "there is no proof that the Applicant suffered from emotional harm as argued…" and that for the Applicant to prove emotional harm "there ought to be a medical certificate to that effect."

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**108.** The Court considers that, as earlier found, the violation of the Applicant's right to free legal assistance is assumed to have caused moral prejudice to the Applicant. The Court, therefore, in exercising its discretion, awards to the Applicant an amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[31]

## B. Non-pecuniary reparations

**109.** The Applicant prays the Court to quash his conviction and sentence, and order his release from prison. The Respondent State does not specifically respond to this prayer.

30 *Robert John Penessis v Tanzania*, § 143; See also *Alex Thomas v Tanzania* (reparations), § 26; *Reverend Christopher R. Mtikila & ors v Tanzania* (reparations), § 30; *Lohé Issa Konaté v Burkina Faso* (reparations), § 17.

31 See *Anaclet Paulo v Tanzania* (merits), § 107; and *Minani Evarist v Tanzania* (merits), § 85.

**110.** With respect to the Applicant's request for his conviction to be quashed, the Court reiterates its jurisprudence that it does not examine details of matters of fact and law that national courts are entitled to address.[32] Therefore, this prayer is dismissed.

**111.** As regards the Applicant's request for an order to have the sentence imposed on him annulled and for his release, as the Court has held in previous cases, such a measure can only be ordered in exceptional and compelling circumstances.[33] With regard to the sentence being set aside, the Court has always held that it is justified, for example, only in cases where the violation found is such that it necessarily vitiated the conviction and the sentencing. With regard specifically to the Applicant's release, the Court has established that this would be the case "if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice".[34]

**112.** In the instant case, the Court recalls that it had already found that the Respondent State is in violation of the right to fair trial for failing to provide the Applicant with legal assistance. Without minimising the gravity of the violation, the Court is of the view that the nature of the violation in the instant case does not reveal any circumstance that signifies that the Applicant's imprisonment is a miscarriage of justice or an arbitrary decision. The Applicant also failed to adduce further specific and compelling reasons to justify the order for his release. Therefore, this prayer is dismissed.

32 See *Mohamed Abubakari v Tanzania* (merits), § 28; and *Minani Evarist v Tanzania* (merits), § 81.

33 See *Jibu Amir & anor v Tanzania*, § 96; *Alex Thomas v Tanzania* (merits), § 157; *Diocles William v Tanzania* (merits), § 101; *Minani Evarist v Tanzania* (merits), § 82; *Mgosi Mwita Makungu v United Republic of Tanzania* (Merits) (2018) 2 RJCA 570, § 84; *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 RJCA 226, § 96; et *Armand Guéhi v Tanzania* (merits and reparations), § 164.

34 *Jibu Amir Mussa & anor v Tanzania*, §§ 96 and 97; *Minani Evarist v Tanzania* (merits), § 82; and *Mgosi Mwita Makungu v Tanzania* (merits), § 84. See also *Del Rio Prada v Spain*, European Court of Human Rights, Judgment of 10/07/2012, § 139; *Assanidze v Georgia* (GC) - 71503/01, Judgment of 8/04/2004, § 204; *Loayza-Tamayo v Peru*, Inter-American Court of Human Rights, Judgment of 17/09/1987, § 84.

## IX. Costs

**113.** The Applicant made no specific submissions on costs.
**114.** The Respondent State prays the Court to rule that the costs of the proceedings should be borne by the Applicant.
**115.** Pursuant to Rule 30 of the Rules "Unless otherwise decided by the Court, each party shall bear its own costs."
**116.** Based on the foregoing, the Court rules that each Party shall bear its own costs.

## X. Operative part

**117.** For these reasons,
The Court,
*Unanimously:*
*On jurisdiction*
i. *Dismisses* the objection to the Court's jurisdiction;
ii. *Declares* that it has jurisdiction.

*On admissibility*
iii. *Dismisses* the objections to the admissibility of the Application;
iv. *Declares* that the Application is admissible.

*On the merits*
v. *Holds* that the Respondent State has not violated the Applicant's right under Article 7(1)(c) of the Charter to be heard and defend himself.
vi. *Holds* that the Respondent State has not violated the Applicant's right under Article 7(1)(c) of the Charter as regards the charge sheet being defective.
vii. *Holds* that the Respondent State has not violated Article 14(5) of the International Covenant on Civil and Political Rights as regards the Court of Appeal and High Court basing their decisions on the findings of the District Court.
viii. *Holds* that the Respondent State has not violated the Applicant's right under Article 7(1)(d) of the Charter to be tried within a reasonable time as regards the alleged delay by the Court of Appeal to review its decision to uphold the Applicant's conviction and sentence.
ix. *Holds* that the Respondent State has not violated the Applicant's right to a fair trial as provided under Article 7(1) of the Charter as regards the sufficiency of the evidence and clarification of the circumstances of the case.

x. *Finds* that the Respondent State has violated the Applicant's right to a fair trial provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights, by failing to provide him with free legal assistance.

*On reparations*

*Pecuniary reparations*

xi. *Does not grant* the Applicant's prayer for material damages for his imprisonment.

xii. *Grants* the Applicant's prayer for reparation for the prejudice suffered as a result of the violations found and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS300,000).

xiii. *Orders* the Respondent State to pay the sum awarded under (xii) above free from tax as fair compensation 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 accrued amount is fully paid.

*Non-pecuniary reparations*

xiv. *Dismisses* the Applicant's prayer for his conviction and sentence to be quashed.

xv. *Dismisses* the Applicant's prayer for the Court to order his release from prison.

*On implementation of the judgment and reporting*

xvi. *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.

*On costs*

xvii. *Decides* that each party shall bear its own costs.

# Mulindahabi v Rwanda (judgment) (2020) 4 AfCLR 291

Application 004/2017, *Fidèle Mulindahabi v Republic of Rwanda*

Judgment, 26 June 2020. Done in English and French, the French text being authoritative.

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

Recused under Article 22: MUKAMULISA

The Applicant, who challenged his dismissal from employment before domestic courts, brought this action alleging that the processes and outcome of his action before the domestic courts were a violation of certain of his Charter protected rights.

**Procedure** (judgment in default of appearance, 20, 22)

**Jurisdiction** (appellate jurisdiction, 53)

**Fair trial** (evaluation of evidence by domestic courts, 54-55; right to be informed of charges, 58; right to a reasoned judgment, 63-64; right to an impartial court. 70)

**Equality and equal protection** (discriminatory treatment, 78)

**Right to work** (security of employment, 95)

Separate opinion: BEN ACHOUR AND TCHIKAYA

**Jurisdictio**n (material jurisdiction, 6,10)

## I. The Parties

**1.** Fidèle Mulindahabi (hereinafter referred to as "the Applicant") is a national of the Republic of Rwanda who was previously employed by the public corporation - *Energy, Water and Sanitation Authority* (hereinafter referred to as "EWSA").

**2.** The Application is filed against the Republic of Rwanda (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 25 May 2004. It also deposited on 22 January 2013, 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, the Respondent State notified the Chairperson of the African Union Commission of its intention to withdraw the said Declaration. The African Union Commission transmitted to the Court, the notice of withdrawal on

3 March 2016. By a Ruling dated 3 June 2016, the Court decided that the withdrawal by the Respondent State would take effect from 1 March 2017.

## II. [1]Subject of the Application

## A. Facts of the matter

**3.** 3. It is apparent from the record, that, on 17 November 2009, following his success in a recruitment test, the Applicant signed an employment contract for the position of Head of the Planning and Strategy Section at the State-owned *Rwanda Electricity Corporation and Rwanda Water and Sanitation Corporation* (hereinafter referred to as "RECO & RWASCO"), which later became the *Energy, Water and Sanitation Authority* (EWSA). On 13 April 2010, the Applicant was dismissed without notice.

**4.** The Applicant alleges that he was recruited in accordance with the procedures established by Law No. 22/2002 of 9 July 2002 on the General Rules and Regulations governing the Rwandan Civil Service. He therefore considers that he was a civil servant and that his dismissal should be governed by the applicable law in that regard.

**5.** The Applicant further alleges that he initially filed administrative appeals before the competent authority of RECO & RWASCO, the Public Service Commission, the Ministry of Public Service and Labour as well as the Presidency of the Republic. Dissatisfied with the decisions arising from his appeals, he lodged an application for annulment of the termination decision before the High Court. Considering the Applicant as a civil servant, the High Court declared that the termination was not in accordance with the applicable law due to the lack of notification to the Applicant of the reasons for his dismissal. Dissatisfied with the damages awarded, the Applicant lodged an appeal before the Supreme Court. EWSA also filed an appeal with the same court.

**6.** By Judgment RADA 0015/13/CS of 8 November 2013, the Supreme Court found that the Applicant was not a civil servant but rather an employee under contract pursuant to Law No. 13/2009 of 27 May 2009 which regulates labour matters in Rwanda. It however, upheld the High Court›s decision to award damages

1 See *Ingabire Victoire Umuhoza v Republic of Rwanda* (Jurisdiction) (2016) 1 AfCLR 540 § 67.

to the Applicant due to the fact that the latter had not been heard prior to the termination of the employment contract. Aggrieved by the decision, the Applicant lodged an appeal before the Supreme Court for review of its Judgment. By Judgment of 27 January 2017, that Court dismissed the application for review.

## B. Alleged violations

**7.** The Applicant alleges that the termination of his appointment is illegal and unconstitutional. He submits that by failing to resolve his problem to date and for lacking fairness, independence and impartiality, the Respondent State violated his rights as expressed hereunder:

i. the right to have one's cause heard under Article 7(1) of the Charter and Article 10 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR");

ii. the right relating to the independence of the courts guaranteed under Article 26 of the Charter;

iii. the right to equality before the law and the courts guaranteed by Article 3 of the Charter, Articles 14(1) and 26 of the International Covenant on Civil and Political Rights (hereinafter referred to as " the ICCPR") and Article 7 of the UDHR;

iv. the right to work, guaranteed under Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ICESCR");

v. the right to a remedy and to ensure that competent authorities enforce such remedies when granted, guaranteed under Article 2(3) of the ICCPR; and

vi. the recognition of rights and the commitment by all States Parties to adopt legislative or other measures to give effect to those rights, as provided under Article 1 of the Charter.

## III. Summary of the Procedure before the Court

**8.** The Application was filed on 24 February 2017. The Respondent State as well as the other entities mentioned in the Protocol were notified.

**9.** At the request of the Registry, the Applicant filed additional submissions within the time frame set by the Court.

**10.** On 11 May 2017, the Registry received a correspondence from the Respondent State requesting the Court to cease all proceedings concerning it. The Respondent State also informed the Court that it would no longer participate in proceedings in cases concerning it. On 22 June 2017, the Registry acknowledged receipt of the said

correspondence and informed the Respondent State that it would nonetheless be notified of all the documents in matters relating to Rwanda in accordance with the Protocol and the Rules.

**11.** On 3 October 2017, the Registry drew the parties' attention to the provisions of Rule 55 of the Rules, under which the Court may render a Judgment in default where a party fails to file any response.

**12.** On 28 November 2017, the Registry informed the parties of the closure of pleadings on the merits of the Application.

**13.** On 6 July 2018, the Registry informed the parties that the Court decided to combine Judgment on the merits of the Application and reparations, it therefore granted the Applicant thirty (30) days to file submissions on reparations.

**14.** On 6 August 2018, the Registry received the Applicant's submissions on reparations and on 9 August 2018, transmitted the same to the Respondent State, with a request for it to file its Response within thirty (30) days. The Respondent State did not file any Response thereto.

**15.** On 4 October 2018, the Registry notified the parties that in the interest of proper administration of justice, the Court reaffirmed its position to combine Judgment on the merits and reparations in default if it did not receive any observations from the parties within thirty (30) days of the notification.

**16.** Pleadings in respect of reparations were closed on 19 March 2020 and the parties were duly notified.

## IV. Prayers of the Parties

**17.** In his Application, the Applicant prays the Court to take the following measures:

i. Recognize that the Rwandan national institutions and courts have violated relevant legal human rights instruments that the country had ratified;

ii. Review Judgment RADA0015/13/CS, ruling No. RS/REV/AD 0003/15/CS of which dismissed the request for review, and annul all the decisions taken, i.e. the Judgments and the dismissal decision contained in letter Ref: No. 11.07.025 /1385/10/DIR-DRH/k.h of 13 April 2010; and hence order that things return to the *status quo ante* and thus order his reinstatement in service as stated in paragraph 28 of RAD0124/07/HC/KIG; order the payment of his wages as 'if I had not been dismissed in the same manner as in paragraph 30 of Judgment RADA0006/12/CS';

iii. Order the payment of damages for the defamation contained in the letter Ref. No. 11.07.025/1385/10/DIR-DRH/k.h of 13/04/2010 and for the fact of failing to me a certificate for the services rendered;

iv. Order the payment of other damages representing the cost of the proceedings and the suffering endured;

v. Order interim measures for the protection of the family in danger;

vi. Order any other measure in accordance with the law...[2]

**18.** The Respondent State did not participate in the proceedings before the Court in the present case. It therefore made no submission in this regard.

## V. Non appearance of the Respondent State

**19.** Rule 55 of the Rules provides that:

"1. Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass Judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings.

2. Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law."

**20.** The Court notes that the afore-mentioned Rule 55 in its paragraph 1 sets out three conditions, namely: i) the default of one of the parties; ii) the request made by the other party; and iii) the notification to the defaulting party of both the application and the documents on file.

**21.** On the default of one of the parties, the Court notes that on 11 May 2017, the Respondent State indicated its intention to suspend its participation in the Court's proceedings and requested the cessation of transmission of documents relating to the proceedings in the pending cases concerning it. The Court notes that, by these requests, the Respondent State voluntarily refrained from exercising its defence.

**22.** With respect to the other party's request for a Judgment in default, the Court notes that in the present case it should, in principle, have given a Judgment in default only at the request of the Applicant. However, the Court considers that, for the sake of proper administration of justice, the decision to rule in default falls within its judicial discretion. In any event, the Court renders Judgment in default *suo motu* where the conditions laid down in

2 Reproduced *in extenso* from the Applicant's submissions

Rule 55(2) are fulfilled.[3]

**23.** Lastly, with regard to the notification of the defaulting party, the Court notes that the Application was filed on 24 February 2017. It further notes that from 29 March 2017, the date of transmission of the notification of the Application to the Respondent State, to 19 March 2020, the date of closure of the pleadings, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. The Court thus concludes that the defaulting party was duly notified.

**24.** On the basis of the foregoing, the Court will now determine whether the other requirements set forth under Rule 55 of the Rules are fulfilled, that is: whether it has jurisdiction, whether the application is admissible and whether the Applicant's claims are founded in fact and in law.[4]

## VI. Jurisdiction

**25.** Article 3(1) of the Protocol provides as follows:

> The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

**26.** Furthermore, Article 39(1) of the Rules stipulates that: **"**The Court shall conduct preliminary examination of its jurisdiction…."

**27.** After a preliminary examination of its jurisdiction and having found that there is nothing on file indicating that it does not have jurisdiction in this case, the Court finds that it has:

i. material jurisdiction, insofar as the Applicant alleges the violation of the rights protected by the Charter and other relevant human rights instruments ratified by the Respondent State, namely, the ICCPR and ICESCR to which the Respondent State is a party[5] as well as the UDHR.[6]

3 See *African Commission on Human and Peoples' Rights (Saïf Al-Islam Kadhafi) v Libya* (Merits) (2016) 1 AfCLR 153, §§ 38-42.

4 *Ibid*, § 42.

5 The Respondent State became a party to ICCPR and ICESCR on 16 April 1975.

6 See *Anudo Ochieng Anudo v United Republic of Tanzania* (Merits) (2018) 2 AfCLR 248, § 76; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (Merits) (2018) 2 AfCLR 314, §33.

ii. personal jurisdiction, insofar as, as stated above, the effective date of the withdrawal of the Declaration by the Respondent State is 1 March 2017.[7]

iii. temporal jurisdiction, insofar as the violations alleged in the Application were committed as from 13 April 2010, that is, after the entry into force of the Charter for the Respondent State (31 January 1992), the ICCPR and ICESCR (16 April 1975) and the Protocol (25 January 2004); and the said alleged violations have continued to date.

iv. territorial jurisdiction in as much as the facts of the case and the alleged violations occurred in the territory of the Respondent State.

**28.** In view of foregoing, the Court holds that it has jurisdiction to hear the instant case.

## VII. Admissibility

**29.** Pursuant to the provisions 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".

**30.** Furthermore, under Rule 39 of the Rules: "the Court shall conduct preliminary examination ... and the admissibility of the application in accordance with Articles 50 and 56 of the Charter, and Rule 40 of these Rules".

**31.** Rule 40 of the Rules, which essentially 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 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

7 See paragraph 2 of this Judgment.

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.

**32.** The Respondent State having failed to take part in the proceedings, the admissibility conditions will be examined on the basis of the Applicant's observations and other information on file. The conditions invoked by the Applicant and also those not invoked, will be examined.

## A. Conditions of admissibility invoked by the Applicant

**33.** The Applicant focusses exclusively on the condition of exhausting the local remedies, arguing that the available administrative and judicial remedies have been exhausted.

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**34.** The Court going by the record, notes that, the Applicant filed a suit in respect of the letter of dismissal of 13 April 2010 before the Kigali High Court of Justice under number RAD 0157/10/HC/KIG.

**35.** On 25 January 2013, the High Court ruled that the dismissal was unlawful and ordered EWSA to pay the Applicant damages in the amount of six million Rwandan francs (RWF 6,000,000).

**36.** The Court notes that Sections 28 and 29 of the Organic Law No. 0312012 of 13 June 2012 on the organisation and functioning of the Supreme Court, the highest court in Rwanda, confers jurisdiction on the latter to adjudicate "appeals against the Judgments rendered in the first instance by the High Court ..."

**37.** The Court also notes that, in the present case, the Applicant lodged a cassation appeal against the Judgment of the High Court before the Kigali Supreme Court under appeal number RADA 0015/13/CS. The Supreme Court dismissed the said appeal by Judgment of 8 November 2013.

**38.** Accordingly, the Court holds that the Applicant has exhausted the domestic remedies.

## B. Other conditions of admissibility

**39.** The Court notes that, from the record, the condition laid down in Article 56(1) of the Charter is fulfilled since the Applicant provided his full identity. The condition laid down in paragraph

2 of the same Article is also fulfilled since no request from the Applicant or any information on file is incompatible with the Charter of the Organisation of African Unity (OAU) or with the Charter. The Application does not contain any disparaging or insulting language towards the State concerned, which makes it consistent with the requirement of Article 56(3) of the Charter. Regarding the condition contained in paragraph 4 of this Article, the Court notes that the Application is not based exclusively on news disseminated through mass media. The Applicant bases his claims on legal grounds in support of which official documents are tendered.

**40.** With regard to compliance with the requirements of Article 56(6) of the Charter, this Court reiterates that for an application to be admissible, it must be submitted "within a reasonable period from the time local remedies are exhausted or from the date the (Court) is seized with the matter".

**41.** The Court notes, in this regard, that the Judgment of the Supreme Court dismissing the Applicant's appeal was rendered on 8 November 2013 whereas the Application was filed at the Registry on 24 February 2017. As the period between these two dates is three (3) years, one (1) month and sixteen (16) days, the Court will decide whether this period is reasonable in terms of Article 56(6) of the Charter.

**42.** The Court recalls, in reference to its jurisprudence, that determination of reasonable time must be done on a case-by-case basis, taking into consideration the circumstances of each case.[8] Furthermore, where the remedies to be exhausted are ordinary judicial remedies, the time used by the Applicant to exhaust other remedies may be taken into account in determining the reasonableness of the period envisaged under Article 56(6) of the Charter.[9] This is particularly the case where the law affords the Applicant the possibility of exhausting such remedies.[10]

**43.** In the instant case, the Court notes that after the dismissal of his appeal on 8 November 2013 by the Supreme Court, the Applicant

8 See *Ally Rajabu & ors v United Republic of Tanzania*, AfCHPR, Application 007/2015, Judgment of 28/11/2019 (Merits and Reparations), § 50; ***Armand Guehi v United Republic of Tanzania*** (Merits and Reparations) (2018) 2 AfCLR 477, §§ 55-57; ***Norbert Zongo & ors v Burkina Faso*** (Preliminary Objections) (2013) 1 AfCLR 197, § 121

9 See ***Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*** (2018) 2 AfCLR 270, § 37.

10 See ***Ally Rajabu & ors v United Republic of Tanzania***, (Merits and Reparations), § 51; ***Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*** (Merits) (2018) 2 AfCLR 287, § 58

seized the same Court with an application for review. By a new Judgment dated 27 January 2017, the Supreme Court dismissed the said application.

**44.** The Court considers that between the aforementioned dates, the Applicant spent time awaiting the decision on his application for review. Considering that the application for review was the Applicant's prerogative, the latter cannot be penalized for attempting to exercise that remedy. The time taken to exercise that remedy must thus be taken into account. In the circumstance, the Court finds that the above-mentioned time used by the Applicant to file this Application is reasonable in terms of Article 56(6) of the Charter.

**45.** In view of the aforesaid, the Court holds in conclusion that the Application meets the condition of admissibility set out in Article 56(6) of the Charter.

**46.** Lastly, as regards compliance with the condition laid down in Article 56(7) of the Charter, the Court notes that there is nothing on record indicating that the present Application concerns a case which has been settled in accordance with either the principles of the United Nations Charter, the OAU Charter or the provisions of the Charter.

**47.** Based on the foregoing, the Court finds that the Application meets all the conditions set out in Article 56 of the Charter and accordingly declares it admissible.

## VIII. Merits

**48.** The Applicant alleges the violation of the right to a fair trial, right to equality before the law, right to equal protection of the law and the right to work, under Articles 1, 3, 7(1) and 26 of the Charter, Articles 2(3)(c), 14(1) and 26 of the ICCPR; Article 6(1) of ICESCR and Articles 7 and 10 of the UDHR. He further alleges that the Respondent State failed to honour its obligation to recognize the rights, duties and freedoms enshrined in the Charter and to adopt the necessary measures to give effect to them.

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

**49.** The aspects of the right to a fair trial raised in the instant Application relate to the right to defence, the right to a reasoned Judgment and the right to be tried by an impartial court.

### i. Right to defence

**50.** The Applicant alleges that, for having concluded in RADA0015/13/CS that he was a contracted staff and ignored his findings as well as the contrary findings of the Public Prosecutor's Office, the Supreme Court violated his right to defence. He further submits that the Supreme Court violated Article 18(3) of the Respondent State's Constitution for having claimed that it delayed the processing of the cases under its responsibility, since neither his employer nor the Supreme Court had communicated to him a report on his conduct and performance.

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**51.** The Court notes that Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard… the right to defence, including the right to be defended by counsel of his choice".

**52.** The Court notes that the Applicant alleges the violation of his right to defence on the grounds that the Rwandan Supreme Court did not take into account some of the evidence he adduced and that the report on his performance was not communicated to him.

**53.** The Court reiterates, as it found in *Armand Guehi v United Republic of Tanzania* Judgment, that it is not an appellate body for decisions rendered by national courts, but rather exercises its jurisdiction in the review of compliance of national procedures with human rights conventions ratified by the State concerned.[11]

**54.** The Court further recalls that once the evidence produced by the parties has been duly received and examined in law and in equity, the domestic courts' proceedings and decisions cannot be regarded as a violation of the right to a fair trial.[12]

**55.** On the issue of considering the evidence adduced by the parties, the Court notes, as is apparent from the record that; in determining the status of the Applicant, the Supreme Court referred to both the labour law of Rwanda, the Civil Procedure Code and the Law on the General Rules and Regulations governing the Rwandan civil service. In particular and contrary to the Applicant's allegations,

11 *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) § 33; *Mohamed Abubakari v United Republic of Tanzania* (Merits) (2016) 1 AfCLR 599 § 29.

12 See *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) § 106.

the Supreme Court considered the arguments regarding dismissal for lateness in the processing of files. The Court notes that in addition to applying the provisions invoked by the Applicant, the Supreme Court extensively relied on the pleadings of the parties to the proceedings as set out in the Judgment RADA 0015/13/CS of 8 November 2013.[13]

**56.** It was on these grounds that the Supreme Court decided that the Applicant was a contracted staff and not a civil servant.[14] Moreover, in decision No. RS/REV/AD/0003/15/CS of 27 January 2017, issued in review of the above-mentioned first decision, the Supreme Court re-examined the Applicant's claims on the basis of standards that he himself invoked.[15]

**57.** In view of the foregoing, the Court considers that the Applicant's right to defence has not been violated given that all the evidence was duly examined.

**58.** With regard to communication of the report on the Applicant's performance, the Court recalls that the right of the accused to be duly informed of the charges levelled against him goes *in tandem* with his right to defence.[16] The Court notes in particular that access to evidence and other information on record is a fundamental component of the right to defence.[17]

**59.** In the instant case, the Court notes that the Judgments of both the High Court and the Supreme Court made reference to, and considered the complaint of, non-disclosure of the Applicant's misconduct arising from his slow handling of the files under his responsibility, thus tarnishing the image of the company.[18] The Court notes, in particular, that the Supreme Court having relied on the right invoked by the Applicant himself, concluded, with reasons, that the employer is not bound to explain the reasons for

13 See Judgment RADA 0015/13/CS of 08/11/2013, §§ 9-13.

14 *Ibid* 14-17

15 See Judgment No. RS/REV/AD/0003/15/CS of 27/1/2017 §§ 6-13.

16 See *Mohamed Abubakari v United Republic of Tanzania*, § 158. See also *Pélissier and Sassi v France*, ECHR, No. 25444/94 of 25/3/1999, § 52; See also *Yvon Neptune v Haiti* (Merits, Reparations and Costs), Inter-American Court of Human Rights, 6/5/2008, §§ 102-109

17 See African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (2001) Guidelines N(2)(d), N(2)(e)(2) (1-5); *International Pen & ors (on behalf of Saro-Wiwa) v Federal Republic of Nigeria Communications* 137/94, 139/94, 154/96 and 161/97 (2000) AHRLR 212 (ACHPR 1998) §§ 99-101; *Jean-Marie Atangana Mebara v Republic of Cameroon*, Communication 416/12 (18th Extra-ordinary Session, 29 July to 8 August 2015) §§ 107-109.

18 See Judgment RAD 0157/10/HC/KIG of 25/01/2013 §§ 5-7; Ruling No. RADA 0015/13/CS of 08/11/2013, §§ 18-28.

the termination of a contract during the probation period.[19]

**60.** In any event, the Court notes that, in this case, the grounds for termination of the contract are explicitly mentioned in the termination letter which the Applicant does not deny having been aware of.[20] Moreover, the Applicant does not dispute the fact that the domestic courts found a violation and awarded him damages for the fact that he was not heard prior to the decision to dismiss him.

**61.** In view of the foregoing, the Court finds that there has been no violation of the right to defence and holds in conclusion that the Respondent State did not violate Article 7(1)(c) of the Charter.

## ii. Right to a reasoned Judgment

**62.** The Applicant submits that, for having failed to invoke contrary reasons to counter those he invoked in regard to his professional status, the Supreme Court violated his right to a reasoned decision.

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**63.** The Court notes that Article 7 of the Charter which guarantees the right to a fair trial does not expressly provide for the right to a reasoned Judgment. The Court notes, however, that the *African Commission's Guidelines on the Right to a Fair Trial* provide for "an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions" as a component of the right to a fair hearing.[21] The motivation of judicial decisions, stemming from the principle of proper administration of justice, therefore makes it incumbent on the judge to clearly base his reasoning on objective arguments.

**64.** The Court notes, on this point, that in application of the above Guidelines, the Commission considered in *Kenneth Good v Botswana* that the right to a reasoned decision derives from the right to seize a competent national court as provided under Article

19 See Ruling RADA 0015/13/CS of 08/11/2013 §§ 24-26.

20 See the statement of facts by the Applicant in this Application §§ 20-21.

21 African Commission 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2001), Principles A(2)(i). (Emphasis by the Court).

7(1)(a) of the Charter.[22] The European[23] and Inter-American[24] Courts of Human Rights have also found a violation of the right to a reasoned decision on the basis of the corresponding provisions of their respective conventions which they have the duty to interpret.

**65.** In the present case, the Court notes that the High Court examined at length the Applicant's plea concerning his status and concluded that the Applicant should have been accorded the status of a state employee and not that of a contracted staff.[25] The same is true for the Supreme Court, which in both Judgments not only relied on the Applicant's pleadings, but also examined them extensively before concluding that the trial judge had misapplied the law on this point.[26]

**66.** In these circumstances, the Court considers that the Applicant's allegation that the domestic courts failed to state the reasons for their decisions, is unfounded.

**67.** Accordingly, the Court finds that there has been no violation of Article 7(1)(a) of the Charter.

## iii. Right to be tried by an impartial court

**68.** The Applicant alleges that the Supreme Court was not impartial because of the enmity between two (2) of the three (3) judges of the court. According to the Applicant, among the members of the bench was Judge Marie Josée Mukandamage, who also sat in a case against the ATRACO Minibus Taxi Drivers' Union in which the Applicant allegedly filed a motion before the Senate against the judges.

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22 See ***Kenneth Good v Botswana*** Communication 313/05 (2010), AHRLR 43 (ACHPR 2010) §§ 162, 175. Also see ***Albert Bialufu Ngandu v Democratic Republic of Congo***, Communication 433/12 (19th Extra-ordinary Session, 16 to 25 February 2016), §§ 58-67.

23 See for example, ***Baucher v France***, ECHR (2007); ***K.K. v France***, ECHR, 10/10/2013, Application 18913/11, § 52.

24 See for example, ***Barbani Duarte & ors v Uruguay***, 13/10/2011, §§ 183-185.

25 See Judgment, RADA 0157/10/HC/KIG of 25/01/2013, § 4.

26 Judgment, RADA 0015/13/CS of 8/11/2013, §§ 9-17; See Judgment No. RS/REV/AD/0003/15/CS of 27/1/2017 §§ 6-13.

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

**70.** The Court recalls that, impartiality within the meaning of Article 7(1)(d) of the Charter must be understood as the absence of bias or prejudice in the consideration of a case in court.[27] As such, bias cannot be presumed and must be irrefutably proven by the party alleging it.[28] Similarly, the Court considers that it cannot accept allegations of a general nature which are not founded on concrete evidence.[29]

**71.** With regard in particular to the influence alleged by the Applicant in his Application, the Court recalls that "the declarations of a single judge cannot be considered as sufficient to influence the opinion of the entire bench". The Court further considers that "…the Applicant failed to illustrate how the judge's remarks at the Ordinary Bench later influenced the decision of the Review Bench".[30]

**72.** Noting that in this case the Supreme Court was composed of a panel of three (3) judges, the Court considers that the mere fact that a judge sat in a previous case to which the Applicant was admittedly a party cannot suffice to influence the entire bench in another case. From the record, it is apparent that the Applicant made reference to enmity between two (2) judges but only explicitly mentioned Judge Marie Josée Mukandamage**.** In addition, he did not demonstrate how the simple presence of this judge and her role in the sitting influenced the decision of the other judges in rendering the impugned decision. Neither did he adduce any evidence to show the alleged impartiality, especially because, in light of the record, he did not request withdrawal of the Judge concerned even though the law provided him the option

27 See *Alfred Agbesi Woyome v Republic of Ghana* , AfCHPR, Application 001/2017. Judgment of 28/6/2019 (Merits and Reparations) § 126; *Ingabire Victoire Umuhoza v Rwanda* (Merits) (2017) 2 AfCLR 165, §§ 103 and 104.

28 *Alfred Agbesi Woyome v Republic of Ghana*, (Merits and Reparations), § 128.

29 See *Alex Thomas v United Republic of Tanzania* (Merits) (2015) 1 AfCLR 465, § 124

30 See *Alfred Agbesi Woyome v Ghana* (Merits and Reparations), § 131.

to do so.[31] The Applicant's allegations are therefore unfounded.

**73.** Accordingly, the Court finds that Article 7(1)(d) of the Charter has not been violated.

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

**74.** The Applicant alleges that his designation as a "contracted staff" by the Supreme Court, different from that granted to other officials in the same situation, constitutes a discriminatory differential treatment that violates the principle of equality before the law.

**75.** The Applicant further submits that, the fact that the Supreme Court found the dismissal unlawful without ordering its annulment and his reinstatement, constitutes a breach of equality before the law since the same court had, in two (2) previous cases, ordered the reinstatement of two (2) employees of the company together with the payment of wages accruing to them. According to the Applicant, without providing sufficient justification as to why his case was not treated in the same way, the Supreme Court failed to respect the prohibition of any form of discrimination before the law.

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**76.** The Court notes that Article 3 of the Charter guarantees the right to equality before the law 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."

**77.** The Court notes, that Article 3 of the Charter is closely related to Article 2 which prohibits discrimination.[32] The Court also recalls that a cross-reading of the right to equal protection of the law

31 See Law No. 21/2012 of 14/6/ 2012 on the Code of Civil, Commercial, Social and Administrative Procedure. Articles 99-105 (repealed in 2018 and replaced by Law No. 22/2008 of 29/4/2018 on the Code of Civil, Commercial, Social and Administrative Procedure; see Articles 103-109 available in the legislative database of the International Labor Organization https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=94327&p_lang=en (accessed on 13/6/ 2020

32 See *Werema Wangoko Werema and Waisiri Wangoko Werema v United Republic of Tanzania* (Merits) (2018) 2 AfCLR 520, § 86; *Tanganyika Law Society, Legal and Human Rights Center and Reverend Christopher Mtikila v United Republic of Tanzania* (Merits) (2013) 1 AfCLR 34, § 105.

and the prohibition of discrimination implies that the law provides for all and sundry, and that the law applies to all equally without discrimination, that is, without distinguishing between persons or situations on the basis of one or several unlawful criteria.[33] Within the narrower context of judicial proceedings, the right to equality before the law presupposes that "all are equal before the courts and tribunals".[34]

**78.** The Court notes, however, that the enjoyment of rights and freedoms on equal terms does not in all cases imply identical treatment.[35] The Court reiterates that the Applicant having alleged discriminatory treatment, must provide proof thereof.[36] As it has established in its case-law, the Court notes besides, that, to find that there has been a violation of Article 3 of the Charter, the Applicant must prove either that he has been discriminated against by the judicial authorities, or that the national legislation allows for discriminatory treatment against him in comparison with the treatment meted out to other persons in a similar situation.[37]

**79.** In the present case, the Court notes, in light of the national legislation, that no discriminatory treatment has been allowed against the Applicant; nor has he proven that his situation was the same or similar to that of other people such that he merits similar treatment.

**80.** With regard to reinstatement, the Court notes that in its two (2) judgments, the Supreme Court examined the allegations of discrimination and concluded that its case-law cited by the Applicant was not applicable to him given that his dismissal occurred during his probationary period. The Supreme Court dismissed the claim for reinstatement as unfounded with regard to the reason for the dismissal.[38] Accordingly, the Court finds that, in the circumstances of the case, the Supreme Court applied the principle of distinction in a manner that is consistent with the right

33 See *Actions for the Protection of Human Rights v Republic of Côte d'Ivoire - Actions pour la Protection des Droits de l'Homme* (2016) 1 AfCLR 668, § 147.

34 See *Kijiji Isiaga v United Republic of Tanzania* (Merits) (2018) 2 AfCLR 218, § 85.

35 Human Rights Committee, General Comment 18, Article 26: Principle of equality, Compilation of general comments and General recommendations adopted by the treaty bodies, U.N. Doc. HRI\GEN \1\ Rev1 (1994), § 8.

36 See also *Kennedy Owino Onyachi & ors v United Republic of Tanzania* (Merits), 2 AfCLR 65 § 142.

37 See *Alex Thomas v United Republic of Tanzania* (Merits), § 140; *Kijiji Isiaga v United Republic of Tanzania*, § 85; and *Sébastien Germain Ajavon v Republic of Benin*, ACHPR, Application 013/2017, Judgment of 29/3/2019 (Merits), § 221.

38 Judgment RADA 0015/13/CS of 08/11/2013, §§ 29-31; See Judgment No. RS/REV/AD/0003/15/CS of 27/1/2017, §§ 29-37.

to equality as guaranteed by the Charter.

**81.** With regard to the allegation of violation of the right to equality before the law stemming from the failure to annul the dismissal and to reinstate him, following the finding of irregularities in the dismissal, the Court notes, as it held earlier, that the Supreme Court examined the relevant grounds and held in conclusion that whereas the dismissal procedure had not respected the right to be heard, the reinstatement was not applicable in the Applicant's case. Moreover, and as a result, the Supreme Court upheld the decision of the lower court on the merits to award the Applicant damages for the prejudice suffered. The Court therefore finds that there has been no violation of the right to equality before the law.

**82.** In view of the foregoing, the Court finds that there has been no violation of Article 3 of the Charter.

## C. Alleged violation of the right to work

**83.** The Applicant alleges that RECO & RWASCO wrongfully dismissed him by disregarding his status as a state official, dismissal which in particular requires the prior opinion of the Public Service Commission as stipulated in Articles 22 (3) and (5) and 93 of Law No. 22/2002 of 09/07/2002 on the General Rules and Regulations of the Rwandan Civil Service.

**84.** He contends that by noting the unlawfulness of the dismissal without ordering his reinstatement and the payment of the real value of unpaid wages and other prejudice suffered, the High Court prevented him from practicing his profession.

**85.** The Applicant further submits that in the dismissal letter he was defamed to the extent that he was unable to find a new job. He claims, in addition, that the institution did not issue him with a certificate for the services rendered as requested by potential employers in his search for a new job. The Applicant further claims that, being the only one who succeeded in the written tests for recruitment at the Kigali University Hospital and Rwanda Housing Authority, he should have been hired. However, according to him, the only reason he was not hired was the defamatory nature of the dismissal letter issued by RECO & RWASCO.

**86.** He alleges that these acts constitute a violation of Article 6(1) of ICESCR.

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**87.** The Court notes that the Applicant alleges the violation of the right to work as guaranteed by Article 6(1) of ICESCR which states that:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

**88.** The Court notes that the same right is protected under the Charter in Article 15 which states that: "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."

**89.** The Court notes that, in comparison to Article 15 of the Charter, the provisions of Article 23 of UDHR which have acquired the character of customary international law,[39] contain a more exhaustive and detailed enumeration of the different aspects of the right to work.[40] The Court considers, with reference to its case-law,[41] that it is clear from a cross-reading of the above-mentioned provisions of the ICESCR, the UDHR and the Charter that, the Charter tacitly covers the different aspects enumerated in the other two instruments. This is so because enshrined in the Charter are the two common conditions governing the right to work, that is, access and enjoyment.

**90.** In the present case, the Applicant alleges the violation of his right to work on three grounds: unfairness of his dismissal in violation of the law; unlawful dismissal decision without reinstatement or award of damages; and the prejudice caused to his image by the content of the dismissal letter.

## i. Wrongful dismissal

39 At least in its provisions relevant in this case. See *Anudo Ochieng Anudo v Tanzania* (Merits), § 76. See also, Diplomatic and Consular staff of the United States in Teheran (*United States v Iran*) (1980) ICJ page 3, Collection 1980; South West Africa (*Ethiopia v South Africa*; *Liberia v South Africa*) (Preliminary Objections) (Separate opinion of Judge Bustamente), ICJ, Collection 1962, page 319

40 Article 23 of UDHR states :

"1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests."

41 See *Armand Guehi v United Republic of Tanzania* (Merits and Reparations); *Mohamed Abubakari v Tanzania*, §§ 137-138; and *Anudo Ochieng Anudo v United Republic of Tanzania* (Merits), §§ 110-111.

**91.** The Court considers, with reference to *the Guidelines on Socio-Economic Rights in the Charter*, that "the Respondent State has an obligation ... to provide protection against arbitrary, unjust dismissal and other unfair professional practices".[42]

**92.** In the instant case, the Court notes that the Applicant alleges that the RECO & RWASCO enterprise acted wrongfully in dismissing him without prior notice from the Public Service Commission as provided by the General Rules and Regulations governing the Public Service. The Court further notes that the question under consideration is intrinsically linked to that of the Applicant's employment status. It observes in this regard that, as it concluded earlier, the Supreme Court, after examining the pleadings filed by the Applicant, concluded that he was a contracted staff and could not therefore be governed by the Law on the General Rules and Regulations of the Rwandan Civil Service. The Supreme Court therefore found that the prior notice was not applicable as alleged by the Applicant.

**93.** In the circumstances, this Court holds that the dismissal could not have been wrongful for the reason advanced by the Applicant. The Court therefore dismisses the allegation of wrongful dismissal.

## ii. Illegality of dismissal without reinstatement or compensation

**94.** This Court notes that the Applicant alleges that his rights were violated because the High Court declared his dismissal unlawful without ordering his reinstatement or the payment of adequate compensation.

**95.** In this regard and in light of the case law of the Inter-American Court of Human Rights, this Court considers that the right to work implies security of employment which requires that persons enjoy effective legal protection where the grounds raised to justify their dismissal are arbitrary or contrary to the law.[43] The Court considers that, invariably, where these conditions are not met, the dismissal necessarily gives rise to a right to compensation. This is the principle on which the ECOWAS Community Court of Justice

42 See African Commission on Human and Peoples' Rights "Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 24 October 2011, Guideline 58.

43 See *Lagos del Campo v Peru*, Application No. 12.795, Judgment of 31/8/2017 (Preliminary Objections, Merits, Reparations and Costs)

relied when it held that:

in matters of termination of employment contract, ... *early termination pronounced by one of the parties, without the agreement of the other, except for cases of serious fault, force majeure or hiring of the employee under fixed term contract, entitles the other party to damages*….[44]

**96.** On the High Court's refusal to order the Applicant's reinstatement in his job, the Court based on its previous findings, considers that the said decision was upheld by the Rwanda Supreme Court in accordance with domestic law. Since the Court has also found that the said decisions are consistent with the applicable international law, there is no need to revisit them.

**97.** On the lack of compensation for the prejudice caused by the dismissal, this Court notes that in its two Judgments, the Supreme Court of Rwanda amply referred to and examined the Applicant's pleadings as mentioned above. The Supreme Court had concluded that he suffered prejudice as a result of the dismissal and upheld the payment of compensation as ordered by the High Court. In particular, on the insufficiency of the compensation awarded by the High Court, the Supreme Court, on the basis of his status, his relation with the management of the company and other factors related to the circumstances of the case, dismissed the Applicant's prayer for a review of the *quantum* and an increase of the compensation.

**98.** The Court therefore finds that the allegation of dismissal without compensation is unfounded, and therefore dismisses it.

### iii. Prejudice arising from the disparaging and defamatory wording of the termination letter and failure to issue a certificate of service

**99.** The Court notes that, according to the Applicant's allegations, the disparaging and defamatory wording used by RECO & RWASCO Company in the dismissal letter had a significant adverse effect on him in obtaining a new job. To buttress this allegation, the Applicant submits that, having been declared successful in the written tests for positions at the Kigali University Hospital and the Rwanda Housing Authority, he was not retained after the interview. This was because his former employer failed to issue him with a Certificate of Service as requested by the would-be employers,

44 *Claude Akotegnon v ECOWAS*, Judgment No. ECW/CCJ/APP/20/17 of 29/6/2018, § 42.

and that this was prejudicial to him in his quest for a new job.

**100.** The Court reaffirms, as it did earlier, that the onus is on the Applicant to prove his allegations and that the said allegations should not be limited to general statements. In the instant case, the Court notes that the record shows, that the letter of dismissal refers to grounds such as "bad behaviour characterized by delayed services which gives the institution a bad name"; the letter further refers to "bad behaviour characterized by clashes between you and the line superiors" and concludes that these issues "do not enable the institution to fulfill its mission". The Court considers that even if such terms influenced the Judgment of a potential employer, the Applicant would still have to prove that the alleged prejudice has taken place in this case.

**101.** In this regard, the Court considers that the mere fact that the Applicant was not retained after the written phase of two recruitment tests cannot constitute proof of the alleged prejudice caused by the wording of the dismissal letter. Notably, in spite of the dismissal letter, the Applicant affirms that he was selected in the written phase for the different positions he mentioned. In this case, the Applicant should have shown that he was not hired for the jobs to which he refers as a result of the communication of the letter of dismissal to the prospective employers. As this is not the case, the Court holds that the Applicant's allegation is unfounded.

**102.** With regard to failure to issue him a certificate of service, the Court notes that the Applicant has not alleged that the employer was under the obligation to issue him the said certificate without him requesting for it. He also fails to prove that he applied for the said certificate and was denied by the employer; nor has he established a causal link between the denial and the fact that he did not obtain the jobs he sought. The Court finds that the Applicant failed to prove the violation of his right to work on the basis of this allegation.

**103.** In view of the aforesaid, the Court finds that there has been no violation of Article 15 of the Charter.

## D. Alleged violation of Article 1 of the Charter

**104.** The Applicant submits, in general terms, that the Respondent State violated Article 1 of the Charter on the obligation to recognize the rights, duties and freedoms enshrined in the Charter and undertake to adopt legislative or other measures to give effect

to them.

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**105.** Pursuant to the provisions of Article 1 of the Charter, "The Member States of the Organisation of African Unity … shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."

**106.** In reference to its established jurisprudence, the Court reiterates that:

> when (the Court) finds that any of the rights, duties or freedoms set out in the Charter are 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.[45]

**107.** Given that none of the violations alleged by the Applicant has been proven in the instant case, the Court finds that there has been no violation of Article 1 of the Charter.

## IX. Reparations

**108.** Article 27(1) of the Protocol states 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.

**109.** Considering that no violation has been established, the Court does not need to pronounce itself on reparations.

## X. Costs

**110.** The Applicant prays the Court to order the Respondent State to bear the costs. He further sought the payment of Three Million Rwandan francs (RWF 3,000,000) for the costs incurred on the

45 See *Alex Thomas v United Republic of Tanzania* (Merits), § 135; See also *Norbert Zongo & ors v Burkina Faso* (Merits) (2014) 1 AfCLR 226, § 199 ; See also *Kennedy Owino Onyanchi & ors v United Republic of Tanzania*, § 159; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*, § 135.

proceedings before the Court.

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**111.** The Court notes, in this respect, that Rule 30 of the Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs".

**112.** The Court reiterates, as in its previous Judgments, that compensation may include the payment of legal costs and other costs incurred in international proceedings.[46] The Applicant must, however, justify the amounts claimed.[47]

**113.** The Court notes that the Applicant has not adduced evidence of the costs incurred in these proceedings. It accordingly rejects the said costs.

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

## XI. Operative part

**115.** For these reasons:

The Court,

*Unanimously and in default*

*On jurisdiction*

i. *Declares* that it has jurisdiction.

*On admissibility*

ii. *Declares the Application admissible.*

*On the merits*

iii. *Finds* that the Respondent State has not violated the Applicant's right to equal protection of the law and equality before the law as enshrined in Article 3 of the Charter;

iv. *Finds* that the Respondent State has not violated the Applicant's right to have his cause heard as enshrined in Article 7(1) of the

46 See ***Norbert Zongo & ors v Burkina Faso*** (Reparations) (2015) 1 AfCLR 265, §§ 79-93 and ***Reverend Christopher R. Mtikila v United Republic of Tanzania*** (Reparations) (2014) 1 AfCLR 74, § 39.

47 See ***Norbert Zongo & ors v Burkina Faso*** (Reparations) (2015) § 81 and ***Reverend Christopher R. Mtikila v United Republic of Tanzania*** (Reparations) § 40.

Charter;

v. *Finds* that the Respondent State has not violated the right to a reasoned Judgment protected under Article 7(1)(a) of the Charter;
vi. *Finds* that the Respondent State has not violated the Applicant's right to defence under Article 7(1)(c) of the Charter;
vii. *Finds* that the Respondent State has not violated the Applicant's right to be tried by an impartial tribunal guaranteed by Article 7(1)(d) of the Charter;
viii. *Finds* that the Respondent State has not violated the Applicant's right to work, guaranteed under Article 15 of the Charter;
ix. *Finds* that the Respondent State has consequently not violated the provisions of Article 1 of the Charter;

*On reparations*

x. *Dismisses* the Applicant's prayer herein.

*On costs*

xi. *Rejects* the Applicant's prayer herein.
xii. *Decides* that each party shall bear its own costs.

***

## Separate opinion: BEN ACHOUR AND TCHIKAYA

**[1]** We concur with the position adopted by the Court on admissibility, jurisdiction and operative provisions in the four *Mulindahabi v Rwanda* decisions adopted by unanimous decision of the judges sitting on the bench.

**[2]** By this Opinion, we wish to express a position on a point of law. This opinion clarifies a point relating to the Court's subject-matter jurisdiction on which our Court has often proceeded by limiting the argument.

**[3]** In our view, Article 3 of the Protocol, while taking account of the general framework of jurisdiction it lays down, should also be understood in terms of the scope given to it by Article 7 of the same Protocol. Since the *Mulindahabi* species do not pose any particular problem of jurisdiction, there were no a *cogenta* reasons for the emergence of such a debate. However, the question did emerge and therefore required clarification which would be valid

for other judgments delivered or to be delivered by the Court.

**[4]** A breadcrumb trail structures the analysis. These are two waves of decisions that characterize the Court's jurisprudence. The cut-off point is generally in 2015, when the Court delivered its *Zongo*[1] judgment. The decision on jurisdiction in this case is given in 2013. It can be supported because a reflection seems to be beginning on the choices in terms of procedure with the *Mohamed Abubakari* judgment in 2016[2]. The Court begins to work, as noted by Judges Niyungeko and Guissé, more "distinctly: first on all questions relating to its jurisdiction (both the preliminary objection and the question of its jurisdiction under the Protocol), and then on all questions relating to the admissibility of the application"[3].

**[5]** Thus, in the first part, we shall examine the state of the matter, i.e., the envisaged readings of Articles 3 and 7 of the Protocol in determining the Court's subject-matter jurisdiction. In the second part, devoted to the second wave of decisions, the use of Articles 3 and 7 will evolve.

## I. Article 3 and 7 of the Protocol through the Court's doctrine and case-law

**[6]** In our view, Articles 3 and 7 of the Protocol should be read together, as one sheds light on the other. They are complementary. For the reasons that follow, they cannot be separated. The Court's subject-matter jurisdiction is therefore based on both the first paragraph of Article 3 and Article 7 of the Protocol. We shall first present a restrictive reading of these provisions (A) before turning to their reference in certain decisions of the Court which we describe as first wave (B).

### A. A restrictive reading of Articles 3 and 7 of the Protocol

[7] Article 3(1) of the Protocol, on the jurisdiction of the Court, reads 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

1 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso, Judgment on Reparations*, 5 June 2015.

2 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29

3 Dissenting opinion of Judges Gérard Niyungeko and El Hajji Guissé in the *Urban Mkandawire v Republic of Malawi* judgment, 21 June 2013.

Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned".

Article 7, on applicable law, states in one sentence that:
"The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned".

**[8]** Different readings of these two Articles have emerged. Reading them separately, some opinions have argued that their functions should not go beyond the title given to them by the successive drafters of the Convention. Article 3(1) applying strictly and exclusively to the jurisdiction of the Court and the other, Article 7, referring solely to the applicable law. This approach is restrictive and, in fact, does not correspond, on a closer look, to the approach which the Court itself has followed through its case-law since 2009.

**[9]** It was also noted that Article 7 would be a mere repetition of Article 3(1) and is, in this respect, superfluous. Professor Maurice Kamto supports this reading in particular when he states that "Articles 3 and 7 are a legal curiosity"[4]. They would have no equivalent in the statutes of other regional human rights jurisdictions. The "Ouagadougou Protocol should have confined itself to this provision, which makes Article 7 all the more useless as its content is likely to complicate the Court's task"[5].

**[10]** It is not clear whether the drafters of the Protocol intended to exclude certain categories of legal rules, such as custom, general principles of law, etc., from the scope of the Protocol. The use of the phrase "ratified by the States concerned" in both Articles might lead one to believe[6] that the Court should only take into account conventions ratified by States. It would be difficult to explain why the next paragraph, 3(2), recognizes the Court's "jurisdiction". It is well known that for the purpose of establishing the grounds for its jurisdiction, the scope of the applicable law should be opened up. The Court cannot, as will be discussed below, be limited in the reasons for its jurisdiction when it is challenged. In the latter

4 Commentary on Article 7 of the Protocol, *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of an African Court, article-by-article commentary*, edited by M. Kamto, Ed. Bruylant, 2011, pp. 1296 et seq.

5 *Idem.*

6 Professor Maurice Kamto tends towards this appreciation. He states that "The restriction of the law applicable by the Court to the Charter and the said legal instruments creates an effect of implicit amputation of the scope of the relevant rules applicable by that jurisdiction. It deprives the Court and the parties brought before it of the application or invocation of "African practices in conformity with international standards relating to human and peoples' rights, customs generally accepted as law, general principles of law recognised by African nations, as well as case law and doctrine", referred to in Article 61 of the *ACHPR, v Idem*, 1297.

case there is a clear manifestation of the link between Article 3 and Article 7 of the Protocol.

**[11]** This was, in short, the interpretation adopted by the Court on the reading of Rule 39 of its Rules:

> "1. The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the application [...].
>
> 2. For this purpose, "the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".

In calling for "the submission of any information relating to the facts, documents or other materials which it consider to be relevant", the Court wishes to inquire into all aspects of the applicable law, as noted in the heading of Article 7.

**[12]** The other reading is to regard the two Articles as complementary and, where the conflict so requires, as being necessary for the Court to further develop its jurisdiction. This was not the case in the *Mulindahabi* decisions, but the Court has done so on various occasions.

## B. The Court's reading of Articles 3 and 7 in its first wave of decisions

**[13]** The first phase of the Court considered in the interest of the analysis ranges from the *Michelot Yogogombaye*[7] judgment (2009) to the *Femi Falana*[8] judgment (2015). This breakdown shows the evolution of the Court and its judicial involvement on the one hand, and on the other, it makes it possible to periodize its commitments as to the bases of its jurisdiction.

**[14]** The Court has always accepted that the provisions of Articles 3 and 7 provide a firm basis for its jurisdiction to respond to human rights disputes. It has done so from its earliest years. It had perceived the openings left by its jurisdiction as formulated in the Protocol. The former Vice-President of the African Court, Judge Ouguergouz, states in his study that: "Article 3 (1) of the Protocol provides for a very broad substantive jurisdiction of the Court [...]. The liberal nature of this provision is confirmed by Article 7,

7 AfCHPR, *Michelot Yogogombaye v Republic of Senegal*, 15 December 2009; see also, Loffelman (M.), *Recent jurisprudence of the African Court on Human and Peoples' Rights*, Published by Deutshed Gesellschaft...GIZ, 2016, p. 2.

8 AfCHPR, *Femi Falana v African Commission on Human and Peoples' Rights*, Order, 20 November 2015.

entitled ''Applicable law"[9].

**[15]** Two issues are apparent in the provisions of Articles 3(1) and 7 of the Protocol: first, the case where the disputes in question are based from the outset on provisions of the Charter; second, where the Court, not having a clearly defined rule, would have to seek them in conventions ratified by the Respondent States. In reality, the Court has always used both approaches. It has always found itself drawn into international law whenever it is part of the law accepted by States.

**[16]** What the Court is seeking to do from 2011 in the case of *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*:

> The Court also had to rule on the issue of applicabilitý of the Treaty establishing the East Africa Community, in the light of Articles 3(1) and 7 of the Protocol, as well as Article 26(1)(a) of the Rules of Court. These three provisions contain the expression "any other relevant human rights instrument ratified by the States concerned" which expressly refers to three conditions: 1) the instrument in question must be an international treaty, hence the requirement of ratification by the State concerned, 2) the international treaty must be "human rights related" and 3) it must have been ratified by the State Party concerned[10].

**[17]** The 2015 *Femi Falana* case, which completes the first wave of the Court's decisions, expresses in all cases the Court's two-step reasoning on its jurisdiction. In the first stage, it states the basis of its jurisdiction (Article 3(1)) and in the second stage, it gives, through the applicable law (Article 7), the reasons for its choice.

**[18]** In this case, the application was directed against an organ of the African Union, established by the African Charter on Human and Peoples' Rights, namely, the African Commission on Human and Peoples' Rights. Under Article 3(1) of the Protocol, the Court first states that it has jurisdiction to hear and determine 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. It goes on to say that, although the facts giving rise to the complaint relate to human rights violations in Burundi, it was brought in the present case against the Respondent, an entitý which is not a State party

9 Ouguergouz (F.), La Cour africaine des droits de l'homme et des peuples - Gros plan sur le premier organe judiciaire africain à vocation continentale, *Annuaire français de droit international*, volume 52, 2006. pp. 213-240;

10 AfCHPR, *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*, Order, 22 September 2011, §§ 13 and 14.

to the Charter or the Protocol. Finally, in its reasoning in § 16 of the judgment, the Court bases itself on a consideration of general applicable law.

The relationship between the Court and the Respondent is based on the complementarity. Accordingly, the Court and the Respondent State are autonomous partner institutions but work together to strengthen their partnership with a view to protecting human rights throughout the continent. Neither institution has the power to compel the other to take any action.

The Court's application of general law reflects the complementarity between that law and the law that governs its substantive jurisdiction.

**[19]** The same approach is found in the discussion of jurisdiction in the *Zongo* (2013)[11] case. The Court states that: "Under Article 3(1) of the Protocol ... and Article 3(2) of the same Protocol, "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide ...". It goes on to state, appropriately, that :

The Court goes on to note that the application of the principle of the non-retroactivity of treaties, enshrined in Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969, is not in contention between the Parties. What is at issue here is whether the various violations alleged by the Applicants would, if they had occurred, constitute "instantaneous" or "continuing" violations of Burkina Faso's international human rights obligations.

**[20]** It is apparent that the Court's reasoning does not focus strictly on the rules concerning its jurisdiction, but also extends it to the applicable law.

## II. The relationship between Articles 3 and 7 of the Protocol as regards the Court's subject-matter jurisdiction: confirmation in the second wave of decisions

**[21]** The drafters of the Protocol provided judges with a kind of "toolbox" through these two articles, which they would make good use of. They are only bound by the consistency and the motivation of their choice. Indeed, quite obviously, the two articles have often been used together in the Court's second decade of activity. It will first be shown that the Court's approach is also present in

11 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso*, Decision on Preliminary Objections, 21 June 2013, § 61, 62, 63.

international litigation.

## A. The Court's approach is confirmed by the practice in international litigation

**[22]** This approach is common in international litigation even before the African Court was established. It is, in fact, consistent with the logic of law. Its manifestation can be found in jurisprudential work as old as that of the Permanent Court of International Justice (PCIJ), confirmed by the jurisprudence of the International Court of Justice (ICJ).

**[23]** It was by reasoning on its applicable law that the PCJI extended its jurisdiction to human rights issues long before the wave of such law following the Second World War. The august Court was already doing its job of protecting fundamental rights in well-known cases[12].

**[24]** There has been a known shift in the jurisdiction of arbitral tribunals in this area. The jurisdiction of these courts is strictly fixed within conventional limits, but they have integrated human rights issues by making a specific reading of their applicable law[13].

**[25]** The African Court already applies this methodology, which is well known in international law. In addition to generally having the "competence of jurisdiction" in the event of a dispute, the international courts and the international instruments establishing them often give them the legal basis to deploy their jurisdiction. In a complex argumentation the ICJ recalled that it has :

"an inherent power which authorizes it to take all necessary measures, on the one hand, to ensure that, if its jurisdiction on the merits is established, the exercise of that jurisdiction does not prove futile, and, on the other hand, to ensure the regular settlement of all points in dispute...."[14] .

Professors Mathias Forteau and Alain Pellet saw this as a kind of implicit jurisdiction within the competence of the International

12 CPJI, Advisory Opinion, *Minority Schools in Albania*, 6 April 1935; Advisory Opinion, German Settlers in Poland, 10 September 1923; Advisory Opinion, *Treatment of Polish Nationals and Other Persons of Origin*, 4 February 1932

13 Cazala (J.), Protection des droits dc l'homme et contentieux international de l 'investissement, *Les Cahiers de l'Arbitrage*, 2012-4, pp. 899-906. v in particular, Tribunal arbitral CIROI (MS), S.A., 29 May 2003, *Tecnicas Medioambientales Teemed SA v Mexico*, §§ 122-123; S.A., CIRDI, *Azurix Corporation v Argentina,* 14 July 2006, §§ 311-312; see S.A., ICSID (MS), *Robert Azinian & ors v Mexico*, ARB(AF)/97/2, 1 November 1999, §§ 102-103.

14 *Nuclear Tests Case (New Zealand v France)*, Judgment of 20 December 1974, ECR 1974, pp. 259-463

Court of Justice[15].

**[26]** Sometimes the international judge, in order to clarify a position or to explore other aspects inherent in its jurisdiction, uses the applicable law rather than the strict rules which conventionally define and frame its jurisdiction.

**[27]** The affirmation of the role of the ICJ in international human rights law provides an example of this. In 2010, the Court in The Hague rendered its judgment on the merits in the case of *Ahmadou Sadio Diallo - Guinea v Congo-Kinshasa*[16]. The Court ruled on claims of violations of human rights treaties. This case showed that, in addition to having general jurisdiction over the rights of States, the International Court of Justice could without hindrance to its jurisdiction, deal with the question of human rights.

**[28]** In this sense, it may be observed that an increasing number of international courts have specialized in human rights, without having an initial mandate to do so. On closer inspection, this is mainly due to their *applicable law*. The cross-cutting nature of the rules of international law has a clear impact on the deployment of jurisdiction. It is thus understandable that in addition to the provisions framing the jurisdiction, the Protocol establishing the African Court has taken them over in terms of applicable law.

**[29]** The same analysis can be made with regard to the European Court of Human Rights. In the *Nicolaï Slivenko*[17] judgment of 2003, the Court stated that it should not "re-examine the facts established by the national authorities and having served as a

15 Forteau (M.) and Pellet (A.), *Droit international public*, Ed. LGDJ, 2009, p. 1001; Visscher (Ch. De), Quelques aspects récents du droit procédural de la CIJ, Ed. Pédone, 1966, 219 p.; Santulli (C.), Les juridictions de droit international : essai d'identification, AFDI, 2001, pp. 45-61.

16 The ICJ states that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights". Diallo was arrested and detained in 1995-1996 with a view to his deportation, the Democratic Republic of the Congo violated article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights. This case showed that the general jurisdiction enjoyed by the ICJ, which relates to "any matter of international law" under Article 36 §2 (b) of its Statute, can be extended to human rights.

17 ECHR, *Nicolai Slivenko v Latvia*, 9 October 2003.

basis for their legal assessment" by reviewing the "findings of the national courts as to the particular circumstances of the case or the legal characterization of those circumstances in domestic law", but at the same time recognized that it was part of its task "to review, from the Convention perspective, the reasoning underlying the decisions of the national courts". The doctrine derived from this idea that the Court was increasing the intensity of its review of judicial decisions. This can only be achieved through a broad reading of the law which the Court is mandated to apply. It can thus be said that the applicable law and jurisdiction stand together, the latter is undoubtedly a common thread.

## B. Links established between Articles 3 and 7 in the second wave of Court decisions

**[30]** Where the Court finds a difficulty or possible challenge to its jurisdiction, it shall combine the two Articles 3(1) and 7. It uses these two complementary texts. It does not, however, feel bound to indicate explicitly the use thus made of Article 7, and that is what we regret.

**[31]** In its *Abubakari*[18] judgment, the Court emphasizes :

28. More generally, the Court would only act as an appellate court if, inter alia, it applied to the case the same law as the Tanzanian national courts, i.e., Tanzanian law. However, this is certainly not the case in the cases before it, since by definition it applies exclusively, in the words of Article 7 of the Protocol, "the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned".

In the following paragraph, it concludes:

Based on the foregoing, the Court concludes that it has jurisdiction to examine whether the treatment of the case by the Tanzanian domestic courts has been in conformity with the requirements laid down in particular by the Charter and any other applicable international human rights instruments. Accordingly, the Court dismisses the objection raised in this regard by the Respondent State.

**[32]** In the 2016 case, *Ingabire Victoire Umuhoza v Republic of Rwanda*[19], the Court states, once again, without citing Article 7, that :

As regards the application of the Vienna Convention to the present case, the Court observes that while the declaration made under Article 34(6)

18 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29.

19 AfCHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Decision on the Withdrawal of the Declaration, 5 September 2016

emanates from the Protocol, which is governed by the law of treaties, the declaration itself is a unilateral act which is not governed by the law of treaties. Accordingly, the Court concludes that the Vienna Convention does not apply directly to the declaration, but may be applied by analogy, and the Court may draw on it if necessary. (...) In determining whether the withdrawal of the Respondent's declaration is valid, the Court will be guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law. With regard to the rules governing the recognition of jurisdiction of international courts, the Court notes that the provisions relating to similar declarations are of an optional nature. This is demonstrated by the provisions on recognition of the jurisdiction of the International Court of Justice,4 the European Court of Human Rights5 and the Inter-American Court of Human Rights", §§ 55 and 56.6.

**[33]** However, the Court says that it is guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law, it is a recourse to Article 7 of the Protocol. In that the latter article allows it to rely on any relevant human rights instrument.

**[34]** On its jurisdiction in the *Armand Guehi*[20] case in 2016, the Court proceeds in the same way. It cites Article 3(1), but resorts to other texts. One wonders whether the Court simply finds its jurisdiction in respect of interim measures or whether it simply applies provisions outside the Charter to do so. It says:

"Having regard to the particular circumstances of the case, which reveal a risk that the death penalty might be imposed, thereby infringing the Applicant's rights under Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights, the Court decides to exercise its jurisdiction under Article 27(2) of the Protocol", § 19.

**[35]** The complementarity between these two Articles, which should be cited together, is expressed. For in Article 3(1) the Court finds its jurisdiction without difficulty and bases it on it; and in Article 7 the Court, by having recourse to other texts, is also founded in law by virtue of the fact that its applicable law authorises it to do so. Accordingly, in the *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire*[21] judgment also delivered in 2016, from § 42 to § 65, the Court sets out a reasoning for establishing its jurisdiction. This can only be understood by reading the two articles, 3(1) and 7 together. In particular, it says

20 AfCHPR, *Armand Guehi v United Republic of Tanzania,* Interim Measures Order, 18 March 2016

21 CAfDHP, *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire (Merits),* 18 November 2016.

that :

"The African Institute of International Law notes that the link between democracy and human rights is established by several international human rights instruments, including the Universal Declaration of Human Rights, Article 21(3), (...) The Institute further maintains that the African Charter on Democracy is a human rights instrument in that it confers rights and freedoms on individuals. According to the Institute, the Charter explains, interprets and gives effect to the rights and freedoms contained in the Charter on Human Rights, the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action (1999), the Declaration on the Principles Governing Democratic Elections in Africa and the 2003 Kigali Declaration".

**[36]** The Conclusion on jurisdiction that follows from this series of instruments in § 65 is suggestive:

"The Court concludes that the African Charter on Democracy and the ECOWAS Protocol on Democracy are human rights instruments, within the meaning of Article 3 of the Protocol, and that it is therefore competent to interpret and apply them.

**[37]** It follows that the Court in its first decade uses Article 3(1) to determine its jurisdiction as set out in the Protocol. As in established judicial practice, the Court uses the applicable law recognized by the "States concerned" to extend or further establish its jurisdiction. In this case, it makes use of Article 7 of the Protocol. The question of priority between the two Articles does not arise, as it is a matter of the particular case and of the choice made by the Court. The two Articles are equally involved in the general question of the Court's jurisdiction to hear cases.

**[38]** In its judgment in Jonas (2017), at paragraphs 28, 29 and 30, the Court goes beyond Article 3 on its own motion, stating that:

"Article 3 of the Protocol does not give the Court the latitude to decide on the issues raised by the Applicant before the domestic courts, to review the judgments of those courts, to assess the evidence and to reach a conclusion", § 25.

**[39]** It concludes that it has jurisdiction as follows:

The Court reiterates its position that it is not an appellate body in respect of decisions of the domestic courts. However, as the Court emphasised in its judgment in *Alex Thomas v the United Republic of Tanzania*, and confirmed in its judgment in *Mohamed Abubakari v the United Republic of Tanzania*, this circumstance does not affect its jurisdiction to examine whether proceedings before national courts meet the international standards established by the Charter or other applicable human rights instruments. The Court therefore rejects the objection raised in this regard by the Respondent State and concludes that it has subject-matter

jurisdiction[22]. The Court does not appear to be taking a position on the question of which of the two Articles is the basis for its jurisdiction.

**[40]** In order to refute the Respondent State's contention and to establish its jurisdiction in the *Nguza*[23] Judgment, the Court begins by relying first on its own jurisprudence[24]. It goes on to have recourse to the applicable law in general, namely:

"as it stressed in the judgment of 20 November 2016 in the case of *Alex Thomas v United Republic of Tanzania* and confirmed in the judgment of 3 June 2016 in the case of *Mohamed Abubakari v United Republic of Tanzania*, this does not exclude its jurisdiction to assess whether proceedings before national courts meet the international standards established by the Charter or by other applicable human rights instruments to which the respondent State is a party", §§ 33 et seq.

It then infers jurisdiction from this and refers to Article 3 of the Protocol:

Accordingly, the Court rejects the objection raised by the Respondent State, ….". It has subject-matter jurisdiction under Article 3(1) of the Protocol, which provides that the Court "shall have jurisdiction in all cases and disputes submitted to it ...", § 36.

**[41]** This reversal of logic by the Court is not in vain. It makes it possible to appreciate how the applicable law is not external to the determination of jurisdiction, which is well defined by the Protocol.

**[42]** Orders for provisional measures do not present the same difficulties. It may be observed, as in the *Ajavon*[25] Case, that the Court's *prima facie* decision does not require recourse to its applicable law (7 Article). This is stated in paragraph 28:

"However, before ordering interim measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction".

22 AfCHPR, *Christopher Jonas v United Republic of Tanzania*, Judgment, 28 September 2017: Convicted and sentenced for robbery of money and various other valuables, Mr. Christopher Jonas filed this application alleging a violation of his rights during his detention and trial. The Court found that the evidence presented during the domestic proceedings had been assessed according to the requirements of a fair trial, but that the fact that the applicant had not received free legal aid constituted a violation of the Charter.

23 AfCHPR, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Republic of Tanzania*, 23 March 2018.

24 AfCHPR, 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi*, 15 March 2013, § 14; *Alex Thomas v United Republic of Tanzania*, 20 November 2015, §; 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania*, 28 March 2014, § 114; *Ernest Francis Mtingwi v Republic of Malawi*, 15 March 2013, § 14.

25 AfCHPR, *Sébastien Germain Ajavon v Republic of Benin*, Order, 7 December 2018.

The Court does not have such jurisdiction.

***

**[43]** Article 3, in particular the first paragraph, sets out the scope of the Court's jurisdiction. However, this cannot be understood without the law which the Court applies, that is, Article 7, with which it should be more regularly associated in its decisions. This scope of jurisdiction is not limited...as long as the Court is within its applicable law, it is within its jurisdiction. This place of applicable law is also present when discussing the Court's jurisdiction to hear a case under Article 3(2). The links between these articles are at the root, they are ontological.

## Mulindahabi v Rwanda (ruling) (2020) 4 AfCLR 328

Application 005/2017, *Fidèle Mulindahabi v Republic of Rwanda*

Ruling (admissibility), 26 June 2020. Done in English and French, the French text being authoritative.

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

Recused under Article 22: MUKAMULISA

The Applicant, who had lost domestic legal action against an insurance company, brought this action against the Respondent State alleging a violation of a number of his Charter protected rights. The Court declared this action inadmissible for failure to file within a reasonable time after exhaustion of legal remedies.

**Admissibility** (assessment of reasonableness of time limit, 43-46)

Separate opinion: BEN ACHOUR AND TCHIKAYA

**Jurisdiction** (material jurisdiction, 6,10)

## I. The Parties

**1.** Fidèle Mulindahabi (hereinafter referred to as "the Applicant"), is a national of the Republic of Rwanda, residing in Kigali, an owner of vehicle no. PAA0162.

**2.** The Application is filed against the Republic of Rwanda (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 25 May 2004. It also deposited on 22 January 2013, the Declaration provided for 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, the Respondent State notified the Chairperson of the African Union Commission of its intention to withdraw the said Declaration. The African Union Commission transmitted to the Court, the notice of withdrawal on 3 March 2016. By a ruling dated 3 June 2016, the Court decided that the withdrawal by the Respondent State would take effect from 1 March 2017.[1]

1 See *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 540 § 67.

## II. Subject of the Application

### A. Facts of the matter

**3.** The Applicant alleges that on 3 March 2013, his vehicle No. PAA0162 was involved in a traffic accident with a Toyota Carina ERAB620A insured by CORAR Insurance Company, which was found to be at fault for the accident.

**4.** On 25 March 2013, the Applicant wrote to CORAR Insurance Company, requesting payment of one million Rwandan francs (RWF 1,000,000), as an advance, to repair his house, which had been destroyed by a natural disaster.

**5.** On 5 April 2013, CORAR Insurance Company granted the Applicant one million Rwandan francs (RWF 1,000,000) as an advance payment. The repair of his vehicle was completed on 18 June 2013. On 23 June 2013, the Insurance Company paid him the cost of repairing the vehicle, amounting to One Hundred and Ten Thousand and Eight Hundered Rwandan francs (RWF 110,800) as well as the cost of transporting the vehicle from the scene of the accident to the garage and the cost of processing the police documents .

**6.** On 12 August 2013, the Applicant wrote to CORAR Insurance Company requesting compensation for the loss of income suffered during the three (3) months that his vehicle was in the garage for repairs. The company replied that it did not owe him anything, as the advance of one million Rwandan francs (RWF 1,000,000 ) that had been paid to him for the repair of the vehicle had instead been used to renovate his house, which is the reason why the vehicle had remained in the garage for an extended period of time.

**7.** The Applicant filed a lawsuit against CORAR Insurance Company, alleging loss of income and the case was registered at the registry of the Court of First Instance under number Rc0865 / 13 / TGI / NYGE. On 4 February 2014, the Court of First Instance dismissed his complaints on the grounds that he had used the money paid to him by CORAR Insurance Company to carry out repair work on his house, even though he had indicated that he was not able to repair his house because he had not obtained the authorisation from the competent authorities to do so.

**8.** The Applicant appealed to the Supreme Court, which was registered in the Court Registry under number RCA0087 / 14 / HC / KIG; on 24 November 2014, the Supreme Court delivered its judgment confirming the judgment of the Court of First Instance

on the same grounds.

**9.** With regard to the house, the Applicant submits that, he had maintained that he had not carried out any repairs in contradiction to the judgment where the, Court concluded (with regard to the vehicle) that he had used the advance payment made to him by CORAR Insurance Company to repair the house, and this violates his right to a fair trial.

## B. Alleged violations

**10.** The Applicant contends that the Respondent State is responsible for:

i. violating his right to a fair trial by an independent and impartial tribunal to determine his rights and obligations under Article 10 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 14 (1) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR").

ii. Failure to ensure that the competent authorities execute the judgment rendered in favour of the Applicant pursuant to Article 2(3)(c) of the ICCPR.

iii. Failure to guarantee his right to have his case heard under Article 7(1)(a)(d) of the Charter.

iv. Failure to ensure the independence of the judiciary and the availability, establishment and improvement of competent national institutions for the promotion and protection of the rights and freedoms guaranteed by the Charter and provided for in Article 26 thereof.

v. Failure to guarantee the right to equality before the law and equal protection of the law, in accordance with Article 7 of the Universal Declaration of Human Rights, Article 26 of the ICCPR and Article 3 of the Charter.

## III. Summary of the Procedure before the Court

**11.** The Application was filed on 24 February 2017. The Respondent as well as other entities mentioned in the Protocol were notified .

**12.** On 9 May 2017, the Registry received a letter from the Respondent State reminding the Court that it had withdrawn its Declaration under Article 34(6) of the Protocol and that it would not participate in any proceedings before the Court. The Respondent State therefore, requested the Court to cease communicating any information relating to cases concerning it.

**13.** On 22 June 2017, the Court acknowledged receipt of the Respondent State's said correspondence and informed the Respondent State that it would nonetheless be notified of all the

documents in matters relating to Rwanda in accordance with the Protocol and the Rules .

**14.** On 25 July 2017, the Court granted the Respondent State an initial extension of forty-five (45) days to file its Response. On 23 October 2017, the Court granted a second extension of forty-five (45) days, indicating that it would render a default judgment after the expiration of this extension if the Respondent State failed to file a Response.

**15.** On 19 July 2018, the Applicant was given thirty (30) days to file his submissions on reparations but no response was received,

**16.** On 18 October 2018, the Respondent State was notified that it was granted a final extension of forty-five (45) days to file the Response and that, thereafter it would render a judgment in default in the interest of justice in accordance with Rule 55 of its Rules.

**17.** Although the Respondent State received all the notifications, it did not respond to any of them. Accordingly, the Court will render a judgment in default in the interest of justice and in accordance with Rule 55 of the Rules.

**18.** On 28 February 2019, pleadings were closed and the parties were duly notified.

## IV. Prayers of the Parties

**19.** The Applicant prays the Court to take the following measures:

i. find that Rwanda has violated the human rights instruments to which it is a party.

ii. revise the judgment in case No. RCA0087 / 14 / HC / KIG and annul all the judgments rendered.

iii. order the Respondent State to comply with human rights law.

**20.** The Applicant did not file any specific claim for compensation.

**21.** The Respondent State did not participate in the proceedings before this Court. Therefore, it did not make any prayers in the instant case.

## V. Non appearance of the Respondent State

**22.** Rule 55 of the Rules provides that:

1. Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings.

2. Before acceding to the application of the party before it, the Court

shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law.

**23.** The Court notes that the afore-mentioned Rule 55 in its paragraph 1 sets out three conditions, namely: i) the default of one of the parties; ii) the request made by the other party; and iii) the notification to the defaulting party of both the application and the documents on file.

**24.** On the default of one of the parties, the Court notes that on 9 May 2017, the Respondent State had indicated its intention to suspend its participation and requested the cessation of any transmission of documents relating to the proceedings in the pending cases concerning it. The Court notes that, by these requests, the Respondent State has voluntarily refrained from asserting its defence.

**25.** With respect to the other party's request for a judgment in default, the Court notes that in the instant case it should, in principle, have given a judgment in default only at the request of the Applicant. However, the Court considers, that, in view of the proper administration of justice, the decision to rule by default falls within its judicial discretion. In any event, the Court shall have jurisdiction to render judgment in default suo motu if the conditions laid down in Rule 55(2) of the Rules are fulfilled

**26.** Lastly, with regard to the notification of the defaulting party; the Court notes that the Application was filed on 24 February 2017. The Court further notes that from 31 March 2017, the date of transmission of the notification of the Application to the Respondent State to 28 February 2019, the date of the closure of pleadings, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. The Court concludes thus, that the defaulting party was duly notified.

**27.** On the basis of the foregoing, the Court will now determine whether the other requirements under Rule 55 of the Rules are fulfilled, that is: it has jurisdiction, that the application is admissible and that the Applicant's claims are founded in fact and in law.

## VI. Jurisdiction

**28.** 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, under Rule 39 (1) of its Rules, "the Court shall conduct a preliminary examination of its

jurisdiction ...".

**29.** After a preliminary examination of its jurisdiction and having found that there is nothing in the file to indicate that it does not have jurisdiction in this case, the Court finds that it has:

i. material jurisdiction by virtue of the fact that the Applicant alleges a violation of Articles 7(1)(a)(d) and 26 of the Charter, Articles 2(3)(c) and 14(1) of the ICCPR to which the Respondent State is a party and Article 10 of the UDHR[2].

ii. personal jurisdiction, insofar as, as stated in paragraph 2 of this Ruling, the effective date of the withdrawal of the Declaration by the Respondent State is 1 March 2017.[3]

iii. temporal jurisdiction, in so far as, the alleged violations took place after the entry into force for the Respondent State of the Charter (31 January 1992), of the ICCPR (16 April 1975), and the Protocol (25 January 2004).

iv. territorial jurisdiction, since the facts of the case and the alleged violations occurred in the territory of the Respondent State.

**30.** From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

## VII. Admissibility

**31.** Pursuant to the provisions 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.** Furthermore, under 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 these Rules".

**33.** Rule 40 of the Rules which restates the provisions of Article 56 of the Charter, sets out the conditions 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'srequest for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;

2 See *Anudo Ochieng Anudo v United Republic of Tanzania*,(merits) (2018) 2 AfCLR 248, §76; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (2018) 2 AfCLR 314, §33.

3 See paragraph 2 of this Judgment.

4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obviousthat 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 ".

**34.** The Court notes that the conditions of admissibility set out in Rule 40 of the Rules are not in contention between the parties, as the Respondent State having decided not to take part in the proceedings did not raise any objections to the admissibility of the Application. However, pursuant to Rule 39(1) of the Rules, the Court is obliged to determine the admissibility of the Application.

**35.** It is clear from the record that the Applicant is identified. The Application is not incompatible with the Constitutive Act of the African Union or the Charter. It does not contain disparaging or insulting language and is not based exclusively on information disseminated through the media. There is also nothing on the record to indicate that the present Application concerns a case which has been settled in accordance with either the principles of the United Nations Charter, the OAU Charter or the provisions of the Charter.

**36.** With regard to the exhaustion of local remedies, the Court reiterates that, as it has established in its case-law: "... the remedies which must be exhausted by the Applicants are ordinary judicial remedies"[4], unless it is clear that such remedies are not available, effective and sufficient or that the procedure provided for exhausting them is unduly prolonged.[5]

**37.** Having regards to the facts of the case, the Court finds that the Applicant had instituted a case before the Court of First Instance, which dismissed it in a judgment delivered on 4 February 2014. He then appealed against the decision to the Supreme Court, which upheld the decision of the Court of First Instance on 24

4 *Mohamed Abubakari v Tanzania* (merits) (2016) 1AfCLR 599 § 64. See also *Alex Thomas v Tanzania* (merits) (2015) 1 ACCR 465 § 64 and *Wilfred Onyango Nganyi v Tanzania* (merits) *op.cit.*, § 95.

5 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, § 77. See also *Peter Joseph Chacha v Tanzania* (admissibility) (2014) 1 AfCLR 398, § 40.

November 2014. The Court, therefore, finds that the Applicant has exhausted the available local remedies.

**38.** With regard to the conditions for filing applications within a reasonable time, the Court notes that Article 56(6) of the Charter does not specify any time limit within which a case must be brought before it. Rule 40(6) of the Rules of Court, which essentially restates the provisions of Article 56(6) of the Charter, simply requires the Application to "be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter.

**39.** It emerges from the record that local remedies were exhausted on 24 November 2014, when the Supreme Court delivered its judgment. It is therefore that date which must be regarded as the starting point for calculating and assessing the reasonableness of the time, as provided for in Rule 40(6) of the Rules and Article 56(6) of the Charter.

**40.** The present Application was filed on 24 February 2017, two (2) years and three (3) months after the exhaustion of local remedies. The Court must, therefore, decide whether or not this period is reasonable within the meaning of Charter and the Rules.

**41.** The Court recalls that "... the reasonableness of a time-limit for referral depends on the particular circumstances of each case, and must be assessed on a case-by-case basis ..."[6]

**42.** The Court has consistently held that the six-month time limit expressly provided for in other international human rights instruments cannot be applied under Article 56(6) of the Charter. The Court has therefore adopted a case-by-case approach to assessing what constitutes a reasonable time limit, within the meaning of Article 56(6) of the Charter.[7]

**43.** The Court considers that, in accordance with its established jurisprudence on the assessment of reasonable time, the determining factors are, *inter alia*, the status of the Applicant,[8] the conduct of the Respondent State[9] or its officials. Furthermore, the Court assesses the reasonableness of the time limit on the basis

6 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso* (preliminary objections) (2013) 1AfCLR 197, § 121.

7 *Norbert Zongo ibid*. See also *Alex Thomas v Tanzania* (merits) *op.cit*, §§ 73 and 74.

8 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465, § 74.

9 *Anudo Ochieng Anudo v Tanzania* (merits) (2018), § 58.

of objective considerations.[10]

**44.** In the case of *Mohamed Abubakari v Tanzania*, the Court held as follows: the fact that an Applicant was in prison; he indigent; unable to pay for a lawyer; did not have the free assistance of a lawyer since 14 July 1997; was illiterate; could not have been aware of the existence of this Court because of its relatively recent establishment; are all circumstances that justified some flexibility in assessing the reasonableness of the timeline for seizure of the Court. [11]

**45.** Furthermore, in *Alex Thomas v Tanzania*, the Court justified its position as follows:

> Considering the Applicant's situation, that he is a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records, and his attempt to use extraordinary measures, that is, the Application for review of the Court of Appeal's decision, we find that these constitute sufficient grounds to explain why he filed the Application before this Court on 2 August 2013, being three (3) years and five (5) months after the Respondent made the declaration under Article 34(6) of the Protocol. For these reasons, the Court finds that the Application has been filed within a reasonable time after the exhaustion of local remedies as envisaged by Article 56(5) of the Charter.[12]

**46.** It is also clear from the Court's case-law that the Court declared admissible an application brought before it three (3) years and six (6) months after the Respondent State deposited the Declaration under Article 34(6) of the Protocol accepting the Court's jurisdiction, having concluded that: "the period between the date of its referral of the present case, 8 October 2013, and the date of the filing by the Respondent State of the Declaration of recognition of the Court's jurisdiction to hear individual applications, 29 March 2010, is a reasonable time within the meaning of Article 56(6) of the Charter.[13]

**47.** In the instant case, the Applicant was not imprisoned and his freedom of movement was not restricted after exhaustion of local remedies; he is not indigent and his level of education not only enabled him to defend himself, as evidenced by this Application filed on24 February 2017, but also enabled him to be aware of the existence of the Court and the procedure for bringing the case within a reasonable time. Moreover, the Respondent State

10 As the date of deposit of the Declaration recognising the Court's jurisdiction, in accordance with Article 34(6) of the Protocol.

11 *Mohamed Abubakari v Tanzania* (merits) *op.cit*, § 92.

12 *Alex Thomas v Tanzania op.cit*, § 74.

13 *Mohamed Aubakari v Tanzania* (merits), § 93

deposited the Declaration recognising the Court's jurisdiction two (2) years and three (3) months before the exhaustion of local remedies. Finally, during this period, the Applicant has not pursued any extraordinary judicial remedies, such as an application for review.

**48.** In light of the foregoing, the Court concludes that the period of two (2) years and three (3) months that elapsed before the Applicant brought his Application is unreasonable within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules.

## VIII. Costs

**49.** The Court notes that Rule 30 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".

**50.** Taking into account the circumstances of this case, the Court decides that each party shall bear its own costs.

## IX. Operative part

**51.** For these reasons,

The Court:

*Unanimously and in default*,

i. *Declares* that it is has jurisdiction;

ii. *Declares* the Application inadmissible;

iii. *Declares* that each party shall bear its own costs.

***

## Separate opinion: BEN ACHOUR AND TCHIKAYA

**1.** We concur with the position adopted by the Court on admissibility, jurisdiction and operative provisions in the four *Mulindahabi v Rwanda* decisions adopted by unanimous decision of the judges sitting on the bench.

**2.** By this Opinion, we wish to express a position on a point of law. This opinion clarifies a point relating to the Court's subject-matter jurisdiction on which our Court has often proceeded by economy

of argument.

**3.** In our view, Article 3 of the Protocol, while taking account of the general framework of jurisdiction it lays down, should also be understood in terms of the scope given to it by Article 7 of the same Protocol. Since the *Mulindahabi* species do not pose any particular problems of jurisdiction, there were no a priori reasons for the emergence of such a debate. However, the question did emerge and therefore required clarification which would be valid for other judgments delivered or to be delivered by the Court.

**4.** A breadcrumb trail structures the analysis. These are two waves of decisions that characterize the Court's jurisprudence. The cut-off point is generally in 2015, when the Court delivered its *Zongo*[1] judgment. The decision on jurisdiction in this case is given in 2013. It can be supported because a reflection seems to be beginning on the choices in terms of procedure with the *Mohamed Abubakari* judgment in 2016[2]. The Court begins to work, as noted by Judges Niyungeko and Guissé, more "distinctly: first on all questions relating to its jurisdiction (both the preliminary objection and the question of its jurisdiction under the Protocol), and then on all questions relating to the admissibility of the application"[3].

**5.** Thus, in the first part, we shall examine the state of the matter, i.e., the envisaged readings of Articles 3 and 7 of the Protocol in determining the Court's subject-matter jurisdiction. In the second part, devoted to the second wave of decisions, the use of Articles 3 and 7 will evolve.

## I. Article 3 and 7 of the Protocol through the Court's doctrine and case-law

**6.** In our view, the two Articles 3 and 7 of the Protocol should be read together, as one sheds light on the other. They are complementary. For the reasons that follow, they cannot be separated. The Court's subject-matter jurisdiction is therefore based on both the first paragraph of Article 3 and Article 7 of the Protocol. We shall first present a restrictive reading of these provisions (A) before turning to their reference in certain decisions of the Court which

1 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso, Judgment on Reparations*, 5 June 2015.

2 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29

3 Dissenting opinion of Judges Gérard Niyungeko and El Hajji Guissé in the *Urban Mkandawire v Republic of Malawi* judgment, 21 June 2013.

we describe as first wave (B).

## A. A restrictive reading of Articles 3 and 7 of the Protocol

**7.** Article 3(1) of the Protocol, on the jurisdiction of the Court, reads 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".

Article 7, on applicable law, states in one sentence that:
"The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned".

**8.** Different readings of these two Articles have emerged. Reading them separately, some have argued that their functions should not go beyond the title given to them by the successive drafters of the Convention. Article 3(1) applying strictly and exclusively to the jurisdiction of the Court and the other, Article 7, referring solely to the applicable law. This approach is restrictive and, in fact, does not correspond, on closer inspection, to the approach which the Court itself has followed through its case-law since 2009.

**9.** It was also noted that Article 7 would be a mere repetition of Article 3(1) and is, in this respect, superfluous. Professor Maurice Kamto supports this reading in particular when he states that "Articles 3 and 7 are a legal curiosity"[4]. They would have no equivalent in the statutes of other regional human rights jurisdictions. The "Ouagadougou Protocol should have confined itself to this provision, which makes Article 7 all the more useless as its content is likely to complicate the Court's task"[5].

**10.** It is not clear whether the drafters of the Protocol intended to exclude certain categories of legal rules, such as custom, general principles of law, etc., from the scope of the Protocol. The use of the phrase "ratified by the States concerned" in both Articles might lead one to believe[6] that the Court should only take into account

4 Commentary on Article 7 of the Protocol, *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of an African Court, article-by-article commentary*, edited by M. Kamto, Ed. Bruylant, 2011, pp. 1296 et seq.

5 *Idem*.

6 Professor Maurice Kamto tends towards this appreciation. He states that "The restriction of the law applicable by the Court to the Charter and the said legal instruments creates an effect of implicit amputation of the scope of the relevant rules applicable by that jurisdiction. It deprives the Court and the parties brought before it of the application or invocation of "African practices in conformity with international standards relating to human and peoples' rights, customs generally

conventions ratified by States. It would be difficult to explain why the next paragraph, 3(2), recognizes the Court's "jurisdiction". It is well known that for the purpose of establishing the grounds for its jurisdiction, the scope of the applicable law should be opened up. The Court cannot, as will be discussed below, be limited in the reasons for its jurisdiction when it is challenged. In the latter case there is a clear manifestation of the link between Article 3 and Article 7 of the Protocol.

**11.** This was, in short, the interpretation adopted by the Court on the reading of Rule 39 of its Rules:

"1. The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the application [...].

2. … the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".

In calling for "the submission of any information relating to the facts, documents or other materials which it consider to be relevant", the Court wishes to inquire into all aspects of the applicable law, as noted in the heading of Article 7.

**12.** The other reading is to regard the two Articles as complementary and, where the conflict so requires, as being necessary for the Court to further develop its jurisdiction. This was not the case in the *Mulindahabi* decisions, but the Court has done so on various occasions.

## B. The Court's reading of Articles 3 and 7 in its first wave of decisions

**13.** The first phase of the Court considered in the interest of the analysis ranges from the *Michelot Yogogombaye*[7] judgment (2009) to the *Femi Falana*[8] judgment (2015). This breakdown shows the evolution of the Court and its judicial involvement on the one hand, and on the other, it makes it possible to periodize its commitments as to the bases of its jurisdiction.

**14.** The Court has always accepted that the provisions of Articles 3 and 7 provide a firm basis for its jurisdiction to respond to human

accepted as law, general principles of law recognised by African nations, as well as case law and doctrine", referred to in Article 61 of the ***ACHPR, v Idem***, 1297.

7 AfCHPR, ***Michelot Yogogombaye v Republic of Senegal***, 15 December 2009; see also, Loffelman (M.), ***Recent jurisprudence of the African Court on Human and Peoples' Rights***, Published by Deutshed Gesellschaft...GIZ, 2016, p. 2.

8 AfCHPR, ***Femi Falana v African Commission on Human and Peoples' Rights***, Order, 20 November 2015.

rights disputes. It has done so from its earliest years. It had perceived the openings left by its jurisdiction as formulated in the Protocol. The former Vice-President of the African Court, Judge Ouguergouz, states in his study that: "Article 3 (1) of the Protocol provides for a very broad substantive jurisdiction of the Court [...]. The liberal nature of this provision is confirmed by Article 7, entitled ''Applicable law"[9].

**15.** Two issues are apparent in the provisions of Articles 3(1) and 7 of the Protocol: first, the case where the disputes in question are based from the outset on provisions of the Charter; second, where the Court, not having a clearly defined rule, would have to seek them in conventions ratified by the Respondent States. In reality, the Court has always used both approaches. It has always found itself drawn into international law whenever it is part of the law accepted by States.

**16.** What the Court is seeking to do from 2011 in the case of *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*:

The Court also had to rule on the issue of applicabilitý of the Treaty establishing the East Africa Community, in the light of Articles 3(1) and 7 of the Protocol, as well as Article 26(1)(a) of the Rules of Court. These three provisions contain the expression "any other relevant human rights instrument ratified by the States concerned" which expressly refers to three conditions: 1) the instrument in question must be an international treaty, hence the requirement of ratification by the State concerned, 2) the international treaty must be "human rights related" and 3) it must have been ratified by the State Party concerned[10].

**17.** The 2015 *Femi Falana* case, which completes the first wave of the Court's decisions, expresses in all cases the Court's two-step reasoning on its jurisdiction. In the first stage, it states the basis of its jurisdiction (Article 3(1)) and in the second stage, it gives, through the applicable law (Article 7), the reasons for its choice.

**18.** In this case, the application was directed against an organ of the African Union, established by the African Charter on Human and Peoples' Rights, namely, the African Commission on Human and Peoples' Rights. Under Article 3(1) of the Protocol, the Court first states that it has jurisdiction to hear and determine all cases

9 Ouguergouz (F.), La Cour africaine des droits de l'homme et des peuples - Gros plan sur le premier organe judiciaire africain à vocation continentale, *Annuaire français de droit international*, volume 52, 2006. pp. 213-240;

10 AfCHPR, *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*, Order, 22 September 2011, §§ 13 and 14.

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. It goes on to say that, although the facts giving rise to the complaint relate to human rights violations in Burundi, it was brought in the present case against the Respondent, an entitý which is not a State party to the Charter or the Protocol. Finally, in its reasoning in § 16 of the judgment, the Court bases itself on a consideration of general applicable law.

The relationship between the Court and the Respondent is based on the complementaritý. Accordingly, the Court and the Respondent State are autonomous partner institutions but work together to strengthen their partnership with a view to protecting human rights throughout the continent. Neither institution has the power to compel the other to take any action.

The Court's application of general law reflects the complementarity between that law and the law that governs its substantive jurisdiction.

**19.** The same approach is found in the discussion of jurisdiction in the *Zongo* (2013)[11] case. The Court states that: "Under Article 3(1) of the Protocol ... and Article 3(2) of the same Protocol, "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide ...". It goes on to state, appropriately, that :

The Court goes on to note that the application of the principle of the non-retroactivitý of treaties, enshrined in Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969, is not in contention between the Parties. What is at issue here is whether the various violations alleged by the Applicants would, if they had occurred, constitute "instantaneous" or "continuing" violations of Burkina Faso's international human rights obligations.

**20.** It is apparent that the Court's reasoning does not focus strictly on the rules concerning its jurisdiction, but also extends it to the law applied by it.

## II. The relationship between Articles 3 and 7 of the Protocol as regards the Court's subject-matter jurisdiction: confirmation in the second wave of decisions

**21.** The drafters of the Protocol provided judges with a kind of "toolbox"

11 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabe Human and Peoples' Rights Movement v Burkina Faso*, Decision on Preliminary Objections, 21 June 2013, § 61, 62, 63.

through these two articles, which they would make good use of. They are only bound by the consistency and the motivation of their choice. Indeed, quite obviously, the two articles have often been used together in the Court's second decade of activity. It will first be shown that the Court's approach is also present in international litigation.

## A. The Court's approach is confirmed by the practice in international litigation

**22.** This approach is known from international litigation even before the African Court was established. It is, in fact, consistent with the logic of law. Its manifestation can be found in jurisprudential work as old as that of the Permanent Court of International Justice (PCIJ), confirmed by the jurisprudence of the International Court of Justice (ICJ).

**23.** It was by reasoning on its applicable law that the PCJI extended its jurisdiction to human rights issues long before the wave of such law following the Second World War. The august Court was already doing its job of protecting fundamental rights in well-known cases[12].

**24.** There has been a known shift in the jurisdiction of arbitral tribunals in this area. The jurisdiction of these courts is strictly fixed within conventional limits, but they have integrated human rights issues by making a specific reading of their applicable law[13].

**25.** The African Court already applies this methodology, which is well known in international law. In addition to generally having the "competence of jurisdiction" in the event of a dispute, the international courts and the international instruments establishing them often give them the legal basis to deploy their jurisdiction. In a complex argumentation the ICJ recalled that it has :

"an inherent power which authorizes it to take all necessary measures, on the one hand, to ensure that, if its jurisdiction on the merits is established,

12 CPJI, Advisory Opinion, M*inority Schools in Albania*, 6 April 1935; Advisory Opinion, German Settlers in Poland, 10 September 1923; Advisory Opinion, ***Treatment of Polish Nationals and Other Persons of Origin***, 4 February 1932

13 Cazala (J.), Protection des droits dc l'homme et contentieux international de l 'investissement, ***Les Cahiers de l'Arbitrage***, 2012-4, pp. 899-906. v in particular, Tribunal arbitral CIROI (MS), S.A., 29 May 2003, ***Tecnicas Medioambientales Teemed SA v Mexico***, §§ 122-123; S.A., CIRDI, ***Azurix Corporation v Argentina***, 14 July 2006, §§ 311-312; see S.A., ICSID (MS), ***Robert Azinian & ors v Mexico***, ARB(AF)/97/2, 1 November 1999, §§ 102-103.

the exercise of that jurisdiction does not prove futile, and, on the other hand, to ensure the regular settlement of all points in dispute...."[14] .

Professors Mathias Forteau and Alain Pellet saw this as a kind of implicit jurisdiction within the competence of the International Court of Justice[15].

**26.** Sometimes the international judge, in order to clarify a position or to explore other aspects inherent in its jurisdiction, uses the applicable law rather than the strict rules which conventionally define and frame its jurisdiction.

**27.** The affirmation of the role of the ICJ in international human rights law provides an example of this. In 2010, the Court in The Hague rendered its judgment on the merits in the case of *Ahmadou Sadio Diallo - Guinea v Congo-Kinshasa*[16]. The Court ruled on claims of violations of human rights treaties. This case showed that, in addition to having general jurisdiction over the rights of States, the International Court of Justice could without hindrance to its jurisdiction, deal with the question of human rights.

**28.** In this sense, it may be observed that an increasing number of international courts have specialized in human rights, without having an initial mandate to do so. On closer inspection, this is mainly due to their *applicable law*. The cross-cutting nature of the rules of international law has a clear impact on the deployment of jurisdiction. It is thus understandable that in addition to the provisions framing the jurisdiction, the Protocol establishing the

14 *Nuclear Tests Case (New Zealand v France)*, Judgment of 20 December 1974, ECR 1974, pp. 259-463

15 Forteau (M.) and Pellet (A.), *Droit international public*, Ed. LGDJ, 2009, p. 1001; Visscher (Ch. De), Quelques aspects récents du droit procédural de la CIJ, Ed. Pédone, 1966, 219 p.; Santulli (C.), Les juridictions de droit international : essai d'identification, AFDI, 2001, pp. 45-61.

16 The ICJ states that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights". Diallo was arrested and detained in 1995-1996 with a view to his deportation, the Democratic Republic of the Congo violated article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights. This case showed that the general jurisdiction enjoyed by the ICJ, which relates to "any matter of international law" under Article 36 §2 (b) of its Statute, can be extended to human rights.

African Court has taken them over in terms of applicable law.

**29.** The same analysis can be made with regard to the European Court of Human Rights. In the *Nicolaï Slivenko*[17] judgment of 2003, the Court stated that it should not "re-examine the facts established by the national authorities and having served as a basis for their legal assessment" by reviewing the "findings of the national courts as to the particular circumstances of the case or the legal characterization of those circumstances in domestic law", but at the same time recognized that it was part of its task "to review, from the Convention perspective, the reasoning underlying the decisions of the national courts". The doctrine derived from this idea that the Court was increasing the intensity of its review of judicial decisions. This can only be achieved through a broad reading of the law which the Court is mandated to apply. It can thus be said that the applicable law and jurisdiction stand together, the latter is undoubtedly a common thread.

## B. Links established between Articles 3 and 7 in the second wave of Court decisions

**30.** Where the Court finds a difficulty or possible challenge to its jurisdiction, it shall combine the two Articles 3(1) and 7. It uses these two complementary texts. It does not, however, feel bound to indicate explicitly the use thus made of Article 7, and that is what we regret.

**31.** In its *Abubakari*[18] judgment, the Court emphasizes :

> 28. More generally, the Court would only act as an appellate court if, inter alia, it applied to the case the same law as the Tanzanian national courts, i.e., Tanzanian law. However, this is certainly not the case in the cases before it, since by definition it applies exclusively, in the words of Article 7 of the Protocol, "the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned".

In the following paragraph, it concludes:

> On the basis of the foregoing considerations, the Court concludes that it has jurisdiction to examine whether the treatment of the case by the Tanzanian domestic courts has been in conformity with the requirements laid down in particular by the Charter and any other applicable international human rights instruments. Accordingly, the Court rejects the objection raised in this regard by the Respondent State.

**32.** In the 2016 case, *Ingabire Victoire Umuhoza v Republic of*

17 ECHR, *Nicolai Slivenko v Latvia*, 9 October 2003.

18 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29.

*Rwanda,*[19] the Court states, once again, without citing Article 7, that :

As regards the application of the Vienna Convention to the present case, the Court observes that while the declaration made under Article 34(6) emanates from the Protocol, which is governed by the law of treaties, the declaration itself is a unilateral act which is not governed by the law of treaties. Accordingly, the Court concludes that the Vienna Convention does not apply directly to the declaration, but may be applied by analogy, and the Court may draw on it if necessary. (...) In determining whether the withdrawal of the Respondent's declaration is valid, the Court will be guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law. With regard to the rules governing the recognition of jurisdiction of international courts, the Court notes that the provisions relating to similar declarations are of an optional nature. This is demonstrated by the provisions on recognition of the jurisdiction of the International Court of Justice,4 the European Court of Human Rights5 and the Inter-American Court of Human Rights", §§ 55 and 56.6.

**33.** However, the Court says that it is guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law, it is a recourse to Article 7 of the Protocol. In that the latter article allows it to rely on any relevant human rights instrument.

**34.** On its jurisdiction in the *Armand Guehi*[20] case in 2016, the Court proceeds in the same way. It cites Article 3(1), but resorts to other texts. One wonders whether the Court simply finds its jurisdiction in respect of interim measures or whether it simply applies provisions outside the Charter to do so. It says:

"Having regard to the particular circumstances of the case, which reveal a risk that the death penalty might be imposed, thereby infringing the Applicant's rights under Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights, the Court decides to exercise its jurisdiction under Article 27(2) of the Protocol", § 19.

**35.** The complementarity between these two Articles, which should be cited together, is expressed. For in Article 3(1) the Court finds its jurisdiction without difficulty and bases it on it; and in Article 7 the Court, by having recourse to other texts, is also founded in law by virtue of the fact that its applicable law authorizes it to do so. Accordingly, in the *Actions for the Protection of Human Rights*

19 AfCHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Decision on the Withdrawal of the Declaration, 5 September 2016

20 AfCHPR, *Armand Guehi v United Republic of Tanzania*, Interim Measures Order, 18 March 2016

*(APDH) v Republic of Côte d'Ivoire*[21] judgment also delivered in 2016, from § 42 to § 65, the Court sets out a reasoning for establishing its jurisdiction. This can only be understood by reading the two articles, 3(1) and 7 together. In particular, it says that :

"The African Institute of International Law notes that the link between democracy and human rights is established by several international human rights instruments, including the Universal Declaration of Human Rights, Article 21(3), (...) The Institute further maintains that the African Charter on Democracy is a human rights instrument in that it confers rights and freedoms on individuals. According to the Institute, the Charter explains, interprets and gives effect to the rights and freedoms contained in the Charter on Human Rights, the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action (1999), the Declaration on the Principles Governing Democratic Elections in Africa and the 2003 Kigali Declaration".

**36.** The Conclusion on jurisdiction that follows from this series of instruments in § 65 is suggestive:

"The Court concludes that the African Charter on Democracy and the ECOWAS Protocol on Democracy are human rights instruments, within the meaning of Article 3 of the Protocol, and that it is therefore competent to interpret and apply them.

**37.** It follows that the Court in its first decade uses Article 3(1) to determine its jurisdiction as set out in the Protocol. As in established judicial practice, the Court uses the applicable law recognized by the "States concerned" to extend or further establish its jurisdiction. In this case, it makes use of Article 7 of the Protocol. The question of priority between the two Articles does not arise, as it is a matter of the particular case and of the choice made by the Court. The two Articles are equally involved in the general question of the Court's jurisdiction to hear cases.

**38.** In its judgment in Jonas (2017), at paragraphs 28, 29 and 30, the Court goes beyond Article 3 on its own motion, stating that:

"Article 3 of the Protocol does not give the Court the latitude to decide on the issues raised by the Applicant before the domestic courts, to review the judgments of those courts, to assess the evidence and to reach a conclusion", § 25.

**39.** It concludes that it has jurisdiction as follows:

The Court reiterates its position that it is not an appellate body in respect of decisions of the domestic courts. However, as the Court emphasised in its judgment in *Alex Thomas v the United Republic of Tanzania*, and confirmed in its judgment in *Mohamed Abubakari v the United Republic*

21 CAfDHP, *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire (Merits)*, 18 November 2016.

*of Tanzania*, this circumstance does not affect its jurisdiction to examine whether proceedings before national courts meet the international standards established by the Charter or other applicable human rights instruments. The Court therefore rejects the objection raised in this regard by the Respondent State and concludes that it has subject-matter jurisdiction[22]. The Court does not appear to be taking a position on the question of which of the two Articles is the basis for its jurisdiction.

**40.** In order to refute the Respondent State's contention and to establish its jurisdiction in the *Nguza*[23] Judgment, the Court begins by relying first on its own jurisprudence[24]. It goes on to have recourse to the applicable law in general, namely:

"as it stressed in the judgment of 20 November 2016 in the case of *Alex Thomas v United Republic of Tanzania* and confirmed in the judgment of 3 June 2016 in the case of *Mohamed Abubakari v United Republic of Tanzania*, this does not exclude its jurisdiction to assess whether proceedings before national courts meet the international standards established by the Charter or by other applicable human rights instruments to which the respondent State is a party", §§ 33 et seq.

It then infers jurisdiction from this and refers to Article 3 of the Protocol:

Accordingly, the Court rejects the objection raised by the Respondent State, ….". It has subject-matter jurisdiction under Article 3(1) of the Protocol, which provides that the Court "shall have jurisdiction in all cases and disputes submitted to it ...", § 36.

**41.** This reversal of logic by the Court is not in vain. It makes it possible to appreciate how the applicable law is not external to the determination of jurisdiction, which is well defined by the Protocol.

**42.** Orders for the indication of provisional measures do not present the same difficulties. It may be observed, as in the *Ajavon*[25] Case, that the Court's *prima facie* decision does not require recourse to

22 AfCHPR, *Christopher Jonas v United Republic of Tanzania*, Judgment, 28 September 2017: Convicted and sentenced for robbery of money and various other valuables, Mr. Christopher Jonas filed this application alleging a violation of his rights during his detention and trial. The Court found that the evidence presented during the domestic proceedings had been assessed according to the requirements of a fair trial, but that the fact that the applicant had not received free legal aid constituted a violation of the Charter.

23 AfCHPR, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Republic of Tanzania*, 23 March 2018.

24 CAfDHP, 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi*, 15 March 2013, § 14; *Alex Thomas v United Republic of Tanzania*, 20 November 2015, §; 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania*, 28 March 2014, § 114; *Ernest Francis Mtingwi v Republic of Malawi*, 15 March 2013, § 14.

25 AfCHPR, *Sébastien Germain Ajavon v Republic of Benin*, Order, 7 December 2018.

its applicable law (7 Article). This is stated in paragraph 28:
"However, before ordering interim measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction".

The Court does not have such jurisdiction.

***

**43.** Article 3, in particular the first paragraph, sets out the scope of the Court's jurisdiction. However, this cannot be understood without the law which the Court applies, that is, Article 7, with which it should be more regularly associated in its decisions. This scope of jurisdiction is not limited...as long as the Court is within its applicable law, it is within its jurisdiction. This place of applicable law is also present when discussing the Court's jurisdiction to hear a case under Article 3(2). The links between these articles are at the root, they are ontological.

# Mulindahabi v Rwanda (ruling) (2020) 4 AfCLR 350

Application 010/2017, *Fidèle Mulindahabi v Republic of Rwanda*

Ruling (admissibility), 26 June 2020. Done in English and French, the French text being authoritative.

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

Recused under Article 22: MUKAMULISA

The Applicant, who had lost domestic action against a transport union, brought this action against the Respondent State alleging a violation of his Charter protected rights. The Court declared the action inadmissible for failure to file within a reasonable time after exhaustion of local remedies.

**Judgment in default** (conditions for default judgment, 28; Court discretion to render suo moto, 30)

**Admissibility** (submission within reasonable time, 47, 48 - 50)

Separate opinion: BEN ACHOUR AND TCHIKAYA

**Jurisdictio**n (material jurisdiction, 6,10)

## I. The Parties

**1.** Fidèle Mulindahabi (hereinafter referred to as "the Applicant"), is a national of the Republic of Rwanda, residing in Kigali, and the owner of four (4) transport minibuses.

**2.** The Application is filed against the Republic of Rwanda (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 25 May 2004. It also deposited on 22 January 2013, the Declaration provided for 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, the Respondent State notified the Chairperson of the African Union Commission of its intention to withdraw the said Declaration. The African Union Commission transmitted to the Court, the notice of withdrawal on 3 March 2016. By a ruling dated 3 June 2016, the Court decided that the withdrawal by the Respondent State would take effect

from 1 March 2017.[1]

## II. Subject of the Application

### A. Facts of the matter

**3.** The Applicant states that he owns a Toyota Hiace minibus in respect of which he alleges he alleges to have paid his membership dues to ATRACO Minibus Drivers' Union on 5 January 2008.

**4.** He further states that although the ATRACO agent received the One Thousand Six Hundred Rwandan francs (RWF 1600) payment for the membership dues, the agent informed the officials in the town of Gitarama (Muhanga) that the Applicant had not paid any money.

**5.** According to the Applicant, on 7 January 2008, the ATRACO representative in Gitarama ordered the coordinator of the southern region, "Mongoose Alexis", to confiscate his minibus. The minibus was subsequently severely damaged by heavy rains and mud.

**6.** The Applicant alleges that on 8 January 2008, ATRACO decided to prohibit the movement of his four (4) public transport vehicles of Registration Numbers RAA147H, RAA660R, RAA016Z and RAB762A.

**7.** On 18 January 2008, the Applicant filed an application before the Court of First Instance, "Banyarengigi", to seek compensation from ATRACO.

**8.** The Applicant alleges that on 14 February 2008, after ATRACO was informed that it was the subject of a complaint he had filed; it served letter No. 1996/SA/ATRACO-02/2008 on the former driver of the minibus, informing him of his deregistration on 7 January 2008 for non-payment of what was described as a tax and for having parked the minibus. He was therefore, required to take the vehicle back without compensation, failing which the vehicle would be transferred to the nearest police station.

**9.** By a letter dated 19 February 2008, the driver responded to the above mentioned letter, stating that the charge of non-payment of the tax had not been established, as he had receipts showing that he had paid one thousand six hundred Rwandan francs (RWF 1,600). With regard to parking the vehicle, the driver responded that he was not responsible for the fact that the vehicle had been

1 See *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 562 § 67.

impounded.

**10.** The Applicant states that since 25 March 2008, the vehicle was parked at Nyarenambu Police Station, thus relieving ATRACO of its responsibility for the vehicle. Even so, according to the Applicant, the question arises as to who is responsible for the poor condition of the vehicle, as no inspection was carried out on the vehicle when ATRACO seized it and when it was transferred to the police station.

**11.** The Court of First instance delivered judgment No. RC0025/08/TGI/NYGE, stating that ATRACO could not return a vehicle which was not in its possession and therefore should not pay for the damage caused to that vehicle.

**12.** On 5 October 2009, the Applicant filed an appeal with the Supreme Court, being Appeal No. RCA0028/09/HC/KIG, in which the Attorney General sought to intervene. Nevertheless, the Attorney General's application to intervene was dismissed on the ground that he was a third party in the case.

**13.** The Applicant filed Application RADO115/09/HC/KID against the Attorney General, claiming that the police had confiscated his minibus in order to force him to pay a fine to ATRACO. On 7 October 2011, the court dismissed the application for lack of merit.

**14.** On 4 November 2011, the Applicant filed an appeal for review before the Supreme Court, basing his appeal on the violation of the provisions of Articles 182 and 184 of Law No. 18/2004 of 20 June 2004 on Civil, Commercial and Administrative Procedures in Rwanda. The Supreme Court, by decision No. RC0063/12/PRE of 15 October 2012, dismissed the appeal.

## B. Alleged violations

**15.** The Applicant contends that the Respondent State:

i. violated his right to property protected under Article 17(2) of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 14 of the Charter.

ii. violated "his right to a fair trial and public hearing by a competent, independent and impartial tribunal, in a fair and public hearing of his case, in the determination of any dispute concerning his rights and obligations in a suit at law", guaranteed by Article 10 of the UDHR and Article 14(1) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR").

iii. has taken no steps to ensure that the competent authorities implement the judgments rendered in his favour in accordance with Article 2(3)(c) of the ICCPR.

iv. violated his right to have his cause heard under Article 7(1)(a) and (d) of the Charter.

v. has failed to guarantee the independence of the courts and the establishment and development of relevant national institutions for the promotion and protection of the rights and freedoms protected under Article 26 of the Charter.

vi. violated his rights to full equality before the law and equal protection of the law, enshrined under Article 7 of the UDHR, Article 26 of the ICCPR and Article 3 of the Charter.

## III. Summary of the Procedure before the Court

**16.** The Application was filed on 24 February 2017 and on 31 March 2017, the Registry transmitted it to the Respondent State and all the other entities mentioned in the Protocol.

**17.** On 9 May 2017, the Registry received a letter from the Respondent State reminding the Court that it had withdrawn its Declaration under Article 34(6) of the Protocol and that it would not participate in any proceedings before the Court. The Respondent State therefore requested the Court to cease communicating any information relating to cases concerning it.

**18.** On 22 June 2017 the Court acknowledged receipt of the Respondent State's said correspondence and informed the Respondent State that it would nonetheless be notified of all the documents in matters relating to Rwanda in accordance with the Protocol and the Rules.

**19.** On 25 July 2017, the Court granted the Respondent State an extension of forty-five (45) days to file its Response. On 23 October 2017 the Court granted a second extension of forty-five (45) days indicating that it will render a judgment in default after the expiration of this extension if the Respondent State did not file its Response.

**20.** On 17 July 2018, the Applicant was requested to file his submissions on reparations within thirty (30) days thereof. The Applicant filed his submissions on reparations on 6 August 2018 and these were transmitted to the Respondent State by a notice dated 7 August 2018, giving the latter thirty (30) days to file the response thereto. The Respondent State failed to respond, notwithstanding proof of receipt of the notification on 13 August 2018.

**21.** On 16 October 2018, the Respondent State was notified that it was granted a final extension of forty-five (45) days to file the Response and that, thereafter it would render a judgment in default in the interest of justice in accordance with Rule 55 of its

Rules.

**22.** Although the Respondent State received all these notifications, it did not respond to any of them. Accordingly, the Court will render a judgment in default in the interest of justice and in accordance with Rule 55 of the Rules.

**23.** On 28 February 2019, pleadings were closed and the parties were duly notified.

**24.** On 2 April 2020, the Applicant filed, a judgment dated 14/12/2018 under number RC 00113/2018/TB/KICU issued by the Kicukiko District Court, and the Court decided that it was immaterial to this Application due to the lack of nexus with the current case.

## IV. Prayers of the Parties

**25.** The Applicant prays the Court to:

**i.** find that Rwanda has violated the human rights legal instruments it has ratified;

ii. revise the judgment in case No. RADA0015/09/CS and annul all the orders contained therein;

iii. order the Respondent State to repair and return to it the Toyota Hiace minibus with registration number RAA624, or pay compensation in the amount of Forty Million Three Hundred and Forty-Nine Thousand One Hundred Rwandan francs (RWF 40,349,100);

iv. order the Respondent State to pay him a daily compensation of One Hundred and Nine Thousand Three Hundred and Eighty Rwandan francs (RWF 109,380) from 7 January 2008 until the date of settlement of the case;

v. order the Respondent State to pay him compensation of Two Hundred and Fifty-five million Four Hundred and Fifty-Six Thousand Nine Hundred and Ninety Rwandan francs (RWF 255,456,990) for having destabilised his activities and banned the movement of his four (4) vehicles;

vi. order the Respondent State to pay him compensation in the amount of Fifty-one Billion Two Hundred and Twenty Six Million Five Hundred and Twenty Nine Thousand Seven Hundred and Twenty Five Rwandan francs (RWF 51,226,529,725) for the returns on reinvestment;

vii. order the Respondent State to compensate him at the rate of 7.4% for the loss of expected profits;

viii. order the Respondent State to pay him an amount of Forty Million Rwandan francs (RWF 40,000,000) for the moral prejudice suffered;

ix. order the Respondent State to pay Eight Million Rwandan francs (RWF 8,000,000) for legal costs.

x. order the Respondent State to pay the cost of counsel's fees for the proceedings before the domestic courts and this Court.

**26.** The Respondent State did not participate in the proceedings before this Court. Therefore, it did not make any prayers in the instant case.

## V. Non appearance of the Respondent State

**27.** Rule 55 of the Rules of Court provides that:

1. Whenever a party does not appear before the Court or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings.
2. Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law.

**28.** The Court notes that the afore-mentioned Rule 55 in its paragraph 1 sets out three conditions, namely: i) the default of one of the parties; ii) the request made by the other party; and iii) the notification to the defaulting party of both the application and the documents on file.

**29.** On the default of one of the parties, the Court notes that on 9 May 2017, the Respondent State had indicated its intention to suspend its participation and requested the cessation of any transmission of documents relating to the proceedings in the pending cases concerning it. The Court notes that, by these requests, the Respondent State has voluntarily refrained from asserting its defence.

**30.** With respect to the other party's request for a judgment in default, the Court notes that in the instant case it should, in principle, have given a judgment in default only at the request of the Applicant. However, the Court considers, that, in view of the proper administration of justice, the decision to rule by default falls within its judicial discretion. In any event, the Court shall have jurisdiction to render judgment in default *suo motu* if the conditions laid down in Rule 55(2) of the Rules are fulfilled.

**31.** Finally, as regards the notification of the defaulting party, the Court notes that the application was filed on 24 February 2017. The Court further notes that from 31 March 2017, the date of transmission of the notification of the Application to the Respondent State, to 28 February 2019, the date of the closure of the pleadings, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. The Court concludes thus, that the defaulting party was duly notified.

**32.** On the basis of the foregoing, the Court will now determine whether the other requirements under Rule 55 of the Rules are fulfilled, that is: it has jurisdiction, that the application is admissible and that the Applicant's claims are founded in fact and in law.[2]

## VI. Jurisdiction

**33.** 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, Rule 39(1) of the Rules provides that "the Court shall conduct a preliminary examination of its jurisdiction ..." .

**34.** After a preliminary examination of its jurisdiction and having found that there is nothing in the file to indicate that it does not have jurisdiction in this case, the Court finds that it has:

i. Material jurisdiction by virtue of the fact that the Applicant alleges a violation of Articles 7(1)(a)(d) and 26 of the Charter, Articles 2(3)(c) and 14(1) of the ICCPR to which the Respondent State is a party and Article 10 of the UDHR.[3]

ii. Personal jurisdiction, insofar as, as stated in paragraph 2 of this Ruling, the effective date of the withdrawal of the Declaration by the Respondent State is 1 March 2017.[4]

iii. Temporal jurisdiction, in so far as, the alleged violations took place after the entry into force for the Respondent State of the Charter (31 January 1992), of the ICCPR (16 April 1975), and the Protocol (25 May 2004).

iv. Territorial jurisdiction, since the facts of the case and the alleged violations occurred in the territory of the Respondent State.

**35.** From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

## VII. Admissibility

**36.** Pursuant to the provisions of Article 6(2) of the Protocol: "the Court shall rule on the admissibility of cases taking into account

2 *African Commission on Human and Peoples' Rights v Libya* (merits) (2016) 1 AfCLR 153 §§ 38-42.

3 See *Anudo Ochieng Anudo v United Republic of Tanzania*,(merits) (2018) 2 AfCLR 257, § 76; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (2018) 2 AfCLR 325, § 33.

4 See paragraph 2 of this Judgment.

the provisions of article 56 of the Charter".

**37.** Furthermore, under Rule 39(1) of its Rules: "[t]he Court shall conduct preliminary examination of its … 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 restates the provisions of Article 56 of the Charter, sets out the conditions 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 the exhaustion 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 of 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.

**39.** The Court notes that the conditions of admissibility set out in Rule 40 of the Rules are not in contention between the parties, as the Respondent State having decided not to take part in the proceedings did not raise any objections to the admissibility of the Application. However, pursuant to Rule 39(1) of its Rules, the Court is obliged to determine the admissibility of the Application.

**40.** It is clear from the record that the Applicant is identified. The Application is not incompatible with the Constitutive Act of the African Union and the Charter. It is not written in disparaging or insulting language and is not based exclusively on information disseminated through the mass media. There is also nothing on the record to indicate that the present Application concerns a case which has been settled in accordance with either the principles of the United Nations Charter, the OAU Charter or the provisions of the Charter.

**41.** With regards to the exhaustion of local remedies, the Court reiterates, as it has established in its case law, that the local

remedies which the Applicants are required to exhaust are ordinary judicial remedies[5], unless they are non-existent, ineffective and insufficient or the procedure for exercising them is unduly prolonged.[6]

**42.** Having regard to the facts of the case, the Court notes that the Applicant filed his complaint before the Court of First Instance, which dismissed it on 5 October 2009; he appealed against that decision to the Supreme Court, which, by judgment of 4 November 2011, upheld the decision of 7 October 2011 delivered by the Court of First Instance. The Applicant filed an application for review of this decision, which was dismissed by the Supreme Court by decision of 15 October 2012. The Court concludes, therefore, that the Applicant exhausted the available local remedies.

**43.** With regard to the obligation to file the application within a reasonable time, the Court notes that Article 56(6) of the Charter does not set any time-limit for the filing of applications before it. Rule 40(6) of the Rules, which essentially restates the provisions of Article 56(6) of the Charter, simply requires the Application to "be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

**44.** It emerges from the record that local remedies were exhausted on 15 October 2012, when the Supreme Court delivered its judgment. It is therefore that date which must be regarded as the starting point for calculating and assessing the reasonableness of the time, within the meaning of Rule 40(6) of the Rules of Court and Article 56(6) of the Charter.

**45.** The present Application was filed on 24 February 2017, four (4) years, three (3) months and nine (9) days after the exhaustion of local remedies. The Court must, therefore, decide whether or not this period is reasonable within the meaning of Charter and the Rules.

**46.** The Court recalls that **"…**the reasonableness of a time-limit for filing a case depends on the particular circumstances of each

5 *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599 § 64. See also *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465 § 64, and *Wilfred Onyango Nganyi & ors v Tanzania* (merits) (2016) 1 AfCLR 507 § 95.

6 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314 § 77. See also *Peter Joseph Chacha v Tanzania* (admissibility) (2014) 1 AfCLR 398 § 40.

case, and must be assessed on a case-by-case basis…"[7]

**47.** The Court has consistently held that the six-month time limit expressly provided for in other international human rights instruments cannot be applied under Article 56(6) of the Charter. The Court has therefore adopted a case-by-case approach to assessing the reasonableness of a time limit within the meaning of Article 56(6) of the Charter.[8]

**48.** The Court considers that, in accordance with its established jurisprudence on the assessment of reasonable time, the determining factors are, *inter alia*, the status of the Applicant[9], the conduct of the Respondent State[10] or its officials. Furthermore, the Court assesses the reasonableness of the time limit on the basis of objective considerations.[11]

**49.** In the case of *Mohamed Abubakari v Tanzania*, the Court held as follows: the fact that an Applicant was in prison; he indigent; unable to pay for a lawyer; did not have the free assistance of a lawyer since 14 July 1997; was illiterate; could not have been aware of the existence of this Court because of its relatively recent establishment; are all circumstances that justified some flexibility in assessing the reasonableness of the timeline for seizure of the Court.[12]

**50.** Furthermore, in *Alex Thomas v Tanzania*, the Court justified its position as follows:

> Taking into account the situation of the Applicant, who is an ordinary, indigent and incarcerated person, and considering the time it took him to obtain a copy of the record of proceedings and the fact that he attempted to use extraordinary remedies such as the application for review, the Court concludes that all these factors are sufficient elements to explain why he did not bring the application before the Court until 2 August 2013, three (3) years and five (5) months after the filing of the declaration under Article 34(6). For these reasons, the Court concludes that the application

7 Beneficiaries of the *late Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo and Blaise Ilboudo & Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso* (preliminary objections) , § 121.

8 *Norbert Zongo ibid*. See also the judgment in *Alex Thomas v Tanzania* (merits), §§ 73 and 74.

9 *Alex Thomas v Tanzanie (*merits) (2015) 1 AfCLR 482, §74.

10 *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (2018) 2 AfCLR 248 § 58.

11 As the date of deposit of the Declaration recognising the Court's jurisdiction, in accordance with Article 34(6) of the Protocol.

12 *Mohamed Abubakari v Tanzania* (merits) *op.cit*, § 92.

was filed within a reasonable time after exhaustion of local remedies, in accordance with section 56(5) of the Charter.[13]

**51.** It is also clear from the Court's case-law that the Court declared admissible an application brought before it three (3) years and six (6) months after the Respondent State deposited the Declaration under Article 34(6) of the Protocol accepting the Court's jurisdiction, having concluded that: "the period between the date of its referral of the present case, 8 October 2013, and the date of the filing by the Respondent State of the Declaration of recognition of the Court's jurisdiction to hear individual applications, 29 March 2010, is a reasonable time within the meaning of Article 56(6) of the Charter.[14]

**52.** In the instant case, the Applicant was not imprisoned, there were no restrictions on his movements after the exhaustion of local remedies, he was not indigent, and his level of education not only enabled him to defend himself, as evidenced by this Application filed on 24 February 2017, but also enabled him to become aware of the existence of the Court and the proceedings before it within a reasonable time. Moreover, the Respondent State deposited the Declaration recognising the Court's jurisdiction four (4) years, three (3) and nine (9) days before the exhaustion of local remedies.

**53.** In light of the foregoing, the Court considers that the period of four (4) years**,** three (3) months and nine (9) days that elapsed before the Applicant filed his Application is unreasonable within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules. Consequently, it finds that the Application is inadmissible on this ground.

## VIII. Costs

**54.** The Court notes that Rule 30 of its Rules provides that: "Unless otherwise stated, each party shall bear its own costs".

**55.** Taking into account the circumstances of this case, the Court decides that each party shall bear its own costs.

13 *Alex Thomas v Tanzania* (merits), § 74.

14 *Mohamed Aubakari v Tanzania* (merits), § 93

## IX. Operative part

**56.** For these reasons,
The Court:
*Unanimously and in default*,
i. *Declares* that it has jurisdiction;
ii. *Declares* the Application inadmissible;
iii. *Declares* that each party shall bear its own costs.

***

## Separate Opinion: BEN ACHOUR AND TCHIKAYA

**1.** We concur with the position adopted by the Court on admissibility, jurisdiction and operative provisions in the four *Mulindahabi v Rwanda* decisions adopted by unanimous decision of the judges sitting on the bench.

**2.** By this Opinion, we wish to express a position on a point of law. This opinion clarifies a point relating to the Court's subject-matter jurisdiction on which our Court has often proceeded by economy of argument.

**3.** In our view, Article 3 of the Protocol, while taking account of the general framework of jurisdiction it lays down, should also be understood in terms of the scope given to it by Article 7 of the same Protocol. Since the *Mulindahabi* species do not pose any particular problems of jurisdiction, there were no a priori reasons for the emergence of such a debate. However, the question did emerge and therefore required clarification which would be valid for other judgments delivered or to be delivered by the Court.

**4.** A breadcrumb trail structures the analysis. These are two waves of decisions that characterize the Court's jurisprudence. The cut-off point is generally in 2015, when the Court delivered its *Zongo*[1] judgment. The decision on jurisdiction in this case is given in 2013. It can be supported because a reflection seems to be beginning on the choices in terms of procedure with the *Mohamed*

1 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso, Judgment on Reparations*, 5 June 2015.

*Abubakari* judgment in 2016[2]. The Court begins to work, as noted by Judges Niyungeko and Guissé, more "distinctly: first on all questions relating to its jurisdiction (both the preliminary objection and the question of its jurisdiction under the Protocol), and then on all questions relating to the admissibility of the application"[3].

**5.** Thus, in the first part, we shall examine the state of the matter, i.e., the envisaged readings of Articles 3 and 7 of the Protocol in determining the Court's subject-matter jurisdiction. In the second part, devoted to the second wave of decisions, the use of Articles 3 and 7 will evolve.

## I. Article 3 and 7 of the Protocol through the Court's doctrine and case-law

**6.** In our view, the two Articles 3 and 7 of the Protocol should be read together, as one sheds light on the other. They are complementary. For the reasons that follow, they cannot be separated. The Court's subject-matter jurisdiction is therefore based on both the first paragraph of Article 3 and Article 7 of the Protocol. We shall first present a restrictive reading of these provisions (A) before turning to their reference in certain decisions of the Court which we describe as first wave (B).

### A. A restrictive reading of Articles 3 and 7 of the Protocol

**7.** Article 3(1) of the Protocol, on the jurisdiction of the Court, reads 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".

Article 7, on applicable law, states in one sentence that:

"The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned".

**8.** Different readings of these two Articles have emerged. Reading them separately, some have argued that their functions should not go beyond the title given to them by the successive drafters of the Convention. Article 3(1) applying strictly and exclusively to the

2 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29

3 Dissenting opinion of Judges Gérard Niyungeko and El Hajji Guissé in the *Urban Mkandawire v Republic of Malawi* judgment, 21 June 2013.

jurisdiction of the Court and the other, Article 7, referring solely to the applicable law. This approach is restrictive and, in fact, does not correspond, on closer inspection, to the approach which the Court itself has followed through its case-law since 2009.

**9.** It was also noted that Article 7 would be a mere repetition of Article 3(1) and is, in this respect, superfluous. Professor Maurice Kamto supports this reading in particular when he states that "Articles 3 and 7 are a legal curiosity"[4]. They would have no equivalent in the statutes of other regional human rights jurisdictions. The "Ouagadougou Protocol should have confined itself to this provision, which makes Article 7 all the more useless as its content is likely to complicate the Court's task"[5].

**10.** It is not clear whether the drafters of the Protocol intended to exclude certain categories of legal rules, such as custom, general principles of law, etc., from the scope of the Protocol. The use of the phrase "ratified by the States concerned" in both Articles might lead one to believe[6] that the Court should only take into account conventions ratified by States. It would be difficult to explain why the next paragraph, 3(2), recognizes the Court's "jurisdiction". It is well known that for the purpose of establishing the grounds for its jurisdiction, the scope of the applicable law should be opened up. The Court cannot, as will be discussed below, be limited in the reasons for its jurisdiction when it is challenged. In the latter case there is a clear manifestation of the link between Article 3 and Article 7 of the Protocol.

**11.** This was, in short, the interpretation adopted by the Court on the reading of Rule 39 of its Rules:

"1. The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the application [...].

2. … the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".

In calling for "the submission of any information relating to the facts, documents or other materials which it consider to be relevant",

4 Commentary on Article 7 of the Protocol, *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of an African Court, article-by-article commentary*, edited by M. Kamto, Ed. Bruylant, 2011, pp. 1296 et seq.

5 *Idem*.

6 Professor Maurice Kamto tends towards this appreciation. He states that "The restriction of the law applicable by the Court to the Charter and the said legal instruments creates an effect of implicit amputation of the scope of the relevant rules applicable by that jurisdiction. It deprives the Court and the parties brought before it of the application or invocation of "African practices in conformity with international standards relating to human and peoples' rights, customs generally accepted as law, general principles of law recognised by African nations, as well as case law and doctrine", referred to in Article 61 of the *ACHPR, v Idem*, 1297.

the Court wishes to inquire into all aspects of the applicable law, as noted in the heading of Article 7.

**12.** The other reading is to regard the two Articles as complementary and, where the conflict so requires, as being necessary for the Court to further develop its jurisdiction. This was not the case in the *Mulindahabi* decisions, but the Court has done so on various occasions.

## B. The Court's reading of Articles 3 and 7 in its first wave of decisions

**13.** The first phase of the Court considered in the interest of the analysis ranges from the *Michelot Yogogombaye*[7] judgment (2009) to the *Femi Falana*[8] judgment (2015). This breakdown shows the evolution of the Court and its judicial involvement on the one hand, and on the other, it makes it possible to periodize its commitments as to the bases of its jurisdiction.

**14.** The Court has always accepted that the provisions of Articles 3 and 7 provide a firm basis for its jurisdiction to respond to human rights disputes. It has done so from its earliest years. It had perceived the openings left by its jurisdiction as formulated in the Protocol. The former Vice-President of the African Court, Judge Ouguergouz, states in his study that: "Article 3 (1) of the Protocol provides for a very broad substantive jurisdiction of the Court [...]. The liberal nature of this provision is confirmed by Article 7, entitled ''Applicable law"[9].

**15.** Two issues are apparent in the provisions of Articles 3(1) and 7 of the Protocol: first, the case where the disputes in question are based from the outset on provisions of the Charter; second, where the Court, not having a clearly defined rule, would have to seek them in conventions ratified by the Respondent States. In reality, the Court has always used both approaches. It has always found itself drawn into international law whenever it is part of the

7 AfCHPR, *Michelot Yogogombaye v Republic of Senegal*, 15 December 2009; see also, Loffelman (M.), *Recent jurisprudence of the African Court on Human and Peoples' Rights*, Published by Deutshed Gesellschaft...GIZ, 2016, p. 2.

8 AfCHPR, *Femi Falana v African Commission on Human and Peoples' Rights*, Order, 20 November 2015.

9 Ouguergouz (F.), La Cour africaine des droits de l'homme et des peuples - Gros plan sur le premier organe judiciaire africain à vocation continentale, *Annuaire français de droit international*, volume 52, 2006. pp. 213-240;

law accepted by States.

**16.** What the Court is seeking to do from 2011 in the case of *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*:

The Court also had to rule on the issue of applicabilitý of the Treaty establishing the East Africa Community, in the light of Articles 3(1) and 7 of the Protocol, as well as Article 26(1)(a) of the Rules of Court. These three provisions contain the expression "any other relevant human rights instrument ratified by the States concerned" which expressly refers to three conditions: 1) the instrument in question must be an international treaty, hence the requirement of ratification by the State concerned, 2) the international treaty must be "human rights related" and 3) it must have been ratified by the State Party concerned[10].

**17.** The 2015 *Femi Falana* case, which completes the first wave of the Court's decisions, expresses in all cases the Court's two-step reasoning on its jurisdiction. In the first stage, it states the basis of its jurisdiction (Article 3(1)) and in the second stage, it gives, through the applicable law (Article 7), the reasons for its choice.

**18.** In this case, the application was directed against an organ of the African Union, established by the African Charter on Human and Peoples' Rights, namely, the African Commission on Human and Peoples' Rights. Under Article 3(1) of the Protocol, the Court first states that it has jurisdiction to hear and determine 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. It goes on to say that, although the facts giving rise to the complaint relate to human rights violations in Burundi, it was brought in the present case against the Respondent, an entitý which is not a State party to the Charter or the Protocol. Finally, in its reasoning in § 16 of the judgment, the Court bases itself on a consideration of general applicable law.

The relationship between the Court and the Respondent is based on the complementaritý. Accordingly, the Court and the Respondent State are autonomous partner institutions but work together to strengthen their partnership with a view to protecting human rights throughout the continent. Neither institution has the power to compel the other to take any action.

The Court's application of general law reflects the complementarity between that law and the law that governs its substantive

10 AfCHPR, *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*, Order, 22 September 2011, §§ 13 and 14.

jurisdiction.

**19.** The same approach is found in the discussion of jurisdiction in the *Zongo* (2013)[11] case. The Court states that: "Under Article 3(1) of the Protocol ... and Article 3(2) of the same Protocol, "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide ...". It goes on to state, appropriately, that:

> The Court goes on to note that the application of the principle of the non-retroactivitý of treaties, enshrined in Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969, is not in contention between the Parties. What is at issue here is whether the various violations alleged by the Applicants would, if they had occurred, constitute "instantaneous" or "continuing" violations of Burkina Faso's international human rights obligations.

**20.** It is apparent that the Court's reasoning does not focus strictly on the rules concerning its jurisdiction, but also extends it to the law applied by it.

## II. The relationship between Articles 3 and 7 of the Protocol as regards the Court's subject-matter jurisdiction: confirmation in the second wave of decisions

**21.** The drafters of the Protocol provided judges with a kind of "toolbox" through these two articles, which they would make good use of. They are only bound by the consistency and the motivation of their choice. Indeed, quite obviously, the two articles have often been used together in the Court's second decade of activity. It will first be shown that the Court's approach is also present in international litigation.

### A. The Court's approach is confirmed by the practice in international litigation

**22.** This approach is known from international litigation even before the African Court was established. It is, in fact, consistent with the logic of law. Its manifestation can be found in jurisprudential work as old as that of the Permanent Court of International Justice (PCIJ), confirmed by the jurisprudence of the International Court

11 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso*, Decision on Preliminary Objections, 21 June 2013, § 61, 62, 63.

of Justice (ICJ).

**23.** It was by reasoning on its applicable law that the PCJI extended its jurisdiction to human rights issues long before the wave of such law following the Second World War. The august Court was already doing its job of protecting fundamental rights in well-known cases[12].

**24.** There has been a known shift in the jurisdiction of arbitral tribunals in this area. The jurisdiction of these courts is strictly fixed within conventional limits, but they have integrated human rights issues by making a specific reading of their applicable law[13].

**25.** The African Court already applies this methodology, which is well known in international law. In addition to generally having the "competence of jurisdiction" in the event of a dispute, the international courts and the international instruments establishing them often give them the legal basis to deploy their jurisdiction. In a complex argumentation the ICJ recalled that it has :

"an inherent power which authorizes it to take all necessary measures, on the one hand, to ensure that, if its jurisdiction on the merits is established, the exercise of that jurisdiction does not prove futile, and, on the other hand, to ensure the regular settlement of all points in dispute...."[14] .

Professors Mathias Forteau and Alain Pellet saw this as a kind of implicit jurisdiction within the competence of the International Court of Justice[15].

**26.** Sometimes the international judge, in order to clarify a position or to explore other aspects inherent in its jurisdiction, uses the applicable law rather than the strict rules which conventionally define and frame its jurisdiction.

**27.** The affirmation of the role of the ICJ in international human rights law provides an example of this. In 2010, the Court in The Hague rendered its judgment on the merits in the case of *Ahmadou*

12 CPJI, Advisory Opinion, ***Minority Schools in Albania***, 6 April 1935; Advisory Opinion, German Settlers in Poland, 10 September 1923; Advisory Opinion, ***Treatment of Polish Nationals and Other Persons of Origin***, 4 February 1932

13 Cazala (J.), Protection des droits dc I'homme et contentieux international de I 'investissement, ***Les Cahiers de l'Arbitrage***, 2012-4, pp. 899-906. v in particular, Tribunal arbitral CIROI (MS), S.A., 29 May 2003, ***Tecnicas Medioambientales Teemed SA v Mexico***, §§ 122-123; S.A., CIRDI, ***Azurix Corporation v Argentina***, 14 July 2006, §§ 311-312; see S.A., ICSID (MS), ***Robert Azinian & ors v Mexico***, ARB(AF)/97/2, 1 November 1999, §§ 102-103.

14 ***Nuclear Tests Case (New Zealand v France)***, Judgment of 20 December 1974, ECR 1974, pp. 259-463

15 Forteau (M.) and Pellet (A.), ***Droit international public***, Ed. LGDJ, 2009, p. 1001; Visscher (Ch. De), Quelques aspects récents du droit procédural de la CIJ, Ed. Pédone, 1966, 219 p.; Santulli (C.), Les juridictions de droit international : essai d'identification, AFDI, 2001, pp. 45-61.

*Sadio Diallo - Guinea v Congo-Kinshasa*[16]. The Court ruled on claims of violations of human rights treaties. This case showed that, in addition to having general jurisdiction over the rights of States, the International Court of Justice could without hindrance to its jurisdiction, deal with the question of human rights.

**28.** In this sense, it may be observed that an increasing number of international courts have specialized in human rights, without having an initial mandate to do so. On closer inspection, this is mainly due to their *applicable law*. The cross-cutting nature of the rules of international law has a clear impact on the deployment of jurisdiction. It is thus understandable that in addition to the provisions framing the jurisdiction, the Protocol establishing the African Court has taken them over in terms of applicable law.

**29.** The same analysis can be made with regard to the European Court of Human Rights. In the *Nicolaï Slivenko*[17] judgment of 2003, the Court stated that it should not "re-examine the facts established by the national authorities and having served as a basis for their legal assessment" by reviewing the "findings of the national courts as to the particular circumstances of the case or the legal characterization of those circumstances in domestic law", but at the same time recognized that it was part of its task "to review, from the Convention perspective, the reasoning underlying the decisions of the national courts". The doctrine derived from this idea that the Court was increasing the intensity of its review of judicial decisions. This can only be achieved through a broad reading of the law which the Court is mandated to apply. It can thus be said that the applicable law and jurisdiction stand together,

16 The ICJ states that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which *Mr. Diallo* was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights". Diallo was arrested and detained in 1995-1996 with a view to his deportation, the Democratic Republic of the Congo violated article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights. This case showed that the general jurisdiction enjoyed by the ICJ, which relates to "any matter of international law" under Article 36 §2 (b) of its Statute, can be extended to human rights.

17 ECHR, *Nicolai Slivenko v Latvia*, 9 October 2003.

the latter is undoubtedly a common thread.

## B. Links established between Articles 3 and 7 in the second wave of Court decisions

**30.** Where the Court finds a difficulty or possible challenge to its jurisdiction, it shall combine the two Articles 3(1) and 7. It uses these two complementary texts. It does not, however, feel bound to indicate explicitly the use thus made of Article 7, and that is what we regret.

**31.** In its *Abubakari*[18] judgment, the Court emphasizes :

> 28. More generally, the Court would only act as an appellate court if, inter alia, it applied to the case the same law as the Tanzanian national courts, i.e., Tanzanian law. However, this is certainly not the case in the cases before it, since by definition it applies exclusively, in the words of Article 7 of the Protocol, "the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned".

In the following paragraph, it concludes:

> On the basis of the foregoing considerations, the Court concludes that it has jurisdiction to examine whether the treatment of the case by the Tanzanian domestic courts has been in conformity with the requirements laid down in particular by the Charter and any other applicable international human rights instruments. Accordingly, the Court rejects the objection raised in this regard by the Respondent State.

**32.** In the 2016 case, *Ingabire Victoire Umuhoza v Republic of Rwanda*[19], the Court states, once again, without citing Article 7, that :

> As regards the application of the Vienna Convention to the present case, the Court observes that while the declaration made under Article 34(6) emanates from the Protocol, which is governed by the law of treaties, the declaration itself is a unilateral act which is not governed by the law of treaties. Accordingly, the Court concludes that the Vienna Convention does not apply directly to the declaration, but may be applied by analogy, and the Court may draw on it if necessary. (...) In determining whether the withdrawal of the Respondent's declaration is valid, the Court will be guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law. With regard to the rules governing the recognition of jurisdiction of international courts, the Court notes that the provisions relating to similar declarations are of an optional nature. This is

18 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29.

19 AfCHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Decision on the Withdrawal of the Declaration, 5 September 2016

demonstrated by the provisions on recognition of the jurisdiction of the International Court of Justice,4 the European Court of Human Rights5 and the Inter-American Court of Human Rights", §§ 55 and 56.6.

**33.** However, the Court says that it is guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law, it is a recourse to Article 7 of the Protocol. In that the latter article allows it to rely on any relevant human rights instrument.

**34.** On its jurisdiction in the *Armand Guehi*[20] case in 2016, the Court proceeds in the same way. It cites Article 3(1), but resorts to other texts. One wonders whether the Court simply finds its jurisdiction in respect of interim measures or whether it simply applies provisions outside the Charter to do so. It says:

"Having regard to the particular circumstances of the case, which reveal a risk that the death penalty might be imposed, thereby infringing the Applicant's rights under Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights, the Court decides to exercise its jurisdiction under Article 27(2) of the Protocol", § 19.

**35.** The complementarity between these two Articles, which should be cited together, is expressed. For in Article 3(1) the Court finds its jurisdiction without difficulty and bases it on it; and in Article 7 the Court, by having recourse to other texts, is also founded in law by virtue of the fact that its applicable law authorizes it to do so. Accordingly, in the *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire*[21] judgment also delivered in 2016, from § 42 to § 65, the Court sets out a reasoning for establishing its jurisdiction. This can only be understood by reading the two articles, 3(1) and 7 together. In particular, it says that :

"The African Institute of International Law notes that the link between democracy and human rights is established by several international human rights instruments, including the Universal Declaration of Human Rights, Article 21(3), (...) The Institute further maintains that the African Charter on Democracy is a human rights instrument in that it confers rights and freedoms on individuals. According to the Institute, the Charter explains, interprets and gives effect to the rights and freedoms contained in the Charter on Human Rights, the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action (1999), the Declaration on the Principles Governing Democratic Elections in Africa and the 2003 Kigali Declaration".

20 AfCHPR, *Armand Guehi v United Republic of Tanzania*, Interim Measures Order, 18 March 2016

21 CAfDHP, *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire (Merits)*, 18 November 2016.

**36.** The Conclusion on jurisdiction that follows from this series of instruments in § 65 is suggestive:
"The Court concludes that the African Charter on Democracy and the ECOWAS Protocol on Democracy are human rights instruments, within the meaning of Article 3 of the Protocol, and that it is therefore competent to interpret and apply them.

**37.** It follows that the Court in its first decade uses Article 3(1) to determine its jurisdiction as set out in the Protocol. As in established judicial practice, the Court uses the applicable law recognized by the "States concerned" to extend or further establish its jurisdiction. In this case, it makes use of Article 7 of the Protocol. The question of priority between the two Articles does not arise, as it is a matter of the particular case and of the choice made by the Court. The two Articles are equally involved in the general question of the Court's jurisdiction to hear cases.

**38.** In its judgment in Jonas (2017), at paragraphs 28, 29 and 30, the Court goes beyond Article 3 on its own motion, stating that:
"Article 3 of the Protocol does not give the Court the latitude to decide on the issues raised by the Applicant before the domestic courts, to review the judgments of those courts, to assess the evidence and to reach a conclusion", § 25.

**39.** It concludes that it has jurisdiction as follows:
The Court reiterates its position that it is not an appellate body in respect of decisions of the domestic courts. However, as the Court emphasised in its judgment in *Alex Thomas v the United Republic of Tanzania*, and confirmed in its judgment in *Mohamed Abubakari v the United Republic of Tanzania*, this circumstance does not affect its jurisdiction to examine whether proceedings before national courts meet the international standards established by the Charter or other applicable human rights instruments. The Court therefore rejects the objection raised in this regard by the Respondent State and concludes that it has subject-matter jurisdiction[22]. The Court does not appear to be taking a position on the question of which of the two Articles is the basis for its jurisdiction.

**40.** In order to refute the Respondent State's contention and to establish its jurisdiction in the *Nguza*[23] Judgment, the Court

22 AfCHPR, *Christopher Jonas v United Republic of Tanzania*, Judgment, 28 September 2017: Convicted and sentenced for robbery of money and various other valuables, *Mr. Christopher Jonas* filed this application alleging a violation of his rights during his detention and trial. The Court found that the evidence presented during the domestic proceedings had been assessed according to the requirements of a fair trial, but that the fact that the applicant had not received free legal aid constituted a violation of the Charter.

23 AfCHPR, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Republic of Tanzania*, 23 March 2018.

begins by relying first on its own jurisprudence[24]. It goes on to have recourse to the applicable law in general, namely:

"as it stressed in the judgment of 20 November 2016 in the case of *Alex Thomas v United Republic of Tanzania* and confirmed in the judgment of 3 June 2016 in the case of *Mohamed Abubakari v United Republic of Tanzania*, this does not exclude its jurisdiction to assess whether proceedings before national courts meet the international standards established by the Charter or by other applicable human rights instruments to which the respondent State is a party", §§ 33 et seq.

It then infers jurisdiction from this and refers to Article 3 of the Protocol:

Accordingly, the Court rejects the objection raised by the Respondent State, ….". It has subject-matter jurisdiction under Article 3(1) of the Protocol, which provides that the Court "shall have jurisdiction in all cases and disputes submitted to it ...", § 36.

**41.** This reversal of logic by the Court is not in vain. It makes it possible to appreciate how the applicable law is not external to the determination of jurisdiction, which is well defined by the Protocol.

**42.** Orders for the indication of provisional measures do not present the same difficulties. It may be observed, as in the *Ajavon*[25] Case, that the Court's *prima facie* decision does not require recourse to its applicable law (7 Article). This is stated in paragraph 28:

"However, before ordering interim measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction".

The Court does not have such jurisdiction.

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**43.** Article 3, in particular the first paragraph, sets out the scope of the Court's jurisdiction. However, this cannot be understood without the law which the Court applies, that is, Article 7, with which it should be more regularly associated in its decisions. This scope of jurisdiction is not limited...as long as the Court is within its

24 CAfDHP, 15/3/2013, ***Ernest Francis Mtingwi v Republic of Malawi***, 15 March 2013, § 14; ***Alex Thomas v United Republic of Tanzania***, 20 November 2015, §; 28/3/2014, ***Peter Joseph Chacha v United Republic of Tanzania***, 28 March 2014, § 114; ***Ernest Francis Mtingwi v Republic of Malawi***, 15 March 2013, § 14.

25 AfCHPR, ***Sébastien Germain Ajavon v Republic of Benin***, Order, 7 December 2018.

applicable law, it is within its jurisdiction. This place of applicable law is also present when discussing the Court's jurisdiction to hear a case under Article 3(2). The links between these articles are at the root, they are ontological.

## Mulindahabi v Rwanda (ruling) (2020) 4 AfCLR 374

Application 011/2017, *Fidèle Mulindahabi v Republic of Rwanda*

Ruling (admissibility), 26 June 2020. Done in English and French, the French text being authoritative.

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

Recused under Article 22: MUKAMULISA

The Applicant brought this action alleging that the Respondent State, by acts of a local authority that compulsorily stopped his repair works on his house, violated his Charter protected rights. The Court declared the application inadmissible for failure to file within a reasonable time after exhaustion of local remedies.

**Judgment in default** (conditions for default judgment, 21)

**Admissibility** (submission within a reasonable time, 39 - 43)

Separate opinion: BEN ACHOUR AND TCHIKAYA

**Jurisdictio**n (material jurisdiction, 6,10)

## I. The Parties

**1.** Fidèle Mulindahabi (hereinafter referred to as "the Applicant"), is a national of the Republic of Rwanda residing in Kigali, who claims to have been the victim of violations by the Respondent State of the right to an adequate standard of living for himself and his family.

**2.** The Application is filed against the Republic of Rwanda (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 25 May 2004. It also deposited on 22 January 2013 the Declaration provided for 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, the Respondent State notified the Chairperson of the African Union Commission of its intention to withdraw the said Declaration. The African Union Commission transmitted to the Court, the notice of withdrawal on 3 March 2016. By a ruling dated 3 June 2016, the Court decided that the withdrawal by the Respondent State would take effect

from 1 March 2017.[1]

## II. Subject of the Application

### A. Facts of the matter

**3.** The Applicant states that as at 23 March 2013, his house had been damaged by heavy rains, and that he subsequently tried to repair the damage in order to be able to shelter his family. However, that, some neighbours who did not want him to undertake the repairs sent confidential reports to the authorities claiming that no local authority could go to his house to assess the situation as the Applicant threatened to attack such persons with a machete.

**4.** The Applicant submits that on the basis of these false confidential reports, the local authority representative of Nyarugenge District in the municipality of Kigali went to his home accompanied by a crowd of people. The representative proceeded to inspect his house and take photographs of all the rooms, without any permission, and in the end asked the Applicant to stop the repair work.

**5.** The Applicant states that he officially submitted a letter to the Ministry in charge of natural disasters requesting that the verbal decision of the municipal authority's representative ordering him to stop the repair work, be annulled and that he be allowed to continue repairing his house. Nevertheless, intelligence officers were sent to stop the work and asked the Applicant to report to the police the following day, that is, 1 May 2013 at 10:00 am. .

**6.** The Applicant submits that instead of reporting to the police, he wrote a letter to the President of the Republic on this matter and the threats ceased. However, a journalist who had discreetly taken photos of the house, posted them on the Internet.

**7.** He further avers that he filed a lawsuit before the Nyarugenge High Court, Kigali, seeking compensation for the damage suffered, based on Article 258 of the Civil Code. His case was registered under number RAD0027/13/TGI/NYGE. However, it was dismissed for lack of evidence.

**8.** The Applicant contends that he appealed the above-mentioned judgment to the Supreme Court, by appeal No. 0006/14/HC/KIC. On 23 May 2014, the Supreme Court issued its judgment

1 See *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 562 § 67.

confirming the judgment of the High Court.

## B. Alleged violations

**9.** The Applicant contends that the Respondent State:

i. Violated his right to an adequate standard of living provided under Article 14 of the Charter.

ii. Violated, in the determination of his rights and obligations, his right to a fair and public hearing by a court, provided for under Article 10 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 14(1) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR").

iii. Failed to ensure the execution by the competent authorities of the judgments rendered in favour of the Applicants under Article 2(3)(c) of the ICCPR.

iv. Violated his right to take legal action within the meaning of Article 7(1)(a)(d) of the Charter.

v. Failed to guarantee the independence of the courts and to provide for the establishment and improvement of competent national institutions for the promotion and protection of the rights and freedoms guaranteed by Article the Charter as required by Article 26 thereof.

vi. Violated the right to equality before the law and equal protection of the law enshrined in Article 3 of the Charter, Article 26 of the ICCPR and Article 7 of the UDHR.

## III. Summary of the procedure before the Court

**10.** The Application was filed on 24 February 2017 and on 31 March 2017 transmitted it to the Respondent State as well as the other entities mentioned in the Protocol.

**11.** On 9 May 2017, the Registry received a letter from the Respondent State reminding the Court of the withdrawal of its Declaration under Article 34(6) of the Protocol and informing the Registry that it would not participate in any proceedings before the Court. The Respondent State also requested the Court to cease from transmitting to it any information relating to any pending cases concerning it.

**12.** On 22 June 2017, the Court acknowledged receipt of the Respondent State's said correspondence and informed the Respondent State that it would nonetheless be notified of all the documents in matters relating to Rwanda in accordance with the Protocol and the Rules.

**13.** On 25 July 2017, granted the Respondent State an extension of Forty-five (45) days for the Respondent State to file its Response.

On 23 October 2017, Court granted a second extension of Forty-five (45) days, indicating that it would render a judgment in default after the expiration of this extension if the Respondent State did not file its Response. .

**14.** On 17 July 2018, the Applicant was requested to file submissions on reparations within thirty (30) days thereof. The Applicant filed the submissions on reparations on 6 August 2018 and these were transmitted on to the Respondent State on 7 August 2018 giving the latter thirty (30) days to file the Response thereto. The Respondent State failed to respond, notwithstanding proof of receipt of the notification on 13 August 2018.

**15.** On 16 October 2018, the Respondent State was notified that it was granted a final extension of Forty-five (45) days to file the Response and that, thereafter it would render a judgment in default in the interest of justice in accordance with Rule 55 of its Rules..

**16.** Although the Respondent State received all these notifications, it did not respond to any of them. Accordingly, the Court will render a judgment in default in the interest of justice and in accordance with Rule 55 of the Rules.

**17.** Pleadings were closed on 28 February 2019 and the parties were duly notified.

## IV. Prayers of the Parties

**18.** The Applicant prays the Court to take the following measures:

i. Find that the Republic of Rwanda has violated relevant human rights instruments that it has ratified.

ii. Review the judgment in case No. RADA006/14/HC, annul all decisions taken and order the Republic of Rwanda to provide him with a house to replace the one that was damaged, photographed and published on the Internet.

iii. Order the Respondent State to pay him compensation of Fifty Million Rwandan francs (RWF 50,000,000) for the purchase of a new house.

iv. Order the Respondent State to pay him an amount of Forty-Five Million Rwandan francs (RWF 45,000,000) as compensation for the non-pecuniary damage he and nine (9) members of his family suffered over a long period of time.

v. Order the Respondent State to pay him damages in the amount of Forty Million Rwandan francs (40,000,000 RWF) for the publication of images on the Internet which caused prejudice to his family.

vi. Order the Respondent State to pay him damages in the amount of Twenty-Two Million Rwandan francs (22,000,000 RWF) for the acts of theft against his home.

vii. Order the Respondent State to pay him an amount of Six Million Rwandan Francs (6,000,000 RWF) as legal fees and costs of proceedings before the domestic courts and the African Court.

viii. Order the Respondent State to pay him an amount of Five Hundred Thousand Rwandan Francs (500,000 RWF) as lawyers' fees and legal costs.

**19.** The Respondent State did not participate in the proceedings before this Court. Therefore, it did not make any prayers in the instant case.

## V. Non appearance of the Respondent State

**20.** Rule 55 of the Rules provides that:

**1.** Whenever a party does not appear before the Court or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings.

2. Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case and that the application is admissible and well founded in fact and in law.

**21.** The Court notes that the above mentioned Rule 55 of the Rules sets out three conditions, namely:

i. failure to appear or defend the case by one of the parties,

ii. a request made by the other party and

iii. the notification to the defaulting party of both the application and the documents on file.

**22.** On the default of one of the parties, the Court notes that on 9 May 2017, the Respondent State had indicated its intention to suspend its participation and requested the cessation of any transmission of documents relating to the proceedings in the pending cases concerning it. The Court notes that, by these requests, the Respondent State has voluntarily refrained from asserting its defence.

**23.** With respect to the other party's request for a judgment in default, the Court notes that in the instant case it should, in principle, have given a judgment in default only at the request of the Applicant. However, the Court considers, that, in view of the proper administration of justice, the decision to rule by default falls within its judicial discretion. In any event, the Court shall have jurisdiction to render judgment in default *suo motu* if the conditions laid down in Rule 55(2) of the Rules are fulfilled.

**24.** Finally, as regards the notification of the defaulting party, the Court notes that the Application was filed on 24 February 2017. The Court

further notes that from 31 March 2017, the date of transmission of the notification of the Application to the Respondent State, to 28 February 2019, the date of the closure of written pleadings, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. The Court concludes thus, that the defaulting party was duly notified.

**25.** On the basis of the foregoing, the Court will now determine whether the other requirements under Rule 55 of the Rules are fulfilled, that is: it has jurisdiction, that the application is admissible and that the Applicant's claims are founded in fact and in law.[2]

## VI. Jurisdiction

**26.** Pursuant to Article 3(1) of the Protocol, "[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"; and "the Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned." Furthermore, Rule 39(1) of the Rules provides that: "[t]he Court shall conduct a preliminary examination of its jurisdiction ..."

**27.** After a preliminary examination of its jurisdiction and having found that there is nothing in the file to indicate that it does not have jurisdiction in this case, the Court finds that it has:

i. Material jurisdiction by virtue of the fact that the Applicant alleges a violation of Articles 7(1)(a)(d) and 14 of the Charter, Articles 2(3)(c) and 14(1) of the ICCPR to which the Respondent State is a party and Article 7 of the UDHR[3].

ii. Personal jurisdiction, insofar as, as stated in paragraph 2 of this Ruling, the effective date of the withdrawal of the Declaration by the Respondent State is 1 March 2017.[4]

iii. Temporal jurisdiction, in so far as, the alleged violations took place after the entry into force for the Respondent State of the Charter (31

2 *African Commision on Human and Peoples' Rights v Libya* (merits) (2016) 1 AfCLR 153 §§ 38-42.

3 See *Anudo Ochieng Anudo v United Republic of Tanzania*,(merits) (2018) 2 AfCLR 248, § 76; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (2018) 2 AfCLR 314, § 33.

4 See paragraph 2 of this Judgment.

January 1992), of the ICCPR (16 April 1975), and the Protocol (25 January 2004).

iv. Territorial jurisdiction, since the facts of the case and the alleged violations occurred in the territory of the Respondent State.

**28.** From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

## VII. Admissibility

**29.** Pursuant to the provision of Article 6(2) of the Protocol "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

**30.** Furthermore under Rule 39(1) of its Rules, "[t]he Court shall conduct a preliminary examination of … the admissibility of the application in accordance with articles 50 and 56 of the Charter and Rule 40 of these Rules".

**31.** Rule 40 of the Rules of Court, which in substance restates Article 56 of the Charter, sets out the conditions 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.

**32.** The Court notes that the conditions of admissibility set out in Rule 40 of the Rules are not in contention between the parties, as the Respondent State having decided not to take part in the proceedings did not raise any objections to the admissibility of the Application. However, pursuant to Rule 39(1) of the Rules, the

Court is obliged to determine the admissibility of the Application.

**33.** It is apparent from the record that the Applicant is identified. The Application is not incompatible with the Constitutive Act of the African Union and the Charter. It is not written in disparaging or insulting language and is not based exclusively on information disseminated through the mass media. There is also nothing on the record to indicate that the present Application concerns a case which has been settled in accordance with either the principles of the United Nations Charter, the OAU Charter or the provisions of the Charter.

**34.** With regard to the exhaustion of local remedies, the Court reiterates as it has established in its case law that "the local remedies that must be exhausted by the Applicants are ordinary judicial remedies"[5], unless they are manifestly unavailable, ineffective and insufficient or the proceedings are unduly prolonged.[6]

**35.** Referring to the facts of the matter, the Court concludes that the Applicant filed is complaint before the Court of First Instance, which dismissed his complaints by judgment dated 27 December 2013. He appealed against this decision to the Supreme Court, which upheld the judgment of the High Court by its judgment of 23 May 2014. The Court, therefore, holds in conclusion that the Applicant has exhausted the available local remedies.

**36.** With regard to the obligation to file an application within a reasonable time, the Court notes that Article 56(6) of the Charter does not set a time limit for the filing of cases before it. Rule 40(6) of the Rules, which restates the provisions of Article 56(6) of the Charter, simply requires the Application to "be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

**37.** It emerges from the record that local remedies were exhausted on 23 May 2014, with the judgment of the Supreme Court. This is, therefore, the date which must be regarded as the starting point for calculating and assessing the reasonableness of the time, within the meaning of the provisions of Rule 40(6) of the Rules and Article 56(6) of the Charter.

**38.** The Application was filed at this Court on 24 February 2017, two (2) years, nine (9) months and nine (9) days after the exhaustion of

5 *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599 § 64. *See also Alex Thomas v Tanzania (*merits) (2015) 1 AfCLR 465 § 64; and *Wilfred Onyango Nganyi & 9 ors v Tanzania* (merits) (2016) 1 AfCLR 507*, § 95.*

6 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, § 77. *See also Peter Joseph Chacha v Tanzania* (admissibility) (2014) 1 AfCLR 398, § 40.

domestic remedies. The Court must therefore determine whether this period is reasonable within the meaning of the Charter and the Rules..

**39.** The Court recalls that "the reasonableness of a time-limit for referral depends on the particular circumstances of each case, and must be assessed on a case-by-case basis ..."[7]

**40.** The Court has consistently held that the six-month period expressly provided for in other international human rights law instruments cannot be applied under Article 56(6) of the Charter; and Court has therefore adopted a case-by-case approach in assessing the reasonableness of a time limit within the meaning of Article 56(6) of the Charter"[8].

**41.** The Court considers that, in accordance with its established jurisprudence on the assessment of reasonable time, the determining factors are, *inter alia*, the status of the Applicant[9] the conduct of the Respondent State[10] or its officials. Furthermore, the Court assesses the reasonableness of the time limit on the basis of objective considerations.[11]

**42.** In the case of *Mohamed Abubakari v Tanzania*, the Court held as follows: the fact that an Applicant was in prison; he indigent; unable to pay for a lawyer; did not have the free assistance of a lawyer since 14 July 1997; was illiterate; could not have been aware of the existence of this Court because of its relatively recent establishment; are all circumstances that justified some flexibility in assessing the reasonableness of the timeline for seizure of the Court. [12]

**43.** Furthermore, in *Alex Thomas v Tanzania*, the Court justified its position as follows:

Considering the Applicant's situation, that he is a lay, indigent, incarcerated person, compounded with the delay of providing him with Court records, and his attempt to use extraordinary measures, that is, the application for review of the Court of Appeal's decision, we find that these constitute sufficient grounds to explain why he filed the application

7 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo & Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso* (preliminary objections) *(*2013) 1 AfCLR 197, § 121.

8 *Norbert Zongo ibid.* See also the judgment in *Alex Thomas v Tanzania* (merits) *op.cit § 73 and 74.*

9 *Alex Thomas v Tanzania* (merits) *op.cit* § 74.

10 *Anudo Ochieng Anudo v Tanzania* (merits), *op.cit* § 58.

11 As the date of deposit of the Declaration recognising the Court's jurisdiction, in accordance with Article 34(6) of the Protocol.

12 *Mohamed Abubakari v Tanzania* (merits) *op.cit*, § 92.

before this Court on 2 August 2013, being three (3) years and four (4) months after the Respondent made the declaration under Article 34(6) of the Protocol. For these reasons, the Court finds that the application has been filed within a reasonable time after the exhaustion of local remedies as envisaged by Article 55 (6) of the Charter.[13]

**44.** It is also clear from the Court's case-law that the Court declared admissible an application brought before it three (3) years and six (6) months after the Respondent State deposited the Declaration under Article 34(6) of the Protocol accepting the Court's jurisdiction, having concluded that: "the period between the date of its referral of the present case, 8 October 2013, and the date of the filing by the Respondent State of the Declaration of recognition of the Court's jurisdiction to hear individual applications, 29 March 2010, is a reasonable time within the meaning of Article 56(6) of the Charter.[14]

**45.** In the instant case, the Applicant was not imprisoned or subject to any restriction of movement after the exhaustion of local remedies, nor was he indigent, and his educational background not only enabled him to defend himself as evidenced by the Application filed on 24 February 2017, but also made him aware of the existence of the Court and the proceedings before it within a reasonable time. Moreover, the Respondent State also deposited the Declaration recognising the Court's jurisdiction four (4) years, three (3) months and nine (9) days before the exhaustion of local remedies.

**46.** In light of the foregoing, the Court holds that the period of two (2) years and nine (9) months that elapsed before the Applicant filed the Application before it is not a reasonable time within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules. Consequently, Court finds that the Application is inadmissible on this ground.

## VIII. Costs

**47.** The Court notes that Rule 30 of its Rules provides that "Unless otherwise decided by the Court, each party shall bear its own

13 *Alex Thomas v Tanzania* (merits) *op.cit*, § 74.

14 *Mohamed Aubakari v Tanzania* (Merits), § 93

costs".

**48.** Taking into account the circumstances of this case, the Court decides that each party shall bear its own costs.

## IX. Operative part

**49.** For these reasons,

The Court:

Unanimously and in default,

i. *Declares* that it is has jurisdiction*;*

ii. *Declares* the application inadmissible *;*

iii. *Declares* that each party shall bear its own costs.

***

## Separate opinion: BEN ACHOUR AND TCHIKAYA

**1.** We concur with the position adopted by the Court on admissibility, jurisdiction and operative provisions in the four *Mulindahabi v Rwanda* decisions adopted by unanimous decision of the judges sitting on the bench.

**2.** By this Opinion, we wish to express a position on a point of law. This opinion clarifies a point relating to the Court's subject-matter jurisdiction on which our Court has often proceeded by economy of argument.

**3.** In our view, Article 3 of the Protocol, while taking account of the general framework of jurisdiction it lays down, should also be understood in terms of the scope given to it by Article 7 of the same Protocol. Since the *Mulindahabi* species do not pose any particular problems of jurisdiction, there were no a priori reasons for the emergence of such a debate. However, the question did emerge and therefore required clarification which would be valid for other judgments delivered or to be delivered by the Court.

**4.** A breadcrumb trail structures the analysis. These are two waves of decisions that characterize the Court's jurisprudence. The cut-off point is generally in 2015, when the Court delivered its *Zongo*[1]

1 AfCHPR*, Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights*

judgment. The decision on jurisdiction in this case is given in 2013. It can be supported because a reflection seems to be beginning on the choices in terms of procedure with the *Mohamed Abubakari* judgment in 2016[2]. The Court begins to work, as noted by Judges Niyungeko and Guissé, more "distinctly: first on all questions relating to its jurisdiction (both the preliminary objection and the question of its jurisdiction under the Protocol), and then on all questions relating to the admissibility of the application"[3].

**5.** Thus, in the first part, we shall examine the state of the matter, i.e., the envisaged readings of Articles 3 and 7 of the Protocol in determining the Court's subject-matter jurisdiction. In the second part, devoted to the second wave of decisions, the use of Articles 3 and 7 will evolve.

## I. Article 3 and 7 of the Protocol through the Court's doctrine and case-law

**6.** In our view, the two Articles 3 and 7 of the Protocol should be read together, as one sheds light on the other. They are complementary. For the reasons that follow, they cannot be separated. The Court's subject-matter jurisdiction is therefore based on both the first paragraph of Article 3 and Article 7 of the Protocol. We shall first present a restrictive reading of these provisions (A) before turning to their reference in certain decisions of the Court which we describe as first wave (B).

### A. A restrictive reading of Articles 3 and 7 of the Protocol

**7.** Article 3(1) of the Protocol, on the jurisdiction of the Court, reads 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".

Article 7, on applicable law, states in one sentence that:

"The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned".

*Movement v Burkina Faso, Judgment on Reparations,* 5 June 2015.

2 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29

3 Dissenting opinion of Judges Gérard Niyungeko and El Hajji Guissé in the *Urban Mkandawire v Republic of Malawi judgment,* 21 June 2013.

**8.** Different readings of these two Articles have emerged. Reading them separately, some have argued that their functions should not go beyond the title given to them by the successive drafters of the Convention. Article 3(1) applying strictly and exclusively to the jurisdiction of the Court and the other, Article 7, referring solely to the applicable law. This approach is restrictive and, in fact, does not correspond, on closer inspection, to the approach which the Court itself has followed through its case-law since 2009.

**9.** It was also noted that Article 7 would be a mere repetition of Article 3(1) and is, in this respect, superfluous. Professor Maurice Kamto supports this reading in particular when he states that "Articles 3 and 7 are a legal curiosity"[4]. They would have no equivalent in the statutes of other regional human rights jurisdictions. The "Ouagadougou Protocol should have confined itself to this provision, which makes Article 7 all the more useless as its content is likely to complicate the Court's task"[5].

**10.** It is not clear whether the drafters of the Protocol intended to exclude certain categories of legal rules, such as custom, general principles of law, etc., from the scope of the Protocol. The use of the phrase "ratified by the States concerned" in both Articles might lead one to believe[6] that the Court should only take into account conventions ratified by States. It would be difficult to explain why the next paragraph, 3(2), recognizes the Court's "jurisdiction". It is well known that for the purpose of establishing the grounds for its jurisdiction, the scope of the applicable law should be opened up. The Court cannot, as will be discussed below, be limited in the reasons for its jurisdiction when it is challenged. In the latter case there is a clear manifestation of the link between Article 3

4 Commentary on Article 7 of the Protocol, *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of an African Court, article-by-article commentary,* edited by M. Kamto, Ed. Bruylant, 2011, pp. 1296 et seq.

5 *Idem.*

6 Professor Maurice Kamto tends towards this appreciation. He states that "The restriction of the law applicable by the Court to the Charter and the said legal instruments creates an effect of implicit amputation of the scope of the relevant rules applicable by that jurisdiction. It deprives the Court and the parties brought before it of the application or invocation of "African practices in conformity with international standards relating to human and peoples' rights, customs generally accepted as law, general principles of law recognised by African nations, as well as case law and doctrine", referred to in Article 61 of the *ACHPR, v Idem*, 1297.

and Article 7 of the Protocol.

**11.** This was, in short, the interpretation adopted by the Court on the reading of Rule 39 of its Rules:

"1. The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the application [...].

2. … the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".

In calling for "the submission of any information relating to the facts, documents or other materials which it consider to be relevant", the Court wishes to inquire into all aspects of the applicable law, as noted in the heading of Article 7.

**12.** The other reading is to regard the two Articles as complementary and, where the conflict so requires, as being necessary for the Court to further develop its jurisdiction. This was not the case in the *Mulindahabi* decisions, but the Court has done so on various occasions.

## B. The Court's reading of Articles 3 and 7 in its first wave of decisions

**13.** The first phase of the Court considered in the interest of the analysis ranges from the *Michelot Yogogombaye*[7] judgment (2009) to the *Femi Falana*[8] judgment (2015). This breakdown shows the evolution of the Court and its judicial involvement on the one hand, and on the other, it makes it possible to periodize its commitments as to the bases of its jurisdiction.

**14.** The Court has always accepted that the provisions of Articles 3 and 7 provide a firm basis for its jurisdiction to respond to human rights disputes. It has done so from its earliest years. It had perceived the openings left by its jurisdiction as formulated in the Protocol. The former Vice-President of the African Court, Judge Ouguergouz, states in his study that: "Article 3 (1) of the Protocol provides for a very broad substantive jurisdiction of the Court [...]. The liberal nature of this provision is confirmed by Article 7,

7 AfCHPR, *Michelot Yogogombaye v Republic of Senegal*, 15 December 2009; see also, Loffelman (M.), *Recent jurisprudence of the African Court on Human and Peoples' Rights*, Published by Deutshed Gesellschaft...GIZ, 2016, p. 2.

8 AfCHPR, *Femi Falana v African Commission on Human and Peoples' Rights*, Order, 20 November 2015.

entitled ''Applicable law"[9].

**15.** Two issues are apparent in the provisions of Articles 3(1) and 7 of the Protocol: first, the case where the disputes in question are based from the outset on provisions of the Charter; second, where the Court, not having a clearly defined rule, would have to seek them in conventions ratified by the Respondent States. In reality, the Court has always used both approaches. It has always found itself drawn into international law whenever it is part of the law accepted by States.

**16.** What the Court is seeking to do from 2011 in the case of *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*:

> The Court also had to rule on the issue of applicabilitý of the Treaty establishing the East Africa Community, in the light of Articles 3(1) and 7 of the Protocol, as well as Article 26(1)(a) of the Rules of Court. These three provisions contain the expression "any other relevant human rights instrument ratified by the States concerned" which expressly refers to three conditions: 1) the instrument in question must be an international treaty, hence the requirement of ratification by the State concerned, 2) the international treaty must be "human rights related" and 3) it must have been ratified by the State Party concerned[10].

**17.** The 2015 *Femi Falana* case, which completes the first wave of the Court's decisions, expresses in all cases the Court's two-step reasoning on its jurisdiction. In the first stage, it states the basis of its jurisdiction (Article 3(1)) and in the second stage, it gives, through the applicable law (Article 7), the reasons for its choice.

**18.** In this case, the application was directed against an organ of the African Union, established by the African Charter on Human and Peoples' Rights, namely, the African Commission on Human and Peoples' Rights. Under Article 3(1) of the Protocol, the Court first states that it has jurisdiction to hear and determine 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. It goes on to say that, although the facts giving rise to the complaint relate to human rights violations in Burundi, it was brought in the present case against the Respondent, an entitý which is not a State party

9 Ouguergouz (F.), La Cour africaine des droits de l'homme et des peuples - Gros plan sur le premier organe judiciaire africain à vocation continentale, *Annuaire français de droit international*, volume 52, 2006. pp. 213-240;

10 AfCHPR, *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*, Order, 22 September 2011, §§ 13 and 14.

to the Charter or the Protocol. Finally, in its reasoning in § 16 of the judgment, the Court bases itself on a consideration of general applicable law.

The relationship between the Court and the Respondent is based on the complementarity. Accordingly, the Court and the Respondent State are autonomous partner institutions but work together to strengthen their partnership with a view to protecting human rights throughout the continent. Neither institution has the power to compel the other to take any action.

The Court's application of general law reflects the complementarity between that law and the law that governs its substantive jurisdiction.

**19.** The same approach is found in the discussion of jurisdiction in the *Zongo* (2013)[11] case. The Court states that: "Under Article 3(1) of the Protocol ... and Article 3(2) of the same Protocol, "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide ...". It goes on to state, appropriately, that :

The Court goes on to note that the application of the principle of the non-retroactivity of treaties, enshrined in Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969, is not in contention between the Parties. What is at issue here is whether the various violations alleged by the Applicants would, if they had occurred, constitute "instantaneous" or "continuing" violations of Burkina Faso's international human rights obligations.

**20.** It is apparent that the Court's reasoning does not focus strictly on the rules concerning its jurisdiction, but also extends it to the law applied by it.

## II. The relationship between Articles 3 and 7 of the Protocol as regards the Court's subject-matter jurisdiction: confirmation in the second wave of decisions

**21.** The drafters of the Protocol provided judges with a kind of "toolbox" through these two articles, which they would make good use of. They are only bound by the consistency and the motivation of their choice. Indeed, quite obviously, the two articles have often been used together in the Court's second decade of activity. It will first be shown that the Court's approach is also present in

11 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabé Human and Peoples' Rights Movement v Burkina Faso*, Decision on Preliminary Objections, 21 June 2013, § 61, 62, 63.

international litigation.

## A. The Court's approach is confirmed by the practice in international litigation

**22.** This approach is known from international litigation even before the African Court was established. It is, in fact, consistent with the logic of law. Its manifestation can be found in jurisprudential work as old as that of the Permanent Court of International Justice (PCIJ), confirmed by the jurisprudence of the International Court of Justice (ICJ).

**23.** It was by reasoning on its applicable law that the PCJI extended its jurisdiction to human rights issues long before the wave of such law following the Second World War. The august Court was already doing its job of protecting fundamental rights in well-known cases.[12]

**24.** There has been a known shift in the jurisdiction of arbitral tribunals in this area. The jurisdiction of these courts is strictly fixed within conventional limits, but they have integrated human rights issues by making a specific reading of their applicable law[13].

**25.** The African Court already applies this methodology, which is well known in international law. In addition to generally having the "competence of jurisdiction" in the event of a dispute, the international courts and the international instruments establishing them often give them the legal basis to deploy their jurisdiction. In a complex argumentation the ICJ recalled that it has :

"an inherent power which authorizes it to take all necessary measures, on the one hand, to ensure that, if its jurisdiction on the merits is established, the exercise of that jurisdiction does not prove futile, and, on the other hand, to ensure the regular settlement of all points in dispute...."[14] .

Professors Mathias Forteau and Alain Pellet saw this as a kind of implicit jurisdiction within the competence of the International

12 CPJI, Advisory Opinion, *Minority Schools in Albania*, 6 April 1935; Advisory Opinion, German Settlers in Poland, 10 September 1923; Advisory Opinion, Treatment of Polish Nationals and Other Persons of Origin, 4 February 1932

13 Cazala (J.), Protection des droits dc l'homme et contentieux international de l 'investissement, *Les Cahiers de l'Arbitrage*, 2012-4, pp. 899-906. v in particular, Tribunal arbitral CIROI (MS), S.A., 29 May 2003, *Tecnicas Medioambientales Teemed SA v Mexico*, §§ 122-123; S.A., CIRDI, *Azurix Corporation v Argentina*, 14 July 2006, §§ 311-312; see S.A., ICSID (MS), *Robert Azinian & ors v Mexico*, ARB(AF)/97/2, 1 November 1999, §§ 102-103.

14 *Nuclear Tests Case (New Zealand v France),* Judgment of 20 December 1974, ECR 1974, pp. 259-463

Court of Justice[15].

**26.** Sometimes the international judge, in order to clarify a position or to explore other aspects inherent in its jurisdiction, uses the applicable law rather than the strict rules which conventionally define and frame its jurisdiction.

**27.** The affirmation of the role of the ICJ in international human rights law provides an example of this. In 2010, the Court in The Hague rendered its judgment on the merits in the case of *Ahmadou Sadio Diallo - Guinea v Congo-Kinshasa*[16]. The Court ruled on claims of violations of human rights treaties. This case showed that, in addition to having general jurisdiction over the rights of States, the International Court of Justice could without hindrance to its jurisdiction, deal with the question of human rights.

**28.** In this sense, it may be observed that an increasing number of international courts have specialized in human rights, without having an initial mandate to do so. On closer inspection, this is mainly due to their *applicable law*. The cross-cutting nature of the rules of international law has a clear impact on the deployment of jurisdiction. It is thus understandable that in addition to the provisions framing the jurisdiction, the Protocol establishing the African Court has taken them over in terms of applicable law.

**29.** The same analysis can be made with regard to the European Court of Human Rights. In the *Nicolaï Slivenko*[17] judgment of 2003, the Court stated that it should not "re-examine the facts established by the national authorities and having served as a

15 Forteau (M.) and Pellet (A.), ***Droit international public***, Ed. LGDJ, 2009, p. 1001; Visscher (Ch. De), Quelques aspects récents du droit procédural de la CIJ, Ed. Pédone, 1966, 219 p.; Santulli (C.), Les juridictions de droit international : essai d'identification, AFDI, 2001, pp. 45-61.

16 The ICJ states that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which ***Mr. Diallo*** was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights". Diallo was arrested and detained in 1995-1996 with a view to his deportation, the Democratic Republic of the Congo violated article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights. This case showed that the general jurisdiction enjoyed by the ICJ, which relates to "any matter of international law" under Article 36 §2 (b) of its Statute, can be extended to human rights.

17 ECHR, *Nicolai Slivenko v Latvia,* 9 October 2003.

basis for their legal assessment" by reviewing the "findings of the national courts as to the particular circumstances of the case or the legal characterization of those circumstances in domestic law", but at the same time recognized that it was part of its task "to review, from the Convention perspective, the reasoning underlying the decisions of the national courts". The doctrine derived from this idea that the Court was increasing the intensity of its review of judicial decisions. This can only be achieved through a broad reading of the law which the Court is mandated to apply. It can thus be said that the applicable law and jurisdiction stand together, the latter is undoubtedly a common thread.

## B. Links established between Articles 3 and 7 in the second wave of Court decisions

**30.** Where the Court finds a difficulty or possible challenge to its jurisdiction, it shall combine the two Articles 3(1) and 7. It uses these two complementary texts. It does not, however, feel bound to indicate explicitly the use thus made of Article 7, and that is what we regret.

**31.** In its *Abubakari*[18] judgment, the Court emphasizes :

28. More generally, the Court would only act as an appellate court if, inter alia, it applied to the case the same law as the Tanzanian national courts, i.e., Tanzanian law. However, this is certainly not the case in the cases before it, since by definition it applies exclusively, in the words of Article 7 of the Protocol, "the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned".

In the following paragraph, it concludes:

On the basis of the foregoing considerations, the Court concludes that it has jurisdiction to examine whether the treatment of the case by the Tanzanian domestic courts has been in conformity with the requirements laid down in particular by the Charter and any other applicable international human rights instruments. Accordingly, the Court rejects the objection raised in this regard by the Respondent State.

**32.** In the 2016 case, *Ingabire Victoire Umuhoza v Republic of Rwanda*[19], the Court states, once again, without citing Article 7, that :

As regards the application of the Vienna Convention to the present case, the Court observes that while the declaration made under Article 34(6)

18 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29.

19 AfCHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Decision on the Withdrawal of the Declaration, 5 September 2016

emanates from the Protocol, which is governed by the law of treaties, the declaration itself is a unilateral act which is not governed by the law of treaties. Accordingly, the Court concludes that the Vienna Convention does not apply directly to the declaration, but may be applied by analogy, and the Court may draw on it if necessary. (...) In determining whether the withdrawal of the Respondent's declaration is valid, the Court will be guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law. With regard to the rules governing the recognition of jurisdiction of international courts, the Court notes that the provisions relating to similar declarations are of an optional nature. This is demonstrated by the provisions on recognition of the jurisdiction of the International Court of Justice,4 the European Court of Human Rights5 and the Inter-American Court of Human Rights", §§ 55 and 56.6.

**33.** However, the Court says that it is guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law, it is a recourse to Article 7 of the Protocol. In that the latter article allows it to rely on any relevant human rights instrument.

**34.** On its jurisdiction in the *Armand Guehi*[20] case in 2016, the Court proceeds in the same way. It cites Article 3(1), but resorts to other texts. One wonders whether the Court simply finds its jurisdiction in respect of interim measures or whether it simply applies provisions outside the Charter to do so. It says:

"Having regard to the particular circumstances of the case, which reveal a risk that the death penalty might be imposed, thereby infringing the Applicant's rights under Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights, the Court decides to exercise its jurisdiction under Article 27(2) of the Protocol", § 19.

**35.** The complementarity between these two Articles, which should be cited together, is expressed. For in Article 3(1) the Court finds its jurisdiction without difficulty and bases it on it; and in Article 7 the Court, by having recourse to other texts, is also founded in law by virtue of the fact that its applicable law authorizes it to do so. Accordingly, in the *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire*[21] judgment also delivered in 2016, from § 42 to § 65, the Court sets out a reasoning for establishing its jurisdiction. This can only be understood by reading the two articles, 3(1) and 7 together. In particular, it says

20 AfCHPR, *Armand Guehi v United Republic of Tanzania*, Interim Measures Order, 18 March 2016

21 CAfDHP, *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire (Merits)*, 18 November 2016.

that :

"The African Institute of International Law notes that the link between democracy and human rights is established by several international human rights instruments, including the Universal Declaration of Human Rights, Article 21(3), (...) The Institute further maintains that the African Charter on Democracy is a human rights instrument in that it confers rights and freedoms on individuals. According to the Institute, the Charter explains, interprets and gives effect to the rights and freedoms contained in the Charter on Human Rights, the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action (1999), the Declaration on the Principles Governing Democratic Elections in Africa and the 2003 Kigali Declaration".

**36.** The Conclusion on jurisdiction that follows from this series of instruments in § 65 is suggestive:

"The Court concludes that the African Charter on Democracy and the ECOWAS Protocol on Democracy are human rights instruments, within the meaning of Article 3 of the Protocol, and that it is therefore competent to interpret and apply them".

**37.** It follows that the Court in its first decade uses Article 3(1) to determine its jurisdiction as set out in the Protocol. As in established judicial practice, the Court uses the applicable law recognized by the "States concerned" to extend or further establish its jurisdiction. In this case, it makes use of Article 7 of the Protocol. The question of priority between the two Articles does not arise, as it is a matter of the particular case and of the choice made by the Court. The two Articles are equally involved in the general question of the Court's jurisdiction to hear cases.

**38.** In its judgment in Jonas (2017), at paragraphs 28, 29 and 30, the Court goes beyond Article 3 on its own motion, stating that:

"Article 3 of the Protocol does not give the Court the latitude to decide on the issues raised by the Applicant before the domestic courts, to review the judgments of those courts, to assess the evidence and to reach a conclusion", § 25.

**39.** It concludes that it has jurisdiction as follows:

The Court reiterates its position that it is not an appellate body in respect of decisions of the domestic courts. However, as the Court emphasised in its judgment in *Alex Thomas v the United Republic of Tanzania*, and confirmed in its judgment in *Mohamed Abubakari v the United Republic of Tanzania*, this circumstance does not affect its jurisdiction to examine whether proceedings before national courts meet the international standards established by the Charter or other applicable human rights instruments. The Court therefore rejects the objection raised in this regard by the Respondent State and concludes that it has subject-matter

jurisdiction[22]. The Court does not appear to be taking a position on the question of which of the two Articles is the basis for its jurisdiction.

**40.** In order to refute the Respondent State's contention and to establish its jurisdiction in the *Nguza*[23] Judgment, the Court begins by relying first on its own jurisprudence[24]. It goes on to have recourse to the applicable law in general, namely:

"as it stressed in the judgment of 20 November 2016 in the case of *Alex Thomas v United Republic of Tanzania* and confirmed in the judgment of 3 June 2016 in the case of *Mohamed Abubakari v United Republic of Tanzania*, this does not exclude its jurisdiction to assess whether proceedings before national courts meet the international standards established by the Charter or by other applicable human rights instruments to which the respondent State is a party", §§ 33 et seq.

It then infers jurisdiction from this and refers to Article 3 of the Protocol:

"Accordingly, the Court rejects the objection raised by the Respondent State, ….". It has subject-matter jurisdiction under Article 3(1) of the Protocol, which provides that the Court "shall have jurisdiction in all cases and disputes submitted to it ...", § 36.

**41.** This reversal of logic by the Court is not in vain. It makes it possible to appreciate how the applicable law is not external to the determination of jurisdiction, which is well defined by the Protocol.

**42.** Orders for the indication of provisional measures do not present the same difficulties. It may be observed, as in the *Ajavon*[25] Case, that the Court's *prima facie* decision does not require recourse to its applicable law (7 Article). This is stated in paragraph 28:

"However, before ordering interim measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction".

22 AfCHPR, ***Christopher Jonas v United Republic of Tanzania***, Judgment, 28 September 2017: Convicted and sentenced for robbery of money and various other valuables, Mr. Christopher Jonas filed this application alleging a violation of his rights during his detention and trial. The Court found that the evidence presented during the domestic proceedings had been assessed according to the requirements of a fair trial, but that the fact that the applicant had not received free legal aid constituted a violation of the Charter.

23 AfCHPR, ***Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Republic of Tanzania***, 23 March 2018.

24 CAfDHP, 15/3/2013, ***Ernest Francis Mtingwi v Republic of Malawi***, 15 March 2013, § 14; ***Alex Thomas v United Republic of Tanzania***, 20 November 2015, §; 28/3/2014, ***Peter Joseph Chacha v United Republic of Tanzania***, 28 March 2014, § 114; ***Ernest Francis Mtingwi v Republic of Malawi***, 15 March 2013, § 14.

25 AfCHPR, ***Sébastien Germain Ajavon v Republic of Benin***, Order, 7 December 2018.

The Court does not have such jurisdiction.

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**43.** Article 3, in particular the first paragraph, sets out the scope of the Court's jurisdiction. However, this cannot be understood without the law which the Court applies, that is, Article 7, with which it should be more regularly associated in its decisions. This scope of jurisdiction is not limited...as long as the Court is within its applicable law, it is within its jurisdiction. This place of applicable law is also present when discussing the Court's jurisdiction to hear a case under Article 3(2). The links between these articles are at the root, they are ontological.

# Woyome v Ghana (review) (2020) 4 AfCLR 397

Application 001/2020, *Alfred Agbesi Woyome v Republic of Ghana*

Ruling (review), 26 June 2020. Done in English and French, the English text being authoritative.

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

In his initial action, the Applicant had alleged that his rights had been violated because he was denied justice in the Supreme Court of the Respondent State. In its judgment on the merits, the Court had held that no violations had been found. The Applicant sought a review of that initial judgment on the grounds that relevant new evidence, which was not available to him had been discovered. The Court dismissed the application.

**Jurisdiction** (jurisdiction to review, 19)

**Procedure** (admissibility, 26, 27; onus to demonstrate discovery of new evidence, 28; nature of new evidence required, 36, 37)

**Provisional measures** (moot request for, 45)

## I. The Parties

**1.** Mr. Alfred Agbesi Woyome (hereinafter referred to as "the Applicant"), is a national of the Republic of Ghana. He is also a prominent business man, 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 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 also deposited on 10 March 2011, 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.** On 4 March 2020, the Applicant filed an Application for Review of the Court's Judgment (hereinafter referred to as "initial Judgment")

in the matter of *Alfred Agbesi Woyome v Republic of Ghana*.[1] The Application, contained a request for Provisional Measures to stay the auction and sale of the Applicant's properties pending the determination of the Application for Review.

**4.** According to the Applicant, "on or about 9 January 2020", he discovered "information" that was not in his knowledge at the time of the delivery of the initial Judgment which affects the basis of the Supreme Court decision dated 29 July 2014.

**5.** Furthermore, he submits that the "information" relates to "another agreement between the Government of Ghana and Shanghai Construction Group for the construction of two stadia at Tamale and Sekondi"; which he claims, proves that the Respondent State violated his rights protected under Articles 2 and 3 of the Charter.

## III. Brief background of the matter

**6.** By the initial Application 001/2017, filed on 16 January 2017, the Applicant alleged that he was denied justice in the Supreme Court of the Respondent State in violation of his rights protected under the Charter.

**7.** According to the Applicant, the truncation of the judicial process by the Review Bench of the Supreme Court of the Respondent State and its assumption of jurisdiction in his case violated his rights to have his cause heard and to non-discrimination protected under the Charter. He also alleged that the Review Bench, as constituted, was impartial and that the comments of one of the Judges, displayed bias.

**8.** On 28 June 2019, the Court rendered the judgment on the initial Application wherein it held:

i. Finds that the Respondent State has not violated Article 2 of the Charter on the right to non-discrimination;

ii. Finds that the Respondent State has not violated Article 3 of the Charter on equality before the law and equal protection of the law.

iii. 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.

iv. 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.

1 Application 001/2017. Judgment of 28 June 2019 (Merits), *Alfred Agbesi Woyome v Republic of Ghana*.

v. 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.

**9.** The Court therefore dismissed the Applicant's initial Application. The initial Judgment is the subject of this Review.

## IV. Summary of the Procedure before the Court

**10.** The Application for Review containing a request for Provisional Measures together with a supporting affidavit and exhibits were filed on 4 March 2020 and transmitted to the Respondent State on 24 March 2020. The Respondent State was requested to respond to the request for Provisional Measures within seven (7) days of receipt thereof and to respond to the Application for Review within thirty (30) days of receipt thereof.

**11.** On 26 May 2020, the Applicant filed a supplementary affidavit to his request for Provisional Measures which was served on the Respondent State on 5 June 2020 and it was given seven (7) days to file any observations thereon.

**12.** The Respondent State did not file its Response to the Application for Review and to the request for Provisional Measures or observations on the supplementary affidavit.

**13.** Pleadings were closed on 16 June 2020 and the Parties were duly notified.

**14.** The Court resolved to consider both the Application for Review on the one hand and the request for Provisional Measures, on the other hand jointly in this Judgment.

## V. Prayers of the Parties

**15.** The Applicant prays the Court to:

i. Review its Judgment of 28 June 2019 and "find that the Republic of Ghana violated his rights to non-discrimination, equality before the law and equal protection of the law guaranteed by articles 2 and 3 of the African Charter";

ii. Issue an Order for Provisional Measures in the interest of justice, for the Respondent State to cease auctioning and selling off his property in order to forestall any irreparable damages to him.

**16.** The Respondent State did not file its Response to the prayers of the Applicant.

***

## VI. Jurisdiction

**17.** 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.

**18.** Rule 26(1) of the Rules of Court (hereinafter referred to as "the Rules") provides: "Pursuant to the Protocol, the Court shall have jurisdiction: … (e) to review its own judgment in light of new evidence in conformity with Rule 67 of these Rules."

**19.** In the instant case, the Court notes that the Application herein is for review of its own judgment in light of alleged new evidence and thus finds that it has jurisdiction.

## VII. On the request for provisional measures

**20.** The Court notes that the Applicant requested for an Order for Provisional Measures "pending the hearing and determination of the Application for Review."

**21.** The Court recalls that in accordance with 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.** Furthermore, Rule 67(5) of the Rules provides that: "an application for review shall not stay the execution of a judgment unless the Court decides otherwise." The Court notes that, the Applicant requested for an Order for Provisional Measures "pending the hearing and determination of the review" is effectively to stay the execution of its initial Judgment.

**23.** The Court observes that, the Applicant by his own admission in his supporting affidavit, indicated that he has been unable to come to an agreement with the Respondent State on a payment plan for the judgment debt that he owes it. Having failed to secure such an agreement, the Applicant seeks to use the Court to forestall the proceedings going on in the national courts.

**24.** The Court considers it desirable to determine both the request for Provisional Measures and the Application for Review in the same decision. The Court will first consider the Application for Review and later decide on the request for Provisional Measures.

## VIII. Admissibility of the Application for review

**25.** Article 28(3) of the Protocol empowers the Court to review its

decisions under conditions to be set out in its Rules.

**26.** The Court recalls that Article 28(3) of the Protocol requires that the process of review must be without prejudice to Article 28(2) of the Protocol; that is, such a process may not be used to undermine the principle of finality of judgments. It is against this background that the Applicant's Application for review shall be considered.[2]

**27.** 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.

**28.** Under Rule 67 of the Rules, therefore, the onus is 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 as well as the time when he came to know of this evidence. Further, the application for review must be submitted within six (6) months of the time when the applicant obtained such evidence.[3]

**29.** The Court will examine the requirements of Article 28(3) of the Protocol and Rule 67(1) of the Rules in tandem, beginning with the issue of the time limit.

**30.** As regards the filing of the Application within six (6) months of the discovery of new evidence; the Court notes that the Applicant alleges that he discovered the evidence on or about 9 January 2020. The Court further notes that the Application was filed on 4 March 2020; that is one (1) month and twenty-four (24) days after the discovery of alleged new evidence.

**31.** Therefore, the Court concludes that the Application has been filed within the stipulated time and in accordance with Rule 67(1) of the Rules.

2 *Urban Mkwandawire v Malawi* (review and interpretation) (2014) 1 AfCLR 299 § 14.

3 *Thobias Mang'ara and Shukrani Mango v United Republic of Tanzania*, AfCHPR, Application 002/2018, Judgment of 4 July 2019 (Review), § 14. *Chrystanthe Rutabingwa v Republic of Rwanda*, AfCHPR, Application 001/2018, Judgment of 4 July 2019 (Review), § 14.

**32.** As regards the condition of the discovery of new evidence, the Court notes that this Application for Review is submitted in respect of the initial Judgment of 28 June 2019. In the circumstances, the Court will limit its consideration to the supporting documents that accompanied the Application which would allegedly prove the violations of Articles 2 and 3 of the Charter.

**33.** The Court observes that the supporting documents filed, include, an agreement between the Respondent State and the Shanghai Construction Group and other exhibits in relation to execution proceedings brought against the Applicant in the national courts.

**34.** The Court also notes that to support his allegations, the Applicant attached the following exhibits:

i. AAW1 Agreement for the Design and Construction of Stadia in Sekondi-Takoradi & Tamale for the CAN 2008 Tournament signed between the Republic of Ghana and Shanghai Construction Company;

ii. AAW2 – Letter dated 5 July 2019 from the Applicant to the Attorney General requesting to pay his judgment debt in instalments;

iii. AAW3 – Letter dated 22 July 2019 from the Deputy Attorney General to the Applicant rejecting the proposal of judgment negotiation;

iv. AAW4 – Notice of Motion for stay of execution dated 31 July 2019 originating from the Former Attorney General Martin Amidu against the Applicant and two others;

v. AAW5 – Supreme Court's decision of 16 October 2019 on the notice of motion filed by Martin Amidu;

vi. AAW6 – Supreme Court's Order of 8 June 2017 for temporary charge;

vii. AAW7 – an Article published on *Ghanaweb* on 14 January 2020, regarding the Supreme Court fining the Applicant's lawyer;

viii. AAW8 – Copy of an Auction sale advertisement published in *Ghanaian Times* on 3 February 2020;

ix. AAW9 & AAW10 – Copies of the writ issued at the High Court by the Applicant and the application for interlocutory injunction at the High Court both dated 5 February 2020;

x. AAW11 – Copies of the injunction case dated 5 February 2020 filed by the Applicant against the Auctioneer in the High Court; and

xi. AAW12 – Copy of an affidavit sworn by Modesta Legibo on 4 May 2020 in relation to the above mentioned High Court proceedings.

**35.** The Court recalls that in its initial Judgment of 28 June 2019, it found that the Respondent State had not violated the Applicant's rights under Articles 2, 3 and 7 of the Charter as regards the decision of the Review Bench of the Supreme Court of the Respondent State. The Court also notes that the Applicant bases

his Application for Review on paragraphs 138 and 139 of the initial Judgment. In the aforementioned paragraphs, the Court held:

> 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…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.[4]

**36.** In relation to supporting documents, the Court recalls that although, produced for the first time before it, the evidence that is required under Article 28(3) of the Protocol is evidence that exerts influence on its initial decision.[5]

**37.** The Court further recalls that substantiation does not constitute "new evidence" that would not have been in the foreknowledge of the Applicant at the time of filing.[6]

**38.** The Court refers to the Inter-American Court of Human Rights case, where it held:

> The application for judicial review must be based on important facts or situations that were unknown at the time the judgment was delivered. The judgment may therefore be impugned for exceptional reasons, such as those involving documents the existence of which was unknown at the time the judgment was delivered; documentary or testimonial evidence or confessions in a judgment that has acquired the effect of a final judgment andis later found to be false; when there has been prevarication, bribery, violence, or fraud, and facts subsequently proven to be false, such as a person having been declared missing and found to be alive.[7]

**39.** The Court notes that having filed an Application for Review containing a request for Provisional Measures, the Applicant also attached supporting documents to both requests. In this regard, the Court further notes that the supporting documents adduced by the Applicant in relation to his Application for Review is an agreement for the design and construction of stadia in Sekondi-Takoradi & Tamale for the CAN 2008 tournament signed between the Respondent State and Shanghai Construction Group Company, marked exhibit "AAW1". The Applicant relies on this

4 *Alfred Agbesi Woyome v Ghana, op.cit*, § §138 and 139.

5 *Frank David Omary & ors v Tanzania* (review) (2016) 1 AfCLR 383 § 49.

6 *Thobias Manga'ra v Tanzania op.cit*. § 25.

7 *Genie Lacayo v Nicaragua*, (Application for judicial review of the judgment of merits, reparations and costs), IACHR Series C no 45, § 12.

document to support his assertion that he has discovered new "evidence" in form of an agreement between the Respondent State & anor Company in relation to the construction of the stadia for the CAN 2008.

**40.** The Court observes therefore, that the rest of exhibits adduced, that is, "AAW2 – AAW12"; were adduced in support of the request for Provisional Measures as they relate to on-going execution proceedings against the Applicant in the national courts. These exhibits will not be considered herein in the determination of the admissibility of the Application for Review as they have no connection with the same.

**41.** As regards the agreement between the Respondent State and the Shanghai Construction Group Company, the Court observes that this information had indeed not been brought to its attention at the time of the initial Judgment. Nevertheless, it is inconceivable that the said contract between the Shanghai Construction Group and the Respondent State which was in the public domain since 2005 was not within the Applicant's knowledge at the time of the delivery of the initial Judgment. In addition, the said agreement would also have been brought forth given the media frenzy in the Respondent State surrounding the tender process for the construction of the stadia for the CAN 2008. Thus, the Court finds that the supporting document adduced herein is neither "new" nor "evidence" as contemplated by Article 28(3) of the Protocol and Rule 67(1) of the Rules.

**42.** The Court further notes that, the supporting document submitted by the Applicant has no correlation with its initial Judgment which is the subject of this review. In other words, it is not related to his claims that the truncation of proceedings and assumption of jurisdiction by the Respondent State's Supreme Court and the conduct of the Review Bench of the Supreme Court resulted in violations of his rights under Articles 2 and 3 of the Charter.

**43.** In light of the foregoing, the Court finds that the supporting document adduced does not constitute new evidence which was not within the knowledge of the Applicant at the time the initial Judgment was delivered, as contemplated by Article 28(3) of the Protocol and Rule 67(1) of the Rules.

**44.** Therefore, the Court, dismisses the Application for Review and declares it inadmissible.

**45.** As regards the request for Provisional Measures, the Court holds that, having found the Application for Review inadmissible, the request for those measures becomes moot.

## IX. Costs

**46.** The Parties did not make any submissions on costs.

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

**48.** In the circumstances of this case, the Court therefore rules that each Party should bear its own costs.

## X. Operative part

**49.** For these reasons,

The Court,

Unanimously,

i. *Declares* that the supporting document submitted by the Applicant does not constitute new evidence;

ii. *Declares* that the Application for Review of the Judgment of 28 June 2019 is inadmissible and is dismissed;

iii. *Declares* that the request for Provisional Measures is moot.

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

# Suy Bi Gohore Emile & ors v Côte d'Ivoire (judgment) (2020) 4 AfCLR 406

Application 044/2019, *Suy Bi Gohore Emile & ors v Côte d'Ivoire*

Judgment, 15 July 2020. 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: ORÉ

The Applicants alleged that in violation of a previous judgment of the Court, the Respondent State had enacted a law to establish an electoral commission that was not independent and impartial. The Applicants claimed this action of the Respondent State was a violation of their Charter protected rights and the State's obligations under international law. The Court held that the Respondent State had only partially violated some of its obligations.

**Procedure** (amicable settlement, 23; public hearing, 23)

**Jurisdiction** (monitoring of judgment, 49, 53, 55; division of competence, 54; complementarity, 54; obligation to comply with judgments, 39; violation of article 30, 60-61; retroactive effect of withdrawal of article 34(6) declaration, 67, 68)

**Admissibility** (amended originating application, 89 -90; exhaustion of local remedies, 100; previously settled, 104-107, 109-110)

**Right to participation** (Independence and impartiality of electoral commission, 168, 170, 171, 222, 223, 224; autonomy of electoral commission, 203-205).

**Obligation to execute judgments** (article 30 of the Charter, 262-263)

## I. The Parties

**1.** Messrs Suy Bi Gohoré Emile, Kakou Guikahué Maurice, Kouassi Kouamé Patrice, Kouadjo François, Yao N'guessan Justin Innocent, Gnonkote Gnessoa Désiré, Djedje Mady Alphonse, Soro Kigbafori Guillaume and Trazere Olibe Célestine (hereinafter referred to as "the Applicants") are nationals of the Republic of Côte d'Ivoire. They challenge the independence and impartiality of their country's electoral commission.

**2.** The Application is 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 "the Charter") on 31 March 1992 and to the Protocol on 25 January 2004. On 23 July 2013, the Respondent State deposited the Declaration prescribed

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 (hereinafter referred to as the "Declaration"). Meanwhile, on 29 April 2020, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration.

## II. Subject of the Application

### A. Facts of the matter

**3.** It is alleged in the Application that between 21 January and 26 June 2019, the Respondent State organised a political dialogue process to reform the Independent Electoral Commission. Thereafter, a new law on the recomposition of the Independent Electoral Commission (herein after referred to as "IEC") was passed by the National Assembly on 30 July 2019 and by the Senate on 2 August 2019. It was then promulgated by the President of the Respondent State on 5 August 2019 as Law N°2019-708.

**4.** The Applicants submit that on 2 August 2019 one member of the National Assembly averring to represent sixty-five (65) other members of the National Assembly petitioned the Constitutional Council of the Respondent State on the non-conformity of Articles 5, 16 and 17 of the said law with Articles 4, 53 and 123 of the Respondent State's Constitution.

**5.** According to the Applicants, the Constitutional Council of the Respondent State declared on 5 August 2019 the petition inadmissible on the ground that it made reference to a draft version of the impugned law while the Constitutional Council does not decide on the constitutionality of draft laws.

**6.** From the record before the Court it emerges that on 6 August 2019 the same applicants in that case filed another petition to the Constitutional Council that referred to the actual law adopted by parliament instead of the draft law.

**7.** The Applicants submit that on 13 August 2019 the Constitutional Council declared the petition again inadmissible for the reason that the law had already been promulgated and that it does not have the power to assess the constitutionality of a law that has already been promulgated by the President.

**8.** The record also shows that on 4 March 2020 the Respondent State adopted Order N° 2020/306 which modified Law N° 2019-708 of 5 August 2019 on the recomposition of the Independent

Electoral Commission by giving opposition parties or political groupings the possibility of proposing one additional personality to the electoral body, both at the level of the Central and the Local electoral commissions.

**9.** Furthermore, the present Application relies on the judgment delivered by this Court on 18 November 2016 in the matter of *Action pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits)[1] concerning the composition of the Electoral Commission of the Respondent State and on this Court's judgment of 28 September 2017 to interpret said judgment.[2]

**10.** The Court had found in its judgment in *APDH v Côte d'Ivoire* (merits) that the Respondent State had violated its obligation to establish an independent and impartial electoral body, and consequently, also violated its obligation to protect the right to participate freely in the government of the country. Moreover, the Court found that the Respondent State had violated the obligation to protect the right to equal protection of the law. The Court therefore ordered the Respondent State to amend Law no. 2014-335 of 18 June 2014 on the Independent Electoral Commission to make it compliant with the relevant human rights instruments to which it is a Party.[3]

**11.** In its judgment in *APDH v Côte d'Ivoire* (interpretation) the Court declared the request for an interpretation of the aforesaid judgment inadmissible as it did not relate to any of the operative provisions of the Judgment.[4]

## B. Alleged violations

**12.** In the instant matter the Applicants allege that the Respondent State has violated:

i. Its obligation to create an independent and impartial electoral body as provided for under Article 17 of the African Charter on Democracy, Elections and Governance (hereinafter referred to as "ACDEG") and Article 3 of the ECOWAS Protocol on Democracy and Good Governance supplementary to the Protocol relating to

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

2 See *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (interpretation) (2017) 2 AfCLR 141.

3 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668 § 153.

4 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (interpretation) (2017) 2 AfCLR 141 § 18-19.

the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security (hereinafter referred to as "ECOWAS Democracy Protocol");

ii. Its obligation to protect citizens' right to participate freely in the government of their country as provided under Article 13(1) and (2) of the Charter;

iii. Its obligation to protect the right to equal protection of the law, as provided under Article 10(3) of the ACDEG, Article 3(2) of the Charter and Article 26 of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR"); and

iv. Its commitment to comply with the judgment of the Court in a case to which it was a party within the time stipulated by the Court and to guarantee its execution in accordance with Article 30 of the Protocol.

## III. Summary of Procedure before the Court

**13.** On 10 September 2019, an Application was filed which also contained a request for provisional measures.

**14.** On 19 September 2019, the Application was served on the Respondent State and the latter was invited to respond to the request for provisional measures within seven (7) days and to the Application within sixty (60) days of receipt of the notice.

**15.** On 24 September 2019, the Applicants filed an amended Application, requesting that it replace the one filed on 10 September 2019.

**16.** On 25 September 2019, the Registry notified the Respondent State of the amended Application and invited it to respond within fifteen (15) days to the request for provisional measures and within sixty (60) days to the Application.

**17.** The Respondent State filed its Response to the request for provisional measures in the initial Application on 1 October 2019 and to the request for provisional measures in the amended Application on 15 October 2019.

**18.** On 18 October 2019, the Applicants filed their Reply to the Response from the Respondent State on the request for provisional measures.

**19.** On 7 November 2019, the Respondent State filed a Rejoinder to the Reply of the Applicants.

**20.** On 28 November 2019, the Court by an order rejected the request for provisional measures on the basis that it did not reveal a situation of gravity or urgency that would pose a risk of irreparable

harm to the Applicants or the social order.[5] On 28 November 2019, the Respondent State filed its Response to the Application.

**21.** On 27 February 2020, the Applicants filed their Reply to the Respondent State's Response.

**22.** On 5 March 2020, the Registry notified the Parties of the closure of written pleadings.

**23.** On 12 March 2020, the Court held a public hearing. Before the hearing, the Court, pursuant to Rule 57 of the Rules and Article 9 of the Protocol, tried unsuccessfully to initiate an amicable settlement between the parties.

## IV. Prayers of the Parties

**24.** The Applicants pray the Court to:

i. find a violation of the human rights instruments referred to in paragraph 12;

ii. order the Respondent State to amend, before any election, Law No. 2019-708 of 5 August 2019 on the recomposition of the IEC, to make it compliant with the human rights instruments mentioned in paragraph 12; and

iii. impose a deadline on the Respondent State to implement the above order and submit to the Court a report on its implementation.

**25.** The Respondent State prays the Court to:

i. declare that it lacks jurisdiction;

ii. declare the Application inadmissible; and

iii. declare that the Application is unfounded and, accordingly, dismiss it.

## V. Jurisdiction

**26.** 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.

**27.** The Court further observes that in terms of Rule 39(1) of the Rules "[t]he Court shall conduct preliminary examination of its

5 *Gohore Emile Suy Bi & ors v Republic of Côte d'Ivoire,* AfCHPR, Application 044/2019, Ruling of 28 November 2019 (Provisional Measures) § 34.

jurisdiction ..."

**28.** Therefore, the Court must first ascertain its jurisdiction in accordance with the Charter, the Protocol and the Rules, and dispose of objections, if any, to its jurisdiction.

## A. Objection to the Court's material jurisdiction

**29.** The Respondent State raises an objection to the material jurisdiction of the Court because the Application is primarily based on allegations that it violated Article 30 of the Protocol.

**30.** According to the Respondent State, the Applicants are seeking the Court to order the suspension of the application of Law N° 2019-708 of 5 August 2019 on the recomposition of the IEC, as long as it is not amended to be compliant with the Court's judgement of 18 November 2016.

**31.** This means, in the view of the Respondent State, that the Applicants are requesting the Court to monitor the execution of its judgments despite there being no provision, either in the Charter or in the Protocol, that confers such a competence on the Court.

**32.** The Respondent State maintains that the enforcement of judgments lies outside the jurisdiction of international courts and further asserts that judgments of international human rights courts, just as those of the International Court of Justice, are only of a declaratory nature. It adds that States are merely required to produce the results required by these judgments and are free to choose the necessary means and measures in their domestic legal systems to comply with the courts' orders. Accordingly, international courts do not have the authority to annul or repeal State laws that do not comply with the international instruments these courts are mandated to protect.

**33.** For the Respondent State, that is exactly what would happen if the Court were to order a State not to implement a law as long as that law has not been amended in the way prescribed by a previous judgment.

**34.** With regard to the African system for the protection of human rights, the Respondent State refers to a division of competences between the Member States and the Court. In its view, the Protocol mandated the Assembly of Heads of State and Government (hereinafter referred to as "the Assembly") to monitor the execution by Member States of the judgments of the Court in accordance with Article 29(2) and Article 31 of the Protocol.

**35.** For the Respondent State, it therefore follows that the Court does not have the jurisdiction to monitor the execution of its judgments. The execution or non-execution of the Court's judgments does

not constitute a human right enshrined in the Charter or any other relevant human rights instrument that the Court is entitled to apply under Article 3 of the Protocol.

**36.** The Respondent State also claims that this provision must be read together with Article 27(1) of the Protocol. According to the Respondent State, these provisions of the Protocol establish a direct relationship between the decision of the Court and a "violation of a human or peoples' right". Therefore, the jurisdiction of the Court cannot be established beyond a violation of human rights.

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**37.** The Applicants submit that the Application submitted to this Court only concerns violations contained in human rights instruments to which the Respondent State is a State Party, specifically the Charter, the Protocol, the ACDEG, the ECOWAS Democracy Protocol, and the ICCPR. Therefore, according to them the Court has material jurisdiction to hear the case.

**38.** Furthermore, the Applicants dispute the arguments of the Respondent State concerning the Court's jurisdiction to interpret and apply Article 30 of the Protocol. They contend that to answer the question whether the Court has jurisdiction to rule on the execution of its own judgments, an important distinction needs to be made between whether the judgment to be executed has led to a new dispute submitted to the Court or not.

**39.** The Applicants observe that pursuant to Article 29(2) of the Protocol, judgments rendered by the Court are notified to the Council of Ministers (hereinafter referred to as the "Executive Council") which is responsible for ensuring their execution.

**40.** Based on an examination of the provisions of the Charter, the Rules and the Protocol, the Applicants concede that the Court has no jurisdiction to rule on the execution or non-execution of its judgements. Therefore, the Court cannot rule on the compliance of possible legal reforms ordered in a judgment such as those imposed in the judgment in *APDH v Côte d'Ivoire* (merits). The Court can only report to the Assembly.

**41.** Similarly, if at the expiration of the time limit imposed by the Court the Respondent State has not begun any kind of reform, the Applicants maintain that the Court cannot demand the

Respondent State to execute its judgment.

**42.** However, the Applicants claim that the situation is different when new Applicants refer a new law to the Court; especially, when the adoption of that new law resulted from the Respondent State's intention to execute the respective order by the Court.

**43.** In support of their position, the Applicants refer to Rule 26 of the Rules which for the Applicants, clearly establishes that the interpretation and application of the Protocol falls within the jurisdiction of the Court.

**44.** Therefore, the Applicants submit that when a new case is submitted to the Court which deals with the question whether or not the Respondent State has fulfilled its commitment to comply with a judgment in accordance with Article 30 of the Protocol, the Court has the power to rule on this matter because it relates to the interpretation and application of the Protocol.

**45.** Considering that the present case involves new litigation based on a new law adopted by the Respondent State with the aim of fulfilling its obligation under Article 30 of the Protocol, the Applicants maintain that the Court is within the limits of its jurisdiction set out in Rule 26 of the Rules, to judge whether or not the Respondent State complied with the Court's previous judgment within the prescribed time limit and in conformity with the terms set out.

***

**46.** The Court observes that its material jurisdiction is not disputed concerning the violations alleged of the Charter, the ACDEG, the ECOWAS Democracy Protocol and the ICCPR which are all instruments to which the Respondent State is a Party. Specifically, the Respondent State became a Party to the Charter on 31 March 1992, to the ACDEG on 28 November 2013, to the ECOWAS Democracy Protocol on 31 July 2013, and to the ICCPR on 26 March 1992.

**47.** However, the Respondent State contests the Court's jurisdiction to hear this matter, because it allegedly lacks the jurisdiction to monitor the execution of its judgments, which, for the Respondent State, constitutes the essence of this Application. Accordingly, the Court notes that the Respondent State contests its jurisdiction to establish a violation of Article 30 of the Protocol.

**48.** The Court recalls that pursuant to Article 3(2) of the Protocol, "[i] n the event of a dispute as to whether the Court has jurisdiction,

the Court shall decide".

**49.** In addressing issues of compliance with its judgments, the Court needs to take Articles 29, 30 and 31 of the Protocol into consideration.

**50.** Article 29 of the Protocol stipulates that the Executive Council shall "be notified of the judgment and shall monitor its execution on behalf of the Assembly."

**51.** Article 30 of the Protocol provides: "[t]he States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."

**52.** Article 31 of the Protocol obliges the Court to "submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court's judgment."

**53.** While the Respondent State disputes the Court's jurisdiction to monitor the execution of its judgments, the question that arises, is whether the Court can successfully fulfil its obligation provided for under Article 31 of the Protocol to report to the Assembly, if it cannot determine the status of compliance with its judgments before submitting the report.

**54.** The Court further considers that the division of competences between itself and Executive Council, raised by the Respondent State, can reasonably be described in terms of complementarity. Accordingly, the mandate of the Executive Council to monitor the execution of judgments, pursuant to Article 29 of the Protocol, does not prevent the Court from making a determination whether a State has or has not complied with its judgment, as provided for under Article 31 of the Protocol.

**55.** While the Protocol does not prescribe how the Court should proceed to make the determination of the degree of compliance with its judgments, the Court, like other international human rights courts, has developed a practice, where it orders Respondent States to report on the implementation of its decisions within a specified time.[6]

**56.** The Court notes that such reports assist it in fulfilling its obligation of reporting on States' non-compliance with its judgments,

6 See, for example, ***Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania*** (merits) (2013) 1 AfCLR 34, § 126; ***Lohé Issa Konaté v Burkina Faso*** (merits) (2014) 1 AfCLR 314, § 176; ***Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali*** (merits) (2018) 2 AfCLR 380, § 135.

especially since it does not have its own enforcement mechanism.

**57.** The Court also observes that according to Article 3(1) of the Protocol:

> The jurisdiction of the Court shall extend to ***all*** cases and disputes submitted to it concerning the interpretation and application of the Charter, *this Protocol* and any other relevant Human Rights instrument ratified by the States concerned." [Emphasis added]

**58.** Accordingly, the Protocol does not make a distinction between the type of cases or disputes submitted to the Court, as long as it concerns the application and interpretation of any of the instruments listed in Article 3 of the Protocol. In the instant case, a dispute is submitted to the Court concerning the application and interpretation of Article 30 of the Protocol, an instrument clearly listed in Article 3 of the Protocol.

**59.** Furthermore, the Court notes that Article 30 of the Protocol explicitly imposes an obligation on States to comply with its judgments. In fact, it considers that this obligation constitutes the *conditio sine qua non* of any international litigation. It is the existence of this duty that distinguishes international judicial mechanisms from quasi-judicial mechanisms that are not authorised to issue binding decisions. In other words, the Court distinguishes itself from other mechanisms that do not have the authority to make decisions that carry an explicit obligation of compliance with their decisions.

**60.** Therefore, considering the obligation to execute the Court's judgments, which generally imposes a duty on States to remedy established human or peoples' rights violations, the Court also holds that a violation of Article 30 of the Protocol is tantamount to a "violation of a human or peoples' rights", as referred to in Article 27(1) of the Protocol.

**61.** Accordingly, the Court holds that it is within its jurisdiction to find a violation of Article 30 of the Protocol, based on which the Court "shall make appropriate orders to remedy the violation," in accordance with Article 27(1) of the Protocol.

**62.** Through a combined reading of Articles 3, 27(1) and 30 of the Protocol, the Court finds that it has material jurisdiction in a case or dispute submitted to it, to establish whether or not a State has complied with its judgment within the time stipulated, and make appropriate orders to remedy the violation, if necessary.

**63.** For the above reasons and considering that the instant Application constitutes a new dispute in relation to the matter of *APDH v Côte D'Ivoire,* based on new factual and legal circumstances, and considering that all the alleged violations concern human rights instruments to which the Respondent State is a Party, the Court

holds that it has material jurisdiction to examine the Application.

## B. Other aspects of jurisdiction

**64.** The Court notes that other aspects of its personal, temporal and territorial jurisdiction are not in contention between the Parties. Nonetheless, it has to satisfy itself that it has jurisdiction in those aspects.

**65.** Concerning its personal jurisdiction, the Court notes that the Respondent State is a Party to the Protocol and deposited the Declaration on 23 July 2013.

**66.** The Court also notes that on 29 April 2020, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration.

**67.** The Court recalls that in *Ingabire Victoire Umuhoza v Rwanda*,[7] it held that the withdrawal of the Declaration does not have any retroactive effect and it also has no bearing on matters pending before it prior to the filing of the Declaration, as is the case in the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the deposit of the instrument of withdrawal.[8]

**68.** In respect of the Respondent State having deposited its instrument of withdrawal of the Declaration on 29 April 2020, this withdrawal will thus take effect on 30 April 2021 and will in no way affect the personal jurisdiction of the Court in the instant case.

**69.** Concerning its temporal jurisdiction, the Court notes that the alleged violations occurred subsequent to the entry into force in respect of the Respondent State of the international instruments mentioned in paragraph 12.

**70.** Regarding its territorial jurisdiction, the Court notes that the facts of the matter took place in the territory of the Respondent State.

**71.** In view of the foregoing, the Court concludes that it has jurisdiction to examine this Application.

7 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (2016) 1 AfCLR 562 § 67.

8 See also *Ghati Mwita v United Republic of Tanzania*, AfCHPR, Application 012/2019, Ruling of 9 April 2020 (provisional measures) § 4.

## VI. Admissibility of the Application

**72.** A preliminary issue was raised by the Respondent State concerning the admissibility of an amended Application submitted by the Applicants to replace the initial Application. The Court will first deal with this issue, before it considers other aspects of the admissibility of the Application.

### A. Preliminary issue on the replacement of one Application with another

**73.** The Respondent State raises an objection to the admissibility of the Application based on Article 26(1) of the Protocol which provides "[t]he Court shall hear submissions by all parties."

**74.** The Respondent State notes that the Applicants filed before the Court an initial Application on 10 September 2019 together with a request for provisional measures.

**75.** The Respondent State also avers that the Applicants filed a subsequent application before the Court on 24 September 2019 whereby it requested the Registry to consider the latter as a replacement of the initial one. This subsequent Application was then registered under the same reference number as the initial Application.

**76.** According to the Respondent State, the initial Application created a legal relationship between the parties before the Court. As a result, this relationship creates rights and obligations for the parties and for the Court.

**77.** The Respondent State claims that the withdrawal of the initial Application is not based on any known procedural rule as it is neither a withdrawal of the proceedings nor a discontinuance within the meaning of Rule 58 of the Rules.

**78.** The Respondent State maintains that it had neither been notified of the Court's decision to acknowledge the Applicants' intention not to proceed with the case nor of the Court's decision to strike out the initial Application from the cause list.

**79.** In addition, the Respondent State claims that the unilateral and secret withdrawal of an Application and its subsequent replacement by another Application, cannot be admissible because these actions are not compatible with the Respondent State's rights to fair proceedings.

**80.** The Respondent State asserts that it has been wrongfully deprived of its right to rebut the withdrawal and replacement of the initial Application in violation of Article 26 of the Protocol. Therefore, it prays the Court to rule on the merits of the initial Application and

find the subsequent Application inadmissible.

**81.** The Applicants maintain that when they resubmitted their Application, the Respondent State had not yet responded to the initial Application. Therefore, it cannot be concluded that the Respondent State had initiated any proceedings at the time the amended Application was filed before the Court. Accordingly, its consent was not required for the subsequent Application to be admitted.

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**82.** The issues to be determined by the Court concern the alleged secrecy of the replacement of the Application and the admissibility of the amended Application.

**83.** The Court observes that to rule on these issues Rules 35(2) and 36(1) need to be taken into consideration.

**84.** Rule 35(2) of the Rules stipulates:
Unless otherwise decided by the Court, the Registrar shall forward copies of the application where applicable to the: a) State Party against which the application has been filed, in accordance with Rule 34 (6) of these Rules; […]

**85.** Rule 36(1) of the Rules provides: "All pleadings received by the Registrar shall be registered and a copy thereof transmitted to the other party."

**86.** The Court notes that the Applicants filed an Application on 10 September 2019 which was transmitted to the Respondent State, pursuant to Rule 35(2) and Rule 36(1) of the Rules. It also notes that on 24 September 2019 the Applicants filed an amended Application before the Court. The Applicants requested the Registry to consider the latter as a replacement of the initial one. This amended Application was then registered by the Registry under the same reference of the initial Application.

**87.** The Court also takes note that the amended Application and its registration was duly transmitted to the Respondent State on 25 September 2019, in accordance with Rule 35(2) and Rule 36(1) of the Rules, almost a week before the Respondent State filed its Response on 1 October 2019 to the request for provisional measures contained in the initial Application.

**88.** The Court further notes that on 15 October 2019 the Respondent State filed its response to the request for provisional measures

contained in the amended Application.

**89.** Therefore, the Court finds the Respondent State's allegation that the replacement was done secretly, as baseless.

**90.** Furthermore, the Court notes that in its communication about the amended Application, it extended the time lines for the Respondent State to file both its Response to the request for provisional measures within fifteen (15) days and its Response on the merits within sixty (60) days of receipt of the notification transmitting the amended Application. Accordingly, the Respondent State was not deprived of the time needed to respond to the amended Application. Therefore, the Court finds that no prejudice has been caused to the Respondent State by the replacement of the Application.

**91.** For these reasons, the Court dismisses the Respondent State's objection to the admissibility of this Application based on this ground.

## B. Admissibility of the Application based on the provisions of Article 56 of the Charter

**92.** According to Article 6(2) of the Protocol: "The Court shall rule on the admissibility of a case taking into account the provisions of Article 56 of the Charter."

**93.** Furthermore, under Rule 39 of the Rules, "the Court shall make a preliminary examination (...) of the conditions of admissibility of the Application as provided for in Articles … 56 of the Charter and Rule 40 of these Rules".

**94.** Rule 40 of the Rules which essentially restates the contents 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 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;

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.

**95.** The Court notes from the records that compliance with sub-rules 1, 2, 3, 4, 5, 6 and 7 of Rule 40 of the Rules is not in contention between the Parties. Nevertheless, the Court must still ascertain that the requirements of the said sub-rules have been fulfilled.

**96.** Specifically, the Court observes that, according to the file, the condition laid down in Rule 40(1) of the Rules is fulfilled since the Applicants have clearly indicated their identity.

**97.** The Court finds that the requirement laid down in paragraph 2 of the same Rule is also met, since no request made by the Applicants is incompatible with the Constitutive Act of the Union or with the Charter.

**98.** Neither does the Application contain any disparaging or insulting language with regard to the State concerned, which makes it consistent with the requirement of Rule 40(3) of the Rules.

**99.** Regarding the condition contained under paragraph 4 of same Rule, the Court notes that the application is not based exclusively on news disseminated through the mass media. The Applicants base their claims on legal grounds in support of which official documents are adduced, as required under Rule 40(4) of the Rules.

**100.** Concerning the condition of exhaustion of local remedies, provided in Rule 40(5) of the Rules, the record shows, in reference to Article 113 of the Constitution of the Respondent State, that no local remedies exist, since no action can be initiated by individuals against a law that has already been promulgated. Accordingly, the Court finds that this condition has been met.

**101.** Pursuant to Rule 40(6) of the Rules, the Court will consider the date of promulgation of the impugned law as the commencement of the time limit within which it shall be seized with the matter. The Court finds that the filing of the Application within a month and a half after the promulgation of the impugned law is reasonable and therefore considers that Rule 40(6) has been fulfilled.

**102.** Finally, with respect to the requirement laid down in Rule 40(7) of the Rules, the Court needs to satisfy itself that the present Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

**103.** The present Application refers to the judgment delivered by this Court on 18 November 2016 in *Action pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (Merits),* concerning the composition of the Electoral Commission and to the Court's judgment on 28 September 2017 in *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (interpretation). The Court thus needs to ensure that the instant Application does not raise any matters or issues that have been previously settled by these judgments.

**104.** The Court recalls that in its earlier decisions in ***Gombert Jean-Claude Roger v Republic of Côte d'Ivoire***[9] and ***Dexter Eddie Johnson v Republic of Ghana***,[10] it developed three cumulative criteria to determine whether the admissibility criteria established in Article 56(7) and Rule 40(7) have been met.

**105.** In Paragraph 48 of its ruling in *Dexter Eddie Johnson v Republic of Ghana:*

> [t]he Court notes that the notion of "settlement" implies the convergence of three major conditions: (1) the identity of the parties; 2) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and 3) the existence of a first decision on the merits.

**106.** Regarding the first criterion, "identity of the parties", the Court notes in the instant case that although the Respondent State is the same, the Applicants are different. In the judgement in *APDH v Côte D'Ivoire* (merits), the Applicant was Actions pour la Protection des Droits de l'Homme (APDH) which presents itself as an Ivorian Non-Governmental Human Rights Organisation which has Observer Status before the African Commission on Human and Peoples' Rights. In the current Application, the Applicants are nine Ivorian individuals. Furthermore, nowhere in the file before the Court is a connection between APDH and the Applicants suggested, let alone established. However, since both the current Application and *APDH v Côte D'Ivoire* (merits) can be qualified as public interest cases, the "identity of the parties", can be considered as being similar, to the extent that they both aim to protect the interest of the public at large, rather than only specific private interests. Therefore, the Court holds that the criteria of

9 *Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270, § 45.

10 *Dexter Eddie Johnson v Republic of Ghana,* AfCHPR, Application 016/2017, Ruling of 28 March 2019 (jurisdiction and admissibility) § 48.

"identity of parties" has been met.

**107.** The second criterion concerns the similarity of the Application. While it is undisputed that the current Application is largely concerned with a similar subject-matter, namely the independence and impartiality of the Respondent State's electoral body, the Court still needs to determine whether the legal and factual elements of the Application are the same.

**108.** In the instant Application, the Court notes that the legal and factual basis to decide on the independence and impartiality of the Respondent's electoral body are not the same. According to the Applicants, no Application concerning Law No. 2019-708 of 5 August 2019 relating to the recomposition of the IEC has ever been filed. The Court also notes that the Application in *APDH v Côte D'Ivoire* (merits) contested Law 2014-335 of 18 June 2014 on the Independent Electoral Commission.

**109.** Therefore, considering that the Applicants contest a new law which was adopted after the 2017 judgment and considering that subsequent events have changed the factual situation previously known to the Court, the Court finds that the second criterion has not been met.

**110.** Concerning the third criterion which interrogates whether a first decision on merits exists, the Court observes that no decision exists concerning the conformity between the impugned new law on the electoral body of 2019 and the international legal instruments invoked by the Applicants. Therefore, the Court finds that this criterion has not been met.

**111.** In sum, the Court finds that the cumulative criteria set out in the cases *Gombert Jean-Claude Roger v Republic of Côte d'Ivoire* and in *Dexter Eddie Johnson v Republic of Ghana* relating to the admissibility requirement established in Article 56(7) and Rule 40(7), have not been fulfilled. Therefore, considering that the instant Application does not raise any issue or matter previously settled in the sense of Article 56(7), the Court holds that this admissibility requirement is met.

**112.** Based on the foregoing, the Court finds that the Application meets all the conditions set out in Article 56 of the Charter and accordingly declares it admissible.

## VII. Merits

**113.** The Applicants allege that by adopting Law N° 2019-708 of 5 August 2019 on the recomposition of the IEC, the Respondent State has violated its obligation to establish an independent and impartial electoral body, its obligation to protect the right to

freely participate in government, its obligation to protect the right to equal protection of the law, and its commitment to execute judgments, as prescribed by Article 17 of the ACDEG, Article 3 of the ECOWAS Democracy Protocol, Article 13(1) and (2) of the Charter, Article 10(3) of the ACDEG, Article 3(2) of the Charter, Article 26 of the ICCPR and Article 30 of the Protocol, respectively.

**114.** The Respondent State submits, however, that the aforementioned law has been modified during the course of the proceedings before this Court by Order N° 2020-306 of 4 March 2020 amending Articles 5, 15, 16, and 17 of Law No. 2019-708 of 5 August 2019 on the recomposition of the IEC. According to the Respondent State this change of the impugned law effectively renders the Application without merit since the provisions of the law allegedly in violation of the abovementioned human rights instruments are no longer in force.

**115.** Considering that the objection raised by the Respondent State affects the basis of the Application, the Court will deal with it first.

## A. The effect of the adoption of Order N° 2020-306 of 4 March 2020 on the Application

**116.** The Respondent State contends that the Application has become without merit since the law questioned by the Applicants has been modified by Order N° 2020-306 of 4 March 2020 and the relevant provisions on which the Applicants base their allegations have been abrogated.

**117.** The Respondent State also notes that the change of the law was not made out of necessity because the older law failed to establish a balanced composition of the electoral body. Instead, the Respondent State argues that the change of the law was carried out in line with its international human rights commitments to raise the standards of its electoral body.

**118.** Nonetheless, the Respondent State maintains that the Court cannot base itself on the arguments pertaining to the law of 2019 because all the provisions on which the Court would rely in handing down its judgment are no longer in force. Accordingly, the Respondent State prays the Court to finds the Application without merit.

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**119.** The Applicants contest the objection by the Respondent State and assert that the Order N° 2020-306 of 4 March 2020 does not modify in any way the arguments brought before this Court regarding the violations alleged in their Application.

**120.** The Applicants first contend that they refer in the Application to the same law. Law N° 2019-708 of 5 August 2019 on the recomposition of the IEC has now simply been modified by the Order N° 2020-306 of 4 March 2020, but essentially remains the same law. For the Applicants, these modifications do not repeal the law itself which governs the composition of the electoral body and which is impugned in their Application, the impugned law has only been modified in part, therefore the Application can in no way be found to be without merit.

**121.** The Applicants also assert that the modifications of the impugned law do not have a material effect on the arguments put before the Court, because even with the amendments, the impugned law still fails to establish an independent and impartial electoral body as required by the abovementioned human rights instruments to which the Respondent State is a Party.

**122.** They further contend that the modifications to the law and the manner in which it was altered, strengthens their argument that the law of 2019 failed to establish an independent and impartial electoral body and that the unilateral amendment of the law by the government without any form of dialogue underscores the dependence of the electoral body on the government.

**123.** Finally, the Applicants note that they also base their argument on provisions of the impugned law that have not been amended by the Order N° 2020-306 of 4 March 2020. For example, the Applicants argue that the electoral body also lacks administrative and financial autonomy and the provisions regulating these matters have not been altered by the Order N° 2020-306 of 4 March 2020.

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**124.** The Court notes that the instant Application concerns the alleged violation of the Respondent State's obligation to establish an independent and impartial electoral body.

**125.** The Court also notes that the Applicants as well as the Respondent State have referred at different times in their submissions to the general legal framework governing the structure and functioning

of the electoral body. For example, the Applicants refer to Article 40 of the Law on the Composition, Organisation, Powers and Functioning of the IEC of 9 October 2001 (which has subsequently been modified) to challenge its financial autonomy. Whereas the Respondent State refers to Article 1(2) of the same law to support its argument that the electoral body is institutionally independent. The Court observes that neither of these two Articles have been amended by Law N° 2019-708 of 5 August 2019 on the recomposition of the IEC nor by Order N° 2020-306 of 4 March 2020.

**126.** In view of the foregoing, the Court holds that an amendment of certain provisions which only partially constitute the legal framework of the electoral body, does not render the Application without merit.

**127.** Considering the position of the Applicants whereby they hold that amendment of the legal framework governing the electoral body as amended by the Order N° 2020-306 of 4 March 2020 does not modify their claims, and considering the position of the Respondent State that the amendment of the law raised the standards of the electoral body even further, the Court finds that it may proceed with this case, taking into consideration the legal framework governing the electoral body currently in force. Accordingly, it dismisses the prayer of the Respondent State to find the Application without merit

## B. Alleged violation of the obligation to establish an independent and impartial electoral body

**128.** The Applicants aver that the Respondent State has violated its obligation to establish an independent and impartial electoral body provided for under Article 17 of the ACDEG and Article 3 of the Democracy Protocol.

**129.** The Applicants contend that the electoral body of the Respondent State does not meet the criteria set out in the respective international human rights instruments or the criteria established in the jurisprudence of the Court on the establishment of an independent and impartial electoral body.

**130.** The Applicants contend that the Respondent State failed to constitute the electoral body in a way that its composition offers sufficient guarantees of the independence and impartiality of its members so as to reassure the public of its ability to organise transparent, free and fair elections (i). They also claim that the electoral body lacks institutional independence as revealed by its insufficient administrative and financial autonomy (ii). Lastly, the

Applicants contend that the electoral body lacks the necessary credibility of its independence and impartiality as exposed by the lack of inclusiveness, participation and transparency of its reform process (iii).

## i. Composition of the electoral body

**131.** On the specific issue of its composition, the Applicants aver that the independence and impartiality of the electoral body is undermined due to the inappropriate presence of certain categories of its members, the inadequate appointment process of its members and the imbalance of its composition.

**132.** The Applicants make reference to Articles 5, 15, 16, and 17 of the impugned law on the recomposition of the IEC.

**133.** Article 5 of the impugned law, as amended by Order N° 2020-306 of 4 March 2020, provides that:

The Independent Electoral Commission shall be composed of permanent and non-permanent members.

The Independent Electoral Commission shall comprise a Central Commission and Local Commissions at the regional, departmental, communal and sub-prefectural levels.

The members of the Central Commission shall be:

- one personality proposed by the President of the Republic;
- one personality proposed by the Minister in charge of Territorial Administration;
- six personalities proposed by civil society, including one Lawyer appointed by the Bar, one personality proposed by the National Human Rights Council and four personalities proposed by Civil Society Organisations;
- one Magistrate proposed by the Higher Judicial Council;
- three personalities proposed by the party or political group in power;
- four personalities proposed by opposition political parties or political groups.

The members of the Central Commission shall be appointed by a Council of Ministers' decree for a period of six years.

Proposals shall be submitted to the Ministry of Territorial Administration who shall, in turn, draw up the list and send same to the Council of Ministers for appointment.

**134.** Article 15 of the impugned law, as amended by Order N° 2020-306 of 4 March 2020, provides that:

The members of the Regional Commission are:

- one personality proposed by the prefect of the Region;

- three personalities proposed by the party or political group in power;
- four personalities proposed by opposition political parties or political groups.

**135.** Article 16 of the impugned law, as amended by Order N° 2020-306 of 4 March 2020, stipulates that:

The members of the Departmental Commission shall be:

- one personality proposed by the Prefect of the Department;
- three personalities proposed by the party or political group in power;
- four personalities proposed by opposition political parties or political groups.

**136.** Article 17 of the impugned law, as amended by Order N° 2020-306 of 4 March 2020, provides that:

The IEC creates, on the proposal of the Departmental Commission, as many sub-prefectoral or communal Commissions as may be needed to carry out its duties.

The members of the sub-prefectoral or communal Commissions shall be:

- one personality proposed by the Sub-Prefect;
- three personalities proposed by the party or political group in power;
- four personalities proposed by the opposition political parties or political groups.

**137.** The Applicants contend that the electoral body lacks independence and impartiality because it is composed of political parties' representatives, who, in the Applicants' view, should not be part of an electoral body since they have a stake in the outcome of the electoral process and this contradicts the requirement of an absence of bias.

**138.** The Applicants also find the presence of the members in the Central Electoral Commission proposed by the Higher Judicial Council and the National Human Rights Council unjustified since these bodies can be considered as being aligned with the ruling party. Lastly, the Applicants consider the presence of the members proposed by the President of the Respondent State and the Minister in charge of Territorial Administration unwarranted as these members, in their view, will undeniably execute the instructions and orders of the President of the Respondent State.

**139.** The Applicants further note that the new law foresees a change in the method of appointing members to the electoral body. In the former law, the electoral body was composed of various representatives from different appointing entities. The current law provides for different entities to "propose" members instead.

However, in the Applicants' view nothing has fundamentally changed; a relationship of subordination remains or in other words a "dependency" between the proposing entity and the appointed member, which undermines the principle of "independence".

**140.** The Applicants also point out that even within this new system of "proposing" members instead of them "representing" certain entities, these proposals are still subject to the government's approval, which emphasises once more the inordinate influence from the government, undermining the principle of an independent electoral body.

**141.** The Applicants further contend that there is insufficient transparency about the principles, based on which the government decides which civil society groups and opposition parties are invited to make membership proposals. Similarly, they argue that there is an absence of competence criteria for appointing members to the electoral body. For them, selection and competence criteria of members are important guarantees of the independence and impartiality of the members of the electoral body which the Respondent State failed to provide.

**142.** The Applicants also note that the oath taken by members of the electoral body before assuming duty is not sufficient to ensure credibility in their independence and impartiality, in light of the overwhelming evidence of factors that undermine such independence and impartiality.

**143.** The Applicants lastly argue that there still is an over-representation of the ruling party and that therefore the necessary "balanced composition" which was ordered by the Court has not been achieved. They note that several of the entities which have the authority to propose members onto the electoral body are in fact aligned with the government or, in other words, the ruling party. Accordingly, to the complement of the ruling party's three members, should be added the members proposed by the President, the Minister in charge of Territorial Administration, the Higher Judicial Council and the National Human Rights Council. The government is therefore represented by seven (7) members against four (4) for the opposition.

**144.** For the Applicants, even the most recent amendment of the law through the Order N° 2020-306 of 4 March 2020 does not change much to this situation. They contend that the majority of the members in the electoral body still represent the government. Therefore, they submit that their arguments about an imbalanced composition and an unjustifiable politicization of the electoral body which undermine the independence of the electoral body,

remain valid despite the change in the law.

**145.** The Applicants further note that whereas the Central Electoral Commission has a more diverse composition, the electoral bodies at the Local levels are almost entirely politicised.

**146.** The only non-overtly political actors are the members proposed by the prefects (Regional Commission) and by the sub-prefects (Departmental Commission). However, the Applicants maintain that these entities are part of the government, in the sense that they are the representatives of the President in the localities where they are called upon to discharge their duties, and therefore can be counted as representing the ruling party; thus creating a majority in the regional and sub-regional electoral bodies in favour of the ruling party. The effects of which were noticed in the election of the Chairpersons of the Local electoral commissions, whereby 96% of the elected Chairpersons belonged to the category of personalities proposed by the ruling party (529 out of 549). This further undermines the notion of independence and impartiality of the electoral body, at least at the Local levels.

**147.** Whereas the balance before was four (4) members representing the government versus three (3) members representing opposition at the Local levels, the change of composition since the adoption of the Order N° 2020-306 of 4 March 2020, resulted in an equal representation of four (4) members of the government and four (4) members for the opposition. However, without new elections of the Bureau of the electoral body, the majority of Chairpersons of the Local Commissions remains members who are aligned with the ruling party and who will cast the deciding vote in case of a split vote, as provided for under Article 35 of the law on the electoral body.

**148.** Accordingly, the Applicants note that although the opposition parties have a greater representation in the Local electoral bodies, the prerogative of the Chairperson to cast the deciding vote in case of a tie, demonstrates that a balanced composition is still not sufficiently established.

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**149.** In its response, the Respondent State argues that the new composition of the electoral body offers sufficient guarantees of independence and impartiality of its members. It also claims that the modifications of the legal framework regarding the

appointment procedure have strengthened the independence and impartiality of the electoral body and that its composition is sufficiently balanced since it is not dominated by any political group, neither by those in power nor by those in the opposition.

**150.** The Respondent State claims that the inclusion of persons proposed by political parties or groups in an electoral body cannot in any way be considered a violation of its international commitments. It maintains that none of the international instruments alleged to have been violated prohibits the inclusion of persons belonging to political parties or groups in the electoral body.

**151.** The Respondent State also disputes the claim from the Applicants that the proposing entities, the Higher Judicial Council and the National Human Rights Council should be considered as being aligned with the government. According to them, these bodies are independent. The guarantees of their independence are provided both by their legal framework and their composition. Therefore, they dismiss the claim from the Applicants that the members proposed by these entities do not offer sufficient guarantees of independence and impartiality for two main reasons. First, the personality proposed by the Higher Judicial Council is a judge and, in that capacity, they do not belong to any political grouping. Second, the personality proposed by the National Human Rights Council, whether chosen from within the Council or not, must come from civil society, which offers a further guarantee of their independence.

**152.** The Respondent State did not make any submissions concerning the claim of the Applicants about the unjustifiable presence in the electoral body of the personalities proposed by the President of the Respondent State and the Minister in charge of Territorial Administration.

**153.** Regarding the appointment procedure of the members of the electoral body, the Respondent State argues contrary to the position of the Applicants that there is a great difference between the notion of "being proposed" by an entity and "being a representative". According to the Respondent State, under the system of representation, power is given to a person to act for and on behalf of another person. For the Respondent State, it is akin to the mechanism of a mandate. Acting for and on behalf of a mandator, the representative or mandatee has no authority of their own and is subjected to instructions and guidelines given by the person they represent.

**154.** In contrast, under the present system of nominations, the appointment of a particular member does not entail any form

of subordination. Therefore, the Respondent State claims that since members of the electoral body no longer represent the entities that propose them, the relationship that ties them to those entities ends at the moment of their appointment. Consequently, the Respondent State maintains that the changed method of appointing members of the electoral body established in the impugned law has greatly strengthened the independence of the electoral body.

**155.** With respect to the criteria on inviting opposition parties to propose members to sit in the electoral body, the Respondent State claims they have invited the different political parties which have parliamentary groups in the National Assembly. In selecting civil society organisations (CSOs) to propose electoral commission members, the Respondent State maintains that it was guided by the principles of inviting organisations based on their representativeness. Specifically, it clarified that umbrella or platform organisations were favoured which bring together the most active human rights organisations working on electoral issues.

**156.** Furthermore, the Respondent State notes that the impugned law does not contain any provision which compels the proposing entities to select persons from their "sphere of influence". Thus, they claim that nothing prevents a member being proposed solely based on their competence rather than their political orientation.

**157.** The Respondent State also insists that it has not used its discretionary powers to reject any proposals by made the designated entities.

**158.** The Respondent State did not make any submissions concerning the insufficiency of an oath of the members of the electoral body to guarantee their independence and impartiality.

**159.** However, the Respondent State underlines that to further guarantee the independence of the electoral body, the members of the electoral body at the Central level are appointed for a fixed term of six years. During this term of office, any possible allegiance of the electoral body members to the entity which proposed them cannot be of any consequence whatsoever, according to the Respondent State, since they stay appointed for a fixed term of office.

**160.** The Respondent State notes also that the Chairperson of the Central Electoral Commission is elected for a six-year term which is not renewable. It, therefore, contends that the Chairperson is under no obligation to manage the institution in such a way that would win him favours and assure the renewal of his term. This individual safeguard of independence of the Chairperson also

results in a higher level of independence of the institution itself, according to the Respondent State.

**161.** Lastly, the Respondent State asserts that the legal reform it carried out to comply with the judgment of the Court in *APDH v Côte d'Ivoire* (merits) resulted in a balanced composition of the electoral body. The Respondent State notes that it removed the representatives of the President of the National Assembly and of the Minister of the Economy and Finance. It also added two representatives from CSOs which now constitutes the largest group within the electoral body with its six (6) members, which further guarantees its impartiality and independence. It also reduced the number of political parties' representatives from the ruling party from four (4) members to three (3) members while retaining four (4) members proposed by opposition parties. The result of these amendments is that the composition of the electoral body is not dominated by any political group, either by those in power or from the opposition.

**162.** The Respondent State did not make any submissions regarding the allegations by the Applicants that the composition of the electoral body remains imbalanced at the Local levels.

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**163.** When considering the issue of the composition of the electoral body and its relationship to independence and impartiality of electoral body, the Court takes note of the international human rights instruments and relevant jurisprudence governing this issue. Specifically, the Court takes into consideration Article 17 of the ACDEG, Article 3 of the ECOWAS Democracy Protocol and the Court's judgements in *APDH v Côte d'Ivoire* (merits) and in *APDH v Côte d'Ivoire* (interpretation).

**164.** Article 17 of the ACDEG stipulates that: "State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall: 1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections. […]"

**165.** Article 3 of the ECOWAS Democracy Protocol provides that: "The bodies responsible for organising the elections shall be independent or neutral and shall have the confidence of all

the political actors. Where necessary, appropriate national consultations shall be organised to determine the nature and the structure of the bodies."

**166.** In its judgment in *APDH v Côte d'Ivoire* (merits) the Court held "that an electoral body is independent where it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality."[11]

**167.** The Court also held "that institutional independence in itself is not sufficient to guarantee the transparent, free and fair elections advocated in the African Charter on Democracy and the ECOWAS Democracy Protocol. The electoral body in place should, in addition, be constituted according to law in a way that guarantees its independence and impartiality and should be perceived as such."[12]

**168.** Furthermore, the Court found that "for a body to be able to reassure the public about its ability to organise transparent, free and fair election, its composition must be balanced."[13]

**169.** The Court also held in its interpretation judgment that the Respondent State sought the Court's opinion on how to implement the order of the Court to make the electoral law compliant with the aforementioned human rights instruments, which, "in the Court's view, is the responsibility of the State of Côte d'Ivoire".[14]

**170.** The Court further notes that in Africa there is a great diversity in terms of the structure and composition of independent and impartial electoral bodies.[15] Generally, these characteristics depend on the specificity of each country taking into account their respective legal, administrative and political history.

**171.** The Court accordingly finds that it is not incumbent on it to impose a one-size-fits-all solution on the structure and composition of the electoral bodies across the continent. However, the Court must still consider whether the new law adopted by the Respondent State is no longer in violation of the human rights instruments mentioned

11 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, § 118.

12 *Ibid,* § 123.

13 *Ibid,* § 125.

14 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (interpretation) (2017) 2 AfCLR 14, § 16.

15 See, for example, *Electoral Commissions in West Africa - a Comparative Study* (ECOWAS Electoral Assistance Unit and Friedrich-Ebert-Stiftung, 2011), *Election Management Bodies in Southern Africa - Comparative study of the electoral commissions' contribution to electoral processes* (Open Society Initiative for Southern Africa and Electoral Commissions Forum – SADC Countries, 2016), *Electoral Management Design* (International IDEA, 2014).

in paragraph 12 of this judgment. Therefore, the Court will first consider the different criteria that may affect the electoral body's independence and impartiality. Then, in the subsequent sections it will consider the electoral body's institutional independence and its credibility as revealed through its reform process.

## a. The members of the electoral body

**172.** With regard to the composition of the Respondent State's electoral body the Court holds, contrary to the Applicants' claim, that having political parties represented in an electoral body does not necessarily exclude the possibility for it to offer sufficient guarantees of its independence and impartiality. However, as the Court noted in its judgement in *APDH v Côte d'Ivoire* (merits), "for such a body to be able to reassure the public about its ability to organise transparent, free and fair elections, its composition must be balanced".[16] The issue of a balanced composition of the electoral body is discussed further below.

**173.** The Court also considers that the allegations relating to the allegiance of the National Human Rights Council and the Higher Judicial Council with the government should be substantiated and demonstrated to the Court and not be limited to mere affirmations without objective evidence. It therefore dismisses them.

**174.** Furthermore, despite that the Respondent State did not offer any justification for the presence of the personality proposed by the President of the Respondent State and the Minister in charge of Territorial Administration, the Court cannot accept the unsubstantiated allegation that these personalities will undeniably carry out the instructions and orders of the proposing entity.

## b. Appointment procedure of the members of the electoral body

**175.** Regarding the procedure for appointing members to the electoral body, the Court does not see how *a priori* it undermines the independence and impartiality of the electoral body. It is certainly reasonable to argue that relationships of dependency between an entity and its representative in an electoral body may reduce the overall independence of the electoral body. However, it is exactly in this vein that the Respondent State "strengthened" the

16 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, § 125.

independence and impartiality of the electoral body, as provided for in Article 17 of the ACDEG, through the adoption of the new law by further reducing the direct link between the proposing entity and the appointed member through a new method of appointment.

**176.** On the criteria for determining which opposition parties and CSOs to invite to propose members for the electoral body, the Court notes that they are not guaranteed by any national law. The Court further observes that it is the Respondent State that decides which opposition parties and umbrella or platform organisations of civil society to invite to submit nominations for membership of the electoral body.

**177.** The Court considers that, borrowing from the process of elections for national CSO representatives for membership of the Economic Social and Cultural Council, an organ of the African Union, the best practice is where the nomination process for representatives of CSOs and opposition parties in the electoral body is driven by those entities, based on pre-determined criteria, and with the authority to organise themselves, consult, hold elections as necessary, and submit the required nominees. The Court holds that this practice would be in line with the international obligations of the Respondent State to ensure public trust and transparency in the management of public affairs and citizens' effective participation in democratic processes, as required by Article 3(7), Article 3(8) and Article 13 of the ACDEG, as well as its obligation to ensure that the electoral body has the confidence of all the political actors as prescribed by Article 3 of the ECOWAS Democracy Protocol.

**178.** The Court further notes that the Respondent State does not refute that the government has discretionary power to potentially reject members proposed by the respective proposing entities, as was asserted by the Applicants. If a rejection would be based on criteria that reveal an unjustifiable bias by the government, then such a rejection would in fact undermine the independence of the electoral body. However, the Court notes the Respondent States' observation that it had not rejected any proposed member.

**179.** Regarding the Applicants' contention that the oath taken by the members of the electoral body is not sufficient to ensure credibility in the independence and impartiality of the members of the electoral body, the Court finds that the Applicants have failed to sufficiently support their argument about the inadequacy of this measure, which is otherwise considered a pertinent guarantee of

independence and impartiality.

**180.** Furthermore, the Court is convinced that the fixed term limits for the members of the electoral commission at the Central level and the non-renewability of the term of the Chairperson are additional guarantees for ensuring the independence of the members of the electoral body, mentioned by the Respondent State.

### c. Balance within the electoral body

**181.** Concerning the question of whether the composition of the electoral body is sufficiently balanced, the Court recalls the Order N° 2020-306 of 4 March 2020 through which an additional seat has been granted to opposition parties. This amendment effectively reduces the influence of the ruling party in the electoral body at both the Central level and at the Local levels.

**182.** The Court also notes that the Respondent State reduced the number of representatives in the electoral body associated with the ruling party compared with the previous law. Specifically, the Court notes that the representative of the President of the National Assembly and the representative of the Minister of the Economy and Finance have been removed from the composition of the Central Electoral Commission.

**183.** The Court also observes that the Respondent State has given a greater representation to members in the Central Electoral Commission originating from CSOs.

**184.** Consequently, the Court finds that the composition of the Central Electoral Commission is no longer overly dominated by any political group, nor is the electoral body dominated by supposedly non-political actors such as those emanating from civil society or the judiciary. Therefore, the Court finds that the composition of the electoral body at the Central level does not reveal a manifest imbalance.

**185.** Concerning the balance of the composition of the electoral body at the Local levels, the Court observes that the Respondent State did not make submissions to explain the politicized nature of its composition. However, the Court notes the concern of the Applicants that the Electoral Commission at the Local levels lacks a more diverse composition compared to the Central Electoral Commission.

**186.** The Court also notes that following the modification of Law N° 2019 – 708 of 05 August 2019 by Order N° 2020-306 of 4 March 2020, whereby opposition parties were given an extra seat in the membership of the electoral body at the local levels, the membership is now balanced between four (4) personalities

proposed by the opposition parties and four (4) proposed by the Government.

**187.** However, the Court takes notice of the concern expressed by the Applicants regarding the internal decision-making procedures within the electoral body at the Local levels whereby the Chairperson may cast the swing vote in case of a tie. They assert that the Chairpersons of the electoral bodies at the Local levels as they are currently constituted, predominantly originate from the ruling party at 96% to 4% from opposition parties. This manifest imbalance originates from the Bureau elections based on the previous composition, before Order N° 2020-306 of 4 March 2020 was adopted, when the electoral body at the Local levels was still composed in such a way that the majority of its members were proposed by the Government.

**188.** The Court finds it reasonable to organise new Bureau elections based on the new composition of the electoral body at the Local levels.

## ii. Institutional independence of the electoral body

**189.** The Applicants contend that the electoral body is not institutionally independent.

**190.** The Applicants refer to the Court's judgment of 18 November 2016 in *APDH v Côte d'Ivoire* (merits) where it held that an electoral body is institutionally independent when it has administrative and financial autonomy.[17]

**191.** The Applicants also refer to the Courts' consideration in that judgment where it established that "[r]egarding the institutional independence of this body, Article 1(2) of the impugned law provides that: '... the IEC is an independent administrative authority endowed with legal personality and financial autonomy'".[18]

**192.** In referring to the Court's finding that "[t]he above provision shows that the legal framework governing the Ivorian electoral body leaves room for assumption that the latter is institutionally independent,"[19] the Applicants argue, however, that this conclusion does not correspond with reality and the electoral body in fact lacks independence and impartiality in terms of its administrative

17 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, § 118.

18 *Ibid,* § 121.

19 *Ibid,* § 122.

and financial autonomy

**193.** For the Applicants, autonomy refers to the ability of a body to govern itself and make decisions for itself.

**194.** To support the claim that the electoral body lacks administrative autonomy the Applicants refer to responsibilities of the electoral body and points out that for many of its duties, it only has the competence to make proposals, which are then to be decided by the government. This limitation in power by only having a right to make proposals underscores, for the Applicants, the lack of sufficient administrative autonomy.

**195.** The Applicants also claim that there is a lack of sufficient financial autonomy. According to them, the financial regulation of the electoral body is left entirely at the whims of the government which decides when and how it makes the financial resources available to the electoral body.

**196.** In referring to Article 40 of the impugned law, the Applicants point out that the budget is drafted by the Bureau which transmits it to the Ministry in charge of the Economy and Finance for inclusion by the Council of Ministers in the draft finance bill for of the financial year in question.

**197.** This means that the electoral body only has the power to make proposals concerning its administrative authority and its financial resources, from which the Applicants conclude that the Respondent State failed to fulfil its obligation to create an independent and impartial electoral body.

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**198.** The Respondent State notes that the Court already ruled on the institutional independence of the electoral body and found that the requirement of institutional independence is met. It notes that the Court based its finding of the institutional independence on Article 1(2) of the impugned law.[20] According to the Respondent State this article has not changed, therefore, it argues that to avoid legal uncertainty the Court should not alter its earlier position on this.

**199.** Regarding the administrative autonomy of the electoral body, the Respondent State refers to its legal system to explain how

20 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, § 121.

its parliament is mandated to vote laws whereas the executive branch is mandated to develop regulations implementing these laws. Therefore, the Respondent State concludes that the responsibility allocated to the government to implement the law on the electoral body is entirely constitutional and does not result in a dependence of the electoral body in any way.

**200.** Concerning the financial autonomy of the electoral body, the Respondent State notes that the budget of the electoral body is prepared by its Bureau which transmits the draft budget to the supervisory ministry for inclusion in the financial bill of the financial year in question which is ultimately adopted by Parliament. The Respondent State therefore argues the fact that the Bureau of the electoral body prepares its own budget underscores the financial autonomy of the electoral commission. The Respondent State further contends that the Applicants failed to provide evidence in the law, in relation to the allocation of financial resources, that would support their claim that the electoral management body lacks independence. Therefore, the Applicants' argument should be dismissed.

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**201.** In its judgment in *APDH v Côte d'Ivoire* (merits) of 18 November 2016, the Court held "that an electoral body is independent where it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality."[21]

**202.** In this decision the Court was satisfied to adopt the presumption that there is sufficient institutional independence based on Article 1(2) of the impugned law, considering that the institutional independence was not specifically challenged by the Applicants in the matter of *APDH v Côte d'Ivoire* (merits).[22] In this Application, however, the Applicants do challenge the institutional independence of the Respondent State's electoral body, even though, the abovementioned article has not changed in the latest legal reform of the electoral body. Accordingly, the Court can proceed to assess the allegations made by the Applicants without

21 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, § 118.

22 *Ibid,* § 122.

necessarily creating legal uncertainty, because no substantive determinations on the electoral body's institutional independence were made.

**203.** Regarding the administrative autonomy of electoral bodies, the Court notes that there are various ways of allocating responsibilities between an electoral body and other state institutions in terms of decision-making on electoral matters. The Court holds that the requirement of administrative autonomy of electoral bodies is not necessarily undermined by a regulation that stipulates that they can make proposals to the executive branch on the basis of which the executive branch then makes decisions.

**204.** The functions of electoral bodies, including their scope of decision-making, vary across the continent. Accordingly, there are various degrees of the extent of electoral body's administrative autonomy. The Court therefore cannot conclude that there are any absolute criteria regarding the appropriate amount of administrative autonomy. Instead, this assessment will depend on the particular circumstances of each case. In the instant case the Court finds that the Applicants have not provided sufficient evidence to justify that the administrative autonomy of the Respondent State's electoral body is manifestly restricted which would prevent it from organising transparent, free and fair elections.

**205.** Similarly, the Court notes that the requirement of financial autonomy is not an absolute requirement. Considering the discretionary power exercised by Parliament in adopting the bill governing the electoral body's finances and the involvement of the electoral body through its Bureau in preparing its own budget, the Court finds that its financial autonomy is sufficiently assured.

**206.** Therefore, the Court dismisses the argument of the Applicants concerning the alleged lack of institutional independence of the Respondent State's electoral body.

### iii. Credibility of the electoral body's independence and impartiality

**207.** The Applicants also raise concerns regarding the process that led to the adoption of the new law on the recomposition of the electoral body and which undermine the credibility of the electoral body's independence and impartiality beyond the deficiencies already raised above.

**208.** The Applicants claim that the legislative process that led to the reform of the electoral body was characterised by a lack of transparency, inclusiveness and adequate opportunities to

participate in the amendment process.

**209.** The Applicants contend that the failure of the government to make the terms of reference, including a discussion schedule, details about the decision-making process and a secretariat to ensure the transparency of the discussions, resulted in the decision by opposition parties to withdraw from the discussions which undermined the inclusiveness of the reform process. According to the Applicants, the absence of such terms of reference prevented the opposition parties to adequately prepare for the discussions and prevented them from knowing the conclusions of each round of discussion.

**210.** The Applicants also challenge that the criteria for selecting which CSOs are allowed to participate in the legislative reform were not clearly defined. They put forward that the participating CSOs lacked proven competence and independence.

**211.** The Applicants note that all the amendments proposed by the parliamentary opposition were simply rejected and that this could be considered as an abuse of majority power. Furthermore, the Applicants also observe that the new impugned law includes elements that were not subjected to previous political consultations.

**212.** Furthermore, the Applicants claim that the adopted law was never made available to the various parliamentary groups to enable them to lodge an appeal with the Constitutional Council. They contend that it is for that reason that the sixty-six (66) opposition members that brought the matter before the Constitutional Court only presented the amended draft. This was subsequently the reason the Constitutional Council found in its decision of 5 August 2019 that their Application is inadmissible, since it cannot decide on draft laws.

**213.** The Applicants also challenge the subsequent hasty promulgation of the law and claim that it undermined the democratic nature of the legislative reform process, especially because it prevented the opposition parties from challenging the constitutionality of the law. The Applicants submit that the new law was promulgated the same day the members of parliament submitted the petition to the Constitutional Council to challenge the law.

**214.** The Applicants similarly contend that the adoption by government of a new law on 4 March 2020 to alter the composition of the Respondent State's electoral body by an Order of the President also reveals its lacking democratic nature. Specifically, they object to the President's use of his powers to alter a law merely a few months after it was reformed by representatives of the people on the basis of a so called "inclusive dialogue".

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**215.** The Respondent State submits, contrary to the written and oral submissions by the Applicants, that the government ensured the legislative reform process was based on inclusive and open political dialogue.

**216.** The Respondent State referred to the judgment of the Court in *APDH v Côte d'Ivoire* (interpretation) where the Court held that it was the government's responsibility to strike the best form of balance. In its search for the best form of balance, the Respondent State opted for a solution based on consensus. In view of its concern to ensure the appropriate conditions to formulate a law that would guarantee the establishment of an independent and impartial electoral body, the President of the Respondent State issued instructions to the Government to initiate consultations with political parties as well as with CSOs.

**217.** The Respondent State note that on the basis of various rounds of discussions, a list of aspirations of political parties and those of the civil society were drawn up. At the end of the discussions, a final report was written and signed by the parties involved. In light of the proposals and reform proposal documents forwarded by the parties involved, the bill amending the law relating to the recomposition of the electoral body was tabled before and adopted by Parliament.

**218.** The Respondent State further notes that the lack of participation of some political parties was not caused by the Government's lack of efforts to invite them to the process. Concerning the contention about the lacking terms of reference, the Respondent State maintains that the objective of the discussions was clearly specified in the invitations to the political dialogue.

**219.** The Respondent State also reminds the Court that it was under no obligation to follow such a resolutely participatory approach by organising the political dialogue. The Respondent State also did not consider it opportune to lock the political dialogue into strict terms of reference imposed on the other stakeholders.

**220.** Regarding the adoption of the Order by the President in March 2020 amending the law of 5th of August 2019, the Respondent State notes that the change in the composition of the electoral body was not to establish a balance which did not exist. On the contrary, the alteration to the law was simply adopted in pursuance of its international human rights obligations to improve

the standards of the electoral body even further.

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**221.** Article 3 of the ECOWAS Democracy Protocol provides that the "bodies responsible for organising the elections shall be independent or neutral and *shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organised to determine the nature and the structure of the bodies.* [emphasis added]".

**222.** In its jurisprudence the Court has held "that institutional independence in itself is not sufficient to guarantee the transparent, free and fair elections advocated in the African Charter on Democracy and the ECOWAS Democracy Protocol. The electoral body in place should, in addition, be constituted according to law in a way that guarantees its independence and impartiality and should be perceived as such."[23]

**223.** In line with Article 3 of the ECOWAS Democracy Protocol, the Court's jurisprudence makes it clear that beyond the need for ***de jure*** guarantees of independence and impartiality, the Court also requires ***de facto*** respect for these principles supported by the perception of the public.[24]

**224.** The Court notes that such a "perception" can be influenced by procedural guarantees such as inclusion, participation and transparency during the different stages constituting an electoral body, including during the development of its legal framework, the appointment of its members and personnel, as well as its functioning throughout the electoral process.

**225.** In the instant case, the Court takes notice of the Applicants' concerns about the reform process, notably the disputed levels of transparency about the organisation of the reform process and the hasty promulgation of the law which allegedly prevented the opposition parties from challenging the constitutionality of the law.

**226.** However, the Court also notes the attempt by the Respondent State to ensure the process reforming the composition of the electoral body was inclusive and consensus based. The

23 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, § 123.

24 *Ibid,* § 125.

Court further observes that the impugned law was adopted by parliament which further underlines the democratic credentials of the reform process of the electoral body. And even if the law was later amended by an Order from the Government, instead of Parliament, the Court notes that the objective of that reform was to grant an additional seat to opposition parties, which thereby further strengthened the independence and impartiality of the electoral body.

**227.** Therefore, the Court finds, pursuant to Article 3 of the ECOWAS Democracy Protocol, that the Applicants have failed to demonstrate that the national consultations on which the reform process was based were of such inappropriate nature to conclude that the resulting electoral body manifestly lacks confidence from relevant political stakeholders in respect of its reform process.

**228.** In sum, the Court finds that the Applicants have failed to demonstrate that the Respondent State established an electoral body that is composed of members who are not independent and impartial, manifestly imbalanced in favour of the ruling party, overly institutionally dependent due to inadequate degrees of administrative or financial autonomy, and manifestly lacking confidence from political stakeholders based on its reform process.

**229.** However, considering the manifest imbalance of the number of Chairpersons of the Local electoral commissions proposed by the ruling party, following Bureau elections based on the previous law when the electoral body at the Local levels was still imbalanced in favour of the Government, the Court finds that the Respondent State has not fully complied with Article 17 of the ACDEG and 3 of the ECOWAS Democracy Protocol, and has therefore violated these provisions.

**230.** In addition, the Court has considered the absence of a mechanism to ensure that the process of nomination of members of the electoral body by political parties, especially opposition parties, as well as CSOs, are driven by those entities. Accordingly, the Court finds that the Respondent State has not fully complied with its obligations to ensure public trust and transparency in the management of public affairs and effective citizens' participation in democratic processes as prescribed by Articles 3(7), 3(8) and 13 of the ACDEG, nor with its obligation to ensure that the electoral body has the confidence of all the political actors, as prescribed by Article 3 of the ECOWAS Democracy Protocol. The Court therefore finds that the Respondent State has violated these provisions.

## C. Alleged violation of the right to participate freely in government and of the right to equal protection of the law

**231.** The Applicants contend that independent candidates are not represented in the composition of the electoral body, whereas candidates from political parties are represented in the Central Electoral Commission and in the electoral bodies at the Local levels. Therefore, the Applicants claim that the impugned law violates the rights of independent candidates to freely participate in the government of their country as well as their right to have equal access to the public services of their country.

**232.** Furthermore, the Applicants assert that if the President of the Respondent State would stand for elections or put a candidate forward from his party, the fact that he is represented in the electoral body together with other representatives of his government and the members of the ruling party, whereas independent candidates are not represented, would result in an unfair advantage for the candidate of the ruling party vis-à-vis other candidates and particularly independent candidates, which constitutes a discrimination that cannot be reasonably and objectively justified. Therefore, the Applicants maintain that the Respondent State has violated its obligation to guarantee the right to equal protection of the law.

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**233.** The Respondent State disputes the claims of the Applicants and argues that in no way can the impugned law be read as being devoted to the representation of candidates from political parties, since this connection of representation has been replaced by the mechanism of proposal. Therefore, the impugned law does not in any way violate the right of citizens from the Respondent State to freely participate in their country, either directly or through freely chosen representatives.

**234.** The Respondent State also contends that the impugned law cannot occasion a violation of the right to equal access to the public services of the country, since its electoral body does not interfere in matters relating to the access to the public service of the country.

**235.** The Respondent State also notes the challenges of identifying independent candidates to participate as an entity to propose members to the electoral body, considering that they are by definition not affiliated to any political organisation. Furthermore, the Respondent State observes that, when constituting the electoral body more than a year before the elections, independent candidates have not yet submitted their nomination papers which could be used to identify them as independent candidates. The Respondent State also asserts that independent candidates may still decide to run under the banner of a political party and, conversely, people affiliated with political parties may decide to break with party discipline and run as independent candidates.

**236.** Finally, the Respondent State maintains that the new composition of the electoral body does not allow for any imbalanced representation in favour of the government and consequently, cannot give rise to an unfair disadvantage or to any breach of the citizen's right to equal protection of the law.

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**237.** In considering the question of independent candidates, the Court needs to address two issues. Firstly, the Court needs to determine whether the non-representation of independent candidates in the electoral body is a violation of the right to freely participate in government. Secondly, the Court needs to establish whether there is an unfair advantage for electoral candidates originating from the ruling party which would violate the right to equal protection of the law.

**238.** Article 13(1) of the Charter provides that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

**239.** Article 13(2) of the Charter stipulates that "Every citizen shall have the right of equal access to the public service of his country."

**240.** Article 10(3) of the ACDEG specifies that "State Parties shall protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society."

**241.** Article 3(2) of the Charter stipulates that "Every individual shall be entitled to equal protection of the law."

**242.** Article 26 of the ICCPR provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

**243.** The first issue for determination concerns whether the non-inclusion of independent candidates' representative in the electoral bodies results in a violation of Article 13(1) and (2) of the Charter.

**244.** At the outset, the Court observes that the Applicants have not demonstrated how the non-inclusion of independent candidates in the list of entities that may propose members to the electoral body as established in the impugned law has affected their right to freely participate in government or have equal access to the public service of the country.

**245.** The Court further notes the difficulty in identifying and selecting representatives of independent candidates before the final lists of candidates for elections are drawn up.

**246.** For these reasons, the Court finds no violation with regard to right to freely participate in government nor with regard to the question of equal access to the public service of the country, as provided under Article 13(1) and (2) of the Charter.

**247.** Concerning the second issue related to the alleged unfair advantage for electoral candidates originating from the ruling party, the Court is of the view that the argument of the Applicants on the discrimination towards independent candidates is based on the assumption that there is an imbalance in the composition of the electoral body. The alleged discrimination against the candidates that do not originate from the ruling party is then supposedly the result of the imbalanced composition. However, the Court notes that it already established that the Applicants have failed to demonstrate the imbalanced composition of the electoral body. The Court also notes that the Applicants did not clarify what kind of advantage candidates from the ruling party would benefit from which is allegedly denied to other candidates, particularly independent candidates. Accordingly, the Court does not find that the Applicants have proven any unfair advantage towards some candidates. Therefore, the Court does not find that the right to equal protection of the law has been violated in relation to independent candidates or any other candidates, as

foreseen in Article 10(3) of the ACDEG, Article 3(2) of the Charter and Article 26 of the ICCPR.

## D. Alleged violation of the obligation to execute judgments

**248.** The Applicants assert that the Respondent State did not execute the judgment rendered by this Court on 18 November 2016 in the matter of *APDH v Côte d'Ivoire* (merits), due to its failure to establish an independent and impartial electoral body which is in compliance with the international legal instruments to which the Respondent State is a party. The Applicants therefore submit that the Respondent State violated Article 30 of the Protocol.

**249.** They substantiate this claim based on their above-mentioned submissions relating to the entities that nominate electoral body members, the method used to nominate those members which remain subject to the approval of the Council of Ministers and the fact that the electoral body only has the power to make proposals for the execution of its duties.

**250.** The Applicants also claim that the Respondent State failed to fulfil its obligation under Article 30 of the Protocol because it did not carry out the reform ordered by the Court within the timeline set by the Court, that is, one year from the date the judgment was rendered.

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**251.** The Respondent State disputes the claim of the Applicants and avers that it honoured its international commitments by adopting Law N° 2019-708 of 5 August 2019 on the recomposition of the IEC. It argues that the impugned reform satisfies the requirements of the said judgment, given that the reform law was enacted in strict compliance with the international instruments which the Court ordered the Respondent State to comply with.

**252.** The Respondent State also notes that to execute the Court's judgement, it first requested an interpretation of the judgment which was only delivered on 28 September 2017. The Respondent State then opted for a consensus-based solution to change the impugned law of the Court's judgment of 18 November 2016. It claims that the organisation of such an inclusive political dialogue with different political parties and CSOs to establish an electoral body that meets relevant international standards inevitably took

time.

**253.** The Respondent State therefore argues that there is ample justification for its inability to submit a report on the execution of the judgment within one year of its notification of the decision and that such inability cannot constitute any violation whatsoever of its international commitments.

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**254.** Article 30 of the Protocol stipulates that: "The States parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."

**255.** The Court recalls that in its judgment in *APDH v Côte d'Ivoire* (merits), it ordered the Respondent State to:

> to amend Law No 2014-335 of 18 June 2014 on the Independent Electoral Commission to make it compliant with the aforementioned instruments to which it is a Party; and
>
> to submit to it a report on the implementation of this decision within a reasonable time which, in any case, should not exceed one year from the date of publication of this Judgment;[25]

**256.** The Court notes the various efforts undertaken by the Respondent State to comply with its judgement of 18 November 2016 and guarantee its execution, including through its request on 4 March 2017 for an interpretation of the Court's judgement and its search for a consensus-based solution to reform the electoral body through the adoption of Law N° 2019-708 of 5 August 2019 on the recomposition of the IEC.

**257.** The Court also observes that it already found that the Applicants have not demonstrated that the impugned law establishes an electoral body that is composed of members who are not independent and impartial. The Court has also not found that the impugned law provides for a composition of the electoral body at the Central level or at the Local levels that is manifestly imbalanced in favour of the ruling party. Neither did it find the electoral body overly institutionally dependent due to inadequate degrees of administrative or financial autonomy, or manifestly

25 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, § 153.

lacking confidence from political stakeholders in respect of its reform process.

**258.** However, the Court noted the manifest imbalance of the number of Chairpersons of the Local electoral commissions proposed by the ruling party, following the Bureau elections on the basis of the previous law when the electoral body at the Local levels was still imbalanced in favour of the Government. Accordingly, the Court found that the Respondent State has not fully complied with Article 17 ACDEG and Article 3 ECOWAS Democracy Protocol, and as a result, it determined that the Respondent State violated these provisions.

**259.** In addition, the Court noted the absence of a mechanism to ensure that the process of nomination of members of the electoral body by political parties, especially opposition parties, as well as CSOs, are driven by those entities. For that reason, the Court also found that the Respondent State has not fully complied with its obligations to ensure public trust and transparency in the management of public affairs as well as effective citizens' participation in democratic processes, as prescribed under Articles 3(7), 3(8) and 13 of the ACDEG; nor with its obligation to ensure that the electoral body has the confidence of all the political actors, as prescribed by Article 3 of the ECOWAS Democracy Protocol. Accordingly, the Court found a violation of these provisions.

**260.** However, the Court notes that the remaining manifest imbalance of the Chairpersons of the Local electoral commissions relates to the implementation of the law and not to the content of the law.

**261.** The Court further notes that the absence of an appropriate mechanism to appoint members of the electoral body from civil society and political parties, particularly opposition parties, does not necessarily require an amendment of the impugned law. Such a mechanism could also be established through other measures.

**262.** The Court recalls its earlier jurisprudence in the matter of *APDH v Côte d'Ivoire* (interpretation), where it held that it is not the Court's responsibility to decide how to make the law governing the electoral body compliant with the relevant human rights instruments, that is the responsibility of the Respondent State. Instead, the Court can only interpret the relevant human rights instruments and consider whether the law on the electoral body is in violation with those instruments or not. In the instant case, the Court finds that the Applicants have not sufficiently demonstrated that the impugned law on the electoral body fails to meet the standards provided by the relevant human rights instruments to which the Respondent State is a Party.

**263.** Regarding the obligation to execute the judgment within the stipulated time, the Court notes that the procedure to interpret the Court's earlier judgment may help explain the initial delay in executing the said judgment. And while the Respondent State could have launched the consensus based legislative process to reform the law governing the electoral body earlier, the Court finds the Respondent State's justification of the delay acceptable.

**264.** Accordingly, the Court holds that the Respondent State has not violated its obligation to execute the judgment of the Court.

## VIII. Reparations

**265.** The Applicants pray the Court to find a violation of the abovementioned human rights instruments, to order the Respondent State to amend, before any election, Law N° 2019-708 of 5 August 2019 on the recomposition of the IEC and to make it compliant with the aforementioned instruments to which it is a party as well as to order a time limit within which it is to execute this order at the expiration of which it will submit a report for the observation of the Court.

**266.** The Respondent State avers that the Applicants' prayers should be dismissed.

**267.** Article 27(1) of the Protocol stipulates that: "[i]f 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."

**268.** The Court found that with regard to the manifest imbalance of the number of Chairpersons of the Local electoral commissions proposed by the ruling party, following Bureau elections based on the previous law when the electoral body at the Local levels was still imbalanced in favour of the Government, the Respondent State did not fully comply with Article 17 of the ACDEG and Article 3 of the ECOWAS Democracy Protocol, and therefore, the Respondent State violated these provisions.

**269.** For this reason, the Court orders the Respondent State to take the necessary measures before any election to ensure that new Bureau elections, based on the new composition of the electoral body, are organised at the Local levels.

**270.** Furthermore, the Court found that the Respondent State has not fully complied with its obligations to ensure public trust and transparency in the management of public affairs as well as effective citizens' participation in democratic processes as prescribed under Article 3(7), Article 3(8) and Article 13 of the ACDEG; nor with its obligation to ensure that the electoral body

has the confidence of all the political actors as prescribed by Article 3 of the ECOWAS Protocol on Democracy. Accordingly, the Court found a violation of these provisions.

**271.** The Court therefore orders the Respondent State to take the necessary measures before any election to ensure that the process of nomination of members of the electoral body by political parties, especially opposition parties, as well as CSOs are driven by those entities, based on pre-determined criteria, with authority to organise themselves, consult, hold elections as necessary, and submit the required nominees.

## IX. Costs

**272.** Neither party made submissions on costs.

**273.** 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".

**274.** The Court therefore decides that each Party shall bear its own costs.

## X. Operative part

**275.** For these reasons,

The Court,

*Unanimously*

*On Jurisdiction*

i. *Dismisses* the objection on jurisdiction of the Court; and

ii. *Declares* that it has jurisdiction.

*On Admissibility*

iii. *Dismisses* the objection to the admissibility of the Application*;* and

iv. *Declares* the Application admissible.

*On Merits*

v. *Finds* that the Respondent State has not violated its obligation to protect citizens' right to participate freely in the government of their country as provided under Article 13(1) and (2) of the African Charter on Human and Peoples' Rights;

vi. *Finds* that the Respondent State has not violated its obligation to protect the right to equal protection of the law, as provided under Article 10(3) of the African Charter on Democracy, Elections and Governance, Article 3(2) of the African Charter on Human and Peoples' Rights and Article 26 of the International Covenant on Civil and Political Rights;

vii. *Finds* that the Respondent State has not violated its commitment to comply with the judgment of the Court in a case to which it was a party within the time stipulated by the Court and to guarantee its execution in accordance with Article 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights;

viii. *Finds* that the Respondent State has not fully complied with its obligation to create an independent and impartial electoral body as provided for under Article 17 of the African Charter on Democracy, Elections and Governance and Article 3 of the ECOWAS Protocol on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. The Court therefore finds a violation of those provisions with regard to the manifest imbalance of the number of Chairpersons of the Local electoral commissions proposed by the ruling party, following Bureau elections based on the previous law when the electoral body at the Local levels was still imbalanced in favour of the Government; and

ix. *Finds* that the Respondent State has not fully complied with its obligations to ensure public trust and transparency in the management of public affairs as well as effective citizens' participation in democratic processes as prescribed under Article 3(7), Article 3(8) and Article 13 of the African Charter on Democracy, Elections and Governance; nor with its obligation to ensure that the electoral body has the confidence of all the political actors as prescribed by Article 3 of the ECOWAS Protocol on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. The Court therefore finds a violation of those provisions with respect to the absence of a mechanism to ensure that the process of nomination of members of the electoral body by political parties, especially opposition parties, as well as CSOs, are driven by those entities.

*On Reparations*

x. *Orders* the Respondent State to take the necessary measures before any election to ensure that new Bureau elections, based on the new composition of the electoral body, are organised at the Local levels;

xi. *Orders* the Respondent State to take the necessary measures before any election to ensure that the process of nomination of members of the electoral body by political parties, especially opposition parties, as well as CSOs are driven by those entities,

based on pre-determined criteria, with the authority to organise themselves, consult, hold elections as necessary, and submit the required nominees; and

xii. *Orders* the Respondent State to report to the Court on the measures taken in respect of paragraphs x and xi within three (3) months from the date of notification of this Judgment, and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On Costs*

xiii. *Orders* that each Party shall bear its own costs

# Konaté & Doumbia v Côte d'Ivoire (provisional measures) (2020) 4 AfCLR 455

Application 036/2019 & 037/2019, *Konaté Kalilou & Doumbia Ibrahim v Republic of Côte d'Ivoire*

Ruling (provisional measures), 15 July 2020. 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: ORÉ

The Applicants, each convicted and serving sentences for armed robbery, brought an action alleging a violation of their rights protected under the Charter and other international human rights instruments. Pending the Court's decision on the merits, the Applicants brought this application for provisional measures. The Court dismissed the application for provisional measures.

**Jurisdiction** (*prima facie*, 16; effect of withdrawal of Declaration 19,20)

**Provisional measures** (similarity to prayers on the merits, 27; evidence in support, 28)

## I. The Parties

**1.** Messrs Konaté Kalilou and Doumbia Ibrahim (hereinafter referred to as "the Applicants"), are nationals of the Republic of Cote d'Ivoire who are each currently serving a twenty (20) year sentence at the Maca Prison in Abidjan.

**2.** The Application is filed against the Republic of Cote d'Ivoire (hereinafter referred to as "the Respondent State"). The Respondent State 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 May 2004. On 23 July 2013, the Respondent State deposited the Declaration prescribed 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 (hereinafter referred to as "the Declaration"). On 29 April 2020, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration.

## II. Subject of the Application

**3.** On 12 July 2019, the Applicants filed an application on the merits

before the Court alleging that the Respondent State violated their rights under Articles 5 and 7 of the Charter, Article 10(1) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") and Articles 8 and 10 of the Universal Declaration of Human Rights.

**4.** On 27 August 2019, the Applicants filed requests for provisional measures asking the Court to order the Respondent State to:

i. Take all necessary measures to end the psychological pressure exerted on them by the prison staff.

ii. Take urgent measures to avoid irreparable harm on them resulting from a violation of the Charter, which provides that everyone shall have the right to defence.

iii. Take all urgent measures to ensure their safety.

**5.** It emerges from the Application that on 14 June 2012, in Case No. 342 before the Court of First Instance of Divo, the Applicants were convicted and sentenced to twenty (20) years imprisonment for having committed armed robbery.

**6.** The Applicants filed an appeal against this judgment before the Court of Appeal in Daloa. On 21 March 2013, the Court of Appeal issued its decision No. 141, in which it upheld the Applicants' conviction but reduced the sentence to fifteen (15) years imprisonment.

**7.** On 26 March 2013, the Applicants appealed the decision of the Court of Appeal before the Supreme Court, which dismissed the appeal on 24 February 2014.

## III. Summary of the Procedure before the Court

**8.** On 12 July 2019, the Registry received two separate Applications filed by each of the Applicants. The Application by Mr. Konaté Kalilou was registered as No. 036/2019, while that by Mr. Doumbia Ibrahim was registered as No. 037/2019.

**9.** On 27 August 2019, the Registry received two additional submissions from each of the Applicants praying the Court to issue orders for provisional measures and compensation for the moral damages suffered by each of them.

**10.** On 10 September 2019, the Registry served the Applications on the Respondent State requesting to the latter to file its response to the request for provisional measures within fifteen (15) days and the response to the main Applications within sixty (60) days of receipt of the notification, in accordance with Rule 36 (1) of the Rules.

**11.** On 26 September 2019, the Court issued an Order for Joinder of Applications No. 36/2019 and 037/2019 as they are based on the

same facts, make similar prayers and are filed against the same Respondent State.

**12.** Following the Applicants' request, on 17 October 2019, the Court granted them legal assistance under its legal aid scheme.

**13.** On 21 October 2019 the Court directed the Applicants to file relevant documents in support of their request for provisional measures and granted them an additional period of thirty (30) days to do so. The Registry sent the Applicants a reminder in that regard on 11 February 2020, but the latter failed to respond.

**14.** On 27 January 2020, the Respondent State requested the Court for an additional thirty (30) days to file its Response to the request for Provisional Measures. The Court granted the same on 11 February 2020 but till date, the Respondent State has failed to file any response.

## IV. Jurisdiction

**15.** 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.

**16.** Nevertheless, for the purpose of issuing a Ruling on Provisional Measures, the Court need not establish that it has jurisdiction on the merits of the Application but must simply satisfy itself that it has *prima facie* jurisdiction.[1]

**17.** 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."

**18.** The Court notes that the alleged violations, subject of the present Application are in respect of the rights protected under the Charter and the ICCPR to which the Respondent State is a Party.[2] The Court therefore holds that it has material jurisdiction to hear the Application.

1 *Amini Juma v United Republic of Tanzania* (provisional measures) (2016) 1 AfCLR 687, § 8 *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (2013) 1 AfCLR 149 §10. *Komi Koutché v Republic of Benin*, AfCHPR, Application No.020/2019, Order of 2 December 2019 § 14

2 The Respondent State became a Party to the ICCPR on 26 March 1992.

## V. Effect of the Respondent State's withdrawal of the declaration

**19.** The Court recalls that in the matter of *Ingabire Victoire Umuhoza v Republic of Rwanda*,[3] it held that the withdrawal of the Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the withdrawal of Declaration as is the case with the present Application. The Court also held that any withdrawal of the Declaration shall take effect twelve (12) months after the instrument of withdrawal is deposited.

**20.** In respect of the Respondent State, therefore, having deposited its instrument of withdrawal on 29 April 2020, the said withdrawal of the Article 34(6) Declaration will take effect as from 30 April 2021 and will in no way affect the personal jurisdiction of the Court in the instant case.

## VI. On the provisional measures requested

**21.** The Applicants allege that because the officials of the Respondent State did not provide them legal counsel during their interrogation, they suffered mental torture.

**22.** The Applicants submit that they require adequate medical treatment as their mental health is constantly deteriorating. Accordingly, they request appropriate medical intervention, to be ordered by the Court as an urgent matter, in accordance with Article 27 (2) of the Protocol.

**23.** The Applicants further aver that their mental health condition and the absence of adequate medical treatment could have negative repercussions on their children's educational prospects and the emotional state of their families for whom they are financially responsible.

***

**24.** The Court notes that Article 27 (2) of the Protocol states that "in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such

3 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (2016) 1 AfCLR 562 § 67.

provisional measures as it deems necessary."

**25.** Furthermore, in terms of Rule 51(1) of the Rules, "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.** It, therefore, lies with the Court to decide in each case whether, in the light of the particular circumstances of each case, it must exercise the jurisdiction conferred upon it by the afore-cited provisions.

**27.** In the present case, the Court notes that the prayers contained in the Applicants' request for provisional measures are closely related to the Applicants' prayers on the merits, especially the request concerning the refusal of legal assistance during their interrogation, which affected their morale.

**28.** Furthermore, the Applicants failed to provide evidence in support of their request for the Court to order provisional measures. Even though the Court requested them to do so on two occasions and accorded them additional time, the Applicants did not respond to these requests.

**29.** The Court, accordingly, dismisses the request for provisional measures filed by the Applicants.

**30.** For the avoidance of doubt, this Ruling is necessarily provisional in nature and in no way prejudges the findings the Court might make as regards its jurisdiction, admissibility and the merits of the Application.

## VII. Operative part

**31.** For these reasons:

The Court,

*Unanimously*

i. *Dismisses* the request for Provisional Measures.

## Kambole v Tanzania (judgment ) (2020) 4 AfCLR 460

Application 018/2018, *Jebra Kambole v United Republic of Tanzania*

Judgment, 15 July 2020. 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 brought this action alleging that by reason of a provision in its Constitution, which barred national courts from inquiring into the election of a presidential candidate after the electoral commission had declared a winner, the Respondent State had violated the rights to equality, equal protection of law, non-discrimination, and to be heard. The Court, by a majority, held that the rights to equality and to be heard had been violated.

**Admissibility** (exhaustion of local remedies, 37, 38, 41; reasonable time to file, 45-46, 50; continuing violations 51, 52)

**Discrimination** (direct and indirect, 68-73, proportionality, 78, margin of appreciation 79-81)

**Fair trial** (scope, 96-98; due process, 96; equality of arms, 97, access to court, 99; right to appeal, 99)

**Reparations** (adoption of constitutional or legislative measures, 118, publication of judgment 123)

Dissenting opinion: TCHIKAYA

**Admissibility** (reasonable time to file, 24-26)

Separate opinion: KIOKO AND MATUSSE

**Equality** (non-discrimination, 4-5)

## I. The Parties

**1.** Jebra Kambole (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania. He is an advocate by profession and a member of the Tanganyika Law Society. He brings this Application challenging article 41(7) of the Constitution of the Respondent State.

**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 deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through

which it accepted the jurisdiction of the Court to receive cases directly from individuals and non-governmental organisations (NGOs). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration under Article 34(6) of the Protocol.

## II. Subject matter of the Application

### A. Facts of the matter

**3.** The Applicant alleges that the Respondent State has violated his rights under the Charter by maintaining article 41(7) in its Constitution**,** which provision bars any court from inquiring into the election of a presidential candidate after the Electoral Commission has declared a winner.

### B. Alleged violations

**4.** The Applicant avers that by barring courts from inquiring into the election of a presidential candidate**,** after the Electoral Commission has declared a winner, the Respondent State has violated his right to freedom from discrimination under Article 2 of the Charter. The Applicant further avers that the Respondent State has violated his right to equal protection of the law and the right to have his cause heard especially the right to appeal to competent national organs against acts violating his fundamental rights as provided for in Articles 3(2) and 7(1)(a) of the Charter, respectively.

**5.** The Applicant also alleges that the Respondent State has failed to honour its obligation to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative and other measures to give effect to the Charter as stipulated under Article 1 of the Charter.

**6.** It is also the Applicant's averment that the Respondent State's conduct also violates article 13(6)(a) of its own Constitution.

## III. Summary of the Procedure before the Court

**7.** The Application was filed on 4 July 2018 and served on the Respondent State on 27 July 2018. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.

**8.** After several reminders and extensions of time by the Registry, the Respondent State filed its Response on 10 July 2019.

**9.** Pleadings were closed on 18 January 2020 and the Parties were duly notified.

## IV. Prayers of the Parties

**10.** The Applicant prays the Court for the following:

i. Find that the Respondent is in violation of Art. 1, 2, 3(2) and 7(1) of the African Charter on Human and People's Rights.

ii. Order the respondent to put in place Constitutional and Legislative measures to guarantee the rights provided for under Art 1, 2, 3(2) and 7(1) of the African Charter on Human and Peoples' Right.

iii. Make an Order that the Respondent report to the Honourable Court, within a period of twelve (12) months from the date of the judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders.

iv. Any other remedy and/or relief that the Honourable Court will deem to grant; and

v. Order the Respondent to pay the Applicant's costs.

**11.** The Respondent State prays the Court for the following orders with respect to jurisdiction and admissibility:

i. Find that the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court or Article 56(5) and Article 6(2) of the Protocol.

ii. Order that the Application be dismissed in accordance to Rule 38 of the Rules of Court.

**12.** The Respondent State prays the Court for the following orders with respect to merits:

i. A declaration that Respondent State is not in violation of 1, 2, 3(2) and 7(1) of the African Charter on Human and Peoples' Rights.

ii. A declaration that 41(7) of the Respondent State's Constitution is not in violation of Article 7(1) of the Charter hence no need of making any constitutional and Legislative measures to guarantee the rights alleged.

iii. That the Application be declared inadmissible.

iv. That, the Application be dismissed.

v. The Applicant to pay the Respondent's costs.

## V. Jurisdiction

**13.** The Court observes that Article 3(1) of the Protocol provides as follows:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

**14.** The Court further observes that in terms of Rule 39(1) of the Rules: "[t]he Court shall conduct preliminary examination of its jurisdiction …".

**15.** The Court notes that none of the Parties to this Application has challenged its jurisdiction. This notwithstanding, and on the basis of the above-cited provisions, the Court must, preliminarily, conduct an assessment of its jurisdiction.

**16.** The Court recalls that jurisdiction has four dimensions: personal, material, temporal and territorial. The Court further recalls that all applications must fulfil the four dimensions of jurisdiction before they can be considered.

**17.** The Court notes, with respect to its personal jurisdiction, that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, filed the Declaration prescribed under Article 34(6) of the Protocol accepting the jurisdiction of the Court to directly receive applications from individuals and Non-governmental Organizations with observer status with the African Commission on Human and Peoples' Rights (hereinafter "the Commission").

**18.** The Court also recalls that the Respondent State, on 21 November 2019, deposited, with the African Union Commission, an instrument withdrawing its Declaration**.**

**19.** As the Court has held, the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending before this Court prior to the deposit of the Declaration, as is the case with the present Application.[1] Further, any such withdrawal of a Declaration only takes effect twelve (12) months after the instrument of withdrawal is deposited and the Respondent State's withdrawal will, therefore, take effect on 22 November 2020.

As the Court has held**,** the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending before this Court prior to the deposit of *the instrument withdrawing* the Declaration, as is the case with the present Application. Further, any such withdrawal of a Declaration only takes effect twelve (12) months after the instrument of withdrawal

1 *Ambrose Cheusi v United Republic of Tanzania*, AfCHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39. See also, *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 562.

is deposited and the Respondent State's withdrawal will, therefore, take effect on 22 November 2020.

**20.** In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

**21.** With regard to its material jurisdiction, the Court has consistently held that Article 3(1) of the Protocol confers on it the power to examine any application provided it contains allegations of violation of the rights protected by the Charter or any other human rights instrument ratified by the Respondent State concerned. Further, the Court notes that, in accordance with Article 7 of the Protocol, it "shall apply the provisions of the Charter and any other relevant human rights instrument ratified by the State concerned." In the present matter, the Applicant alleges the violation of rights guaranteed in Articles 1, 2, 3 (2), and 7(1)(a) of the Charter. As noted above, the Respondent State is a party to the Charter and to the Protocol. Consequently, the Court finds that its material jurisdiction is established.

**22.** In relation to temporal jurisdiction, the Court holds that the relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and the Protocol as well as the date of depositing the Declaration under Article 34(6) of the Protocol.

**23.** The Court observes that the violations alleged by the Applicant stem from article 41(7) of the Respondent State's Constitution. The Court also observes that this Constitution was adopted in 1977 but it has been amended several times over the years. Nevertheless, it is clear that the Respondent State's Constitution was enacted before the Respondent State became a party to both the Charter and the Protocol. Notably**,** article 41(7) remains a part of the Respondent State's laws to date, long after the Respondent State became a party to both the Charter and the Protocol.

**24.** The Court finds, therefore, that the violations alleged by the Applicant, though commencing before the Respondent State became a party to the Charter and the Protocol, continued after the Respondent State became a party to these two instruments. Given the foregoing, the Court holds that it has temporal jurisdiction in the present matter.

**25.** With regard to territorial jurisdiction, the Court observes that the alleged violations are all said to have occurred within the territory of the Respondent State and this has not been contested. The Court, therefore, holds that its territorial jurisdiction is established.

**26.** In light of all the above, the Court holds that it has jurisdiction to examine the Application filed by the Applicant.

## VI. Admissibility

**27.** 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 Article… 56 of the Charter, and Rule 40 of the Rules."

**28.** 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.

**29.** While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections to the admissibility of the Application.

### A. Conditions of admissibility in contention between the Parties

**30.** 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 on the ground that the Applicant failed to exhaust local remedies

**31.** The Respondent State argues that the:
[a]pplicant never made an attempt to exhaust the available local remedies nor has he given the Respondent the opportunity to address his alleged grievances. The right to appeal is also provided under the Constitution of the United Republic of Tanzania together with various enabling statutory provisions. Therefore, it is indeed improper for the Applicant at this stage to raise matters which could have been sufficiently addressed within the national justice system of the Respondent State prior to the application before this Honourable Court.

**32.** On the basis of the above, the Respondent State argues that the Court should find the Application inadmissible.

**33.** The Applicant submits that there is no remedy within the judicial system of the Respondent State to address the violations that he is alleging. He raises three grounds to substantiate his assertion. Firstly, he argues that article 74(12) of the Respondent State's Constitution which provides that "no court shall have power to inquire into anything done by the Electoral Commission in the discharge of its functions in accordance with the provisions of this Constitution" ousts the jurisdiction of domestic courts in all cases involving acts or omissions by the Electoral Commission.

**34.** Secondly, he contends that article 41(7) of the Respondent State's Constitution which provides that "when a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then no court of law shall have any jurisdiction to inquire into the election of that candidate" prohibits recourse to judicial remedies for the purposes of challenging the results of presidential elections. In the Applicant's view, article 41(7) contradicts article 13(6)(a) of the said Constitution and thus is unconstitutional. The Applicant further argues that the Respondent State's Court of Appeal has already ruled that it does not have the power to declare any provision of the Constitution unconstitutional. The Applicant thus submits that there is no remedy for his grievance within the Respondent State.

**35.** Thirdly, the Applicant contends that under the Basic Rights and Duties Enforcement Act, a person can only go to court if he alleges a human rights violation covered by articles 12 to 29 of the Respondent State's Constitution. According to the Applicant, the violation he is alleging arises from article 41(7) of the Respondent State's Constitution and is not covered by the remedies offered under the Basic Rights and Duties Enforcement Act. The Applicant thus submits that there is no remedy for him to exhaust in the Respondent State.

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**36.** The Court reiterates that, in accordance with Article 56(5) of the Charter and Rule 40(5) of the Rules, for an Application to be admissible it must be filed "after exhausting local remedies, if any, unless it is obvious [to the Court] that this procedure is unduly prolonged".

**37.** The Court recalls that for purposes of exhausting local remedies an Applicant is only required to exhaust judicial remedies that are available, effective and sufficient.[2] As confirmed by both the Commission and the Court, a remedy is available if it can be utilised as a matter of fact without impediment; a remedy is effective if it offers a real prospect of success; and a remedy is sufficient if it is capable of redressing the wrong complained against.[3] However, the Court has always considered that there is an exception to this rule if local remedies are unavailable, ineffective or insufficient, or if the procedure for obtaining such remedies is abnormally prolonged.[4] The Court also notes that an applicant is only required to exhaust ordinary judicial remedies.[5]

**38.** The Court recalls 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."[6] The Court further recalls that a remedy is available if it can be pursued by the Applicant without any impediment.[7]

**39.** The Court notes that in 1995, the Respondent State enacted the Basic Rights and Duties Enforcement Act which permits litigants to enforce the basic rights and duties set out in Chapter One (1), Part III of its Constitution. Under this Act, the High Court has

2 *Sir Dawda K Jawara v The Gambia*, (2000) AHRLR 107 (ACHPR 2000) §§ 31-32.

3 *Ibid*.

4 *The Beneficiaries of Late Norbert Zongo & ors v Burkina Faso* (preliminary objections) (2013) 1 AfCLR 197 § 84; *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465 § 64 and *Wilfred Onyango Nganyi & ors v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507 § 95.

5 *Oscar Josiah v United Republic of Tanzania*, AfCHPR, Application 053/2016, Judgment of 28 March 2019 (merits) § 38 and *Diocles William v United Republic of Tanzania*, AfCHPR, Application 016/2016. Judgment of 21 September 2018 (merits and reparations) § 42.

6 *The Beneficiaries of Late Norbert Zongo & ors v Burkina Faso* (merits) (2014) 1 AfCLR 219 § 68.

7 *Lohe Issa Konate v Burkina Faso* (merits) (2014) 1 AfCLR 314 § 96.

the power to "make all such orders as shall be necessary and appropriate to secure [an applicant] the enjoyment of the basic rights, freedoms and duties …".

**40.** In considering the powers of the High Court under the Basic Rights and Duties Enforcement Act, the Court takes judicial notice of the fact that the Respondent State's Court of Appeal in *Attorney General v Mtikila*, held that it did not have the power to nullify any constitutional provisions.[8] Specifically in respect of article 41(7) of the Respondent State's Constitution, the Court also takes judicial notice of the decision of the Respondent State's High Court in *Augustine Lyatonga Mrema v Attorney General*[9] in which it held that article 41(7) in unambiguous language has ousted the jurisdiction of courts to inquire into the election of the president once the Electoral Commission has declared the results. According to the High Court, if parliament had intended for courts to have the power to inquire into the election of a president, clear provision for the same would have been included in the Constitution.

**41.** In the present circumstances, the Court notes that had the Applicant challenged article 41(7) before the Respondent State's courts the application would have, inevitably, been dismissed on the basis that, no Court in the Respondent State has the power to nullify provisions of its Constitution. In this regard, the Court further notes that a domestic remedy that has no prospects of success does not constitute an effective remedy within the context of Article 56(5) of the Charter.[10] In the circumstances, therefore, the Court finds that the Applicant did not have a remedy that was available for exhaustion before filing this Application.[11]

**42.** In light of the above, the Court dismisses the Respondent State's objection to the admissibility of the Application on the ground that domestic remedies were not exhausted.

8 *The Honourable Attorney General v Reverend Christopher Mtikila*, Civil Appeal No. 45 of 2009.

9 [1996] TLR 273 (HC).

10 *Alfred Agbes Woyome v Republic of Ghana,* AfCHPR, Application 001/2017, Judgment of 28 June 2019 (merits and reparations) §§ 65-68.

11 Cf. *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, African Commission on Human and Peoples' Rights* (2000) AHRLR (ACHPR 2000) 227.

### ii. Objection on the ground that the Application was not filed within a reasonable time

**43.** The Respondent State argues that the "Application does not meet the requirements of Rule 40(6) of the Court Rules." According to the Respondent State, "the Applicant's case at the local jurisdiction was concluded in 2010 where the Court of Appeal of Tanzania dismissed the appeal. It has taken eight years for the Applicant to file his application in this Honourable Court." Although the Respondent State concedes that neither the Charter nor the Rules prescribe a time limit within which an individual is required to file an application, it submits that the Application "does not fulfil the provisions of Article 56(6) of the African Charter together with Rule 40(6) of the Court Rules, thus it should be rejected by the Court."

**44.** The Applicant submits that there is no time frame stipulated under Article 56(6) of the Charter and that it "falls on the Court to pronounce itself on what in its view is within reasonable time." In support of his submission, the Applicant cites the decision of the the Commission in *Darfur Relief and Documentation Centre v Sudan.* He argues that although Article 56(6) is meant to encourage applicants to be vigilant and to prevent tardiness in filing of applications, in appropriate cases, where there are good and compelling reasons, fairness and justice require the consideration of applications that have not been filed promptly. Specifically, the Applicant submits that, in relation to his Application:

> … the acts complained of are acts that are continuous in nature and do not occur in a specific time. Therefore, due to the continuous violation of this conduct by respondent, the court should consider that the application is within the time frame as provided by the law.

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**45.** The Court confirms that Article 56(6) of the Charter does not stipulate a precise time limit within which an Application shall be filed before the Court. 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 of the matter."

**46.** As the Court has established, the reasonableness of the period for seizure of the Court depends on the particular circumstances

of each case and must be determined on a case-by-case basis.[12]

**47.** In the present Application, the Court takes cognisance of the fact that the source of the violation alleged by the Applicant lies in a provision of the Respondent State's Constitution. The Court also recalls that the Respondent State deposited the Declaration under Article 34(6) of the Protocol in March 2010. Strictly speaking, therefore, the door for commencing action against the Respondent State, in relation to the violations alleged by the Applicant, was only opened in March 2010. This Application, however, was filed on 4 July 2018, which is eight (8) years and four (4) months after the deposit of the Declaration. In the circumstances, the Court must determine whether, on the facts of the present case, the aforementioned period is reasonable within the meaning of Rule 40(6) of the Rules.

**48.** At the outset, the Court notes that although the Respondent State has submitted that the "Applicant's case at the local jurisdiction was concluded in 2010 where the Court of Appeal of Tanzania dismissed the appeal" no details have been provided of the case involving the Applicant which was dismissed in 2010. For example**,** the Respondent State has not indicated to the Court who were the parties in the 2010 case; what the issues before the Court of Appeal were or even what the registration number of the case was. Given the lack of information about the alleged 2010 case, the Court holds that the Respondent State has failed to demonstrate that there was a 2010 case involving the Applicant which has relevance to the proceedings before it. The Court is reinforced in its finding since it is trite law that he who alleges bears the burden of proving the allegation(s).

**49.** The Court recalls that Rule 40(6) of the Rules, which restates Article 56(6) of the Charter, emphasises two aspects that the Court must consider for purposes of determining whether or not an application fulfils the requirement of being filed within a reasonable time. The first aspect is that an "application be filed within a reasonable time from the date local remedies were exhausted." The second aspect requires that an application be filed within a reasonable time "from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

**50.** In the present Application, since the Court has found that there were no domestic judicial remedies available for the Applicant to

12 *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (2018) 2 AfCLR 248 § 57.

exhaust, the question of a reasonable time, after the exhaustion of domestic remedies, within which the Applicant ought to have filed his Application with the Court does not arise. The Court, therefore, holds that this Application fulfils the requirement in the first limb of Rule 40(6).

**51.** As for the second aspect of Rule 40(6), the Court recalls that the date from which an application can be filed against any State party is the date on which the particular State deposited the Declaration under Article 34(6) of the Protocol which for the Respondent State is 29 March 2010.*13* In the present Application, however, the Court notes that the Applicant alleges continuing violation of his rights and the Court has found, for purposes of establishing temporal jurisdiction, that the alleged violations have a continuous character, since they are founded in a law adopted in 1977 which remains in force to date.

**52.** The Court reiterates that the essence of continuing violations is that they renew themselves every day as long as the State fails to take steps to remedy them.[14] The result is that the violations alleged to have been perpetrated by article 41(7) of the Respondent State's Constitution automatically renewed themselves for as long as they were not remedied.

**53.** The Court notes that in this case it took the Applicant eight (8) years and four (4) months to file his case from the time when the Respondent State deposited its Declaration. However, no local remedy was available for the Applicant to exhaust and the persistence of the violations meant that they automatically renewed themselves. Given this context, the Court holds that, on the facts of the present case, and within the meaning of the second limb of Rule 40(6), it could have been seized of the matter at any time for as long as the law causing the alleged violation remained in force.

**54.** In light of the above, the Court, therefore, holds that the Application meets the requirement in Rule 40(6) of the Rules and thus dismisses the Respondent State's objection.

## B. Other conditions of admissibility

**55.** The Court notes, from the record, that the Application's compliance

13 *Mohamed Abubakari v United Republic of Tanzania* (merits) (2016) 1 AfCLR 599 § 89.

14 Cf. *Parrillo v Italy* [GC] No. 46470/11 ECHR 27 August 2015 §§ 109-112 and *FAJ & ors v The Gambia* Suit No. ECW/CCJ/APP/36/15, Judgment No. ECW/CCJ/JUD/04/18, 13 February 2018.

with the requirements in Article 56 sub articles (1),(2),(3),(4) and 7 of the Charter, which requirements are reiterated in sub-rules 1, 2, 3, 4, and 7 of Rule 40 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

**56.** Specifically, the Court notes that, according to the record, the condition laid down in Rule 40(1) of the Rules is fulfilled since the Applicant has clearly indicated his identity.

**57.** The Court also finds that the requirement laid down in paragraph 2 of the same Rule is also met, since no request made by the Applicant is incompatible with the Constitutive Act of the African Union or with the Charter.

**58.** The Court also notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 40(3) of the Rules.

**59.** Regarding the condition contained under paragraph 4 of same Rule, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

**60.** Finally, with respect to the requirement laid down in Rule 40(7) of the Rules, the Court finds that the present case does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

**61.** 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

**62.** The Applicant alleges violation of Articles 1, 2, 3(2) and 7(1)(a) of the Charter.

## A. Alleged violation of the right to non-discrimination

**63.** The Applicant avers that article 13(6)(a) of the Respondent State's Constitution provides that:

> When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

**64.** The Applicant argues that notwithstanding article 13(6)(a), article 41(7) of the same Constitution bars any court from inquiring into the election of any presidential candidate after the Electoral Commission has pronounced a winner which in turn entails that any person aggrieved by the results of a presidential election cannot access a judicial remedy. The Applicant submits that by having a provision such as article 41(7) in its Constitution, the Respondent State has violated Article 2 of the Charter.

**65.** The Respondent State contends that the right to non-discrimination as provided for under Article 2 of the Charter "is not absolute where there is a legitimate justified purpose or aim that is justifiable." Referring to the Advisory Opinion of the Inter-American Court of Human Rights on the Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Opinion of 19 January 1984, the Respondent State argues that no discrimination can be said to "exist if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things…" The Respondent State further argues that "the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable."

**66.** The Respondent State submits, therefore, that a State Party to the Charter enjoys "a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment." Specifically, in relation to the Applicant's allegation, the Respondent State submits that a:

> … reasonable relationship of proportionality between the means employed by the Constitution of the United Republic of Tanzania in relation to article 41(7) are legally based on an objective and reasonable justification and the aim sought to be realised in protection of the United Republic of Tanzania's sovereignty, therefore, it is not in violation of Article 2 of the African Charter on Human and Peoples' Rights.

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**67.** The Court recalls that Article 2 of the Charter provides as follows:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised 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.

**68.** The Court recalls that in *APDH v Cote d'Ivoire*, it accepted that discrimination is "a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria."[15] This understanding of discrimination, however, is what is often referred to as direct discrimination. In cases where the discrimination is indirect, the key indicator is not necessarily different treatment based on visible or unlawful criteria but the disparate effect on groups or individuals as a result of specified measures or actions.

**69.** While direct discrimination may be more prominent in human rights discourse, international human rights law prohibits both direct and indirect discrimination. For example, the Convention on the Elimination of Racial Discrimination of 1965 (CERD) in article 1 defines racial discrimination as:
Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[16]

**70.** Given that indirect discrimination is an effects-based concept, it is clear that this definition includes a prohibition not only of direct but also of indirect discrimination. This has been confirmed by the Committee supervising the implementation of the CERD, which describes indirect discrimination as relating to "measures which are not discriminatory at face value but are discriminatory in fact and effect".[17] A similar position obtains under the Convention on the Elimination of All Forms of Discrimination Against Women

15 *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire* (Merits) (2016) 1 AfCLR 668 §§146-147.

16 The Respondent State acceded to the CERD on 27 October 1972 – see, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN.

17 European Commission "Limits and potential of the concept of indirect discrimination" https://op.europa.eu/en/publication-detail/-/publication/aa081c13-197b-41c5-a93a-a1638e886e61.

(CEDAW) of 1979 in relation to the definition of discrimination against women under article 1 of the said convention.[18]

**71.** In respect of Article 2 of the Charter, the Court reiterates its position that Article 2 is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.[19]

**72.** The Court notes that while the Charter is unequivocal in its proscription of discrimination, not all forms of distinction or differentiation can be considered as discriminatory. A distinction or differential treatment becomes discrimination, contrary to Article 2, when it does not have any objective and reasonable justification and, in circumstances where it is not necessary and proportional.[20]

**73.** As the Court noted in *African Commission on Human and Peoples' Rights v Kenya*,[21] the right not to be discriminated against is related to the right to equality before the law and equal protection of the law as guaranteed under Article 3 of the Charter. However, the scope of the right to non-discrimination extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status. The expression "any other status" in Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter. In determining whether a ground falls under this category, the Court takes into account the general spirit of the Charter.

**74.** The Court observes that the Respondent State, in its submissions, has not denied the possible distinction effected by article 41(7) of its Constitution but it has argued that the same is justifiable since there is a reasonable relationship of proportionality between the

18 The Respondent State ratified the CEDAW on 20 August 1985 – see, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN.

19 *African Commission on Human and Peoples' Rights (ACHPR) v Republic of Kenya* (merits) (2017) 2 AfCLR 9 § 137.

20 *Ibid* § 139. See also, *Tanganyika Law Society & ors v United Republic of Tanzania* (merits) (2013) 1 AfCLR 34 § 106 .

21 *African Commission on Human and Peoples' Rights v Kenya* (merits) § 138.

means adopted and the result sought to be achieved, which is the "protection of the United Republic of Tanzania's sovereignty…". The Respondent State has also invoked the doctrine of margin of appreciation as justifying the measures that it has devised through article 41(7) of its Constitution.

**75.** The Court notes, however, that article 41(7) of the Respondent State's Constitution creates a differentiation between litigants in that while the Respondent State's courts are permitted to look into any allegation by any litigant, they are not given equal latitude when a litigant seeks to inquire into the election of a president. The result is that those seeking to inquire into the election of a president are, practically, treated differently from other litigants, especially by being denied access to judicial remedies while litigants with other claims are not similarly barred.

**76.** The Court emphasises that while article 41(7) of the Respondent State's Constitution is, seemingly, neutral on its face and that it, in principle, applies to all citizens within the Respondent State, this provision does not have the same effect on all citizens. It is trite that in a multiparty democracy, like the Respondent State, during any election, the electorate would vote for different candidates. In this sense, therefore, there will be, within the broad group of voters, different subgroups depending on their political persuasion. While those supporting winning candidates may not have the motivation to approach the courts for relief in relation to the electoral process, the other subgroups of voters may be desirous of seeking judicial intervention to enforce their rights.

**77.** By outrightly barring the Courts from considering a complaint by anyone in relation to the results of a presidential election, in effect, article 41(7) of the Respondent State's Constitution treats citizens that may wish to judicially challenge the election of a president differently and less favourably as compared to citizens with grievances other than those related to the election of a president.

**78.** The Court recalls that the Respondent State considers that the distinction made by article 41(7) of its Constitution represents a relationship of proportionality between the means used and the objective sought in terms of protection of its sovereignty. However, in its submissions, the Respondent State has not provided details as to how the distinction made in article 41(7) of its Constitution is necessary to protect its sovereignty or how its sovereignty would be jeopardized if this provision was repealed or amended, for example. The Court is aware that, under Article 27 of the Vienna Convention on the Law of Treaties, a State cannot invoke the provisions of its internal laws to justify the non-fulfillment of its

obligations under a treaty.[22]

**79.** Specifically, in respect of the doctrine of margin of appreciation, the Court observes that this doctrine has been recurrent in international jurisprudence, notably the jurisprudence of the European Court of Human Rights (hereinafter referred to as "the ECHR") and also the former European Commission of Human Rights.[23] In terms of definition, the margin of appreciation can be understood as "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws."[24]

**80.** The Court agrees with the Commission's position on the relevance of the margin of appreciation for the interpretation and application of the Charter as stated in *Prince v South Africa*, where the Commission held that:

> Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society.[25]

**81.** However, the Court emphasises that while it is for a particular State to determine the mechanisms or steps to be taken for purposes of implementing the Charter, it retains the jurisdiction to assess and review the steps taken for compliance with the Charter and other applicable human rights standards. In particular, the Court's duty is to assess if a fair balance has been struck between societal interests and the interests of the individual as protected under the Charter. The doctrine of margin of appreciation, therefore, while recognising legitimate leverage by States in the implementation of the Charter, cannot be used by States to oust the Court's supervisory jurisdiction.

**82.** In the absence of clear justification as to how the differentiation and distinction in article 41(7) is necessary and reasonable in

22 The Respondent State acceded to the Vienna Convention on the Law of Treaties on 12 April 1976, see: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang = _en.

23 *Lawless v Ireland*, [1961] ECHR 2, *Ireland v United Kingdom* [1978] ECHR 1, and *Handyside v UK* [1976] ECHR 5.

24 HC Yourow *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (1996: Kluwer Law International) 13.

25 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) § 51.

a democratic society, the Court finds that article 41(7) of the Respondent State's Constitution effects a distinction between litigants and that this distinction has no justification under the Charter.[26] This distinction is such that individuals within the Respondent State are excluded from pursuing a remedy before the court simply because of the subject matter of their grievances while other individuals with grievances not related to the election of a president are not equally barred.

**83.** In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution violates the Applicant's right to be free from discrimination as guaranteed under Article 2 of the Charter.

## B. Alleged violation of the right to equal protection of the law

**84.** The Applicant argues that notwithstanding article 13(6)(a) of the Respondent State's Constitution, article 41(7) of the same prohibits any person aggrieved by the results of a presidential election from accessing courts to seek a remedy. The Applicant submits that by having a provision such as article 41(7) as part of its Constitution, the Respondent State has violated Article 3(2) of the Charter.

**85.** In its Response, the Respondent State contends that the right to equal protection of the law is not absolute and can be limited where there is a legitimate purpose or aim. The Respondent State further argues that "the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable." The Respondent State further submits that a State Party to the Charter enjoys "a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

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**86.** Article 3(2) of the Charter provides that "[e]very individual shall be entitled to equal protection of the law."

26 Cf. *Tanganyika Law Society & ors v Tanzania* (merits) § 106.

**87.** The Court notes that the principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law, does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations.[27]

**88.** In the present case, the Court notes that article 41(7) of the Respondent State's Constitution does not deny the Applicant equal protection of the laws in the Respondent State. The Applicant, like other citizens, has been guaranteed the same range of rights in respect of contesting the election of a president. Given these circumstances, the Court finds that the Applicant has failed to prove a violation of Article 3(2).

**89.** In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution does not violate the Applicant's right to equal protection of the law guaranteed under Article 3(2) of the Charter.

## C. Alleged violation of the Applicant's right to have his cause heard

**90.** The Applicant avers that by having article 41(7) as part of its Constitution, the Respondent State has violated his right under Article 7(1)(a) of the Charter.

**91.** The Respondent State disputes the Applicant's allegation of a violation of Article 7(1)(a) of the Charter and argues that as a sovereign State it enjoys:

> …exclusive, ultimate and comprehensive powers of law-making, under its fundamental legal framework. Since all powers arise from the people, the Respondent has the right to make provisions in the Constitution or any other written law.

**92.** It is also the Respondent State's argument that article 41(7) of its Constitution is protected by the doctrine of margin of appreciation. According to the Respondent State:

> …given that contracting States possess different legal and cultural traditions, it is inevitable that States shall occasionally view the application of their obligations under the African Charter on Human and Peoples' Rights differently.

**93.** The Respondent State thus submits that:

> the doctrine of the margin of appreciation provides the African Court on Human and Peoples' Rights with the means by which to permit national authorities to enjoy the freedom to apply the African Charter on Human and Peoples' Rights in accordance with their own unique legal and

27 *Norbert Zongo & ors v Burkina Faso* (merits) § 167.

cultural traditions without flouting the ultimate objective and purpose of the Charter.

**94.** In support of its arguments, the Respondent State has referred the Court to the decisions of the ECHR in *Handyside v United Kingdom* and *James v United Kingdom*.

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**95.** Article 7(1)(a) of the Charter provides as follows:

(1) Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

**96.** The Court observes that the right to have one's cause heard, as enshrined under Article 7(1)(a) of the Charter, bestows upon individuals a wide range of entitlements pertaining to due process of law, including the right to be given an opportunity to express their views on matters and procedures affecting their rights, the right to file a petition before appropriate judicial and quasi-judicial authorities for violations of these rights and the right to appeal to higher judicial authorities when their grievances are not properly addressed by the lower courts.[28] The Court also notes that the right to have one's cause heard does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place.

**97.** The Court recalls that the right to a fair hearing encompasses several elements, including the principle of equality of arms for parties to a case in all proceedings; the opportunity to properly prepare a defence; present one's arguments and evidence; and to respond to the arguments and evidence presented by the opposing side.[29] Article 7 of the Charter permits every person who feels that his/her rights have been violated to bring his/her case

28 *Werema Wangoko Werema v United Republic of Tanzania* (merits) (2018) 2 AfCLR 520 §§ 68-69.

29 *Dino Noca v Democratic Republic of Congo* Communication No. 286/2004 [2018] ACHPR 10; (22 October 2012) §186-187.

before a competent national court. In the realization of this right, the position or status of the victim or the alleged perpetrator of the violation are irrelevant and every complainant is entitled to an effective remedy before a competent and impartial judicial body. It is the duty of all State Parties to the Charter to ensure that their judicial organs are accessible to all and that every litigant is accorded ample opportunity to present his/her claim.

**98.** The Court notes that:

> [t]he protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief.[30]

**99.** The Court recalls that among the key elements of the right to a fair hearing, as guaranteed under Article 7 of the Charter, is the right of access to a court for adjudication of one's grievances and the right to appeal against any decision rendered in the process. As against this, the Court notes that article 41(7) of the Respondent State's Constitution has ousted the jurisdiction of courts to consider any complaint in relation to the election of a presidential candidate after the Electoral Commission has declared a winner. This entails that irrespective of the nature of the grievance or the merits thereof, as long as the same pertains to the declaration by the Electoral Commission of the winner of a presidential election, no remedy by way of a judicial challenge exists to any aggrieved person within the Respondent State.

**100.** The Court acknowledges that, in appropriate conditions, rights contained in the Charter may be limited. However, as the Court has previously stated [31] restrictions on rights must be necessary in a democratic society and they must be reasonably proportionate to the aim pursued.

**101.** The Court also acknowledges that once a complainant establishes that there is a *prima facie* violation of a right, it behoves **on** the Respondent State to establish that the right has been legally restricted in line with the provisions of Article 27(2) of the Charter. The Respondent State can discharge its burden by proving that the restriction is authorized by law - both domestic and international - and also by establishing that the restriction serves one of the

30 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) § 213.

31 *Tanganyika Law Society & ors vl Tanzania* (merits) § 106.

purposes listed under Article 27(2) of the Charter.[32]

**102.** Focusing on the position of the Respondent State in this Application, especially in relation to the purported restriction of the right to have one's cause heard, the Court notes that there is nothing in the submissions of the Respondent State which establishes any of the conditions in Article 27(2) of the Charter to justify a limitation of the right to have one's cause heard. Admittedly, there is a constitutional provision – article 41(7) of the Respondent State's Constitution – which prescribes the limitation at issue here. However**,** it is trite law that a State cannot invoke its domestic laws to justify a breach of its international obligations. Resultantly, therefore, if a State relies on a provision of its domestic law to justify restriction of a right, such a State must be able to demonstrate that the provision(s) in its domestic law do not infringe the Charter.

**103.** In the context of the present Application, the Court notes that electoral disputes, even those related to the election of a president, implicate rights guaranteed in the Charter. Considering that decisions of the Electoral Commission in relation to the election of a president may have an effect on the rights to be enjoyed by citizens of the Respondent State, the Court finds it anomalous that citizens have not been provided with an avenue for invoking judicial scrutiny of decisions of the Electoral Commission. It is the lack of opportunity given to individuals to have recourse to judicial scrutiny of the declaration by the Electoral Commission of the winner of a presidential election that this Court finds to be against the values underlying the Charter.

**104.** In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution, in so far as it ousts the jurisdiction of courts to consider challenges to a presidential election after the Electoral Commission has declared a winner, violates Article 7(1)(a) of the Charter.

## D. Alleged violation of Article 1 of the Charter

**105.** The Applicant alleges that the conduct of the Respondent State has violated Article 1 of the Charter while the Respondent State denies the alleged violation.

32 Cf. *Article 19 v Eritrea*, (2007) AHRLR 73 (ACHPR 2007) § 92.

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**106.** Article 1 of the Charter provides as follows:

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.

**107.** 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.[33] Consequently, 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 have been violated.

**108.** In the present case, the Court has found that the Respondent State has violated Articles 2 and 7(1) (a) of the Charter. Resultantly, the Court holds that the Respondent State has also violated Article 1 of the Charter.

## VIII. Reparations

**109.** In relation to reparations, the Applicant prays the Court to order:

b. That the respondent to put in place Constitutional and Legislative measures to guarantee the rights provided for under Art 1, 2, 3(2) and 7(1) of the African Charter on Human and People's Rights

c. Make an Order that the Respondent report to the Honourable Court, within a period twelve (12) months from the date of the judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders;

d. Any other remedy and/or relief that the Honourable Court will deem to grant;

…

**110.** The Respondent State's Response did not address the question of reparations but simply prayed that the Application be dismissed.

33 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477 § 149-150 and *Ally Rajabu & ors v United Republic of Tanzania,* AfCHPR, Application 007/2015, Judgment of 28 November 2019 (merits and reparations) § 124.

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**111.** Article 27(1) of the Protocol provides that "[i]f 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."

**112.** 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.

**113.** The Court, recalling its earlier judgments, reiterates the fact that:

> to examine and assess claims 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.[34]

**114.** The Court also recalls 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."[35]

**115.** Measures that a State can take to remedy a violation of human rights 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.[36]

**116.** It is against the above enumerated principles that the Court will consider the claim for reparations by the Applicant.

## A. Adoption of constitutional and legislative measures

**117.** The Court recalls that, in appropriate cases, it has ordered State Parties to amend their legislation in order to bring it in conformity with the Charter. For example, the Court has previously ordered the Respondent State "to take constitutional, legislative and all

34 *Mohamed Abubakari v United Republic of Tanzania,* AfCHPR, Application 007/2013, Judgment of 4 July 2019 (reparations) § 19 and *Majid Goa alia Vedastus & anor v Tanzania*, AfCHPR, Application 025/2015, Judgment of 26 September 2019 (merits and rteparations) § 81.

35 *Majid Goa v Tanzania* (merits and reparations) § 82 and *Wilfred Onyango Nganyi & 9 ors v Tanzania* (merits) *,* § 16.

36 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) § 20.

other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken."[37] In a different case, the Court ordered Burkina Faso to "amend its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66(2) of the Revised ECOWAS Treaty."[38] Further, in a case involving the Republic of Mali, the Court held that:

> … with respect to the measures requested by the Applicants in paragraph 16 (i), (ii), (iv), (v), (vi) and (vii), relating to the amendment of the national law, the Court holds that the Respondent State has to amend its legislation to bring it in line with the relevant provisions of the applicable international instruments.[39]

**118.** The Court having found that article 41(7) of the Respondent State's Constitution violates Articles 1, 2, and 7(1)(a) of the Charter orders the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of Articles 2, and 7(1) (a) of the Charter.

**119.** The Respondent State is also ordered to report to the Court, within twelve (12) months of this judgment, on the measures taken to implement the terms of this judgment.

## B. Other measures of reparations

**120.** The Court notes that the Applicant did not specifically request for other measures of reparation but prays the Court to order "any other remedy and/or relief that the Honourable Court will deem to grant."

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**121.** The Court recalls that Article 27(1) of the Protocol gives it power to "make appropriate orders to remedy" violations. In the circumstances, the Court reaffirms that it can, by way of reparations, order publication of its decisions *suo motu* where the

37 *Tanganyika Law Society & ors v Tanzania* (merits)§126.

38 *Lohe Issa Konate v Burkina Faso* (merits) §176.

39 *APDF and IHRDA v Mali* (merits and reparations) (2018) 2 AfCLR 380 §130.

circumstances of the case so require.[40]

**122.** In the present case, the Court notes that the violations that it has established affect a significant section of the population in the Respondent State by reason of the fact that they relate to the exercise of several rights in the Charter, key among which is the right to political participation guaranteed under Article 13 of the Charter.

**123.** In the circumstances, the Court deems it proper to make an order *suo motu* for publication of this Judgment. The Court, therefore, 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 to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

## IX. Costs

**124.** The Court observes that Rule 30 of the Rules provides that "[u] nless otherwise decided by the Court, each Party shall bear its own costs."

**125.** In their submissions, both Parties prayed the Court to order the other to pay costs.

**126.** In the instant case, the Court rules that each party shall bear its own costs.

## X. Operative part

**127.** For these reasons:

The Court,

*On jurisdiction*

*Unanimously*

*i.* Holds that it has jurisdiction.

*On admissibility*

By a majority of Seven (7) for and Three (3) against, Judges Tujilane CHIZUMILA, Blaise TCHIKAYA and Stella ANUKAM dissenting:

*ii.* Dismisses the objections to admissibility of the Application;

*iii.* Declares the Application admissible.

40 *Rajabu & ors v Tanzania* (merits and reparations) §§ 165-167.

*On merits*

By a majority of Six (6) for and Four (4) against, Judges Sylvain ORÉ, Suzanne MENGUE, Tujilane CHIZUMILA and Blaise TCHIKAYA dissenting:

*iv.* Holds that article 41(7) of the Respondent State's Constitution, in so far as it bars courts from inquiring into the election of a presidential candidate who has been declared elected by the Electoral Commission, violates Article 2 of the Charter,

By the President's casting vote under Rule 60(4) of the Rules, with Five (5) for – Judges Ben KIOKO, Rafaâ BEN ACHOUR, Angelo MATUSSE, Chafika BENSAOULA and M-Therese MUKAMULISA - and Five (5) against - Judges Sylvain ORE, Suzanne MENGUE , Tujilane CHIZUMILA, Blaise TCHIKAYA and Stella ANUKAM.

*v.* Holds that article 41(7) of the Respondent State's Constitution does not violate Article 3(2) of the Charter;

By a majority of Nine (9) for and One (1) against, Judge Blaise TCHIKAYA dissenting:

*vi.* Holds that article 41(7) of the Respondent State's Constitution, in so far as it bars courts from inquiring into the election of a presidential candidate who has been declared elected by the Electoral Commission, violates Article 7(1)(a) of the Charter;

By a majority of Nine (9) for and One (1) against, Judge Blaise TCHIKAYA dissenting:

*vii.* Holds that by retaining article 41(7) of its Constitution, the Respondent State has violated Article 1 of the Charter.

*On reparations*

*viii.* Orders the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, and in any case not exceeding two (2) years, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter to eliminate, among others, a violation of Articles 2, and 7(1)(a) of the Charter;

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

*On implementation of the Judgment and reporting*

*x.* Orders the Respondent State to report to the Court within twelve (12) months of notification of this judgment on the measures taken to implement the terms of the judgment and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On costs*

*xi.* Orders that each party shall bear its own costs.

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## Dissenting opinion: TCHIKAYA

**[1]** To say that I disagree with the majority of my honourable colleagues in favour of the Court's judgment in the *Jebra Kambole* case is an understatement, given the many differences of opinion. These differences of opinion have run through the whole case before the Court. They begin with the identification of the legal question raised, through the procedure followed, to the point where the Court believes that this is the solution.

**[2]** The special feature of a judicial decision on human rights is that it finds violations and, if appropriate, orders reparations. The *Jebra Kambole* decision singularly succeeds in the ruse of departing from this principle, not because of the nature of the case, but because the Court focuses on non-issues, on points of rights that are not rights, even though the only Article 7 paragraph 1 that could be discussed here was sufficient - even if, in this case, the account was not there either. The legal "mille-feuille" generated by the Court in this case gives the impression of a great opacity.

**[3]** To tell the truth, I was even able to consider, for solid reasons that must be reiterated, that the Court's jurisdiction was not established and was open to discussion. The heavy question of public law raised - the proclamation of the President of the Republic - required that the "Court strengthen its argument" (Words dear to Judge Suzanne Mengué). In view of the material basis of the dispute, the conviction that the Court was able to judge this question was not so prominent in the camp of those

who supported this judgment.

**[4]** I am of the opinion that it would be better to obtain, through internal discussion, a judicial decision that is rigorous in law rather than the time taken for a dissenting opinion. From this point of view, my regret is total. This is all the truer given that the African Court, by its decisions, after more than a decade (or nearly fifteen years), has earned admiration and respect. It has become an indispensable judicial relay for the functioning of democracies on the continent.

**[5]** Before getting to the substance of the *Kambole* case, it will be necessary to consider the reflections of Charles Evans Hughes, Judge at the Permanent Court of Arbitration (PCA) and Member of the Permanent Court of International Justice (PCIJ). His words sum up my current situation very well:

"A dissenting opinion expressed in a court of last resort is an appeal to the ever-present spirit of the law, to the intelligence of a future day when a later decision may rectify the error into which the judge giving that opinion believes the court has fallen".[1]

**[6]** The following discussion will be based on two pillars: on the one hand, on a few discordant points retained by the court (I.); on the other hand, on the fundamental inconsistencies with international human rights law that appear in the decision (II).

## I. The *Jebra Kambole* Decision: a few discordant points

**[7]** The threads of the "Gordian knot" in which the Court set itself begin with the way in which it identified the question brought by *Mr. Kambole*. The problem had to be put there, although it seemed in many ways specific. It was, in fact, by its nature, out of all proportion to the Court's usual applications.

### A. The special nature of the Jebra Kambole case

**[8]** The question put by the Applicant was of a special nature. Tanzanian lawyer, *Jebra Kambole*, is a member of the Tanganyika Law Society. By an application filed on 4 July 2018, he challenges the provisions of Article 41(7) of the Constitution of the Republic of Tanzania. This application was to be considered by the Court despite the fact that the Respondent State had filed a declaration of withdrawal on 21 November 2019 under Article 34(6) of the

1 v. in Philip C. Jessup, *The Development of International Law by the International Court*, 1958, note 10, p. 66; Mr. Charles Evans Hughes was elected a judge of the CPJI in 1928..

Protocol allowing individual and NGO applications. The Court also confirmed by Order that the withdrawal had no retroactive effect and had no impact on pending cases.[2]

**[9]** The Court is therefore, in this rare instance, seised of a question of public law, which appears to be of the first order: the result of the election of the President of the Republic. This Applicant's connection to the question raised may surprise as to his interest in acting, since he was not a priori a candidate for that result, but the Court will rightly,[3] hear the case.

**[10]** I do not agree with the analyses of my honourable colleagues on this case. I disassociate myself from the methodology of the examination used and the legal issues assumed to be relevant to this proceeding. Thus, in its entirety, the operative part of the Judgment obliges me to this dissenting opinion.

**[11]** In the third paragraph of its judgment, the Court recalls that Mr Kambole asks the Court to sanction the following:

"The fact that the Respondent State allowed the Constitution to contain such a provision prohibiting any person who felt aggrieved by the results of the presidential election from bringing proceedings before the Tanzanian courts constitutes a violation of Articles 1, 2, 3(2) and 7(1)(a) of the African Charter".[4]

The Tanzanian has thus allegedly failed to fulfil its obligations.

**[12]** The constitutional provision challenged by the Applicant is Article 41(7), according to which ...:

"Where a candidate is declared duly elected by the Electoral Commission in accordance with this Article, no court shall have jurisdiction to investigate his election".

**[13]** While the point of law is clear, the same cannot be said of the choices made by the majority of the Court. Leaving aside the question of harm to the individual, the Court was faced with a classic review of conventionality. The Court had to rule on the validity of a domestic text in the light of the principles of the international human rights order. Two elements would judicially

2 v. *Ingabire Victoire Umuhoza v* Rwanda, Judgment on Jurisdiction, 03 June 2016, v. *Ingabire Victoire Umuhoza v Rwanda*, Decision (Jurisdiction), 03 June 2016 1 RJCA 584 § 67; v also; in the Ghati Mwita case, the Court confirmed that the withdrawal of the said withdrawal will take effect twelve months after the date of deposit of the instrument of withdrawal, in this case 22 November 2020; AfCHPR, *Ghati Mwita v United Republic of Tanzania* (Provisional Measures Order), 9 April 2020, §§ 4 and 5..

3 In addition to Article 56 of the Charter and Article 30 of the Rules of Procedure, which lay down the conditions for bringing a case before the Court, it is understandable that, since suffrage is universal, the remedies attached to it are also universal.

4 AfCHPR, *Jebra v United Republic of Tanzania*, 11 July 2020, § 3.

follow:

- Was the Applicant's application admissible?
- Was the application valid in law?

The majority choices of the Court on these two points are surprising.

## B. The points identified by the Court

**[14]** From the foregoing, the Court concludes firstly that the Respondent State has acted in a discriminatory manner. Article 41(7) of the Tanzanian Constitution would introduce discrimination. I do not share this view. The Court cites its decision in *APDH v Côte d'Ivoire*, in which it recognized that discrimination is:
"A differentiation between persons or situations on the basis of one or more non-legitimate criteria".[5]

This definition from Professor Jean Salmon's dictionary[6] is defensible, but it is manifestly inappropriate in the present case because it does not say what the specificity of the situation is. This is not a case of a constitutional provision that is available to everyone, which would be denied to others on the basis of an unjustified criterion.

**[15]** Whatever definition of discrimination is used,[7] it will not be taken into account. It cannot be accepted that the constituent power of the Respondent State intended to support one group or individual over another by adopting the provisions of Article 41(7). What is understandable is that the elected President, by virtue of his position (which will have to be reconsidered) has benefited from adjustments that would be favourable to him by virtue of his new functions. This is far from any discriminatory situation.[8] The Court seems to suggest that any statutory claim is a challenge for

5 AfCHPR, *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire* (Merits), 18 November 2016, *RJCA*, p. 697, § 147.

6 *Dictionnaire des droits de l'homme*, edited by Andriantsimbazovina (J.), Hélène Gaudin (H.), Maguenaud (J.-P), Rials (S.) and Sudre (F.), PUF, 2008, p. 284

7 The African Charter is careful not to use the term "discrimination". The term has been reinvested by African case-law, but its contribution in the present case is questionable in that it assimilates discrimination to the principle of equality and does not bring out its nuances. v AfCHPR, *Tanganyika Law Society & ors v United Republic of Tanzania (Merits) (2013)*, *1 RJCA* p. 697, § 147. 34, §106; and the Court stated in *African Commission on Human and Peoples' Rights v Kenya*, Order (Interim Measures), 15 March 2013 that "the right not to be discriminated against is linked to the right to equality before the law and equal protection of the law, rights enshrined in Article 3 of the Charter". Section 3 simply states that "All persons are equal before the law. All persons are entitled to equal protection of the law"

8 Weil (P.), *Liberté, égalité, discriminations*, Ed. Grasset and Fasquelle, 2008, pp. 9-10.

non-discrimination.

**[16]** The Court's basic argument is that section 41(7) does not have the same effect on all citizens. Thus, the Court points out that:

"While those who support the winning candidates may have no incentive to apply to the courts for redress as part of the electoral process, other sub-groups of voters may be willing to seek judicial intervention to enforce their rights".[9]

**[17]** It should be noted, on the one hand, that these voters expressed themselves in this way and, on the other hand, that they expressed themselves democratically on the basis of a democratic process. Article 41(7) applies to all voters without distinction. All are bound by it. One wonders why the reasoning of the august Court in this case begins its consideration of the merits of the case with the inappropriate idea of discrimination, albeit indirect.

**[18]** The majority in this decision is tempted by the equal protection of the law enshrined in s. 3(2) of the Charter:

"All persons are entitled to equal protection of the law.

The approach is similar to that followed in importing the previous concept. It is all in all, the Court seems to say in passing, on the same basis, to the consideration of equality before the law. It notes:

"The principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law.[10] (...) Nevertheless, equal protection of the law also presupposes that the law protects every individual, without discrimination".

**[19]** The Court sees in this case a link between equality before the law and the principle of access to the courts. While this link clearly exists, it is not automatic in this case. Without referring to the specific characteristics of these principles, it should be recalled that access to the courts - to be considered solely in terms of this principle - involves prior procedural rules and may be subject to adjustments, depending on the matters and persons concerned. In judicial law, not everything is melted into a mould. The questions lead to specific or specific procedures. Prisoners' rights before the judge may differ from those of a citizen enjoying full civil and political rights. Rather, it was a question of trying to understand the meaning and useful effect of Article 41(7) of the Constitution of the Respondent State. The question posed by the court was

9 AfCHPR, *Jebra Kambole v United Republic of Tanzania*, op. cit. § 74..

10 *AfCHPR, Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabé Movement of Human and Peoples' Rights v Burkina Faso,* (Preliminary Objections), 21 June 2013, 1 RJCA, p. 204; Judgment (Merits), 28 March 2014, 1 ***RJCA*** 226, Judgment (Reparations), 5 June 2015, 1 RJCA, p. 265

why the person elected in a presidential election was removed from judicial scrutiny.

**[20]** The same applies where the Court considers that there is an alleged violation of the Applicant's right to have his case heard. It concludes that the Respondent State violated his right under Article 7(1)(a) of the Charter.[11] There is a question of identification of the actual issue before the Court. The majority of my dear colleagues argue that:

"This means that, whatever the nature of the grievances, whether well-founded or not, as far as they relate to the declaration of the winner in the presidential election by the Electoral Commission, no judicial remedy is available to any person who feels aggrieved in the respondent State".[12]

[21] The majority of my honourable colleagues thought that there was a dispute over the electoral procedure. The question of law put to the Court relates to the preposition directly contained in Article 41(7): "in so far as it relates to the declaration of the winner in the presidential election". This preposition in the sentence of the Article in question is as essential as it is blindingly obvious. The whole of the *Jebra Kambole* judgment does not see it. Yet this preposition, the main one here, obliged the Court to examine the special status of the newly elected President of the Republic. This special status is enshrined in all the advanced legal systems of the world.

[22] After this reading of a few selected points, it is appropriate to consider the main points of disagreement on which the Court has mistakenly based its decision.

## II. The *Jebra Kambole* Decision: fundamental points of disagreement

**[23]** Undoubtedly, the *Kambole* case should have had a different judicial outcome. The decision handed down raises questions, including on the basis of admissibility.

11 Section 7(1)(a) of the Charter: "(1) Everyone has the right to have his or her case heard. This right includes: (a) the right to bring before the competent national tribunals any action violating the fundamental rights granted and guaranteed to him by the conventions, laws, regulations and customs in force"

12 AfCHPR, *Jebra Kambole v United Republic of Tanzania*, op. cit, § 97

## A. The fundamental flaw in the decision: A flagrant inadmissibility of the application

**[24]** The Court should have dealt with the admissibility of the application in a precise manner, an aspect on which, as a matter of settled law, it has previously ruled.[13] Clearly, *Mr Kambole's* Application was not presented to the Court within a reasonable time. Moreover, the Court acknowledges that:

"The possibility of bringing an action against the Respondent State in relation to the violation alleged by the Applicant was only offered from March 2010. However, the present Application was filed in July 2018, eight (8) years and four (4) months after the filing of the declaration"[14]

**[25]** This period of more than 8 years is prohibitive. The Court innovates and overturns all its previous jurisprudence without giving a solid justification. It justifies itself as follows:

"Consequently, even if, in the present case, the Applicant brought the matter before the Court eight (8) years and four (4) months after the Respondent State filed its declaration, in view of the lack of any remedy available to the Applicant and the continuing nature of the alleged violation, the Court concludes that it is not necessary to set a time-limit as provided for in the first aspect of Article 40(6) of the Rules of Court".[15]

This argument of my Honourable Colleagues in the majority comes up against two stumbling blocks: (i) it confuses the nature of the violation with its continuing nature and (ii) the procedure applicable to the Court must take account of a reasonable, i.e. not excessive, time-limit for bringing the matter before the Court. Even before ruling on the question, the Court must be sure of its procedural time limits.[16]

**[26]** This time-limit must be contained. It corresponds to a period of time which allows the victim, under conditions of law and fact to be determined by the Court, to submit his or her complaint.

13 Article 6.2 of the Protocol states that: "The Court shall rule on the admissibility of applications having regard to the provisions of Article 56 of the Charter"; in particular Article 39, which presents it as "the Court shall decide on the admissibility of applications having regard to the provisions of Article 56 of the Charter"

14 AfCHPR*, Jebra Kambole v United Republic of Tanzania, § 47*

15 AfCHPR, *Jebra Kambole v United Republic of Tanzania*, §§ 48-53.

16 The universality of this approach may be recalled. see in particular ICJ, East Timor, *Portugal v Australia*, 30 June 1995; the Hague Court holds that the ***erga omnes*** opposability of a norm and the rule of consent to jurisdiction are two different things. The lawfulness of the conduct of a State cannot be determined when the decision to be taken involves an assessment of the lawfulness of the conduct of another State which is not a party to the proceedings. This latter rule is the basis of international procedure. In such cases the Court cannot rule, even if the right in question is enforceable ***erga omnes***.

The most important thing is not that the Court should assume that the time limit is fixed under section 56 of the Charter, but that it should consider how reasonable the time limit for referral appears to be. This reasonable time is required for any application after the exhaustion of domestic remedies, regardless of the alleged violation. The Court has in fact established that the reasonableness of the time limit for its referral depends on the particular circumstances and must be assessed on a case-by-case basis.[17] *Mr. Kambole* will have waited more than eight (8) years to submit the application to the Court. This excessively long time is unfortunate and should motivate the rejection of the application, given that the Applicant is a lawyer and also a member of the Tanganyika Law Society which is an NGO with observer status at the African Commission on Human and Peoples' Rights.

**[27]** This last point is central. The combination of two major qualities means that the Petitioner is very familiar with the laws of his country. Could he be unaware of the existence of such an important text of the Constitution? This renders unjustifiable the delay of more than 8 years for a violation that is said to be continuous, and therefore visible, for a lawyer of his quality. In addition, the *Tanganyika Law Society*, a learned society to which *Mr. Kambole* says he belongs, has often appealed to the Court. It has some practice in this regard.[18] The delay of more than 8 years especially taken in this case should be sanctioned by the Court. It is sufficient in itself to establish the procedural vacuity of the application. Neither the Petitioner nor the Tanganyika Law Society are profane or "indigent" in constitutional matters.

**[28]** The decision to the contrary on this point is novel. It is in a way the end of the earlier case law,[19] developed by the Court itself, in which it held that the Applicant's indigence could justify a delay. The lay nature of the law was also one of the grounds.

**[29]** Paradoxically, the excessively long time-limit in the present case does not lead to rejection even though the Applicant is a lawyer.

17 *Anudo Ochieng Anudo v United Republic of Tanzania (Merits) (2018)* 2 RJCA 257, § 57

18 See in particular AfCHPR, *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, Decision (joinder), 22 September 2011, 1 JCJA, p. 33; Judgment (merits), 14 June 2013 (2013), 1 JCJA, p. 34; Judgment (reparations), 13 June 2014, 1 JCJA, p. 74

19 v. AfCHPR, *Alex Thomas v United Republic of Tanzania*, 20 November 2015, § 66 et seq., the Court noted that "the applicant maintains that his application was lodged within a reasonable time after domestic remedies had been exhausted, having regard to the circumstances and his particular situation as a lay person, indigent and in detention"

In so doing, the Court reverses a case-law position which it has held without interruption since at least 2015, in which it has shown and held that the Applicant's indigence and profane nature removed the requirement of a reasonable time limit. This position of the Court appears, inter alia, in AfCHPR, *Onyachi and Njoka v Tanzania*, 28 September 2017, 2 RJCA p. 65; *Jonas v Tanzania*, 2 RJCA, 28 September 2017, p. 101.

**[30]** A position that the Court has upheld throughout 2018, including AfCHPR, *Isiaga v Tanzania*, 21 March 2018, 2 RJCA, p. 218; *Gombert v Côte d'Ivoire*, 2 RJCA, 2018, 2 RJCA, p. 270; *Nguza v Tanzania*, 23 March 2018, 2 RJCA p. 287; *Mango v Tanzania*, 11 May 2018, 2 RJCA, p. 314. The Court clearly reiterated this in *Evarist v Tanzania*. Tanzania, 21 September 2018, 2 JCAR, p. 402; *Guehi v Tanzania*, 7 December 2018, 2 JCAR, p. 477 ...and many others.[20]

**[31]** Surprising position taken in Kambole, as it runs counter to the regime applicable to continuing violations. It is recognized that even in the face of continuing violations the Court retains control over its rules of procedure. Its role is not open to the ad vitam æternam plaintiffs. A continuing violation cannot postpone the time limit for appeal indefinitely. The judges require the applicants to show diligence and initiative in the face of continuing breaches by the State. The abundant case-law on this point, in particular ECHR, *Sargsyan v Azerbaijan*,[21] is very clear in § 129 on a disappearance case:

"When examining the Turkish Government's plea of non-observance of the six-month time-limit, the Court recalled that the human rights protection mechanism established by the Convention had to be concrete and effective, that this principle applied not only to the interpretation of the normative clauses of the Convention but also to its procedural provisions, and that it had implications for the obligations incumbent on the parties, both the governments and the Applicants. For example, where speed is of the essence in resolving a matter, it is incumbent on the Applicant to ensure that his or her complaints are brought before the Court with the necessary promptness to enable them to be decided properly and fairly".

**[32]** This obligation on Applicants to be diligent in the presentation of appeals is important for legal certainty. The European Court makes it quite clear that this "is an obligation incumbent on the

20 V notamment AfCHPR, ***Ramadhani v Tanzania***, (2018) 2 RJCA, p. 344 ; ***William v Tanzania***, (2018) 2 RJCA, p. 426 ; ***Paulo v Tanzania*** (2018) 2 RJCA, p. 446 ; ***Werema v Tanzania***, (2018), 2 RJCA, p. 520

21 ECHR, ***Sargsyan v Azerbaïdjan***, 14 December 2011

parties, both the governments and the Applicants". It expresses it as follows in § 31 of the *Kolosov & ors v Serbia* judgment:

"Nevertheless, the Court recalls that the continuing situation may not postpone the application of the six-month rule indefinitely. The Court has, for example, imposed a duty of diligence and initiative on Applicants wishing to complain about the continuing failure of the State to comply with its obligations in the context of ongoing disappearances or the right to property or home (…) While there are, admittedly, obvious distinctions as regards different continuing violations, the Court considers that the Applicants must, in any event, introduce their complaints "without undue delay", once it is apparent that there is no realistic prospect of a favourable outcome or progress for their complaints domestically".[22]

This should be the exact way to address the effect of the continuing nature of the infringement of the procedure before the Court.

**[33]** As such, the *Kambole* decision would not have passed the admissibility stage. It should have been declared inadmissible. Moreover, the decision contains only a weak statement of reasons in terms of the national margin of appreciation, which is a major right under the Tanzanian system of law applicable to the President-elect.

## B. A summary approach to the NPM (the national margin of appreciation)

**[34]** The Court has developed a legal tradition that has not yet been contradicted in its judicial work. Traditionally, when a principle is relevant to a case, it considers it, then rejects or validates it. This is even attached to the function of judging. The most fundamental remains the way in which the Court gives reasons, if any, for its rejection.[23] This was not the case with the so-called "national margin of appreciation" (NMA) standard in the *Jebra Kambole*

22 ECHR, *Sokolov & ors v Serbia*, 14 January 2014.

23 In particular, one can consider the *Court's reasoning in Mohamed Abubakari* of 2016. The Applicant is rebuked by the State for failing to cite the exact provision to justify the Court's jurisdiction. The Court will take up the issue to show the basis for that jurisdiction. In § 32 of this case the Court states: "jurisdiction is a question of law which it must itself determine, whether or not that question has been raised by the parties to the proceedings. It follows that the fact that a party has relied on provisions which are allegedly inapplicable is of no consequence, since in any event the Court is aware of the law and is able to base its jurisdiction on the appropriate provisions. ... the Court rejects the objection to its jurisdiction raised here by the Respondent State. The Court considers that it has jurisdiction ratione materiae to consider the present case, inasmuch as the alleged violations all concern ***prima facie*** the right to a fair trial,6 as guaranteed in particular by Article 7 of the Charter". The demonstrative and inductive approach used by the Court in these elements shows the Court's effort of persuasion. v AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016.

case. It would be superfluous to demonstrate its relevance in the present case, since the matter falls within the primary civil service and the sphere of State sovereignty.

**[35]** It has been established that the State has a national margin of appreciation (NOM)[24] on its territory, a concept recognized since 1976 in international human rights law. So many States have the disputed provisions in their domestic law. These provisions can only be legally understood through the NPM. States may, in certain cases, restrict rights and freedoms for reasons of public order, public health, national security... This is a moderating concept, which would be well reconciled with the African community interest in that it allows, as in other continents, the pluralism of constitutional systems.

**[36]** The proclamation of the President and his or her internal status, which are of the very nature of domestic public law, should be considered more rigorously. The elements of the Judgment do not only partially convey this conviction in the sense. They do not draw sufficient conclusions from it. The Court decides as follows: "The Court notes that the margin of appreciation left to the State is a recurring feature of international jurisprudence .... The margin of appreciation refers to the limit at which international supervision must give way to the State party's discretion to enact and enforce its laws".[25]

**[37]** The Court goes on, endorsing the position of the African Commission on Human and Peoples' Rights, recalling that: "Similarly, the doctrine of appreciation guides the African Charter, in that it considers the Respondent State to be better disposed to adopt policies, (...) given that the State is well aware of its societý, its needs, its resources, (...) and the fair balance needed between the competing and sometimes conflicting forces that make up its society".[26]

**[38]** The Court does not give the fundamental reason why it rejects the NPM in this case. However, the applicable case-law has laid down criteria for assessing its relevance in the event of invocation

24 The European Court puts it in the following terms in its ***Handyside*** judgment §§ 49 and 50: "the Court has jurisdiction to give a final judgment on whether a 'restriction' or 'sanction' is compatible with freedom of expression as protected by Article 10 (art. 10). The national margin of appreciation thus goes hand in hand with European supervision. The latter concerns both the purpose of the disputed measure and its "necessity". It relates both to the basic law and to the decision applying it, even when it emanates from an independent court. In this connection, the Court refers to Article 50 (art. 50) of the Convention ("decision taken or (...) measure ordered by a judicial or other authority") as well as to its own case-law (Engel & ors judgment of 8 June 1976). ECHR, ***Handyside v the United Kingdom***, 7 December 2016

25 AfCHPR, ***Jebra Kambole v Tanzania***, §§ 79

26 AfCHPR, ***Jebra Kambole v Tanzania***, §80 citing the Commission, ***Prince v South Africa*** (2004), AHRLR 105 (ACHPR 2004), § 51

by a State.[27] Rather, it will conclude on this point with a surprising argument:

"This distinction is such that individuals within the Respondent State do not have the possibility of bringing proceedings simply because of the subject-matter of their complaints, while other individuals with complaints unrelated to the presidential election are not excluded".[28]

**[39]** Even considering the established human rights provisions, it is not trivial to deprive a State of its sovereignty of domestic legal order, which international human rights law otherwise recognizes. The NAM has this vocation, in that it preserves, under the control of the human rights judge, a diversity of internal laws, on issues such as the status of the elected President. As Professor Pellet[29] said, in any event:

"The breakthrough of human rights in international law does not call into question the principle of sovereigntý, which seems to remain (if correctly defined) a powerful organizing factor of the international societý and an explanation, always enlightening, of international legal phenomena".

**[40]** There remains, therefore, the feeling of a genuine "misunderstanding". In its most accurate sense: a misunderstanding that consists in taking one thing for another.

## B. The feeling of a genuine "misunderstanding" in the decision

**[41]** Mr Kambole challenges the provisions of Article 41(7) which remove any challenge after the proclamation of the elected candidate. In the grounds of its decision, the Court rejects the "complaints relating to the presidential election". Disputes relating to the electoral procedure or operations are not the same as those

27 v. elements of discommendation and assessment of this theory formulated by the European Court, ECHR, *Observer and Guardian v the United Kingdom*, 26 November 1991: "The Contracting States enjoy a certain margin of appreciation in assessing the existence of such a need, but this is coupled with European supervision of both the law and the decisions applying it, even when they emanate from an independent court. The Court therefore has jurisdiction to give the final ruling on whether a "restriction" is compatible with the freedom of expression protected by Article 10 (art. 10). (d) It is not the task of the Court, when exercising its review, to substitute itself for the competent domestic courts, but to review under Article 10 (art. 10) the decisions which they have given in exercise of their discretion. It does not follow that it should confine itself to ascertaining whether the respondent State has used this power in good faith, carefully and reasonably"

28 AfCHPR, *Jebra Kambole v Tanzania*, § 82

29 Alain Pellet, Droits-de-l'hommisme et droit international", Droits fondamentaux, N. 01, 2001, p. 4820; La mise en oeuvre des normes relatives aux droits de l'homme, CEDIN (H. Thierry and E. Decaux, eds.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme*, Montchrestien, Paris, 1990, p. 126.

relating to the status of the winning candidate.

**[42]** No country in the world opens the challenge of the President-elect to all after the election procedure has been completed.[30] Article 41(7) of the Respondent State formulates it in its own way, no more than that. This is not the issue on which the Court decides in the decision. It talks about the right of Tanzanian citizens to challenge the election of the President. It does not address the question of the legal status that Tanzanian domestic law attributes to the elected President. Do the provisions of Article 41(7) consider the result to be final or not? This main question, the only one contained in Mr Kambole's appeal, is not discussed. There seems to be a real "misunderstanding".

**[43]** The Court believed, on examining the terms of Article 41(7), that the Tanzanian constituent refused to accept the election in the proceedings. There is undoubtedly a "quidproquo" because, in my view, the terms of that Article refer to the elected candidate. Once it is enshrined and final, it becomes free from challenge. That is common public law. There is a misunderstanding of the subject matter of the dispute.

**[44]** Article 46, paragraph 2, of the Guinean Constitution of 7 May 2010, as revised on 7 April 2020, does not say any more: "If no dispute relating to the regularity of the electoral process has been filed by one of the candidates with the registry of the Constitutional Court within eight days of the day on which the first overall total of the results was made public, the Constitutional Court shall proclaim the President of the Republic elected". Any procedural operation shall take place prior to the proclamation. In the same vein, the Kenyan Constitution of 2010.

**[45]** The Constitution of neighbouring Kenya of 5 August 2010 also does not provide for a procedure to challenge the proclaimed elected candidate. Article 138 of the Constitution states in paragraph 10 that

"Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall- (a) declare the result of the election; and (b) deliver a written notification of the result to the Chief Justice and the incumbent President".

**[46]** The issue that the Court addresses is that of the regularity of the electoral operations. This is a different matter altogether. It figures prominently in many constitutions. The choice consists, as

30 France, tempted by an opening, restricts the submission of appeals to two days following the ballot. However, the final result will not be contested

in the Beninese[31] and Congolese,[32] Senegalese[33] constitutions, in particular, in making a provisional proclamation. This does not concern the regime that rightly applies to the elected candidate. The final result is not open to question. For obvious reasons, the electoral quarrels took place earlier. That is what is ultimately formulated, in other words, the provisions of Article 41.7.

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**[47]** There will undoubtedly be a after *Jebra Kambole*...The Court's decisions on admissibility, including on the reasonable time limit, will undoubtedly be read and scrutinized. However, the Court's path in this decision was not so simple: to uphold a restrictive reading of the "normative margins" of States or to say the domestic law of the State, which in any case legitimately restricted a right... but which one? The pan-African jurisdiction will undoubtedly have new opportunities to clarify the content of the national margin of appreciation, subsidiarity, proportionality, etc., in the application of Article 7 of the Protocol (applicable law).

**[48]** In Professor Flauss' classification of human rights trends,[34] one of them is not lacking in interest. That of the advocates of "moderate evolutionism". According to this trend, the protection of human rights would benefit from relying more on the established rules of international law and taking them into consideration more frequently, while advocating, in certain cases, the particularization of the rules of international law. The Court does not appear to be

31 Article 49, paragraph 3, of the Beninese Constitution of 11 December 1990, as revised on 7 November 2019, is *mutatis mutandi*s a prototype of this provision: "... If no dispute as to the regularity of the electoral process has been lodged with the Registry of the Court by one of the candidates within five days of the provisional proclamation, the Court shall declare the ... President of the Republic ... definitively elected ...".

32 v. Article 72 of the Congolese Constitution, 15 October 2015

33 v. Article 35, paragraph 2, of the Constitution of Senegal of 22 January 2001, as revised on 5 April 2016

34 Flauss (J.F.), La protection des droits de l'homme et les sources du droit international, S.F.D.I., Strasbourg Colloquium, La protection des droits de l'homme et l'évolution du droit international, Pedone, Paris, 1998, pp. 13-14.

following such an approach in the present decision.[35]

**[49]** Far from being complacent, it is with deep regret that I note that I have not been able to convince the majority of my Dear Colleagues of a better approach. I therefore accept this dissenting opinion, which I would have wanted to avoid.

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## Joint separate opinion: KIOKO AND MATUSSE

**[1]** We agree with the majority in terms of the finding of a violation of Articles 1, 2 and 7(1)(a) of the Charter. We also voted in favour of the Court finding a violation of Article 3(2) of the Charter. On the latter point, the majority found that the Respondent State did not violate Article 3(2) of the Charter and it is on this account that we proffer this separate opinion.

**[2]** The Court, correctly in our view, held that article 41(7) of the Constitution of the United Republic of Tanzania violates Article 2 of the African Charter on Human and Peoples Rights (the Charter). Article 2 of the Charter, it must be recalled, guarantees the right to non-discrimination in relation to the enjoyment of all rights and freedoms enshrined in the Charter. We agree that the practical effect of article 41(7) of the Constitution of Tanzania is to impose a distinction among litigants such that litigants seeking to challenge the results of a presidential election are treated differently from other litigants. We, however, differ with the majority and hold the view that the same conduct, which was correctly found to have infringed Article 2 of the Charter, also automatically, on the facts of the present case, infringed Article 3(2) of the Charter.

**[3]** In our view, the Charter's provisions on non-discrimination and equality broadly follow the scheme contained in the International Covenant on Civil and Political Rights (ICCPR). Just as is the

35 The African human rights system does not include a safeguard clause. This constitutes for its Arusha Court a source of obligation of vigilance on the restrictions of the rights which accrue to States. v Les développements de Ouguergouz (F.), *La charte africaine des droits de l'homme*, Ed. PUF, 1993, p. 255; v Virally (M. ), Des moyens utilisés dans la pratique pour limiter l' effet obligatoire des traites, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme,* IV ème colloque du départernent des droits de l'homme, Université Catholique de Louvain, Bruxelles, Bruylant, 1982, pp. 14-15.

case with the ICCPR, the Charter has a provision proscribing discrimination of any kind in relation to the enjoyment of all rights in the Charter (article 2) and a separate provision that, in a general way that is not limited to Charter rights, seeks to secure equality before the law and equal protection of the law. The corresponding ICCPR provisions are articles 2 and 26.

**[4]** The result of the scheme created by Articles 2 and 3 of the Charter is that while Article 2 limits the application of the principle of non-discrimination to rights contained in the Charter, Article 3 does not have a similar restriction. Ultimately, therefore, Article 3 stipulates that all persons are equal before the law and entitled to equal protection of the law without any discrimination. In doing this, Article 3 does not simply replicate the provisions of Article 2 but creates an autonomous right proscribing discrimination in law and in fact in any field regulated and protected by public authorities.[1] Specifically in terms of national laws and Article 3(2) of the Charter, the obligation of State Parties is to ensure that the content of any legislation adopted is not discriminatory in substance or effect.

**[5]** The presentation of the Articles 2 and 3 in the Charter and articles 2 and 26 of the ICCPR, demonstrates clearly the affinity between non-discrimination, on the one hand, and equality, on the other hand, as principles of human rights law. As a matter of fact, it is correct to view the principle of non-discrimination as possessing two dimensions: non-discrimination and equality.[2] It is, therefore, not uncommon to see the two terms used interchangeably since they are, in any event, two sides of the same coin. "Equality" represents the positive statement of the principle while "non-discrimination" stands for the negative statement of the principle. Thus, in practice, one can say he/she has been treated equally if he/she has not been discriminated against and conversely one can say he/she has been discriminated against if he/she has not been treated equally.

**[6]** The right to equality before the law requires that "all persons shall be equal before the courts and tribunals".[3] In *Institute for*

1 "CCPR General Comment No. 18: Non-discrimination" <https://www.refworld.org/docid/453883fa8.html>

2 Mpoki Mwakagali "International Human Rights Law and Discrimination Protections: A Comparison of Regional and National Responses" <https://brill.com/view/journals/rpcd/1/2/article-p1_1.xml?language=en>

3 *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 AfCLR 218 § 85 and *George Maili Kemboge v United Republic of Tanzania* (merits) (2018) 2 AfCLR 369 § 49.

*Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 ors v Angola*,[4] the African Commission on Human and Peoples' Rights (the Commission) referred to the United States Supreme Court decision in *Brown v Board of Education of Topeka*[5] wherein the right to equal protection of the law was defined as the right of all persons to have the same access to the law courts and to be treated equally by the law courts, both in the procedure and in the substance of the law. Further, in *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* the Commission stated that:

> … the right to equal protection of the law envisaged under Article 3 of the African Charter consists of the right of all persons to have the same access to the law and Courts, and to be treated equally by the law and Courts, both in procedures and in the substance of the law. While it is akin to the right to due process of law, it applies particularly to equal treatment as an element of fundamental fairness. It is a guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property.[6]

**[7]** Article 41(7) of the Respondent State's Constitution, in our view, has the effect of removing from judicial scrutiny any determination by the Electoral Commission pronouncing a candidate as a winner of a presidential election. Notably, however, a challenge against the declaration of a winner of a presidential election may implicate the rights of the Respondent State's citizens, for example, under Article 13 of the Charter. The net result of article 41(7) of the Respondent State's Constitution, however, is that irrespective of the grievances that one may have with the declaration of the winner of a presidential election, no court can inquire into any such grievance. Citizens in the Respondent State, therefore, do not have the same opportunity in terms of accessing the Courts for relief on their grievances.

**[8]** We also feel obliged to highlight that although the Respondent State pleaded the doctrine of margin of appreciation, this doctrine does not amount to a blanket licence for States to choose haphazardly the measures for implementation of Charter rights. Even within the context of the doctrine of the margin of appreciation, and as States craft measures for the Charter's

4 *IHRDA (on behalf of Esmaila Connateh and 13 ors v Angola* (2008) AHRLR (ACHPR 2008) 43 § 46.

5 *Brown v Board of Education of Topeka* 347 US 483 (1954).

6 *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* (2011) AHRLR 3 (ACHPR 2011) § 59.

implementation, it remains important that States preserve the spirit of the Charter and the values underlying it.

**[9]** In relation to the present case, we find that the Respondent State has failed to provide details, which would justify barring any court of law from inquiring into the election of a president subsequent to the Electoral Commission announcing the results of an election.

**[10]** Further, in the absence of arguments by the Respondent State as to the reasonableness or necessity of the provisions of article 41(7) of its Constitution, we believe the Court should have found that the Applicant's right to equal protection of the law guaranteed under Article 3(2) of the Charter has been violated.

**[11]** We particularly find it difficult to understand how the same conduct which the majority correctly determined to be against the principle of non-discrimination could somehow pass the test for equal treatment. In our view, the same reasoning used to support a finding of a violation of Article 2 could have been used to support a violation of Article 3(2) of the Charter.

# Malengo v Tanzania (review judgment) (2020) 4 AfCLR 506

Application 001/2019, *Ramadhani Issa Malengo v United Republic of Tanzania*

Judgment (application for review) 15 July 2020. 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

In an earlier ruling on this matter, the Court held that the Applicant had not exhausted local remedies and accordingly declared the action inadmissible. Citing new evidence, this application sought a review of the earlier ruling. The Court dismissed the application.

**Jurisdiction** (review jurisdiction, 15, 16)

**Admissibility** (new evidence, 24, 27,29)

## I. The Parties

**1.** Mr. 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.

**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 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. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The withdrawal will take effect on 22 November 2020 and thus has no bearing on this instant Application.[1]

## II. Subject of the Application

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, AfCHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 35-39.

**3.** On 4 December 2019, the Applicant filed an Application for Review of the Court's Ruling of 4 July 2019 in the matter of *Ramadhani Issa Malengo v United Republic of Tanzania* (hereinafter referred to as "Ruling").

**4.** In this regard, the Applicant submits that the Court erred in its ruling that he had not exhausted local remedies and avers that he did so through Civil Case No.163 of 2000 decided by the High Court and Civil Cases No. 108/2009 and 76/2011 decided by the Court of Appeal of Tanzania on the one hand. And that, by failing to take cognisance of the aforementioned cases in its determination of the Application 030/2015 (hereinafter referred to as "initial Application") on the other hand; the Court made an error that justifies this Application for Review.

## III. Brief background of the matter

**5.** In his Initial Application 030/2015, filed on 23 November 2015, the Applicant alleged that he was denied justice in the municipal courts of the Respondent State.

**6.** According to the Applicant, his contractual dispute with a cooperative society was unfairly handled by the municipal courts. He especially submitted that he was awarded trivial damages and that his claim of defamation and his application for taxation of the bill of costs were wrongfully dismissed. The Applicant further alleged that he was unlawfully confined in the Regional Crimes Officer's (hereinafter referred to as "RCO") office in Tabora for a period of eight (8) hours.

**7.** On 4 July 2019, the Court rendered the Ruling as follows:

*i.* *Dismisses* the objection to its material jurisdiction;

*ii.* *Declares* that it has jurisdiction.

*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.

**8.** The Court therefore, dismissed the Applicant's initial Application. The Ruling is the subject of this Review.

## IV. Summary of the Procedure before the Court

**9.** The Application for Review was filed on 4 December 2019 and transmitted to the Respondent State on 18 December 2019.

**10.** The parties filed their pleadings within the time stipulated by the Court.

**11.** Pleadings were closed on 2 July 2020 and the Parties were duly notified.

## V. Prayers of the Parties

**12.** The Applicant prays the Court to:

i. Review its judgment of 4 July 2019;

ii. Order the Respondent State to pay him Two Billion, Five Hundred Million (2,500,000,000)Tanzanian shillings as general damages and Four Billion, Two Hundred and Seventy Two Million, Four Hundred and Sixty Eight Thousand and Six Hundred (4,272,468,600) Tanzanian shillings as reparations for breach of his rights; and

iii. Order any other relief as it deems fit and just.

**13.** The Respondent State prays the Court to declare this Application for Review inadmissible and dismiss it in its entirety.

## VI. Jurisdiction

**14.** 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.

**15.** Rule 26(1) of the Rules provides: "Pursuant to the Protocol, the Court shall have jurisdiction: … (e) to review its own judgment in light of new evidence in conformity with Rule 67 of these Rules."

**16.** In the instant case, the Court notes that the Application fulfils the requirements of Rule 26(1) of the Rules, as it is based on the review of the Court's own judgment in light of alleged new evidence and thus finds that it has jurisdiction.

## VII. Admissibility

**17.** In the Application for Review, the Applicant reiterates some of the claims of violation of his rights by the Respondent State that were stated in his initial Application to the Court.

**18.** The Respondent State submits that the Application lacks merit and thus should be declared inadmissible. It contends that the Applicant has failed to demonstrate discovery of new evidence

and has merely reiterated his allegations in his Application on the merits in respect of his grievances on the conduct of his cases by the municipal courts.

**19.** According to the Respondent State, the Court analysed some of the issues he raises specifically on wrongful confinement and the damage to his reputation. It contends that the Court found that the Applicant had not exhausted local remedies nonetheless. Furthermore, that although some of the arguments have been raised for the first time, "they do not qualify as new evidence." Relying on the Application for Review of *Thobias Mang'ara Mango and Shukrani Masegenya Mango v the United Republic of Tanzania*, the Respondent State submits that "further evidence in support of previous allegations does not qualify as new evidence that would not have been in the Applicant's knowledge during the time of filing."

**20.** The Respondent State further avers that the Court considered the two cases where the Applicant indicates that he exhausted local remedies and found that they were contractual disputes and not human rights related. Moreover, it contends that the issues raised by the Applicant herein have already been settled by a decision of this competent Court and thus reconsidering them would be violating the principle of *res judicata*.

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**21.** Article 28(3) of the Protocol empowers the Court to review its decisions under conditions to be set out in its Rules and the process of review must be without prejudice to Article 28(2) of the Protocol.[2]

**22.** 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.

2 "The judgment of the Court decided by majority shall be final and not subject to appeal"; *Urban Mkwandawire v Malawi* (review and interpretation) (2014) 1 AfCLR 299 § 14.

**23.** In addition, Rule 67(2) of the Rules 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.[3]

**24.** 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 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.

**25.** The Court will examine the requirements of Article 28(3) of the Protocol and Rule 67(1) of the Rules in tandem, beginning with the issue of the time limit.

**26.** As regards the filing of the Application within six (6) months of the discovery of new evidence; the Court notes, that the Applicant did not submit on when he discovered the alleged new evidence. Nevertheless, the Application having been filed on 4 December 2019, that is, five (5) months after the delivery of the Ruling of 4 July 2019; it is deemed to have been filed within the six (6) months' time limit and in accordance with Rule 67(1) of the Rules.

**27.** As regards the condition of the discovery of new evidence, the Court will limit its consideration to the supporting documents that accompanied the Application and which were not in the foreknowledge of the Applicant at the time of the delivery of the Ruling.

**28.** The Court observes that the supporting documents filed in this Application, include; judgments of the national courts in relation to the Applicant's civil cases, a copy of summons to appear before the Court of Appeal and his advocate's letter of withdrawal.

**29.** In relation to the supporting documents, the Court recalls that that although, produced for the first time before it, the evidence that is required under Article 28(3) of the Protocol is evidence that exerts influence on its initial decision.[4]

3 *Thobias Mang'ara and Shukrani Mango v Tanzania*, AfCHPR, Application 002/2018, Judgment of 4 July 2019 (review) § 13; *Chrysanthe Rutabingwa v Republic of Rwanda*, AfCHPR, Application 001/2018, Judgment of 4 July 2019 (review) § 14.

4 *Frank David Omary & ors v Tanzania* (review) (2016), 1 AfCLR 383 § 49.

**30.** The Court further recalls its jurisprudence:
…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.[5]

**31.** The Court recalls its jurisprudence, where it held:
The application for judicial review must be based on important facts or situations that were unknown at the time the judgment was delivered. The judgment may therefore be impugned for exceptional reasons, such as those involving documents the existence of which was unknown at the time the judgment was delivered; documentary or testimonial evidence or confessions in a judgment that has acquired the effect of a final judgment and is later found to be false; when there has been prevarication, bribery, violence, or fraud, and facts subsequently proven to be false, such as a person having been declared missing and found to be alive.[6]

**32.** The Court notes that the Applicant merely restates some allegations which the Court had already examined in its Ruling. Also, he advances detailed submissions which stem from the same factual basis and which only seek to substantiate the previous allegations in the initial Application.

**33.** The Court recalls that in its Ruling of 4 July 2019, it declared the Application inadmissible for failure to exhaust local remedies. It further recalls that it considered Civil Case No.163 of 2000 determined by the High Court and Civil Cases No. 108/2009 and 76/2011 determined by the Court of Appeal and found that the cases concerned contractual disputes.[7]

**34.** With respect to the inadequate representation and the financial difficulties of the Applicant allegedly caused by the breach of contract; the Court observes that they were not brought to the attention of the Court at the time of delivery of the Ruling. Moreover, they do not constitute new evidence that would not have been in the fore knowledge of the Applicant at the time of delivery of the Ruling and as such, the Applicant should have argued the same before the Court's delivery of its Ruling. Even so, the said information has no bearing on the Court's Ruling that the Applicant failed to exhaust local remedies.

**35.** In light of the foregoing, the Court finds that the supporting documents adduced do not constitute new evidence which was

5 *Thobias Manga'ra and Shukrani Mango v Tanzania op.cit*. § 25.

6 *Alfred Agbesi Woyome v Republic of Ghana*, AfCHPR, Application for Review No. 001/2020, Judgment of 26 June 2020 (review) § 38.

7 *Ramadhani Issa Malengo v Tanzania op.cit* §§ 40-41.

not within the knowledge of the Applicant at the time the Ruling was delivered, as contemplated by Article 28(3) of the Protocol and Rule 67(1) of the Rules.

**36.** Therefore, the Court, declares the Application for Review inadmissible and dismisses it.

## VIII. Costs

**37.** The parties did not made any submissions on costs.

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

**39.** The Court, therefore, rules that each party shall bear its own costs.

## IX. Operative part

**40.** For these reasons,

The Court,

*Unanimously*

i. *Declares* that it has jurisdiction;

ii. *Declares* that the Application was filed within the prescribed time-limit of six (6) months;

iii. *Declares* that the supporting documents submitted by the Applicant do not constitute new evidence;

iv. *Declares* that the Application for Review of the Ruling of 4 July 2019 is inadmissible and is dismissed;

v. *Decides* that each party shall bear its own costs.

# Mango & anor v Tanzania (reopening of pleadings) (2020) 4 AfCLR 513

Application 005/2015, *Thobias Mang'ara Mango & Another v United Republic of Tanzania*

Order (reopening of pleadings), 4 September 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

Following delivery of judgment on the merits in this matter, parties were invited to submit pleadings on reparations with supporting evidence. The Applicants' application to submit additional evidence after the close of extended time was initially rejected by the Court. On a further application for the reopening of pleadings the Court granted the order.

**Procedure** (exceptional circumstances to warrant reopening of pleadings, 16)

## I. The Parties

**1.** Messrs Thobias Mang'ara Mango and Shukurani Masegenya Mango (hereinafter referred to as "the Applicants") alleged that their rights to a fair trial had been violated by the United Republic of Tanzania (hereinafter referred to as "the Respondent State").

**2.** The judgment of the Court on merits was delivered on 11 May 2018 and a certified true copy thereof was transmitted by Registry to the Parties on the same day. In the said judgment, this Court found that the Respondent State had violated Article 7(1)(c) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and consequently Article 1 of the Charter.

## II. Subject matter of the Request

**3.** Pursuant to the aforementioned judgment on merits, on 30 July 2018, the Applicants filed submissions on reparations. The pleadings on reparations were exchanged and on 20 May 2020, the Parties were notified that pleadings were closed.

**4.** On 6 June 2020, pursuant to Rule 50 of the Rules, the Applicants requested leave to file additional evidence in support of their

claims on reparations.

## III. Summary of the Procedure before the Court

**5.** The Parties filed their submissions on reparations within the extended time stipulated by the Court after several extensions.

**6.** On 16 April 2020, the Parties were requested to file evidence and observations, as necessary, in support of their claims for reparations.

**7.** On 7 May 2020, the Applicants were informed that the Respondent State had, on 21 November 2019 deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration deposited in accordance with Article 34(6) of the Protocol and that since the effective date of the withdrawal is 22 November 2020, this has no effect on the consideration of their Application.

**8.** Pleadings were closed on 20 May 2020 and the Parties were duly notified.

**9.** On 3 June 2020 the Applicants applied for leave to file additional evidence and on 5 June 2020, the Applicants' request was transmitted to the Respondent State for observations, if any.

**10.** On 30 June 2020, the Applicants were informed that the Court has denied their request for leave to file additional evidence on the ground that the additional evidence comprised affidavits sworn in July 2019 by the Applicants and the alleged indirect victims and there was no discernible impediment for the Applicants' Counsel to file them as they had ample opportunity to do so before the close of pleadings.

**11.** During deliberation on the matter in the course of the 58th Ordinary Session, the Court decided, in the interests of justice, to review its previous decision on denial of leave to the Applicants to file additional evidence.

## IV. On the request for leave to file additional evidence

**12.** The Applicant's request for leave to file additional evidence is on the basis that:

i. The Counsel encountered significant difficulties in acquiring supporting documentation in support of the Applicants' reparation submissions, due to the fact that the Applicants have been incarcerated for almost 16 years, and most of their documentation was misplaced over the years.

ii. The Applicants were transferred to Segerea and Isanga Prisons without their Counsel's knowledge, and by the time their Counsel

obtained this information, prison visits in the country had been suspended as a result of the prevailing COVID-19 pandemic.

iii. The said pandemic made it impossible for their Counsel to conduct further trips in an attempt to locate other relatives the Applicants might have apart from the few they had communicated with.

**13.** The Respondent State did not file observations in response to the Applicants' request.

**14.** The Court observes that Rule 50(2) of the Rules provides: "No party shall file additional evidence after closure of pleadings except by leave of Court".

**15.** The Court notes that this Rule envisages that additional evidence can be admitted only with leave of court and in exceptional circumstances.

**16.** The Court notes that although the COVID-19 pandemic occurred after the Applicants and the alleged indirect victims of the Respondent State's actions swore the affidavits in support of their reparation claims in July 2019, the lack of information to Counsel as to the Applicants' whereabouts could have contributed to the delay in the submission of these documents to the Court. The Court therefore notes that this qualifies as an exceptional circumstances warranting the reopening of pleadings and the admission of the additional evidence field by the Applicants.

**17.** The Court considers that in view of the afore-mentioned exceptional circumstances it is appropriate to grant the Applicants' request for leave to file additional evidence.

## V. Operative part

**18.** For these reasons:

The Court,

*Unanimously,*

i. Orders that, in the interests of justice, pleadings in *Application 005/2015 Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (Reparations) be and are hereby re-opened.

ii. The Applicants' additional evidence be deemed as duly filed and be served on the Respondent State.

# Soro v Côte d'Ivoire (provisional measures) (2020) 4 AfCLR 516

Application 012/2020, *Guillaume Kigbafori Soro v Republic of Côte d'Ivoire*

Order (provisional measures), 15 September 2020. 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: ORÉ

In an earlier action, the Applicant, along with 19 others, had seized the Court alleging a violation of their Charter protected rights. The Court had, in that earlier application, *inter alia*, ordered a stay of an arrest warrant issued against the present Applicant. Arising from a failure of the Respondent State to comply with the measures previously ordered, the Applicant was tried and convicted by the domestic courts. The Applicant therefore faced a risk of exclusion from the voters register and disqualification from contesting as a candidate in the general elections. He brought this request for provisional measures, seeking the removal of all obstacles to his participation as a candidate in the forthcoming elections or a suspension of the elections. The Court ordered the provisional measures requested.

**Jurisdiction** (*prima facie*, 17; withdrawal of Art 34(6) declaration, 19)

**Provisional measures** (risk of non-participation in elections, 30; non implementation of earlier order, 32)

## I. The Parties

**1.** Mr Guillaume Kigbafori Soro (hereafter "the Applicant") is an Ivorian national and politician who has served as Prime Minister and Head of Government as well as Speaker of the National Assembly and leader of a political party.

**2.** The Application was brought against the Republic of Côte d'Ivoire (hereinafter "Respondent State") which became 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. Also, on 23 July 2013, the Respondent State made the Declaration provided for in Article 34(6) of the Protocol accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations. However, on 29 April 2020, the Respondent State filed with the African Union Commission the instrument of withdrawal of its Declaration.

## II. Subject of the Application

**3.** In the main Application filed on 2 March 2020, the Applicant and nineteen (19) others seized the Court alleging the violation of their rights protected by Articles 7, 12 and 18 of the Charter and 13 and 24 of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR"). In the said main Application, the Applicant submits with respect to his particular situation that he was the subject of an arrest warrant issued by the Ivorian judicial authorities as part of criminal proceedings initiated on 20 December 2019, for misappropriation of public funds, concealment of public property and conspiracy against the authority of the State and the integrity of the national territory.

**4.** On 22 April 2020, following a request from the Applicants, the Court ordered the Respondent State to implement the following provisional measures with regard to the Applicant:

i. Stay execution of the arrest warrant issued against Guillaume Kigbafori Soro;

ii. Report to the Court within thirty (30) days from the date of receipt, on the implementation of the interim measures ordered in this decision.

**5.** The present request for provisional measures filed on 7 August 2020 is ancillary to the afore mentioned main Application. In support of this new request, the Applicant submits that, in defiance of the Ruling on provisional measures rendered by the Court on 22 April 2020 and which has not yet been executed, the Respondent State had him tried and convicted on 28 April 2020, by the First Criminal Chamber of the Abidjan Court of First Instance, without previously serving him the act of referral to the court and the charges levelled against him.

**6.** According to the Applicant, at the end of the said procedure, he was found guilty of money laundering, concealment and misappropriation of public funds and sentenced to twenty (20) years of imprisonment. He was also sentenced to a fine of four billion five hundred million (4,500,000,000) CFA francs and five (5) years of deprivation of civil and political rights, which according to the Applicant amounts to a ban from being registered as a voter and stand as a candidate in the October 2020 presidential election. A new arrest warrant was thus issued against him.

**7.** The Applicant submits that the criminal conviction entered in his criminal record and the source of which is the failure to comply with the Ruling of 22 April 2020 issued by this Court, resulted in the following:

i. His removal from the electoral register, thus stripping him of the capacity of voter which should also allow him to be eligible;

ii. Entering of his conviction in the criminal record, thus rendering him ineligible to stand as a candidate; and

iii. The difficulty to receive the endorsement of voters and obtain the nomination needed for submission of his candidacy, the deadline of which is set for 1 September 2020.

**8.** The Applicant alleges that these acts of the Respondent State put him at real and serious risk of his candidacy being rejected for non-compliance with the legal and regulatory conditions, reason why the Court should order the required provisional measures.

**9.** Accordingly, the Applicant prays the Court to order the following provisional measures:

i. remove all legal acts and obstacles preventing the Applicant full enjoyment of the right to vote and the right to be elected, in particular, the rights compromised by the non-execution of the Ruling issued by this Court on 22 April 2020, until this Court rules on the merits of the dispute before it in the instant case;

ii. in the alternative, suspend the organization of the 31 October 2020 presidential election, pending a decision on the merits of the main dispute brought before the Court in the instant case; and

iii. report to the Court, within 15 days of service, on the execution of the measures ordered.

## III. Alleged violations

**10.** In the main Application, the Applicant alleges a violation of his rights under Articles 7, 12 and 18 of the Charter, as well as 14 and 23 of the ICCPR. However, in the present request for provisional measures, the Applicant alleges that the failure to comply with the Court's Order of 22 April 2020 compromised the enjoyment of his right to vote and to be elected as guaranteed under Article 25 of the ICCPR.

## IV. Summary of the Procedure before the Court

**11.** On 7 August 2020, the Applicant filed with the Registry of the Court a request for provisional measures.

**12.** On 18 August 2020, the Registry served the said request on the Respondent State for response within ten (10) days of service.

**13.** At the expiry of the said time limit, the Respondent State had not submitted any observations on the request for provisional measures.

## V. Jurisdiction of the Court

**14.** The Applicant alleges that the Court has jurisdiction to order the measures requested insofar as the Respondent State is party to the Charter and to the other human rights instruments invoked in the main Application as well as to the Protocol. Referring to the Respondent State's withdrawal of its declaration of recognition of jurisdiction, the Applicant maintains that the Court nonetheless has jurisdiction since, according to its case law, the one-year notice applies to withdrawal.

**15.** The Respondent State did not comment on this point.

***

**16.** 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.

**17.** Rule 39(1) of the Rules stipulates that "the Court shall conduct preliminary examination of its jurisdiction…". However, with regard to provisional measures, the Court does not have to ensure that it has jurisdiction over the merits of the case, but simply that it has *prima facie* jurisdiction.[1]

**18.** In the instant case, the Applicant's rights allegedly violated are protected by the Charter and the ICCPR, to which the Respondent State is a party.[2]

**19.** The Court notes, as indicated in paragraph 2 of this Order, that the Respondent State, on 29 April 2020, withdrew its Declaration deposited on 23 July 2013 in accordance with Article 34(6) of the Protocol. However, the Court recalls, with reference to its Judgement of 15 July 2020 on the merits in the case of *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire*, that the withdrawal of the Declaration has no retroactive effect, has no bearing on the

1 *Komi Koutche v Republic of Benin*, AfCHPR, Request No. 020/2019, Ruling of 2 December 2019 (provisional measures), § 14; *Amini Juma v United Republic of Tanzania* (provisional measures) (2016) 1 RJCA 687, § 8; *African Commission on Human and People' Rights v Libya* (provisional measures) (2013) 1 RJCA 149, § 10.

2 The Respondent State became party to the ICCPR on 26 March 1992.

cases pending before it and takes effect on 30 April 2021.[3]

**20.** Accordingly, the Court concludes that the said withdrawal in no way affects its personal jurisdiction in the instant case.[4]

**21.** From the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the present Application.

## VI. Provisional measures requested

**22.** The Applicant maintains that his conviction is clear proof of the existence of a real risk of proven infringement of the rights for which he seeks protection in the main Application. He alleges that the non-compliance with the 22 April 2020 Ruling on provisional measures issued by this Court gives rise to prejudice against him insofar as, without a clean criminal record and without being entered on the electoral register, it is impossible for him to submit his candidacy in the forthcoming presidential election in Côte d'Ivoire.

**23.** He further alleges that since almost all the members of his political party's leadership are in detention, despite the 22 April 2020 Ruling, it is difficult for him to obtain the nomination letter to complete his candidacy file. The Applicant also argues that the impossibility of being physically present on the national territory prevents him from obtaining the endorsements needed for his candidacy and from fulfilling other related formalities.

**24.** The Applicant concludes that there is therefore unquestionable real risk for him not being able to stand for the 31 October 2020 presidential election, so much so that the irreparable nature of the damage which will result therefrom is indisputable.

**25.** The Applicant therefore prays the Court to consider that in order to prevent the occurrence of irreparable damage in the instant case, all legal acts and obstacles preventing him from enjoying his right to vote and to be elected should be lifted or, failing that, order the Respondent State to suspend the organization of the 31 October 2020 presidential election, pending a ruling on the merits.

3 *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire*, AfCHPR, Application 044/2019, Judgement of 15 July 2020 (merits), § 66.

4 *Ibid*, § 67.

**26.** The Respondent State did not make any submission on the measures sought.

***

**27.** 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".

**28.** Rule 51(1) of the Rules of Court also 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.

**29.** The Court recalls that, in deciding whether it should exercise the jurisdiction conferred on it by these provisions, it takes into account the criteria applicable to provisional measures that are only ordered where there are conditions of extreme gravity, urgency and prevention of irreparable damage. In this regard, the Court considers that extreme gravity presupposes that there is a real and imminent risk that irreparable damage will be caused before it renders its final decision. As such, there is urgency whenever acts likely to cause irreparable harm may occur at any time before the Court makes a final decision in the case at hand.[5]

**30.** In the instant case, with reference to the first Ruling on provisional measures rendered on 22 April 2020, the Court observes that the foreseen harm was established insofar as the execution of the arrest warrant issued against Applicant Guillaume Kigbafori Soro risked seriously compromising the enjoyment of his political freedoms and rights whereas Mr Soro had already anticipated the electoral competition.[6] The Court further recalls that the circumstances of the case reveal a situation of urgency given that the elections are imminent, in particular the October 2020 presidential election.[7]

5 *XYX v Republic of Benin*, AfCHPR, Application 057/2019, Ruling of 2 December 2019 (provisional measures), § 24; *Komi Koutche v Benin* (provisional measures) § 31.

6 *Guillaume Kigbafori Soro v Republic of Côte d'Ivoire*, AfCHPR, Application 012/2020, Ruling of 22 April 2020 (provisional measures), § 35.

7 *Idem*.

**31.** The Court notes that the Respondent State has not given effect to the 22 April 2020 Ruling on Provisional Measures and that it has not reported to it on the measures taken in this regard. The Court further notes that, as inferred from the Applicant's submissions in support of the present request for provisional measures, his trial and conviction as well as all the subsequent acts taken by the competent authorities of the Respondent State, particularly the election authorities, subsequent to the Ruling of 22 April 2020, were in violation of the said Ruling.

**32.** The Court further observes, and in the light of the foregoing, that the situation subject of the present Order for provisional measures is new and different from the one covered by the Order dated 22 April 2020. As such, the second situation is the consequence of the first one. It follows that the acts which are the subject of the present Order for provisional measures are likely to cause irreparable damage and reveal an urgent situation relating to the acts covered by the Ruling of 22 April 2020 and by the very fact of the non-compliance with the said Ruling.

**33.** In view of the foregoing and considering the circumstances of the case, the Court deems it necessary to order that all acts adopted subsequent to the Ruling of 22 April 2020 be stayed and all the obstacles preventing Applicant Guillaume Kigbafori Soro from enjoying his rights to vote and to be elected be removed.

**34.** Accordingly, the Court considers that the circumstances of the case require the adoption of provisional measures pursuant to Article 27(2) of the Protocol and Rule 51 of the Rules to preserve the *status quo ante* pending its decision on the merits of the case.

**35.** For the avoidance of doubt, this Order is provisional and does not in any way prejudge the conclusions that the Court might draw regarding its jurisdiction, the admissibility and the merits of the Application instituting proceedings.

## VII. Operative part

**36.** For these reasons,

The Court

*Unanimously*

*Orders the Respondent State to:*

i. *stay* all acts taken against Applicant Guillaume Kigbafori Soro subsequent to the Ruling of 22 April 2020, until the Court's decision on the merits of the case;

ii. *take* all necessary measures to immediately remove all obstacles preventing the Applicant Guillaume Kigbafori Soro from enjoying his rights to vote and be elected, in particular during the October

2020 presidential election; and

iii. *report* to the Court within fifteen (15) days from the date of receipt of this decision, on the implementation of the provisional measures ordered.

# Akouedenoudje v Benin (provisional measures) (2020) 4 AfCLR 524

Application 024/2020, *Conaide Togia Latondji Akouedenoudje v Republic of Benin*

Ruling (provisional measures), 25 September 2020. Done in English and French, the French text being authoritative.

The Applicant brought this action to challenge an inter-ministerial order prohibiting the issuance of acts of authority to people wanted by judicial authorities. In initiating the action, the Applicant requested for provisional measures to stay execution of the contested inter-ministerial order pending a decision on the merits. The Court dismissed the application for provisional measures.

**Jurisdiction** (*prima facie*, 11; effect of withdrawal of Art 34(6) Declaration, 13)

**Provisional measures** (extreme gravity, 20, 21; Irreparable damage, 22)

## I. The Parties

**1.** Mr Conaïde Togia Latondji Akouedenoudje, (hereinafter referred to as "the Applicant") is a citizen of Benin. He challenges an inter-ministerial order prohibiting the issuance of acts of authority to people wanted by the judicial authorities of Benin.

**2.** The Application is filed against the Republic of Benin (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 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. In addition, on 8 February 2016, it made the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and non-governmental organizations having observer status with the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission"). However, on 25 March 2020, the Respondent State deposited with the African Union Commission an instrument withdrawing its Declaration.

## II. Subject of the Application

**3.** An application instituting proceedings was filed on 4 August 2020, together with a request for provisional measures. The Applicant states in the Application that on 22 July 2019, the Ministry of Justice and the Ministry of the Interior of Benin issued inter-ministerial Order No. 023/MJL/DC/SGM/DACPG/SA 023SGGG19 (hereinafter referred to as "Inter-Ministerial Order") stating in Article 3 a ban on issuance of acts of authority to persons wanted by the judicial authorities of Benin. Such acts are listed in a non-exhaustive manner in Article 4 of the said Order.

**4.** He considers that the Inter-Ministerial Order is inconsistent with principles relating to the protection of fundamental human rights, notably the presumption of innocence and the right to nationality.

**5.** Accordingly, the Applicant prays the Court to order a provisional measure for a stay of execution of the abovementioned Inter-Ministerial Order, pending delivery of the judgment on the merits.

## III. Alleged violations

**6.** In the principal Application, the Applicant alleges the violation of the following rights:

i. Right to be presumed innocent, enshrined in Article 7(1)(b) of the Charter; and

ii. Right to nationality, protected by Article 15 of the Universal Declaration of Human Rights (UDHR).

## IV. Summary of Procedure before the Court

**7.** On 4 August 2020, the Applicant filed the Application on the merits together with a request for provisional measures. The Application and the request for provisional measures were served on the Respondent State on 17 August 2020. The Respondent State was allowed 60 days from the date of receipt of the notice to submit its response on the merits, and 15 days to submit its response on provisional measures.

**8.** The Registry received the observations of the Respondent State on the provisional measures on 9 September 2020.

## V. *Prima facie* jurisdiction

**9.** The Respondent State and the Applicant have not submitted on this point.

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**10.** Article 3(1) of the Protocol provides that "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

**11.** Rule 39(1) of the Rules stipulates that "the court shall conduct preliminary examination of its jurisdiction…" However, with regard to provisional measures, the Court does not have to ensure that it has jurisdiction over the merits of the case, but simply has *prima facie* jurisdiction.[1]

**12.** In the instant case, the Applicant's allegedly violated rights that are all protected by Articles 7(1)(b) of the Charter and 17 of the UDHR, which were ratified by the Respondent State and which the Court is empowered to interpret and apply under Articles 3(1) and 7 of the Protocol.

**13.** The Court notes, as recalled in paragraph 2 above, that on 25 March 2020, the Respondent State filed an instrument of withdrawal of its Declaration deposited under Article 34(6) of the Protocol. The Court recalls, however, in reference to its ruling on provisional measures of 5 May 2020 and the corrigendum thereto of 29 July 2020, that withdrawal of the Declaration does not have any retroactive effect and has no bearing on cases pending before it, as it only takes effect on 26 March 2021.[2] Consequently, the Court finds that the said withdrawal will, in no way, affect the personal jurisdiction of the Court in the instant case.

**14.** The Court therefore concludes that it has *prima facie* jurisdiction to hear the request for provisional measure.

## VI. Provisional measures requested

**15.** The Applicant requests a stay of execution of the Inter-Ministerial Order of 22 July 2019, on the grounds that the persons cited are suffering or could suffer prejudice.

1 *Komi Koutche v Republic of Benin*, ACtHPR, Application 020/2019, Ruling of 2 December 2019 (provisional measures).

2 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No.003/2020, Ruling of provisional measures of 5 May 2020 and corrigendum of 29 July 2020.

**16.** In response, the Respondent State argues that the requested measure does not meet the conditions laid down in Article 27 of the Protocol, namely urgency and the existence of irreparable damage.

**17.** The Respondent State further asserts that the Applicant does not show evidence of any urgency, or any damage concerning him directly, insofar as he admits that he is not personally concerned by the implementation of the Inter-Ministerial Order, since he was not refused issuance of any of the acts by the authority. It asserts that the Applicant alleges a purely hypothetical grievance.

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**18.** The Court notes that Article 27(2) of the Protocol provides that: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

**19.** The Court observes that it has the discretion to decide in each individual case whether, in the light of the particular circumstances of the case, it should exercise the jurisdiction conferred on it by the above provisions.

**20.** The Court reiterates that urgency, consubstantial with extreme gravity, implies a "real and imminent risk being caused before it renders its final decision".[3]

**21.** The Court emphasizes that the risk in question must be real, which excludes purely hypothetical risks, and explains the need to remedy it forthwith.[4]

**22.** With regard to the irreparable damage, the Court considers that there must exist a "reasonable probability of materialization" having regard to the context and the personal situation of the Applicant.[5]

**23.** The Court finds, in the present case, that the Applicant does not provide any evidence that he or any other specifically designated person is in a situation of urgency to which the provisions of the

3 *Ajavon Sébastien v Republic of Benin*, ACtHPR, Application N°062/2019, Ruling on provisional measures of 17 April 2020.

4 *Ibid.*

5 *Ibid.*

Inter-Ministerial Order must be applied.

**24.** The Court further observes that the Applicant does not provide evidence as to the reality and the imminence of the irreparable damage he will suffer as a result of implementation of the Inter-Ministerial Order.

**25.** Accordingly, the Court does not see the need to order the measures requested and therefore dismisses the request.

**26.** For the avoidance of doubt, this Ruling is provisional in nature and in no way prejudges the decision the Court might take regarding its jurisdiction, the admissibility and the merits of the Application.

## VII. Operative part

**27.** For these reasons

The Court,

*Unanimously,*

i. *Dismisses* the Applicant's request for provisional measures.

# Gbagbo v Côte d'Ivoire (provisional measures) (2020) 4 AfCLR 529

Application 025/2020, *Laurent Gbagbo v Republic of Côte d' Ivoire*

Order (provisional measures), 25 September 2020. Done in English and French, the French text being authoritative.

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

Recused under Article 22: ORÉ

The Applicant, a former President of the Respondent State, brought this action alleging that the removal of his name from the voter's register on the basis of a conviction following a trial in absentia was a violation of his Charter rights. This application for provisional measures was filed along with the main action. The Court granted the provisional measures sought.

**Jurisdiction** (*prima facie* 14, effect of withdrawal of Article 34(6) Declaration, 16)

**Provisional measures** (extreme gravity, 22; duty to report back 34)

## I. The Parties

**1.** Mr. Laurent Gbagbo (hereinafter referred to as "the Applicant") is an Ivorian national, university professor, and former President of the Republic of Côte d'Ivoire. He challenges various measures relating to his civil and political rights.

**2.** The Application is filed against the Republic of Côte d'Ivoire (hereinafter referred to as "the Respondent State"). The Respondent State 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. On 23 July 2013, the Respondent State deposited the Declaration 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 (hereinafter referred to as "the Declaration). However, on 29 April 2020, the Respondent State deposited with the African Union Commission an instrument of withdrawal of the Declaration.

## II. Subject of the Application

**3.** The Application for provisional measures dated 4 September 2020

was filed with the Registry of the Court on 7 September 2020, together with the Application instituting proceedings. It emerges from the said Application instituting proceedings that, following his removal from the voters' register noted on 4 August 2020, the Applicant, who was already enrolled in the voters' register reviewed in 2018, referred the matter to the Independent Electoral Commission (IEC) on 5 August 2020, to request for enrolment in the voters' register. On 18 August 2020, the IEC dismissed his request on grounds of inadmissibility.

**4.** The Applicant states that he then appealed against the said decision before the Abidjan Court of First Instance which, by Order No. RG 3505/2020 of 25 August 2020, ruled that the said appeal was unfounded. That Court had taken such decision on the grounds that by default Judgment No. 52002019 of 29 October 2019, the Applicant had been sentenced by the Abidjan Criminal Court to twenty (20) years of imprisonment and payment of a fine of ten million (10,000,000) CFA francs for aiding and abetting armed robbery and embezzlement of public funds. Thus, the Court held that he was incapacitated and unworthy within the meaning of Article 4 of Ordinance No. 2020-356 of 8 April 2020 to amend the Electoral Code and therefore considered that he had lost his status as a voter and could not enroll in the 2020 voters' register established by the IEC.

**5.** The Applicant further states that during a televised statement on 16 August 2020, the President of the Independent Electoral Commission (IEC) affirmed that the Applicant had been convicted *in absentia* of a criminal offence in a judgment rendered by the Abidjan Court of First Instance for aiding and abetting theft. The President of the IEC also affirmed that following an application to set aside, given that the judgment by default had given rise to a judgment of iterative default, became irreversible, following the refusal of Counsel for the Applicant to receive service thereof at the elected domicile, on his behalf, in their capacity as lawyers, so much so that the period for appeal having largely expired, the temporary removal of the Applicant's name from the voters' register became legally established.

**6.** The Applicant alleges that these acts pose a threat to the enjoyment of his rights which should be prevented by an order for provisional measures pending examination of his Application on the merits. He therefore prays the Court to order the following provisional measures on the Respondent State:

i. stay execution of Order No. RG 3505/2020 of 25 August 2020 issued by the presidential jurisdiction of the Abidjan-Plateau Court of First Instance confirming removal of Mr Laurent Gbagbo from the voters'

register, the delisting decision taken by the Independent Electoral Commission and the decision of the same Commission dismissing his application for enrolment dated 18 August 2020;

ii. clear the Applicant's criminal record, or as appropriate, stay inclusion of the non-irrevocable criminal conviction obtained under the terms of the iterative default criminal Judgment No. 5200/2019 of 29 October 2019;

iii. pending a decision on the merits, report to the Court on the measures taken to enforce the order, within fifteen (15) days from the date of receipt of the order.

## III. Alleged violations

**7.** In the Application to institute proceedings, the Applicant alleges violation of his rights guaranteed in Articles 3, 7, 13(1)(2) of the Charter, Articles 14(1)(2), 25(a)(b)(c) of the International Covenant on Civil and Political Rights (ICCPR),[1] Articles 2(3), 3(7) of the African Charter on Democracy, Elections and Governance (ACDEG),[2] Article 1 of the ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (ECOWAS Protocol on Democracy),[3] Articles 11 and 21 of the Universal Declaration of Human Rights, item i of resolution A/RES/55/96 of the United Nations General Assembly on Promotion and Consolidation of Democracy, and Part IV 2 and 3 entitled "Elections: rights and obligations" of the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa (2002).

## IV. Summary of the Procedure before the Court

**8.** On 7 September 2020, the Court received two Applications filed by the Applicant: the main Application alleging violation of the Applicant's fundamental rights within the context of the general election litigation in Côte d'Ivoire, and attached to which was a request for provisional measures.

**9.** On 9 September 2020, the Court transmitted to the Respondent State the Application instituting proceedings as well as the request for provisional measures, and invited it to file its response to the

1 The Respondent State became a party on 26 March 1992.

2 The Respondent State became a party on 28 November 2013.

3 The Respondent State became a party on 31 July 2013.

latter request for provisional measures within seventy-two (72) hours.

**10.** At the expiry of the said period, the Respondent State had not responded to the Applicant's request for provisional measures.

## V. *Prima facie* jurisdiction

**11.** The Applicant alleges that the Court has jurisdiction to order the measures sought insofar as the Respondent State is a party to the Charter, the Protocol, as well as to the other human rights instruments referred to in the main Application. Referring to the Respondent State's withdrawal of its Declaration, the Applicant maintains that the Court nonetheless has jurisdiction since, under the Court's case law, the withdrawal will only take effect one year from the date of deposit of the withdrawal, that is, in the present case, from 28 April 2021.

**12.** The Respondent State did not make any submission on this point.

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**13.** Article 3(1) of the Protocol provides that:

> The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

**14.** Rule 39(1) of the Rules stipulates that: "[T]he Court shall conduct preliminary examination of its jurisdiction ...". However, with regard to provisional measures, the Court does not have to ensure that it has jurisdiction over the merits of the case, but simply that it has *prima facie* jurisdiction.[4]

**15.** In the instant case, the Applicant's rights allegedly violated are protected by the Charter, the ACDEG, the ICCPR, and the ECOWAS Protocol on Democracy, to which the Respondent State is a party.

4 *Komi Koutche v Republic of Benin*, ACtHPR, Application 020/2019, Order of 2 December 2019 (provisional measures), § 14; *Amini Juma v United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR 658, § 8; *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (25 March 2011) 1 AfCLR 149, § 10.

**16.** The Court notes, as indicated in paragraph 2 of this Ruling, that on 29 April 2020, the Respondent State deposited an instrument withdrawing its Declaration filed on 23 July 2013, in accordance with Article 34(6) of the Protocol. The Court has held that the withdrawal of a Declaration has no retroactive effect and has no impact on cases under consideration before the Court prior to deposit of the instrument of withdrawal of the Declaration,[5] as is the case in the present matter. The Court has reiterated this position in its Judgement in *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire*, and held that the withdrawal of the Declaration will take effect on 30 April 2021.[6] Accordingly, the Court concludes that said withdrawal does not in any way affect its personal jurisdiction in the present case.[7]

**17.** From the foregoing, the Court holds that it has *prima facie* jurisdiction to hear the present Application.

## VI. Provisional measures requested

**18.** The Applicant prays the Court to take the following provisional measures:

i. stay execution of Order No. RG 3505/2020 of 25 August 2020 issued by the presidential jurisdiction of the Abidjan-Plateau Court of First Instance confirming the removal of Mr. Laurent Gbagbo from the voters' register, the delisting decision taken by the Independent Electoral Commission and the decision of the same Commission rejecting his application for enrolment on 18 August 2020.

ii. clear the Applicant's criminal record, or as appropriate, stay inclusion of the non-irrevocable criminal conviction obtained under the terms of the iterative default criminal Judgment No. 5200/2019 of 29 October 2019.

iii. pending a decision on the merits, report to the Court on the measures taken to enforce the order, within fifteen (15) days from the date of receipt.

**19.** The Respondent State did not respond to the request for provisional measures.

5 *Ingabire Victoire Umuhoza v Rwanda* (juridiction) (3 June 2016) 1 AfCLR 562, § 67.

6 *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire*, ACtHPR, Application 044/2019, Judgment of 15 July 2020 (merits), § 66.

7 *Ibid*, § 67.

***

**20.** Article 27(2) of the Protocol provides as follows: "[I]n 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".

**21.** Rule 51(1) of the Rules provides, moreover, that:

> … The Court may, at the request of a party, the Commission or of 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.** In deciding whether it should exercise the jurisdiction, the Court takes into account the extreme gravity and urgency of the situation and the need to prevent irreparable harm to any of the parties. The Court has held in this regard that extreme gravity presupposes that there is a real and imminent risk that irreparable damage will be caused before it renders its final decision. As such, there is urgency whenever acts likely to cause irreparable harm may occur at any time before the Court makes a final decision in the case at hand.[8]

## A. Request for stay of execution of the Order confirming the removal of the Applicant from the voters' register

**23.** The Applicant argues that it is highly probable that the general elections will indeed be held on 31 October 2020, whereas the Applicant is denied the enjoyment of his civil and political rights.

**24.** He avers that this request is based on the extreme gravity of the situation which is likely to cause him irreparable or even unforeseeable harm, in compliance with the case law of the Court, especially in previous ones.[9]

**25.** The Applicant further states that in any case, suspension of the administrative and judicial decisions to remove him from the voters' register will, in no way, prejudge the merits of this Application, since what is at issue in the present case is protection of his rights and freedoms which are at risk, while reserving judgment to be

8 *XYZ v Republic of Benin*, ACtHPR, Application 057/2019, Order of 2 December 2019 (provisional measures), § 24; *Komi Koutche v Benin*, Order of 2 December 2019, (provisional measures) §§ 31-32.

9 *Sebastien Germain Ajavon v Republic of Benin* (provisional measures) (5 December 2018) 2 AfCLR 470, § 45; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Order of 5 May 2020 (provisional measures), § 54.

made on the substance of the case. According to the Applicant, failing to do so would very likely render any judgment pointless after the 31 October 2020.

**26.** The Applicant further submits that the circumstances of the case are of extreme gravity, and present a risk of irreparable or clearly excessive harm to him, in particular, if the measure to remove him from the voters' register is not suspended in view of the forthcoming general elections of 31 October 2020.

**27.** He points out that on 21 August 2020, he filed an appeal before the Abidjan Court of Appeal, Court of First Instance against the decision of the local Electoral Commission of Cocody Riviera III dated 18 August 2020 rejecting his enrolment in the voters' register. The Applicant had been previously enrolled in the revised voters' register of 2018, in the Cocody Commune. He noted that he was not in the voters' register.

**28.** Lastly, the Applicant maintains that the Court of First Instance upheld the decision of the Electoral Commission by stating that the Applicant was incapacitated and unworthy within the meaning of Article 4 of Ordinance No. 2020-356 of 8 April 2020 to amend the Electoral Code. He had thus lost his capacity as a voter and cannot, therefore, be enrolled in the 2020 voters' register by the Independent Electoral Commission.

***

**29.** The Court observes that the decision of the Electoral Commission, upheld by the Court of First Instance ruling as a Court of last resort in disputes relating to the voters' register is likely to prejudice the Applicant at the dawn of the elections slated for 31 October 2020. As such, it is clear that, as it stands, he may not be able to exercise his right in the forthcoming election.

**30.** In view of the foregoing, the Court considers that the circumstances of the case require the adoption of provisional measures pursuant to Article 27(2) of the Protocol and Rule 51 of the Rules, to avoid irreparable harm to the Applicant. Accordingly, the Court finds it necessary to adopt provisional measures in order to allow the Applicant to enjoy his right to enroll in the voters' register.

## B. Request to clear the Applicant's criminal record or suspend any mention of the criminal conviction therein

**31.** The Court observes that the Applicant was extradited in 2011 to the International Criminal Court in The Hague, Netherlands, to face charges of crimes against humanity and war crimes which he allegedly committed during the post-election crisis of 2010 in Côte d'Ivoire.

**32.** Concurrently, with the Applicant's proceedings before the International Criminal Court, the Public Prosecutor at the Abidjan-Plateau Court of First Instance had issued a summons dated 2 November 2017, for the Applicant to appear before the Abidjan-Plateau Criminal Court on 21 November 2017, to face charges of armed robbery in the case of burglary at the Central Bank of West African States (BCEAO), where he allegedly misappropriated the assets to deal with the economic blockade imposed at the time by the Economic Community of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU).

**33.** In view of the circumstances of the case, there is a criminal aspect to this case. The Applicant is involved in various domestic and international proceedings. The Court notes that the rights he is claiming are essential civil and political human rights, which the Court is competent to protect. The criminal convictions have a definite impact on the rights in question. The Court considers that it is necessary to order that measures be taken to preserve his rights guaranteed in the cited human rights instruments in order to avoid irreparable harm to the Applicant by expunging his criminal record of irrevocable criminal conviction.

## C. Request to report to the Court on the implementation of the measures taken with a view to its execution

**34.** The Court notes that it is now established practice to require the Respondent State to report, within a time limit to be determined, on the measures taken to ensure the enforcement of its decisions, including orders for provisional measures.[10]

**35.** The Court orders the Respondent State to report to the Court on the measures taken to enforce this order within fifteen (15) days from the date of notification.

**36.** For the avoidance of doubt, this Ruling is provisional and does not prejudge in any way the decisions that the Court may take on its

10 *Houngue Eric Noudehouenou v Benin*, (provisional measures) 5 May 2020, § 60.

jurisdiction, on admissibility of the Application and on the merits.

## VII. Operative part

**37.** For these reasons,
The Court,
*Unanimously,*
*Orders the Respondent State to:*

i. S*tay* inclusion of the Applicant's criminal conviction and sentence in the criminal record until the Court decides on the merits of the main Application;
ii. *Take* all necessary steps to immediately remove all obstacles preventing the Applicant from enrolling in the voters' register;
iii. *Report* to the Court within fifteen (15) days from the date of notification of this Ruling on the implementation of the provisional measures ordered.

# Hossou & anor v Benin (provisional measures) (2020) 4 AfCLR 538

Application 016/2020, *Glory Cyriaque Hossou & anor v Republic of Benin*

Ruling (provisional measures), 25 September 2020. Done in English and French, the French text being authoritative.

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

The Applicants challenged the Respondent State's withdrawal of its article 34(6) Declaration on grounds that it amounted to a violation of the Charter and international human rights standards and sought provisional measures to revoke the withdrawal. The Court dismissed the application for provisional measures.

**Jurisdiction** (*prima facie*, 12-14, effect of withdrawal of Art 34(6) declaration, 15)

**Procedure** (flexible approach to seizure, 20-21)

**Provisional measures** (gravity and urgency, 27, request pre-empting merits , 28)

## I. The Parties

**1.** Glory Cyriaque Hossou and Angelo Adelakoun (hereinafter referred to as "the Applicants"), are nationals of the Republic of Benin who are lawyers by profession. They challenge the Respondent State's withdrawal of the Declaration deposited under Article 34(6) of the Protocol.

**2.** The Respondent State is the Republic of Benin, 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 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, it also deposited the Declaration provided for 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). On 25 March 2020, the Respondent State deposited with the African Union Commission an instrument of withdrawal of the said Declaration.

## II. Subject of the Application

**3.** On 7 May 2020, the Applicants filed an Application before this Court complaining about the Respondent State's withdrawal of the Declaration filed under Article 34(6) of the Protocol. In the same Application, the Applicants also prayed the Court to order provisional measures.

**4.** The Applicants state that on 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol which allows individuals and NGOs to directly seize the Court after exhausting local remedies. The Applicants aver that the Respondent State withdrew the Declaration pursuant to a written notice dated 25 March 2020.

**5.** In so doing, the Applicants allege that the Respondent State violated the Charter and international human rights standards. It is also the Applicants' contention that by withdrawing its Declaration, the Respondent State has deprived its citizens from directly accessing the regional judicial system to litigate and seek redress for the prejudice they have suffered within their domestic system, which constitutes a regression of rights.

**6.** With regard to the provisional measures, the Applicants pray the Court "to revoke, as a matter of urgency and in accordance with the provisions of the Protocol on the Establishment of the Court, Benin's decision to withdraw the Declaration filed under Article 34(6), pending a ruling on the principal Application."

## III. Summary of the Procedure before the Court

**7.** The Application instituting proceedings, together with the request for provisional measures, was served on the Respondent State on 8 July 2020. The Respondent State was given fifteen (15) days, from the date of receipt, to respond to the request for provisional measures and sixty (60) days, from 1 August 2020, to file its Response to the main Application.

**8.** On 5 August 2020, the Court granted the Respondent State an additional fifteen (15) days to respond to the request for provisional measures.

**9.** On 26 August 2020, the Court received the response of the Respondent State to the request for provisional measures.

## IV. *Prima facie* jurisdiction

**10.** Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it

concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned".

**11.** Rule 39(1) of the Rules of Court (hereinafter referred to as "the Rules") stipulates that "the Court shall conduct preliminary examination of its jurisdiction…". However, with regard to provisional measures, the Court need only ensure that it has jurisdiction over the merits of the case, but simply that it has *prima facie* jurisdiction.[1]

**12.** Accordingly, the Court will ascertain whether it has *prima facie* jurisdiction.

**13.** The Court notes that the Respondent State is a Party to the Charter and the Protocol, and it also accepted the Court's jurisdiction to receive applications from individuals and NGOs by virtue of Article 34(6) of the Protocol read together with Article 5(3) thereof.

**14.** The Court also notes that the violations alleged by the Applicants relate to rights protected in instruments to which the Respondent State is a Party. The Applicants specifically allege that the withdrawal is a violation of the Charter and international human rights instruments and also that it amounts to depriving citizens from accessing regional judicial mechanisms. The Applicants' allegations, therefore, cover instruments over which the Court has jurisdiction under Article 3(1) of the Protocol. Accordingly, the Court concludes that it has jurisdiction to consider the Application.

**15.** The Court also recalls that it has held that the withdrawal of a Declaration filed in accordance with Article 34(6) of the Protocol has no retroactive effect on cases under consideration at the time of the deposit of the instrument of withdrawal,[2] as is the case in the present matter. The Court reiterated this position in *Hongue Eric Noudehouenou v Republic of Benin,*[3] and held that the Respondent State's withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal does not in any way affect its personal jurisdiction in the present case.

1 *Komi Koutche v Republic of Benin*, ACtHPR Application 020/2019, Ruling of 2 December 2019 (provisional measures), § 14; *Amini Juma v United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR, 658, § 8; *African Commission on Human and People' Rights v Libya* (provisional measures) (15 March 2013) 1 AfCLR 193 § 21.

2 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR, 562 § 67

3 *Hongue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and corrigendum of 29 July 2020.

**16.** From the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the present Application.

## V. Admissibility of the request for provisional measures

**17.** The Respondent State raises a preliminary objection to the admissibility of the request based on the Applicants' failure to sign the request for provisional measures.

**18.** The Respondent State contests the admissibility of the request for provisional measures based on Rule 34(1) of the Rules which requires that an Application should be signed by the Applicant. The Respondent State submits that the request filed by the Applicants in the instant matter is not signed.

***

**19.** The Court notes that Rule 34(1) of the Rules provides that:

- The Applicant shall file in the Court Registry, one (1) copy of the Application containing a summary of the facts of the case and of the evidence intended to be adduced.
- The said Application shall be signed by the Applicant or by his/her representative.
- The Registrar shall acknowledge receipt of the application.

**20.** The Court recalls that with regard to the form and modality of seizure, it has always adopted a flexible approach.[4] Overall, the Court always takes into account the specific conditions of each Applicant and the circumstances of each application in determining the validity of the application.

**21.** In the present case, the Court notes that the Application containing the request for provisional measures was filed via email. The Court also notes that although no signature was included at the end of the Application, the Applicants duly endorsed their names to the Application. Further, the Applicants have fully disclosed their particulars in the Application and have been able to maintain contact with the Registry of the Court through their email addresses. In the circumstances, the Court holds that the identity of the Applicants is well established notwithstanding the lack of

4 *Robert John Penessis v United Republic of Tanzania*, ACtHPR, Application 012/2015, Judgment of 28 November 2019 (merits and reparations), §§ 44-46.

signatures on their Application. The Court, therefore, dismisses the Respondent State's objection on this point.

## VI. Provisional measures requested

**22.** In their request for provisional measures, the Applicants pray the Court to: "revoke Benin's decision to withdraw the Declaration deposited under Article 34(6) of the Protocol, pending the determination of the principal Application by the Court." Furthermore, the Applicants submit that the Respondent State's decision to withdraw the Declaration constitutes a claw-back of rights and a deprivation of its citizens' right to access the regional judicial mechanism to litigate and seek redress for the damage they suffered within their domestic system.

**23.** In its Response, the Respondent State submits that the issue of suspending the decision to withdraw the Declaration filed in accordance with Article 34(6) of the Protocol had previously been decided by the Court in the case of *Ingabire Victoire Umuhoza v Rwanda*, as well as in the order issued by the Court on 5 May 2020 in the matter of *Houngue Eric Noudehouenou v Republic of Benin*. The Respondent State further submits that according to the jurisprudence of the Court a State's decision to withdraw its Declaration does not take effect until 12 months after the date of the deposit of the instrument of withdrawal. According to the Respondent State, the requested procedure in the present case is inappropriate and baseless, and the Court must dismiss it.

**24.** Specifically, the Respondent State prays the Court to:

i. Find that the two Applicants did not sign the Application filed before it;

ii. Declare that the failure to sign is reason for inadmissibility of the Application;

iii. State that this inadmissibility also affects the admissibility of the requested provisional measures;

iv. Accordingly, declare the request for provisional measures inadmissible.

**25.** The Respondent State additionally, prays the Court to:

i. Note that the issue of revoking the State of Benin's decision to withdraw the declaration deposited in accordance with Article 34(6) of the Protocol has been decided by the Court on 5 May 2020 in the Order on request for provisional measures in the matter of *Houngue Eric Noudehouenou v Republic of Benin*;

ii. Find that the provisional measures requested by the Applicants in the present case are aimed at the same issue;

iii. Rule that the subject matter of the request is immaterial since it has been voided of its content;

iv. Consequently, the request for provisional measures is dismissed.

***

**26.** The Court recalls that in accordance with Article 27(2) of the Protocol and Rule 51(1) of the Rules, it is empowered:

at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

**27.** It thus always lies with the Court to decide, given the specific circumstances of each case,[5] where the alleged situation of extreme gravity and urgency necessitates the exercise of the jurisdiction conferred upon it under the earlier-mentioned provisions. Nevertheless, the Court must always be convinced of the existence of a very serious situation before it orders provisional measures.

**28.** In the present case, the Court observes that the request for provisional measures touches on the merits of the Application. Issuing an order for provisional measures at this stage, especially given the manner in which the Applicants have formulated the request, would, in principle, grant the very reliefs that the Applicants are seeking in their main Application.

**29.** The Court also notes that the Applicants did not present evidence of the extreme gravity or urgency in this case to support the request for provisional measures.

**30.** The Court considers, therefore, that the circumstances of this case do not reveal a situation of extreme gravity or urgency, which could cause irreparable harm to the Applicants and, consequently, dismisses the request for provisional measures.

**31.** For the avoidance of doubt, this Ruling is provisional in nature and in no way prejudges the decision the Court might take regarding its jurisdiction, the admissibility and the merits of the Application.

5 *Armand Guéhi v United Republic of Tanzania* (provisional measures) (18 March 2016), 1 AfCLR, 587, §17.

## VII. Operative part

**32.** For these reasons,
The Court:
*Unanimously*,
i. *Dismisses* the Respondent State's objection to the admissibility of the Application.
ii. *Dismisses* the Applicants' request for provisional measures.

# Jonas v Tanzania (reparations) (2020) 4 AfCLR 545

Application 011/2015, *Christopher Jonas v United Republic of Tanzania*

Judgment on reparations, 25 September 2020. 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

In its judgment on the merits, the Court held that the Respondent State had violated the Applicant's right to a fair trial by failing to provide him with free legal assistance during the trial before the national courts. In this judgment on reparations, the Court granted the Applicant's prayers for moral damages only.

**Reparations** (nature of reparations, 15, 16; material prejudice, 17; moral prejudice, 23; assessment of quantum of damages, 25; guarantee of non-repetition, 29, 30; measures of satisfaction, 32)

## I. Subject of the Application

**1.** The present request for reparations, filed on 11 October 2018, arises from the judgment on the merits dated 28 September 2017 in which the Court found that the United Republic of Tanzania (hereinafter referred to as "the Respondent State") violated Article 7(1)(c) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") for failing to provide the Applicant with free legal assistance during his trial.

## II. Brief background of the matter

**2.** In the Application on merits, the Applicant alleged that his right to a fair trial had been violated by the Respondent State by reason of lack of access to information on the proceedings and to legal representation, being convicted on the basis of uncorroborated testimonies and being subjected to a sentence that was not applicable at the time of trial. In the said proceedings before domestic courts, the Applicant was sentenced to thirty (30) years imprisonment for armed robbery.

**3.** On 28 September 2017, the Court rendered the judgment on the merits whose operative part, at paragraphs vi, ix, and x, reads as follows:

vi. *Holds* that the Respondent violated Article 7(1)(c) of the Charter in terms of the Applicant's allegation that he did not have the benefit of

free legal assistance**,** and that, consequently, the Respondent also violated Article 1 of the Charter; …

ix. *Reserves* its ruling on the Applicant's prayer on other forms of reparation;

x. *Requests* the Applicant to submit to the Court his Brief on other forms of reparations within thirty (30) days of receipt of this Judgment; also requests the Respondent to submit to the Court its Response on reparations within thirty (30) days of receipt of the Applicant's Brief; ….

**4.** It is the above mentioned Judgment on the merits that serves as the basis for the present request for reparations.

## III. Summary of the Procedure before the Court

**5.** On 3 October 2017, the Registry transmitted to the Parties a certified true copy of the Judgment on the merits.

**6.** The Parties filed their submissions on reparations within the time stipulated.

**7.** On 9 March 2020, pleadings were closed and the Parties were duly notified.

**8.** On 12 May 2020, the Applicant was informed that the Respondent State had, on 21 November 2019, deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration deposited in accordance with Article 34(6) of the Protocol and that since the effective date of the withdrawal is, in accordance with the Court's case-law,[1] 22 November 2020, this has no effect on the consideration of his Application.[2]

## IV. Prayers of the Parties

**9.** The Applicant prays the Court to grant him the following reparations:

i. The amount of one hundred and eighty-five thousand dollars (USD 185,000) to Christopher Jonas as a direct victim for moral prejudice suffered;

ii. The amount of eight hundred thousand dollars (USD 800,000) to Christopher Jonas for material prejudice suffered or in the alternative,

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (withdrawal, jurisdiction) (3 June 2016) 1 AfCLR 562, § 66.

2 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39. See also, *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application 018/2018, Judgment of 15 July 2020, § 19.

the amount of thirty-six thousand six hundred and forty dollars, (USD 36,640);

iii. The amount of thirty thousand dollars (USD 30,000) to his mother and twenty thousand dollars (USD 20,000) to his siblings identified as indirect victims;

iv. The amount of sixty-five thousand dollars (USD 65,000) in Counsel's legal fees.

v. The amount of two thousand dollars (USD 2,000) for expenses incurred.

**10.** The Applicant further prays that:

vi. the Court apply the principle of proportionality when considering the award for compensation to be granted to him;

vii. the Court order the Respondent State to guarantee the non-repetition of the violations to the Applicant;

viii. the Court request the Respondent State to report back to the Court every six months until they satisfy the orders the Court shall make when considering the submissions for reparations.

**11.** The Applicant also asks the Court to order the Respondent State to publish in the Official Gazette the judgment on the merits of 28 September 2017 in both English and Swahili within three (3) months as a measure of satisfaction.

**12.** The Respondent State prays the Court to make the following order and declaration:

i. that, the Judgment of the Court dated 28 September 2017 is sufficient reparation to the prayers found in the Applicant's submission for reparation;

ii. that, the Applicant's claim for reparations be dismissed in its entirety.

## V. Reparations

**13.** 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.

**14.** 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.[3]

3 *Mohamed Abubakari v United Republic of Tanzania*, ACtHPR, Application 007/2013, Judgment of 4 July 2019 (reparations), § 19; *Alex Thomas v United Republic of Tanzania*, ACtHPR, Application 005/2013, Judgment of 4 July 2019 (reparations),

**15.** The Court further restates that reparation "… 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]

**16.** The Court also recalls that measures that a State would take to remedy a violation of human rights includes, notably, 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]

**17.** 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/her prayers.[6] Exceptions to this rule include moral prejudice, which need not be proven.

**18.** The Court having found in its judgment on the merits of 28 September 2017 that the Respondent State violated Article 7(1)(c) of the Charter, the Applicant prays for pecuniary reparations for (i) material loss, (ii) moral prejudice for himself and indirect victims and non-pecuniary reparations in the form of (a) guarantees of non-repetition and (b) measures of satisfaction.

§ 11; ***Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania***, ACtHPR, Application 006/2013, Judgment of 4 July 2019 (reparations), § 13; ***Lucien Ikili Rashidi v United Republic of Tanzania***, ACtHPR, Application 009/2015, Judgment of 28 March 2019 (merits and reparations), § 116; ***Ingabire Victoire Umuhoza v Republic of Rwanda*** (reparations) (7 December 2018) 2 AfCLR 202, § 19.

4 ***Mohamed Abubakari v Tanzania*** (reparations), § 20; ***Alex Thomas v Tanzania*** (reparations), § 12; ***Wilfred Onyango & ors v Tanzania*** (reparations), § 16; ***Ingabire Victoire Umuhoza v Rwanda*** (reparations), § 20; ***Lucien Ikili v Tanzania*** (merits and reparations), § 118.

5 ***Mohamed Abubakari v Tanzania*** (reparations), § 21; ***Alex Thomas v Tanzania*** (reparations), § 13; ***Ingabire Victoire Umuhoza v Rwanda*** (reparations), § 20.

6 ***Tanganyika Law Society, the Legal and Human Rights Centre v United Republic of Tanzania***, Application 009/2011, ***Reverend Christopher R. Mtikila v United Republic of Tanzania***, 011/2011 (Consolidated Applications) (reparations) (13 June 2014) 1 AfCLR 72, § 40; ***Lohé Issa Konaté v Burkina Faso*** (reparations) (3 June 2016) 1 AfCLR 346, § 15; ***Mohamed Abubakari v Tanzania*** (reparations), § 22; ***Alex Thomas v Tanzania*** (reparations), § 14; ***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) (5 June 2015) 1 AfCLR 258, § 24.

## A. Pecuniary reparations

### i. Material loss

**19.** The Applicant claims that prior to his arrest, he was a street trader at Kariakoo market in Dar es Salaam selling hand clothes from 1998 to 2002. He further claims that he started his business with a capital of Two Hundred and Fifty Thousand Tanzanian Shillings (TZS 250,000), which is equivalent to One Hundred and Ninety-Nine USD (US$ 199) as at 2002. He avers that he was making an average of Six Thousand Tanzanian Shillings (TZS 6,000), which is equivalent to Six Dollars (US$ 6) a day as of 2002.

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**20.** The Court notes that the above stated claims are based on the conviction, sentencing and incarceration of the Applicant, which this Court did not find unlawful and thus do not warrant damages.[7] The Court consequently dismisses the claim.

### ii. Moral prejudice

#### a. Moral prejudice suffered by the Applicant

**21.** The Applicant claims that he suffered undue stress from the lack of provision of legal assistance by the Respondent State during his trials at the District Court, the High Court and the Court of Appeal, which led to his unfair conviction. He requests the Court to order the Respondent State to pay him the amount of One Hundred and Eighty-Five Thousand Dollars (US$ 185,000) as a compensation for moral damages as a direct victim of his violation.

**22.** The Respondent State avers that the judgment on the merits is sufficient reparation and prays the Court to dismiss this claim.

7 See *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 186; and *Werema Wakongo Werema & anor v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520.

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**23.** The Court recalls that, as established in its case-law, moral prejudice is presumed in cases of human rights violations, and quantum of damages in this respect is assessed based on equity, taking into account the circumstances of the case.[8] The Court has adopted the practice of granting a lump sum in such instances.[9]

**24.** The Court notes that, as established in its Judgment on the merits of the present matter, the Respondent State violated the Applicant's right to legal assistance.[10] Prejudice therefore ensued and the Applicant is entitled to moral damages.

**25.** In assessing the quantum of damages, the Court recalls that it had adopted the practice of granting applicants an average amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) in instances where legal aid was not availed by the Respondent State without any peculiar prevailing circumstances.[11] The Court notes that in the present case, the Applicant's claim to be awarded One Hundred and Eighty-Five Thousand Dollars (US$ 185,000) is exaggerated and there is also no reason that warrants awarding damages in United State Dollars.[12] Against these standards and in exercising its discretion, the Court awards the Applicant the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) as fair compensation.[13]

## b. Moral prejudice suffered by indirect victims

**26.** The Applicant prays the Court to award an amount of Thirty Thousand Dollars (US$ 30,000) to his mother as an indirect victim for the emotional anguish she suffered, the social stigma of having

8 *Norbert Zongo & ors v Burkina Faso* (reparations), § 55; and *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 59.

9 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 119; *Minani Evarist v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 18; and *Armand Guehi v Tanzania* (merits and reparations), § 177.

10 See *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 100(vi).

11 See *Minani Evarist v Tanzania* (merits), § 90; and *Anaclet Paulo v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 111.

12 See *Mohamed Abubakari v Tanzania* (reparations), § 23; *Alex Thomas v Tanzania* (reparations), § 15.

13 *Minani Evarist v Tanzania* (merits), § 85.

an incarcerated son, the death of her husband due to his blood pressure as a result of the Applicant's imprisonment, the financial implications of the Applicant's arrest on self-sustenance, and the financial implications of the occasional visits to the prison to see her son. The Applicant further requests the payment of Twenty Thousand Dollars (US$ 20,000) to his siblings: Juliana Kusena, Jenifer Kusena, Veronika Kusena, and Kalekwa Kusena for the loss of financial support and the financial and mental implications of their visits to the Applicant while he was in detention.

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**27.** The Court notes that the claims related to loss incurred by the indirect victims are based on the conviction, sentencing and incarceration of the Applicant, which as earlier established did not cause prejudice. As such, damages are not called for. The Court consequently dismisses the claims.

## B. Non-pecuniary reparations

### i. Guarantees of non-repetition of the violations and report on implementation

**28.** The Applicant prays the Court to order that the Respondent State guarantees non-repetition of the violations against them and reports back every six (6) months until the orders made by this Court on reparation are implemented.

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**29.** 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.[14] The Court has however also held that guarantees of non-repetition could apply in individual cases where there is a likelihood of continued or repeated violations.[15]

**30.** 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 the courts. Furthermore, the said violations are not repetitive in nature and this Court has earlier, in this Judgment, awarded compensation in their respect. In light of the fact that the proceedings at the domestic courts have already been completed, this Court does not deem it necessary to issue an order regarding non-repetition.[16] The prayer is therefore dismissed.

## ii. Measures of satisfaction

**31.** The Applicant prays the Court that the Respondent State should be ordered to publish in the national Gazette, the Judgment of 28 September 2017 on the merits of this matter in both English and Swahili within three (3) months of the present Judgment as a measure of satisfaction.

***

**32.** The Court considers that, as established in its jurisprudence, a judgment *per se* may constitute a sufficient reparation for an established violation. However, other measures such as the publication of the decision can be ordered as the circumstances warrant.[17]

**33.** The Court finds that, in the instant matter, there is no peculiar circumstance that warrants an order for publication. Furthermore,

14 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), §§ 146-149; *Armand Guehi v Tanzania* (merits and reparations), § 191; and *Norbert Zongo & ors v Burkina Faso* (reparations), §§ 103-106.

15 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 146; *Armand Guehi v Tanzania* (merits and reparations), § 191; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 43.

16 *Armand Guehi v Tanzania* (merits and reparations), §§ 191 and 192.

17 *Alex Thomas v Tanzania* (reparations), § 74; *Wilfred Onyango Nganyi & 9 ors v Tanzania* (reparations), § 86; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 45.

the Respondent State had, on 31 January 2017, which is prior to the Judgment on the merits of the present case, passed its Legal Aid Act. In light of these considerations, the Court does not deem it necessary to grant the prayer for publication of any of its judgments in the present matter. The prayer is therefore dismissed.

## VI. Costs

**34.** Rule 30 of the Rules provides that, "[u]nless otherwise decided by the Court, each Party shall bear its own costs."

***

**35.** The Court notes that, in line with its earlier judgments, reparation may include payment of legal fees and other expenses incurred in the course of both domestic and international proceedings.[18] The Applicant must provide justification for the amounts claimed.[19]

## A. Legal fees related to proceedings before this Court

**36.** The Applicant prays the Court to order the payment of the following being the legal fees incurred in the proceedings before the African Court. He requests for the payment of a total of US Dollars Sixty-Five Thousand (US$ 65,000) in Counsel's legal fees, including:

i. 100 hours for the lead counsel at US Dollars Two Hundred (US$ 200) per hour, which amounts to US Dollars Twenty Thousand (US$ 20,000); and

ii. 300 hours for the two legal assistants at US Dollars 150 (US$ 150) per hour, which amounts to US Dollars Forty-Five Thousand (US$ 45,000).

18 *Norbert Zongo & ors v Burkina Faso* (reparations), § 79-93 and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 39; *Alex Thomas v Tanzania* (reparations), § 77; and *Mohamed Abubakari v Tanzania* (reparations), § 81.

19 *Norbert Zongo & ors v Burkina Faso* (reparations), § 81 and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 40; *Alex Thomas v Tanzania* (reparations), § 77; and *Mohamed Abubakari v Tanzania* (reparations), § 81.

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**37.** The Court notes that the Applicant was duly represented by Pan African Lawyers Union (PALU) throughout the proceedings under the Court's legal aid scheme. Noting further that the Court's legal aid scheme is *pro bono* in nature, the claim is not justified and the prayer is therefore denied.

## B. Other costs related to proceedings before this Court

**38.** The Applicant's request for the Court to grant reparations for transport, fees and stationery costs, including:

i. US Dollars Five Hundred (US$ 500) for postage;

ii. US Dollars Three Hundred (US$ 300) for printing and photocopying;

iii. US Dollars One Thousand (US$ 1,000) for communication costs; and

iv. US Dollars Two Hundred (US $ 200) for transportation to and from Ukonga Prison.

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**39.** The Court dismisses this prayer for lack of supporting documents.

## VII. Operative part

**40.** For these reasons:

The Court,

*Unanimously*:

*On pecuniary reparations*

i. *Does not grant* the Applicant's prayer for material damages due to his conviction and sentencing;

ii. *Does not grant* the Applicant's prayer for damages for moral prejudice suffered by the indirect victims;

iii. *Grants* the Applicant's prayer for damages for the moral prejudice he suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300,000);

iv. *Orders* the Respondent State to pay the amount indicated under (iii) above 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 Tanzania throughout the period of delayed payment until the amount is fully paid.

*On non-pecuniary reparations*

v. *Does not* grant the Applicant's prayer regarding non-repetition of the violations;

vi. *Does not* grant the Applicant's prayer regarding publication of the Judgment.

*On implementation and reporting*

vii. *Orders* the Respondent State to submit to this Court, within six (6) months from the date of notification of the present 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

viii. *Does not grant* the prayer related to payment of the legal fees, costs and other expenses incurred in proceedings before this Court;

ix. *Decides* that each party shall bear its own costs.

## Kulukuni v Tanzania (striking out) (2020) 4 AfCLR 556

Application 007/2018, *Abdallah Ally Kulukuni v United Republic of Tanzania*

Order, 25 September 2020. 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, who had been convicted and sentenced for certain offences, brought this action contending that the domestic proceedings that led to his conviction and the conditions of his incarceration were in violation of his rights. After he filled the application, the Applicant failed to respond to all further communications from the Court's Registry. The Court decided *suo moto*, to strike out the matter for lack of diligent prosecution.

**Procedure** (struck out for lack of diligent prosecution, 18, 22)

## I. The Parties

**1.** Abdallah Ally Kulukuni (hereinafter referred to as "the Applicant") is a national of Tanzania, who at the time of filing his Application was serving a Seven (7) year sentence at Maweni Central Prison, Tanga, having been convicted of burglary and stealing by the District Court of Handeni on 7 May 2017.

**2.** The Application was filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter, "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. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court decided that the withdrawal of the Declaration would not affect matters pending before it and that the withdrawal would take effect on 22 November 2020.[1]

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits), §§ 35-39.

## II. Subject of the Application

### A. Facts of the matter

**3.** The Applicant alleges that on 22 April 2014, after a "shoddy and shambolic investigation", he was arraigned before the District Court of Handeni on a charge of burglary and stealing contrary to Sections 294(1) and 250 of the Respondent State's Penal Code.

**4.** The Applicant claims that during his trial, he tried his best to prove his innocence but in vain and, on 7 May 2017, he was convicted and sentenced to seven (7) years' imprisonment.

**5.** Aggrieved by the decision of the District Court, the Applicant avers that he filed an appeal at the High Court, which dismissed it for lack of merit on 25 April 2016. He subsequently appealed to the Court of Appeal on 27 April 2016.

**6.** The Applicant submits that his appeal at the Court of Appeal was heard on 10 July 2017 and the Court quashed his conviction and set aside the sentence imposed on him on 12 July 2017.

**7.** The Applicant contends that at the trial and appeals, he was not assisted by counsel and it is for this reason that he was unlawfully convicted and sentenced by the District Court and that his appeal at the High Court was wrongly dismissed.

**8.** The Applicant states that during his imprisonment, he was forced into hard labour while he was given only one meal per day, and this resulted in his health deteriorating. He also contends that his conviction and sentence exposed him to the public as a dishonest criminal person, leading to his stigmatisation in the society. In this regard, he states that, before his conviction, he was trusted by business people and was able to earn his livelihood by doing business but that his conviction tainted his reputation in the business community.

**9.** Furthermore, the Applicant avers that for the same reason, his wife has separated with him and at the age of 28 "being a toothless young guy" with a criminal record, he has found it difficult to get another woman to marry him.

### B. Alleged violations

**10.** The Applicant alleges that by unlawfully convicting and sentencing him, the Respondent State has violated Articles 3 and 5 of the Charter and his rights and freedoms set out in Articles 12-29 of the Constitution of the Respondent State. The Applicant further avers that, by failing to provide him with legal aid during his trial, the

Respondent State violated his right to legal assistance contrary to Article 13 of the same Constitution.

## III. Summary of the Procedure before the Court

**11.** The Application was filed on 6 February 2018.

**12.** On 8 March 2018, the Registry acknowledged receipt of the Application, informed him of its registration and sought clarification on whether he was still in prison. He was also requested to substantiate his allegation that the domestic proceedings in the Respondent State had been prolonged when he attempted to seek redress for his grievances.

**13.** The Registry sent the Applicant four reminders to provide the clarifications sought, that is, on 5 March 2019, 6 August 2019, 4 February 2020 and 8 May 2020. With each reminder, the Applicant was requested to provide the response sought within thirty (30) days of receipt. To date, the Applicant has failed to file the clarifications sought.

**14.** On 8 May 2020, the Registry sent a letter to the Applicant notifying him of the Respondent State's withdrawal of its Declaration under Article 34 (6) of the Protocol.

**15.** By the same letter, the Registry also notified the Applicant the decision of the Court of 9 April 2020 that the withdrawal will take effect only after lapse of twelve (12) months from the date of deposit, that is, 21 November 2019 and it does not have effect on all pending applications at the time of the withdrawal, including his Application.

## IV. On the striking out of the Application

**16.** The Court notes that the pertinent Rule on striking out of Applications is Rule 58 of the Rules, which provides that:

> Where an Applicant notifies the Registrar of its intention not to proceed with a case, the Court shall take due note thereof, and shall strike the Application off the Court's cause list. If at the date of receipt by the Registry of the notice of the intention not to proceed with the case, the Respondent State has already taken measures to proceed with the case, its consent shall be required.

**17.** The Court observes that Rule 58 only addresses instances where an applicant expressly indicates the intention to discontinue the application. This Rule does not cover situations where an applicant neither notifies the Court of an intention to withdraw an Application nor actively pursues his case.

**18.** However, the Court notes that parties to an application should pursue their case with diligence. The failure to do so leads to the logical conclusion, that a party is no longer interested in pursuing their claim. This holds true even though a party does not expressly indicate its intention not to proceed with its case.

**19.** In the instant Application, the Applicant filed his Application on 6 February 2018. In his Application, the Applicant mentioned that he was not able to exhaust local remedies alleging that domestic proceedings were prolonged. Although he claimed that his conviction and sentence were quashed by the Court of Appeal, he also alleged that he was still in prison at the time of filing the Application.

**20.** After a preliminary examination of his Application, on 8 March 2018, the Registry wrote to the Applicant requesting clarification whether he was still in prison or whether he had been released after the Court of Appeal quashed his conviction and sentence on 12 July 2017. By the same letter, the Applicant was also requested to substantiate his claim that domestic proceedings to seek redress for his grievances were prolonged.

**21.** Despite four (4) reminders and a lapse of more than one year and five months, the Applicant has not responded to the request for clarifications. In this regard, the Court notes from the record that, there are proofs of delivery of the letters to his address. While it is not clear whether the Applicant in fact received the letters, it behoves him to take reasonable steps to make a follow-up on his matter and notify the Court if he has been released from prison and changed his address. Without such notification, the Court is constrained in reaching the Applicant for service of process.

**22.** The Court finds that under these circumstances it is reasonable to conclude that the Applicant has no intention to pursue his Application and therefore, decides that the Application shall be struck out from its Cause List pursuant to Rule 58 of the Rules.

**23.** The Court notes that, as the Application was not served on the Respondent State, it could not have taken any measures with regard to this case and, therefore, there was no need for the Court to seek its consent before striking out the Application.

**24.** The Court further notes that, the striking out of the Application is without prejudice to the Applicant to file a new application.

## V. Operative part

**25.** For these reasons:
The Court,
*Unanimously,*
i. *Orders* that Application 007/2018 *Abdallah Ally Kulukuni v United Republic of Tanzania* be and is hereby struck out from the Cause List of the Court.

# Luchagula v Tanzania (admissibility) (2020) 4 AfCLR 561

Application 007/2016, *Chananja Luchagula v United Republic of Tanzania*

Ruling (jurisdiction and admissibility) 25 September 2020. 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, who was convicted and sentenced to death for murder but was granted presidential pardon, brought this action alleging that proceedings before the national courts were a violation of his rights. The Court declared the action inadmissible for failure to file the Application within a reasonable time.

**Jurisdiction** (in relation to matters concluded by national courts, 26, 28; withdrawal of article 34(6) declaration, 32)

**Admissibility** (exhaustion of local remedies, 45, 47; reasonable time to file, 55, 58, 59)

## I. The Parties

**1.** Mr. Chananja Luchagula (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania who was sentenced to death for murder, on 31 May 2001. As at the time of filing his Application, he was at Butimba Central Prison in Mwanza up until his release following a Presidential Pardon of 9 December 2017.

**2.** The Application was filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter, "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. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration.

The Court decided that the withdrawal of the Declaration would not affect matters pending before it and that the withdrawal would take effect on 22 November 2020.[1]

## II. Subject of the Application

### A. Facts of the matter

**3.** It emerges from the record that, on 9 February 1989, the Applicant and other individuals abducted five (5) people whom they took to the Ibelambogo forest in the District of Kahama. Claiming that they were forest guards, the Applicant and his accomplices demanded money from their captives and the logging permit, in exchange for their freedom. In response, the captives claimed that they had only Two Thousand Six Hundred and Ninety Tanzanian shillings (TZS 2,690).

**4.** Throughout the day, the Applicant and his accomplices insisted that the captives give them at least Ten Thousand Tanzanian Shillings (TZS 10,000). In the evening, they tied up four of the captives, the fifth having managed to escape.

**5.** The next day, that is, on 10 February 1989, the escapee reported the incident to the police who, having visited the scene, found the bullet ridden bodies of the other four captives. Two months later, that is, on 2 April 1989, the escapee recognised the Applicant in a shop and alerted the police who came and arrested him.

**6.** The Applicant was arraigned in court and eventually convicted of murder of the four captives, in Criminal Case No. 42 of 1989 before the High Court of Tanzania sitting at Tabora. By its judgment of 31 May 2001, the High Court sentenced him to death by hanging.

**7.** The Applicant filed an appeal before the Court of Appeal of Tanzania sitting at Mwanza which by judgment of 2 July 2003, upheld the sentence handed down by the High Court. Following an initial Presidential pardon, the Applicant's death sentence was commuted to life imprisonment. A second Presidential pardon dated 9 December 2017 resulted in his release.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

## B. Alleged violations

**8.** The Applicant argues that the Court of Appeal erred in the judgment of 2 July 2003 in making a significantly wide evaluation of the evidence presented by the Prosecution.

**9.** The Applicant further contends that the Respondent State violated his right to freedom from discrimination, right to equality and equal protection of the law, the right to life and integrity of his person, right to dignity and freedom from torture and inhuman and degrading treatments, right to a fair trial and right to equality of people guaranteed under Articles 2, 3(1) and (2), 4, 5, 6, 7(1) and 19 of the Charter, respectively.

## III. Summary of the Procedure before the Court

**10.** The Application was filed before the Court on 14 July 2016 and served on the Respondent State on 18 August 2016 and transmitted to the entities listed in Rule 35(3) and (4) of the Rules on 8 September 2016.

**11.** The parties filed their pleadings within the timeframe stipulated by the Court and these were duly exchanged.

**12.** Pleadings were closed on 2 October 2018; and the parties were duly notified.

**13.** On 13 August 2020, the Registry sent a letter to the Applicant notifying him of the Respondent State's withdrawal of its Declaration under Article 34 (6) of the Protocol. By the same letter, the Registry also notified the Applicant of the decision of the Court of 9 April 2020, that the withdrawal will take effect only after the lapse of twelve (12) months, from the date of deposit thereof, that is, 22 November 2020 and it does not have effect on all pending applications at the time of the withdrawal, including his Application.

## IV. Prayers of the Parties

**14.** The Applicant prays the Court to:

i. restore justice where it has been overlooked;

ii. quash his conviction and sentence and set him at liberty;

iii. award him reparation in order to remedy the violations of his rights by the Respondent State, pursuant to Article 27(1) of the Protocol;

iv. grant such other reliefs as the Court may deem fit.

**15.** Moreover, he prays the Court to order the Respondent State to take immediate measures to remedy the violations.

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

i. declare that it has no jurisdiction to examine the Application;

ii. declare that the Application does not meet the conditions of admissibility set out in Rule 40 (5) and (6) of the Rules of Court;

iii. declare that the Respondent State has not violated the Applicant's rights guaranteed in Articles 3(1) and (2), and 7(1) of the Charter;

iv. declare that the Application is inadmissible and baseless and dismiss the same;

v. dismiss the Applicant's prayers in their entirety;

vi. rule that the Applicant is not entitled to reparations.

## V. Jurisdiction

**17.** The Court observes that Article 3 of the Protocol and 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.

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

**19.** On the basis of the above-cited provisions, the Court must preliminarily, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

**20.** In the instant case, the Respondent State raises an objection to the Court's material jurisdiction.

### A. Objection to material jurisdiction

**21.** The Respondent State contests the Court's jurisdiction arguing that, contrary to the provisions of Article 3(1) of the Protocol and Rule 26 (1) (a) of the Rules, the present Application seeks to have the Court act as an appellate court to examine issues of evidence and procedure already settled by its Court of Appeal. The Respondent State submits further that, this does not fall within the mandate or the jurisdiction of the Court.

**22.** The Respondent State cites the Court's jurisprudence in *Ernest Francis Mtingwi v Republic of Malawi* in which the Court examined its own jurisdiction and found that, not being an appellate court, it had no jurisdiction to receive and consider appeals in cases over which the national and/or regional courts have already adjudicated upon. The Respondent State therefore prays the Court to declare

that it has no jurisdiction and to dismiss the Application.[2]

**23.** Refuting the Respondent State's arguments, the Applicant submits that in *Alex Thomas v United Republic of Tanzania,* the Court affirmed that, though it is not an appellate body with respect to decisions of national courts, this does not preclude it from examining the 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 instrument ratified by the State concerned.[3]

**24.** The Applicant also relies on the jurisprudence of the Court in *Peter Joseph Chacha v United Republic of Tanzania* to argue that the Court has jurisdiction to examine his Application in so far as it relates to allegations of violations of his fundamental rights.

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**25.** The Court recalls that, pursuant to the provisions of Article 3(1) of the Protocol and Rule 29(1) (a) of the Rules, it has jurisdiction to hear a case as long as its subject matter relates to allegations of violations of human rights protected by the Charter or any other relevant human rights instrument ratified by the State concerned.

**26.** The Court has previously concluded that where allegations of human rights violations relate to the way in which the national courts have evaluated evidence, it reserves the power to determine whether the said evaluation is compatible with international human rights standards, in particular, the relevant provisions of the Charter and doing so would not make it an appellate court.

**27.** In the instant case, the Applicant alleges that procedural irregularities marred the conduct of his trial in the domestic courts and that his case was not given a fair hearing as provided in the Charter as regards the right to a fair trial. The Applicant challenges, in particular, the manner in which the Court of Appeal

2 *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application 020/2015, Judgment of 28 November 2019 (jurisdiction and admissibility), § 24; See also: *Kennedy Ivan v United Republic of Tanzania*, ACtHPR, Application 025/2016, Judgment of 28 March 2019 (merits and reparations), § 20.

3 *Livinus Daudi Manyuka v Tanzania* (jurisdiction and admissibility), § 29; See also: *Werema Wangoko Werema v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 31; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45.

of the Respondent State evaluated the evidence on which it relied to uphold the sentence handed down against him.

**28.** The Court notes that the Applicant's allegations concerned the violations of his rights guaranteed in Articles 2, 3, 4, 5, 6, 7, 19 of the Charter and guaranteed in other human rights instruments ratified by the Respondent State. Although some of these allegations relate to the manner in which domestic courts have assessed evidence, the Court can still examine whether such assessment is congruent with the Charter. The Court observes that this is within the ambit of its competence and does not render it an appellate court.

**29.** In view of the aforesaid, the Court holds that it has material jurisdiction to examine the present Application and, therefore, dismisses the objection to jurisdiction raised by the Respondent State.

## B. Personal jurisdiction

**30.** 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.

**31.** The Court notes, as it did earlier in paragraph 2 of this Ruling that, the Respondent State is a party to the Protocol and deposited, on 29 March 2010, the Declaration prescribed under Article 34(6) of the said Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental organisations (NGOs).

**32.** The Court also notes that on 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration.

**33.** The Court recalls its previous judgments[4] where it concluded that the withdrawal of the Declaration deposited in accordance with Article 34(6) of the Protocol has no retroactive effect and no bearing on the matters pending prior to the filing of the withdrawal, as in case with the present Application. The Court also held that withdrawal of the Declaration takes effect twelve (12) months after the filing of the instrument of the withdrawal, therefore for

4 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67; *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 37-39.

the Respondent State, it takes effect on 22 November 2020.[5]

**34.** In view of the aforesaid, the Court holds that it has personal jurisdiction to hear the present Application.

### C. Other aspects of jurisdiction

**35.** The Court notes that its temporal and territorial jurisdiction are not disputed by the Respondent State and that nothing on record indicates that the Court lacks such jurisdiction. The Court accordingly holds that:

i. It has temporal jurisdiction given that, at the time the Application was filed, the alleged violations were continuing, the Applicant having been convicted and sentenced on grounds which he considers as irregular;[6]

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

**36.** Consequently, the Court holds that it has jurisdiction to hear the present Application.

## VI. Admissibility

**37.** 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".

**38.** Pursuant to Rule 39(1) of its 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.

**39.** Rule 40 of the Rules, which essentially 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 be based exclusively on news disseminated through the mass

5 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), § 39.

6 *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* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71 - 77.

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.

**40.** The Court notes that the Respondent State has raised two preliminary objections to the admissibility of the Application; the first, on exhaustion of local remedies; and the second, on filing the Application within a reasonable time after local remedies were exhausted.

## A. Objection based on non-exhaustion of local remedies

**41.** The Respondent State argues that remedies are available at national level which the Applicant could have utilised before filing the Application. According to the Respondent State, the Applicant had the possibility of lodging an Application for review of the judgment of the Court of Appeal, in accordance with Rule 66 of Chapter III. B. of the Tanzania Court of Appeal Rules.[7]

**42.** The Respondent State contends that the Applicant also had the possibility of filing a constitutional petition under the Basic Rights and Duties Enforcement Act. The Respondent State argues that the condition of exhaustion of local remedies requires that the Applicant take all the necessary measures to exhaust or, at least, attempt to exhaust the internal remedies available in the national judicial system.

**43.** The Respondent State considers that the referral of the matter to the Court is premature. It concludes that the Application does not meet the requirements of Rule 40(5) of the Rules of Court and must therefore be dismissed for failure to exhaust the domestic remedies.

7 The Court may review its own judgments or orders but, applications for review are admissible only under the following conditions: a) the judgment was based on an error manifest upon reading the file, which resulted in denial of justice; or b) a party has been improperly denied the opportunity to be heard; or c) the judgment of the courts was null and void; or d) the court did not have jurisdiction to examine the case; or e) the judgment was procured unlawfully, by fraud or perjury.

**44.** The Applicant asserts that he has exhausted all available domestic remedies. He also submits that in the judicial system of the Respondent State, the Court of Appeal is the highest jurisdiction and he filed an appeal before that Court, which was dismissed by the judgment rendered on 2 July 2003, affirming the High Court's decision.

**45.** The Applicant further submits that the application for review of the Court of Appeal's judgment and the constitutional petition are extraordinary remedies which the national courts are not required to apply. For these reasons, the Applicant requests that the Court take into account his appeals to the Court of Appeal sitting at Mwanza and, rule that he has exhausted domestic remedies and admit his Application.

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**46.** The Court notes that, in the spirit and letter of Article 56(5) of the Charter and Rule 40(5**)** of the Rules, any Application brought before it must meet the requirement of exhaustion of local remedies unless it is obvious that such remedies are not available, not effective and not sufficient or the procedures to access them are unduly prolonged.[8]

**47.** In the instant case, the Court notes that after the judgment of the High Court, the Applicant filed an appeal before the Court of Appeal, the highest court in the judicial system of the Respondent State. The Court considers that the Applicant has exhausted the domestic remedies given that that proceedings at the High Court and at the Court of Appeal offered the Respondent State ample opportunities to address the allegations brought by the Applicant before this Court**.**[9]

**48.** On the application for review and constitutional petition, the Court has previously found that these are extraordinary remedies which the Applicant was not required to exhaust.[10]

8 *Werema Wangoko Werema v Tanzania* (merits), § 40; *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 40.

9 *Alex Thomas v Tanzania* (merits), §§ 60-65.

10 *Livinus Daudi Manyuka v Tanzania* (merits and reparations), § 45; *Kennedy Ivan v Tanzania* (merits and reparations), § 42; *Werema Wangoko Werema vTanzania* (merits), § 40; *Alex Thomas v Tanzania* (merits), § 64.

**49.** Therefore, pursuant to Article 56(5) of the Charter and Rule 40(5) of the Rules, the Applicant exhausted the local remedies.

**50.** In conclusion, the Court dismisses the objection based on non-exhaustion of local remedies.

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

**51.** The Respondent State contends that, even though Rule 40(6) of the Rules does not specify what is meant by reasonable time, international human rights case law, in particular, that of the African Commission on Human and Peoples' Rights in the matter of *Michael Majuru v Zimbabwe*[11] has established that six (6) months is considered a reasonable time.

**52.** The Respondent State also notes that, in the present case, the Applicant seized the Court on 14 July 2016, that is, five (5) years after they deposited the Declaration prescribed under Article 34(6) of the Protocol which allows referral of cases to the Court by individuals and NGOs. The Respondent State infers from this that, this time frame is unreasonable and that the Application must therefore be declared inadmissible.

**53.** In his Reply, the Applicant asserts that he does not question the timeframe for the case as presented by the Respondent State, but rather challenges what the latter considers as an unreasonable time through erroneous interpretation of Article 34(6) of the Protocol, without taking into account the circumstances in which he found himself after exhausting the local remedies.

**54.** He asserts that the Court should take into account his situation as an indigent person, a layman in matters of law, a person without legal assistance, incarcerated and subject to restrictions, to decide that, there are sufficient reasons to justify filing his Application on the date indicated.

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**55.** Pursuant to Article 56(6) of the Charter as restated in Rule 50(6) of the Rules, in order for an application to be admissible, it must

11 *Michael Majuru v Zimbabwe*, ACHPR, No. 308/2005, 24 November 2008, § 108.

"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". The Court notes that these provisions do not set a time limit within which it must be seized.

**56.** However, the Court has held that "the reasonableness of the time limit for referral depends on the particular circumstances of each case and must be determined on a case-by-case basis".[12] In this regard, the Court has considered as relevant factors, the fact that an applicant is incarcerated,[13] his indigence, the time taken to utilise the procedures of the application for review at the Court of Appeal, or the time taken to access the documents on file,[14] the recent establishment of the Court, the need for time to reflect on the advisability of seizing the Court and determine the complaints to be submitted.[15]

**57.** In the present case, the Court notes that Court of Appeal dismissed the Applicant's appeal on 2 July 2003 and the Applicant filed the Application on 14 July 2016. As the judgment of the Court of Appeal was on 2 July 2003, prior to the deposit of the Declaration provided under Article 34(6) of the Protocol, on 29 March 2010, the Applicant was able to file an application only after the latter date. Therefore, the assessment of reasonable time will be from 29 March 2010.

**58.** In this regard, the Court notes that between the date of deposit of the Declaration on 29 March 2010 and when the Application was filed on 14 July 2016, a period of six (6) years, three (3) months and fifteen (15) days elapsed.

**59.** The Court previously considered that a period of five (5) years and one (1) month was reasonable having regard to the situation of the applicants.[16] In the said cases, the Court took into account the fact that the Applicants were in prison, restricted in their movement with limited access to information, and the fact that

12 *Beneficiaries of late Norbert Zongo & ors v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, § 92; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 56; *Alex Thomas v Tanzania* (merits), § 73.

13 *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 52; *Alex Thomas v Tanzania* (merits), § 74.

14 *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 61.

15 *Beneficiaries of late Norbert Zongo & ors v Burkina Faso* (preliminary objections), § 122.

16 *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 50, *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 54.

they were laymen in matters of law, were indigent and without the assistance of a lawyer during the trials before the domestic courts.

**60.** Furthermore, the Court has held that failure to file an application within a reasonable time due to indigence and incarceration must be proven and cannot be justified by blanket assertions or assumptions. The Court has accordingly held that applications filed after five (5) years did not meet the requirement of reasonableness where the Applicants, although incarcerated, did not provide proof that they were lay, illiterate or had no knowledge of the existence of the Court.

**61.** The Court has also considered that where Applicants had filed applications for review before the Court of Appeal and this had either been determined or were pending by the time they filed their Applications before this Court this would be taken as an additional factor justifying the delay by those Applicants in filing their applications before this Court as they had to wait for the outcome of the review procedure.

**62.** The Court observes that while it emerges from the record that the Applicant was incarcerated at the time of filing the Application, he has not provided evidence to support his claim of indigence and that he was subject to restrictions. The Applicant also did not apply for a review of the judgment of the Court of Appeal of 2 July 2003.

**63.** In view of the foregoing, the Court finds that the filing of the Application Six (6) years, three (3) months and fifteen (15) days after exhaustion of local remedies is not a reasonable time within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules. The Court therefore upholds the Respondent State's objection in this regard.

**64.** The conditions listed in Article 56 of the Charter and Rule 40 of the Rules being cumulative, therefore, the Application's non-compliance with Article 56(6) of the Charter and Rule 40(6) of the Rules renders the application inadmissible.

## VII. Costs

**65.** The Court notes that, none of the parties has made submissions on costs.

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

**67.** In view of the above provision, the Court rules that each party shall bear its own costs.

## VIII. Operative part

**68.** For these reasons,

The Court

*Unanimously,*

*On jurisdiction*

i. *Dismisses* the objection to its jurisdiction;

ii. *Declares* that it has jurisdiction.

*On admissibility*

iii. *Dismisses* the objection based on non- 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 and Rule 40(6) of the Rules;

v. *Declares* that the Application is inadmissible.

*On costs*

vi. *Orders* each party to bear its own costs.

## Lyambaka v Tanzania (admissibility) (2020) 4 AfCLR 574

Application 010/2016, *Hamad Mohamed Lyambaka v United Republic of Tanzania*

Ruling (admissibility) 25 September 2020. 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, who was convicted and serving separate sentences for armed robbery and rape, brought this action alleging a violation of his rights by the Respondent State on the grounds that the domestic court acted erroneously in its consideration of his case. The Court declared the case inadmissible for failure to file within a reasonable time after exhaustion of local remedies.

**Jurisdiction** (nature of jurisdiction in cases involving domestic courts, 23-25)

**Admissibility** (submission within a reasonable time, 46-51)

## I. The Parties

**1.** Mr Hamad Mohamed Lyambaka (hereinafter referred to as "the Applicant") is a Tanzanian national currently incarcerated in Butimba Central Prison in Mwanza, Tanzania, serving a thirty (30) year sentence for the offence of armed robbery. The Applicant is concurrently serving a life sentence for the offence of rape.

**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. It also deposited, on 29 March 2010, 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. The Court ruled that the withdrawal of the Declaration does not have any bearing on pending cases and will take effect on 22 November 2020.[1]

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

## II. Subject of the Application

### A. Facts of the matter

**3.** The Application arises from the Applicant's conviction, jointly and together with four other defendants, for the offences of armed robbery and gang rape for which the District Court of Musoma sentenced him to thirty (30) years in prison and life imprisonment respectively by a judgment delivered on 16 July 2002 in Criminal Case No 35 of 2001.

**4.** Aggrieved by the decision of the District Court, the Applicant filed a Criminal Appeal No. 05 of 2003 before the High Court of Tanzania sitting at Mwanza, which in a judgment dated 2 July 2004, dismissed his claims. He further then appealed the judgment of the High Court before the Court of Appeal sitting at Mwanza in Criminal Appeal No. 178 of 2004. On 16 March 2007, the Court of Appeal dismissed the Applicant's appeal.

### B. Alleged violations

**5.** The Applicant alleges that:

i. the judgment of the Court of Appeal was erroneous as the court did not sufficiently evaluate the evidence presented by the prosecution;

ii. the Court of Appeal did not consider all grounds of appeal raised by the Applicant and thus violated his fundamental right to be heard by a court of law; and

iii. his right to legal representation was violated as the Respondent State failed to accord to him legal representation.

## III. Summary of the Procedure before the Court

**6.** The Registry received the Application on 26 February 2016, served it on the Respondent State on 12 April 2016 and transmitted it to the entities listed under Rule 35(3) of the Rules on 22 April 2016.

**7.** The Parties filed their pleadings on the merits within the time prescribed by the Court and these were duly exchanged.

**8.** Pleadings on the merits were closed on 6 September 2017 and the Parties were duly notified.

**9.** On 6 July 2018, the Registry requested the Parties to file their pleadings on reparations.

**10.** On 13 September 2018, the Applicant filed his pleadings on reparations after being accorded the requested extension of time to do so. The Respondent State similarly filed its response to

the Applicant's submissions on reparations on 22 August 2019. Pleadings on reparations were closed on 3 August 2020 and the Parties were duly notified.

**11.** On 13 May 2020, the Registry sent a letter to the Applicant notifying him of the Respondent State's withdrawal of its Declaration made under Article 34(6) of the Protocol. By the same letter, the Registry also notified the Applicant of the decision of the Court of 9 April 2020 that the withdrawal will take effect only after the lapse of twelve (12) months from the date of deposit thereof, that is, 22 November 2020 and it does not have any effect on all pending applications at the time of the withdrawal, including his Application.

## IV. Prayers of the Parties

**12.** The Applicant prays the Court to make the following findings with respect to its jurisdiction and the admissibility of the Application:

i. that the Court has jurisdiction to examine the Application; and

ii. that the Application has met the admissibility requirements as stipulated under Article 56 of the Charter, Article 6(2) of the Protocol and Rule 40(6) of the Rules of the Court

**13.** With respect to the merits of the Application, the Applicant prays the Court to:

i. declare that the Respondent State violated Articles 2, 3(1) and (2) and 7(1)(c) of the Charter;

ii. declare that the Respondent State violated Articles 1 and 107A (2) of its Constitution;

iii. restore justice where it was overlooked and quash both his conviction and the sentence imposed on him;

iv. set him at liberty;

v. grant reparations in his favour;

vi. declare that the costs of the Application be borne by the Respondent State; and

vii. grant any other order(s) or relief(s) as the Court may deem fit.

**14.** The Respondent State makes the following prayers with respect to the jurisdiction of the Court and admissibility of the Application:

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 or Article 56 and Article 6(2) of the Protocol;

3. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules and Article 6(2) of the Protocol;

4. That the Application be declared inadmissible;
5. That the Application be dismissed in accordance to Rule 38 of the Rules of Court;
6. That the costs of this Application be borne by the Applicant.

**15.** With respect to the merits of the Application, the Respondent State prays the Court to find that there is no need to pronounce itself. In the alternative, the Respondent State prays the Court to grant the following orders:

1. That the Government of the United Republic of Tanzania did not violate Articles 2, 3(1), 3(2), 7(1) (c) of the African Charter on Human and Peoples' Rights;
2. That the Government of the United Republic of Tanzania did not contravene Article 1 and 107A (2) (b) of the Constitution of the United Republic of Tanzania;
3. That the Application be dismissed for lack of merit;
4. That the Applicant's prayers be dismissed;
5. That the Applicant not be awarded reparations;
6. That the costs of this Application be borne by the Applicant.

## 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 pursuant to Rule 39(1) of the Rules "[t]he Court shall conduct preliminary examination of its jurisdiction …".

**18.** It emerges from the above-mentioned provisions that for all applications, the Court must carry out a preliminary examination of its jurisdiction and examine any objections raised. In the instant matter, the Respondent State raises an objection in relation to jurisdiction first, on the ground that the Court is being called to exercise appellate jurisdiction, and second, on the ground that the Court lacks jurisdiction to quash the conviction and set aside the sentence.

## A. Objection to material jurisdiction

**19.** The Respondent State alleges that this Court does not have jurisdiction to hear this Application as it raises issues of fact and law, which had been finally determined by the Court of Appeal of Tanzania. The Respondent State avers that, through this Application, this Court is being asked to act as an appellate court.

**20.** Relying on Rule 26 of the Rules and the ruling in the case of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State also avers that this Court lacks jurisdiction to quash the conviction set aside sentences and order the release of the Applicant from prison as these decisions were affirmed by the highest court of the land.

**21.** The Applicant contends that the failure of the Court of Appeal to properly consider all the grounds he had raised invokes the jurisdiction of this Court to hear the Application. He further argues that the Respondent State's claim that this Court lacks jurisdiction to quash the conviction, set aside the sentences and order his release is not founded.

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**22.** With respect to the Respondent State's objection that this Court is being called to act as an appellate court, the Court recalls, as it has consistently held, that pursuant to Article 3(1) of the Protocol, it has jurisdiction to consider any Application filed before it provided that the latter alleges the violation of rights guaranteed in the Charter or any other human rights instruments ratified by the Respondent State.[2]

**23.** The Court further reiterates that, while it does not exercise appellate jurisdiction with respect to decisions of domestic courts, it is empowered by provisions of Article 3(1) of the Protocol to ensure the observance of the obligations undertaken under the Charter and any other human rights instruments ratified by the

2 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application 025/2016, Judgment of 28 March 2019 (merits and reparations), § 26; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; and *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 25.

Respondent State.[3]

**24.** The Court observes that, in the instant Application, the Applicant seeks an assessment of whether the manner in which the Court of Appeal examined his claims and evidence in support thereof are in conformity with the Charter and other human rights instruments to which the Respondent State is a party. Consequently, the Court finds that the issues raised fall within its material jurisdiction and dismisses the objection.

**25.** Regarding the objection that this Court lacks jurisdiction to quash the conviction and set aside the sentence, the Court reiterates its position that, while it does not exercise appellate jurisdiction, it is empowered under Article 3(1) of the Protocol, to examine whether proceedings before domestic courts are conducted in accordance with international obligations set out in the Charter and other international instruments to which the Respondent State is a party.[4] Accordingly, the Court dismisses the objection.

**26.** From the foregoing, the Court finds that it has material jurisdiction to hear the Application.

## B. Other aspects of jurisdiction

**27.** The Court notes that none of the Parties raises any contestation with respect to its personal, temporal and territorial jurisdiction.

**28.** The Court however notes, with respect to its personal jurisdiction, that on 21 November 2019, the Respondent State deposited an instrument withdrawing the Declaration that it had made under Article 34(6) of the Protocol. In the judgment that it delivered on 26 June 2020 in the matter of *Andrew Ambrose Cheusi v United Republic of Tanzania*, the Court held that the withdrawal does not have any retroactive effect and, therefore, has no bearing on matters pending prior to its filing, as is the case of the present Application.[5] The Court consequently holds that it has personal jurisdiction to hear the present Application.

3 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 130; *Mohamed Abubakari v Tanzania* (merits), § 29; *Christopher Jonas v Tanzania* (merits), § 28; and *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165, §§ 53 and 54.

4 *Abubakari v Tanzania* (merits), § 29; *Thomas Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 31; *Werema Wakongo Werema and Waisiri Wakongo Werema v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 31.

5 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39. See also, *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application 018/2018, Judgment of 15 July 2020, § 19.

**29.** With respect to its temporal and territorial jurisdiction, and noting that there is no information on record suggesting that the Court does not have jurisdiction in these respects, the Court holds that:

i. It has temporal jurisdiction in view of the fact that although the alleged violations commenced in 2004, which is prior to the filing of the Declaration in 2010, they continued thereafter since the Applicant is still serving sentences based on his conviction that he avers constitutes a breach of his right to a fair trial;[6]

ii. It has territorial jurisdiction given that the facts of the matter occurred within the territory of the Respondent State, which is a state party to the Charter.

**30.** In view of the foregoing, the Court holds that it has jurisdiction to hear the present Application.

## VI. Admissibility of the Application

**31.** 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". According to Rule 39(1) of the 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 [the] Rules."

**32.** Rule 40 of the Rules, which in essence 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 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

6 *Jebra Kambole v Tanzania*, § 24; *Dismas Bunyerere v United Republic of Tanzania*, ACtHPR, Application 031/2015, Judgment of 28 November 2019, § 28(ii); *Norbert Zongo & ors v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 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.

**33.** 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

**34.** The Respondent State's objections relate, first to the requirement of exhaustion of local remedies, and second, to the filing of the Application within a reasonable time.

### i. Objection on non-exhaustion of local remedies

**35.** The Respondent State alleges that the Application was prematurely filed as the Applicant could have filed a constitutional petition in the High Court to complain of the violations that he alleges occurred in the proceedings before the Court of Appeal under the Basic Rights and Duties Enforcement Act [Cap 3 R.E. 2002].

**36.** The Respondent State further alleges that the Applicant could have applied for review of the Court of Appeal's judgment in Criminal Appeal No 48 of 2000 in accordance with Part IIIB, Rule 66 of the Tanzanian Court of Appeal Rules, 2009.

**37.** The Applicant avers that he had explored all available domestic remedies before filing the present Application. He refers to the judgments of the District Court of Musoma, the High Court of Tanzania sitting at Mwanza, and the Court of Appeal whose references are stated in paragraphs 4 and 5 of the present Ruling.

**38.** According to the Applicant, attempting to use the review procedure before the Court of Appeal would have been a waste of time and the same court would have apparently failed to notice a miscarriage of justice which was intentional.

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**39.** The Court notes that pursuant to Article 56(5) of the Charter, applications brought before it should be filed after exhausting local

remedies that exist unless it is proved that such remedies have been unduly prolonged. However, as the Court has consistently held, an applicant is not compelled to exhaust remedies that are non-judicial or extraordinary in nature.[7] As such, the remedies which consist of filing an application for review or a constitutional petition for breach of fundamental rights are extraordinary as they operate in the judicial system of the Respondent State.[8]

**40.** The Court observes that, in the present Application, the Applicant filed an appeal against his conviction and sentencing before the Court of Appeal, which is the highest court of the Respondent State. The Court of Appeal, on 16 March 2007, dismissed the Applicant's appeal. Against these facts, which the Respondent State does not challenge, the Court finds that the Applicant has exhausted all available local remedies within the meaning of Article 56(5) of the Charter and Rule 40(5) of the Rules.

**41.** For this reason, the Court dismisses the Respondent State's objection that the Application does not meet the requirement of exhaustion of local remedies.

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

**42.** The Respondent State argues that the Applicant did not file his Application within a reasonable time. He alleges that the Application was filed six (6) years and eight (8) months after exhausting local remedies while international human rights jurisprudence provides for six (6) months as a reasonable to do so. In support of its submission, the Respondent State refers to the finding of the African Commission on Human and Peoples' Rights in the matter of *Michael Majuru v Zimbabwe*.

**43.** The Respondent State further avers that being in custody is not a justification for not filing the present Application within a reasonable time because the prison authorities actually helped the Applicant lodge the Application.

**44.** The Applicant contends that he filed the Application within a reasonable time in compliance with Article 56(5) of the Charter. He avers that the time is reasonable because he used the available opportunity to address the Application to the Court in a

7 *Alex Thomas v Tanzania* (merits), § 64; *Wilfred Onyango Nganyi & 9 ors v Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95; *Dismas Bunyerere v Tanzania*, § 36.

8 *Alex Thomas v Tanzania* (merits), § 65; *Mohamed Abubakari v Tanzania* (merits), §§ 66-70; *Christopher Jonas v Tanzania* (merits), § 44; *Dismas Bunyerere v Tanzania*, § 36.

timely manner.

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**45.** The Court notes that Article 56(6) of the Charter, which is restated in Rule 40(6) of the Rules, does not stipulate a specific time frame within which an Application must be filed before it. The provisions of Article 56(6) of the Charter merely prescribe that applications shall 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 of the matter.

**46.** The Court observes that, the reckoning of time within which to assess reasonableness in filing the Application should have been the date when the Court of Appeal rendered its judgment that is on 16 March 2007. However, in the instant case, the actual starting date for computing the time is 29 March 2010 when the Respondent State filed its Declaration. Given that the Application was filed on 26 February 2016, the said time is five (5) years, eleven (11) months and twenty-seven (27) days. The issue for determination is whether such time is reasonable in the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules.

**47.** The Court recalls that the reasonableness of the time frame to file an application within the meaning of Article 56(6) of the Charter "depends on the particular circumstances of each case and must be determined on a case-by-case basis".[9] Among the relevant factors, the Court has based its evaluation on the situation of the Applicants, including whether they had attempted to exhaust extraordinary remedies, or if they were lay, indigent, incarcerated persons who had not benefited from free legal assistance.[10]

**48.** In this respect, the Court has held in particular that failure to file an application within a reasonable time due to indigence and incarceration must be proved and cannot be justified by blanket

9 *Norbert Zongo & ors v Burkina Faso* (preliminary objections), § 121; *Alex Thomas v Tanzania* (merits), §§ 73-74; *Armand Guehi v Tanzania* (merits and reparations), §§ 55-57; *Werema Wangoko Werema & anor v Tanzania* (merits), § 45.

10 *Jibu Amir alias Mussa & anor v United Republic of Tanzania*, ACtHPR, Application 014/2015, Judgment of 28 November 2019, § 50; *Christopher Jonas v Tanzania* (merits), § 53; *Mohamed Abubakari v Tanzania* (merits), § 92; and *Alex Thomas v Tanzania* (merits), §§ 74.

assertions or assumptions. The Court has accordingly held that applications filed after five (5) years did not meet the requirement of reasonableness where the Applicants although incarcerated did not justify the delay by proving for instance that they were lay, illiterate or justified the delay.[11]

**49.** In the instant case, the Applicant does not aver that the delay was owing to him being lay, illiterate, indigent or having pursued an extraordinary remedy. He only submits that he used the available opportunity in a timely manner to file the Application. Conversely, the Respondent State alleges that the delay may not be justified by the Applicant's incarceration because the prison authorities actually helped channel the Application to this Court.

**50.** Against these submissions, the Court observes that while it emerges from the record that the Applicant was incarcerated, there is no proof that his incarceration constituted an impediment to the timely filing of the Application. As a matter of fact, the Applicant does not aver that an earlier attempt to file the Application through the prison authorities was met with a rejection that would have justified the delay. As such, the Applicant's averment that he seized the available opportunity to file the case is not well founded and he has not attempted to adduce evidence as to why it took him five (5) years, eleven (11) months and twenty-seven (27) days to file the Application. In the absence of clear and compelling justification for the above mentioned lapse of time, the Court finds that the Application was not filed within a reasonable time in the meaning of Article 56(5) of the Charter and Rule 40(6) of the Rules.

**51.** The Court therefore upholds the Respondent State's objection relating to failure to file the Application within a reasonable time.

**52.** The Court recalls that the conditions of admissibility under Article 56 of the Charter being cumulative, failure to fulfil any of them renders the Application inadmissible. In the instant matter, given that the Application did not meet the requirement made under Article 56(6) of the Charter, the Court finds the Application is inadmissible.

11 See *Godfred Anthony & anor v United Republic of Tanzania*, ACtHPR, Application 015/2015, Ruling of 26 September 2019 (jurisdiction and admissibility), §§ 48-49; *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application 020/2015, Ruling of 28 November 2019 (jurisdiction and admissibility), §§ 51-56.

## VII. Costs

**53.** The Applicant prays the Court to order that the costs of the Application should be borne by the Respondent State.

**54.** The Respondent State prays the Court to rule that the costs of the Application should be borne by the Applicant.

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

**56.** In the present Application, the Court rules that each party shall bear its own costs.

## VIII. Operative part

**57.** 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 objections based on non-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 and Rule 40(6) of the Rules;

v. *Declares* that the Application is inadmissible.

*On costs*

vi. *Orders* that each party shall bear its own costs.

# Mornah v Benin & ors (intervention by Mauritius) (2020) 4 AfCLR 586

Application 002/2020, (*Application for Intervention by Mauritius*) in Application 028/2018, *Bernard AnbaTaayela Mornah v Republic of Benin & 7 ors*

Ruling (intervention), 25 September 2020. Done in English and French, the French text being authoritative.

Judges: KIOKO, MATUSSE, MENGUE, MUKAMULISA, BENSAOULA, TCHIKAYA, and ANUKAM.

Recused under Article 22: ORÉ, BEN ACHOUR, CHIZUMILA and ABOUD

The Applicant State brought this application for leave to intervene in an action brought against eight other states. The Court granted the Applicant State leave to intervene.

**Jurisdiction** (*prima facie*, 13)

**Procedure** (determination of intervenor's interest, 16)

**Self-determination** (*erga omnes* nature, 20)

Separate Opinion: TCHIKAYA

**Procedure** (nature of proceedings for intervention, 9,10, 14)

## I. Background

**1.** The Republic of Mauritius is a Member State of the African Union (hereinafter referred to as "the AU") and brings this Request for Leave to Intervene in the Application filed by Bernard Anbataayela Mornah (hereinafter referred to as "the Applicant"). Together with its Request, it also makes its submissions on the merits of the main Application.

**2.** On 14 November 2019, the Applicant, a Ghanaian national and the National Chairman of the Convention of People 's Party a political party in Ghana filed his Application against the Republic of Benin, Burkina Faso, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia (hereinafter collectively referred to as "the Respondent States").

**3.** The Respondent States became Parties to the African Charter on Human and Peoples' Rights (hereinafter the "African Charter" or "the Charter") as follows: Benin – 21 October 1986; Burkina Faso – 21 October 1986; Côte d'Ivoire –31 March 1992; Ghana –1 March 1989; Mali –21 October 1986; Malawi 17 November 1989;

Tanzania – 21 October 1986; and Tunisia – 21 October 1986.

**4.** The Respondent States all became Parties to the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter "the Protocol"), as follows: Benin 22 August 2014; Burkina Faso – 25 January 2004; Cote d'Ivoire – 25 January 2004; Ghana –25 January 2004; Mali –25 January 2004; Malawi –9 September 2008 –; Tanzania –29 March 2010; Tunisia –21 August 2007.

**5.** All the Respondents have also made a Declaration under Article 34(6) of the Protocol permitting individuals and Non-Governmental Organisations (NGOs) to directly bring cases against them before the Court (hereinafter referred to as "the Declaration") as follows: Benin: 8 February 2016; Burkina Faso: 28 July 1998; Côte d'Ivoire: 23 July 2013; Tanzania: 23 March 2010; Ghana: 10 March 2011; Malawi: 9 October 2008; Mali: 19 February 2010; Tunisia: 13 April 2017.

## II. Subject matter of the request

### A. Facts of the Matter

**6.** The Request for Leave to Intervene is in relation to the Application filed on 14 November 2018 by the Applicant wherein he alleges that by failing to protect the sovereignty, territorial integrity and independence of the Sahrawi Arab Democratic Republic (hereinafter, SADR), the Respondent States have violated Articles 3 and 4 of the Constitutive Act of the African Union; Articles 1, 13, 19, 20, 21, 22, 23 and 24 of the Charter; Articles 1 and 2 of the International Covenant on Civil and Political Rights and Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights.

**7.** The Republic of Mauritius requests that the Court should allow it to intervene in this matter alleging that it has interest in the Application as it is an AU Member States whose decolonisation is still not completed and given the *erga omnes* character of the right to self-determination.

### B. Intended Intervener's Prayers

**8.** In its Request for Leave to Intervene, the Republic of Mauritius prays the Court "for leave to intervene to make written submission in respect of the right to self-determination and decolonization" in accordance with Article 5(2) of the Protocol, Rule 33 (2) and Rule

53 of the Rules of the Court.

## III. Summary of the Procedure before the Court

**9.** The Request for intervention was filed on 31 August 2020.

**10.** On 8 September 2020, the Registry sent a notice to the Parties requesting them to submit their observations, if any, on the request for intervention, within fifteen (15) days of receipt of the notice.

**11.** No observations were received from any of the Respondent States or any other entity within the time prescribed by the Court

## IV. *Prima facie* jurisdiction

**12.** 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(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction … of the Application in accordance with Article 50 and Rule 40 of these Rules".

**13.** The Court observes that in the instant Application, the Applicant alleges violation of human rights and freedoms protected by the Charter and the Application is filed against Respondent States which have ratified the Protocol and deposited the Declaration under Article 34 (6) of the same. The Court thus finds that it has *prima facie* jurisdiction to examine the Application.

**14.** As regards the Request for Leave to Intervene, the Court notes 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." This is reiterated in Rule 33(2) of the Rules which declares that: "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".

**15.** Rule 53 of the Rules stipulates that:

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 the 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

d. 'of the jurisdiction which, in the view of the State applying to intervene, exists between it and the parties to the case.

**16.** The Court notes that the determination of whether an intervenor has interests in a case in terms of Article 5 (2) of the Protocol and Rule 53 of the Rules depends on the nature of issues involved in the case, the identity of the intervenor and the potential impact of any of the decision of the Court on the intervenor and third parties.[1]

**17.** The Court observes that the instant Application mainly relates to the rights and freedoms of the people of SADR, which the Applicant alleges have been violated as a result of the continued occupation of the territory of SADR by the Kingdom of Morocco and the failure of the Respondent States to protect the sovereignty, territorial integrity and independence of SADR. In its request, the Republic of Mauritius avers that, as an AU Member State whose process of decolonisation is still incomplete and considering the *erga omnes* character of the right to self-determination, it should be granted leave for intervention in the Application. It also states that the purpose of its intervention is to make written submissions in respect of the said right to self-determination and decolonization.

**18.** The Court notes that the instant Application raises issues pertaining to the rights and freedoms of the people of SADR. However, the rights and freedoms alleged to have been violated by the Respondent States' failure to protect the independence and territorial integrity of SADR have wider significance beyond the people of SADR.

**19.** Indeed, the rights that the Applicant claims to have been violated, specifically, the right to self-determination and freedom from colonisation and oppression, the right of people to freely dispose of their wealth and natural resources, and the right to national and international peace and security protected under Articles 20, 21 and 23 of the Charter, respectively, have particular relevance to the African continent at large due to its colonial past. In addition, the basis of the main Application essentially relates to the decision of African Union, an organization to which the Republic of Mauritius is a Member State, to readmit the Kingdom of Morocco to the

1 Jurisdictional Immunities of the State (*Germany v Italy: Greece* intervening), Application by the Hellenic Republic for Permission to Intervene, ICJ, Order of 4 July 2011, § 22.

Union despite its continued occupation of the territory of SADR.

**20.** Furthermore, the Republic of Mauritius alleges that its decolonization is not complete yet; thus, making the Application a matter of great importance to it and its people. In this regard, the Court takes judicial notice of the recent Advisory Opinion of the International Court of Justice (ICJ) on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,[2] where the ICJ affirmed the *erga omnes* nature of the right to self-determination and that the decolonisation process of the Republic of Mauritius was not lawfully completed under international law.

**21.** In view of the foregoing, the Court is of the view that the Republic of Mauritius, as a Member State to the African Union has an interest in seeking to intervene in this matter for the purpose of submitting its observations on issues of relevance to the rights and freedoms of its people as well as the people of SADR. The Court, therefore, grants its Request for Leave to Intervene in the instant Application.

## V. Operative part

**22.** For these reasons:

The Court,

Unanimously,

i. *Grants* leave for the Republic of Mauritius to intervene in the instant Application;

ii. *Decides* that the submissions of the Republic of Mauritius on the merits of the main Application

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## Separate Opinion: TCHIKAYA

**1.** I have followed the final and majority position of the Court in the operative part of this decision, but I am nevertheless eager to see more precision in the wording. The presentation in the form of

2 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion (25 February2019)

an order[1] does not seem to be justified and is, for that matter, a shortcoming. It is the subject of this opinion. Following the orders, I was keen to raise this issue because their content, which is of major legal significance, should be presented in the form of a judgment of the Court.

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**2.** This is not the first time that the institution of intervention in international judicial proceedings is causing a stir at the African Court. While its development at the International Court of Justice has been laborious[2] since 1951,[3] Judge Roberto Ago predicted rather surprisingly in the Continental Shelf Case, (*Libya v Tunisia* of 1981)[4] that the judgment at the end of Malta's intervention could "sound the death knell of the institution of intervention in international trials". The Orders of the African Court on Mauritius and the Saharawi Republic of 25 September 2020 have in fact added to the confusion over a concept whose use was already not so obvious in international judicial proceedings.

1 AfCHPR, *Orders for interventions by Republic of Mauritius and the Sahrawi Arab Democratic Republic (SADR) – Matter of Bernard Anbataayela Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Tanzania and Tunisia*, 25 September 2020.

2 The issue of institution came up again at the International Court of Justice in the case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Application by Equatorial Guinea to intervene v ICJ*, Order of 21 October 1999. Equatorial Guinea was an intervener following the judgment on preliminary objections in the main proceedings. Third party States were questioned by the Court on the impact that the future judgment might have on the merits (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria),* Preliminary Objections, Judgment of 11 June 1998, §116).

3 Gonidec (P.-F.), *L'Affaire du droit d'asile* , *RGDIP*, 1951, p.547; Cuba's intervention in *Peru v Colombia* on the interpretation of the Havana Convention of 1928 and the right to asylum; ICJ, Judgment, *Haya de la Torre, Colombia v Peru*, 13 June 1951, pp. 76 s.

4 ICJ, ICJ, *Continental Shelf (Libya Arab Republic v Malta), Request by Italy for permission to intervene*, Judgment, 21 March 1984, Dissenting opinion by Judge Ago, § 22; see also Sperduti (G.), *Notes sur l'intervention dans le procès international, AFDI*, 1984, pp. 273-281. ; Decaux (E.), ICJ Judgment on the application by Malta for permission to intervene, *AFDI.*, 1981, pp. 177-202 ; Decaux (E.), *ICJ Judgment on the application by Malta for permission to intervene*, *AFDI.*, 1981, pp. 177-202

**3.** On 14 November 2019, a Ghanaian national[5] filed a motion to institute proceedings against seven States: the Republic of Benin, Burkina Faso, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia. These States were named as Respondent States. In addition to being parties to the Charter, they became parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[6] On various dates, they accepted the Court's jurisdiction to receive applications brought against them by individuals and non-governmental organisations (NGOs) with observer status with the African Court on Human and Peoples' Rights.

**4.** In addition to the obvious questions of jurisdiction, admissibility and merits regarding the initial application which the Court will subsequently have to deal with, the Court was faced with an exercise relating to its perception of the applications for intervention by two countries - Mauritius and the Sahrawi Republic - as reflected in the two Orders. The majority opinion was that the two countries could intervene in the proceedings and be welcomed by the Court. The purpose of this separate opinion is, therefore, to clarify a specific point of law: the Court should accept these interventions by way of a judgment. It is already clear from the material in the case file that this intervention was not optional in nature. The Court had to rule on the substance, *a priori* and by interlocutory decision with regard to the interests at stake.[7]

**5.** We shall then examine the questions raised by the order (I.), before going on to review the state of the law as it relates to a judgment at the end of the intervention (II).

## I. Status of the questions raised by the Order

**6.** The first question put to the Court was the designation of the proceedings relating to the decision for intervention, and whose conceptual scope would best reflect the Court's position. The

5 He is the national President of the Convention of People's Party in Ghana.

6 On the following dates, respectively: Benin, 22August 2014; Burkina Faso, 25January 200; Côte d'Ivoire, 25 January 2004; Ghana, 25 January 2004; Mali, 25January 2004; Malawi, 9 September 2008; Tanzania, 29 March 2010; Tunisia, 21 August 2007

7 This does not include an intervention in an advisory case or of the nature of an amicus curiae brief. Hervé Ascensio, Amicus curiae before international jurisdictions, ***RGDIP***, 2001, pp. 905 s.

indication here was that this was not a question of pure semantics.

## i. Beyond the dilemma of semantics

**7.** There was an assumption that we were faced with a semantic choice between two concepts, that of "order" and that of "judgment", without appreciating their substance. However, judicial practice adequately dictates the use of these concepts, unless they are defined otherwise.

**8.** The identification of the rights contained in "third party intervention" in international litigation is an issue that is "as old as Methuselah", and is a complex one. Judge Rony Abraham wondered whether the institution conferred on:

"Third party states a right to intervene in a trial, or, on the contrary, grants them a mere option which they may request to exercise, but only with authorisation of a discretionary nature that the Court may or may not decide to grant them"[8]

The various and sometimes contradictory interpretations that have followed have focused on both substance and semantics.

**9.** For some reason, perhaps, the Court does not explain, why it refers to the document by which it received the intervention of Mauritius and the SADR as an "order for intervention". It is by a Judgment that this Court should have ruled on the said applications. In the legal world, it is customary to call "a spade a spade" and "apricots are not to be confused with tomatoes". Words definitely have a meaning. Judge Ago recalled in one of his captivating writings that:

" (…) the most correct use of terms, i.e. the one which, either because of its link with the etymological origin of the term or especially because it corresponds to common and traditional usage, is most suitable to facilitate understanding and avoid misunderstandings".[9]

**10.** The Court should have used the established instrument, namely, ruling by way of a judgment or in the form of a decree. This is not mere rhetoric. The parties to a conflict are in conflict because of interests. They represent opposing views and arguments out of interest. This is, moreover, what is meant by the famous phrase by the Hague Court found in the decision on *Mavrommatis Palestine*

8 He added " The debate is obscured, however, by the fact that the notion of a "right" (to intervene) is ambiguous and, according to how that notion is understood, it is possible to argue both in favour of and, on the contrary, against the existence of such a right, without those arguments necessarily contradicting one another." v Abraham (R.), Dissenting Opinion, Intervention Judgment, Application by Honduras, 4 May 2011.

9 Ago (R.), *Droit positif et droit international*, *AFDI*, 1957, pp. 14-62

*and Jerusalem Concessions*:
"An international dispute is a disagreement on a point of fact or of law, a conflict of legal views or of interests between two people"[10]

**11.** This is the definition of an international dispute, whatever its nature. It is, at least *prima facie*, a view that the Court has of the interests involved in considering an application for intervention and in making its decision, which is not covered by an order in the international judicial tradition. This has been endorsed by the Court in the more than 100 orders it has issued to date. Orders for provisional measures issued by the Court do not presume interests. They do not have the force of *res judicata* in the main proceedings. The phrase is well known. It appears in all the reasons for orders of provisional measures issued by the Court, namely:
"The Court specifies that this Order is necessarily provisional and does not in any way prejudge the findings the Court might make as regards its jurisdiction, admissibility of the Application and the merits of this matter."[11]

**12.** Paradoxically, through the Order of 4 July 2011 permitting Greece to intervene in the case of *Jurisdictional Immunities of the State, Germany v Italy,* the International Court of Justice itself was able to create the impression that an order could cover the important subject of intervention. The reason for the order was that the court had to decide and order the limits of the intervention in this particular case. The court authorized it but at the same time circumscribed the scope of the intervention. The Greek application was limited.

**13.** The Court stated as much right from the second "whereas clause" of the Order:
"Whereas, in its Application, the Hellenic Republic […] states that "its intention is to solely intervene in the aspect of the procedure relating to judgments rendered by its own (domestic Greek) Tribunals and Courts on occurrences during World War II and enforced (exequatur) by the Italian Courts".[12]

This restriction seemed to justify the order.

10 PCIJ, *Mavrommatis Concessions in Palestine and Jerusalem*, *Greece v United Kingdom*, ICJ, 30 August 1924 and 26 March 1925.

11 See, in particular, AfCHPR, *Sébastien Germain Ajavon Order,* 7 December 2018, § 47; see also: "For the avoidance of doubt, this Order is provisional in nature and in no way prejudges the Court's conclusions on its jurisdiction, admissibility and the merits of the Application instituting proceedings", in AfCHPR, *Guillaume Kigbafori Soro v Cote d'Ivoire*, 15 September 2020, § 35

12 ICJ, *Jurisdictional Immunities of the State (Germany v Italy), application, to intervene, order of 4 July 2011,*§ 2.

**14.** I further submit that, although the order was a judicial document of the Court,[13] it was not sufficient reason to issue the interlocutory ruling which is more of a judgment of the Court. The question raised is therefore not merely semantic; the applications submitted are on the merits, and the Court is not required to rule on them at this stage. This is the meaning of the applicable ordinary law.

## ii. Orders are inappropriate and contrary to the ordinary law of intervention

**15.** African human rights law cannot deviate from the legal bases established for this intervention mechanism. Third party intervention is governed by the provisions of the Protocol establishing the African Court, as explained further here below (see *infra*, § 20 et seq.).

**16.** It can be said in brief that the same is true of the European system. Article 36 of the European Convention[14] provides for third party intervention. The first paragraph states in particular that:

"In all cases before a Chamber or the Grand Chamber, a High Contracting Party whose national is an applicant may submit written comments and take part in hearings."[15]

**17.** This is a right that the Contracting Parties and the Commissioner for Human Rights derive from Protocol No. 14, which is incorporated into the Convention. It is enshrined in abundant case law.[16] One may also recall the case concerning seventeen asylum seekers and four families of Albanian, Bosnian and Kosovar nationals accompanied by children aged between one and eleven years at the time. They complained under Article 3 of the Convention that for several months, they had been accommodated by the French authorities in inhuman and degrading conditions, in a camp made of tents and located in a car park (...), and that they had not received material and financial support provided for by

13 Rule 68 of the new Rules of Court, 25 September 2020: "In the exercise of judicial functions, the Court will render its decisions in the form of a judgment, ruling, order, opinion, instruction, direction or any other form of pronouncement as the Court deems necessary. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. Introduced by Art. 13 of Protocol No. 14 of 13 May 2004.

14 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

15 Introduced by Art. 13 of Protocol no 14 of 13 May 2004.

16 For example, the Armenian Government, which exercised its right to intervene under Article 36 § 1 of the Convention, was represented by its Agent, Mr G. Kostanyan.

the national law.[17] The alleged violations were dismissed, but the Court accepted the applications for intervention by human rights organisations. On the basis of Article 13, the Section President in the instant case authorized the observations received from the respondent government and those submitted in reply by the applicants, as well as the comments received on 12 November 2013 from non-governmental organisations, the *Comité Inter-Mouvements Auprès des Evacués* (CIMADE), the *Groupe d'information et de soutien des immigrés* (GISTI) and the National Human Rights Advisory Commission (NHRAC). This is confirmed by the various rulings. It is the practical meaning of the provisions of the aforementioned 2010 European protocol.

**18.** The Inter-American Convention on Human Rights[18] provides for automatic intervention in pending cases. It states, inter alia, that: "The Commission shall appear in all cases before the Court." (Article 57 of the Convention).

**19.** It follows from these examples and the state of the applicable law that the African Court had only one possibility with regard to the cases in question: to rule collegially on the application of the provisions of Article 5.2 of the Protocol[19] by taking a full decision on the applications for intervention by the two applicants, the Republic of Mauritius and the SADR. This is the appropriate judgment that would take account of the interests at stake and the state of the applicable law.

## II. State of the applicable law, a decision authorizing intervention

**20.** On the one hand is the law applicable by this Court and, on the other, the elements that are peculiar to the case. Contrary to its usual litigation that is strictly confined to international human rights law, the pending case is interesting in terms of rights of the States – the *Western Sahara*[20] dispute in particular - which

17 ECHR, ***B.G et al v France***, 10 September 2020.

18 Adopted in San José, Costa Rica, on 22 November 1969

19 Restated in Rule 39 of the Rules of Procedure of the Court: "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 under Rule 61 of these Rules.

20 ***Western Sahara, ICJ, Order***, 22 May 1975; ***Avis consultatif***, 16 October 1975, ***Rec.***,p.6 ; Chappez (J.), ***RGDIP***, 1976, p.1132; Condorelli (L.), ***Cta.I.***1978, p.396; Flory (M.), ***AFDI***, 1975, p.253; Janis (M. W), ***Harvard ILJ***, 1976, p.609; Prévost (J.-F), ***JDI***, 1976, p.831; Shwa (M.), ***BYbIL***, 1978, p.118.

underlies Mr. Bernard Anbataayela Mornah's application.

**21.** The Armand Guehi Case of 2015 set a precedent at the African Court. It however provides a different solution from the one the Court opted for.

## i. The Protocol establishing the Court and the Rules of Court providing for a judgement for intervention

**22.** States which consider that they have an interest in a case may submit an application to the Court for leave to intervene, in accordance with the above-mentioned provisions of the Protocol. It is not specified how the Court will deal with such an application. Nor are the Rules of Procedure precise enough.

**23.** Yet, seven paragraphs are devoted to this issue in Article 61 of the Rules. The first paragraph recalls that under Article 5, paragraph 2 States Parties have the right to intervene. In the second paragraph, the possibility of intervention is, rather singularly, extended to "any other person" having an interest in a case. It is not certain whether this was intended by the Protocol. The third paragraph lists the constituent elements of the application,[21] while the fourth paragraph basically sets a time-limit for the submission of the application, which is before the closure of the written proceedings. The parties are informed of this (paragraph 5) and may submit observations. It is paragraph 6 which does not seem to specify the nature of the proceedings through which the Court must interpret its decision. It simply states that:

"Where the Court rules that the Application is admissible, it shall fix a time limit within which the intervening party shall submit its written observations. Such submissions shall be forwarded by the Registrar to the parties to the case, who may file written submissions in reply within a deadline set by the Court."[22]

**24.** The Rule concludes that the intervening party has the right to submit observations on the subject of the intervention during the hearing, if the Court decides to hold one (paragraph 7). It follows that both the treaty law establishing the Court and secondary legislation (the Rules) do not specify the nature and scope of the proceedings authorising a State to intervene. It is understandable

21 Article 61, paragraph 3 of the Rules: " An Application to intervene shall indicate: a) the names and addresses of the Applicant or his/her representatives, if any; b) the Applicant's interest in the case; c) the purpose of the intervention; and d) a list of all supporting documents.

22 Rule 61, paragraph 6 of the Rules of Court, 25 September 2020.

that the Court should be able to give an answer to this question.

**25.** The Application of the Republic of Mauritius[23] set the Court on the right track in two respects: (a) This application for leave to intervene, which is in line with the present provisions of Rule 61 of the Rules of the Court is in the form of a discussion, and (b) it speaks to the merits of the case:

"As the International Court of Justice (ICJ) stressed in its Advisory Opinion of 25 February 2019 on the Legal Effects of the Separation of the Chagos Archipelago from Mauritius in 1965, respect for the right to self-determination is an obligation *erga omnes.* All States have a legal interest in protecting that right."

**26.** The Saharawi Republic in its application stated that:

"Since the substance of the issues raised in the application before the Honourable Court mainly concerns our country, the Sahrawi Arab Democratic Republic has a primary interest in joining the case and following the proceedings thereof."

**27.** Arguments for intervention were therefore formulated and the Court had to assess them in full by means of a judgment. The solution in the Armand Guehi case, which set a precedent, appears to be only a compromise.

## ii. The middle-ground solution in the Armand Guehi decision of 2015

**28.** There is a precedent in the case law of the Court. The Court did not want to proceed in the same way. The precedent concerns the *Armand Guehi* case of 2015 in which the applicant, an Ivorian citizen, was found guilty of the murder of his wife and was sentenced to death by the Tanzanian courts.[24] However, he claimed before this Court that his rights had been violated in the national proceedings. The Court found that certain guarantees of a fair trial had been violated. The said violations had not, according to the Court, vitiated the decision of the Tanzanian courts regarding the applicant's guilt. The Court also dismissed his application for release. It had, however, awarded compensation for the violations found.

**29.** The Armand Guehi case is of interest with respect to the Mauritius and the SADR intervention orders because of the presence of a third State in the proceedings, namely, Côte d'Ivoire. As soon

23 Application for leave to intervene by the Republic of Mauritius, 31 August 2020, in 6 points.

24 State of the territory where he is held as a prisoner

as Côte d'Ivoire was informed of the current proceedings on 21 January 2015, it requested to intervene on 1 April 2015 in its capacity as the applicant's State of origin. It was authorised to bring a case as an intervening State in the proceedings. Côte d'Ivoire filed its observations on 16 May 2016 and 4 May 2017. The judgment was delivered on 7 December 2018.[25] The Court's approach in this case with regard to the third party intervener is a middle-ground approach that, on the one hand, avoids clearly defining the status and rights of the intervening State and, on the other hand, allows the third party to participate in the proceedings to a certain extent. No decision on the intervention was taken; the judgment of 7 December 2018 is unique.

**30.** This situation should lead the Court to issue a judgement authorising intervention and stating: a) the *ratione personae*, the status of the third party intervener in the proceedings and, b) the *ratione materiae*, circumscribing the litigious rights covered by the intervention. These aspects, which are not proceedings *per se*, are akin to them, and it is therefore desirable in proceedings to issue a separate judgment of the Court. The judicial reason for this will be to ensure clarity and distinction between the rights of each party. This is what the Algerian Judge, Bensaoula, who sat in this case, seemed to advocate in her separate opinion appended to the *Armand Guehi* single judgment:[26]

> "... at no point in the judgment does it appear that the Court responded to those requests, which, in my respectful view, constitutes a procedural irregularity both with regard to the intervening State to declare its application for intervention admissible, and on the merits of its request approving the applicant's allegations, even if only by considering them as supported by the Court in its decision on the applicant's requests because similar to those of the intervening State."[27].

**31.** Although I approve of the operative part of the two intervention orders of Mauritius and the Sahrawi Republic, I however note that they perpetuate a lack of clarity already introduced by the 2015 *Guehi* case law. The institution of intervention appears to be a delicate matter in international litigation, and even more so when it applies to international human rights law. In a general reflection, one may wonder about the nature of the rights that an

25 AfCHPR, *Armand Guehi v Tanzania – Cote d'Ivoire intervening State*, 7 December 2018.

26 An Order dated 18 March 2016 granting provisional measures was issued by the Court. It stayed the execution of the death sentence.

27 Judge Bensaoula, Separate Opinion, AfCPHR, *Armand Guehi,* see also *2 RJCA*, vol. 2, 2017-2018, p. 493.

intervention by a third party - be it a State or an individual - could cover in the field of human rights. The Court will no doubt give its decision on the merits.

**32.** However, still on the issue of delineation, the Court refrains from analysing and exploring the already known status of non-party intervener, which requires setting a framework. On 13 September 1990, in the Land, Island and Maritime Frontiers Case,[28] the International Court of Justice granted Nicaragua leave to intervene. The purpose of Nicaragua's intervention was to inform the Court about the rights at issue in the dispute. The Court in The Hague held that:

"…the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party."[29]

**33.** Having been informed of the pleadings submitted by El Salvador and Honduras, Nicaragua considered that it had an interest of a legal nature that could be affected by the ruling in the case. The Court allowed Nicaragua to submit a written declaration and El Salvador and Honduras to submit written observations on the declaration. Nicaragua was then asked to make oral submissions as a *non-party in the proceedings*. These are some of the possibilities offered by the applications for intervention by Mauritius and the SADR, which the Court could exploit.

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**34.** Legal theory may have created the impression that the institution of intervention "had seven lives".[30] In its orders on Mauritius and the SADR, the African Court may have found the eighth one... This last life seems to have no future because, when faced with such a reasoned application for intervention, the Court must, *volens nolens*, rule on the interests at stake. It will have to deliver a judgment.

28 ICJ, Land, Island and Maritime Frontier Dispute (*El Salvador v Honduras*), Application for permission to Intervene, Judgment, 13 December 1990, Reports, 1990, p. 92.

29 *Idem*, see § 100 and 101.

30 Patrick (J.), *L'intervention devant la Cour internationale de Justice à la lumière des décisions rendues en 2011: lente asphyxie ou résurrection?* AFDI, 2011, p. 213.

**35.** It would no doubt be considered inappropriate to order a *subject of law to intervene* in proceedings, except for reasons of parochial legalism.

# Mornah v Benin & ors (intervention by Sahrawi) (2020) 4 AfCLR 602

Application 001/2020, (*Application for intervention by Sahrawi Arab Democratic Republic*) in Application 028/2018, *Bernard AnbaTaayela Mornah v Republic of Benin & 7 ors*

Ruling (intervention), 25 September 2020. Done in English and French, the French text being authoritative.

**Judges:** KIOKO, MATUSSE, MENGUE, MUKAMULISA, BENSAOULA, TCHIKAYA, and ANUKAM.

Recused under Article 22: ORÉ, BEN ACHOUR, CHIZUMILA and ABOUD

The Applicant State brought this application for leave to intervene in an action brought against eight other states. The Court granted the Applicant State leave to intervene.

**Jurisdiction** (*prima facie*, 13)

**Procedure** (determination of intervenor's interest, 16; filing out of time, 19)

Separate Opinion: TCHIKAYA

**Procedure** (nature of proceedings for intervention, 9,10, 14)

## I. Background

**1.** The Sahrawi Arab Democratic Republic (hereinafter referred to as "SADR"), is a Member State of the African Union and brings this Request for Leave to intervene in the Application filed by Bernard Anbataayela Mornah (hereinafter referred to as "the Applicant") citing that it has an interest in the matter.

**2.** On 14 November 2019, the Applicant, a Ghanaian national and the National Chairman of the Convention of People 's Party a political party in Ghana filed his Application against the Republic of Benin, Burkina Faso, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia (hereinafter collectively referred to as "the Respondent States").

**3.** The Respondent States became Parties to the African Charter on Human and Peoples' Rights (hereinafter the "African Charter" or "the Charter") as follows: Benin – 21 October 1986; Burkina Faso – 21 October 1986; Côte d'Ivoire –31 March 1992; Ghana –1 March 1989; Mali –21 October 1986; Malawi 17 November 1989;

Tanzania – 21 October 1986; and Tunisia – 21 October 1986.

**4.** The Respondent States all became Parties to the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter "the Protocol"), as follows: Benin 22 August 2014; Burkina Faso – 25 January 2004; Cote d'Ivoire – 25 January 2004; Ghana –25 January 2004; Mali –25 January 2004; Malawi –9 September 2008; Tanzania –29 March 2010; Tunisia –21 August 2007.

**5.** All the Respondents have also made a Declaration under Article 34(6) of the Protocol permitting individuals and Non-Governmental Organisations (NGOs) to directly bring cases against them before the Court (hereinafter referred to as "the Declaration") as follows: Benin: 8 February 2016; Burkina Faso: 28 July 1998; Côte d'Ivoire: 23 July 2013; Tanzania: 23 March 2010; Ghana: 10 March 2011; Malawi: 9 October 2008; Mali: 19 February 2010; Tunisia: 2 June 2017.

## II. Subject matter of the request

### A. Facts of the Matter

**6.** The request for leave of intervention is in relation to the Application filed on 14 November 2018 by the Applicant wherein he alleges that, by failing to protect the sovereignty, territorial integrity and independence of the SADR, the Respondent States have violated Articles 3 and 4 of the Constitutive Act of the African Union; Articles 1, 13, 19, 20, 21, 22, 23 and 24 of the Charter; Articles 1 and 2 of the International Covenant on Civil and Political Rights and Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights.

**7.** The SADR requests that the Court should allow it to intervene in this matter alleging that it has interest in the Application as it directly relates to the occupation of its territory by the Kingdom of Morocco. It also asserts that the Application raises a number of legal issues of fundamental concern to human rights and the Application of the Charter that it considers it vital to intervene in line with the norms of international law and in accordance with the provisions of Article 5(2) of the Protocol.

### B. Intended Intervenor's Prayers

**8.** In its request for leave of intervention, the SADR prays the Court "to grant the leave to intervene to our Government …in

accordance with Article 5(2) of the Protocol, Rule 33 (2) and Rule 53 of the Rules of the Court."

## III. Summary of the Procedure before the Court

**9.** The Request for Leave to intervene was filed by SADR on 23 July 2020.

**10.** On 6 August 2020, the Registry sent a notice to the Parties requesting them to submit their observations, if any, on the request for leave of intervention, within fifteen (15) days of receipt of the notice.

**11.** None of the parties except the Republic of Cote d'Ivoire have submitted observations. The Republic of Cote d'Ivoire filed its observations on 7 September 2020.

## IV. *Prima facie* jurisdiction

**12.** 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(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction … in accordance with Article 50 and Rule 40 of these Rules".

**13.** The Court observes that in the instant Application, the Applicant alleges violation of human rights and freedoms protected by the Charter and the Application is filed against Respondent States which have ratified the Protocol and deposited the Declaration under Article 34 (6) of the same. The Court thus finds that it has *prima facie* jurisdiction to examine the Application.

**14.** As to the request for leave to intervene, the Court notes 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." This is reiterated in Rule 33(2) of the Rules which stipulates that: "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".

**15.** Rule 53 of the Rules provides that:

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 the 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.

**16.** The Court notes that the determination of whether an intervenor has an interest in a case in terms of Article 5 (2) of the Protocol and Rule 53 of the Rules depends on the nature of issues involved in the case, the identity of the intervenor and the potential impact of any of the decisions of the Court on the intervenor and third parties.[1]

**17.** The Court further notes that the instant Application mainly relates to the rights and freedoms of the people of SADR, which the Applicant alleges have been violated as a result of the continued occupation of part of the territory of SADR by the Kingdom of Morocco and the failure of the Respondent States to protect the sovereignty, territorial integrity and independence of SADR. The request for leave to intervene is made by SADR through Mr. Mohamed Salem Ould Salik, its Minister of Foreign Affairs and was filed on 23 July 2020 before the close of written pleadings. Furthermore, SADR indicates the purpose of its intervention, that is, to join and follow the proceedings of the case.

**18.** In view of the foregoing, the Court holds that SADR has an interest in the case and its possible outcome, which will potentially have a direct bearing on the rights and freedoms of its people.

**19.** As regards the Republic of Cote d'Ivoire's submission that the Court should deny SADR's request, the Court notes that Cote d'Ivoire filed its observations on 7 September 2020, after the lapse of two weeks from the deadline given to all Respondent States to make such observations, that is, 22 August 2020. The Republic of Cote d'Ivoire did not justify its filing out of time and did not apply for leave to file out of time. In this regard, the Court notes that a failure to file a pleading within the time limits set by the Court without good cause results in the pleading concerned being considered as not having been filed. As a result, the Republic of Cote d'Ivoire's observations shall be deemed not to have been

1 Jurisdictional Immunities of the State (*Germany v Italy*: Greece intervening), Application by the Hellenic Republic for Permission to Intervene, ICJ, Order of 4 July 2011, § 22.

filed.

**20.** The Court further notes that, even if it had accepted the said observations by Cote d'Ivoire, the instant Application essentially relates to SADR and its people and SADR has an interest justifying its request for intervention.

**21.** Consequently, the Court grants SADR's request for leave of intervention in the instant Application

## V. Operative part

**22.** For these reasons:

The Court

*Unanimously,*

i. *Grants* the Sahrawi Arab Democratic Republic's request for leave of intervention;

ii. *Orders* the Sahrawi Arab Democratic Republic to file its submissions within thirty (30) days of receipt of this order.

***

## Separate opinion: TCHIKAYA

**1.** I have followed the final and majority position of the Court in the operative part of this decision, but I am nevertheless eager to see more precision in the wording. The presentation in the form of an order[2] does not seem to be justified and is, for that matter, a shortcoming. It is the subject of this opinion. Following the orders, I was keen to raise this issue because their content, which is of major legal significance, should be presented in the form of a judgment of the Court.

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2 AfCHPR, *Orders for interventions by Republic of Mauritius and the Sahrawi Arab Democratic Republic (SADR) – Matter of Bernard Anbataayela Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Tanzania and Tunisia*, 25 September 2020.

**2.** This is not the first time that the institution of intervention in international judicial proceedings is causing a stir at the African Court. While its development at the International Court of Justice has been laborious[3] since 1951,[4] Judge Roberto Ago predicted rather surprisingly in the Continental Shelf Case, (*Libya v Tunisia* of 1981)[5] that the judgment at the end of Malta's intervention could "sound the death knell of the institution of intervention in international trials". The Orders of the African Court on Mauritius and the Saharawi Republic of 25 September 2020 have in fact added to the confusion over a concept whose use was already not so obvious in international judicial proceedings.

**3.** On 14 November 2019, a Ghanaian national[6] filed a motion to institute proceedings against seven States: the Republic of Benin, Burkina Faso, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia. These States were named as Respondent States. In addition to being parties to the Charter, they became parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[7] On various dates, they accepted the Court's jurisdiction to receive applications brought against them by individuals and non-governmental organisations (NGOs) with observer status with the African Court

3 The issue of institution came up again at the International Court of Justice in the case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Application by Equatorial Guinea to intervene* v ICJ, Order of 21 October 1999. Equatorial Guinea was an intervener following the judgment on preliminary objections in the main proceedings. Third party States were questioned by the Court on the impact that the future judgment might have on the merits (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria),* Preliminary Objections, Judgment of 11 June 1998, §116).

4 Gonidec (P.-F.), *L'Affaire du droit d'asile* , *RGDIP*, 1951, p.547; Cuba's intervention in *Peru v Colombia* on the interpretation of the Havana Convention of 1928 and the right to asylum; ICJ, Judgment, *Haya de la Torre, Colombia v Peru*, 13 June 1951, pp. 76 s.

5 ICJ, ICJ, *Continental Shelf (Libya Arab Republic v Malta), Request by Italy for permission to intervene*, Judgment, 21 March 1984, Dissenting opinion by Judge Ago, § 22; see also Sperduti (G.), *Notes sur l'intervention dans le procès international, AFDI*, 1984, pp. 273-281. ; Decaux (E.), ICJ Judgment on the application by Malta for permission to intervene, *AFDI.*, 1981, pp. 177-202 ; Decaux (E.), *ICJ Judgment on the application by Malta for permission to intervene*, *AFDI.*, 1981, pp. 177-202

6 He is the national President of the Convention of People's Party in Ghana.

7 On the following dates, respectively: Benin, 22August 2014; Burkina Faso, 25January 200; Côte d'Ivoire, 25 January 2004; Ghana, 25 January 2004; Mali, 25January 2004; Malawi, 9 September 2008; Tanzania, 29 March 2010; Tunisia, 21 August 2007

on Human and Peoples' Rights.

**4.** In addition to the obvious questions of jurisdiction, admissibility and merits regarding the initial application which the Court will subsequently have to deal with, the Court was faced with an exercise relating to its perception of the applications for intervention by two countries - Mauritius and the Sahrawi Republic - as reflected in the two Orders. The majority opinion was that the two countries could intervene in the proceedings and be welcomed by the Court. The purpose of this separate opinion is, therefore, to clarify a specific point of law: the Court should accept these interventions by way of a judgment. It is already clear from the material in the case file that this intervention was not optional in nature. The Court had to rule on the substance, *a priori* and by interlocutory decision with regard to the interests at stake.[8]

**5.** We shall then examine the questions raised by the order (I.), before going on to review the state of the law as it relates to a judgment at the end of the intervention (II).

## I. Status of the questions raised by the Order

**6.** The first question put to the Court was the designation of the proceedings relating to the decision for intervention, and whose conceptual scope would best reflect the Court's position. The indication here was that this was not a question of pure semantics.

### i. Beyond the dilemma of semantics

**7.** There was an assumption that we were faced with a semantic choice between two concepts, that of "order" and that of "judgment", without appreciating their substance. However, judicial practice adequately dictates the use of these concepts, unless they are defined otherwise.

**8.** The identification of the rights contained in "third party intervention" in international litigation is an issue that is "as old as Methuselah", and is a complex one. Judge Rony Abraham wondered whether the institution conferred on:

"Third party states a right to intervene in a trial, or, on the contrary, grants them a mere option which they may request to exercise, but only with

8 This does not include an intervention in an advisory case or of the nature of an amicus curiae brief. Hervé Ascensio, Amicus curiae before international jurisdictions, ***RGDIP***, 2001, pp. 905 s.

authorisation of a discretionary nature that the Court may or may not decide to grant them"[9]

The various and sometimes contradictory interpretations that have followed have focused on both substance and semantics.

**9.** For some reason, perhaps, the Court does not explain, why it refers to the document by which it received the intervention of Mauritius and the SADR as an "order for intervention". It is by a Judgment that this Court should have ruled on the said applications. In the legal world, it is customary to call "a spade a spade" and "apricots are not to be confused with tomatoes". Words definitely have a meaning. Judge Ago recalled in one of his captivating writings that:

" (…) the most correct use of terms, i.e. the one which, either because of its link with the etymological origin of the term or especially because it corresponds to common and traditional usage, is most suitable to facilitate understanding and avoid misunderstandings".[10]

**10.** The Court should have used the established instrument, namely, ruling by way of a judgment or in the form of a decree. This is not mere rhetoric. The parties to a conflict are in conflict because of interests. They represent opposing views and arguments out of interest. This is, moreover, what is meant by the famous phrase by the Hague Court found in the decision on *Mavrommatis Palestine and Jerusalem Concessions*:

"An international dispute is a disagreement on a point of fact or of law, a conflict of legal views or of interests between two people"[11]

**11.** This is the definition of an international dispute, whatever its nature. It is, at least *prima facie*, a view that the Court has of the interests involved in considering an application for intervention and in making its decision, which is not covered by an order in the international judicial tradition. This has been endorsed by the Court in the more than 100 orders it has issued to date. Orders for provisional measures issued by the Court do not presume interests. They do not have the force of *res judicata* in the main proceedings. The phrase is well known. It appears in all the reasons for orders of provisional measures issued by the Court,

9 He added " The debate is obscured, however, by the fact that the notion of a "right" (to intervene) is ambiguous and, according to how that notion is understood, it is possible to argue both in favour of and, on the contrary, against the existence of such a right, without those arguments necessarily contradicting one another." v Abraham (R.), Dissenting Opinion, Intervention Judgment, Application by Honduras, 4 May 2011.

10 Ago (R.), *Droit positif et droit international*, *AFDI*, 1957, pp. 14-62

11 PCIJ, *Mavrommatis Concessions in Palestine and Jerusalem*, *Greece v United Kingdom*, ICJ, 30 August 1924 and 26 March 1925.

namely:

"The Court specifies that this Order is necessarily provisional and does not in any way prejudge the findings the Court might make as regards its jurisdiction, admissibility of the Application and the merits of this matter."[12]

**12.** Paradoxically, through the Order of 4 July 2011 permitting Greece to intervene in the case of *Jurisdictional Immunities of the State, Germany v Italy,* the International Court of Justice itself was able to create the impression that an order could cover the important subject of intervention. The reason for the order was that the court had to decide and order the limits of the intervention in this particular case. The court authorized it but at the same time circumscribed the scope of the intervention. The Greek application was limited.

**13.** The Court stated as much right from the second "whereas clause" of the Order:

"Whereas, in its Application, the Hellenic Republic […] states that "its intention is to solely intervene in the aspect of the procedure relating to judgments rendered by its own (domestic Greek) Tribunals and Courts on occurrences during World War II and enforced (exequatur) by the Italian Courts".[13]

This restriction seemed to justify the order.

**14.** I further submit that, although the order was a judicial document of the Court,[14] it was not sufficient reason to issue the interlocutory ruling which is more of a judgment of the Court. The question raised is therefore not merely semantic; the applications submitted are on the merits, and the Court is not required to rule on them at this stage. This is the meaning of the applicable ordinary law.

## ii. Orders are inappropriate and contrary to the ordinary law of intervention

**15.** African human rights law cannot deviate from the legal bases

12 See, in particular, AfCHPR, ***Sébastien Germain Ajavon Order,*** 7 December 2018, § 47; see also: "For the avoidance of doubt, this Order is provisional in nature and in no way prejudges the Court's conclusions on its jurisdiction, admissibility and the merits of the Application instituting proceedings", in AfCHPR, ***Guillaume Kigbafori Soro v Cote d'Ivoire***, 15 September 2020, § 35

13 ICJ, *Jurisdictional Immunities of the State (Germany v Italy), application, to intervene, order of 4 July 2011,*§ 2.

14 Rule 68 of the new Rules of Court, 25 September 2020: "In the exercise of judicial functions, the Court will render its decisions in the form of a judgment, ruling, order, opinion, instruction, direction or any other form of pronouncement as the Court deems necessary. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. Introduced by Art. 13 of Protocol No. 14 of 13 May 2004.

established for this intervention mechanism. Third party intervention is governed by the provisions of the Protocol establishing the African Court, as explained further here below (see *infra*, § 20 et seq.).

**16.** It can be said in brief that the same is true of the European system. Article 36 of the European Convention[15] provides for third party intervention. The first paragraph states in particular that:

"In all cases before a Chamber or the Grand Chamber, a High Contracting Party whose national is an applicant may submit written comments and take part in hearings."[16]

**17.** This is a right that the Contracting Parties and the Commissioner for Human Rights derive from Protocol No. 14, which is incorporated into the Convention. It is enshrined in abundant case law.[17] One may also recall the case concerning seventeen asylum seekers and four families of Albanian, Bosnian and Kosovar nationals accompanied by children aged between one and eleven years at the time. They complained under Article 3 of the Convention that for several months, they had been accommodated by the French authorities in inhuman and degrading conditions, in a camp made of tents and located in a car park (...), and that they had not received material and financial support provided for by the national law.[18] The alleged violations were dismissed, but the Court accepted the applications for intervention by human rights organisations. On the basis of Article 13, the Section President in the instant case authorized the observations received from the respondent government and those submitted in reply by the applicants, as well as the comments received on 12 November 2013 from non-governmental organisations, the *Comité Inter-Mouvements Auprès des Evacués* (CIMADE), the *Groupe d'information et de soutien des immigrés* (GISTI) and the National Human Rights Advisory Commission (NHRAC). This is confirmed by the various rulings. It is the practical meaning of the provisions of the aforementioned 2010 European protocol.

15 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

16 Introduced by Art. 13 of Protocol no 14 of 13 May 2004.

17 For example, the Armenian Government, which exercised its right to intervene under Article 36 § 1 of the Convention, was represented by its Agent, Mr G. Kostanyan.

18 ECHR, ***B.G et al v France***, 10 September 2020.

**18.** The Inter-American Convention on Human Rights[19] provides for automatic intervention in pending cases. It states, inter alia, that: "The Commission shall appear in all cases before the Court." (Article 57 of the Convention).

**19.** It follows from these examples and the state of the applicable law that the African Court had only one possibility with regard to the cases in question: to rule collegially on the application of the provisions of Article 5.2 of the Protocol[20] by taking a full decision on the applications for intervention by the two applicants, the Republic of Mauritius and the SADR. This is the appropriate judgment that would take account of the interests at stake and the state of the applicable law.

## II. State of the applicable law, a decision authorizing intervention

**20.** On the one hand is the law applicable by this Court and, on the other, the elements that are peculiar to the case. Contrary to its usual litigation that is strictly confined to international human rights law, the pending case is interesting in terms of rights of the States – the *Western Sahara*[21] dispute in particular - which underlies Mr. Bernard Anbataayela Mornah's application.

**21.** The Armand Guehi Case of 2015 set a precedent at the African Court. It however provides a different solution from the one the Court opted for.

### i. The Protocol establishing the Court and the Rules of Court providing for a judgement for intervention

**22.** States which consider that they have an interest in a case may submit an application to the Court for leave to intervene, in accordance with the above-mentioned provisions of the Protocol. It is not specified how the Court will deal with such an application.

19 Adopted in San José, Costa Rica, on 22 November 1969

20 Restated in Rule 39 of the Rules of Procedure of the Court: "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 under Rule 61 of these Rules.

21 *Western Sahara, ICJ, Order*, 22 May 1975; *Avis consultatif*, 16 October 1975, *Rec.*,p.6 ; Chappez (J.), *RGDIP*, 1976, p.1132; Condorelli (L.), *Cta.I.*1978, p.396; Flory (M.), *AFDI*, 1975, p.253; Janis (M. W), *Harvard ILJ*, 1976, p.609; Prévost (J.-F), *JDI*, 1976, p.831; Shwa (M.), *BYbIL*, 1978, p.118.

Nor are the Rules of Procedure precise enough.

**23.** Yet, seven paragraphs are devoted to this issue in Article 61 of the Rules. The first paragraph recalls that under Article 5, paragraph 2 States Parties have the right to intervene. In the second paragraph, the possibility of intervention is, rather singularly, extended to "any other person" having an interest in a case. It is not certain whether this was intended by the Protocol. The third paragraph lists the constituent elements of the application,[22] while the fourth paragraph basically sets a time-limit for the submission of the application, which is before the closure of the written proceedings. The parties are informed of this (paragraph 5) and may submit observations. It is paragraph 6 which does not seem to specify the nature of the proceedings through which the Court must interpret its decision. It simply states that:

"Where the Court rules that the Application is admissible, it shall fix a time limit within which the intervening party shall submit its written observations. Such submissions shall be forwarded by the Registrar to the parties to the case, who may file written submissions in reply within a deadline set by the Court."[23]

**24.** The Rule concludes that the intervening party has the right to submit observations on the subject of the intervention during the hearing, if the Court decides to hold one (paragraph 7). It follows that both the treaty law establishing the Court and secondary legislation (the Rules) do not specify the nature and scope of the proceedings authorising a State to intervene. It is understandable that the Court should be able to give an answer to this question.

**25.** The Application of the Republic of Mauritius[24] set the Court on the right track in two respects: (a) This application for leave to intervene, which is in line with the present provisions of Rule 61 of the Rules of the Court is in the form of a discussion, and (b) it speaks to the merits of the case:

"As the International Court of Justice (ICJ) stressed in its Advisory Opinion of 25 February 2019 on the Legal Effects of the Separation of the Chagos Archipelago from Mauritius in 1965, respect for the right to self-determination is an obligation *erga omnes.* All States have a legal interest in protecting that right."

22 Article 61, paragraph 3 of the Rules: " An Application to intervene shall indicate: a) the names and addresses of the Applicant or his/her representatives, if any; b) the Applicant's interest in the case; c) the purpose of the intervention; and d) a list of all supporting documents.

23 Rule 61, paragraph 6 of the Rules of Court, 25 September 2020.

24 Application for leave to intervene by the Republic of Mauritius, 31 August 2020, in 6 points.

**26.** The Saharawi Republic in its application stated that:
"Since the substance of the issues raised in the application before the Honourable Court mainly concerns our country, the Sahrawi Arab Democratic Republic has a primary interest in joining the case and following the proceedings thereof."

**27.** Arguments for intervention were therefore formulated and the Court had to assess them in full by means of a judgment. The solution in the Armand Guehi case, which set a precedent, appears to be only a compromise.

## ii. The middle-ground solution in the Armand Guehi decision of 2015

**28.** There is a precedent in the case law of the Court. The Court did not want to proceed in the same way. The precedent concerns the *Armand Guehi* case of 2015 in which the applicant, an Ivorian citizen, was found guilty of the murder of his wife and was sentenced to death by the Tanzanian courts.[25] However, he claimed before this Court that his rights had been violated in the national proceedings. The Court found that certain guarantees of a fair trial had been violated. The said violations had not, according to the Court, vitiated the decision of the Tanzanian courts regarding the applicant's guilt. The Court also dismissed his application for release. It had, however, awarded compensation for the violations found.

**29.** The Armand Guehi case is of interest with respect to the Mauritius and the SADR intervention orders because of the presence of a third State in the proceedings, namely, Côte d'Ivoire. As soon as Côte d'Ivoire was informed of the current proceedings on 21 January 2015, it requested to intervene on 1 April 2015 in its capacity as the applicant's State of origin. It was authorised to bring a case as an intervening State in the proceedings. Côte d'Ivoire filed its observations on 16 May 2016 and 4 May 2017. The judgment was delivered on 7 December 2018.[26] The Court's approach in this case with regard to the third party intervener is a middle-ground approach that, on the one hand, avoids clearly defining the status and rights of the intervening State and, on the other hand, allows the third party to participate in the proceedings to a certain extent. No decision on the intervention was taken; the

25 State of the territory where he is held as a prisoner

26 AfCHPR, *Armand Guehi v Tanzania – Cote d'Ivoire intervening State*, 7 December 2018.

judgment of 7 December 2018 is unique.

**30.** This situation should lead the Court to issue a judgement authorising intervention and stating: a) the *ratione personae*, the status of the third party intervener in the proceedings and, b) the *ratione materiae*, circumscribing the litigious rights covered by the intervention. These aspects, which are not proceedings *per se*, are akin to them, and it is therefore desirable in proceedings to issue a separate judgment of the Court. The judicial reason for this will be to ensure clarity and distinction between the rights of each party. This is what the Algerian Judge, Bensaoula, who sat in this case, seemed to advocate in her separate opinion appended to the *Armand Guehi* single judgment:[27]

"... at no point in the judgment does it appear that the Court responded to those requests, which, in my respectful view, constitutes a procedural irregularity both with regard to the intervening State to declare its application for intervention admissible, and on the merits of its request approving the applicant's allegations, even if only by considering them as supported by the Court in its decision on the applicant's requests because similar to those of the intervening State."[28].

**31.** Although I approve of the operative part of the two intervention orders of Mauritius and the Sahrawi Republic, I however note that they perpetuate a lack of clarity already introduced by the 2015 *Guehi* case law. The institution of intervention appears to be a delicate matter in international litigation, and even more so when it applies to international human rights law. In a general reflection, one may wonder about the nature of the rights that an intervention by a third party - be it a State or an individual - could cover in the field of human rights. The Court will no doubt give its decision on the merits.

**32.** However, still on the issue of delineation, the Court refrains from analysing and exploring the already known status of non-party intervener, which requires setting a framework. On 13 September 1990, in the Land, Island and Maritime Frontiers Case,[29] the International Court of Justice granted Nicaragua leave to intervene. The purpose of Nicaragua's intervention was to inform the Court about the rights at issue in the dispute. The Court in

27 An Order dated 18 March 2016 granting provisional measures was issued by the Court. It stayed the execution of the death sentence.

28 Judge Bensaoula, Separate Opinion, AfCPHR, ***Armand Guehi,*** see also ***2 RJCA***, vol. 2, 2017-2018, p. 493.

29 ICJ, Land, Island and Maritime Frontier Dispute (***El Salvador v Honduras***), Application for permission to Intervene, Judgment, 13 December 1990, Reports, 1990, p. 92.

The Hague held that:

"…the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party."[30]

**33.** Having been informed of the pleadings submitted by El Salvador and Honduras, Nicaragua considered that it had an interest of a legal nature that could be affected by the ruling in the case. The Court allowed Nicaragua to submit a written declaration and El Salvador and Honduras to submit written observations on the declaration. Nicaragua was then asked to make oral submissions as a *non-party in the proceedings*. These are some of the possibilities offered by the applications for intervention by Mauritius and the SADR, which the Court could exploit.

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**34.** Legal theory may have created the impression that the institution of intervention "had seven lives".[31] In its orders on Mauritius and the SADR, the African Court may have found the eighth one... This last life seems to have no future because, when faced with such a reasoned application for intervention, the Court must, *volens nolens*, rule on the interests at stake. It will have to deliver a judgment.

**35.** It would no doubt be considered inappropriate to order a *subject of law to intervene* in proceedings, except for reasons of parochial legalism.

30 *Idem*, see § 100 and 101.

31 Patrick (J.), *L'intervention devant la Cour internationale de Justice à la lumière des décisions rendues en 2011: lente asphyxie ou résurrection?* AFDI, 2011, p. 213.

# Mallya v Tanzania (striking out) (2020) 4 AfCLR 617

Application 018/2015, *Benedicto Daniel Mallya v United Republic of Tanzania*

Order (striking out), 25 September 2020. Done in English and French, the French text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant, who had been convicted and was serving term for the rape of a minor, brought this action alleging that the domestic proceedings were in violation of his right to a fair trial. In a judgment on the merits, the Court found that the Respondent State had violated the Applicant's rights. No pleadings were filed on reparations as the Applicant could not be found. The Court ordered the case to be struck out.

**Procedure** (state consent to strike out, 18, 19)

## I. The Parties

**1.** Mr. Benedicto Daniel Mallya (hereinafter referred to as "the Applicant") is a national of Tanzania who was convicted of the rape of a seven (7) year old girl and sentenced to life imprisonment by the District Court of Moshi, Tanzania on 16 May 2000. At the time of filing his Application, he was serving the sentence at Maweni Central Prison in Tanga, Tanzania.

**2.** The Application was filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). 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 10 February 2006. Furthermore, on 29 March 2010, it 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 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration under Article 34(6) of the Protocol. The Court decided that the withdrawal of the Declaration would not affect matters pending before it and that the withdrawal would take effect on 22 November 2020 in conformity with its

jurisprudence.[1]

## II. Subject matter of the Application

### A. Facts of the matter

**3.** The Applicant alleged that he 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.

**4.** He further alleged that he appealed to the High Court of Tanzania at Moshi. Furthermore, that since filing the Notice of Appeal, he was not provided with certified true copies of the record of proceedings and judgment of the District Court to enable him process his appeal at the High Court. He stated 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 submitted 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 marred by difficulties. He averred that it was only after he filed the Application before this Court that the Respondent State availed him the certified true copies of the record of proceedings and judgment in February 2016.

**6.** 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. Subsequently, on 15 February 2016, it ordered a hearing of the appeal that the memorandum of appeal be served on the Applicant. According to the Respondent State, on 22 February 2016, the appeal which was not objected to by the Respondent State was considered in the Applicant's presence. During the appeal, the High Court cast doubt on the evidence relied upon by the District Court of Moshi, quashed the conviction, set aside the sentence and ordered release of the Applicant. The Applicant alleges that he was released sometime in May 2016, after serving fifteen (15) years and nine (9) months in prison.

### B. Alleged violations

1 ACtHPR *Andrew Ambrose Cheusi v United Republic of Tanzania* (merits) (26 June 2020) §§ 35-39.

**7.** The Applicant alleged violation of his rights under the Charter, specifically, the right to have his cause heard, the right to a fair and expeditious trial and, the right to appeal under Article 7 of the Charter. Furthermore, he alleged a violation of his right to equality before the law under Article 13 (6) (a) of the Respondent State's Constitution.

## III. Summary of the Procedure before the Court

**8.** The Application was filed before this Court on 1 September 2015, and was served on the Respondent State on 28 September 2015, in accordance with Rule 35 of the Rules.

**9.** The Parties filed their submissions on the merits within the time stipulated and thereafter, on 20 April 2018, they were notified of the close of pleadings.

**10.** On 2 October 2018, pleadings were re-opened to enable the Parties to file submissions on reparations, pursuant to the decision of the Court during its 49th Ordinary Session (16 April-11 May 2018).

**11.** On 4 June 2019, the Applicant's legal representative informed the Court about his inability to locate the Applicant and his family and requested for extension of the time to do so. Following this request, on 12 June, 2019, the Court granted the Applicant forty-five (45) days extension of time to file his submissions on reparations.

**12.** On 15 July 2019, the Applicant's representative informed the Court that he was unable to file the Applicant's submissions on reparations because he was still unable to reach the Applicant as he and his family had relocated from Moshi after the Applicant's release from detention. Furthermore, that numerous attempts were made to contact the Applicant including physical visits to his former prison and attempts to contact his relatives without success. The representative also reported that *"it is our considered opinion that the applicant no longer has interest in pursuing this matter further"* and 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 on reparations.

**14.** On 26 September 2019, this Court rendered judgment on the merits in favour of the Applicant and found that the Respondent State had violated Article 7 (1) (a) of the Charter of the Applicant's rights to appeal to competent national organs. In the said judgment, the Court reserved the ruling on reparations and allowed the Parties

to file further submissions on reparations.

**15.** The certified copy of the judgment was transmitted to the Parties on the same day.

## IV. On the striking out of the Application

**16.** The Court notes the pertinence of Rule 58 of the Rules which provides that:

> where an Applicant notifies the Registrar of its intention not to proceed with a case, the Court shall take due note thereof, and shall strike the Application off the Court's cause list. If at the date of receipt by the Registry of the notice of the intention not to proceed with the case, the Respondent State has already taken measures to proceed with the case, its consent shall be required.

**17.** The Court observes in the instant case that, at the time the Registry received the letter from the Applicant's representative dated 15 July 2019, indicating the Applicant's loss of interest to pursue the matter further, the Respondent State had already quashed the Applicant's sentence, set it aside and released him from prison. The Court considers these steps are an expression of the Respondent State's will and commitment to redress the violations of the Applicant's rights using its own domestic system and to bring the matter to a close.

**18.** In view of the foregoing, the Court is of the view that it is not necessary to seek the consent of the Respondent State on the Applicant's notice of discontinuance. Consequently, and pursuant to Rule 58 of the Rules of Court, the Court hereby holds that the matter shall be struck out from its Cause List.

## V. Operative part

**19.** For these reasons:

The Court,

*Unanimously,*

i. *Orders* that Application 018/2015 *Benedicto Daniel Mallya v United Republic of Tanzania* be and is hereby struck out from the Cause List of the Court.

# Mlama & ors v Tanzania (judgment) (2020) 4 AfCLR 621

Application 019/2016, *Job Mlama & 2 ors v United Republic of Tanzania*

Judgment, 25 September 2020. 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 Applicants, each convicted and serving terms in prison for the sexual exploitation of a child, brought this action alleging that their trial and conviction amounted to a violation of their rights to equality, equal protection of law and fair trial. The Court held that the rights of the Applicants had not been violated.

**Jurisdiction** (material jurisdiction – nature of application, 23; personal jurisdiction, 28; continuing violation, 30)

**Admissibility** (exhaustion of local remedies, 40, 41; reasonable time to file, 48, 50, 51)

**Fair trial** (bias, 68; impartiality, 69, principle of legality, 79)

**Liberty** (restriction of, 88, 89)

**Equality** (essence of, 95)

## I. The Parties

**1.** Job Mlama, Ancieth Edward and Shija Madata (hereinafter referred to as "the first, second and third Applicants respectively") are all nationals of Tanzania, who are currently serving a term of twenty (20) years' imprisonment, for the offences of sexual exploitation of a child.

**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 by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court has held that this withdrawal will have no bearing on pending cases and will only

take effect one year after its filing, namely, 22 November 2020.[1]

## II. Subject of the Application

### A. Facts of the matter

**3.** The record before this Court indicates that on 3 June 2008, the Applicants were jointly charged with three counts of sexual exploitation of a child in accordance with Section 138B (1) of the Respondent State's Penal Code for having allegedly forced a thirteen (13) year-old girl to engage in sexual intercourse with a dog. These counts involved: threatening to use violence towards a child in order to procure sexual intercourse; knowingly keeping a child in a premise for the purpose of sexual abuse and taking advantage of a relationship with a child to procure the child for sexual intercourse.

**4.** On 4 May 2009, the Resident Magistrate's Court at Mwanza convicted all the Applicants. They were each sentenced to twenty (20) years' imprisonment on the first two counts. Further, the third Applicant was sentenced to an additional term of fifteen (15) years imprisonment on the third count. The sentences were ordered to run concurrently.

**5.** Dissatisfied with the conviction and sentence, on 24 June 2009, the Applicants appealed to the High Court of Tanzania sitting at Mwanza. On 26 September 2012, the High Court quashed the conviction and sentence imposed on the Applicants in respect of the first count. It also quashed the conviction and sentence imposed on the third Applicant in respect of the third count. However, the High Court confirmed the conviction and sentence of all the Applicants in respect of the second count. Subsequently, on 15 October 2012, the Applicants filed an appeal to the Court of Appeal.

**6.** On 30 July 2013, the Court of Appeal dismissed the appeal in its entirety. Furthermore, it ordered each of the Applicants to pay to the complainant, compensation of Two Hundred Thousand Tanzanian Shillings (TZS 200,000).

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

## B. Alleged violations

**7.** The Applicants allege the following:

i. That their conviction was based on partial evaluation of evidence;

ii. That they were convicted for an act that did not constitute an offence at the time it was committed;

iii. That they were denied bail pending their trial;

iv. That Section 138B(1)(e) as well as the entire section of the Penal Code on the offences against morality are "couched in terms contravening Article 13(1),(2),(3),(4) and (5) of the Constitution of Tanzania".

## III. Summary of the Procedure before the Court

**8.** The Application was received on 5 April 2016 and served on the Respondent State on 10 May 2016. It was also transmitted to the entities listed under Rule 35(3) of the Rules on the same day.

**9.** The parties filed their pleadings on the merits and reparations within the time stipulated by the Court. The said pleadings were duly exchanged.

**10.** Pleadings were closed on 12 February 2019 and the Parties were duly notified.

## IV. Prayers of the Parties

**11.** The Applicants pray the Court to grant the following orders:

a. That the Respondent State has violated the Applicants' right provided under Article 2 of the African Charter on Human and Peoples' Rights;

b. That the Respondent State has violated the Applicants' right provided under Article 3(1) and (2) of the African Charter on Human and Peoples' Rights;

c. That the Respondent State has violated the Applicants right provided under Article 7(1), (b), (d) and 7(2) of the African Charter on Human and Peoples' Rights;

d. That the Application be admitted and granted in totality;

e. That the Applicants' prayers be granted;

f. That the Respondent be notified ***(sic)*** to quash the Applicants' sentence of 20 years imprisonment per capita to restore justice;

g. Reparations to the first and second Applicants in the amount of Four Hundred Thousand United States Dollars each and the third Applicant, Three Hundred Thousand United States Dollars for the violations of their rights;

h. That the Respondent State bears the costs.

**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 Applicants' prayers be dismissed;

iv. That the Applicants continue to serve their lawful sentences;

v. That the Applicant not be granted reparations;

vi. That the Application be dismissed in totality for lack of merit.

vii. That the Respondent State has not violated any of the rights alleged by the Applicant.

## V. Jurisdiction

**13.** 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.

**14.** In accordance with Rule 39(1) of the Rules, "the Court shall ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

**15.** On the basis of the above-cited provisions, the Court must preliminarily, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

**16.** The Respondent State raises an objection to the material jurisdiction of the Court on two grounds.

### A. Objections to material jurisdiction

**17.** The Respondent State objects to the material jurisdiction of the Court as follows: firstly, that the Applicants have raised two allegations before this Court for the first time; and secondly, that the Court is being asked to sit as an appellate court.

**18.** According to the Respondent State, the allegations raised for the first time are the:

a. Allegation that the Applicants were denied bail, and;

ii. Allegation that the Applicants were convicted on the basis of a non-existent offence.

**19.** Citing the Court's decision in the matter of *Ernest Mtingwi v Republic of Malawi*, the Respondent State also contends that this Court is not a court of appeal and thus it cannot consider issues already finalised by its national courts.

**20.** The Applicants argue that freedom, equality, justice and dignity are cardinal principles of the Charter as indicated in the Charter's preamble and that their Application is a result of the denial of "freedom and dignity" by the national courts and thus the Court has jurisdiction to consider it.

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**21.** As regards the objection that the Court lacks jurisdiction since it is not a court of first instance, the Court recalls that it has jurisdiction as long as the rights alleged by an Applicant as having been violated, fall under a bundle of rights and guarantees invoked at the national courts.

**22.** In the instant case, the Court notes that the Applicants have alleged the violation of rights guaranteed by the Charter and by other international human rights instruments. It therefore rejects the Respondent State's objection on this point.

**23.** On the objection by the Respondent State, that the Court is being asked to sit as an appellate court, the Court notes in accordance with its established jurisprudence: "…that it is not an appellate body with respect to decisions of national courts.[2] 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."[3]

2 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.

3 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) *ibid*; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application 25/2016, Judgment of 28 March 2019 (merits and reparations) § 26; *Armand Guehi v United Republic of Tanzania* (merits and reparations) 7 December 2018, 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287 § 35.

**24.** In this connection, the Court notes that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.

**25.** The Court notes that the present Application raises allegations of violations of the human rights enshrined in Articles 2, 3 and 7 of the Charter, the examination of which falls within the Court's jurisdiction. The Respondent State's objections in this respect are therefore dismissed.

**26.** Consequently, the Court holds that it has material jurisdiction.

## B. Personal jurisdiction

**27.** While the Respondent State has not raised any objection to the personal jurisdiction of the Court, the Court notes that, on 21 November 2019, it deposited with the Chairperson of the African Union Commission, a notice of withdrawal of the Declaration, as referred to in paragraph 2 of this Judgment.

**28.** The Court recalls that, the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the deposit of the instrument withdrawing the Declaration, as is the case with the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is filed. In respect of the Respondent State, therefore, its withdrawal will take effect on 22 November 2020.[4]

**29.** In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

## C. Other aspects of jurisdiction

**30.** The Court notes that the 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 such jurisdiction. The Court, accordingly, holds that:

i. that it has temporal jurisdiction on the basis that the alleged violations are continuing in nature, in that the Applicants remain convicted

4 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67; *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 35-39.

and are serving a sentence of twenty (20) years' imprisonment on grounds which they consider are wrong and indefensible;[5]

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

**31.** In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

## VI. Admissibility

**32.** 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, Article 6(2) of the Protocol and Rule 40 of these 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.

5 *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) (21 June 2013) 1 AfCLR 197 §§ 71 - 77.

## A. Conditions of admissibility in contention between the Parties

**34.** The Respondent State submits that the Application does not comply with Rules 40(5) and (6) of the Rules in relation to admissibility requirements, namely; regarding exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies.

### i. Objection based on non-exhaustion of local remedies

**35.** The Respondent State, citing the decision of the African Commission on Human and Peoples' Rights (hereinafter referred to as "African Commission") in *Southern African Human Rights NGO Network & ors v Tanzania*[6] submits that the 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 body like the Court.

**36.** It submits that there were domestic legal remedies available to the Applicants which they should have exhausted before approaching this Court. 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.

**37.** 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, even though the Applicants are alleging violation of various rights under the Constitution; they did not refer the alleged violations to the High Court as required under Section 9(1) of the Basic Rights and Duties Enforcement Act. The Respondent State thus argues that it was denied the chance to redress the alleged violations.

**38.** The Applicants argue that they exhausted local remedies because their trial began at the Resident Magistrate's Court and having been convicted, they filed appeals in both the High Court and the Court of Appeal, the highest and final appellate court in the Respondent State. There was thus a final decision from the highest court in the Respondent State.

6 *Southern African Human Rights NGO Network & ors v Tanzania*, Communication No. 333/2006.

**39.** The Applicants further contend that the national courts ought to have considered the issues that they had not raised "on their own initiative" as they have "the authority and it is their duty to do so" and thus it is their submission that the Application has fulfilled the requirement of exhaustion of local remedies.

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**40.** 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 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.[7]

**41.** In its established jurisprudence, the Court has consistently held that an Applicant is only required to exhaust ordinary judicial remedies.[8] Furthermore, in several cases involving the Respondent State, the Court has repeatedly stated that the remedy of constitutional petition in the Tanzanian judicial system is an extraordinary remedy that an Applicant is not required to exhaust prior to seizing this Court.[9]

**42.** The Court notes from the record that the Applicants filed an appeal against their conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 30 July 2013, the Court of Appeal upheld the judgment of the High Court, which had earlier upheld the judgment of the District Court. The Respondent State therefore, had the opportunity to redress their violations. It is thus clear, that the Applicants exhausted all the available domestic remedies.

7 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017), 2 AfCLR 9 §§ 93-94.

8 *Alex Thomas v Tanzania* (merits) op.cit.§ 64; *Wilfred Onyango Nganyi & ors v Tanzania* (merits) 18 March 2016, 1 AfCLR 507 § 95.

9 *Alex Thomas v Tanzania* (merits) op. cit. § 65; *Mohamed Abubakari v Tanzania* (merits) *op. cit.* §§ 66-70; *Christopher Jonas v Tanzania* (merits) *op. cit* § 44

**43.** For this reason, the Court dismisses the objection that the Applicants have not exhausted local remedies.

### ii. Objection based on the Application not having been filed within a reasonable time

**44.** According to the Respondent State, 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 30 July 2013, and it took two (2) years and eight (8) months for the Applicants to seize 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[10] has held a period of six (6) months to be the reasonable time.

**46.** The Respondent State argues that two (2) years and eight (8) months is beyond reasonable time as suggested by the *Majuru v Zimbabwe* case. The Respondent State thus submits that the Application should be declared inadmissible.

**47.** The Applicants argue that they only became aware of the Court "late in the year 2015 and early in 2016". They contend that the Court's assessment of whether they complied with the reasonable time requirement should take into consideration the fact that they are "mere prisoners who have no legal assistance and representation".

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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 it. Rule 40(6) of the Rules, restates Article 56(6) of the Charter, simply requires that application 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

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

which it shall be seized with the matter."

**49.** The record before this Court shows that the local remedies were exhausted on 30 July 2013 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. The Application was filed on 5 April 2016, that is, two (2) years, eight (8) months and (10) days after exhaustion of local remedies. Therefore, the Court shall determine whether this time is reasonable.

**50.** The Court recalls its jurisprudence 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."[11] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[12] indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal[13] and the use of extra-ordinary remedies.[14]

**51.** From the record, the Applicants are incarcerated, restricted in their movements and with limited access to information and they have also submitted that they were unaware of the Court until "late in the year 2015". Ultimately, the above mentioned circumstances delayed the Applicants in filing their claim to this Court. Thus, the Court finds that the two (2) years and eight (8) months and (10) days taken to file the Application before this Court is reasonable.

**52.** 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.

11 *Norbert Zongo v Burkina Faso* (merits) op. cit, § 92. See also *Alex Thomas v Tanzania* (merits) *op.cit,*, § 73.

12 *Alex Thomas v Tanzania* (merits), op. cit. § 73; *Christopher Jonas v Tanzania* (merits) op.cit, § 54; *Ramadhani v Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83.

13 *Association Pour le progrès et la Defense des droit des Femme Maliennes and the Institute for Human Rights and Development in Africa v Republic of Mali* (merits) (11 May 2018), 2 AfCLR 380 § 54.

14 *Armand Guehi v Tanzania* (merits and reparations) op.cit. § 56; *Werema Wangoko v United Republic of Tanzania* (merits) 7 December 2018, 2 AfCLR 520 § 49; *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application 001/2017, Judgment of 28 June 2019 (merits) §§ 83-86.

## B. Other conditions of admissibility

**53.** The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 40(1), (2), (3), (4) and (7) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

**54.** From the record, the Court notes that, the Applicants have been clearly identified by name in fulfilment of Rule 40(1) of the Rules.

**55.** The Application is in compliance with the Constitutive Act of the African Union and the Charter because it raises alleged violations of human rights in fulfilment of Rule 40(2) of the Rules.

**56.** The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 40(3) of the Rules.

**57.** The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment with Rule 40(4) of the Rules.

**58.** Further, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 40(7) of the Rules.

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

## VII. Merits

**60.** The Applicants allege that their rights guaranteed in the Charter under Article 2, on the right not to be discriminated against; Article 3, on the right to equality before the law and to equal protection of the law and Article 7 on the right to a fair trial were violated.

**61.** The Applicants also allege the violations of Articles 3(1) and (2), 7(1)(d), 7(2) of the Charter and Article 13(1), (2), (3), (4) and (5) of the Respondent State's Constitution; in relation to the following allegations:

i. Conviction based on the partial evaluation of evidence;

ii. Conviction of the Applicants based on a non-existent offence;

iii. Applicants' denial of bail pending trial;

iv. Section 138 B(1)(e) and the Penal Code section on offences against morality promotes sexism.

**62.** 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.[15]

## A. Allegation that the Applicants' conviction was based on partial evaluation of evidence

**63.** The Applicants contend that the "recording, assessment and determination" of their trial was "premeditated" by the Resident Magistrate who they claim "influenced the entire evidence by unfairness, dishonesty and partiality" thereby violating their rights under Article 7(1)(d) of the Charter.

**64.** They further allege that the Resident Magistrate gave "undeserved credence" to PW1, the victim and other prosecution witnesses who according to the Applicants provided "weak" evidence which did not prove the charges against them.

**65.** According to the Respondent State, the Applicants had the option of requesting the Resident Magistrate to recuse himself if they were unhappy with his conduct of the trial. The Respondent State also argues that the Applicants are raising their distrust of the Resident Magistrate for the first time. The Respondent State thus submits that the Application lacks merit and should therefore be dismissed

* * *

**66.** The Court notes that the issue in question is whether the Resident Magistrate was biased and thus convicted the Applicants on the basis of what was considered as weak evidence.

**67.** Article 7(1)(d) of the Charter provides: "Every individual shall have the right to have his cause heard. This comprises: […] d) [t] he right to be tried […] by an impartial court or tribunal."

**68.** The Court observes that according to the Commentary on the Bangalore Principles on 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

15 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398 § 122.

the judge from sitting. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable."[16]

**69.** The Court considers that, to ensure impartiality, any Court must offer sufficient guarantees to exclude any legitimate doubt.[17] The Court restates that, "the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge"[18] 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".[19]

**70.** In the instant case, the Applicants allege that the Resident Magistrate displayed bias by convicting them on the basis of insufficient evidence. They also made general statements such as, they are not sure whether the victim met with the judge outside or whether the judge was moved by the "drama dramatized by the victim" but have not demonstrated exactly how the conduct of the judge displayed bias which eventually led to their conviction. In any case, the High Court and Court of Appeal, upon assessment of the Applicants' appeals, held that they were rightly convicted and sentenced.

**71.** Furthermore, the Court notes from the record that there was neither a motion at the Resident Magistrate's Court for the Magistrate to recuse himself nor was this issue raised with the appellate courts in relation to the evaluation of the evidence which led to their conviction. This allegation is therefore dismissed.

**72.** In light of the foregoing, the Court holds that the Respondent State has not violated the Applicants' right to be heard by an impartial tribunal guaranteed under Article 7(1)(d) of the Charter.

16 United Nations Office on Drugs and Crime, "Commentary on the Bangalore Principles of Judicial Conduct", September 2007. Available:https://www.unodc.org/documents/nigeria/publications/Otherpublications/Commentry_on_the_Bangalore_principles_of_Judicial_Conduct.pdf. (accessed on 14 September 2020) § 60.

17 *Findlay v UK* (1997) 24 EHRR 221 § 73. See also Nsongurua J Udombana, 'The African Commission on Human and Peoples' Right and the development of fair trial norms in Africa' 2006 *African Human Rights Law Journal* Vol 6/2.

18 *Alfred Agbesi Woyome v the Republic of Ghana* (merits) op. cit, § 128.

19 *Ibid* § 126.

## B. Allegation regarding the non-existence of an offence

**73.** The Applicants contend that they were convicted of an offence that was non-existent at the time of their trial in the Resident Magistrate's Court. Particularly, the Applicants assert that the provision of the law, that is, Section 138(B)(1)(e) of the Penal Code does not define the offence as they were charged.

**74.** According to the Applicants, Section 138(B)(1)(e) of the Penal Code creates the offence of sexual exploitation of a child by "a human being." In essence, the Applicants contend that the above section of the law does not cover instances where an animal is used in the sexual exploitation of the child. They, thus argue that they were convicted and sentenced on the basis of a non-existent offence in violation of Article 7(2) of the Charter.

**75.** The Respondent State submits that the offences the Applicants were charged with, were already in its Penal Code at the time of their trial, that is, 7 August 2008.

**76.** Furthermore, the Respondent State submits that if the Applicants' contention were true then their advocates would have raised the issue in the municipal courts as it is such a preliminary issue. Similarly, the Respondent State argues that its municipal courts would have brought the issue to the fore if it were true.

**77.** Therefore, the Respondent State submits that the allegation is "misconceived, lacks merit and should be dismissed".

***

**78.** 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.

**79.** The Court notes that Article 7(2) of the Charter reflects a key principle of criminal law, according to which, an offence must be clearly defined by law and the law should not be applied retroactively. It is a "safeguard against arbitrary prosecution,

conviction and sentencing."[20] Also, it guarantees the principle of legality by proscribing the extension of the scope of existing offences and penalties.

**80.** Even so, one cannot ignore the inevitable requirement of judicial interpretation of ambiguous points of the law to adapt it to the circumstances of the case; "provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."[21]

**81.** In the instant case, the Court observes that Article 138(B)(1) (a) and (e) of the Tanzanian Penal Code, provides:

> Any person who (a) knowingly permits any child to remain in any premises for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show; (b) acts as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse, or indecent exhibition or show; … (e) threatens, or uses violence towards, a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show; … commits an offence of sexual exploitation of children and is liable upon conviction to imprisonment for a term of not less than five years and not exceeding twenty years.

**82.** The Court also notes that at the time of the commission of the incriminating acts, this Article 138 of the Penal Code relating to the sexual exploitation of a child already existed; and that the interpretation of this text by the courts of the Respondent State to include the use of a dog for the purposes of sexual exploitation of a child, indeed, was within the judicial discretion of the interpretation of the constituent elements of the selected offence.

**83.** Furthermore, the Court observes that, the Resident Magistrate in his summation of the offence indicated that, "the sections in which the accused persons are charged concern sexual exploitation of a child and this is no more than Section 138(B)(1)(a), (e) and (d) of the Penal Code." He also alluded to the evidence provided by the prosecution witnesses as enough to have proven the elements of the charge against the accused. Moreover, on appeal, the High Court judge also held that the elements of the crime of sexual exploitation of a child had been proven in this case.

**84.** Therefore, the allegation that the Applicants were convicted of a non-existent offence in violation of Article 7(2) of the Charter is unfounded.

20 ECtHR, *Coëme & ors v Belgium*, Appl. nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 22 June 2000 § 145.

21 ECtHR, *Streletz, Kessler and Krenz v Germany*, Appl. nos 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001 § 50.

## C. Allegation on the denial of bail pending trial

**85.** The Applicants allege that they were denied bail pending trial thereby violating the Constitution of the Respondent State.

**86.** The Respondent State argues that the reason given for the denial of bail was that, if released, the Applicants would pose a danger to the victim, especially because she was a child. It further argues that the Applicants did not contest the denial of bail in the Resident Magistrate's Court. The Respondent State thus prays the Court to dismiss this allegation.

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**87.** Article 6 of the Charter which guarantees the right to liberty provides: "[e]very 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 the law…"

**88.** The Court reiterates its position that, the restriction of liberty which aims to "preserve public security, protect the rights of others and avoid possible repetition of the offence…"[22] is justified.

**89.** From the record, the Court notes that bail was denied by the Resident Magistrate's Court in order to protect the victim, who was a minor from possible attacks by the Applicants. The Court further notes that this is a justifiable limitation of the right to liberty given that it is also provided for by law, that is Section 148(4) of the Respondent's State's Criminal Procedure Act and it is necessary and proportionate for the attainment of the objective of preserving security of a witness. Consequently, the Court dismisses this allegation.

**90.** For the above reasons, the Court holds that the Respondent State has not violated Article 6 of the Charter with respect to denial of bail pending trial.

22 *Anaclet Paulo v Tanzania* (merits) (21 September 2018) 2 AfCLR 446 §§ 66-67.

## D. Allegation that the impugned provisions of the Penal Code promotes sexism

**91.** The Applicants allege that Section 138(1)(B)(e) of the Penal Code as well as the entire section of the Penal Code on the offences against morality "are couched in sexist terms" in violation of Articles 2 and 3 of the Charter, without giving any details.

**92.** The Respondent State did not respond to this allegation.

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**93.** Article 2 of the Charter provides that

> Every individual shall be 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.

**94.** 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."

**95.** The Court notes that the essence of Articles 2 and 3 of the Charter is to proscribe differential treatment to individuals found in the same situation on the basis of unjustified grounds. In the instant Application, the Applicants make a general allegation that the provision of the law perpetuates discrimination and inequality before the law. They neither explain the circumstances of this differential treatment nor provide evidence to substantiate their allegation.

**96.** For the above reasons, the Court holds that the Respondent State has not violated Articles 2 and 3 of the Charter with respect to the allegation that Section 138(B)(e) and the Penal Code section on morality offences promotes sexism.

## VIII. Reparations

**97.** The Applicants pray that the Court quash their convictions and sentences and order their release. Further, they pray that the Court grant them reparations for the violations they suffered.

**98.** The Respondent State prays the Court to deny the Applicant's request for reparations.

***

**99.** 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.

**100.** In the instant case, no violation has been established and thus the issue of reparation does not arise. The Court, therefore, dismisses the Applicants' prayer for reparations.

## IX. Costs

**101.** The Applicants pray the Court to order the Respondent State to bear the costs. The Respondent State did not respond to this prayer.

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

**103.** In view of the above provision, the Court rules that each party shall bear its own costs.

## X. Operative part

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

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

On the merits
v. *Finds* that the Respondent State has not violated Article 7(1)(d) of the Charter as regards the basis of the Applicants' conviction being partial evidence;
vi. *Finds* that the Respondent State has not violated Article 7(2) as

regards the Applicants' conviction on the basis of a non-existent law;

vii. *Finds* that the Respondent State has not violated Article 6 of the Charter as regards the denial of bail pending trial.

viii. *Finds* that the Respondent State has not violated Articles 2 and 3 of the Charter as regards Section 138(B)(e) of the Penal code and the Penal Code section on morality offences promotes sexism.

*On reparations*

ix. *Dismisses* the Applicants' prayer for reparations;

*On costs*

x. *Orders* each party to bear its own costs.

# Sissoko & 74 ors v Mali (judgment) (2020) 4 AfCLR 641

Application 037/2017, *Boubacar Sissoko & 74 ors v Republic of Mali*

Judgment, 25 September 2020. Done in English and French, the French text being authoritative.

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

The Applicants, who were all police officers in the Respondent State, alleged that the rejection of their application for admission into the Police Academy was a violation of their rights, including a right to be promoted to a higher position. In its judgment, the Court found no violations.

**Admissibility** (disparaging language, 28-30; exhaustion of local remedies, 46, 47, 50, 51)

**Equality before the law** (equality before judicial institutions, 70)

**Non-discrimination** (fundamental nature, 95)

**Work** (implicit nature of right to be promoted, 108)

**Educatio**n (scope of, 120-125)

## I. The Parties

**1.** Mr Boubacar Sissoko and 74 others (hereinafter referred to as "the Applicants"), are nationals of Mali and police officers whose applications into the National Police Academy were rejected by the Ministry of Internal Security.

**2.** The Application is filed against the Republic of Mali (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 to the Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 20 June 2000. The Respondent State also deposited, on 19 February 2010, 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 Organizations with observer status before the African Commission on Human and Peoples' Rights.

## II. Subject of the Application

### A. Facts of the matter

**3.** The Applicants submit that in order to cater to the shortage of police personnel, the Respondent State issued Decree No. 06-53/P-RM of 6 February 2006 which lays down the special provisions to recruit more officers and which was applicable to the various branches of the National Police Force. Article 47 of the Decree provides that:

> All Police Inspectors and non-commissioned officers holding a Master's degree on the date of entry into force of this decree shall be authorized to enter the National Police Academy in successive batches according to seniority in rank and service in order to be trained as Superintendents of Police.

**4.** Pursuant to Articles 18, 47 and 49 of the said Decree, the then Minister of Internal Security and Civil Protection, on the proposal of the Director-General of the Police, admitted to the National Police Academy, in successive batches, graduates listed as Cadet Superintendents of the Police.

**5.** The Applicants aver that, in order to benefit from the provisions of above-mentioned Decree of 6 February 2006, they undertook university studies in law and economics, leading to a Master's degree, which enabled them to apply for admission to the National Police Academy so as to attend the training therein as Cadet Superintendents of Police.

**6.** However, the Ministry of Security rejected their applications, whereas under the same laws, their colleagues who had obtained similar diplomas and who were at the same level of seniority were admitted to the Academy and appointed as Cadet Superintendents of the Police.

**7.** The Applicants contend that some of their colleagues, whose applications had also been rejected referred the matter to the Administrative Division of the Supreme Court of the Respondent State which, by judgments No. 362 of 22 November 2013 and No. 093 of 17 April 2014, granted their application, on the basis of the principles of equality of all before the law and non-discrimination, paving the way for their administrative regularisation by the supervisory authority.

**8.** The Applicants aver that they equally referred their matter to the same Administrative Division of the Supreme Court which however, dismissed their application by Decision No. 258 of 5 May 2016.

## B. Alleged violations

**9.** The Applicants allege the following against the Respondent State:

i. Violation of the right to equality before the law, the right to equal protection of the law without discrimination, provided for in Article 26 of the ICCPR and Article 3(1) and (2) of the Charter;

ii. Violation of the right to equal opportunity for advancement to the next higher grade without regard to any consideration other than seniority in the most recent grade and competence, as provided for in Article 7(C) of the ICESCR;

iii. The inconsistency of Articles 125 and 127 of Law No. 034 of 12 July 2010 with the international obligations of the Republic of Mali in laying down the rules and regulations governing civil servants of the National Police.

## III. Summary of the Procedure before the Court

**10.** The Applicants filed their Application on 8 December 2017 and it was served on the Respondent State on 22 march 2018.

**11.** The Parties filed their submissions on the merits and on reparations within the prescribed time-limits.

**12.** The pleadings were closed on 26 September 2018 and the Parties were duly notified.

## IV. Prayers of the Parties

**13.** The Applicants pray the Court to:

i. Find that it has jurisdiction to hear the Application;

ii. Declare that the Application is admissible;

iii. Find that the Republic of Mali has violated the right of the Applicants to equality before the law and the right to equal protection of the law without discrimination provided for in Articles 25 and 26 of the ICCPR and 3(1) and (2) of the Charter;

iv. Find that the Republic of Mali violated the Applicants' right to advancement under Article 7(c) of the ICESCR;

v. Order the State of Mali to put an end to the violations of their rights, to regularize their situation and to reclassify them, pursuant to the provisions of Decree No. 06-053/P-RM of 6 February 2006, in particular Article 47 thereof;

vi. Declare that the State of Mali is required to pay an amount of one hundred million (100,000,000) CFA Francs to each Applicant for the prejudice suffered;

vii. Order the State of Mali to bear the costs of the proceedings.

**14.** They further pray the Court to award the following reparations:
Order the State of Mali to pay an amount of one billion, ninety-six million (1,096,000,000) CFA Francs to each Applicant as fair compensation for the damages and loss of income suffered. The amount shall be distributed as follows:

i. Twelve million (12,000,000) CFA Francs in respect to salary arrears from December 2014 to December 2018, or forty-eight (48) months' salary for each Applicant;

ii. Twenty-four million (24,000,000) CFA Francs for procedural costs;

iii. Ten million (10,000,000) CFA Francs for the preparation of the pleadings;

iv. Seventy-five million (75,000,000) CFA Francs per Applicant in respect of non-pecuniary damage suffered;

v. Seventy-five million (75,000,000) CFA Francs in respect of missed career opportunities and missed assignments.

**15.** The Respondent State prays the Court to:

i. Declare the Application inadmissible for non-exhaustion of local remedies and for containing disparaging and insulting language;

ii. Dismiss the Application on the ground that it is unfounded and further dismiss the request for reparations;

iii. Order the Applicants to bear the costs and expenses.

## V. Jurisdiction

**16.** The Court notes that Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

**17.** According to Rule 39(1) of the Rules: "the Court shall conduct a preliminary examination of its jurisdiction in accordance with the Charter, the Protocol and these Rules".

**18.** On the basis of the above-cited provisions, the Court must, in every application, preliminarily, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

**19.** The Court notes that the Respondent State has not raised any objections to its jurisdiction.

**20.** After a preliminary examination of its jurisdiction, and having further found that there is nothing in record to indicate that it does not have jurisdiction, the Court holds that it has:

i. Material jurisdiction, insofar as the Applicants allege violation of Articles 3(1) and (2) of the Charter and also of Articles 25 and 26 of

the ICCPR, 7(2) of the ICESCR to which the Respondent State is a party;[1]

ii. Personal jurisdiction, insofar as the Respondent State is party to the Charter, the Protocol and has deposited the Declaration allowing individuals and Non-Governmental Organizations with observer status before the Commission to bring cases directly before the Court;

iii. Temporal jurisdiction, in so far as the violations were alleged to have been perpetrated by the Respondent State, after the entry into force of the aforementioned instruments (21 October 1986 for the Charter, 3 January 1976 for the ICESCR and 23 March 1976 for the ICCPR);

iv. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place on the territory of the Respondent State.

**21.** Accordingly, the Court holds that it has jurisdiction to consider the Application.

## VI. Admissibility

**22.** In accordance with Rule 39(1) of the Rules of Court, "the Court shall ascertain its admissibility of an application in accordance with the Charter, the Protocol and these Rules".

**23.** Rule 40 of the Rules of Court, 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

1 The Republic of Mali became a party to the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR") and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "ICESCR") on 16 July 1974.

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

**24.** The Respondent State raises two objections to the admissibility of the Application, alleging that the Application uses offensive and disparaging language and that it was filed before local remedies were exhausted.

### i. Objection based on the use of abusive and disparaging language

**25.** The Respondent State asserts that the Applicants used offensive and disparaging language, without further explanation.

**26.** The Applicants did not file a reply to this point.

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**27.** The Court notes that the issue herein is whether the language used in the Application is insulting or derogatory towards the Respondent State to render the Application inadmissible.

**28.** In determining whether language is derogatory or insulting, the Court must satisfy itself that the language used has intentionally violated the dignity, reputation or integrity of a public official or judicial body. The terms must be aimed at undermining the integrity and status of the institution and discrediting it.[2]

**29.** The Court also notes that "public figures, particularly those holding the highest offices of political power are legitimately subject to criticism."[3] Therefore, for the terms used against them to be considered as outrageous and insulting, they must be offensive,

2 *Lohé Issa Konaté v Burkina Faso*, (merits) (5 December 2014) 1 AfCLR 314; *Kennedy Gihana & ors v Republic of Rwanda*, ACtHPR, Application 017/2015, Judgment of 28 November 2019 (merits and reparations).

3 UN Human Rights Committee (HRC), General Comment No. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 and *Rafael Marques de Morais v Angola*, Communication No. 1128/2002, U.N.Doc. CCPR/C/83/D/1128/2002 (2005).

seeking to belittle and undermine their integrity and reputation.

**30.** In the instant case, the Respondent State has not specified how the disparaging or insulting language used by the Applicants offended the Minister of Internal Security and Civil Protection. Furthermore, it has not specified the terms and expressions that the Applicants used with the aim of corrupting the public mind or any other public figure and of undermining the integrity and function of the Minister of Internal Security and Civil Protection.

**31.** The Court notes, in any event, that the terms used by the Applicants set out the facts and do not reflect any personal animosity, either towards the Minister of Internal Security and Civil Protection of Mali, or towards the Ministry of Security, or towards the Malian judiciary.

**32.** Consequently, as the Application does not contain any terms that are disparaging or insulting to the administrative and judicial authorities of Mali, the Court dismisses the objection to the admissibility herein.

### ii. Objection based on non-exhaustion of local remedies

**33.** The Respondent State states that the exhaustion of local remedies is an important requirement under Article 56 of the Charter and Rule 40 of the Rules.

**34.** The Respondent State contends that the purpose of these articles is to limit the unjustified and arbitrary referral of cases to the Court and to avoid overloading the Court with many cases.

**35.** The Respondent State draws the Court's attention to the fact that the Applicants have not exhausted the local remedies available to them, inasmuch as they have not lodged an application for review of Judgment No. 258 of 5 May 2016 delivered by the Administrative Division of the Supreme Court of Mali.

**36.** It further argues that it is therefore necessary for the Court to declare the Application inadmissible for the above reasons as it is not compatible with the Court's case-law and violates Rules 34(4) and 40 of the Rules of Court, and Article 56 of the Charter.

**37.** In their Reply, the Applicants submit that the Court should only be seized after all local remedies have been exhausted, which means that an application against a State may be brought before the Court only if the national courts of that State have had an opportunity to consider the alleged violations.

**38.** The Applicants further submit that the exhaustion of local remedies has two aspects:

i. Firstly, exhaustion of the complaints, in other words, the Applicant must have raised before the Court the same complaints as those

raised before the domestic courts. In that regard, they refer to the case-law of the European Court of Human Rights (hereinafter referred to as "ECtHR") in the matter of *Guzzardi v Italy*.[4]

ii. Secondly, it is the duty of the Applicant to prove he has exhausted local remedies while the Respondent State must demonstrate the availability of the judicial remedies that the Applicant should have exhausted.

**39.** The Applicants further submit that the ECtHR held, in *Van Osterwijck v Belgium*, and *Radio France & ors v France*, that the Applicant is not required do anything other than exhaust appropriate, available, accessible and effective remedies.[5]

**40.** The Applicants also submit that Article 254 of Organic Act No. 2016-046 of 23 September 2016 of the Supreme Court of Mali only provides for the possibility for an application for review in a limited number of cases.

**41.** The Applicants consider that only one of the options of the above mentioned provision was available to them, that is, "failure to apply the law, an error in its application or a misinterpretation of the law*".*

**42.** Even so, the Applicants assert that the review of this complaint would have been ineffective because the Administrative Chamber of the Supreme Court of Mali had, by judgment No. 186 of 7 April 2016, dismissed the appeal of the civil servants Broulaye Coulibaly & ors.

**43.** The Applicants assert that, the Supreme Court seeking to comply with the above-mentioned jurisprudence, in Decision No. 412 of 10 August 2017, also granted the appeal of the Respondent State by retracting Decisions No. 295 of 17 December 2015 and No. 420 of 4 August 2016 rendered in favour of Mr. Salif Traoré and Mr. Sékou Oumar Coulibaly for their regularization as Cadet Superintendents of Police.

**44.** The Applicants state that, having obtained their Master's degree without having required approval from the hierarchy, in accordance with Article 125 of Law No. 034-2010 of 12 July 2010 which lays down the national police officers' rules and regulations, any application for review would have been futile.

**45.** The Applicants contend that they cannot therefore file an application for review in the present case, since the Administrative Chamber of the Supreme Court of Mali has a well-established and consistent body of case law on this point.

4 *Guzzardi v Italy*, ECtHR, 10 March 1977, § 70.

5 *Van Osterwijck v Belgium*, ECtHR, 6 November 1980, § 270; *Radio France & ors v France*, 23 September 2003 § 34.

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**46.** The Court recalls that any application submitted to it must satisfy, *inter alia*, the condition of prior exhaustion of local remedies,[6] unless the remedies are not available, effective or sufficient or the proceedings of such remedies are unduly prolonged. In its case-law, the Court has consistently held that the remedies to be exhausted must be ordinary domestic judicial remedies.[7]

**47.** In this regard, the Court notes that in the Malian judicial system, the procedure for appealing for review before the Supreme Court, under Article 254 of Act No. 2016-046 of 23 September 2016 on the Organization Act establishing the organization and operating rules of the Supreme Court and the procedure followed before it, is subject to specific cases of initiation.

**48.** The Court further notes that before filing their Application at the Court, the Applicants had filed an application before the Administrative Division of the Supreme Court, which issued judgment No. 258 of 5 May 2016 dismissing their application for their regularization as Cadet Superintendents of police.

**49.** The Court further underscores that, following the application for review by the Malian authorities against the regularization judgments handed down by the Administrative Division of the Supreme Court of Mali, the Supreme Court quashed and set aside those judgments.

**50.** In the circumstances, it is clear that the Applicants could not expect a different result from the Supreme Court in respect to any application for review.

**51.** In this connection, the Court stated that "it was not necessary to resort to the same judicial process if the result was known in advance".[8]

**52.** Consequently, the Court finds that the Applicants exhausted local remedies and dismisses the objection to admissibility of the Application herein.

6 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314 § 77.

7 *Wilfred Onyango Nganyi & ors v Tanzania* (merits) (18 March 2016) 1 AfCLR 507.

8 *Lohé Issa Konaté v Burkina Faso* (merits) *op.cit; Tanganyika Law Society v the Legal and Human Rights Centre*; *Reverend Christopher R. Mtikila* (merits) (14 June 2013) 1 AfCLR 34; *Action pour la protection des droits de l'homme v Côte d'Ivoire*, (merits) (18 June 2016) 1 AfCLR 668.

## B. Other conditions of admissibility

**53.** The Court notes that the compliance of the present Application with the conditions set out in subparagraphs 1, 2, 4, 6 and 7 of Rule 40 of the Rules are not in contention between the Parties. However, the Court must satisfy itself that these conditions are met.

i. The Court notes from the record, that the condition set out in Rule 40(1) of the Rules has been met, as the Applicants have clearly indicated their identity.

ii. The Court also finds that the Application is compatible with the Constitutive Act of the African Union or the Charter insofar as it concerns allegations of violations of human rights enshrined in the Charter and therefore complies with the Rule 40(2) of the Rules.

iii. The Court notes that since the present Application is not based exclusively on news disseminated by mass media but rather on the record of proceedings of the courts of the Respondent State, it meets the requirement of Rule 40(4) of the Rules.[9]

iv. The Court notes that the appeal lodged by the Applicants was dismissed by Decision No. 258 of 5 May 2016 and that their application was filed with this Court on 8 December 2017, that is, one (1) year, six (6) months and eight (8) days later. The Court considers that the Application was brought within a reasonable time after the exhaustion of local remedies in accordance with the Rule 40(6) of the Rules and its case-law.

v. Lastly, the Court notes that the present matter does not concern a case that has already been settled by the Parties in accordance with either the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter or any legal instrument of the African Union. It therefore fulfils the condition set out in the Rule 40(7) of the Rules of Court.

**54.** In light of the foregoing, the Court concludes that the Application meets all the conditions of admissibility set out in Article 56 of the Charter and the Rule 40 of the Rules of Court and, accordingly, declares it admissible.

9 *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 105; *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) (21 June 2013) 1 AfCLR 197.

## VII. Merits

**55.** The Applicants allege:

i. Violation of the right to equality before the law, equal protection of the law and non-discrimination by the Supreme Court and the Ministry of the Internal Security.

ii. Violation of the right to be promoted to a higher category;

iii. The inconsistency of Articles 125 and Law No. 10-034 of 12 July 2010 which lays down the national police officers' rules and regulations with Mali's international obligations.

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

**56.** The Applicants allege, that the Respondent State, flagrantly violated their rights guaranteed by international human rights instruments, including Article 3 of the Charter, Articles 25(c) and 26 of the ICCPR and Article 2(1) of the Charter, at two levels, through the Administrative Chamber of the Supreme Court and the Ministry of Internal Security and Civil Protection.

#### i. Alleged violation of the right to equality and equal protection of the law by the Supreme Court

**57.** The Applicants submit that they are not praying the Court to rule on the legality of a domestic court's decision, but rather to determine whether that decision results in violation of human rights.

**58.** The Applicants aver that, while the judges of the Court cannot assess the application of domestic law by national judges, they nevertheless have jurisdiction to identify human rights violations, even if they result from the judgment of a domestic court of a member State.

**59.** They claim that this Court cannot play its role in protecting human rights if it disregards the flagrant violations resulting from the judgments of national courts, in particular, the contradictory Judgment No. 258 of 5 May 2016, handed down by the Administrative Division of the Supreme Court of Mali.

**60.** Furthermore, they assert that human rights' treaties are legal instruments that Member States must incorporate into their domestic legislation so as to be binding on their courts. By virtue of this special regulation, it is the duty of the national judge to apply the rights guaranteed by these treaties in the cases brought before him.

**61.** The Applicants allege that in the present case, the Administrative Division of the Supreme Court dismissed their appeal in Judgment No. 258 of 5 May 2016, whereas in Judgments No. 362 of 22 November 2013 and No. 93 of 17 April 2014, the same Chamber had granted the application of other colleagues in a similar situation of seniority and grade.

**62.** They further indicate that a reversal of the case law cannot have the effect of undermining an international commitment of the State, in this case, the principle of equality of all before the law.

**63.** Consequently, they conclude that they did not enjoy equal protection of the law before the Supreme Court, thus leading to a breach of equality between them and their police colleagues, who had the same seniority and qualifications, in violation of the provisions of Article 3 of the Charter.

**64.** The Respondent State avers that the Applicants are wrong to criticize it for the appointment of Cadet Superintendents of Police Salif Traore and Sekou Oumar Coulibaly in accordance with Judgments No. 295 of 17 December 2015 and No. 420 of 4 August 2016 of the Administrative Chamber of the Supreme Court, considering that, they are in the same *de facto* and *de jure* situation but did not benefit from the same appointment.

**65.** The Respondent State notes that, contrary to the allegations made by the Applicants, the Ministry of Security lodged an appeal with the Supreme Court seeking withdrawal of Judgments No. 295 and No. 420.

**66.** According to the Respondent State, the Supreme Court, noting that the police officers concerned had obtained their Master's degree without the prior authorization of their hierarchical authority, as provided for in Article 125 of Law No. 034-2010 of 12 July 2010 which lays down the national police officers' rules and regulations stated that; "it is a general principle of civil service law that a civil servant may not invoke a right illegally obtained by another; that he who claims to hold a right is required to prove it". It therefore, according to Judgment No. 412 of 10 August 2017, retracted Judgments No. 295 and No. 420 and rejected the request of Salif Traoré and Sekou Oumar Coulibaly for regularization.

**67.** It indicated that, in compliance with the above-mentioned judgment, the Ministry of Security took a decision to withdraw the appointment of these two Cadet Superintendents of Police.

**68.** In fact, according to the Respondent State, the Applicants seek to mislead the Court by claiming that others had enjoyed privileges, as if that illegality constituted a source of acquired rights.

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**69.** The Court observes that the right to equal protection of the law and equality before the law is guaranteed by Article 3 of the Charter, which reads as follows:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

**70.** The Court recalls that the principle of equality before the law implied by the principle of equal protection of the law and equality before the law does not mean that all cases must necessarily be treated by the judicial institutions in the same manner. The treatment of the case may indeed depend on the particular circumstances of each case.[10]

**71.** It recalls that "an evolution of case-law is not, in itself, contrary to the proper administration of justice, since to assert the opposite would be to fail to maintain a dynamic and evolving approach, which might hinder any reform or improvement".[11]

**72.** The Court notes in the present case that although initially Judgments No. 295 of 17 December 2015 and No. 420 of 4 August 2016 of the Administrative Division of the Supreme Court were in favour of regularizing the status of some of the Applicants' colleagues who were in the same position in terms of seniority and qualifications as them, the fact remains that through Judgment No. 412 of 10 August 2017, the Supreme Court retracted those judgments because "these Applicants had obtained their diplomas after the reference date and did not provide proof that they had obtained prior authorization from their hierarchical authority to enrol in a training course, as provided for in Article 125 of Law No. 034-2010 of 12 July 2010 on the status of police officers".

**73.** The Court observes that the Applicants do not deny that they obtained their diplomas after the date of the decree in question and also did not obtain prior authorization from their hierarchical authority. It was on this same argument, as it did in the above-mentioned Judgment No. 421, that the Supreme Court dismissed the Applicants' request for regularization.

**74.** In so doing, the Applicants cannot claim that there has been a breach of equality between them and their other colleagues. It follows that the Respondent State has not violated the Applicants'

10 *Norbert Zongo & ors v Burkina Faso* (merits) (28 March 2014), 1 AfCLR 219.

11 *Micallet v Malta*, ECtHR, Application 17056/06 § 51.

right to equality before the law and to equal protection of the law before the Supreme Court under Article 3 of the Charter.

### ii. Alleged violation of the right to equality before the law and to equal protection of the law by the Ministry of Internal Security and Civil Protection

**75.** The Applicants submit that the administration of the Respondent State violated the principle of equality before the law and equal protection of the law by discriminating in the promotion of police officers, without any justification whatsoever, and by disregarding the disputed laws which lays down the national police officers' rules and regulations, in particular Decree No. 06/053 of 6 February 2006 and Article 125 of Law No. 10-034 of 12 July 2010 which lays down the rules and regulations governing police officers.

**76.** They further maintain that by Decision No. 2017/1239 of 5 May 2017, the Ministry of Security and Civil Protection promoted two Cadet Superintendents of police on the basis of Decisions No. 295 of 17 December 2015 and No. 420 of 4 August 2016 issued by the Administrative Chamber of the Supreme Court.

**77.** The Applicants also aver that, the effects of Article 47 of Decree No. 06-053 of 6 February 2006 were extended by letter No. 0586 of 26 August 2009 from the Minister of the Interior to the Director General of the Police.

**78.** They add that, on the basis of this letter, some of their colleagues were promoted to the rank of Cadet Superintendents of Police while they did not obtain the favourable recommendation of their superior before starting their studies and even obtained their master's degree after the aforementioned decree.

**79.** The Applicants conclude that the Respondent State violated the principles of equality of all before the law and equal protection enshrined in Article 3 of the Charter.

**80.** The Respondent State, in reply, recalls that Article 47 of that Decree reads as follows: "Police inspectors and non-commissioned police officers holding the Master's degree on the date of entry into force of this decree shall be authorized to enter the National Police Academy in successive waves according to seniority in rank and service".

**81.** It considers that the above-mentioned Article 47 leaves no room for ambiguity. The police inspectors and non-commissioned police officers concerned are those who hold the requisite diplomas on the date of entry into force of the decree in question.

**82.** The Respondent State further states that the Applicants did not hold the requisite degree on the date of entry into force of

this aforementioned decree and were therefore not eligible to join the contingent admitted for vocational training for Cadet Superintendents and Inspectors. This is because, all of them obtained their diplomas after the decree was signed.

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**83.** The Court restates that equality and equal protection of the law, guaranteed under Article 3 of the Charter are fundamental principles of international human rights law and that everyone, without distinction of any kind, is entitled to all rights.

**84.** The Court notes that, in the instant case, Article 47 of Decree No. 06-053 of 6 February 2006 sets out the conditions relating to the date of graduation and seniority in the service, in order to receive the training in question.

**85.** The Court confirms that the evidence provided by the Applicants prove that they graduated after 31 July 2008.

**86.** The Court notes that the Respondent State applied the provisions of the decree of 6 February 2006 and the Law of 12 July 2010 which lays down the national police officers' rules and regulations, taking into account the situation of the Applicants on the date the decree was signed.

**87.** The Court further observes that the purpose of the letter of 26 August 2009 from the Minister of the Interior, was to provide an exception and allow a selection based on seniority (at least 15 years) and date of graduation (obtained before 31 July 2008). Police officers admitted to the National Police Academy on an exceptional basis were appointed by Orders Nos. 2330 and 2331 of 23 June 2016 on the basis of the criteria set out in the above-mentioned letter and not those of the decree in question, which had already been repealed.

**88.** The Court notes that the Applicant's argument that the temporal effects of Article 47 of the above-mentioned Decree of 6 February 2006 were extended by letter No. 0586 of 26 August 2009 is unfounded.

**89.** The Court concludes that the Respondent State made a simple application of the provisions in the matter. Consequently, it has not violated the Applicants' right to equality before the law and equal protection of the law under Article 3(1) and (2) of the Charter.

## B. Alleged violation of the right to non-discrimination

**90.** The Applicants allege that they did not enjoy the same rights as their colleagues who were regularized through the decisions rendered by the Supreme Court who were in the same position in terms of seniority and qualifications as them.

**91.** They stated that their right to non-discrimination is guaranteed under Article 2 of the Charter and Articles 25 and 26 of ICCPR.

**92.** The Respondent State contends that the Applicants did not suffer any discrimination. Their applications were rejected because they did not comply with the provisions of Article 47 of the decree of 6 February 2006.

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**93.** Article 2 of the Charter provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national, social origin, fortune, birth or any status.

**94.** This provision is similar to those reflected in Articles 25 and 26 of the ICCPR in that they present the same elements of distinction enshrined in Article 2 of the Charter.[12]

**95.** The Court notes that there is an interconnection between equality before the law and equal protection of the law on the one hand and the enjoyment, without discrimination, of the rights guaranteed by the Charter on the other in the sense that the entire legal structure of national and international public order relies on this principle which transcends all norms.[13]

12 Article 25: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (c) To have access, on general terms of equality, to public service in his country.
Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

13 This notion is shared by ACmHPRComm, *Open Society Justice Initiative v Côte d'Ivoire*, 28 February 2015, 318/06; Inter-American Court of Human Rights, Advisory Opinion OC-18 of September 17, 2003.

**96.** In other words, when the rights to equality before the law and equal protection of the law are violated, the rights under Article 2 are equally violated.

**97.** The Court notes that the Applicants failed to demonstrate that they suffered discrimination as a result of their race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune or birth.

**98.** In the instant case, the Court found that the Respondent State did not violate the rights to equality before the law and equal protection of the law. Consequently, the right to non-discrimination has not been violated.

## C. Alleged violation of the right to be promoted to a higher category

**99.** The Applicants claim that there has not been equality of treatment between them and some of their fellow police officers who are in the same position of seniority and qualifications as them. The status of these colleagues had been resolved by judgments of the Supreme Court, which showed a manifest refusal to promote the Applicants to a higher category, so that the Respondent State had violated Article 15 of the Charter and Article 7(c) of the ICESCR.

**100.** In its Response, the Respondent State asserts that it was originally Decree No. 053-06 of 6 February 2006 that set out the special provisions applicable to the various cadres of national police officers, including Superintendents, Inspectors and non-commissioned officers.

**101.** Articles 14 and 15 of the said Decree provide that recruitment into the corps of Police Officers and Police Inspectors may be by way of training for police officers authorized to undertake training entitling them to change category. In addition, officials from the police inspectorate and the police officers' corps who have successfully completed studies at a level corresponding to the Master's degree are integrated into the corps of Superintendents of Police.

**102.** The same text also regulates the training framework, due to the specificity of the police corps.

**103.** The Respondent State also argues that a Police Officer must be authorized to undertake the training. In order to obtain such authorization, the Police Inspector or non-commissioned Police Officer must have at least five years of seniority in his rank, three of which must have been spent in his post, obtain the approval of the hierarchical authority on the basis of the last rating and the speciality to which he intends to accede, and be at least five years

away from retirement at the end of the training.

**104.** The Respondent State asserts that, contrary to the Applicants' allegations, the right to be promoted in one's work to a higher category, guaranteed by the ICESCR, is incorporated into Mali's domestic legislation.

**105.** It argues that training and promotion in the course of one's career are statutory rights recognised for all Police Officers. These rights are part of the regulatory provisions provided for by Law No. 039 of 12 July 2010 which lays down the National Police Officers' rules and regulations, in particular Article 125, which sets the conditions for promotion in grade, and Article 127, which sets conditions for the promotion of training in the course of one's career with regard, *inter alia*, to the criteria of seniority in the corps, the favourable recommendation of their superior, prior authorization and study leave.

**106.** It asserts that none of the Applicants met the criteria required by those legal provisions.

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**107.** The Court recalls that 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".

**108.** The Court notes that, while Article 15 of the Charter does not expressly provide for the right to promotion to a higher category. It may nevertheless be interpreted in light of Article 7(c) of the ICESCR, which provides as follows:

> The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular ... Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.

**109.** The Committee on Economic, Social and Cultural Rights has also stated that:

> All workers are entitled to equal opportunities for promotion through fair, merit-based and transparent procedures which respect human rights. The criteria for seniority and competence should include an assessment of personal circumstances and the different roles and experiences of

men and women, in order to ensure equal opportunities for promotion for all.[14]

**110.** The Court observes in the instant case that, in respect of the provisions of Articles 125[15] and 127[16] of Law No. 10-034 of 12 July 2010 which lays down the National Police Officers of Mali's rules and regulations, the criteria for promotion of a police officer in the Respondent State, are seniority and competence, in accordance with Article 7 of the aforementioned ICESCR.

**111.** It notes that the Applicants, at the date of the decree of 6 February 2006, did not meet these criteria for access to the training of Superintendents of Police as they obtained their Master's degrees after the date of the decree.

**112.** The Court concludes that the State of Mali has not violated the Applicants' right to be promoted to a higher category.

**113.** It therefore dismisses the Applicants' allegation of violation of Article 15 of the Charter and Article 7(c) of the ICESCR.

## D. Incompatibility of Mali's laws with its international obligations

**114.** The Applicants submit that Articles 125 and 127 of Law No. 10-034 of 12 July 2010 which lays down the National Police Officers' rules and regulations are inconsistent with the obligations in the international instruments ratified by the Republic of Mali, in particular Article 26 of the UDHR and Articles 1 and 3 of the Convention against Discrimination in Education (the "UNESCO

14 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23: available at: https://www.refworld.org/docid/5550a0b14.html [accessed 28 September 2020], § 31.

15 Article 125: Advancement to a higher grade through training requires that a national police officer successfully complete studies at the level corresponding to the higher category he wishes to access. In order to enroll for the aforementioned training, the police officer shall:
obtain prior approval of his hierarchical authority, including their last performance appraisal and of the specialization of the corps he plans to access.
be, at least five, (5) years away from retirement at the end of the training.

16 Article 127: In order to lead to promotion, in-service training shall be a discipline which corresponds to one of the specializations of the Police; furthermore, it shall be justified by need, and undertaken by officers in service or on secondment.
The training undertaken shall allow the officer, depending on the diploma obtained, to get an advancement to the next higher grade, or to a higher category which corresponds to the diploma obtained.
Promotion resulting from the said training, shall not, in any way, pave the way for access to a higher rank in the same corps.
To benefit from the right to advancement to a higher grade, the training duration shall not be less than two (2) years.

Convention of 14 December 1960"), ratified by Mali on 7 December 2007, and that the Respondent State is therefore required to comply with those obligations.

**115.** They also aver that, access to a higher grade in an administration is obviously freely regulated by the State, which sets the legal and regulatory conditions for it. Articles 125 and 127 of Law No. 10-034 of 12 July 2010 are consistent with this. In order to reconcile the right to education of public officials with the continuity of public service, the State may make temporal adjustments for service needs.

**116.** The Applicants question the relevance of the prior opinion of the hierarchical authority, given that the higher education diploma is part of the need to ensure continuity of public service during the staff member's training cycle.

**117.** They maintain that, when analysing the criteria set out in Articles 125 and 127 of Law No. 10-034 of 12 July 2010, the taking into account of the years of service, the staff member's rating and the favourable recommendation of their superior are in no way linked to any need to ensure the continuity of public service. Rather, it is an obstacle to the right to education, in particular the right of access to higher education with a view to obtaining social promotion, since making enjoyment of such a right conditional on the favourable recommendation of their superior constitutes an obstacle to promotion to a higher grade and access to higher education.

**118.** The Applicants conclude by stating that in the circumstances, it is undeniable that the right to education has been deprived of its substance.

**119.** The Respondent State contends that the impugned law does not contain any provisions contrary to national or international legal standards. Articles 125 and 127 merely lays down conditions for the promotion of police officers, it being understood that such promotion may not be arbitrary or merely subject to the will of the hierarchical authority, in the interests of the equality of all officials.

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**120.** In order to determine whether Articles 125 and 127 are in conformity with the international obligations of the Republic of Mali, the Court must answer the following questions:

i. Are the studies necessarily aimed at promotion to a higher grade?

ii. Does the requirement of a favourable recommendation of a superior for upgrading of a higher education certificate obtained by a police officer hoping to be promoted constitute an obstacle to the right to education?

**121.** Regarding the first question, the Court notes that Article 13(1) of the ICESCR provides as follows:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

**122.** The Court notes that technical and vocational education is an integral part of education at all levels, including higher education.[17]

**123.** Article 26(2) of the UDHR provides as follows:

> Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

**124.** It follows from the foregoing that promotion to a higher category is not an objective of education within the meaning of Article 26(2) of the UDHR and Article 13(1) of the ICCPR.

**125.** In answer to the first question, the Court concludes that promotion to a higher category is not a higher education goal and hence obtaining a higher education certificate does not necessarily lead to promotion at work.

**126.** Regarding the second question, the Court recalls that Article 17(1) of the Charter provides that "everyone has the right to education" and Article 26(1) of the UDHR stipulates that:

> Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

**127.** The UNESCO Convention against Discrimination in Education (hereinafter referred to as the "UNESCO Convention"), adopted on 14 December 1960 and ratified by the Republic of Mali,

17 This opinion is reflected in the International Labour Organization's Human Resources Development Convention, 1975 (No. 142) No. 142) and Social Policy (Basic Aims and Standards) Convention, 1962 (No.117).

provides in Article 1 that:

For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular...:

a. To exclude any person or group from access to the various types or levels of education;

b. Limiting the education of a person or group to a lower level.

**128.** In view of the foregoing, the Court considers that the requirement of prior authorization for the use of a diploma within a particular service does not constitute discrimination within the meaning of Article 1 of the UNESCO Convention, since it does not impede the right of access to higher education.

**129.** Moreover, Article 13(2) of the ICESCR provides that "higher education shall be made equally accessible to all, on the basis of capacity," which is in line with the provisions of Article 125 of the impugned law, which takes into account the years of service and the staff member's rating in addition to the favourable recommendation of their superior who makes the assessment.

**130.** The Court concludes that Articles 125 and 127 of the impugned law cannot be said to be incompatible with the international obligations of the Republic of Mali under the international human rights instruments it has ratified, including the UDHR and the UNESCO Convention.

## VIII. Reparations

**131.** The Applicants pray the Court, pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules, to make an order for reparations to remedy the violations of their fundamental rights, including the payment to each Applicant of the sum of:

1,096,000,000 CFA francs as fair compensation for damages and loss of income suffered. The amount is distributed as follows:

i. Twelve million (12,000,000) CFA francs in respect of salary arrears from December 2014 to December 2018, or forty-eight (48) months' salary for each Claimant;

ii. Twenty-four million (24,000,000) CFA francs for procedural costs;

iii. Ten million (10,000,000) CFA francs for the constitution of pleadings;

iv. Seventy-five million (75,000,000) CFA francs per claimant in respect of non-pecuniary damage suffered;

v. Seventy-five million (75,000,000) CFA francs in respect of missed career opportunities and missed assignments.

**132.** They also pray the Court to order such other reparation as it considers appropriate in the circumstances of the case.
**133.** The Respondent State prays the Court to dismiss the prayer for reparations in so far as no violation is attributable to it.

***

**134.** Article 27(1) of the Protocol reads as follows: "If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".
**135.** The Court notes that in the present case, no violation has been found against the Respondent State and that, consequently, there is no need to order any reparation. The Court therefore dismisses the Applicants' prayer for reparations.

## IX. Costs

**136.** The Applicants pray the Court to order the Respondent State to bear the costs.
**137.** The Respondent State prays the Court to Order the Applicants to pay the full costs of the proceedings.

***

**138.** Rule 30 of the Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".
**139.** In the light of the above provisions, the Court decides that each Party shall bear its own costs.

## X. Operative part

**140.** For these reasons,
The Court,
*Unanimously,*
*On jurisdiction*
i. Dismisses objections to jurisdiction;

ii. Declares that it has jurisdiction.

*On admissibility*

iii. Dismisses objections to admissibility;
iv. Declares the Application admissible.

*On the merits*

v. Finds that the Respondent State has not violated the right to equality before the law, the right to equal protection of the law provided for in Article 3(1) and (2) of the Charter;
vi. Finds that the Respondent State has not violated the right to non-discrimination provided for in Articles 25(c) and 26 of the ICESCR;
vii. Holds that the Respondent State has not violated the right to equal advancement to a higher grade without regard to any consideration other than seniority and competence, as set out in Article 15 of the Charter and 7(c) of the ICESCR;
viii. Holds that Articles 125 and 127 of Law No. 10-034 of 12 July 2010 are not incompatible with the international obligations of the Republic of Mali.

*On reparations*

ix. Dismisses the Applicants' prayers for reparations.

*On costs*

x. Decides that each Party shall bear its own costs.

# Traore v Mali (admissibility) (2020) 4 AfCLR 665

Application 010/2018, *Yacouba Traore v Republic of Mali*

Ruling: Admissibility, 25 September 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought this action alleging that the circumstances of his dismissal from employment amounted to a violation of his rights guaranteed under the Charter. The Court declared the case inadmissible for non-exhaustion of local remedies.

**Admissibility** (exhaustion of local remedies, 39-42, 47, 50)

## I. The Parties

**1.** Mr Yacouba Traore, (hereinafter referred to as "the Applicant"), of Malian nationality, is former Chief Chemist and former staff representative of the Australian Laboratory Service (ALS) Group Mali SARL. He alleges violation of his human rights as a result of the dismissal from his job, which he deems unlawful.

**2.** The Republic of Mali (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 20 June 2000. In addition, on 19 February 2010, the Respondent State made the Declaration provided for in Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") accepting 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 contends that he was recruited by the ANALAB Exploitation, a member company of ALS Mali SARL Laboratory Group, in 2006 as Chief Chemist to determine the gold content of

ores. Considering that he was not classified in the corresponding professional category and that his salary was below that category, he made claims for reclassification which led to reprisals, including an assignment in Bamako, allegedly, for purpose of training.

**4.** The Applicant argues that in Bamako, the reprisals continued and resulted in summons before the disciplinary board, layoffs and sabotage of his work by colleagues, under the instigation of the employer.

**5.** In this regard, he claims to have been unfairly dismissed on 31 August 2012, whereas his capacity as staff representative required his employer to seek prior authorisation from the Regional Director of labour, in accordance with Article L 277 of the Labour Code.

**6.** He avers that, following his dismissal, he referred the matter to the national director of labour for a hierarchical appeal, then to the Bamako Labour Court, which declared his dismissal unlawful by Judgment No. 007/JGT/2013 of January 7, 2013, in spite of which the situation has not changed.

**7.** The Applicant further contends that, on the side lines of these labour proceedings, on 22 February 2017, he filed a complaint with the Bamako Public Prosecutor for forgery and use of forged documents against the former National Director of Labour, the former Regional Director of Labour in Bamako and an employee of the Bamako labour service who were accomplices in his dismissal.

**8.** The said complaint was dismissed, as the Public Prosecutor considered that there had been no criminal law offence

## B. Alleged violations

**9.** The Applicant alleges infringement of the following rights:

i. The right to respect for life and physical and moral integrity, enshrined in section 4 of the Charter; and

ii. The right to work under fair and satisfactory conditions, enshrined in Article 15 of the Charter.

## III. Summary of the Procedure before the Court

**10.** The Application was filed at the Registry on 20 February 2018.

**11.** On 28 February 2018, the Registry requested the Applicant to indicate whether local remedies had been exhausted, to which

the Applicant responded in the affirmative on 27 March 2018.

**12.** The Parties filed their pleadings on merits and reparations within the time stipulated by the Court and these were duly exchanged.

**13.** On 16 June 2019, the Registry informed the parties of the close of proceedings.

## IV. Prayers of the Parties

**14.** The Applicant makes the following prayers:

i. Reimbursement of arrears of contributions to the National Institute for Social Security (INPS) from August 2012 to 31 January 2017;

ii. Payment of the sum of eighty million (80,000,000) CFA francs as damages, in accordance with the letter of 2 October 2012 filed with the Labour Court;

iii. Payment of the sum of eight million (8,000,000) CFA francs as a reminder of the housing bonus, in accordance with the provisions of the mining Union agreement and the minutes of 08 December 2011, signed between FENAME and the mining operators;

iv. Reimbursement of his children and spouse's medical costs from his unlawful dismissal until the Court's decision;

v. Payment of the remaining overtime, amounting to one million (1,000,000) CFA francs, in accordance with the employer's commitments, under the aegis of the Ministry of Mines;

vi. Issuance of a work certificate in due and proper form subject to a penalty of one hundred thousand (100,000) CFA francs for each day of delay from the date of the Court's decision;

vii. Provisional Execution of the Judgment to take place, up to half of the sums allocated.

**15.** For its part, the Respondent State prays the Court to:

i. Declare the Application inadmissible;

ii. Dismiss the Applicant's Application as ill-founded;

iii. Award costs against the Applicant.

## V. Jurisdiction

**16.** The Court notes that Article 3 of the Protocol provides that:

1. The jurisdiction of the Court shall extend 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.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

**17.** The provisions of Article 3 of the Protocol are reflected, in substance, in Rule 26 of the Rules of Court (hereinafter referred

to as "the Rules").

**18.** Furthermore, under Rule 39 (1) of the Rules, "[t]he Court shall conduct a preliminary examination of its jurisdiction ..."

**19.** The Court notes that, in the instant case, none of the material, personal, temporal and territorial aspects of its jurisdiction are disputed by the parties. However, the Court is required to satisfy itself that it has the jurisdiction to deal with the case.

**20.** As regards its material jurisdiction, the Court has consistently held that Article 3(1) of the Protocol confers on it the power to consider any application containing allegations of violations of rights protected by the Charter or by any human rights instrument ratified by the Respondent State concerned.[1]

**21.** In the instant case, the Applicant alleges the violations of human rights guaranteed in the provisions of the Charter, which the Respondent State has ratified.

**22.** Accordingly, the Court has material jurisdiction.

**23.** In addition, the Court notes that when it receives an Application lodged by an individual, its personal jurisdiction is dependent on the Declaration made by the Respondent State in accordance with Articles 5(3) and 34(6) of the Protocol. In the instant case, the Respondent State made the said Declaration on 19 February 2010. It follows that the Court has personal jurisdiction.

**24.** Furthermore, as regards its temporal jurisdiction, the Court notes that the alleged violations took place after the entry into force of the Charter and the Protocol, and after the Declaration was made by the Respondent State. Consequently, the Court has temporal jurisdiction.

**25.** As to its territorial jurisdiction, the Court notes that the alleged violations took place in the territory of a Member State of the African Union. It follows that the Court has territorial jurisdiction.

**26.** In light of the foregoing, the Court declares that it has jurisdiction.

## VI. Admissibility

**27.** Article 6(2) of the Protocol provides that: "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

**28.** Furthermore, under Rule 39 of the Rules of Court: "The Court shall conduct a preliminary examination (...) of the conditions of admissibility of the application, as provided for in Articles (…) 56

1 *Peter Joseph Chacha v United Republic of Tanzania*, (admissibility) (28 March 2014), 1 AfCLR 398 § 114.

of the Charter, and Rule 40 (…) of the Rules".

**29.** Rule 40 of the Rules, which restates in substance 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, 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.

**30.** The Respondent State raises an objection to admissibility of the Application based on the failure to exhaust local remedies.

## A. Objection based on non-exhaustion of local remedies

**31.** Referring to Rule 34(4) of the Rules, the Respondent State points out that the Applicant has not adduced any evidence of exhaustion of local remedies, as the filing of copies of decisions rendered by national courts cannot legally satisfy this requirement.

**32.** It argues that only the production of certificates of no appeal, issued by the Registrar of the Labour Court, the Court of Appeal or the Supreme Court of Mali that can attest to this, in accordance with the Malian Code of Civil, Commercial and Social Procedure.

**33.** The Respondent State further submits that the copy of the Application notified to it is not accompanied by the certificate of absence of the application for a stay of execution in respect of Judgment No. 36 of 12 September 2017 handed down by the Supreme Court of Mali.

**34.** The Respondent State also contends that the Applicant voluntarily refrained from exercising certain legal remedies available in the Code of Civil Procedure of Mali, in particular the reversal of judgment against Supreme Court decision No. 36 of

12 September 2017, or under the Code of Criminal Procedure of Mali, in particular, the filing of a civil claim before the examining magistrate against the decision to dismiss his complaint against the labour administrators of 22 February 2017, which was notified to him on 29 January 2018 by the Public Prosecutor of the Republic.

**35.** For his part, the Applicant seeks the dismissal of the objection on the grounds that, with regard to the labour procedure, a post-Cassation judgment was handed down on 1 March 2018 by the Bamako Court of Appeal, a judgment that was not available at the time of the filing of the Application before this Court. However, on 2 May 2018, he filed the copy of the said judgment in the Court's Registry.

**36.** With regard to the criminal proceedings for forgery and use of forged documents initiated against the administrators on duty at the Regional Directorate and National Directorate of Labour, he recalls that the case was closed.

**37.** He concludes that he has exhausted local remedies, which makes his Application admissible.

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**38.** The Court recalls that, in accordance with Articles 56(5) of the Charter and Rule 40(5) of the Rules, applications must be filed after the exhaustion of local remedies, if any, unless it is obvious that the procedure is unduly prolonged.

**39.** The Court holds that the requirement of exhaustion of local remedies prior to bringing a case before an international human rights court is an internationally recognised and accepted rule.[2]

**40.** He adds that the local remedies to be exhausted are ordinary judicial remedies, which must be available, that is, they can be used without hindrance by the Applicant,[3] effective and sufficient, in the sense that they are "capable of satisfying the complainant" or of remedying the disputed situation.[4]

2 *Diakité v Republic of Mali*, (jurisdiction and admissibility) (28 September 2017), 2 AfCLR 118, § 41; *Lohé Issa Konaté v Burkina Faso*, (merits) (5 December 2014), AfCLR, 1AfCLR 314, § 41.

3 *Ibid*, § 96.

4 *Ibid*, § 108.

**41.** Furthermore, the Court underscores that, in principle, the determination of whether local remedies are exhausted should be made on the date the case is brought before it.[5]

**42.** The Court further explains that compliance with the requirement implies that the Applicant not only initiates but also awaits the outcome of internal remedies in the national courts.

**43.** The Court points out that, in the instant case, to challenge his dismissal, on 2 October 2012, the Applicant took his case before the Bamako Labour Court which handed down Judgment No. 007/JGT/2013 of 7 January 2013.

**44.** Following an appeal of the Judgment, the Bamako Court of Appeal issued a reversal decision on 25 July 2013, against which the Applicant filed an appeal in cassation.

**45.** The Court notes that, on 12 September 2017, the Supreme Court reversed and annulled the impugned overturning Judgment and referred the case and the parties to the Bamako Court of Appeal, otherwise composed. Indeed, the supreme national jurisdiction held that the dismissal of the Applicant had taken place without the labour inspector's authorisation, in violation of Article L. 277 of the Labour Code. According to the Supreme Court, the appeal judges had legitimised a dismissal which the law described as "void as of right".

**46.** However, the Court notes that the Applicant did not wait for the post-Cassation ruling to be handed down by the Court of Appeal before it filed its Application against the Respondent State.

**47.** In fact, on 20 February 2018, the date on which the Application was filed with the Court, local remedies were still pending before the Bamako Court of Appeal.

**48.** The Bamako Court of Appeal rendered its decision only on 1 March 2018, that is, five (5) months and ten (10) days after the judgment of cassation was handed down.

**49.** The Court is of the view that this lapse of time is a reasonable period and attests that the procedure for local remedies was not unduly prolonged in terms of Rule 40(5) of the Rules. Accordingly, nothing justifies the Applicant's filling of his Application before the post-cassation judgment of the Court of Appeal.

**50.** The Court therefore notes that the Applicant filed his Application while local remedies were still pending and had not been exhausted.

5 *Baumann v France*, N°33592/96, ECHR, 22 May 2001, § 47.

**51.** The Court observes that the conditions of admissibility laid down in Article 56 of the Charter and Rule 40 of the Rules are cumulative,[6] so much so that it suffices for one of them not to be complied with for the Application to be declared inadmissible.

**52.** It follows that, without having to consider the other conditions set out in Article 56 of the Charter and Rule 40 of the Rules, the Court declares the Application inadmissible.

## VII. Costs

**53.** The Applicant did not submit on the costs of proceedings. For its part, the Respondent State prayed that the Applicant be ordered to bear the costs.

**54.** Rule 30 of the Rules provides that: "Unless otherwise stated by the Court, each party shall bear its own costs".

**55.** The Court considers that in the present case, there is no reason to depart from the principle laid down in that text. Accordingly, each party shall bear its own costs.

## VIII. Operative part

**56.** For these reasons

The Court,

*Unanimously,*

*On Jurisdiction*

i. *Declares* that it has jurisdiction.

*On admissibility*

ii. *Declares* the Application inadmissible.

*On costs*

iii. *Orders* that each party shall bear its own costs.

6 ***Jean Claude Roger Gombert v Republic of Côte d'Ivoire*** (jurisdiction and admissibility), (22 March 2018), 2 AfCLR 270 § 61; ***Dexter Eddie Johnson v Republic of Ghana*** Application, ACtHPR, No. 016/2017, Judgment of 28 March 2019 (jurisdiction and admissibility) § 57.

# Wanjara & ors v Tanzania (judgment) (2020) 4 AfCLR 673

Application 033/2015, *James Wanjara & 4 ors v United Republic of Tanzania*

Judgment, 25 September 2020. 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 Applicants, each serving a 30 year jail sentence for armed robbery, brought this action alleging that the Respondent State violated Charter protected rights to the extent the criminal proceedings affecting them before its domestic courts were not satisfactory. The Court found that only the Applicants' rights to free legal assistance had been violated.

**Jurisdiction** (appellate jurisdiction, 28; nature of jurisdiction, 29; personal jurisdiction, 32; continuing violations, 34)

**Admissibility** (exhaustion of local remedies, 42-43; extraordinary remedies, 43-44; fresh claims, 45; reasonable time to file, 49, 52-53; computation of reasonable time, 51)

**Fair trial** (right to free legal assistance, 66, 68-70; margin of appreciation, 78; evaluation of evidence of domestic courts, 79)

**Reparations** (grounds for reparation, 85; onus of justification, 85-86; purpose of reparations, 85; assessment of quantum, 86; currency of reparation 87; material prejudice, 89,93; supporting evidence of, 94; moral prejudice, 99-100; indirect victims, 106; restitutions, 108; guarantees of non-repetition, 114)

## I. The Parties

**1.** Messrs James Wanjara, Jumanne Kaseja, Chrispian Kilosa, Mawazo Selemani and Cosmas Pius (hereinafter referred to as "the Applicants") are all nationals of the United Republic of Tanzania. At the time of filing the Application, the Applicants were serving a thirty (30) years sentence after having been convicted of armed robbery and unlawfully causing grievous harm.

**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 deposited, on 29 March 2010, 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. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that that this withdrawal will have no effect on pending cases and will come into effect one year after its filing, namely 22 November 2020.[1]

## II. Subject of the Application

### A. Facts of the matter

**3.** On 31 March 2001, the Applicants, together with a co-accused who is not before the Court, were arrested and charged with armed robbery and unlawfully causing grievous harm.

**4.** On 26 October 2001, the District Court at Magu convicted and sentenced each of the Applicants to thirty (30) years imprisonment on the first count of armed robbery and twelve (12) months imprisonment on the second count of unlawfully causing grievous bodily harm. The sentences were ordered to run concurrently.

**5.** On 5 February 2002, the Applicants, being dissatisfied with their conviction and sentence, appealed to the High Court of Tanzania at Mwanza but their appeal was dismissed on 3 June 2003. Subsequently, on 13 June 2003, the Applicants appealed to the Court of Appeal of Tanzania sitting at Mwanza which also dismissed their appeal on 27 February 2006.

**6.** The record before the Court confirms that the Applicants attempted to trigger the process for review of the Court of Appeal's decision even though no indication is given of the precise date when this was done. Nevertheless, on 11 March 2013, and subsequently, on 9 May 2014, respectively, the Court of Appeal struck out the Applicants' applications for extension of time within which to file an application for review of its judgment dismissing the Applicants' appeal.

### B. Alleged violations

**7.** The Applicants submit that the Respondent State violated their basic rights as guaranteed under article 13(6) (c) of its Constitution by imposing an improper sentence of thirty (30)

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 § 38.

years imprisonment for the offence of armed robbery.

**8.** The Applicants also submit that the Respondent State violated their rights as guaranteed under Article 7(1)(c) of the Charter by failing to provide them with legal representation during the domestic proceedings.

**9.** It is further contended that "the evidence that was relied upon to convict the Applicants was not well-analysed by both courts; and this default caused the applicants being convicted while the prosecution evidence was not sufficient to sustain their conviction."

## III. Summary of the Procedure before the Court

**10.** The Application was filed at the Registry on 8 December 2015 and served on the Respondent State on 11 February 2016.

**11.** After several extensions of time were granted to the Respondent State, it filed its Response on 16 May 2017.

**12.** On 21 June 2017, the Applicants filed their Reply to the Respondent State's Response and this was served on the Respondent State the same day.

**13.** On 1 February 2019, legal aid was granted to the Applicants.

**14.** The Parties' submissions on reparations were filed within the time allowed by the Court. These submissions were duly exchanged between the Parties.

**15.** Pleadings were closed on 8 July 2020 and the Parties were duly notified.

## IV. Prayers of the Parties

**16.** The Applicants pray that the Court:

i. Grant them free legal representation.

ii. Intervene and quash both their conviction and sentence.

iii. Order reparations.

iv. Grant any other orders or reliefs as it may deem fit.

**17.** The Respondent State prays the Court to grant the following orders with respect to the jurisdiction and admissibility of the Application:

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

ii. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court and should be declared inadmissible.

iii. That the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court and should be declared inadmissible.

iv. That costs of this Application be borne by the Applicants.

**18.** The Respondent State further prays the Court to make the following orders on the merits of the Application:

i. That the Government of the United Republic of Tanzania is not in violation of the Applicant' rights under Article 7(1)(c) of the African Charter on Human and Peoples' Rights.

ii. That the Government of the United Republic of Tanzania is not in violation of Applicant's rights stipulated under Article 13 (6) (c) of the Constitution of the United Republic of Tanzania, 1977.

iii. That the sentence of 30 years in prison for the offence of Armed Robbery is lawful.

## V. Jurisdiction

**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 instruments ratified by the State 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 ascertain its jurisdiction … in accordance with the Charter, Protocol and these Rules."

**21.** On the basis of the above-cited provisions, therefore, the Court must, in every application, preliminarily conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

**22.** The Court notes that the Respondent State raises one objection to the Court's jurisdiction.

### A. Objection to material jurisdiction

**23.** The Respondent State contends that:
The Court is not vested with jurisdiction to adjudicate the Application as the Application seeks the Honourable Court to sit as an appellate Court and pronounce itself on matters already considered and concluded by the Court of Appeal of the Respondent State.

**24.** According to the Respondent State:
Both Article 3(1) of the Protocol and Rule 26 of the Rules of Court only afford the Court jurisdiction to deal with cases or disputes concerning application and interpretation of the Charter, Protocol and any other relevant human rights instrument ratified by the State concerned hence the Court is not afforded unlimited jurisdiction to sit as an appellate Court.

**25.** The Applicants, in their Reply to the Respondent's State's Response, contend that the nature of the allegations contained in their Application raise "material elements which may constitute human rights violations and as such, [the Court] has competence *rationae materiae* and *rationae personae*" to determine the Application.

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**26.** The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[2]

**27.** The Court notes that the crux of the Respondent State's objection is that the Applicants are inviting the Court to sit as an appellate court when it is not empowered to sit as one. The Court also notes that the Respondent State objects to the fact that the Applicants are asking it to evaluate the evidence and procedures already finalised by its domestic courts.

**28.** As regards the question whether the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's Court of Appeal, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts. At the same time, however, the Court emphasises the fact that even though it is not an appellate court vis a vis domestic courts, it retains the power to assess the propriety of domestic proceedings as against standards set out in international human rights instruments ratified by the State concerned.[3]

**29.** In considering the allegations made by the Applicants, the Court holds that the said allegations are within the purview of its jurisdiction given that they invoke rights protected under the Charter, specifically under Article 7 thereof. These allegations

2 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application 028/2015, Judgment of 26 June 2020 § 18.

3 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema & anor v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 29 and *Alex Thomas v United Republic of Tanzania* (Merits) (20 November 2015) 1 AfCLR 465 § 130.

require the Court to determine whether the manner in which domestic proceedings were conducted was in compliance with international law. In conducting this function, the Court does not sit as an appellate court with regard to domestic courts but simply examines procedures and processes before national courts to determine whether they are in conformity with the standards set out in the Charter and any other human rights instrument ratified by the State concerned.[4]

**30.** In light of the above, the Court holds that it has material jurisdiction in this matter and the Respondent State's objection is, therefore, dismissed.

## B. Other aspects of jurisdiction

**31.** The Court observes that none of the Parties has raised any objection in respect of its personal, temporal or territorial jurisdiction. Nonetheless, in line with Rule 39(1) of the Rules, the Court must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

**32.** In relation to its personal jurisdiction, the Court recalls that the Respondent State, on 21 November 2019, deposited with the Office of the Chairperson of the African Union Commission, an instrument withdrawing its Declaration made under Article 34(6) of the Protocol. The Court further recalls that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, as is the case of the present Application.[5] The Court also confirms that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is filed.[6] In respect of the Respondent State, therefore, its withdrawal will take effect on 22 November 2020.

4 *Alex Thomas v Tanzania* (merits) § 130. See also, *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 29; *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 28 and *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits) (24 November 2017) 2 AfCLR 165 § 54.

5 *Andrew Ambrose Cheusi v United Republic of Tanzania*, §§ 35-39.

6 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

**33.** In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

**34.** In respect of its temporal jurisdiction, the Court notes that although the alleged violations commenced before the Respondent State became a party to the Protocol or made the Declaration under Article 34(6) of the Protocol, that is, on 27 February 2006 when the Court of Appeal dismissed the Applicants' appeal, the said violations were continuing as of 29 March 2010 when the Respondent State deposited its Declaration. The Application having been filed on 8 December 2015, the Court thus finds that it has temporal jurisdiction to examine it.

**35.** As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicants happened within the territory of the Respondent State. In the circumstances, the Court holds that its temporal jurisdiction in this matter is established.

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

## VI. Admissibility

**37.** 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(1) of its Rules, "[t] he Court shall ascertain… the admissibility of an application in accordance with the Charter, the Protocol and 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 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.

**39.** While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections 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.

## A. Objections to the admissibility of the Application

### i. Objection based on non-exhaustion of local remedies

**40.** The Respondent State contends that although the Applicants are alleging that their rights under its Constitution have been violated, there is no evidence showing that they filed a constitutional petition at its High Court. The Respondent State further contends that the Applicants should have exhausted local remedies by filing a constitutional petition instead of prematurely filing their Application before the Court.

**41.** The Applicants submit that their Application was filed after exhausting local remedies since it was filed after the Court of Appeal, which is the final appellate court in the Respondent State, dismissed their appeal. The Applicants further submit that after the Court of Appeal dismissed their appeal, they filed an application for review of the Court of Appeal's decision which was dismissed on 11 March 2013. The Applicants also point out that a further application for review was struck out by an order of the Court of Appeal dated 9 May 2014.

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**42.** The Court notes that pursuant to Rule 40(5) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility

for the same.[7]

**43.** The Court recalls that an Applicant is only required to exhaust ordinary judicial remedies.[8] The Court further recalls that in several cases involving the Respondent State it has repeatedly stated that the remedies of constitutional petition and review before the Court of Appeal, as framed in the Respondent State's judicial system, are extraordinary remedies that an Applicant is not required to exhaust prior to seizing this Court.[9] In the instant case, the Court observes that the Court of Appeal dismissed the Applicants' appeal on 27 February 2006. The Court further observes that on two separate occasions, to wit, 11 March 2013 and 9 May 2014, the Applicants' attempts to trigger the review of the decision of the Court of Appeal were dismissed.

**44.** In the circumstances, the Court holds that the Applicants were not required to file a constitutional petition before filing their Application with the Court, the same being an extraordinary remedy within the Respondent State's system.

**45.** Regarding those allegations that have allegedly 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 Applicants did not raise them explicitly.[10] It would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for these claims.[11] The Applicants should thus be deemed to have

7 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

8 *Alex Thomas v Tanzania* (merits) § 64. See also, *Wilfred Onyango Nganyi & 9 ors v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

9 See, *Alex Thomas v Tanzania* (merits) § 65; *Mohamed Abubakari v Tanzania* (merits), §§ 66-70; *Christopher Jonas v Tanzania* (merits), § 44.

10 *Kennedy Owino Onyachi & anor v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54.

11 *Jibu Amir alias Mussa & anor v United Republic of Tanzania*, ACtHPR, Application 014/2015, Judgment of 28 November 2019 § 37; *Alex Thomas v Tanzania* (Merits), §§ 60-65, *Kennedy Owino Onyachi & anor v United Republic of Tanzania* (merits) § 54.

exhausted local remedies with respect to these allegations.

**46.** In light of the foregoing, the Court dismisses the Respondent State's objection based on non-exhaustion of local remedies.

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

**47.** The Respondent State points out that it took over five (5) years after the Court of Appeal dismissed the Applicants' appeal for them to file their Application with the Court. It thus submits that this period is not reasonable within the meaning of Rule 40(6) of the Rules. The Respondent State, relying on the decision of the African Commission on Human and Peoples' Rights in *Michael Majuru v Republic of Zimbabwe,* prays the Court to declare the Application inadmissible.

**48.** The Applicants contend that subsequent to the Court of Appeal dismissing their appeal, they filed applications for review in Criminal Application No 05A of 2011 and Criminal Application No 012 of 2014 before the Court of Appeal which were both unsuccessful. The Applicants thus urge the Court to find that their Application was filed within a reasonable time.

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**49.** The Court recalls that neither the Charter nor the Rules set a definite time limit within which an application must be filed before it. Rule 40(6), for example, simply alludes to the fact that applications must be filed within a reasonable time after the exhaustion of domestic remedies or "from the date the Commission is seized with the matter." In the circumstances, the reasonableness of a time limit for seizure will depend on the particular circumstances of each case and should be determined on a case by case basis. Some of the factors that the Court has used in its evaluation of the reasonableness of time are imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal and

the use of extra-ordinary remedies.[12]

**50.** In the present case, the Court notes that after the Court of Appeal dismissed the Applicants' appeal on 27 February 2006, the Applicants twice attempted to review the decision of the Court of Appeal through Criminal Application No.05A of 2011 which was struck out on 11 March 2013 and also through Criminal Application 12 of 2013 which was also dismissed on 9 May 2014. The Court also notes that the Applicants filed this Application on 8 December 2015. At the same time, the Court notes that the Respondent State deposited the Declaration permitting the Court to receive applications from individuals and Non-Governmental Organisations on 29 March 2010.

**51.** The Court finds, therefore, that the computation of the reasonableness of the time within which the Application should have been filed must commence from the date when the Respondent State deposited the Declaration under Article 34(6) of the Protocol. This is the earliest time that the Applicants could have brought their Application to this Court after having exhausted the ordinary local remedies.

**52.** The Court takes cognisance of the attempts by the Applicants to utilise the review procedure before the Respondent State's Court of Appeal. In line with its jurisprudence, this should be taken into account as a factor in the determination of the reasonableness of the time limit under Rule 40(6) of the Rules.[13] In this regard, the Court takes note that the Applicants filed their Application before this Court one (1) year and seven (7) months after the dismissal of their last attempt at reviewing the Court of Appeal's judgment.

**53.** The Court, therefore, holds that, considering the time the Applicants spent pursuing the remedy of review before the Court of Appeal, the time lapse of one year and seven (7) months before they filed their Application before the Court is reasonable within the context of Article 56(6) of the Charter. The Court is reinforced in this finding since the Applicants are lay and incarcerated and it was as a result of their situation, that the Court granted them legal

12 *Jibu Amir alias Mussa & anor v United Republic of Tanzania* §§ 49-50; *Ally Rajabu & ors v United Republic of Tanzania*, ACtHPR, Application 007/2015, Judgment of 28 November 2019 (merits and reparations) §§ 50-52; *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application 020/2015, Ruling of 28 November 2019 (jurisdiction and admissibility) §§ 52-54 and *Godfrey Anthony & anor v United Republic of Tanzania*, ACtHPR, Application 015/2015. Ruling of 26 September 2019 (jurisdiction and admissibility) §§ 46-49.

13 *Jibu Amir alias Mussa & anor v United Republic of Tanzania* § 49 and *Ally Rajabu & ors v United Republic of Tanzania* § 51.

assistance through its legal aid scheme.

**54.** The Court, therefore, dismisses the Respondent State's objection based on failure to file the Application within a reasonable time.

## B. Other conditions of admissibility

**55.** The Court notes, from the record, that the Application's compliance with the requirements in Article 56 sub articles (1),(2),(3),(4) and (7) of the Charter, which requirements are reiterated in sub-rules (1),( 2), (3), (4), and (7) of Rule 40 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

**56.** Specifically, the Court notes that, according to the record, the condition laid down in Rule 40(1) of the Rules is fulfilled since the Applicants have clearly indicated their identity.

**57.** The Court also finds that the requirement laid down in Rule 40(2) of the Rules is also met, since no request made by the Applicants is incompatible with the Constitutive Act of the African Union or with the Charter.

**58.** The Court also notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 40(3) of the Rules.

**59.** Regarding the condition contained under Rule 40(4) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

**60.** Finally, with respect to the requirement laid down in Rule 40(7) of the Rules, the Court finds that the present case does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

**61.** 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

**62.** The Applicants make three allegations: firstly, they allege a violation of their right to free legal assistance; secondly, they question the legality of their sentence for armed robbery, and, lastly, they question the assessment of the evidence relied upon to convict them.

## A. Alleged violation of the right to free legal assistance

**63.** The Applicants submit that during their trial before the District Court as well as during their second appeal to the Court of Appeal they were not afforded free legal assistance. According to the Applicants, this amounts to a violation of Article 7(1)(c) of the Charter.

**64.** The Respondent State disputes this allegation and submits that during the Applicants' trial before the District Court as well as during their appeals, legal aid was available and could have been extended to the Applicants under the Legal Aid (Criminal Proceedings) Act of 1969 but that the Applicants did not request for the same. The Respondent State submits that it has always recognised and adhered to the right to legal representation and that, therefore, the Applicants' allegation lacks merit and should be dismissed.

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**65.** The Court notes that Article 7(1)(c) of the Charter provides that "[e]very individual shall have the right to have his cause heard. This right comprises: (c) the right to defence, including the right to be defended by counsel of his choice."

**66.** The Court is mindful that Article 7(1)(c) of the Charter does not explicitly provide for the right to free legal assistance. The Court recalls, however, that it has previously interpreted Article 7(1)(c) in light of article 14 (3) (d) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") and determined that the right to defence includes the right to be provided with free legal assistance.[14]

**67.** The Court notes that the Applicants were not accorded free legal assistance during proceedings before the Magu District Court as well as before the Court of Appeal. The record, however, shows that the Applicants were represented by counsel during their first appeal before the Respondent State's High Court. This is

14 *Jibu Amir alias Mussa & anor v United Republic of Tanzania* § 75; *Alex Thomas v Tanzania* (merits) § 114 and *Kennedy Owino Onyachi & anor v United Republic of Tanzania* (merits) § 104. The Respondent State acceded to the ICCPR on 11 June 1976 - https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

not disputed by the Respondent State, which simply contends that there is no "evidence anywhere in this application to show the Applicants applied for the free legal aid from the certifying authority."

**68.** The Court reiterates that an individual charged with a criminal offence is entitled to free legal assistance even if he/she does not specifically request for the same provided that the interests of justice so demand.[15] The interests of justice will inevitably require that free legal assistance be extended to an accused person where he/she is indigent and is charged with a serious offence which carries a severe penalty.

**69.** In the instant case, the Applicants were charged with a serious offence, that is, robbery with violence, carrying a severe punishment - a minimum sentence 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 conduct their case in person during the original trial as well as during the appeal before the Court of Appeal. In the circumstances, the Court finds that the interests of justice warranted that the Applicants should have been provided with free legal assistance during their trial before the District Court and also during their second appeal before the Court of Appeal. The fact that the Applicants never requested for legal assistance did not absolve the Respondent State from its responsibility.

**70.** In view of the above, the Court finds that the Respondent State has violated Article 7(1)(c) of the Charter, as read together with article 14(3)(d) of the ICCPR, due to its failure to provide the Applicants with free legal assistance during their trial before the District Court at Magu as well during their appeal before the Court of Appeal at Mwanza.

## B. Allegation relating to the legality of the Applicants' sentence

**71.** The Applicants argue that according to section 286 of the Respondent State's Penal Code, the legal sentence for armed robbery, at the time when they were convicted, was fifteen (15) years imprisonment. The Applicants thus submit that their sentence of thirty (30) years imprisonment was unconstitutional

15 *Jibu Amir alias Mussa & anor v United Republic of Tanzania* § 77 and *Mohamed Abubakari v United Republic of Tanzania* (merits) §§ 138 -139.

and also violated their rights under Article 7(2) of the Charter.

**72.** The Respondent State contends that the sentence of thirty (30) years imprisonment for the offence of armed robbery has always been provided for in sections 285 and 286 of its Penal Code. The Respondent State further contends that sections 285 and 286 of the Penal Code must be read together with the Minimum Sentences Act. The Respondent State thus submits that the Applicants have misdirected themselves on the interpretation of sections 285 and 286 and that their allegation lacks merit and should be dismissed.

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**73.** The Court recalls that 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.

**74.** The Court notes that the applicable law for the sentencing of convicts of armed robbery at the time the Applicants were convicted was section 286 of the Respondent State's Penal Code and the Minimum Sentences Act of 1972, as amended in 1989 and 1994. Reading the applicable law together, it is clear that the minimum sentence for armed robbery was thirty (30) years imprisonment at the time the Applicants were convicted. The Court further notes that it has previously taken judicial notice of these developments in the Respondent State's criminal law.[16] In the circumstances, the Court finds, therefore, that the Respondent State has not violated any provision of the Charter in sentencing the Applicants to this term of imprisonment.

## C. Allegation that the evidence relied on to convict the Applicants was defective

**75.** The Applicants submit that the evidence that was relied upon

16 *Christopher Jonas v United Republic of Tanzania* (Merits and Reparations) § 86; *Anaclet Paulo v United Republic of Tanzania* 21 September 2018 2 AfCLR 446 § 99 and *Muhamed Abubakari v United Republic of Tanzania* § 210

to convict them was not well-analysed by the District Court and the appellate courts and it is this that led to their conviction. The Applicants further submit that the District Court erroneously relied on the doctrine of recent possession to convict them and this was upheld by the appellate courts.

**76.** The Respondent State contends that, apart from the doctrine of recent possession, the Applicants' conviction was also supported by visual identification by individuals who were at the scene of crime. According to the Respondent State credible witnesses were brought by the prosecution who identified the Applicants to have been at the scene of the crime. According to the Respondent State, therefore, the allegation lacks merit and should be dismissed.

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**77.** The Court notes that Article 7(1) of the Charter provides that "[e]very individual shall have the right to have his cause heard."

**78.** The Court reiterates its 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. [17]

**79.** The Court notes that it intervenes in the assessment of evidence by domestic courts only if such domestic assessment resulted in a miscarriage of justice.[18] The Court recalls that its role with regard to evaluation of the evidence on which the conviction by the national judge was grounded is limited to determining whether, generally, the manner in which the latter evaluated such evidence is in conformity with the relevant provisions of applicable international human rights instruments or not.[19]

**80.** From its perusal of the record, the Court finds that the District Court fairly evaluated the evidence before it before convicting the Applicants and that the appellate courts also fairly considered all the grounds of appeal raised by the Applicants. Specifically in

17 *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 65.

18 *Nguza Viking & anor v Tanzania* (merits) § 89.

19 *Mohamed Abubakari v United Republic of Tanzania* (Merits) § 26.

relation to the application of the doctrine of recent possession, the Court notes that the Court of Appeal dealt with this issue and concluded that the Applicants' conviction was not solely based on the doctrine of recent possession but also by positive identification on the scene of the crime by the victims.

**81.** In the circumstances, the Court finds that the evidence in the Applicants' trial was evaluated in conformity with the requirements of fair trial and the procedures followed by the national courts in dealing with the Applicants' appeals did not violate Article 7(1) of the Charter. The Court, consequently, dismisses the Applicants' allegation on this point.

## VIII. Reparations

**82.** By their Amended Submissions for Reparations, the Applicants pray the Court to grant the following remedies and reparations;

i. Setting aside the custodial sentence

ii. Restoration of the Applicants' liberty by their release from prison

iii. Payment of reparation in the amount of USD 257,775 to the Applicants on account of moral damage suffered.

iv. Payment of reparations in the amount of USD 10,000 to the Applicants on account of loss of income

v. Payment of reparations in the amount of six thousand dollars (USD 6,000) for each indirect victim on account of moral damage suffered

vi. Payment of reparations in the amount of USD 1,000 for transport and stationery costs

vii. That this Court makes an order that the Respondent guarantees non-repetition of these violations against the Applicants. The Respondent State should also be requested to report back to this Court every six months until they satisfy the orders this Court shall make when considering the submissions for reparations.

**83.** The Respondent State prays the Court for the following:

i. A Declaration that the interpretation and application of the Protocol and African Charter does not confer jurisdiction to the Court to set the applicants at liberty.

ii. A Declaration that the Respondent State has not violated the African Charter or the Protocol and the Applicants were treated fairly and with dignity by the Respondent.

iii. An Order to dismiss this Application.

iv. Any other order this Hon. Court may deem right and just to grant under the prevailing circumstances.

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**84.** Article 27(1) of the Protocol provides that "[i]f 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."

**85.** The Court considers that 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 granted, reparation should cover the full damage suffered. It is also clear that it is always the Applicant that bears the onus of justifying the claims made.[20] As the Court has stated previously, the purpose of reparations is to place the victim in the situation he/she would have been in but for the violation.[21]

**86.** In relation to material loss, the Court recalls that it is the duty of an applicant to provide evidence to support his/her claims for all alleged material loss. In relation to moral loss, however, the Court restates its position that prejudice is assumed in cases of human rights violations and the assessment of the quantum must be undertaken in fairness looking at the circumstances of the case.[22] The practice of the Court, in such instances, is to award lump sums for moral loss.[23]

**87.** At the outset, the Court observes that the Applicants' claims for reparation are all quantified in United States Dollars. As a general principle, however, the Court awards damages in the currency in which the loss was incurred.[24] In the present case, the Court will apply this standard and monetary reparations, if any, will be

20 See, *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) § 157. See also, *Norbert Zongo & ors v Burkina Faso* (Reparations) (5 June 2015) 1 AfCLR 258 §§ 20-31; *Lohé Issa Konaté v Burkina Faso* (Reparations) (3 June 2016) 1 AfCLR 346 §§ 52-59 and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (Reparations) (13 June 2014) 1 AfCLR 72 §§ 27-29.

21 *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application 009/2015, Judgment of 28 March 2019 (Merits and Reparations) § 118 and *Norbert Zongo & ors v Burkina Faso* (Reparations) § 60.

22 *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) § 55; and *Lucien Ikili Rashidi v United Republic of Tanzania* (Merits and Reparations) § 58.

23 *Norbert Zongo & ors v Burkina Faso* (Reparations) §§ 61-62.

24 *Lucien Ikili Rashidi v United Republic of Tanzania* (Merits and Reparations) § 131 and *Ingabire Victoire Umuhoza v Republic of Rwanda (*reparations) (7 December 2018) 2 AfCLR 202 § 45.

assessed in Tanzanian Shillings.

## A. Pecuniary reparations

**88.** As the Court has found, the Respondent State violated the Applicants' right to free legal assistance guaranteed under Article 7(1)(c) of the Charter. Based on this finding, the Respondent State's responsibility and causation have been established. The prayers for reparation are, therefore, being examined against this finding.

### i. Material prejudice

**89.** The Court notes that all the Applicants except Chrispian Kilosa filed affidavits in support of their claims for reparations. In their affidavits, the Applicants claim that they were engaged in the business of selling fish and other entrepreneurial activities and that they lost income from the same as a result of their incarceration. Specifically, James Wanjara claims that he was able to make Two Hundred Thousand Tanzanian Shillings (TZS 200 000) per month from selling fish and about Three Hundred Thousand Tanzanian Shillings (TZS 300 000) from carpentry activities. Cosmas Pius claims that he was making One Hundred and Fifty Thousand Tanzanian Shillings (TZS 150 000) per week from selling fish. Mawazo Selemani claims that he was making at least One Million Tanzanian Shillings (TZS 1 000 000) per month from selling fish. Jumanne Kaseja claims that he was making Five Hundred Thousand Tanzanian Shillings (TZS 500 000) per month from selling fish.

**90.** The Applicants further claim that their incarceration made it impossible for them to continue providing for their families resulting in their children dropping out of school and their families suffering. It is the Applicants' submission, therefore, that the indirect victims that they have listed in their affidavits also suffered by reason of their incarceration since the Applicants were all sole bread winners in their families.

**91.** The Applicants thus submit that given that each one of them had his own business which generated income, the Court should award each of them the sum of Ten Thousand United States Dollars (USD 10,000) for loss of income.

**92.** The Respondent State argues that the Applicants bear the burden of proving their claims for reparations and also of establishing a causal connection between the alleged wrongful conduct and the prejudice they claim to have suffered. The Respondent State

submits that the Applicants have failed to provide proof that they were breadwinners for their families or any documentation in support of their claims in relation to the economic activities that they claim to have engaged in. It is the Respondent State's prayer, therefore, that the claim for loss of income be dismissed.

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**93.** As the Court has acknowledged, "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."[25]

**94.** The Court notes that although affidavits were filed in support of the Applicants' claims for reparation, the claims that each of the Applicants had his own business that generated an income were not accompanied by supporting evidence. The Court, thus, finds that the Applicants have failed to substantiate their claims for loss of income. Additionally, the Court notes that the claims for material reparations are all based on the conviction, sentencing and subsequent incarceration of the Applicants, which the Court has not found to be unlawful. In the circumstances, therefore, reparations are not warranted.[26]

**95.** In light of the foregoing, the Applicants' claims for United States Dollars Ten Thousand (USD 10,000) per individual as loss of income are dismissed.

## ii. Moral prejudice

## a. Moral prejudice suffered by the Applicants

**96.** The Applicants submit that the long judicial process leading to their conviction and sentence drained them emotionally, physically and also financially. They also submit that they have suffered emotional and physical distress due to lack of conjugal rights as a result of their imprisonment. It is also the Applicants'

25 *Norbert Zongo & ors v Burkina Faso* (reparations) § 24.

26 See, *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) § 186.

submission that they have suffered embarrassment and lost their social status within their communities due to their imprisonment.

**97.** The Applicants have also highlighted the fact that they have been in custody since 31 March 2001, which is a period of over nineteen (19) years. For all the moral prejudice suffered, the Applicants pray the Court to award them the sum of Two Hundred and Fifty-seven Thousand, Seven Hundred and Seventy- five and twenty cents United States Dollars (USD 257, 775.20) each.

**98.** The Respondent State submits that the Applicants were lawfully convicted and sentenced, and they are, therefore, victims of their own wrongdoing. According to the Respondent State, the claim for reparations by the Applicants as direct victims of a violation should be dismissed.

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**99.** The Court recalls that moral prejudice involves the suffering, anguish and changes in the living conditions of an Applicant and his family.[27] As such, the causal link between the wrongful act and moral prejudice "can result from the human rights violation, as a consequence thereof, without a need to establish causality as such".[28] As the Court has previously recognised, the evaluation of the quantum in cases of moral prejudice must be done in fairness taking into account the circumstances of each case.[29] In such instances, awarding lump sums would generally apply as the standard.[30]

**100.** The Court having found that the Respondent State violated the Applicants' right to free legal assistance, contrary to Article 7(1)(c) of the Charter, there is a presumption that the Applicants suffered some form of moral prejudice.

**101.** The above notwithstanding, the Court notes that the Applicants have claimed the sum of Two Hundred and Fifty-seven Thousand,

27 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) § 34.

28 *Norbert Zongo & ors v Burkina Faso* (reparations) § 55; and *Lohé Issa Konaté v Burkina Faso* (reparations) § 58.

29 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 157 and *Norbert Zongo & ors v Burkina Faso* (reparations) § 61.

30 *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) §§ 116-117.

Seven Hundred and Seventy- five and twenty cents United States Dollars (USD 257, 775.20) as reparation for violation of Article 7(1) (c) of the Charter. The Court holds, however, that there is nothing on the record which would justify awarding the sum claimed by the Applicants for the moral prejudice they suffered.

**102.** In assessing the quantum of damages, the Court bears in mind that it had adopted the practice of granting applicants an average amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) in instances where legal aid was not availed by the Respondent State especially where the facts reveal no special or exceptional circumstances.[31] In the circumstances, and in the exercise of its discretion the Court awards each of the Applicants the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) as fair compensation[32].

## b. Moral prejudice to indirect victims

**103.** Each of the Applicants has submitted a list of indirect victims that were allegedly affected by the violation of the Applicants' rights. James Wanjara has indicated the indirect victims as his wife, Mubweli Sote, and his children Kamese James, Mukwaya James, Loyce James, Masatu James, Mushangi James, Mwima James and Nyamumwi James. Jumanne Kaseja has indicated the following: his two wives Texra Jumanne and Ester Jumanne together with his children Halia Jumanne, Mekitilida Jumanne, Haji Jumanne, Zuhena Jumanne and Jacline Jumanne. Mawazo Selemani has listed his wife Ester Mawazo and his child John Mawazo Selemani. Cosmas Pius has listed his wife Getruza Siza and his children Rebeca Cosmas and Pius Cosmas.

**104.** It is the Applicants' submission that the indirect victims were "heavily affected following the imprisonment of their beloved ones." The Applicants also submit that their trials were emotionally draining for the indirect victims and that their convictions resulted in stigmatisation for their wives and children. The Applicants thus pray the Court to award each of the indirect victims the sum of Six Thousand United States Dollars (USD6 000) as reparations.

**105.** The Respondent State opposes the prayer for reparation to indirect victims. According to the Respondent State, the Applicants

31 See *Minani Evarist v Tanzania* (merits), (21 September 2018) 1 AfCLR 402 § 90; and *Anaclet Paulo v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 111.

32 *Minani Evarist v Tanzania* (merits), § 85.

were lawfully convicted and sentenced and any suffering by their families was "self-imposed and caused by their acts and not that of the Respondent." It is the Respondent State's submission that the Applicants have failed to prove their relationship to their alleged children and wives. It is the prayer of the Respondent State, therefore, that the Applicants' claims on behalf of the indirect victims should be dismissed.

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**106.** With regard to the moral prejudice suffered by indirect victims, the Court recalls that, as a general rule, for indirect victims to be entitled to reparation, they must prove their filiation with the Applicant.[33] Consequently, spouses should produce marriage certificates or any equivalent proof, birth certificates or any other equivalent evidence should be produced for children and parents must produce attestation of paternity or any other equivalent proof.[34] It is not sufficient to simply list the alleged indirect victims.[35]

**107.** The above notwithstanding, the Court notes that in the present case, all the claims by the indirect victims are premised on the conviction, sentencing and incarceration of the Applicants, which, as earlier alluded to, was not unlawful. In the circumstances, therefore, the Court finds that there is no basis for making an award of reparations in favour of the indirect victims. The Court, accordingly, dismisses the claims for reparations on behalf of the indirect victims.

33 *Norbert Zongo & ors v Burkina Faso* (reparations) § 54 and *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) § 135.

34 *Alex Thomas v United Republic of Tanzania*, ACtHPR, Application 005/2013, Judgment of 4 July 2019 (reparations) § 51 and *Armand Guehi v United Republic of Tanzania* (merits and reparations) §§ 182 and 186.

35 *Andrew Ambrose Cheusi v United Republic of Tanzania* §§ 158-159.

## B. Non-pecuniary reparations

### i. Restitution

**108.** The Applicants submit that "in the present case [they] cannot be returned to the state they were before their incarceration but, as a starting point, their liberty can be restored as the second best measure taking into account passage of time since the alleged offence was committed."

**109.** The Respondent State opposes the Applicants' prayer and prays for "a declaration that the interpretation and application of the Protocol and African Charter does not confer jurisdiction to the Court to set the applicants at liberty."

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**110.** With respect to the Applicants' prayer that they be set at liberty, which entails quashing their sentence and ordering their release, the Court wishes to emphasise that it does not, ordinarily, examine details of matters of fact and law that national courts are entitled to address.[36] Nevertheless, the quashing of the sentence and the release of an applicant may be ordered in special and compelling circumstances.[37] The Court has held that this would be warranted only in cases where the violation found was such that it had necessarily vitiated the conviction and sentence. This would be the case "if an Applicant sufficiently demonstrates or the Court itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued imprisonment would occasion a miscarriage of justice."[38]

36 *Mohamed Abubakari v United Republic of Tanzania* (merits) § 28 and *Minani Evarist v United Republic of Tanzania* (merits) § 81.

37 *Alex Thomas v United Republic of Tanzania* (merits) § 234; *Armand Guéhi v United Republic of Tanzania* (merits and reparations) § 160; *Kijiji Isiaga v United Republic of Tanzania* (merits) § 96 and *Thomas Mang'ara Mango & anor v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314 § 156.

38 *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550 § 84 and *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426 § 101.

**111.** In the instant case, the Court notes that it has only found a violation of the Applicants' right to free legal assistance and that it has not otherwise found fault with the proceedings leading to the Applicants' conviction, sentence and incarceration. In the circumstances, the Court holds that the Applicants have not proven the existence of any circumstances to warrant the restoration of their liberty, and neither has the Court, *proprio motu*, established the existence of such circumstances. The Court, therefore, dismisses the Applicants' prayer for release.

## ii. Guarantees of non-repetition

**112.** The Applicants pray the Court to make an order that the Respondent State guarantees non-repetition of the violations against them. The Applicants further pray that the Respondent State should also be ordered to report back to the Court every six (6) months until full satisfaction of the Court's orders.

**113.** The Respondent State prays for an order to dismiss the Application.

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**114.** The Court recalls that the objective of ordering guarantees of non-repetition is to prevent future violations. As a result, guarantees of non-repetition are usually ordered in order to eradicate structural and systemic violations of human rights.[39] Such measures are, therefore, not generally intended to repair individual prejudice but rather to remedy the underlying causes of the violation. Nevertheless, guarantees of non-repetition may also be relevant in individual cases where it is established that the violation will not cease or is likely to reoccur. This could be in instances where the Respondent State has challenged or has not complied with the previous findings and orders of the Court.

**115.** In the instant case, the Court notes that the nature of the violation found, that is, the Applicants' right to free legal assistance is unlikely to recur in respect of the Applicants as the proceedings in respect of which it arose have already been completed.

39 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 191 and *Ally Rajabu & ors v United Republic of Tanzania* § 162.

Furthermore, the Court has already awarded compensation for the moral prejudice that the Applicants suffered as a result of the said violation. The Court, therefore, finds that the request is not justified in the present case and the same is, therefore, dismissed.

**116.** With respect to the prayer for an order for reporting 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 thus holds that the Respondent State shall file its reports on the implementation of this judgment within six (6) months of its notification.

## IX. Costs

**117.** The Applicant prays the Court to grant "reparations for transport and stationary costs: postage, printing and photocopying to the tune of one thousand United States Dollars (USD1 000)".

**118.** The Respondent State prays that the costs of this Application be borne by the Applicants.

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**119.** The Court notes that Rule 30 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".

**120.** The Court recalls that "expenses and costs form part of the concept of reparation." The Court considers that transport costs incurred for travel within Tanzania, and stationery costs fall under the "categories of expenses that will be supported in the Legal Aid Policy of the Court". Since, in the present case, the East Africa Law Society, represented the Applicants on a *pro bono* basis, the Court finds that the claims for costs by the Applicants are unjustified and are accordingly dismissed.

**121.** The Court, therefore, orders that each Party shall bear its own costs.

## X. Operative part

**122.** 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 objections on admissibility;
iv. *Declares* that the Application is admissible.

*On the merits*
v. *Finds* that the Respondent State has not violated Article 7 of the Charter as regards the treatment of the evidence before the domestic courts during the Applicants' trial;
vi. *Finds* that the Respondent State has not violated Article 7(2) of the Charter as regards the Applicants' sentence of thirty (30) years imprisonment for armed robbery;
vii. *Finds* that the Respondent State has violated the Applicants' right to fair trial, provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, by failing to provide them with free legal assistance.

*On reparations*
*Pecuniary reparations*
viii. *Does not* grant the Applicants' prayer for reparations arising from material loss of income and for legal costs incurred during proceedings before the Court;
ix. *Orders* the Respondent State to pay each of the Applicants the sum of Three Hundred Thousand Tanzanian Shillings (TZS 300 000) free from tax as fair compensation for a violation of their right to free legal assistance 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;
x. *Does not* grant the Applicants' prayer for reparations for moral prejudice suffered by the alleged indirect victims;

*Non-pecuniary reparations*
xi. *Dismisses* the Applicant's prayer for release from prison.

*On implementation and reporting*

xii. Orders the Respondent State to submit to the Court, 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*

xiii. *Orders* each party to bear its own costs.

# Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 701

Application 003/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Order (provisional measures), 5 May 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought an action to challenge domestic law introduced to amend the Constitution of the Respondent State alleging that the effect of the amendment was to restrict the rights of citizens to participate in the political affairs of the State. The Applicant also brought this request for provisional measures. The Court granted one of the measures requested.

**Jurisdiction** (*prima facie*, 17)

**Admissibility** (conditions for admissibility not applicable, 26-28)

**Provisional measures** (preventive nature, 41; purpose of provisional measures, 44; urgency, 48-49; irreparable harm, 48-50; political rights, 51, 54)

## I. The Parties

**1.** Mr Houngue Eric Noudehouenou, (hereinafter referred to as the Applicant) is a Benin national, an economist and tax specialist by profession.

**2.** The Respondent State is the Republic of Benin (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 to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 22 August 2014. It also deposited the Declaration provided for in Article 34(6) of the said Protocol on 8 February 2016, by virtue of which it accepts the Court's jurisdiction to receive applications from individuals and non-governmental organizations.[1]

1 The Respondent State has also ratified the International Covenant on Civil and Political Rights (ICCPR), and the Economic Community of West African States (ECOWAS) Protocol A/SP1/12/01 on Democracy and Good Governance, additional to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, on 21 December 2001. It has also ratified

**3.** On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of the Declaration it had deposited under Article 34 (6) of the Protocol.

## II. Effect of the withdrawal of the Declaration by the Respondent State under Article 34(6) of the Protocol

**4.** The Court recalls that in its judgment in *Ingabiré Victoire v Republic of Rwanda,*[2] it held that the withdrawal of the Declaration deposited under Article 34 (6) of the Protocol has no retroactive effect and has no bearing on cases pending at the time of notification of the withdrawal, as is the case in the instant Application. The Court also confirmed that any withdrawal of the Declaration does not take effect until twelve (12) months after the instrument of withdrawal has been deposited.

**5.** With respect to the Respondent State, as the instrument of withdrawal was deposited on 25 March 2020, the withdrawal of the Declaration made under Article 34(6) will take effect on 25 March 2021.

## III. Subject of the Application

**6.** In Application on the merits, the Applicant submits that Law No. 2019-40 of 7 November 7, 2019 on the revision of the Beninese Constitution excludes any Beninese citizen who is not affiliated with a political party from participating in the public affairs of Benin. The said law also institutes sponsorship as a condition for candidacy in presidential elections. This has the effect of calling into question the principle of impartiality and democratic alternation.

**7.** In addition to this, there is the requirement of a tax returns provided for in the Beninese electoral code, of which the Director of Taxes is the sole issuing authority, and a certificate of compliance with Law No. 2018-23 of 17 September 2018 issued by the Beninese Constitutional Council, which is not provided for in Law No.

the African Charter on Democracy, Elections and Governance (January 30, 2007), ratified by Law No. 2011-18 of 5 September 2011.

2 Application003/2014. Decision of 3/06/2016 on the withdrawal of the Declaration, Ingabire Victoire Umuhoza v Republic of Rwanda*, § 67*

2018-31 of 9 October 2018 governing candidacy documents.

**8.** The Applicant alleges violations of the following Articles by the Respondent State:

"i. Articles 21, 2, 7, 8, 10, 18, 19, 20 and 3 of the Universal Declaration of Human Rights of 10 December 1948 (hereinafter the "UDHR");

ii. Articles 25, 2, 14-1, 26, 18, 19 and 7 of the International Covenant on Civil and Political Rights of 16 December 1966 (hereinafter the "ICCPR");

iii. Articles 13, 2, 3, 8, 9, 10, 7, 23 (1) of the African Charter on Human and Peoples' Rights (hereinafter the "Charter");

iv. Articles 4, 6, 7, 10, 11, 13, 15, 17, 23, 27 and 39 of the African Charter on Democracy, Elections and Governance of 31 January 2007 (hereinafter referred to as the "African Charter on Democracy");

v. Articles 1, 10, and 33 of the Protocol A/SP1/12/01 on Democracy and Good Governance additional to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security of ECOWAS ratified by Law No. 2003-11 of 9 July 2003 (hereinafter referred to as "the ECOWAS Protocol").

**9.** The Applicant seeks the following measures on the merits:

"i. A decision affirming that the violations of the Applicant's human rights are well-founded and that the Respondent State has violated each of the human rights at issue or the articles of the international instruments mentioned;

ii. a decision ordering the Respondent State to take all necessary constitutional, legislative and other measures within one month and before the next elections, to put an end to the violations found and to report to the Court on the measures taken in this regard;

iii. a decision ordering the Respondent State to take all measures to guarantee the Applicant, and all Beninese citizens, the right to participate freely and directly in the 2020 communal, municipal, ward and village elections;

iv. a decision ordering the Respondent State to take all measures to put an end to all the effects of the violations of which it has been found guilty by this Court in accordance with Chapter "IX Reparation for damage suffered" of United Nations resolution 60/147 of December 16, 2005;

v. A decision allowing the Applicant, in view of the urgency of the substantive issues, to make his submissions on reparations for pecuniary and non-pecuniary damages at a later date, within a time limit to be set by the Court;

vi. an order that the Respondent State pay the costs of this procedure;

vii. an order that the Respondent State pay all costs".

**10.** By a separate attached application, the Applicant seeks the

following provisional measures:

"i. Interpret to the Parties Article 13 (1) of the Charter, subject to the assessment of the merits of the provisions of Beninese domestic law in relation to this interpretation

ii. Order the Respondent State to take all appropriate measures to grant, effectively and without hindrance, the right to run for office to the Applicant and to any Beninese citizen who wishes to run for office as an independent candidate in the communal, municipal, ward and village elections of the year 2020, without being affiliated to any political party;

iii. Order the Respondent State to take all appropriate measures to allocate elected seats to the Applicant and any Beninese citizen who is an independent candidate, under conditions of equality and non-discrimination;

iv. Order the Respondent State to take all appropriate measures to issue to the Applicant and to any Beninese citizen the administrative documents required for their candidacies in accordance with the principle of presumption of innocence;

v. Order the Respondent State to take all appropriate measures to ensure the transparency of the 2020 elections;

vi. Order the Respondent State to take all appropriate measures to avoid a second post-election crisis in the 2020 elections and to "establish and maintain political and social dialogue, as well as transparency and trust between political leaders and the people, with a view to consolidating democracy and peace" in accordance with Article 13 of the ACDEG.

## IV. Summary of the Procedure before the Court

**11.** On 21 January 2020, the Applicant filed with the Court Registry application on the merits and for provisional measures.

**12.** On 18 February 2020, pursuant to Article 34(1), the Registry acknowledged receipt of the said application and, in accordance with Article 36 of the Rules of Court, notified them to the Respondent State, with a request to submit its response on provisional measures within fifteen (15) days and on the merits within sixty (60) days.

**13.** On 28 February 2020, the Registry received from the Applicant additional evidence and pleas concerning the requests on the merits and for provisional measures. The Registry notified the Respondent State on 5 March 2020, with a request to submit its response within eight (8) days from the date of receipt.

**14.** On 4 March 2020, the Registry also received a letter from the Respondent State requesting an additional fifteen (15) days counting from 3 March 2020, to respond to the requests for

provisional measures. The Respondent State's request was notified to the Applicant on 5 March 2020, for its comments within three (3) days from the date of receipt.

**15.** On 10 March 2020, the Registry acknowledged receipt of the Respondent State's request for an extension and requested that the Respondent State provide its response on provisional measures within eight (8) days from the date of receipt.

**16.** On 18 March 2020 the Registry received the Respondent State's response and notified it to the Applicant for his comments.

## V. Jurisdiction

**17.** The Applicant submits, based on Article 27(2) of the Protocol and Article 51 of the Rules, that in matters of provisional measures the Court need not be satisfied that it has jurisdiction over the merits of the case, but merely that it has *prima facie* jurisdiction.

**18.** Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as the Respondent State has ratified the African Charter and the Protocol. It has also deposited the Declaration under Article 34 (6). The Applicant alleges violations of rights protected by other human rights instruments.

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**19.** When an application is submitted to the Court, the Court shall ascertain its jurisdiction, pursuant to Articles 3 and 5(3) of the Protocol and 39 of the Rules of Court (hereinafter "the Rules").

**20.** 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".

**21.** Under 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".*

**22.** The Court notes that the Respondent State has ratified the Charter and the Protocol. It has also deposited the Declaration by virtue of which it accepts 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.

**23.** The rights alleged by the Applicant to have been violated are all protected by the Charter, the ICCPR, the ECOWAS Protocol and the UDHR, all of which are instruments that the Court is empowered to interpret and apply under Article 3(1) of the Protocol.[3]

**24.** In view of the foregoing, the Court recalls its established jurisprudence that it does not have to satisfy itself that it has jurisdiction on the merits of the case, but that it has *prima facie* jurisdiction[4].

## VI. Admissibility

**25.** The Respondent State contends that the Application is inadmissible for lack of urgency or extreme gravity and irreparable harm.

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**26.** The Court emphasizes that neither the Charter nor the Protocol stipulates admissibility requirements in respect of provisional measures, the examination of such measures being subject only to prima facie jurisdiction, which in the instant case has been established.[5]

**27.** Article 27(2) of the Protocol and Article 51(1) of the Rules, on which the Respondent State relies to establish the inadmissibility of the Application, are in fact the requirements that allow the Court

3 *Action pour la Protection des Droits de l'Homme v Republic of Côte d'Ivoire,* AfCHPR (Merits)18 November 2016.

4 See Application 058/2019 ***XYZ v Republic of Benin*** (Provisional measures), 2 December 2019; Application 020/2019 ***Komi Koutche v Republic of Benin*** (Provisional measures), 2 December 2019; Application 002/2013 ***African Commission on Human and Peoples' Rights v Libya*** (Provisional measures) 15 March 2013); Application 006/***2012 African Commission on Human and Peoples' Rights v Kenya*** (Provisional measures) 15 March 2013) and Application 004/2011 ***African Commission on Human and Peoples' Rights v Libya*** (Provisional measures) 25 March 2011).

5 See ***Sébastien Germain Ajavon v Republic of Benin***, (Provisional measures) 17 April 2020, paragraph 30;

to grant or dismiss a request for provisional measures.[6]

**28.** The Court notes that it does not examine the admissibility of requested provisional measures. It simply limits itself to examining its *prima facie* jurisdiction. It can therefore not entertain the Respondent State's objection based on lack of jurisdiction.

**29.** Accordingly, the Court dismisses the objection based on admissibility.

## VII. Provisional measures requested

**30.** The Applicant states in his Application for provisional measures that Article 153-1 of Law No. 2019-40 of 7 November 2019, amending the Beninese Constitution excludes from participation in public affairs any Beninese citizen not affiliated to a political party or who is not a candidate of a political party. He further alleges that this same law creates a new requirement for candidacy, namely, candidates in presidential elections must be sponsored by elected officials. This has the effect of eliminating impartiality and democratic handing-over of power.

**31.** In addition, there is the requirement of a tax receipt provided for in Benin's electoral code, the issuance of which is the sole responsibility of the Director of Taxes, which is not a guarantee against abuse and arbitrariness. Also required is a certificate of compliance with Law No. 2018-23 of September 17, 2018 issued by the Constitutional Council pursuant to Decision EL 001 of 1 February 2019, which did not exist previously. Accordingly, the Applicant requests the Court to grant the above provisional measures (see paragraph 7).

**32.** The Applicant alleges, on the one hand, the imminence of the upcoming elections on 17 May 2020 and, on the other hand, the occurrence of irreparable harm. Regarding the imminence of the communal and legislative elections, the Applicant produces minutes of the Respondent State's Cabinet meeting of 22 January 2020, which adopted the decree convening the electoral body for 17 May 2020. He states that the deadline for submitting candidacies for the 17 May 2020 elections is 11 March 2020.

**33.** The Applicant contends that if no provisional measures are taken in these circumstances, human rights will be violated in the upcoming 2020 elections through the disqualification of independent candidates, the violation of the rights to freedom of association, freedom of expression and the right to equality.

6 See Note 4, paragraph 31.

He further submits, with regard to irreparable harm, that if the elections were to be held despite the alleged violations, and even if the Court were to rule against the State of Benin, the latter would never annul the elections.

**34.** Finally, he asserts that this situation could lead to serious disturbances leading to loss of life.

**35.** The Respondent State argues that urgency means " the nature of a state of affairs which, if not remedied within a short time, is likely to cause irreparable harm ", while extreme gravity is a situation of heightened violence of an exceptional nature justifying the Court's intervention to put an end to it.

**36.** The Respondent State therefore concludes that the provisional measures requested are not based on any finding of urgency or extreme gravity.

**37.** With regard to irreparable damage, the Respondent State notes that it is distinct from damage that is difficult to repair and refers to actions whose consequences cannot be erased, repaired or compensated for.

**38.** The Respondent State further contends that provisional measures are only possible in exceptional cases, when an applicant is exposed to a real risk of irreparable harm, such as a threat to life or ill-treatment prohibited by international legal instruments or a serious and manifest violation of his or her rights.

**39.** The Respondent State finally asserts that, in addition to the lack of urgency and irreparable harm, requests for provisional measures, in any case, are considered at the stage of the merits.

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**40.** The Court notes that Article 27(2) of the Protocol provides that "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

**41.** In view of the foregoing, the Court shall take into account the law applicable to provisional measures, which are preventive in nature and do not prejudge the merits of the Application. The Court may only order provisional measures *pendente lite* if the basic requirements are met, namely, extreme gravity or urgency

and the prevention of irreparable harm to persons.

**42.** The Court recalls that the Applicant has requested six (6) provisional measures, namely:

"i. Interpret to the Parties Article 13 (1) of the Charter, subject to the assessment of the merits of the provisions of Beninese domestic law in relation to this interpretation

ii. Order the Respondent State to take all appropriate measures to grant, effectively and without hindrance, the right to run for office to the Applicant and to any Beninese citizen who wishes to run for office as an independent candidate in the communal, municipal, ward and village elections of the year 2020, without being affiliated to any political party;

iii. Order the Respondent State to take all appropriate measures to allocate elected seats to the Applicant and any Beninese citizen who is an independent candidate, under conditions of equality and non-discrimination;

iv. Order the Respondent State to take all appropriate measures to issue to the Applicant and to any Beninese citizen the administrative documents required for their candidacies in accordance with the principle of presumption of innocence;

v. Order the Respondent State to take all appropriate measures to ensure the transparency of the 2020 elections;

vi. Order the Respondent State to take all appropriate measures to avoid a second post-election crisis in the 2020 elections and to "establish and maintain political and social dialogue, as well as transparency and trust between political leaders and the people, with a view to consolidating democracy and peace" in accordance with Article 13 of the ACDEG.

**43.** It is clear to the Court that the provisional measures requested can be classified into three categories, which it will now examine.

## A. Provisional measure relating to the interpretation of Article 13(1) of the Charter

**44.** The Court observes that in international law provisional measures are measures which, under the seal of urgency, serve to preserve a legal situation or to safeguard rights or interests threatened by the risk of harm.

**45.** The Court notes that the measure sought by the Applicant is for the Court to interpret a provision of the Charter or to determine the manner in which it is to be applied. The Court is persuaded that this would go beyond its strict litigation function, which is the only one at play in the instant case.

**46.** Moreover, the request to interpret an article relating to the free participation of citizens in the conduct of public affairs, the violation

of which is alleged by the Applicant, necessarily prejudges the merits of the case. This would lead the Court to examine aspects that it will have to examine at the merits stage of the proceedings.

**47.** Accordingly, the Court dismisses this request.

## B. Provisional measures 2 to 4 on the requirement for independent candidates to be issued administrative documents and other requirements

**48.** The Court observes that urgency, which is consubstantial with extreme gravity, means that there is an "irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision". There is therefore urgency whenever " acts likely to cause irreparable harm may occur at any time before the Court makes a final decision in the case".

**49.** The Court emphasizes that the risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it immediately.

**50.** With regard to irreparable harm, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation[7].

**51.** The Court notes that provisional measures 2 to 4, which relate to political rights, have a special meaning;

**52.** These rights are protected by Article 2 of the African Charter. It is clearly stated that " Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status ". Furthermore, Article 13(1) of the Charter establishes the general principle in human rights that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".

**53.** The Court notes that it is not disputed that as things stand, the Applicant cannot be a candidate in the upcoming communal, municipal, ward and village elections;

**54.** The Court considers that the risk for him not running in these elections is real, so that the irreparable nature of the resulting

7 See Note 4, paragraphs 61-63.

harm is indisputable.

**55.** The Court notes, in view of the foregoing, that the requirements stipulated under Article 27(2) of the Protocol have been met.

**56.** Consequently, the Court orders the Respondent State to take all necessary measures to effectively remove all administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming communal, municipal, ward, town and village elections.

### C. Provisional measures 5 and 6 to ensure the transparency of the 2020 elections and to avoid a post-election crisis in relation to these elections

**57.** The Court observes that the Applicant does not provide evidence that the 2020 elections will not be transparent, let alone that unrest will occur.

**58.** The Court declares that it will not grant these requests.

**59.** This Ruling does not in any way prejudge the findings of the Court on its jurisdiction, the admissibility of the Application and the merits thereof.

## VIII. Operative part

**60.** For these reasons

The Court,

*Unanimously,*

i. *Orders* the Respondent State to take all necessary measures to effectively remove all administrative, judicial and political impediments to the candidacy of the Applicant in the upcoming communal, municipal, ward, city or village elections.

ii. *Requests* the Respondent State to report on the implementation of this Ruling within fifteen (15) days from the date of receipt.

iii. *Dismisses* all other measures requested.

# Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 712

Application 004/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Order (provisional measures), 6 May 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought this action alleging that he was illegally arrested, charged and sent to a detention Centre. Thereafter, he was tried in absentia, convicted and sentenced to ten years imprisonment. He claims that the entire domestic process leading to his conviction in absentia is a violation of his Charter protected rights. Along with the originating process, the Applicant filed this application for provisional measures, including a request to stay execution of the sentence of the domestic court. The Court granted part of the provisional measures sought.

**Jurisdiction** (*prima facie*, 26)

**Admissibility** (conditions for admissibility not applicable, 28)

**Provisional measures** (preventive nature, 36; extreme gravity 37, 48; risk of execution of prison sentence, 47; risk of irreparable harm, 48; direct and accurate information, 55)

## I. The Parties

**1.** Mr Houngue Eric Noudehouenou, (hereinafter referred to as the "Applicant") is a Beninese citizen, economist and tax specialist by training.

**2.** The Respondent State is the Republic of Benin (hereinafter referred to as "the Respondent State"). It 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 on 22 August 2014. Also, on 8 February 2016, the Respondent State filed the Declaration required in Article 34(6) of the Protocol accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations.[1]

1 The Respondent State also ratified the International Covenant on Civil and Political Law on 12 March 1992 and the African Charter on Democracy, Elections

**3.** On 25 March 2020, the Respondent State deposited with the African Union Commission, an instrument withdrawing its Declaration under Article 34(6) of the Protocol.

## II. Effect of the Respondent State's withdrawal of the Declaration required in Article 34(6) of the Protocol

**4.** The Court recalls that in its judgment in *Ingabiré Victoire v Republic of Rwanda,*[2] it concluded that withdrawal of the declaration filed under Article 34(6) of the Protocol does not have retroactive effect and has no bearing on matters pending at the time of notification of the withdrawal, as is the case for the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the instrument of withdrawal is deposited.

**5.** Regarding the Respondent State, having deposited the instrument of withdrawal on 25 March 2020, withdrawal of the Declaration made under Article 34(6) will take effect on 25 March 2021.

## III. Subject of the Application

**6.** In his Application on the merits, the Applicant alleges that he was arrested on 20 February 2018 by unidentified individuals who led him to the Cotonou police station, where he was informed of the reasons for his arrest, namely, embezzlement of public funds.

**7.** By Decision No. 001/CRIET/COM-I/2019 of 20 March 2019, the Investigating Committee of the Court for the Repression of Economic Crimes and Terrorism (CRIET) referred him to the Correctional Chamber of that Court, including with a new charge. He was referred there with a new charge of complicity in the abuse of office, even though he has never been privy to the information on the proceedings.

**8.** By judgment of 25 July 2019, he was tried *in abstentia* by CRIET, convicted and sentenced to ten (10) years' imprisonment for abuse of office and usurpation of title and an arrest warrant was issued against him. In addition, he was ordered to pay the sum

and Governance on 28 June 2012 and Protocol A/SP1/12/01 of the Economic Community of West African States (ECOWAS) on Democracy and Good Governance, Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security on 21 December 2001. The Respondent State is also a party to the African Charter on Democracy, Elections and Governance, ratified by Law No. 2011-18 of 5 September 2011.

2 Application 003/2014. Ruling of 3 June 2016 on the withdrawal of the declaration, *Ingabire Victoire Umuhoza v Republic of Rwanda*, § 67.

of 1,277,995,474 (one billion two hundred and seventy-seven million nine hundred and ninety-five thousand four hundred and seventy-four) CFA francs to CNCB as compensation for the damage suffered.

**9.** By letter of 26 July 2019, he lodged an appeal in cassation against the judgment, since Article 19 of Law No. 2018–13 of 2 July 2018 establishing CRIET prohibited him from lodging an appeal, in violation of Article 14 of the Charter.

**10.** The Applicant alleges violation by the Respondent State of the following rights:

"i. His right to be tried by a competent court, equality of all before the law, to be tried by an impartial tribunal, a reasoned judgment guided by the adversarial principle, protection from arbitrariness and judicial security, all protected by the Charter and Articles 10 of the Universal Declaration of Human Rights (hereinafter referred to as "UDHR") and 14(1) of the Covenant;

ii. His rights to defence, the equality of arms, to be defended by Counsel, to the facilities necessary to organize his defence, to be notified of the indictment and charges, to be present at his trial, the adversarial principle, to adduce evidence and present his arguments, to question the prosecution witnesses, to be protected by Articles 14(3) of the Covenant and 7(1)(c) of the Charter;

iii. His right to appeal the judgments protected under Articles 10 of the UDHR, 7(1)(a) of the Charter and 2(3) of the Covenant;

iv. His right to have his conviction and sentence reviewed under Article 14(5) of the Covenant;

v. His right to the presumption of innocence protected under Article 7(1) of the Charter;

vi. His rights to paid work, property and an adequate standard of living, protected by Articles 6 of the ICESCR, 15 and 14 of the Charter and 23 of the UDHR;

vii. His right to reputation and dignity, not to be subjected to inhuman and degrading treatment protected under Articles 7 of the Covenant and 5 of the Charter and his right to freedom of movement, protected under Articles 12, 14(5) and 17 of the Covenant".

**11.** The Applicant sought from the Court the following reliefs on the merits:

i. A decision stating that the violations of the Applicant's human rights are well-founded and that the Respondent State has violated each of the Applicant's human rights in question;

ii. A decision condemning the Respondent State on each violation of the Applicant's human rights invoked in this Application;

iii. A decision that the unrealistic facts referred to in the 20 March 2019 CRIET judgment against the Applicant leading to his 10-year prison

sentence constitutes a serious breach on his honour, his dignity, reputation, health and right to protection from arbitrariness;

iv. A decision that the Applicant has been subject to arbitrary judicial practices and persecution for having ensured the exercise of the tax defence right in Benin in his capacity as manager of the company Fisc Consult Sarl;

v. A decision that the Applicant is being persecuted for having ensured the exercise of tax defence rights for the benefit of political opponent Sébastien Germain Ajavon and companies in which he has interests;

vi. A decision that as long as the CRIET judgments was not appealed, the arrest warrant issued by the Respondent State against the Applicant is a violation of the right to freedom of movement guaranteed under Article 12 of the Covenant, the right to stay execution of the sentence imposed by Article 15(5) of the Covenant and Chapter N, 10(a) point (2) of the Guidelines and Principles on the Right to a Fair Trial and Legal Aid in Africa;

vii. A decision ordering the Respondent State to take all necessary measures to quash the judgment of 25 July 2019 and Judgment No. 001/CRIET/COM-I/2019 of 20 March 2019 issued by CRTET against the Applicant, and in order to erase all the effects of these two judgments within one month of the judgment of this High Court in accordance with the requirements of Chapter IX of United Nations Resolution 60/147 of 16 December 2005 and the jurisprudence of this High Court and the Permanent Court of International Justice which recalls that "the State responsible for the violation must endeavour to erase all the consequences of the unlawful act and restore the state that would likely have existed had that act not been committed";

viii. A decision ordering the Respondent state to take all measures to restore the reputation of the Applicant tainted by the CRIET judgments, proceedings conducted in violation of human rights, as well as charges brought against him in the absence of evidence of personal guilt, and to stop any prejudice against the Applicant;

ix. Order the Respondent State to pay the Applicant the pecuniary damages of 20,701,312,046 CFA francs for losses incurred and loss in income not including that relating to all other companies in which he is a shareholder and has shares that have suffered losses in value, and which can be presented as follows:

- 21,016,320 CFA francs for wage losses and wage benefits from 2018 to 2022 taking into account the likely date of the Court's judgment;
- 366,784,794 CFA francs for the Applicant's real losses in dividend;
- 20,088,510,933 CFA francs for the loss in income suffered by the Applicant in COMON, JLR SAU, SCI L'ELITE, MAERSK BENIN, CMA-CGM BENIN, MSC BENIN, EREVAN, ECOBANK;
- 150,000,000 CFA francs for losses in fiscal studies and tax

training contracts with the World Bank and the European Union;

- 75,000,000 CFA francs for legal fees, assistance and legal advice due to the violations which led to this Application;

x. Order the Respondent State to pay the Applicant moral damages of two billion CFA francs (2,000,000,000) and for any other moral damages to which he has been subjected;

xi. Order the Respondent State to pay for the property and moral damages amounting to 1,000,000 CFA francs, including 400,000,000 CFA francs for his wife and 300,000 000 FCFA for each of his three children for the inhuman and degrading treatment and other moral harm to the Applicant's family as a result of CRIET's judgments and the legal proceedings that violated his human rights;

xii. Order the Respondent State to bear the cost of this action;

xiii. Order the Respondent State to bear the full costs.

**12.** In a separate Application, the Applicant also seeks the following provisional measures:

"i. Order the Respondent State to stay execution of the sentence of 25 July 2019 rendered by CRIET until the final judgment of this Court is rendered;

ii. Order the Respondent State to take all appropriate measures to ensure that his life, physical and moral integrity and health are not harmed;

iii. Order the Respondent State to take all appropriate measures so as not to subject him to any inhuman, degrading or demeaning treatment;

iv. Order the Respondent State to take all appropriate measures to ensure that the freedom, security and physical and moral integrity of his family members are not infringed upon;

v. Under his arguments and additional evidence, the Applicant further seeks, as a provisional measure, that the Court order, seek or obtain from any Member State of the African Union asylum and the legal protection of his wife and children, on the one hand, pursuant to the right to protection of victims and their families, and on the other, in accordance with Articles 12(3) of the Charter and 23 of the Covenant in order to protect them from the judicial, economic and moral persecution they face ".

## IV. Summary of Procedure before the Court

**13.** The Application on the merits and request for provisional measures dated 14 January 2020 were filed with the Registry of the Court on 21 January 2020.

**14.** Pursuant to Article 34(1) of the Protocol on the Establishment of the Court, on 18 February 2020 the Registry communicated to the Applicant, acknowledgment of receipt of said Applications

and in accordance with Rule 36 of the Rules of Court, served the Applications on the Respondent State with a request to submit its Response on the provisional measures within fifteen (15) days and that on the merits within sixty (6) days.

**15.** On 28 February 2020, the Registry received additional evidence and arguments from the Applicant concerning the provisional measures and this was notified to the Respondent State on 5 March 2020, with a request for the latter to submit its Response within eight (8) days of receipt.

**16.** On 4 March 2020, the Registry also received a letter from the Republic of Benin requesting for an extension of time by fifteen (15) days from 3 March 2020 for it to file its Response to the request for provisional measures. This was transmitted to the Applicant on 5 March 2020 for his comments within three (3) days of receipt.

**17.** On 10 March 2020, the Registry acknowledged receipt of the Respondent State's request for extension and asked it to submit its Response on the provisional measures within eight (8) days from the date of receipt.

**18.** On 18 March 2020, the Registry received the Response from the Respondent State and notified the Applicant for his comments.

## V. Jurisdiction of the Court

**19.** In support of jurisdiction, the Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules, that to make determination on requests for provisional measures, the Court does not have to satisfy itself that it has jurisdiction over the merits of the case but simply that it has *prima facie* jurisdiction.

**20.** Referring further to Article 3(1) of the Protocol, the Applicant argues that the Court has jurisdiction insofar as, on the one hand, the Republic of Benin has ratified the African Charter and the Protocol, and made the Declaration provided for in Article 34(6). He alleges that the Respondent State has violated rights protected by other human rights instruments.

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**21.** When seized of an application, the Court conducts a preliminary examination of its jurisdiction, under Articles 3 and 5(3) of the Protocol and Rule 39 of the Rules of Court (hereinafter "the

Rules").

**22.** 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*".

**23.** Under 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*".

**24.** The Court notes that the Respondent State has ratified the Charter and the Protocol. It has also made the Declaration 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 jointly read.

**25.** The rights alleged by the Applicant to have been violated are all protected by the ICCPR, the ECOWAS Protocol and the UDHR, all of which are instruments that the Court is entitled to interpret and apply under Article 3(1) of the Protocol.[3]

**26.** In the light of the above, the Court recalls its established jurisprudence that in determining requests for provisional measures, it does not have to ensure that it has jurisdiction over the merits of the case, but that it has *prima facie* jurisdiction.[4]

## VI. Admissibility

**27.** In its Response dated 18 March 2020, the Respondent State raised an objection to the admissibility based on the absence of urgency or extreme gravity and irreparable harm on the basis of the provisions of Article 27(2) of the Protocol.

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3 ACHPR, Judgment on the merits, ***Action for the Protection of Human Rights v Republic of Côte d'Ivoire***, 18 November 2016.

4 See Application 058/2OL9 ***XYZ v Republic of Benin*** (Order on provisional measures of 2 December 2019); Application No.020/2019 ***Komi Koutche v Republic of Benin*** (Order on provisional measures of 2 December 2019); Application 002/2013 ***African Commission on Human and Peoples' Rights v Libya*** (Order for provisional measures dated 15 March 2013); Application 006/2072 ***African Commission on Human and Peoples' Rights v Kenya*** (Order for provisional measures of 15 March 2013) and Application 004/2011 ***African Commission on Human and Peoples' Rights v Libya*** (Order for provisional measures of 25 March 2011).

**28.** The Court notes that in matters of provisional measures, neither the Charter nor the Protocol provided for conditions of admissibility, the examination of those measures being subject only to *prima facie* jurisdiction.

**29.** Accordingly, the Court dismisses the objection to the admissibility of the Application.

## VII. Provisional measures requested

**30.** The Applicant considers that the judgments of 25 July 2019 and 20 March 2019 of CRIET put him in a precarious situation of unbearable extreme gravity. They have unpredictable and irreparable consequences due to impunity for the human rights violations in question.

**31.** Pursuant to Article 27 of the Protocol and Rule 51 of the Rules, the Applicant prays the Court to order the Respondent State to take the provisional measures set out in paragraph 9 of this Order.

**32.** The Respondent State argues on the contrary in its Response that urgency means *"the character of a state of affairs that, if not repaired at short notice, could cause irreparable harm",* while extreme gravity is a situation of increased violence and of an exceptional nature justifying that the Court put an end to it. The Respondent State therefore concludes that the provisional measures sought do not result from any finding of urgency or a situation of extreme gravity.

**33.** With regard to irreparable harm, the Respondent State notes that it differs from the harm that is difficult to repair and refers to the action whose consequences cannot be erased, repaired or compensated, even by compensation.

**34.** According to the Respondent State, provisional measures are only possible in exceptional circumstances, when an applicant is exposed to a real risk of irreparable harm. This is not the case in the present case because these measures hinge on consideration of the case on the merits.

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**35.** The Court notes that Article 27(2) of the Protocol states 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 relevant"*.

**36.** In the light of the foregoing, the Court takes into account the law applicable in matters of provisional measures which are of a preventive nature and in no way prejudge the merits of the Application. It can only order for provisional measures *pendente lite* and if the basic conditions are met, namely, extreme gravity or urgency and the prevention of irreparable harm to persons.

**37.** The Court notes that urgency, consubstantial with extreme gravity, means a "*real and imminent risk that irreparable harm will be caused before it renders its final judgement"*.[5]

**38.** There is urgency whenever acts likely to cause irreparable harm can "*occur at any time"* before the Court renders a final judgment in the case.[6]

**39.** The Applicant's various requests for provisional measures will be considered in the light of the above.

## A. Request for a stay of execution of CRIET's sentence of 25 July 2019

**40.** The Applicant seeks a stay of execution of the CRIET's 25 July 2019 conviction for putting him in a precarious, extreme, serious and unbearable situation with unpredictable consequences and also because of irreparable consequences due to impunity of the human rights violations at stake before this Court.

**41.** With regard to the unforeseeable consequences, the Applicant alleges that, following the 10-year sentence imposed by the above judgment, he lodged an appeal in cassation against the judgment.

**42.** According to the Applicant, despite the appeal in cassation, the Respondent State may enforce the judgment at any time because the CRIET law removed the right to appeal and Article 594 of the Criminal Procedure Code requires the execution of the sentence before the exercise of the right protected under the Charter.

**43.** He asserts that the Respondent State is obliged to automatically stay execution of the CRIET judgment under Articles 14 and 2(1)

5 ICJ, *Implementation of the Convention for the Prevention and Punishment of Genocide Crime* (*Gambia v Myanmar*), 23 January 2020, § 65; *Alleged Violations of the 1955 Treaty of Friendship, Trade and Consular Rights* (*Islamic Republic of Iran v United States of America*), 3 October 2018; and *Immunity and criminal proceedings* (*Equatorial Guinea v France*), 7 December 2016, § 78.

6 *Infra*, note 2.

(2) of the Covenant.

**44.** In these circumstances, according to the Applicant, the execution of the CRIET judgment prior to the Court's decision on the alleged violations will have unforeseeable consequences for him.

**45.** With regard to irreparable harm, the Applicant contends that if the CRIET decision of 25 July 2019 is implemented and the Court subsequently established the alleged violations, the execution would therefore be arbitrary and the perpetrators of that execution would never be punished.

***

**46.** The Court notes that even though under the terms of Article 19(2) of the law establishing CRIET, the judgments of that Court are subject appeal in cassation,[7] Article 594 of Benin's Criminal Procedure Code declares appeals of convicts who are not in detention or who have not obtained exemption from serving their sentence are void. [8]

**47.** In the circumstances of this case where the Applicant is not in detention and has not been granted an exemption from the execution of his ten-year prison sentence, the Court considers that there is still a risk that the sentence of imprisonment will be executed, notwithstanding the appeal, especially since he is the subject of an international arrest warrant.

**48.** From the foregoing, the Court considers that the circumstances of this case reveal a situation of extreme gravity and present a risk of irreparable harm to the Applicant, should the CRIET judgment of 25 July 2019 be carried out before the Court's decision in the case pending before it.

**49.** The Court recalls that in a previous case presenting similar circumstances, it had ordered a stay of execution of a CRIET

7 It is noted that "The judgments of the Court for the Repression of Economic Crimes and Terrorism are justified. They are delivered in open court. They are liable to appeal in cassation by the convicted, the Public Prosecutor's Office and the civil parties."

8 "Persons sentenced to a penalty involving deprivation of liberty who are not in detention or who have not obtained a waiver, with or without bail, from the court that pronounced the sentence, shall be declared to have forfeited their appeal."

judgment.[9] The Court finds that there is no reason in the instant case for it to depart from its jurisprudence.

**50.** Accordingly, the Court orders a stay of execution of the 25 July 2019 CRIET judgment.

## B. Provisional measure not to impair the liberty, security, physical and moral integrity of the Applicant

**51.** The Applicant recalls that on 31 October 2018, three unidentified armed persons entered his home, without notifying him of any warrant, arrested him and took him *manu militari* to a police station.

**52.** He further alleges that while he was in his hospital bed following his arrest, he was persecuted and assaulted by a Bailiff acting in the name and on behalf of the Respondent State, to discharge acts addressed to the company Fisc Consult, of which he is no longer the manager.

**53.** Therefore, in view of these events, he fears, not only to be subjected to inhuman and degrading treatment, but also fears for his life.

**54.** The Applicant adds to the additional arguments and evidence he adduced as a result of his request for provisional measures, that the threats have persisted. According to him, the threats are aimed at killing him.

**55.** The Court finds that the Applicant has failed to provide direct and accurate information to demonstrate the extreme gravity or urgency and the risk of serious and irreparable harm to him. The Court cannot rely on mere assertions to grant his request.

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**56.** The Court therefore decides to dismiss the request for the provisional measures requested.

9 AfCHPR, ***Sébastien Germoin Ajovon v Republic of Benin***, Order on interim measures, 7 December 2017.

## C. Provisional measure relating to the Applicant's right to defence before this Court

**57.** The Applicant asserts that without the stay of execution of the CRIET judgment, he will be in a weaker position in regard to his rights to defence before this Court vis-a-a-vis the Respondent State.

**58.** To this end, the Applicant maintains that in consideration of this judgment, on the one hand, he cannot mobilize the financial resources necessary to cover travel and accommodation costs for even one of his Counsel in the context of the referral to the Court.

**59.** On the other hand, he cannot appear before this Court to answer all the questions and refute the arguments of the Respondent State which would require comments on his part.

***

**60.** The Court notes that the Applicant argues that the CRIET conviction is an obstacle to the exercise of his right to defence before it.

**61.** The Court notes that the provisional measures sought in connection with his right to defence are, in the present case, moot, to the extent that the Court ordered a stay of execution of the CRIET judgment.

## D. Provisional measure for the rights to liberty and security of the Applicant's family

**62.** The Applicant alleges that following his arrest in February 2019, his wife, carrying their 8-year-old child, and his adoptive mother, who arrived two hours after the incident and wished to see him, were remanded in custody for eight (8) days, on the pretext that he had escaped. He contends that this situation can have psychological consequences on his family members and can even be fatal for some of them.

**63.** The Applicant therefore considers that his family is being persecuted and this justifies the need to issue provisional

measures for their protection.

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**64.** The Court reiterates that urgency, consubstantial with extreme gravity, means a "*real and imminent risk that irreparable harm will be caused before it makes its final decision*".[10]

**65.** The Court finds that the deprivation of liberty of the Applicant's family members took place in February 2019 following his arrest. It further notes that since that time, the Applicant has not made mention of any threat to his family members.

**66.** The Court notes that the Applicant failed to provide evidence as to the real and imminent threats to the health, liberty and security of his family to justify provisional measures. Nor does he establish the urgency of such measures.

**67.** The Court therefore considers that it does not see the need to order the provisional measures.

## E. Provisional measure to obtain asylum and legal protection from all African Union Member States

**68.** The Applicant maintains that his entire family is subjected to persecution and ill-treatment that warrants the benefit of asylum and legal protection from African Union Member States.

***

**69.** The Court recalls, as the Applicant contends, that Article 12(3) of the Charter states that "every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international

10 International Court of Justice: Implementation of the Convention for the Prevention and Punishment of Genocide Crime (*Gambia v Myanmar*), para 65, 23 January 2020; Alleged Violations of the 1955 Treaty of Friendship, Trade and Consular Rights (*Islamic Republic of Iran v United States of America*), 3 October 2018; Immunity and criminal proceedings (*Equatorial Guinea v France*), 7 December 2016, para 78.

conventions". Nevertheless, the sought provisional measure must meet the conditions of Article 27(2) of the Protocol.

**70.** The Court notes that the Applicant fails to adduce evidence as to the direct and current existence of persecutions of his family, nor does he show proof of urgency and the need to order the sought provisional measure.

**71.** The Court therefore finds that this request for provisional measure should not be granted.

**72.** Lastly, the Court underscores that this order does not prejudge its findings on the jurisdiction, admissibility and merits of the Application.

## VIII. Operative part

**73.** For these reasons

The Court

*Unanimously*

i. *Orders* the Respondent State to stay execution of the judgment of 25 July 2019 of the Court for the Repression of Economic Crimes and Terrorism rendered against the Applicant, Hougue Eric Noudehouenou, until the final decision of this Court;

ii. *Requests* the Respondent State to report on the implementation of this Order within fifteen (15) days of receipt.

iii. *Dismisses* all other prayers made.

# Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 726

Application 003/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Order (provisional measures), 25 September 2020. Done in English and French, the French text being authoritative.

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

The Applicant, in this action, challenged certain national measures which he claimed were a violation of his rights to participate in presidential elections and in the management of the public affairs of his country . The Applicant filed this second request for provisional measures on the grounds that the Respondent State had failed to implement the first order for provisional measures. The Court granted part of the provisional measures sought.

**Jurisdiction** (*prima facie*, 16; ICCPR, 16; UDHR, 16; withdrawal of article 34(6) declaration, 16)

**Provisional measures** (probability of materialisation of irreparable damage, 28; imminent irreparable harm 33; imminent reprisals, 41)

**Procedur**e (urgent examination of the merits, 35-36; guarantees of non-repetition before merits, 38)

## I. The Parties

**1.** Mr Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin, an economist and tax expert by training. He is contesting measures which violate his right to participate in the presidential election and the management of the public affairs of his country.

**2.** The Application is brought against the Republic of Benin (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 the 21 October 1986 and the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), on 22 August 2014. In addition, on 8 February 2016, it made the Declaration provided for in Article 34(6) of the Protocol by virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental organisations. However, on 25 March 2020, the Respondent State deposited with the African Union Commission an instrument withdrawing its Declaration.

## II. Subject of the Application

**3.** This request for provisional measures, filed on 25 August 2020, is a follow-up to the Application instituting proceedings and a first request for provisional measures filed on 21 January 2020 as well as to a Supplementary Brief to the first request filed on 4 June 2020. In the Application instituting proceedings, the Applicant seized the Court with allegations of the violation of his right to participate freely in the management of the country's public affairs, in relation to the 2021 presidential election.

**4.** He recalls that, as a result of the first request for provisional measures, the Court issued a Ruling on 5 May 2020 by which it ordered the Respondent State to take all appropriate measures to effectively remove all obstacles to the Applicant's participation in the forthcoming communal, municipal, neighbourhood, town or village elections. He states that the Respondent State has failed to execute the ruling relating to these elections.

**5.** He asserts that the alleged violations of this fundamental rights are ongoing as he is still required to be affiliated to a political party, obtain an endorsement from a Member of Parliament and a Mayor, a tax clearance and a certificate of conformity. He states that the requirements are obstacles to his candidacy in the forthcoming presidential election in 2021.

## III. Alleged violations

**6.** In the Application instituting proceedings and the Supplementary Brief, the Applicant alleged the violation of:

i. The right to right to participate freely in the management of the public affairs of his country guaranteed under Articles 13(1) of the Charter, 25 of the ICCPR and 21 of the UDHR;

ii. The right to freedom of association guaranteed by Articles 13 of the Charter and 20 of the UDHR;

iii. The right to freedom of expression guaranteed by Articles 4 and 6 of ACDEG, 25(b) and 19 of the ICCPR, 19 and 21(3) of the UDHR;

iv. The principles of democratic change of government and the right of any citizen to be elected to the supreme office guaranteed by Articles 23(5), 17 of ACDEG and 25 of the ICCPR;

## IV. Summary of the Procedure before the Court

**7.** On 21 January 2020, the Applicant filed the Application instituting proceedings together with a request for provisional measures. The Application and the request were served on the Respondent

State on 20 February 2020 and to other entities provided for in Rule 35 of the Rules.

**8.** On 5 May 2020, the Court issued a first Order for Provisional Measures. The order was duly served on the Parties.

**9.** On 4 June 2020, the Applicant filed a Supplementary Brief which was served on the Respondent State on 11 June 2020.

**10.** On 25 August 2020, the Applicant filed a second request for provisional measures, which was served on the Respondent State on 1 September 2020 for its observations within fifteen (15) days from the date of receipt.

**11.** At the expiry of the afore-mentioned deadline, the Respondent State did not respond to the second request for provisional measures.

## V. *Prima facie* jurisdiction

**12.** On the basis of Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Applicant asserts that with regard to provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case, but simply that it has jurisdiction *prima facie.*

**13.** Referring further to Article 3(1) of the Protocol, the Applicant argues that the Court has jurisdiction insofar as the Respondent State has ratified the Charter and the Protocol and that it has also made the Declaration provided for in Article 34(6) of the Protocol. The Applicant states that, the Respondent State's withdrawal of the Declaration will only take effect from 26 March 2021.

**14.** Lastly, the Applicant argues that he alleges violations of rights protected by human rights instruments to which the Respondent State is a party.

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**15.** 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".

**16.** Rule 39(1) of the Rules stipulates that "the court shall conduct preliminary examination of its jurisdiction…" However, with regard to provisional measures, the Court does not have to ensure that it

has jurisdiction over the merits of the case, but simply has *prima facie* jurisdiction.[1]

**17.** In the instant case, the Applicant's rights allegedly violated are all protected by the Charter, the International Covenant for Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), which are instruments that the Court is empowered to interpret and apply under Article 3(1) and 7 of the Protocol.

**18.** The Court notes, as recalled in paragraph 2 above, that on 25 March 2020, the Respondent State filed an instrument withdrawing its Declaration deposited in conformity with Article 34(6) of the Protocol. The Court recalls, however, in reference to its order for provisional measures of 05 May 2020 and the corrigendum of 29 July 2020, that the withdrawal of the Declaration does not have any retroactive effect and has no bearing on cases pending before it as it only takes effect on 26 March 2021.[2] Consequently, the Court finds that the said withdrawal will, in no way, affect the personal jurisdiction of the Court in the instant case.

**19.** The Court therefore concludes that it has jurisdiction *prima facie* to hear the application for provisional measures.

## VI. Provisional measures requested

**20.** The Applicant prays the Court to order the following provisional measures:

i. order the Respondent State to take all appropriate measures to effectively remove all legal, administrative, political and other obstacles to the Applicant's effective participation in the 2021 presidential election as a candidate, in his country.

ii. impose on the Respondent State, in favour of the Applicant, interest on the present award to be pronounced by this Court, for a monthly sum of 500,000,000 CFA francs for each month of delay in execution and for each month of default execution of the order of this Court, until the full and perfect execution of the said order pronounced by this Court;

iii. order all guarantees of non-repetition that the Court deems useful, including but not limited to the following:

a. order the Respondent State to bring to justice any person who objects to this Court order

1 *Komi Koutche v Republic of Benin*, ACtHPR, Application 020/2019, Ruling on provisional measures of 2 December 2019.

2 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Ruling on provisional measures of 5 May 2020 and corrigendum of 29 July 2020.

b. declare and rule that the Assembly of Heads of State of the African Union as well as any competent organ of the African Union and of the United Nations, can examine cases *proprio motu*, in the event of violation of the Court decision, to enforce or have enforced individual and collective sanctions against the Respondent State and all its employees involved in violation of the decisions of this Court;

iv. rule on the merits in emergency procedure and shorten the time limits granted to them;

v. order the Respondent State to take all measures to prevent the Applicant, his family and his counsel from reprisals, in any form whatsoever, on the ground of this matter and/or from the persons implicated.

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**21.** The Applicant argues that there is fear of irreparable damage and an urgency insofar as the alleged violations are ongoing and the deadline for submitting candidacy files is set for 19 January 2021.

**22.** He further explains that the provisional measures are also justified in the interests of justice because the Respondent State has not complied with the Order for Provisional Measures in Application 062/2020 *Ajavon Sébastien v Benin* .of 17 April 2020 to suspend the holding of the 2020 municipal and legislative elections and the Order for Provisional Measures in Application 003/2020 of 5 May 2020 ordering the Respondent State to remove the obstacles to his candidacy for said election.

**23.** In terms of the measures concerning the application of interests and the guarantee of non-repetition, he explains that they are justified as they will spare him the irreparable damage linked to the certainty that the Respondent State will not comply with the measures taken, as was the case with the other orders.

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**24.** The Court notes that Article 27(2) of the Protocol provides that: *"*In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such

provisional measures as it deems necessary*".*

**25.** The Court observes that it is up to it to decide in each individual case whether, in the light of the particular circumstances of the case, it should exercise the jurisdiction conferred on it by the above provisions.

**26.** The Court recalls that urgency, consubstantial with extreme gravity, refers to a real and imminent risk being caused before it renders its final decision.[3]

**27.** The court underscores that the risk in question must be real, which excludes any risks that are purely hypothetical, and explains the need to remedy it forthwith.[4]

**28.** With regard to irreparable damage, the Court considers that the probability of its materialization should be reasonable, having regard to the context and the personal situation of the Applicant.[5]

**29.** The measures requested will be examined in the light of the foregoing.

## A. Measure aimed at effectively removing all judicial, administrative, political and other obstacles to the presidential election

**30.** The Court notes that the fact that it is undisputed that the Applicant could not, in the current state of the instruments in force, present his candidacy for the next presidential election.

**31.** The Court recalls the provision of Article 13(1) of the Charter which provides that "[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives".

**32.** The Court notes that to enjoy such a right in the current legal framework on presidential elections in force as in the Respondent State, the candidate must have all the documents that constitute the candidacy file and must submit them before the deadline of 21 January 2021.

**33.** The Court therefore considers that there is urgency in the instant case given that the 2021 presidential electoral process is imminent and the risk for the Applicant not participating as a candidate for the election is real, so that there is indisputably imminent irreparable damage.

3 *Ajavon Sébastien v Republic of Benin,* ACtHPR, Application 062/2019, Ruling on provisional measures of 17 April 2020, § 61.

4 *Ibid* §62.

5 *Ibid* §63.

**34.** Accordingly, it orders the Respondent State to take all the necessary measures to effectively remove any administrative, judicial, political and other obstacles to the Applicant's candidacy for the forthcoming presidential election in 2021.

## B. Measure concerning the urgent examination of the merits of the case

**35.** The Court observes that the procedure for urgent examination of the merits of the application is neither provided for by the Protocol nor by the Rules of Court.

**36.** The Court notes that although in practice it has generally adopted a case-by-case approach in applying time limits and the priority in examination of applications, it does so in application of its discretionary judgment in the interest of justice.

**37.** Accordingly, the Court declares this request moot and dismisses it.

## C. Imposition of interest and guarantees of non-repetition

**38.** The Court observes that the measures requested presupposes that the Respondent State is liable for the alleged violations. This should be addressed during the proceedings on the merits.

**39.** The Court notes that the said measures prejudge the merits since they would necessarily lead the Court to examine the aspects which it will have to examine under the proceedings on the merits.

**40.** Accordingly, the Court dismisses the request.

## D. Measures to prevent the Applicant, his family and his counsel from reprisals

**41.** The Court observes that the Applicant did not provide evidence of real and imminent reprisals against his person, his family and his counsel. Neither does he establish the urgency of such measures.

**42.** The Court therefore does not see the need to order the measure requested and therefore dismisses it.

**43.** For the avoidance of doubt, this Order is provisional and does not prejudge in any way the decisions that the Court may take on its jurisdiction, on admissibility and on the merits of the Application.

## VII. Operative part

**44.** For these reasons,
The Court,
*Unanimously,*
i. *Orders* the Respondent State to take all necessary measures to effectively remove any administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming presidential election in 2021.
ii. *Dismisses* all the other measures requested.
iii. *Orders* the Respondent State to report to the Court within thirty days of notification of this Ruling, on the measures taken to implement the order.

# Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 734

Application 028/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Ruling (provisional measures), 27 November 2020. Done in English and French, the French text being authoritative.

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

The Applicant, who alleged that domestic laws amending the constitution of the Respondent State amounted to a violation of his Charter protected rights, brought this application for provisional measures to prevent or stay criminal proceedings likely to lead to a violation of his right to liberty and for urgent consideration of the merits of his case. The Court dismissed the application for provisional measures.

**Jurisdiction** (*prima facie*, 15, 20; effect of withdrawal of Art 34(6) Declaration,19)

**Provisional measures** (evidence of risk, 35; hypothetical risk, 35; moot prayer, 39)

**Procedure** (prioritisation of cases on cause list, no procedure under Protocol or Rules, 41-42)

## I. The Parties

**1.** Mr Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He is seeking orders of provisional measures to stay all criminal proceedings, to prevent the deprivation of his liberty, for an urgent review of the merits of his case and imposition of a penalty for any delay in execution of the decision of the Court.

**2.** The Application is filed against the Republic of Benin (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 22 August 2014. Furthermore, on 8 February 2016, the Respondent State deposited the Declaration provided for under Article 34(6) of the Protocol (hereafter referred to as "the Declaration") through which it accepted the jurisdiction of the Court to receive applications filed by individuals and Non-Governmental Organisations having

observer status with the African Commission on Human and Peoples' Rights. On 25 March 2020, the Respondent State deposited with the African Union Commission an instrument withdrawing the said Declaration. The Court has held that this withdrawal does not have any bearing on pending or the new cases filed before the withdrawal takes effect, that is, a year after the withdrawal of the Declaration, that is, 26 March 2021.[1]

## II. Subject of the Application

**3.** 3. In his request for provisional measures, the Applicant states that he had filed with the Court an Application on the merits to challenge on one hand, Law no. 2018-02 of 2 July 2018 amending and supplementing Organic Law No. 94-027 of 18 March 1999 on the Supreme Judicial Council and on other hand, the finding in Decision DCC 18-141 of 18 June of the Constitutional Court of Benin which declared that the said law was in conformity with the Constitution.

**4.** The Applicant states that, as a result of the referral of his case to this Court, the Respondent State intends to implement against him and his Counsel the provisions of Article 410 of the Benin Criminal Code, whereby anyone who publicly, by acts, words or writings, seeks to discredit a judicial act or decision in conditions likely to undermine the authority of the judiciary or its independence is liable to imprisonment and a fine.

**5.** Fearing for his own freedom, that of his family and of his Counsel, the Applicant requests the Court to order a number of provisional measures.

## III. Alleged violations

**6.** In the Application on the merits, the Applicant alleges:

i. Violation of the Independence of the judiciary protected by Article 26 of the Charter, Articles 2 and 14(1) of the ICCPR, Articles 10 and 30 of the Universal Declaration of Human Rights (UDHR) and Articles 1(h) and 33 of the ECOWAS Protocol on Democracy.

ii. Violation of the Magistrates' right to strike protected by Articles 9, 10 and 11 of the Charter

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Ruling of 5 May 2020 (provisional measures) §§ 4-5 and corrigendum of 29 July 2020.

iii. Violation of the right to remedies provided for under Article 56(5) of the Charter, Article 8 of the UDHR, and Article 1(h) of the ECOWAS Protocol;

iv. Violation of right to freedom of the means of communication protected by Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR).

## IV. Summary of the Procedure before the Court

**7.** The Application on the merits was filed on 17 September 2020, and the Request for provisional measures was subsequently filed on 28 September 2020.

**8.** The Application and the Request were served on the Respondent State on 15 October 2020 for its Response on the merits within sixty (60) days and observations on the Request for provisional measures within fifteen (15) days of receipt of the notification. The Application and the Request were also transmitted to the other entities provided for under Rule 42(4) of the Rules on 15 October 2020.

**9.** The Respondent State submitted its observations on the request for provisional measures on 30 October 2020.

## V. *Prima facie* jurisdiction

**10.** The Applicant asserts pursuant to Articles 27(2) of the Protocol and Rule 51 of the Rules,[2] that in matters of provisional measures, the Court need not be satisfied that it has jurisdiction on the merits of the case but merely, that it has *prima facie* jurisdiction.

**11.** Referring further to Article 3(1) of the Protocol, the Applicant asserts that the Court has jurisdiction in so far as, on the one hand, the Republic of Benin has ratified the African Charter, the Protocol and made the Declaration, and on the other, he alleges violations of the rights protected by human rights instruments.

**12.** The Applicant further argues that although the Respondent State withdrew its Declaration on 25 March 2020, the withdrawal does not take effect until 26 March 2021.

**13.** The Respondent State has not filed a response to this point.

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2 Rules of Court, 2 June 2010 (Rule 59 of the Rules of Court of 25 September 2020).

**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, the Protocol and any other relevant human rights instrument ratified by the States concerned."

**15.** Rule 49(1) of the Rules[3] provides that "[t]he Court shall ascertain its jurisdiction …" However, with respect to provisional measures, the Court need not ensure that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.[4]

**16.** In the instant case, the rights alleged to have been violated are all protected by human rights instrument ratified by the Respondent State.

**17.** The Court further notes that the Respondent State has ratified the Protocol and deposited the Declaration prescribed under Article 34(6) of the Protocol.

**18.** The Court observes, as stated in paragraph 2 of the present Ruling, that on 25 March 2020, the Respondent State deposited an instrument of withdrawal of its Declaration.

**19.** The Court also recalls that it has held that the withdrawal of a Declaration filed in accordance with Article 34(6) of the Protocol has no retroactive effect, and has no bearing on pending cases and new cases filed before the withdrawal comes into effect[5] as is the case in the present matter. The Court reiterated this position in its Order of 5 May 2020, *Houngue Eric Noudehouenou v Republic of Benin,*[6] and held that the Respondent State's withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal does not affect its personal jurisdiction in the present case.

**20.** From the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the present Application for provisional measures.

3 Formerly Rule 39(1) of the Rules of Court, 2 June 2020.

4 *Komi Koutche v Republic of Benin*, ACtHPR, Application 020/2019, Order of 2 December 2019 (provisional measures) § 11.

5 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

6 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 003/2020, Ruling of 5 May 2020 (provisional measures) §§ 4- 5 and corrigendum of 29 July 2020.

## VI. Provisional measures requested

**21.** The Applicant seeks the following orders on provisional measures:

i. Order the Respondent State to take all necessary measures to ensure his effective protection and that of his counsel, including a stay of all criminal proceedings and suspension of imprisonment for challenging domestic decisions before the Court on the grounds of human rights violations, once the Court's ruling is delivered and to report to the Court within ten days of the delivery of the Court's ruling, on the measures taken.

ii. Order the Respondent State to comply with the Court's decision of 6 May 2020, Application 004/2020, and to take all necessary measures to ensure that the Applicant is not unlawfully and/or arbitrarily deprived of his freedom and to report to the Court within ten days of delivery of the ruling;

iii. As much as possible, it is the Court's discretion to hear the case on the merits under urgent procedure;

iv. Impose on the Respondent State, in the Applicant's favour, a monthly sum of FCFA 500,000,000 for each month of delay in execution and for each month of non-execution of the order to be pronounced by the Court, until the said order is fully executed.

**22.** To buttress his Application, the Applicant states that Article 410 of the Criminal Procedure of Benin provides for imposition of a prison sentence and a fine on anyone who publicly, by acts, words or writings, seeks to discredit a judicial act or decision in a manner likely to undermine the authority of the judiciary or its independence.

**23.** The Applicant claims that, as a result of the case it brought before the Court, *inter alia*, to denounce the violation of the independence of the Constitutional Court of Benin by Decision DCC 18-141 of 18 June 2018, the Respondent State intends to implement, at any time, the above-mentioned penal provision against him and his counsel.

**24.** The Applicant submits that he is constantly being threatened with arrest by the Respondent State in order to compel him to withdraw his complaints and to refrain from exercising remedies at both national and international levels. He argues that the evidence of these threats is, *inter alia*, contained in briefs filed by the Respondent State in cases under consideration before this Court and the ECOWAS Court of Justice.

**25.** The Applicant also claims that members of his family are also being intimidated.

**26.** The Applicant asserts that the implementation of the above-mentioned penal provision will have harmful consequences insofar as he and his counsel are concerned. The effect will be

that of condemning them and denying them of their liberty while they have simply exercised their rights of recourse provided for in the Charter. The Applicant submits that this would also affect his ability to argue the cases he has filed before this Court.

**27.** The Applicant therefore submits that the conditions of urgency and irreparable harm provided for in Article 27 (2) of the Protocol have been fulfilled, justifying the provisional measures sought.

**28.** The Respondent State contends that Article 410 of the Criminal Procedure referred to by the Applicant does not punish the exercise of the right to bring cases, but rather statements designed to discredit the Beninese judiciary.

**29.** The Respondent State asserts that, in any event, neither the Applicant nor his counsel is subject to criminal proceedings, let alone detention, for filing the Application before this Court. The Respondent State therefore submits that the request for provisional measures should be dismissed.

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**30.** The Court notes that Article 27(2) of the Protocol provides that "in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary."

**31.** The Court notes that it decides on a case by case basis whether, in light of the particular circumstances of a case, it should exercise the jurisdiction conferred on it under the above provisions.

**32.** The Court recalls that urgency, which is consubstantial with extreme gravity, means a "real and imminent risk will be caused before it renders its final judgment."[7] The risk in question must be real, which excludes purely hypothetical risk and explains the need to remedy it in the immediate future.[8]

**33.** As regards irreparable harm, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation.[9]

7 *Sebastien Ajavon v Republic of Benin*, ACtHPR, Application 062/2019, Order (provisional measures) of 17 April 2020, § 61.

8 *Ibid*, § 62.

9 *Ibid*, § 63.

**34.** The prayers of the Applicant will be examined in light of the above.

## A. Prayer for protective measures and stay of all criminal proceedings stemming from the filing Application 028/2020

**35.** The Court observes that the Applicant has not adduced evidence as to the reality or even the imminence of criminal proceedings against him and his counsel for bringing his case before the Court. Furthermore, he has not adduced any evidence of intimidation towards his family members. The Court notes thus, that the Applicant's allegations are hypothetical.

**36.** The Court therefore considers that there is no need to grant the request sought and dismisses it.

## B. Application for measures against any deprivation of liberty, in compliance with the Order for Provisional Measures of 6 May 2020, Application 004/2020

**37.** The Court notes that on 6 May 2020, in Application 004/2020, *Houngue Eric Noudehouenou v Republic of Benin*, it issued an order for provisional measure as follows:[10]

> Orders the Respondent State to stay execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant, Houngue Eric Noudehouenou, until the final Judgment of this Court.

**38.** The Court observes that the respondent State does not dispute that the judgment of 25 July 2019 was not executed.

**39.** Thus, given that the stay of execution of the ten-year imprisonment sentence is still in effect, the prayer sought herein is moot.

**40.** Accordingly, the Court dismisses this particular request.

## C. Prayer to order urgent review of the merits of the case

**41.** The Court points out that the procedure for urgent examination of the merits of an application is not provided for in the Protocol or in the Rules of Court.

**42.** The Court notes that while in its practice it has generally adopted a case by case approach according to the priorities for examining

10 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application 004/2020, Ruling of 6 May 2020 (provisional measures) §§ 73 and corrigendum of 29 July 2020.

applications, it does so by exercising its discretion in the interests of justice. The Court notes that an examination of the merits of the case is not urgent in the instant case.

**43.** Accordingly, the Court declares that the request herein is baseless and dismisses it.

## D. Prayer for imposition of penalty for delay in execution of the decision of Court

**44.** The Court observes that the measure sought presupposes that the Court would grant the order for provisional measures requested.

**45.** The Court notes that since the other measures requested have been dismissed, this request is dismissed as well.

**46.** For the avoidance of doubt, this Order is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

## VII. Operative part

**47.** For these reasons,

The Court,

*Unanimously,*

i. *Dismisses*, the Applicant's request for provisional measures

# Noudehouenou v Benin (provisional measures) (2020) 4 AfCLR 742

Application 032/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Ruling (provisional measures), 27 November 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought an action against the Respondent State, alleging that a judgment of the domestic court of the Respondent State violated his rights to property, equality, equal protection of law and to have his cause heard. Applicant also sought provisional measures to restrain execution of the domestic court's judgment. The Court dismissed the request for provisional measures.

**Jurisdiction** (*prima facie*, 14, 18; effect of withdrawal of Art 34(6) Declaration, 17)

**Provisional measures** (meaning of urgency, 32; irreparable harm, 34; absence of urgency,36)

## I. The Parties

**1.** Mr Houngue Éric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He requests the stay of execution of a judgment of the Court of First Instance of Cotonou, which according to him violates his right to property.

**2.** The Application is brought against the Republic of Benin (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 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. It further made the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") on 8 February 2016, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases nor

on new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing.[1]

## II. Subject of the Application

**3.** In his Application on merits, the Applicant alleges that, following a domestic proceeding in which he had voluntarily intervened, the Court of First Instance of Cotonou (hereinafter referred to as "Cotonou CFI") issued a judgment on 5 June 2018 without his knowledge, which denied him his property rights and moreover, was never notified to him.

**4.** To avoid initiating further proceedings related to this judgment, he filed the present Application before the Court to order all necessary measures, including stay of the execution of the said judgment.

## III. Alleged violations

**5.** The Applicant alleges the following violations:

i. The right to property, guaranteed by Article 14 of the Charter;

ii. The rights to equality before the law and equal protection of the law, guaranteed by Articles 3(1) and (2) of the Charter and 26 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR");

iii. The right to have one's cause heard, guaranteed by Articles 7 of the Charter, 14(1) of the ICCPR and 8 of the Universal Declaration of Human Rights.

## IV. Summary of the Procedure before the Court

**6.** The Application on the merits was filed on 15 October 2020 together with a request for provisional measures.

**7.** On 20 October 2020, the Application together with the request for provisional measures were served on the Respondent State for its Response on the merits within ninety (90) and observations on the request for provisional measures within fifteen (15) days of receipt of the notification, that is 27 October 2020.

**8.** The Registry received the Respondent State's Response on 16 November 2020. Although this Response was filed out of

1 *Ingabire Victoire Umuhoza v Republic of Rwanda (*Jurisdiction*)* (03 June 2016) 1 AfCLR 540 § 69; ***Houngue Eric Noudehouenou v Republic of Benin*** ACtHPR, Application 003/2020 Ruling of 05 May 2020 (provisional measures), §§ 4- 5 and ***Corrigendum*** of 29 July 2020.

time, the Court decides, in the interests of justice, to take it into consideration.

## V. *Prima facie* jurisdiction

**9.** The Applicant asserts pursuant to Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter referred to as "the Rules"),[2] that in matters pertaining to provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.

**10.** Referring further to Article 3(1) of the Protocol, the Applicant asserts that the Court has jurisdiction, in so far as, on the one hand, the Republic of Benin has ratified the African Charter, the Protocol and made the Declaration, and on the other, he alleges violations of the rights protected by human rights instruments.

**11.** The Applicant further argues that although the Respondent State has withdrawn its Declaration on 25 March 2020, the withdrawal does not take effect until 26 March 2021.

**12.** The Respondent State has not made any observations on this point.

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**13.** Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned."

**14.** Rule 49(1) of the Rules provides: "the Court shall ascertain its jurisdiction ..." However, with respect to provisional measures, the Court need not ensure that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction.[3]

**15.** In the instant case, the rights alleged to have been violated are guaranteed by the human rights instruments ratified by the Respondent State.

2 This Rule of the Rules of 2 June 2010 corresponds to Rule 59 of the Rules of 1 September 2020 which entered into force on 25 September 2020.

3 *Ghati Mwita v United Republic of Tanzania,* ACtHPR, Application 012/2019, Ruling of 9 April 2020 (Provisional Measures), § 13;

**16.** The Court further notes that the Respondent State has ratified the Protocol and has made the Declaration.

**17.** The Court observes, as stated in paragraph 2 of the present Ruling, that on 25 March 2020, the Respondent State deposited an instrument of withdrawal of its Declaration. The Court also recalls that it has held that the withdrawal of a Declaration filed in accordance with Article 34(6) of the Protocol has no retroactive effect, and has no bearing on pending cases nor on new cases filed before the withdrawal comes into effect[4] as is the case in the present matter. The Court reiterated this position in *Houngue Eric Noudehouenou v Republic of Benin,*[5] and held that the Respondent State's withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal does not affect its personal jurisdiction in the present case.

**18.** The Court, thus, finds that it has *prima facie* jurisdiction to hear this Application for provisional measures.

## VI. Provisional measures requested

**19.** The Applicant submits that the execution of Judgment No. 006/2DPF/-18 of June 2018 of the Cotonou CFI will cause him irreparable harm because the said judgment deprived him of his right of ownership and authorised third parties to occupy his land, without adequate possibility of reparation. He attributes this irreparable damage to the following six factors.

**20.** The Applicant argues that the first factor is financial, in the sense that he will not be able to obtain any pecuniary compensation, since the occupation of his land by third parties is based on a court decision.

**21.** Secondly, he contends that under the provisions of Articles 523 et seq. of the Land Code he is prohibited from evicting the third parties without first seeking alternative remedies, which according to him constitutes forced dispossession.

**22.** Thirdly, he avers that he will no longer be able to enjoy his right of ownership, not only because of the large size of his land which would make it impossible to evict the occupants unless the Respondent State decided to convert the land into public property,

4 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR, 562 § 67.

5 *Houngue Eric Noudehouenou v Republic of Benin,* ACtHPR, Application 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and corrigendum of 29 July 2020.

which would deny him adequate reparation, but also because of the lengthy domestic eviction procedures that would enable the illegal occupants to exercise the right of acquisitive prescription.

**23.** Fourthly, the Applicant contends that there is no adequate reparation due to the inconsistency of the domestic jurisprudence, in violation of the principle of legal certainty. Failure to order the measures sought will give rise to a serious dispute between the occupants of the Applicant's land and the Applicant, which will render the Court's decision ineffective, even if it is favourable to him.

**24.** Fifthly, he claims that even if this Court renders a favourable decision on the merits without suspending the execution of the judgment of the Cotonou CFI, the Applicant will not be able to have the occupants of the land evicted because the Court will have found that the proceedings before the Cotonou Court lasted from 2004 to 2018, that is, fourteen (14) years.

**25.** Lastly, he maintains that the dismissal of his Application will cause him irreparable harm since, in all likelihood, the judgment on the merits will not be implemented, just like the two Rulings issued in his favour by this Court.

**26.** The Applicant infers from this that even if this Court were to issue a favourable decision on the merits, without first ordering a stay of the execution of the Cotonou CFI judgment, he will not be able to enjoy his right to property because of the domestic law, particularly because of the lengthy proceedings, coupled with the inconsistency of the jurisprudence of the Respondent State and of the non-execution of the decisions of this Court, which amounts to a violation of Articles 2, 7(1) and 14 of the Charter.

**27.** The Applicant therefore prays the Court to order all necessary measures, including the stay of execution of Judgment No. 006/2DPF/-18 of 5 June 2018 of the Cotonou CFI until this Court has made its final determination.

**28.** The Applicant pointed out that such a decision would in no way prejudge the merits, since the issue at stake is one of safeguarding the endangered rights and freedoms pending final determination by the Court.

**29.** The Respondent State submits that the provisional measures should be dismissed. It avers that the arguments of the Applicant relating to the length of the proceedings, the inconsistency of the domestic jurisprudence and lack of compliance with the decisions of the Court are unsubstantiated claims.

**30.** The Respondent State maintains that these claims have not been objectively established and it further submits that the fact that the Applicant merely makes these assertions does not constitute evidence of urgency and of a risk of irreparable harm.

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**31.** The Court notes that Article 27(2) of the Protocol provides that "in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

**32.** The Court notes that it decides on a case by case basis whether, in light of the particular circumstances of a case, it should exercise the jurisdiction conferred on it under the above provisions.

**33.** The Court recalls that urgency, which is consubstantial with extreme gravity, means a "real and imminent risk will be caused before it renders its final judgment."[6] The risk in question must be real, which excludes purely hypothetical risk and explains the need to remedy it in the immediate future.[7]

**34.** As regards irreparable harm, the Court considers that there must be a "reasonable probability of occurrence" having regard to the context and the Applicant's personal situation.[8]

**35.** The Court observes in this case that the Applicant's submissions are based on assumptions and speculations. Indeed, his allegations do not prove the fulfillment of the criteria of imminent risk or irreparable harm, as developed in the Court's jurisprudence.

**36.** The Court notes that the absence of urgency is evidenced by the Applicant's long delay. Indeed, between 5 June 2018, the date on which the judgment of the Cotonou CFI was delivered and 15 October 2019, the date of filing the main Application at the Registry of the Court, sixteen (16) months and nine (9) days have passed. This long delay calls into question the fact that the Applicant considers that there was urgency in the present case.

**37.** The Applicant has not provided any explanation for the length of this delay nor did he provide any indication of the possible

6 *Sebastien Ajavon v Republic of Benin,* ACtHPR, Application 062/2019, Ruling for Provisional Measures of 17 April 2020, § 61.

7 *Ibid*, §-- 62.

8 *Ibid,* § 63.

existence of an obstacle to seize the Court. Such an attitude is sufficiently indicative of the absence of real and imminent risk.

**38.** In summary, the Court finds that the conditions required by Article 27(2) of the Protocol have not been met.

**39.** The Court therefore finds that there is no need to order the requested measures.

**40.** For the avoidance of doubt, the Court recalls that this Ruling is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

## VII. Operative part

**41.** For these reasons

The Court

Unanimously,

i. *Dismisses*, the Applicant's request for provisional measures.

# Noudehouenou v Benin (judgment) (2020) 4 AfCLR 749

Application 003/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Judgment, 4 December 2020. Done in English and French, the French text being authoritative.

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

The Applicant brought this action alleging that the Respondent State, by a 2019 amendment of its Constitution, violated several rights guaranteed in the African Charter and other international human rights instruments. The Court held that the Respondent State had violated its obligation to ensure that amendment of the Constitution was based on national consensus and had violated the rights to participation and the presumption of innocence.

**Jurisdiction** (material jurisdiction, 26)

**Admissibility** (victim requirement, 38; public interest, 40)

**Democratic governance** (amendment of constitution, 61-66)

**Fair trial** (effective remedy 87-88; presumption of innocence, 100)

**Participation** (access to public property and services, 104-105)

**Freedom and security of persons** (specific facts, 112; temporal and localised disturbance, 113)

**Reparations** (causal links, 117; purpose of, 117)

## I. The Parties

**1.** Mr Houngue Eric Noudehouenou (hereinafter referred to as "the Applicant") is a national of Benin. The Applicant challenges Law No. 2019-40 of 7 November 2019 (hereinafter referred to as "the Revised Constitution)" revising the Constitution of Benin of 11 December 1990 (hereinafter referred to as "the 1990 Constitution") and Law No. 2019-43 of 15 November 2019 on the Electoral Code (hereinafter referred to as "the Electoral Code").

**2.** The Application is filed against the Republic of Benin (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 of Human and Peoples' Rights on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration prescribed under Article 34(6) of

the Protocol by virtue of which it accepted the jurisdiction of the Court to receive cases from individuals and Non-governmental organisations. However, on 25 March 2020, the Respondent State deposited with the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and that it also has no effect on new cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing.[1]

## II. Subject of the Application

### A. Facts of the matter

**3.** In his Application, the Applicant alleges that as a result of the effect of Law No. 2018-31 of 3 September 2018 on Electoral Code, which was declared as being in in conformity with the Constitution by Constitutional Court decision DCC 18-199 of 2 October 2018, only candidates of two political parties close to the government were able to run for election and be elected in the legislative elections of 28 April 2019.

**4.** The Applicant submits that the National Assembly that emerged from the said elections promulgated, in secret, without national consensus, the Revised Constitution and the Electoral Code.

**5.** The Applicant further submits that Constitutional Court decisions DCC 19-504 of 6 November 2019 and DCC 19-525 of 14 November 2019, respectively, ruled that the said laws are compliant with the Constitution, despite the fact that the laws infringe the Applicant's fundamental rights guaranteed by international human rights instruments ratified by the Respondent State.

### B. Alleged violations

**6.** The Applicant alleges the violation of:

i. The right to participate freely in the government of his country, as provided under Article 13(1) of the Charter

ii. The right to freedom of association, as provided under Article 13 of the Charter and Article 20 of the Universal Declaration of Human Rights (UDHR);

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 585 §69; *Houngue Eric Noudehouenou v Republic of Benin*, ACtPHR, Application 003/2020, Order of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020.

iii. The right to equal protection, as provided under Article 3 of the Charter, Article 7 of the UDHR and Article 26 of the International Covenant on Civil and Political Rights (ICCPR);

iv. The right to an effective remedy, as provided under Article 13 of the Charter, Article 2(3) of the ICCPR, Article 7(1) of the Charter and Articles 7 and 8 of the Universal Declaration of Human Rights (UDHR);

v. The right to freedom of expression, as provided under Articles 4 and 6 of African Charter on Democracy, Election and Good Governance (ACDEG), Articles 25(b) and 19 of the ICCPR and Articles 19 and 21(3) of UDHR;

vi. The right to non-discrimination guaranteed in Article 21 of UDHR, Article 13 of the Charter and Articles 2, 25 and 26 of the ICCPR.

vii. The principle of amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change, as provided under Article 23(5) of the ACDEG.

viii. The right to be presumed innocent, as provided under Article 11 of the UDHR

ix. The right to peace, as provided under Article 23(1) of the Charter

x. The right to free practice of religion, as provided under Article 8 of the Charter and Article 18 of the ICCPR.

## III. Summary of the Procedure before the Court

**7.** On 21 January 2020, the Application was filed together with a request for provisional measures. The Application and the request for provisional measures were served on the Respondent State on 20 February 2020.

**8.** On 5 May 2020, the Court issued an Order for provisional measures, whose operative part reads:

i. Orders the Respondent State to take all necessary measures to effectively remove any administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming municipal, district, town or village elections.

ii. Requests the Respondent State to report to the Court within thirty (30) days of receipt of the ruling, the measures taken to implement the order.

**9.** Following another Request for provisional measures dated 25 August 2020, the Court issued, on 25 September 2020, a second Order for provisional measures whose operative part reads:

i. Orders the Respondent State to take all necessary measures to effectively remove any administrative, judicial and political obstacles to the Applicant's candidacy in the forthcoming presidential election in 2021.

ii. Orders the Respondent State to report to the Court within thirty days of receipt of this Ruling, the measures taken to implement the Order.

**10.** The Parties filed their submissions on the merits within the time limits prescribed by the Court and these were duly exchanged.

**11.** On 11 September 2020, in response to the request made in the application instituting proceedings for the Court to allow the Applicant to file submissions on the pecuniary reparations at a later stage, the Court informed the Applicant that it decided to consider claims for reparation when examining the merits of Application, and that he should file his submissions on reparation within thirty (30) days of receipt of the notification.

**12.** The Applicant did not make file the detailed submissions on reparations.

**13.** On 9 October 2020, the pleadings were closed and the Parties were duly notified.

## IV. Prayers of the Parties

**14.** The Applicant prays the Court to:

i. Find that the Court has jurisdiction and that the Application is admissible;

ii. Find that the alleged violations of his human rights are well-founded and that the Respondent State has violated the Applicant's human rights;

iii. Order the Respondent State to take all necessary constitutional, legislative and other measures within one month and before the forthcoming elections to end the violations established and to inform the Court on the measures taken in this regard;

iv. Order the Respondent State to take all measures to guarantee the right to participate freely and directly, without any political, administrative or judicial obstacles, in the forthcoming presidential, local and legislative elections free of the violations established by the Court and under conditions respecting the principle of the presumption of innocence as well as the right to freedom from persecution;

v. Order the Respondent State to take all necessary measures to put an end to all the effects of the violations of which it has been found guilty, in accordance with Chapter IX "Reparation for harm Suffered" of United Nations Resolution 60/147 of 16 December 2005;

vi. In view of the urgency of the substantive issues, grant the Applicant time to subsequently complete the legal analysis on pecuniary and non-pecuniary reparations, which will be determined by the Court;

vii. Order the Respondent State to pays all costs.

**15.** The Respondent State prays the Court to:

i. Find that Benin is a sovereign state that may freely decide on the content of its laws in accordance with its Constitution;

ii. Find that the Court cannot rule on the conventionality of national laws;

iii. Find that the Court lacks jurisdiction to examine or annul the Constitution and Electoral Code of Benin;

iv. Find that the Applicant has no authority to initiate or request amendments to the laws of Benin;

v. Find that the Applicant does not justify any authority to act on behalf of all Beninese citizens;

vi. Accordingly, find the Application inadmissible for lack of standing;

vii. Find that none of the violations of law alleged by the Applicant is founded;

viii. Declare and rule that the Respondent State has not violated any of the Applicant's human rights;

ix. Order the Applicant to pay costs.

## V. Jurisdiction

**16.** 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.** Furthermore, under Rule 49(1) of the Rules,[2] "[t]he Court shall ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

**18.** It follows from the above provisions that the Court must, in respect of any application, conduct a preliminary assessment of its jurisdiction and rule on the objections raised, if any.

**19.** The Court notes that in the present case, the Respondent State raises an objection to the material jurisdiction of the Court.

### A. Objection to material jurisdiction

**20.** The Respondent State submits that the purpose of the Applicant's complaints is to annul or amend certain provisions of the Revised

2 Formerly, Rule 39(1) of the Rules of 2 June 2010.

Constitution and the Electoral Code of Benin.

**21.** The Respondent State further submits that once the Constitutional Court rules that a provision is in conformity with the Constitution, it cannot be challenged on the basis that it results in human rights violations. The Respondent State argues that the African Court cannot scrutinise the conventionality of national laws and therefore lacks jurisdiction to assess national laws conformity in accordance with international conventions.

**22.** In this regard, the Respondent State avers that since the Constitution is the supreme expression of sovereignty, neither it nor any other law expressing the national will can be amended by a court. Therefore, it argues that the Court lacks jurisdiction to consider the instant Application.

**23.** The Applicant points out that whenever a domestic law violates its rights protected by international instruments to which the Respondent is a party, the Court has jurisdiction within the meaning of Article 3(1) of the Protocol.

**24.** Accordingly, the Applicant asserts that the Respondent State's objection should be dismissed.

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**25.** The Court notes that, in accordance with Article 3(1) of the Protocol, its 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."

**26.** The Court notes that in order for it to have material jurisdiction, it is sufficient that the rights purportedly violated be guaranteed by the Charter or by any other human rights instrument ratified by the State concerned.[3] In the instant case, the Application

3 *Franck David Omary & ors v United Republic of Tanzania*, (admissibility) (28 March 2014) 1 AfCLR 371, § 74; *Peter Chacha v United Republic of Tanzania,* (admissibility) (28 March 2014) 1 AfCLR 413, § 118; *Alex Thomas c. United Republic of Tanzania*, (merits) (20 November 2015) 1 AfCLR 482, § 45. The Respondent State became a party to the International Covenant on Civil and Political Rights (ICCPR) on 12 March 1992, the African Charter on Democracy, Elections and Governance (ACDEG),on 11 July 2012, the A/SP1/12/01 Protocol of the Economic Community of West African States (ECOWAS) on Democracy and Good Governance, Additional Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security (ECOWAS Protocol on Democracy) on 20 February 2002.

alleges violations of various rights protected by the Charter, the ICCPR, and ACDEG to which the Respondent State is a party. As regards the ACDEG specifically, the Court recalls its position that this Charter constitutes a human rights instrument within the meaning of Article 3 (1) of the Charter and, therefore, the Court has jurisdiction to examine complaints alleging violations of its provisions.[4]

**27.** Regarding the claim that the Court cannot adjudicate the conventionality of national laws, the Court states that it follows from the applicable provisions that, it has the power to examine all violations alleged before it, including the conformity with national laws, in the light of the provisions of the Charter and other international instruments ratified by the Respondent State.

**28.** The Court declares that it has material jurisdiction and therefore dismisses the Respondent State's objection.

## B. Other aspects of jurisdiction

**29.** The Court finds that nothing on the record shows that it lacks jurisdiction with respect to the other aspects of jurisdiction and declares that it has:

i. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited with the Commission, the Declaration which allows individuals and non-governmental organisations with observer status to bring cases directly before the Court. In this regard, the Court recalls its earlier position that the Respondent State's withdrawal of its Declaration on 25 March 2020 does not have effect on the instant Application, as the withdrawal was made after the Application was filed before the Court.[5]

ii. Temporal jurisdiction, insofar as the alleged violations were perpetrated, in relation to the Respondent State, in 2018 and 2019, that is, after the entry into force of the abovementioned instruments.

iii. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.

**30.** Accordingly, the Court has jurisdiction to examine the instant Application.

## VI. Preliminary objection on admissibility

**31.** The Respondent State raises a preliminary objection relating to

4 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (2016) 1 AfCLR 668, §§ 48-65.

5 See paragraph 2 above.

the admissibility of the Application, based on the Applicant's lack of standing before the Court to seek amendment of the Electoral Code and the Constitution of Benin, and to represent Beninese citizens.

**32.** The Court notes that even if these objections are not grounded in the Protocol and the Rules, the Court is required to examine them.

**33.** According to the Respondent State, the Applicant is seeking, through his prayers, the Court's intervention for the purpose of amending the laws in contention, whereas the authority to initiate changes in laws belongs exclusively to the President of the Republic and Parliamentarians by virtue of Article 57(1) of the Constitution of Benin. The Respondent State maintains that since the Applicant is neither the President of the Republic nor a Member of Parliament, he has no standing to file such requests.

**34.** The Respondent State argues that the Applicant acts not only in his own interest but also on behalf of every citizen. The Respondent State further argues that as *"no one shall plead by proxy,"* the Applicant cannot act on behalf of other Beninese citizens because he does not have the mandate to do so and cannot assess the interests of all citizens on his own.

**35.** On his part, the Applicant submits that his prayers rely on the Court's jurisprudence according to which applications concerning electoral rights cannot be examined as if they were individual actions. If there has been a violation, it affects all citizens and the Court's decision benefits everyone.[6]

**36.** The Applicant maintains that, in any event, the objection raised by the Respondent State lacks legal basis in so far as it is not provided for in the provisions of Article 56 of the Charter, which sets out the conditions for admissibility of an application filed before the Court.

***

**37.** The Court notes that under Article 5(3) of the Protocol, "the Court may entitle relevant Non-Governmental Organisations (NGOs) with observer status with the African Commission and individuals

6 *Tanganyika Law Society, The Legal and Human rights Centre and Reverend Christopher Mtikila v Republic of Tanzania*, (merits) (14 June 2013) 1 AfCLR 34.

to institute cases directly before it…"

**38.** The Court notes that these provisions do not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court. The only prerequisite is that the Respondent State, in addition to being a party to the Charter and the Protocol, should have deposited the Declaration allowing individuals and NGOs to file a case before the Court. It is also in cognisance of the practical difficulties that ordinary African victims of human rights violations face in bringing their complaints before the Court, thus allowing any person to bring applications to the Court without a need to demonstrate victimhood or a direct interest.[7]

**39.** In the instant Application, the Court observes that the Applicant is challenging the Revised Constitution and the Electoral Code. Considering that these laws pertain to the Constitution and relate, more specifically, to elections, it is evident that the case involves matters of public interest having a direct bearing on the rights of the citizens of the Respondent State, including the Applicant. Accordingly, the Applicant has an interest to file this Application before the Court as the issues therein implicate his own rights.

**40.** The Court wishes to point out that the fact that an application raises matters of general public interest does not prevent individuals from bringing such cases before the Court. Indeed, it is an inestimable virtue and duty of a responsible citizen to stand for the preservation of public interest. In any event, as was indicated above, neither the Charter, the Protocol, nor the Rules require an applicant to be a direct victim of human rights violations or demonstrate interest in a matter to institute a case in the Court.

**41.** Consequently, the Court dismisses the Respondent State's objection to the admissibility of the Application on the basis that the Applicant is acting not only in his behalf but also all other citizens.

## VII. Admissibility of the Application

**42.** Article 6 (2) of the Protocol provides that "the Court shall rule on the admissibility of cases taking into account the provisions of

7 African Commission on Human and Peoples Rights, Communications 25/89, 47/90, 56/91, 100/9, *World Trade Organisation Against Torture, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah (WTOAT) v Zaire*, §. 51.

Article 56 of the Charter".

**43.** In accordance with Rule 50(1) of the Rules[8] provides that: "The Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

**44.** Rule 50 (2) of the Rules,[9] which essentially restates Article 56 of the Charter, provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

a. Indicate their authors even if the latter request anonymity,

c. Are compatible with the Constitutive Act of the African Union and with the Charter,

d. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,

e. Are not based exclusively on news disseminated through the mass media,

f. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,

g. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter,

h. 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, the Constitutive Act of the African Union or the provisions of the Charter.

**45.** The Respondent State raises an objection based on non-exhaustion of local remedies.

## A. Condition of admissibility in contention between the parties: Objection based on non-exhaustion of local remedies

**46.** The Respondent State argues that the Applicant had the possibility of filing his complaints at the Constitutional Court, since it has on previous occasions declared specific provisions of laws duly passed by the National Assembly to be inconsistent with human rights,

**47.** The Respondent State therefore maintains that the Applicant has not fulfilled the condition of exhaustion of local remedies and that

8 Formerly Rule 40 of the Rules of Court, 2 June 2010.

9 *Ibid*.

his Application should therefore be found inadmissible.

**48.** The Applicant avers that the Constitutional Court has already declared that the Revised Constitution and the Electoral Code is consistent with the Constitution. Since these decisions are not subject to appeal in accordance with Article 124 (2) of the Constitution, the Applicant submits that appealing against the same laws would be ineffective.

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**49.** The Court notes that pursuant to Article 56(5) of the Charter, whose requirements are restated in Rule 50(2) (e) of the Rules,[10] any application filed before it shall fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[11]

**50.** In the instant case, the Court notes that the Application was filed before the Court after the Revised Constitution was adopted following decision DCC 2019-504 of 6 November 2019 of the Constitutional Court of the Respondent State in conformity with Article 114 of the Beninese Constitution.[12] The Constitutional Court is the highest jurisdiction of the State in constitutional matters.

**51.** There is nothing on the record indicating that the Applicant had any other additional ordinary judicial remedy within the judicial system of the Respondent State that he could have pursued to get redresses for his grievances.

**52.** Consequently, the Court finds that the Applicant has exhausted local remedies and therefore the application complies with Rule 50(2) (e) of the Rules.

10 Formerly Rule 40(5) of the Rules of 2 June 2010.

11 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

12 Constitution of 11 December 1990.

## B. Other conditions of admissibility

**53.** The Court notes that the Application's compliance with the conditions set out in subparagraphs (a), (b), (c), (d), (f) and (g) of Rule 50(2) of the Rules are not in contention between the Parties. However, the Court must consider whether these conditions are fulfilled.

i. The Court notes that the condition set out in Rule 50(2)(a) has been fulfilled because the Applicant clearly indicated his identity.

ii. The Court further notes that the Application is compatible with the Constitutive Act of the African Union or the Charter insofar as it relates to alleged violations of human rights enshrined in the Charter and thus fulfils the requirement of Rule 50(2)(b).

iii. The Court observes that the Application is not written in disparaging or insulting language, and therefore, fulfils the requirement in Rule 50(2)(c).

iv. The Court notes that since the present Application is not based exclusively on news disseminated through the mass media but rather concerns legislative provisions of the Respondent State, it fulfils the condition set out in Rule 50(2)(d).

v. The Court further observes that the Application was filed on 21 January 2020 challenging the provisions of the Revised Constitution and the Electoral Code. This means that a period of two (2) months had elapsed between the time the impugned laws were promulgated and when the Application was filed. In accordance with Rule 50(2)(f) of the Rules and its jurisprudence,[13] the Court considers that the Application was filed within a reasonable time.

vi. Lastly, the Court notes that the present case does not concern a case that has already been settled by the Parties in accordance with either the principles of the Charter of the United Nations, the Constitutive Act of the African Union, or the provisions of the Charter or any legal instrument of the African Union. It therefore fulfils the condition set out in Rule 50(2)(g).

**54.** In the light of the foregoing, the Court concludes that the Application fulfils all the conditions of admissibility set out in Article 56 of the Charter and Rule 50(2) of the Rules, and accordingly, declares it admissible.

13 *Christopher Jonas v United Republic of Tanzania*, (merits) (28 September 2017), 2 AfCLR 101, § 55; *Norbert Zongo & ors v Republic of Burkina Faso*, (preliminary objections) (25 June 2013), 1 AfCLR197, § 121.

## VIII. Merits

**55.** The Applicant alleges:

a. Violation of the principle of national consensus by the adoption of the law revising the constitution;

b. Violation of rights as a result of the constitutional revision, namely:

i. The right to participate freely in the management of the public affairs of his country;

ii. Violation of freedom of association;

iii. Violation of the right to equality and non-discrimination;

iv. Violation of the right to freedom of expression;

v. Violation of the guarantee of democratic transfer of power;

vi. Violation of the right to freedom of religion.

c. Violation of the right to an effective remedy before the Constitutional Court;

d. Violation of the right to presumption of innocence;

e. Violation of the right to live in peace in Benin.

### A. Alleged violation of the principle of national consensus

**56.** The Applicant submits that the Revised Constitution was adopted in violation of the principle of national consensus, as provided under Article 10(2) of the ACDEG.

**57.** The Applicant argues that the revision of the Constitution deprived the citizens of Benin their right to freedom of expression and freedom to vote during the April 2019 legislative elections. The Applicant supports this argument on the bases that independent candidacies were prohibited on the one hand, and, on the other, all other opposition political parties were arbitrarily and illegally excluded by Decision EL 19-001 of 1 February 2019 of the Constitutional Court for failure to produce certificates of conformity with Law No. 2018-23 of 17 September 2018 on the Charter of Political Parties, even though the said certificate is not part of the candidacy documents required by the Electoral Code. Thus, only the Members of the Parliament from the ruling party approved the above-mentioned Revised Constitution.

**58.** The Applicant accordingly submits that the State violated the principle of national consensus within the meaning of Articles 10(2), 29, 4, 6 and 15 of the ACDEG and Articles 7, 21, 18, 19 and 20 of the UDHR.

**59.** The Respondent State maintains that the revision of the Constitution was done following a political dialogue to which all political formations in the country were invited, and the procedure provided for in the Constitution itself was complied with.

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**60.** The Court observes that Article 10(2) of the ACDEG provides that "State Parties shall ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum."

**61.** The Court notes that prior to the ratification of the ACDEG, the Respondent State had established national consensus, as a principle with constitutional value, through Constitutional Court decision DCC 06 - 74 of 8 July 2006, as follows:

> Although, the Constitution provides for the modalities of its own revision, the determination of the Beninese people to create a State based on the rule of law and multi-party democracy, the safeguard of legal security and national cohesion requires that all revisions must take into account the ideals that led to the adoption of the Constitution of 11 December 1990, in particular the national consensus, a principle with constitutional value.

**62.** Moreover, by its decisions DCC 10 - 049 of 5 April 2010 and DCC 10 - 117 of 8 September 2010, the same Constitutional Court gave a precise definition of the term "consensus". It stated that:

> Consensus, a principle with constitutional value, as affirmed by Decision DCC 06-074 of 08 July 2006 (...) far from signifying unanimity, is first and foremost a process of choice or decision without going through a vote; (...) it makes it possible, on a given issue, to find solution that satisfies a greater number of people through an appropriate channel.

**63.** The Court holds that the expression 'greater number of people' attributed to 'national consensus' refers to the people but also to the representatives of the people if they truly represent the different forces or sections of society, which is not the case here, since all the parliamentarians belong to the presidential camp.

**64.** It is not in contention that the Revised Constitution was adopted in line with the summary procedure. A consensual revision would have been possible had it been preceded by consultation with all the stakeholders in the country and people of various opinions in order to reach a national consensus, or were it to be followed, if

need be, by a referendum as required by the Constitution.

**65.** The fact that the Revised Constitution was passed unanimously cannot conceal the need for national consensus driven by the "ideals that prevailed during the adoption of the Constitution of 11 December 1990"[14] and by Article 10(2) of the ACDEG.

**66.** Consequently, the Court finds that the constitutional revision[15] is inconsistent with the principle of consensus as set out in Article 10(2) of the ACDEG.

**67.** The Court therefore finds that the Respondent State violated Article 10(2) of the ACDEG.

## B. Alleged violation of the right to participate in public affairs, the right to equality, the right to freedom of association, the right to freedom of religion and the right to freedom of expression as a result of the provisions of the Revised Constitution.

**68.** The Applicant submits that Article 153-1 of the Revised Constitution excludes from participation in public affairs, notably legislative, municipal, village and town elections, any Beninese citizen who does not belong to a political party or is not on the list of a political party, in violation of Article 13(1) of the Charter.

**69.** The Applicant alleges that the said law violates the right to freedom of association, the right to equality and non-discrimination enshrined in Articles 9(2), 2 and 3 of the Charter.

**70.** The Applicant also submits that by requiring Beninese citizens to vote only for candidates chosen and endorsed by political parties, Article 153-1 of the Revised Constitution violates the right to freedom of expression enshrined in Article 19 (2) of the ICCPR.

**71.** The Applicant further submits that the introduction of sponsorship system through Article 44 of the Revised the Constitution was promulgated by a national assembly composed solely of elected representatives of the party in power. The Applicant states that this Article confers authority of sponsorship only on parliamentarians and mayors, undermines the principle of impartiality and excludes any guarantee of democratic change of government in Benin, as

14 Judgment DCC 10 - 049 of 5 April 2010 and DCC 10–117 of 8 September 2010 of the Constitutional Court of Benin.

15 The following articles were deleted: 46 and 47. The following articles have been modified or created: 5, 15, 26, 41, 42, 43, 44, 45, 48, 49, 50, 52, 53, 54, 54-1, 56, 62, 62-1, 62-3, 62-4, 80, 81, 82, 92, 99, 11, 117, 119, 131, 132, 134-1, 134-2, 134-3, 134-4, 134-5, 134-6, 143, 145, 151, 151-1, 153-1, 153-2, 153-3, 157-1, 157-2, 157-3, Title VI(I-1 and I-2) have been modified or created.

provided for in Article 23(5) of the ACDEG.

**72.** Lastly, the Applicant argues that by providing as follows: "before taking office, the President of the Republic shall take the following oath: before God, the sacred masts of the ancestors, the Nation and the people of Benin, the sole holder of sovereignty....," the new Article 53 of the Revised Constitution violates the right to freedom of religion enshrined in Article 8 of the Charter and Article 18 of the ICCPR.

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**73.** The Respondent State argues that the right conferred by Article 13(1) of the Charter must be exercised in accordance with national law and cannot be construed as a violation of human rights. It is up to the persons concerned to rise to the required standards.

**74.** The Respondent State further argues that there is violation of the right to equality when persons in the same circumstances are treated in different ways. It asserts that, in the instant case, there is no inequality or discrimination because the law did not establish differences in conditions or treatment from one candidate to another.

**75.** With regard to the alleged violation of freedom of association, the Respondent State asserts that it does not require its citizens to join a political party. What is required, however, is that candidates be registered with a political party before standing for election.

**76.** Finally, the Respondent State submits that, since the right to vote is expressed by casting a vote or by not voting, there is no violation of the right to freedom of expression because persons who do not meet the requirements are not allowed to stand for election.

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**77.** The Court recalls it's finding in paragraph 66 above to the effect that the Constitutional revision violates Article 10(2) of the ACDEG.

**78.** The Court further holds that it is superfluous to give a detailed ruling on violations that would result from any of the revised

articles because the Constitutional revision as a whole violates Article 10(2) of the ACDEG.

**79.** The Court therefore concludes that the Applicant's prayers that the Court finds violations of the various aforementioned rights due to the constitutional revision, are moot and thus, it does not deem it necessary to deal with them.

## C. Alleged violation of the right to an effective remedy for the protection of human rights

**80.** The Applicant alleges that prior to promulgating the said Revised Constitution, the Respondent State did not provide any modalities for the exercise of remedies against the violation of human rights, as provided under Article 13 of the Charter.

**81.** The Applicant recalls that referral to the Constitutional Court for purpose of ensuring that the law is in conformity with the Constitution is open only to members of the National Assembly and to the President of the Republic, upon the adoption the said law.

**82.** The Applicant argues that although Article 122 of the Constitution allows citizens to appeal to the Constitutional Court, this remedy is useless, ineffective and inadequate in the sense that it has the force of *res judicata*; the laws in question having been declared to be consistent with the Constitution before they were promulgated and, therefore, before the citizens became aware of them.

**83.** The Applicant argues that this remedy is all the more ineffective because Article 124(2) and (3) of the Constitution formally prohibits any appeal against such laws, since it had been declared that the laws are in conformity with the Constitution. Therefore, citizens can only exercise the right of appeal *ex-post* when it has become legally impossible to remedy the situation.

**84.** Lastly, the Applicant submits that the Respondent State violates the right to an effective, efficient and adequate remedy enshrined in Article 7(1) of the Charter, Article 2(3) of the ICCPR and Articles 8 and 10 of the UDHR.

**85.** The Respondent State maintains, contrary to the Applicant's assertions that, citizens' right to appeal before the Constitutional Court exists and is effective.

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**86.** Article 7(1)(a) of the Charter provides that
Everyone has the right to have their cause heard. This right includes: a) The right to bring before the competent national courts any act violating the fundamental rights which are recognized and guaranteed by the conventions, laws, regulations and customs in force.

**87.** The Court notes that while the right to an effective remedy is not explicitly provided for in Article 7(1) of the Charter, this provision can be interpreted in conjunction with Article 2(3)(a) of the International ICCPR relating to civil and political rights which provides that:
The Parties States undertake to guarantee that any person whose rights and freedoms recognized in the present ICCPR have been violated will have an effective remedy, even if the violation has been committed by persons acting in the exercise of their functions official.

**88.** The Court observes that the right to an effective remedy has three (3) components. Firstly, the remedy must be effective, that is, it must not be formal but must be capable of providing redress for a situation violating fundamental rights. This implies that the person concerned has real access to a court. Secondly, the scope of the provision must relate to laws, conventions, regulations and customs. Thirdly and lastly, the organ competent to ensure the defence of fundamental rights must be a judicial body.

**89.** It is important, therefore, to ascertain whether the Respondent State legislation allows citizens to seek redress in court in cases of human rights violations.

**90.** In this regard, the Court notes that Article 117 of the Constitution of Benin of 11 December 1990 provides as follows:
The Constitutional Court shall rule on the constitutionality of laws and regulatory acts that may infringe fundamental human rights and public freedoms, and violate human rights in general.

**91.** The Court further observes that in accordance with Article 122 of the Constitution[16] and Articles 20,[17] 22[18] and 24[19] of Law No.

16 Article 122 of the Constitution states: "Any citizen may refer matters to the Constitutional Court on the constitutionality of laws, either directly or through the procedure objecting to unconstitutionality in a case that concerns him/her before a court of law."

17 In accordance with Article 121 of the Constitution, the President of the Republic or any member of the National Assembly may refer a matter to the Constitutional Court.

18 Likewise, laws and regulatory acts which may infringe fundamental human rights and public freedoms, and violate human rights in general are referred to the Constitutional Court either by the President of the Republic, or by any citizen, association or non-governmental human rights organisation.

19 Any citizen may, by a letter containing his or her surname, first name and precise address, refer matters directly to the Constitutional Court on the constitutionality of

91-009 of 4 March 1991 on Organic Law on the Constitutional Court, the said Constitutional Court may be seized by the President of the Republic, any member of the National Assembly, any citizen, any association or non-governmental human rights organisation, regarding all laws and regulatory acts deemed to violate fundamental human rights and public freedoms, and human rights in general.

**92.** It is clear from these texts that the Constitutional Court of Benin can hear, as first and last instance, an action for violation of human rights and that, accordingly, Beninese citizens have a remedy for protection of their human rights at national level.

**93.** The Court concludes that the Respondent State did not violate Article 7(1) of the Charter.

## D. Alleged violation of the right to be presumed innocent

**94.** The Applicant points out that the Ministry of Justice and the Ministry of the Interior of Benin issued an Inter-ministerial Decree No. 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019 prohibiting the issuance of official papers to persons wanted by the courts of Benin in violation of Article 11 of the UDHR.

**95.** The Applicant asserts that Article 3 of the said decree prohibits the establishment and issuance of official papers on behalf of, and to persons wanted by the courts. The Applicant states that Article 4 of the decree provides a non-exhaustive list of official papers that may not be issued on behalf of or to persons wanted by the Courts, notably "extracts from civil status records, birth certificates and national identity cards, passport, laissez-passer, safe-conduct certificate, residence permit, consular card, criminal record number 3, certificate or attestation of residence, certificate of life and responsibilities, attestation or certificate of state ownership, driving licence, voter's card, tax receipt."

**96.** The Applicant alleges that the above provisions are inconsistent with certain principles relating to the protection of fundamental human rights, notably the presumption of innocence.

**97.** The Applicant argues that by refusing to issue the said official papers to persons accused of criminal acts even though they have not been convicted by the courts, the Respondent State intends to prevent citizens from running for the 2021 presidential election.

laws.

**98.** The Respondent State did not make any submissions on this allegation.

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**99.** Article 11 of the UDHR states that:
Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

**100.** The presumption of innocence implies that any person prosecuted for an offence is presumed not to have committed it, *a priori*, as long as his or her guilt has not been established by a final judgment. It is clear that the scope of the right to presumption of innocence covers the entire procedure from the moment of arrest to the delivery of final judicial decision.

**101.** The Court observes that compliance with the principle of presumption of innocence is not only binding on the criminal court, but also on all other judicial, quasi-judicial and administrative authorities, such as the courts, the judiciary and the administration of justice.[20]

**102.** In so doing, any measures taken against a citizen solely on the basis of a procedural act and in the absence of a final decision by the competent authority should presume the innocence of that citizen.

**103.** The Court further notes that obtaining the official papers entails the right of every person to use public property and services in strict equality of all persons before the law as provided under Article 13(3) of the Charter.

**104.** The Court also notes that restriction of this right, by prohibiting the establishment and issuance of official papers on behalf of or to persons, who have not yet been convicted of any offence, violates Article 13(3) of the Charter.

**105.** In the light of the foregoing, the Court concludes that the Respondent State has violated the right to be presumed innocent, as provided under Article 11 of the UDHR and the right of access to public property and services in strict equality of all persons before the law, as provided under Article 13(3) of the Charter.

20 *Sebastien Germain Ajavon v Republic of Benin*, ACtHPR, Application 013/2017 Judgment of 29 March 2019 (merits), § 192.

## E. Alleged violation of the right to live in peace in Benin

**106.** The Applicant submits that it is the responsibility of the Respondent State to ensure that its domestic legislation, in its drafting, interpretation and application, does not undermine peace and the right to live in peace.

**107.** The Applicant submits that the Respondent state has failed to fulfil its obligations, particularly by compelling the people of Benin to vote only for candidates of the party in power, thus breaching confidence between the people and the National Assembly.

**108.** The Applicant argues that, following the 2019 legislative elections, the people of Benin held demonstrations in reaction to the revision of the Constitution and that there was a violation of fundamental rights when live ammunition was fired at the demonstrators, resulting in deaths. The Applicant alleges that the post-election crisis continues to date.

**109.** Lastly, the Applicant submits that the Respondent State's actions in this regard violated Article 23(1) of the Charter.

**110.** The Respondent State argues that there is no link between the alleged violations and the loss of lives.

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**111.** The right to freedom and security of peoples is guaranteed by Article 23(1) of the Charter in the following terms:

> All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the African Union shall govern relations between States.

**112.** The Court notes that, although the Applicant alleges that the right to freedom and security of persons was violated as a result of the shootings at demonstrators following local and parliamentary elections in 2019, the Applicant does not present specific facts which would enable the Court to make a finding in this regard. The Applicant merely refers to deaths without any further details on the circumstances and the number of people who died.

**113.** The Court notes that the record shows that the disturbance was temporary and localized, which cannot constitute a breach of peace and public security. The Court therefore concludes that the allegation of breach of the right to peace and security has not been established.

## IX. Reparations

**114.** The Applicant has prayed for the Court to order the Respondent State to take constitutional, legislative and other measures within one month and before the forthcoming election to end the violations established and to inform the Court on the measures taken in this regard.

**115.** The Respondent State submits that the Court should declare that the violations alleged are unfounded and that the Applicant's prayers should be dismissed.

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**116.** Article 27(1) of the Protocol provides that "[i]f 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."

**117.** The Court has previously held that reparations are only awarded when the responsibility of the Respondent State for an internationally wrongful act is established and a causal nexus is established between the wrongful act and the harm caused. As the Court stated earlier, the purpose of reparations is to ensure that the victim is placed in the situation he or she was in prior to the violation.[21]

**118.** The Court recalls that it has found that the Respondent State has violated the obligation to ensure that the procedure for amendment or revision of its Constitution is based on national consensus, as provided under Article 10(2) of the ACDEG. The Court has also found that Respondent State has violated the right to be presumed innocent under Article 11 of the UDHR and the right of access to public property and services in strict equality of all persons before the law, as provided under Article 13(3) of the Charter.

**119.** The Court notes that it has found that the revision of the 1990 Constitution was contrary to the principle of national consensus as

21 See *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application 009/2015, Judgment of 28 March 2019 (merits and reparations), §§ 116-118, and *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabe des droits de l'homme et des peuples v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR, § 60.

enshrined in Article 10(2) of ACDEG and that the Inter-Ministerial Decree 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019 violates the principal of presumption of innocence.

## X. Costs

**120.** Each of the parties prays the Court to order the other party to pay costs.

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**121.** Rule 32(2) of the Rules provides that: "Unless otherwise decided by the Court, each party shall bear its own costs, if any."

**122.** In the present case, the Court decides that each Party shall bear its own costs.

## XI. Operative Part

**123.** For these reasons,
The Court,
*Unanimously,*
*On jurisdiction*

i. Dismisses the objection to the Court's jurisdiction;
ii. Declares that the Court has jurisdiction.

*On the preliminary objections on admissibility*

iii. Dismisses the preliminary objections.

*On admissibility*

iv. *Dismisses* the objection to admissibility of the Application;
v. *Declares* that the Application is admissible.

*On merits*

vi. *Finds* that the Respondent State has not violated the right to an effective remedy for protection of human rights, as provided under Article 7(1) of the Charter and Article 2(3)(a) of the ACDEG;
vii. *Finds* that the Respondent State has violated the obligation to ensure that the procedure for amendment or revision of its Constitution is based on national consensus, enshrined in Article 10(2) of the ACDEG;
viii. *Finds* that since the Revised Constitution violated Article 10(2) of

the ACDEG, the Applicant's prayer to establish that the revision violated Articles 13(1), 2, 3, 8 of the Charter, Article 19(2) and 18 of the ICCPR, and Article 23(5) of the ACDEG are moot

ix. *Finds* that the Respondent State has violated the right to be presumed innocent under Article 11 of the UDHR and the right of access to public property and services in strict equality of all persons before the law, as provided under Article 13(3) of the Charter.

*On pecuniary reparations*

x. *Finds* that in the absence of the Applicant's submissions on pecuniary reparations, there is no need to rule on this prayer.

*On non-pecuniary reparations*

xi. *Orders* the Respondent State to take all measures to repeal Law No. 2019-40 of 1 November 2019 revising Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws related to the election in order to guarantee that its citizens will participate freely and directly, without any political, administrative or judicial obstacles, in the forthcoming presidential election without repetition of the violations found by the Court and under conditions respecting the principle of presumption of innocence;

xii. *Orders* the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision;

xiii. *Orders* the Respondent State to take all measures to repeal Inter-Ministerial Decree 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019.

xiv. *Orders* the Respondent State to take all measures to guarantee the right

xv. *Orders* the Respondent State to take all necessary measures to ensure cessation of all effects of the constitutional revision and the violations which the Court has found.

*On implementation and reporting*

xvi. *Orders* the Respondent State to submit to the Court, within four (4) months of notification of this Judgment, a report on the measures taken to implement paragraphs xi to xv of this Operative Part.

*On costs*

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

# Bocoum v Mali (provisional measures) (2020) 4 AfCLR 773

Application 023/2020, *Babarou Bocoum v Republic of Mali*

Ruling (provisional measures), 23 October 2020. Done in English and French, the French text being authoritative.

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

The Applicant, who had brought an action alleging that his exclusion from the voter's list of the Respondent State was violation of his rights, subsequently brought this application for provisional measures. The Court declared the application moot.

**Provisional measures** (moot application, 22, 23)

## I. The Parties

**1.** Babarou Bocoum (hereinafter referred to as "the Applicant") a Malian national, is a businessman and Secretary for Political Affairs of the African Solidarity Party for Democracy and Independence (SADI).

**2.** The Application is brought against the Republic of Mali (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 to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 25 January 2004. The Respondent State also deposited, on 19 February 2010, the Declaration provided for under Article 34(6) of the Protocol by which it accepts the Court's jurisdiction to receive applications from individuals and Non-Governmental Organizations (hereinafter referred to as "NGOs").

## II. Subject of the Application

**3.** This Application for provisional measures, filed on 16 June 2020 is a follow-up to the Application instituting proceedings filed with the Registry on 15 June 2020. In the Application instituting proceedings, the Applicant stated that he is a citizen listed in the biometric database of the civil status Registry of the Respondent State, enjoying his civil and political rights, not subject to any

prohibition provided by law and that he is not subject to any judicial deprivation of his rights.

**4.** However, he alleges that as he was not registered on the voters' list for lack of annual revision of the said list in violation the Electoral Law, he was deprived of his voter status and unable to vote in first and second rounds of the legislative elections of 29 March 2020.

**5.** The Applicant further asserts that the legislative poll was held in violation of the Respondent State's international commitments under Protocol A/SP1/12/01 on Democracy and Good Governance, additional to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (hereinafter referred to as "ECOWAS Protocol on Democracy and Good Governance"), the International Covenant on Civil and Political Rights (hereinafter referred to as " the ICCPR"), the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), the African Charter on Democracy, Elections and Governance (hereinafter referred to as "the ACDEG") and the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR").

## III. Alleged violations

**6.** In his Application instituting proceedings, the Applicant alleges the violation of the following rights and obligations:

i. The obligation to hold elections on the dates or periods provided for in the Constitution and the Electoral Law pursuant to Article 2(2) of the ECOWAS Protocol on Democracy and Good Governance;

ii. The right to vote and to be elected at genuine periodic elections by universal and equal suffrage and by secret ballot, ensuring the free expression of the will of the electorate as guaranteed in Article 25(b) of the ICCPR;

iii. The obligation to create a credible electoral dispute resolution mechanism under Article 17 of the ACDEG and Articles 3 and 7 of the ECOWAS Protocol on Democracy and Good Governance;

iv. The obligation to establish an independent and impartial electoral body under Article 17 of the ACDEG and Articles 3 and 6 of the ECOWAS Protocol on Democracy and Good Governance;

v. The right to equality of all before the law and equal protection of the law as guaranteed in Articles 3 and 10(3) of the ACDEG, Article 3 of the Charter, Article 1 of the UDHR and Article 26 of the ICCPR; and

vi. The obligation to establish transparent and reliable voters' lists with the participation of political parties and voters under Article 5 of the ECOWAS Protocol on Democracy and Good Governance.

## IV. Summary of the Procedure before the Court

**7.** The Application instituting proceedings was filed at the Registry on 15 June 2020.

**8.** The request for provisional measures was received on 16 June 2020. On 22 June, the Registry sent the Applicant a letter seeking additional information on his request for reparation and granted him fifteen (15 days) within which to respond thereto. The Applicant failed to respond to the request.

**9.** On 13 July 2020, the Registry served the request for provisional measures on the Respondent State granting it fifteen (15) days to respond. On 27 July 2020, the Registry served the Respondent State the Application instituting proceedings.

**10.** On 5 August 2020, the Respondent State submitted its response to the request for provisional measures. The Registry acknowledged receipt of the response on 11 August 2020 and transmitted it to the Applicant on the same day for information.

**11.** On 17 September 2020, the Applicant filed a Reply to Respondent State's observations on the request for provisional measures.

**12.** On 22 September 2020, the Registry transmitted the said Reply to the Respondent State for information.

## V. *Prima facie* jurisdiction

**13.** When an application is filed before it, the Court shall conduct a preliminary examination of its jurisdiction pursuant to Articles 3, 5(3) and 34(6) of the Protocol and Rule 39 of the Rules of Court (hereinafter referred to as "the Rules").

**14.** However, with respect to provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but only that it has *prima facie* jurisdiction.[1]

**15.** 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 or application of the Charter, this Protocol or any other relevant human rights instrument ratified by the States concerned.

1 *Suy Bi Gohore Emile & ors v Republic of Côte d'Ivoire*, ACtHPR, Application 044/2019, Order of 28 November 2019 (provisional measures), § 18; *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (15 March 2013) 1 AfCLR 193, § 10; *Amini Juma v United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR 658,§ 8.

**16.** Under Article 5(3) of the Protocol:
The Court may entitle relevant Non-Governmental organisations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.

**17.** The Court notes, as set out in paragraph 2 of this Ruling that the Respondent State is a party to the Charter and the Protocol and has also made the Declaration accepting the Court's jurisdiction to receive applications from individuals and NGOs in accordance with Article 34 (6) read jointly with Article 5(3) of the Protocol.

**18.** In the instant case, the Applicant alleges violations of provisions of the Charter, the ICCPR, the ACDEG, the ECOWAS Protocol on Democracy and Good Governance and the UDHR. These are instruments that the Court has jurisdiction to interpret and apply under Article 3(1) of the Protocol.

**19.** The Court concludes, therefore, that it has *prima facie* jurisdiction to entertain the request for provisional measures.

## VI. Provisional measures requested

**20.** The Applicant prays the Court to:

i. Order the Respondent State to take all necessary measures, available to it under domestic law, to safeguard the Applicant's electoral rights which he was unable to exercise during the legislative elections held as a result of Decree No. 2020-0010/PRM of 22 January 2020 convening the Electoral College, opening and closing of the electoral campaign for the ballot of 29 March 2020;

ii. Defer any legislative activity that is inconsistent with the provisions of Articles 1(b) and 2(2) of Protocol A/SP1/12/01 on Democracy and Good Governance (...); and

iii. Report to the Court within 15 days of notification of the order indicating these provisional measures.

**21.** In his Reply, the Applicant however prays the Court to dismiss the request for provisional measures.

**22.** In support of the request, he affirms that following demonstrations and the deployment of the armed forces, the President of the Republic dissolved the parliament and handed in his resignation. According to the Applicant, these circumstances make a request for provisional measures moot, especially as the National Assembly had been dissolved and a new electoral register would be prepared for subsequent elections.

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**23.** Accordingly, the Court takes note of the Applicant's request and declares that his application for provisional measures is moot.

**24.** For the avoidance of doubt, this Ruling is provisional in nature and in no way prejudges the findings of the Court as to its jurisdiction, the admissibility of the Application and the merits thereof.

## VII. Operative part

**25.** For these reasons,

The Court,

*Unanimously,*

i. *Declares* that the request for provisional measures has become moot.

# Legal and Human Rights Centre and Tanganyika Law Society v Tanzania (provisional measures) (2020) 4 AfCLR 778

Application 036/2020, *Legal and Human Rights Centre and Tanganyika Law Society v United Republic of Tanzania*

Ruling (provisional measures), 30 October 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicants, who alleged violations of their civil and political rights, were co-Applicants in an earlier consolidated action that sought orders for certain constitutional amendments in the Respondent State. Claiming that they were inexplicably excluded from later stages of the earlier successful action, the Applicants brought this action along with a request for provisional measures seeking inter alia to reinstate them to the earlier judgment and to stay elections billed to take place in the Respondent State. The Court dismissed the application for provisional measures.

**Jurisdiction** (*prima facie*, 16)

**Provisional measures** (discretion of the Court, 24; urgency, 25-26; irreparable harm and extreme gravity, 26-27)

**1.** The Applicants are Non-Governmental Organisations, identified as Tanganyika Law Society and the Legal and Human Rights Centre. They challenge some actions and omissions relating to their civil and political rights and those of Tanzanian citizens.

**2.** The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter, "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 provided for under Article 34(6) of the Protocol, by which it accepts the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations**.** On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument of withdrawal of its Declaration**.**

**3.** The Applicants state that they instituted an Application against the Respondent State before this Court in 2011 vide Application

011/2011),[1] seeking orders to compel the Respondent State to amend its constitutional and legal framework to allow for independent candidacy in its electoral process.

**4.** The Applicants further state that they were successful in that Application, and that the Court found in their favour, that the Respondent State had violated Articles 10 and 13(1) of the Charter and ordered the Respondent State to take constitutional, legislative and all other measures necessary and within reasonable time to remedy the violations, and to inform the Court on the measures taken.

**5.** The Applicants contend that, without reason, the Court's judgment on the merits delivered on 14 June 2013 excluded them from subsequent stages of the case, including the reparations stage, and instead, heard only from Reverend Christopher Mtikila, who was the 2nd Applicant in Consolidated case. The Applicants argue that due to the fact that Reverend Christopher Mtikila died on 4 October 2015, there has been nobody to formally follow up with the implementation of the Court's judgments.

**6.** The Applicants also aver that the Respondent State has not aligned its constitutional and legal framework to allow independent candidacy, therefore failing to give effect to the rights of the Applicants and countless other citizens. This is despite the Respondent State arguing that such changes can only be through a constitutional review process, yet the Head of State has publicly stated that there shall be no constitutional review process. They contend that there is no justification for the over six years' inaction by the Respondent State to comply with the Court's decision.

**7.** The Applicants submit that the constitutional review process is not the only means by which to give effect to the Court's judgment and that this can be achieved through a constitutional amendment bill which would be adopted by Parliament at an ordinary or extraordinary sitting.

**8.** They further state that in compounding the continuous violations occasioned by the non-implementation of the decision of the Court, the Respondent State has contributed to or failed to prevent a number of activities that have contributed to shrinking

1 That Application filed by the Applicants on 2 June 2011 was registered as Application 009/2011 *Tanganyika Law Society and Legal and Human Rights Centre v United Republic of Tanzania* and not Application 011/2011, the latter having been filed by Reverend Christopher Mtikila also against the United Republic of Tanzania on 10 June 2011 and which was registered as Application 011/2011; By an order dated 22 September 2011, the Court ordered the two proceedings be consolidated and the case be titled Consolidated Application Nos. 009/2011 and 011/2011 *Tanganyika Law Society and the Legal and Human Rights Centre & Reverend Christopher Mtikila v United Republic of Tanzania*.

space in Tanzania, including:

i. Arrests and harassment of opposition politicians and journalists

ii. Banning of live broadcast of parliamentary sessions which has contributed to limiting citizen's access to information

iii. Adoption of laws and policies that restrict media freedoms and free speech

iv. The unlawful banning of political activity including political rallies and public political gatherings

**9.** They state that, local government elections were conducted on 24 November 2019 and Parliamentary and Presidential elections are scheduled to be held in October 2020. They argue that in the absence of a framework that provides for independent candidacy and in light of the shrunken civic and political space, it will be difficult, if not impossible, to have a fair, just and credible electoral process.

**10.** They argue that, they and Tanzanian citizens as a whole, continue to suffer grave and irreparable harm due to the actions and omissions of the Respondent and that should elections proceed under the current legal framework, grave consequences could follow, including electoral related disputes and violence.

**11.** The Applicants pray the Court for the following orders:

a. Provisional measures pursuant to Article 27 of the Protocol to order the Respondent to stay council members, parliamentary and presidential elections scheduled for 2020 pending the determination of this Application;

b. An order reinstating the Applicant to proceedings in Application 9 of 2011 before the Court.

c. An order compelling the Respondent to take all necessary measures to give effect to the decision on the merit decision in such manner so as to ensure that independent candidates can vie for council members, parliamentary and presidential elections scheduled for October 2020 respectively.

d. An order finding that the Respondent in violation of Article 1 of the African Charter.

e. An order compelling the Respondent to periodically report to the Court within a reasonable timeframe on the measure taken to give effect to the decisions of the Court.

f. An order to declare the Respondent has disobeyed the Court orders of this Honourable Court of 14th June 2011.[2]

2 The correct date of this Judgment is 14 June 2013 and not 14 June 2011 as stated by the Applicants.

## I. Summary of the Procedure before the Court

**12.** The Application which contained a request for provisional measures was received at the Registry of the Court on 16 October 2020.

**13.** The Application was notified to the Respondent State on 19 October 2020 and the Respondent State was provided until 22 October 2020 to send its observations. At the end of this period, the Respondent State did not submit observations.

**14.** The Applicants have not submitted on jurisdiction. The Respondent State has not submitted any observations.

***

**15.** 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.

**16.** Rule 49(1) of the Rules provide that: "[T]he Court shall conduct preliminary examination of its jurisdiction …". However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but it simply needs to satisfy itself, *prima facie*, that it has jurisdiction.[3]

**17.** In the instant case, the rights the Applicants allege have been violated are all protected under Articles 1, 9, 10 and 13 of the Charter, an instrument to which the Respondent State is a Party.

**18.** The Court further notes that the Respondent State has ratified the Protocol. It has also made the Declaration by which it accepted the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations in accordance with Articles 34(6) and 5(3) of the Protocol, read jointly.

**19.** The Court notes, as stated in paragraph 2 of this Ruling, that on 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration, filed on 29 March 2010 in accordance with Article 34(6) of the Protocol. The Court has

3 See *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (15 March 2013) 1 AfCLR 145, §10; *African Commission on Human and Peoples' Rights v Kenya* (provisional measures) (15 March 2013) 1 AfCLR 193, § 16.

held that the withdrawal of a Declaration has no retroactive effect and has no impact on cases under consideration before the Court prior to the deposit of the instrument of withdrawal of the Declaration[4], as is the case in the present matter. The Court has reiterated this position in its Judgment in *Andrew Ambrose Cheusi v United Republic of Tanzania* and held that the withdrawal of the Declaration will take effect on 22 November 2020.[5] Accordingly, the said withdrawal does not affect its personal jurisdiction in the present case.[6]

**20.** The Applicants pray the Court to order 'the Respondent to stay council members, parliamentary, and presidential elections scheduled for 2020 pending the determination of this Application'.

**21.** The Respondent State has not made any submissions.

***

**22.** Article 27(2) of the Protocol provides that: "in cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

**23.** Furthermore, Rule 59(1) of the Rules provides that:

> Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

**24.** It therefore lies with the Court to decide, in the light of the circumstances of each case, whether to exercise the powers provided for in the above-mentioned provisions.

**25.** The Court notes that it delivered the Judgment on the merits in *Consolidated Application Nos. 009/2011 and 011/2011 Tanganyika Law Society and the Legal and Human Rights Centre & Reverend Christopher Mtikila v United Republic of Tanzania* on 14 June 2013, seven (7) years and four (4) months ago. In

4 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

5 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

6 *Ibid* § 37.

that Judgment, the Respondent State was 'directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken'[7].

**26.** Had there been a real risk that irreparable harm would be caused to the Applicants' and other Tanzanian citizens' rights, they would have sought the provisional measures earlier than they did. The electoral cycles for local government, parliamentary and presidential elections are established the applicable legal frameworks and are in the public domain. The electoral cycles are therefore within the Applicants' knowledge, and would have been of particular interest in view of the Judgment mentioned above, in a matter involving them as one of the Parties. In these circumstances, the Court therefore finds that the Applicants have failed to demonstrate that their request for provisional measures is of extreme urgency.

**27.** The Court further notes that the Applicants have not demonstrated that they and Tanzanian citizens would be prevented from participating in the electoral process or that such a process would occasion irreparable harm to them or in the exercise of their rights. The Court also observes that, the Applicants' general statement that, the holding of elections under the current legal framework could result in grave consequences does not suffice to demonstrate that there exists a situation of extreme gravity necessitating it to grant the provisional measures sought.

**28.** Consequently, the Court declines to exercise its powers under Article 27(2) of the Protocol, and Rule 59(1) of the Rules, to order the Respondent State to stay council members, parliamentary and presidential elections pending the determination of the Application on the merits.

**29.** For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

**30.** For these reasons,

The Court,

*Unanimously:*

i. Dismisses the Applicants' requests for provisional measures.

7 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (merits) (14 June 2013) 1 AfCLR 34 § 126 (4).

# Dicko & ors v Burkina Faso (provisional measures) (2020) 4 AfCLR 784

Application 037/2020, *Harouna Dicko & 4 ors v Republic of Burkina Faso*

Ruling (provisional measures), 20 November 2020. Done in English and French, the French text being authoritative.

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

The Applicants brought this action alleging that an amendment to the Respondent State's Electoral Code amounted to a violation of the right of people to participate in elections. Along with the action, the Applicants filed a request for provisional measures to suspend the application of certain provisions of the amended Electoral Code. The Court held that the circumstances did not warrant the issuance of provisional measures.

**Jurisdiction** (*prima facie*, 15, 20)

**Provisional measures** (extreme gravity or urgency, 24-25; irreparable harm to person, 26; burden of proof of irreparable harm, 30)

## I. The Parties

**1.** Messrs Harouna Dicko, Aristide Ouedraogo, Bagnomboé Bakiono, Lookmann Mahamoud Sawadogo and Ms. Apsatou Diallo (hereinafter referred to as "the Applicants") are Burkinabe nationals. They allege the violation of the right of participation of the Burkinabe people following amendments made to the Electoral Code**.**

**2.** The Application is filed against Burkina Faso (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 25 January 2004. On 28 July 1998, the Respondent State also deposited the Declaration provided for in Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to accept Applications filed by individuals and Non-Governmental Organisations (NGOs).

## II. Subject of the Application

**3.** In the initial Application, the Applicants allege that in July 2019, the

President of the Respondent State issued a decree to organise a National Dialogue Forum in preparation for the elections scheduled for 2020. At the end of the Dialogue Forum which took place from 5 to 22 July 2019, a report was produced.

**4.** The Applicants maintain that on 23 January 2020, the Government tabled before the National Assembly a bill to amend the Electoral Code based on the Report of the Dialogue, whereas the population of several regions of the territory of the Respondent State had fled their localities to take refuge in border regions with neighbouring countries due to prevailing insecurity in the country. Similarly, several Mayors had abandoned their towns for the same reason. In addition, on 5 February 2020, the Government drew up the electoral register and scheduled elections for 22 November 2020.

**5.** In response to this decision, various political actors met to discuss the issue and published a Report in which they proposed that the elections be postponed. In light of the Report, the Government tabled before the National Assembly a bill introducing new amendments aimed at removing legal obstacles to the holding of elections on the initial date. The said bill was later withdrawn on 13 July 2020 in a bid to give political dialogue a chance.

**6.** However, according to the Applicants, on 20 July 2020, without organising a new political dialogue, and based on consultations held with only a few members of the National Dialogue Monitoring Committee, the Government again tabled the amendment bill before the National Assembly.

**7.** The Applicants allege that, on 10 August 2020, they tried without success to block the amendment bill, as it was finally passed on 25 August 2020 and promulgated into law by the President of the Respondent State on 28 August 2020. Following the amendments introduced, Articles 148(2) and 155(2) (new) contain similar provisions to the effect that: "where due to supervening impossibility [force majeure] or an exceptional circumstance duly established by the Constitutional Council upon referral by the President of Faso, upon a detailed report of the CENI, it becomes impossible to organize presidential or legislative elections in a part of a constituency, the election shall be validated based on the results of the part of that constituency not affected by the supervening impossibility or exceptional circumstance".

**8.** On 16 September 2020 the Applicants filed a petition before the Constitutional Council on the anti-constitutionality of the amendments to the Electoral Code. On 16 October 2020, the Constitutional Council declared the said petition inadmissible on the grounds that it was filed against a law that had already been promulgated.

**9.** In their request for provisional measures, the Applicants pray this Court to order the Respondent State to "stay the application of the of the provisions of Articles 148 and 155 (new) of Law No. 034-2020/AN given the imminence of the violation of the inalienable right of the people of Burkina Faso as a whole to take part by universal suffrage in the twin elections of 22 November 2020 as set forth in Article 4(2) of the African Charter on Democracy, Elections and Governance".

## III. Summary of the Procedure before the Court

**10.** The initial Application was filed on 5 November 2020 together with the Application for provisional measures.

**11.** On 10 November 2020, the Registry acknowledged receipt of the Application and informed the Applicants that it had been registered. On the same date the Registry served the Application to the Respondent State, requesting the Respondent State to respond on the Application for provisional measures within three (3) days, submit the names of its representatives within thirty (30) days and submit its Response to the main Application within ninety (90) days of receipt of the notification.

**12.** At the expiry of the time-limit so accorded, the Respondent State did not submit any comments on the Application for provisional measures.

## IV. Alleged violations

**13.** In the main Application, the Applicants allege that by amending the Electoral Code as it did through the abovementioned new Articles 148 and 155 of Law No. 034-2020 of 25 August 2020 to amend Law No. 014-2001/AN of 3 July 2001 on the Electoral Code**,** the Respondent State violated the right of the Burkinabe people to participate in elections, guaranteed under Article 4(2) of the African Charter on Democracy, Elections and Governance (hereinafter referred to as "the ACDEG").

## V. *Prima facie* jurisdiction

**14.** When an Application is submitted to the Court, it ascertains its jurisdiction pursuant to Articles 3, 5(3) and 34(6) of the Protocol and Rule 49(1) of the Rules of Court (hereinafter referred to as "the Rules").

**15.** However, as far as provisional measures are concerned, the Court does not have to ascertain its jurisdiction on the merits of the matter but only that it has *prima facie* jurisdiction.[1]

**16.** 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.

**17.** Under 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.** In the instant case, the Applicants allege violation of certain provisions of the African Charter on Democracy, Elections and Governance, an instrument to which the Respondent State is a Party and which the Court has determined to be a human rights instrument which it has jurisdiction[2] to interpret and apply under Article 3(1) of the Protocol.[3]

**19.** The Court further notes, as established in paragraph 2 of this Ruling, that the Respondent State is a Party to the Charter and to the Protocol and has also made the Declaration in which it accepts the jurisdiction of the Court to admit applications from individuals and NGOs in accordance with Article 34(6) read together with Article 5(3) of the Protocol.

**20.** The Court therefore finds that it has *prima facie* jurisdiction to entertain the Application for provisional measures.

## VI. Provisional measures requested

**21.** The Applicants pray this Court to order the Respondent State to "stay the application of the of the provisions of Articles 148 and 155 (new) of Law No. 034-2020/AN given the imminence of the

1 *Guillaume Kigbafori Soro & ors v Republic of Côte d'Ivoire*, ACtHPR, Application 012/2020, Order (provisional measures) of 15 September 2020 § 17; *Babarou Bocoum v Republic of Mali,* ACtHPR, Application 023/2020, Ruling (provisional measures), of 23 October 2020, § 14; *Suy Bi Gohore Emile & ors v Republic of Côte d'Ivoire*, ACtHPR, Application 044/2019, Order (provisional measures) of 28 November 2019, § 18; *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (15 March 2013) 1 AfCLR 149, § 10; *Amini Juma v United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR 687, § 8.

2 The Respondent State became Party to the said instrument on 28 November 2013.

3 *Actions pour la protection des droits de l'homme v Republic of Cote d'Ivoire* (merits), 18 November 2016, 1 AfCLR 697, § 52; *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire*, ACtHPR, Application 044/2019, Judgment of 15 July 2020 (merits and reparations), § 45.

violation of the inalienable right of the people of Burkina Faso as a whole to take part by universal suffrage in the twin elections of 22 November 2020 as set forth in Article 4(2) of the African Charter on Democracy, Elections and Governance".

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**22.** The Court notes that Article 27(2) of the Protocol provides that: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary."

**23.** Furthermore, under Rule 59(1) of the Rules:

> […] the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

**24.** The Court notes that it emerges from these provisions that in considering an Application for provisional measures, it takes into account the extreme gravity or urgency and the irreparable nature of the harm to be suffered.

**25.** With regard to urgency, the Court thus reiterates that extreme gravity or urgency presupposes the existence of a real and imminent risk that irreparable harm will be caused before it makes a determination on the merits. Accordingly, there is said to be urgency each and every time this Court finds the violation of human rights while hearing a matter on the merits and the damage suffered can no longer be repaired.[4]

**26.** In the present case, the Court notes that the Application for provisional measures pertains to the presidential and legislative elections scheduled for 22 November 2020. The Court notes that while the decision of the Constitutional Council dismissing their petition for unconstitutionality was delivered on 16 October 2020, the Applicants did not submit the matter to this Court until 5 November 2020. That said, the Court maintains that the provisional measures provided for in Article 27(2) of the Protocol

4 *Guillaume Kigbafori Soro & ors v Côte d'Ivoire* (provisional measures), 15 September 2020, § 29; *XYZ v Republic of Benin*, ACtHPR, Application 057/2019, Order (provisional measures), 2 December 2019, § 24; *Komi Koutché v Benin* ACtHPR, Application 020/2019, Order (provisional measures), 2 December 2019, § 31.

are primarily intended to avoid "irreparable harm to persons".

**27.** In the instant case, the main Application and the request for provisional measures preceded the election day and the elections will hold even before the Court rules on the merits.

**28.** Accordingly, the Court finds that, in the instant case, urgency is established by the imminent holding of the elections.

**29.** The Court recalls that in matters of provisional measures, it does not suffice for urgency be established, but it is also necessary that such urgency be corroborated by the virtually certain possibility of irreparable harm.

**30.** As regards the existence of irreparable harm, the Court reiterates that such harm can be established if the acts which the Applicant complains about are likely to seriously jeopardise the rights allegedly violated, such that the Court's subsequent judgment on the merits would be without effect.[5] Generally, the burden of proof of the irreparable nature of the harm lies with the Applicant.

**31.** The Court recalls that in the instant case, the Applicants claim that the application of the amendments to the Electoral Code would cause irreparable harm to the Burkinabe people as a whole in that it would prevent them from participating in the said elections. According to the Applicants, such harm would be suffered because of the displacement within the country of a large number of the population and mayors of certain localities as well as the lack of political consensus on the holding of the election on 22 November 2020.

**32.** The Court notes that the amendments concerned provide that "where due to supervening impossibility [force majeure] or an exceptional circumstance duly established by the Constitutional Council upon referral by the President of Faso, upon a detailed report of the CENI, it becomes impossible to organize presidential or legislative elections in a part of a constituency, the election shall be validated based on the results of the part of that constituency not affected by the supervening impossibility or exceptional circumstance".[6]

**33.** The Court notes that the means adduced by the Applicants in support of their request for provisional measures mainly concern: (i) the proportionality between the persons who would be prevented from taking part in the election and the rest of the Burkinabe

5 *Guillaume Kigbafori Soro & ors v Côte d'Ivoire* (provisional measures), 15 September 2020, § 29.

6 Articles 148 and 155 of Law No. 034-2020 of 25 August 2020 to amend Law No. 014-2001/AN of 3 July 2001 on the Electoral Code.

people; and (ii) determining the concept of national political consensus and its application in the circumstances of the case. In addition, and in the light of the amendments to the Electoral Code, the issue of applicability of the principle of supervening impossibility arises and the authorities of the Respondent State have used it to rebut the argument of vote prevention advanced by the Applicants.

**34.** From the preceding, the Court holds that determining the irreparable nature of the harm in the instant case would necessarily entail examining these various issues, which are particularly relevant to the merits of the case. In this regard, the Court recalls that on the merits, the Applicants allege that the amendments to the Electoral Code violate the right of the people to participate in elections as guaranteed in Article 4(2) of ACDEG. Against such a backdrop, the Court cannot rule on the application for provisional measures submitted by the Applicants without running the risk of prejudging the outcome of matter on the merits.

**35.** From the foregoing and having regard to the circumstances of the case, the Court finds that it is not necessary to order a stay of application of the amendments to the Electoral Code in preparation for the organisation of the elections of 22 November 2020.

**36.** Accordingly, the Court finds that the circumstances of the matter do not warrant the pronouncement of provisional measures pursuant to Article 27(2) of the Protocol and Rule 59(1) of the Rules.

**37.** For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudge the determination the Court will make regarding its jurisdiction, admissibility and the merits of the main Application.

## VII. Operative part

**38.** For these reasons,

The Court,

*Unanimously*,

i. *Dismisses* the request for provisional measures.

# Lazaro v Tanzania (reopening of pleadings) (2020) 4 AfCLR 791

Application 003/2016, ***John Lazaro** v United Republic of Tanzania*

Order (reopening of pleadings), 20 November 2020. Done in English and French, the English text being authoritative.

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

The Applicant, who had been convicted and sentenced to death for murder brought this action alleging that the proceedings before the national courts violated his rights. The Applicant was self-represented and was personally responsible for filing processes in the case. Counsel, who was eventually authorised to represent the Applicant, brought this application for an order to reopen pleadings. The Court granted this application for reopening of pleadings by counsel newly representing the Applicant.

**Procedure** (reopening of pleadings, 17, 18)

## I. The Parties

**2.** Mr John Lazaro, (hereinafter referred to as "the Applicant") is a national of Tanzania who was convicted of murder and sentenced to death, on 2 July 2004, by the High Court of Tanzania sitting at Bukoba. The sentence was subsequently upheld by the Court of Appeal sitting at Mwanza, on 6 August 2010. The Applicant alleges violations of his rights during the course of these proceedings.[1]

**3.** The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter, "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. On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits), §§ 35-39.

cases filed before the withdrawal comes into effect on 26 March 2021, that is, one year after its filing.

## II. Subject of the Application

### A. Facts of the matter

**4.** The Applicant alleges that on 6 August 2010, the Court of Appeal at Mwanza, upheld the sentence of death by hanging, which was rendered by the High Court of Tanzania sitting at Bukoba on 2 July 2004, after he was found guilty of murder.

### B. Alleged violations

**5.** The Applicant alleges that the Respondent State has violated the:
i. Right to equal protection of the law under Article 3 of the Charter
ii. Right to life under Article 4 of the Charter
iii. Right to dignity under Article 5 of the Charter
iv. Right to liberty under Article 6 of the Charter
v. Right to have his cause heard under Article 7 of the Charter

### C. Applicant's Prayers

**6.** The Applicant prays the Court to:
i. Declare the Application admissible.
ii. Order that his conviction and sentence be quashed.
iii. Order that he be released from custody.
iv. Grant the applicant reparations in terms of Article 27(1) of the Court Protocol.
v. Grant any other relief or orders that may be deemed fit in the circumstances.

## III. Summary of the Procedure before the Court

**7.** The Application was filed on 4 January 2016 by the Applicant, who was self-represented at the time and served on the Respondent State on 25 January 2016.
**8.** The Respondent State filed the Response to the Application on 11 July 2016 and the Applicant filed his Reply on 25 July 2016.
**9.** Pleadings were then closed on 8 March 2018.
**10.** Following the Court's decision to combine consideration of the merits and reparations, on 28 August 2018, the Applicant was

requested to file submissions on reparations. The Applicant filed submissions on reparations on 11 October 2020, and these were served on the Respondent State on 17 October 2018, but it did not file any response.

**11.** On 17 September 2018, the Human Rights Clinic, Cornell University, Law School, informed the Court that it had authorisation to represent the Applicant through Advocate Jebra Kambole. On 5 October 2018, the Registry informed the Respondent State of the Applicant's representation.

**12.** On 5 December 2018, Counsel for the Applicant sought leave to amend the Application and file further evidence which was served on the Respondent State on 10 December 2018 with a request to file its observations within thirty (30) days of receipt. By an Order dated 13 February 2020, Counsel for the Applicant was informed that the request was granted and requiring the Applicant to file the amended Application and further evidence within fifteen (15) days of receipt.

**13.** On 26 February 2019, the Applicant's Counsel requested for an extension of sixty (60) days to amend the Application and file additional evidence on the basis that he was unable to locate the Applicant who was transferred severally to different prisons. He also informed the Court that he had learnt that the Applicant suffered from mental illness and he needed to organise a medical examination. The Request was served on the Respondent State on 8 March 2019 with a request to share its observations within fifteen (15) days of receipt. By a notice dated 21 March 2019, Counsel for the Applicant was informed that this request was granted and requiring the Applicant to file the amended Application and further evidence within sixty (60) days of receipt.

**14.** On 24 May 2019, the Applicant's Counsel requested for another extension of thirty (30) days to amend the Application and file the additional submissions on the same grounds as before. He also reported that he was unable to obtain from the Respondent State, various documents pertaining to the national proceedings and documents from this Court and that his office is located in Dar-es- Salaam while the Applicant is reportedly incarcerated at Butimba Prison which is a distance away. This additional request was granted and the Counsel for the Applicant was notified on 18 June 2019, and requiring the Applicant to file the amended Application and further evidence within thirty (30) days of receipt. Counsel was also notified that the submissions on reparations from the Applicant were received from Bukoba and not Butimba Prison.

**15.** On 23 July 2019, Counsel filed the additional submissions indicating that, he was filing them without the knowledge of the Applicant because he had failed to locate him at Butimba Prison, as he had been transferred to an unknown location since April 2019. The Counsel for the Applicant requested the Court to grant leave to file detailed submissions on reparations at such a time when he would be able to locate and interview the Applicant.

**16.** The additional submissions were transmitted to the Respondent State on 3 September 2019, with a request for it to file the Reply within fifteen (15) days of receipt thereof. The Respondent State did not file the Reply.

**17.** On 28 September 2020, Counsel for the Applicant filed a supplement to the additional submissions filed on 23 July 2019. The Registry acknowledged receipt thereof on 8 October 2020 and on the same date served them to the Respondent State for information purposes.

## IV. On the re-opening of pleadings

**18.** The Court notes that when the Applicant filed the Application before this Court, he was unrepresented. The Applicant was then provided legal aid by the Human Rights Clinic, Cornell University, Law School, however his Counsel could not locate him to confer with him, but nonetheless, the Counsel filed additional submissions on 23 July 2019 as supplemented in the submissions filed on 28 September 2020. The Applicant is yet to file submissions on reparations.

**19.** In accordance with Rule 46(3) of the Rules, the Court notes that, in the interest of justice there is a need to re-open the pleadings, to allow the Applicant who is now represented by Counsel to amend his pleadings and file submissions on reparations and to allow the Respondent State to respond thereto.

## V. Operative part

**20.** For these reasons

The Court,

*Unanimously,*

*Orders:*

i. That, in the interest of justice, pleadings in Application 003/2016 *John Lazaro v United Republic of Tanzania* be, and are hereby re-opened.

ii. The Applicant's amended pleadings and additional evidence be deemed as duly filed and be served on the Respondent State.
iii. The Applicant to file detailed submissions on reparations.

# Selemani v Tanzania (provisional measures) (2020) 4 AfCLR 796

Application 042/2019, ***Masudi Said Selemani v United Republic of Tanzania***

Order (provisional measures), 20 November 2020. 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, who had been convicted and sentenced to death for murder, brought this action alleging a violation of his right to equal protection of law, dignity and defence. He subsequently applied for provisional measures to stay execution of the death sentence. The Court granted the application.

**Jurisdiction** (*prima facie*, 13, 17; effect of withdrawal of Article 34(6) Declaration, 16)

**Provisional measures** (death penalty, 23)

## I. The Parties

**1.** Mr. Masudi Said Selemani (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania who is incarcerated at Lilungu prison following his conviction and sentence to death for murder, by the High Court of Tanzania at Mtwara.

**2.** The Application is filed against the United Republic of Tanzania (hereinafter referred to as "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 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 filed by individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument of withdrawal of the said Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal comes into effect, one

year after its filing, that is, on 22 November 2020.[1]

## II. Subject of the Application

**3.** On 5 October 2020, the Applicant filed a request for provisional measures following the Application on merits filed on 19 August 2019. It emerges from the said Application that on 4 February 2013, the Applicant was charged with murder before the High Court sitting at Mtwara, and on 15 May 2013, he was convicted and sentenced to death by hanging.

**4.** The Applicant, being dissatisfied with the conviction and sentence by the High Court, appealed to the Court of Appeal sitting at Mtwara in Criminal Appeal No.162 of 2013, which dismissed his appeal in its entirety on 22 November 2014. The Applicant claims that at the time of his conviction, the Respondent State had failed to respect his right to a fair trial and that the "procedure and evidence obtained by the national courts was grossly erroneous". He further states that "he was not provided with legal representation by counsel of his choice" in violation of his rights protected under the Charter.

**5.** It is against this background that the Applicant seeks an order to stay the execution of the death penalty imposed upon him until the decision on the merits of his Application has been rendered by the Court.

## III. Alleged violations

**6.** In the Application on the merits, the Applicant alleges:

i. Violation of the right to equal protection of the law protected under Article 3(2) of the Charter;

ii. Violation of the right to respect of dignity protected under Article 5 of the Charter;

iii. Violation of the right to a fair trial protected under Article 7(1) of the Charter; and

iv. Violation of the right to be defended by counsel of his choice protected under Article 7(1)(c) of the Charter.

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67; *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 35-39.

## IV. Summary of the Procedure before the Court

**7.** The Application was filed at the Registry on 19 August 2019 and served on the Respondent State on 21 October 2019 and it was granted sixty (60) days of the receipt thereof to file its Response. The Respondent State has not filed its Response to the Application despite being sent reminders on 7 May 2020 and 5 August 2020.

**8.** On 6 August 2020, the Court *suo motu* granted the Applicant legal aid under its legal aid scheme. This is because the Applicant was on death row, was self-represented and his Application lacked clarity.

**9.** The request for provisional measures was filed on 5 October 2020 and served on the Respondent State on 7 October 2020. The Respondent State was granted fifteen (15) days from the date of receipt of the notification to file its Response but the Respondent State only did so on 30 October 2020. In the interest of justice, the Response was deemed to have been filed within the time-limit set by the Court. On 2 November 2020, the Respondent State's Response was served on the Applicant and he filed his Reply on 9 November 2020.

## V. *Prima facie* jurisdiction

**10.** The Applicant submits that the Court has jurisdiction in so far as, on the one hand, the Respondent State has ratified the Charter and the Protocol and made the Declaration provided for under Article 34(6) thereof and, on the other hand, he alleges violations of rights protected by the Charter.

**11.** The Respondent State submits that the Court has jurisdiction to grant provisional measures as provided under Article 27(2) of the Protocol. Nevertheless, the Respondent State argues that the Applicant must demonstrate a situation of gravity and urgency "as the result of [its] irreparable prejudice."

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**12.** 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".

**13.** Rule 49(1)[2] of the Rules provides that "the Court shall ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules". However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but it simply needs to satisfy that it has *prima facie* jurisdiction.[3]

**14.** In the instant case, the rights alleged to have been violated are protected under Articles 3(2), 5, 7 and 7(1)(c) of the Charter, an instrument to which the Respondent State is a party.

**15.** The Court further notes that the Respondent State has ratified the Protocol. It has also made the Declaration by which it accepted the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations, in accordance with Articles 34(6) and 5(3) of the Protocol, read jointly.

**16.** The Court notes, as indicated in paragraph 2 of this Ruling, that on 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration filed on 29 March 2010, in accordance with Article 34(6) of the Protocol. The Court has held that the withdrawal of a Declaration has no retroactive effect and has no bearing on pending cases and new cases filed before the withdrawal comes into effect.[4] The Court also reiterated this position in its Judgment of *Andrew Ambrose Cheusi v United Republic of Tanzania* and held that the withdrawal of the Declaration, will take effect on 22 November 2020.[5] Accordingly, the Court concludes that the said withdrawal does not affect its personal jurisdiction in the present case.[6]

**17.** From the foregoing, the Court holds that it has *prima facie* jurisdiction to hear the Application.

## VI. Provisional measures requested

**18.** The Applicant alleges that having been convicted of murder, he is on death row awaiting the execution of the death sentence. He submits that he is facing imminent danger of being executed

2 Formerly Rule 39(1) of the Rules of Court, 2 June 2010.

3 See *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* (provisional measures) (15 March 2013) 1 AfCLR 145 §10; *African Commission on Human and Peoples' Rights v Republic of Kenya* (provisional measures) (15 March 2013) 1 AfCLR 193 § 16.

4 *Umuhoza v Rwanda* (jurisdiction) § 67.

5 *Cheusi v Tanzania* (merits and reparations) §§ 35-39.

6 *Umuhoza v Rwanda* (jurisdiction) § 67.

and therefore the situation is of extreme gravity and irreparable harm to his rights protected under Article 4 of the Charter. He finally argues that the observation of *de facto* moratorium, by the Respondent State, is not a safeguard against the imminent risk he faces, of execution and thus prays the Court to stay the execution of the death penalty against him.

**19.** The Respondent State argues that the Applicant has not demonstrated a situation of extreme gravity, urgency and irreparable harm to justify the order for provisional measures as it took the Applicant, one (1) year and two (2) months to file the present request. According to the Respondent State, the Applicant was rightfully sentenced to death as per its Penal Code and that the death penalty is "a lawful penalty acknowledged by the ICCPR".

***

**20.** Under Article 27(2) of the Protocol, the Court is empowered to order provisional measures *proprio motu* "in cases of extreme gravity and when necessary to avoid irreparable harm to persons", and "which it deems necessary to adopt in the interest of the parties or of justice."

**21.** Rule 59(1)[7] of the Rules provides:

> [p]ursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

**22.** It is for the Court to decide in each case if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions.

**23.** In the instant case, the Applicant challenges the conduct of the proceedings and the assessment of evidence in the domestic courts which resulted in his conviction of murder and death sentence. The Court notes that, in a request for provisional measures, what should be demonstrated is that there exists a situation of extreme gravity and urgency with a risk of irreparable harm occurring before the consideration of the merits of the Application. In this

7 Formerly Rule 51 of the Rules, 2 June 2010.

regard, the Court further notes that the implementation of the death penalty, with its irreversible character, could cause the Applicant irreparable harm and render nugatory any finding of the Court on the merits of the Application. The Court thus finds that the situation of extreme gravity and urgency exists, necessitating the adoption of provisional measures to avoid irreparable harm to the Applicant.[8]

**24.** Consequently, the Court decides to exercise its powers under Article 27(2) of the Protocol and Rule 59(1) of its Rules, to order the Respondent State to stay the execution of the Applicant's death sentence pending the determination of the Application on the merits.

**25.** For the avoidance of doubt, this Ruling is provisional in nature and does not in any way prejudge the findings of the Court on its jurisdiction, on the admissibility of the Application and the merits thereof.

## VII. Operative part

**26.** For these reasons,

The Court,

*Unanimously*, orders the Respondent State:

i. To refrain from executing the death penalty against the Applicant pending the determination of the Application on the merits by the Court.

ii. To report to the Court within thirty (30) days, on the measures taken to implement the order, from the date of notification of this Ruling.

8 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application 012/2019, Judgment of 9 April 2020 § 21; *Tembo Hussein v United Republic of Tanzania*, ACtHPR, Application 001/2018, Judgment of 11 February 2018 § 21.

# Selemani v Tanzania (amendment of pleadings) (2020) 4 AfCLR 802

Application 042/2019, *Masudi Said Selemani v United Republic of Tanzania*

Order (Amendment of Pleadings), 20 November 2020. 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, who had been convicted and sentenced to death for murder, brought this action alleging a violation of his right to equal protection of law, dignity and defence. The application for leave to amend pleadings followed the grant of legal aid to the Applicant. The Court granted the leave requested.

**Procedure** (conditions for amendment of pleadings,11-12)

## I. The Parties

**1.** Mr. Masudi Said Selemani (hereinafter referred to as "the Applicant"), is a national of Tanzania (hereinafter referred to as "Respondent State") who is incarcerated at Lilungu prison following his conviction and sentence to death for murder by the High Court at Mtwara.

**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 to the African Charter on Human and Peoples' Rights on the Establishment an African Court on Human and Peoples' Rights on 10 February 2006. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 29 March 2010. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal will have no bearing on pending cases and new cases filed before the withdrawal comes into effect, one year after its filing, that is, on 22 November 2020.[1]

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 35-39.

## II. Subject matter of the Request

**3.** The Application, filed on 19 August 2019, is based on the Respondent State's alleged violations of the Applicant's:

i. Right to equal protection of the law protected under Article 3(2) of the Charter;

ii. Right to respect of dignity protected under Article 5 of the Charter; and

iii. Right to defence protected under Article 7(1)(c) of the Charter.

**4.** Following the grant of legal aid by the Court to the Applicant, his Counsel, on 5 October, sought leave to amend the pleadings pursuant to Rule 47 of the Rules so as to provide facts and evidence in support of his claims.

## III. Summary of the Procedure before the Court

**5.** The Application was filed on 19 August 2019.

**6.** The Application was served on the Respondent State on 21 October 2019 and it was requested to file its Response within sixty (60) days of receipt but has not done so even after two reminders sent on 7 May 2020 and 5 August 2020.

**7.** On 5 October 2020, the Applicant filed a request to amend the Application and this request was transmitted to the Respondent State on 7 October 2020, for its observations, if any, within fifteen (15) days of receipt.

**8.** On 30 October 2020, the Respondent State filed its observations on the Applicant's request for leave to amend pleadings and these were accepted in the interests of justice. On 2 November 2020, the Respondent State's Response was transmitted to the Applicant and he filed his Reply on 9 November 2020.

## IV. On the request for leave to amend pleadings

**9.** The request for leave to amend the pleadings is on the basis that, as the Applicant is now represented by Counsel, he seeks to substantiate his pleadings by corroborating it with "facts and evidence".

**10.** The Respondent State avers that the request for leave to amend the pleadings "is an after-thought and has no basis."

***

**11.** The Court observes that Rule 47 of the Rules provides as follows:

1. A party may, subject to the approval of the Court, amend its pleadings before the close of pleadings.
2. A request for amendment of pleadings shall be made by a written notice explaining the specific part of the pleadings to be amended. The request shall also state the reasons thereof.
3. If the request is made after the close of pleadings, the Court may grant leave on exceptional basis.

**12.** The Court notes that the Applicant's request has been filed before the close of pleadings and it also specifies the part of the pleadings sought to be amended. The Court concludes, therefore, that the Applicant's request complies with Rules 47(1) and 47(2) of the Rules.

**13.** In the circumstances, the Court grants the Applicant's request for leave to amend the pleadings.

## V. Operative part

**14.** For these reasons:

The Court,

*Unanimously,*

i. *Grants* the request by the Applicant for leave to amend the pleadings.

ii. The Applicant's amended pleadings be deemed as duly filed and be served on the Respondent State.

# Boateng & 351 ors v Ghana (jurisdiction) (2020) 4 AfCLR 805

Application 059/2016, *Akwasi Boateng & 351 ors v Republic of Ghana*

Ruling (jurisdiction), 27 November 2020. Done in English and French, the English text being authoritative.

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

The Applicants, who claimed to be indigenous peoples, brought this action alleging that their lands were wrongfully confiscated and appropriated in violation of their rights under the Charter. The Court declared that it lacked temporal jurisdiction.

**Jurisdiction** (personal jurisdiction, 32-34; material jurisdiction, 43; temporal jurisdiction, 49, 53-56; continuing violation, 55-56)

**Dissenting opinion**: BENSAOULA

**Jurisdictio**n (personal jurisdiction, 21-24; continuous violations, 25, 26, 35)

## I. The Parties

**1.** Akwasi Boateng and Three Hundred and Fifty One (351) others (hereinafter referred to as "the Applicants") claim to be an indigenous people and members of the Twifo Hemang Community, living in the Central Region of Ghana comprising seven (7) villages with forty-eight (48) Chiefs. Their names are appended in support of this application.

**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 March 1989; 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; and deposited on 10 March 2011, the Declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non- Governmental Organisations.

**3.** As filed in Court, the Application also listed J.E. Ellis and Emmanuel Wood, two (2) wealthy foreign merchants purportedly as the 2nd Respondents and the Chief of Morkwa, Ackwasie Symm alias Kenni of Morkwa (hereinafter referred to as "the Morkwa Chief"),

a former chief of another community in the Central Region of Ghana, as the 3rd Respondent.

## II. Subject of the Application

## A. Facts of the matter

**4.** The Applicants identify themselves as the indigenous people of the Twifo area in the Central Region of Ghana. According to them, in 1884, boundary disputes arose between two (2) communities in the Central Region of Ghana, that is, the Applicants headed by Chief Kwabena Otoo and the Morkwa Community headed by Chief Ackwaise Symm also known as Akasi Kenni I. They state that the disputes were settled by the Gold Coast Colonial Division Court in 1894, resulting in the Applicant's Chief being ordered to pay an award or compensation of two hundred and fifty thousand (250,000) pounds to the Court. The Applicants aver that there are no records from either party illustrating how the award was obtained. However, since their Chief was unable to pay the award, the land was sold through a public auction on 8 May 1894, and this resulted in a violation of their right to property, as they and their descendants were unable to utilise their land.

**5.** The Applicants allege that the land was fraudulently purchased by the Chief of Morkwa at one hundred thousand (100,000) pounds. On 5 March 1896, the Morkwa Chief sold the Applicant's Lands to the J. E. Ellis and Emmanuel Wood families. After the sale, disputes over its ownership continued, necessitating the intervention of the Respondent State. The Applicants allege that this sale in 1894, was orchestrated by J. E. Ellis then a Clerk at the Gold Coast Colonial Divisional Court.

**6.** The Applicants claim that they still live on the land which is owned by their ancestors. It is where the community derives its livelihood and it was vested in the chiefs of the village as custodians and not as owners. They contend that the Gold Coast Colonial Court did not have the right to sell the lands, rather that these lands required special protection.

**7.** Furthermore, the Applicants claim that, at the instigation of the Respondent State and the J. E. Ellis and Emmanuel Wood families, their land has attracted the interest of national development planners and private investors contrary to the Community's interest. They allege that no services and infrastructure have been provided to the Community, yet lumber companies have received large concessions on their land for timber exploitation,

with some leases issued since the 1930's to date, lasting up to ninety-nine (99) years.

**8.** The Applicants allege that in 1961, the new Twifo Community Chief, Nana Kyei Baffour II realised the futility of the Community's efforts to seek remedies in the courts of law and decided to seek redress from the Executive Arm of the Respondent State's Government. In 1964, Chief Nana Kyei Baffour II petitioned the Respondent State for redress but did not receive a response. In 1972, he petitioned the Respondent State for the restoration of the Community land. In 1972, The Respondent State initiated two (2) steps to address the matter: first, it referred the matter for consideration to the civilian arm of the military regime because of reports of harassment of the Twifo Community by the J. E. Ellis and Emmanuel Wood families in collaboration with top police and military personnel and second, the Respondent State directed the Attorney General to investigate the purported sale of all the "Twifo Hemang Stool Lands".

**9.** In the Report that was submitted by the Applicants, they aver that in 1974, the Attorney General, following his investigation, made recommendations in his report which resulted in the confiscation of the Twifo Hemang Community land by the Respondent State. In the report, the Attorney General also established that the families of J. E. Ellis and Emmanuel Wood are legitimate members of the Aburadzi clan, which is part of the Twifo Hemang Community. Accordingly, it follows that their rights and duties on the Hemang Stool Lands are no different from those of the Twifo Community as they owe allegiance to, and are subjects of the Twifo Community Chief. As such even if the J. E. Ellis and Emmanuel Wood families had bought the land, it would still belong to the Twifo Hemang Community as per the tradition.

**10.** The Attorney General's Report also indicated that there was no evidence that any court issued a decree auctioning the Applicants Community Lands at a public auction and there was no court record about a settlement. Furthermore, that the Community Lands covering an area of two hundred (200) square miles are rich in natural resources such as timber, cocoa and minerals yielding over one thousand (1000) Cedis annually through dues, tributes and royalties which went to the coffers of the J. E. Ellis and Emmanuel Wood families. As a result, neither the central government nor the local council was able to develop any projects in the area.

**11.** The Attorney General concluded that a *prima facie* case had been established by the Petitioner (the Applicant's Chief) and made the following recommendations:

i. The J. E. Ellis and Emmanuel Wood families be asked to produce their documents in connection with the Applicants' Community Lands for study;

ii. An interim injunction be placed on all Lands in question, whereby all persons in occupation and paying rents, dues, royalties and tributes should do so to the Administrator of Stool Lands until the disputes are resolved;

iii. That a Lands Commission be appointed to inquire into the alleged sale of the land to the J. E. Ellis and Emmanuel Wood families with the aim of finding a permanent solution to the disputes.

**12.** The Applicants allege that in early 1974, the Attorney General's Office advised the Respondent State to "compulsorily confiscate the Twifo Hemang Ethnic Community Land" by invoking "its powers under Act 125 of 1962 to vest all the Twifo Hemang Ethnic Community Lands in the State to settle the matter once and for all." They further allege that the Act was itself 'fraudulent' because it did not comply with the principles of public interest and did not take into consideration publicity and education of the community on compulsory acquisition, prompt compensation at market value or replacement value of the land or the cost of disturbances or any other damage suffered by the victims. They also allege that, there was no improvement of the land by the Respondent State within two (2) years from the date of publication of the instrument or decree.

**13.** The Applicants aver that following the Attorney General's recommendation, and without prior notification or consultation with the Twifo Community, the Respondent State enacted five (5) laws concerning the Applicants Lands, namely:

i. The State Lands-Hemang Acquisition- Instrument, 1974 (Executive Instrument, 61) issued on 21 June 1974;[1]

ii. The Hemang Acquisition- Instrument, 1974 (E.I 133);[2]

iii. The Hemang Lands (Acquisition) Decree 1975 (NRCD 332);[3]

iv. The Hemang Land (Acquisition) (Amendment) Law, 1982 (PNDC Law 29); and[4]

1 This law published on 12 June 1974, allegedly vested 190,784 Acres of Twifo Hemang Lands to the Respondent State.

2 This law "published soon afterword's" allegedly revoked the original instrument, Executive Instrument 61 and backdated the acquisition to 21 February 1973 in a bid to address the loop holes created by Executive Instrument 61.

3 This law allegedly strengthened the legal basis of the acquisition and maintained the date of acquisition as 2 May 1975.

4 This law published "Seven years later" allegedly amended the NRCD 332, decreasing the size of the land compulsorily acquired by the State from 190,784 Acres to 35,707.77 Acres. According to the Applicants the original 1982 PNDC

v. The PNDC Law 294 - Hemang Lands (Acquisition and Compensation Act) 1992.[5]

**14.** The Applicants state that as a result of the above laws, particularly Section 3 of the PNDC Law 294 - Hemang Lands (Acquisition and Compensation Act) 1992, prevented them from accessing judicial remedies during this period. They further allege that the effects of the above laws created massive and irreversible problems for their Community which persist to date. The Regional Lands Commission of the Cape Coast Region became the owner of the Twifo Community Land and started collecting rent, tolls and royalties from the Community. This action created a shortage of land, threatening the existence and future generations of their Community and culminating in increased alienation of the community, manifesting in their abject poverty and their continued under-development. They aver that their land has been used as a subject of political campaigns by politicians to the detriment of the Community.

## B. Alleged violations

**15.** The Applicants allege that the Respondent State has conspired to deprive them of their community land in contravention of their rights under the Charter, specifically:

i. The right to property under Article 14 of the Charter; and

ii. The right to economic, social and cultural development under Article 22 of the Charter.

## III. Summary of the Procedure before the Court

**16.** The Application was filed on 28 November 2016.

**17.** On 25 April 2017, the Court requested the Applicants to submit evidence of proof of exhaustion of local remedies and relevant documents to substantiate their claims. They submitted the said information on 21 June 2017. The Application was then served on the Respondent State on 18 January 2018.

Law 29 transferred back to the Twifo Community all land that was compulsorily acquired by the Respondent State, however, this law was never enacted until another "PNDC Law 294 came in 1992 to repeal Law 29, vesting again all Twifo Hemang Lands into the State".

5 This law allegedly barred the Twifo from accessing a judicial remedy for their claims. Section 3 of the Act states that "a court or tribunal does not have jurisdiction to entertain an action or any proceedings of whatever nature for the purpose of questioning or determining a matter on or relating to the lands, the acquisition or the compensation specified in this Act."

**18.** The Parties filed their submissions on merits and reparations within the time stipulated by the Court and the pleadings were duly exchanged.

**19.** On 13 May 2019, written pleadings were closed and the Parties were duly notified.

**20.** On 5 March 2020, the Court solicited the Parties' views on amicable settlement under the auspices of the Court pursuant to Article 9 of the Protocol and Rule 57 of the Rules. There was no response from the Parties and the Court decided to continue with consideration of the Application and issue the present Ruling.

**21.** On 15 July 2020, the Applicants requested for leave to file new evidence in support of the Application, which they claim emerged after the close of pleadings**,** without indicating the nature of the evidence.

**22.** On 17 July 2020, the Respondent State was requested to submit observations on the request, if any, within seven (7) days of receipt of notification but did not do so.

**23.** On 14 August 2020, the Court considered the request from the Applicants to file new evidence and denied the request because the nature of the new evidence was not specified in the request and the Parties had already been notified that the judgment had been reserved for delivery. The Parties were notified of the Court's decision on the same day.

## IV. Prayers of the Parties

**24.** The Applicants pray the Court to:

i. Find that the Court has jurisdiction by virtue of the ratification of the Protocol by the Ghana Government (Article 56 of the African Charter) and by virtue of Articles 6, 34(6) and 5(3) of the Protocol;

ii. Find that the Application is admissible and must be upheld by the African Court due to the human rights violations alleged on the poor indigenous community of Twifo Hemang;

iii. Order the Respondent to produce their documents in connection with the Twifo Hemang Stool lands for study by the Court;

iv. Order the Respondents to release the Twifo Hemang community land to the legally rightful ancestral owners;

v. Order the abrogation of all instruments including the PNDC Law 294, that vests the Twifo Hemang community land on the Respondent;

vi. Order that all royalties accrued from the time of the Respondent's compulsory acquisition of the Twifo Hemang Community land be paid/returned to the poor community dwellers to enable them develop the community and live a decent life; and

vii. Ban the 2nd and 3rd Respondents from contesting the community land.

**25.** The Respondent State makes the following prayers:

i. That the Court dismiss the Application for lack of jurisdiction as the alleged violation predates the ratification of the Protocol in 2004.

ii. That the Court declares the Application inadmissible as it does not meet the admissibility requirements of Articles 56 (5) and (6) of the Charter on the exhaustion of local remedies and filing the Application within a reasonable time after exhausting local remedies.

iii. That the Court should dismiss this Application as the Applicants have failed to inform the Court of a specific right that has been infringed, and that the Court cannot proceed with the hearing of the Application since it cannot invent or conjure one for them.

## V. Jurisdiction

**26.** 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.

**27.** In accordance with Rule 49(1) of the Rules,[6] "[T]he Court shall ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules".

**28.** On the basis of the above-cited provisions, the Court must preliminarily, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

**29.** In the instant Application, the Respondent State raises objections to the material and temporal jurisdiction of the Court. However, before dealing with the Respondent State's objections, the Court will determine its personal jurisdiction so as to clarify the question of the Respondent before this Court.

## A. Personal Jurisdiction of the Court

**30.** As noted in paragraph**s** 2 and 3 of this Ruling, the Application is filed against the Republic of Ghana, J. E. Ellis and Emmanuel Wood families and the Morkwa Chief. Accordingly, it is necessary

6 Formerly Rule 39(1) of the Rules of 2 June 2010.

for the Court to rule on whether these individuals are all properly before this Court.

**31.** Of the three (3) entities against whom the Application is filed, only the 1st Respondent is a State Party to the Protocol, the other two, that is, J. E. Ellis and Emmanuel Wood families and the Morkwa Chief are individuals and not parties to the Protocol. The question for the Court to determine is whether an entity, other than a State Party to the Protocol, could be a Respondent before this Court.

**32.** The jurisdiction of the Court is premised on the principle that, States bear the primary responsibility for respect for human rights and as such are the principal duty bearers to ensure the implementation of their obligations. The said principle is, *in casu*, derived from Articles 5 and 34(6) of the Protocol.

**33.** The Court settled the issue of the Respondent against whom an Application can be filed before this Court in its various decisions. The Court held in the matter of *Femi Falana v The African Union*, that "it is important to emphasise that the Court is a creature of the Protocol and that its jurisdiction is clearly prescribed by the Protocol...The present case in which the Application has been filed against an entity other than a State having ratified the Protocol… falls outside the jurisdiction of the Court." In the same matter, the Court emphasized that "… what is specifically envisaged by the Protocol … is precisely the situation where Applications from individuals and NGOs are brought against State Parties*…" .*[7]

**34.** The Court reiterated this position in *Atabong Denis Atemnkeng v The African Union* where it held that "it should be understood that the Court was established by the Protocol and that its jurisdiction is clearly enshrined in the Protocol. When an Application is brought before the Court, the jurisdiction rationale personae of the Court is set out in Articles [5] and 34(6), read jointly. In the present case where the Application is brought against a body which is not a State which has ratified the Protocol and/or made the Declaration, it falls outside the jurisdiction of the Court…"[8]

**35.** Thus, in the instant case, where the 2nd and 3rd Respondents, J. E. Ellis and Emmanuel Wood and the Morkwa Chief, respectively, are not States Parties to the Protocol, but individuals, no suit can be entertained against them before this Court.

7 *Femi Falana v African Union* (jurisdiction) (26 June 2012) 1 AfCLR 118, §§ 63, 70 and 71.

8 *Atabong Denis Atemnkeng v African Union (*jurisdiction) (15 March 2013) 1 AfCLR 182, § 40.

**36.** As indicated in paragraph 2 of this Ruling, the 1st Respondent is a State which became a Party to the Protocol on 16 August 2005 and as such qualifies to be brought before this Court by virtue of Articles 5 and 34(6) of the Protocol, as read together.

**37.** From the above analysis, the only Respondent that is properly before this Court is the Republic of Ghana.

**38.** Having determined that the Republic of Ghana is the only Respondent and that as such, it is properly before this Court in this matter, the Court will now consider its objections to the jurisdiction of this Court to entertain the matter.

## B. Objections raised by the Respondent State

**39.** As indicated earlier, the Respondent State raises objections to the material and temporal jurisdiction of the Court on the basis that the Applicants have not specified the rights under the Charter allegedly violated and that the alleged violation "predates the ratification of the Protocol in 2004".

### i. Objection to the material jurisdiction of the Court

**40.** The Respondent State contends that this Application cannot be entertained by this Court, because, according to it, the Applicants simply narrated a story without specifically alluding to the violation of any of the rights guaranteed by the Charter.

**41.** The Applicants on the other hand argue that their allegations are specific. They submit that, by compulsorily confiscating their ancestral land without consultation and compensation, the Respondent State violated their rights to property and to development, guaranteed under Articles 14 and 22 of the Charter, respectively.

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**42.** The Court notes that as provided in Article 3 (1) of the Protocol, the material jurisdiction of the Court extends to all cases and disputes concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned.

**43.** The Court has consistently held that "as long as the rights allegedly violated are protected by the Charter or any other human rights

instrument ratified by the State concerned, the Court will have jurisdiction over the matter."[9] In any case, the Court retains the discretion to qualify the claims of the Parties accordingly.

**44.** The Court notes that in the present Application, the Applicants clearly indicate that they are alleging the violation of Articles 14 and 22 of the Charter, relating to the rights to property and socio-economic and cultural development, respectively.

**45.** The Court therefore, holds that it has material jurisdiction to consider the Application and accordingly dismisses the Respondent State's objection to the material jurisdiction of the Court in this regard.

## ii. Objection to the temporal jurisdiction of the Court

**46.** The Respondent State submits that the Court lacks temporal jurisdiction to entertain this matter. According to the Respondent State, the alleged violations predate its signing and ratification of the Protocol and that the compulsory acquisition of the Applicants Community lands was in 1974 and later, in 1982. It avers that other dealings that it undertook with regard to the Twifo Community lands also happened before it became Party to the Protocol.

**47.** The Respondent State contends that the Charter and relevant regulations governing the jurisdiction of the Court cannot be applied retrospectively to situations that occurred before their entry into force. It argues that it signed the Protocol on 9 June 1998 and subsequently ratified it on 25 August 2004 and the instrument of ratification was deposited on 16 August 2005. Furthermore, that it is from 16 August 2005 that it became subject to the jurisdiction of the Court. The Respondent State argues that the Applicants' cause of action, if any, relates to acts that occurred prior to ratification of the Protocol by the Respondent State, therefore the Court has no jurisdiction to adjudicate on those issues.

**48.** The Applicants on their part, submit that the Court has jurisdiction to consider their Application since the Respondent State has ratified the Charter and the Protocol and deposited the Declaration envisaged under Article 34(6) of the Protocol. They add that "where a violation preceded the treaty, but still has an on-going effect, claimants may argue for an exception on the basis of an 'on-going' or continuing violation on the national level." The Applicants also

9 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) ( 28 March 2014)1 AfCLR 398, § 114.

argue that the Respondent State cannot be allowed to continue its violations against the Applicants in perpetuity.

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**49.** The Court holds that, with regard to temporal jurisdiction, the relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and of the Protocol as well as the date of depositing the Declaration required under Article 34(6) of the Protocol.[10]

**50.** As stated in paragraph 2 of this Ruling, the Respondent State became a party to the Charter on 1 March 1989 and to the Protocol on 16 August 2005 having deposited the Declaration under Article 34(6) on 10 March 2011.

**51.** The Court observes that the alleged fraudulent sale of the Applicants' Community land in 1884; the subsequent compulsory acquisition of the land in dispute by the Respondent State through the successive enactment of the five (5) legislations[11] between

10 *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) (25 June 2013) 1 AfCLR 197, §§ 74 and 77; See also *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34 *Mtikila v Tanzania* (merits) (2013) §, 84; *Jebra Kambole v United-Republic of Tanzania*, AfCHPR, Application 018/2018, Judgment of 15 July 2020 (merits and reparations) §§ 22-25.

11 i. The State Lands-Hemang Acquisition- Instrument, 1974 (Executive Instrument, 61) issued on 21 June 1974 - This law allegedly published on 12 June 1974, vested 190,784 Acres of Twifo Hemang Lands to the Respondent State.

ii. The Hemang Acquisition- Instrument, 1974 (E.I 133) - This law "published soon afterword's" allegedly revoked the original instrument, Executive Instrument 61 and backdated the acquisition to 21 February 1973 in a bid to address the loop holes created by Executive Instrument 61.

iii. The Hemang Lands (Acquisition) Decree 1975 (NRCD 332)- This law allegedly strengthened the legal basis of the acquisition and maintained the date of acquisition as at 2 May 1975.

iv The Hemang Land (Acquisition) (Amendment) Law, 1982 (PNDC Law 29)- This law allegedly published "Seven years later" amended the NRCD 332, decreasing the size of the land compulsorily acquired by the State from 190,784 Acres to 35,707.77 Acres. According to the Applicants the original 1982 PNDC Law 29 transferred back to the Twifo Community all land that was compulsorily acquired by the Respondent State, however, this law was never enacted until another "PNDC Law 294 came in 1992 to repeal Law 29, vesting again all Twifo Hemang Lands into the State".

The PNDC Law 294 - Hemang Lands (Acquisition and Compensation Act) 1992- This law allegedly barred the Twifo from accessing a judicial remedy for their

1974 and 1992, occurred before the Respondent State became a Party to the Charter and to the Protocol and before it deposited the Declaration.

**52.** The question that arises therefore, is whether, the jurisdiction of the Court can extend to acts of human rights violations that occurred before the Respondent State ratified the Protocol and deposited the Declaration.

**53.** According to the Protocol, the Court does not have jurisdiction to hear acts of violations occurring before the State concerned became party to the Protocol and filed the Declaration, except in cases where the violations alleged are continuous in character.[12]

**54.** The Court notes, therefore, that a distinction has to be made between continuous and instantaneous acts of human rights violations. It previously determined that where the acts that form the basis of the allegations of the violations are instantaneous, it will lack temporal jurisdiction and where such acts result in continuing violations, the Court will establish temporal jurisdiction.[13]

**55.** In the matter of *Beneficiaries of Late Norbert Zongo v Burkina Faso,*[14] the Court held that instantaneous acts are those which are occasioned by an identifiable incident that occurred and is completed at an identifiable point in time. It was on the basis of this definition that the Court determined that the alleged violation of the right to life fell outside its temporal jurisdiction because "this instantaneous and completed incident" occurred before the entry into force of the instrument, that is, the Protocol, which gives the Court jurisdiction to hear *inter alia* , the alleged violations of the Charter'.[15]

**56.** In the same matter, the Court also held that continuing acts or violations as being "the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in

claims. Section 3 of the Act states that "a court or tribunal does not have jurisdiction to entertain an action or any proceedings of whatever nature for the purpose of questioning or determining a matter on or relating to the lands, the acquisition or the compensation specified in this Act."

12 *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) (21 June 2013 ) 1 AfCLR 197, §§ 76-77.

13 *Ibid*, §§ 76-77.

14 *Ibid*, § 70.

15 *Ibid*, § 69.

conformity with the international obligation".[16]

**57.** In the present case, the Court notes that, the Respondent State promulgated five (5) legislations on the compulsory acquisition of the disputed land, at specific points in time, albeit in a successive manner between 1974 and 1992. The promulgation of these laws which resulted in the compulsory acquisition of the Applicants' disputed land had immediate effect with regard to ownership in that, the beneficiaries became the new *bona fide* owners thereof.

**58.** Furthermore, the Court notes that these laws were neither abstract in nature, nor of general application, rather their target was very specific in scope, that is the resolution of the land disputes of the Twifo Hemang Community as raised by some members of that community. The said laws, indeed, put an end to the specific land disputes of the Twifo Hemang Community. This position is also supported by that of the European Court of Human Rights in the case of *Blečić v Croatia*,[17] where that Court determined that "the deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuing situation of deprivation …therefore did not create a continuing situation."

**59.** The instant case can be distinguished from the Court's reasoning in other cases[18] where the subject matter of the application relates to the Constitution of the Respondent State. In other words, the law of the Respondent State is abstract in nature and of general application in that it is binding on all subjects under the jurisdiction of that State, and is in force until it is repealed.

**60.** In the present context, the subject matter of the Application revolves around laws that are neither general nor abstract in their nature. Instead they are concrete as they target a well identified group of people belonging to the Twifo Hemang Community, and are also specific in scope as they aim at resolving a land dispute. Their life span comes to an end with their implementation to that concrete and specific subject matter, hence are instantaneous in nature.

**61.** The Court therefore, considers that the Respondent State's promulgation of the laws on the compulsory acquisition of the

16 *Ibid*, § 73.

17 *Blečić v Croatia* (Application 59532/00) Judgment of 8 March 2006.

18 *Jebra Kambole* (merits and reparations), § 23 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R. Mtikila v Tanzania* (merits) (14 June 2013) 1 AfCLR 34, §§ 107-111 and 114-115, *Nyamwasa & ors v Rwanda* (interim measures) (24 March 2017) 2 AfCLR §§ 34-36. *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9 , §§ 143-144 and 216-217.

lands in dispute were instantaneous acts.

**62.** From the foregoing, the Court finds that the five (5) laws which form the basis of the Applicants' allegations of violations of the Charter were not only enacted before the Respondent State became a Party to the Charter and the Protocol, but that their operation also ceased thereof.

**63.** The Court therefore upholds the Respondent State's objection that it lacks temporal jurisdiction in the present matter.

**64.** Having determined that it lacks temporal jurisdiction to hear the case, the Court does not deem it necessary to examine other aspects of jurisdiction or the question of admissibility.[19]

## VI. Costs

**65.** Neither Party has made submissions on costs.

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**66.** According to Rule 32(2) of the Rules of Court**,** "Unless otherwise decided by the Court, each party shall bear its own costs".

**67.** The Court, decides that each Party shall bear its own costs.

## VII. Operative part

**68.** For these reasons,

The Court,

*On jurisdiction*

By a majority of Ten (10) for, and One (1) against, Justice Chafika BENSAOULA Dissenting,

i. *Upholds* the Respondent State's objection to the temporal jurisdiction of the Court;

ii. *Declares* that it lacks jurisdiction.

*On costs*

*Unanimously,*

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

19 *Michelot Yogogombaye v Senegal* (jurisdiction) (15 December 2009) 1 AfCLR, § 40.

In accordance with Article 28 (7) of the Protocol and Rule 70(2) of the Rules, the Dissenting Opinion of Justice Chafika BENSAOULA is appended to this Ruling.

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## Dissenting opinion: BENSAOULA

**1.** I disagree with the majority decision for two basic reasons:

a. The first one relates to the statement of facts, which has many grey areas.

b. The second relates to the treatment of temporal jurisdiction in which the specific characteristics of the victims and the subject of the dispute were overlooked.

## a. On the facts

**2.** I am of the view that the contradictions observed in the statement of the facts as submitted by the Applicants deserved the Court's attention in terms of further information, interlocutory judgment or simply by granting the Applicants' request for leave to file additional evidence instead of dismissing it on the ground that they did not specify the nature of the new evidence.[1]

**3.** Indeed, it emerges from facts, not refuted by the Respondent State by the way, that the Applicants, residents of 7 villages led by 48 chiefs, are an indigenous population of the Twifo area in the Central Region of Ghana. In 1884, that is, during colonial times, a dispute broke out between the Applicants, led by Chief Kwabena Otoo, and the Morkwa community, led by Chief Acwaise Symm. These disputes, according to the Applicants, were settled in 1894 by the Colonial Regional Court of the Gold Coast which ordered the Applicants' Chief to pay compensation or indemnity of two hundred fifty (250,00) pounds to the Court.[2]

1 § 21-23 of the Judgment.

2 § 4 of the Judgment.

**4.** However, the records do not show "the manner in which this decision was obtained"[3] or what was the effect of such a conviction on the property being claimed. However, the Applicants state that owing to the inability of their Chief to pay the amount imposed, the lands were sold at a public auction on 8 May 1994, which resulted in the violation of their right to property, since neither they nor their descendants can enjoy their lands any longer.[4]

**5.** A question arises on this point: How, after Ghana's independence in 1957, can a decision taken during colonial times be enforced through an auction in 1894? This date warranted investigation.

**6.** It further emerges from the facts that on 5 May 1894, these lands were fraudulently acquired by another clan led by Chief Morkwa (Respondent in the Application) who sold them to Respondents J.E. Ellis and Emmanuel Wood (paragraph 5), who are businessmen that the Court has exonerated by not considering them as Respondents.

**7.** However, statements from these persons would have been useful to the Court in ascertaining the veracity of the situation of the disputed lands. It is important to note, as the Applicants submitted without being refuted by the Respondent State, that they are still on the land and that they are the custodians thereof.

**8.** In 1964, their new Chief asked for reparations from the Respondent State but nothing was done about it. As a result, they asked for restitution in 1972 but no action was taken. As a result of all these attempts, the Respondent State delegated the civilian branch of the military regime to investigate the allegations of harassment made by the Applicants. The Attorney General was also tasked to investigate the alleged sale of the land.[5]

**9.** In his report, the Attorney General recommended to the Respondent State to confiscate the land on the ground that he found no evidence of a court judgment ordering an auction of the lands.[6]

This is another contradiction in relation to some facts stated above, on which the Court could have lingered and requested the parties to file more information.

**10.** A public hearing was necessary or, failing that, additional information or a judgment for more fairness and justice, especially

3 § 4 of the Judgment.

4 § 4 of the Judgment.

5 § 8 of the Judgment.

6 § 10 of the Judgment.

as the Applicants maintain that they still live on the land that belonged to their ancestors, stating that the land is their main means of subsistence and that the village chiefs are the custodians thereof, not the owners. Besides, to this day, they pay rents and fees to the Regional Lands Commission in Cape Coast."

**11.** Following these developments, the Respondent State has passed a set of laws whose effect is to confiscate the lands.

**12.** In relation to these laws, the Respondent State enacted the State Lands-Hemang Acquisition- Instrument, 1974 (Executive Instrument, 61) on 12 June 1974, vesting a Hundred and Ninety Thousand, Seven Hundred and Eighty Four acres (190,784) of the Twifo-Hemang land to the Respondent State. The Hemang Acquisition Instrument, 1974, a law that was passed shortly afterwards, repealed the initial instrument 61, cited above, and backdated the land acquisition to February 21, 1973.

**13.** The Hemang Lands (Acquisition) Decree of 1975 (NRC Decree 332), strengthened the legal basis for the acquisition and maintained the date of acquisition of the land as 2 May, 1975.

**14.** The Hemang Land (Acquisition) (Amendment) Law,1982 was passed seven years later (1989), after the Respondent State had become party to the Charter, amended NRC Decree 332, reducing the area of the land expropriated by the State from 190,784 acres to 35,707.77 acres. According to the Applicants, it also retroceded all the lands expropriated by the Respondent State, but the law was not enacted until after "the enactment of PNDC Law No. 294 repealing Law No. 29 which once again returned the Twifo Hemang lands to the domain of the State".

**15.** PNDC Law 294 of 1992, which was passed after the Respondent State became party to the Charter denied the Twifo Community access to any legal recourse to reclaim the land. Indeed, Section 3 of the law provides that "A Court or tribunal does not have jurisdiction to entertain an action or any proceedings of whatever nature for the purpose of questioning or determining a matter on or relating to the lands, the acquisition or the compensation specified in this Act".

**16.** These laws, especially those of 1989 and 1992 passed after the Respondent State had ratified the Charter, were worth careful examination for a good appreciation of the facts and the submissions made.

## b. Temporal jurisdiction and the specificity of the dispute

**17.** The Court holds that the laws enacted by the Respondent State to compulsorily acquire the disputed lands constituted an

instantaneous act and furthermore, came into force before the Respondent State became a party to the Charter and Protocol and therefore, the Court did not have temporal jurisdiction to hear the matter.

**18.** There is no doubt that the Respondent State became a party to the African Charter on Human and Peoples' Rights on 1 March, 1989, to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights on 16 August, 2005. There is also no doubt that the Respondent State on 10 March, 2011 deposited the Declaration provided for in Article 34(6) of the Protocol, by which it accepted the Court's jurisdiction to receive applications from individuals and non-governmental organizations.

**19.** While it is clear that the laws of 1974 and 1975 were passed before the Respondent State became a party to the African Charter on Human and Peoples' Rights, the laws of 1982 (passed 7 years later) and 1992 were passed after the Respondent State became a party to the Charter, contrary to the Court's statement.[7] At the time of the passing the law of 1992, the State was bound by the obligations imposed by the Article 14 of the Charter, including the protection of the rights of peoples, minorities and indigenous populations[8], especially as it does not contest the facts alleged by the Applicants.

**20.** The Applicants pray the Court to order the repeal of all instruments, including PNDC Law No. 294, which vested the Twifo Hemang Community Lands to the Respondent State.

**21.** It is clear that any law passed is an instantaneous act in material terms but has lasting effects in time. Having become party to the Charter, the Respondent State was obliged to find a lasting solution to the Twifo community dispute to protect their rights that guarantee them dignity, identity as well a social, cultural and economic wellbeing by ending the spoliation of their land started by the colonial government.

**22.** By promulgating the laws of 1982 and 1992 (which only reinforced and approved previous laws) after becoming party to the Charter, the Respondent State not only violated the principles of the Charter, and therefore its obligations, but also the fundamental rights to which every citizen is entitled and the right to seek redress before the competent courts (see the content of the

7 § 51 of the Judgment.

8 §§ 2 and 3 of the Judgment.

law that prevented any action against the act of appropriation[9] (paragraph 13 and 14), which, in my opinion, constitutes abusive and unjust harassment.[10]

**23.** Even if they remain an instantaneous act, the enacted laws are still in force because, to this day, the situation of the Twifo community remains unresolved, their claims having been expeditiously dispatched through confiscation, especially as the laws were passed by an "act of the prince" in relation to a community in search of a solution to a serious identity situation, thereby preventing the victims from seeking appropriate recourse with a view to challenging this arbitrary act that they find unjust.

**24.** The Court has jurisdiction, even if it begins from the date the Respondent State became party to the Protocol and the Declaration and the Court will have jurisdiction as long as the violation continues in its effects since 1989, when the Respondent State had already violated the rights protected by the Charter. The Court should have made a distinction between the impugned acts and the very special status of the victim.

**25.** In its ruling of 21 June 2013 on preliminary objections in *Norbert Zongo, Abdoulaye Nikiema a.ka. Ablasse*, *Ernest Zongo*, *Blaise Ilboudo and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso* the Court held that under the Protocol, the Court does not have jurisdiction over acts of violations that occurred before the State concerned became a party to the Protocol and deposited the Declaration, except in cases where such violations are of a continuing nature.[11]

**26.** In the same case, the Court adopted the definition of the notion of a continuous violation in Article 14(2) of the draft articles on the international responsibility of States that commit internationally illegal acts, adopted in 2001 by the International Law Commission: " The breach of an international obligation by an act of a State having a continuous character extends over the entire period during which the act continues and remains inconsistent with the international obligation".[12]

**27.** However, in the instant case, the Court has distorted this definition since the laws enacted by the Respondent State were specific in

9 §§ 13 and 14 of the Judgment.

10 See 52 of the Judgment.

11 Right-holders of the late *Norbert Zongo, Abdoulaye Nikiema a.k.a. Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkina des droits de l'homme et des peuples v Burkina Faso*, Judgment (Preliminary objections) (21 June 2013) 1 ACLR 204, §§ 61-83.

12 *Ibid*. § 73.

scope because their purpose was to resolve the Twifo Hemang community land disputes.[13] (Paragraph 53 of the Judgment).

**28.** In support of its ruling, the Court reference a ruling of the European Court of Human Rights issued on 8 March, 2006 in *Blečić v Croatia*,(Application 59534) where the European Court held that "deprivation of an individual's home or property is in principle an instantaneous act and does not produce a continuous situation of 'deprivation' ... does not therefore create a permanent situation.»[14] (Paragraph 58 of the Judgment).

**29.** My criticism of the Court in this comparison is the specificity of the facts of the two litigations compared. While one concerns the rights of an individual, the other concerns the rights of a whole community, a minority people in search of identity and dignity, a minority catered for by the Charter as seen in its very title!

**30.** It is unjust to use specific laws to resolve an identical situation through an act of confiscation that does not in any way resolve the situation of the Respondents nor that of future generations. Additionally, the law has not only robbed the Respondents of their rights to property without compensation or indemnity, but also their basic right to seek redress in the courts to reclaim the alleged rights.

**31.** There is abundant case law in this respect. In many of its cases, including *Minority Rights International v Kenya* (Communication 276/03 of 25/11/2009), the Commission held that the Kenyan government had violated the Charter, in particular the right to property, to the free disposal of natural resources and to social and cultural development cited in Article 14 of the Charter, which obliges the Respondent State not only to respect the right to property but also to protect same.

**32.** There are many cases in which the Court has held that confiscation, plunder of property, expropriation or destruction of land constitute a violation of Article 14 and especially any restriction of property rights, which are continuing acts!

**33.** The Inter-American Court of Human Rights has also considered the expropriation of the traditional lands of indigenous communities in numerous cases and has required the establishment of national laws and procedures to make their rights effective, and where the only remedy available is the cessation of the acts, these acts are considered continuous.

13 § 53 of the Judgment.

14 § 58 of the Judgment.

**34.** As the Court has held regarding spoliation of indigenous peoples' lands. The act can only be considered as continuous!

**35.** Like the Banjul Commission, the African Court has already held that expropriation of land or restricting on the rights to property are continuing acts. It also on this basis asserted its jurisdiction to examine the applications, as was the case in the matter of Ogiek Community (*African Commission on human and Peoples' Rights v Republic of Kenya)*[15] in which it considered that although the alleged violations started when the Respondent State was not a party to the Charter "the violations alleged by the fact of the expulsion"[16] of the Ogiek community continue, as do the failures of the Respondent to honour its international obligations under the Charter".[17]

**36.** Finally, I will quote the dissenting and individual opinion of Cheng Tien-Hs attached to the Judgment of the International Criminal Court rendered on 14 June 1938 in which he held that "For the monopoly, though instituted by the dahir of 1920, is still existing to-day. It is an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence every day, so long as the dahir (royal decree) that first created it remains in force".

**37.** It is estimated that there are about 50 million indigenous people in Africa and many of them face multiple challenges including the despoilment of their lands, territories and resources. Their identity and history are inseparable from their territory and even if recognition of indigenous peoples in the laws and constitutions of most countries remains a challenge at the regional level, the inclusion of "peoples' rights" in the African Charter on Human and Peoples' Rights is a starting point for the recognition of these peoples.

**38.** Consideration for these peoples starts by the effective management of their disputes by focusing on facts that often lead us to allegations of violations that go back in time and that undoubtedly deserve to be elucidated.

**39.** The abundant case law in this context proves to us that continuous violations will remain so as long as the act by which the violation

15 *African Commission on Human and Peoples' Rights v Kenya* (26 May 2017) 2 ACLR 9, §§ 64-66.

16 *Ibid*. § 65.

17 *Ibid*. § 66.

began is still present through its effects and will always lead to claims and litigation, although States will always attempt to use the dates of accession to human rights instruments to escape being held accountable for human rights violations.

# Collectif Des Anciens Travailleurs de la Semico Tabakoto v Mali (jurisdiction and admissibility) (2020) 4 AfCLR 827

Application 009/2018, *Collectif Des Anciens Travailleurs de la Semico Tabakoto v Republic of Mali*

Ruling (jurisdiction and admissibility), 27 November 2020. Done in English and French, the French text being authoritative.

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

The Applicants, who are former employees of a mining company, alleged that the Respondent State violated certain of their Charter rights by its failure to act against the mining company for the use of harmful chemicals in mining that resulted in high levels of lead contamination in their blood. The Court upheld the Respondent State's preliminary objection challenging the capacity and standing of the Applicants' legal representatives.

**Jurisdiction** (personal, 21, material, 22, temporal, 23, territorial, 24)

**International law** (general principles of law, 31; authority of a legal representative 32-36)

**Procedure** (preliminary objection, 37)

## I. The Parties

**1.** Collectif des Anciens Travailleurs de la Semico Tabakoto Company (herein-after referred to as "the Applicants") is an informal group of forty nine (49) former workers of the Ségala Mining Corporation (SEMICO), which has been running activities in the Tabakoto gold mine since 2005.The Applicants are all nationals of Mali and their complaint is about the high level of lead contamination in their blood, resulting from their employment in the said company.

**2.** The Application is brought against the Republic of Mali (herein-after 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 the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 May 2000. On 19 February 2010, the Respondent State also deposited the Declaration prescribed in Article 34 (6) of the Protocol accepting the Court's jurisdiction to hear cases brought before the Court by individuals and

Non-Governmental Organisations.

## II. Subject of the Application

### A. Facts of the matter

**3.** SEMICO is a subsidiary of the multinational company (Endeavor) registered in the Cayman Islands with its headquarters in London, United Kingdom. It is listed on the Toronto Stock Exchange, Canada and it has been running the activities of the Tabakoto gold mine in Mali since 2005.

**4.** The Applicants state that the mining activity of SEMICO makes use of highly toxic substances such as cyanide, lead, arsenic and acids. As a consequence, high levels of lead were found in the Applicants' blood after tests were conducted.

**5.** The Applicants' further state that, on 8 December 2016, the National Federation of Mines and Energy Workers (FENAME) filed an application against SEMICO before the Public Prosecutor at the Bamako Court of First Instance, accusing the Federation of unintentionally inflicting bodily harm on the workers and failing to provide assistance to persons in danger, contrary to Articles 207, 208, 220 and 221 of Law No. 0179 of 20 August 2001 on the Malian Penal Code.

**6.** The Applicants aver that on 13 December 2016 the Public Prosecutor received the above-mentioned application and an investigation was opened by the police in the sixth district of Bamako. The workers and the company's doctor were heard, and an official report No. (0011 / 6A) was issued on 17 January 2017.

**7.** It is also the Applicants' allegation that on 13 February 2017 the Public Prosecutor issued Decision No. (082 / RP2017) shelving the case and no further action was taken on the ground that criminal prosecution of legal entities is not provided for in the laws of Mali.

**8.** On 3 January 2018, the Applicants sent a second reminder to the Public Prosecutor, but did not receive a response.

### B. Alleged violations

**9.** The Applicants allege that the Respondent State violated:

i. Their right to bring a matter before a court of competent jurisdiction and to seek effective remedy under Articles 7(1)(a) of the Charter and 2 (3) of the International Covenant on Civil and Political Rights (ICCPR).

ii. The right to guarantee the independence of the courts as enshrined in Articles 26 of the Charter and 14 (1) of the ICCPR.

iii. The right of every person to enjoy the best physical and mental health, and the duty to take necessary measures to protect the health of its people and ensure their access to medical care in case of illness, as stipulated in Article 16 of the Charter.

iv. The right of the people to a satisfactory, comprehensive and appropriate environment for their development, as stipulated in Article 21 of the Charter.

## III. Summary of the Procedure before the Court

**10.** The Application was filed on 20 February 2018 and served on the Respondent State on 28 May 2018.

**11.** On 25 July 2018, the Registry received the Response of the Respondent State, which it served on the Applicants on 27 July 2018, giving them a thirty (30) day deadline to file their Reply. The Applicants did not file a Reply.

**12.** Pleadings were closed on 9 April 2019 and the Parties were duly notified.

## IV. Prayers of the Parties

**13.** The Applicants pray the court to:

i. Find the Respondent State guilty and order it to pay all medical expenses for the spouses and the children of each employee from 2013 until the end of the proceedings in the matter.

ii. Compel the Respondent to pay the arrears of contributions to the National Social Welfare Institute (INPS) from the date of layoff until the end of 2017 in order to update the contributions.

iii. Pay 20 million CFA francs (20,000,000) to each worker, or a total of nine hundred and eighty million francs CFA (980,000,000) for the 49 workers, as reparation for the damage suffered.

**14.** The Respondent State prays the Court to:

i. In terms of form, rule on the admissibility of the Application of the Group of Former Workers of SEMICO Tabakoto;

ii. On the merits: to find that the Application has no merit and reject all the prayers of the Applicants.

## V. Jurisdiction

**15.** The Court recalls 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.

**16.** The Court notes that Rule 49(1) of the Rules[1] provides that: "[t]he Court shall ascertain its jurisdiction …"

**17.** Based on the aforementioned provisions, the Court must, in every Application, conduct an examination of its jurisdiction and dispose of objections to its jurisdiction, if any.

**18.** In this Application, the Respondent State has raised one objection to the Court's jurisdiction relating to the Court's lack of personal jurisdiction. The Court will now address this objection before ruling on the other aspects of its jurisdiction.

## A. Objection based on lack of personal jurisdiction:

**19.** The Respondent State contends that, to be able to take legal action before the courts, the Applicant must be a natural person who is able to exercise his civil rights or a legal entity under public or private law. It further contends that the group of former workers, who are Applicants in the instant case, have no legal personality or, at least, proof of their legal existence that would allow them to bring an action, whether as applicants or as respondents. The Respondent State submits, therefore, that the Application is filed in the name of an entity that does not have any legal status.

**20.** The Applicants did not respond to the Respondent State's objection.

***

**21.** The Court notes that Article 5(3) of the Protocol permits individuals to bring applications against States that have deposited the Declaration. The Court finds, therefore, that the Applicants' right to commence this action is guaranteed by Article 5(3) of the Protocol.[2] Consequently, the Respondent State's objection in

1 Formerly, Rule 39(1) of the Rules of 2 June 2010.

2 *Collectif des anciens travailleurs du laboratoire ALS v Republic of Mali*, AfCPHR, Application 042/2016, Ruling of 26 March 2019 (jurisdiction and admissibility), §17.

relation to the Court's personal jurisdiction is dismissed.

## B. Other aspects of jurisdiction

**22.** The Court recalls that its material jurisdiction is established so long as the Applicants allege violations of provisions of the Charter or any other human rights instrument ratified by the Respondent State.[3] In the instant case, the Applicants allege violation of Articles 7 (1), 16, 24, and 26 of the Charter and Articles 2 (3), 17 (1) of the International Covenant on Civil and Political Rights which have been ratified by the Respondent State[4]. The Court, therefore, finds that it has material jurisdiction to hear the Application.

**23.** In respect of its temporal jurisdiction, the Court notes that the alleged violations occurred after the entry into force of the Charter and Protocol, and after the Respondent State had deposited the Declaration. The Court holds, therefore, that it has temporal jurisdiction to hear the Application.

**24.** With regard to its territorial jurisdiction, the Court notes that the alleged violations occurred in the territory of the Respondent State, and that it therefore has territorial jurisdiction.

**25.** In light of the foregoing, the Court holds that it has jurisdiction to hear the instant Application.

# VI. Preliminary objection

**26.** The Respondent State has raised an objection relating to the Applicants' representation before the Court. The Court considers it apposite to address this objection first.

## A. Objection to the mandate of the Applicants' representative before the Court

**27.** The Respondent State raises objection as to the admissibility of the Application, challenging Mr. Yacouba Traoré's mandate of 22 November 2016, authorising him to represent the Applicants. The Respondent State avers that this mandate does not give the representative the authority to represent the group of former workers before this Court. It rather gives him the right to represent them only before the Criminal Court of 2nd District of the Bamako

3 Article 3 (1) of the Protocol.

4 The Respondent State became a Party to the International Covenant on Civil and Political Rights on 16 July 1974

region

**28.** The Applicants did not respond to the Respondent State's objection.

***

**29.** The Court notes that Article 10 (2) of the Protocol provides that, "Any party to a case shall be entitled to be represented by a legal representative of the party's choice ...."

**30.** The Court also notes that Rule 31 (1) of the Rules states that, "Every party to a case shall be entitled to be represented or to be assisted by counsel and/or by any other person of the party's choice."

**31.** The Court recalls that international adjudication draws, in large part, from the general principles of law as contained in national laws,[5] and the provisions of Article 10 of the Protocol are part of this practice.

**32.** According to the general principles of law, legal representation must take place within the scope of the terms agreed with the agent, and if the agent oversteps his mandate, the effects shall not apply to the principal, in accordance with the provisions of the agency agreement.

**33.** If the mandate is worded in general terms and is not precise, then it does not give any powers to the agent except within the purview of management work. In the case of acts of disposal such as contentious matters, a special mandate is required.

**34.** The Court notes in the present case, even if Mr. Yacouba Traoré signed and filed the Application on behalf of the Collective of Former Workers, nothing in the file indicates that he holds a mandate authorizing him to represent Collective or its members.

**35.** Furthermore the Court notes that on 22 November 2016, the Applicants mandated Mr.Yacouba Traoré of the National Federation of Mines and Energy (FENAME) to represent them before the Bamako Court, but not before the African Court. In the circumstances, it is clear that Yacouba Traoré does not have any

5 M.Mahouve, The African Charter on Human and People's Rights and the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, comments on article by article, Edition Brulant, 2011, p1313.

mandate to represent the Applicants before this Court.

**36.** In light of the foregoing, the Respondent State's objection relating to the mandate of the Applicants' representative is upheld.

## VII. Admissibility

**37.** The Court recalls that admissibility of applications is governed by the requirements contained in Article 56 of the Charter, which are reiterated in Rule 50 of the Rules. The Court also recalls that by virtue of Rule 49(1) of the Rules, it must, in every application, ascertain the admissibility of an application. In the present case, however, having upheld the Respondent State's preliminary objection, the Court holds that it is unnecessary to examine the admissibility requirements as stipulated in Article 56 of the Charter.

## VIII. Costs

**38.** Neither party made submissions on costs.

**39.** Pursuant to Rule 32 (2) of the Rules of Court,[6] "Unless otherwise decided by the Court, each party shall bear its own costs, if any".

**40.** In the light of the foregoing, the Court decides that each Party shall bear its own costs.

## IX. Operative part

**41.** For these reasons:

The Court,

Unanimously,

*On jurisdiction*

i. *Dismisses* the objection to lack of personal jurisdiction;

ii. *Declares* that it has jurisdiction.

*On the preliminary objection*

iii. *Upholds* the objection relating to the mandate of the Applicants' representative to bring proceedings before the Court;

iv. Declares that the Application is inadmissible.

*On costs*

v. Orders that each Party shall bear its own costs.

6 Formerly, Rule 30 of the Rules of 2 June 2010.

## Mugesera v Rwanda (judgment) (2020) 4 AfCLR 834

Application 012/2017, *Leon Mugesera v Republic of Rwanda*

Judgment, 27 November 2020. Done in English and French, the French text being authoritative.

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

Recused under Article 22: MUKAMULISA

The Applicant, while in pre-trial detention, brought this action alleging that proceedings before national courts and the conditions of his detention amounted to violations of some of his rights protected under the Charter and other international human rights instruments. The Court upheld part of the claim.

**Procedure** (default judgment, 14)

**Evidence** (burden of proof, 33-34)

**Fair trial** (right to defence, 43, 44, 46; free legal assistance, 52, 57; independent and impartial court, 69,70-72)

**Cruel, inhuman and degrading treatment** (degree of suffering, 81; burden of proof of, 84, 87, 88; deprivation of adequate food, 89; death threats, 89-90; conditions of detention, 93)

**Physical and mental integrity** (decent existence, 100; dignified life for inmates, 103)

**Right to family life** (restriction of, 117)

**Reparations** (international responsibility of state, 124; purpose of, 124, future material prejudice, 134, legal fees, 136, moral prejudice/damage, 143-144; indirect victims, 148; proof of relationship, 148, 152)

## I. The Parties

**1.** Léon Mugesera (hereinafter referred to as "the Applicant") is a national of Rwanda who was extradited by the Government of Canada to the Republic of Rwanda (hereinafter referred to as "the Respondent State") on 24 January 2012 and who, at the date of filing of the Application, was in custody pending legal proceedings initiated against him for genocide crimes that occurred in 1994. He alleges that the Respondent State mistreated him during detention and violated his right to a fair trial.

**2.** The Respondent State is the Republic of Rwanda, 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 25 May 2004. The Respondent State also filed,

on 22 January 2013, the Declaration provided for in Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. However, on 29 February 2016, the Respondent State deposited with the African Union Commission an instrument of withdrawal of the said Declaration. The Court held, on 3 June 2016, that this withdrawal would come into effect on 1 March 2017.[1]

## II. Subject of the Application

### A. Facts of the matter

**3.** The Applicant claims that during the judicial proceedings between 2012 and 2016, the High Court Chamber for International Crimes and the Supreme Court of Rwanda committed several irregularities against him, both with regard to the proceedings and the conditions under which he was detained and treated by the prison authorities. The Applicant claims that he tried to remedy these procedural irregularities and obtain an improvement in his conditions of detention from the competent authorities of his country, all to no avail. He therefore decided to bring the matter before this Court.

### B. Alleged violations

**4.** The Applicant alleges there was a:

i. Violation of his right to a fair trial, that is:

a. Right to defence;

b. Right to legal aid; and

c. Right to be heard by an independent and impartial court.

ii. Violation of his right not to be submitted to cruel, inhuman and degrading treatment;

iii. Violation of his physical and mental integrity; and

iv. Violation of his right to family and to information.

1 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

## III. Summary of the Procedure before the Court

**5.** The Application was received at the Registry and registered on 28 February 2017. It was served on the Respondent State and transmitted to the other entities under the Protocol.

**6.** On 12 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. The Respondent State informed the Court it will not take part in any proceedings before the Court and consequently, requested the Court to desist from transmitting any information on cases concerning Rwanda until it reviews the Declaration and communicates its position to the Court.

**7.** On 22 June 2017, the Court responded to the above-mentioned letter. In its response, the Court stated 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. Consequently, and in line with these requirements, all pleadings on matters to which Rwanda is a party before this Court shall be transmitted to you until the formal conclusion of the latter.

**8.** Under request of the Applicant filed on 28 February 2017, the Court issued an Order for Provisional Measures dated 28 September 2017, in which it ordered the Respondent State to allow the Applicant access to his lawyers; to be visited by his family members and to communicate with them, without any impediment; to allow the Applicant to have access to all medical care required, and to refrain from any action that may affect his physical and mental integrity as well as his health.

**9.** On 7 November 2017, the Registry informed the Parties that, following the decision of the Respondent State not to participate in the proceedings, the Court decided to render a judgment in default *suo motu*, taking into account the provisions of Rule 55 of the Rules[2] and in the interest of justice, if submissions were not filed within forty-five (45) days.

**10.** On 6 August 2018, the Applicant filed its preliminary observations and on 23 November 2018 its final observations on reparations. Both documents were served on the Respondent State to respond within thirty (30) days.

2 Rule 63 of the new Rules of 25 September 2020.

**11.** Following various extensions of time, pleadings were closed on 30 October 2020, and the Parties were dully notified.

## IV. Applicant's Prayers

**12.** The Applicant prayed the Court to:

i. Declare that the Respondent State has violated the rights guaranteed by the Charter, in particular Articles 4, 5, 6, 7, 9(1), 18(1) and 26 thereof;

ii. Order for his release from detention;

iii. Appoint an independent doctor to assess his state of health and identify the necessary measures for providing him with assistance;

iv. Order the Respondent State to establish an impartial and independent procedure to closely monitor the respect of the Applicant's rights;

v. Make appropriate remedial measures;

vi. Render any other measures or grant any other reparation that the Court deems appropriate;

vii. Order the Respondent State to respect the Applicant's fundamental rights in ongoing and future proceedings and submit, within six (6) months, a report on compliance with the provisions of the Charter;

viii. Award costs to the Respondent State.

## V. Non-Appearance of the Respondent State

**13.** Rule 63 of the Rules provides that:

1. Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter judgment in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.

2. The Court may, upon an Application from the defaulting party showing good cause, and within a period not exceeding one year from the date of notification of the judgment, set aside a judgment entered in default in accordance with sub-rule 1 of this Rule.

**14.** The Court notes that the above-mentioned Rule 63(1) of the Rules sets out three conditions for the default judgment procedure, namely: i) the default of one of the parties; ii) the request made by the other party or on its own motion; and iii) the notification to the defaulting party of both the application and documents on file.

**15.** On the default of one of the parties, the Court notes that on 12 May 2017, the Respondent State had indicated its intention to suspend its participation in the proceedings and requested the cessation of any transmission of documents relating to the

proceedings in the pending cases concerning it. The Court notes that, by these requests, the Respondent State has voluntarily refrained from exercising its defence.

**16.** On the second condition, the Court notes that none of the parties requested for a default judgment. However, the Court, in the interest of the proper administration of justice, decides of its own motion to render judgment in default if the conditions laid down in Rule 63(1) of the Rules are fulfilled.[3]

**17.** With regard to the notification of the defaulting party, the Court notes that Respondent State was served with the Application on 3 April 2017 and with all pleadings filed by the Applicant until 30 October 2020, when pleadings were closed. The Court thus concludes that the defaulting party was duly notified.

**18.** On the basis of the foregoing, the Court will now determine whether the other requirements under Rule 63 of the Rules are fulfilled, that is: whether it has jurisdiction, whether the application is admissible and whether the Applicant's claims are founded in fact and in law.[4]

## VI. Jurisdiction

**19.** Article 3(1) of the Protocol provides as follows:

> The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.

**20.** In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide. Furthermore, Rule 49(1) of the Rules[5] stipulates that "[t]he Court shall ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules."

**21.** On the basis of the above-cited provisions, therefore, the Court must, in every application, preliminarily conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

**22.** The Court finds that nothing on the record indicates that it does not have jurisdiction in this case. Therefore, it concludes that it has:

3 See *African Commission on Human and Peoples' Rights (Saïf Al-Islam Kadhafi) v Libya* (merits) (3 June 2016) 1 AfCLR 158, §§ 38-42. See also *Fidèle Mulindahabi v Republic of Rwanda*, ACtHPR, Application 004/2017, Judgment of 26 June 2020 (merits and reparations), § 22.

4 *Ibid*, §§ 42 and 22, respectively.

5 Formerly, Rule 39(1) of the Rules of 2 June 2010.

i. Material jurisdiction, since the alleged violations concern Articles 4, 5, 6, 7(1)(a)(c)(d), 9(1), 18(1) and 26 of the Charter, an instrument ratified by the Respondent State, which the Court has jurisdiction to interpret and apply pursuant to Article 3 of the Protocol;

ii. Personal jurisdiction, since the Respondent State is a party to the Protocol and it made the Declaration provided for in Article 34(6) of the Protocol, which enables the Applicant to submit cases directly to the Court, pursuant to Article 5(3) of the Protocol. In addition, the Application was filed on 28 February 2017, before 1 March 2017, the date when the withdrawal of the afore-mentioned Declaration would take effect, as indicated in paragraph 2 of this Judgment;

iii. Temporal jurisdiction, in as much as the alleged violations are continuous in nature since the Applicant remains in detention under conditions, he considers inadequate;[6]

iv. Territorial jurisdiction, considering that the facts of the case occurred on the territory of the Respondent State, a State Party to the Protocol.

**23.** In light of the foregoing, the Court holds that it has jurisdiction to determine the present Application.

## VII. Admissibility

**24.** Under Article 6(2) of the Protocol, "[t]he Court shall rule on the admissibility of cases taking into account the provisions set out in Article 56 of the Charter".

**25.** Rule 49(1) of the Rules[7] provides that "[t]he Court shall ascertain … the admissibility of an Application in accordance with the Charter, the Protocol and these Rules."

**26.** Rule 50(2) of the Rules[8] which in essence restates Article 56 of the Charter provides as follows:

Applications filed before the Court shall comply with all of the following conditions:

a. Indicate their authors even if the latter request anonymity,

b. Are compatible with the Constitutive Act of the African Union and with the Charter,

c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union,

6 *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) (21 June 2013 (2013) 1 AfCLR 197, §§ 71-77.

7 Formerly Rule 39(1) of the Rules of 2 June 2010.

8 Formerly Rule 40 of the Rules of 2 June 2010.

d. Are not based exclusively on news disseminated through the mass media,

e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,

f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and

g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter.

**27.** Pursuant to Rule 49(1) of the Rules, the Court shall examine whether the Application has met the conditions for admissibility of the Application.

**28.** The Court notes that the Applicant alleges that the Application complies with all the conditions of admissibility provided for in Rule 50 of the Rules.

**29.** The Court also notes that it appears from the record that the Applicant is well identified, that the terms used in the Application are not offensive or insulting, that the Application is not incompatible with the Constitutive Act of the African Union and the Charter, that the Applicant has submitted or referred to documents of various kinds as evidence and that do not refer to news that is disseminated through the media.

**30.** Regarding the exhaustion of local remedies, the Applicant claims to have exhausted all domestic remedies, since on 6 June 2016, the Supreme Court of Rwanda, on the bench, rendered a decision on the matter.[9] He submits that "[d]ecisions of the Supreme Court are not subject to Appeal pursuant to Article 144 of the Constitution of the Republic of Rwanda". He further submits that that "[i]n its judgement, the Supreme Court acknowledged that there was a serious and wilful violation of the fundamental and constitutional rights of the Applicant."

**31.** The Applicant alleges that "[a]lternatively, if the Court considers that the Applicant has not exhausted all the local remedies, the said remedies must be considered ineffective, inaccessible and inefficient for four reasons: lack of an independent judiciary, where there is no reasonable possibility of success, the passive nature of national authorities when faced with allegations that state employees have violated their rights, and language difficulties

9 Letter from Mr. Jean-Felix Rudakemwa to the President of National Council of Nurses, and Mid-Wives of Rwanda (28 December 2016).

faced by the Applicant." To buttress his claim, the Applicant cites the Court's decision in *Tanganyika Law Society & The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* and that of the European Court of Human Rights in the matter of *Van Oosterwijck v Belgium*.[10]

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**32.** The Court notes that Article 144 of the Constitution of the Respondent State of June 2003, provides that "[t]he Supreme Court is the highest court in the country. Its decisions are not subject to any appeal except in the matter of pardon or revision." Indeed, the issue for determination concerns the evidence of exhaustion of local remedies, since the Applicant has not produced a copy of the Supreme Court's decision. On this issue, the Court has held that

> [i]t is a fundamental rule of law that anyone who alleges a fact shall provide evidence to prove it. However, when it comes to violations of human rights, this rule cannot be rigidly applied.[11]

**33.** The Court has considered that, with regard to the facts under control of the State, the burden of proof can be shifted to the Respondent State, provided that the Applicant adduces any *prima facie* evidence to support his allegation.[12] In the instant case, the Court notes from the Applicant's submissions that, on 13 May 2016, the Applicant transmitted to the Supreme Court an appeal against the decision of the High Court Chamber on International and Cross-border Crimes of 15 April 2016, which was decided on 6 June 2016 on bench.

**34.** The Court, therefore, considers that on the basis of the information mentioned above on the appeal and the decision of the Supreme Court, the burden of proof is shifted to the Respondent State. Thus, without any contrary evidence submitted by the Respondent

10 *Van Oosterwijck v Belgium*, (1980) of 6 November 1980, A40 ECHR (vol A), paras 36-40 and *Sejdovic v Italy*, No. 56581/00, [2006] II ECHR 201, § 55.

11 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 142.

12 *Ibidem*, §§ 143 – 145. See as well: Inter-American Court of Human Rights, Case of *Veldsquez-Rodrlguez v Honduras*, Judgment of July 29, 1988, §§ 127-136; Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), International Court of Justice, Judgment of 30 November 2010, §§ 54-56.

State, the Court concludes that it has no reason to consider that the domestic remedies were not exhausted.

**35.** The Court further notes that the failure by the High Court Chamber for international crimes to comply with the Supreme Court's decision demonstrates that, in the instant case, it is not reasonable to refer the Applicant back to the same court whose decision proved ineffective in addressing his claims.

**36.** With respect to the filing of the Application within a reasonable time, the Court notes that the domestic remedies were exhausted on 6 June 2016, the date when the Supreme Court rendered its decision, and the Application was filed at the Court on 28 February 2017, that is, eight (8) months and twenty-two (22) days after that. The Court must therefore determine whether the Application was filed within a reasonable time, for the purposes of Rule 50(2)(f) of the Rules.

**37.** The Court recalls its case law that "...the reasonableness of the time limit for referral depends on the specific circumstances of the case and should be determined on a case-by-case basis".[13]

**38.** The Court has held that it is acceptable for an applicant to await the final decision of a procedure initiated at the national level if it is reasonable to expect that such a procedure would result in a decision in his favour.[14] In the instant case, the Court notes that the Applicant had a favourable decision from the Supreme Court, therefore, it was reasonable for him to wait for its execution by the High Court Chamber for International Crimes. Thus, the Court considers that the period of eight (8) months and twenty-two (22) days that elapsed between the decision of the Supreme Court and its referral is reasonable.

**39.** In light of the foregoing, the Court concludes that this Application meets all the conditions for admissibility and declares it admissible.

## VIII. Merits

**40.** The Court notes that the Applicant alleges a number of violations of the right to a fair trial, namely: i) the right to defence; ii) the right to legal aid; iii) the right to be tried before an independent and impartial court or tribunal. He also alleges the violation of his physical and mental integrity and his right to family and

13 *Zongo & ors v Burkina Faso* (preliminary objections), § 121. See also *Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 73.

14 *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application 001/2017, Judgment of 28 June 2019 (merits and reparations), §§ 82-85.

information.

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

### i. The right to defence

**41.** The Applicant submits that his right to defence provided for in Article 7(1)(a) of the Charter has been violated as a result of different acts carried out by the Rwandan authorities, namely:

i. refusal to "hear his arguments, his experts and his witnesses,[15] as well as the fact that "his motion for interlocutory judgement before the Supreme Court in Rwanda was equally denied";

ii. failure to try him in a language of his choice and "Although French is one of Rwanda's three official languages, the trial was held in Kinyarwanda",[16] a language that his Counsel do not speak;[17]

iii. The Prosecution's refusal to provide him with the information necessary for the preparation of his defence, whereas the High Court Chamber for International Crimes had ordered the Prosecutor to provide the necessary resources for the Applicant's[18] defence. The Registrar's office then handed the Applicant's file to his lawyer on a USB stick (flash drive) in January 2017, but the files were illegible;

iv. The High Court Chamber for International Crimes heard the oral arguments and submissions of the Prosecutor General of Rwanda, but refused to hear the Applicant's response, thereby denying the Applicant the right to equality of arms at trial.[19]

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**42.** The Court notes that the Applicant's allegations raise three issues, namely: i) the hearing of witnesses; ii) the language of the

15 Affidavit of Léon Mugesera, 14 April 2016, Nyanza Prison, §§ 8 and 9.

16 The request was all the more justified since two of its foreign lawyers, Ms. Melissa Kanas of the United States of America and Mr. Mr Gershom Otachi Bw'omanwa of Kenya, do not speak Kinyarwanda. They could therefore not fully defend their client.

17 Addendum 11 to Mugesera's observations, 2016, § 7.

18 Letter from Barrister Rudakemwa to Mr Yves Rusi, § 11.

19 Élise Grouix, The New International Justice System and the Challenges facing the Legal Profession (2010) Hors-Série, Revue québécoise de droit international, 39.

proceedings; and iii) the lack of information for proper preparation of the defence. These matters fall within the scope of Article 7(1) (c) of the Charter, which provides that "[e]very individual shall have the right to defence, including the right to be assisted by counsel of his or her choice. They also fall within the scope of Article 14(3) of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") which provides that: "everyone charged with a criminal offence shall be entitled: a) to be informed, promptly and in detail in a language which he understands, of the nature and cause of the charge against him; b) [to] have adequate time and facilities for the preparation of his defence".

**43.** The Court considers that, from a joint reading of the provisions of the two articles, it follows that the right to defence includes, "… the right of the accused to be fully informed of the charges brought against him is a corollary of the right to defence …",[20] the obligation to hear the accused's witnesses[21] and to ensure the provision of interpretation if the accused does not understand the language of the proceedings.[22]

**44.** The Court reiterates that failure by one of the parties to appear before it does not exempt the Applicant from having to prove his case, and adduce evidence, even if *prima facie*, to render the allegations credible. In the instant case, the Applicant claims that his lawyers of foreign origin (Ms Melissa Kanas from the United States of America and Mr Gershom Otachi Bw'omanwa from Kenya) do not speak Kinyarwanda without demonstrating that he requested that interpretation be provided. Furthermore, one member of his team of Counsel is a Rwandan national. In the absence of further substantiation, this claim is dismissed.

**45.** The Court notes that Applicant alleges the refusal by the High Court Chamber for the International Crimes to "hear his arguments, experts and witnesses", as well as the fact that "his motion for interlocutory judgement before the Supreme Court in Rwanda was equally denied" and the Public Prosecutor's refusal to provide him with the information necessary to prepare his defence.

20 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 158.

21 *Diocles William v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 426, § 62.

22 *Armand Guéhi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 73.

**46.** The Court considers that these allegations are supported by the Applicant's Counsels' letter dated 20 April 2012, addressed to the Attorney General, in which he raises the difficulty in preparing his defence because of the obstacles created by the judicial and penitentiary authorities.

**47.** In light of the foregoing, the Court holds that the Applicant's allegations have been proven and concludes that the Respondent State has violated the Applicant's right to a defence under Article 7(1)(a) of the Charter.

### ii. Right to legal assistance

**48.** Citing the Court[23] and the African Commission on Human and Peoples' Rights' (hereinafter referred to as "the Commission") jurisprudence,[24] the Applicant submits that while the Respondent State made a commitment to the Government of Canada before his extradition, to provide him with legal aid, such assistance has not been provided. The Applicant states that the Respondent State has refused to consider him indigent, whereas he did not have the resources to pay for the services of a lawyer.

**49.** According to the Applicant, his lawyer, Barrister Jean-Félix Rudakemwa, was fined 400,000 CFA francs (nearly €610) on the grounds that he unreasonably delayed the trial. The authorities have ordered that he no longer appear in court until he has paid the fine. According to the Applicant, this amount represents nearly thirteen (13) months of average gross salary in Rwanda.

**50.** The Applicant concludes that by its inaction and refusal to provide legal aid to the Applicant, the Respondent State is in breach of the guarantees it had given to the Government of Canada, and of Article 7(1)(c) of the Charter. According to the Applicant, both the provision and effectiveness of the legal aid are "a fundamental element of the right to fair trial".

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23 *Alex Thomas v Tanzania* (merits), § 123; *Wilfred Onyango Nganyi & ors v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 182.

24 *Doctors without borders (on behalf of Bwampamye) v Burundi*, Communication No. 231/99, Decision on the merits, (6 November 2000), (African Commission on Human and Peoples' Rights), § 30.

**51.** The Court notes that in terms of Article 7(1) (c) of the Charter, [e] very 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."

**52.** The Court notes that even if Article 7(1)(c) of the Charter does not expressly provide for the right to free legal assistance, such assistance is an inherent right of the right to a fair trial, in particular the right to defence guaranteed in Article 7(1)(c) of the Charter, read in conjunction with Article 14(3)(d) of the ICCPR.[25]

**53.** The Court observes that the first paragraph of the Respondent State's letter of undertaking to the Government of Canada states that

> [t]he accused will receive a fair trial in accordance with the national legislation and in conformity with fair trial guarantees contained in other international instruments ratified by the Republic of Rwanda", namely the Charter, the ICCPR, Genève Conventions of 1949 and Protocols I and II of 1977.[26]

**54.** The Court further notes that in paragraph 1(g) of the same letter, the Respondent State specifically undertook to guarantee to the Applicant:

> The right to defend himself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right, and to have legal assistance assigned to him or her, in any case where the interest of justice so requires, and without payment by the beneficiary if they do not have sufficient means to pay for it.

**55.** In the instant case, the Court observes that, in its letter of undertaking, the Respondent State assumes the obligation to provide free legal assistance to the Applicant under conditions laid down under Rwandese law and international law.

**56.** The Court, therefore, concludes that the Respondent State's undertaking does not create an obligation for the Respondent State beyond what is already provided for in Article 7(1)(c) of the Charter with regard to legal assistance.

**57.** Regarding the conditions required for obtaining legal assistance, the Court has always held that everyone charged with a criminal offence is automatically entitled to free legal assistance, even without requesting it, when the interest of justice so require, in particular if the person is indigent, the offence is serious and the

25 *Alex Thomas v Tanzania* (merits), § 114. The Respondent State became a party to the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976.

26 Letter of Assurance on Human Rights requested by the Government of Canada in the case of MUGESERA Leon, dated 27 March 2009.

penalty provided for by law is severe.[27]

**58.** In the instant case, the Applicant was accused of an international crime, namely genocide which carries a sentence of life imprisonment under Article 115 of the Rwandan Penal Code adopted by the law No 01 of 02 May 2012. Therefore, there is no doubt that the interest of justice justifies the granting of free legal assistance, if the Applicant proves he does not have the necessary means to pay for his own counsel.

**59.** However, the Court notes that, on the one hand, the Applicant claims that he is indigent without providing evidence to that effect[28] and, on the other hand, it appears from the record that, in addition to one lawyer from Rwanda, the Applicant was represented by two lawyers of foreign origin, which shows that he was at least able to obtain the services of a lawyer of his choice. The Court, therefore, holds that the Applicant does not satisfy conditions justifying the granting of legal aid as provided for under Article 7(1)(c) of the Charter and the letter of undertaking to the Government of Canada.

**60.** With regard to the fine imposed on the Applicant's counsel, the Court notes that States may regulate the practice of law and even impose sanctions on lawyers who violate professional or ethical obligations and standards.[29] These sanctions are the result of the personal conduct of the counsel, who may use existing mechanisms to challenge this sanction. For this reason, since the link between the fine imposed on his counsel and the Applicant's right to legal assistance has not been established, the allegation is dismissed on this point.

**61.** In light of the foregoing, the Court dismisses the allegation that the Applicant's right to legal assistance was violated.

### iii. The right to be heard by an independent and impartial court

**62.** The Applicant alleges that the Rwandan judiciary is neither independent nor impartial, as "[t]he *Honourable Judge Athanase*

27 *Ibid*, § 123. See also *Mohamed Abubakari v Tanzania* (merits), §§ 138 and 139.

28 *Alex Thomas v Tanzania* (merits), § 140. See also *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania* (merits), §§ 150 to 153.

29 Section I(b) of the Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa (2003) provides that: "States shall ensure that lawyers: 3. are not subject to, or threatened with, prosecution or economic or other sanctions for all measures taken in accordance with their recognized professional obligations, standards and ethics".

*Bakuzakundi* was replaced on 15 September 2014 by a new judge, two years after the beginning of the trial, on 12 September 2012, when most of the prosecution witnesses and oral submissions had been heard".

**63.** The Applicant also alleges that the Executive branch intervened in the appointment of judges, in violation of the Rwandan Constitution,[30] and in 2015, Human Rights Watch further denounced the alleged lack of independence of judges.[31] He further alleges that the situation would be even more dramatic for people of the Hutu ethnic group who are opponents of Paul Kagame's[32] regime. The Applicant claims that the pressure exerted on the judiciary by the Executive branch is even greater when it comes to political matters.[33]

**64.** In support of his claims, the Applicant recalls the statements of the former Minister of Justice, Mr. Stanislas Mbonampeka,[34] according to which "Léon Mugesera will certainly not be able to benefit from a fair trial in Rwanda, given that the executive holds all institutions with an iron fist, including the judiciary". He also cites the reports of various organisations, namely the *Commonwealth Human Rights Initiative (2008)*; *Human Rights Watch*, 2015 and the Human Rights Committee, 2016.[35] The reports of these organizations make reservations and raise concerns about the

30 Human Rights Council Working Group on the Periodic Review, tenth session, A./HRC./WG6/10/RWA/3 (2010), § 11.

31 *Ibid*, § 14.

32 Ms. Susan Thomson, of the Field Operations Service, based in Rwanda for the Office of the United Nations High Commissioner for Human Rights between 1997 and 1998, made the following observations: By labelling the Hutus as genociders, the RPF has put in place a maximum protection strategy that has even more negative effects on the possibility of benefiting from a fair trial before Rwandan courts]. Statement by Mrs Susan Thomson, § 14. More generally, in 2008, judicial and police employees claimed that all Hutus were complicit in the 1994 genocide. Human Rights Watch, Law and Reality: Progress in Judicial Reform in Rwanda (July 25, 2008).

33 Human Rights Council Working Group on the Periodic Review, tenth session, A./HRC. /WG6/10/RWA/3 (2010), § 11.

34 Sworn statement by Stanislas Mbonampeka, former Minister of Justice in Rwanda (3 January 2012): "Léon Mugesera will certainly not be able to benefit from a fair trial in Rwanda, given that the executive holds all institutions in an iron grip, including the judiciary."

35 Human Rights Committee: Closing remarks on the fourth periodic report of Rwanda, document No. CCPR/C/RWA/4, para. 33: "The Committee is concerned at reports of unlawful interference by public officials in the judicial system and notes that the procedure for appointing Supreme Court judges and presidents of the main courts may expose them to political pressure".

independence and impartiality of the Rwandan judiciary system.

**65.** The Applicant further cites the *Brown* case, in which "the High Court of England refused to expel a Rwandan citizen at the request of his government:[36] The Court held that expulsion could lead to a denial of justice, due to the lack of independence and impartiality of the Rwandan courts".

**66.** According to the Applicant, "due to government interference and political pressure on the judiciary, serious doubts may arise as to the bias of the High Court of Rwanda" and that this amounts to a violation of Articles 7(1)(d) and 26 of the Charter.

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**67.** The Court observes that Article 7(**1**)(d) of the Charter provides that "[e]veryone shall have the right to have his case heard. This comprises: … d) the right to be tried within a reasonable time by an impartial court or tribunal."

**68.** The Court further notes that, Article 26 of the Charter provides that "States Parties to this Charter shall have the duty to guarantee the independence of the Courts..."

**69.** The notion of judicial independence essentially implies the ability of courts to discharge their functions free from external interference and without depending on any other government authority[37] or Parties.

**70.** The Court considers that a combined reading of the above provisions does not mean that the replacement or substitution of judges is prohibited in the course of judicial proceedings and that, in the event of modification or substitution of a judge, this does not in itself constitute a violation of the independence or impartiality of a court.[38]

**71.** The Court is of the opinion that the change of a judge may be a form of interference if it has been determined or made to satisfy the wishes of another entity or one of the Parties, in violation of

36 *Vincent Brown, alias Vincent Bajinya & ors v the Government of Rwanda and the Secretary of State for the Interior* [2009] EWHC 770 (Admin), § 121.

37 *Action pour la protection des droits de l'homme v Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 697, § 117. See also Dictionary of international public Law, Jean Salmon, Brulyant, Bruxelles, 2001, pages 562 and 570.

38 *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 104.

the principles of the proper administration of justice.

**72.** In the instant case, the Applicant simply refers to a change of a judge, without indicating to what extent this constitutes bias or how the independence of the High Court Chamber for International Crimes would be affected. The Court also considers that the allegations about the lack of independence of the Respondent State's judiciary, including international reports, the decision of the High Court of England to refuse the extradition of a Rwandan to his country of origin and the declaration of the former Rwandan Minister of Justice, are general allegations that do not establish how are they connected to his case. This court has held that "[g[eneral assertions that a right has been violated are not sufficient. More concrete evidence is required.[39]

**73.** In light of the foregoing, the Court considers the Applicant's allegations as unsubstantiated and therefore concludes that the Respondent State has not violated the right to be tried by an independent and impartial tribunal as provided for in Articles 7(1) (d) and 26 of the Charter.

## B. Alleged cruel, inhuman and degrading treatment

**74.** The Applicant claims to be "a victim of cruel, inhuman and degrading treatment and constant threats, in violation of Article 5 of the Charter". This is on the basis that "Just before his extradition from Canada in 2012, the Rwandan government created an atmosphere of fear and intimidation by broadcasting in a loop the speech delivered by Mr. Mugesera in 1992".[40]

**75.** He also claims that he "lived in a state of terror, given that he was on the list of persons to be executed drawn up by the Rwandan government on 14 January 1994".[41] Since his arrival in Rwanda, the Applicant claims to have been subjected to constant threats and humiliation.[42] He states that he has consistently received death threats from Rwandan officials (secret service agents,

39 *Alex Thomas v Tanzania* (merits), § 140.

40 Canada's submissions on the admissibility and merits of Mr. Léon Mugesera's submissions, 26 July 2012, § 36, citing the opinion of the Minister's delegate (R. Grenier) dated 24 November 2011, p. 29. Human Rights Watch: "World Report 2015: Rwanda Events of 2014" (January 2015), available on the website. https://www.hrw.org/fr/world-report/2015/country-chapters/268129.

41 Affidavit of Mr. Alexanda Marcil, Defence Council (ICTR), 3 January 2012.

42 Letter from Mr. Jean-Félix Rudakemwa to Ms. Gemma Uwamariya (20 October 2012), § 29.

[43]police officers and prison wardens).[44]

**76.** The Applicant further alleges that "on 24 March 2016, he was transferred to Nyanza prison outside Kigali and his family was not informed about this for several days".

**77.** He also alleges that his "diet is poor. Indeed, his meals are often forgotten and his fruit-based diet[45] is not respected, nor is his cholesterol-free diet".[46] He states that he "does not receive the whole wheat bread required by his diet which is considered a real medication given his illness.[47] That is why he has been deprived of breakfast since 24 March 2016".[48]

**78.** In support of his claims, he cites the reports of Human Rights Watch and the High Commissioner for Human Rights, as well as those of the Commission, the jurisprudence of the Commission and the Inter-American Court of Human Rights, which "gives a broad interpretation of this prohibition, as creating a threatening situation can constitute inhuman treatment".

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**79.** Article 5 of the Charter reads as follows:

> 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, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

**80.** The Court observes that respect for human rights as a whole is intended to protect the dignity of the human person. However, under Article 5 of the Charter, the protection of human dignity takes a specific form, namely the prohibition of treatment likely

43 Letter from Mr. Jean-Félix Rudakemwa to Ms. Gemma Uwamariya (20 October 2012). § 15.

44 Letter from Mr. Jean-Félix Rudakemwa to Ms. Gemma Uwamariya (20 October 2012). § 28.

45 Letter from Mr. Jean-Félix Rudakemwa to Ms. Gemma Uwamariya (20 October 2012). § 15.

46 Board and Nurse Report, 28 December 2016, §§ 58 and 64; Special Diet Prescription, 2 July 2015; Observations on the Health of the Applicant, § 60. Letter from the Applicant's counsel, February 2017, § 30.

47 Board and Nurse Report, § 43 and 44.

48 *Ibid*, § 45.

to restrict it, such as slavery, slave trade, torture and any other form of cruel, inhuman or degrading treatment. Thus, the Court shares the Commission's view that Article 5 of the Charter "can be interpreted as extending to the broadest possible protection against abuse, whether physical or mental".[49]

**81.** The Court considers that the cruelty or inhumanity of the treatment must involve a certain degree of physical or mental suffering on the part of the person, which depends on the duration of the treatment, the physical or psychological effects of the treatment, the sex, age and state of health of the person. All this must be analysed on a case-by-case basis.[50]

**82.** The Court notes that questions relating to slavery, slave trade and torture do not arise in the instant case and the Applicant does not claim that these practices have taken place. Consequently, what remains is to examine the Applicant's allegations in the context of the prohibition of cruel, inhuman or degrading treatment as enshrined in Article 5 of the Charter.

**83.** The Court recalls that the Applicant alleges: i) the repeated broadcasting of his speech in 1992; ii) the inclusion of his name on the list of persons to be executed; iii) death threats by agents of the Respondent State; and iv) the refusal to provide adequate food to him and deprivation of communication with his family and lawyers.

**84.** The Court notes that the issue at stake is the burden of proof as regards these allegations, which is primarily incumbent on the Applicant, but may be shifted, if the Applicant provides *prima facie* evidence in support of his allegations.[51]

**85.** The Court observes that the Applicant has not provided proof of the allegation relating to the repeated re-run of his speech made in 1992, as the references presented as evidence do not contain any information to that effect. This allegation is therefore dismissed.

49 *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application 009/2015, Judgment of 28 March 2019 (merits and reparations), § 88. See also *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2011) AHRLR 90 (ACHPR 2011) § 196.

50 ECHR, *Ireland v The United Kingdom* (Application 5310/71) (19 January 1978), § 162; *Velasquez Rodriguez v Honduras* (1988) IACtHR, § 173; See also *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2011) AHRLR 90 (ACHPR 2011), §§ 186-209.

51 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania* (merits), §§ 142-146; *Armand Guéhi v United Republic of Tanzania* (merits and reparations), §§ 132-136.

**86.** With regard to the allegation of the inclusion of his name on the list of persons to be executed, the Court notes that the Applicant did not submit *prima facie* evidence to shift the burden of proof. The statement of Alexandra Marcel of 3 January 2012, cited by the Applicant, contains no reference to a list of persons to be executed with his name.

**87.** With regard to the allegations of death threats, deprivation of food and deprivation of communication with his family and lawyers, the Applicant has taken multiple steps with regard to the treatment to which he has been subjected by the authorities, namely: the letter to the Prosecutor General of the Republic of Rwanda dated 20 April 2012 concerning the difficulty of communicating with his family and lawyers, and his deprivation of food; the letter of 21 February 2017, addressed to the Director of Nyanza Prison, requesting permission to communicate with his lawyers, the letter of 14 February 2017, addressed to Mr. Yves Rusi (his son) concerning the death threats made by Rwandan officials.

**88.** The Court notes that the letters referred to above justify shifting the burden of proof to the Respondent State, given that the Applicant is in prison and that it is difficult for him to produce additional evidence beyond the steps he claims to have taken.[52] The Court also considers it relevant, for the reversal of the burden of proof, that the Applicant expressly mentioned the date from which he was deprived of breakfast, namely 24 March 2016.

**89.** The Court recalls that it is incumbent on the Respondent State to take all appropriate measures to protect detainees and to put in place mechanisms to monitor the conduct of prison wardens.[53] In the absence of contrary information concerning the allegations of death threats and deprivation of adequate food, the Court considers that these allegations are well-founded.

**90.** The Court considers that the right to dignity of the human being is incompatible with issuance of death threats against prisoners by prison officials. In addition to these threats, the Applicant's deprivation of adequate food, limited access to a doctor and medication, non-provision of an orthopaedic pillow, difficulties in establishing contact with his family and his counsel would lead

52 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania* (merits), § 142.

53 Section M(1)(d) of the Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa (2003) provides that: Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

to demoralisation and deterioration of the physical and mental condition of the detainee. The Court notes that the Applicant is already ill and is elderly and has been in detention since January 2012.

**91.** In view of the foregoing, the Court finds that this situation amounts to cruel, inhuman and degrading treatment of the Applicant, in violation of Article 5 of the Charter.[54]

**92.** The Court further notes that in accordance with Article 11 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[55] read together with Article 16 of the same text, the Respondent State:

> Shall keep under systematic review interrogation rules instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest detention or imprisonment in any territory under its jurisdiction…

**93.** The Court notes that even after the Applicant informed the Respondent State, through the Prosecutor General and the Director of the prison, about the conditions of his detention and the ill treatment to which he was exposed, it did not take appropriate measures to correct the abuse that the Applicant claimed to be a victim of. Consequently, the Court holds that the Respondent State has violated the Applicant's rights not to be submitted to cruel, inhuman and degrading treatment.

## C. Alleged violation of the right to physical and mental integrity

**94.** The Applicant submits that since his return to Rwanda and his imprisonment in 2012, the Respondent State has been violating his right to physical and mental integrity guaranteed under Article 4 of the Charter. The Applicant states that, the Respondent does so "by isolating him from any contact with his close relatives and his Defence team, by refusing to administer him appropriate medication and to provide him with the necessary medical care, the Applicant finds himself exposed to inhumane treatment likely to have serious and irreparable repercussions on his physical and mental health".

**95.** The Applicant claims to have "suffered inhuman and degrading treatment affecting his physical health such as lack of access

54 *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999), §§ 25 to 27.

55 The Respondent State ratified this Convention by accession on 15 December 2008.

to a doctor, cancellation of medical appointments, refusal to provide him with light adapted to his sight in his cell or access to an orthopaedic pillow". He alleges that "[t]hese conditions are, indirectly, an infringement on [his] mental integrity … [and] isolating the Applicant from his family and his Defence exacerbates his psychological distress. He alleges further that "… he was supposed to have access to a psychiatrist to treat the mental repercussions caused, such as sleep disorders and the trauma of a gradually failing eyesight without receiving any assistance".

**96.** He further states that he sometimes "... is cared for by a person who presents himself as a nurse but who, in fact, is a supervisor who has been converted into a nurse and has no certificate".

**97.** The Applicant alleges that "Since his arrival in Rwanda, [his] diet has been deficient. Indeed, his meals are often forgotten, and his fruit-based[56] diet is not respected, likewise his cholesterol-free[57] diet. More precisely, the Applicant does not receive the whole-wheat bread needed for his diet and considered as real medication in view of his illness.[58] Hence he has been deprived of breakfast since 24 March 2016".[59]

**98.** Citing the Commission's jurisprudence,[60] the Applicant alleges that "… Article 4 of the Charter, is violated when the State exposes an individual to "personal suffering and… deprive him of his dignity. "

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**99.** Article 4 of the Charter provides as follows: "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."

56 Letter from Mr. Donah Mutunzi to the Public Prosecutor, 20 April 2012, §§ 18 and 19.

57 Report of the Council/Nurse, 28 December 2016, §§ 58 and 64; Prescription of a special diet, 2 July 2015; Comments on the Applicant's health, § 60; Letter from the Council, February 2017, § 30.

58 Report of the Council/Nurse, 28 December 2016, §§ 43 and 44.

59 *Ibid*, § 45.

60 *John K. Modise v Botswana*, Communication No. 97/93, Decision on the merits: Amicable settlement, (6 novembre 2000) (African Commission on Human and Peoples' Rights), para. 91.

**100.** The Court recalls that it has held that "[c]ontrary to other human rights instruments, the Charter establishes the link between the right to life and the inviolable nature and integrity of the human being",[61] and the right to life within the meaning of Article 4 must be understood in its physical sense,[62] not in its existential sense, that is, "a decent existence…".[63]

**101.** The Court notes that the issue here is whether the facts presented by the Applicant relate to the right to physical life or the right to a decent existence. It notes that the facts presented by the Applicant, in theory, are likely to involve physical life. Accordingly, it will consider this allegation in the light of this aspect of the right to life.

**102.** The Court reaffirms that the right to life is the cornerstone on which the realisation of all other rights and freedoms depend, and the deprivation of someone`s life amounts to eliminating the very holder of these rights and freedoms, and that depriving someone of life renders his rights and freedoms irrelevant. This is why Article 4 of the Charter strictly prohibits the arbitrary deprivation of life.[64]

**103.** With regard to the lives of prisoners, the Court agrees with the Commission that State Parties to the Charter have an obligation "to provide the necessary conditions of a dignified life, including food, water, adequate ventilation, an environment free from disease, and the provision of adequate healthcare."[65]

**104.** The Court notes the applicant's situation of deprivation of food, poor sleeping conditions, detention in solitary confinement and lack of adequate medical care and psychiatric examination. It also notes that the poor illumination of his cell affects his vision. This situation of the Applicant is sufficiently serious and likely to cause his death, given his already poor state of health, as evidenced by the medical reports available in the file before this Court and his advanced age.

61 *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9, § 152.

62 *Ibid*, § 154.

63 *Ibid*, § 154

64 *African Commission on Human and Peoples' Rights v Kenya* (merits), § 152; Communication 223/98 (2000), *Forum of Conscience v Sierra Leone*, § 19; See also ECHR, *Streletz, Kessler and Krenz v Germany* (Applications Nos 34044/96, 35532/97 and 44801/98) (2001), § 72, 87 and 94.

65 General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia, § 36.

**105.** The Court notes that the Applicant buttresses his allegations with the correspondences he sent to report about the treatment meted out on him by the authorities. These correspondences are, first, the letter dated 4 April 2016, from his Counsel to the Prosecutor General of Rwanda denouncing the cancellations of the medical appointments of 10 March 2016 (ophthalmology Doctor), 25 April 2016 (internist Doctor), the exhaustion of the drugs stored, the refusal of the doctor to access the Applicant in prison to provide him with medical care, and deprivation of breakfast of whole wheat bread for forty-two (42) days as prescribed by the Doctor. The second is a letter from the Applicant's Counsel dated 28 December 2016, in which he denounced the same situations by mentioning a nurse in charge of the Nyanza Prison Dispensary (Mpanga) whom he accuses of violating medical ethics and seriously endangering the life and health of the Applicant.

**106.** The Court notes that, on 20 April 2012, the Applicant's Counsel had already sent a letter to the Prosecutor General of Rwanda raising the same concerns, in particular the isolation of the Applicant who could not easily contact his family, in particular his wife, and his lawyers, as well as the problem of inadequate food. Further it takes note of the Applicant's letter addressed to the Director of Nyanza Prison on 21 February 2017, in which he requested permission to contact his lawyers before the Court and complained of the lack of contact with family members; and Addendum 11 to the Observations sent to his son Ives Rusi, regarding the Applicant's conditions of detention, wherein he reports the lack of access to the doctor, cancellation of medical appointments, poor lighting in the cell and the lack of an orthopaedic pillow.

**107.** The Court considers that the evidence adduced by the Applicant is sufficient and concludes that the treatment meted out on the Applicant constitutes a violation of his right to life as provided for in Article 4 of the Charter.

## D. Alleged violation of the Applicant's right to family and to information

**108.** The Applicant alleges that he did not hear from his family for several days following his transfer to Nyanza prison, and that this constitutes a deprivation of the right to information provided for in Article 9(1) of the Charter. He further contends "... that the lack of information on the Applicant's fate and the obvious difficulties encountered until recently in contacting him constitute violations of Articles 6 and 7 of the African Charter".

**109.** The Applicant contends that his right under Article 18(1) of the Charter was violated, in that "as of 27 April 2012, he was granted the right to call his family on Wednesdays and to receive calls from his wife on Sundays, for a period of ten minutes each week. His right to communicate with his family was limited by the fact that prison wardens repeatedly denied him access to a telephone, forcing his wife to call several times before she could speak to her husband."

**110.** The Applicant further claims that he was transferred to another prison without the knowledge of his family members and that his telephone conversations with his lawyer and family were tapped.

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**111.** The Court notes that the allegation relating to the Applicants' communication with his family and his lawyer, including during the period when he was transferred to another prison, has already been examined in the light of the provisions of Articles 5 and 7(1)(c) of the Charter, relating to his physical and mental integrity and his right to a defence, respectively.

**112.** With regard to the allegation of a violation of Article 6 of the Charter, the Court is of the opinion that it is an allegation which is not the subject of the instant case, as the Applicant does not contest the lawfulness of his detention, rather the conditions of its detention.

**113.** In relation to the allegation of violation of the right to information, Article 9(1) of the Charter states that "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinion within the law."

**114.** The Court notes that the Applicant does not provide any evidence to support this allegation of violation. This court has held that "[g]eneral assertions that a right has been violated are not sufficient. More concrete evidence is required."[66]

**115.** As regards the alleged violation of the right to family, the Article 18(1) of the Charter provides that "the family shall be the natural unit and basis of society. It shall be protected by the State, which

66 *Alex Thomas v Tanzania* (merits), § 140.

shall take care of its physical and moral health."

**116.** The Court is of the opinion that the right to family implies, among other things, being able to live together or at least the family members can contact each other. Indeed, the issue here is whether the restrictions imposed on the Applicant constitute a violation of his family right.

**117.** The Court notes that the right to family allows for restrictions. However, such restrictions must comply with the conditions of Article 27(2) of the Charter, including respect for the rights of others, collective security, morality and the common interest.[67]

**118.** The Court considers that the exercise of this right is limited by the mere fact that a family member is in detention, as is the case for the Applicant's. However, the detainee "shall be given reasonable facilities to receive visits from family and friends, subject to restrictions that are necessary for proper administration of justice, the security of the institution and of the detainees."[68]

**119.** In the instant case, the Court notes that the Applicant admits that his family is allowed to visit him in prison and he was granted the right to call his family on Wednesdays and to receive calls from his wife on Sundays for ten (10) minutes. However, the Applicant alleges that his communication with the family was limited by the fact that on several occasions prison guards denied him access to the telephone, which required his wife to call several times before she could speak to him.

**120.** The Court notes that this allegation is buttressed by the letter dated 20 April 2012, from his Counsel to the Prosecutor General of Rwanda in which he raised the issue of his isolation due to difficulties in contacting his family, in particular his wife.

**121.** The Court notes that the reason why the duration of communication between the Applicant and his family was set at ten (10) minutes is not apparent from the record. Accordingly, the Court is not in a position to examine the compatibility of the restrictions imposed on the Applicant with the conditions set out in the Article 27(2) of the Charter. Furthermore, the Applicant does not challenge the time allocated to him to call his family. Nevertheless, the Court

67 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania* (merits) (2013) 1 AfCLR 34, § 100. See also *African Commission on Human and Peoples' Rights v Kenya* (merits), § 188.

68 Section M(2)(g) of the Principles and Guidelines on the right to a fair trial and legal assistance in Africa provides that: "Anyone who is arrested or detained shall be given reasonable facilities to receive visits from family and friends, subject to restriction and supervision only as are necessary in the interests of the administration of justice and of security of the institution."

considers that the failure by the prison authorities to comply with the facilities offered to the Applicant to communicate with his family constitutes a violation of his right to family provided under Article 18(1) of the Charter.

## IX. Reparations

**122.** The Applicant prays the Court to order measures to remedy the violations of his rights, including the annulment of his conviction and his release from detention, and to appoint an independent doctor to assess his state of health.

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**123.** Article 27(1) of the Protocol provides that "if the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

**124.** The Court considers that 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 granted, reparation should cover the full damage suffered. It is also clear that it is always the Applicant that bears the onus of justifying the claims made.[69] As the Court has stated previously, the purpose of reparations is to place the victim in the situation he/she would have been in but for the violation.[70]

**125.** In relation to material loss, the Court recalls that it is the duty of an applicant to provide evidence to support his or her claims for all alleged material loss. In relation to moral loss, however, the Court restates its position that prejudice is assumed in cases of human rights violations and the assessment of the quantum must

69 *Armand Guéhi v United Republic of Tanzania* (merits and reparations) § 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) (5 June 2015) 1 AfCLR 258, §§ 20-31; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346 §§ 52-59 and *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§ 27-29.

70 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 118 and *Norbert Zongo & ors v Burkina Faso* (reparations), § 60.

be undertaken in fairness looking at the circumstances of the case.[71] The practice of the Court, in such instances, is to award lump sums for moral loss.[72]

**126.** The Court recalls that it has already found that the Respondent State has violated the Applicant's rights under Articles 7(1) (c), 4, 5 and 18(1) of the Charter. It is in the light of these findings that the Court will examine the Applicant's prayers for reparations.

## A. Pecuniary reparations

**127.** The Applicant seeks pecuniary compensation for the material damage and moral damage suffered by himself and the indirect victims of the violations.

### i. Material prejudice

**128.** The Applicant prays the Court to order the Respondent State to pay him for material damage relating to his health care, legal fees and other costs incurred.

#### a. Material prejudice related to health care

**129.** The Applicant alleges that "the damage to his moral and physical health... is such that he will require numerous treatments over a long period of time, or even for the rest of his life".

**130.** The Applicant alleges that [w]ithout knowing the extent of the damage to [his] moral and physical health..., the exercise of determining the financial costs of comprehensive medical care in the event of [his] release can only be approximate". He asks the Court to order the Respondent State to pay damages estimated at a total of United States dollars Two Hundred and Eighty Thousand (US$280,000), calculated "on the basis of an estimated life expectancy of 80 years and health care needs estimated at 20,000 USD per year...".

71 *Armand Guehi v Tanzania* (merits and reparations) § 55; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 58; *Norbert Zongo & ors v Burkina Faso* (reparations), § 61; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 34.

72 *Lohé Issa Konaté v Burkina Faso* (reparations), § 59; *Norbert Zongo & ors v Burkina Faso* (reparations), § 62.

***

**131.** The Court notes that it is apparent from the file that the Applicant does not pay for any health care expenses while in detention, which are borne by the Respondent State.

**132.** The Court notes that the Applicant seeks reparations valued at United States dollars Two Hundred and Eighty Thousand (US$280,000). According to the Applicant, this amount is calculated "on the basis of an estimated life expectancy of 80 years and health care needs estimated at 20,000 USD per year."

**133.** The Court notes that the Applicant is requesting reparations for future material prejudice, without demonstrating in which circumstances they are going to occur. Therefore, the Court rejects the Applicant's prayer.

## b. Legal fees for proceedings before national courts

**134.** The Applicant claims the United States Dollars Ninety-four Thousand Two Hundred and Seventy-one and Seventy-six Cents (US$ 94,261.76) for the legal fees and expenses paid to Barrister Jean-Félix Rudakemwa, "for his six years of commitment to the case before the Rwandan courts".

**135.** The Applicant alleges that "this amount is established in accordance with the Model A of the fees for the Defence Counsel of persons tried in Rwanda following the referral of a foreign jurisdiction and pursuant to the commitments of the Rwandan Government to devote financial resources to legal assistance of such persons…"

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**136.** The Court recalls that, according to its case-law, reparations may include the reimbursement of legal fees and other costs incurred during domestic proceedings.[73] It is up to the Applicant to provide

73 *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 39; *Norbert Zongo & ors v Burkina Faso* (reparations), §§ 79 to 93; *Révérend Christopher R. Mtikila v Tanzania* (reparations), § 39.

the justification for the amounts claimed.[74]

**137.** The Court notes that the Applicant has not produced any retainer agreements with his counsel, Barrister Jean-Félix Rudakemwa, who represented him in proceedings before the national courts, but only receipts for the Counsel's transport costs. The Court notes, however, that according to the record, Barrister Jean-Félix Rudakemwa, a Rwandan lawyer, represented the Applicant before the national courts.

**138.** The Court notes that the Applicant claims United States Dollars Ninety-four Thousand Two Hundred and Seventy-one and Seventy-six Cents (US$ 94,261.76) for expenses and legal fees due to Counsel Me Jean-Félix Rudakemwa "for his six years of commitment to the case before the Rwandan courts".

**139.** The Court further notes that it is included in this amount: i) the fine paid by the lawyer of One Million Six Hundred and Forty-seven Thousand (RWF 1,647,000) Rwandan francs equivalent to United States Dollars One Thousand Six Hundred and Forty-seven and Five cents (US$ 1,647.05); ii) transport from Kigali prison to Nyanza and back,40 times – Rwandan francs Three Million Six Hundred Thousand (RWF 3,600,000.00) equivalent to United States Dollars Four Thousand Seven Hundred and Five and Eighty-eight Cents (US$4,705.88)); iii) transport from Kigali to Nairobi and back for United States Dollars Three Hundred and Fifty (US$ 350); iv) Four-day accommodation costs in Nairobi for United States Dollars four hundred (US$ 400); v) other costs (disbursements) for United States Dollars Seven Thousand Two Hundred and Two and Ninety-four cents (US$ 7,202.94).

**140.** With regard to the fine imposed on the Rwandan lawyer, the Court recalls that it found in paragraph 60 above of this judgment that this was an issue which concerned the conduct of the lawyer himself and not that of the Applicant and which is therefore not relevant to the case. This claim is therefore dismissed.

**141.** As regards the transport costs of the Rwandan lawyer for the forty (40) times he went to visit the Applicant and for his trip to Nairobi, the Court considers that these costs are related to the preparation of the defence. The Court notes that the Applicant did not submit proof of payment of the amounts claimed. However, in view of the fact that he has hired a counsel, which has certainly led to expenses for him, and taking into account that he has been partially successful in its allegations of violation, the Court

74 *Norbert Zongo & ors v Burkina Faso* (reparations), § 81; *Révérend Christopher R. Mtikila v Tanzania* (reparations), § 40.

decides to award the Applicant the sum of Rwandan Francs Ten Million (RWF 10,000,000) as for expenses and Counsel's fees for representing the Applicant in proceedings before the national courts.[75]

## ii. Moral prejudice

### a. Moral prejudice suffered by the Applicant

**142.** The Applicant claims that the alleged violations caused him "acute suffering, despair, stress, permanent anxiety", "anxiety and distress", "the gradual loss of the unavoidable of his life", "family alienation, the feeling of helplessness... a slow death programmed by the Respondent State", which "increases his worries, exasperation, troubles, suffering, agony, and stress". Accordingly, he prays the Court to order the Respondent State to pay him "USD 500 per day, for a total of USD 1,095,000 for six (6) years (365 days x 6) spent in the criminal justice system of the Respondent State".

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**143.** The Court recalls that moral prejudice involves the suffering, anguish and changes in the living conditions of an Applicant and his family.[76] The Court recalls further that there is a presumption of moral prejudice suffered by the Applicant once it has established that his rights have been violated and that he no longer needs to prove the existence of a link between the harm caused and the prejudice.[77]

**144.** In addition, the Court has also held that the assessment of the amounts to be awarded for moral damage must be made in all

75 *Ingabire Victoire Umuhoza v Rwanda* (reparations), §§ 44 and 46.

76 *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 34.

77 *Ingabire Victoire v Rwanda* (reparations), § 59; *Norbert Zongo v Burkina Faso* (reparations), § 61; *Ingabire Victoire v Rwanda* (reparations), § 59; Lohé Issa *Konaté v Burkina Faso* (reparations), § 58.

fairness and taking into account the circumstances of the case.[78] In such cases, the general principle is to allocate lump sums.[79]

**145.** The Court notes in this case that the claim for compensation for the Applicant's moral prejudice results from the Court's finding that the Respondent State has violated the Applicant's rights under Articles 4, 5 and 18(1) of the Charter. However, the Court considers that the amount requested by the Applicant as compensation for the moral prejudice suffered, namely United States one million and ninety-five thousand (US $1,095,000) dollars, is excessive.

**146.** In the light of these considerations and on the basis of equity, the Court considers that the Applicant is entitled to compensation for the moral prejudice suffered and grants him Rwandan Francs ten million (RWF 10,000,000 Fr).[80]

## b. Moral prejudice suffered by indirect victims

**147.** The Applicant seeks reparations for his close relatives as indirect victims, as follows:

i. Sixty-five thousand (65,000) United States dollars for his wife (Ms. Gemma Uwamariya); and

ii. Forty-five thousand (45,000) United States dollars for each of her two children (Carmen Nono and Yves Rusi).

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**148.** With regard to the moral prejudice suffered by indirect victims, the Court recalls that, as a general rule, for indirect victims to be entitled to reparation, they must prove their marital status or filiation to the Applicant.[81] Consequently, spouses should produce marriage certificates or any equivalent proof, birth certificates or any other equivalent evidence should be produced for children

78 Voir *Norbert Zongo & ors v Burkina Faso* (reparations), §§ 61; and *Reverend Christopher R. Mtikila v Tanzanie* (reparations), § 34.

79 *Norbert Zongo & ors v Burkina Faso* (reparations), § 62; *Lohé Issa Konaté v Burkina Faso* (reparations), § 59.

80 *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 46.

81 *Norbert Zongo & ors v Burkina Faso* (reparations), § 54; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135.

and parents must produce attestation of paternity or any other equivalent proof.[82] It is not sufficient to simply list the alleged indirect victims.[83]

**149.** In the instant case, the Applicant attached the statement of his alleged wife, Ms. Gemma Uwamariya, in which she claims to have married him on 7 October 1978 in Butare, Rwanda, an act celebrated by Father Félicien Muvara, and maintains that this relationship exists to this day. The alleged wife claims to have lost the marriage certificate when she fled Rwanda in March 1993.

**150.** The Court considers the events that occurred in Rwanda in 1993 to which the alleged wife refers are in the public domain and that their gravity and circumstances make it plausible that the marriage certificate proving the Applicant's marriage to Ms Gemma Uwamariya was lost as a result of her flight. In the absence of evidence to the contrary, the Court considers that the matrimonial relationship in question has been established by the affidavit sworn by Ms. Gemma Uwamariya.

**151.** With regard to Yves Rusi, the Court notes that two documents are relevant for the determination of his paternal relationship with the Applicant: the Power of Attorney issued by the Applicant to Yves Musi in his capacity as the Applicant's son; and the Power of Attorney delivered by Yves Rusi to the Applicant's lawyers invoking the same capacity.

**152.** Regarding Carmen Nono, the Court notes that the inquisitorial nature of the international human rights litigation and Rule 55 of the Rules[84] allow it to obtain, on its own initiative, all the evidence it considers appropriate to enlighten itself the facts of the case.[85] In the instant case, it is in the public domain that Carmen Nono is a member of the Applicant's family, her name appearing in particular in the various cases before the Canadian jurisdictions as such.[86]

**153.** As regards the determination of the amounts of pecuniary compensation for non-material damage, it appears from the

82 *Alex Thomas v United Republic of Tanzania*, ACtHPR, Application 005/2013, Judgment of 4 July 2019 (reparations), § 51; and *Armand Guehi v Tanzania* (merits and reparations) §§ 182 and 186.

83 *Andrew Ambrose Cheusi v United Republic of Tanzania* (merits and reparations), ACtHPR, Application 004/2015, Judgment of 26 March 2020, §§ 158-159.

84 Formerly, Rule 45 of the Rules of 2 June 2010.

85 ECHR, *Rahimi v Grèce*, Arrêt du 05 avril 2011, § 65.

86 Suprême Cour, *Mugesera c. Canada* (Ministre de la Citoyenneté et de l'Immigration), [2005] 2 R.C.S. 100, 2005 CSC 40 ; Federal Court Reports, *Mugesera v Canada* (Minister of Citizenship and Immigration) (T.D.) [2001] 4 F.C. 421.

Court's case-law that it has adopted the practice of granting lump sums,[87] calculated in equity, taking into account the particular circumstances of each case.[88]

**154.** The Court notes that, in the instant case, the Applicant calculated the amount of compensation on the basis of the number of days spent in detention. In paragraph 112 of this judgment, the Court concluded that the Application is not based on the lawfulness of the Applicant's detention rather on the conditions of detention. Therefore, the amount of compensation takes into account the duration of the violation and not the legality of the detention.

**155.** The Court also notes that the violations found are sufficiently relevant to cause suffering not only to the Applicant, but also to the members of his family, in this case his wife, in particular, in view of the difficulties she faced in having access to the Applicant, the deterioration of his health as proved by the medical reports submitted and the fact that he reported the treatment he had been undergoing in detention.

**156.** In view of the above and on the basis of equity, the Court awards Rwandan five million (RWF 5,000,000) to each of the indirect victims, that is, his wife Ms Gemma Uwamariya, son Yves Rusi and daughter Carmen Nono.

## B. Non-pecuniary reparations

### i. On quashing of the Applicant's conviction and sentence and his release

**157.** The Applicant prays the Court to quash his conviction and order his release.

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87 *Norbert Zongo & ors v Burkina Faso* (reparations), § 62; *Lohé Issa Konaté v Burkina Faso* (reparations), § 59.

88 *Armand Guehi v Tanzania* (merits and reparations), § 55 ; *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 58 ; *Norbert Zongo & ors v Burkina Faso* (reparations), § 61; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 34.

**158.** As regards the Applicant's request for an order to have the sentence imposed on him annulled and for his release, the Court recalls that it has held that such measures can only be ordered in exceptional and compelling circumstances[89].

**159.** With respect specifically to his release, the Court determined that it would order such a measure only:

> If an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice.[90]

**160.** In this case, the Court notes that the Applicant did not provide evidence of such circumstances. Moreover, in the alleged allegations, the Applicant only challenges the conditions of his incarceration, and not the legality of his detention. The Court therefore rejects the Applicant's request.

## ii. On rehabilitation measures

**161.** The Applicant prays the Court to order the appointment of an independent doctor to assess his state of health and determine the measures necessary for his assistance.

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**162.** The Court observes that the Applicant has been subjected to cruel, inhuman and degrading treatment and that his life, physical and mental health were endangered, in violation of Articles 4 and 5 of the Charter, respectively.

**163.** In light of the foregoing, the Court considers that an independent assessment of the Applicant's physical and mental health by an expert is necessary for the purposes of determining appropriate

89 See *Jibu Amir & anor v Tanzania*, § 96; *Alex Thomas v Tanzania* (merits), § 157; *Diocles William v Tanzania* (merits), § 101; *Minani Evarist v Tanzania* (merits), § 82; *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (2018) 2 RJCA 570, § 84; *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 RJCA 226, § 96; et *Armand Guéhi v Tanzania* (merits and reparations), § 164.

90 *Jibu Amir Mussa & anor v Tanzania*, §§ 96 and 97; *Minani Evarist v Tanzania* (merits), § 82; and *Mgosi Mwita Makungu v Tanzania* (merits), § 84. See also *Del Rio Prada v Spain*, European Court of Human Rights, Judgment of 10/07/2012, § 139; *Assanidze v Georgia* (GC) - 71503/01, Judgment of 8/04/2004, § 204; *Loayza-Tamayo v Peru*, Inter-American Court of Human Rights, Judgment of 17/09/1987, § 84.

treatment and, consequently, grants the Applicant's prayer.

### iii. On serving the remainder of the Applicant's sentence in Canada

**164.** The Applicant prays the Court "to direct the Respondent State to enter into discussions with Canada in order to allow him … to serve the remaining sentence in that country."

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**165.** The Court notes that, in principle, a person convicted by a court of a State shall serve the sentence in the territory of the same, unless there is an agreement with another State where the sentenced person will serve his sentence. In the instant case, the Court finds that the Applicant's request falls within the sovereign domain of the Respondent State and Canada.

**166.** The Court therefore rejects the Applicant's request.

### iv On adoption of sanctions against the Respondent State

**167.** The Applicant requests the Court to refer the matter to "[t] he African Union Commission and the Assembly of Heads of State and Government of the African Union in the event of non-performance by the Respondent State of the judgment rendered in the present case, to recommend the adoption of sanctions against the Respondent State, including, if necessary, a suspension of its membership in the African Union until the full implementation of the judgment is foreseen."

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**168.** Article 31 of the Protocol provides that "[t]he Court shall submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases

in which a State has not complied with the Court's judgment."

**169.** The Court notes that the provisions of this Article give it the power to monitor the implementation of its decisions. In the event of a finding of non-compliance, it shall report that fact to the Executive Council of the African Union.

**170.** The Court notes that, in the present case, the Applicant's request tends to anticipate both phases. Furthermore, if the Court's competence to monitor the implementation of its decisions is covered by the provisions of the Article 31 of the Protocol, the proposal to the Commission for the initiative to apply sanctions to the Respondent State falls within the mandate of the Executive Council of the African Union, in accordance with the Article 31 of the Protocol.

**171.** In view of the foregoing, the Applicant's request is dismissed.

## X. Costs

**172.** The Applicant is claiming United States Dollars seventy-five thousand (US$ 75,000) for Counsel Geneviève Dufour and David Pavot, United States Dollars fifteen thousand (US$ 15,000) for the International Legal Assistance Office of the University of Sherbrooke and United States thirty thousand (US$ 30,000) for Barrister Philippe Larochelle.

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**173.** The Court notes that Rule 32(2) of the Rules[91] provides that "unless otherwise decided by the Court, each party shall bear its own costs".

**174.** The Court recalls, as in its previous judgments, that reparation may include the payment of legal fees and other costs incurred in international proceedings.[92] However, the Applicant must justify the amounts claimed.[93]

91 Formerly, Rule 30(2) of the Rules of 2 June 2010.

92 *Norbert Zongo & ors v Burkina Faso* (reparations), §§ 79-93; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 39.

93 *Norbert Zongo & ors v Burkina Faso* (reparations), § 81; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 40.

**175.** The Court notes that the Applicant did not present any retainer agreements concluded with the lawyers, nor any receipts for the payments they received. The Applicant simply lists the amount for legal fees by the various lawyers. However, the Court notes that the three (3) lawyers (Geneviève Dufour, David Pavot and Philippe Larochelle) represented the Applicant in these proceedings and that, consequently, it presumes that the Applicant have to pay their legal fees.

**176.** The Court considers that, since the Applicant has partially won his case, it deems it more appropriate to award him in equity, the lump sum of Rwandan Francs ten million (RWF 10,000,000), as reimbursement for the fees paid to his lawyers.[94]

## XI. Operative part

**177.** For these reasons,
The Court,
*In default*
*Unanimously*:
*On jurisdiction*
i. *Declares* it has jurisdiction.

*On admissibility*
ii. *Declares* the Application is admissible.

*On merits*
*Unanimously:*
iii. *Holds* that the Respondent State has not violated Article 7(1)(c) of the Charter with respect to the Applicant's allegation that his witnesses did not appear;
iv. *Holds* that the Respondent State has not violated Article 7(1)(c) and (d) of the Charter, as read together with Article 14(3) of the ICCPR, and the letter of undertaking to the Government of Canada, with regard to the Applicant's right to free legal assistance;
By a majority of Nine (9) for and One (1) against, Judge Rafaâ BEN ACHOUR dissenting:
v. Holds that Respondent State has not violated the Applicant's right to be heard by an independent and impartial court, provided for under Articles 7(1)(d) and 26 of the Charter;

94 *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 46.

*Unanimously:*

vi. *Finds* that the Respondent State has violated Article 5 of the Charter for having subjected the Applicant to cruel, inhuman and degrading treatment;

vii. *Finds* that the Respondent State has violated the Applicant's right to life under Article 4 of the Charter, for an attempt on his life.

viii. *Finds* that the Respondent State has violated the Applicant's right to family under article 18(1) of the Charter, with respect to his contact with family members.

*Unanimously:*

*On reparations*

*On pecuniary reparations*

ix. *Does not grant* the Applicant's prayer for material damages for his imprisonment.

x. *Dismisses* the Applicant's prayer for reimbursement of the amount of the fine imposed on his Rwandan lawyer, Barrister Jean-Félix Rudakemwa, as it does not fall within this case;

xi. *Grants* the Applicant's prayer as fees with legal representation before the domestic proceedings and awards him Rwandan Francs ten million (RWF 10, 000,000);

xii. *Grants* the Applicant's prayer for compensation for the moral prejudice suffered by him and by the indirect victims, and awards them compensation as follows*:*

   a. Rwandan Francs ten million (RWF 10,000,000) to the Applicant;

   b. Rwandan Francs five million (RWF 5,000,000) each to Ms. Gemma Uwamariya, the Applicant's wife, his son, Yves Musi and daughter, Carmen Nono;

.

*On non-pecuniary reparations*

xiii. *Dismisses* the Applicant's prayer to quash his conviction and the sentence imposed on him.

xiv. *Dismisses* the Applicant's prayer for the Court to order his release from prison.

xv. *Dismisses* the Applicant's prayer to order the Respondent State to enter into negotiations with the Government of Canada with a view to the Applicant serving the remainder of his sentence in Canada.

xvi. *Dismisses* the Applicant's request regarding the imposition of the sanctions against the Respondent State in case of non-execution of this judgment.

xvii. *Orders* the Respondent State to appoint an independent medical doctor to assess the Applicant's state of health and to determine the measures required to assist him.

*On costs*

xviii. *Grants* the Applicant's prayers for legal fees of his lawyers before this Court and awards him the sum of Rwandan Francs Ten Million (RWF 10,000,000).

*On implementation and reporting*

xix. *Orders* the Respondent State to pay the amounts indicated in paragraphs xi, xii and xviii above, free of tax, within six (6) months from the date of notification of this judgment, failing which it shall also pay default interest calculated on the basis of the applicable rate set by the Central Bank of the Republic of Rwanda, throughout the period of late payment and until the sums due have been paid in full.

xx. *Orders* the Respondent State to report within six (6) months of the date of notification of this judgment on the measures taken to implement it and thereafter every six (6) months until the Court considers that it has been fully complied with.

## Pan African Lawyers Union (PALU) (Advisory Opinion) (2020) 4 AfCLR 874

Application 001/2018, *Request for Advisory Opinion by the Pan African Lawyers Union (PALU)*

Advisory Opinion, 4 December 2020. Done in English and French, the English text being authoritative.

This request for advisory opinion was brought by the Pan African Lawyers Union to seek the Court's views on vagrancy laws across Africa. The Court held that vagrancy laws violate a range of rights guaranteed in several instruments.

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

**Jurisdiction** (personal jurisdiction, 20-21; African organisation, 22; recognition by AU, 24; material jurisdiction, 26; access 37)

**Admissibility** (pendency before the African Commission, 30, 32)

**Advisory Opinion** (nature of proceedings, 36)

**Equality, equal protection of law and non-discrimination** (interconnected, 66; 'any other status', 66; unlawful differentiation, 67; criminalisation of economic status, 72-74)

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Separate Opinion: TCHIKAYA

**Advisory Opinion** (conditions for admissibility, 28-29)

## I. The Author

**1.** This Request for Advisory Opinion (hereinafter referred to as "the Request") was filed by the Pan African Lawyers Union (hereinafter referred to as "PALU").

**2.** PALU states that it is an African organisation based in Arusha, United Republic of Tanzania and that it is recognised by the African Union (hereinafter referred to as "the AU"). In support of this assertion, PALU has provided the Court with a copy of the Memorandum of Understanding (hereinafter referred to as "MoU") signed between itself and the AU dated 8 May 2006.

## II. Subject of the Request

**3.** PALU submits that a number of AU Member States retain laws which criminalise the status of individuals as being poor, homeless or unemployed as opposed to specific reprehensible acts. PALU has generically termed these laws as "vagrancy laws".

**4.** According to PALU "[m]any countries abuse [vagrancy laws] to arrest and detain persons where there has been no proof of a criminal act." PALU submits, therefore, that these laws are overly broad and confer too wide a discretion on law enforcement agencies to decide who to arrest which impacts disproportionately on vulnerable individuals in society. PALU also submits that arrests for violation of vagrancy laws contribute to congestion in police cells and prison overcrowding. It is PALU's further submission that the manner in which vagrancy offences are enforced is contrary to the basic principles of criminal law i.e. it undermines the presumption of innocence and thereby threatens the rule of law.

**5.** PALU, therefore, requests for an opinion from the Court on the following questions:

a. Whether vagrancy laws and by-laws, including but not limited to: those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence; as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have a visible means of subsistence and cannot give good account of him or herself, violate: [Articles 2, 3, 5, 6 ,7, 12 and 18 of the African Charter on Human and Peoples' Rights ].

b. Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's deportation to another area, violate: [Articles 5, 12, 18 of the African Charter on Human and Peoples' Rights and Articles 2, 4(1) and 17 of the African Charter on the Rights and Welfare of the Child].

c. Whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without warrant simply

because the person has no 'means of subsistence and cannot give a satisfactory account' of him or herself, violate [Articles 2, 3, 5, 6, 7 of the African Charter on Human and Peoples' Rights, Articles 3, 4(1), 17 of the African Charter on the Rights and Welfare of the Child and Article 24 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa].

d. Whether State Parties to the African Charter on Human and Peoples' Rights have positive obligations to repeal or amend their vagrancy laws and/or by-laws to conform with the rights protected by the [African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa] and in the affirmative, determine what these obligations are.

## III. Summary of the Procedure before the Court

**6.** The Request was filed at the Registry of the Court on 11 May 2018.

**7.** On 13 August 2018, the Registry requested the African Commission on Human and Peoples' Rights (hereinafter referred to as the "Commission.") to confirm that the subject matter of the Request was not related to any matter pending before it. On the same day, the Registry wrote to the AU Commission's Legal Counsel to confirm PALU's claim that it has an MoU with the AU.

**8.** By a letter dated 26 October 2018, the AU Commission's Legal Counsel confirmed that the AU has a subsisting MoU with PALU.

**9.** On 8 November 2018, the Registry notified the following entities of the filing of the Request: AU Member States; the Commission; the AU Commission; the African Committee of Experts on the Rights and Welfare of the Child; the Pan African Parliament; the Economic, Social and Cultural Council of the AU; the AU Commission on International Law; the Directorate of Women, Gender and Development of the AU; the African Institute of International Law; and the Centre for Human Rights, University of Pretoria. The Court set a ninety (90) day limit for receiving observations on the Request.

**10.** On 18 December 2018 the Court received a letter from the Commission in which it advised the Court that it had, in 2017, adopted Principles on Decriminalisation of Petty Offences in Africa and that these Principles ably captured its position on the subject matter of the Request.

**11.** On 18 June 2019 the Court received a submission from Burkina Faso.

**12.** On divers dates, the following entities filed their *amicus curiae* briefs pursuant to the Court's grant of leave: the Network of

African National Human Rights Institutions (hereinafter referred to as "the NANHRI"); the International Commission of Jurists, Kenyan Section (hereinafter referred to as " the ICJ-Kenya"); the Centre for Human Rights, University of Pretoria and the Dullah Omar Institute for Constitutional Law Governance and Human Rights, University of Western Cape (hereinafter referred to as "the CHR and DOI"); the Human Rights Clinic, University of Miami and Lawyers Alert, Nigeria (hereinafter referred to as "the HRC-Miami and Lawyers Alert") and the Open Society Justice Initiative (hereinafter referred to as "the OSJI").

**13.** On 10 October 2020 PALU and all entities that had filed observations on the Request were notified of the close of pleadings.

## IV. Jurisdiction

**14.** Article 4(1) of the Protocol to the African Charter on Human and People' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), whose provisions are reiterated in Rule 82(1) of the Rules of Court (hereinafter referred to as "the Rules"),[1] provides as follows:

> At the request of a Member State of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

**15.** The Court observes that Rule 87 of the Rules provides that "[t]he Court shall apply, *mutatis mutandis*, the provisions of Part V of [the Rules] to the extent that it deems appropriate, to advisory procedure/proceedings." [2] In line with the edict in Rule 87 of the Rules, the Court further notes that Rule 49(1) of the Rules stipulates that "the Court shall ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules." [3]

**16.** Following from the provisions of Rule 49(1) of the Rules, therefore, in all advisory proceedings, the Court must, ascertain

1 Formerly Rule 68, Rules of Court 2010.

2 Formerly Rule 72, Rules of Court 2010.

3 Formerly Rule 39(1), Rules of Court 2010.

its jurisdiction.

**17.** PALU submits that the Request is made under Article 4(1) of the Protocol and Rule 68 of the Rules.[4] It also avers that the Request is on a legal matter as to whether vagrancy laws, as applied by some Member States of the AU, violate the African Charter on Human and Peoples' Rights (hereinafter "the Charter"), the African Charter on the Rights and Welfare of the Child (hereinafter the Children's Rights Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter "the Women's Rights Protocol").

**18.** PALU further submits that its standing to make this Request, under Article 4(1) of the Protocol, is established by virtue of its MoU with the AU and also by its Observer Status with the Commission.

***

**19.** The Court recalls that in advisory opinions, given that such requests do not involve contestation of facts between opposing parties, it need not consider its, territorial and temporal jurisdiction.[5] For this reason, therefore, the Court will only interrogate whether the Request satisfies the requirements for personal and material jurisdiction.

## A. Personal jurisdiction

**20.** To determine whether it has personal jurisdiction, the Court must satisfy itself that the Request has been filed by one of the entities contemplated under Article 4(1) of the Protocol, to request for an advisory opinion.[6]

**21.** Focusing on the entities listed in Article 4(1) of the Protocol, the Court observes that PALU does not belong to the first three categories mentioned in Article 4(1) of the Protocol i.e. it is not a member state of the AU, it is not the AU and it is also not an organ of the AU. In the circumstances, therefore, the question

4 Currently Rule 82, Rules of Court 2020.

5 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (5 December 2014) 1 AfCLR 725 § 38.

6 *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (Advisory Opinion) (26 May 2017) 2 AfCLR 572 § 38.

that arises is whether PALU falls under the fourth category, that is, whether it is an "African organization" and also one that is recognised by the AU.

**22.** As the Court has held, "an organisation may be considered as 'African' if it is registered in an African country and has branches at the sub-regional, regional or continental levels, and if it carries out activities beyond the country where it is registered."[7]

**23.** In respect of the Request, the Court notes that PALU is registered in a Member State of the AU, to wit, the United Republic of Tanzania and that it has structures at the national and regional levels as an umbrella organization of national and regional lawyers' associations. The Court also notes that PALU undertakes its activities beyond the territory where it is registered.

**24.** The Court recalls that, and as confirmed by the AU Commission's Legal Counsel, on 8 May 2006 PALU and the AU signed an MoU to co-operate in undertaking activities concerning the rule of law, promoting peace and integration, and protecting human rights across the continent. The signing of an MoU is an accepted way by which the AU recognises non-governmental organisations.[8] The Court finds, therefore, that PALU is an organization recognised by the AU within the meaning of Article 4(1) of the Protocol.

**25.** Given the above, the Court concludes that it has personal jurisdiction to deal with the Request.

## B. Material jurisdiction

**26.** In terms of its material jurisdiction, the Court recalls that under Article 4(1) of the Protocol, whose provisions are reiterated in Rule 82(2) of the Rules,[9] it may provide an advisory opinion on "any legal matter relating to the Charter or any other relevant human rights instrument …."

**27.** The Court observes that PALU has requested it to interpret specific provisions of the Charter, the Children's Rights Charter and the Women's Rights Protocol. The Request, therefore, is on legal matters relating to the enjoyment of human rights guaranteed in

7 *Request for Advisory Opinion by L'Association Africaine de Defense des Droits de l'Homme* (Advisory Opinion) (28 September 2017) 2 AfCLR 637 § 27.

8 *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria & ors* (Advisory Opinion) (28 September 2017) 2 AfCLR 622 § 49.

9 Formerly Rule 68(2), Rules of Court 2010.

the aforementioned instruments.

**28.** In the circumstances, the Court holds that it has material jurisdiction in respect of the Request.

## V. Admissibility

**29.** According to PALU, the Request is admissible since it does not relate to any application pending before the Commission.

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**30.** The Court observes that Article 4(1) of the Protocol, the provisions of which are restated in Rule 82(3) of the Rules, [10] provides that it may provide an advisory opinion "provided that the subject matter of the opinion is not related to a matter being examined by the Commission.

**31.** The Court recalls that by a letter dated 13 August 2018 it requested the Commission to advise on whether the Request, as filed by the PALU, was related to any matter pending before it. In its response, dated 18 December 2018, the Commission informed the Court that it had, in 2017, developed Principles on the Decriminalisation of Petty Offences in Africa. According to the Commission, the said principles well articulate its position on the subject matter of the Request. The Commission, however, did not expressly state whether the Request related to any matter pending before it but simply urged the Court to consider the Principles on the Decriminalisation of Petty Offences in Africa in dealing with the Request.

**32.** Given the Commission's response, the Court infers, therefore, that no matter related to this Request is pending before the Commission. The Court also confirms that PALU has provided the context within which the Request arises as well as the address of its representatives. The Court thus finds that the Request is admissible.

10 Formerly Rule 68(3), Rules of Court 2010.

## VI. On the questions presented

**33.** In paragraph 5 above, the Court reproduced verbatim all the questions on which PALU seeks its opinion. In respect of these questions, the Court notes that PALU, essentially, questions the compatibility of vagrancy laws with the Charter, the Children's Rights Charter and the Women's Rights Protocol. Given the preceding, and without in any way undermining the four questions as framed by PALU, the Court will, sequentially, assess vagrancy laws as against the standards in the three aforementioned instruments. Thereafter it will separately address the fourth question posed by PALU which seeks the Court's opinion on the obligations of State's parties under the Charter, the Children's Rights Charter and the Women's Rights Protocol in respect of the vagrancy laws.

**34.** In relation to the instruments invoked by PALU, the Court notes as follows: the Charter has been ratified by fifty-four (54) of the fifty-five (55) Member States of the AU;[11] the Children's Rights Charter has been ratified by forty-nine (49) Member States;[12] and the Women's Rights Protocol by forty-two (42) Member States.[13] The Court observes that although none of the three instruments has universal Pan-African ratification, the rate of ratification remains high. More pointedly, the Court notes that all fifty-five (55) Member States of the AU have ratified the Constitutive Act of the AU.[14]

**35.** The Court remains alive to the fact that some Member States of the AU have not ratified the instruments that PALU has invited it to employ in assessing the compatibility of vagrancy laws with human rights standards. Nevertheless, the Court understands that all Members States of the AU have undertaken to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human

11 https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed 10 November 2020).

12 https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf

13 https://au.int/sites/default/files/treaties/37077-sl- (accessed 10 November 2020).PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf (accessed 10 November 2020) .

14 https://au.int/sites/default/files/treaties/7758-sl-constitutive_act_of_the_african_union_2.pdf (accessed 10 November 2020).

rights instruments."[15] By making this commitment, Member States have assumed the obligation to uphold human rights in respect of all persons within their jurisdiction.

**36.** In connection to its jurisdiction to render advisory opinions, the Court bears in mind the fact that it does not resolve factual disputes as between opposing parties during advisory proceedings. Its main duty is to provide "an opinion on any legal matter relating to the Charter or any other relevant human rights instruments."[16] In doing this, the Court principally assesses the compatibility of the matters raised in a request for an opinion with the Charter and other applicable human rights standards. Any use of examples/ illustrations, in the course of an advisory opinion, therefore, simply serves to highlight the practical dimensions of the opinion and does not amount to a decision on any factual situation. [17]

**37.** The Court further recalls that its jurisdiction to render an advisory opinion can be invoked by any Member State of the AU and is not limited to those States that have ratified the Protocol or any other AU human rights instruments. Equally, therefore, the Court understands that its advisory opinions provide guidance to all Member States of the AU.

## A. Compatibility of vagrancy laws and the Charter

**38.** Specifically in relation to vagrancy laws and Charter, PALU has requested the Court to provide an opinion on:

Whether vagrancy laws and by-laws, including but not limited to, those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence; as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have visible means of subsistence and cannot give good account of him or herself violate [Articles 2, 3, 5, 6, 7, 12 and 18 of the Charter].

**39.** PALU has also requested the Court to advise on:

Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant

15 Article 3(h) of the Constitutive Act of the AU.

16 Article 4(1) of the Protocol.

17 Cf. Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 of September 17, 2003 Requested by the United Mexican States, Juridical condition and rights of undocumented migrants* §§ 63-65.

or rogue and vagabond, summarily orders such person's deportation to another area, violate Articles 5, 12, 18 of the Charter.

**40.** PALU has further requested the Court to provide an opinion on:
Whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without a warrant simply because the person has no "means of subsistence and cannot give a satisfactory account" of him or herself, violate Articles 2, 3, 5, 6 and 7 of the Charter.

## i. PALU's position

**41.** PALU argues that vagrancy laws and by-laws criminalize poverty and are inconsistent with the right to dignity, equality before the law and non-discrimination. According to PALU, vagrancy laws do not punish specific acts of individuals but a status that individuals involuntarily entered into and cannot or easily be changed. PALU also argues that these laws either target or have a disproportionate impact on poor and vulnerable persons

**42.** According to the PALU:
[Vagrancy laws] afford police justification which otherwise would not be present under prevailing constitutional and statutory limitations; that is to arrest, search, question and detain persons solely based on suspicions that they have committed or may commit a crime. [Vagrancy laws] are also used by police to clear the streets of 'undesirables', to harass persons believed to be engaged in crime, and to investigate unclear offences.

**43.** PALU argues that such an application of vagrancy laws is prevalent across Africa despite the lack of evidence of correlation between vagrancy and criminality. Vagrancy laws, PALU points out, are unnecessary for the legitimate purpose of crime prevention since:
Most Penal Codes allow police to arrest a person without a warrant based on a suspicion on reasonable grounds that an offence has been committed. The requirement of reasonable cause is an important safeguard from improper police invasions of constitutionally protected rights. These criminal procedure provisions ought to be sufficient without the need for vagrancy laws to be used as catch-all provisions to prevent crime.

**44.** PALU also points out that "[v]agrancy laws are applied in a manner where a person is arrested without evidence and where the police seldom attempt to provide evidence." PALU contends that vagrancy laws are used by the police to clear the streets of people who are deemed undesirable, to harass persons who the police suspect to have engaged in criminal activities and to investigate unclear offences.

**45.** PALU submits that prison conditions, across Africa, are often appalling and thus any detention results in serious violations

of the detainee's human rights. Detention facilities are "often unhygienic and hazardous" and insufficient food is provided to detainees. According to PALU, the common practice by the police, across Africa, is to mount sweeping operations under vagrancy laws resulting in mass arrests and guilty pleas which exacerbates the living conditions of detainees by overcrowding detention facilities. PALU further submits that such arrests and detentions also burden a suspect's family members, who must bring food and pay for bail, among other things.

**46.** According to PALU vagrancy laws often do not have the clarity, accessibility and precision required under section 2(a) of the Commission's Guidelines on the Use and Conditions of Arrest, Police and Pre-trial Detention in Africa, which provide that:[18]

> Persons shall only be deprived of their liberty on grounds and procedures established by law. Such laws and their implementation must be clear, accessible and precise, consistent with international standards and respect the rights of the individual.

**47.** PALU argues that the phrases such as "known or reputed thief", "having no visible means of support" and "give no good account of themselves" are imprecise and thus give neither fair nor adequate notice to those who might come within their scope nor sufficient guidelines to those empowered to enforce them. PALU thus submits that the ambiguity in vagrancy laws gives overly broad discretion to law enforcement officers, which results in arbitrary and discriminatory enforcement based on the police's prejudice and social stigma which disproportionately targets poor and marginalized populations.

**48.** PALU also argues that because the police's suspicion is the foundation in the enforcement of vagrancy laws, the principle that an individual is presumed innocent until proven guilty is negated when applying vagrancy laws.

**49.** PALU also points out that "[i]n many countries, once declared a vagrant, a person can also be banned from [an] area, sent back to his or her place of origin, or otherwise deported, if the person is not a citizen." It thus submits that this is a violation of Articles 5, 12 and 18 of the Charter.

18 See, https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrs/guidelines_on_arrest_police_custody_detention_final_en_fr_po_ar.pdf (accessed 16 October 2020).

## ii. Observations by AU Member States and *amici curiae*

**50.** Burkina Faso, in its submission, points out that many of the vagrancy offences require social rather than penal responses. It also submits that vagrancy offences tend to perpetrate discrimination and also effect violation of the freedom of movement and choice of residence which are guaranteed in Article 12 of the Charter. It further submits that vagrancy laws violate the right to liberty and impede the right to a fair trial especially by diluting the presumption of innocence

**51.** The NANHRI observes that enforcement of vagrancy laws often leads to the exacerbation of prison overcrowding and thus worsens the conditions of incarceration. It submits that vagrancy laws and by-laws that criminalise the status of a person as being without a fixed home, employment or means of subsistence are, therefore, contrary to the rights entrenched in the Charter. It further submits that arrests and detention for vagrancy-related offences are a disproportionate response to unemployment, poverty and homelessness that may result in significant harm to the individual and his or her family. The essence of the NAHRI submission is also reflected in the observations filed by the OSJI.

**52.** The ICJ-Kenya observes that vagrancy laws have a net effect of targeting the poor and the marginalized, especially women, victims of domestic violence and sex workers It submits that the continued enforcement of vagrancy laws has resulted in unparalleled human rights violations suffered by alleged petty offenders at the point of arrest, detention before trial, trial and post-trial periods and hence is incompatible with the principles of international human rights law, including the prohibition of arbitrary arrest and detention.

**53.** According to the Principles on the Decriminalisation of Petty Offences in Africa, which were submitted by the Commission, laws that create petty offences are inconsistent with the principles of equality before the law and non-discrimination in that they either target or have a disproportionate impact on the poor and vulnerable and perpetrate gender-based discrimination. The enforcement of petty offences, it is argued, has the effect of punishing, segregating, controlling and undermining the dignity of individuals on account of their socioeconomic status thereby perpetuating the stigmatisation of poverty

**54.** The CHR and DOI observe that arrests and detentions under vagrancy laws are often not for prosecuting the suspects but for intimidating and removing them from the streets. Such arrests are not supported by law enforcement officers' reasonable suspicion

that an offence has been or is about to be committed. They further submit that vagrancy laws violate key human rights in the Charter which also results in an adverse socio-economic impact on those that are arrested or detained. According to CHR and DOI, such an infringement of the ability of individuals to be agents of their own development is only justified if it is within the ambit of democratic and rights-respecting laws.

**55.** The submission by HRC-Miami and Lawyers Alert reiterates the points made by the ICJ-Kenya, the NAHRI and also the CHR and DOI. Additionally, the HRC-Miami and Lawyers Alert point out that vagrancy is the principal crime in which the offence consists of being a certain kind of person rather than in having done or failed to do certain acts thereby violating Articles 2, 3, 5 and 6 of the Charter.

**56.** The OSJI submits that vagrancy laws are a colonial relic that work to reinforce patterns of discrimination instituted by colonial regimes contrary to Article 2 of the Charter.

### iii. The Court's position

**57.** According to the Black's Law Dictionary, a vagrant is anyone belonging to the several classes of idle or disorderly persons, rogues and vagabonds.[19] This includes anyone who, not having a settled habitation, strolls from place to place; a homeless, idle wanderer. Vagrancy, generally, is the state or condition of wandering from place to place without a home, job or means of support. Vagrancy is thus considered a course of conduct or a manner of living, rather than a single act.[20] The term "vagrancy" is generic. It refers to misconduct brought about by a perceived socially harmful condition or mode of life. The misconduct itself takes many forms.

**58.** Although many countries have had vagrancy laws on their statute books, there have always been nuances across legal systems in terms of the formulation of the offences and the manner of enforcement.[21] In this Advisory Opinion, therefore, the Court remains alive to the fact that the term "vagrancy" is often used in a generic sense to allude to various offences commonly grouped under this umbrella including but not limited to: being idle and

19 B Gardener (Ed) *Black's law dictionary* (2009) 1689.

20 *Ibid*.

21 J Lisle "Vagrancy law: Its faults and their remedy" (1915) 5(4) *Journal of Criminal Law and Criminology* 498-513.

disorderly, begging, being without a fixed abode, being a rogue and vagabond, being a reputed thief and being homeless or a wanderer.

**59.** From a sociological perspective, it has been suggested that there were three main reasons that motivated the adoption of vagrancy laws.[22] First, to curtail the mobility of persons and criminalise begging, thereby ensuring the availability of cheap labour to land owners and industrialists whilst limiting the presence of undesirable persons in the cities; second, to reduce the costs incurred by local municipalities and parishes to look after the poor; lastly, and to prevent property crimes by creating broad crimes providing wide discretion to law enforcement officials. These justifications, the Court observes, have not remained stagnant in time or place. At different points in time, various countries have emphasised different justifications for maintaining vagrancy offences. Definitions of conduct caught by vagrancy laws, therefore, have also varied from one country to the other.

**60.** With regard to the prevailing situation in Africa, the Court notes that several countries still have laws containing vagrancy offences. For example, in the Penal Codes of at least eighteen (18) African countries,[23] a vagrant is defined as any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession. In at least eight (8) African countries;[24] a "suspected person or reputed thief who has no visible means of subsistence and cannot give a good account" of him or herself commits an offence of being a "rogue" or a "vagabond". The Court also notes that in South Africa, for instance, by-laws prohibit a person without a fixed abode from loitering or sleeping in a public amenity, public space or in the beach.[25] The Court further notes that in at least three (3) African

22 W Chambliss "A Sociological Analysis of the Law of Vagrancy" (1960) 12 *Social Problems* 67-77.

23 Algeria, Burundi, Burkina Faso, Cameroon, Chad, Comoros, Republic of Congo, Cote d'Ivoire, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, Sahrawi Arab Democratic Republic, Senegal and Togo. A list of countries with vagrancy related provisions in their criminal laws has been compiled by the Southern Africa Litigation Centre and can be accessed at: https://icj-kenya.org/e-library/papers/send/4-papers/171-vagrancy-related-provisions-in-various-criminal-laws-and-criminal-procedure-laws-in-africa.

24 Botswana, Gambia, Malawi, Nigeria, Seychelles, Tanzania, Uganda and Zambia.

25 See, Ubuhlebezwe Local Municipality Public Amenities By-Law, Municipal Notice No. 139 of 2009. It should be noted that some municipalities have removed these offences post-Apartheid.

countries,[26] the offence of being an idle and disorderly person is defined to include someone who loiters or is idle and who does not have a visible means of subsistence and cannot give a good account of him or herself.

**61.** At the same time, however, the Court observes that other African countries, for example, Angola, Cape Verde, Kenya, Lesotho, Mozambique, Rwanda and Zimbabwe have repealed some of their vagrancy laws. The Court further observes that courts, in some African countries, have also nullified some vagrancy laws for being unconstitutional. For example, in *Mayeso Gwanda v The State*, the High Court of Malawi ruled that the offence of "being a rogue and vagabond" was a violation of human rights and unconstitutional.[27]

**62.** At the regional level, the Court also takes judicial notice of the judgment of the Court of Justice of the Economic Community of West African States (hereinafter referred to as "the ECOWAS Court") in *Dorothy Njemanze & ors v Federal Republic of Nigeria.*[28] In this case, the applicants, all women, were arrested and detained on suspicion of engaging in prostitution simply because they were found on the streets at night. The Court held that the arrest of the applicants was unlawful and that it violated their right to freedom of liberty, as the Respondent State had submitted no proof that the applicants were indeed prostitutes. The Court also found that branding the women prostitutes constituted verbal abuse, which violated their right to dignity. Further, the Court held that the arrest violated the applicants' right to be free from cruel, inhuman or degrading treatment; and also constituted gender-based discrimination. Among others, the ECOWAS Court found that there were multiple violations of articles 1, 2, 3 and 18 (3) of the Charter; articles 2, 3, 4, 5, 8 and 25 of the Women's Protocol); and articles 2, 3, 5 (a) and 15(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW)

**63.** The Court will now consider whether vagrancy laws are compatible with Articles 2, 3, 5, 6, 7, 12 and 18 of the Charter. In its consideration, the Court will sequentially deal with each of the

26 Mauritius, Namibia and Sierra Leone.

27 [2017] MWHC 23. Available at: https://malawilii.org/mw/judgment/high-court-general-division/2017/23 (accessed 10 September 2020).

28 Available at: http://prod.courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_08_17-1.pdf (accessed 12 September 2020).

Articles pleaded by PALU.

## a. Vagrancy laws and the right to non-discrimination and equality

**64.** The Court recalls that Article 2 of the Charter provides that:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised 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.

**65.** The Court also recalls that Article 3 of the Charter provides that:
1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

**66.** As the Court has noted, the right to non-discrimination under Article 2 of the Charter, is related to the right to equality before the law and equal protection of the law as guaranteed under Article 3. [29] It is for this reason that the Court is analysing the compatibility of vagrancy laws with Articles 2 and 3 of the Charter at the same time. Admittedly, the scope of the right to non-discrimination extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.[30] The expression "any other status" in Article 2 of the Charter encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter

**67.** Although Articles 2 and 3 of the Charter are unequivocal in their proscription of discrimination not all forms of differentiation or distinction are unlawful.[31] Differentiation and distinction amounts to discrimination if it does not have an "objective and reasonable justification" and "where it is not necessary and proportional."[32] Nevertheless, the Court reiterates its position that Article 2 is imperative for the respect and enjoyment of all other rights and

29 *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) AfCLR 9 § 138. *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v United Republic of Tanzania* (14 June 2013) 1 AfCLR 34 § 119.

30 *Jebra Kambole v United Republic of Tanzania,* ACtHPR, Application 018/2018, Judgment of 15 July 2020 §§ 71-72.

31 *Ibid*.

32 See, *Mtikila v Tanzania* (Merits) §§ 105.1 and 105.2.

freedoms protected in the Charter.[33]

**68.** The Court recalls that the Commission has held that: [34]

> Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.

**69.** The Court observes that vagrancy laws, in several African countries, criminalize the status of an individual being a "vagrant," often defined as "any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession," a "suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself" or "someone who loiters or is idle and who does not have a visible means of subsistence and cannot give a good account of him or herself."

**70.** Against the above background, the Court notes that vagrancy laws, effectively, punish the poor and underprivileged, including but not limited to the homeless, the disabled, the gender-nonconforming, sex workers, hawkers, street vendors, and individuals who otherwise use public spaces to earn a living. Notably, however, individuals under such difficult circumstances are already challenged in enjoying their other rights including more specifically their socio-economic rights. Vagrancy laws, therefore, serve to exacerbate their situation by further depriving them of their right to be treated equally before the law.

**71.** The Court also notes that while an eternal attribute of all good laws is that they must always be clear and precise, vagrancy laws often employ vague, unclear and imprecise language. Common terminology used in framing vagrancy offences include expressions such as "loitering", "having no visible means of support" and "failing to give a good account of oneself". Such language does not provide sufficient indication to the citizens on what the law prohibits while at the same time conferring broad discretion on law enforcement agencies in terms of how to enforce vagrancy laws. This, automatically, makes vagrancy laws prone

33 *Jebra Kambole v Tanzania* § 71.

34 *Purohit and Moore v The Gambia*, Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII § 49.

to abuse, often to the detriment of the marginalized sections of society.

**72.** The Court recalls that the status of an individual is one of the prohibited grounds for discrimination under Article 2 of the Charter. In relation to the application of vagrancy laws, no reasonable justification exists for the distinction that the law imposes between those classified as vagrants and the rest of the population except their economic status. The individual classified as a vagrant will, often times, have no connection to the commission of any criminal offence hence making any consequential arrest and detention unnecessary. The arrest of persons classified as vagrants, clearly, is largely unnecessary in achieving the purpose of preventing crimes or keeping people off the streets.

**73.** The Court further recalls that the right to equality before the law requires that "all persons shall be equal before the courts and tribunals".[35] Equal protection of the law, the Court observes, presupposes that the law protects everyone, without discrimination. Where different treatment is meted to individuals based on their status, as is the case with the application of vagrancy laws, it is clear that those individuals are denied the equal protection of the law. The Court, therefore, agrees with the Commission that laws with discriminatory effects towards the marginalized sections of society are not compatible with both Articles 2 and 3 of the Charter. [36]

**74.** The Court also recalls that any arrest without a warrant requires reasonable suspicion or grounds that an offence has been committed or is about to be committed. Notably, where vagrancy-related offences are concerned, most arrests are made on the basis of an individual's underprivileged status and the inability to give an account of oneself. In this context, therefore, arrests are substantially connected to the status of the individual who is being arrested and would not be undertaken but for the status of the individual. Arrests without a warrant for vagrancy offences, therefore, are also incompatible with Articles 2 and 3 of the Charter.

**75.** In light of the above, the Court holds that vagrancy laws, both in their formulation as well as in their application, by, among other things, criminalizing the status of an individual, enabling the

35 *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 85 and *George Maili Kemboge v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 369 § 49.

36 *Purohit and Moore v The Gambia* §§ 50-54.

discriminatory treatment of the underprivileged and marginalized, and also by depriving individuals of their equality before the law are not compatible with Articles 2 and 3 of the Charter. The Court also finds that arrests for vagrancy-related offences, where they occur without a warrant, are not only a disproportionate response to socio-economic challenges but also discriminatory since they target individuals because of their economic status.

## b. Vagrancy laws and the right to dignity

**76.** Under Article 5, the Charter 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 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.

**77.** The Court recalls that it has recognised three main principles for determining violations of the right to dignity as guaranteed under Article 5 of the Charter.[37] First, Article 5 has no limitation provisions and thus the prohibition of indignity manifested in cruel, inhuman and degrading treatment is absolute. Second, the prohibition in Article 5 provides the widest possible protection against both physical and mental abuse. Third, personal suffering and indignity can take various forms and the assessment of whether a specific provision of a law or policy violates Article 5 must be made on a case-by-case basis.

**78.** The Court reaffirms that "[h]uman dignity is an inherent basic right to which all human beings … are entitled to without discrimination."[38] The breadth of the protection offered by Article 5 entails, therefore, that the Court should remain open-minded in assessing novel allegations of violations of the Charter.

**79.** The Court also recalls that the Commission in *Purohit and Moore v The Gambia* concluded that the use of the words "lunatics" and "idiots" to refer to persons with mental disabilities dehumanizes and denies them their dignity.[39] In the same vein, the Court notes that vagrancy laws commonly use the terms "rogue", "vagabond", "idle" and "disorderly" to label persons deemed to be vagrants. These terms, the Court holds, are a reflection of an outdated and

37 *Lucien Ikili Rashidi v United Republic of Tanzania,* ACtHPR, Application 009/2015, Judgment of 28 March 2019 (Merits and Reparations) § 88.

38 *Ibid* § 57.

39 *Ibid* § 59.

largely colonial perception of individuals without any rights and their use dehumanizes and degrades individuals with a perceived lower status.

**80.** The Court also holds that the application of vagrancy laws often deprives the underprivileged and marginalized of their dignity by unlawfully interfering with their efforts to maintain or build a decent life or to enjoy a lifestyle they pursue. In this vein, the Court is particularly mindful that "all human beings have a right to enjoy a decent life … which lies at the heart of the right to human dignity."[40] Consequently, the Court finds that vagrancy laws are incompatible with the notion of human dignity as protected under Article 5 of the Charter.

**81.** The Court also holds that labelling an individual as a "vagrant", "vagabond", "rogue" or in any other derogatory manner and summarily ordering them to be forcefully relocated to another area denigrates the dignity of a human being. If the implementation of such order is accompanied by the use of force, it may also amount to physical abuse. The Court thus finds that the forcible removal of persons deemed to be vagrants is not compatible with Article 5 of the Charter.

**82.** In addition to its earlier finding, the Court reiterates the fact that arrests without a warrant for vagrancy offences are arbitrary since, often times, no rational connection exists between such arrests and the objectives of law enforcement. Practically, such warrantless arrests normally target the underprivileged only. The Court thus also holds that vagrancy laws that permit arrests without a warrant are incompatible with the right to dignity as guaranteed in Article 5 of the Charter.

## c. Vagrancy laws and the right to liberty

**83.** The Court notes that Article 6 of the Charter provides that:

> Every individual shall have the right to liberty and 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.

**84.** In line with its jurisprudence, any arrest and detention is arbitrary if it has no legal basis and has not been carried out in accordance with the law.[41] In the circumstances, deprivation of liberty in line

40 *Purohit and Moore v The Gambia* § 61.

41 *Kennedy Owino Onyachi v United Republic of Tanzania* (28 September 2017) 2 AfCLR 65 § 132.

with an existing law does not of itself make the process legal. It is also important that deprivation of liberty be supported by clear and reasonable grounds.[42] Any restriction of an individual's liberty, therefore, must have a legitimate aim and must also serve a public or general interest.[43]

**85.** The Court notes that a major challenge with the enforcement of vagrancy laws is that, in practice, the enforcement of these laws often results in pretextual arrests, arrests without warrants and illegal pre-trial detention. This exposes vagrancy laws to constant potential abuse.

**86.** The Court concedes that arrests under vagrancy laws may, ostensibly, satisfy the requirement that the deprivation of freedom must be based on reasons and conditions prescribed by law. Nevertheless, the manner in which vagrancy offences are framed, in most African countries, presents a danger due to their overly broad and ambiguous nature. One of the major challenges is that vagrancy laws do not, *ex ante,* sufficiently and clearly lay down the reasons and conditions on which one can be arrested and detained to enable the public to know what is within the scope of prohibition. In practice, therefore, many arrests for vagrancy offences are arbitrary.

**87.** For the reasons stated above, the Court holds that arrests and detentions under vagrancy laws are incompatible with the arrestees' right to liberty and the security of their person as guaranteed under Article 6 of the Charter. This, the Court holds, is invariably the case where the arrest is without a warrant.

## d. Vagrancy laws and the right to fair trial

**88.** Article 7 of the Charter provides, in so far as is material that:

> Every 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 ….

**89.** The Court notes that the right to fair trial is a fundamental human right which is enshrined in all universal and regional human rights instruments. In Article 7(1)(b) the Charter reiterates the fundamental principle of the presumption of innocence. As the Court has held, "the essence of the right to presumption of

42 *Ibid* § 134.

43 *Anaclet Paulo v United Republic of Tanzania* (21 September 2018) 2 AfCLR 446 § 66.

innocence lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings, from preliminary investigation to the delivery of judgment, and until his guilt is legally established."[44]

**90.** Although the Charter does not have a provision specifically dealing with the protection against self-incrimination, it is clear to the Court that the Charter's omnibus provision for fair trial includes a proscription of self-incrimination. In any event, the Court has already established that Article 7 of the Charter should be interpreted in light of article 14 International Covenant on Civil and Political Rights in order to read into the Charter fair trial protections which are not expressly provided for in Article 7.[45]

**91.** Additionally, the Court notes that the Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 (hereinafter "the Fair Trial Principles") provide useful guidance in interpreting Article 6 of the Charter. According to the Fair Trial Principles, "[i]t shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him or her to confess, to incriminate himself or herself or to testify against any other person."[46]

**92.** The Court observes that because vagrancy laws often punish an individual's perceived status, such as being "idle", "disorderly" or "a reputed thief", which status does not have an objective definition, law enforcement officers can arbitrarily arrest individuals without the sufficient level of *prima facie* proof that they committed a crime. Once they are taken into custody, such arrested persons would have to explain themselves to the law enforcement officer(s) to demonstrate that, for example, they were not idle or disorderly, are not a reputed thief or that they practice a trade or profession. A failure to provide an explanation acceptable in the eyes of law enforcement officers could result in them being deemed unable to give an account of themselves and thereby, supposedly, providing justification for their further detention.

**93.** The Court notes, however, that forcing a suspect to explain himself/herself may be tantamount to coercing a suspect to make self-incriminating statements. Law enforcement officers may exert

44 *Ingabire Victoire Umuhoza v Republic of Rwanda* (24 November 2017) 2 AfCLR 165 § 83.

45 *Armand Guehi v United Republic of Tanzania* (7 December 2018) 2 AfCHR 477 § 73.

46 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, available at: https://www.achpr.org/legalinstruments/detail?id=38 (accessed 1 October 2020). .

undue pressure on suspected criminals by pretextually arresting them under vagrancy laws and then soliciting incriminatory evidence even in relation to crimes not connected to vagrancy.

**94.** Given the above, the Court holds, therefore, that arresting individuals under vagrancy laws and soliciting statements from them about their possible criminal culpability, is at variance with the presumption of innocence and is not compatible with Article 7 of the Charter.

## e. Vagrancy laws and the right to freedom of movement

**95.** The Court recalls that Article 12 of the Charter provides, so far as is material, that:

> 1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.

**96.** The right to freedom of movement entails the right of everyone lawfully within the territory of a State to move freely and to choose his or her place of residence."[47] As noted by the Human Rights Committee in its General Comment No. 27, such freedom is "an indispensable condition for the free development of a person."[48] States must, therefore, guarantee the enjoyment of this right irrespective of the individual's purpose or reason for staying in or moving in or out of a specific place.[49]

**97.** The Court observes that article 12(3) of the ICCPR explicitly lays out the conditions on the basis of which the right to the freedom of movement can be restricted being "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." Any limitations on the right, therefore, must not nullify its essential content. The freedom of movement guarantees every individual the right not only to move freely within a territory but also to choose a place of residence.

**98.** The Court recalls that the Charter does not have a provision comparable to article 12(3) of the ICCPR, setting out when limitations on the freedom of movement are permissible. In Article 12(1), the Charter merely provides that the enjoyment of the

47 CCPR General Comment No. 27: Article 12 on Freedom of Movement (1999) § 4, available at https://www.refworld.org/pdfid/45139c394.pdf (accessed 20 September 2020).

48 *Ibid* § 1.

49 *Ibid* § 5.

freedom of movement is subject to the condition that the individual abides by the law. It is clear from this provision that, in appropriate circumstances, the law may limit the freedom of movement under the Charter.

**99.** The above notwithstanding, any limitation of the freedom of movement must, firstly, be provided by law. A contrary interpretation of Article 12 would open the door to arbitrary and unpredictable interference with the right. Secondly, any such restriction must be necessary to protect national security, public order, public health or morals or the rights and freedom of others. This ensures that the restrictions are only issued for these limited reasons and not for others. Lastly, the restrictions must be consistent with the other rights recognized in the Charter. This means that a restriction on the freedom of movement must not infringe the other rights of an individual unless the restriction of those other rights is permissible under the Charter.

**100.** The Court observes that, in many instances, the enforcement of vagrancy laws leads to infringement limitation of the right of freedom of movement. Admittedly, such limitations are prescribed by vagrancy laws, since many African countries have laws outlawing vagrancy, thereby satisfying the first of the conditions earlier enumerated. Such conduct, however, fails to satisfy the second and third conditions. This is because vagrancy laws are not necessary for any of the purposes for which they are often cited. Notably, vagrancy laws are often employed for crime-prevention purposes, but, as the Court has earlier stated, there is no correlation between vagrancy and the criminal propensity of an individual.

**101.** The Court is also mindful that even if vagrancy laws contribute to the prevention of crimes in some cases, other less-restrictive measures such as offering vocational training for the unemployed and providing shelter for the homeless adults and children are readily available for dealing with the situation of persons caught by vagrancy laws. Where policy alternatives that do not infringe on individuals' rights and freedoms exist, policies that infringe on fundamental human rights such as the right to freedom of movement are unnecessary and should be avoided.

**102.** The Court finds, therefore, that the enforcement of vagrancy laws, generally, is incompatible with the right to freedom of movement as guaranteed under Article 12 of the Charter. The Court also finds that forced relocation, which is permitted by vagrancy laws in some African countries, is also incompatible with Article 12 of

the Charter.

## f. Vagrancy laws and the right to the protection of the family

**103.** Article 18 of the Charter provides that:

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 of morals and traditional values recognized by the community.
3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of rights of women and the child as stipulated in international declarations and conventions.
4. The aged and the disabled shall also have the right to special measures for protection in keeping with their physical or moral needs.

**104.** The Court notes that underlying Article 18 of the Charter is the responsibility of Member States to take care of the physical and moral health of the family. The Court also notes that international human rights law consistently recognises the family as the fundamental group unit of society requiring protection.[50] The protection of the family includes the right to family unity which entails that members of the same family are entitled to protection against forcible separation.

**105.** The Court observes that arrests and detentions under vagrancy laws may result in the forcible removal of the suspected "vagrants" from their families. Due to this, other family members that rely on those arrested under vagrancy laws, most notably children, the elderly and the disabled may suffer from the deprivation of financial and emotional support. The Court is cognisant that every arrest and detention leads to the detriment of the physical and moral health of a suspect's family, irrespective of the crime at issue. For this reason, therefore, not all arrests and detentions are incompatible with Article 18 of the Charter. However, an arrest or detention carried out pursuant to the enforcement of vagrancy

50 The family is recognized as a fundamental institution in society, and as such international human rights instruments establish obligations for States to protect and assist it. Examples include the Universal Declaration of Human Rights (UDHR, Article. 16(3)); the International Covenant on Economic, Social and Cultural Rights (ICESCR, e.g., Article. 10); the International Covenant on Civil and Political Rights (ICCPR, Article 23(1)); the Convention on the Rights of the Child (CRC, e.g., preamble); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW, e.g., Article 44(1)).

laws, as has been demonstrated in this Advisory Opinion, is incompatible with several rights protected under the Charter and such arrests accentuate the vulnerability of families.

**106.** The Court emphasises that arrests and detentions are permissible when they take place in the course of lawful law enforcement activity which is based on laws that do not violate fundamental human rights. Since vagrancy laws are incompatible with several human rights enshrined in the Charter as well as other international human rights instruments, they cannot be the basis for lawful law enforcement activity.

**107.** Based on the above considerations, the Court holds that arrests and detentions based on vagrancy laws are incompatible with Article 18 of the Charter. The Court, also holds that the forcible relocation of "vagrants" is incompatible with the preservation of the sanctity of the family as a basic unit of society as guaranteed in the Charter.

## B. Vagrancy laws and the Children's Rights Charter

**108.** PALU has also invited the Court to advise on whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's relocation to another area violate Articles 3, 4(1) and 17 of the Children's Rights Charter.

**109.** PALU submits that vagrancy laws have often been employed to indiscriminately arrest street children thereby undermining their right to dignity and equal protection of the law. Children of parents who have been imprisoned, PALU points out, are more likely to face food insecurity or come into further conflict with the law especially when they are forcibly separated from their parents due to the application of vagrancy laws.

**110.** PALU also points out that "[i]n many countries, once declared a vagrant, a person can also be banned from [an] area, sent back to his or her place of origin, or otherwise deported, if the person is not a citizen." PALU submits that this is a violation of Articles 3, 4(1) and 17 of the Children's Rights Charter

### i. Observations by *amicus curiae*

**111.** The NAHRI submits that the extent to which vagrancy laws are used to arrest and detain children who live on the streets shows criminal justice systems that ignore the fundamental principle of the best interests of the child. Street children arrested and

detained by the police, the NAHRI argues, are often subjected to "exploitation, abuse, discrimination and stigmatisation both on the streets and by law enforcement officials." The conditions which children endure when detained, the NAHRI also points out, further violate their rights. This, therefore, makes criminal justice systems complicit in the violation of children's rights.

## ii. The Court's position

**112.** The Court notes that Article 3 of the Children's Rights Charter provides as follows:

Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex language, religion, political or other opinion, national and social origin, fortune, birth or other status.

**113.** The Court also notes that Article 4(1) of the Children's Rights Charter provides as follows:

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

**114.** The Court further notes that Article 17 of the Children's Rights Charter provides as follows:

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.
2. State Parties to the present Charter shall in particular:

a. ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

b. ensure that children are separated from adults in their place of detention or imprisonments;

c. ensure that every child accused of infringing the penal law: shall be presumed innocent until duly recognised guilty.

**115.** The Court recalls that PALU has invoked the compatibility of vagrancy laws with several rights under the Children's Rights Charter. Each of the rights invoked will now be assessed individually.

### a. Vagrancy laws and children's right to non-discrimination

**116.** The Court acknowledges that Article 3 of the Children's Rights Charter is simply an affirmation of the application of the right to non-discrimination to all children. Specifically, Article 3 proscribes any discrimination "irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."

**117.** The Court observes that arbitrary arrests, generally, have a disproportionate effect on impoverished and marginalized children. By way of illustration, where street children are required to give a satisfactory account of themselves to avoid arrests, such children may be left to provide statements to the police alone. In such a situation it may, practically, be very difficult for the children to establish that they should not be arrested. This predicament, however, invariably affects underprivileged and marginalised children in societies across Africa.

**118.** The Court further observes that children who are routinely in conflict with vagrancy laws often belong to vulnerable and disadvantaged groups in society, including but not limited to children living on the street. In the case of children living on the streets, any forcible removal may entail losing their community and means of livelihood. The treatment that children in conflict with vagrancy laws are subjected to is, therefore, less favourable than that which other children in society experience. The primary reason for the differentiated treatment is the position of marginalisation and vulnerability occupied by these children. Children in conflict with vagrancy laws, therefore, are discriminated against because of their status.

**119.** The Court notes that aside from the discrimination directly suffered by children who find themselves in conflict with vagrancy related laws such children's other rights are also compromised when one or more of their parents or primary caregivers are removed from the area in which they reside or work. Parental incarceration or forced relocation leads to children living separately from their parents thereby resulting to instability in family relationships and financial problems.

**120.** Given the above, the Court thus holds that the enforcement of vagrancy-related laws, which results in the arrests, detention and sometimes forcible relocation of children from the areas of residence, is incompatible with children's right to non-discrimination as protected under Article 3 of the Children's Rights

Charter.

## b. Vagrancy laws and the best interests of the child

**121.** Article 4(1) of the Children's Rights Charter restates the general principle of the best interests of the child. This principle also finds expression in Article 3(1) of the United Nations Convention on the Rights of the Child, 1989.

**122.** In respect of Article 4(1) of the Children's Rights Charter, the Court observes that in General Comment No. 5, the African Committee of Experts on the Rights and Welfare of the Child (hereinafter "the Committee of Experts") has stated that the principle of the best interests of the child has no conditions attached to it.[51] The result is that its scope, reach and standard of application cannot be diluted. In the words of the Committee of Experts, there are "no limitations to the domains or sectors within which the best interests of the child must apply, so that its application can extend to every conceivable domain of public and private life." From the foregoing, the Court concludes that the best interests of the child is a cross-cutting principle which applies to children, irrespective of status, in diverse circumstances

**123.** Given that the Court has already established that vagrancy laws, *inter alia,* are incompatible with children's right to non-discrimination, it is clear that the arrest, detention and forcible relocation of children on account of vagrancy offences also infringes their best interests. Such conduct not only compromises children's fundamental rights but also exposes them to multiple other potential violations of their rights. The Court holds, therefore, that the application of vagrancy laws is incompatible with Article 4(1) of the Children's Rights Charter.

## c. Vagrancy laws and children's right to fair trial

**124.** The Court notes that Article 17 of the Children's Rights Charter extends fair trial guarantees to all children. The provision specifically emphasises the need to accord children special treatment in a manner consistent with the "child's sense of dignity and worth". Akin to Article 3 of the Children's Rights Charter, which

51 See, African Committee of Experts on the Rights and Welfare of the Child, General Comment No. 5 "State Obligations Under the African Charter on the Rights and Welfare of the Child (Article 1) and System Strengthening for Child Protection" - https://www.acerwc.africa/wp-content/uploads/2018/08/Website_Joint_GC_ACERWC-ACHPR_Ending_Child_Marriage_20_January_2018.pdf (accessed 12 September 2020).

simply extends the application of the right to non-discrimination so that it expressly covers children, Article 17 of the Children's Rights Charter does the same in respect of the right to fair trial. Additionally, however, Article 17 of the Children's Rights Charter spells out some protections and safeguards that are specific to children because of their unique position.

**125.** As the United Nations Committee on the Rights of the Child has observed, States have a duty to ensure that all necessary measures are implemented to ensure that all children in conflict with the law are treated equally.[52] This requires that particular attention must be paid to *de facto* discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girl children, children with disabilities and children who are repeatedly in conflict with the law. Additionally, in all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration.

**126.** Children, the Court reaffirms, are entitled to all fair trial guarantees applicable to adults plus other special guarantees tailored to their special situation. Basic fair trial guarantees require that a law enforcement officer should not effect any arrest except for reasonable cause. However, the ambiguity and lack of clarity in many vagrancy offences, as earlier pointed out, entails that law enforcement officers are conferred an undue latitude in determining when to make an arrest. Just as is the case with adults, the right to fair trial requires that children's rights be upheld during arrest, detention or even trial. An arrest without a warrant, therefore, could be the precursor for further violations of the rights of children.

**127.** Any judicial system, therefore, must accord children in conflict with the law a treatment that is consistent with their sense of dignity and worth. This includes, among other things, treating children in a manner that accords with their age and promotes their reintegration into society.

**128.** As the Court has earlier observed, numerous fair trial rights are violated during the enforcement of vagrancy laws. Although these violations affect both adults and children, in response to PALU's question, the Court holds that the arrest, detention and forcible

52 General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice, available at: https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.docx (accessed 15 September 2020).

relocation of children due to vagrancy laws is incompatible with their fair trial rights as protected under Article 17 of the Children's Rights Charter.

## C. Vagrancy laws and the Women's Rights Protocol

**129.** PALU has requested the Court to advise as to whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without a warrant simply because the person has no "means of subsistence and cannot give a satisfactory account" of him or herself, violate Article 24 of the Women's Rights Protocol

**130.** PALU submits that women are particularly vulnerable to arrests based on vagrancy laws because they often spend longer time in pre-trial detention due to their inability to pay fines, bail or legal representation.

**131.** PALU also reiterates its submission that the enforcement of vagrancy laws "further perpetuates the stigmatisation of poverty by mandating a criminal justice response to what, in actuality, are socio- economic and sustainable development issues." PALU points out that imprisonment on vagrancy-based laws "disproportionately affects people living in poverty and directly contributes to the impoverishment of the prisoner and his or her family." According to PALU, therefore, vagrancy laws reinforce discriminatory attitudes against marginalised persons.

### i. Observations by *amici curiae*

**132.** The HRC-Miami and Lawyers Alert submit that the use of vagrancy laws to criminalize women and gender non-conforming people and deny their access to public spaces is a violation of the basic rights to liberty and security of a person. They also observe that while women targeted under vagrancy statutes in Africa are sometimes only detained overnight or released within a few days, some of them are forced to stay behind bars for indefinite periods of time causing them to lose time that could have been used to engage in productive activity. It is thus submitted that the discriminatory and arbitrary application of vagrancy laws to women may also violate their economic rights.

**133.** The CHR and DOI submit that women in African countries are disproportionately affected by poverty and often engage in activities such as street trading, which may put them at risk of prosecution under outdated vagrancy laws. Poorer women are, therefore, more likely to be arrested under vagrancy laws because

their attempts to earn a living often put them in conflict with the law. It is further submitted that the enforcement of vagrancy laws is used to exploit women in the informal sector. The highly discretionary nature of law enforcement for vagrancy offences presents a prime opportunity for law enforcement officials to exploit women's vulnerability and extort bribes.

**134.** The CHR and DOI further submit that the socio-economic consequences for the arrest and detention of women for vagrancy offences is disproportionate and more harmful to "women particularly their children than the 'crime' being committed which is not harmful to society." Women who are detained under vagrancy laws are thereby deprived of the opportunity to exercise their role as primary care givers and where their husbands or partners are detained, they bear the brunt of the household responsibilities.

### ii. The Court's position

**135.** The Court recalls that in at least six (6) African countries, criminal procedure laws allow the police to arrest without a warrant where a person has no ostensible means of subsistence and cannot give a satisfactory account of him or herself.[53]

### a. Vagrancy laws and Article 24 of the Women's Rights Protocol

**136.** The Court recalls that Article 24 of the Women's Rights Protocol provides as follows:

> The State Parties undertake to ensure the protection of poor women and women heads of families including women from marginalised population groups and provide an environment suitable to their condition and their special physical, economic and social needs.

**137.** The Court notes that Article 24 of the Women's Rights Protocol creates a composite obligation for States in respect of poor women, women heads of families and other women from marginalised populations. This obligation requires States to create an environment where poor and marginalised women can

53 These countries are: The Gambia (Sections 167 and 168 Criminal Code, Act No. 25 of 1933), Malawi (sections 180 and 184 Penal Code Cap. 7:01 and Section 28 Criminal Procedure and Evidence Code Cap 8:01), Nigeria (Sections 249 and 250 Criminal Code Act, Cap. 77), Tanzania (section 177 Penal Code and section 28 Criminal Procedure Act), Uganda (section 168 Penal Code and Section 11 Criminal Procedure Code) and Zambia (Section 181 Penal Code and section 27 Criminal Procedure Code).

fully enjoy all their human rights.

**138.** Against the above background, the Court notes, for example, that vagrancy laws perpetrate multiple violations of the rights of poor and marginalised women. Some of the rights that are compromised by the application of vagrancy laws on poor and marginalised women include women's right to dignity, non-discrimination and equality.

**139.** The Court remains alive to the fact that many poor and marginalised women across Africa earn a living by engaging in activities that put them at constant risk of arrest under vagrancy laws. By sanctioning the arrest of poor and marginalised women on the ground that they have "no means of subsistence and cannot give a satisfactory account" of themselves, vagrancy laws undermine Article 24 of the Women's Protocol.

**140.** In answer to PALU's third question, therefore, the Court holds that vagrancy laws are incompatible with Article 24 of the Women's Rights Protocol for permitting the arrest without a warrant of women where they are deemed to have "no means of subsistence and cannot give a satisfactory account" of themselves.

## D. The obligations of State Parties to the Charter in respect of vagrancy laws

**141.** In its final question, PALU has asked the Court to advise whether State Parties to the African Charter have positive obligations to repeal or amend their vagrancy laws and/or by laws to conform with the rights protected by the African Charter, the Children' Rights Charter and Women's Rights Protocol, and in the affirmative, determine what these obligations are.

**142.** PALU points to the Commission's 2017 Principles on the Decriminalisation of Petty Offences in Africa which have emphasised that:

> Criminal laws must be a necessary and proportionate measure to achieve that legitimate objective within a democratic society, including through the prevention and detection of crime in a manner that does not impose excessive or arbitrary infringements upon individual rights and freedoms. There must be a rational connection between the law, its enforcement and the intended objectives.[54]

**143.** PALU draws the Court's attention to the Kampala Declaration on

54 Section 11.2.2

Prison Conditions in Africa,[55] which has called on governments to review their penal policies and reconsider the use of prisons to prevent crime. Given the inhumane conditions in prisons for both prisoners and staff, the Kampala Declaration on Prison Conditions in Africa concluded by pointing out that mass-incarceration neither serves the interests of justice nor proves to be a good use of scarce public resources

**144.** PALU also draws the Court's attention to the Commission's Ouagadougou Declaration and Plan of Action on Accelerating Prisons' and Penal Reforms in Africa.[56] According to this Declaration, African States were encouraged to decriminalise some petty offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents in a bid to reduce prison populations.

### i. Observations by AU Member States and amici curiae

**145.** Burkina Faso submits that under article 151 of its Constitution of 2 June 1991 "[t]reaties and agreements that are regularly ratified or approved shall, as soon as they are published, have precedence over the laws, subject, for each agreement or treaty, to its application by the other party." In line with this constitutional obligation, it points out, it reviewed its Penal Code on 31 May 2018 to decriminalise the offence of wandering.

**146.** According to the ICJ-Kenya, the Ouagadougou Declaration and Plan of Action on Accelerating Prisons' and Penal Reforms in Africa called for the decriminalization of offences such as being a rogue and vagabond, loitering, prostitution, failure to pay debts and disobedience to parents. The ICJ-Kenya has also highlighted that decriminalization takes numerous forms and it can be partial or full. The distinctions between these policy choices, it has been highlighted, are enormous. The reclassification of a crime into a civil infraction means that vagrancy-related offences would no longer be criminally punishable. By contrast, under the practice of partial decriminalization, offences retain their criminal character and attendant burdens. Partial decriminalization could mean that defendants cannot be incarcerated for the offence, but it could also mean shortened or deferred sentences, supervision and

55 See, https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-1996-kampala-declaration-en.pdf (accessed 30 September 2020).

56 See, https://www.ru.nl/publish/pages/688602/ouagadougou-eng.pdf (accessed 30 September 2020)

treatment.

**147.** The NANHRI submits that some countries have already experimented with mechanisms aimed at reducing prison populations by releasing prisoners convicted with minor offences. The examples provided by the NAHRI include Kenya, South Africa and Egypt. The NANHRI submits that given that prison overcrowding is an imminent problem across Africa, abolishing vagrancy laws would contribute to stemming the flow of convicts to prisons. It is also submitted that abolishing vagrancy-related offences would send an important signal to law enforcement agencies that they should respect the dignity and rights of the poor and vulnerable children and women.

**148.** The OSJI submits that prison congestion, which results from enforcement of vagrancy laws, poses a great challenge to the right to health of prisoners especially those with underlying conditions. It further submits that given the COVID-19 Pandemic, the time may be ripe for African countries to decriminalise vagrancy offence and ease the congestion in prisons while at the same time safeguarding the right to health of prisoners.

## ii. The Court's position

**149.** The Court notes that Article 1 of the Charter provides that:

> 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.

**150.** The Court also notes that Article 1 of the Children's Rights Charter provides as follows:

> Member States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.

**151.** The Court further notes that Article 1 of the Women's Rights Protocol provides thus:

1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.
2. States Parties undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

**152.** The Court observes that there are two dimensions to PALU's final question and these are, first, whether an obligation to amend vagrancy laws exist and, second, the precise nature of this obligation.

**153.** Given the Court's findings in this Advisory Opinion, the Court holds that Article 1 of the Charter, Article 1 of the Children's Rights Charter and Article 1 of the Women's Rights Protocol obligates all State Parties to, *inter alia*, either amend or repeal their vagrancy-laws and by-laws to bring them in conformity with these instruments. This would be in line with the obligation to take all necessary measures including the adoption of legislative or other measures in order to give full effect to the Charter, the Children's Rights Charter and the Women's Rights Protocol.

**154.** As to the nature of the obligation, the Court holds that this obligation requires all State Parties to amend or repeal all their vagrancy laws, related by-laws and other laws and regulations so as to bring them in conformity with the provisions of the Charter, the Children's Rights Charter and the Women's Rights Protocol.

## VII. Operative part

**155.** For the above reasons:

The Court,

*Unanimously,*

*On jurisdiction*

i. *Finds* that it has jurisdiction to give the Advisory Opinion requested;

*On admissibility*

ii. *Declares* that the Request for Advisory Opinion is admissible;

*On the merits*

iii. *Finds* that vagrancy laws, including but not limited to those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence, as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have visible means of subsistence and cannot give good account of him or herself violate; and also those laws that order the forcible removal of any person declared to be a vagrant and laws that permit the arrest without a warrant of a person suspected of being a vagrant are incompatible with Articles 2, 3, 5, 6, 7, 12 and 18 of the Charter;

iv. *Finds* that vagrancy laws and by-laws, including but not limited to,

those containing offences which, once a child has been declared a vagrant or rogue and vagabond, summarily orders such child's forcible relocation to another area, are incompatible with Articles 3, 4(1) and 17 of the Children's Rights Charter;

v. *Finds* that vagrancy laws, including but not limited to, those that allow for the arrest of any woman without a warrant simply because the woman has no "means of subsistence and cannot give a satisfactory account" of herself are incompatible with Article 24 of the Women's Protocol; and

vi. *Declares* that State Parties to the Charter have a positive obligation to, *inter alia*, repeal or amend their vagrancy laws and related laws to comply with the Charter, the Children's Rights Charter and the Women's Rights Protocol within reasonable time and that this obligation requires them to take all necessary measures, in the shortest possible time, to review all their laws and by-laws especially those providing for vagrancy-related offences, to amend and/or repeal any such laws and bring them in conformity with the provisions of the Charter, the Children's Rights Charter and the Women's Rights Protocol.

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## Separate opinion: TCHIKAYA

**1.** On 4 December 2020, the African Court rendered an Advisory Opinion on "*The Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other Human Rights Instruments Applicable in Africa*". The Advisory Opinion[1] was ultimately unanimously approved by members of the Court. I am nevertheless attaching a separate opinion thereto, because although I generally agree that this Request for Opinion leads to useful brainstorming and may influence some public policies, it is nevertheless to be considered that the Court could have broadened its analysis of the subject.

**2.** This Request for Opinion, which was received at the Registry of the

1 The requesting party, the Pan African Union Layers Association, is an African organization based in Arusha, Tanzania. This organization is recognized by the African Union through a Memorandum of Understanding signed on 8 May 2006.

Court on 10 May 2018, was examined in plenary session during the 59th session of the Court in November 2020. It was timely, as the Court had not examined a social issue of this magnitude for some time, at least in advisory matters. Pursuant to Article 4(1) of the Protocol on the Establishment of the Court and Rule 68 of the Rules of Court, the Pan African Lawyers Union (PALU) requested an Advisory Opinion from the Court on the conformity of certain laws relating to vagrancy with the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

**3.** In the practice of opinions issued by international institutions or courts, it has been agreed that the body to which a request is made "must ascertain what are the legal questions really in issue in questions formulated in a request".[2] This cardinal requirement is even recorded as being linked to judicial common sense in the face of a question raised, as the I.C.J. recalls in the 1980 case of *WHO-Egypt*. This should account for most of the time the Court devotes to the application submitted to it.

**4.** There seems to be a prerequisite to be clarified. The persons authorized to submit requests for an opinion are free to decide on the content of their request. They may submit requests without great limitation. It is up to the authority seized to say what rules apply before it in the matter. This is why the international judge has discretionary powers to refuse to rule on a request for an opinion.[3] The same position is defended, not without sarcasm, by Judge Bennouna in the *Kossovo* case. He said, regretting, that the Court could not refuse to give its opinion, that:

"if it had declined to respond to this request, the Court could have put a stop to any "frivolous" requests which political organs might be tempted

2 I.C.J., *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt*, Reports 1980, p. 88. The International Court emphasized that, if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue. In *Certain Expenses of the United Nations,* rendered in 1962, the ICJ also pointed out in this connection that, in replying to requests for an advisory opinion, the Permanent Court of International Justice likewise found it necessary in some cases first to ascertain what were the legal questions really in issue in the questions posed in the requests.

3 As recalled by Judge Donoghue in the *Opinion on the Legal Effects of the Separation of the Chagos Archipelago from Mauritius in 1965* (2020): Discretion is intended to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations. See also ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010 (II), p. 416, para. 29.

to submit to it in future, and indeed thereby protected the integrity of its judicial function."[4]

**5.** Once it agrees to give its opinion, the Court must at the very least ensure: (a) that it will do so within the established legal conditions; and (b) that the rigour as to the accuracy of the opinion is included in it for the case in hand.

**6.** First, the status of the questions raised (I.) and then the question of State obligations (II.) will be addressed.

## I. Subject of the Request

**7.** This part will present the points on which the Court would have advanced in view of giving an opinion. These include specifying the question raised, as well as the factual and legal bases of the subject of the opinion.

## A. Status of questions raised

**8.** The request for an opinion to the Court presents four questions on three major instruments of the continent. The Court summarizes them as follows:

"The Court notes that although the author has asked four questions, the request is in fact for alleged violations of the African Charter on Human and Peoples' Rights,[5] the African Charter on the Rights and Welfare of the Child[6] and the Protocol to the Charter on the Rights of Women.[7]Given the preceding, and without in any way undermining the four questions as framed by PALU, the Court will, sequentially, assess vagrancy laws as against the standards in the three aforementioned instruments. Thereafter it will separately address the fourth question posed by PALU which seeks the Court's opinion on the obligations of State's parties under the Charter, the Children's Rights Charter and the Women's Rights Protocol in respect of the vagrancy laws".[8]

**9.** The meaning of the four questions can be clearly understood by

4 Dissenting Opinion, Judge Bennouna, in ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, p. 403.

5 27 June 1981, adopted in Nairobi, Kenya.

6 1 July 1990, adopted in Addis Ababa, Ethiopia.

7 11 July 2003, adopted in Maputo, Mozambique.

8 Request for an *Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Applicable Human Rights Instruments in Africa*, pp. 4-6

looking at the first question, which is identical to the others:
"a. Whether vagrancy laws and by-laws, including but not limited to: those that contain offences which criminalise the status of a person as being without a fixed home, employment or means of subsistence; as having no fixed abode nor means of subsistence, and trade or profession; as being a suspected person or reputed thief who has no visible means of subsistence and cannot give a good account of him or herself; and as being idle and who does not have a visible means of subsistence and cannot give good account of him or herself, violate: (i) the right not to be discriminated against, protected by Article 2 of the African Charter; (ii) the right to full equality before the law and equal protection of the law, protected by Article 3 of the African Charter; (iii) the right to dignity and freedom from cruel, inhumane or degrading treatment or punishment, protected by Article 5 of the African Charter; (iv) the right to freedom and security of person, protected by Article 6 of the African Charter; (v) the right to a fair trial, protected by Article 7 of the African Charter; (vi) the right to freedom of movement and choice of residence, protected by Article 12 of the African Charter; (vii) the right of women, children and persons with disabilities to protection, protected by Article 18 of the African Charter."

**10.** The nature of the questions raises the problems raised by this Advisory Opinion. The idea of the author of the request is to study three components: national vagrancy instruments (laws and regulations), the three African Union conventions mentioned above and the use that States make of them, in the light of which it is said that some provisions criminalize certain persons.

**11.** The second and third questions give rise to legal facts of a repressive nature, namely:
"Whether vagrancy laws and by-laws, including but not limited to, those containing offences which, once a person has been declared a vagrant or rogue and vagabond, summarily orders such person's deportation to another area, violate (the right to non-discrimination; the right to equality;)".[9]

**12.** Similarly, the third question reads as follows:
"Whether vagrancy laws and by-laws, including but not limited to, those that allow for the arrest of someone without warrant simply because the person has no 'means of subsistence and cannot give a satisfactory account' of him or herself, violate... (the aforementioned principles)".[10]

**13.** The Court should be more careful to narrow the conceptual debate to which the Applicant was inviting it. For the latter:
"In Africa, many offences actually criminalize poverty. These offences were introduced during the colonial period and it is preposterous, to

9 *Idem.*, p. 4

10 *Idem.,* p. 5.

say the least, that such offences can be maintained in constitutional democracies".

**14.** The Court should, on the one hand, examine the content of these concepts in greater depth and, on the other hand, ensure that they have the power to clarify them. The conclusions to be drawn, which are important for the Court, will only be relevant in the light of the analysis of these concepts.

**15.** The panellist nature of some conclusions still requires further clarification. We are aware of the unclarified historical influences of the current exercise of criminal power and the colonial legacy,[11] which are recalled in the request for opinion, but the two difficulties which the Court does not take care to circumvent beforehand are glaring in the request made to it: the fluidity of the concept of vagrancy and the contentious shift in the subject of the request.

## B. Fluidity of the concept of vagrancy

**16.** What would become of the advisory opinion if, moreover, its notional basis is fluid, undefined and unfocused? In the sense of the Court's advisory work, this, as stated in Rule 82 of the Rules of Court on advisory proceedings, relates to "questions of law". This implies an obligation of precision. A dual obligation for the Court. Firstly, it is obliged to accurately cover a request which the author expects, and secondly, obligation is to be understood in relation to the requirement of law which, by definition, rejects approximation.

**17.** The Merriam-Webster's online dictionary defines vagrancy as "the act or practice of wandering about from place to place". This fact has been socially appreciated in various ways. In some countries, it may therefore constitute a crime for people who are homeless and have no means of livelihood. As the request to the Court suggests, and no doubt rightly so, this leads to a "criminalization"

11 The text of the referral cites the experience of Tanganyika where "a magistrate declared a vagrancy law abusive in 1941 and found the administrative regulation "unfair and oppressive". The 1944 Removal of Undesirables Ordinance is said to have survived to the present day and many children and adults have been arrested and labelled as vagrants under its provisions". See*Idem*, p. 20. See "The travelling native: Vagrancy and Colonial Control in British East Africa" in, AL Beier and Paul Ocobock, *Cast Out: Vagrancy and Homelessness in Global and Historical Perspective*, 2008, 408 p.

of persons.

**18.** There are examples of at least 22 countries in Africa where being a vagrant is a crime:
"for example, in the penal codes of at least eighteen (18) countries, a vagrant is defined as any person who does not have a fixed abode nor means of subsistence, and who does not practice a trade or profession. These countries include Algeria, Angola, Burkina Faso, Cameroon, Chad, Comoros, Republic of Congo, Cote d'Ivoire, Ethiopia, Eritrea, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, Rwanda, Saharawi Arab Democratic Republic, Senegal, South Sudan and Togo".[12]

**19.** Below is a selection of a few penal codes which give a view of the African perception of vagrancy. The Senegalese Penal Code provides as follows:
Paragraph II on Vagrancy, "Article 241: Vagrancy is an offence. Article 242: Vagrants or people without a confession are those who have no definite domicile, no means of subsistence, and who do not habitually practice a trade or profession. Article 243: Vagrants or persons without a confession who have been legally declared as such shall be punished with imprisonment for one month to three months for that fact alone. Article 244: Individuals declared to be vagrants by judgment may, if they are foreigners, be taken, by Government orders, outside the territory of the Republic. If they are claimed by their Government, this measure may be taken even before the expiry of their sentence.[13][***Translated by Registry***]

**20.** The Algerian Penal Code also makes vagrancy, which it associates with begging, a criminal offence:
"Section IV: Begging and vagrancy, Art. 196: Whoever, having neither a fixed domicile nor means of subsistence, does not habitually practice a trade or profession despite being fit for work and who does not justify having applied for work or who has refused the paid work offered to him shall be guilty of vagrancy and punishable with imprisonment of one (1) to six (6) months".[14] [*Translated by Registry*]

**21.** Mali's rules are close to the known provisions. Example:
"Art.181 - Vagrants or people without a confession who have been legally declared as such will, for this alone, be punished with imprisonment of from fifteen days to six months. They may also, in case of repeated offence, be denied residence for a minimum of two years and a maximum of five years. Art.182 - Individuals not originating from the Republic of Mali who are declared vagrants can be taken by the orders of the government outside the Republic. Vagrants born in Mali may, even after a judgement which has become final, be claimed by deliberation of the council of the

12 *Ibidem*., p. 10.

13 Penal Code of Senegal, 2020.

14 Algerian Penal Code, 2015.

commune or village where they were born or guaranteed by a solvent citizen...."[15] [*Translated by Registry*]

**22.** Section 5 of the Ivorian Penal Code,[16] which deals with vagrancy and begging - virtually assimilates them -, states in Article 189 that:

"Anyone who has no definite domicile, no means of subsistence and who does not habitually carry out a trade or profession shall be punished with a sentence of three to six months' imprisonment and may be banned from residing in the territory of the Republic, or banned from appearing in certain places, for a period of five years. [*Translated by Registry*]

**23.** In addition to this definition, the vagrant is further at risk in the event of an offence. This is set out in Article 193:

"Any beggar or vagrant who uses violence against persons shall be punished with imprisonment of two to five years. If the violence is accompanied by one of the circumstances mentioned in Article 192, the penalties shall be doubled". [*Translated by Registry*]

**24.** The complexity of the issue requires consideration of the approach adopted in other countries. France, one of the countries that used the concept in its colonial model, has, because of the vagueness of the term, banned it from any criminal law approach since 1992. It is attributed another term that is close to it, "begging".[17]

**25.** It must be considered that while the concept of vagrant propounds, without actually saying so, a state of being a subject, it does not specify an act or commission. The criminal sanction will have to await the wrongful act, as long as it is accepted that being a beggar, poor or wandering cannot in themselves constitute offences.

**26.** The Court's Opinion agrees with the above when it states that one of the constant features of criminal law is that it must always be clear and the criminalization precise. However, it goes on to state that:

"vagrancy laws often employ vague, unclear and imprecise language. Common terminology used in framing vagrancy offences include expressions such as "loitering", "having no visible means of support" and "failing to give a good account of oneself". Such language does not provide sufficient indication to the citizens on what the law prohibits while at the same time conferring broad discretion on law enforcement agencies in terms of how to enforce vagrancy laws" (note).

**27.** The regime to which the vagrant is liable calls for an in-depth

15 Malian Penal Code, 2001.

16 Law No. 95-522 of 6 July 1995.

17 See Section 2 ter of the Penal Code which deals with the exploitation of begging 225-12-5 Law No. 2003-239 of 18 March 2003, Article 64, JORF 19 March 2003.

analysis of the nexus between the economic situation of the subjects and the rules of law to which they are liable. It should be recalled that in one of its earliest formations,[18] the Court dismissed a request for advisory opinion submitted by the Socio-Economic Rights and Accountability Project (SERAP).[19] The question raised in the request was not totally devoid of meaning or interest. The Court was to give its opinion on "the legal and human rights consequences of systematic and widespread poverty in Nigeria", and whether it "constitutes a violation of certain provisions of the African Charter ...". After acknowledging receipt of the request, the Registry of the Court sent an e-mail inviting SERAP to inform it of the legal basis of its request and by a subsequent decision sent to SERAP, stated that the request did not meet the requirements of the Rules of Court, in particular Rule 68(2).

**28.** This requirement is also found throughout the development of international advisory jurisprudence. The Permanent Court of International Justice, for example, which laid the foundations thereof, was seized by the League of Nations. The advisory referral concerned the question as to whether "the Workers' Delegate for the Netherlands at the third Session of the International Labour Conference was nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles. The Court posed the following methodological principles:

"Since the Netherlands Workers' Delegate to the Third Session of the International Labour Conference was admitted by the Conference, the Court is of opinion that, the sole object of the question submitted to it is to obtain an interpretation of the provisions of paragraph 3 of Article, 389. Though, according to the form given to the question by the Council of the League of Nations, the method of procedure adopted by the Government of the Netherlands for the nomination of the Workers' Delegate forms the subject of the question, this is solely in order to fix clearly the state of facts to which the interpretation has application".[20]

**29.** One of the eminent former Judges of this Court, Ouguergouz (F.), stressed in his Opinion that requests presented to the plenary should be only those

"meeting the conditions of formal validity provided for in the Protocol and the Rules of Court. Only applications that contain all the information necessary to determine the Court's jurisdiction to hear them meet these

18 It included Judge Akuffo and Judges Ouguergouz, Ngoepe, Niyungueko, Ramadhani, Tambala, Thompson, Oré, Guissé, Kioko and Aba, in 2013.

19 Request filed with the Registry on 1 March 2012 by *Socio-Economic Rights & Accountability Project* (SERAP).

20 *CPJI, A.C., Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, 31 July 1922.*

conditions. According to Article 4(1) of the Protocol and Article 68 of the Rules of Court, the advisory jurisdiction of the Court is subject to four conditions: (1) the request for an opinion must be made by an entity authorized to do so, (2) it must concern a legal question, (3) the question must relate to the African Charter or any other relevant human rights instrument, and (4) its subject matter must not relate to an application pending before the African Commission".[21]

**30.** It can be argued that, in the end, the Court was right to admit the request. Its contours remained to be explored in greater depth, including its main question on the positive obligations of the States concerned.

## II. States' positive obligations

**31.** This question calls on the Court to state whether "States Parties to the African Charter have positive obligations to repeal or amend their vagrancy laws and regulations to conform with the rights protected ..." by international instruments and, in the affirmative, determine what these obligations are.

**32.** There are two aspects to the question: (i) the first is whether States, duly identified, have positive obligations to repeal obsolete rules of their domestic law, in particular those criminalizing so-called vagrancy practices; (ii) the second concerns the nature of such obligation, as the request prays the Court to determine what these obligations are. On this point, it would be natural to consider the corollary of the international obligation, i.e. the responsibility of those States.

### A. Positive obligations to repeal obsolete rules criminalizing vagrancy practices

**33.** The question thus raised is a classic one in the law of international relations, whether related to the protection of human rights or not.[22] It presupposes the relationship of the State with its international normative context. Member States of the African

21 The Coalition for the International Criminal Court, the Legal Defence & Assistance Project (LEDAP), the Civil Resource Development & Documentation Center (CIRDDOC) and the Women Advocates Documentation Center (WARDC) requested an advisory opinion on whether *obligations under AU decisions take precedence over obligations under the Statute of the International Criminal Court*, 29 November 2015.

22 These decisions adequately formulate this normative obligation of the States, PCIJ, *Chorzow Factory, Germany v Poland,* Jurisdiction, Determination of Compensation and Merits, 26 July 1927, 16 December 1927 and 13 September 1928.

Union have a legal obligation to apply the rules deriving from the three instruments in question. Somehow, the continental organization[23] in this case the African Union, can contribute to the effectiveness of this obligation and its fulfilment. This obligation is general; it derives from the law of treaties. It is the famous *Pacta sunt servanda* which binds States whatever the matter. Article 26 of the Vienna Convention on the Law of Treaties states to this effect that:

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

**34.** In this connection, it is worth recalling the second paragraph of Article 46 of the same Convention, which, not without anticipation, deals with an essential point in the application of international conventions:

"A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith".

**35.** This dimension relating to manifestly and objectively obvious violation is relevant to the sociologically practical area of vagrancy. The State concerned must respond to a situation of social proximity.

**36.** The Member States of the African Union that have subscribed to the two Charters - Human, Peoples' and Children's Rights - and the Protocol on the Rights of Women are bound by them. However, a specific issue arises. Since it is accepted that much of the legislation on vagrancy stems from colonial law, is there a particularism?

**37.** In this regard, the Court was informed of developments in some countries, and of the changes and decriminalization in some States, such as Tunisia, Burkina Faso and Kenya. Burkina Faso, in particular, under Article 151 of its Constitution of 2 June 1991, from which stems the constitutional obligation to comply with its international commitments, decriminalized the crime of

23 One of the disturbing aspects of the doctrine, see Zoller (E.), *La bonne foi en droit international public*, Pedone, 1977, XXVIII-395 p.; see also the article by Voirovich (S.A.), "*The Law-Implementing Functions of International Economic Organizations*", GYBIL, 1994, p. 230-258; Malenovsky (J.), "*Suivi des engagements des Etats membres du Conseil de l'Europe par son Assemblée parlementaire*", AFDI, 1997, p. 656; *La travail à l'Académie de Crawford* (J.), *Multilateral Rights and Obligations in International Law*, RCADI, 2006, vol. 319, p.325-482. See also Colloquium, *The Effectiveness of International Organisations: Monitoring and Control Mechanisms*, Sakkoulas/Pedone, Athens/Paris, 2000, 338 p.; Alvarez (E.), *International Organizations as Law-Makers*, Oxford UP, 2005, XLVIII- 660 p. ;Sarooshi (D.), *International Organizations and Their Exercise of Sovereign Powers*, Oxford UP, 2005, XVII-143 p. ; Bastid-Burdeau (G.), Q*uelques remarques sur la notion de droit derive en droit international*, Mélanges Salmon, 2007, pp. 161-175.

vagrancy on 31 May 2018. Thus, while some African countries still maintain vagrancy laws, others such as Angola, Cape Verde, Kenya, Lesotho, Mozambique, Rwanda and Zimbabwe have repealed them. Courts have struck off vagrancy laws on grounds of unconstitutionality. An example is the case of *Mayeso Gwanda v the State.*[24] The High Court of Malawi held that the offence of "lazing about and being vagrant was contrary to human rights and unconstitutional".[25]

## B. Regime of internal vagrancy rules inconsistent with continental law

**38.** Domestic rules inconsistent with continental law or its trends must be repealed, otherwise they will fall into disuse. It is contrary to the legal order for old rules to be perpetuated while new ones are adopted and ratified.

**39.** Many African multilateral provisions deal with vagrancy or similar phenomena. Examples include the Action Plan for the Implementation of the Kadoma Declaration on Community Service; ECOSOC Resolutions 1998/23 and 1999/27; the Arusha Declaration on Good Prison Practice; the Kampala Declaration on Prison Health in Africa; and the Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa; the Ouagadougou Plan of Action for Accelerating Penal and Prison Reform in Africa; the Lilongwe Declaration on Access to Legal Aid in the Penal System in Africa; the Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines); also, the Guidelines and Principles on the Right to a Fair Trial and Legal Aid in Africa.[26]

**40.** Another example is the *Commission's 2017 Principles on the Decriminalization of Petty Offences in Africa*,[27] which highlights

24 *Mayeso Gwanda v State MWHC* 23 (2017) v https ://pocketlaw. africanlii.org/judgment/high-court-general-division/2017/23.html.

25 *Idem.*

26 Penal Reform International (PRI), ***Recommandations africaines pour une réforme pénale***, 2008, pp. 9 et seq.

27 The 21st Special Session of the African Commission on Human and Peoples' Rights, entrusted the Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa with the mission of developing principles for the decriminalization of petty offences in Africa. The commission officially launched the principles during the 63rd Ordinary Session in October 2018. See Resolution on the Need to Define the Principles for the Re-characterization and Decriminalization of Petty Offences in Africa - ACHPR/RES.366 (EXT.OS/XX1), 2017.

the following:
"Criminal laws must be a necessary and proportionate measure to achieve this legitimate aim in a democratic society, including through the prevention and detection of crime in a manner that does not impose excessive or arbitrary interference with individual rights and freedoms. There must be a rational connection between the law, its application and the objective pursued".

**41.** The Kampala Declaration on Prison Conditions in Africa[28] calls on governments to overhaul their criminal policies and to reconsider the use of prisons. The Kampala Declaration on Prison Conditions concludes that mass incarceration serves the interests of justice and is clearly not a good use of public resources.

**42.** Maintaining inconsistent internal rules is tantamount to failure to comply with international commitments. Unjustified failure to fulfil these commitments entails the international responsibility of the State. The will of the Member States is very important, as it is established that:
"refusal to fulfil a treaty obligation involves international responsibility".[29]

**43.** This will be the case for States' implementation of the two African Union Charters mentioned above and the Protocol on the Rights of Women. These are States' treaty obligations in this area. Subject to implementation, legally, the States' obligations are fulfilled upon adoption of the instruments adapted internationally. The latter are of higher authority.

## C. Aspects that temper obligations enforceable against States

**44.** Different aspects of international human rights law may be considered in this regard. If, as stated in the Request for an Opinion, there is a nexus between the instruments at issue in the request for opinion and former colonial instruments, the question of the linkage of these States, having succeeded the colonial regime, could arise, without the need, for the time being, to establish responsibilities. In its Opinion, the Court noted that:
"vagrancy laws commonly use the terms "rogue", "vagabond", "idle" and "disorderly" to label persons deemed to be vagrants. These terms, the Court holds, are a reflection of an outdated and largely colonial

28 *International Seminar on Prison Conditions in Africa*, Kampala, 21 September 1996.

29 ICJ, Advisory Opinion, 18 July 1950, *Interpretation of Peace Treaties* (2nd Phase), Reports 1950, p. 228; see also ICJ, *Gabcikovo Nagymaros*, Judgment, 25 September 1997, Reports 1997, p. 38, § 47.

perception of individuals without any rights and their use dehumanizes and degrades individuals with a perceived lower status".

**45.** Many of these laws emanated from the colonial era. The laws allowed segregation and separation of communities to oppress and repress them. The instruments were often vague and overly general...they were used for arbitrary arrests and for the excessive and abusive use of colonial power. In some countries, offences such as vagrancy are commonly used to arrest sex workers, the homeless and people with psychosocial disabilities.…

**46.** There is an acute issue of how succession between the colonial master and our current sovereign systems was conducted.[30] This is the problematic issue of State succession.[31] It can be underscored in this regard that the law of succession is not indifferent to the circumstances in which the succession occurs. In particular, the significance of decolonization between 1945 and the end of the 1960s led the codification conventions of 1978 and 1983 to individualize the category of the "newly independent states" of African defined as successor States.[32]

**47.** The internal legal order of the predecessor State has disappeared and has been replaced by that of the successor African state. This "transfer" of legislation, administrative regulations, jurisdiction of civil, criminal and administrative courts is a direct consequence of the principle of territorial sovereignty.[33] As a result, the criminal treatment that States currently administer to the so-called vagrants is a matter of their own authority.

**48.** It is in criminal matters that this succession is most complex. All post-colonial national criminal systems must make a sovereign

30 Succession of States means "replacement of one State by another in the responsibility for the international relations of a territory" (Art. 2, § 1(b), common to the Vienna Conventions of 1978 and 1983). This very general definition covers a wide range of realities, from simple border adjustments through the transfer of rules to the dissolution of a State. In a contentious case *Northern Cameroons (Cameroon v United Kingdom)* decided by the International Court of Justice (2 December 1963). The request submitted to the international judge was to find that the United Kingdom "had not conducted the peoples of Northern Cameroons to self-government". This is one aspect of transfer of legal assets. The Court dismissed the question.

31 It is common knowledge that Cameroon sought explanations from the International Court of Justice.

32 The principle was well established in customary law (...) the transfer of such property to the successor State "takes place ipso jure by virtue of the [transfer] treaty and without the need for a special acquisition agreement on the part of the successor State", CPJI, Case of P*eter Pazmany University v Czechoslovakia* (Judgment, 1933, Series B, No. 61, pp. 237-238).

33 Reports of Mr. Mohammed Bedjaoui to the ILC at the UN General Assembly since 1968.

assessment of the appropriateness of prosecutions ... the enforcement of decisions taken and rendered by courts, etc. .....

**49.** In any event, the establishment of criminal policies on these issues of vagrancy, which largely concern so-called petty offences, is a matter of national sovereignty in criminal matters. It is primarily up to the State to set the framework and intervene. States' positive obligations, including their responsibility, can only be established after the failure of this national criminal order whose State sovereignty is not open to challenge. The provisions of the Charter of Human and Peoples' Rights (1981), in particular Article 1 thereof, do not exclude this fact; on the contrary, they take into account the commitment made by States in the sense that:

**50.** "The Member States of the Organization of African Unity, parties to the present Charter, shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".

**51.** The standard known as the "national margin of appreciation" (NMA) could be considered to temper States' obligations. In the present case, where the matter is attractive from the point of view of criminal sovereignty, because it concerns matters of basic public policy, the national margin of appreciation must be considered. Under international human rights law, the State has a national margin of appreciation in this criminal field and in relation to this type of offence.[34]

**52.** This concept has been recognized in international human rights law since 1976. States may, in some cases, restrict rights and freedoms for reasons of public order, public health, national security, etc. This is a moderating concept, which is well reconciled with respect for the rights of individuals.

**53.** The African Commission on Human and Peoples' Rights also recalled that:

"Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies (…) as it indeed has direct and continuous knowledge of its society, its needs, resources, (…) and the fine balance

34 The ECHR recalled that: "The Court…is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention ("decision or ... measure taken by a legal authority or any other authority") as well as to its own case-law (Engel & ors judgment of 8 June 1976. ECHR, *Handside v the United Kingdom*, 7 December 2016, §§ 49 and 50.

that need to be struck between the competing and sometimes conflicting forces that shape its society."[35]

**54.** There is no doubt that the positive obligations of States express the continental commitment of States to exercise their criminal sovereignty over vagrant nationals. Even considering the established human rights law provisions, one cannot deprive a State of its sovereignty of internal legal ordering that international human rights law otherwise recognizes. This is preserved by the NMA principle, under the control of the human rights judge.[36]

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**55.** It would be risky to conclude this individual opinion in this context. PALU has brought before the African Court a real subject, rich in questions. It is clear that some collective imagination identifies vagrants in terms of contraventions, misdemeanours and crimes, but these issues need to be addressed. Again, I agree with the Court's approach and conclusions, as do my Honourable Colleagues, but there were so many other hidden issues at stake.

35 African Commission on Human and Peoples' Rights, *Prince v South Africa* (2004), AHRLR 105 (ACHPR 2004), § 51.

36 Pellet (P.), *Droits-de-l'hommisme et droit international* », Droits fondamentaux, N. 01, 2001, p. 4820;La mise en œuvre des normes relatives aux droits de l'homme, CEDIN (H. Thierry et E. Decaux, dirs.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme,* Montchrestien, Paris, 1990, p. 126.

# Ramadhani v Tanzania (reopening of pleadings) (2020) 4 AfCLR 925

Application 010/2015, *Amir Ramadhani v United Republic of Tanzania*

Order (reopening of pleadings) 19 August 2020. 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

In 2018, the Court delivered its judgment on the merits in the matter brought by the present Applicant. Based on the Court's finding that certain rights of the Applicant had been violated, the present request for reopening of pleadings was brought. The Court granted the request for reopening of pleadings.

**Procedure** (interest of justice, 4)

## I. The Parties

**1.** The Applicant, Amir Ramadhani, (hereinafter referred to as "the Applicant") is a national of Tanzania.

**2.** The Respondent State is the United Republic of Tanzania, which ratified the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986; the Protocol on 7 February 2006; and deposited the Declaration under Article 34(6) of the Protocol, by which it accepts the jurisdiction of the Court to receive cases directly from individuals and Non-Governmental Organizations, on 29 March 2010.

## II. Subject matter of the Application

**3.** An Application for reparations was filed by the Applicant pursuant to the judgment of the Court on the merits delivered on 11 May 2018. In the said judgment, the Court decided that the Respondent State violated Article 7(1)(c) of the Charter, due to its failure to provide the Applicant with free legal assistance during the judicial proceedings and decided that the Respondent State also consequently violated Article 1 of the Charter.

**4.** Pursuant to Rule 63 of the Rules, the Court ordered the Applicant to file his submission on reparations within thirty (30) days of the judgment of 11 May 2018 and the Respondent State to file submissions in response thereto within thirty (30) days of receipt

of the Applicant's submissions.

## III. Summary of the procedure before the Court

**5.** On 14 May 2018, the Registry transmitted a certified true copy of the judgment on the merits to the Parties.

**6.** The Applicant filed his submission on reparations on 30 July 2018, which was transmitted to the Respondent State on 2 August 2018.

**7.** After extensions of time granted to the Respondent State on 19 September 2018; 12 December 2018 and 15 February 2019, on 3 May 2019, pleadings were closed and the Parties were duly notified.

**8.** On 10 July 2019, the Respondent State filed its Response to the Applicant's submission on reparations.

## IV. The Court

i. *Orders* that the proceedings in Application 010/2015 *Amir Ramadhani v United Republic of Tanzania* (Reparations) are hereby reopened; and

ii. *Rules* that Respondent State's Response to the Applicant's submissions on reparations is deemed as properly filed, in the interest of justice;

iii. *Orders* the Applicant to submit his Reply to the Respondent State's Response within thirty (30) days of receipt thereof.