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

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Editorial

This is the fifth volume of the *Report of judgments, orders and advisory opinions of the African Court on Human and Peoples' Rights*. This volume covers decisions of 2021.

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 fifth volume of the *African Court Law Report* includes 61 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 (5), 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
- Ms. Milka Mkemwa, Documentalist
- Lizette Hermann, Manager, Pretoria University Law Press (PULP)

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Inter-American Court of Human Rights

International Criminal Court

International Court of Justice

Permanent Court of International Justice

United Nations Human Rights Committee

Privy Council

Supreme Court of Kenya

High Court of Malawi

Supreme Court of Uganda

Attorney General v Kigula
Juma v Tanzania (judgment) (2021) 5 AfCLR 431

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Juma v Tanzania (judgment) (2021) 5 AfCLR 431

Roper v Simmons
Rutechura v Tanzania (judgment) (2021) 5 AfCLR 7

Omar v Tanzania (provisional measures) (2021) 5 AfCLR 1

Application 045/2020, *Bashiru Rashid Omar v United Republic of Tanzania*

Order, 26 February 2021. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced for murder by courts in the Respondent State. He brought this Application alleging that his Charter guaranteed rights to life, dignity and fair trial were violated by the domestic proceedings that led to his conviction. Along with the main Application, he brought an Application for provisional measures to stay execution of the death sentence imposed by the domestic court. The Court granted the order requested.

Jurisdiction (*prima facie*, 14,18; effect of withdrawal of article 34(6) declaration, 17)

Provisional measure (*proprio motu* exercise of discretion, 24; death penalty demonstrates gravity and urgency, 26, 27, 29; irreparable damage, 28)

I. The Parties

1. Mr. Bashiru Rashid Omar (hereinafter referred to as "the Applicant"), is a Tanzanian national who is incarcerated at the Zanzibar Prison following his conviction and sentence to death for murder.

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 the deposit, that is, on 22 November 2020.[1]

II. Subject of the Application

3. It emerges from the main Application dated 20 November 2020 and received at the Registry of the Court on 21 November 2020 that, on 28 September 2016, the Applicant was mandatorily sentenced to death by the High Court of Zanzibar for the murder of his son in Criminal Case No. 03 of 2006.

4. As part of the domestic proceedings, the Applicant challenged his conviction and sentencing before the Court of Appeal of Tanzania in Criminal Case No. 309 of 2017. On 13 December 2018, the Court of Appeal affirmed the judgment of the High Court.

5. The Applicant avers that he was mandatorily sentenced to death based on contradictory evidence, and both the High Court and Court of Appeal did not examine the said evidence nor did they order further examination into his mental situation at the time of the offence. The Applicant claims that his lawyer did not have adequate time and facilities to present his case.

6. These facts form the basis for the present request for provisional measures through which the Applicant seeks an order from this Court that the Respondent State should stay the execution of the death penalty imposed upon him until the matter is determined on the merits.

III. Alleged violations

7. In the main Application, the Applicant alleges that the Respondent State violated his rights as follows:

i. The right to life protected under Article 4 of the Charter;

ii. The right to dignity protected under Article 5 of the Charter; and

iii. The right to a fair trial guaranteed under Article 7 of the Charter.

IV. Summary of the Procedure before the Court

8. The Registry received the main Application on 21 November 2020 together with a request for provisional measures and a request for legal aid. On 2 December 2020, the Application was served on the Respondent State, which was granted fifteen (15) days to file

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction, withdrawal) (3 June 2016) 1 AfCLR 562, § 67; *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 35-39.

its observations on the request for provisional measures.

9. On 11 December 2020, the Court granted the Applicant legal aid under its legal aid scheme and served the Application on the appointed counsel, Advocate Alphonse VAN of the Côte d'Ivoire Bar.

10. On 8 February 2021, the Registry received the Respondent State's response to the request for provisional measures, which was served on the Applicant on 9 February 2021 for information.

V. *Prima facie* jurisdiction

11. The Applicant did not make any observation on the jurisdiction of the Court.

12. The Respondent State does not object to the Court having jurisdiction to order provisional measures as provided under Article 27(2) of the Protocol and Rule 59(1) of the Rules.

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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 49(1) of the Rules[2] provides that "the Court shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules." However, in ordering provisional measures, the Court need not ascertain that it has jurisdiction on the merits of the case, but it simply needs to satisfy itself that it has *prima facie* jurisdiction.[3]

15. In the instant matter, the Applicant alleges violation of rights that are protected under Articles 4, 5, and 7 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

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.

34(6) and 5(3) of the Protocol, read jointly.

17. 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 recalls, in reference to its case-law, that the withdrawal of a Declaration comes into effect within one year of its deposit, has no retroactive effect, and does not have any bearing on pending cases and new cases filed before the withdrawal comes into effect.[4] The Court further recalls, as it has held in the Judgment that it rendered in the matter of *Andrew Ambrose Cheusi v United Republic of Tanzania*, that the withdrawal of the Declaration took effect on 22 November 2020 with respect to the Respondent State.[5] Noting that, in the present matter, the main Application, together with a request for provisional measures, was filed on 21 November 2020, the Court finds that the said withdrawal does not affect its personal jurisdiction.[6]

18. In light of the foregoing, the Court holds that it has *prima facie* jurisdiction to hear this Application.

VI. Provisional measures requested

19. The Applicant requests the Court to order that his execution should be halted until the matter is determined on the merits. He did not make any submissions in support of the request.

20. The Respondent State avers that the Applicant has merely made a request without advancing sufficient reasons to demonstrate gravity, urgency and irreparable harm that could justify the issuance of provisional measures.

21. The Respondent State further submits that the Applicant is serving a lawful sentence given that the provision in its Penal Code for death penalty in cases of murder was declared constitutional by the Court of Appeal of Tanzania.

22. It is also the Respondent State's submission that the Applicant's sentencing was lawful as it was handed down in accordance with the International Covenant on Civil and Political Rights (ICCPR).

4 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction), § 67.

5 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 35-39.

6 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction), § 67.

***

23. The Court recalls that

> [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.[7]

24. It follows from the foregoing that the Court has discretion and is empowered to decide *proprio motu* in each case whether, in the light of the particular circumstances, it should make use of the power vested in it by the aforementioned provisions.[8]

25. The Court recalls that, in examining whether a request for provisional measures should be granted, it is required to establish both urgency and irreparable harm. In the present case, the Applicant challenges the mandatory death penalty meted against him by domestic courts.

26. Regarding gravity and urgency, the Court notes that the Respondent objects to the granting of the order on the ground that the Applicant did not demonstrate gravity and urgency. In this respect, the Court considers that, in the present case which involves execution of the death penalty, it is empowered to issue provisional measures *suo motu* as doing so is necessary and in the interest of justice.[9]

27. In examining gravity and urgency, the Court is also cognisant of the fact that the Respondent State has been implementing a general moratorium and has not carried out any death sentence since 1994. However, and relying on its case-law, the Court does not deem such commitment sufficient in the face of such a serious risk as the execution of the Applicant.[10] As a matter of fact, despite the moratorium and the lack of execution in a long time, the

7 Emphasis of the Court.

8 See ***Charles Kajoloweka v Republic of Malawi***, ACtHPR, Application No. 055/2019, Ruling of 27 March 2020 (provisional measures), § 17.

9 See for instance, ***John Lazaro v United Republic of Tanzania*** (provisional measures) (18 March 2016) 1 AfCLR 593, §§ 12-19; ***Marthine Christian Msuguri v United Republic of Tanzania*** (provisional measures) (18 November 2016) 1 AfCLR 711, §§ 13-19.

10 ***Armand Guehi v United Republic of Tanzania*** (provisional measures) (18 March 2016) 1 AfCLR 587, §§ 18-21; ***Ally Rajabu & Others v United Republic of Tanzania*** (provisional measures) (18 March 2016) 1 AfCLR 590, §§ 18-20; ***Joseph Mukwano v United Republic of Tanzania*** (provisional measures) (3 June 2016) 1 AfCLR 655, §§ 15-18.

Respondent State may at any time carry out the death penalty**.** As a consequence, the Court finds that urgency is established.

28. With respect to irreparable harm, the Court recalls that it is established in instances where the impugned acts are capable of seriously compromising the rights whose violation is alleged in a way that prejudice would be caused prior to the Court makes a determination on the merits of the matter.[11] In the present case, the Applicant seeks to prevent the execution of the death sentence meted against him which, if carried out, would be irreversible. The condition of irreparable harm is therefore met.

29. In light of the above, the Court finds that the circumstances in the present Application are of such an extreme gravity and urgency that they warrant the adoption of provisional measures to avoid irreparable harm to the Applicant[12] pending determination on the merits of the matter.

30. 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.

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

VII. Operative part

32. For these reasons,

The Court,

Unanimously, orders the Respondent State to:

i. *Stay* the execution of the death penalty against the Applicant pending the determination of the present Application on the merits.

ii. *Report* to the Court within thirty (30) days, from the date of notification of this Ruling, on the measures taken to implement the order.

11 *Harouna Dicko and Others v Burkina Faso*, ACtHPR, Application No. 037/2020, Ruling of 20 November 2020 (provisional measures), § 29; *Guillaume Kigbafori Soro and Others v Côte d'Ivoire*, ACtHPR, Application No. 012/2020, Ruling of 15 September 2020 (provisional measures), § 29.

12 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application No. 012/2019, Judgment of 9 April 2020, § 21; *Tembo Hussein v United Republic of Tanzania*, ACtHPR, Application No. 001/2018, Judgment of 11 February 2019, § 21.

Rutechura v Tanzania (judgment) (2021) 5 AfCLR 7

Application 004/2016, *Evodius Rutechura v United Republic of Tanzania*

Judgment, 26 February 2010. 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's domestic appeal against his conviction and sentence to death for murder was unsuccessful. He brought this Application alleging that the refusal of his Application for extension of time to apply for a review of that decision and indeed his trial and conviction was a violation of several aspects of his charter protected right to a fair trial. The Court held that the Respondent State had not violated any of the rights claimed. In his separate opinion, Judge Tchikaya agreed with the operative part of the Court's judgment but argued that the Court ought to make a pronouncement of the evolution and legality of the death penalty.

Jurisdiction (material jurisdiction, 22, 25; effect of withdrawal of article 34(6) declaration, 27)

Admissibility (exhaustion of local remedies, 39; reasonable time, 46-50)

Procedure (citation of wrong provision, 62, 81)

Fair trial (access to municipal courts, 63; manifest error or miscarriage of justice, 67; free legal assistance, 72-74)

Evidence (margin of appreciation of municipal courts, 64)

Separate Opinion: TCHIKAYA

Procedure (*ultra petita*, 24-28)

Life (death penalty, 37-39)

I. The Parties

1. Mr. Evodius Rutechura (hereinafter referred to as "the Applicant") is a national of Tanzania, who at the time of the filing of this Application, was on death row at the Butimba Prison having been convicted of the offence of murder. He alleges the violations of his right to a fair trial.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the

Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), 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 (hereinafter referred to as "AUC"), an instrument withdrawing its Declaration under Article 34(6) of the Protocol. The Court held that this withdrawal had no bearing on pending cases and new cases filed before the withdrawal came into effect, one year after its deposit, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. The record before the Court, indicates that on 13 May 2003 at 8pm, the Applicant in the company of two individuals were involved in a burglary of the house of Erodia Jason in Mwanza. In the course of the burglary, the daughter of Erodia Jason named Arodia, was shot dead as she tried to flee the house. Subsequently, on 15 May 2003, the Applicant was arrested and charged with the murder of Arodia Jason. On 19 November 2008, he was convicted and sentenced to death by hanging at the High Court in Mwanza.

4. The Applicant being dissatisfied with the conviction and sentence from the High Court of Mwanza, filed an appeal on 25 November 2008 to the Court of Appeal of Tanzania sitting at Mwanza, judgment to which was delivered on 18 June 2010, dismissing his appeal.

5. On 10 December 2012, the Applicant filed an application for review of the Court of Appeal's judgment but before the matter was listed for hearing he discovered that he was out of time. On 20 March 2015, he withdrew his application for review requesting instead for extension of time to file the application for review. The request for extension of time was denied by the Court of Appeal on 8 June 2015, because the Applicant did not "show good cause."

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

B. Alleged violations

6. The Applicant alleges the following:

i. That the Court of Appeal violated his rights under the Charter by dismissing his request for extension of time to file the application for review;

ii. That the High Court and Court of Appeal violated his rights under the Charter by failing to provide him with free legal representation of his choice during his trial and appeal;

iii. That the Court of Appeal erred by relying on the visual identification evidence adduced by the prosecution witnesses who were related;

iv. That the Court of Appeal "overlooked the law relevant to admission of documentary evidence", thereby violating his rights under Articles 3(1) and (2) of the Charter.

III. Summary of the Procedure before the Court

7. The Application was filed on 13 January 2016, served on the Respondent State on 18 February 2016 and transmitted to the entities listed under Rule 35(3) of the Rules[2] on 18 March 2016.

8. On 18 March 2016, the Court issued an order for provisional measures *proprio motu*, in consideration of the situation of extreme gravity and the risk of irreparable harm associated with the death penalty. The Court ordered the Respondent State to "refrain from executing the death penalty against the Applicant pending the determination of the Application."[3]

9. The Parties filed their pleadings within the time stipulated by the Court.

10. On 26 September 2018, the Applicant filed a request for amicable settlement under the auspices of the Court, requesting the Court to facilitate a settlement which would result in the determination of his application for review in his favour. On 26 September 2018, the request was served on the Respondent State for its response within (30) thirty days.

11. The Respondent State did not file any observations on the proposal for amicable settlement and thus the Court decided to close written pleadings on the 3 September 2020 and the Parties were notified thereof.

2 Rule 42(4) of the Rules of Court, 25 September 2020.

3 *Evodius Rutechura v United Republic of Tanzania* (provisional measures) (18 March 2016), 1 AfCLR 596 § 20.

IV. Prayers of the Parties

12. The Applicant prays the Court to:

i. Quash both the conviction and sentence imposed upon him;

ii. Order his release from Custody;

iii. Grant him reparations pursuant to Article 27(1) of the Protocol; and

iv. Grant him any other orders or reliefs that the Court may deem fit in the circumstances.

13. 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(5) of the Rules of Court;

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

iv. That, the costs of the Application be borne by the Applicant;

v. That, the Applicant's conviction and sentence be maintained;

vi. That, the Application lacks merit;

vii. That, the Applicant's prayers be dismissed;

viii. That, the Application be dismissed with costs;

ix. That, the Applicant not be granted reparations.

14. Furthermore, the Respondent State prays the Court to declare that it has not violated any of the rights alleged by the Applicant.

V. Jurisdiction

15. 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.

16. In accordance with Rule 49(1) of the Rules, "the Court shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

17. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

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

A. Objection to material jurisdiction

19. The Respondent State raises an objection to the material jurisdiction of the Court, in that, the Applicant is asking the Court to sit as an appellate court on matters that have already been concluded by its Court of Appeal, the highest Court in its judicial system.

20. According to the Respondent State, Rule 26 of the Rules[4] does not provide the Court with "unlimited jurisdiction", rather, it limits the Court's jurisdiction to the interpretation and application of the Charter and other human rights instruments ratified by the State concerned.

21. The Applicant, citing *Alex Thomas v Tanzania*, submits that the Court has jurisdiction to consider this Application, as it raises alleged violations of his rights which are protected by the Charter.

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22. The Court notes in accordance with its established jurisprudence that, it is competent to examine 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 instruments related to human rights ratified by the State concerned.[5]

23. Furthermore, the alleged violations relating to the procedures at the domestic courts are of rights provided for in the Charter. Thus, the Court is not being required to sit as an appellate court but to act within the confines of its powers.

24. The Court notes that the Applicant raises allegations of violations of the human rights enshrined in Articles 3 and 7 of the Charter, whose interpretation and application falls within its jurisdiction.

4 Rule 29(1)(a) of the Rules of Court, 25 September 2020.

5 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) § 26; *Armand Guehi v 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.

The Respondent State's objection in this respect is therefore dismissed.

25. Consequently, the Court holds that it has material jurisdiction.

B. Personal jurisdiction

26. Although, the Respondent State has not objected to the personal jurisdiction of the Court, the Court notes, as earlier stated in this Judgment, that, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration provided for under Article 34(6) of the Protocol with the AUC. On 21 November 2019, it deposited an instrument withdrawing the Declaration with the AUC.

27. 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 of withdrawal of 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 deposited, in this case, on 22 November 2020.[6]

28. In view of the above, the Court finds that it has personal jurisdiction.

C. Other aspects of jurisdiction

29. 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 Applicant remains convicted and is on death row on grounds which he considers are wrong and indefensible;[7]

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

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

6 *Ingabire Victoire Umuhoza v Rwanda* (juridiction) (3 June 2016) 1 AfCLR 540 § 67; *Cheusi v Tanzania* (merits), *op.cit*, §§ 5-39.

7 *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.

VI. Admissibility

31. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter." Pursuant to Rule 50(1) of the Rules, "[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."

32. Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

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

b. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;

c. comply with the Constitutive Act of the Union and the Charter;

d. not contain any disparaging or insulting language;

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

f. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

g 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;

h. 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

33. The Respondent State submits that the Application does not comply with Rule 40(5)[8] and 40(6)[9] 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.

8 Rule 50(2)(e) of the Rules of Court, 25 September 2020.

9 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

i. Objection on non- exhaustion of local remedies

34. The Respondent State contends that the Applicant has raised some allegations of human rights violations in this Court, for the first time. It is of the view, that the Applicant only raised one ground in his appeal at the Court of Appeal, that is; that the High Court erred in law and facts in finding that he was correctly identified at the scene of the crime. Therefore, it argues that, the Applicant did not utilize the remedy of the Court of Appeal to address the other grievances that he raises before this Court.

35. The Respondent State citing the decision of the African Commission on Human and Peoples' Rights of *Southern African Human rights NGO Network and others v Tanzania* 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 the International body like the Court.

36. Referring to *Article 19 v Eritrea* filed before the Commission, the Respondent State submits that the onus is on the applicant to demonstrate that he took all the steps to exhaust the domestic remedies and not merely to cast aspersions on the effectiveness of those remedies. It submits that, "in this regard, it cannot be said that the Applicant has exhausted legal remedies in light of the fact that he never took his grievances to the Court of Appeal for redress. The Respondent further states that these remedies were never prolonged and (*sic*) always accessible to the Applicant."

37. The Applicant submits that his Application should be found admissible **"**according to Articles 5(3) and 6(1) and (2) of the Protocol.**"**

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38. The Court notes that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are not available, they are ineffective, insufficient or the procedure to pursue them is unduly prolonged.[10] The rule aims at providing States with the opportunity to remedy the human rights

10 *Zongo and Others v Burkina Faso* (preliminary objections) *op. cit.* § 84.

violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.[11]

39. In the instant case, the Court notes from the record that the Applicant filed an appeal against his conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 18 June 2010, the Court of Appeal upheld the judgment of the High Court. The Respondent State thus had the opportunity to redress the alleged violations but failed to do so. It is therefore clear that the Applicant has exhausted all the available domestic remedies.

40. For these reasons, the Court dismisses the objection that the Applicant has not exhausted local remedies.

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

41. The Respondent State submits that the Applicant has not complied with the requirement under Rule 40(6)[12] 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 Applicant's case at the Court of Appeal was concluded on 13 September 2012, and it took "three (3) years and four (4) months" for the Applicant to seize this Court. The Respondent State also contends that the Court of Appeal dismissed the Applicant's Application to file for review out of time on 13 February 2015, that is "one (1) year and two (2) months" before the Applicant seized the Court and that this was also unreasonable delay on the part of the Applicant.

42. Noting that Rule 40(6)[13] of the Rules does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws this Court's attention to the fact that the African Commission has held a period of six (6) months to be the reasonable time.[14]

11 *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017), 2 AfCLR 9 §§ 93-94; *Dismas Bunyerere v United Republic of Tanzania,* ACtHPR, Application No. 031/2015, Judgment of 28 November 2019 (merits and reparations) § 35.

12 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

13 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

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

43. The Respondent State argues that the Applicant filed his Application **"**more than six (6) months**"** after the Court of Appeal decision of 13 September 2012. Thus, the Application is improper and should be dismissed.

44. The Applicant submits that reasonable time has not been defined and that it should be assessed on a case-to-case basis according to the Court's jurisprudence in *Zongo v Burkina Faso*.

***

45. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 50(2)(f) of the Rules, which in substance restates Article 56(6) of the Charter, only requires: "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."

46. In the instant case, the Court observes that the judgment of the Court of Appeal was delivered on 18 June 2010. The Court notes that about five (5) years, six (6) months and twenty-four (24) days elapsed between 18 June 2010 and 13 January 2016 when the Applicant filed the Application before this Court. The issue for determination is whether the five (5) years, six (6) months and twenty-four (24) days that the Applicant took to file the Application before the Court is reasonable.

47. The Court recalls 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."[15] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[16] indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal[17] and the

15 *Zongo and others v Burkina Faso* (merits), *op. cit.* § 92; See also *Thomas v Tanzania (*merits) *op.cit* § 73;

16 *Thomas v Tanzania* (merits) *op.cit*, § 73; *Christopher Jonas v Tanzania* (merits) (28 September 2017), 2 AfCLR 101 § 54; *Ramadhani v Tanzania* (merits) (11 May 2018), 2 AfCLR 344 § 83.

17 *Association Pour le progress et la Defense des droit des Femme Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (11 May 2018), 2 AfCLR 380 § 54.

use of extra-ordinary remedies.[18]

48. From the record, the Applicant is a death-row inmate, incarcerated, restricted in his movements and with limited access to information. Further, the Applicant tried to use the review procedure twice, with the last attempt being on 8 June 2015, that is, seven (7) months and five (5) days before seizing the Court. The Court has held that an Applicant using a review procedure even though an extra-ordinary remedy should not be penalised for exercising it.[19]

49. The Court notes that the above mentioned circumstances delayed the Applicant in filing his claim before this Court. Taking into account the applications for review filed by the Applicant, the time taken to seize the Court would no longer be considered to be five (5) years and six (6) months, but rather seven (7) months and five (5) days. The Court thus finds that the seven (7) months and five (5) days taken to file the Application before this Court is reasonable.

50. Accordingly, the Court dismisses the objection of the Respondent State and holds that the Application was filed within a reasonable time.

B. Other conditions of admissibility

51. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2) (a), (b), (c), (d) and (g) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

52. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

53. 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 50(2)(b) of the Rules.

54. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of

18 *Armand Guehi v Tanzania* (merits and reparations) *op.cit* § 56; *Werema Wangoko v Tanzania* (merits) (7 December 2018), 2 AfCLR 520 § 49; *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits) § § 83-86.

19 *Werema Wangoko v Tanzania* (merits) § 49; *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits) § § 83-86.

Rule 50(2)(c) of the Rules.

55. 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 50(2)(d) of the Rules.

56. 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 50(2)(g) of the Rules.

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

VII. MERITS

58. The Applicant avers the violations of Article 3(1) and (2), 7(1)(c) and (d) of the Charter in relation to the following allegations:

i. Court of Appeal's dismissal of the Application for leave to file for review;

ii. The denial of the right to free legal representation;

iii. Assessment of evidence in the Court of Appeal.

A. Allegation relating to the application for leave to file for review

59. The Applicant argues that the Court of Appeal erred in rejecting his application for leave to file his review application out of time as he had communicated to the Court of Appeal that he was unwell and thereby unable to comply with the time limits. According to the Applicant, this violated his right under Article 7(1)(d) of the Charter.

60. The Respondent State submits that the Applicant did not give good reasons as to why his application for leave to file out of time should be granted. It avers that the Court of Appeal dismissed the Application in accordance with Rule 66 of its Rules, because the application for leave did not demonstrate a prospect of success.

***

61. Article 7(1)(a) of the Charter provides:

> Every individual shall have the right to have his cause heard. This comprises:
>
> a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force…

62. The Court notes that the Applicant erroneously relied on Article 7(1)(d) of the Charter, as his allegation is properly suited to Article 7(1)(a) of the Charter, that is, the right to have his cause heard. The Court will thus consider this allegation in light of Article 7(1)(a) of the Charter.

63. The Court observes that the Respondent State is mandated to ensure that its municipal courts are accessible to individuals and that due process is observed in all its proceedings. Notwithstanding this mandate, individuals are also required to abide by rules of procedure and the laws enacted by the Respondent State.

64. The Court reiterates its jurisprudence that:

> …domestic courts enjoy a wide margin of discretion in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[20]

65. In the instant case, the Applicant alleges that the Court of Appeal erroneously dismissed his application to file for review out of time. Nevertheless, he did not substantiate this allegation or demonstrate with evidence the alleged violation of his right owing to the error of the Court of Appeal. He has simply asserted that he was sick.

66. Further, the Court observes from the record that the Court of Appeal dismissed his application to file for review out of time because the application did not demonstrate prospect of success in accordance with Rule 66(1) of its Court of Appeal Rules.[21]

67. The Court finds that the manner in which the Court of Appeal dismissed the Applicant's application to file an application

20 *Kijiji Isiaga v Tanzania*, (merits) (21 March 2018), 2 AfCLR 218 § 65; *Majid Goa v United Republic of Tanzania*, ACtHPR, Application No.025/2015, Judgment of 26 September 2019 (merits and reparations) § 86.

21 Rule 66(1)(a-e), "The Court may review its judgment or order, but no application for review will be entertained except on the following grounds: namely, that: (a) The decision was based on a manifest error on the face of the record resulting in miscarriage of justice or (b) a party was wrongly deprived of an opportunity to be heard; or (c) the Court's decision is a nullity; or (d) The Court has no jurisdiction to entertain the case; or (e) The judgment was procured illegally or by fraud or perjury." The Court of Appeal's Ruling - "no good cause has been shown, the application is hereby dismissed"

for review out of time, does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation and finds that the Respondent State has not violated Article 7(1)(a) of the Charter.

B. Allegation related to the right to free legal assistance

68. The Applicant contends that he was not provided with a free legal representative of his choice during the proceedings in the national courts because the Respondent State chose all the lawyers that represented him. He therefore claims that this is a violation of Article 7(1)(c) of the Charter.

69. The Respondent State submits that the Applicant was represented by "Advocates Bantulaki, Muna and Kitwala in the High Court and Advocate Deya Paul Outa at the Court of Appeal", therefore he was duly represented throughout the national courts' proceedings.

70. Consequently, the Respondent State submits that the allegation herein is "frivolous, lacks merit and should be duly dismissed."

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71. Article 7(1)(c) of the Charter provides as follows: "[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."

72. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[22] and determined that the right to defence includes the right to be provided with free legal assistance.[23]

73. The Court notes, in line with the jurisprudence of the European Court of Human Rights, that the right to be defended by counsel of one's choice is not absolute when the counsel is provided through a free legal assistance scheme.[24] In this circumstance,

22 The Respondent State became a State Party to ICCPR on on 11 June 1976.

23 *Thomas v Tanzania* (merits) *op.cit* § 114; *Isiaga v Tanzania* (merits) *op.cit* § 72; *Kennedy Onyachi and Njoka v Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104.

24 ECHR, *Croissant v Germany* (1993) App No.13611/89 § 29, *Kamasinski v Austria* (1989) App No. 9783/82, § 65.

the important consideration is whether the accused was given effective legal representation rather than whether he or she was allowed to be represented by a lawyer of their own choosing.[25]

74. Therefore, the duty of the Respondent State is to provide adequate representation to an accused and intervene only when the representation is not adequate. [26]

75. The Court notes from the record, that the Applicant was represented throughout the proceedings in the national courts by advocates provided for by the Respondent State at its own expense. The Court further notes that there is nothing on the record to the effect that the Applicant was not adequately represented or that he raised this issue in the proceedings at the national courts. Moreover, the Applicant did not substantiate his claim herein.

76. Consequently, the Court finds that the Respondent State has not violated Article 7(1)(c) of the Charter by failing to provide free legal assistance.

C. Allegation relating to the manner of the evaluation of evidence in the Court of Appeal

77. The Applicant contends that the decision of the Court of Appeal was based on the visual evidence of relatives who were serving their own interest and that there were no "independent witnesses" who testified. He also submits that he was arrested as a result of "mere suspicion" because they had been prior complaints about him at the police station.

78. He avers that the Court of Appeal did not abide by the rules of documentary evidence; notably, giving him an opportunity to object to the evidence that was tendered in. Further, that this evidence was not supported by oral evidence of its "maker". He claims that these "errors" violated his rights under Article 3(1) and (2) of the Charter.

79. According to the Respondent State, the Court of Appeal not only considered the conditions of identification but also the credibility of the witnesses. It further submits that the evidence presented in the High Court was **"**water-tight**"** and left no doubt that it was the Applicant who murdered the deceased.

25 ECHR, *Lagerblom v Sweden* (2003) App no 26891/95, §§ 54 - 56.

26 ECHR, *Kamasinski v Austria* (1989) App No. 9783/82, § 65.

80. The Respondent State contends that the Applicant was represented by legal counsel at the trial at the High Court and his counsel did not object to the tendering in of the exhibits which was in compliance with the Criminal Procedure Act.

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81. The Court notes that the Applicant has relied on Article 3(1) and (2) in his allegation herein. Nevertheless, the allegations raised by the Applicant concern, the right to a fair trial and especially the right to defence. Therefore, the Court will consider this allegation in the light of Article 7(1) of the Charter.

82. Article 7(1) of the Charter provides: "Every individual shall have the right to have his cause heard…"

83. The Court reiterates its position according to which, it held that:

> … domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence, and as an international court, this court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[27]

84. In the instant case, the record before this Court shows that the national courts convicted the Applicant on the basis of visual identification evidence tendered by three (3) prosecution witnesses who were at the scene of the crime. The Court notes that the witnesses being related, cannot on its own put doubt on the credibility of their testimonies especially since the Applicant was represented by counsel who had the opportunity to challenge their credibility. The Court further notes, that the national courts assessed the circumstances in which the crime was committed, in order to eliminate possible errors as to the identity of the perpetrator and found that the Applicant was guilty.

85. As regards the documentary evidence tendered, the Court notes that the Applicant was represented by counsel and he did not object to the said exhibits. Further, the record shows that the national courts followed the procedures according to its laws in assessing the probative value of the said evidence.

86. The Court finds that the manner in which the domestic courts evaluated the evidence relating to the Applicant's identification

27 *Isiaga v Tanzania* (merits) *op.cit.* § 65.

does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation.

VIII. Reparations

87. The Applicant prays that the Court grant him reparations for the violations he suffered including quashing his conviction and sentence and ordering his release.

88. The Respondent State prays the Court to deny the Applicant's request for reparations.

***

89. 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.

90. In the instant case, no violation has been established and thus the issue of reparations does not arise. The court, therefore, dismisses the Applicant's prayer for reparations.

IX. Costs

91. The Respondent State prays the Court to order the Applicant to bear the costs of the Application.

92. Pursuant to Rule 32(2) of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

93. In light of the foregoing, the Court rules that each party shall bear its own costs.

X. Operative part

94. For these reasons:

The Court

Unanimously,

On jurisdiction

i. *Dismisses* the objection to material jurisdiction.

ii. *Declares* that it has jurisdiction.

On admissibility

iii. Dismisses the objections on admissibility.

iv. *Declares* the Application admissible.

On merits

v. *Finds* that Respondent State has not violated Article 7(1) of the Charter as regards the manner of evaluation of evidence;
vi. *Finds* that the Respondent State has not violated Article 7(1)(a) of the Charter as regards the application for leave to file for review;
vii. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter as the Applicant was provided with free legal assistance.

On reparations

viii. *Dismisses*, the prayer for reparations.

On costs

ix. *Orders* each party to bear its own costs.

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Separate Opinion: Tchikaya

1. International human rights law, through its most advanced jurisprudence, *has already derived from the prohibition of torture, cruel, inhuman or degrading treatment or punishment* the international prohibition of the death sentence.[1] The question of the legal basis for this prohibition no longer arises.

2. Like my honourable colleagues, I approved the operative part

1 The Strasbourg Court's reading of Articles 2 and 3 of the European Convention on Human Rights (4 November 1950) (the judgments on ***Ocalan v Turkey***, 12 May 2005 and ***Al-Saadoon and Mufdhi v the United Kingdom***, 2 March 2010) allows the Court to characterise a death sentence imposed following an unfair trial as inhuman treatment. It describes the death sentence as an "unacceptable punishment" prohibited by Article 2 and considers, in the light of State practice, that the enforcement of the death penalty in all circumstances now constitutes inhuman and degrading treatment contrary to Article 3. Recall that the US Supreme Court decision in ***Roper v Simmons***, 13 October 2004 invoked the Eighth Amendment to the Constitution prohibiting cruel and unusual punishment. It held that the execution of persons under the age of 18 at the time of the trial constituted cruel and unusual punishment, contrary to the 8th and 14th amendments.

of the *Evodius Rutechura v Republic of Tanzania*[2] decision of 26 February 2021.[3] However, it would have been desirable for the said operative part to have been supplemented by one of the aspects relating to the evolution of the sentence in question: the death penalty. The death penalty was not the main focus of this judgment, nor was it its legal issue. However, this penalty is undoubtedly the cause of Mr Evodius Rutachura's procedural challenges before the Court. Evodius limits his complaints before the Court of Appeal to the dismissal of his request for additional time to file a request for review, the lack of legal aid during his trial and appeal, and the insufficiency of evidence.[4]

3. In the same proceedings, the Applicant requested for provisional measures on his death sentence. In order to avoid irreparable harm despite the *de facto* moratorium adopted by the Respondent State and the fact that no execution had taken place for a long time, the Court granted these provisional measures in a decision rendered in 2016.[5] The operative part of the said decision was limited in scope. It was not intended to make a pronouncement on the death penalty regime.

4. The practice of executing people for 'serious' offences, although in decline, still exists on the continent. Although this is not the place for an analysis, the so-called "legal" death penalty pronounced by judges, is an extension of the power of the rule of law. A death sentence in this case results from the construction of the State itself. The etymology of the word *potency* derives from the latin word *potentia*, meaning 'power' in the public and political sense. This is precisely the Roman position,[6] which held that the death penalty would protect society, because it would be an exemplary punishment and would serve as deterrence to criminals. This position, although widely held, has not been

2 On 21 November 2019, this State notified the Chairperson of the AU Commission of its withdrawal of its Declaration accepting the Court's jurisdiction to receive applications filed directly by individuals and non-governmental organisations. The Court, taking into account the applicable law and its jurisprudence (*Ingabire Victoire Unuhoza v Rwanda*, 3 June 2016, 1 AfCLR 584, § 67; *Andrew Ambrose Cheusi v Tanzania*, 26 June 2020, §§ 37-39), decided that the withdrawal had no bearing on cases pending before the Court as well as on cases filed before the withdrawal took effect, one year after the deposit of the instrument of withdrawal, i.e., on 22 November 2020. The Court thus retained admissibility and jurisdiction over the case.

3 AfCHPR., *Evodius Rutechura v Tanzanie,* udgement, 26 février 2021.

4 *Idem*., § 6.

5 AfCHPR, Order, *Evodius Rutechura v Tanzania,* 18 March 2018.

6 Gaudemet (J), *Les institutions de l'Antiquité*, Paris, Montchrestien, coll. « Domat Droit public », 5e éd., 1998, p. 511.

sociologically proven. It has been considered an absolute denial of human rights, a premeditated and cold-blooded State murder or an act of barbarism. Since 1973, more than 160 death row inmates have been exonerated or released in the United States after being proven innocent.[7] Other prisoners have been executed even though there were serious doubts about their guilt.[8]

5. The question – the relevance of which remains to be demonstrated – is whether human law affirms or negates the outlawing of the death sentence. The Evodius case has given the Court the opportunity to reflect further on the subject. Once again, the continental court noted the opportunity given it to recall, as an incentive, to clarify an increasingly universal doctrine on the abolition of the death sentence. The case of Evodius Rutechura comes after the Second Additional Protocol to the International Covenant on Civil and Political Rights, which abolishes the death sentence for States that are party to it. On 17 November 2020, the General Assembly called on "States that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death sentence".[9]

6. In the operative part of the Evodius Rutechura decision, which we endorsed, the Court shows strict compliance with the applicable law (1). However, the Court could, on this occasion, have clarified and prompted the States of the region to pay more attention to the human rights developments that are taking place before them on the issue of the death penalty (2).

1. *Evodius Rutechura*, a *lex lata* decision

7. As recalled, the Applicant and two acolytes, undertook to rob the home of Erodia Jason in Mwanza on 13 May 2003. Erodia Jason's daughter, Arodia, was shot while trying to escape from the house.

7 Badinter (R.), *Contre la peine de mort*, Ed. Poche, 320 p. ; *L'abolition,* Ed. Poche, 2002, p 288.

8 https://www.amnesty.org/fr/what-we-do/death-penalty/

9 AGONU, Resolution. No. °73/175, *Moratorium on the Use of the death penalty*, 17 December 2018 (Report of the 3rd Commission (A/73/589/Add.2), § 10. 123 UN Member States voted in favour of the resolution, including Djibouti, Jordan, Lebanon and South Korea, who support the proposal for the first time. The Democratic Republic of Congo, Guinea, Nauru and the Philippines, Yemen and Zimbabwe also supported the Resolution. The UN Commission on Human Rights held that "States that no longer apply the death penalty but maintain it in their legislation to abolish it" (Point 6) of the Resolution of the Commission on Human Rights 2004/67 adopted by a recorded vote of 29 to 19, with 5 abstentions. Chap. XVII E/2004/23-E/CN.4/2004/127], 21 April 2004

On 15 May 2003, the Applicant was arrested. He was convicted on 19 November 2008 and sentenced to death by hanging by the High Court sitting in Mwanza.[10]

1.1 The Evodius case, issues and solutions

8. The Applicant is a Tanzanian national sentenced to death by hanging for murder. He challenged the proceedings and ultimately the sentence imposed on him. In the operative part of the judgment, the Court rightly concludes that the Respondent State did not violate Article 7 of the Charter as regards the manner in which the evidence was assessed, nor did it violate the right to free legal assistance to which the Applicant was entitled. While adhering to its decision, it would have been desirable for the Court to take a position on the issue of the death sentence which was the essence of the judgment. This would have been a welcome extension of the Court's praetorian power in this matter of such concern.

9. The Respondent State's arguments could not prosper. The Court, committed to its principles, unanimously held that it has jurisdiction to assess the relevant proceedings before domestic courts to the extent of the international instruments ratified by the State. It relied on case law that is now established.[11] It also rightly pointed out that the withdrawal of the Declaration deposited pursuant to Article 34(6) of the Protocol has no retroactive effect and has no bearing on the Evoduis case insofar as it was pending at the time the Respondent State deposited its instrument of withdrawal. The latter does not take effect until twelve (12) months after this deposit (22 November 2020).[12]

10. The Court declared the case admissible, as it appeared that the Applicant had appealed his conviction and sentence to the Tanzanian Court of Appeal, the highest court, on 18 June 2010, which court upheld the judgment of the High Court of Justice. The Respondent State was thus given the opportunity to cure the alleged violations. The Applicant had therefore previously

10 AfCHPR, *Evodius Rutechura v Tanzanie*, Judgment, § 3.

11 AfCHPR, *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 197, § 14; *Kenedy Ivan v Tanzania*, Application No. 25/2016, 28 March 2019, § 26; *Armand Guéhi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 493, §33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits) (23 March 2018) 2 AfCLR 297, § 35.

12 AfCHPR, *Ingabire Victoire Unuhoza v Rwanda* (merits) (2016) 1 AfCLR 584, § 67; *Cheusi v Tanzania* (merits), §§ 35 à 39.

exhausted all available local remedies. This position of the Court was defensible and of established jurisprudence.[13] It should be recalled that the admissibility of the Application is subject to the principle of prior exhaustion of local remedies. This principle prescribes that persons challenging a State in a human rights dispute before an international body are, in principle, under an obligation to make prior use of the remedies available under their country's legal system.

11. The Court was therefore faced with the question of whether the referral was made within a reasonable time. As in many previous cases, "the determination as to whether the duration of the procedure in respect of local remedies has been normal or abnormal should be carried out on a case-by-case basis depending on the circumstances of each case".[14] In the Evodius case, the Court found that the Applicant was detained and sentenced to death, imprisoned and restricted in his movements with limited access to information. On two occasions, he attempted to apply for a review, the last attempt being on 8 June 2015, i.e., seven (7) months and five (5) days before the case was brought before the Court. It further held that the circumstances mentioned delayed the filing of the Application before it. The Application was therefore deemed to have been filed within a reasonable time.

12. The operative part of the judgment was unanimous. On the whole, the Court did not uphold the Applicant's claims, except for the aspect relating to the Respondent State's failure to provide free legal assistance to the Applicant under Article 7(1)(c) of the Charter.

1.2 The relationship of the *Evodius decision* with previous case law

13. It should be recalled that the Court has handed down numerous decisions on the issue of the death penalty. Although this particular Evodius case did not make it a point of law, it was fundamentally

13 ECHR, *Akdivar et al. v Turkey*, 16 September 1996; JDJ, 1996,239, obs. E. Decaux; RTDH. 1998, p. 27, note P. Legros and P. Coenraets. It is clearly understood that States are not accountable to an international body before they have had the opportunity to rectify the situation in their domestic legal order, *Interhandel Case*, *Switzerland v United States*, Preliminary Objections, ICJ 21 March 1959, ICJ Reports 1959, p. 27; Wiebringhaus (H.), La règle de l'épuisement préalable des voies de recours internes dans la jurisprudence de la Commission européenne des Droits de l'Homme, AFDI, 1959. pp. 685-704.

14 AfCPHR., *Zongo and Others v Burkina Faso* (merits), *op. cit.,* § 92; See also *Thomas v Tanzania* (merits) *op. cit*., § 73.

at the root of the proceedings before the African Court. In the *Armand Guehi* case (2018),[15] its first and most important case on the matter, the Court, in accordance with the reasons contained in its judgment, ruled against the requested release. It said, without further provision on the death sentence, that it dismissed "the Applicant's prayer for the Court to quash his conviction and sentence, and order his release".[16] The Court thus went no further than to rule on the Applicant's claims.

14. The Arusha Court has been seized with various cases involving the death penalty.[17] From 2015 to 2020, the Court has heard almost 20 cases involving the death sentence. They come to the Court on the basis of Article 7 (1) of the African Charter which protects the right to a fair trial. The typical argument in the 2019 *Oscar Joshia* case,[18] for example, is as follows:

> "The Court of Appeal's judgment was rendered on the basis of evidence derived from statements of the Prosecution Witness which were marred by inconsistencies and "manifest errors patent in the face of the records (...) the Court of Appeal misdirected itself by dismissing his grounds of appeal without giving them due consideration by relying on incriminating evidence obtained from an "untruthful witness. The Court of Appeal's wrongful dismissal of his Appeal violates his rights under sections 3(1) and (2) and 7(1)(c) of the Charter".[19]

15. This argument cannot be assessed *a priori*, but it can be noted, as here in Evodius, that it is almost always used in death sentence cases.

15 AfCHPR., ***Armand Guehi v Tanzania***, 3 June 2016 (jurisdiction and admissibility) and 7 December 2018 (merits).

16 *Idem*., 205, point X of the operative part.

17 These include ***John Lazaro v Tanzania***, Order 18 March 2016; ***Habiyalimana Augustino and Mburo Abdukarim v Tanzania***, Order, 3 June 2016*; Deogratius Nicholaus Jeshi v Tanzania*, Order, 3 June 2016; ***Cosma Faustin v Tanzania***, 3 June 2016; ***Joseph Mukwano v Tanzania***, 3 June 2016 and; ***Oscar Josiah v Tanzania***, Provisional Measures, 3 June 2016; ***Dominick Damian v Tanzania***, 3 June 2016; ***Chrizant John v Tanzania***, 18 November 2016; ***Crospery Gabriel and Ernest Mutakyawa v Tanzania***, Provisional Measures,18 November 2016; ***Nzigiyimana Zabron v Tanzania***, interim measures (2016); ***Marthine Christain Msuguri v Tanzania***, Provisional measures, 18 November 2016; ***Gozbert Henerico v Tanzania***, interim measures, 28 November 2016, ***Mulokozi Anatory v Tanzania***, Provisional measures, 28 November 2016; ***Amini Juma v Tanzania***, 18 November 2016.

18 CAfDHP., ***Oscar Josiah,*** merits, 28 November 2019

19 *Idem*., § 7 and 8.

16. The Ally Rajabu case has attracted a great deal of attention from the Court.[20] In this case, Ally Rajabu and four other Tanzanian nationals were sentenced to death for murder. They alleged, as already mentioned, that they had been convicted without a full hearing of their case and that the fact that they were

> convicted in violation of Section 235(1) of the Criminal Procedure Act and therefore should be given the benefit of the doubt.[21]

17. The operative part of the judgment made no reference to the death sentence regime at issue, which was contested by the Applicants. Rather, the Court stated that:

> "the Respondent State has not violated the Applicants' right to be tried within a reasonable time, under Article 7(1) (d) of the Charter, (nor)(...) the right to life guaranteed under Article 4 of the Charter, in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer".[22]

18. Thus, the Court in *Evodius Rutechera* simply recalls its established jurisprudence on the issue of the death sentence, resolutely steering clear of the current debates applicable to the law in force, an approach that will be followed in the *Dexter* case.

1.3 *The Evodius case* and the particularities of *the Dexter case*

19. The case of *Dexter Eddie Johnson v the Republic of Ghana*[23] followed the same line of reasoning, albeit with some peculiarities, but the Court of Appeal maintained its jurisprudential stance.

20. On 27 May 2004, this Applicant, who has dual Ghanaian and British nationality, killed an American national in the Greater Accra region of Ghana. When brought to court, he denied the offence. On 18 June 2008, the Accra High Court, in a fast-track procedure, found him guilty of the murder and sentenced him to death. In addition to the issue of due process, the right to life and the prohibition of inhuman or degrading treatment or punishment, the problem in Dexter's case is that the only sentence for this offence under Ghanaian law is capital punishment, which has

20 AfCHPR., *Ally Rajabu, Angaja Kazeni, Geofrey Stanley, Emmanuel Michael and Julius Michael v Tanzania*, Order. 18 March 2016; admissibility and jurisprudence, 4 July 2019.

21 *Idem*., § 6.

22 *Ibidem*., § 171 – vii and viii.

23 AfCHPR, *Dexter Eddie Johnson,* Order. 28 September 2017 and Judgment on the merits, 28 November 2019.

been called the mandatory death sentence.[24] Dexter is currently awaiting execution.

21. In this precedent, the Court reiterates its jurisprudence, *lex lata*. Pursuant to Rule 56(7) of its Rules of Court, it ruled that the case was not admissible because it had been heard by another body, the Human Rights Committee, and was therefore a "*non bis in idem*". In this case, the Court did not rule on the merits. From paragraphs 33 to 57 of the Dexter judgment, the Court perceives the issue of the mandatory death sentence, but in this 2018 decision it complies with the procedural restriction of *non bis in idem*.

22. The Court was right not to add incentives to its operative part in *Dexter*, at least for two reasons. The first reason was that the case was declared inadmissible; the second reason was that once it had held that the United Nations Human Rights Committee had disposed of the substance of the dispute, it would have seemed prudent to focus more on the merits than to add incentives to its decision to dismiss the case. The Court's position in Dexter on this point, clearly seems consistent.

23. The question of the form of these incentives already arises, as does the question of their basis.

2. Evodius Rutechura, the death sentence and incentives

24. The Court's attention was rightly drawn to the enactment of the death sentence incentives. It was noted that the Court could deal with this only if it is a principal issue of law in the case or if it was not a request in the Application.

25. At the margin, a question therefore arose for the Court as to a specific extension of the operative part of the judgment on the attitude of the Respondent State to the law applicable to the death sentence. Was this possible, given the content of the terms of the dispute? In short, could the Court include in its operative part a statement, which it would consider appropriate, for the purpose of advancing human rights, even though it was not among the Applicant's requests? Would the Court not be ruling *ultra petita*? This question deserves to be addressed.

2.1 Should the specter of *ultra petita* therefore limit the Court's creative function?

24 UN Human Rights Committee, Communication *Dexter Eddie Johnson v Ghana*, 18 July 2012.

26. The issue at hand is arguably one of the most important and sensitive in human rights: the death sentence. When the Court is seized of this issue, directly or indirectly, its jurisdictional function should be carried out in the normal way, while taking strict account of the essential counterpart of this right: the right to life.[25]

27. It is accepted that a court can only rule on the findings submitted to it because its judicial function is the application of the law. It must provide the resulting interpretation. The *Evodius* judgment in its operative part, by the principle of lex lata, is limited to the Applicant's claims. The question to be asked is whether the spectre of *ultra petita* should limit the Court's jurisdictional function from the outset. This point is so important that it requires clarification. Three arguments suggest that the Court can go further.

28. The first argument is that the Court has, when it is in the interests of human rights, a broad power of interpretation. It cannot limit it in order to safeguard its jurisdictional function. It may consider that this was induced by the claims or by the facts in dispute.[26] In sum, it is known in international law that the judge can establish himself the meaning of his judgment on the points referred to in the submissions, because the procedure for interpreting the law is always specific to a Court.[27] This would mean that the Court could not be considered to have ruled *ultra petita*.

29. In its *Papamichalopoulos* judgment,[28] the ECHR recalled that its power to sanction is not confined within narrow limits. On

25 This argument may seem relative in the context of peremptory rights, certain human rights, including the prohibition of the death penalty.

26 The right to life has been rightly invoked to protect the citizen against "legal murder", i.e., the death penalty. It is conventionally known that "No one shall be arbitrarily deprived of his life", Articles 5 and 7 of the American Convention on Human Rights, which guarantee the right to life, physical integrity and personal liberty. See IACHR, Velasquez Rodrigez case, Preliminary objection, 26 June 1987; merits, 29 July 1988. Cohen-Jonathan (G.), RGDIP, 1990, pp. 145-465 ; Cerna (Ch.), AFDI, 1996, pp. 715-732 ; Frumer (Ph.), RBDIP, 1995/2, p. 515 ; Hennebel (L.) and Tigroudja (J.), Revue trimestrielle des droits de l'Homme, 2005, No. 66, pp. 277-329 ; Tigroudja (H.), AFDI, 2006, pp. 617-640 ; Burgorgue-Larsen (L.) and Úbeda de Torres (A.), Les grandes décisions de la CIDH, Ed. Bruylant, 2008, p.996

27 See in particular, I.C.J., Order, Case of the *Free zones of Haute-Savoie and Pays de Gex, France v Switzerland*, 19 August 1929: "having regard to the fact that the Court cannot as a general rule be compelled to choose between constructions determined beforehand none of which may correspond to the opinion at which it may arrive". p. 15.

28 See also (CPIJ, Interpretation of Judgments Nos. 7 and 8 (Chorzów Factory), 16 December 1927, pp. 15-16: "In so doing, the Court does not consider itself as bound simply to reply "yes" or "no" to the propositions formulated in the submissions of the German Application. It adopts this attitude because, for the purpose of the interpretation of a judgment, it cannot be bound by formulæ chosen by the Parties concerned, but must be able to take an unhampered decision".

the contrary, the adjective "equitable" and the phrase "where appropriate" would indicate the latitude it has in its exercise.[29] It is clear that the Court has a significant margin of discretion in the exercise of its powers. This corresponds, moreover, to the very idea of implicit, non-contestable jurisdictions established in general international law.[30]

30. The second argument is that the Court itself, and rightly so, has been in the habit of attaching binding measures to its orders that are not included in the requests of the Parties. While this is the very meaning of the Court's injunctions, it provides a basis for justifying any incentive measures. They could have allowed the inclusion of incentives on the death sentence in line with current international human rights law.[31]

31. Such measures are found in various judgments. They are neither contained in the actual terms of the Protocol establishing the Court nor in the reasons for the judgments in which they are included. Two examples: a) In the *Ajavon case*, the Court orders:

> "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."[32]

b) In the *Mugesera case*, the Court ordered:

> "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".[33]

29 ECHR, *Papamichalopoulos v Greece,* 31 October 1995.

30 ECHR., *Comingersoli SA v Portugal,* 6 April 2000, § 29.

31 The concept of implied jurisdiction is well established in international law. It is the result of a confirmed and internationally recognised analysis. The CJEU has recognised it in the Community system (29 November 1956, Fédéchar, Case 8/55, ECR 291; 31 March 1971, *Commission v Council* (AETR), ECR 1971, p. 1263; 26 April 1977, Opinion 1/76, ECR 754). However, it was the ICJ that applied at the international level the reasoning that led to the finding of implicit jurisdiction (ICJ, ILO Jurisdiction, Opinion, 23 July 1926, Series B, No. 13, p. 18). The Court has consistently applied the theory of implied competence. See in particular: ICJ, South West Africa, 11 July 1950, p. 128; Opinion, Certain United Nations Expenditures, 20 July 1962, p. 151; Opinion, Legal Consequences of the Continued Presence of South Africa in Namibia, [1971] ECR 16; Judgment, *Cameroon v United Kingdom of Great Britain and Northern Ireland*, Northern Cameroon, 2 December 1963, [1963] ECR 15.

32 AfCHPR., *Ajavon v Benin*, 4 December 2020, § 369, XXVII.

33 AfCHPR., *Léon Mugesera v Rwanda*, 27 November 2020, § 177, XIX.

32. These measures certainly provide the conditions for the effectiveness of the operative part in question. They also remain guarantees of effectiveness in the protection of human rights. In this respect, the Court can only resort to them, notwithstanding the Protocol's silence to this effect. This silence is relative, because Article 27 of the Protocol on the measures to be taken by the Court when it considers that there has been a violation refers to "all appropriate measures". This article leaves it open to the Court to take all measures "to remedy the situation",[34] including incentives to adapt domestic laws.

33. The third argument relates to the number of applications relating to the death sentence or referring to it. The Court should assist and consider those countries that still retain the death sentence. The protection of the right to life depends on it. In five (5) years, at least twenty (20) cases have been repeatedly brought before the Court. This last circumstance alone justifies the Court's taking incentives in its judgments to bring domestic legislation into line with international law.

34. This relates even to the way in which the function and material jurisdiction of the Court's should be understood as established by Articles 3, 7 and 27 of the Protocol. The Court has consistently held that for it to have jurisdiction,

> "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. (...)".[35]

35. In addition to opening up the jurisdiction to hear the case, the Court has full jurisdiction to inquire into all aspects of the dispute in order to examine all aspects that make the protection of the rights concerned effective.

2.2 Judicial proscription of the death sentence

36. Judicial proscription of the death sentence is possible. It is compatible with international human rights law. Notwithstanding the framework set by cases such as *Evodius*, the Court can become involved through its case law. With the support of numerous international laws that aim to prohibit the death

34 Article 27 of the Protocol establishing the Court provides: "If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

35 The Court has recalled this in various cases, including: *Alex Thomas v United Republic of Tanzania* (merits), 20 Nov 2015, Application No. 005/2013, 1 RJCA, p. 491.

sentence,[36] the Court can contribute in this respect to more dynamic judicial protection.

37. It has been pointed out that human rights jurisprudence has deduced from the prohibition of torture, cruel, inhuman or degrading treatment or punishment the international prohibition of the death sentence.[37] The question of the legal basis for this prohibition no longer arises. The relatively widespread idea that human rights judges have normative limits in this respect no longer stands up to criticism. Many fundamental rights are at stake: the prohibition of torture, inhuman and degrading treatment, the right to life, etc.

38. The prohibition of torture is a peremptory norm of international law, yet the death sentence is, if not similar, at least close to torture. Death row falls, quite sensibly, under this same prohibition. This constitutes *erga omnes* obligations, opposable to all, outside any law.

39. In its 1996 Advisory Opinion on the Legality of Nuclear Weapons,[38] the International Court of Justice described many rules of humanitarian law applicable in armed conflict as "intransgressible principles of international customary law", which are known to include a prohibition on torture. This is possible for inhuman and degrading treatment. The *Al-Adsani* decision[39] had indeed clarified the answer to the question of whether a State could

36 Recall that the United Nations General Assembly, through various resolutions, has called for the establishment of a universal moratorium on the use of the death penalty. These resolutions were adopted in 2007, 2008, 2010, 2012, 2014, 2016 and 2018 with increasing majorities. In 2018, this Resolution received 121 votes in favour, 35 votes against and 32 abstentions, i.e., 8 more votes in favour and 2 fewer votes against than in 2016. This is a notable progress and a growing support from African countries, members of the African Union. The Human Rights Council, through the Resolution adopted in June 2014, for the first time in a United Nations text, noted the grave human rights violations arising from the use of the death penalty. Additional Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (May 2002), provides for the abolition of capital punishment in all circumstances, including in time of war or imminent threat of war. The aim is "to take the ultimate step towards abolishing the death penalty in all circumstances". The Charter of Fundamental Rights, in its Article 2, prohibits the death penalty as well as the expulsion or extradition of a person to a country where he or she would face the death penalty.

37 ECHR, *Ocalan v Turkey*, 12 May 2005 and *Al-Saadoon and Mufdhi v United Kingdom*, of 2 March 2010. The death penalty is an "unacceptable punishment" prohibited by Article 2 and considers, in the light of State practice, that the enforcement of the death penalty in all circumstances now constitutes inhuman and degrading treatment contrary to Article 3.

38 *Legality of the threat or use of nuclear weapons (UN and WHO), Advisory Opinion, 8 July 1996: P. H. F. Bekker, AJIL 1997, p. 126; see Coussirat-Coustère, AFDI 1996, p. 337; G. Kohen, JEDI 1997, p. 336. See also CHR, Kindler v Canada, 30/07/1993, RUDH 1994*.

39 ECHR, Al-*Adsani v United Kingdom,* 21 November 2001.

claim sovereign immunity from the prescriptions of international law. The answer is now clear: it is no. Even if, in the case under consideration (Al-Adsani), the conditions for such an application were not met for the ECHR.

40. The same question then arose at the ECHR in rather eloquent terms. Is Russia obliged to forgo the Applicant's removal in order to protect his life? On 16 August 2015, the Court unanimously held that such an obligation arose from Articles 2 and 3 of the Convention. Extradition to China would expose the Applicant to a real risk of being sentenced to death for murder. The Court upheld its provisional measures to prohibit the Applicant's removal until its judgment became final (§ 101). In this case,[40] the ECHR gave full effect to provisions not ratified by Russia.

41. Another question insidiously raised is that of the formal enforceability of the principle of the international abolition of the death sentence against those States that have not ratified the texts enshrining the abolition of the death sentence.

2.3 The primacy of the international death sentence regime notwithstanding the non-ratification of texts by certain States

42. The known fact that many States do not execute their death row inmates speaks volumes about the ineffectiveness of this criminal sanction on its sociological flaws. In a monistic approach,[41] some States argue that they have not ratified or signed the international instruments condemning the death sentence.

43. It should be noted that in this sense the analysis of the International Court of Justice in *North Sea Continental Shelf*, which was correct, should be highlighted. The Court held that the argument of the Netherlands and Denmark could be accepted provided that Germany's conduct was "absolute and consistent" but that, even in this case, the German position would have to be further examined by specifically examining the reasons for which it did not ratify the Convention (§ 28), i.e., to carry out the unilateral acts (ratification, accession, etc.) which are required for the treaty

40 ECHR., *A.L. (X.W.) v Russia*, 16 August 2015.

41 Alain Pellet rightly said that "Intellectually, monism is not without attraction, if only because it should - in theory at least - avoid conflicts between legal rules, each one, to whatever 'system' it belongs, finding its foundation in a higher rule up to a higher axiomatic norm which would make it possible to resolve *in fine* all problems of incompatibility between two or more rules", Repenser les rapports entre ordres juridiques ? Oui, mais pas trop ! in B. Bonnet (ed.), Traité des rapports entre ordres juridiques, BLGDJ / Lextenso, Paris, 2017, pp. 1781-1789.

regime to be applicable. The ICJ went on to say that "the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way".[42] This analysis applies a fortiori, in specific cases, to all treaty provisions that preserve fundamental rights of the highest order.

44. These provisions can be applied to a State that has not ratified the provisions outlawing the death sentence. Ratification of a convention is only one of the ways in which it can be enforced. This application can be obtained because of objective reasons relating to the content of the text. The Court says this quite clearly for humanitarian rights in its advisory opinion on the *Legalitý of the Threat or Use of Nuclear Weapons*:

> a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Covfu Channel case (1. C. J Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by al1 States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

45. The jurisprudence of the Human Rights Council has made it possible to move forward resolutely on the subject of the death sentence and to keep pace with developments in international treaty law. The Council has, in fact, focused on analysing the enforcement of the death sentence in relation to Article 7 of the Covenant on Civil and Political Rights more than Article 6 and the right to life and Protocol 2, when it held that detaining the condemned person causes intense psychological stress and a deterioration in the state of health, particularly mental health, of the condemned person, the violation of Article 7 is established.[43]

46. The Human Rights Council recognises that the majority of Member States are moving towards the abolition of the death sentence. It even points out that States are evolving the International

42 ICJ, North Sea Continental Shelf, ***Denmark and the Netherlands v Germany***, ICJ, 20 February 1969: B. Conforti, RDI, 1969, p. 509; F. Eustache, RGDIP, 1970, p. 590; L. Goldie, RGDIP RFA), ICJ, 20 February 1969: B. Conforti, RDI, 1969, p.509; F. Eustache, RGDIP, 1970, p. 590; L. Goldie, AJIL, 1970, p.536; E. Grisel, AJIL, 1970, p.562; J. Lang, LGDJ, 1970, 169 p.; J. Marck, RBDI, 1970, p.44; F. Monconduit, AFDI, 1969, p. 213; A. Renaud, LGDJ, 1975, p. 263 p. See the reflections of Barberis (Julio A.), Réflexions sur la coutume internationale, AFDI, 1990, pp. 9- 46.

43 HRC, ***Pratt and Morgan v Jamaica***, 6 April 1989, RUDH, 1989.

Covenant on Civil and Political Rights. In the decision against Canada, it states that any abolitionist State extraditing an alien to a country where a person risks the death sentence violates Article 6 of the Covenant.

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47. I have shared the Court's unanimous decision in the *Evoduis Retuchera case* with my honourable colleagues. The decision on the merits is in accordance with the state of the law. The issue of the death sentence at the origin of the facts in dispute required that the operative part be reinforced. Sociologically speaking, there is only one weak argument left to support the death sentence as a criminal sanction: the fear it would instill in potential criminals. The emptiness of this argument, if it was ever an argument, is demonstrated by the fact that most crimes are crimes of passion or spontaneous acts. Finally, it should be remembered that intellectuals used to say, at the end of the Second World War, that universal peace will only be possible when legal death is definitively outlawed.

Zanzibar v Tanzania (judgment) (2021) 5 AfCLR 39

Application 022/2016, *Mussa Zanzibar v United Republic of Tanzania*

Judgment, 26 February 2021. 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 by a district court in the Respondent State for rape, appealed unsuccessfully before higher municipal courts against his conviction and sentence. He brought this Application, asking the Court to quash his conviction and sentence on the grounds that the domestic proceedings were in violation of his charter protected rights.

Jurisdiction (material jurisdiction, 23; appellate jurisdiction 24; effect of withdrawal of article 34(6) declaration, 27)

Admissibility (exhaustion of local remedies, 38-39; reasonable time, 43-46)

Procedure (applicant not pleading specific articles alleged to have been violated, 54)

Fair trial (partial assessment of evidence, 64-67; free legal assistance, 70-72)

Reparations (basis for, 77; scope, 77; material loss, 78; fair compensation, violation of right to free legal assistance, 81-82)

I. The Parties

1. Mussa Zanzibar (hereinafter referred to as "the Applicant") is a Tanzanian national. He was convicted of rape and sentenced to thirty (30) years imprisonment. At the time of filing the Application he was incarcerated at Butimba Central Prison, Mwanza, Tanzania.

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 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 held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that on 27 June 2011, the Applicant was charged in the District Court of Chato with the offence of rape. On 6 October 2011, the Applicant was convicted and sentenced to thirty (30) years' imprisonment.

4. Aggrieved by the decision of the District Court, the Applicant appealed to the High Court at Bukoba but on 5 September 2012 his appeal was dismissed. The Applicant lodged another appeal with the Court of Appeal at Bukoba which was also dismissed on 10 March 2014.

B. Alleged violations

5. The Applicant alleges, notably, that:

i. The trial court erred in convicting him on the basis of the evidence of a single witness without satisfying itself that the witness was telling the truth;

ii. The trial court erred by failing to resolve the contradictions and inconsistencies in the prosecution evidence;

iii. The trial court failed to warn itself of the need for evidence beyond reasonable doubt before convicting him.

III. Summary of the Procedure before the Court

6. The Application was filed on 13 April 2016 and served on the Respondent State on 13 May 2016.

7. After several extensions of time were granted to the Respondent State, it filed its Response on 18 May 2017.

8. The Applicant filed his submissions on reparations on 27 September 2018 and this was served on the Respondent

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACHPR, Application No. 004/2015, Judgment of 26 June 2020, § 38.

State on the same day giving it thirty (30) days within which to file its Response. The Respondent State did not file any Response within the time prescribed.

9. Pleadings were closed on 6 November 2020 and the Parties were duly notified.

IV. Prayers of the Parties

10. The Applicant prays the Court to "restore justice where it was overlooked and quash both conviction and sentence imposed upon him and set him at liberty." He further prays that the Court may "grant other order(s) or relief(s) sought that may deem fit in the circumstances of the complaints."

11. On reparations, the Applicant prays that:

> … after the Court finding to remedy more violation, it shall make an order of my acquittal as basic reparation and adding reparation of the payment which shall be considered and assessed by the Court according to the custody period per the national ratio of a citizen per year in the country.

12. 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 this Application.

ii. That, the Application has not met the admissibility requirement provided by Rule 40(5) of the Rules of the Court.

iii. That, the Application has not met the admissibility requirement provided by Rule 40(6) of the Rules of Court.

iv. That, the Application be declared inadmissible and duly dismissed.

13. The Respondent State further prays the Court to make the following orders on the merits of the Application:

i. That, the United Republic of Tanzania has not violated the Applicant's rights provided under Article 3(1) and (2) of the African Charter on Human and Peoples' Rights.

ii. That, the Application be dismissed in its totality for lack of merit.

iii. That, the Applicant's prayers be dismissed.

iv. That, the Applicant continue to serve his lawful sentence.

V. Jurisdiction

14. 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.

15. Furthermore, in terms of Rule 49(1) of the Rules,[2] "the Court shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

16. In view of the foregoing, the Court must, in every application, conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

17. In this Application, the Court notes that the Respondent State has raised one objection to its jurisdiction.

A. Objection to material jurisdiction

18. The Respondent State argues that the Court is not "vested with jurisdiction to adjudicate over this Application." According to the Respondent State:

> Article 3 of the Protocol does not provide the Honourable Court with the mandate or jurisdiction to sit as a Court of first instance or sit as an Appellate Court and adjudicate of point of law and evidence finalised by the highest Court of a state party.

19. The Respondent State contends that the Applicant is inviting the Court to sit as a court of first instance and deliberate on allegations that were never raised in municipal courts. It further argues that the Applicant is also calling upon the Court to "adjudicate on matters already finalised by the Court of Appeal …". For the preceding reasons, the Respondent State prays that the Application should be dismissed.

20. The Applicant did not respond to this objection.

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21. 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.[3]

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

3 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.

22. The Court notes that the Respondent State's objection is two–pronged in that it simultaneously questions the Court's jurisdiction to sit as a first instance court as well as its power to sit as an appellate court.

23. In relation to the allegation that the Court is being invited to sit as a court of first instance, the Court reaffirms that its jurisdiction, under Article 3 of the Protocol, extends to any application submitted to it, provided that an applicant invokes a violation of rights protected by the Charter or any other human rights instrument ratified by the Respondent State. The Court notes, however, that the Applicant has not specified the particular provisions of the Charter or any other international human rights instrument allegedly violated by the Respondent State. Nevertheless, the Court reiterates the fact that it has jurisdiction to examine alleged violations of human rights even when an applicant does not specify the articles of the Charter which were allegedly violated as long as the alleged violations substantively implicate rights protected in the Charter.[4]

24. As regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[5] At the same time, however, and 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.[6] In conducting the aforementioned task, the Court does not thereby become an appellate court and neither does it need to sit as one.

25. Considering the allegations made by the Applicant, which all implicate the right to a fair trial which is protected under Article 7 of the Charter, the Court finds that the said allegations are within

4 *Frank David Omary and others v United Republic of Tanzania* (28 March 2014) 1 AfCLR 358 § 74, *Peter Joseph Chacha v United Republic of Tanzania* (28 March 2014) 1 AfCLR 398 §118 and *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 45.

5 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.

6 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema and Another 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.

the purview of its material jurisdiction.[7] The Court, therefore, holds that it has material jurisdiction in this matter and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

26. 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 49(1) of the Rules, the Court must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

27. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State withdrew its Declaration made under Article 34(6) of the Protocol. The Court further recalls that it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the withdrawing of the Declaration.[8] This Application, having been filed before the Respondent State deposited its instrument of withdrawal, is thus not affected by it.

28. In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

29. In respect of its temporal jurisdiction, the Court recalls that the Respondent State deposited its Declaration on 29 March 2010 while the judgment of the District Court at Chato, which is the genesis of the Applicant's case, was delivered on 6 October 2011. Given that the Application was filed after the Respondent State had already deposited its Declaration, the Court finds that it has temporal jurisdiction to examine the Application.

30. The Court also notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction in this matter is established.

7 Cf. *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.

8 *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39 and *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

31. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

32. 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".

33. In accordance with Rule 50(1) of the Rules, "[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."

34. Rule 50(2) of the Rules,[9] which in substance restates the provisions of 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, the Charter of the Organisation of African Unity or the provisions of the Charter.

35. Although 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 relates to whether the Application was filed within a reasonable time.

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

A. Objections to the admissibility of the Application

i. Objection based on non-exhaustion of local remedies

36. The Respondent State contends that although the Applicant is alleging violation of his rights as provided under the Charter, which rights are also provided for under its Constitution, there is no evidence showing that the Applicant filed a constitutional petition at its High Court. The failure to file a constitutional petition, the Respondent State further contends, "is clear evidence that the Applicant did not provide the Respondent an opportunity to redress the alleged wrong within the framework of its domestic legal system before it is dealt with at the international level."

37. Apart from confirming that he took his case to the Respondent State's Court of Appeal, the Applicant did not make any submissions on this objection.

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38. The Court notes that under Article 56(5) of the Charter, whose provisions are reiterated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The Court confirms that 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.[10]

39. The Court recalls that an applicant is only required to exhaust ordinary judicial remedies.[11] The Court further recalls that in several cases involving the Respondent State, it has consistently held that the remedy of constitutional petition, as framed in the Respondent State's judicial system, is an extraordinary remedy that an applicant is not required to exhaust prior to seizing this

10 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

11 *Alex Thomas v Tanzania* (merits) § 64. See also, *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

Court.[12] In the instant case, the Court observes that the Court of Appeal dismissed the Applicant's appeal on 10 March 2014. There being no other court above the Court of Appeal, the Court holds, that the Applicant exhausted ordinary judicial remedies.

40. 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

41. The Respondent State argues that it took two (2) years after the Court of Appeal dismissed the Applicant's appeal for him to file his Application before the Court. It thus submits that this period is not reasonable within the meaning of Rule 40(6) of the Rules.[13] 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.

42. The Applicant did not respond to the Respondent State's objection.

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43. The Court recalls that neither the Charter nor the Rules set a definite time limit within which an application must be filed before it. Article 56(6) of the Charter, which is recaptured in Rule 50(2)(f) of the Rules, 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

12 See, *Alex Thomas v Tanzania* (merits) § 65; *Mohamed Abubakari v Tanzania* (merits), §§ 66-70; *Christopher Jonas v Tanzania* (merits), § 44.

13 Corresponding to Rule 50(2) (f) Rules of Court 2020.

the use of extra-ordinary remedies.[14]

44. In the present case, the Court notes that the Court of Appeal dismissed the Applicant's appeal on 10 March 2014[15] and the Applicant filed this matter on 13 April 2016. A period of two (2) years and thirty-three (33) days, therefore, lapsed between the time the Applicant exhausted domestic remedies and the time he filed his Application. The Court must, therefore, decide, whether, on the facts of this Application, the period of two years (2) and thirty-three (33) days is reasonable.

45. The Court also notes that the Applicant did not have the benefit of counsel during his trial before the District Court at Chato as well as during his appeals before the High Court and the Court of Appeal.[16] Given the Applicant's incarceration and his lack of counsel, the Court finds that the period of two (2) years and thirty-three (33) days is reasonable.[17]

46. 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

47. 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 2(a), 2(b), 2(c), 2(d), and 2(g) of Rule 50 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

48. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since

14 *Jibu Amir alias Mussa and another v United Republic of Tanzania,* §§ 49-50; *Ally Rajabu and others v United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations), §§ 50-52; *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application No. 020/2015, Ruling of 28 November 2019 (jurisdiction and admissibility), §§ 52-54 and *Godfrey Anthony and another v United Republic of Tanzania*, ACtHPR, Application No. 015/2015. Ruling of 26 September 2019 (jurisdiction and admissibility) §§ 46-49.

15 *Mussa Zanzibar v The Republic*, Criminal Appeal No. 287 of 2012 (Bukoba).

16 *The Republic v Mussa Zanzibar,* Criminal Case No. 47/2011 (Bukoba) Judgment of 6 October 2011; *Mussa Zanzibar v The Republic*, HC Criminal Appeal No. 20 of 2012 (Bukoba) Judgment of 5 September 2012 and *Mussa Zanzibar v The Republic*, Criminal Appeal No. 287 of 2012 (Bukoba) Judgment of 10 March 2014.

17 Cf. *Job Mlama v United Republic of Tanzania*, ACtHPR, Application No. 019/2016, Judgment of 25 September 2020 (merits and reparations) § 51.

the Applicant has clearly indicated his identity.

49. The Court also finds that the requirement laid down in Rule 50(2)(b) of the Rules is also met, since no request made by the Applicant is incompatible with the Constitutive Act of the African Union or with the Charter.

50. 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 50(2)(c) of the Rules.

51. Regarding the condition contained under Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

52. Finally, with respect to the requirement laid down in Rule 50(2)(g) 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 or the provisions of the Charter.

53. 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 50(2) of the Rules, and accordingly declares it admissible.

VII. Merits

54. As the Court has earlier pointed out, the Applicant has not invoked the violation of any specific provisions of the Charter. Nevertheless, the Court has noted that the Applicant has, in effect, pleaded a violation of his right to a fair trial which is covered under Article 7 of the Charter. For this reason, the Court will assess the alleged violations together under Article 7 of the Charter.

55. Article 7 of the Charter provides as follows:

> Every individual shall have the right to have his cause heard. This comprises:
>
> a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> c. The right to defence, including the right to be defended by counsel of his choice;
>
> d. The right to be tried within a reasonable time by an impartial court or tribunal.

56. 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 violation of the right to a fair trial due to the partial treatment of the evidence

57. The Applicant argues that the District Court at Chato erred in convicting him by relying on the evidence of a single witness without satisfying itself as to the credibility of the witness and that the Court of Appeal also erred in not acknowledging and rectifying this oversight. He further argues that the District Court erred by failing to resolve the contradictions and inconsistencies in the prosecution evidence. It is also the Applicant's contention that the District Court failed to take into consideration, the need for the prosecution to prove the case beyond reasonable doubt before convicting him.

58. The Respondent State submits that the District Court's reliance on the evidence of a single witness and her credibility was dealt with by the Court of Appeal which held that corroboration was not always necessary in rape cases as long as the credibility of the witness was established. The Respondent State also submits that the District Court considered the credibility of the prosecution witness and concluded that their evidence was reliable.

59. In respect of the alleged failures to resolve contradictions and inconsistencies in the prosecution evidence, the Respondent State argues that the Applicant has failed to specify the contradictions and inconsistencies which were not resolved. It has also been submitted that this argument was raised by the Applicant before the Court of Appeal which considered the same and dismissed it. The Respondent State thus submits that the allegation lacks merit and should be dismissed.

60. As to the need for the prosecution to prove its case beyond reasonable doubt, the Respondent State submits that the District Court clearly directed its mind to the nature of the evidence required to convict the Applicant and concluded that the prosecution had discharged its duty. The Respondent State has referred the Court to passages in the judgment of the District Court where the standard of proof was dealt with. The Respondent State thus prays that the Applicant's allegations be dismissed.

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61. As the Court has held:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[18]

62. The above notwithstanding, the Court can, in evaluating the manner in which domestic proceedings were conducted, intervene to assess whether domestic proceedings, including the assessment of the evidence, was done in consonance with international human rights standards.

63. In the present case, the Court has had the opportunity to consider the record of the proceedings in respect of the Applicant's trial before the District Court as well as his appeals before the High Court and the Court of Appeal.[19] From the record of the trial before the District Court, it is noted that the prosecution called five (5) witnesses. Admittedly, only PW1 – the complainant – testified to the actual occurrence of the crime at issue, being rape. Nevertheless, the District Court considered the evidence of PW1 together with the evidence of other witnesses and concluded that PW1 was a credible witness. During the first appeal to the High Court, the credibility of PW1 was also considered and the High Court concluded that PW1 was a credible and truthful witness. On further appeal, the Court of Appeal held that there were no grounds for interfering with the findings of the two lower courts especially since corroboration is not always necessary in rape cases.

64. Given the exhaustive manner in which the question of the credibility of PW1 was considered by three courts within the Respondent State's system, the Court finds that the manner in which the evidence of PW1 was evaluated does not manifest errors requiring this Court's intervention.

65. With regard to the Applicant's contention that domestic courts did not resolve contradictions and inconsistencies in the prosecution

18 *Kijiji Isiaga v United Republic of Tanzania* (21 March 2018) 2 AfCLR 218 § 65.

19 *The Republic v Mussa Zanzibar,* Criminal Case No. 47/2011 (Bukoba) Judgment of 6 October 2011; *Mussa Zanzibar v The Republic*, HC Criminal Appeal No. 20 of 2012 (Bukoba) Judgment of 5 September 2012 and *Mussa Zanzibar v The Republic*, Criminal Appeal No. 287 of 2012 (Bukoba) Judgment of 10 March 2014 .

evidence, the Court notes that he has not specified which contradictions tainted the proceedings leading to his conviction or the failure of his appeals.

66. The above notwithstanding, the Court notes, from the record, that on appeal to the High Court the question of the contradictions, specifically in relation to the evidence of the medical personnel who examined the PW1 subsequent to the commission of the rape, was dealt with. After analysing the evidence, the High Court concluded that there was no contradiction between the evidence of the two medical personnel.[20] This matter was also considered by the Court of Appeal which concluded that there was no contradiction and also that even if there had been a contradiction, the evidence of PW1 by itself was sufficient to convict the Applicant.[21] Given the foregoing, the Court holds that the Applicant has failed to prove that the domestic courts failed to resolve contradictions in the prosecution's evidence and his allegation of a violation of the right to fair trial is dismissed.

67. In connection to the allegation that the District Court failed to apply itself to the need for the prosecution to prove the case beyond reasonable doubt before convicting him, the Court observes that the District Court applied itself to this issue. After assessing the evidence of all witnesses, the District Court concluded that the case against the Applicant had been proved beyond reasonable doubt. The Court of Appeal also subsequently found that there was no reason for interfering with the findings of the trial court.

68. In the circumstances, the Court finds that the Applicant has not made out a case for a violation of his right to a fair trial on the ground of a partial assessment of the evidence and, therefore, dismisses his allegations.

i. Alleged violation of the right to free legal assistance

69. The Court observes that the Applicant did not specifically plead a violation of his right to free legal assistance. Nevertheless, the Applicant submitted that the decision of the Court of Appeal violated his rights under the Charter and that the Court should "restore justice where it was overlooked…".[22] From its perusal of

20 *Mussa Zanzibar v The Republic*, HC Criminal Appeal No. 20 of 2012 (Bukoba) Judgment of 5 September 2012 p.11.

21 *Mussa Zanzibar v The Republic*, Criminal Appeal No. 287 of 2012 (Bukoba) Judgment of 10 March 2014, p.8.

22 Page 2 of Applicant's Application filed with the Court.

the records of the domestic proceedings, the Court confirms that the Applicant did not have the benefit of counsel during his trial before the District Court, the High Court as well as the Court of Appeal..

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70. In this regard, the Court recalls 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."

71. 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. [23]

72. 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.[24] 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. In the instant case, the Applicant was charged with a serious offence, to wit, rape, carrying a severe punishment - a minimum sentence of thirty (30) years' imprisonment.

73. In the circumstances, the Court finds that the interests of justice warranted that the Applicant should have been provided with free legal assistance during his trial before the District Court at Chato and also during his appeals both before the High Court and the Court of Appeal. This is an obligation that persists even if the

23 *Jibu Amir alias Mussa and another v United Republic of Tanzania* § 75; *Alex Thomas v Tanzania* (merits) § 114 and *Kennedy Owino Onyachi and another 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.

24 *Jibu Amir alias Mussa and another v United Republic of Tanzania* § 77 and *Mohamed Abubakari v United Republic of Tanzania* (merits) §§ 138 -139.

Applicant never requests for legal assistance.

74. 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 Applicant with free legal assistance during his trial before the District Court at Chato as well during his appeals before the High Court and the Court of Appeal.

VIII. Reparations

75. The Court recalls that, in respect of reparations, the Applicant prays that it should order his "acquittal as basic reparation and adding reparation of the payment which shall be considered and assessed by the Court according to the custody per the national ratio of a citizen per country."

76. In its Response, the Respondent State prays that the Court dismiss all the Applicant's prayers.

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77. 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 the fair compensation or reparation.

78. 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.[25] 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.[26]

79. 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

25 See, *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 157. See also, *Norbert Zongo and Others 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.

26 *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and reparations) § 118 and *Norbert Zongo and Others v Burkina Faso* (reparations) § 60.

of human rights violations and the assessment of the quantum must be undertaken in fairness looking at the circumstances of the case. [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] The practice of the Court, in such instances, is to award lump sums for moral loss.[30]

80. The Court acknowledges that although Article 27 empowers it to "make appropriate orders" to remedy the violation of human rights, in line with its jurisprudence, it can only order the release of a convict in exceptional and compelling circumstances. Such exceptional circumstances could exist where the Court finds that the Applicant's conviction was based entirely on arbitrary considerations such that his continued imprisonment would be a miscarriage of justice.[31] In the present case, however, the Applicant has not established the existence of any exceptional circumstances that would necessitate the Court ordering his release. The Applicant's prayer for release is, therefore, dismissed.

81. On a separate note, the Court having found that the Respondent State violated the Applicant's right to free legal assistance, contrary to Article 7(1)(c) of the Charter, there is a presumption that the Applicant suffered moral prejudice.

82. In assessing the quantum of damages for the violation of the Applicant's right to free legal assistance, the Court bears in mind that it has 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

27 *Armand Guehi v United Republic of Tanzania* (merits and reparations) § 55; and *Lucien Ikili Rashidi v United Republic of Tanzania* (merits and reparations) § 58.

28 *Norbert Zongo and others 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 and others v Burkina Faso (*reparations*)* § 61.

30 *Norbert Zongo and Others v Burkina Faso* (reparations) §§ 61-62.

31 *Diocles William v United Republic of Tanzania* (21 September 2018) 2 AfCLR 426 §101-*Mgosi Mwita Makungu v United Republic of Tanzania* (7 December 2018) 2 AfCLR 550 § 84 and African Court on Human and Peoples' Rights *Comparative study on the law and practice of reparations for human rights violations* (2019) 46-50.

or exceptional circumstances.[32] In the circumstances, and in the exercise of its discretion, the Court awards the Applicant the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300.000) as fair compensation.

IX. Costs

83. None of the Parties made any prayers in respect of costs.

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84. The Court notes that Rule 32(2) of the Rules[33] provides that "Unless otherwise decided by the Court, each party shall bear its own costs, if any".

85. In this case, the Court orders that each Party shall bear its own costs.

X. Operative part

86. 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 to the admissibility of the Application;

iv. *Declares* that the Application is admissible.

On merits

v. *Holds* that the Respondent State has not violated the Applicant's right to a fair trial, as guaranteed by Article 7 of the Charter, due to the manner of assessment of the evidence during the domestic proceedings;

32 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.

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

vi. *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.

On reparations

Pecuniary reparations

vii. *Orders* the Respondent State to pay the Applicant the sum of Tanzanian Shilling Three Hundred Thousand (TZS 300 000) as reparations for violation of his right to free legal assistance;

viii. *Orders* the Respondent State to pay the amount indicated under (vii) 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.

Non-pecuniary reparations

ix. Dismisses, the Applicant's prayer for release from prison.

On implementation and reporting

x. *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

xi. *Orders* each Party to bear its own costs.

Zuberi v Tanzania (judgment) (2021) 5 AfCLR 58

Application 054/2016, *Mhina Zuberi v United Republic of Tanzania*

Judgment, 26 February 2021. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced for rape by a court in the Respondent State. Following an unsuccessful appeal before the national courts, he brought this Application asking the Court to quash his conviction and sentence on the grounds that the domestic proceedings violated his Charter protected rights. The Court held that the Respondent State had only violated the Applicant's right to free legal reprsentation.

Jurisdiction (material jurisdiction, 23)

Admissibility (exhaustion of local remedies, 36-40)

Fair trial (free legal assistance, 61-64; right to defence, 71-74; domestic assessment of evidence, 88-92)

Reparations (basis for, 94; measures of, 95; proof, 96; moral prejudice, 105-106; non-pecuniary reparations, 109-111; fair compensation, violation of right to free legal assistance, 105-106; quashing of conviction and sentence, exceptional remedy, 109-110)

I. The Parties

1. Mhina Zuberi (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who, at the time of filing the Application, was serving a thirty (30) year prison sentence at Maweni Central Prison in Tanga, for the rape of a 10-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 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. The Court held that this withdrawal did not have any effect on pending cases as well as new

cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the records before this Court that the Applicant was convicted and sentenced on 30 September 2014, in Criminal Case No. 38/2014 before the District Court of Muheza (hereinafter referred to as "the District Court"), to thirty (30) years in prison for the rape of a 10-year-old girl, an offence punishable under Sections 130(2)(e) and 131(1) of the Tanzania Penal Code (hereinafter referred to as the "Penal Code").

4. On 4 May 2015, the Applicant appealed against this judgment by Criminal Appeal No. 24/2015 before the High Court of Tanzania at Tanga (hereinafter referred to as "the High Court"), which upheld the decision of the District Court on 9 September 2015.

5. On 10 September 2015, the Applicant subsequently appealed against the decision of the High Court by Criminal Appeal No. 36/2016 before the Court of Appeal of Tanzania at Tanga (hereinafter referred to as the "Court of Appeal"). The Court of Appeal upheld the Applicant's conviction and the sentence by its judgment of 30 June 2016.

B. Alleged violations

6. The Applicant alleges the following violations:

i. That he was not assisted by counsel before domestic courts;

ii. That he was deprived of his right to summon witnesses in his defence as an accused person, an appellant and defendant, in violation of Section 13 of the Respondent State's Constitution of 1977 (hereinafter referred to as "the Constitution"), Section 310 of the Criminal Procedure Act and the Universal Declaration of Human Rights;

iii. That there were errors of law and fact in the assessment of the evidence adduced.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020, §§ 35-39. See also *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

III. Summary of the Procedure before the Court

7. The Application was filed on 2 September 2016, and served on the Respondent State on 15 November 2016. On 24 January 2017, the Application was transmitted to the entities referred to in Rule 35(3) of the Rules.[2]

8. The Parties filed their submissions on the merits within the time limits set by the Court.

9. Following various extensions of time at the parties' request, they filed their pleadings on the reparations within the time stipulated by the Court. These pleadings were duly exchanged.

10. Pleadings were closed and the Parties were informed accordingly.

IV. Prayers of the Parties

11. The Applicant prays the Court to "uphold all the rights flouted by the Respondent State, quash the guilty verdict and the sentence meted to him by the lower courts and order the Respondent State to pay reparations for all the damages he suffered."

12. The Applicant prays the Court for the total award of Tanzanian Shillings Four Million and Six Hundred Thousand (TZS 4,600,000) with any adjustments to this amounts as necessary and to order his release.

13. The Respondent State prays the Court to:

i. Declare that it has no jurisdiction and that Application is not Admissible;

ii. Declare that it has not violated Articles 3 and 7(1)(c) of the Charter;

iii. Declare that it has not deprived the Applicant of his right to legal representation;

iv. Dismiss the Application as unfounded;

v. Rule that the Applicant should not be awarded damages;

vi. Dismiss all the Applicant's prayers;

vii. Rule that the costs of the proceedings be borne by the Applicant.

V. Jurisdiction

14. 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 Rule 42(4) of the current Rules of 25 September 2020.

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

15. In accordance with Rule 49(1) of the Rules[3] "[t]he Court shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules."

16. 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.

17. The Court notes that the Respondent State raised objections to the Court's material jurisdiction on the grounds that it is neither a court of first instance, nor an appellate court.

A. Objection to material jurisdiction

18. The Respondent State also disputes the jurisdiction of the Court claiming that the Court is not a court of first instance to hear claims that have not been raised before the domestic courts. It submits that the Applicant is raising for the first time the alleged contradiction between PW1's (the victim) and PW2's (the victim's schoolmate) testimonies. The Respondent State also submits that as a result, the domestic courts did not have the opportunity to examine this allegation.

19. 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 examined by its judicial bodies, overturn their rulings and order his release, the Applicant is asking the Court to act as an appellate body, which according to the Respondent State, is not within its jurisdiction as set out in Article 3(1) of the Protocol and Rule 26 of the Rules.[4]

20. The Applicant refutes in general terms the Respondent State's claim and contends that the Court has jurisdiction.

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21. The Court notes that the Respondent State's objection suggests that this Court does not have jurisdiction to entertain the

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

4 Rule 29 of the current Rules of 25 September 2020.

Application before it, since it is neither a court of first instance nor an appellate court with respect to decisions of national courts.

22. The Court recalls that, in accordance with its established case-law on the application of Articles 3(1) and 7 of the Protocol, it is competent to examine relevant proceedings before domestic courts to determine whether they comply with the standards set out in the Charter or any other instrument ratified by the State concerned. [5]

23. In the present case, the Court notes that the Applicant alleges that the Respondent State violated certain aspects of his right to a fair trial protected by Article 7 of the Charter, in particular the lack of legal assistance, the deprivation of his right to summon witnesses in his defence and that there were errors of law and fact in the assessment of the evidence adduced. The Court observes that by invoking these violations, the Applicant does not invite the Court to sit as a court of first instance, or a court of appeal. Rather, the Court is called upon to exercise its material jurisdiction, pursuant to Articles 3(1) and 7 of the Protocol.

24. In view of the foregoing, the Court dismisses this objection and holds that it has material jurisdiction.

B. Other aspects of jurisdiction

25. The Court notes that its personal, temporal and territorial jurisdiction have not been contested by the Respondent State, and that nothing on record indicates that the Court does not have jurisdiction. The Court thus holds that it has:

i. Personal jurisdiction, insofar as stated in paragraph 2 of this Judgment, the effective date of the withdrawal of the Declaration by the Respondent State being 22 November 2020;

ii. 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] and

iii. Territorial jurisdiction given that the facts of the matter occurred in the territory of the Respondent State.

5 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations), *§ 26; Armand Guehi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

6 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71-77.

26. In view of the aforesaid, the Court declares that it has jurisdiction to hear the instant case.

VI. Admissibility

27. 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".

28. Pursuant to Rule 50(1) of the Rules,[7] "[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."

29. Rule 50(2) of the Rules,[8] which in essence restates Article 56 of the Charter, provides that:

> 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,
> 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 Court 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.

30. The Court notes that the Respondent State raised an objection to the admissibility of the Application in relation to exhaustion of local remedies.

A. Objection based on failure to exhaust local remedies

31. Citing the jurisprudence of the African Commission on Human

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

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

and Peoples' Rights,[9] the Respondent State alleges that "the exhaustion of domestic remedies is a fundamental principle of international law and that the Applicant should have used all existing domestic remedies before submitting the case to an international body such as the African Court on Human and Peoples' Rights."

32. The Respondent State claims that the Applicant had the possibility of applying for a review of the judgment to the Court of Appeal in accordance with Part III B, Rules 65 and 66 of the Rules of Procedure of that court.

33. The Respondent State further submits that the Applicant ought to have addressed the alleged violation of Article 13 of the Constitution through a constitutional petition, as provided for in Article 30(3) of Respondent State's Constitution and its Basic Rights and Duties Enforcement Act.

34. The Respondent State also claims that the right to legal assistance is provided for under the Legal Aid Act, yet the Applicant never requested for legal aid at the domestic courts.

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35. In his Reply, the Applicant refutes in general terms the Respondent State's contention without specifically responding to this objection.

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36. The Court notes that the issue for determination is whether the Applicant exhausted local remedies as required under Article 56(5) of the Charter and as restated in substance by Rule 50(2)(e) of the Rules. On this issue, the Court recalls that the

9 ACHPR, Communication No. 333/02 – ***Southern African Human rights NGO Network and Others v United Republic of Tanzania;*** Communication No. 275/02 – ***Article 19 v Eritrea***; and on Communication No. 263/02 – ***Kenyan Section of the International Commission of Jurists, Law Society of Kenya, Kituo cha Sheria v Kenya***.

local remedies that must be exhausted are judicial remedies.[10] Moreover, the Court has consistently held that the Constitutional petition and review, as provided for in the judicial system of the Respondent State, are extraordinary remedies that the Applicant is not required to exhaust prior to seizing this Court.[11]

37. In the instant case, the Court notes from the record that the Applicant filed an appeal before the Court of Appeal, the highest judicial organ of the Respondent State and that on 30 June 2016, the Court of Appeal upheld the judgments of the High Court and the District Court.

38. On the issue of legal assistance not having been requested for at the domestic courts, the Court notes that the Applicant complained about it during the appeal before the High Court, which complaint was dismissed. Subsequently, the Court of Appeal also upheld the sentence delivered by the High Court.

39. The Court recalls that it has held that in so far as the matter had been referred to the national courts, the latter had the opportunity to hear the alleged violation and to redress the same.[12] Therefore, the Court rejects the claim that the Applicant is raising the issue of lack of provision of legal assistance for the first time.

40. Consequently, the Court finds that the Applicant has exhausted local remedies and therefore the Application complies with Article 56 (5) of the Charter and Rule 50(2) (e) of the Rules.

B. Other conditions of admissibility

41. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 50(2), Sub-rules a), b), c), d), f) and g) of the Rules.[13] However, the Court must examine whether these conditions are met.

42. The Court notes that the Applicant has indicated his identity, and finds that the condition set out in Rule 50(2)(a) of the Rules has been met.

10 *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, § 82.1.

11 *Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 65; *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Wilfred Onyango Nganyi & 9 Others v Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95; *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44; and *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 36.

12 *Mohamed Abubakari v Tanzania* (merits), § 76.

13 Formerly, Rule 40(1)(2)(3)(4)(6) and (7) of the Rules of 2 June 2010.

43. The Court notes that the claims made by the Applicant seeks to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the African Union stated in Article 3(h) of its Constitutive Act is the promotion and protection of human and peoples' rights. As a consequence, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and therefore finds that it meets the requirement specified in Rule 50(2)(b) of the Rules.

44. With respect to the requirement set out under Rule 50(2)(c), the Court notes that the Application does not contain terms that undermine the dignity, reputation or integrity of persons and institutions of the Respondent State. The Court therefore finds that the Application meets the said requirement.

45. Regarding the condition prescribed in Rule 50(2)(d) of the Rules, the Court notes that the Application involves decisions made by the judicial authorities of the Respondent State, including the Court of Appeal. The Court therefore considers that the Application is not based exclusively on news disseminated through the mass media and finds that it meets the requirement under consideration.

46. With respect to the filing of the Application within a reasonable period of time, the Court notes that the Court of Appeal, which is the highest judicial authority of the Respondent State, rendered its decision on 30 June 2016, while the Application was filed on 2 September 2016. The Application was therefore filed two months and two days after the exhaustion of domestic remedies. The Court considers that such time is manifestly reasonable and therefore finds that the condition of admissibility set out in Rule 50(2)(f) of the Rules is met.

47. The Court notes that nothing in the file indicates that the Application concerns a case which had been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitution of the African Union or the provisions of the Charter. Accordingly, it finds that the Application fulfils the condition of admissibility under Rule 50(2)(g) of the Rules.

48. Based on the foregoing, the Court finds that all the admissibility conditions set out in Article 56(5) of the Charter and as restated in substance by Rule 50(2) of the Rules have been met, and accordingly declares it admissible.

VII. Merits

49. The Applicant alleges the violations that fall within the scope of the right to a fair trial, namely, (A) lack of legal assistance, (B) failure to hear his witnesses, and (C) inadequate assessment of the evidence.

A. The alleged violation of the right to legal assistance

50. In his Application, the Applicant claims that: "He was not assisted by counsel during the hearings and during the appeals' phase."

51. In his Reply, the Applicant submits that he did not receive legal assistance and that, had he been assisted by a lawyer, he would have informed the Court that the victim's mother had bribed an officer by the name of Zainabu with Forty Thousand (TZS 40,000) Tanzanian Shillings, to incriminate him.

52. The Applicant further contends that the procedure for obtaining legal assistance is very complicated and that he was not afforded such service. He further states that the domestic courts registries had been instructed to provide legal assistance only in cases of murder or manslaughter.

53. The Respondent State refutes the Applicant's allegations and submit that he should provide evidence thereof. It claims that there is provision for legal assistance under Section 310 of the Criminal Procedure Act, Section 3 of the Legal Aid Act, and Rule 31(1) of the Rules of Procedure of the Court of Appeal, 2009.

54. The Respondent State contends that, in any case, the competent judicial authorities are required to offer legal assistance to an accused person provided the requisite conditions are met, namely that: the defendant lacks the means to hire a lawyer; the accused has requested the competent authorities to grant legal assistance; and that granting legal assistance is in the interest of justice.

55. The Respondent State requests the Court to take into account the fact that legal assistance is provided progressively and is mandatory in cases of murder and manslaughter. It further submits that legal assistance is granted by all courts, but that there are constraints that hamper its systematic provision in all cases, especially concerning the inadequate number of lawyers to cover legal assistance requests across the country, as well as financial and resource constraints.

56. The Respondent State argues that the right to legal representation is guaranteed for all those who can afford it. For legal assistance, it is not easy or practical to provide the defendant with a counsel

of his choice. The Respondent State prays the Court to take into account the fact that legal assistance is not an absolute right and that States exercise discretionary powers in this regard depending on their capacity; and this is how the current legal assistance system operates in the country.

57. The Respondent State further states that its legal assistance system review process was ongoing, and that the outcome would be communicated to the Court in due course.

58. The Respondent State submits that the fact that the Applicant had no counsel does not mean that he was disadvantaged, given that Section 196 of the Criminal Procedure Act provides that all evidence must be taken in the presence of the accused. According to Section 231(1)(a) of the said Act, the accused shall also be informed of his right to give evidence whether or not on oath or affirmation on his own behalf, and the answer shall be recorded; the court shall then call on the accused to plead his case save for where he does not wish to exercise any of the above rights.

59. The Respondent State contends, in conclusion, that all accused persons enjoy the aforementioned right to defence, and that no exception has been made in respect of the Applicant.

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60. The Court notes that Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard. This comprises: c) the right to defence, including the right to be defended by Counsel of his choice".

61. The Court further notes that although Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal aid, it has consistently determined that this Article, interpreted in light of Article 14(3)(d)[14] of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR"),[15]

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

15 The Respondent State became a party to the International Covenant on Civil and Political Rights on 11 June 1976.

establishes the right to free legal assistance where a person is charged with a serious criminal offence, and cannot afford to pay for legal representation and where the interest of justice so requires.[16] The interest of justice includes where the Applicant is indigent, the offence is serious and the penalty provided by the law is severe.[17]

62. The Court observes from the records[18] that the Applicant was not afforded free legal assistance throughout the proceedings at the national courts. The Court further notes that the Respondent State does not dispute that the Applicant is indigent, that the offence is serious and the penalty provided by law is severe, carrying a minimum punishment of thirty (30) years imprisonment. The Respondent State rather contends that the Applicant did not request for legal assistance and that States have a margin of discretion in the application of the right to legal assistance. It also avers that the right to legal assistance is not absolute and this depends on the financial means which are limited in the country.

63. Given that the Applicant was charged with a serious offence and that the Applicant's indigence is not contested by the Respondent State, the Court is of the view that the interest of justice required that the Applicant should have been provided with free legal assistance, regardless of whether he requested for such assistance or not.

64. The Court notes that the allegations relating to the discretion of the States in the implementation of the right to legal assistance, its non-absolute nature and the lack of financial means are not part of conditions for granting legal assistance as indicated in its jurisprudence above.[19] Moreover, it is a general principle of law that a State cannot rely on its internal laws and circumstances to evade its international obligations.

16 *Alex Thomas v Tanzania* (merits), § 114.

17 *Alex Thomas v Tanzania* (merits), § 123. See also *Mohamed Abubakari v Tanzania* (merits), §§ 138-139; *Minani Evarist v United Republic of Tanzania (merits)* (21 September 2018) 2 AfCLR 402, § 68; *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 85; Anaclet *Paulo v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 92; and *Kalebi Elisamehe v Tanzania*, § 55.

18 In particular, submissions from the parties, judgments of the District Court of 30 September 2014, the High Court of 9 September 2015 and the Court of Appeal of 30 June 2016.

19 See *Minani Evarist v Tanzania* (merits)*, § 70 and Diocles William v Tanzania* (merits), § 87.

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

B. Alleged violation of the right to summon the defence witnesses

66. The Applicant alleges that "[T]he Court of First Instance deprived him of the right to summon witnesses as an accused person, appellant and defendant ... contrary to Article 13 of the Constitution …, the Universal Declaration of Human Rights and Section 310 of the Criminal Procedure Act …".

***

67. The Respondent State contests the Applicant's claim, arguing that Article 13 of the Constitution provides for non-discrimination and equal protection of the law, and that at no time has the Applicant been discriminated against, but has always enjoyed equal protection of the law.

68. The Respondent State argues further that the Applicant was afforded the opportunity to call other witnesses but "chose not to do so but instead represented himself as the sole witness at his trial".

69. The Respondent State submits that under Section 231(1) of the Criminal Procedure Act, the defendant has the right to call his witnesses, and hearings may be adjourned where the presiding Magistrate or Judge is of the view that the witnesses may adduce solid evidence in defence of the accused.

70. The Respondent State submits that nothing on the record indicates that the Applicant requested for any witness to be summoned in his defence, let alone that such a request was declined. On the contrary, according to the Respondent State, after the Applicant testified in his defence, he requested that the hearing proceed as he did not intend to call witnesses.

***

71. The Court notes that although the Applicant merely highlighted the violation of Article 13 of the Respondent State's Constitution, the Court will, however, examine the allegation in light of Article 7(1)(c) of the Charter, which stipulates that: "Every 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…".[20]

72. Article 14(3)(d) of the ICCPR is even more specific and stipulates that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … d) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

73. The Court notes that under Section 231 of the Respondent State Criminal Procedure Act, all accused persons have the right to obtain the attendance of their witnesses. The Court notes, however, that the Applicant does not refute the Respondent State's allegation that he did not request for his witnesses be summoned and that, on the contrary, after his testimony, he requested that the hearing proceeds as he did not intend to call witnesses to testify in his defence.

74. The Court notes that the Applicant did not respond to the rebuttal by the Respondent State. Therefore, in the absence of any other evidence to buttress the Applicant's allegation, namely the identity of the defence witnesses to support his case or the reference to his request for legal assistance, the Court declares the Respondent State's rebuttal is valid.[21] Accordingly, the Court dismisses the Applicant's claim that he was deprived of the opportunity to call witnesses in his defence.

C. The allegation that evidence was inadequately assessed

75. The Applicant claims that the Court of Appeal erred in law and in fact by ruling that the testimony of PW1 (the victim) was credible, strong and reliable, whereas the circumstances of the case did not corroborate the said statements. Specifically, the Applicants

20 *Minani Evarist v Tanzania* (merits), *§ 74.* See also *Diocles William v Tanzania* (merits), § 91.

21 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania (*merits*)* (28 September 2017) 2 AfCLR 65, § 142. See also *Robert John Penessis v United Republic of Tanzania*, ACtHPR, Application No. 13/2015, Judgment of 28 November 2019, § 91; *Alex Thomas v Tanzania* (merits), § 140; and *Kalebi Elisamehe v Tanzania,* § 44.

claims that:

i. The Prosecution did not adduce at the trial court substantive evidence to support the charge;

ii. The High Court Judge erred in law and in fact when he failed to take note that the Applicant's constitutional rights, under Sections 32(1) and 33 of the Criminal Procedure Act, were violated by the police;

iii. The charge was not based on facts, but on fabricated evidence, because prior to this case, there had been a quarrel between the mother of PW1 (the victim) and the Applicant over a place he rented for "showing videos to the villagers", which dispute was known to the residents and to the village chief. This fact was not taken into account by the trial court;

iv. That the trial magistrate erred in law and in fact by convicting the Applicant for the offence of rape relying on the testimony of PW1 (victim) and PW2 without taking into account the testimony of PW5, (doctor) whose testimony revealed that PW1 (victim) had fungus in her vagina; that she had lacerations on her vagina which might be due to scratching herself; ruled out any sign of intercourse as the victim's cervix was in perfect condition and her vagina was intact as stated on page 36 of the record of the proceedings.

v. The statements of PW1 (victim) and PW2 (schoolmate) differed in relation to PW1's initial account of the commission of the offence; PW1 had testified that at that time the Applicant's pants zipper was open. PW2 stated on the other hand that the Applicant had a bed sheet wrapped around his chest, which the Applicant considers as a blatant falsehood;

vi. That, the trial court erred by disregarding the lie that the accused was arrested on 2 April 2014 by Abdallah Semhando and then taken to Muheza police station where he was interrogated by WP 7237 D. C Zainabu; whereas the detailed particulars of the offence indicate that Mhina Zuberi was charged on 25 March 2014 before his arrest, thus making the charges levelled against him defective. Furthermore, police officer, Abdallah Semhando did not appear before the court to testify why he arrested the accused;

vii. That the Court of Appeal erred in its reasoning and judgment in finding, despite the contradictory and dubious evidence, that the Prosecution had proved, beyond reasonable doubt, that the accused was guilty.

76. The Applicant specifies that the police officer named Zainabu must surely have been bribed by the victim PW1's mother with Tanzanian Shillings Forty Thousand (TZS 40,000), to implicate him in the fabricated rape crime.

77. The Applicant further alleges that he was initially arrested because of his quarrel with PW1's (the victim) mother, but on arrival at the

police station, the issue was transformed to that of rape.

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78. The Respondent State rejects the Applicant's allegations, and contends that the Court of Appeal assessed the witness's credibility and held in conclusion that "Once again, we agree with both lower courts' findings that PW1 was a credible and reliable witness and that under section 127(7) of the Evidence Act, appellant's conviction could solely be anchored on her evidence."

79. The Respondent State denies having violated Section 229(1) of the Criminal Procedure Act as alleged by the Applicant, arguing that this provision requires the prosecution to open a case against the accused, call witnesses and adduce evidence where the accused enters a plea of "not guilty". The Respondent State argues that, in the instant case, the Prosecutor acted in accordance with the provisions of that Section, having called five witnesses in support of the charges.

80. The Respondent State also denies having violated Section 32(1) and Section 33 of the Criminal Procedure Act, as alleged by the Applicant, arguing that the Sections in question confer powers on the law enforcement authorities to arrest and interrogate suspects and bring them before the court within twenty-four (24) hours or as soon as possible. In the instant case, the Respondent State holds that the police arrested the Applicant on 2 April 2014, interrogated him on 3 April 2014 and referred him to the court for examination the same day.

81. The Respondent State further contends that the allegation that there had been a quarrel between the Applicant and the victim's mother, was examined by all the courts, including the Court of Appeal which upheld the decision of the lower courts. It also claims that this Court has no jurisdiction to entertain issues pertaining to evidence.

82. The Respondent State also rejects the claim that PW5 (the doctor's) testimony was not taken into account, arguing that the testimony was duly examined by the appellate courts, including the Court of Appeal, which held that the physician's testimony, a mere expert, was not binding.

83. The Respondent State refutes the allegation of contradiction between the testimonies of PW1 (the victim) and PW2 (the victim's schoolmate) at the material time, of the former having

found the Applicant with his trouser zipper open, whereas the latter stated that she found the him with a bed sheet wrapped around his chest, and puts the Applicant to strict proof thereof.

84. The Respondent State claims that this was the first time the Applicant raised the alleged contradiction between the two witnesses' testimony and that PW1's (the victim's) credibility had been examined and confirmed by all the domestic courts.

85. The Respondent State refutes the allegation that the Applicant was arrested on 2 April 2014 and charged on 25 March 2014, and affirmed that the Applicant "was arrested on 2/4/2014 and interrogated on 3/4/2014 and brought in court on 3/4/2014."

86. The Respondent State confirms that the police officer by name Adballah Semhando who arrested the Applicant was not called to testify in court. However, it maintains that the charge levelled against the accused has been proven beyond a reasonable doubt.

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87. The Court notes that Article 7(1) of the Charter stipulates that "Every individual shall have the right to have his cause heard".

88. The Court considers that determination of the Applicant's allegations 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.[22]

89. The Court notes that the records show that the alleged contradiction between the statements of PW1 and PW2 have been examined by all the domestic courts; that the alleged contradiction between the date of commission of the offence and that of the indictment has not been established, given that the Respondent State stated in its Response that the offence was committed on 2 April 2014, and that the Applicant was interrogated by the police on 3 April 2014 and brought before the court the same day; that the allegation of a quarrel between the Applicant and the victim's mother was also examined and dismissed by the domestic courts.

22 *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits), § 89. See also *Mohamed Abubakari v Tanzania (merits), § 26;* and *Kalebi Elisamehe v Tanzania*, § 65.

90. With regard to the issue that the results of the medical examination were not taken into account, the Court finds that the Court of Appeal examined the report and noted that a medical report is merely an opinion. The fact that the doctor ruled out the possibility of penetration does not invalidate the material act of rape, as defined under Section 130(4)[23] of the Criminal Procedure Act. Sexual contact, however slight, is sufficient to satisfy the threshold of the offence.

91. Concerning the alleged bribing of a police officer to disregard the Applicant's quarrel with the victim's mother and fabricate a rape charge against the Applicant, the Court notes that this is a general allegation which is not supported by any evidence.

92. In light of the foregoing, the Court notes that nothing on record indicates that the manner in which the national courts have examined the allegations has resulted in a miscarriage of justice.[24] The Court therefore dismisses the allegation that the evidence has not been properly assessed.

VIII. Reparations

93. 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."

94. 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. The purpose of reparations is to ensure that the victim is placed in the situation he or she was in prior to the violation.[25]

95. The Court also restates that measures that a State could take to remedy a violation of human rights include restitution,

23 "(4) For the purposes of proving the offence of rape - (a) penetration however, slight is sufficient to constitute the sexual intercourse necessary to the offence; and I (b) evidence, of resistance such as physical, injuries to the body is not necessary to prove that sexual intercourse took place without consent."

24 *Nguza Viking and Another v Tanzania* (merits), § 90. See also *Mohammed Abubakari v Tanzania (merits), § 26; and Kalebi Elisamehe v Tanzania*, §§ 65.

25 *XYZ v Republic of Benin*, ACtHPR, Application No. 059/2019, Judgment of 27 November 2020 (merits), § 158. See also *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application No. 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 258, § 60.

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]

96. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers.[27] With regard to moral damages, the Court has held that the requirement of proof is not rigid[28] since it is presumed that there is prejudice caused when violations are established.[29]

97. The Court has already found that the Respondent State violated the Applicant's right to a fair trial by failing to provide him with free legal assistance, contrary to Articles 7(1)(c) of the Charter, interpreted in light of Article 14(3)(d) of the ICCPR. The Court will therefore consider the Applicant's claims for compensation on the basis of the above-mentioned principles and the violation found.

A. Pecuniary reparations

i. Material prejudice

98. The Applicant alleges that he was a farmer and a businessman before his imprisonment, and that his income was as follows: Tanzanian Shillings One Hundred and Fifty Thousand (TZS 150,000) per year, as a maize producer; and Tanzanian Shillings One Million (TZS 1,000,000), from his local video entertainment business. Therefore, he prays the Court for the total award of Tanzanian Shillings Four Million and Six Hundred Thousand (TZS 4,600,000) as damages for having been imprisoned for Four (4) years.

26 *Ingabire Victoire Umuhoza v Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Kalebi Elisamehe v Tanzania*, § 96.

27 *Kennedy Gihana and Others v Republic of Rwanda*, ACtHPR, Application No. 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) (3 June 2016) 1 AfCLR 346, § 15(d); and *Kalebi Elisamehe v Tanzania*, § 97.

28 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55. See also *Kalebi Elisamehe v Tanzania*, § 97.

29 *Ally Rajabu and Others v United Republic of Tanzania,* ACtHPR, Application No. 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania,* ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and reparations), § 58; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v Tanzania*, § 97.

99. Citing the Court's decision in the Matter of *Zongo and Others v Burkina Faso*, the Respondent State avers that "the Applicant has not only failed to substantiate the wrongful act committed by the Respondent State but also failed to produce evidence that he suffered damages."

100. The Respondent State avers further that the Applicant has not submitted evidence that "[he] was a farmer and that he had maize and other agricultural products business that earn him a profit of Tshs 150,000/= per year…"; or "proof such as records of business profits, business returns, receipts that [he] owned a 'video shows business' that earn him Tshs 1,000,000/= per year…"

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101. 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]

102. Consequently, this prayer is dismissed.

ii. Moral prejudice

103. The Applicant prays the Court to order other measures or remedies as the Court may deem appropriate.

104. The Respondent State requests the Court in general terms to reject all the measures requested by the Applicant, as baseless.

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105. The Court notes that notwithstanding the fact that the Applicant did not specifically request reparations for moral prejudice, he

30 *Robert John Penessis v Tanzania,* § 143; See also *Alex Thomas v Tanzania* (reparations), § 26; *Reverend Christopher R. Mtikila and Others v Tanzania* (reparations), § 30; *Lohé Issa Konaté v Burkina Faso* (reparations), § 17; and *Kalebi Elisamehe v Tanzania*, § 104.

asked the Court to order any other reparations that it considers appropriate. Furthermore, Article 27(1) of the Protocol empowers the Court to make appropriate orders, including the payment of fair compensation or reparation, when the Court finds that there has been violation of a human or peoples' right.

106. In the instant case, the Court observes that, as mentioned in paragraph 96 above, the violation of the Applicant's right to free legal assistance is presumed to have caused moral prejudice to the Applicant. Consequently, the Court notes that the violation it established caused moral prejudice to the Applicant. The Court therefore, in exercising its discretion, awards an amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[31]

B. Non-Pecuniary reparations

107. The Applicant prays the Court to quash his conviction and sentence and to order his release.

108. Citing the Court's decision in the matter of *Alex Thomas v United Republic of Tanzania*, the Respondent State avers that the Applicant has not demonstrated that his request meets the criteria of exceptional and compelling circumstances to support the request to be released from prison.

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109. The Court notes that, in accordance with Article 27(1) of the Protocol, it has the power to order appropriate measures to remedy situations of human rights violations, including ordering the Respondent State to take the necessary measures to annul the Applicant's conviction and sentence as well as to release him. However, the Court has held in previous cases that such a measure can only be ordered in exceptional and compelling circumstances.[32]

31 *Anaclet Paulo v Tanzania (merits and reparations)*, § 107; *Minani Evarist v Tanzania (merits and reparations)*, § 85; *Kalebi Elisamehe v Tanzania*, § 108.

32 *Alex Thomas v Tanzania* (merits), § 157; *Diocles William v Tanzania* (merits), § 101; *Minani Evarist v Tanzania* (merits), § 82; *Jibu Amir Mussa and Saidi Ally alias Mangaya v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits), § 96; *Mgosi Mwita Makungu v United*

110. 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

> [I]f 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.[33]

111. In the instant case, the Court recalls that it has found that the Respondent State is in violation of the right to fair trial for failing to provide the Applicant with free 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 circumstances to justify the order for his release. Therefore, this prayer is dismissed.

IX. Costs

112. The Applicant made no specific submission as to costs whereas the Respondent State prays the Court to rule that the costs of the proceedings should be borne by the Applicant.

113. Pursuant to Rule 32(2) of the Rules[34] "[u]nless otherwise decided by the Court, each party shall bear its own costs, if any."

114. Considering the circumstances of this case, the Court decides that each party shall bear its own costs.

Republic of Tanzania (merits) (2018) 2 AfCLR 570, § 84; *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 AfCLR 226, § 96; *Armand Guéhi v Tanzania* (merits and reparations), § 164; and *Kalebi Elisamehe v Tanzania*, § 111.

33 Jibu *Amir Mussa and Another v Tanzania,* §§ 96 and 97; *Minani Evarist v Tanzania* (merits), § 82; and *Mgosi Mwita Makungu v Tanzania* (merits), § 84; and *Kalebi Elisamehe v Tanzania*, § 110. See also ECHR: *Del Rio Prada v Spain* – 42750/09, Judgment of 10/07/2012, § 139; and *Assanidze v Georgia* (GC) - 71503/01, Judgment of 8/04/2004, § 204; IACHR, *Loayza-Tamayo v Peru,* Judgment of 17/09/1997 (merits), § 84.

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

X. Operative part

115. 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 objection on admissibility;
iv. *Declares* that the Application is admissible.

On merits
v. *Holds* that the Respondent State has not violated Article 7(1)(c) of the Charter as regards the Applicant's allegations that he was deprived of his right to summon witnesses in his defence.
vi. *Holds* that the Respondent State has not violated Article 7(1)(c) of the Charter as regards the assessment of evidence.
vii. *Holds* that the Respondent State has violated the Applicant's right to a fair trial as provided by 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
viii. *Dismisses* the Applicant's prayer for material damages for his imprisonment;
ix. *Grants* to the Applicant the sum of Tanzanian Shillings Three Hundred Thousand (TZS300,000) for the moral prejudice suffered as a result of the violations found;
x. *Orders* the Respondent State to pay the sum awarded under (ix) 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
xi. *Dismisses* the Applicant's prayer for his conviction and sentence to be quashed.
xii. *Dismisses* the Applicant's prayer for his release from prison.

On implementation of the judgment and reporting

xiii. *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

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

Muwinda & Ors v Tanzania (reopening of pleadings) (2021) 5 AfCLR 82

Application 030/2017, *Almas Mohamed Muwinda, Sylvester Zanganya, Margret Mhando & 56 Others v United Republic of Tanzania*

Order, 5 March 2021. 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 Respondent State brought this Application for reopening of pleadings and extension of time after it failed to respond to the original Application within the timeframe allowed by the Rules. The Court granted the Application and made the orders sought.

Procedure (reopening of pleadings, 15)

I. The Parties

1. Almas Mohamed Muwinda, Sylvester Zanganya, Margret Mhando and 56 others (hereinafter referred to as "the Applicants"), are all Tanzanian nationals. The Applicants bring this Application claiming a violation of their right to be paid their subsistence allowances following their retrenchment by a publicly owned corporation, Urafiki Textile Mills, in 1997.

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 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 held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit.

II. Subject of the Application

3. In their Application, the Applicants allege the violation of their right to be paid emoluments pending their repatriation subsequent to their retrenchment from Urafiki Textile Mills.

4. According to the Applicants, notwithstanding the fact that the Respondent State dissolved Urafiki Textile Mills by a notice published in the Gazette on 21 March 1997, their terminal benefits were not paid immediately. The Applicants further allege that the payment of their terminal benefits was only finalised in March 1998. The Applicants thus claim for the payment of subsistence allowance for the time they were jobless while waiting for the payment of their terminal benefits.

III. Summary of the Procedure before the Court

5. The Application was filed on 25 September 2017 and served on the Respondent State on 23 February 2018.

6. Notwithstanding several reminders from the Registry, the Respondent State has not filed its full List of Representatives, Response or Submissions on Reparations.

7. Pleadings were closed on 28 May 2019 and the Parties were duly notified.

8. On 14 December 2020, the Registry received a request from the Respondent State for extension of time within which to file its Response and Submissions on Reparations.

9. On 7 January 2021, the Registry transmitted the Respondent State's request for extension of time to the Applicants giving them fifteen (15) days within which to file observations, if any.

10. The Applicant did not file any observations within the time prescribed by the Court.

IV. On the request for extension of time and subsequent reopening of pleadings

11. The Respondent State avers that the request for extension of time is due to the fact that "information were being sought from Government stakeholders on the matters, especially in light of the fact that most of the applications need consultations and deliberations with different Governmental agencies." .

12. The Applicant did not file observations on the request for extension.

13. The Court observes that Rule 45(2) provides: "Where a party seeks to file out of time, the request shall be made within a

reasonable time, giving reasons for the failure to comply with the time limit."

14. The Court further observes that Rule 46(3) of the Rules provides that "the Court has the discretion to determine whether or not to reopen pleadings".

15. The Court recalls that, where the interests of justice so require, it is empowered by the Rules to order that pleadings be reopened or grant an extension of time for a Party to file its pleadings. In the present case, the Court considers that it appropriate, in the interests of justice, to grant the Respondent State's request for extension of time to file its pleadings. However, given that pleadings were already closed in this matter, the Court also considers it necessary that pleadings be re-opened for purposes of enabling the Respondent to file its pleadings.

V. Operative part

16. For these reasons:

The Court

Unanimously,

Orders that:

i. In the interests of justice, pleadings in Application No. 030/2017 be and are hereby re-opened.

ii. The Respondent State should file its full List of Representatives, Response and Submissions on Reparations within thirty (30) days of receipt of this Order.

Ajavon v Benin (provisional measures) (2021) 5 AfCLR 85

Application 002/2021, *Sébastein Germain Marie Aïkoue Ajavon v Republic of Benin*

Order, 29 March 2021. 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, a national of the Respondent State residing outside its territory, brought this Application based on the fallout of tax procedures before domestic authorities. Applicant alleged that tax assessments of companies he was linked to, the rejection by the Supreme Court of his appeal against the assessments, and the consequent confiscation of his properties and properties of his family members all violated his Charter protected rights. Along with the main claim, the Applicant brought an Application for provisional measures to stop execution of the domestic judgments permitting sale of the confiscated properties pending the outcome of the Application before this Court. The Court granted the Applicant's prayers.

Jurisdiction (*prima facie* jurisdiction, 14, 18; effect of withdrawal of article 34(6) declaration, 17)

Provisional measures (discretion of the court, 36; extreme gravity, 38, 42; irreparable harm, 47; real and imminent risk, 40)

I. The Parties

1. Mr. Sébastien Germain Marie Aïkoué Ajavon, (hereinafter referred to as "the Applicant") is a Beninese citizen and businessman, residing in Paris, France, as a political refugee. He seeks the stay of execution of three (3) decisions rendered by the Supreme Court of Benin, following appeals for the annulment of tax adjustments in respect of companies of which he is a shareholder.

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 deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration"), 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 had no bearing on pending cases and on new cases filed before the withdrawal came into effect on 26 March 2021, that is, one year after its deposit.[1]

II. Subject of the Application

3. In his Application, the Applicant alleges the violation of the rights to defence and of equality before the law as well as the principle of fairness during the tax reassessment proceedings initiated against the companies, *Comptoir Mondial de Négoce* (COMON) SA, JLR SA *Unipersonnelle* and the real estate civil company *l'Elite*, of which he is a shareholder.

4. He further states that in spite of these violations, the Supreme Court of the Respondent State, by Judgments No. 209/CA[2] and No. 210/CA[3] of 5 November 2020, and No. 231/CA[4] of 17 December 2020, (hereinafter referred to as "the three Supreme Court judgments") dismissed the appeals for the annulment of the said tax adjustments.

5. In respect of provisional measures, the Applicant prays the Court to order the Respondent State to stay the execution of these judgments and the confiscation and sale of his assets, those of his family members and those of the companies in question, pending the determination of the Application on the merits.

III. Alleged violations

6. The Applicant alleges violation of the following rights:

i. The right to defence, protected by Article 7(1)(c) of the Charter;

ii. The rights to equality before the law and equal protection of the law, protected by Articles 3(1) and (2) of the Charter.

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (Order of 3 June 2016) 1 AfCLR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin* ACtHPR, Application No. 003/2020 Order of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020.

2 This judgment was in the case between the following parties: *Comptoir Mondial de Négoce (COMON) SA Company v Ministry of Economy and Finance and 2 Others.*

3 This judgment was in the case between the following parties: *JLR SA Unipersonnelle Company v Ministry of Economy and Finance*.

4 This judgment was rendered in the case between the following parties: *L'Elite SA Company v Ministry of Economy and Finance and two others*.

IV. Summary of the Procedure before the Court

7. The Application instituting proceedings, together with a request for provisional measures, were filed at the Registry on 4 January 2021.

8. On 25 January 2021, the Application was served on the Respondent State, together with the request for provisional measures, with deadlines for submitting responses set at ninety (90) days and fifteen (15) days, respectively.

9. On 8 February 2020, the Respondent State filed its response to the request for provisional measures.

V. *Prima facie* jurisdiction

10. The Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 59 of the Rules of Court (hereinafter referred to as "the Rules"), 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. The Applicant further points out that the Respondent State has ratified the Charter as well as the Protocol, and has deposited the Declaration. The Applicant further alleges a violation of the rights protected by Articles 3(1) and 7(1)(c) of the Charter.

12. The Respondent State did not make any submission on the Court's jurisdiction.

***

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. In addition, Rule 49(1) of the Rules provides: "(t)he Court shall preliminarily ascertain its jurisdiction…". However, with respect to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits, but merely that it has *prima facie*

jurisdiction.[5]

15. In the instant case, the rights alleged by the Applicant to have been violated are all protected by the Charter which has been ratified by the Respondent State.

16. The Court further notes that the Respondent State has also ratified the Protocol and has deposited the Declaration.

17. The Court observes, as mentioned 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 found that the withdrawal of the Declaration has no retroactive effect on pending cases, nor any impact on cases filed before the withdrawal[6] took effect, as is the case in this Application. The Court reiterated its position in *Houngue Eric Noudehouenou v Republic of Benin*[7] and confirmed that the withdrawal of the Declaration by the Respondent State would take effect on 26 March 2021. Consequently, the said withdrawal has no effect on the personal jurisdiction of the Court.

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

VI. Provisional measures requested

19. The Applicant prays the Court to order the Respondent State to stay the execution of the three Supreme Court judgments, the confiscation and sale of his property, those of the members of his family and those of companies in which he is a shareholder until the matter is determined on the merits.

20. In support, the Applicant contends that in his Application No. 062/2019[8] and 065/2019,[9] he made reference to the non-execution of the decisions rendered by this Court in his favour and of the annulment of the tax adjustments against l'Elite SCI, JLR SAU and COMON SA, of which he is a shareholder, and for

5 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application N°012/2019, Order of 9 April 2020 (provisional measures), § 13.

6 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (Order of 3 June 2016) 1 AfCLR 540 § 67.

7 *Houngue Eric Noudehouenou v Republic of Benin* ACtHPR, Application No. 003/2020 Order of 5 May 2020 (provisional measures), §§ 4-5 and Corrigendum of 29 July 2020.

8 The matter of *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*.

9 The matter of *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*.

violation of Article 7 of the Charter.

21. He affirms that the Supreme Court dismissed his appeals for annulment of the tax adjustments made in violation of his human rights. According to him this trial lacked fairness since he did not receive the submissions of the public prosecutor's office for comments, in violation of Article 937(1) of the Code of Civil, Commercial, Social, Administrative and Accounting Procedure (CPCCSAC). The Applicant also contends that this is despite the principle of equality of arms and the principle of adversarial procedure which require that each party should be able, at all stages of the procedure, to present its case in line with the jurisprudence developed under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[10]

22. The Applicant states that he seeks provisional measures in view of the massive human rights violations committed against him and the imminent confiscation and sale of all of his property.

23. In this regard, he argues that there is urgency and extreme gravity insofar as, despite the judgment on reparations of 28 November 2019,[11] in which this Court ordered the Respondent State to "lift forthwith the seizure of the accounts and property of the Applicant and those of members of his family", following the tax adjustment proceedings against JLR SA, SCI Elite and COMON SA, the Respondent State has maintained the effects of the said seizures.

24. The Applicant adds that, as a result of the three judgments of the Supreme Court, the Respondent State is going to confiscate, remove and sell all of his assets, although he has supranational judicial decisions in his favour, that prescribe otherwise.

25. On irreparable harm, he points out that in the event of confiscation and sale of his assets, it will be difficult for him to obtain compensation as long as the current regime is in place, which, moreover, is corroborated by the Respondent State's failure to comply with this Court's decisions.

26. He also notes that he will automatically lose his civil and political rights in relation to the presidential election scheduled for April 2021, since he will not be able to obtain, in his current state, the tax clearance certificate that is part of the requirements for his candidacy.

10 ECHR Judgment on *Niederost-Hubert v Switzerland*, 18 February 1997.

11 The judgment on reparations in Application No. 013/2017 – *Sébastien Germain Ajavon v Benin*.

27. The Applicant believes that for these reasons, he is entitled to request a stay of execution of the three Supreme Court's judgments of 5 November and 17 December 2020, of the dispossession and sale, in any form whatsoever, of the tangible and intangible movable and immovable property belonging to him, to the members of his family and to the three companies in questions, pending the examination on the merits, of the Application initiating proceedings of 29 December 2020.

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28. The Respondent State submits that, in the instant case, there is neither urgency nor extreme gravity nor imminent irreparable harm to warrant the orders requested.

29. In support of its submission, the Respondent State contends that the requirement of urgency or extreme gravity is in relation to an actual situation of imminent human rights violations and not reliance on the judgment in Application No. 013/2017,[12] of which the disputed execution is referenced under the cover of violation of the rules of fair trial.

30. The Respondent State further submits that the statement by the Applicant that "the confirmation of the adjustments contested before the African Court will allow the confiscation, removal and sale" of his assets cannot stand insofar as the enforcement of a court ruling is consistent with constraining formalism that guarantees the protection of the debtor and the means of contestation before the enforcing judge.

31. Regarding the imminence of irreparable harm, the Respondent State submits that the Applicant does not establish any threat to his life and does not demonstrate any restriction to which he is subject, but merely relies on a precarious situation of extreme and unbearable gravity with unforeseeable consequences.

32. The Respondent State further submits that by stating that the situation he alleges cannot be remedied for as long as the Talon regime is in place, the Applicant admits that the supposed prejudice that he alleges is reparable. The Respondent State contends that in respect of provisional measures, only irreparable prejudice is taken into account.

12 *Ibid*.

33. Furthermore, the Respondent State points out that the Applicant does not adduce any evidence of the violation of Article 937 of CPCCSAC insofar as, after the depositions of the submissions by the Public Prosecutor and the responses of the Parties, a hearing is scheduled and the advocates notified fifteen (15) days in advance.

34. The Respondent State further states that at this hearing, the Parties are free to request for any communication or documents and to make any submissions by presenting, when necessary, any grievances in respect of the procedure.

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35. 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."

36. It is for the Court to decide, on case-by-case basis, in the light of the particular circumstances of the matter, if it must exercise the jurisdiction conferred on it by Article 27(2) of the Protocol.

37. The Court recalls that urgency, which is consubstantial with extreme gravity, means "irreparable and imminent risk being caused before the Court issues the final judgment in the matter".[13] The risk in question must be real, which excludes purely hypothetical risk and justifies the need to forestall it immediately.[14]

38. With regard to irreparable harm, the Court holds that there must be a "reasonable probability of occurrence" given the personal context and situation of the Applicant.[15]

39. In view of the above, the Court shall take into account applicable laws on provisional measures, which are preventive in nature and do not prejudge the merits of the Application.

40. The Court notes that it is not disputed that the three Supreme Court judgments are final and, therefore, binding. There is, in fact, no obstacle to their execution. For this reason, the Court is of the

13 *Komi Koutche v Republic of Benin*, ACtHPR, Application No. 013/2020, Ruling (Provisional measures) (02 April 2020), § 32.

14 *Ibid*.

15 *Ibid*, § 63. *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application N°003/2020, Ruling (Provisional measures), § 28.

view that such an execution may take place at any time before it renders its final decision. In this regard, the existence of a real and imminent risk is established.

41. The Court concludes, therefore, that the condition of urgency and extreme gravity is met.

42. With respect to irreparable harm, the Court notes that the tax adjustments concern two public limited liability companies and a real estate company, which is commercial in nature. The Court emphasises that a public limited liability company has its own legal personality.[16] Consequently, "separated from the company by numerous barriers, the shareholder cannot be identified with it"[17] and that "the separation of property rights as between company and shareholder is an important manifestation of this distinction".[18] Consequently, the forced recovery of debts, even if they are tax debts, cannot, in principle, be enforced against the assets of individuals.

43. The Court further observes that neither the Applicant nor any member of his family was a civil party or was joined to the proceedings that led to the three Supreme Court judgments.

44. The Court notes that in its judgment on reparations of 28 November 2019 issued between the two parties in Application No. 013/2017, it ordered the Respondent State to "take the necessary measures, in particular, to lift forthwith the seizure of the accounts and property of the Applicant and those of members of his family in the context of the tax adjustments in respect of JLR SA, SCI Elite and COMON SA.[19]

45. The Court notes that the seizures of which it ordered a withdrawal were protective seizures and as such, they had the effect of rendering the assets inaccessible and could deprive the Applicant and his family of the means of subsistence.[20]

46. The Court notes, independently of this situation, that if the seizures had just been conducted on the basis of the three Supreme Court judgments that are binding, they would not only be protective. They would have been for the purpose of dispossessing the owner of the seized assets.

16 ICJ, Barcelona Traction Light Power Company Limited (New Application 1962) (*Belgium v Spain*) (5 February 1970), § 44.

17 *Ibid*. § 41.

18 *Ibid*.

19 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment on Reparations (28 November 2019), §§ 108 and 111.

20 *Ibid*. § 110.

47. The Court considers that such seizures will also deprive the Applicant and his family of means of subsistence, which will cause them irreparable harm, whereas neither he nor any member of his family was a party to the proceedings which led to the three Supreme Court judgments.

48. Based on the foregoing, the Court holds that there is an imminent risk of irreparable harm.

49. Given all the above, the Court finds that the conditions set out in Article 27 (2) of the Protocol have been met and that it is appropriate to grant the request for provisional measures to preserve the status quo[21] pending consideration on the merits.

50. Based on the foregoing, the Court orders the stay of the three judgments of the Supreme Court No. 209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and No. 210/CA (*Societe JRL SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020 and No. 231/CA (*Societe Elite SCI v Ministry of Economy and Finance and 2 others*) of 17 December 2020).

51. 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.

VII. Operative part

52. For these reasons:

The Court

By a majority of six (6) votes for and five (5) against, Judges Suzanne Mengue, M-Thérèse Mukamulisa, Blaise Tchikaya, Stella I. Anukam, Imani D. Aboud dissenting*:*

i. *Orders* the stay of execution in respect of Judgments of the Supreme Court of the Respondent State No. 209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and No. 210/CA (*Société JLR SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020, and No. 231/CA (*Société l'Elite SCI v Ministry of Economy and Finance and two others*) of 17 December 2020.

ii. *Report* to the Court within thirty (30) days, from the date of notification of this Ruling, on the measures taken to implement the order.

21 *Alfred Agbesi Woyome v Republic of Ghana*, (provisional measures) (24 November 2017) 2 AfCLR 213. § 26;

Ajavon v Benin (judgment) (2021) 5 AfCLR 94

Application 065/2019, *Sébastein Germain Marie Aïkoue Ajavon v Republic of Benin*

Judgment, 29 March 2021. 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, a national of the Respondent State who resides outside its territory, brought this Application alleging that the failure of the Respondent State to execute judgments and rulings entered in his favour by this Court were a violation of his Charter protected rights. The Court held that the Respondent State had violated the Charter by failing to implement the decisions.

Jurisdiction (material jurisdiction, 26-28)

Admissibility (premature claim, 40-42; victim requirement, 47-48, 60; *res judicata*, 68-70; exhaustion of local remedies, 75-79, 84; reasonable time, 85-87)

Execution of judgment (decisions and judgments, 101; binding nature of decisions, 102-106; link between articles 1 and 30 of the Court Protocol, 121-125)

Reparations (external expert, 134-136; reparation measures, 138-140; material prejudice, 160-166; moral prejudice, 168, 169; non-pecuniary reparations, 171-174)

I. The Parties

1. Mr. Sébastien Germain Marie Aïkoué Ajavon, (hereinafter referred to as "the Applicant"), a national of Benin, is a businessman, residing in Paris, France, as a political refugee. He alleges the violation of various human rights resulting, especially, from the failure to execute the decisions rendered by this Court.

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 deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration"), 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 (hereinafter referred to as "AUC"), the instrument of withdrawal of its Declaration. The Court has held that this withdrawal has no bearing on pending cases or on new cases filed before the withdrawal comes into effect, one year after its deposit, that is, on 26 March 2021.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant contends that in a matter between him and the Respondent State, this Court issued, all in his favour, a Ruling on Provisional Measures of 7 December 2018, a Judgment on Merits of 29 March 2019 and a Judgment on Reparations of 28 November 2019.

4. He stresses that the failure of the Respondent State to execute the decisions has resulted in several violations of his human rights.

B. Alleged violations

5. The Applicant alleges the violation of the following rights and obligations:

i. The rights to non-discrimination and to equal protection of the law, as enshrined in Articles 2 and 3(2) of the Charter;

ii. The right to a fair trial, provided for under Article 7 of the Charter;

iii. The right to property, as guaranteed under Article 14 of the Charter;

iv. The rights to participate freely in the government of his country and to have the right of equal access to the public service, protected by Article 13(1) and (2) of the Charter,

v. The obligation to comply with the decisions rendered by this Court, provided for under Article 30 of the Protocol;

vi. The obligation to ensure that the process for revising its Constitution based on national consensus, obtained if need be, through referendum as stipulated under Article 10(2) of the African

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4-5 and Corrigendum of 29 July 2020.

Charter on Democracy, Elections and Governance (hereafter referred to as "the ACDEG");

vii. The obligation to adopt legislative or other measures for the implementation of the rights, duties and freedoms enshrined in the Charter provided for in Article 1 of the said Charter.

III. Summary of the Procedure before the Court

6. The Initial Application was filed at the Registry on 29 November 2019.

7. On 14 January 2020, the Applicant filed an Additional application. On 17 January 2020, the Registry served the two Applications on the Respondent State and requested it to file its Response within sixty (60) days.

8. The Parties filed their submissions, on merits and reparations, within the time-limits prescribed by the Court. These were duly exchanged.

9. On 18 October 2020, the Registry informed the Parties that the pleadings were closed.

IV. Prayers of the Parties

10. The Applicant prays the Court to:

i. Find that it has jurisdiction to hear the matter;

ii. Find the Application admissible;

iii. Establish failure to comply with the decisions of the African Court delivered on 7 December 2018 and 29 March 2019;

iv. Find the violation of the Applicant's rights to non-discrimination and equal protection of the law;

v. Find the violation of the Applicant's right to a fair trial;

vi. Find the violation of the Applicant's right to property;

vii. Find the violation of the Applicant's right to participate freely in the government of his country and the right of equal access to the public service in his country;

viii. Find the violation by the State of Benin of its obligation to guarantee the effective enjoyment of the rights enshrined in the Charter;

ix. Accordingly, adjudge and determine that the Applicant's fundamental rights have been violated.

11. With regard to reparations, the Applicant prays the Court to:

i. Find and rule that the Applicant's fundamental rights have been violated;

ii. Find and rule that the violations committed against the Applicant have caused him immeasurable harm which merits reparation;

iii. Order the State of Benin to compensate the Applicant for the prejudice suffered and award him the sum of three hundred billion (300,000,000,000) CFA francs as damages;

iv. Order the Respondent State to remove obstacles to the execution of the decisions of the African Court.

v. Assess the Court costs and charge the same to the State of Benin.

12. In his additional Application, the Applicant prays the Court to:

i. Order, an assessment by a leading firm, at his own expense, in advance, of the prejudice suffered by the Applicant due to non-compliance with the African Court's Order for Provisional Measures of 7 December 2018 and Judgment on Merits delivered on 29 March 2019;

ii. Find and rule that the advance payment made by the Applicant be borne by the Respondent State.

13. For its part, the Respondent State prays the Court to:

i. Find that the African Court is not the judge of the execution of its own decisions;

ii. Note that, in a similar case, the European Court of Human Rights (hereinafter referred to as "ECHR") held that it lacked jurisdiction to determine whether a Contracting Party has complied with the obligations imposed on it by one of its judgments;

iii. Consequently, rule that it lacks the jurisdiction to hear the matter;

iv. Note that the Applicant seeks to ensure compliance with the Court's decisions of 29 March 2019 and 28 November 2019;

v. Find that in the final judgment of 28 November 2019, the Court allowed six (6) months for the Respondent State to comply with the decisions;

vi. Note that the instant matter was filed on 29 November 2019;

vii. Note that between the date on which the decision was delivered and the Application for compliance therewith, a period of six (6) months had not elapsed;

viii. Consequently, find the Application inadmissible because it is filed prematurely;

ix. Note that the Applicant is praying the Court to rule against the State of Benin on account of facts pertaining to Application No. 013/2017 that was examined by this Court;

x. Note that the Court's judgments on merits of 29 March and 28 November 2019 are final (*res judicata*);

xi. Consequently, declare the Application inadmissible;

xii. Find that the complainant is bringing multiple proceedings as political propaganda;

xiii. Rule the Application inadmissible for abuse of rights;

xiv. Find that the ECHR has ruled that an application is abusive when an applicant files multiple frivolous applications;

xv. 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 (the Charter, in this case) is abusive;

xvi. Find that the ECHR stated that the Court may also declare that an application that 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] §§ 62 and 68);

xvii. Find that the Applicant is not a victim within the meaning of the Charter;

xviii. Find that the application is abusive and disputatious;

xix. Consequently, rule the application inadmissible;

xx. Find that a legal claim must be based on a personal interest;

xxi. Find that the Applicant is not a victim within the meaning of the Rules of Court and the Charter;

xxii. Find that the Applicant is bringing infringement proceedings;

xxiii. Rule that the application is inadmissible.

14. Alternatively, the Respondent State prays the Court to:

i. Find that the Applicant does not complain about any case of human rights violation;

ii. Conclude that the Application is based on a wrong premise.

15. In response to the Applicant's prayers in the additional Application, the Respondent State prays the Court to:

i. Find that the Respondent State has not committed any fault that would cause prejudice to the Applicant;

ii. Find that the Applicant fails to prove the material damage purportedly caused by the State;

iii. Find that the State has not committed any fault that led to the purported damage that would warrant any compensation;

iv. Dismiss the claim for reparation.

v. Find that the action brought by the Applicant is abusive and disputatious;

vi. Find that the Applicant cannot disregard the principle of res judicata with which this case is confronted;

vii. Find that the Applicant subjected the State to the risk of conviction;

viii. Order the Applicant to pay the State an amount of one billion (1,000,000,000) CFA by way of counterclaim.

V. Jurisdiction

16. The Court observes that Article 3 (1) 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, 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. In accordance with Rule 49(1) of the Rules, "The Court shall preliminarily ascertain its jurisdiction […] in accordance with the Charter, the Protocol and […] these Rules".

18. On the basis of the above-cited provisions, the Court must, first of all, conduct a preliminary assessment of its jurisdiction and dispose of objections thereto, if any.

19. In the instant Application, the Respondent State raises an objection to the material jurisdiction of the Court on which it will first rule, before pronouncing itself on the other aspects of its jurisdiction**.**

A. Objection to material jurisdiction

20. The Respondent State avers that this Court lacks material jurisdiction because there is no provision in the AU Constitutive Act, the Charter, or even the Rules, which makes the Court a judge of its own decisions. This means that the Court cannot settle disputes arising from the execution of its decisions.

21. The Respondent State notes that according to the jurisprudence of the ECHR,[2] a human rights court has no jurisdiction to determine whether a State Party has complied with the obligations imposed on it by one of its judgments.

22. The Applicant retorts that he is not asking the Court to monitor the execution of its decisions of 7 December 2018 and 29 March 2019. Rather, he is praying the Court to note that the Respondent State has failed to honour its undertaking to comply with such decisions in accordance with Article 30 of the Protocol.

23. In his opinion, this matter concerns the application or interpretation of the Protocol which falls within the remit of the Court and, thus, its jurisdiction cannot be challenged.

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2 ECHR, *Mehemi v France* (N°2), Application No.53470/99; *Oberschlick v Austria*, Application No.19255/92 and 21655/93.

24. The Court notes that the Applicant alleges violations of human rights protected by the Charter and the Protocol to which the Respondent State is a Party.

25. Furthermore, the Court recalls that it has previously held that:

> 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[3] [namely, the Charter, the Protocol and any other instrument on human rights and ratified by the States concerned].

26. It is not disputed that the instant case concerns alleged human rights violations due to non-compliance with the decisions delivered by this Court. This case therefore concerns the interpretation or application of Article 30 of the Protocol, under which States commit to comply with the decisions of the Court on any case in which they are a party and to guarantee their execution.

27. The jurisdiction of the Court in relation to such a dispute is exercised without prejudice to the prerogative conferred by Article 29(2) of the Protocol on the Executive Council of the African Union to monitor the execution of decisions rendered by the Court, on behalf of the Assembly of Heads of State and Government.

28. The Court underlines that this jurisdiction is based on Article 3 of the Protocol which confers on it the ability to apply or interpret all the provisions of the Protocol, including Article 30.

29. Consequently, the Court dismisses the objection regarding lack of material jurisdiction.

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B. Other aspects of jurisdiction

30. 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, insofar as the Respondent State is a Party to the Charter, the Protocol and has deposited the Declaration. In this regard, the Court recalls its previous decision that the fact that the Respondent State withdrew its Declaration on 25 March 2020 has

3 *Suy Bi Gohore Emile and others v Republic of Côte d'Ivoire*, ACtHPR, Application No. 044/2019, Judgment of 15 July 2020 (merits), § 57.

no effect on the present Application as it was already pending at the time of the withdrawal.[4]

ii. Temporal jurisdiction, insofar as the alleged violations were committed, in respect of the Respondent State, after the entry into force of the Charter and the Protocol to which the Respondent State is a party.[5]

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.

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

VI. Admissibility

32. The Court will first examine the preliminary objections relating to inadmissibility conditions not provided for in Article 56 of the Charter and will then consider the admissibility conditions provided for in Article 56 of the Charter.

A. Preliminary Objections based on inadmissibility conditions not provided for under Article 56 of the Charter

33. The Respondent State raises a number of preliminary objections. They raise an objection based on the fact that (i) the action was brought prematurely and objections based on (ii) the Applicant's lack of victim status (iii) the abuse of the right to bring proceedings, and (iv) lack of personal interest in bringing proceedings.

i. Objection based on the premature nature of the action

34. The Respondent State avers that the Application should be declared inadmissible on the ground that the Applicant, who alleges the failure to execute the Court's decisions, brought the matter before the Court prematurely.

35. The Respondent State points out that, in the proceedings initiated by the Application on 27 February 2017, the Court delivered the final judgment on reparations on 28 November 2019 and gave the Respondent State a time-limit of six (6) months to submit a report on the execution of the judgment.

4 See § 2 of this Judgment.

5 See § 25 of this Judgment.

36. The Respondent State claims that the Applicant did not wait for this deadline to expire, but instead, he filed the instant Application the next day, that is, on 29 November 2019.

37. For his part, the Applicant asserts that he does not challenge the non-execution of the judgment on reparations of 28 November 2019, but rather that of the Order on Provisional Measures of 7 December 2018 and of the Judgment of 29 March 2019, whose time limits for execution set by the Court have long expired.

38. He concludes that this preliminary objection must be dismissed.

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39. The Court notes that, in Application No. 013/2017 involving the same parties, it issued an Order on Provisional Measures on 7 December 2018 and, subsequently, a judgment on merits on 29 March 2019, giving time limits of (15) days and six (6) months, respectively, to execute the decisions.

40. The Court emphasises that it cannot be disputed that the said time limits have expired, which means that the preliminary objection regarding the alleged violations with respect to these two decisions must be dismissed.

41. In any event, the Court notes, in his latest submissions, the Applicant claims that he made reference only to the non-execution of the order on provisional measures of 7 December 2018, and to the judgment on merits of 29 March 2019, and not to the non-execution of the judgment on reparations delivered on 28 November 2019. This statement renders the Respondent State's objection moot.

42. Consequently, the Court will only examine the allegations regarding the failure to execute the Order on Provisional Measures of 7 December 2018 and the Judgment on merits of 29 March 2019, thereby excluding the claim relating to the right to property with regard to the non-execution of the judgment on reparations of 28 November 2019.

ii. Objection relating to lack of victim status

43. The Respondent State contends that the Application must be declared inadmissible on the ground that the Applicant is not a victim of human rights violations, given that he does not cite any

act by the administration that has infringed on his civil rights.

44. The Respondent State notes that the ECOWAS Court of Justice dismissed an Applicant who could not claim to be a victim of rights violations on the ground that he was unable to stand as a candidate in his country's presidential elections.

45. On his part, the Applicant prays the Court to dismiss the objection, stressing that he has previously established that he is a victim of human rights violations.

46. To buttress his argument, he points out that the refusal by the Ministry of the Interior and Public Security to issue a certificate of compliance to his party *Union Sociale Libérale* (USL) on the ground that he had been sentenced to a degrading punishment, is a refusal to execute this Court's decisions and therefore a measure that violates his rights.

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47. The Court notes that neither the Charter, the Protocol, much less the Rules require that an Applicant be a victim of the violations alleged.

48. The Court stresses that this is due to a particularity of the African regional human rights system. It notes, however, that in any case, the failure to comply with the Order on Provisional Measures of 7 December 2018 and the Judgment on Merits of 29 March 2019 is prejudicial to the Applicant and his ability to enjoy his rights of which the Court had established their violation.

49. Accordingly, the Court dismisses this objection.

iii. Objection based on abuse of the right to file legal proceedings

50. The Respondent State points out that the Applicant has engaged in a vexatious and abusive exercise by submitting, in less than one month, six (6) applications which cannot be of any interest to him owing to their manifest disparities.

51. The Respondent State further notes that, in the circumstances, the abuse of rights is manifest, and that this notion must be understood in its ordinary meaning, namely the fact that the person entitled to a right has exercised it in a prejudicial manner, in disregard of its purpose.

52. For his part, the Applicant submits that he has not brought all the proceedings listed by the Respondent State, and has, therefore, not abused his right to file proceedings. He points out that the proceedings mentioned 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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53. The Court points out that the Applicant has filed three (3)[6] applications to initiate proceedings before this Court, not six (6).

54. In line with its jurisprudence, the Court recalls that:

> An Application is said to be abusive if, among others, it is manifestly frivolous or if […] an Applicant filed it in bad faith contrary to the general principles of law and the established procedures of judicial practice. [T]he mere fact that an Applicant files several Applications against the same Respondent State does not necessarily show a lack of good faith.[7]

55. The Court notes that this objection cannot be dealt with at this stage of the procedure, given that the abuse cited by the Respondent State can only be established after examination of the merits.[8] The Court will therefore determine this issue after examining the violations alleged by the Applicant.

iv Objection based on lack of interest in filing proceedings

56. The Respondent State submits that the Applicant does not make any attempt to cite any personal violation of his rights. The Respondent State further submits that according to the jurisprudence of the ECOWAS Court of Justice based on Article 10 of the Additional Protocol establishing the said Court, only

6 Application 013/2017 filed on 27 February 2017 resulting in a Ruling on Provisional Measures of 7 December 2018, a Judgment on merits of 29 March 2019, and a Judgment on Reparations of 28 November 2019; Applications 062/2019 and 065/2019 filed on 29 November 2019.

7 *XYZ v Republic of Benin*, ACtHPR, Application No. 059/2020, Judgment of 27 November 2020 (merits and reparations), § 44.

8 *Ibid*. § 45.

direct victims of human rights violations may refer a case to it.

57. The Respondent State explains that the admissibility of an action is conditional on the alleged violations being linked to the Applicant.

58. The Applicant requests that the objection be dismissed, arguing that his status as a victim is clear from the documents in the case file, which according to him shows that he has a direct, concrete and current interest.

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59. The Court notes that although human rights courts have a common mission to protect human rights**,** they do not necessarily share the same rules of procedure, particularly with respect to questions of admissibility.

60. The Court emphasises that in the instant case, the Respondent State bases its objection on the victim status of the Applicant, which is a procedural requirement of having an interest in proceedings, provided for in Article 10(d) of the 2005 Protocol on the ECOWAS Court of Justice. However, the Court finds that neither the Charter, the Protocol, nor the Rules, contain a similar provision.

61. The Court notes that, in any case, the failure to comply with the Order of 7 December 2018 and the Judgment of 29 March 2019, is a sufficient ground for the Applicant's interest in bringing the instant Application.

62. Accordingly, the Court dismisses the objection of the Respondent State based on lack of interest in filing proceedings.

v Objection based on *res judicata*

63. The Respondent State argues that the principle of *res judicata* is a legal and irrebuttable presumption of judicial truth by which parties are prevented from going to the same court again with the same case.

64. The Respondent State maintains, however, that the Applicant is inviting the Court, through these proceedings, to rule on the same violations alleged in the proceedings relating to Application No. 013/2017, which culminated in 'three (3) decisions, including two

(2) on merits.

65. The Respondent State stresses that once this Court has irrevocably ruled on the Applicant's claims, it can no longer hear the same again on account of the principle of *non bis in idem*, a consequence of *res judicata*.

66. The Applicant prays the Court to dismiss this preliminary objection, explaining that *res judicata* requires three conditions, namely, the identity of the parties, the prayers and the existence of a previous decision on merits.

67. He notes, with regard to the prayers, that the violations alleged in this Application arise from non-compliance with the decisions of 7 December 2018 and of 29 March 2019 and are different from those presented in Application No. 013/2017 which gave rise to the said decisions.

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68. The Court reiterates that it has consistently[9] found that the principle of *res judicata* presupposes the existence of three cumulative conditions, namely the identity of the parties, identity of the prayers or their supplementary or alternative nature, and the existence of a first decision on merits.

69. In the instant case, the Court notes that while the identity of the parties is established, the prayers are not identical. Indeed, in Application No. 013/2017 which led to the decisions of 7 December 2018 and 29 March 2019, the Applicant alleged the violation of his human rights in connection with criminal proceedings instituted against him before the Court for the Repression of Economic Offences and Terrorism (CRIET) of the Respondent State. However**,** in the present Application, the alleged violations are related to the failure to comply with the decisions issued by this Court.

70. Consequently, in view of the cumulative nature of the requirements, and without having to examine the aspect relating to the existence of a first decision on merits, the Court dismisses the objection to admissibility based on the *res judicata* rule.

9 *Jean Claude Roger Gombert v Republic of Côte d'Ivoire*, (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270, § 45; *Dexter Eddie Johnson v Republic of Ghana*, ACtHPR, Application No. 016/2017, Ruling (jurisdiction and admissibility) (28 March 2019), § 48.

B. Admissibility conditions stipulated under Article 56 of the Charter

71. 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.

72. Rule 50 of the Rules, which essentially reiterates Article 56 of the Charter, provides as follows:

1. 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.
2. 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 set by the Court as being the commencement of the time limit within which it shall be 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 Constitutive Act of African Union or the provisions of the Charter.

73. The Court notes that although the Respondent State has not raised any objection to inadmissibility based on Article 56 of the Charter, it is obliged, under Rule 49 of the Rules of Court, to ascertain whether the conditions of admissibility are met.

74. The Court notes that it will first examine (i) the condition relating to the exhaustion of local remedies, then (ii) the condition relating to the filing of the Application within a reasonable time, and, finally, (iii) the other conditions of admissibility provided for by Article 56 of the Charter, reiterated in Rule 50 of the Rules.

i. Exhaustion of local remedies provided for under Article 50(2)(e)

75. The Court emphasises that the local remedies required to be

exhausted must be available, effective and adequate.

76. The Court further notes that under Articles 114[10] and of 122[11] the Beninese Constitution, the Constitutional Court is the judge of the constitutionality of laws and it is the guarantor of the fundamental rights of the human person and public freedoms. It hears, in the first and last instance, any action related to the violation of human rights.

77. Consequently, a local remedy exists and is available.

78. Regarding effectiveness and adequacy, the Court emphasises that it is not sufficient that a remedy exists to satisfy the exhaustion rule. An Applicant is only required to exhaust a remedy to the extent that the remedy is effective, useful and offers prospects of success.[12]

79. The Court recalls that the analysis of the usefulness of a remedy does not lend itself to automatic application and is not absolute.[13] It also recalls that the interpretation of the rule of exhaustion of local remedies must realistically take into account the context of the case as well as the personal situation of the Applicant.[14]

80. The Court notes that Article 117 of the Constitution of Benin[15] provides that every law shall be subject to constitutional review prior to enactment.

81. The Court thus stresses that the Charter is an integral part of the Constitution of Benin[16] as is the preamble to the said Constitution

10 Constitution of 11 December 1990.

11 Article 122 of the Constitution stipulates that: "*Any citizen may submit a case to the Constitutional Court on the constitutionality of laws, either directly or through an exceptional procedure of unconstitutionality invoked in a matter concerning them before a court*".

12 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema aka Ablasse, Ernest Zongo and Blaise Ilboudo and Burkinabè Human and Peoples' Rights Movement v Burkina Faso*, Judgment (merits) (5 December 2014), 1 AfCLR 219 § 68; *Ibid. Konaté v Burkina Faso* (merits) §108.

13 *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.

14 *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment of 29 March 2019 (merits), §110; ECHR, Application No. 21893/93, *Akdivar and Others v Turkey*, Judgment of 16 September 1996, §50; Also see ECHR Application No. 25803/94, *Selmouni v France*, Judgment of 28 July 1999, § 74.

15 See also Article 19 of 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.

16 Article 7 of the Constitution of Benin provides that: "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, are an integral part of the (…) Constitution and the law"; See

which makes mention of "attachment to the principles of democracy and human rights as defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights (UDHR) of 1948".[17]

82. It follows that constitutional review, which covers both the procedure followed for the adoption of the law and its content,[18] is exercised in relation to the "*constitutional corpus ["bloc de constitutionnalité"] comprising the Constitution and the African Charter on Human and Peoples Rights*".[19] Through this procedure, the Constitutional Court of Benin is required to ascertain the compliance of the law with human rights instruments, notably, the Charter and the UDHR.

83. In the instant case, the Applicant alleges human rights violations based on the failure to comply with decisions issued by this Court.

84. The Court has already ruled, in a judgment concerning the same parties and of which the non-execution is presently claimed, that given the particular context surrounding the matter and the personal situation of the Applicant, he should be exempted from the obligation to exhaust local remedies,[20] notably that of filing an appeal before the Constitutional Court. Consequently, the Applicant should not be required to seize that Court. Therefore, the condition relating to the exhaustion of local remedies is deemed to have been met.

ii. Filing of the Application within a reasonable time provided for under Rule 50(2)(f)

85. The Court emphasises, with regard to this condition, that the date to be taken into consideration is that on which the Respondent State was required to file the execution report in respect of the latest judgment of which the non-execution is alleged by the Applicant.

also the Decision of the Constitutional Court of Benin, Decision DCC No. 34-94 of 23 December 1994.

17 See Decisions of the Constitutional Court of Benin: Decision DCC No. 34-94 of 22 and 22 December 1994, 1994 Law Report, p. 159 ***et seq***; Decision DCC No. 09-016 of 19 February 2009.

18 Article 35 of the Rules of Procedure of the Constitutional Court provides, with respect to review of compliance with the Constitution, that: "*The Constitutional Court shall rule on the full text of the law, in terms of both its content and the procedure followed for its adoption*".

19 High Council of the Republic (HCR) of Benin sitting *in lieu* and place of the Constitutional Court, Decision No. 3DC of 2 July 1991.

20 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment of 29 March 2019 (merits), § 110 and 116.

86. The Court notes that this decision is the Judgment of 29 March 2019 ordering the Respondent State to "take all the necessary measures to annul judgment No.007/3C.COR delivered on 18 October 2018 by the CRIET in a way that erases all its effects and to report thereon to the Court within six (6) months from the date of notification of this Judgment ".

87. The Court notes that this notification was made on 29 March 2019 to the Respondent State, so that the time-limit to be taken into consideration is 30 September 2019. Between that date and 29 November 2019, one month and twenty-nine (29) days have elapsed. The Court considers this period to be reasonable.

iii. Other admissibility conditions provided for under Rule 50(2)(a), (b), (c), (d) and (g)

88. The Court notes that the condition set out in Rule 50 (2) (a) of the Rules has been met insofar as the Applicant clearly stated his identity.

89. The Court further finds that the condition set out in Rule 50(2)(b) is also met, insofar as the Application is in no way inconsistent with the Constitutive Act of the Union or the Charter.

90. Furthermore, the Court notes that the Application does not contain any disparaging or insulting language directed against the Respondent State, its institutions or the African Union, which brings it into compliance with Rule 50 (2) (c) of the Rules.

91. With regard to the condition set out in Rule 50 (2) (d) of the Rules, the Court notes that it is not established that the arguments of fact and law developed in the Application are based exclusively on information disseminated by the media.

92. Finally, the Court notes that the requirement of Rule 50 (2) (g) of the Rules of Procedure is met insofar as there is no indication that the instant case has already been settled in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the Charter.

93. Based on the foregoing, the Court finds the Application admissible.

VII. Merits

94. The Applicant alleges a violation of the rights to non-discrimination and equal protection of the law, the right to a fair trial and the right to participate in the government of his country. All these allegations arise from (A) the alleged violation of Article 30 of the Protocol. He further alleges (B) a violation of the obligation to adopt a constitutional revision on the basis of a national

consensus. Finally, the Applicant alleges (C) a violation of the rights enumerated in the Charter.

A. Violation of Article 30 of the Protocol

95. The Applicant prays the Court to find that the Order for Provisional Measures of 7 December 2018 and the Judgment on Merits of 29 March 2019 have not been executed.

96. He further submits that, by failing to execute these decisions, the Respondent State violated his right to non-discrimination, his right to equal protection of the law, his right to a fair trial, his right to participate freely in the government of his country and his right of equal access to the public service of his country.

97. The Respondent State responded only in respect of the alleged violation of the right to participate in the government of his country and to have equal access to the public service of his country. The Respondent State argues that the Applicant does not show how it prevented him from voting, being elected and accessing the public service.

98. For the Respondent State, the Applicant chose not to return to his country but rather to go to international courts. In its view, no violation of Articles 13 (1) and (2) of the Charter exists in the present case.

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99. Article 30 of the Protocol provides 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.

100. The Court notes that the French version of the Protocol reads as follows:

> Les Etats parties au présent Protocole s'engagent à se conformer aux décisions rendues par la Cour dans tout litige où ils sont en cause et à en assurer l'exécution dans le délai fixé par la Cour.

101. The Court therefore considers that the terms "*décisions*" and "judgment" refer to any act of a judicial nature.

102. The Court emphasises that judicial acts include, in particular, orders for provisional measures, the binding nature of which is

unanimously recognised by international jurisprudence.

103. In this respect, in the *Lagrand case* (*Germany v United States of America*), the International Court of Justice reached "the conclusion that orders indicating provisional measures (...) have a binding character".[21]

104. Similarly, the United Nations Human Rights Committee,[22] the European Court of Human Rights[23] and the Inter-American Court of Human Rights[24] have recognised this principle.

105. The Court further notes that the term "judgment" includes all judgments rendered by the Court, the binding nature of which is confirmed by Rule 72 (2) of the Rules of Court, which states that: "The judgment shall be binding on the parties and is enforceable as provided under Article 30 of the Protocol".

106. The Court finds, in the present case, that all the violations alleged by the Applicant relate in one way or another, directly or indirectly, to the non-enforcement of the Order for provisional measures of 7 December 2018[25] and the Judgment of 29 March 2019.[26]

107. The Court notes that the Respondent State has not filed any report, nor does it dispute that it has not executed the relevant decisions.

108. In view of the foregoing, the Court finds that the Respondent State has violated Article 30 of the Protocol.

B. On the violation of the obligation to adopt a constitutional revision on the basis of national consensus

109. The Applicant contends that the constitutional revision was carried out following a parliamentary vote, but the national

21 ICJ, Lagrand (*Germany v United States of America*) (Judgment of June 27, 2001), § 109.

22 UN Human Rights Committee, Case of *Glen Ashby v Trinidad and Tobago*, (Communication No. 580/1994) (Decision of 26 July 1994) § 10.9.

23 ECtHR, *Mamatkulov and Askarov v Turkey*, Applications No. 46827/99 and 49951/99), ECHR, GC (Judgment of 04 February 2005) §§ 128-129, Reports of Judgments and Decisions 2005 - 1.

24 IACtHR, *Loayza Tamayo v Peru*, Judgment of 17 September 1997, § 80.

25 The Court had ordered the Respondent State to "i. stay execution of Judgment No. 007/3C.COR of 18 October 2018 delivered by the Economic Crimes and Terrorism Court established by Law No. 2018/13 of 2 July 2018, pending this Court's final decision of this Court; and ii. Report to this Court within fifteen (15) days from the date of receipt of this Order on the measures taken to implement the same".

26 The Court had ordered the Respondent State to "xxii. […] take all necessary measures to annul Judgment No. 007/3C.COR of October 18, 2018 by CRIET in a way that erases all its effects and to report thereon to the Court within six (6) months from the date of notification of this Judgment".

consensus, which was established by the Constitutional Court of the Respondent State as a principle with constitutional value, is not limited to the National Assembly.

110. He notes that it should not be up to a group of militants from two political parties to rewrite nearly fifty (50) articles of the Constitution without any debate, thereby excluding the people and distancing them from the procedure and by debating with no one.

111. He further emphasises the fact that because Parliament has no opposition in its midst able to open the debate, attests that it in no way can be considered to represent the people in all their political diversity.

112. According to the Respondent State the case should be dismissed, arguing that a referendum is merely one option for revising the Constitution, as is a parliamentary vote by qualified majority, as provided for in the Constitution.

113. The Respondent State points out that Article 155 of the Constitution provides that:

> [The constitutional] revision is achieved only after having been approved by referendum, unless the bill or proposal in question has been approved by a four-fifths majority of the members of the National Assembly.

114. From this it concluded that, since the constitutional revision was the result of a parliamentary vote, it is legal, constitutional and consensual.

115. The Court emphasises that the issue at stake here is not for it to determine whether or not it can call into question the constitutional order of a State. Rather, it has been requested to determine whether the constitutional revision of 7 November 2019 reposes on a national consensus, as provided for in Article 10(2) of the ACDEG.[27]

116. This 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

117. The Court recalls that in its judgment rendered on 4 December 2020 relating to the same parties, in Application No. 062/2019, it ruled, in relation to the constitutional revision of 7 November 2019, that the Respondent State had violated its obligation to ensure that the process of constitutional revision is conducted

27 In its decision *APDH v Republic of Côte d'Ivoire*, the Court held that "the African Charter on Democracy and the ECOWAS Protocol on Democracy and Governance are human rights instruments within the meaning of Article 3 of the Protocol, and therefore that it has jurisdiction to interpret and apply the same".

on the basis of a national consensus, in accordance with Article 10(2) of the ACDEG.[28]

118. The Court adopted the same position in the judgment of 4 December 2020 in Application No. 003/2020 *Houngue Eric Noudehouenou v Republic of Benin.*[29]

119. Accordingly, the Court finds that this request is moot.

C. Alleged violation of Article 1 of the Charter

120. The Applicant claims that any infringement of the rights provided for and protected by the Charter can be attributed to the actions or omissions of a public authority and can be attributable to the State.

121. He submits that in the instant case, the Respondent State has not taken any steps with regard to the human rights violations established by the decisions of this Court, and thus violates Article 1 of the Charter.

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122. Article 1 of the Charter provides that:

> The Member States of the Organization of African Unity [now African Union], parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

123. The Court notes that Article 66 of the Charter provides: "Special protocols or agreements may, if necessary, supplement the provisions of the present Charter".

124. The Court considers that, within the meaning of this text, there exists, between the protocols and agreements adopted to complement the Charter, a legal complementarity.

125. It follows that the violation of rights, duties and freedoms set out in any protocol or instrument adopted to supplement the Charter implies a violation of Article 1 of the Charter**.**

28 *Sebastien Ajavon v Republic of Benin*, ACtHPR, Application 013/2017, Judgment of 29 November 2019 (reparations), § 40.

29 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020 – Judgment (merits and reparations) (4 December 2020), §§ 60-67; 123-viii.

126. Consequently, the Court considers that the violation of Article 30 of the Protocol implies the violation of Article 1 of the Charter**.**

VIII. Reparations

127. The Applicant has (A) requested various reparations measures. For its part, the Respondent State (B) submits a counterclaim for the sum of one billion (1,000,000,000) CFA francs as damages for abuse of process.

A. Applicant's Prayers

128. The Applicant prays for (i) an expert appraisal, (ii) a pecuniary reparation of three Hundred Billion (300,000,000,000) CFA Francs, and (iii) a non-pecuniary reparation.

i. Expert appraisal

129. The Applicant prays, on the basis of Rule 45 of the Rules, for an expert appraisal for the purpose of establishing the extent of the damages he has suffered due to the Respondent State's failure to execute the decisions of the Court. To this effect, he requests the appointment of an international firm of experts.

130. To buttress his point, he states that the expert appraisal will help quantify the prejudice resulting from the failure to execute this Court's Order for Provisional Measures of 7 December 2018 and the Judgment on Merits of 29 March 2019.

131. Thus, he would be restored to the situation he would have been in, had the Respondent State implemented these decisions, and would thus benefit from full reparation. This is in accordance with the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Article 34 of the ILC Draft Articles and the principles set out in the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case.[30]

132. In response, the Respondent State argues that the case should be dismissed, arguing that an expert opinion is requested to enlighten the judge when he or she does not have sufficient information to make a decision. However, it points out that this Court has

30 ICJ, ***Case concerning the factory at Chorzów*** (Claim for indemnity) (merits), (13 September 1928), Publications of the PCIJ, Série A – n°17.

amply examined the Applicant's claims for compensation in these proceedings and awarded him the sum of thirty-nine billion (39,000,000,000) CFA francs, without resorting to an expert opinion, as the pleadings had been sufficient to enlighten the Court.

133. The Respondent State concludes that his prayer has therefore become moot, as the damages related to the proceedings in Application No. 013/2017 have already been examined.

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134. The Court notes that based on Rule 55 of the Rules, it may, of its own accord or at the request of a party, obtain any evidence which in its opinion may provide any necessary clarification, including through the appointment of an expert.

135. The Court emphasises that, although it does not follow from the letter of the above-mentioned Rule, the decision to resort to an expert opinion presupposes the existence of a technical issue[31] for which the Court needs to obtain further information before making a decision.

136. The Court finds that the Applicant has not demonstrated that there is an issue of such a technical nature as to warrant the appointment of an expert.

137. Accordingly, the Court dismisses the Applicant's request for expert appraisal.

ii. Reparation measures

138. Article 27(1) of the Protocol provides 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**".**

139. The Court has consistently held that reparation is only awarded when the responsibility of the Respondent State for an internationally wrongful act is established and the causal link

31 ICJ, Military activities on Congolese territory, (***Democratic Republic of Congo v Uganda***) – Order of 8 September 2020, § 13.

between the wrongful act and the alleged injury is established.[32]

140. The Court emphasises that the burden of proof of this causal link rests, in principle, on the Applicant, who must therefore provide the evidence to support his claims.[33]

141. The Court recalls that it has already found that the Respondent State violated Article 30 of the Protocol and Article 1 of the Charter.

iii. Pecuniary reparations

142. The Applicant seeks the sum of three hundred billion (300,000,000,000) CFA francs as compensation for the damage suffered as a result of the failure to implement the Order for Provisional Measures of 7 December 2018 and the judgment of 29 March 2019.

143. According to him, this damage has a political dimension as well as an economic and social dimension.

144. Regarding the political dimension, he emphasises that due to the conviction handed down by the CRIET, he was unable to stand for the legislative elections of 28 April 2019 owing to the fact that he could not produce a certificate of a clean criminal record. He adds that the deposit of two hundred and forty-nine million (249,000,000) CFA francs made for the Liberal Social Union (USL) political party, of which he is Honorary Chair, to participate in the legislative elections of 28 April 2019 has been confiscated.

145. Regarding the economic and social dimension, he stresses that as of April 2019, the Respondent State has refused to lift the assets freeze, including of all his shares, buildings and all his bank accounts. In this regard, he maintains that the value of his frozen assets is two hundred billion (200,000,000,000) francs CFA corresponding to the tax adjustment to which he was subjected to.

32 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020 Judgment of 4 May 2020 (merits and reparations), §§ 4- 5 4 December 2020 §117.

33 *Reverend Christopher R. Mtikila v Tanzania*, Judgment, (reparations) (2014) 1 AfCLR 74, § 40 ; *Sébastien Ajavon v Republc of Benin*, ACtHPR, Application No.013/2017, Judgment (reparations) (29 November 2019), § 17 ; *Leon Mugesera v Republic of Rwanda*, ACtHPR, Application No. 012/2017, Judgment (merits and reparations) 27 November 2020, § 125.

146. In addition, he points out that the Ministers of the Interior and of Justice issued an order prohibiting any public servant from issuing "official documents"[34] to persons against whom there is an arrest warrant.[35] In July 2019, he tried to have some public documents issued, but the various officials refused to do so, citing the CRIET judgment against him.

147. He also avers that, since July 2019, his name has been published on the website of the Ministry of Justice as someone who has been sentenced to twenty (20) years in prison and against whom there is an arrest warrant.

148. The Applicant further asserts that he is thus forced to live in exile, which is a source of moral prejudice. He claims that in addition to his companies having been blacklisted, he is now also seen by his business partners as a drug trafficker. He further alleges that the Respondent State has refused to reinstate the licences of his companies.[36]

149. For its part, the Respondent State prays the Court to dismiss that prayer, noting that damages constitute financial compensation and can be claimed only by a person who has suffered moral prejudice and/or property damage.

150. The Respondent State stresses that in order to warrant compensation, three cumulative conditions are required: fault, damage and a causal link between the fault and the prejudice resulting from the damage. The Respondent State submits that these conditions have not been met in this case.

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151. The Court emphasises that it is true the obligation to execute its decisions lies with the Respondent State concerned. Nonetheless, it is incumbent on the Applicant to prove the damage he claims to

34 These are the documents: extracts of civil status certificates, certificate of nationality, national identity card, passport, laissez - passer, sauf-conduit, residence permit, consular card, Bulletin No. 3 of the criminal record, certificate of life and duties, certificate or attestation of residence, attestation or certificate of possession of state, driver's license, voter's card and tax receipt.

35 These are persons "whose appearance, hearing or interrogation is required for the purposes of a judicial police investigation, preparatory investigation, trial proceedings or who are the subject of an enforceable conviction decision and who do not comply with the summons and injunction of the authority".

36 Comon SA, Socotrac SA and Sikka TV.

have suffered as a result of the violations found.

152. The Court notes that it has found the violation of Article 30 of the Protocol and Article 1 of the Charter by the Respondent State.

153. The Court notes that in order to prove the prejudice resulting from the violation by the Respondent State of Article 30 of the Protocol, the Applicant has submitted several documents. The Applicant has submitted a certificate of a criminal record of 17 January 2019 mentioning the Applicant's conviction by the CRIET; a bailiff's report dated 12 February 2019, stating that he was unable, through one of his Counsel, to obtain a certificate of a clean criminal record; and a bailiff's report dated 4 October 2019, indicating that the Applicant's name appears on the "list of wanted persons" posted on the website of the Ministry of Justice and Legislation of the Respondent State. The Applicant also submitted three airline tickets issued in the name of his Advocate for travel during the months of September, October and November 2019 and a hotel reservation in the name of the Applicant's Advocate.

154. The Court notes that the Applicant sought (a) restitution of the sum of Two Hundred and Forty-Nine million (249,000,000) CFA francs. The Court notes, moreover, that he did not specify the nature of the loss claimed in support of the Three Hundred billion (300,000,000,000) CFA Francs. Consequently, both (b) material loss and (c) moral loss must be taken into account.

a. Restitution of the sum of two hundred forty-nine million (249,000,000) CFA francs

155. The Court recalls that the Applicant contends that this sum was paid as a deposit for participation in the legislative elections of 28 April 2019 of the USL party, of which he is the honorary president.

156. The court considers that the restitution of this sum of money can only be considered if it is established that it was actually paid into the coffers of the Respondent State.

157. In the instant case however, none of the exhibits produced relates to the payment of this deposit. Even if this money was paid, the Applicant does not show that it is his, since it was intended for the payment of a political party's guarantee and not for the Applicant himself.

158. More decisively, the Applicant has not established any possible link between this deposit that was paid and the failure to execute the Order for provisional measure of 7 December 2018 or the judgment of 29 March 2019.

159. Consequently, the Court dismisses the Applicant's prayer for restitution of the sum of Two Hundred and Forty-Nine Million

(249,000,000) CFA francs.

b. Material prejudice

160. The Court emphasises that the Applicant's allegations that the Respondent State refused to lift the seizures made on his assets and to restore the licenses of his companies do not stand.

161. Indeed, these allegations are unrelated to the measures ordered in the two decisions that this Court has found not to have been executed.

162. The Court further considers that the documents submitted by the Applicant in support of his claim for reparation can be classified in two categories: those that tend to establish a given situation and those that relate to the travels of the Applicant's Advocate.

163. The first category of documents, consisting of bailiff's reports, show that the Applicant was unable to obtain a certificate of clean criminal record or that his name is listed on the website of the Ministry of Justice as a wanted person.

164. They show that the Respondent State did not implement the decisions of this Court. However, they do not constitute evidence of any material prejudice, not does it show a causal link with the non-enforcement of the said decisions.

165. With respect to the documents in the second category, consisting of airline tickets, their probative value is limited to evidence of the fact that the Applicant's Advocate made a hotel reservation for 22 November 2019 in Zanzibar and made trips on the following routes : Cotonou - Paris, 23 September 2019, Paris - Addis Ababa - Arusha, outbound on 23 September 2019 and return on 26 September 2019, Paris - Cotonou, 4 October 2019, Cotonou - Addis Ababa - Zanzibar, outbound and return on 25 and 29 November 2019. The Court notes that the Applicant does not state the purpose of these travels.

166. The Court considers that they are not of such a nature as to constitute evidence of any prejudice that would have arisen from the failure to comply with the Order of 7 December 2018 and the Judgment of 29 March 2019.

167. Based on the foregoing, the Court dismisses the request for reparation for material prejudice.

c. Moral prejudice

168. The Court recalls its jurisprudence according to which, in case

of violation of human rights, moral prejudice is presumed.[37] Moral prejudice can, in fact, be considered as an automatic consequence of the violation, without the need to establish it by any other means.[38]

169. The Court also points out that the determination of the amount to be awarded for moral damage is made on the basis of equity, taking into account the circumstances of each case.[39]

170. In the instant case, the Court considers that awarding the Applicant a symbolic amount of 1 franc CFA is sufficient reparation.

iv Non-pecuniary reparations

171. The Court recalls that the Applicant requested that it order the Respondent State to remove all obstacles to the enforcement of its decisions.

172. The Court emphasises that under Article 30 of the Protocol, the Respondent State is obligated to ensure such enforcement.

173. The Court notes that this provision alone is sufficient for the Respondent State to remove all obstacles to the execution of the Judgment on Merits of 29 March 2019.

174. Accordingly, the Court orders the Respondent State to comply with Article 30 of the Protocol by executing the Judgment on Merits of 29 March 2019, that is, by taking all necessary measures to annul the judgment No. 007/3C/COR delivered on 18 October 2018 by the CRIET, so as to erase its effects.

B. Respondent State's counterclaim

175. The Respondent State contends that the Applicant, assisted by a lawyer, cannot be unaware of the fact that he brought an action in connection with the decisions rendered in the case - *Application No. 013/2017 Sebastien Ajavon v Republic of Benin.*

176. The Respondent State affirms that he deliberately chose to initiate vexatious proceedings with a view to having the same claims tried on several occasions, thereby exposing it to the risk of a decision

37 *Ibid. Guehi v United Republic of Tanzania* (merits and reparation) § 55 ; ***Konaté v Burkina Faso*** (reparations) §58.

38 ***Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema aka Ablasse, Ernest Zongo and Blaise Ilboudo and Burkinabè Human and Peoples' Rights Movement v Burkina Faso***, Judgment (merits) (5 December 2014), 1 AfCLR 219 § 68; ***Ibid. Konaté v Burkina Faso*** (merits) §108.

39 ***Ibid. Zongo v Burkina Faso*** (merits) § 55; ***Konaté v Burkina Faso*** (merits) § 58; ***Guehi v United Republic of Tanzania*** (merits) § 55; ***Ibid***.

that is harmful to its image, for abusive procedure.

177. The Respondent State concludes that it is therefore entitled to seek, by way of counterclaim, the sum of One Billion (1,000,000,000) CFA francs as damages for abuse of process.

178. The Applicant has not responded to this counterclaim.

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179. The Court notes that the counterclaim for damages made by the Respondent State is based on the abuse of the right to bring proceedings before a court.

180. The Court finds that the Applicant did not abuse this right,[40] especially since not all of the allegations he made were dismissed. In any event, the Court considers, after having examined his allegations, that they are not frivolous, nor motivated by malicious intent**.** Accordingly, the Respondent State's counterclaim is dismissed.

IX. Costs

181. The Applicant prays the Court to order the Respondent State to bear the costs of the proceedings.

182. For its part, the Respondent State submits that Applicant's prayer on costs be dismissed.

183. Article 32 (2) of the Rules[41] provides:

> Unless otherwise decided by the Court, each party shall bear its own costs, if any.

184. In the instant case, the Court considers that there is no reason to depart from the principle laid down in that provision. Consequently, each party bears its own costs of the proceedings.

X. Operative part

185. For these reasons,
The Court

40 See §§ 54-56 of this Judgment.

41 Formerly Rule 30(2) of the Rules of Court of 2 June 2010.

Unanimously,
On jurisdiction
i. *Dismisses* the objection based on the lack of material jurisdiction;
ii. *Finds* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objections based on inadmissibility;
iv. *Finds* the Application admissible.

On merits
v. *Finds* that the Respondent State has violated Article 30 of the Protocol;
vi. *Finds* that the Respondent State has violated Article 1 of the Charter.

On reparations
Pecuniary reparations
vii. *Dismisses* the Applicant's prayer for an expert appraisal of the damages resulting from the failure to execute the Order for Provisional Measures of 7 December 2018 and the Judgment on Merits of 29 March 2019 in Application 013/2017 with respect to the same parties;
viii. *Dismisses* the request for payment of the amount of Three Hundred Billion (300, 000, 000, 000) francs CFA;
ix. *Dismisses* the Respondent State's counterclaim for payment of the amount of One Billion (1,000,000,000) CFA Francs as damages for abuse of process initiated by the Applicant;
x. *Awards* the Applicant a symbolic amount of 1 CFA francs as reparation for moral prejudice.

Non-pecuniary reparations
xi. *Orders* the Respondent State to comply with Article 30 of the Protocol by executing the Judgment of 29 March 2019, that is, by taking all necessary measures to annul the judgment N° 007/3C. COR delivered on 18 October 2018 by the CRIET in a way to erase all its effects;
xii. *Orders* the Respondent State to report to the Court within seven (7) days from the notification of this Judgment.

Costs
xiii. *Orders* each party to bear its own costs.

Diarra v Mali (provisional measures) (2021) 5 AfCLR 124

Application 047/2020, *Adama Diarra a.k.a Vieux Blen v Republic of Mali*

Order, 29 March 2021. 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, a radio host in the Respondent State, brought this Application to challenge national processes leading to his committal to prison based on the complaint of two magistrates' unions, allegedly for contempt and making insulting statements. Together with the main Application, the Applicant filed a request for provisional measures. The Court held that the request for provisional measures was moot.

Jurisdiction (*prima facie*, 17-20)

Provisional measures (proximity to examination on the merit, 23; moot application, 24)

I. The Parties

1. Mr. Adama Diarra, also known as "Vieux Blen" (hereinafter referred to as "the Applicant") is a Malian national and a radio host. He challenges the legality of procedure that led to his being placed under a committal order on 22 October 2020, following a joint complaint filed by two magistrates' unions for contempt of court as well as for making insulting statements.

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 "the Charter") on 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 10 May 2000. The Respondent State also deposited, on 19 February 2010, the Declaration prescribed under Article 34(6) of the Protocol, by which it accepts the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations (hereinafter referred to as "the Declaration").

II. Subject of the Application

3. It emerges from the Application dated 27 November 2020 that,

on 22 October 2020, the Applicant was placed under a committal order by the Substitute Public Prosecutor of the High Court of Commune III of Bamako.

4. The alleged deprivation of liberty of the Applicant follows a joint complaint filed by the two magistrates' unions in Mali, namely, *Syndicat Autonome de la Magistrature* (SAM) and the *Syndicat Libre de la Magistrature* (SYLIMA) for broadcasting a video on the internet. Subsequently, the Prosecutor's office of the High Court of Commune III prosecuted him for contempt of court as well as for making insulting statements.

5. The Applicant submits that in accordance with the Criminal Procedure Code of the Respondent State, a trial must be held within three (3) months, but a detainee has the right to apply for bail; provided that, this does not pose any threat and the detainee's legal representation is guaranteed.

6. The Applicant argues that the provisions of Article 155 of the said Code of Procedure confers on him the right to apply for bail at any stage of the proceedings, and that his three advocates applied for bail on 25 October, 10 and 11 November 2020, pending judgment on his case.

7. The Applicant states that the said applications for bail initiated successively by his advocates were listed for hearing on 15 December 2020 after their joinder. The hearing resulted in Interlocutory Judgment No. 25 of 27 January 2021 granting the Applicant bail, against which the prosecution appealed and the appeal is still pending.

III. Alleged violations

8. In the Application, the Applicant alleges:

i. The violation of the right to freedom, protected by Article 6 of the Charter;

ii. The violation of the right to have his cause heard, protected by Article 8 [sic][1] of the Charter and Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[2]

IV. Summary of the Procedure before the Court

9. On 7 December 2020, the Registry of the Court acknowledged receipt of the Application dated 27 November 2020, filed together

1 Article 7(1)(a)(b)(c) of the Charter.

2 The Respondent State became a Party to the said instrument on 16 July 1974.

with the request for provisional measures.

10. On 15 January 2021, the Registry served the Application and the request for provisional measures on the Respondent State for its response within respectively ninety (90) days and fifteen (15) days of receipt of the notification.

11. On 5 February 2021, the Respondent State filed its response to the request for provisional measures. On the same date, the Applicant filed his reply to the request for information made by the Registry regarding the outcome of the hearing of 15 December 2020 as well as that of the appeal by the Prosecutor. The Applicant indicated in the said reply that the hearing of 15 December could not be held because of the suspension of hearings due to the Covid-19 pandemic. He also mentioned through a document received at the Registry on 28 January 2021, that following the preliminary motion No. 25 for release of 27 January 2021, the Public Prosecutor's Office filed an appeal. On 5 February 2021, the said correspondence was notified to both Parties.

12. On 11 February 2021, the Registry requested the Applicant for further information on the outcome of the Public Prosecutor's appeal against the pre-trial judgment of 27 January 2021. The Applicant replied on 12 February 2021, indicating that the said appeal by the Public Prosecutor had not been ruled on and that the Public Prosecutor's Office had indeed examined the 3 successive applications for provisional release, at the same time as though they were the same application. The Applicant's replies were notified to the Respondent State on 15 February 2021.

13. On 2 March 2021, the Registry requested for further information from the Applicant's lawyer regarding the outcome of the hearing of the Bamako Court of Appeal of 25 February 2021 against the Interlocutory Judgment No. 25 of 27 January 2021 granting the Applicant bail pending hearing of the criminal case. On 11 March 2021, the Applicant informed the Registry that his release on bail pending hearing had been confirmed.

V. *Prima facie* jurisdiction

14. Applicant alleges that the Court has jurisdiction to order the measures requested since the Respondent State is a Party to the Charter, the Protocol and the other human rights instruments cited in the Application.

15. The Respondent State has not made any submissions on the jurisdiction of the Court.

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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. However, with regard to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits in the matter but only that it has *prima facie* jurisdiction.[3]

18. In the instant case, the Applicant alleges violation of Articles 6, 7(1)(a),(b),(c) of the Charter and Article 14 of the ICCPR. These are instruments that the Court has jurisdiction to interpret and apply by virtue of Article 3(1) of the Protocol.

19. The Court notes, as set out in paragraph 2 above, that the Respondent State is a party to the Charter, the Protocol and has also deposited the Declaration by virtue of which it accepts the Court's jurisdiction to receive applications from individuals and NGOs in accordance with Article 34(6) read in conjunction with Article 5(3) of the Protocol.

20. From the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the instant Application for provisional measures.

VI. Provisional measures requested

21. The Applicant requests the Court to order the following provisional measures:

3 *Harouna Dicko and 4 Others v Burkina Faso*, ACtHPR, Application No. 037/2020, Order of 20 November 2020 (provisional measures) § 14; *Guillaume Kigbafori Soro and Others v Republic of Côte d'Ivoire*, ACtHPR, Application No. 012/2020, Order of 15 September 2020 (provisional measures) § 17 ; *Babarou Bocoum v Republic of Mali*, ACtHPR, Application No. 023/2020, Order of 23 October 2020 (provisional measures), § 14 ; *Suy Bi Gohore Emile and Others v Republic of Côte d'Ivoire*, ACtHPR, Application No. 044/2019, Order of 28 November 2019 (provisional measures), § 18 ; African Human and Peoples' Rights Commission *v Lib*ya (provisional measures) (15 March 2013) 1 AfCLR 149, § 10, *Amini Juma v United Republic of Tanzania* (provisional measures) (3 June 2016) 1AfCLR 687, § 8.

i. Find that the issuance of a committal order by the Public Prosecutor's Office of the *Tribunal de la Grande Instance of Commune III* as well as the refusal to register the 3 applications for release on bail of the Applicant constitute violations of the Applicant's human rights, insofar as they violate Articles 6 and 8 [sic][4] of the Charter, Article 9 of the Constitution of the Respondent State as well as Article 1 of Law No. 01-79 of 20 August 2001 of the Criminal Procedure Code of the Respondent State;

ii. To cease the violations by ordering the release on bail of the Applicant, pending the judgment on the merits.

iii. To report back, within one month, on the measures taken with regard to this stay.

22. The Respondent State submits that the provisional measures requested are not well founded in law and that they do not comply with the conditions laid down in Rule 59(1) of the Rules of Court, which reproduces the provisions of Article 27(2) of the Protocol. The request should therefore be dismissed by the Court.

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23. The Court observes that the measure requested by the Applicant concerning the issuance of the committal order and the refusal to list the applications for release, being violations of human rights, is of such a nature that its examination would require a determination of whether the procedural acts of the domestic courts comply with the Charter. It follows that such an examination would go to the merits of the case, which is outside the scope of provisional measures.

24. The Court notes that, following the confirmation of the Applicant's release referred to in paragraph 13 above, the request for provisional measures to release the Applicant has consequently become moot.

25. For the avoidance of doubt, this Ruling is provisional and is without prejudice to any decision the Court may make on its jurisdiction, the admissibility of the Application and the merits.

4 Article 7(1)(a)(b)(c) of the Charter.

VII. Operative part

26. For these reasons,
The Court,
Unanimously,
i. *Declares* that the Applicant's request for provisional measures is moot.

Noudehouenou v Benin (provisional measures) (2021) 5 AfCLR 130

Application 028/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Order, 29 March 2021. 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 Application to challenge the validity of a domestic law as well as a decision of the Constitutional Court of the Respondent State which affirmed the constitutionality of the challenged law. Further alleging that he and his attorney faced a risk of domestic criminal prosecution for bringing the main Application, the Applicant subsequently filed a request for provisional measures which was dismissed by the Court. The Applicant then filed this request for provisional measures. The Court dismissed the request for provisional measures on the grounds that it did not consider the measures necessary.

Jurisdiction (*prima facie*, 15-16, 18; effect of withdrawal of article 34(6) Declaration 17)

Provisional measures (urgency, 31; irreparable harm, 32, 38; preventive nature, 33; breach of national law, 42)

I. The Parties

1. Mr. Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He seeks provisional measures, essentially to suspend the application of a provision of the Beninese Criminal Code.

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. It further deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") through which it accepted 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, an instrument of withdrawal of its Declaration. The Court has

previously 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 deposit.[1]

II. Subject of the Application

3. On 17 September 2020, the Applicant filed with the Court, an Application dated 15 September 2020, to challenge the law of 2 July 2018,[2] which amends and supplements the organic law of 18 March 1999[3] on the Higher Judicial Council. He also challenges the decision of 18 June 2018 of the Constitutional Court of Benin[4] which held that, the above-mentioned law of 2 July 2018 is in conformity with the Constitution.

4. In this request for provisional measures filed on 4 January 2020, the Applicant states that he had criticised decisions of the national courts.[5] He also states that, the application of Article 410 of the Criminal Code places him and his Counsel at a permanent and imminent risk of arbitrary deprivation of their liberty and possible conviction, which gives the Court the justification to grant the provisional measures requested.

5. He alleges that the Respondent State may, at any time and arbitrarily, apply against him and his Counsel the provisions of Article 410 of the Criminal Code of Benin,[6] which punishes with imprisonment and a fine, anyone who publicly, by action, words or writing, seeks to discredit a judicial act or decision in

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Request No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and *Corrigendum* of 29 July 2020.

2 Law N°2018-02 of 02 July 2018.

3 Law N°94-027 of 18 March 1999.

4 DCC Decision 18-141 of 18 June 2018.

5 These are decisions of: the Constitutional Court, the Court of Repression for Economic Offences and Terrorism (CRIET) and the Cotonou Court of First Instance.

6 Article 410 "Anyone who has publicly, by deeds, words or writings, sought to discredit an act or a judicial decision, under conditions likely to undermine the authority of justice or its independence, is punished with (1) months to six (6) months of imprisonment and from one hundred thousand (100,000) CFA francs to one million (1,000,000) CFA francs fine or one of these two penalties only.The Court may also order that its decision be displayed and published under the conditions it determines, at the expense of the convicted person, without these costs being able to exceed the maximum fine provided for above. The foregoing provisions may in no case be applied to purely technical comments in specialist journals, nor to acts, words or writings tending to review a conviction. When the offence has been committed through the press, the provisions of article 455 of this code are applicable "

a manner likely to undermine the authority of the judiciary or its independence.

6. He adds finally that Article 410 violates the Respondent State's international commitments in that, criticism of local decisions before national courts and the Court is a right protected by Articles 7(1) of the Charter, 2(3), 14(1-3) and 19 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR").

III. Alleged violations

7. The Applicant alleges the following:

i. Violation of the right to an independent 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), Article 1(h) and Article 33 of the ECOWAS Protocol on Democracy.

ii. Violation of the right of magistrates to strike protected by Articles 9, 10 and 11 of the Charter*;*

iii. Violation of the right to appeal enshrined in Article 56(5) of the Charter *(sic)*, Article 8 of the UDHR, Article 1(h) of the ECOWAS Protocol on Democracy, Article 7(1) of the Charter, and Articles 2(3), 14(1-3) and 19 of the ICCPR;

iv. Violation of the right to freedom of communication protected by Article 19(2) of the ICCPR;

v. Violation of the right to equality and non-discrimination protected by Articles 2 and 3 of the Charter;

vi. Violation of the right to human integrity protected by Article 5 of the Charter;

vii. The violation of the right to the effective guarantee, protection and enjoyment of fundamental rights protected by Articles 1 of the Charter, 2 of the ICCPR and 1(h) of the ECOWAS Protocol on Democracy;

viii. Violation of the right to freedom of religion protected by Article 18 of the ICCPR;

ix. Violation of the right to freely take part in the conduct of public affairs of one's country protected by Article 13 of the Charter;

x. Violation of the right of defence protected by Article 7(1)(c) of the Charter.

IV. Summary of the Procedure before the Court

8. The Applicant filed an Application on the merits on 17 September 2020 followed by a request for provisional measures on 28 September 2020. On 27 November 2020, the Court issued a

Ruling dismissing the request for provisional measures for lack of urgency and irreparable harm. The Ruling was duly notified to the Parties.

9. On 4 January 2021, the Applicant filed a new request for provisional measures which was served on the Respondent State on 14 January 2021 for its response within fifteen (15) days from the date of receipt.

10. The Respondent State did not file any Response to this request for provisional measures.

V. *Prima facie* jurisdiction

11. The Applicant submits, on the basis of Articles 27(2) of the Protocol and Rule 59(1) of the Rules[7] of Court, 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.

12. Referring further to Article 3(1) of the Protocol, the Applicant submits that the Court has jurisdiction insofar as, the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration. The Application contains alleges violations of rights protected by human rights instruments.

13. He further argues that although the Respondent State withdrew its Declaration on 25 March 2020, this withdrawal will not take effect until 26 March 2021.

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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. According to Rule 49(1) of the Rules[8] "(t)he Court shall preliminarily ascertain its jurisdiction…". However, with respect to provisional measures, the Court need not satisfy itself that it has jurisdiction

7 Rules of Court, 25 September 2020.

8 Rules of Court, 25 September 2020.

on the merits of the case, only that it has *prima facie* jurisdiction.[9]

16. In the present case, the rights alleged by the Applicant to have been violated, are all protected by the human rights instruments ratified by the Respondent State. The Court further notes that the Respondent State has ratified the Protocol and deposited the Declaration under Article 34(6) of the Protocol.

17. The Court also recalls that it has ruled 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 and new cases filed before the withdrawal comes into effect[10] as is the case in the present matter. The Court reiterated this position in its Ruling of 5 May 2020, *Houngue Eric Noudehouenou v Republic of Benin,*[11] and held that the Respondent State's withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that the said withdrawal does not affect its personal jurisdiction in the instant case.

18. From the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the present request for provisional measures.

VI. Provisional measures requested

19. The Applicant seeks the following orders on provisional measures:

i. To declare that the content of Article 410, paragraph 3 of the Beninese Criminal Code makes no mention of the remedies of appeal, cassation and unconstitutionality before the Court, for actions which are punishable under paragraphs 1 and 2 of Article 410, paragraph 3, when a court decision is criticised in the course of its enforcement.

ii. Order the Respondent State to take all necessary measures to stay any application of Article 410 of the Criminal Code against the Applicant and his counsel with regard to the criticisms made by them against decisions handed down by the Beninese Constitutional Court, the CRIET and the Cotonou Tribunal in the appeals lodged by the latter before the Court in Applications No. 003/2020, No. 004/2020, 028/2020 and No. 032/2020 until the final judgment of the Court in the instant case is pronounced and to report thereon within ten days.

9 *Komi Koutche v Republic of Benin*, ACtHPR, Application No. 020/2019, Order of 2 December 2019 (provisional measures) § 11.

10 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

11 *Houngue Eric Noudehouenou v Republic of Benin,* ACtHPR, Application No. 003/2020, Ruling of 5 May 2020 (provisional measures) §§ 4- 5 and corrigendum of 29 July 2020.

iii. Order that, without being subject to criminal prosecution on this count, the Applicant, members of his family and his counsel shall be authorised to record and produce before the Court any form of threat made against them and any form of verbal persecution suffered by them.

20. The Applicant argues in this regard that, criticism of decisions of local courts, both before the local courts and before the Court, for, *inter alia*, human rights violations, is a right enshrined in Articles 7(1) of the Charter, 2(3), 14(1-3) and 19 of the ICCPR, to which the Respondent State is a Party.

21. The Applicant avers that the Respondent State's legislation criminalises the exercise of this right of appeal, notably through Article 410 of the Criminal Code, which provides that "anyone who has publicly by deed, word or writing, sought to discredit a jurisdictional act or decision, in a manner likely to undermine the authority of the judiciary or its independence, is punishable by one (1) to six (6) months' imprisonment or a fine of one hundred thousand (100,000) to one million (1,000,000) CFA francs, or both fine and imprisonment".

22. The Applicant states that because of his applications to the Court, this Article places him and his Counsel at imminent and constant risk of arbitrary and unlawful deprivation of liberty of and conviction.

23. He maintains that this risk is all the more evident since, the Public Prosecutor's office can, at any time, institute proceedings against them on the basis of this Article and that he has been in the bad books of the Respondent State ever since he has been close to the political opposition figure Mr. Sebastien Ajavon, whose tax interests he defends.

24. The Applicant further argues that if he and his Counsel were to be imprisoned, this would cause them irreparable harm since the Respondent State, which is accustomed to the non-enforcement of the numerous decisions rendered against it by the Court, would never release them and they would be unable to properly exercise their rights before this Court.

25. He therefore believes that the conditions of urgency and irreparable harm are present to enable the Court grant his request for provisional measures to stay the application of Article 410 of the Beninese Criminal Code.

26. The Applicant further submits that he, his family and Counsel continue to receive verbal threats, including from officials of the Respondent State, which violate their rights to moral integrity and defence protected, by Articles 5 and 7(1) of the Charter,

respectively and cause them harm.

27. He states that he was, however, unable to provide evidence of these violations before this Court in the context of the Application on the merits, since the threats were verbal and Articles 608 and 609 of the Beninese Criminal Code prohibit and punish the recording of a person without his knowledge or consent.

28. He therefore prays the Court to authorise him to record and produce before it any threats made and any verbal persecution against him, his family, and his Counsel, without running the risk of criminal conviction on this count, in order to prove these violations.

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29. 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 order such provisional measures as it deems appropriate."

30. The Court notes that it decides on a case-by-case basis whether, in the light of the particular circumstances of a case, it should exercise the jurisdiction conferred on it under the above provisions.

31. The Court recalls that urgency, which is consubstantial with extreme seriousness, means that "an irreparable and imminent risk must exist before the Court renders its final decision".[12] The risk involved must be real, which excludes assumed or abstract risk. This constitutes serious risk which calls for its immediate remedy.[13]

32. With respect to irreparable harm, the Court has held that there must be a "reasonable probability of occurrence" having regard to the context and the personal situation of the Applicant.[14]

33. In light of the above provisions, the Court will take into account the applicable law on provisional measures, which are preventive

12 *Sébastien Ajavon v Republic of Benin,* ACtHPR, Application No. 062/2019, Order of 17 April 2020 (provisional measures) § 61.

13 *Ibid*, § 62.

14 *Ibid*, § 63.

in nature and do not prejudge the merits of the Application.

A. On the request to find that remedies of appeal, cassation, unconstitutionality and remedies before the Court are covered by Article 410 of the Criminal Code

34. The Applicant is requesting the Court to find that even though paragraph 3 of Article 410 of the Criminal Code does not mention the remedies of appeal, cassation, and unconstitutionality and remedies before the Court, these remedies are covered by paragraph 1 and 2 of the said article.

35. The Court observes that Article 410[15] paragraph 3 does not expressly mention remedies of appeals, cassation, unconstitutionality and remedies before the Court, and the literal reading of paragraphs 1 and 2 of this article does not lead to the conclusion that the exercise of these remedies is prohibited. Moreover, paragraph 3 of the said Article 410 clearly indicates that: "[t]he preceding provisions may not be applied in any case to purely technical comments in specialised journals, nor to acts, utterances or writings aimed at the revision of a conviction".

36. Consequently, the Court dismisses this request.

B. On the request for suspension of the application of Article 410 of the Criminal Code

37. The Applicant is requesting the Court to suspend the application of Article 410 which he contends that, the Respondent State will implement against him and his Counsel because of the applications he has brought before this Court.

38. The Court notes that the Applicant has not proved the reality or the imminence of the criminal proceedings likely to be instituted against him and his Counsel as a result of filing applications before this Court. The Applicant has also not proved the risk of irreparable harm that he faces.

39. The Court notes that the allegations made by the Applicant are unsubstantiated and therefore dismisses them.

C. On the authorisation to record and produce proof before this Court

40. The Applicant prays this Court to authorise him to record, all

15 See note 6.

persons proffering any verbal threats and verbal persecutions against him, his family, and his Counsel, without their consent and without running the risk of criminal conviction on this count, in order to prove the violations he alleges in this regard in his Application.

41. The Court finds, as the Applicant admits, that Articles 608[16] and 609[17] of the Benin Criminal Code make it an offence to record a person without his or her knowledge and consent, and nothing on the record shows that these provisions violate human rights or are no longer in force.

42. The Court can therefore not authorise the Applicant to breach the internal laws of the Respondent State. Accordingly, the request is dismissed.

43. The Court therefore concludes that it is not necessary to order the provisional measures sought.

44. For the avoidance of doubt, the Court recalls that the present Ruling is provisional in character and in no way prejudges the Court's findings as to its jurisdiction, the admissibility of the application and the merits of the application.

VII. Operative part

45. For these reasons,

The Court

Unanimously,

i. *Dismisses the* request for provisional measures.

16 Article 608: Anyone who wilfully violates the privacy of another person's private life by: - listening to, recording or transmitting or using any of the words spoken without the person's consent shall be liable to imprisonment of six months or five years and a fine of five hundred thousand CFA francs (500,000) or two million CFA francs (2,000,000). Where the acts stated or this article are carried out or take place in the course of a meeting with the knowledge of its participants, their consent shall be presumed.

17 Article 609: The penalties provided for in the preceding article shall be imposed on anyone who knowingly keeps, brings to the attention of the public or a third party, or who uses publicly or not, any record or document obtained by means of the acts provided for in that article.

Noudehouenou v Benin (provisional measures) (2021) 5 AfCLR 139

Application 032/2020, *Houngue Eric Noudehouenou v Republic of Benin*

Order, 29 March 2021. Done in English and French, the French text being authoritative.

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

Alleging that the delivery by a domestic court, of a judgment which threatened his right to property without notice to him, in a case in which he voluntarily intervened was in violation of his rights, the Applicant brought an Application before the Court. The Applicant further filed a request for provisional measures to stay execution of the impugned domestic judgment. The Court dismissed the request for provisional measures on the grounds that the urgency of the request was not established.

Jurisdiction (*prima facie*, 15-16, 20; effect of withdrawal of Declaration 18-19)

Provisional measures (urgency, 33; irreparable and imminent risk, 33; irreparable harm, 34-40)

I. The Parties

1. Mr Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He seeks the stay of execution of the Judgment in a civil suit delivered against him on 5 June 2018, by the Cotonou Court of First Instance (hereinafter referred to as the "Cotonou CFI").

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, deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration"), 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 African Union Commission the instrument of withdrawal of its Declaration. The

Court has held that this withdrawal has no bearing on pending cases or 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 the main Application, the Applicant alleges that on 5 June 2018, following a civil suit in which he had voluntarily intervened, the Cotonou CFI delivered a judgment without his knowledge on 5 June 2018. According to him, this judgment, which was never served on him, deprived him of his right to property.

4. This judgment was delivered between the Houngue Gandji group on the one hand, and Akobande Bernard, Mrs Anne Pogle, née Kouto, and Kouto Gabriel, on the other. The Applicant, the Djavac association and the Hounga group intervened voluntarily as third-parties in these proceedings. The operative part of the judgment, inter alia, reads as follows:

For these reasons,

- Ruling publicly, adversarialy, in a civil matter on land and state property law and in the first instance;
- Validates the framework agreement dated 4 October 2016, the amicable settlement dated 4 April 2016 and the minutes dated 4 May 2017 and makes them enforceable;
- Acknowledges that Houngue Gandji group has withdrawn its action;
- Notes that Mrs Anne Pogle née Kouto and Gabriel Kouto are presumed owners of the plots "S" of Lot No. 3037 of Agla estate, plotted under number 1392 and "R" of Lot No. 3037 of Agla estate, plotted under number 1462 F;
- Notes that the DJA-VAC association represented by Koty Bienvenue acquired landed property of 4ha 62a 58ca from the Houngue Gandji group;
- Confirms the property rights of: Pedro Julie on Plots Numbers 403h and EL 404h at Agla estate;
- Mrs Anne Pogle, née Kouto on Plot "S" of Lot 3037 of Agla estate, under number 1392 F;
- Kouto Gabriel on Plot "R" of lot 3037 of Agla estate under number 1462 F;
- DJA-VAC association on land the size of 4ha 62a 58ca;

1 *Ingabire Victoire Umuhoza v Republic of Rwanda (*jurisdiction*)* (Order of 3 June 2016) 1 AfCLR 540 § 67; ***Houngue Eric Noudehouenou v Republic of Benin*** ACHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020.

- Dismisses the Application by Trinnou D. Valentin, Houenou Eleuthère, Alphonse Adigoun and Houngue Eric and orders them to pay costs;
- Notifies the parties that they have a period of one (01) month to appeal.

5. He submits that he is filing the instant Application for provisional measures for this Court to order all necessary measures, notably, the stay of execution of the said judgment.

III. Alleged violations

6. The Applicant alleges the violation of the following rights:

i. The right to property, protected by Article 14 of the Charter;

ii. The rights to equality before the law and to equal protection of the law, protected by Article 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, protected 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

7. The Applicant filed an Application on 15 October 2020. On 20 October 2020, the Application was served on the Respondent State, which was given a time limit of ninety (90) days to file its response.

8. On 16 December 2020, the Applicant filed the instant Application for provisional measures which was duly served on the Respondent State with a time limit of fifteen (15) days from the date of receipt to file its response**.**

9. As of 14 January 2021, when the time for filing the response to the Application for provisional measures elapsed, the Registry had not received the response of the Respondent State.

V. *Prima facie* jurisdiction

10. The Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter referred to as "the Rules")[2] that in matters of provisional measures, the Court need

2 This Article of the former Rules of 2 June 2020 corresponds to Rule 59 of the new Rules which came into force on 25 September 2020.

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 submits that the Court has jurisdiction insofar as the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration provided for in Article 34 (6) thereof; and insofar as he alleges violations of rights protected by human rights instruments.

12. He adds that although the Respondent State withdrew its Declaration on 25 March 2020, this withdrawal only becomes effective on 26 March 2021.

13. The Respondent State did not respond to this point.

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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. Furthermore, Rule 49(1) of the Rules 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.[3]

16. In the instant case, the rights the Applicant alleges to have been violated are all protected by the Charter and the ICCPR, instruments to which the Respondent State is a Party.

17. The Court further notes that the Respondent State has ratified the Protocol and deposited the Declaration under Article 34(6) of the Protocol.

18. The Court notes, as stated in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration pursuant to Article 34 (6) of the Protocol.

19. The Court also recalls that it has held that the withdrawal of a Declaration has no retroactive effect on pending cases and has

3 *Ghati Mwita v Republic of Tanzania,* ACHPR, Application No. 012//2019, Ruling of 9 April 2020 (provisional measures), § 13.

no bearing on new cases filed before the withdrawal comes into effect,[4] as is the case in the instant case. The Court reiterated its position in its Ruling of 5 May 2020 *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 the said withdrawal has no bearing on its personal jurisdiction in the instant case.

20. The Court finds that it has *prima facie* jurisdiction to hear the instant Application for provisional measures.

VI. Provisional measures sought

21. The Applicant prays the Court to order "the stay of execution of the judgment of the Cotonou CFI" as well as "all other measures to preserve the efficacy of the judgment on the merits. […] so as to avoid irreparable harm which may result from the violation of his basic rights […] in the event of the execution of the said judgment."

22. The Applicant submits that the fact that he brought proceedings before the Court sixteen (16) months after the delivery of the impugned judgment of which he is seeking a stay of execution is due to several factors which, according to him, constitute urgency and irreparable harm.

23. He asserts that he was arbitrarily deprived of the knowledge and enforceability of the judgment of 5 June 2018, pointing out that the Respondent State has not proved that he was informed of the judgment date. According to him, there is urgency since 5 December 2019, the date on which the six (06) month notification period elapsed, as provided for in Article 547 of the Civil Procedure Code (CPC).

24. He further notes that he could not bring the matter before the Court until 7 September 2020, the date on which he was informed by a third party of the existence of the judgment of the Cotonou CFI which, according to him, became enforceable because the time limit for filing an appeal, pursuant to Article 621 of the CPC,

4 *Ingabire Victoire Umuhoza v Republic of Rwanda (*jurisdiction*)* (Order of 3 June 2016) 1 AfCLR 540 § 67.

5 *Houngue Eric Noudehouenou v Republic of Benin,* ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and *Corrigendum* of 29 July 2020.

had elapsed.

25. He notes that "the beneficiaries of the Cotonou CFI judgment never notified him", contrary to the provisions of Articles 570,[6] 57[7] and 70[8] of the Civil Procedure Code. He specifies that "he cannot know their identity since he does not have the means to hire the services of a bailiff".

26. He further submits that the Respondent State's refusal to enforce the decisions handed down by this Court, that is, the Rulings on provisional measures of 6 May[9] and 25 September 2020,[10] and the Judgment of 4 December 2020[11] show that the irreparable nature of the harm is not hypothetical. Similarly, he points out

6 This article provides that: "Unless execution is voluntary, judgments may not be enforced against those against whom they are opposed until eight (08) days after they have been notified".

7 This article states that: "Notification done by a bailiff is valid. Notification may always be made otherwise even if the law provides for it in another form.

8 This article provides that: "The bailiff may not act in cases which personally concern his parents, his spouse and his direct lineal allies, his parents and his collateral allies up to the level of cousin from first cousin inclusively, on pain of the annulment of the act, by implementation of articles 197 and 198 of the present code".

9 The operative part of this Ruling of 6 May 2020 issued in Application 004/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, reads, inter alia, as follows: " i. Orders the Respondent State to stay the 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 is rendered on the merits; 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".

10 The operative part of this Ruling of 25 September 2020 issued in Application 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* reads, inter alia, as follows: " 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".

11 The operative part of this Judgment in Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* reads, with regard to reparations, as follows: "xii. Orders the Respondent State to take all measures to repeal Law 2019-40 of 1 November 2019 revising Law 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws to guarantee that its citizens will participate freely and directly, without any political, administrative or judicial obstacles, before any election, without repetition of the violations found by the Court and under conditions respecting the principle of presumption of innocence; xiii. Orders the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision; xiv Orders the Respondent State to take all measures to repeal Inter-Ministerial Decree No. 023/MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019; xv Orders the Respondent State to take all measures to put an end to all the effects of the constitutional revision and the violations for which it has been found responsible by the Court; [...] xvi. Orders the Respondent State to submit to the Court, within three (3) months from the date of notification of the present judgment, a report on the measures taken to implement paragraphs xii to xv of the [...] operative part".

that in its response of 18 September 2020, filed in another case he brought against the Respondent State, the latter claimed immunity from enforcement.

27. The Applicant further notes that the continued enforcement of the judgment of 5 June 2018 will cause him unquestionable irreparable harm in relation to his rights protected by Articles 1, 2, 5, 7, 14, 17 and 18 of the Charter, Articles 26 and 27 of the Protocol, 1(h) of the Protocol of the Economic Community of West African States on Democracy, Articles 2, 7, 14(1), 18 and 26 of the ICCPR.

28. He points out that Article 34 of the Respondent State's Land Code deprives him of the right to enjoy his right to property even if the Court decides in his favour on the merits, thus nullifying his rights protected by Article 27(1) of the Protocol, Article 2(3) of the ICCPR and Article 7(1) of the Charter.

29. He further explains that in relation to his right to freedom of worship protected by Article 18 of the ICCPR, he will suffer irreparable harm if the Judgment of the Cotonou CFI is enforced; since, based on his religious and personal convictions regarding the spiritual functions and virtues of land, he can only sell his property to persons who share his faith, whereas Articles 528(1) and (5) and 530 of the Property Law of the Respondent State compel him to sell his property to unknown persons.

30. He adds that these same provisions are inconsistent with Article 17(2) of the Charter, which protects his right to freely take part in the cultural life of his community, since his property is ancestral land and for this reason must only be sold among members of the tribe.

31. Finally, the Applicant emphasises that the requested measure is in the interest of the parties and of the work of the judiciary, since continuing the execution of the judgment will cause him irreparable harm in relation to his right to equality of the parties pursuant to Articles 14(1) and 26 of the ICCPR, 3 and 7 of the Charter.

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32. The Court notes that Article 27(2) of the Protocol provides that:

> [i]n 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.

33. The Court recalls that urgency, which is consubstantial with extreme gravity, means an "irreparable and imminent risk that an irreparable harm will be caused before it renders its final judgment".[12] The risk in question must be real, which excludes a purely hypothetical risk and which explains the need to cure it immediately.[13]

34. With respect 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.[14]

35. The Court notes that the two conditions required under the above-mentioned Article, that is, extreme gravity or urgency and irreparable harm are cumulative, to the extent that where one of them is absent, the measure requested cannot be ordered.

36. The Court notes that in the instant case, urgency must result from the imminence of execution of the Cotonou CFI judgment. This imminence can be inferred from its binding nature.

37. The Court notes that the decision of the Cotonou CFI is an adversarial judgment rendered at First Instance[15] which is binding only if its execution is temporary or if it is established that it is not subject to suspensive remedies.[16]

38. In this regard, the Court notes that on the one hand, it is not stated with regard to the judgment of the Cotonou CFI that its execution will be temporary.[17]

39. On the other hand, the only suspensive remedy which, in the instant case, could be lodged is an appeal. The absence of this remedy must, in principle be attested to by a certificate of non-appeal, issued by the Registry of the court before which it should have been filed.[18] In the instant case, the Applicant has not brought any such proof.

40. It follows from the foregoing that the judgment of the Cotonou CFI is not binding, such that the risk of the harm cited occurring is

12 *Sébastien Ajavon v Republic of Benin,* ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (provisional measures), § 61.

13 *Ibid*, § 62.

14 *Ibid*, § 63.

15 See § 4 of this Ruling;

16 Article 571 of CPCCSAC provides: "The enforceability of the judgment is proven by the judgment itself even if it is not subject to suspensive appeal or is provisionally enforced".

17 *Ibid*.

18 Article 572 of CPCCSAC provides: "Any party may have a certificate issued by the registry of the court before which the appeal could be lodged attesting to the absence of opposition, appeal or cassation (...)".

not imminent. This means that the condition of urgency required under Article 27(2) has not been met.

41. Accordingly, without the need to determine the existence of irreparable harm, the Court dismisses the Applicant's request for provisional measures.

42. For the avoidance of doubt, the Court reiterates 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

43. For these reasons

The Court

Unanimously,

i. *Dismisses* the request for provisional measures.

Nondo v Tanzania (joinder of cases) (2021) 5 AfCLR 148

Application 040/2020, *Abdul Omary Nondo v United Republic of Tanzania and;*

Application 043/2020, *Rweyemamu & Another v United Republic of Tanzania*

Order, 30 March 2021. 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

Taking into account the fact that the two separate Applications brought by the three Applicants were against the same Respondent and were similar challenges against the electoral laws of the Respondent State, the Court exercised its discretion and ordered a joinder of the cases.

Procedure (joinder of cases, 4-8)

After deliberation:

1. Considering the Application No. 040/2020 filed on 19 November 2020 by Abdul Omary Nondo (hereinafter referred to as "the First Applicant") against the United Republic of Tanzania (hereinafter referred to as "the Respondent State").

2. Considering also, Application No. 043/2020 filed on 19 November 2020 by Deusdedit Valentine Rweyemamu (hereinafter referred to as the Second Applicant) and Paul Revocatus Kaunda (hereinafter referred to as the Third Applicant) against the Respondent State.

3. Considering further that Rule 62 of the Rules provides that: "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."

4. Observing that it follows from Rule 62 that the Court may exercise its discretionary power to order the joinder of two or more cases where it is in the interest of the proper administration of justice to hear and determine them at the same time.[1] Further observing

1 *Elie Sandwidi v Burkina Faso, Republic of Benin* and *Republic of Côte d'ivoire, Republic of Mali; and Burkinabè Movement for Human and Peoples' Rights v Burkina Faso and three other states* ACtHPR Applications No. 014/2020 and No. 017/2020, Order on Joinder of Cases,15 July 2020 § 5.

that such joinder must be consonant not only with the principle of the sound administration of justice but also with the imperatives of judicial economy.[2]

5. Noting that Applications Nos. 040/2020 and 043/2020 are filed against the same Respondent State.

6. Noting also that both Applications are raising broadly similar challenges against the electoral laws of the Respondent State more especially the consonance between the electoral laws and provisions of the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights and Universal Declaration of Human Rights.

7. Noting further that in both Applications, the Applicants pray that the Respondent State be ordered to amend its constitutional and legal framework.

8. Considering that it follows from the foregoing that the joinder of these two cases is appropriate in fact and in law, pursuant to Rule 62 of the Rules and is consistent with the principles governing the proper administration of justice.

9. Finding, therefore, that it is appropriate to order the joinder of Application No. 040/2020 and Application No. 043/2020 which have been filed against the same Respondent State

I. Operative part

10. For these reasons,

The Court,

Unanimously,

Orders:

i. The joinder of Application No. 040/2020 *Abdul Omary Nondo v United Republic of Tanzania* and Application No. 043/2020 *Deusdedit Valentine Rweyemamu and Paul Recovatus Kaunda v United Republic of Tanzania* and related pleadings.

ii. That henceforth, the joined Applications shall be referred to as "Consolidated Applications No. 040/2020 and 043/2020 – *Abdul Omary Nondo and others v United Republic of Tanzania*".

iii. The consequent upon the joinder, this Order shall be duly notified to the Parties.

2 *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Joinder of Proceedings) 17 April 2013 § 18.

Ajavon v Benin (provisional measures) (2021) 5 AfCLR 150

Application 027/2020, *Sébastein Germain Marie Aïkoue Ajavon v Republic of Benin*

Order, 1 April 2021. 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, a national of the Respondent State, brought an Application contending that criminal proceedings instituted against him in the domestic courts were a violation of his Charter rights. Along with the main Application, and subsequent to the Application, the Applicant filed successive requests for provisional measures which were dismissed by the Court. Applicant then filed this further request for provisional measures to stay execution of a pending judgment of the domestic court. The Court granted the request for provisional measures.

Jurisdiction (*prima facie*, 15, 19; effect of withdrawal of article 34(6) Declaration 18)

Provisional measures (urgency, 28; irreparable and imminent risk, 28; irreparable harm, 29, 33-35; establishment of existence of violation not required, 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 legality of the criminal proceedings brought against him before the Economic Crimes and Terrorism Court (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 a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 22 August 2014. On 8 February 2016, the Respondent State further deposited 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 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 or new cases filed before the withdrawal comes into effect, that is, on 26 March 2021, one year after the deposit of the Declaration.[1]

II. Subject of the Application

3. In the Application on the merits filed on 11 June 2020, the Applicant prays the Court to establish the violation of his fundamental rights by the Respondent State due to its initiating investigation against him for "forgery of a public document, abetment of forgery of a public document and fraud" before the CRIET.

4. The Applicant asserts in the instant request for provisional measures that the Investigative Chamber of CRIET issued Judgment No. 21/CRIET/COM-I/2020 of 29 May 2020 against him which partially dismissed his appeal and referred the case to the Judgments Chamber of the CRIET. This decision was upheld by Judgment No. 003/CRIET/CA/SI of 18 June 2020 of the Appeals Investigation Section of the CRIET. The appeal in cassation that he filed before the Supreme Court was dismissed by a Judgment of 29 January 2021.

5. He submits further that by Judgment No. 41/CRIET/CJ/1S of 1 March 2021, the First Chamber of the CRIET found him guilty of forgery and fraud and sentenced him to twenty (20) years' imprisonment and a fine of Four Hundred Thousand (400,000) CFA francs, the payment of damages of Eighty Billion Nine Hundred and Fifty-Eight Million Two Hundred and Fifty-Four Thousand, Eight Hundred and Sixty-Three (80,958,254,863) CFA francs for the prejudice suffered by the tax authorities and Sixty Billion (60,000,000,000) CFA francs for the other non-tax prejudices and issued an arrest warrant for him.

6. It is in this context that the Applicant requests the stay of execution of the judgments rendered against him by the CRIET on 1 March 2021, pending a decision on the merits of the case by this Court.

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4- 5 and corrigendum of 29 July 2020.

III. Alleged violations

7. In the Application, the Applicant alleges the violation of:

i. The right to a fair trial protected by Articles 7(1), 7(1)(a), 7(1)(c) of the Charter;

ii. The right to property protected by Article 14 of the Charter; and

iii. The right to adequate housing enshrined in Articles 14, 16 and 18 of the Charter.

IV. Summary of the Procedure before the Court

8. On 22 June 2020, the Applicant filed the Application on the merits together with a previous request for provisional measures. They were notified to the Respondent State. On 27 November 2020, the Court issued an order dismissing the request for provisional measures notified to the Parties.

9. On 4 February 2021, the Applicant filed another request for provisional measures which was served on the Respondent State. This request was declared moot, by virtue of the Ruling of 29 March 2021 duly notified to the Parties.

10. On 5 March 2021, the Applicant filed the instant request for provisional measures which was served on the Respondent State on 9 March 2021 for its observations within fifteen (15) days from the date of receipt.

11. The Respondent State has not made any submissions on this request for provisional measures.

V. *Prima facie* jurisdiction

12. The Applicant asserts that based on Article 27(2) of the Protocol and Rule 51 of the Rules[2] of Court, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, that it has *prima facie* jurisdiction.

13. Referring further to Article 3(1) of the Protocol, the Applicant further submits that the Court has jurisdiction insofar as he alleges violations of rights protected by human rights instruments and that the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration under Article 34(6).

2 Rules of the Court of 2 June 2010 corresponding to Rule 59 of the Rules of 25 September 2020.

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14. Article 3(1) of the Protocol provides that "[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

15. Rule 49(1) of the Rules[3] provides that "[t]he Court shall preliminarily ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules". However, with respect to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits of the case, but only that it has *prima facie* jurisdiction.[4]

16. In the instant case, the rights alleged by the Applicant to have been violated are all protected by Articles 7(1), 7(1)(a), 7(1)(c), 14, 16 and 18 of the Charter, an instrument to which the Respondent State is a Party.

17. The Court further notes that the Respondent State has ratified the Protocol. It also deposited the Declaration by virtue of which it accepted the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations pursuant to Articles 34(6) and 5(3) of the Protocol read together.

18. The Court notes, as mentioned in paragraph 2 of this Ruling that on 25 March, 2020, the Respondent State deposited the instrument of withdrawal of its Declaration pursuant to Article 34(6) of the Protocol. The Court has held that this withdrawal has no retroactive effect, no bearing on pending cases and on new cases filed before the withdrawal comes into effect,[5] as in the instant case. The Court reiterates its position in its Order of 5 May 2020 *Houngue Eric v Republic of Benin*[6] that the withdrawal of the Declaration by the Respondent State takes effect on 26 March 2021. Consequently, the said withdrawal in no way affects the

3 Corresponding to Article 39(1) of the Rules of the Court of 2 June 2010.

4 *Komi Koutche v Republic of Benin*, ACtHPR, Application No 020/2019, Order of 2 December 2019 (provisional measures) §11.

5 *Ingabire Victoire Umuhoza v Republic of Rwanda,* (jurisdiction) (3 June 2016) 1 AfCLR 585 § 67.

6 *Houngue Eric Noudéhouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

personal jurisdiction of the Court in the instant case.

19. The Court therefore finds that it has *prima facie* jurisdiction to hear the Application for provisional measures.

VI. Provisional measures requested

20. The Applicant seeks a stay of execution of Judgment No.41/ CRIET/CJ/1S. Cor of 1 March 2021 issued at first instance by the trial chamber of the CRIET pending the examination of the Application on the merits.

21. He submits that until the date of his judgment by the CRIET, neither he nor his advocate were invited by the judicial authorities of the Respondent State to acquaint themselves with the case file in order to better prepare their defence. According to him, this requirement meets the principle of equality of arms between the defendant and the prosecution as recalled by the Principles and Guidelines on the right to a fair trial and legal assistance in Africa adopted in July 2003 by the African Commission on Human and Peoples' Rights.

22. The Applicant further asserts that at the 1 March 2021 hearing, the judge refused to allow his advocate to defend his cause because he had not appeared physically even though a letter informing the judge of this absence had been sent to him. The Advocate was allowed to intervene only on the civil aspect as though the conviction had already been confirmed.

23. He notes that in criminal matters, even when a letter of absence is not adduced, criminal courts are obliged to hear the advocate who appears to defend the accused. He alleges that his right to defence recognised and protected at all stages of the proceedings by Article 14(3) of the ICCPR, Article 7(1)(c) of the Charter and Article 428 of the Beninese Code of Criminal Procedure has not been respected. He therefore considers that the trial was unfair.

24. Moreover, the Applicant adds that the remedies, namely, the appeal and the appeal in cassation, which are open to him, will not be of any effectiveness to him since he will not be able to go to the hearings and his advocate will not be able to defend him for the same reason cited by the first judge. He notes further, that no recourse will be able to suspend the effects of the warrant issued against him.

25. The Applicant points out that, in addition, the Supreme Court will deny him a possible appeal in cassation on the grounds that he did not surrender himself to be imprisoned, as it had already done in a previous case, in compliance with Article 594 of the Code of Criminal Procedure.

26. The Applicant states that he fears being arrested due to a warrant issued against him in an unfair trial and the final seizure of all his assets due to the heavy sentences pronounced against him, more than one hundred and forty billion (140,000,000,000) CFA francs, thereby reducing him to a state of total indigence.

27. He concludes that the requirements of urgency and irreparable harm set out in Article 27(2) of the Protocol and Article 59 of the Rules of Court have been met, so that the Court may order the provisional measures requested.

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28. The Court recalls that urgency, which is consubstantial with extreme gravity, means that an "irreparable and imminent risk will be caused before it renders its final judgment".[7] The risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it in the immediate future.[8]

29. With respect 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.[9]

30. The Court holds that it does not, at this stage, have to establish the existence of the violations alleged by the Applicant, but must determine whether the circumstances of the case require that the provisional measures requested be ordered.[10]

31. The Court notes that in the instant case, the Applicant was sentenced by the Trial Chamber of the CRIET to twenty (20) years imprisonment, accompanied by an arrest warrant.

32. The Court also notes that "the arrest warrant is the order given to the police to search for the accused and to take him to the prison indicated on the warrant where he will be received and detained".[11]

7 *Sébastien Ajavon v Republic of Benin,* ACtHPR, Application No. 062/2019, Order of 17 April 2020 (provisional measures), § 61.

8 *Ibid*, § 62.

9 *Ibid*, note 8, § 63.

10 See in this sense, ICJ, Application of the Convention on the Prevention and Punishment of Genocide (*Gambia v Myanmar*) Order for Provisional Measures, 23 January 2020, § 66.

11 Article 132 in fine of the Code of Criminal Procedure of the Respondent State.

33. The Court emphasises that, being a search and arrest warrant, the arrest warrant places the Applicant at risk, which will result in irreparable harm if it is executed.

34. The Court concludes that the circumstances of the instant case show a situation of urgency requiring the need to stay the execution of the decision appealed, before irreparable harm is caused to the Applicant.

35. With regard to irreparable harm in relation to the civil convictions, the Court notes that the Applicant's movable and immovable property is already in the custody of the Respondent State. The Respondent State has not implemented the measure to lift the seizures on the Applicant's movable and immovable property ordered by the Court.[12]

36. The Court therefore holds that there is a real risk that the Applicant's property will be sold thereby permanently dispossessing him of his assets.

37. Consequently, the Court, orders the stay of execution of Judgment no. 41/CRIET/CJ/1S. Cor of 1 March 2021, issued at first instance of the CRIET's Trial Chamber, in order to prevent irreparable harm to the Applicant, pending consideration of the Application on the merits.

38. For the avoidance of doubt, this ruling is provisional and in no way prejudges the Court's conclusions on its jurisdiction, the admissibility of the Application and the merits of the Application.

VII. Operative part

39. For these reasons,

The Court

Unanimously,

i. *Orders* the stay of execution of Judgment No. 41/CRIET/CJ/1S. Cor of 1 March 2021 issued in first instance by the Trial Chamber of the CRIET, pending examination of the Application on the merits.

ii. *Report* to the Court within thirty (30) days, from the date of notification of this Ruling, on the measures taken to implement the order.

12 *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment of 28 November 2019, § 144.

XYZ v Benin (provisional measures) (2021) 5 AfCLR 157

Application 003/2021, *XYZ v Republic of Benin*

Order, 8 April 2021. Done in English and French, the French text being authoritative.

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

In his main Application before the Court, the Applicant claimed that by its processes leading to the holding of presidential elections, including the retention of certain laws and revision of its Constitution, the Respondent State had violated his rights protected by the Charter and other relevant human rights instrument. Claiming further that the Respondent State had failed to abide by certain earlier judgments of this Court relating to its elections, the Applicant filed this request for provisional measures to suspend the electoral process and to guarantee certain protective measures. The Court dismissed the request for provisional measures on the ground that it cannot order measures based on a vague and imprecise request.

Jurisdiction (*prima facie*, 13, 16; effect of withdrawal of article 34(6) Declaration 15)

Provisional measures (urgency, 23, 31; irreparable and imminent risk, 23; irreparable harm, 24, 30-31; preventive nature, 25; delay by applicant, 26-29; mootness, 35, 37; vague and imprecise request, 30-31)

I. The Parties

1. XYZ (hereinafter referred to as "the Applicant") is a national of Benin. He has requested for anonymity for reasons of personal security. He seeks provisional measures to, among other things, suspend the electoral process for the presidential election.

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. It further deposited, on 8 February 2016, the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration"), whereby it accepted 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,

an instrument of withdrawal of its Declaration. The Court has previously 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 deposit.[1]

II. Subject of the Application

3. On September 18 January 2021, the Applicant filed with Court, an Application dated 16 January 2021, for alleged violation of his rights by the Respondent State through the holding of the presidential election, by the maintaining of Law No. 2019-40 of 7 November 2019, by revising the Constitution (hereinafter referred to as the "Revised Constitution") and all subsequent laws, especially Law No. 2019-43 of 15 November 2019, establishing the Electoral Code (hereinafter referred to as the "Electoral Code") for the presidential election of 11 April 2021.

4. In the instant request for provisional measures filed on 18 January 2021, the Applicant asserts that this Court held in the judgments rendered in Application No. 059/2019 - *XYZ v Republic of Benin*, Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* and Application No.010/2020, *XYZ v Republic of Benin*, that the Constitutional Court, the body in charge of electoral disputes, is not independent and that the Revised Constitution and the Electoral Code must be repealed before any election. He further asserts that in the first of the judgments cited, this Court added that *Conseil d'Orientation et de supervision de la Liste Electorale Permanente informatisée* (Orientation and Supervision Council of the Permanent Computerised Electoral List) (COS-LEPI), the body in charge of updating the electoral list, is not balanced in its membership and is not independent of the executive .

5. He alleges that, the Respondent State in disregard of the above-mentioned judgments, by Decree No. 2020-563 of 25 November 2020 on the modalities for setting the electoral calendar for the presidential election, the first round of which is scheduled for 11 April 2021, started the electoral process on the basis of these laws whose repeal this Court has ordered.

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin* ACtHPR, Request No. 003/2020 Order of 5 May 2020 (provisional measures), §§ 4-5 and Corrigendum of 29 July 2020.

6. The Applicant avers that in these circumstances, there is a need for provisional measures to be ordered.

III. Alleged violations

7. The Applicant alleges the following:

i. Violation of the right to non-discrimination, protected by Article 2 of the Charter;

ii. Violation of the right to equality before the law and the right to equal protection of the law, protected by Article 3 of the Charter;

iii. Violation of the right to dignity, protected by Article 5 of the Charter;

iv. Violation of the right to freedom of expression and opinion, protected by Article 9(2) of the Charter;

v. Violation of the right to freedom of association, protected by Article 10(1) of the Charter;

vi. Violation of the right to participate freely in the government of one's country, protected by Article 13(1) of the Charter;

vii. Violation of the right to work protected by Article 15 of the Charter;

viii. Violation of the right of all peoples to freely determine its political status protected by Article 20(1) of the Charter;

ix. Violation of the right of every peoples to economic, social and cultural development, protected by Article 22(1) of the Charter;

x. Violation of the right of all peoples to peace and security, protected by Article 23(1) of the Charter;

xi. Violation of the obligation to guarantee the independence of the courts under Article 26 of the Charter;

xii. Violation of the obligation to recognize the rights enshrined in the Charter provided for by Article 1 of the Charter;

xiii. Violation of the obligation to create independent and impartial bodies as provided for in Article 17(1) of the African Charter on Elections Democracy and Governance and Article 3 of the ECOWAS Protocol.

IV. Summary of the Procedure before the Court

8. The Application was filed on 18 January 2021, together with a request for provisional measures and a request for anonymity.

9. On 18 February 2021, the Court requested the Applicant to provide additional information or documents regarding his request for anonymity, within three (3) days of the notification. The Applicant replied on 19 February 2021. He was granted anonymity during the 60th Ordinary Session of the Court (1-26 February 2021).

10. On 9 March 2021, the Application on the merits and the request for provisional measures were served on the Respondent State

for its response, within ninety (90) days and fifteen (15) days respectively, from the date of receipt.

11. At the expiration of the time limit, the Respondent State did not file a response to the request for provisional measures.

V. *Prima facie* jurisdiction

12. Article 3(1) of the Protocol provides:

> 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. Under Rule 49(1) of the Rules of Court[2] "The Court shall preliminarily ascertain its jurisdiction...". However, with respect to provisional measures, the Court does not have to ensure that it has jurisdiction on the merits of the case, but only that it has *prima facie* jurisdiction.[3]

14. In the instant case, the Applicant's rights allegedly violated are all protected by the human rights instruments ratified by the Respondent State. The Court further notes that the Respondent State has ratified the Protocol and deposited the Declaration under Article 34(6) of the Protocol.

15. The Court also recalls its decision that the withdrawal of the Declaration deposited under Article 34(6) of the Protocol has no retroactive effect and has no bearing on new cases filed before the effective date of the withdrawal[4] as is the case in the instant case. The Court reiterates its position in its Order of 5 May 2020 *Houngue Eric v Republic of Benin*[5] that the withdrawal of the Respondent State's Declaration shall take effect on 26 March 2021. Consequently, the said withdrawal does not affect the Court's personal jurisdiction in the instant case.

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

2 Rules of Court, 25 September 2020.

3 *Komi Koutche v Republic of Benin*, ACtHPR, Application No. 020/2019, Order of 2 December 2019 (provisional measures) § 11;

4 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67.

5 *Houngue Eric Noudehouenou v Republic of Benin* ACtHPR, Application No. 003/2020 Order of 5 May 2020 (provisional measures), §§ 4-5 and *Corrigendum* of 29 July 2020.

VI. Provisional measures requested

17. The Applicant requests the following provisional measures:

Suspend the current electoral process and take the necessary measures to:

- Guarantee the independence of the Constitutional Court, the body in charge of settling disputes in presidential elections through its consensual reorganisation.
- Guarantee the independence and impartiality of COS-LEPI, which is in charge of updating the electoral list for the presidential election.
- Repeal the inter-ministerial Decree No.023/MJL/DC/SGM/DACPG/SA023SGG19 of 22 July 2019 on the prohibition of the issuance of official documents to persons wanted by the courts in the Republic of Benin.
- Removal of the following eligibility requirements for participation in the 2021 presidential election: sponsorship, vice-presidential position, residence, prohibition of political party alliances.
- Ending the current term of Mr. Patrice Talon on 5 April 2021 at midnight and allowing all opponents cleared by international courts to participate in the presidential election if they so wish.

18. The Applicant submits that this Court ordered the repeal of the law revising the Constitution and the law on the electoral code, in particular, because they exclude a large part of the citizenry from participating in the political life of their country. He cites as an example, the sponsorship system that restricts the right to participate in elections. He argues that sponsorship is at the discretion of the President of the Republic, who is the only one with the authority to choose the candidates who will run in the following presidential election.

19. He further submits that, by its refusal to implement the judgments of this Court, by maintaining the Revised Constitution and a manifestly illegal Electoral Code, the Respondent State is putting the country at risk of destabilisation insofar as human rights violations are continuing and increasing. He asserts that the radicalisation of the political discourse observed in the opposition camp and that of the President of the Republic, bears witness to this.

20. He argues that this situation will have manifestly serious and irreparable consequences not only on his civil and political rights insofar as he will not be able to present his candidacy or vote in the presidential elections, but also on his rights to life, liberty, security and integrity if he has to claim peacefully the execution of

the decisions that the Court has rendered in his favour.

21. The Applicant concludes that there is a real and imminent risk of irreparable harm to him before this Court considers the merits of his Application.

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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. The Court recalls that urgency, which is consubstantial with extreme gravity, means that an "irreparable and imminent risk will be caused before it renders its final judgment".[6] The risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it in the immediate future.[7]

24. With respect 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.[8]

25. In view of the above provisions, the Court will take into account the applicable law on provisional measures, which are preventive in nature and do not prejudge the merits of the Application.

A. Request to suspend the electoral process

26. The Court notes, that while the date for the presidential election was set on 11 April 2021 by Decree No. 2020-563 of 25 November 2020 establishing the modalities for drawing up the electoral calendar, it is on 18 January 2021 that the Applicant filed with this Court his request for provisional measures to suspend the said election.

27. Almost two (2) months elapsed between the date of the decree and the date of the filing of the Application. This period casts doubt on the existence of the urgency claimed by the Applicant.

6 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 062/2019, Order of 17 April 2020 (provisional measures), § 61.

7 *Ibid*, § 62.

8 *Ibid*, § 63.

28. The Court notes that the Applicant has not provided any explanation for his inaction during this lapse of time or claimed the existence of any obstacle to seizing the Court prior. The Applicant's attitude attests to the absence of a real and imminent risk.[9]

29. Accordingly, the Court concludes that there is no urgency.

30. On the other hand, if it turns out that the Applicant's rights were not respected and that the presidential election was inconsistent with the Respondent State's human rights obligations, the Court can always remedy this situation when considering the Application on the merits. Thus, the existence of irreparable harm is not real.

31. The Court concludes that the conditions of urgency and irreparable harm are not met.

32. Consequently, the Court dismisses this request.

B. On the request to guarantee the independence and impartiality of the Constitutional Court and COS-LEPI and the request to abolish the eligibility conditions for candidacy in the presidential election

33. The Court notes that, in the Judgment in Application No. 010/2020, *XYZ v Republic of Benin,*[10] it ordered the Respondent State to take all legislative and regulatory measures to guarantee the independence of the Constitutional Court. In the Judgment in Application No.059/2019, *XYZ v Republic of Benin,*[11] it ordered the Respondent State to take measures to bring the composition of the COS-LEPI in line with the provisions of Article 17(2) of the African Charter on Elections, Democracy and Governance and Article 3 of the ECOWAS Protocol on Democracy, prior to any election.

34. It recalls that in these judgments, it also ordered the Respondent State to repeal Law No. 2019-40 of 7 November 2019 amending Law No. 90-032 of 11 December 1990 on the Constitution of the Republic of Benin and all subsequent laws, including Law No. 2019-43 of 15 November 2019 on the Electoral Code. The Court specifies that these laws spell out, in particular, the eligibility

9 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 032/2020, Ruling (provisional measures) (27 November 2020) § 37.

10 *XYZ v Republic of Benin*, ACtHPR, Application No. 010/2020, Judgment of 27 November 2020 (merits and reparations), § 11§159(xiii).

11 *XYZ v Republic of Benin*, ACtHPR, Application No. 059/2019, Judgment of 27 November 2020 (merits and reparations), §179(xii).

conditions for candidacy in elections.

35. The Court notes that, by its purpose, the measure requested has been settled by decisions already rendered by this Court. The Court therefore holds that the request is moot.

C. On the request to repeal the inter-ministerial order of 22 July 2019

36. The Court notes that in the Judgment rendered in Application No. 003/2020, *Houngue Eric Noudehouenou v Republic of Benin,*[12] it ordered the Respondent State to take all measures to repeal the Inter-ministerial Order No. 023/MJL/DC/SGM/DACPG/SA 023SGGG19 of 22 July 2019.

37. The Court concludes therefore, that the measure requested by the Applicant has already been ordered in the above-mentioned judgment. Consequently, this request is moot.

D. The request to terminate the term of the President of the Republic and the request to order the participation of all opposition candidates in the presidential election

38. The Applicant requests that the Court terminate the current term of the incumbent President of the Republic on 5 April 2021 at midnight, and order that all opposition candidates cleared by international courts to participate in the presidential election.

39. With regard to the termination of the President's mandate, the Court considers that, it is an issue to be determined on the merits, which cannot be considered in this request for provisional measures.

40. With regard to the participation of the opposition candidates, the Court notes that the Applicant did not provide any details on the identity of the said opposition candidates or evidence of their alleged clearance by international courts.

41. The Court notes that it cannot order a measure based on a vague and imprecise request.

42. The Court therefore dismisses the request.

43. For the avoidance of doubt, this Ruling is provisional in nature and is without prejudice to any decision the Court may make on its jurisdiction, the admissibility of the Application and the merits.

12 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No 003/2020 Judgment of 4 December 2020 (merits and reparations) § 123(xiv).

VII. Operative part

44. For these reasons,
The Court
Unanimously,
i. *Dismisses* the request for provisional measures.

Mwita v Tanzania (order) (2021) 5 AfCLR 166

Application 012/2019, *Ghati Mwita v United Republic of Tanzania*

Order (filing out of time), 9 April 2021. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced to death for murder by courts of the Respondent State. In an Application before the Court, she claimed that the entire process leading to her conviction and sentence were in violation of her human rights. The Respondent State, which had not responded to the processes served on it by the Court, brought this Application for extension of time to file its Response. The Court granted the request for extention of time.

Procedure (extension of time, 16; discretion to grant extension of time, 17)

I. The Parties

1. Ghati Mwita (hereinafter referred to as "the Applicant") is a Tanzanian national. At the time of filing her Application, she was incarcerated at Butimba Central Prison, Mwanza, having been convicted of murder and sentenced to death.

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 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 held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its

deposit.[1]

II. Subject of the request

3. By her amended Application, the Applicant alleges that the Respondent State has violated her right to a fair trial contrary to Article 7 of the Charter, her right to life contrary to Article 4 of the Charter and her right to dignity contrary to Article 5 of the Charter. All these violations, the Applicant avers, were occasioned during her arrest, detention, trial, conviction and subsequent imprisonment.

4. The Respondent State has requested, pursuant to Rule 45(2) of the Rules, for an extension of time to file its Response and submissions on reparations.

III. Summary of the procedure before the Court

5. The Application was filed on 24 April 2019.

6. On 10 May 2019, the Registry wrote the Applicant requesting her to provide further information and documentation in relation to her claims.

7. On 6 August 2019, the Applicant filed her submissions on reparations together with copies of the judgments from the domestic courts during her trial for murder.

8. On 16 September 2019, the Court, *suo motu*, granted the Applicant free legal assistance.

9. On 29 October 2019, the Applicant, through her Court appointed counsel, filed a request for provisional measures which was served on the Respondent State on 11 November 2019. The Respondent State was requested to file its Response within fifteen (15) days of receipt but filed none.

10. On 9 April 2020, the Court issued an order for provisional measures staying the execution of the death penalty imposed on the Applicant until the determination of the Application on the merits.

11. On 26 November 2020, the Respondent State filed a request for extension of time to file its Response and submissions on reparations. This was served on the Applicant on 7 January 2021

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), § 38.

for observations, if any, to be made within fifteen (15) days.

12. On 25 January 2021, the Applicant's counsel filed an objection to the request by the Respondent State for extension of time.

IV. On the request to file out of time

13. The Respondent State avers that its "request for further extension of time to submit its Replies to Applications and Reparations that are pending before [the] Court"… is justified on the basis that its delay was because "various information were being sought from various Government stakeholders on the matters, especially in light of the fact that most of the applications need consultations and deliberations with different Governmental agencies."

14. The Applicant objected to the granting of any extension of time. According to the Applicant, she has already suffered undue delay between her arrest and trial and also her trial before the domestic courts was unreasonably long. The Applicant stated that any further extension of time would violate Articles 1, 4, 5 and 7 of the Charter since the Respondent has already had ample time to "consider and prepare a response."

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15. The Court notes that Rule 45(2) of the Rules provides that "Where a party seeks to file out of time, the request shall be made within a reasonable time giving reasons for the failure to comply with the time limit." In Rule 45(3) of the Rules it is further provided that "the decision to extend time is at the discretion of the Court."

16. The Court recognises that it is accepted practice in international tribunals, for reasons given, to extend the time for filing documents.[2] In the present case, having regard to the Parties' respective positions, as reflected in their submissions, the Court finds that it is appropriate, in the interests of justice, to grant the Respondent State leave to file its Response and submissions on

2 *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* Order of 15 August 2019, I.C.J. Reports 2019, p. 552 and *Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize)*, Order of 22 April 2020, I.C.J. Reports 2020, p. 72.

reparations out of time.

17. The Court recalls that Rule 45(3) of the Rules vests it with discretion in determining any extension of time to be afforded to a Party. In the present Application, the court, in the exercise of its discretion grants the Respondent State an extension of forty-five (45) days within which it must file its List of Representatives and a Response to the Application which addresses both merits and reparations.

18. Specifically, the Court draws the Respondent State's attention to the provisions of Rule 63 of the Rules which vests it with power to render judgments in default in the event a party fails to appear before it or fails to defend its case within the period prescribed by the Court.

V. Operative part

19. For these reasons:

The Court

Unanimously,

i. *Grants* the request by the Respondent State for leave to file relevant pleadings and submissions out of time.

ii. *Orders* the Respondent State to file its List of Representatives and its Response to the Application, covering both merits and reparations, within forty-five (45) days of notification of this Order.

Hamad & Ors v Tanzania (order) (2021) 5 AfCLR 170

Application 046/2020, *Seif Sharif Hamad and 6 Others v United Republic of Tanzania*

Order (striking out the name of the first applicant and change of title of the Application), 4 May 2021. 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 who are all nationals of the Respondent State, brought an Application before the Court alleging that the Respondent State, acting by some of its agencies had violated their human rights during the national elections. The Applicants brought this Application to strike out the name of the first Applicant who had died during the pendency of the Application. The Court granted the request to strike out the name of the first Applicant and change the title of the Application.

Procedure (inherent power of court to adopt procedures, 11; striking out of name, 13; change of title of Application, 14)

I. The Parties

1. Mr. Seif Sharif Hamad (First Applicant), was a Presidential candidate in Zanzibar for the Alliance for Change and Transparency Wazalendo party (ACT Wazalendo party) during the 2020 general elections. Mr. Ado Shaibu (Second Applicant) is the Secretary General of the ACT Wazalendo party. Mr. Ezekiah Dibogo Wenje (Third Applicant) was a contestant for a Parliamentary seat of Rorya Constituency, Tanzania. Mr. Omar Mussa Makame (Fourth Applicant) was a contestant for the House of Representative in *Kwahani* Constituency, Tanzania. Ms. Dorah Seronga Wangwe (Fifth Applicant) and Mr. Enock Weges Suguta (Sixth Applicant) are registered voters in Tanzania Mainland while Mr. Kassim Ali Haji (Seventh Applicant) is a registered voter in Zanzibar. All the Applicants are nationals of the United Republic of Tanzania.

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 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 held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that on 21 July 2020, the National Elections Commission (NEC) and the Zanzibar Electoral Commission (ZEC), which organise and supervise the conduct of elections in Tanzania mainland and Zanzibar, respectively announced that local, parliamentary and presidential elections would be held on 28 October 2020.

4. The Applicants allege that preceding, during and immediately after the elections, the Respondent State through its agents namely NEC, ZEC, the Tanzania Police Force, Tanzania Intelligence and Security Service, Tanzania Peoples Defence Force, Tanzania Broadcasting Corporation, Ministry of Information, Culture, Arts and Sports, Ministry for Regional Administration and Local Government, and Special Forces engaged in multiple acts that violated the rights of the Applicants to participate in the elections as citizens of the Respondent.

5. The Applicants thus submit, that the Respondent State by its actions violated Articles 2(1)(a) and (b), and 9(1)(a) and (b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as "Maputo Protocol"). They also allege that, by ousting the jurisdiction of courts the Respondent State violated Articles 1, 2, 3, 7(1) and 13 of the Charter; Articles 2(3)(a)-(c), 3, 25(a)-(c) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR").

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), § 38.

B. Alleged violations

6. The Applicants allege:

i. Violation of Articles 1, 2, 3(1) and (2), 13(1) and (2) of the Charter;

ii. Violation of Articles 2(1)(a), (b) and 9(1)(a) and (b) of the Maputo Protocol; and

iii. Violation of Articles 2(3)(a) and (c), 3 and 25 (a) – (c) of the ICCPR.

III. Summary of the Procedure before the Court

7. The Application was filed on 20 November 2020 and served on the Respondent State on 3 December 2020.

8. The First Applicant died on 17 February 2021. On 24 March 2021, the Court requested the Applicants to indicate how they wanted to proceed with the Application, following the First Applicant's death.

9. On 1 April 2021, the other Applicants informed the Court that following the First Applicant's death, his name should be struck off the Application.

10. On the request to strike out the name of the first Applicant.

11. The Applicants submit that the First Applicant's name should be struck off the Application.

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12. The Court notes that Rule 90 of the Rules, provides: "[n]othing in these Rules shall limit or otherwise affect the inherent power of the Court to adopt such procedure or decisions as may be necessary to meet the ends of justice."

13. The issue at hand is whether the Court can strike out an Applicant from an Application filed by several Applicants.

14. Since the Second to Seventh Applicants have requested that the First Applicant's name be struck out from the Application following his death, it is in the interest of justice to order the striking out.

15. The Court notes that striking out the First Applicant's name necessitates a change of the title of the Application and that this will not adversely affect either the procedural or substantive rights

of the Respondent State.[2]

16. Consequently, the Court deems it necessary and for the proper administration of justice to strike out the name of the First Applicant, Seif Sharif Hamad and consequently change the title of the Application from "*Seif Sharif Hamad and 6 others v United Republic of Tanzania*" to "*Ado Shaibu and 5 others v United Republic of Tanzania*".

IV. Operative part

17. For these reasons:

The Court

Unanimously,

i. *Takes* due note of the fact that Seif Sharif Hamad who is deceased can no longer be party to this Application;

ii. *Concludes* that consideration of Application No. 046/2020, by the Court will not be affected by the striking out of the name of Seif Sharif Hamad from the list of Applicants;

iii. *Directs* that the title of the Application, that is "*Seif Sharif Hamad and 6 others v United Republic of Tanzania*" be replaced by "*Ado Shaibu and 5 others v United Republic of Tanzania*".

2 *Karata Ernest and others v Tanzania* (procedure) (27 September 2013) 1 AfCLR 356 § 8.

Kaunda & Ors v Malawi (provisional measures) (2021) 5 AfCLR 174

Application 013/2021, *Symon Vuwa Kaunda and 5 Others v Republic of Malawi*

Ruling, 11 June 2021. Done in English and French, the English text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, BENSAOULA, ANUKAM, NTSEBEZA, and SACKO

Recused under Article 22: CHIZUMILA

The Applicants, who are all nationals of the Respondent State, brought an Application against the State alleging that the nullification by the domestic court, of the 1st Applicant's election to parliament was a violation of their human rights. In this request for provisional measures, the Applicants asked the Court to make an order directing the Respondent State not to conduct by-elections until the main Application was finally determined. The Court dismissed the request for provisional measures on the grounds that the Application did not reveal a situation of potential irreparable harm to the Applicants.

Jurisdiction (*prima facie*, 11-15)

Provisional measures (discretion of court, 20; urgency, 21-22; irreparable harm, 23-28)

I. The Parties

1. Symon Vuwa Kaunda, Getrude Mnyenyembe, Daniel Tula Phiri, Mpata Shadreck Tayani, Nkhasi Esaau Msinawana, and Kayafa Phiri (hereinafter referred to as "the Applicants"), are Malawian nationals who allege that their rights have been violated. The Applicants aver that these violations ensued from the decision of the Supreme Court of Appeal of the Republic of Malawi to order the nullification of the election of Mr Symon Vuwa Kaunda (hereinafter referred to as "the First Applicant") as a Member of the National Assembly and the holding of a fresh election.

2. The Application is filed against the Republic of Malawi (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 23 February 1990 and to the Protocol on 9 October 2008. Furthermore, on 9 October 2008, 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 having observer status with the

African Commission on Human and Peoples' Rights.

II. Subject of the Application

3. It emerges from the main Application dated 5 May 2021 that, following the election held on 21 May 2019, the Malawi Electoral Commission declared the First Applicant, Mr Symon Vuwa Kaunda, elected as a Member of the National Assembly of the Respondent State for the Nkhatabay Central Constituency. Pursuant to a petition filed by Mr Ralph Joseph Mbone who contested in the same Constituency, the High Court of Malawi, on 16 September 2019, dismissed the petition on the ground that there was insufficient evidence to overturn the First Applicant's election. However, Mr Mbone appealed the High Court's decision before the Supreme Court of Appeal, which, on 21 April 2021, set aside the lower court's judgment and ordered the nullification of the First Applicant's election as well as a fresh election.

4. In the present request, the Applicants are seeking an order for provisional measures directing the Respondent State to not conduct the by-election until the main Application is finally determined.

III. Alleged violations

5. In the main Application, the Applicants allege that the Respondent State violated their rights as follows:

i. The right to equal protection before the law guaranteed under Article 3(2) of the Charter;

ii. The right to be heard protected under Article 7(1) of the Charter; and

iii. The right to participate freely in government guaranteed under Article 13(1) of the Charter.

IV. Summary of the Procedure before the Court

6. The Registry received the main Application on 5 May 2021 including the request for provisional measures. On 13 May 2021, the Application was served on the Respondent State, which was granted ten (10) days to file its observations on the request for provisional measures. Upon request, the Respondent State was granted an additional time of ten (10) days effective 27 May 2021.

7. On 5 June 2021, the Registry received the Respondent State's response to the request for provisional measures, which was

transmitted to the Applicants on 6 June 2021 for information.

V. *Prima facie* jurisdiction

8. The Respondent State submits that the Court lacks jurisdiction to order provisional measures as requested by the Applicants given that this Court does not have the power to nullify the decision of the Malawi Supreme Court of Appeal.

9. The Applicant did not make any observation on the jurisdiction of the Court.

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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 49(1) of the Rules[1] provides that "the Court shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules." However, in ordering provisional measures, the Court need not ascertain that it has jurisdiction on the merits of the case, but it simply needs to satisfy itself that it has *prima facie* jurisdiction.[2]

12. Regarding the Respondent State's objection on jurisdiction, this Court observes that its jurisdiction in relation to the decision of the Malawi Supreme Court of Appeal is an issue for full determination on jurisdiction while considering the merits of this matter. This objection is therefore dismissed for purposes of examining the present request for provisional measures.

13. The Court notes that, in the instant matter, the Applicant alleges violation of rights that are protected under Articles 3(2), 7(1) and 13 of the Charter, an instrument to which the Respondent State

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

2 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; *Charles Kajoloweka v Republic of Malawi*, ACtHPR, Application No. 055/2019, Order of 27 March 2020 (provisional measures), § 10.

is a party.

14. The Court further notes that the Respondent State is a party to the Protocol. It has also made the Declaration by which it accepts the Court's jurisdiction to receive applications from individuals and Non-Governmental Organisations having observer status with the African Commission on Human and Peoples' Rights in accordance with Articles 34(6) and 5(3) of the Protocol read jointly.

15. In light of the foregoing, the Court holds that it has *prima facie* jurisdiction to hear this Application.

VI. Provisional measures requested

16. The Applicants request the Court to order that the Respondent State and its organs should refrain from taking any measures to implement the decision of the Malawi Supreme Court of Appeal including to conduct the by-election at the Nkhatabay Central Constituency until the matter is finally determined. The Applicants submit that, pursuant to Article 63(2)(b) of the Constitution of the Respondent State, where the seat of a Member of the National Assembly falls vacant, a by-election shall be held within sixty (60) days, which in the present case will be no later 21 June 2021.

17. The Applicants aver that should a by-election be held before the determination of the main Application in the present matter, the First Applicant, that is Mr Symon Vuwa Kaunda, would be severely prejudiced and would suffer irreparable damage as he would have incurred financial costs in contesting the by-election. The Applicants further allege that the holding of the by-election and the uncertainty of its outcome may subject Mr Kaunda to unquantifiable reputational damage, which is his main asset as a politician and there is no appropriate or adequate remedy to redress the loss should it occur. The Applicants also submit that they expended time and continue to incur unforeseen legal and other costs in the processing of this Application.

18. The Respondent State avers that the First Applicant does not provide reasons to justify gravity and urgency in support of the present request for provisional measures. Regarding the alleged harm of financial loss, the Respondent State submits that the First Applicant does not seek the nullification of the decision of the Supreme Court of Appeal and that a stay of the said decision will only delay an inevitable election process. In respect of the First Applicant's contention that he would suffer reputational damage, the Respondent State avers that the fresh election is a lawful process to which the First Applicant is well accustomed and that uncertainty of the outcome only lasts for the period within which

the ballots are being counted. The Respondent State thus prays this Court to dismiss the request for provisional measures and condemn the Applicants to costs.

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19. The Court recalls that

> [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.[3]

20. It follows from the foregoing that the Court has discretion to decide in each case whether, in the light of the particular circumstances, it should make use of the power vested in it by the aforementioned provisions.

21. In the present case, the Applicants challenge the decision by which the Respondent State's Supreme Court of Appeal nullified the election of the First Applicant, Mr Kaunda, as a Member of the National Assembly and ordered that a by-election be held for his constituency. The Court recalls that, in examining whether a request for provisional measures should be granted, it is required to establish urgency and irreparable harm. The Court further recalls that the Applicants bear the onus of proving that their request meets the requirements of both urgency and risk of irreparable harm.[4]

22. Regarding urgency in the present matter, the Court notes that the harm that the Applicants seek to prevent in this case is contingent on the holding of the by-election, which is to be conducted on 21 June 2021. The Court observes that the main Application, including the request for provisional measures, was filed on 5 May 2021, which is one (1) month and sixteen (16) days to the occurrence of the aforementioned election. In light of the imminent

3 Rule 59(1) of the Rules of Court, 2020. Emphasis of the Court.

4 *Legal and Human Rights Centre and Tanganyika Law Society v United Republic of Tanzania*, ACtHPR, Application No. 036/2020, Ruling of 30 October 2020 (provisional measures), §§ 27-28.

nature of the election, the Court finds that urgency is established.

23. With respect to irreparable harm, the Court recalls that it is established in instances where the impugned acts are capable of seriously compromising the rights whose violation is alleged in a way that prejudice would be caused prior to the Court making a determination on the merits of the matter.[5]

24. In the present case, the Applicants aver that the holding of the election would cause irreparable harm to the First Applicant, Mr Kaunda, namely in respect of i) the financial cost of contesting the election; ii) reputational damage due to the uncertainty of the outcome; and, to all the Applicants, iii) time and costs in legal proceedings related to this Application.

25. Regarding the financial cost of contesting the election, the Court notes that the Applicants do not specify the loss that is foreseen neither do they supply evidence in support of such loss. Having said that, the Court observes that, as a general practice, when vying for any public elective position a candidate incurs the costs of his campaign and other related costs. Ultimately, the Court observes that any costs that the First Applicant might incur due to the fresh election do not represent harm that would compromise the rights involved in an irreparable manner should this Court find in his favour with respect to the merits of the matter. The Court therefore finds that this averment does not stand the test of irreparable prejudice.

26. With respect to "unquantifiable reputational damage" due to the uncertainty of the election's result, the Court observes that uncertainty is inherent in any election. Furthermore, the decision of the Supreme Court of Appeal does not prevent the First Applicant, Mr Kaunda, from contesting. The Court consequently finds that the risk of reputational damage due to uncertainty is not established.

27. The Court finally examines the Applicants' claim that the time and costs incurred in legal proceedings related to this Application constitute irreparable harm that warrant an order that the election be stayed. On this point, the Court notes that the present matter is only at the stage of the filing of the Application. The Court also observes that, as much as the Applicants might have incurred the costs of availing themselves the services of counsel both in Malawi and Tanzania as it emerges from the file, such costs and

5 *Harouna Dicko and Others v Burkina Faso*, ACtHPR, Application No. 037/2020, Ruling of 20 November 2020 (provisional measures), § 29; *Guillaume Kigbafori Soro and Others v Côte d'Ivoire*, ACtHPR, Application No. 012/2020, Ruling of 15 September 2020 (provisional measures), § 29.

the time involved are inherent in legal processes. Furthermore, the determination of these alleged costs is an issue that falls under the merits of the matter. As such, the Court finds that the time and costs related to this Application do not fulfil the requirement of irreparable harm.

28. In light of the above, the Court finds that, while they indisputably bear urgency, the circumstances in the present Application do not reveal a situation of potential irreparable harm to the Applicants that warrants the adoption of provisional measures.[6]

29. Consequently, the Court declines 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 conduct of the by-election ordered by the Supreme Court of Appeal for the Nkhatabay Central Constituency pending the determination of the Application on the merits.

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

VII. Operative part

31. For these reasons,

The Court,

Unanimously:

i. *Dismisses* the Applicants' request for provisional measures

6 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application No. 012/2019, Judgment of 9 April 2020, § 21; *Tembo Hussein v United Republic of Tanzania*, ACtHPR, Application No. 001/2018, Judgment of 11 February 2019, § 21.

Adelakoun & Ors v Benin (provisional measures) (2021) 5 AfCLR 181

Application 009/2021, *Landry Angelo Adelakoun and Others v Republic of Benin*

Ruling, 25 June 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, and SACKO

The Applicants brought this Application alleging that their human rights were violated by a decision of the Constitutional Court of the Respondent State which nullified the jurisdiction of the ECOWAS Court over the Respondent State. In this request for provisional measures, the Applicants asked the Court to make an order suspending the effects of the impugned decision of the Constitutional Court of the Respondent State. The Court dismissed the request for provisional measures on the grounds that the Applicants had not demonstrated any evidence of urgency or extreme gravity or irreparable harm.

Jurisdiction (*prima facie*, 14,19; effect of withdrawal of article 34(6) declaration, 18)

Provisional measures (urgency, 24, 26-27; irreparable harm, 25)

Separate opinion: BENSAOULA

Provisional measures (presumption of necessity, 11)

I. The Parties

1. Landry Angelo Adelakoun, Romaric Jesukpego Zinsou and Fifamin Miguèle Houeto (hereinafter referred to as "the Applicants") are nationals of Benin. They allege the violation of the right of access to community justice and of the principle of non-regression, as a result of Decision No. 20-434 of 30 April 2020 rendered by the Constitutional Court of Benin (hereinafter, referred to as "Decision No. 20-343 of 30 April 2020").

2. The Application is filed against the Republic of Benin (hereinafter referred to as "the Respondent State"), which became a party, on 21 October 1986, to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and on 22 August 2014 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"). The Respondent State further made, on 8 February 2016, the Declaration provided for in Article 34(6) of the Protocol

(hereinafter referred to as "the Declaration") by virtue of which it accepts 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. On 25 March 2020, the Respondent State deposited with the African Union Commission the instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no effect on pending cases and also on new cases filed before the entry into force of the withdrawal, on 26 March 2021, that is one year after its deposit.[1]

II. Subject of the Application

3. In the main Application, the Applicants submit that on 30 April 2020, the Constitutional Court of Benin issued decision DCC 20-434, by which it declared Additional Protocol A/SP.1 /01/05 revising the preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P1/7/91 on the ECOWAS Court of Justice (hereinafter referred to as "the 2005 Protocol on the ECOWAS Court of Justice") null and void, with retroactive effect. The same effect was extended to all decisions rendered by the ECOWAS Court of Justice pursuant to the implementation of the Protocol.

4. They contend that in support of its decision, the Constitutional Court found that the procedure for ratification of the 2005 Protocol on the ECOWAS Court of Justice was flawed under Article 145 of the Constitution of the Respondent State.

5. According to the Applicants, this decision is contrary not only to Article 11 of the 2005 Protocol on the ECOWAS Court of Justice,[2] by virtue of which the ECOWAS Member States accepted its provisional entry into force, but also to Article 46 (1) of the Vienna

1 *Ingabire Victoire Umuhoza v Republic of Rwanda*, Judgment (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Ruling (provisional measures) (5 May 2020) §§ 4-5 and Corrigendum of 29 July 2020.

2 This articles provides: "The supplementary Protocol shall enter into force provisionally upon signature by the Heads of State and Government. Accordingly, signatory Member States and ECOWAS hereby undertake to start implement all provisions of this Supplementary Protocol".

Convention on the Law of Treaties.[3]

6. As provisional measures, the Applicants request the suspension of the effects of Decision DCC 20-434 of 30 April 2020.

III. Alleged violations

7. The Applicants allege a violation of:

i. The right of access to justice, guaranteed by Article 7 of the Charter;

ii. The principle of non-regression, enshrined in Article 5 common to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ICESCR") and the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR");

IV. Summary of the Procedure before the Court

8. The main Application filed together with a Request for provisional measures was received at the Registry on 11 March 2021.

9. On 16 March 2021, the Registry acknowledged receipt and requested the Applicants to provide information regarding their address and the relief sought.

10. On 2 April 2021, the Applicants responded to the above request.

11. On 9 May 2021, the main Application, together with the request for provisional measures, as well as the additional information on the Applicants' address and their request for reparations, were transmitted to the Respondent State, with deadlines of fifteen (15) days and ninety (90) days being set, respectively, for its response to the request for provisional measures and the main Application.

12. The Respondent State did not file any response to the request for provisional measures until the expiration of the time limit given to it.

V. *Prima facie* jurisdiction

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.

3 This article provides: "The fact that the consent of a State to be bound by a treaty has been expressed in violation of a provision of its internal law concerning competence to conclude treaties may not be invoked by that State as vitiating its consent, unless the violation was manifest and concerned a rule of its internal law of fundamental importance.

14. Furthermore, under Rule 49(1) of the Rules, "the Court shall conduct a preliminary examination of its jurisdiction...". However, in the case of interim measures, the Court need not satisfy itself that it has jurisdiction on the merits, but merely that it has *prima facie* jurisdiction.[4]

15. In this case, the Applicants allege a violation of Article 7 of the Charter and Article 5 of the ICESCR and the ICCPR, which the Court may interpret or apply under Article 3 of the Protocol.[5]

16. The Court notes that the Respondent State has ratified the Charter, the ICESCR and the ICCPR.[6] It has also made the Declaration under Article 34(6) of the Protocol.

17. The Court observes, as mentioned in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

18. The Court recalls that it has held that the withdrawal of the Declaration had no retroactive effect on pending cases, nor did it have any effect on cases instituted prior to the withdrawal taking effect,[7] as is the case in the present application. The Court reiterated its position in its Ruling of 5 May 2020 in *Houngue Eric Noudehouenou v Republic of Benin*[8] where it held that the withdrawal of the Respondent State's Declaration would take effect on 26 March 2021. Consequently, the said withdrawal has no bearing on the personal jurisdiction of the Court in this Application.

19. The Court concludes, therefore, that it has *prima facie* jurisdiction to entertain the request for provisional measures.

VI. Provisional measures requested

20. The Applicants request that the Court order the suspension of the Decision DCC 20-434 of 30 April 2020, such suspension to

4 *Ghati Mwita v United Republic of Tanzania*, ACtHPR, Application No. 012/2019, Ruling of 9 April 2020 (provisional measures) § 13.

5 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin,* ACtHPR, Application No. 065/2019, Judgment (merits and reparations) of 29 March 2021 § 28.

6 The Respondent State became a party to the ICESCR and the ICCPR on March 12, 1992.

7 *Ingabire Victoire Umuhoza v Republic of Rwanda,* ACtHPR, Judgment (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67.

8 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Ruling (provisional measures) of 5 May 2020 § 4-5 and Corrigendum of 29 July 2020.

allow the Respondent State's citizens to continue to benefit from access to ECOWAS Court of Justice.

21. According to them, the Respondent State's citizens will thus be able to continue to sue it before the ECOWAS Court of Justice, since with the effectiveness of the withdrawal of the Declaration, their access to supranational courts will be almost impossible.

22. The Respondent State did not file any Response to the Applicants' averments.

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23. The Court notes that under Article 27(2) of the Protocol: "In cases of extreme gravity and urgency, and where necessary to avoid irreparable harm to persons, the Court shall order such provisional measures as it deems necessary".

24. The Court recalls 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".[9] The risk in question must be real, which excludes the purely hypothetical risk and explains the need to remedy it immediately.[10]

25. With regard to irreparable harm, the Court considers that there must be a "reasonable likelihood of its occurrence" in view of the context and the personal situation of the Applicant".[11]

26. The Court underscores that it is up to the Applicants seeking provisional measures to prove urgency or extreme gravity and irreparable harm.

27. The Court notes that in the present case, in support of their request for provisional measures, the Applicants have not presented any argument or produced any evidence of urgency or extreme gravity and of irreparable harm. In fact, they have merely made the said request without demonstrating the existence of the conditions required by Article 27(2) of the Protocol. In the circumstances, the Court considers that the Applicants have failed to prove their case

9 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 062/2019, Ruling (provisional measures) of 17 April 2020 § 61.

10 *Ibid* § 62.

11 *Ibid* § 63.

and their request cannot be granted.[12]

28. Accordingly, the Court dismisses the request for provisional measures.

29. For the avoidance of doubt, the Court recalls that this Ruling is provisional in nature and in no way prejudges the Court's decision on its jurisdiction, admissibility and the merits of the case.

VII. Operative part

30. For these reasons

The Court

Unanimously

i. *Dismisses* the request for provisional measures.

Separate Opinion: BENSAOULA

[1] I disagree with the conclusions reached by the Court in its Order and the grounds thereof. I would therefore like to make a brief observation of a general nature and express some more detailed views on the question of the Court's prerogatives in matters of provisional measures

[2] In the request for provisional measures attached to the Application on the merits, the Applicants prayed the Court to suspend the enforcement of Decision dcc 20/43 of 30/04/2020 issued by the Constitutional Court.

[3] The decision would violate the right of access to community justice and the principle of non-regression, because the Constitutional Court of the Respondent State declared null and void all the decisions rendered by the Economic Community of West African States Court of Justice and non-binding to the Respondent State, the Additional Protocol A/P1/7/91 relating to the ECOWAS Court of Justice

[4] These facts would constitute a violation of the right of access to justice protected by Article 7 of the Charter and the principle of non-regression enshrined in Article 5 common to the International Covenant on Economic, Social and Cultural Rights and the

12 *Romaric Jesukpego Zinsou and Others v Republic of Benin*, ACtHPR, Application No. 008/2021 Ruling (provisional measures) of 10 April 2021 § 21.

International Covenant on Civil and Political Rights.

[5] Article 27/2 of the Protocol clearly states that provisional measures are ordered in cases of

- extreme gravity and
- If it is necessary to avoid irreparable harm
- The measures ordered must be deemed appropriate by the Court

[6] The Court, relying on its jurisprudence on the subject, defines urgency consubstantial with extreme gravity as "irreparable and imminent risk of irreparable harm being caused before the Court renders its final decision".

There is a requirement that the risk involved must be real and require immediate remedy (para 24)

[7] In paragraph 26, the Court notes that it is up to the Applicants to provide evidence of urgency or extreme gravity as well as irreparable harm.

[8] Finally, the Court emphasises that the Applicants have not provided any evidence of all these elements. Accordingly, it dismisses the request.

[9] It is my observation that the Court often dismisses provisional measures on the ground that applicants have not provided evidence that the conditions required for ordering such measures exist.

[10] It is clear that, following the example of American and European jurisdictions, the facts that would require ordering provisional measures should be related to fundamental rights, essentially the right to life and the right to personal integrity (physical, psychic and moral), in the sense that they seek to avoid irreparable harm to the human person as a subject of the International Law of Human Rights, since it is essentially a right that protects the human being.

[11] I think that the Court, instead of basing its orders on the "lack of evidence", could often, and for some of the emergency measures requested, apply the presumption that the protective measures requested are necessary and that a substantial and reasonable proof of the existence of the facts is not required, because the very purpose of requests for measures is of an urgent nature with a risk of real harm.

[12] This is all the more so as there does not seem to me, from a legal and epistemological point of view, to be any obstacle to extending urgent measures to other human rights, as these are all inseparable and indivisible.

[13] Internationally, provisional protection can, at best, only prevent an aggravation of human rights violations already committed by the States with regard to those other rights that are excluded

by international judicial institutions from being the subject of provisional measures.

[14] Common sense tells me that it is not for nothing that the law requires that a request for provisional measures be linked to a request on the merits, given that their effects will disappear with the pronouncement of the decisions on the merits. In my opinion, it would often be practical to refer to these requests on the merits in order to determine the gravity, urgency and harm related to the request for provisional measures, without judging the merits of the case.

[15] In fact, in the Order that is the subject of this declaration, it is clear that the Applicants impugn the decision taken by the Respondent State through its Constitutional Council, for having violated their right of access to justice and the principle of the non-retroactivity of laws, both of which are enshrined in Article 7 of the Charter and Article 5 common to the ICESCR and the PDCIP respectively.

[16] Although in paragraph 20 of the Order the Applicants clearly state that suspending the execution of the Respondent State's decision would allow Beninese citizens to continue to benefit from access to Community justice, the Court notes in paragraph 27 that the Applicants have not developed any arguments or produced any evidence of urgency or extreme gravity as well as irreparable harm. Hence the Court's dismissal of the request in paragraph 28 of the Order.

[17] Article 27/2, to which the Court refers in paragraph 23, gives the Court the prerogative to order the provisional measures it deems appropriate, if it considers that there is extreme gravity and the need to avoid irreparable harm to persons. It is my understanding that the power to determine the appropriateness of provisional measures is given to the Court in paragraph 23, with exclusive jurisdiction to determine extreme gravity, urgency and irreparable harm.

[18] It is obvious, then that as the provisional measures judge being judge of the obvious and incontestable, the Court cannot divest itself of its power to define the relevance of the provisional measures to the benefit of the Applicants and in any case, to the latter.

[19] As I underlined above, it happens that the very nature of the request for provisional measures is urgent, if not grave, and would avoid irreparable damage.

[20] If a judge cannot take up a request himself, once seized, his competent extends to the point where he must say the law and render justice. A decision that ignores the right to access to justice and the principle of non-retroactivity of laws due to the allegations

of the Applicants, and that does not elicit any response from the Respondent State can only be urgent, grave and cause irreparable harm.

[21] In their reply in paragraph 20, the Applicants made an unequivocal summary of the urgency, gravity and irreparable harm, and there was no need elaborate on their reasons, since the Court, by virtue of its prerogatives, could deduce the elements of urgency from the very nature of the facts alleged without ignoring the principle of neutrality.

[22] The disturbance caused by the decision that was the subject of the application was manifestly unlawful because it nullified acquired rights and rights protected by the Charter, given that the power of the provisional measures judge is limited to what is manifest. This is all the more so because as regards the case on the merits, the Court is bound by the procedure and the interest of good justice which require a meticulous examination of the case, a process that is often long.

[23] Emergency measures will remain for me as a means of treating urgency resulting from the delays of a justice system that is slow by necessity. The Court's only concern would be the style of drafting the order because if the order must not prejudge the merits, the order issued must be based on simple presumptions of damage and prejudice which would make urgency ease to assess. One could for examine say that "it would appear that, if the Applicant's allegation is found by the Court to be true on the merits, the harm and damages alleged would be certain …" or that it would appear from the decision that is the subject of the requests for provisional that if it were to be implemented the resulting harm and damage would be certain …"

African Commission on Human and Peoples Rights v Kenya (procedure) (2021) 5 AfCLR 190

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

Order, 25 June 2021. Done in English and French, the English text being authoritative.

Judges: ABOUD, TCHIKAYA, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, and SACKO

Recused under Article 22: KIOKO

In a judgment on the merits, the Court had found that the Respondent State had violated rights of the Ogiek Community of the Mau Forest Complex. Submissions on reparations filed by the parties could not be heard *inter alia*, as a result of the onset of the COVID-19 pandemic. Owing to continued difficulties to get the parties to hold a virtual hearing, the Court adjourned the matter *sine die*.

Procedure (disposal of case based on written submissions, 15-20; article 90 of the Court's Rules, 18)

I. The Parties

1. The Applicant is the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Applicant"). It filed this Application pursuant to Article 5(1) of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter "the Protocol").

2. The Application was filed against the Republic of Kenya (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 10 May 1992 and to the Protocol on 18 February 2005.

II. Brief background

3. On 26 May 2017, the Court delivered a Judgment on the merits in which it found the Respondent State to have violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter with respect to the Ogiek Community of the Mau Forest Complex within the Respondent State. Simultaneously, the Court reserved its determination on reparations while permitting the parties to file submissions on reparations.

4. Subsequently, both Parties filed their submissions on reparations, and these were duly exchanged between them.

5. During the 55th Ordinary Session of the Court, held between the 4th and 29th November 2019, the Court decided to hold a public hearing on reparations in this matter. The Parties were subsequently duly informed that the hearing was scheduled for 6 March 2020.

6. Due to the non-availability of the Parties, as well as the Court appointed experts, the hearing scheduled for 6 March 2020 was, on 3 March 2020, adjourned to 5 June 2020 and the Parties were informed accordingly.

7. On 18 May 2020, the Registry informed the Parties that the public hearing on reparations had been adjourned *sine die* due to the challenges brought about as a result of the COVID-19 Pandemic.

8. On 8 July 2020, the Registry informed the Parties of the Court's intention to hold a virtual hearing between 7 and 8 September 2020. The Parties were also invited to confirm their availability and capacity to participate in a virtual hearing.

9. On 6 August 2020, the Respondent State confirmed its general capacity to participate in a virtual hearing but also requested for an adjournment on the ground that it would be difficult for them to participate in the hearing due to the COVID-19 Pandemic.

10. On 28 August 2020, the Registry informed the Parties that the hearing had been adjourned on account of the persisting challenges due to the COVID-19 Pandemic.

11. On 17 February 2021, the Registry informed the Parties that the public hearing on reparations had been set down for 8 and 9 June 2021.

12. On 29 March 2021 the Registry requested the Parties to confirm their participation in the public hearing scheduled for 8 and 9 June 2021 and also to provide names of their representatives for the hearing.

13. On 19 May 2021, the Respondent State informed the Court that it was unable to confirm its attendance of the public hearing scheduled for 8 and 9 June 2021 due to, among others, "the prevailing situation occasioned by the COVID-19 Pandemic". It also expressed its "very strong reservations" to the holding of a virtual public hearing in a situation involving the examination of witnesses.

14. On 3 June 2021 the Registry informed the Parties of the adjournment of the hearing scheduled for 8 and 9 June 2021.

III. On the procedure for disposal of the case

15. The Court recalls that when this matter was first set down for a public hearing, scheduled for 6 March 2020, the Registry sent the Parties, and the *amici curiae,* a list of issues to clarify ahead of the public hearing.

16. The Court notes that both Parties and the *amici curiae* have now filed their Responses to the issues that were raised.

17. The Court also notes that efforts to hold the public hearing in this matter have, this far, not made meaningful progress largely due to the COVID-19 Pandemic.

18. Given the uncertainty engendered by the COVID-19 Pandemic, and the other challenges experienced by the Court in attempting to schedule the public hearing in this matter, the Court decides to invoke Rule 90 of the Rules of Court (hereinafter "the Rules") in determining the most suitable procedure for finalizing this matter.

19. The Court, noting that both Parties, and even the *amici curiae*, have filed their submissions on reparations as well as Responses to the List of Issues identified by the Court and also noting the prevailing situation, especially in relation to the COVID-19 Pandemic, decides to adjourn, *sine die*, the public hearing that was scheduled in this Application.

20. Further, and fully mindful of Rule 30 of the Rules, the Court decides that all the claims on reparations shall, unless otherwise determined, be resolved on the basis of the written pleadings and submissions filed by the Parties.

IV. Operative part

21. For the above reasons

The Court

Unanimously:

i. *Decides* to adjourn *sine die* the public hearing that was scheduled in this matter;

ii. *Decides* that the reparations phase of this Application shall be disposed of on the basis of the Parties' written pleadings and submissions.

Abdelhafid v Tunisia (admissibility) (2021) 5 AfCLR 193

Application 033/2018, *Ali Ben Hassen Ben Youcef Abdelhafid v Republic of Tunisia*

Ruling, 25 June 2021. Done in Arabic, English and French, the Arabic text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, and SACKO

Recused under Article 22: BEN ACHOUR

The Applicant's Application against the Respondent State was based on the allegation that by the State's non-compliance with its own constitutional procedures in the making of certain laws and in constituting its Supreme Judicial Council, the Respondent State had violated certain rights of the Applicant. The Court found the Application inadmissible on grounds of non-exhaustion of local remedies.

Jurisdiction (administrative jurisdiction, 24-26; mootness, 26)

Admissibility (lack of personal interest, 38-40; infringement on national sovereignty, 46-48; exhaustion of local remedies, 58-62, 64-67; criteria cumulative, 68)

I. The Parties

1. Mr. Ali Ben Hassen Ben Youcef Ben Abdelhafid (hereinafter referred to as "the Applicant") is a Tunisian national. He challenges the Respondent State's non-compliance with its Constitutional Procedure.

2. The Application is filed against the Republic of Tunisia (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 the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 21 August 2007. It deposited, on 16 April 2017, 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.

I. Subject of the Application

A. Facts of the matter

3. It emerges from the Application before the Court that, on 11 April 2017, the Assembly of the People's Representatives passed Organic Law No. 2017-19 of 18 April 2017, amending and supplementing Organic Law No. 2016-34 of 28 April 2016, on the Supreme Judicial Council.

4. Subsequently, a group of Tunisian parliamentarians petitioned the interim body in charge of ensuring the constitutionality of draft laws, against the above-mentioned Organic Law, on the ground of unconstitutionality. The said body owing to lack of quorum, rendered a decision on 11 April 2017, in which, it referred the impugned Organic Law to the President of the Respondent State to decide on its constitutionality.

5. The President of the Republic however promulgated the said law, despite the fact that it was challenged before the interim body in charge of ensuring the constitutionality of draft laws, without referring it back to the Assembly of the People's Representatives, which allegedly constitutes a violation of the Constitution.

6. On 25 April 2017, the Speaker of the Assembly of the People's Representatives convened the Supreme Judicial Council to sit on 28 April 2017.

7. On 26 April 2017, the Applicant filed a first case before the Administrative Court, requesting the stay of execution of the Speaker's decision, on the ground that it violated the provisions of Article 109 of the Respondent State's Constitution that prohibits interference with the judiciary. The case was registered as No. 4101086.

8. On 12 July 2017, the Administrative Court rendered its decision on the first case, dismissing the application, on the ground that it was inconsistent with Articles 6 and Chapter 39 of the Administrative Court Law. The Court concluded that the Applicant failed to show a personal and direct interest and to demonstrate how his status was affected by the decision for which he was seeking the stay of execution. The Administrative Court found that the Applicant lacked *locus standi* to request the stay of execution of the decision of the Assembly of the People's Representatives convening the Supreme Judicial Council on 28 April 2017.

9. On April 26 2017, the Applicant filed a second case challenging the decision of the President of the Assembly of People's Representatives before the Administrative Court, on the ground

that it was illegal and unconstitutional, and requested the said Court to annul it due to the flagrant violation of the Constitution. The case was registered as No. 152015 but had not been decided by the date of filing the instant Application.

10. Finally, the Applicant alleges that Justice Rafaâ BEN ACHOUR, member of this Court and a national of Tunisia, who was elected as a Judge of the African Court on Human and Peoples' Rights in June 2014, was, in his capacity as an active member of the "Nidaa Tounis" movement, simultaneously appointed presidential advisor by the then Tunisian President, H.E. Mohamed Baji Qaid Essebsi, by a presidential decree published on 16 January 2014, which constitutes an incompatibility.

B. Alleged violations

11. The Applicant alleges the violations of his rights by the Respondent State as follows:

i. His right to the enjoyment of the rights and freedoms recognised and guaranteed by the Charter without discrimination under Article 2 of the Charter.

ii. His right to equality before the law and equal protection of the law as enshrined in Article 3 of the Charter.

iii. His right to have his cause heard as enshrined in Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights.

iv. His right to participate freely in the government of his country as enshrined in Article 13 of the Charter.

II. Summary of the Procedure before the Court

12. The Registry received the above-mentioned Application on 12 October 2018 and on 20 December 2018,[1] duly served it on the Respondent State, giving it a time limit of sixty (60) days to submit its response. The Application was also notified to the entities listed in Rule 42(4) of the Rules of Court on 20 December 2018.

13. On 22 March 2019, the Court granted the Respondent State an extension of thirty (30) days to file its Response, but it failed to do so.

14. On 4 April 2019, the Respondent State requested for additional time to file its Response which was granted by the Court on 9

1 Rule 35(3) of the former Rules of 2 June 2010.

April 2019, giving it an extension of thirty (30) days.

15. On 10 May 2019, the Registry received the Response from the Respondent State and served it on the Applicant on the same day, giving him thirty (30) days to file a Reply. The Applicant failed to comply in spite of reminders sent to him on 18 June 2019 and 28 August 2019 respectively.

16. Pleadings were closed on 15 January 2020 and the Parties were duly notified.

III. Prayers of the Parties

17. The Applicant prays the Court to:

i. Remove the Tunisian judge, Justice Rafaâ BEN ACHOUR from the African Court on Human and Peoples' Rights for lack of impartiality.

ii. Order the State of Tunisia, through the tenth chamber of the First Instance of the Tunisian Administrative Court, which has been seized of the case but is yet to render a ruling, to render a decision with the immediate effect by cancelling the decision of the Speaker of the Assembly of the People's Representatives convening the Supreme Judicial Council to sit on 28 April 2017.

iii. To order the Respondent State, to pay him One Million (1,000,000) Tunisian dinars for the moral prejudice suffered and to award him the sum of One Million (1,000,000) Tunisian dinars as reparation for the denial of his right to have his cause heard before an independent court and the failure to accord him equal treatment.

iv. Order the Respondent State to pay One Hundred Thousand (100,000) Tunisian dinars, for litigation fees, attorney's fees, transport and living expenses and to bear all costs in respect of this Application.

18. On its part, the Respondent State prays the Court to find that the Application is "inadmissible and without merit and is accordingly dismissed".

IV. 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 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 notes that under Rule 49(1) of the Rules,[2] "[t]he Court shall conduct a preliminary examination of its jurisdiction and the admissibility of an application in accordance with the Charter, the Protocol and these Rules". Based on the above-mentioned provisions, the Court must, in every application, conduct a preliminarily assessment of its jurisdiction and rule on any objections to its jurisdiction.

21. In the instant case, the Respondent State raises an objection to the material jurisdiction of the Court, insofar as the Applicant is praying the Court to remove Justice Rafaâ BEN ACHOUR as judge from the African Court of Human and Peoples' Rights.

A. Objection based on material jurisdiction

22. In its submission, the Respondent State contends that the appointment of Justice Rafaâ BEN ACHOUR as a member of the African Court on Human and Peoples' Rights cannot be considered a violation of human rights and therefore does not fall within the Court's material jurisdiction.

23. The Applicant did not respond to this objection.

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24. The Court holds that this request does not fall within its jurisdiction as stipulated in Article 3 of the Protocol, but rather falls within its administrative jurisdiction of Article 19 of the Protocol[3] and Rule 8 of the Rules.[4]

25. The Court further notes the fact that in 2014, after the decree appointing Justice Rafaâ BEN ACHOUR as a Presidential Advisor,

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

3 Article 19 of the Protocol states:
(1) A judge shall not be suspended or removed from office unless, by the unanimous decision of other judges of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court.
(2) Such a decision of the Court shall become final unless it is set aside by the Assembly at its next session.

4 Article 8 of the Rules states:
(1) Where the application of Article 19(1) of the Protocol is under consideration, the President or, if the circumstances so require, the Vice-President, shall inform the concerned Judge, by a written statement, of the grounds thereof and any relevant evidence.

the Court applied the provisions of the two above-mentioned articles, which led to the issuance of Presidential Decree No. 66 of 2015, dated 31 March 2015, accepting the resignation of Mr. Rafaâ BEN ACHOUR as Advisor to the President of the Republic, effective 1 April 2015. As the matter has already been settled by the Court, the request is therefore moot**.**

26. Apart from the fact that this an administrative matter and the Court having considered the objection and declared it moot, it nevertheless still has to examine the other aspects of jurisdiction.

B. Other aspects of jurisdiction

27. The Court notes that the Respondent State did not raise any objection to its personal, temporal or territorial jurisdiction and that nothing on record indicates that the Court lacks this jurisdiction. Accordingly, the Court finds that it has:

i. Personal jurisdiction, insofar as the Respondent State is a party to Charter, the Protocol and has deposited the Declaration provided for in Article 34 (6) of the Protocol, which enabled the Applicant to seize this Court pursuant to Article 5 (3) of the Protocol.

ii. Material jurisdiction, insofar as the Applicant alleges the violation of Articles 2, 3, 7 and 13 of the Charter and Article 14 of the International Covenant on Civil and Political Rights, these two instruments having been ratified by the Respondent State[5] such that the Court has jurisdiction to interpret and apply them as provided for in Article 3 of the Protocol.

iii. Temporal jurisdiction, insofar as the alleged violations were committed, in respect of the Respondent State, after the entry into force of the Charter and the Protocol to which the Respondent State is a party.

iv. Territorial jurisdiction, insofar as the facts of the case and the violations alleged took place on the territory of the Respondent State.

28. In light of the foregoing, the Court finds that it has personal,

(2) The concerned Judge shall, subsequently, at a closed sitting of the Court specially convened for the purpose, be afforded an opportunity of making a statement, of furnishing any information or explanations he/she wishes to give, and of supplying answers, orally or in writing, to any questions put to him/her.
(3) At a further closed sitting, at which the Judge concerned shall not be present, the matter shall be considered, each Judge shall state his/her opinion and, if required, a vote shall be taken.
(4) Any decision to suspend or remove a Judge shall be communicated to the Chairperson of the AU Commission.

5 The Respondent State became a party to the International Covenant on Civil and Political Rights on 23 March 1976.

material, temporal and territorial jurisdiction to hear the Application.

V. Admissibility

29. The Court will examine, on the one hand, the preliminary objections of the Respondent State of inadmissibility not provided for by Article 56 of the Charter and, on the other hand, the conditions of admissibility provided for by Article 56 of the Charter.

A. Preliminary objections on inadmissibility not provided for by Article 56 of the Charter

30. The Respondent State raises preliminary objections on two grounds: i) that the Applicant has no interest in filing the Application, ii) the subject of the Application infringes on the Respondent State's national sovereignty.

i. Objection based on lack of personal interest to file proceedings

31. The Respondent State raises a preliminary objection on the ground that the Applicant has no interest in filing the Application, and is an unemployed Tunisian citizen as he stated at the beginning of his Application.

32. The Respondent State asserts that the functions of the Supreme Judicial Council include the appointment, promotion and transfer of judges. It determines the needs of the Courts in terms of filling vacancies for judges, considering applications for transfers, monitoring the career of judges. In brief, it is responsible for everything related to judicial appointments, promotion of judges, resignations and considering the disciplinary measures to be taken against them.

33. The Respondent State avers that in the instant case, the Applicant has no connection with the internal affairs of the judges and their careers, be it in terms of appointment, transfer or disciplinary actions. It is therefore evident that he has no personal and direct interest in the functions of the Supreme Judicial Council. The Respondent State further submits that the Applicant has failed to prove any right to be granted, protected or restored or even that there is a reparation to be awarded for its violation.

34. The Respondent State contends that the allegation of the unconstitutionality of the law on the creation of the Supreme Judicial Council raised by an unemployed Tunisian citizen, who has no connection with the career of judges, nor to the tasks

assigned to the Supreme Judicial Council with regard to the appointment, transfer and discipline of judges, is an arbitrary use of the right to bring proceedings before this Court. The Application is neither based on direct or immediate personal right nor on a legal status that has been violated. The Respondent State further contends that the Applicant did not adduce any evidence of the prejudice suffered, nor did he provide any justification for bringing proceedings before this Court.

35. Finally, the Respondent State contends that the Applicant's allegation that the law on the Supreme Judicial Council violates his right to an independent judiciary within the Tunisian State, is baseless and, moreover, has no legal ground for several reasons, including:

i. The independence of the judicial authority in Tunisia is regulated by the Constitution, in particular Articles 102 and 103.

ii. The independence of the judiciary is guaranteed by virtue of the Organic Law of the Judiciary No. 69 of 14 July 1967, which sets out the rights and duties of judges in Chapter two, Articles 14 to 24.

iii. The independence of the judiciary is guaranteed by the Tunisian code of civil and commercial procedure. The principle of the impartiality of judges was enshrined by the lawmakers in Article 12 of the Constitution, while the recusal of magistrates is regulated in Chapter six, Articles 248 to 250.

36. The Applicant did not respond to the submissions of the Respondent State.

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37. The Court notes that Article 5 (3) of the Protocol Provides, "[t] he Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it", in accordance with Article 34(6) of this Protocol."[6]

38. The Court notes that these provisions do not require individuals or NGOs to demonstrate personal interest in order to initiate proceedings before this Court. The only requirement is that the Respondent State, in addition to being a party to the Charter

6 African Commission on Human and Peoples' Rights, Communication No. 25/89, 47/90, 56/91, and 100/93, *Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Jehovah Witnesses v DRC (WTOAT) v DRC*.

and the Protocol, must have deposited the Declaration allowing individuals and NGOs to file Applications before this Court. This requirement takes into account the practical difficulties that victims of human rights violations may face in bringing their cases to the Court. Thus, anyone can file Applications before the Court without the need to demonstrate a direct individual interest in the case.

39. Moreover, in the instant case, the Court notes that the Applicant alleges that the Speaker of the Assembly of the People's Representatives convened the Supreme Judicial Council to sit on 28 April 2017, in violation of the Constitution of the Respondent State.

40. The Court further notes that these allegations are the basis for the Application since the impugned legal instrument concerns all citizens of the country, as they have a direct or indirect impact on their individual rights. The law also has a bearing on the security and well-being of their community and their country. Given that the Applicant is a citizen of the Respondent State and that respect for the Constitution is a collective responsibility, as the violation of its provisions can impact the right to participate in the political affairs of the country, it is obvious that the Applicant has a direct interest in the instant case. Accordingly, the Court dismisses the Respondent State's objection regarding the Applicant's lack of personal interest in bringing proceedings.

ii. Objection based on the fact that the Application infringes on national sovereignty

41. The Respondent State also raises an objection to the admissibility of the Application on the ground that it infringes on its national sovereignty. It further avers that international relations are based on the "principle of sovereignty", whereby the State has full authority over its territory and exercises supreme power over its institutions and in the choice of its political, legal, economic and social options as well as in managing its foreign relations without being subject to any other higher authority.

42. The Respondent State submits that Article 2 (7) of the United Nations Charter enshrines the "principle of non-interference," which is one of the cardinal principles in public international law on which the work of international bodies and courts is based. The principle of non-interference is considered the core of the State's internal authority to protect its independence and sovereignty, as long as it does not take actions that are likely to threaten international peace and security, or result in aggression against another State.

43. The Respondent State further avers that State sovereignty manifests in the exercise of three powers: the legislative, the executive and the judiciary. The judiciary represents an aspect of State sovereignty and is considered the core of its internal authority. The Respondent State thus contends that the Court can therefore not render a decision that violates the sovereignty of a State Party to the Protocol.

44. The Applicant did not respond to the submissions of the Respondent State.

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45. The Court recalls Article 1 of the Charter, which states:

> "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."

46. The Court notes that, by acceding to international treaties and conventions, State Parties establish international jurisdiction on human rights protection, and are therefore subject to oversight by the international mechanisms created by the United Nations and to other mechanisms for the protection of human rights. These mechanisms seek to guarantee better protection for these rights and to uphold human dignity. This is a noble goal that is neither contrary to, nor contradict, the sovereignty of States. It therefore does not constitute a violation of State sovereignty.

47. The Court further notes that it is established in international jurisprudence that the sovereignty of the State is subject, in contemporary international relations, to stringent restrictions, among which is the voluntary commitment by the State to implement certain international obligations upon becoming a party to a bilateral or multilateral treaty. In this regard, the Court refers to the decision of the Permanent Court of International Justice in 1923 according to which "the Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty; on the contrary, the right of entering into international engagements is an attribute of State sovereignty."[7]

7 *S.S. Wimbledon*, PCIJ Series A. No.1, p. 25 (1923).

48. The Respondent State is party to the Charter and the Protocol and it has deposited the Declaration allowing individuals to bring applications to the Court as stated in paragraph 2 of this judgment, which is consistent with its commitment as a ratifying State to the Charter and does not infringe on its national sovereignty. Furthermore, the Respondent State has not stated how bringing this case before the Court constitutes an infringement of its national sovereignty.

49. Accordingly, the Court dismisses this objection.

B. Admissibility conditions provided for under Article 56 of the Charter

50. Rule 50(1) of the Rules[8] provides: "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".

51. Rule 50 (2) of the Rules, which restates the provisions of 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 set by the Court as being the commencement of the time limit within which it shall be 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 Constitutive Act of African Union or the provisions of the Charter.

52. The Respondent State submits that the Application does not comply with Article 50 (2) (e) on admissibility requirements, regarding the exhaustion of local remedies.

8 Formerly Rule 40 of the Rules of Court of 2 June 2010.

i. Objection based on non- exhaustion of local remedies

53. The Respondent State contends that the Application does not meet the admissibility requirements stipulated in Article 56 of the Charter as the Applicant has not exhausted local remedies.

54. The Respondent State submits that one cannot bring proceedings before this Court without prior recourse to competent domestic courts to settle the matter or to protect the right allegedly violated. According to the Respondent State, it is also required that a final decision be made within reasonable time by these competent courts. The Applicant can only bring proceedings before this Court if he is not satisfied with the decision of a domestic court and has no other means to cure what he deems a violation of his right.

55. The Respondent State further contends that the Application will not meet the admissibility requirements as long as local remedies have not been exhausted, or if the matter is still pending, or if the Applicant has not gone through all the stages of the procedure, and the matter has not been disposed of in a final judgment that is not subject to appeal.

56. The Respondent State contends that the Applicant has appealed the decision of the Speaker of Assembly of the Peoples' Representatives before the competent domestic court, namely the Administrative Court, and that the case was still pending at the time of filing of this Application. The Respondent State argues that the stages of litigation have not been completed and no judicial ruling has been rendered yet on the matter. The Respondent State further contends that the instant Application before this Court therefore does not meet the admissibility requirement because its subject matter is still pending in Tunisian courts.

57. The Applicant did not respond to the Respondent State's objection.

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58. The Court notes that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are unavailable, ineffective, insufficient or unless the procedure to pursue them is unduly prolonged.

59. The Court notes that the requirement to exhaust local remedies before bringing proceedings before an international human rights

Court is an internationally recognised and accepted rule.[9]

60. Furthermore, the local remedies that must be exhausted are judicial remedies, which must be available, or can be accessed without hindrance by the Applicant,[10] they must effective and satisfactory, which means they are "able to satisfy the Applicant" or able to cure the situation in dispute.[11]

61. The Court notes that the requirement to exhaust local remedies is assessed , in principle, from the date of filing the Application before it.[12]

62. The Court further notes that compliance with this requirement presupposes not only exhaustion of local remedies by the Applicant but also knowledge of the outcome.

63. The Court notes that in the instant case, the Applicant filed two cases before domestic courts:

i. The first was filed before the Administrative Court on 26 April 2017, seeking the stay of execution of the decision of the said court. On 12 July 2017, the Administrative Court rendered its decision, dismissing the Applicant's appeal. It was a final judgment not subject to appeal under Article 41 of Tunisian Law No. 72-40 of 1972 of 1 June 1972, amended by Organic Law No. 39 of 1996 of 3 June 1996, on the organization of the Administrative Court. The case was decided by a domestic judge within the timeline stipulated in Article 40 of the said law.[13]

ii. The second case filed by the Applicant on the same date, 26 April 2017, was for abuse of power. The case was listed under No. 152015, and had not yet been decided, by the date of filing the instant Application before this Court, that is, 12 October 2018, being a period of one (1) year, four (4) months and fifteen (15) days after it was filed.

64. The Court finds that without awaiting the decision of the case in domestic courts in the second case regarding abuse of power, the Applicant filed his Application before this Court against the Respondent State. The Court notes that the Respondent State's legislation does not specify a time limit for the domestic judge to

9 *Diakité v Mali* (admissibility and jurisdiction) (28 September 2017), 2 AfCLR 122 § 41; *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014), 1 AfCLR 324 § 41.

10 *Ibid*, § 96.

11 *Ibid*, § 108.

12 ECHR *Bauman v France*, No. 3359/96, 22 May 2001, §47.

13 Chapter 40 (new) - "The first president decides on the demands submitted to him within a period not exceeding one month by a reasoned decision and without prior verbal pleading.".

decide on the case of abuse of power.

65. As a matter of fact, on 12 October 2018, the date of filing the instant Application before this Court, the proceedings for exhausting local remedies were still pending before the Administrative Court of the Respondent State.

66. Although the domestic legal framework does not provide for the timeline for a judge to consider the case on the abuse of power, the Court considers that the time limit of one (1) year, four (4) months and fifteen (15) days from which the Application was filed before this Court is reasonable and that the proceedings in respect of local remedies were not been unduly prolonged, within the meaning of Rule 50 (2) (e) of the Rules. There was therefore no ground for the Applicant to file his Application prior to the Administrative Court's decision, against which he had the right to appeal after the verdict.[14]

67. Accordingly, this Court finds that the Applicant filed the Application while the local procceedings were still pending and, therefore local remedies had not yet been exhausted.

ii. Other conditions of admissibility

68. The Court reiterates that the conditions of admissibility stipulated in Articles 56 of the Charter and Rule 50 (2) of the Rules are cumulative, so that if one of the conditions is not met, the Application is not admissible.[15]

69. Accordingly, without having to consider the other conditions stipulated in Article 56 of the Charter and Rule 50(2) of the Rules, the Court finds the Application inadmissible.

VI. Costs

70. The Applicant prayed the Court to order the Respondent State to:

> Pay a total of One hundred thousand Tunisian Dinars (TND100, 000) as costs of the proceedings, Advocate's fees, travel and living expenses, and the expenses incurred.

14 Article 60 (new) - The appeal must be submitted within a period not exceeding one month from the date of notification of the judgment made according to the provision in Article 58 of this law.

15 *Jean Claude Roger Gombert v Republic of Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018), 2 AfCLR 280 § 61; *Dexter Eddie Johnson v Republic of Ghana*, AfCHPR, Application No. 016/2017, Ruling of 28 March 2019, (jurisdiction and admissibility) § 57.

71. The Respondent State did not make any prayer in this regard.

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72. Rule 32 (2) of the Rules provides: "Unless otherwise decided by the Court, each party shall bear its own costs, if any." [16]

73. In the instant case, the Court considers that there is no reason to depart from the principle laid down in that provision. Consequently, each party shall bear its own costs of the proceedings.

VII. Operative part

74. For these reasons,
The Court
Unanimously,
On jurisdiction
i. *Dismisses* the objection based on lack of material jurisdiction.
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Finds* that the Applicant did not exhaust local remedies.
iv. *Declares* the Application inadmissible.

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

16 Rule 30 (2) of the former Rules of 2010.

Confederation Syndicale des Travailleurs du Mali v Mali (jurisdiction) (2021) 5 AfCLR 208

Application 003/2017, *Confederation Syndicale des Travailleurs du Mali v Republic of Mali*

Ruling, 25 June 2021. Done in English and French, the French text being authoritative.

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

Recused under Article 22: SACKO

The Applicant, a collection of affiliated trade unions operating in the formal and informal sectors of the Respondent State, brought this Application claiming that its exclusion from membership of a council in the Respondent State violated the Charter. The Court found that it lacked jurisdiction to hear the matter since the Applicant is a trade union and not an NGO with observer status with the African Commission.

Jurisdiction (personal jurisdiction, 22-24)

I. The Parties

1. The Confédération Syndicale des Travailleurs du Mali (CSTM), (hereinafter referred to as "the Applicant"), is a group of affiliated trade unions in the formal and informal sectors. It is challenging its exclusion from membership of the Economic, Social and Cultural Council (hereinafter referred to as "ESCC") of the Republic of Mali.

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 on 20 June 2000. The Respondent State also deposited, on 19 February 2010, the Declaration provided for in Article 34(6) of the Protocol, by which it recognises the Court's jurisdiction to entertain applications from individuals and Non-Governmental organisations with observer status before the African Commission on Human and Peoples' Rights.

II. Subject of the Application

A. Facts of the matter

3. The Applicant submits that since the creation of the ESCC in 1998, the Confederation Syndicale des Travailleurs du Mali (hereinafter referred as "Confederation) was excluded from ESCC in 1999, 2004 and 2009, although according to the Respondent State's Constitution, the ESCC is made up of representatives of public and parastatal bodies, as well as trade unions.

4. The Applicant avers that, in an attempt to assert the Confederation's rights, an application was filed with the Respondent State's Supreme Court, seeking recourse for abuse of power against Decree No. 99-272 of 20 September 1999 by which the President of the Republic excluded the Confederation from membership of ESCC. The Applicant further submits that the Supreme Court annulled the decree by Judgment No.76 of 15 August 2002.

5. The Applicant further contends that, following this judgment, Decree No. 04-415/PRM of 23 September 2004 listing the members of the ESCC was issued, which decree again excluded the Confederation thus compelling it to bring another action before the Respondent State's Supreme Court for abuse of power. The Supreme Court annulled the decree by Judgment No. 135 of 16 August 2007.

6. According to the Applicant, the International Labour Organization (ILO) Committee on Freedom of Association, which was seized of the matter, recommended in its 359th report of 2011 that the Respondent State include the Confederation on the list of ESCC representatives, in accordance with the Supreme Court judgments.

7. The Applicant further submits that the Confederation was also excluded from the Arbitration Councils of the joint tripartite institutions or bodies, including the Institut National de Prévoyance Sociale (INPS), [the National Social Insurance Institute], the Caisse Malienne de Sécurité Sociale (CMSS) [the Malian Social Insurance Fund] and the Caisse Nationale d'Assurance Maladie (CANAM) [the National Health Insurance Fund].

8. In view of all the above alleged violations of laws, decrees and orders, the Applicant prays the Court to find that the Confederation must be included in these bodies.

B. Alleged violation

9. The Applicant alleges a violation of Article 7 of the Charter.

III. Summary of the Procedure before the Court

10. The Application was received at the Registry on 6 April 2017 and was served on the Respondent State on 1 November 2017.

11. The submissions and exhibits submitted by the parties were duly notified. On 7 May 2021, pleadings were closed and the parties were duly notified.

IV. Prayers of the Parties

12. The Applicant prays the Court to:

i. Find that it has jurisdiction;

ii. Declare the Application admissible;

iii. Find that the Confederation must be a member of the CESC.

13. In terms of reparations, the Applicant prays the Court to:

i. Order the Respondent State to pay the sum of one billion (1,000,000,000) CFA francs as damages for excluding the Confederation from the joint and tripartite bodies, namely, *l'Agence National pour l'Emploie* (ANPE), [The National Employment Agency], the *Caisse nationale d'assurance maladie* (CANAM), [The National Health Insurance Fund], the *Institut national de Prévoyance Sociale* (INPS), [National Social Insurance Institute] and the *Fonds d'appui à la formation professionnelle* (FAFPA) [Vocational Training Support Fund];

ii. Order the Respondent State to pay the Confederation the sum of six hundred and forty-eight million (648,000,000) CFA francs as arrears of the subsidies from the joint bodies;

iii. Order the Respondent State to include the Confederation in the said bodies.

14. For its part, the Respondent State prays the Court to:

i. Find that it lacks jurisdiction;

ii. Rule the Application inadmissible;

iii. Dismiss the Applicant's claims as being unfounded.

V. Jurisdiction

15. 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.

16. Under Rule 49(1) of the Rules of Court,[1] "The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules."

17. Based on the above provisions, the Court must, in each application, ascertain its jurisdiction and rule on objections to its jurisdiction, if any.

18. The Court notes that the Respondent State raised an objection questioning the Court's personal jurisdiction.

A. Objection alleging lack of personal jurisdiction

19. The Respondent State raises an objection alleging the Court's lack of personal jurisdiction on the ground that the Applicant is not an NGO with observer status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") and as such, cannot bring a case before the Court under Article 5(3) of the Protocol.

20. In its reply, the Applicant concurs that it is a trade union and that it is not an NGO with observer status before the Commission. For this reason, it requests the Court to substitute the identity of the Applicant with those of twenty seven (27) natural persons, namely *Hammadoun Amion Guindo and 26 others.*[2]

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21. The Court notes that Article 3 (3) of the Protocol states:

> The Court may entitle relevant Non Governmental Organization (NGOs) with observer status before the Commission, and individual

1 Rules of 25 September 2020 corresponding to Rule 39(1) of the Rules of 2 June 2010.

2 Their names are the following: Hawa Sow, Nassoum Keïta, Fadaman Keïta, Almoubachar Haïdara, Sitan Diakite, Oumar Barou Diallo, Yacouba Traore, Daouda Cisse, Amadou Coulibaly, Mahamane Kounta, Dramane Diarra, Moussa Doumbia, Tiédiougou J. Diarra, Boulkassoum Maïga, Aboubacar S. Doumbia, Daouda Ndiaye, Mahamady Sossokho, Aïssata Ba, Saran Coulibaly, Soumana I. Maïga, Souleymane I. Maïga, Souleymane Traore, Daouda Sow, Ibrahim Cisse, Issiaka Moussa Kabore, Modibo Keïta et Rokia Camara.

to institute cases directly before it, in accordance with Article 34 (6) of this Protocol.

22. The Court notes that the Applicant itself concedes that it is not an NGO with observer status before the Commission and can therefore not bring proceedings before the court within the meaning of above mentioned provisions. Accordingly, the Court cannot hear the instant Application.[3]

23. In any case, the request for substitution of the identity of natural persons for that of the Applicant cannot be granted insofar as the rights alleged in the Application are intrinsically inherent to the trade union nature of the Applicant and are not those of natural persons.

24. Accordingly, the Court finds that it lacks jurisdiction to hear the instant Application.

VI. Costs

25. The Applicant requests the Court to order the Respondent State to bear the costs of proceedings.

26. The Respondent State on the other hand prays the Court to dismiss the Application.

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27. The Court notes that under Rule 32(2) of the Rules,[4] "unless otherwise decided by the Court, each party shall bear its own costs, if any."

28. In the instant case, the Court considers that, having found that it lacks jurisdiction, there is no reason to depart from the principle laid down in the above-mentioned Rule.

29. The Court, therefore, rules that each Party shall bear its own costs.

3 *Association Juristes d'Afrique pour la Bonne Gouvernance v Republic of Côte d'Ivoire*, (jurisdiction) (16 June 2016), 1 AfCLR 26, §§ 8-9 ; *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Gabon* (jurisdiction) (11 December 2011), 1 AfCLR 100, § 8.

4 Rule 30 of the former Rules.

VII. Operative part

30. For these reasons,
The Court
Unanimously
On jurisdiction
i. *Finds* that it lacks jurisdiction.
ii. *Dismisses* the Application.

On costs
iii. *Orders* that each Party bears its own costs.

Isiaga v Tanzania (reparations) (2021) 5 AfCLR 214

Application 032/2015, *Kijiji Isiaga v United Republic of Tanzania*

Judgment, 25 June 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Court had held in its judgment of 21 March 2018 that the Respondent State had in part violated the Applicant's right to fair hearing. In this decision on reparations, the Court denied the prayers for material prejudice and moral prejudice for indirect victims but granted the prayer for moral prejudice suffered by the Applicant.

Reparations (state responsibility, 12; material prejudice, 15, 20; moral prejudice, 25; quantum of damages, 25, 27)

I. Brief background of the matter

1. In his Application filed on 8 December 2015, Mr. Kijiji Isiaga (hereinafter referred to as "the Applicant") alleged that his right to a fair trial had been violated by the United Republic of Tanzania (hereinafter referred to as "the Respondent State) when its local courts relied on contestable evidence to convict and sentence him. He also alleged that he was not provided with legal assistance in the domestic proceedings despite him being lay and indigent.

2. On 21 March 2018, the Court rendered its judgment whose paragraphs v-xi of the operative part read as follows:

On the merits,

v *Holds* that the Respondent State has not violated Articles 2 and 3 (1) and (2) of the Charter relating to freedom from discrimination and the right to equality and equal protection of the law, respectively.

vi. *Holds* that the Respondent State has not violated the right to defence of the Applicant in examining the evidence in accordance with Article 7 (1) of the Charter;

vii. *Holds* that the Respondent State has violated the Applicant's right to a fair trial by failing to provide free legal aid, contrary to Article 7(1) (c) of the Charter

viii. *Does not grant* the Applicant's prayer for the Court to order his release from prison, without prejudice to the Respondent applying such measure proprio motu.

ix. *Orders* the Respondent state to take all necessary measures to remedy the violations, and inform the court, within six (6) months

from the date of this judgment, of the measures taken.

x. *Reserves* its ruling on the prayers for other forms of reparation and on costs.

xi. *Grants*, in accordance with Rule 63 of the Rules, the Applicant to file written submissions on the request for reparations within thirty (30) days hereof, and the Respondent state to reply thereto within thirty (30) days.

3. It is this Judgment that serves as the basis for the present Application for reparations.

II. Subject of the Application

4. On 9 May 2018, the Applicant filed his written submissions on reparations following the judgment on the merits rendered on 21 March 2018 by this Court, which found a violation by the Respondent State of Article 7 (1) (c) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter"), by failing to provide free legal assistance to the Applicant.

III. Summary of the Procedure before the Court

5. On 23 March 2018, the Registry transmitted a certified true copy of the judgment on the merits of 21 March 2018 to the Parties.

6. The Applicant filed his submissions on reparations on 8 May 2018 and these were served on the Respondent State on 9 May 2018.

7. The Parties filed their pleadings within the prescribed time limits.

8. Pleadings were closed on 21 April 2020 and the Parties were duly notified.

IV. Prayers of the Parties

9. The Applicant prays the Court to grant him reparations for the period he has spent in custody "calculated per ratio of the national income of each citizen of the [Respondent State]". Alternatively, the Applicant states that, the Respondent State may *proprio motu* take measures to release him from prison in lieu of the pecuniary reparations.

10. On its part, the Respondent State disputes the Applicant's submissions on reparations and prays the Court for:

i. A Declaration that the Applicant's prayer for reparations has no merit for failure to meet the standards so required for reparations to be awarded;

ii. An Order to dismiss the Application;

iii. Any other Order this Hon. Court may deem right and just to grant under the prevailing circumstances.

V. Reparations

11. Article 27(1) of the Protocol provides that:

> "If the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

12. The Court recalls 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".[1]

13. The Court also reaffirms 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."[2]

14. Measures that a State must 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.[3]

15. The Court reiterates that with regard to material prejudice, the general rule is that there must be a causal link between the alleged violation and the prejudice suffered and the burden of proof is on the Applicant who has to provide supporting documents to justify his prayers.[4] Exceptions to this rule include moral prejudice, which need not be proven, since presumptions are made in favour of the

1 *Mohamed Abubakari v United Republic of Tanzania,* ACtHPR, Application No. 007/2013, Judgment of 4 July 2019 (reparations), § 19; *Alex Thomas v United Republic of Tanzania,* ACtHPR, Application No. 005/2013, Judgment of 4 July 2019 (reparations), § 11; *Lucien Ikili Rashidi v United Republic of Tanzania,* ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and reparations), §§ 19*; Ingabire Victoire Umuhoza v Rwanda*(reparations) (7 December 2018) 2 AfCLR 202, § 19.

2 *Mohamed Abubakari v Tanzania* (reparations), § 20; *Alex Thomas v Tanzania* (reparations), § 12; *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 20; *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 118.

3 *Mohamed Abubakari v Tanzania* (reparations), § 21; *Alex Thomas v Tanzania* (reparations), § 13; *Ingabire Victoire Umuhoza v Rwanda* (reparations)*,* § 20*.*

4 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v Burkina Faso,* (reparations) 03 June 2016) 1 AfCLR 346, § 15. *Mohamed Abubakari v Tanzania* (reparations), § 22*, Alex Thomas v Tanzania* (reparations), § 14.

Applicant and the burden of proof shifts to the Respondent State.

16. In the judgment on the merits, the Court established that the Respondent State violated the Applicant's right to a fair trial by failing to provide him with free legal assistance during his trial in the domestic courts, contrary to Article 7(1)(c) of the Charter.

17. Relying on the above finding of the Court, the Applicant prays the Court to award him damages in the form of pecuniary and non-pecuniary reparations.

A. Pecuniary reparations

i. Material loss

18. The Applicant alleges that before his arrest, he was a peasant with a wife, children and parents who depended on him. He states that the family's sole source of income was farming and this was disrupted after his arrest and subsequent conviction for offences of armed robbery and inflicting bodily injury. The Applicant prays the Court to grant him reparations for the period he spent in custody calculated *per ratio* of the annual per capita income of the Respondent State.

19. On its part, the Respondent State argues that the Applicant is not a victim of deliberate actions or negligence of the Respondent State but rather that of his own actions. It avers that the Applicant was convicted and sentenced for crimes he committed which affected the rights of other ordinary citizens and the action to take him before the court of law was in exercise of its obligation to protect the rights of innocent citizens. According to the Respondent State, the Applicant has not adduced any evidence to support the claim for material damages suffered as direct victim following the violation established by the Court.

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20. The Court notes that when an applicant claims reparations for material prejudice, not only should there be a causal link between the violation established by the Court and the prejudice caused but also the Applicant must specify the nature of the prejudice and

offer a proof thereof.

21. In the instant Application, the Court found in its judgment on the merits that the Applicant's right to legal assistance under Article 7(1)(c) of the Charter was violated.[5] However, the Court notes that the Applicant neither specifies the precise nature and extent of the material damage he sustained nor does he offer evidence showing that the prejudice was caused by this violation. In fact, the Applicant simply describes his and his family's situation before his arrest, without substantiation and without clearly stating the actual prejudice suffered. In any event, the Applicant's general claims are based on his conviction, sentencing and incarceration, which this Court did not find unlawful.[6]

22. The Court consequently dismisses the Applicant's claims for reparations for material damage.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicant

23. The Applicant claims that the Respondent State should be ordered to pay reparations for the moral prejudice he suffered for fourteen (14) years since 7 April 2004 to April 2018, the time when he filed his claims for reparations.

24. The Respondent State reiterates its assertion that the Applicant's arrest and conviction are a result of his own illegal actions and thus, his claims for reparations for his imprisonment should be denied.

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25. The Court recalls its established case-law where it has held that moral prejudice is presumed in cases of human rights violations, and quantum of damages in this respect is assessed based on

5 *Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 80.

6 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 18, *Christopher Jonas v United Republic of Tanzania,* ACtHPR, Application No. 011/2015. Judgment of 25 September 2020 (reparations), § 20.

equity, taking into account the circumstances of the case.[7] The Court has thus adopted the practice of granting a lump sum in such instances.[8]

26. As indicated above in paragraphs 2 and 4, the Court has already established in its judgment on merits that the Respondent State violated the Applicant's right to free legal assistance on account of which he suffered moral prejudice. Accordingly, the Applicant is entitled to moral damages.

27. In assessing the quantum of damages, the Court's practice has been that it grants applicants an average amount of Three Hundred Thousand Tanzanian Shillings (TZS 300,000) in instances where free legal assistance was not availed by the Respondent State where the Applicant was charged with a serious offence and where there are no extenuating circumstances.[9] On this basis and exercising its discretion in equity, the Court awards the Applicant the amount of Three Hundred Thousand Tanzanian Shillings (TZS 300, 000) as fair compensation.

b. Moral prejudice suffered by indirect victims

28. The Applicant does not expressly claim reparations for indirect victims but simply states that he used to be the breadwinner of his family, namely, his children, wife and parents before was arrested and convicted.

29. In response to the Applicant's allegation that he had dependent children, wife and parents, the Respondent State argues that there is nothing to prove this fact. In this regard, the Respondent State submits that moral prejudice for indirect victims should be proved but the Applicant failed to do so. Also, that the Applicant, neither establishes the existence of filial relations by providing the children's birth certificates and a marriage certificate for the wife nor does he adduce evidence showing that the prejudice suffered

7 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 59, *Christopher Jonas v Tanzania* (reparations), § 23.

8 *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, *Christopher Jonas v United Republic of Tanzania* (reparations), § 24.

9 *Minani Evarist v Tanzania* (merits), § 90; and *Anaclet Paulo v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 111, *Christopher Jonas v Tanzania* (reparations), § 25.

by indirect victims was caused by the violation of his right.

***

30. As already stated above, the Applicant does not explicitly pray the Court to award reparations for his family members. The Applicant has also not adduced documents proving his familial relations with any of his alleged family members. In this circumstance, the Court does not need to consider granting reparations for indirect victims.[10]

B. Non-pecuniary reparations

31. In his submissions on reparations, the Applicant also prays that the Court issue an order requiring the Respondent State to release him from prison in lieu of pecuniary reparations.

32. The Respondent does not respond to this prayer.

***

33. The Court notes that it has already dealt with this prayer in its judgment on merits and therefore, it does not need to pronounce itself again herein.[11] Consequently, it dismisses the Applicant's prayer in this regard.

VI. COSTS

34. In terms of Rule 32(2) of the Rules[12] "unless otherwise decided by the Court, each party shall bear its own costs."

10 See *Christopher Jonas v United Republic of Tanzania* (reparations), § 27.

11 *Kijiji Isiaga v Tanzania* (merits), § 96.

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

35. In the instant Application, neither the Applicant nor the Respondent State made submissions on costs.

36. The Court, therefore, holds that each party shall bear its costs.

VII. Operative part

37. For these reasons,

The Court,

Unanimously:

On pecuniary reparations

i. *Does not grant* the Applicant's prayer for damages for material prejudice;

ii. *Does not grant* damages for moral prejudice to the indirect victims as the Applicant failed to pray reparations for indirect victims and did not provide proof establishing his familial relations and alleged family members

iii. *Grants* the Applicant's prayer for damages for the moral prejudice he suffered from the violation of his right to free legal assistance and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS300,000);

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 for an order of release from custody.

On implementation and reporting

vi. *Orders* the Respondent State to submit to the Court, within six (6) months of the date of notification of this Judgment, and every six months until the Court is satisfied thereof, a report on the implementation of paragraphs (iii) and (iv) of this operative part

On costs

vii. *Orders* each party to bear its own costs.

Kante & Ors v Mali (admissibility) (2021) 5 AfCLR 222

Application 006/2019, *Moussa Kante & thirty-nine (39) Others v Republic of Mali*

Ruling, 25 June 2021. Done in English and French, the French text being authoritative.

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

Recused under Article 22: SACKO

Dissatisfied with the delay in their appeal in a domestic labour dispute before the Supreme Court of the Respondent State, the Applicants brought this Application, claiming a violation of their rights arising from alleged manifest unwillingness to render justice to them. The Court held that the Application was inadmissible for failure to exhaust local remedies.

Admissibility (exhaustion of local remedies, 31-33; duration of national proceedings, 37)

I. The Parties

1. Mr. Moussa Kanté and Thirty-nine (39) others[1] (hereinafter referred to as "the Applicants") are Malian nationals and former workers of *Société africaine d'Etude et de réalisation-Emploi* (The African Research and Employment Company) (hereinafter referred to as "*SAER-emploi*"). They allege the violation of their rights during legal proceedings initiated following their dismissal by *SAER-emploi*.

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 on 20 June 2000. The Respondent State also deposited, on 19 February 2010, the Declaration prescribed under Article 34(6) of the Protocol, by which it accepts 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.

1 See List of Applicants attached.

II. Subject of the Application

A. Facts of the matter

3. The Applicants state that they were hired by *SAER-emploi* whose main activity is to recruit workers to be placed at the disposal of certain companies in the mining sector.

4. They aver that following a failed attempt in 2014 to dismiss them, in January 2015, their employer withdrew their access badges to their workplace, even though they had not committed any malpractice and without any document being served on them to that effect, thus preventing them from going about their professional activities. They indicate that they have not received any compensation from their former employer.

5. The Applicants further contend that this action by *SAER-Emploi* violated their contractual relationship and the provisions of the Labour Code. Believing this breach to be prejudicial, they filed a suit, on 19 January 2016, against their former employer before the Sikasso Labour Tribunal to claim their reinstatement and the payment of their back wages.

6. They claim that by Judgment No. 010/JUGT of 11 May 2016, the Tribunal upheld their claims. However, on appeal by *SAER-emploi*, the Court of Appeal of Bamako, by Judgment N°190 of 15 December 2016, declared their action inadmissible.

7. They further aver that by Application No. 62 of 9 November 2017, they filed an appeal in *cassation* at the Supreme Court against the judgment of the Court of Appeal of Bamako and that the Supreme Court was yet to rule on this appeal at the date of their filing of the Application to this Court.

8. They conclude that the Malian justice system demonstrated a manifest unwillingness to render justice to them, which constitutes a clear violation of their fundamental rights.

B. Alleged violations

9. The Applicants allege the following violations:

i. Violation of the right to equality before the law, the right to equal protection of the law, set out in Article 3(1) and (2) of the Charter;

ii. Violation of the right to have one's case heard enshrined in Article 7(1)(a) and (b) of the Charter.

III. Summary of the Procedure before the Court

10. The Application was filed on 21 February 2019. It was served on the Respondent State on 14 June 2019 for its response within sixty (60) days of receipt.

11. The Parties filed their submissions on the merits and on reparations within the prescribed time limits.

12. Pleadings were closed on 16 April 2021 and the Parties were duly notified.

IV. Prayers of the Parties

13. The Applicants pray the Court to:

i. Find that the Application is admissible;

ii. Find that the Application is well-founded;

iii. Order the Respondent State to pay:

- One billion CFA francs (1,000,000,000) as arrears for their salaries;
- Ten million CFA francs (10 000 000) to each employee as damages;
- pay all arrears of INPS (Social security insurance) contributions;

iv. Order the issuance of their labour certificates;

v. Attach to the decision a fine of two million CFA francs (2,000,000) per day of delay from the date of pronouncement of the decision;

vi. Order the provisional execution of the decision on half of the rights to be implemented.

14. The Respondent State prays the Court to:

i. Declare the application inadmissible;

ii. Declare the application unfounded and dismiss it;

iii. Order the Applicants to bear the costs.

V. Jurisdiction

15. 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 whether the Court has jurisdiction, the Court shall decide.

16. Under Rule 49(1) of the Rules of Court,[2] "the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of an application in accordance with the Charter, the Protocol and these Rules".

17. On the basis of the above-mentioned provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections to its jurisdiction, if any.

18. The Court notes that the Respondent State has not raised any objection to its jurisdiction.

19. After a preliminary examination of its jurisdiction, and having found that there is nothing on the record to indicate that it lacks jurisdiction, the Court concludes that it has:

i. Material jurisdiction, insofar as the Applicants allege the violation of Articles 3(1) and (2) and 7(1)(a) and (b) of the Charter which has been ratified by the Respondent State.

ii. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration that allows individuals and Non-Governmental organisations with Observer Status with the African Commission on Human and Peoples' Rights to file cases directly to the Court.

iii. Temporal jurisdiction, insofar as the violations were allegedly committed as from January 2015, therefore, after the entry into force of the Charter and the Protocol for the Respondent State and after the deposit of the Declaration.

iv. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the territory of the Respondent State.

20. Accordingly, the Court holds that it has jurisdiction to hear the Application.

VI. Admissibility

21. Article 6(2) of the Protocol provides that "the Court shall rule on the admissibility of applications taking into account the provisions of Article 56 of the Charter".

22. Pursuant to Rule 50(1) of the Rules of Court, "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".[3]

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

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

23. Rule 50(2) of the Rules of Court, which in substance restates Article 56 of the Charter, provides that:

> Applications filed before the Court shall comply with all of the following conditions:
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> a. Indicate their authors even if the latter request anonymity;
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> b. Are compatible with the Constitutive Act of the African Union and with the Charter;
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> c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the African Union;
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> d. Are not based exclusively on news disseminated through the mass media;
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> e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
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> f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
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> g. Do not deal with cases that have been settled in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

24. The Court notes that the Respondent State has raised an objection to admissibility based on non-exhaustion of local remedies.

A. Objection based on non-exhaustion of local remedies

25. The Respondent State submits that the requirement of exhaustion of local remedies is an important requirement under Rule 40(5) of the Rules,[4] which provides that Applications should "…be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged".

26. The Respondent State draws the Court's attention to the fact that the Applicants have not exhausted the available local remedies insofar as they filed this Application before the Supreme Court ruled on the appeal *in cassation* that they filed against judgment No. 190/16 rendered on 8 November 2017 by the Court of Appeal of Bamako.

27. It concludes that the Court should declare the Application inadmissible.

28. The Applicants assert, in their response that, by Application No. 62 of 9 November 2017, they lodged an appeal in *cassation*

4 Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.

against the judgment of 15 December 2016.

29. They contend that the appeal in *cassation* in this case is ineffective since the procedure is unduly prolonged. Accordingly, they pray the Court to dismiss the objection raised.

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30. The Court recalls that, in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, applications must be filed after the exhaustion of local remedies, if any, unless it is clear that the proceedings are unduly prolonged.

31. 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.[5]

32. The Court further requires that the local remedies to be exhausted are those of a judicial nature. These must be available, that is, they must be available to the Applicant without hindrance and effective in the sense that they are "capable of satisfying the complainant" or of remedying the situation in dispute. The Court also emphasises that the condition of exhaustion of local remedies is assessed, in principle, as at the date of the institution of proceedings before it.[6]

33. The Court further notes that the compliance with this condition presupposes that the Applicant not only initiates the domestic remedies, but also awaits their outcome.[7]

34. The Court further notes that in the instant case, in order to challenge their dismissal by the *SAER-emploi* company the Applicants brought their case before the Sikasso Labour Tribunal, which rendered judgment No. 10/JUGT of 11 May 2016.

35. Following the appeal lodged by their former employer against this judgment, the Court of Appeal of Bamako rendered, on 15 December 2016, an invalidating judgment No. 190/16 against which the Applicants filed an appeal in *cassation* on 9 November 2017 before the Supreme Court which has jurisdiction to hear appeals in *cassation* against decisions in social matters, pursuant

5 *Yacouba Traoré v Republic of Mali,* ACtHPR, Application No. 010/2018, Ruling of 25 September 2020 (jurisdiction and admissibility), §39.

6 *Idem* § 41 and 42.

7 *Idem* §§ 46 and 47.

to Article 217 of Law No. 92-020 of 23 September 1992 of the Labour Code of Mali[8] and Article 87 of Organic Law No. 2016-046 of 23 September 2016 setting out the organization, rules of procedure of the Supreme Court and the procedure followed before it.[9]

36. The Court notes that the Applicants filed their Application before this Court on 21 February 2019 while their appeal *in cassation* was still pending before the Supreme Court which rendered its decision on 15 December 2020.[10]

37. With regard to the Applicants' argument that proceedings before the Supreme Court were unduly prolonged, the Court recalls that it has considered that the assessment of the nature of the duration of the proceedings relating to local remedies must be carried out on a case-by-case basis, according to the specific circumstances of each case.[11] In its analysis, it "takes into account, in particular, the complexity of the case or of the proceedings relating to it, the conduct of the parties themselves and that of the judicial authorities in order to determine whether or not the latter displayed passivity or definite negligence".[12]

38. In the instant case, the Court notes that the Applicants filed their appeal *in cassation* by Application No. 62 of 9 November 2017 in accordance with Article 133[13] of Law No. 2016-046 of 23 September 2016 on the Organic Law establishing the

8 Article 217 "the Supreme Court shall hear appeals in cassation against final judgments and judgments of the Court of Appeal. The appeal shall be lodged and judged in the forms and conditions provided for by the law on the organization and procedure of the Supreme Court".

9 Article 87: « The Judicial Section shall be the supreme judge of all the decisions rendered in civil, social and criminal and commercial matters by the courts of the Republic, with the exception of disputes relating to the OHADA uniform Acts.

10 Judgment No.93 of 15 December 2020 of the Supreme Court of Mali:
" The Court
In the form: Upholds the appeal.
On the merits: dismisses it.
Orders the Public Treasury to bear the costs".

11 *Beneficiaries of Norbert Zongo, Abdoulaye 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, § 92.

12 See *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (merits) (21 March 2018) 2 AfCLR 237, § 38; *Wilfred Onyango Nganyi and 9 others v Tanzania* (merits), § 136.

13 Article 133: "The declaration of appeal shall be made by a document containing, under penalty of nullity: 1. If the Applicant for cassation: a) is a natural person: his surname, first name, domicile, nationality, date and place of birth; b) is a legal entity: its form, name, registered office and the body that legally represents it; 2. The name, surname and domicile of the Respondent or, if it is a legal entity, its name and registered office; 3. An indication of the impugned decision. The statement shall indicate, where applicable, the points of the decision at issue, to

organisation, the rules of operation of the Supreme Court and the procedure followed before it.

39. The Court notes that while the aforementioned law, in particular, in its article 147,[14] grants a period of thirty (30) days from the appeal to file an additional memorandum containing the submission at the Supreme Court and arguments, a document that sets in motion the investigation of the case, the Applicants submitted their memorandum to the Supreme Court on 8 June 2018,[15] that is, seven (7) months after filing the appeal *in cassation*.

40. The Court holds, therefore, that the Applicants demonstrated some degree of negligence, which lengthened the duration of the proceedings before the Supreme Court. Consequently, what the Applicants allege as undue prolongation of the appeal is attributable to them.

41. In light of the foregoing, the Court finds that the Applicants have not exhausted local remedies. Accordingly, the Application does not meet the requirements of Rule 50(2)(e) of the Rules.

42. Having found the Application inadmissible on the basis of the above mentioned ground, the Court need not examine the other admissibility requirements, as these conditions are cumulative in nature.[16]

VII. Costs

43. The Applicants did not make any submissions on this point.

44. The Respondent State prays the Court to order the Applicants to bear the costs.

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which the appeal is limited. It shall be signed and accompanied by a copy of the decision".

14 Article 147: "The Advocate for the Applicant in cassation must, under penalty of forfeiture, file with the Registrar's office of the Supreme Court, at the latest within thirty (30) days from the date of receipt of the case file at this Registrar's office, a supplemental brief containing the legal grounds invoked against the contested decision, and where applicable, the documents invoked in support of the appeal (...)".

15 See judgment No. 93 of 15 December 2020 of the Supreme Court of Mali.

16 *Frank David Omary and Others v United Republic of Tanzania* (*admissibility*) (2016) 1 AfCLR 383 § 52.

45. Rule 32(2) of the Rules[17] provides that "unless otherwise decided by the Court, each party shall bear its own costs".

46. Based on the above provisions, the Court decides that each party shall bear its own costs.

VIII. Operative part

47. For these reasons,

The Court,

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Upholds* the objection to admissibility based on the non-exhaustion of local remedies;

iii. *Declares* the Application inadmissible.

On costs

iv. *Orders* that each Party shall bear its own costs.

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

Koutche v Benin (admissibility) (2021) 5 AfCLR 231

Application 020/2019, *Komi Koutche v Republic of Benin*

Ruling, 25 June 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, who had unsuccessfully challenged one of two criminal trials he faced before the domestic courts of the Respondent State brought this Application claiming that the processes around his trial were in violation of some of his human rights. Following the Respondent State's challenge on admissibility, the Court held that the Application was inadmissible for failure to exhaust local remedies.

Admissibility (civility in pleadings, 34-38; exhaustion of local remedies, 42, 49-52, 60-63; equality of arms, 62; duration of domestic proceedings, 64, 68, 75)

I. The Parties

1. Komi Koutche (hereinafter referred to as the "Applicant") is a politician and a national of Benin, who at the time of filing this Application, claimed to be residing in the United States of America and to have the status of a political asylum seeker in Spain. The Applicant is the subject of criminal proceedings in his country of origin before the Court for the repression of economic crimes and terrorism (CRIET) for misappropriation of public funds.

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 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 (hereinafter referred to as "the Declaration"). On 25 March 2020, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument of withdrawal of its Declaration. The Court ruled that this withdrawal had no effect on pending

cases and also on new cases filed before the entry into force of the withdrawal on 26 March 2021, that is, one year after its deposit.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that following Cabinet meetings of 28 June and 2 August 2017, audit reports on the management of the cotton sector as well as the National Microfinance Fund (hereinafter referred as to "NMF") were published, in which the Applicant was implicated in financial mismanagement and misappropriation.[2]

4. Aggrieved that he was not given the right of response before the publication of the two audit reports, the Applicant filed two lawsuits before the Constitutional Court. The first, relating to the cotton sector, was filed on 2 August 2027, and the second, concerning the FNM sector, was filed on 11 August 2017. In both lawsuits, the Applicant alleged violation by the Respondent State of his rights to be heard and to a defence as protected by Article 17 of the Beninese Constitution and Article 7(1)(b) of the Charter.

5. As regards the first lawsuit, by a decision of 5 December 2017 (DCC 17-251),[3] the Constitutional Court, chaired by Théodore HOLO, found a violation of the principle of adversarial proceedings, as the audit did not afford the Applicant the right to respond to the cotton sector audit report prior to its adoption and publication by the Council of Ministers.

6. With regard to the second lawsuit, on 6 December 2018, the Constitutional Court, presided by Mr. Joseph Djogbenou, the former Minister of Justice and Keeper of the Seals, rejected the Applicant's appeal against the NMF audit, on the ground that the absence of an adversarial hearing in an audit process did not constitute a violation of the Constitution of the Respondent State and the right to a fair trial.

1 *Hongue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5, and Corrigendum of 29 July 2020.

2 For the Cotton sector, the Applicant was at the time Minister of Economy, Finance and Denationalization Programmes; for the NMF, he was Director General.

3 The Court decided to join the Applicant's lawsuit with that of Mr. Kpodèto Philibert AZON (Application of 28 June 2017), filed with the Constitutional Court on 31 July 2017, under number 1285/221/REC.

7. In relation to the criminal case pending against him before the CRIET, the Applicant alleges that in March 2018, he learnt, through the press that he was being prosecuted at the initiative of the Minister of Justice, for embezzlement of NMF funds. According to the Applicant, the Minister of Justice and Keeper of the Seals, on 27 August 2018, issued a letter cancelling his ordinary passport, with instructions to arrest him if he entered the national territory or if a travel ticket was found on him. On 3 October 2018, Counsel for the Applicant filed an administrative appeal for the withdrawal of the decision to cancel the Applicant's passport. There was no action on this appeal.

8. On 17 September 2018, the authorities of the Respondent State transmitted the arrest warrant dated 4 April 2018 to the International Criminal Police Organization (hereinafter referred to as "INTERPOL") for the arrest of the Applicant. Although this warrant was cancelled on 6 April 2018 by the Investigating Magistrate in charge of the case, the Applicant was arrested on 14 December 2018, in Madrid by the Spanish authorities based on information provided by INTERPOL in the enforcement of the warrant.

9. On 17 December 2018, the Respondent State sent an extradition request to the Spanish authorities based on the arrest warrant of 4 April 2018. On 28 January 2019, the latter sent another extradition request to the Spanish authorities based on a new arrest warrant issued on 27 December 2018.

10. The Applicant was released on 17 January 2019 by the Central Investigation Tribunal No. 1 and the request of his extradition to the Respondent State was rejected.

11. The Applicant, by two letters dated 7 July and 9 September 2019 received at the Registry, informed the Court that he was no longer the subject of a red alert and that the information regarding the cancellation of his passport had been deleted from the INTERPOL database.

12. It emerges from the file that as at the date of filing this Application, the criminal case before CRIET that commenced in March 2018 against the Applicant and ten (10) other people, was still pending. Furthermore, according to the Respondent State the appeal lodged by the Applicant against the judgment by CRIET, which sentenced him for "embezzlement of public funds and abuse of office", in the proceedings relating to the FNM, to twenty (20) years imprisonment and the payment of a fine of five hundred million (500 000 000 CFA) is still pending before the appeals chamber of CRIET. The Respondent State points out that the preceding has

not been contested by the Applicant.

B. Alleged violations

13. The Applicant alleges the following violations:

Before the Constitutional Court

i. The right to an impartial and independent court, protected by Article 7(1) of the Charter, Article 10 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as " the ICCPR");

As regards procedure before the CRIET:

ii. Violation of Rule 7(1)(a) of the Rules of the ACHPR, Articles 10 of the UDHR, 14 of the ICCPR and Rule 26 of the Rules of the ACHPR for lack of independence and structural objective impartiality of CRIET (Investigating Committee of the Judgment and Appeals Chambers);

iii. Violation of Rules 2 and 3 of the Rules of the ACHPR for unequal protection before the law;

iv. Violation of Article 14(5) of the ICCPR for the lack of a two-tier trial as regards stopping referral which was the basis of the sentence of the Applicant;

v. Violation of Rule 7(1)(b) of the Rules of the ACHPR for breaching the presumption of innocence.

Cancellation of the passport of the Applicant

vi. Violation of Rule 12(2) of the Rules of the ACHPR, Article 2 of the ECOWAS Protocol on free movement and Article 12 2) and (4) of the ICCPR.

As regards the arrest and request for extradition

vii. Find violations of Rules 2, 3, and 6 of the Rules of the ACHPR.

On the right to respect of property

viii. Find the violation of Rule 14 of the Rules of the ACHPR.

On the right to dignity and good reputation

ix. Find the violation of Rule 5 of the Rules of the ACHPR.

On the right to vote and to participate in the conduct of the political affairs of one's country

x. Violation of Rule 13 of the Rules of the ACHPR and Articles 25 of the ICCPR and 21 of the UDHR.

III. Summary of the Procedure before the Court

14. On 23 April 2019, the Applicant filed with the Registry of the Court the Application together with a request for provisional measures, which were served on the Respondent State on 28 May 2019. The Respondent State was required to submit its Response to

the Application and to the request for provisional measures within sixty (60) and fifteen (15) days from the date of receipt of the notification, respectively.

15. On 2 December 2019, the Court issued a Ruling on provisional measures ordering the Respondent State to "stay the proceedings for cancelling the Applicant's passport until the final judgment (...)".

16. After several extensions of time at the behest of the Parties, they filed their submissions on the merits and reparations within the time limit set out by the Court.

17. On 9 December 2020, the pleadings were closed and the Parties notified thereof.

IV. Prayers of the Parties

18. The Applicant prays the Court to:

1. Order the Respondent State to annul all proceedings against the Applicant stemming from the Cabinet meeting of 2 August 2017 as well as all subsequent decisions for failure to follow procedure and for violation of the adversarial principle.
2. Order the Respondent State to annul the decision No. DCC 18-256 of 6 December 2018, of the Constitutional Court, and any subsequent decisions for violation of the adversarial principle and violation of the principle of independence and impartiality.
3. Order the Respondent State to annul all criminal proceedings pending before the criminal chambers of CRIET and, *a fortiori*, the decision to dismiss the Applicant from the investigating committee of 25 September 2019 cited above and the sentence of 4 April 2020 (No. 0014/CRIET/C.CRIM) as well as any other decision emanating from these proceedings;
4. Order the Respondent State to annul the arrest warrant of 27 December 2018;
5. Order the immediate release of those arrested in relation to this matter;
6. Order the Respondent State to repeal the effects of the decision to cancel the passport of the Applicant of 27 August 2018 and to provide him with identification and travel documents to enable him to travel across borders freely;
7. Order the Respondent State to amend the ministerial decision of the Ministry of Justice and Legislation of 22 July 2019 cited above to make it consistent with the provisions of the African Charter on Human and Peoples' Rights (ACHPR) and the ICCPR;

8. Order the Respondent State to amend Law No. 201 18-13 of 2 July 2018 on the establishment of CRIET to make it consistent with the provisions of the African Charter on Human and Peoples' Rights and the ICCPR;
9. Order the Respondent State to amend the Law No. 2078-02 of 2 July 2018 on the Supreme Council of the Judiciary to make it consistent with the provisions of the African Charter on Human and Peoples' Rights and the ICCPR and to guarantee the principle of full and total independence and objective impartiality of judges;
10. Order the Respondent State to amend decree No. 2019-462 of 30 September 2019 to make it consistent with the provisions of the African Charter on Human and Peoples' Rights, the ICCPR and to guarantee the principle of full and total independence and objective impartiality of judges;
11. Order the Respondent State to pay the Applicant the sum of 17 455 775 Euros (seventeen million, four hundred and fifty-five thousand, seven hundred and seventy-five Euros).

19. For its part, on the form, the Respondent State prays the Court to find that the Application is inadmissible "due to the use of disparaging language, for failing to exhaust local remedies, for not having been filed within a reasonable time after the exhaustion of local remedies."

20. On the merits, the Respondent State prays the Court to dismiss all of the Applicant's allegations and to find that:

i. The independence and impartiality of the Beninese judiciary has not been called into question;
ii. The Applicant was not discriminated against during the proceedings before the CRIET;
iii. The Applicant does not prove the alleged violation of his right to the presumption of innocence;
iv. The Applicant's passport has not been cancelled and that the Applicant travels freely with his ordinary passport;
v. The Applicant's assets are disproportionate to his objective means;
vi. The Applicant has not proved the alleged damage to his image caused by the actions of the State;
vii. There is no interference of such a nature as to impede his right to participate in public affairs;
viii. There are no grounds for reparations.

V. Jurisdiction

21. 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 instruments ratified by the States concerned.

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

22. Furthermore, Rule 49(1) of the Rules of Court[4] provides that "[t]he Court shall conduct a preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules."

23. It follows from the above provisions that the Court must preliminarily, conduct an examination of its jurisdiction and rule on any objections raised, if any. The Court notes that in this case, the Respondent State did not raise any objections to its jurisdiction. Nevertheless, the Court is required to examine its material, personal, temporal and territorial jurisdiction.

24. The Court notes that there is nothing on the record to indicate that it does not have jurisdiction in this matter. The Court, therefore, concludes as follows:

i. It has material jurisdiction, since the Applicant, as indicated in paragraph 13 of this judgment, alleges the violation of human rights under the Charter, ICCPR and the UDHR, instruments to which the Respondent State is a Party.

ii. It has personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and had deposited the Declaration which allows individuals and non-governmental organizations to bring cases directly before the Court. In this regard, the Court recalls its position that the withdrawal by the Respondent State of its Declaration on 25 March 2020 has no effect on the present application, since the withdrawal was made after the application had been filed with the Court;[5]

iii. It has temporal jurisdiction, insofar as the alleged violations were perpetrated, after the entry into force of the above-mentioned instruments;

iv. It has territorial jurisdiction, in so far as the facts of the case occurred in the territory of a State Party to the Protocol, namely the Respondent State.

25. In light of the foregoing, the Court finds that it has jurisdiction in the present case.

VI. Admissibility

26. Article 6(2) of the Protocol stipulates that, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of

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

5 See paragraph 2 above.

Article 56 of the Charter".

27. Rule 50(1) of the Rules of Court[6] provides that "[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".

28. Rule 50(2) of the Rules of Court,[7] which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with 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 Court 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.

A. Conditions of admissibility in contention between the parties

29. The Respondent State raises two objections to the admissibility of the Application based on, firstly, the use of disparaging language and, secondly, the non-exhaustion of local remedies.

i. Objection based on the use of disparaging language

30. The Respondent State considers the allegations that: "several cases have been initiated by the Government with the sole purpose of either to keep Komi Koutche out of the country (…) or to embroil him by means of a transformed judiciary" by laws that render justice pro-governmental rather than republican; "The

6 Formerly Rule 40 of Rules of Court, 2 June 2010.

7 *Ibid.*

ultimate goal of all these clumsily mounted manoeuvres against Mr. Koutche (...)" and that "(...) the Government tends to persecute dissenting voices and to weaken opposition figures by using the courts as an instrument for personal political ends (...)" .

31. According to the latter, by these remarks, "the Applicant undermines the prestige and credibility of the institutions of the Republic of Benin and jeopardises their effectiveness by resorting to terminology that is in no way necessary for the need to enjoy freedom of expression or to firmly denounce alleged human rights violations."

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32. The Applicant prays the Court to reject this objection, on the ground that in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe,*[8] the African Commission on Human and Peoples' Rights (hereinafter referred to as to "the Commission") has developed its jurisprudence in the direction of a less strict interpretation of the test, in the name of the right to freedom of expression. He argues that "the Respondent State … does not show how the terminology used is disparaging or insulting, and fails to substantiate any grievance in this regard."

33. The Applicant further contends that his "remarks cannot be deemed to undermine the prestige and credibility of the institutions of the Republic of Benin, since he only reported the facts in his application in a tone that highlights the violations of rights of which he is a victim."

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34. The Court notes that exchange of pleadings between the Parties and any other type of intervention before the courts must obey rules of civility and good conduct, so as to avoid the use of legal

8 Comm. 293/04 (May 22, 2008).

proceedings to undermine the dignity, reputation or integrity of persons or institutions.

35. The Court notes that the issue here is whether or not the above words cited by the Respondent State are offensive within the meaning of Rule 50 of the Rules. In this regard, the Court has in the past shared the Commission's view that words are considered to be offensive if they are aimed at:

> [I]ntentionally violating the dignity, reputation and integrity of a judicial official or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.[9]

36. The Court endorses the Commission's position that this condition of admissibility must be examined in light of the right to freedom of expression under section 9(2) of the Charter.[10] In this regard, the Court recalls its jurisprudence that:

> Certain statements are of the kind that is expected in a democratic society and should thus be tolerated, especially when they originate from a public figure as the Applicant is. By virtue of their nature and positions, government institutions and public officials cannot be immune from criticisms, however offensive they are; and a high degree of tolerance is expected when such criticisms are made against them by opposition political figures. [11]

37. In the instant case, the Court notes that nothing in the words cited above shows that they are intended to undermine the dignity, reputation or integrity of the officials or institutions of the Respondent State.

38. The Court further notes that, in light of the case law on freedom of expression set out above, the Applicant, being a politician, the Respondent State must be more tolerant of the language used in his submissions in a situation with political implications as in the instant case.

9 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 70. See also *Boubacar Sissoko and 74 Others v Republic of Mali*, ACtHPR, Application No. 037/2017, Judgment of 25 September 2020 (merits and reparations), § 28; and Communication 284/2003, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (3 April 2009) ACHPR, § 91.

10 Communication no 284/2003, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (3 April 2009) ACHPR, §§ 91-96.

11 *Ingabire Victoire Umuhoza v Republic of Rwanda* (merits) (24 November, 2017) 2 AfCLR 165, § 160. See also *Boubacar Sissoko and 74 Others v Mali* (merits reparations), § 29; *Sébastian Germain Ajavon v Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment of 29 March 2019 (merits), § 73.

39. Accordingly, the Respondent State's objection is dismissed.

ii. Objection based on non-exhaustion of local remedies

40. The Court further notes that the Respondent State raised an objection based on non-exhaustion of local remedies indicating that the Applicant had domestic remedies available to him including before the Constitutional Court, the CRIET, the administrative courts and the Supreme Court.

41. For his part, the Applicant relies on: a) his having exhausted the remedy before Constitutional Court; b) that the remedy sought before CRIET is ineffective; c) that appeal proceedings before the administrative courts were unduly prolonged; d) that Appeals Chambers and the Judicial Chamber of the Supreme Court lack independence and impartiality and e) the political context prevents him from exhausting available remedies.

42. The Court notes that it has consistently held that the requirement of exhaustion of local remedies applies only to ordinary, available and effective judicial remedies.[12] In order to rule on the objections raised by the Respondent State, the Court thus will examine below the domestic remedies exercised by the Applicant or which those which he should have exercised before the national courts.

a. Appeal to the Constitutional Court

43. The Respondent State submits that the Applicant did not lodge, before the Constitutional Court, a case alleging the violations that he is making before this Court. According to the Respondent State, contrary to the Applicant's allegation, the case brought before the Constitutional Court was on the violation of the right to defence, while the case before CRIET, which is the subject matter of the application before this court was for misappropriation of public funds when he was Head of FNM. The Respondent State submits that the Applicant, having failed to submit to the Constitutional Court the violations he alleges before this Court, cannot claim to have exhausted the remedy available to him before the Constitutional Court.

12 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465 § 64. See also *Wilfried Onyango Nganyi and 9 Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

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44. The Applicant alleges that he exhausted the remedies before the Constitutional Court, given that he brought before it a case of "the violation of the constitutionally guaranteed principle of adversarial proceedings, with respect to the two management audit reports of the cotton sector, on the one hand, and the NMF on the other hand." According to the Applicant, "the Constitutional Court, presided over by Mr. Djogbenou (former Minister of Justice and Attorney General of President Talon ...), on 6 December, 2018, rendered Judgment No. DCC 18-256 on the NMF case only. In the said Judgment, the Constitutional court held that there had been no violation of the right to defence, contrary to a previous Judgment of the Constitutional Court composed differently".[13]

45. The Applicant alleges that "from the inception of the new Constitutional Court, the former Minister of Justice, Mr. Joseph Djogbenou who is the personal counsel of President Talon became the new President of the Constitutional Court in June 2018. He had been charged with prosecuting Mr. Komi Koutche on behalf of the executive in his capacity as Minister of Justice within the purview of the case relating to the management of the FNN and it was only when he became President of the Constitutional Court that the matter of Komi Koutche was examined on 6 December 2018."

46. The Applicant alleges that "All the actions of the Benin government against [him] stem from an audit whose conditions he challenged due to the non-respect of the adversarial principle before the highest court in the field of human rights in Benin. He has therefore exhausted local remedies with regard to the originating fact which led to all the charges that will be brought against him in terms of procedure."

47. The Applicant contends that "since the Constitutional Court is the highest court of the Beninese order, competent to hear violations of principle of a constitutional nature, it stands to reason that the Applicant has effectively exhausted the existing domestic remedies in this matter."

13 Decision of the Constitutional Court DCC 17-251 of 5 December 2017 on the cotton sector.

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48. The Court notes that in its decision DCC18-256 OF 6 December 2018 in the FNN matter, the Constitutional Court found that the adoption of the audit report by the Cabinet without hearing the Applicant did not violate his right to defence. The Constitutional Court held that the Applicant had the possibility of defending himself before administrative and judicial bodies if the said audit report was used to initiate disciplinary or judicial procedures against him. The question, therefore, is whether or not, through this decision of the Constitutional Court, it can be said that the Applicant exhausted local remedies.

49. The Court recalls that the requirement to exhaust local remedies entails that issues brought before it for determination must be, on the merits, the same as those that have been brought before the highest domestic court with jurisdiction in the matter.[14] It is not enough that the Applicant merely seized that court. It is also necessary for him to have submitted to it, in substance, the same complaints as those he raises before this Court.

50. The Court notes that the Applicant's appeal before the Constitutional Court was in relation to the violation of the adversarial principle and the right to defence, in relation to the adoption of the FNM audit report without previously hearing the Applicant. The violations alleged by the Applicant in the instant case, which are set out in paragraph 13 of this judgment, are related to new composition of the Constitutional Court, the proceedings before the CRIET against the Applicant, the cancellation of his passport, his arrest and extradition request, his rights to property, dignity and reputation, and to participate in the conduct of public affairs of his country.

51. The Court considers that the subject matter of the appeal before the Constitutional Court and that of the Application before this Court are not the same, in substance, and the Applicant cannot claim to have exhausted the domestic remedies before the Constitutional Court.

52. The Court further notes that, before the Constitutional Court, the Applicant should have raised before it the issue of its lack of impartiality and independence. This especially, because according to the Applicant himself, the new President of the Constitutional

14 *Sébastien Germain Ajavon v Bénin* (merits), § 98.

Court, and lawyer of the President of the Republic, had been charged, in his capacity as Minister of Justice, with prosecuting him for mismanagement of the FNM.

53. Based on the foregoing, the Court upholds the objection raised by the Respondent State.

b. Remedies before the CRIET

54. The Respondent State alleges that "prior to bringing a case before international human rights courts, domestic remedies must be exhausted," which, according to it, "postulates that the Applicant must have 'substantially' invoked before the domestic courts the claim that he is making before this Court." The Respondent State contends that this requirement affords the Respondent State "the opportunity to reform the effects of the decision resulting from an impugned act by the State. *In fondo*, it is a requirement that stems from the sovereignty of the State."

55. The Respondent State submits that "the Applicant did not even try to argue his case before the national courts in a timely manner. He avoided appearing before judges and resorted to multiple correspondences in an attempt to stop the proceedings against him. To date, no decision on the merits of the case has been rendered against the Applicant and, moreover, no decision has been rendered after the exercise of the appeals."

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56. The Applicant alleges that the appeal before CRIET is ineffective and unrealistic. He submits that CRIET is a court of exceptional or *ex post* jurisdiction and that the proceedings before it do not comply with the basic principles of law.

57. He observes that this Court has already found that the CRIET does not provide for a right of appeal as guaranteed in Article 14(5) of the ICCPR but also that Article 12 of the law establishing the CRIET does not establish equality between the parties since a convicted person could not appeal whereas the Prosecutor could do so in case of acquittal.

58. The Applicant indicates that this fact is also confirmed by the Decision rendered by the Central Investigating Court No. 1 of the *Audiencia Nacional de Madrid* (National High Court of Madrid), which rejected the Applicant's extradition request, stating that

there are grounds to fear that extraditing the Applicant may infringe his right to an ordinary judge predetermined by law, and that his persecution is politically motivated. He notes that the Commission for the Control of INTERPOL's Files also expressed the same fears as the *Audiencia Nacional de Madrid* (National High Court of Madrid).

59. The Applicant alleges having encountered difficulties in travelling to participate in the proceedings from 12 March 2020[15] and in obtaining information relating to his trial before the CRIET, in particular the fact that he was not notified of the committal judgment by the Investigating Commission, neither was he notified of the hearing. He only learned of the date of the hearing through the lawyer for Mr. Edenakpo, co-accused, whereas the CRIET knows his lawyers.

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60. The Court notes that the *ratio legis* of the requirement to exhaust local remedies lies in the need to afford States, through their domestic courts, the opportunity to prevent or redress the violations alleged against them.[16]

61. The Court also notes that, to determine whether there has been compliance with the requirement of exhaustion of local remedies, the relevant domestic proceedings to which the Applicant is party should have been completed by the time he filed the Application before this Court.[17] It follows from this therefore, that the Applicant's allegation that there was no two-tier jurisdiction before the CRIET must be dismissed because the Applicant could have waited until the completion of the first-instance proceedings before CRIET.

15 According to the Applicant, he resides in the United States, in the State of Maryland. A state of health emergency and disaster was declared on 5 March 2020 in the State of Maryland to combat the spread of the Covid-19 virus. On 12 March 2020, the Governor of the State of Maryland, Lawrence J. Hogan, issued an Order for the imposition of strict containment measures and social restrictions, which was amended on 23 and 30 March 2020.

16 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94; *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Judgment of 4 December 2020 (merits and reparations), § 49.

17 *Yacouba Traoré v Republic of Mali*, ACtHPR, Application 010/2018, Ruling of 25 September 2020 (jurisdiction and admissibility), § 41.

62. With regard to the violation of the right to equality of arms, the Court notes that in *Sébastien Germain Ajavon v Benin*, it held that the infringement of this right was occasioned due to the fact that a convicted person could not appeal the ruling issued by CRIET, whereas the Prosecutor could do so in case the accused person was acquitted.[18] The Court reiterates that the so-called impossibility of appealing does not absolve the Applicant from awaiting the end of proceedings before CRIET. Be that as it may, the allegation of violation of the principle of equality of arms relates to the merits, not to the exhaustion of local remedies.

63. The Court notes that pursuant to Article 56(6) of the Charter and Rule 50(2) of the Rules, where domestic proceedings are pending , it cannot be seized of the matter except if the matter is unduly prolonged. In the instant case, the Court notes that at the time it was seized of the Application, proceedings against the Applicant before CRIET, which started in March 2018, were ongoing. In the circumstances, the Court must decide whether the domestic proceedings were unduly prolonged such as to allow the Applicant to seize it before the end of the proceedings.

64. The Court considers that in assessing whether or not the duration of the proceedings relating to domestic remedies is normal or abnormal must be made on a case-by-case basis, taking into account the circumstances of each case.[19] In its analysis, the Court "takes into account, in particular, the complexity of the case or of the procedure relating to it, the conduct of the parties themselves and that of the judicial authorities in determining whether the latter have shown a degree of passivity or clear negligence." [20]

65. The Court notes that the complexity of this case is not in dispute, not only because of the number of persons prosecuted – eleven (11) in all – but also the complex nature of the offences being prosecuted, namely, abuse of office, embezzlement, illicit enrichment, money laundering, lack of licence and corruption.

66. With respect to the conduct of the parties, the court notes that there is no evidence on the record that the Respondent State or its counsel engaged in conduct that led to the delay in finalization of the case. The Court further notes that the investigative measures

18 *Sébastien Germain Ajavon v Bénin* (merits), § 213.

19 *Beneficiaries of the late Norbert Zongo, Abdoulaye 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, § 92.

20 See *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and merits) (21 March 2018) 2 AfCLR 237, § 38; *Wilfred Onyango Nganyi and Others v Tanzania* (merits), § 136.

taken, including arrest warrants and the shortening of time limits of proceedings before the Supreme Court, indicate the interest of the judicial authorities of the Respondent State in determining and adjudging the case expeditiously. Moreover, the Applicant's non-appearance at certain hearings, due to the fact that he resides abroad, may be considered to have contributed to the delayed proceedings.

67. Regarding the Applicant's difficulty to appear before the domestic courts due to the Covid-19 restrictive measures, the Court considers that this is traceable to 12 March 2020, which is subsequent to its referral on 23 April 2019, and cannot therefore be taken into consideration.[21] Even if this fact were to be taken into account, it would be one of the reasons to justify the extension of proceedings before the national courts.

68. The Court notes that the Applicant has not shown how a non-conclusion of his case in one (1) year and one (1) month, which is the time that elapsed between the beginning of the proceedings and the seizure of the Court, can be considered as an undue prolongation of the criminal trial before the CRIET.

69. The Court further notes that the allegation based on the position of INTERPOL and *Tribunal Central d'Instruction N° 1 of Audiencia Nacional* of Madrid (National High Court of Madrid) in relation to the CRIET concern, respectively, the assessment of the grounds for the request for extradition of the Applicant and the assessment of the deletion of his passport data from the INTERPOL database. In the instant case, however, the issue is about the exhaustion of domestic remedies before the CRIET. In this regard, the Court reaffirms that the Applicant could have waited until the completion of the first-instance proceedings before CRIET (see paragraph 60 above), instead of casting aspersions on the ability of the CRIET.[22] This argument therefore, does not stand.

70. On the alleged difficulties in obtaining information relating to his trial before CRIET, the Court notes that this fact is subsequent to the filing of this Application. It cannot, therefore, examine this issue.

21 *Yacouba Traoré v Republic of Mali*, CAfDHP, Application No. 010/2018, Judgment of 25 September 2020 (jurisdiction and admissibility), § 41; ECHR, *Baumann v France*, Application No. 33592/96, 22 May 2001, § 47.

22 *Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 143. See also, *Diakité Couple v Republic of Mali* (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 53.

71. Based on the foregoing, the Court upholds the objection raised by the Respondent State.

c. Appeals before Administrative Courts

72. The Respondent State alleges that the Applicant's passport has never been seized and that the appeal against the so-called decision to cancel his passport is still pending before administrative courts. It concludes that local remedies were not exhausted.

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73. The Applicant alleges that he lodged "an appeal at a senior administrative level for the withdrawal of the arbitrary decision to cancel his ordinary passport ... To date, this appeal has received no response. The same applies to the appeal against abuse of authority to the President of the Cotonou First Class Court of First Instance on 15 February 2019."

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74. The Court notes that the issue that arises here is whether the Applicant's administrative and judicial appeals before domestic administrative and judicial courts were unduly prolonged.

75. The Court recalls that for it to decide whether a domestic proceeding is unduly prolonged, it takes into consideration, the date on which the case is filed at the domestic court and the date of its referral to this Court. In the instant case, the Court notes that on 3 October 2018, Counsel for the Applicant filed an administrative appeal to the President of the Respondent State for the withdrawal of the decision to cancel his passport. They also filed a request relating to abuse of power to the President of the Cotonou first class Court of First Instance on 15 January 2019.

76. In view of the fact that the Court was seized on 23 April 2019, six (6) months and twenty (20) days elapsed with respect to the appeal relating to the cancellation of the Applicant's passport.

Regarding the request before the Cotonou first class Court of First Instance, two (2) months had elapsed.

77. The Court considers that, in relation to the administrative appeal against the decision to cancel the Applicant's passport, this appeal cannot be taken into account because it is not a judicial appeal already analysed in the preceding paragraph.

78. As regards the abnormally prolonged nature of the case before the Court of First instance of Cotonou, the Court notes that the Applicant does not adduce evidence to show how two (2) months and eight (8) days constitute an unreasonable delay of the proceedings before the Cotonou first class Court of First Instance.

79. Accordingly, the Court upholds the objection raised by the Respondent State.

d. Remedies before the Appeals Chambers of CRIET and the Judicial Chamber of the Supreme Court

80. The Respondent State asserts that, appeals before the Appeals Chamber of CRIET and the Judicial Chamber of the Supreme Court are available and efficient, and that the Applicant's allegations cannot exempt him from exhausting local remedies. Specifically, it affirms that contrary to the Applicant's statements, the fact that the Judge who had presided over the Trial Chamber became President of the Appeals Chamber of CRIET does not call into question the impartiality of this body, since the appeal has not even taken place yet.

81. The Respondent State further contends that, according to Article 129 of the Constitution, "magistrates are appointed by the President of the Republic, on the proposal of the Minister of Justice and Attorney General, after receiving the opinion of the Supreme Council of the Judiciary)" and that this method of appointment does not raise any problem regarding the independence of the national courts. The Respondent State further asserts that under Article 126 of the Constitution, "the security of tenure of Beninese judges is unlimited. No judge may be assigned, promoted, or transferred without his or her consent."

82. The Respondent State also alleges that the careers of Supreme Court magistrates are being extended to meet the need for justice delivery as a public service, and these magistrates continue to enjoy the same rights and obligations as before.

83. The Respondent State refutes the alleged collusion between two of its representatives, Advocate Assogba, and Advocate KOUNDE, respectively with the President of the Supreme Court and the Minister of Justice. In the case of Assogba, the Respondent State

contends that the document attached by the Applicant contradicts his allegation and that in the case of Advocate Kounde, his relationship with the Minister of Justice dates back to the time when he was a trainee lawyer.

84. The Respondent State further refutes the alleged collusion between the Judicial Chamber of the Supreme Court and the prosecutor of CRIET, stating in its press briefing that the latter spoke of the appearance of twenty-nine (29) administrative officials allegedly guilty of embezzlement of public funds and did not, in any case, mention the name of Komi Koutche. In addition, the Respondent State argues that the Applicant himself acknowledges that his file was not on the provisional docket of the criminal session.

85. On the shortening of the time limit for the proceedings, the Respondent State alleges that it is a gratuitous decision taken on the basis of an application and is not contradictory. It argues that the Applicant was notified at the town hall, and the said notification was served on his lawyer, Advocate Théodore Zinsou.

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86. The Applicant alleges that the Appeals Chambers of the CRIET are not independent mainly because the presiding judge of the Trial Court that convicted him was appointed President of the Appeal Court by Cabinet, upon recommendation by the Minister of Justice and after the opinion of the Supreme Council of the Judiciary.

87. Regarding the appeals before the Judicial Chamber of the Supreme Court, the Applicant alleges that he appealed to the said Court against the arrest warrant of 27 December 2018 and the indictment and referral order of 25 September 2019. He further alleges, however, that these remedies proved ineffective and fruitless due to the fact that the magistrates of the said Court and the Public Prosecutor's Office are retired persons who have been recalled from retiring by the Government, pursuant to Decrees No. 2019-150 of 29 May 2019 and Decree 2019-426 of 30 September 2019.

88. The Applicant states that according to these two decrees, "retired magistrates who wish to return to office must make an express request to the Head of State." These decrees, in his view, "do not specify the objective criteria adopted by the executive to select a particular candidate." As a result, "the total discretionary

power of the executive validating their candidacy makes them beholden to the Head of State by duty of gratitude (consciously or unconsciously)".

89. He also states that at the request of the Judicial Officer of the Treasury representing the Respondent State and through the office of Advocate Assogba, from the Office of the President of the Constitutional Court and Minister of Justice, originator of the case, and of Mr. Kounde, from the Office of the Minister of Justice, the Supreme Court reduced the time limits of the proceedings.

90. The Applicant further cites the collusion between the Judicial Chamber of the Supreme Court and the CRIET Prosecutor in the fact that "the Supreme Court was to render its judgment on 13 March 2020. On the eve of the ruling (12 March 2020), the Prosecutor of CRIET, during a press briefing, revealed that the proceedings of Mr. Komi Koutche were among the cases to be judged".

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91. The Court notes on the one hand, that the Respondent State contends that the Applicant has not exhausted available and efficient local remedies, notably, before the Constitutional Court, CRIET and the Supreme Court, on the other hand, the Applicant does not challenge the existence of such remedies. According to the Respondent State, the Applicant alleges rather that these judicial bodies are inefficient due to the fact that they lack independence and impartiality.

92. On the efficiency of the local remedies, the Court recalls that it adopted the jurisprudence of the Commission according to which "it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the Complainants to cast aspersions on the ability of the domestic remedies of the State". [23]

93. The Court notes that in the instant case, the Applicant challenges the efficiency of the entire judicial system of the Respondent State without providing sufficient information to prove it. The information

23 *Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 143. See also, *Diakité Couple v Republic of Mali* (jurisdiction and admissibility) (28 September 2017) 2 AfCLR 118, § 53.

provided by the Applicant, notably the procedure for appointing judges and the lack of impartiality of some judges stem from the substance and do not prevent him from exhausting all available remedies in the internal judicial system to test its efficiency.

94. In view of the foregoing, the Court upholds the objection raised by the Respondent State.

e. Objection based on the fact that the political context cannot excuse the Applicant from exhausting domestic remedies

95. The Respondent State contends that the Applicant ought to have exhausted local remedies and rejects the claim by the latter of the political context to justify the failure to exhaust local remedies. Specifically, it alleges that "from 2016, Benin initiated the process of cleaning up public management. In this regard, certain institutions were audited, including Société Béninoise de Manutention Portuaire, Office national pour l'appui à la sécurité alimentaire, Centrale d'achat des intrants agricoles, Conseil national des chargeurs du Bénin and Fonds national de la microfinance."

96. The Respondent State alleges that, like other institutions, the management audit of FNM for the financial years during which Mr. Komi Koutche was in charge revealed numerous serious irregularities, and that it was in the light of these irregularities and cases of misappropriation of public funds that the judicial processes were initiated against the Applicant and other executive staff of FNM and other institutions audited.

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97. The Applicant alleges that, with the coming of the new regime, democracy has retrogressed, with the media under close surveillance and the judiciary subjugated. He contends that the Government tends to persecute dissenting voices and to weaken opposition figures by manipulating the judiciary to achieve individual political gains. In his case, he considers himself to be politically persecuted like other opposition members and that the Government has initiated several legal court cases for the purpose of removing him from the country or using a compromised

judiciary to jail him.

98. Referring to this Court's ruling in *Sébastien Ajavon v Republic of Benin*, the Applicant states that "the particular circumstances and, more specifically, the political nature of the instant case absolves the Applicant from exhausting the local remedies, which are certainly available but ineffective insofar as the country's judiciary lacks independence and impartiality."

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99. The Court notes that the issue that arises is whether the political context may absolve the Applicant from exhausting local remedies. In this connection, the Court observes that the prosecution of a politician is not per se a ground for exemption from the requirement to exhaust local remedies. The Court further observes that where, in a particular context, it appears that the political context has significant negative impact on the functioning of the courts, it will take into account, on a case-by-case basis, the scope of the implications of that context in deciding whether to exempt the Applicant from exhausting local remedies.

100. Thus, in *Sebastian Germain Ajavon v Benin,*[24] the Court held that:

> in interpreting the rule of exhaustion of local remedies, it has regard to the circumstances of the case, such that it realistically takes into account not only the remedies provided in theory in the national legal system of the Respondent State, but also the legal and political context in which the said remedies are positioned and the personal situation of the Applicant.

101. The Court also recalls that in the same case, in dismissing the Respondent State's objection on the ground that local remedies had not been exhausted, it examined the material obstacles[25] which had deprived the Applicant of the remedies which he would have had to exhaust if those obstacles had not been present.

102. The Court notes that in *Sebastian Ajavon v Benin*, referred to by the Applicant, the Court, in finding that the Applicant was exempted from exhausting local remedies, had examined the context of the

24 *Sébastien Germain Ajavon v Bénin* (merits and reparations), § 110.

25 *Ibid,* § 113: for obstacles to recourse pursuant to Article 206 of the Code of Criminal Procedure, § 114 for obstacles to recourse before the administrative courts and § 115 for obstacles to recourse after the judgment of the CRIET.

case in light of the particular circumstances surrounding it.[26] The Court laid emphasis on the specific situation of the victim who in the course of local remedies had faced obstacles resulting from the conduct of the authorities of the Respondent State. Specifically, the Court held that:

> the Prosecutor General's appeal in the end placed the Applicant in a state of confusion, such that he could not utilise the remedy provided under Article 206 of the Benin Code of Criminal Procedure, and this, ipso facto rendered the remedy unavailable. Thus, failure in the obligation to effect service was transformed into an impediment for the Applicant to exercise the local remedies and exhaust them.[27]

103. The Court notes that, in the instant case, the cases pending before the domestic courts concerning the Applicant were following their normal course at the time they were referred to this Court, and there was no indication that the Applicant was facing serious procedural or other obstacles.

104. The Court also notes that the only impediments that the Applicant cited relate to communication with CRIET and the fact that the State's judicial authorities required his presence in the country in order to ensure his appearance at the hearings. In the Court's view, these facts cannot be considered to constitute an impediment to the exhaustion of domestic remedies. The requirement to appear before a judge, which is an obligation for an indicted person, is not in any way prejudicial and is consistent with the rules of criminal procedure.

105. The Court notes that, in any event, and as recognised by the Parties, the domestic judicial proceedings relating to the cancellation of the Applicant's passport and the mismanagement of public funds are still ongoing, the Applicant having been convicted at first instance by CRIET and the appeal pending before the CRIET Appeals Chambers.

106. From the foregoing, the Court concludes that the political context, as raised by the Applicant, cannot be an obstacle to the exhaustion of local remedies and, therefore, upholds the objection raised by the Respondent State.

B. Other conditions of admissibility

107. The Court notes that the Parties do not dispute that the Application

26 *Ibid,* § 113: for obstacles to recourse pursuant to Article 206 of the Code of Criminal Procedure, § 114 for obstacles to recourse before the administrative courts and § 115 for obstacles to recourse after the judgment of the CRIET.

27 *Ibid*, § 113.

meets the requirements of Article 56(1), (2), (4), (6) and (7) of the Charter and Rule 50(2)(a)(b)(d)(f) and (g) of the Rules.[28]

108. Having concluded that the Application is inadmissible on the basis of non-exhaustion of domestic remedies, the Court does not have to rule on the conditions of admissibility under paragraph 1, 2, 3, 4, 6 and 7 of the Charter and Rules 50(2)(a)(b)(d)(f) and (g) of the Rules[29] which are not under contention between the parties. This is because the conditions of admissibility are cumulative, and if one condition is not met, the Application is inadmissible.[30]

109. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

110. The Applicant prays to Court to order the Respondent State to bear the costs in terms of Lawyer's fees as follows:

a. Barrister Luis Chabaneix: One hundred and fifty-three thousand (153,000 Euros);

b. Barrister Jaime Sanz de Bremond fifty seven thousand three hundred and fifty Euros (57,350 Euros) ;

c. Barrister Gregory Thuan Dit Dieudonne': One hundred and fifty thousand Euros 150,000 Euros

d. Kharti Prakash: Fifty thousand USD (USD50,000);

e. Theodore Zinflou: Ninety million CFA frs. (90,000,000 CFAF);

f. Victorien Fade: Eighty million CFA frs. (80,000,000 CFAF).

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111. The Respondent State did not make any prayers on costs. It merely prayed the Court to dismiss the Applicant's prayers for lack of merit.

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

29 *Ibid.*

30 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 246, § 63; *Rutabingwa Chrysanthe v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 373, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACtHPR, Application No. 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

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112. The Court notes that Rule 32(2) of the Rules[31] provides that "unless the Court decides otherwise, each party shall bear its own costs".

113. The Court decides that, in the circumstances of this case, each party shall bear its own costs.

VIII. Operative part

114. For these reasons,
The Court,
Unanimously:
On jurisdiction
i. *Dismisses* the objections to jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Upholds* the objection to the admissibility of the Application on the ground of non-exhaustion of domestic remedies;
iv. *Decides* that the Application inadmissible.

On costs
v. *Orders* each Party to bear its own costs.

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

Makame & Ors v Tanzania (judgment) (2021) 5 AfCLR 257

Application 023/2016, *Yahaya Zumo Makame & Three (3) Others v United Republic of Tanzania*

Judgment, 25 June 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicants, who were unsuccessful in an appeal against their domestic conviction and sentence for drug related offences brought this Application claiming *inter alia*, that the denial of opportunity for further appeal from the Court of Appeal in the Respondent State was a violation of their human rights. The Applicants also sought provisional measures to suspend fines imposed by the domestic court. The Court held that the Respondent State had not violated the rights of the Applicants.

Jurisdiction (appellate jurisdiction, 27; review jurisdiction, 28-29; material jurisdiction, 28-29; withdrawal of article 34(6) Declaration, 31)

Admissibility (exhaustion of local remedies, 45-47; submission within reasonable time, 51-53)

Provisional measures (simultaneous consideration with merits, 63)

Fair hearing (right to appeal, 74-75; evaluation of evidence before domestic courts, 82-84, 87; right to interpreter, 90-93)

Equality (different treatment of convicts, 76)

Separate Opinion: BENSAOULA

Fair hearing (right to interpreter, 5-8)

I. The Parties

1. Yahaya Zumo Makame, Salum Mohamed Mpakarasi and Said Ibrahim, all Tanzanian nationals, and Mohamedi Gholumgader Pourdad, a national of the Islamic Republic of Iran, (hereinafter referred to as "the Applicants") were, at the time of filing the Application, incarcerated at Maweni Central Prison, Tanga, after having been convicted and sentenced to twenty-five (25) years imprisonment each, for the offence of trafficking narcotic drugs.

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 further 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 this withdrawal had no effect on pending cases as well as all new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period **of** one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the original Application that on 10 August 2012 the High Court of Tanzania sitting at Tanga convicted the Applicants, together with a co-accused who is not an Applicant before this Court, of trafficking narcotic drugs and sentenced them to twenty-five (25) years imprisonment each. The Applicants were also ordered to pay a fine of Tanzanian Shillings One Billion, Four Hundred Thirty Eight Million, Three Hundred and Sixty-four Thousand and Four hundred (TZS 1, 438,364,400).

4. Dissatisfied with the High Court's decision, the Applicants appealed to the Court of Appeal of Tanzania against both their sentence and conviction. On 8 September 2015, the Court of Appeal dismissed the appeal in its entirety.

B. Alleged violations

5. The Applicants contend that the Respondent State's legal system only permits one appeal from a decision of the High Court. The absence of a higher court, above the Court of Appeal, the Applicants submit, violates their right to fair trial and is contrary to Articles 3 and 7 of the Charter, Article 14 (1) and (5) of the International Convention on Civil and Political Rights (hereinafter referred to as "the ICCPR") and Article 10 of the Universal Declaration of

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) § 38.

Human Rights (hereinafter referred to as "the UDHR").

6. The Applicants also allege a violation of their right to fair trial as a result of the manner in which the Court of Appeal dealt with the evidence adduced in support of their conviction. It is also their contention that the Court of Appeal was partial in its assessment of the evidence.

7. The Applicants further argue that the Court of Appeal heard their appeal without due consideration for whether the Fourth Applicant, Mohamedi Gholumgader Pourdad, who is an Iranian national, could understand the proceedings. The Applicants submit that the failure to provide the Fourth Applicant with an interpreter, violates Article 7 of the Charter, Article 14(3)(a) and 14(3)(f) of the ICCPR and Article 10 of the UDHR.

III. Summary of the Procedure before the Court

8. The Application was filed on 13 April 2016 and it was served on the Respondent State on 7 June 2016. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.

9. After several extensions of time, the Respondent State filed its Response to the Application on 25 May 2017.

10. On 8 October 2018 the Court, *suo motu*, granted the Applicants legal aid under its legal aid scheme.

11. On 19 November 2018, the Applicants were granted leave to file additional submissions and a time limit of thirty (30), from the date of notification, was set.

12. On 21 December 2018 the Applicants filed additional submissions and also included therein a request for provisional measures. The additional submissions, together with the request for provisional measures, were served on the Respondent State on 16 January 2019. The Respondent State was given thirty (30) days to respond but it did not file a response.

13. Pleadings were closed on 28 May 2019 and the Parties were duly notified.

IV. Prayers of the Parties

14. On the merits of the Application, the Applicants pray the Court for the following:

i. A declaration that the Respondent State has violated Articles 1, 3 and 7 of the Charter, Article 14 of the ICCPR and Article 10 of the UDHR;

ii. An order to the Respondent State to release the Applicants from prison;

iii. In the event that prayer (ii) is not granted, an order for the Respondent to revisit the case and order a retrial;

iv. An order directing the Respondent State to take legislative or remedial measures to give effect to the Court's findings in their application to others;

v. An order for costs;

vi. An order for such reparations as the Court sees fit.

15. In relation to provisional measures, the Applicants pray the Court for the following:

i. An order that the Respondent shall not seek to recover the outstanding fine currently forming part of the Applicants' sentence;

ii. An order that the Respondent State shall report to the Court within 30 days of the interim order on the measures taken for its implementation.

16. The Respondent State prays the Court for the following, in respect of jurisdiction and the admissibility of the Application:

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

ii. That, the application has not met the admissibility requirement provided by Rule 40(5) of the Rules of Court.

iii. That, the Application has not met the admissibility requirement provided by Rule 40(6) of the Rules of Court.

iv. That, the Application be declared inadmissible and duly dismissed.

17. As to the merits of the Application, the Respondent State prays the Court to order that:

i. That, the United Republic of Tanzania did not violate the Applicant's Rights provided under Article 2 of the African Charter on Human and Peoples' Rights.

ii. That, the United Republic of Tanzania did not violate the Applicant's Rights provided under Article 7 of the African Charter on Human and Peoples' Rights.

iii. That, the Application be dismissed for lack of merit.

iv. That, the Applicants' prayers be dismissed in their entirety.

v. That, the Applicants continue to serve their sentence.

vi. That, the Applicants not be awarded reparations.

V. Jurisdiction

18. 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.

19. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules." [2]

20. On the basis of the above-cited provisions, the Court must preliminarily ascertain its jurisdiction and dispose of objections to its jurisdiction, if there are any.

21. In the present Application, the Respondent State has raised an objection to the Court's material jurisdiction and this will be addressed next.

A. Objections to material jurisdiction

i. Objection alleging that the Court is being called to assume appellate jurisdiction

22. The Respondent State avers that the Court lacks jurisdiction to examine the Application as the Applicants are asking it to sit as an appellate court and deliberate on matters of evidence and procedure already finalised by its Court of Appeal.

23. In support of its position, the Respondent State cites the judgment of the Court in *Ernest Francis Mtingwi v Republic of Malawi* where the Court held that "it does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and or regional courts."[3]

24. In reply, the Applicants submit that the Court has jurisdiction as per Article 3 of the Protocol since the violations alleged and the rights invoked in the Application are protected under the Charter. The Applicants further submit that although the Court is not an appeal court it has confirmed that this does not preclude it from examining whether the procedures before a national court are in accordance with the Charter or other international human rights

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

3 (jurisdiction) (15 March 2013) 1 AfCLR 190.

instruments ratified by the State in question.

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25. 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.[4]

26. The Court notes that Respondent State's objection in the instant Application raised two issues, first, that the Applicants are inviting it to sit as an appellate court when it is not empowered to do so. Second, that the Applicants are asking it to evaluate the evidence and procedures already finalised by its domestic courts.

27. On the objection 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.[5] However, as the Court emphasised in *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."[6] Consequently, the Court dismisses the objection alleging that it would be sitting as an appellate court in adjudicating this case.

ii. Objection alleging that the Court is being asked to evaluate evidence and procedures finalised by domestic courts

28. As regards the objection that the Court lacks jurisdiction since the

4 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18.

5 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.

6 *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 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.

Applicants are asking it to evaluate the evidence and procedures already finalised by its domestic courts, the Court recalls that it has jurisdiction as long as the rights alleged by an Applicant as having been violated fall under the bundle of rights and guarantees invoked at the national courts. In the present case, the Court notes that the allegations made by the Applicants involve violations of the Charter, the ICCPR and the UDHR all of which are instruments applicable to the Respondent State.[7] Given this context, the Court holds that the allegations raised by the Applicants are within the purview of its jurisdiction.

29. In light of the above, the Court holds that it would neither be sitting as an appellate Court nor would it be examining afresh evidence and procedures finalised by a domestic Court if it pronounces itself in this case. The Court thus holds that it has material jurisdiction in this matter and the Respondent State's objection is, therefore, dismissed.

B. Other aspects of jurisdiction

30. 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 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

31. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that the Respondent State, on 21 November 2019, deposited with 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 it has held that the withdrawal of a Declaration 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, or new cases filed before the withdrawal takes effect.[8] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[9] This Application having been filed before the

7 The Respondent State acceded to the ICCPR on 11 June 1976. The Court has also held that the UDHR is part of customary international law, see, *Anudo Ochieng Anudo v United Republic of Tanzania* (22 March 2018) (merits) 2 AfCLR 248 § 76.

8 *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39.

9 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

Respondent State deposited its notice of withdrawal is thus not affected by it.

32. In light of the above, the Court finds that it has personal jurisdiction to examine the present Application.

33. In respect of its temporal jurisdiction, the Court notes all the violations alleged by the Applicants arose after the Respondent State became a Party to the Charter and also after it deposited the Declaration. Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

34. 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 territorial jurisdiction is established.

35. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

36. 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".

37. Pursuant to Rule 50(1) of the Rules,[10] "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."

38. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of 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

10 Formerly Rule 40 Rules of Court, 2 June 2010.

matter, and

e. 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 Organisation of African Unity or the provisions of the Charter.

A. Conditions of admissibility in contention between the Parties

39. While some of the above-mentioned 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 relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of domestic remedies

40. The Court observes that the Respondent State's objection in relation to the exhaustion of local remedies is premised on the contention that the Applicants had remedies at their disposal which they did not utilise. Specifically, the Respondent State contends that the Applicants could have raised the issue of the location of the gas lighter and cassava flour before the Court of Appeal. It is also contended that questions about the authenticity of a signature on a prosecution exhibit could have been raised before the Court of Appeal.

41. The Respondent State also submits that the allegation that the Court of Appeal applied a double standard in acquitting a co-accused but convicting the Applicants could have been raised in a review application before the Court of Appeal. With regard to the allegation that the Fourth Applicant was denied the services of an interpreter, the Respondent State submits that the Applicants could have informed their defence counsel to convey this to the Court. Overall, the Respondent State prays that the Application be dismissed for failure to exhaust domestic remedies.

42. The Applicants submit that they took their case to the Court of Appeal which is the highest court in the Respondent State and that they, therefore, exhausted local remedies. The Applicants further submit that Respondent State misconstrues their argument when it argues that they could have raised the errors concerning the location of the gas lighters and cassava flour with the Court of Appeal when it is the very court which the Applicants allege

made the errors. The Applicants aver that with no higher court to challenge these alleged errors, the Applicants have exhausted local remedies.

43. The Applicants also submit that this Court has consistently ruled that the application for review of a Court of Appeal decision, within the judicial system of Respondent State, amounts to an extraordinary measure which need not be exhausted for admissibility of an application before the Court. The Applicants further refer to the principle of the bundle of the rights and guarantees, as developed by the Court, to justify that they need not have specifically raised all alleged fair trial violations at the domestic level.

44. The Applicants also aver that Respondent State's submission that the Fourth Applicant could have conveyed the need for an interpreter through defence counsel is unclear as it does not indicate the court which the Respondent State is referring to; that is whether it is the High Court or the Court of Appeal. The Applicants contend that the nationality of the Fourth Applicant was common knowledge before the Court of Appeal, yet the Court of Appeal did not seek to clarify the potential fair trial considerations.

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45. The Court notes that pursuant to Article 56(5) of the Charter, whose requirements are mirrored in Rule 50(2) (e) 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.[11]

46. With respect to whether the Applicants should have filed an application for review of the Court of Appeal's decision, this Court has consistently held that, as applied in the Respondent State's judicial system, such a process is an extraordinary remedy that the Applicants are not required to exhaust within the meaning of

11 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

Article 56(5) of the Charter.[12]

47. Regarding those allegations made by the Applicants, which the Respondent State contends were never raised before domestic courts, the Court notes that these happened in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence. The allegations, therefore, form part of the bundle and guarantees that were related to or were the basis of their appeals. Accordingly, the domestic courts had ample opportunity to address the allegations even without the Applicants having raised them explicitly. It would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for these claims.[13] The Applicants should thus be deemed to have exhausted local remedies with respect to these allegations.

48. 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

49. The Respondent State submits that the period of eight (8) months that it took the Applicants to file the Application before this Court, after the Court of Appeal delivered its judgment, is not reasonable time within the meaning of Rule 40(6) of the Rules. In support of its argument, the Respondent State refers to the decision of the African Commission in the matter of *Michael Majuru v Republic of Zimbabwe* and prays the Court to declare the matter inadmissible.[14]

50. The Applicants contend that the Application must be considered to have been filed within a reasonable time given the circumstances of the matter and their situation as lay, indigent and incarcerated persons.

12 See Application No. 025/2016. Judgment of 26 May 2019(merits and reparations), *Kenedy Ivan v United Republic of Tanzania*; *Mohamed Abubakari v Tanzania* (merits), §§ 66-70; *Christopher Jonas v Tanzania* (merits), § 44.

13 *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 § 37; *Alex Thomas v Tanzania* (merits), §§ 60-65, *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) § 54.

14 See ACHPR Communication 308/2005 *Michael Majuru v Republic of Zimbabwe*, 2008.

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51. The Court recalls that Article 56(6) of the Charter and Rule 50(2)(f) of the Rules do not specify any period within which Applicants should seize the Court. Rather, these provisions speak of filing of the Application within a reasonable time from the date when local remedies were exhausted or from the date the Commission is seized of the matter. The Court notes that, in the present matter, the time within which the Application should have been filed must be computed from the date the Court of Appeal dismissed the Applicants' appeal, which is 8 September 2015. Since the Application was filed before this Court on 13 April 2016, the period to be considered is seven (7) months and six (6) days.

52. As the Court has held "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."[15] Some of the factors that the Court considers in determining the reasonableness of time include the personal situation of the Applicant including whether he/she was a lay, indigent or incarcerated person.[16]

53. The Court notes that, in the present case, the Applicants are lay and incarcerated. Given the personal situation of the Applicants, which resulted in, among other things, limited mobility and access to information, the Court holds that they acted within reasonable time to activate the jurisdiction of this Court.[17]

54. The Court, therefore, dismisses the Respondent State's objection based on failure to file the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

55. The Court notes, 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 50(2)(a), (b), (c), (d), and (g) of Rule 50 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still

15 See Application No. 013/2011. Ruling of 28/06/2013 (Preliminary Objections), *Norbert Zongo and others v Burkina Faso* (herein after referred to as *Norbert Zongo and others v Burkina Faso* (Preliminary Objections)").

16 See, *Christopher Jonas v United Republic of Tanzania* (28 September 2017) 2 AfCLR 101 § 44.

17 See *Alex Thomas v Tanzania* (merits) § 74.

ascertain that these requirements have been fulfilled.

56. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) 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 50(2)(b) 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 further 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 50(2)(c) of the Rules.

59. Regarding the condition contained in Rule 50(2)(d) 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 50(2)(g) 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 50 of the Rules, and accordingly finds it admissible.

VII. On the request for provisional measures

62. The Court recalls that in their Additional Submissions, the Applicants prayed the Court for an "interim protective order pursuant to Article 27(2) of the Court Protocol and Rule 51 of the Court Rules requiring the Respondent to cease in any attempts to recover the fine element of the Applicants' sentence …pending the completion of the case".

63. The Court notes that it is disposing of the Applicants' claims on the merits simultaneously with the request for provisional measures. Consequently, the Court will pronounce itself on the request for provisional measures when it considers the merits of the Application.

VIII. Merits

64. The Applicants allege that the Respondent State has violated their rights under Articles 1, 3 and 7 of the Charter, Article 14

of the ICCPR and Article 10 of the UDHR. These violations, as alleged by the Applicants, however, all relate to the right to a fair trial. Resultantly, the Court will examine all the alleged violations under the rubric of the right to a fair trial.

A. Alleged violation of the right to a fair trial

i. Alleged violation of the right to appeal

65. The Applicants argue that having been convicted by the High Court, they were only able to avail themselves of a single appeal court; the Court of Appeal. The Applicants submit that the lack of a higher court beyond the Court of Appeal, as is the case in other countries, is a violation of their right to a fair trial and contrary to Article 7 of the Charter.

66. The Applicants further argue that the Respondent State's judicial system put them at a disadvantage compared to those prosecuted for other offences who can enjoy two levels of appeal. According to the Applicants, this is a violation of Article 3 of the Charter, Article 14 (1) and (5) of the ICCPR and Article 10 of the UDHR. With regard to Article 3 of the Charter, the Applicants argue that this difference in situation, compared to others passing through the Respondent's judicial system, violates their right to equality before the law.

67. The Respondent State submits that if the Applicants were aggrieved with the decision of the Court of Appeal, they had a remedy which was to file for a review. The Respondent State further avers that the Applicants' allegations lack merit and should be dismissed.

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68. The Court observes that Article 3 of the 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.

69. The Court further observes that Article 7(1)(a) of the Charter provides thus:

> Every individual shall have the right to have his cause heard. This comprises (a) the right to an appeal to competent national organs

against acts of violating his fundamental rights as recognised and guaranteed by the conventions, laws, regulations and customs in force.

70. The Court notes that the Applicants are making two interrelated allegations in connection to the alleged violation of their right to appeal. Firstly, they are alleging a violation due to the failure to have their sentences reviewed by a higher court beyond the Court of Appeal. Secondly, they are alleging that they were subjected to different treatment since other convicts are able to have recourse to two levels of appeal.

71. With regard to the first allegation, the Court notes that the court system in the Respondent State is three-tiered. The Court of Appeal is the highest appellate court and below it is the High Court, with its various divisions, and further below are subordinate courts.

72. The Court also notes that section 164 of the Respondent State's Criminal Procedure Act, read together with the First Schedule of the same Act, outlines which offences are triable by the High Court exclusively or concurrently with subordinate courts and also which offences wherein the original jurisdiction lies with subordinate courts.

73. The Court further notes that the original jurisdiction for dealing with offences under section 16 of the Drugs and Prevention of Illicit Traffic in Drugs Act – under which the Applicants were charged – vests with the High Court. It is clear to the Court, therefore, that for any conviction and sentence under section 16 of the Drugs and Prevention of Illicit Traffic in Drugs Act, the right of appeal lies with Court of Appeal.

74. The Court holds that the right to an appeal or review of a decision of a lower court as provided for under Article 7 of the Charter and Article 15(5) of the ICCPR simply entails the provision of another level of judicial structures for one to have recourse to beyond the trial court. The essence of the right is that findings of a trial court should always be amenable to review by another court.[18] The right does not prescribe the number of levels at which an appeal must be processed.

75. The Court thus finds that the absence of a higher court, above the Court of Appeal, is not a violation of Article 7 of the Charter or Article 14 of the ICCPR.

18 Human Rights Committee "General Comment No. 32 – Right to equality before courts and tribunals and right to a fair trial" https://www.refworld.org/docid/478b2b2f2.html (accessed 17 November 2020).

76. The Court further notes that the Applicants alleged, relatedly, that the fact that convicts whose trials commenced at the subordinate court level are accorded two levels of appeals is a violation of their right to equality since no similar accommodation was accorded to them. In this connection, the Court notes that the Applicants did not demonstrate that there is any fault with the law that vests jurisdiction for different offences, either in the High Court only or in the subordinate courts only or concurrently in both the High Court and subordinate courts. Neither have the Applicants demonstrated that other people convicted for trafficking narcotic drugs are treated differently. For this reason, the Court holds that the different treatment of convicts, according to the offences for which they were convicted, does not violate the Charter and, consequently, dismisses the Applicants' allegation.

77. Given the above findings, the Court dismisses the Applicants' allegation of a violation of their right to fair trial by reason of there being no review of their sentences by a higher court beyond the Court of Appeal. The Court also dismisses the Applicants' allegation of their differentiated treatment as compared to other convicts who are able to have recourse to two levels of appeal.

ii. Alleged violation due to erroneous findings by the trial court

78. The Applicants allege that the Respondent State's Court of Appeal erred in failing to correctly direct itself as to the location of gas lighters (Exhibit P.9 and P.10). The Applicants submit that the errors as to the location of items seized is of fundamental importance and demonstrates their unsafe conviction. In the Applicants' view, this showed the Court of Appeal's lack of understanding of the case and also demonstrates the potential for an unsafe conviction.

79. The Applicants also contend that the Court of Appeal erred in failing to correctly recall the location where the cassava flour was seized (Exhibit P.15) and also failed to establish the genuineness of the signature on the Exhibit P.12. The Applicants submit that the Court of Appeal was required to have mastery of the entirety of the evidence in order to safely adjudicate guilt or innocence. The errors on the part of the Court of Appeal, according to the Applicants, demonstrate that the Applicants' conviction was unsafe and, therefore, a violation of the right to a fair trial.

80. The Respondent State submits that the evidence available clearly pointed out the location of the gas lighters and the cassava flour. In the Respondent State's view, the Court of Appeal duly considered

the location of these items of evidence. The Respondent State also submits that the Applicants could have raised these issues as grounds of appeal but they did not and that these allegations are misconceived, lack merit and should be dismissed.

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81. The Court observes that the question that arises here is the manner in which the Court of Appeal dealt with the evidential contentions raised by the Applicants especially whether the same were duly examined in line with Article 7(1) of the Charter.

82. The Court recalls its established position that examination of particulars of evidence is a matter that should be left for domestic courts. However, as further acknowledged by the Court, it may nevertheless evaluate the relevant procedures before the national courts to determine whether they conform to the standards prescribed by the Charter and other international human rights instruments.[19]

83. From its perusal of the record, the Court notes that the Applicants were represented by counsel before the Court of Appeal. It also notes that the Court of Appeal analysed all the grounds of appeal as filed by the Applicants together with the counter-arguments raised by the State. In terms of the grounds of appeal raised by the Applicants, the Court notes that, before the Court of Appeal, the Applicants, among other grounds, included the generic allegation that the learned trial judge grossly misdirected himself in fact and in law in convicting them against the weight of the evidence. To respond to this allegation, the Court of Appeal went into detail analysing the manner in which the Applicants were arrested and subsequently tried before the High Court. It was only after this analysis that it dismissed the Applicants' appeal.

84. Given the manner in which the Court of Appeal dealt with the Applicants' appeal, the Court finds nothing which could merit its intervention. The Court, therefore, holds that the manner in which Court of Appeal made its findings in respect of the Applicants' appeal did not violate Article 7 of the Charter. The Applicants' allegation in this connection is thus dismissed.

19 *Minani Evarist v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402 § 54.

iii. Allegation that the Applicants' conviction was based on "double-standards"

85. The Applicants submit that the acquittal of one of the co-accused due to his lack of awareness of the contents of one of the vehicles demonstrates the unsafe basis of their conviction. The Applicants also submit that the Court of Appeal erred in its recollection of the procedure by which their signatures were obtained as well as in respect of where the various items of evidence were found in the vehicles during their arrest. . In the Applicants' view, all this lends credence to the lack of safety of their conviction.

86. The Respondent State disputes this allegation and submits that the Applicants never raised this concern as a ground of appeal before the Court of Appeal. The Respondent State also submits that the allegation lacks merit and must be dismissed.

***

87. The Court reiterates that it, generally, does not interfere with matters of evidence as established by domestic courts except where there are manifest errors which implicate violations of the Charter or other applicable international human rights standards. In respect of the Applicants' allegations concerning the acquittal of one of the co-accused, allegedly on the basis that he did not know the contents of the vehicle, the Court notes that this matter was also evaluated by the Court of Appeal. The Court does not find anything patently wrong with the manner in which the Court of Appeal treated the evidence in relation to this issue to warrant its interference. For this reason, the allegation by the Applicants that double standards were applied in acquitting one of the co-accused is dismissed.

iv Alleged violation due to failure to provide the Fourth Applicant with an interpreter

88. The Applicants aver that the Fourth Applicant, Mohamedi Gholumgader Pourdad, is a citizen of the Islamic Republic of Iran and his native language is Persian. The Applicants contend that the Fourth Applicant's right to fair trial was violated by reason of not being provided with an interpreter when the Court of Appeal heard the appeal.

89. The Respondent State submits that this allegation was not raised as a ground of appeal before the Court of Appeal. The Respondent State also submits that, had the Fourth Applicant made it known that he required an interpreter one would have been provided at the Respondent State's expense. The Respondent State, therefore, submits that the Applicants' allegation lacks merit and must be dismissed.

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90. The Court recalls that Article 7(1)(c) of the Charter does not expressly provide for the right to be assisted by an interpreter. However, the provision should be interpreted in light of Article 14(3)(a) of the ICCPR which provides that:

> …everyone shall be entitled to…(a) be promptly informed and in detail in a language which he understands of the nature and cause of the change against him; and (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

91. A joint reading of the above cited provisions, as confirmed by the Court, establishes that every accused person has the right to an interpreter if he/she cannot understand or speak the language being used in court.[20]

92. In the present case, the Court notes that the Applicants state that "…the issue of the 3rd Applicant the justices of the Court of Appeal of Tanzania erroneously heard the applicant's appeal without considering necessity of his nationality and language he understands by not providing him the interpreter to ease up his understanding of the appeal hearing." It is clear, therefore, that the Applicants' grievance in this regard relates specifically to the conduct of proceedings before the Court of Appeal.

93. The Court notes, as earlier pointed out, that the judgment of the Court of Appeal indicates that the Applicants had the services of counsel during the hearing of their appeal. Although the Court has acknowledged that an accused person is entitled to an interpreter if he/she cannot understand or speak the language that is being used in court, it is practically necessary that where an accused person is represented by counsel that the need for interpretation

20 See *Armand Guehi v Tanzania* (merits and reparations), § 73.

is communicated to the Court. From the Court's perusal of the record, the Court notes that the Applicants were represented by counsel during their appeal but there is no indication that a request for interpretation services on behalf of the Fourth Applicant was brought to the attention of the Court.

94. In the circumstances, therefore, the Court finds no basis for holding that the absence of an interpreter led to a violation of the Fourth Applicant's right to a fair trial. The Applicants' allegation on this point is, therefore, dismissed.

B. Alleged violation of Article 1 of the Charter

95. The Applicants submit that in the event that the Court finds violations of Articles 3 and 7 of the Charter, it should also find a violation of Article 1 of the Charter.

96. The Respondent State did not respond to the Applicants' submissions on this point.

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97. Article 1 of the Charter provides as follows:

> The Member States of the Organisation of the African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

98. The Court considers that examining an alleged violation of Article 1 of the Charter involves a determination not only of whether the measures adopted by the Respondent State are available but also if these measures were implemented in order to achieve the intended object and purpose of the Charter. As a consequence, whenever a substantive right of the Charter is violated due to the Respondent State's failure to meet these obligations, Article 1 will be violated.[21]

99. In the present case, the Court having found that the Respondent State has not violated any provisions of the Charter, the Court consequently finds that the Respondent State has also not

21 See *Armand Guehi v Tanzania* (merits and reparations), § 149-150 and *Alex Thomas v Tanzania* (merits) § 135.

violated Article 1 of the Charter.

IX. Reparations

100. In terms of reparations, the Applicants pray the Court to make "an order for such reparations as the Court sees fit."

101. The Respondent State did not make any submissions on reparations.

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102. 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 the fair compensation or reparation.

103. The Court having found that the Respondent State has not violated any of the Applicants' rights dismisses the Applicants' claim for reparations.

104. With respect to the Applicants' request for provisional measures, the Court, having dismissed the Applicants' case on the merits, finds that the same has become moot.

X. Costs

105. The Applicants pray the Court for costs incurred by *pro bono* Counsel.

106. The Respondent State did not make any submissions on costs.

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107. The Court notes that Rule 32 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs, if any".[22] In the present Application, considering that the Applicants benefitted from the Court's Legal Aid Scheme, the Court orders that each Party shall bear its own costs.

22 Formerly Rule 30, Rules of Court, 2 June 2010.

XI. Operative part

108. 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 to the admissibility of the Application;
iv. Declares that the Application is admissible.

On merits
v. Finds that the Respondent State has not violated the Applicants' right to equality under Article 3 of the Charter;
vi. Finds that the Respondent State has not violated the Applicants' right to a fair trial under Article 7 of the Charter;
vii. Finds that the Respondent State has not violated Article 1 of the Charter.

On reparations
viii. Dismisses the Applicants' prayers for reparations.
ix. Finds that the request for provisional measures is moot.

On costs
x. Orders each party to bear its own costs.

***

Separate Opinion: BENSAOULA

1. I agree with the Operative Part of the decision rendered today regarding the majority of the allegations deemed unfounded by the Court. However, I make this statement because I am not convinced of the manner in which the allegation by the fourth Applicant that "he did not benefit from the assistance of an Interpreter" was dealt with.

2. Indeed, it appears from the facts, as related by the Applicants, that Mr. Mohamedi Gholimgader Pourdad, a national of the

Islamic Republic of Iran whose mother tongue is Persian, had his right to a fair trial violated by the fact that he was not provided an Interpreter when the Court of Appeal heard his Appeal.

3. In its response, the Respondent State merely argued that the above-mentioned Applicant did not make it known that he needed the assistance of an Interpreter, otherwise he would have been provided one at his own expense.

4. Paragraph 7 (1) (c) of the Charter states very clearly that "the right to defence including the right to be defended by a counsel of one's choice". The right to defence is often defined as "the prerogatives that a person has to defend himself in a trial". This right applies to the phase of investigation, instruction or judgment as well.

5. I conclude from the reading of the above mentioned Article of the Charter, that although the Court concluded that the article does not expressly mention the right to an Interpreter (see paragraph 90 of the Judgment), it seems to me that the Legislator makes it clear that "the right to a defence" is in a broad sense a term that includes all the mechanisms that enable the accused person and his interlocutors to understand each other, and this, in all the phases of the procedure to defend oneself. The above-mentioned Article 1 well implies the right to an interpreter when it provides for "the right to defence" even if it does not expressly mention it. The principle is that every Applicant has the choice to defend himself first or to have recourse to a defence counsel. To defend himself he can either ask for the help of an Interpreter or the Court itself appoints one if the situation of the accused so requires, either because he is not a resident of the country where the trial takes place, or a national of another country, as in the instant case!

6. The Court subsequently referred to Article 14/3C of the International Covenant on Civil and Political Rights which expressly provides for the right to an interpreter.

7. However, on reading this Article, it is clear that the Legislator first requires the accused to be informed in a language he understands and in detail, of the nature and cause for the accusation against him, and also be informed that he can have the free assistance of an interpreter if he cannot understand or speak the language used in court.

8. Therefore, the first obligation of the interlocutors, in this case the Judges, is to inform the accused of the nature and cause for the accusation against him, in his language. The second obligation is to appoint an Interpreter.

9. However, at no point, whether in the allegations of the Applicant or in the responses of the Respondent State, does it appear that

the Judges on Appeal were concerned about this obligation, and in no paragraph of the Judgment does the Court consider this obligation of the Judges.

10. The first obligation of the interlocutors confirms that at any stage of the proceedings the interlocutor of the accused must by himself ensure that the accused understands the language used in court. The interlocutor then enforces the right to an Interpreter if he establishes that the accused does not understand the language used in court.

11. From the reading of paragraph 93 of the Judgment, it appears that the Court emphasized the fact that the Applicant was provided the services of a defence counsel and that the need for the assistance of an Interpreter was not communicated to the Court, based on which it therefore concludes that the allegation is unfounded.

12. In my opinion it is imperative that the Court imposes through its jurisprudence rules regarding the necessity of an Interpreter and the conditions thereof. It is important that the accused knows that he has the right to an interpreter and he must be informed about it! This information must be communicated to him in a language he understands. The accused must be provided information on the assistance of the interpreter the same way as that of information on a Lawyer!

13. This is because in the absence of an interpreter it is doubtful that the accused could have made an informed choice in his answers to all the questions he was asked, which could be prejudicial to the fairness of the procedure as a whole.

14. Moreover, I think that the fact that the accused has a rudimentary knowledge of the language of the proceedings can in no way be an obstacle to providing him/her with interpretation into a language that he/she understands sufficiently so that the rights of the defence can be fully exercised.

15. I also think that even when the accused is represented by a Lawyer, it is not enough that the Lawyer, and not his client, knows the language used in the hearing. Hence the unconvincing ground of paragraph 93 of the Judgment!

16. It is clear that the right to a fair trial includes "the right to participate in the hearing" which requires that the accused be able to understand the pleadings and inform his lawyer of any element that should be raised in his defence.

17. This leads me to say that providing interpretation at a trial is primordial because it does not only concern the relations between the accused and his Lawyer but also those between the accused

and those who judge him.

18. I will conclude by saying that as guarantors of the rights of the accused and the fairness of proceedings, both domestic and international jurisdictions must impose the obligation of the judge to identify the needs in terms of interpretation in consultation with the accused, and to ensure that the absence of an interpreter does not jeopardise his full participation in the proceedings. It is of particular importance that courts take note of this, especially when the accused is a foreigner!

Rajabu v Tanzania (judgment) (2021) 5 AfCLR 282

Application 008/2016, *Masoud Rajabu v United Republic of Tanzania*

Judgment, 25 June 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant had been convicted and sentenced for rape by a domestic court in the Respondent State. Failing to secure a reversal of the conviction and sentence on appeal, the Applicant brought this Application claiming several violations of his right to fair trial. The Court held that the Respondent State had only violated the Applicant's right to free legal assistance and granted the Applicant damages for moral prejudice.

Jurisdiction (appellate jurisdiction, 21-22; material jurisdiction, 24-26; withdrawal of article 34(6) declaration, 27-29)

Admissibility (exhaustion of local remedies, 42-44; submission within reasonable time, 49-53)

Fair hearing (evaluation of evidence before domestic courts, 70-72; right to participate in one's trial, 77-81; right to free legal representation, 86-88; right to trial within a reasonable time, 92-94)

Reparations (state responsibility to make reparations, 100; nature and scope of reparations, 101-102; moral prejudice, 104; fair compensation violation of right to free legal assistance, 104; non-pecuniary reparations, 105)

I. The Parties

1. Mr. Masoud Rajabu (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who at the time of the filing of this Application was serving thirty (30) years' prison sentence having been convicted and sentenced before the District Court at Tanga for the offence of rape of a minor.

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

as "Declaration"). On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission (hereinafter referred to as "AUC"), an instrument withdrawing its Declaration under Article 34(6) of the Protocol. In accordance with the applicable law, the Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, one year after its deposit, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. The record before this Court indicates that, on 21 December 2009, the Applicant, who was a tailor, invited an eleven (11) year old minor to his home for her to try out a gown that he had sown. It is in the Applicant's house that he was said to have committed rape of the minor. This incident was later reported to the village chairman who directed that the Applicant be taken to the police station, where he was subsequently charged with the offence of rape on 23 December 2009.

4. On 8 April 2010, the Applicant was convicted of rape by the District Court at Tanga and sentenced to thirty (30) years' imprisonment. Being dissatisfied with the conviction and sentence, the Applicant appealed to the High Court of Tanzania sitting at Tanga, which delivered judgment on 4 May 2012, dismissing his appeal.

5. On 8 May 2012, the Applicant appealed before the Court of Appeal, which upheld the judgment of the High Court on 29 July 2013. On 6 August 2013, he filed a motion in the Court of Appeal for "revision" of his case which was rejected on 19 November 2013.

B. Alleged violations

6. The Applicant alleges :

i. That his conviction was based on insufficient evidence;

ii. That the delivery of the judgment that convicted him *in absentia* violates his rights under Section 226(2) of the Respondent State's Criminal Procedure Act;

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

iii. That he was denied free legal representation during his trial and appeals in violation of Article 7(1)(c) of the Charter;

iv. That his application for review of the Court of Appeal's judgment had not been decided at the time of filing the Application before this Court, which he considers as unreasonable delay contrary to Article 7(1)(d) of the Charter.

III. Summary of the Procedure before the Court

7. The Application was filed on 10 February 2016 and served on the Respondent State on 15 March 2016 and it was transmitted to the entities listed in Rules 42(4) of the Rules on 31 March 2016. The Respondent State filed its response on 14 July 2016 and this was transmitted to the Applicant on the same date.

8. The Parties filed other pleadings on the merits of the Application in accordance within the time stipulated by the Court.

9. Written pleadings were closed with effect of 10 September 2020 and the Parties were notified thereof.

IV. Prayers of the Parties

10. The Applicant prays the Court to, find the violations of his rights, quash his conviction and set aside his sentence.

11. In its response, 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(5) of the Rules of Court;

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

iv. That, the Application be dismissed in accordance with Rule 38 of the Rules of Court;

v. That, the costs of this Application be borne by the Applicant;

vi. That, the Application lacks merit…

12. The Respondent State further prays the Court to declare that it 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 49(1) of the Rules, "the Court shall primarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."[2]

15. On the basis of the above-cited provisions, the Court must 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. Objection to material jurisdiction

17. The Respondent State submits that the Applicant is asking the Court to sit as an appellate court on matters that have already been concluded by its Court of Appeal, the highest Court in its judicial system.

18. The Respondent State contends that the Court cannot grant the Applicant's prayer to "quash both the conviction and sentence imposed upon the Applicant and set him at liberty" because, Article 3(1) of the Protocol does not grant the Court the jurisdiction to act as an appellate court.

19. According to the Respondent State, this Application is also calling on the Court to sit as a Court of first instance contrary to Article 3(1) of the Protocol as the Applicant is raising issues that he never raised at the municipal courts. The Respondent State argues that the issues raised for the first time concern: the right to be defended by counsel of his choice, the right to be tried within a reasonable time and the right to free legal representation. Consequently, the Court lacks material jurisdiction to examine the allegations of violations of these rights.

20. The Applicant did not address these issues.

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

21. 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 competent to examine 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 instruments related to human rights ratified by the State concerned.[3]

22. Furthermore, the alleged violations relating to the procedures at the domestic courts are of rights provided for in the Charter. Thus, the Court is not being required to sit as an appellate court but to act within the confines of its powers.

23. The Court notes that the Applicant raises allegations of violations of the human rights enshrined in Article 7 of the Charter, whose interpretation and application falls within its jurisdiction. The Respondent State's objection in this respect is therefore dismissed.

24. 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.

25. In the instant case, the Court notes that the Applicant has alleged the violation of rights guaranteed by the Charter and by other international human rights instruments ratified by the Respondent State. It therefore rejects the Respondent State's objection on this point.

26. Consequently, the Court holds that it has material jurisdiction.

B. Other aspects of jurisdiction

27. The Court notes that its personal, temporal and territorial jurisdiction are not disputed by the Respondent State and that nothing on the record indicates that the Court lacks such jurisdiction. The Court further notes that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration with the AUC. Subsequently, on 21 November 2019, it deposited an instrument

3 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) *§ 26; Armand Guehi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 477 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018), 2 AfCLR 287 § 35.

withdrawing its Declaration.

28. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[4]

29. In view of the above, the Court finds that it has personal jurisdiction.

30. The Court notes that it has temporal jurisdiction on the basis that the alleged violations are continuing in nature, in that the Applicant remains convicted and is serving a sentence of thirty (30) years' imprisonment on grounds which he considers are wrong and indefensible;[5] thus the Application can still be considered by the Court.

31. The Court also notes that it has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

32. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

33. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."

34. Pursuant to Rule 50(1) of the Rules, "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."[6]

35. Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> b. comply with the Constitutive Act of the Union and the Charter;
>
> c. not contain any disparaging or insulting language;
>
> d. not based exclusively on news disseminated through the mass media;

4 *Cheusi v Tanzania* (merits) §§ 35-39.

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.

6 Formerly Rule 40 Rules of Court, 2 June 2010.

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

f. 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;

g. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

36. The Respondent State raises an objection to the admissibility of the Application on two grounds in regards to non-exhaustion local remedies and non-compliance with filing an application within a reasonable time.

A. Conditions of admissibility in contention between the Parties

37. The Respondent State submits that the Application does not comply with Rule 40(5) and 40(6) of the Rules[7] 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 prior non-exhaustion of local remedies

38. The Respondent State contends that the Applicant has raised some allegations of human rights violations in this Court, for the first time. The Respondent State is of the view, that the Applicant only raised two grounds in his appeal before the Court of Appeal, that is, that the "trial magistrate and appellate Court erred in law by failing to scrutinize the credibility of the prosecution witnesses and that the case was not proven beyond reasonable doubt." Therefore, he did not fully utilize the Court of Appeal to address the other grievances that he raises before this Court.

39. The Respondent State citing the decision of the African Commission on Human and Peoples' Rights of *Southern African Human rights NGO Network and others v Tanzania* 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 municipal courts before seizing

7 Rule 50(2)(e) and (f) of the Rules of Court, 25 September 2020.

the international body like the Court.[8]

40. Referring to *Article 19 v Eritrea*, the Respondent State submits that the onus is on the Applicant to demonstrate that he took all the steps to exhaust the domestic remedies and not merely cast aspersions on the effectiveness of those remedies.[9] It submits that the legal remedies available to the Applicant which he should have exhausted were never prolonged and thus he should have pursued them.

41. The Applicant did not reply to this objection.

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42. The Court notes that pursuant to Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are not available, they are ineffective, insufficient or the procedure to pursue them is unduly prolonged.[10] This rule 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.[11]

43. In the instant case, the Court notes from the record that, on 8 May 2012, the Applicant appealed against his conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 29 July 2013, the Court of Appeal upheld the judgment of the High Court. The Court further notes that, the Applicant's alleged violations herein form part of the bundle of rights and guarantees that were related to or were the basis of his appeals in the national courts.[12] Therefore, the

8 ACHPR, *Southern African Human rights NGO Network and others v Tanzania* Communication No. 333/2006.

9 ACHPR, *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007).

10 *Norbert Zongo and Others v Burkina Faso* (preliminary objections) *op. cit.* § 84.

11 *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94; *Dismas Bunyerere v United Republic of Tanzania* (merits and reparations), ACtHPR, Application No. 031/2015, Judgment of 28 November 2019 § 35.

12 See *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 60; *Kennedy Owino Onyanchi and Njoka v United Republic of Tanzania* (merits) (2017) 2 AfCLR 65 § 54.

Respondent State had ample opportunity to redress the alleged violations even without the Applicant raising them explicitly. Furthermore, the Applicant applied for "revision" of his matter in the Court of Appeal, even though it is an extra-ordinary remedy. It is thus clear that the Applicant exhausted all the available domestic remedies.

44. For this reason, the Court dismisses the objection that the Applicant did not exhaust local remedies.

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

45. The Respondent State argues that in the event the Court finds that the Applicant exhausted local remedies; the Court should find that the Application fails to comply with the provisions of Rule 40(6) of the Rules.[13] The Respondent State argues that the Application was not filed within a reasonable time after the local remedies were exhausted.

46. In this regard, the Respondent State recalls that the judgment of the Court of Appeal was delivered on 29 July 2013, and that this Application was filed on 10 February 2016. The Respondent State notes that a period of two (2) years and six (6) months elapsed in between. Furthermore, the Respondent State submits that even though the Applicant had filed an application for "revision" on 6 August 2013, he filed the present Application, "two (2) years and two (2) months after he was informed on 19 November 2013 that his application for "revision" was improper before the Court of Appeal.

47. The Respondent State is of the view that the established international human rights jurisprudence considers six (6) months as reasonable time for filing such an application.[14]

48. The Applicant did not make a submission on this issue.

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49. The Court notes that Rule 50(2)(f) of the Rules which restates the

13 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

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

contents of Article 56(6) of the Charter, requires an 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."

50. In the instant Application, the Court observes that the judgment of the Court of Appeal was delivered on 29 July 2013. The Court notes that two (2) years, six (6) months and five (5) days elapsed between 29 July 2013 and 10 February 2016, when the Applicant filed the Application before this Court. The issue for determination is whether the two (2) years, six (6) months and five (5) days that the Applicant took to file the Application before the Court is reasonable in the circumstances.

51. The Court recalls its jurisprudence that: "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[15] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[16] indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal[17] and the use of extra-ordinary remedies.[18] Nevertheless, these circumstances must be proven.

52. From the record, the Applicant is self-represented, incarcerated, restricted in his movements and with limited access to information. Ultimately, the above mentioned circumstances delayed the Applicant in filing his claim before this Court. Thus, the Court finds that the two (2) years, six (6) months and five (5) days taken to file the Application before this Court after exhaustion of local remedies is reasonable.

53. Accordingly, the Court dismisses the objection relating to the non-compliance with the requirement of filing the Application within a

15 *Zongo v Burkina Faso* (merits), *op. cit*, § 92. See also *Thomas v Tanzania (*merits) *op.cit*,, § 73;

16 *Thomas v Tanzania* (merits) *op. cit*, § 73, *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 54, *Ramadhani v Tanzania* (merits) (11 May 2018), 2 AfCLR 344 § 83.

17 *Association Pour le progress et la Defense des droit des Femme Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (11 May 2018) 2 AfCLR 380 § 54.

18 *Armand Guehi v Tanzania* (merits and reparations) *op.cit*, § 56; *Werema Wangoko v Tanzania* (merits) (7 December 2018) 2 AfCLR 520 § 49; *Alfred Agbes Woyome v Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits and reparations), §§ 83-86.

reasonable time after exhaustion of local remedies.

iii. Other conditions of admissibility

54. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2) (a), (b), (c), (d) and (g) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

55. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

56. 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 50(2)(b) of the Rules.

57. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

58. 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 50(2)(d) of the Rules.

59. 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 50(2)(g) of the Rules.

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

VII. Merits

61. The Applicant avers the violations of Article 7(1), 7(1)(c) and (d) of the Charter in relation to the following allegations:

i. That the Applicant's conviction was based on insufficient evidence;

ii. His conviction and sentencing at the District Court *in absentia*;

iii. The denial of the right to free legal representation; and

iv. Delay of the determination of his application for "revision" of the Court of Appeal judgment.

A. Allegation relating to the conviction based on insufficient evidence

62. The Applicant contends that he was charged with having committed the offence of rape in the absence of a government representative, such as the Village Chairman who should have been a witness in the case. He also states that the doctor who examined the complainant did not mention that he found blood in the underwear worn by the complainant even though the witnesses testified to that fact, during the trial. The Applicant maintains that the evidence adduced was false and should not have been taken into consideration by the municipal courts.

63. Furthermore, the Applicant alleges that evidence adduced during the trial and appeal was insufficient for the judges to convict him of rape and to sentence him to thirty (30) years imprisonment. He alleges that Prosecution Witness 2 (PW2) only testified that she heard him call the complainant by name but did not "directly" see them together. Moreover, he avers that the testimony of the complainant, Prosecution Witness 1 (PW1), is "illegal" because it was not procured according to the national laws and should therefore be disregarded. He also contends that, some "elements" relating to the charge, were not produced before the District Court as exhibits for the purpose of proving the charge beyond reasonable doubt.

64. According to the Applicant, the District Court also erred by not taking into consideration the fact that, during his arrest, the Police failed to comply with the provisions of the Respondent State's Criminal Procedure Act.

65. The Respondent State denies these allegations and avers that the charge was properly proffered and contained all elements of the offence of rape as required by law. Further, the Respondent State contends that Police Form (PF3) was the pertinent documentary evidence and it was tendered in court. Also, that the evidence adduced in the court was strong enough to sustain the conviction thus the appeals were dismissed.

66. According to the Respondent State, the Applicant has not explained how the provisions of its Criminal Procedure Act were violated and furthermore, that the Applicant should have raised the issue at the municipal courts if he felt that his rights under these provisions were violated.

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67. Article 7(1) of the Charter provides: "every individual shall have the right to have his cause heard."

68. The Court notes that the Applicant's contention herein is that the evidence presented against him was insufficient to sustain a conviction of rape against him.

69. On the evidence used to convict the Applicant, the Court restates its position, 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.[19]

70. In this regard, the Court reiterates that:

> …municipal courts enjoy a wide margin of discretion in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the municipal courts and investigate the details and particularities of evidence used in domestic proceedings.[20]

71. Furthermore, the Court observes from the record that, the municipal courts analysed the evidence adduced by the six (6) prosecution witnesses including, the complainant, her grandmother, the doctor who examined the complainant and the police officer who proffered the charge and concluded that the minor had been raped and the perpetrator was the Applicant. The Applicant in the presentation of his defence case, did not rebut the evidence adduced by the prosecution. The Court further notes that, the municipal courts relied on precedents such as *Selemani Makumba v the Republic*, *Petro Andrea v the Republic*, and *Hassani Amiri v the Republic*, which explain and expound on the elements of the offence of rape, applied them to the circumstances of the Applicant's case and found that the prosecution had proved its case beyond reasonable doubt and the Applicant was rightly sentenced to the mandatory sentence of thirty years' imprisonment.

72. In light of the foregoing, the Court finds that the manner in which the municipal courts handled the Applicant's trial, conviction and

19 *Mohammed Abubakari v Tanzania* (merits) *op. cit*., §§ 26 and 173. See also *Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 65.

20 *Kijiji Isiaga v Tanzania* (merits) *op. cit*. § 66; *Majid Goa v United Republic of Tanzania*, ACtHPR, Application No.025/2015. Judgment of 26 September 2019 (merits) § 52.

sentence does not disclose any manifest error or miscarriage of justice to the Applicant that required its intervention. The Court therefore dismisses this allegation and finds that the Respondent State has not violated Article 7(1) of the Charter.

B. Allegation relating to the Applicant's absence in the delivery of the judgment

73. The Applicant alleges that, at the close of oral proceedings in his case, to which he had participated in all the proceedings, he was notified that the pronouncement of judgment would take place on 7 April 2010. Nevertheless, the judgment was pronounced on 8 April 2010, in his absence. As a result of the pronouncement of the judgment *in absentia*, he alleges that the District Court denied him the chance to defend himself.

74. The Respondent State argues that the date of delivery of the judgment was moved to 8 April 2010, because the date when it was originally set down for delivery was a public holiday. Moreover, that even though the judgment was delivered on 8 April 2010; the Applicant was informed of his right to appeal as provided for in Section 231 of the Criminal Procedure Act on the day that he was taken into custody to start serving his sentence, that is, on 15 April 2010.

75. Lastly, it contends that Section 227 of its Criminal Procedure Act permits the Court to pronounce judgments in the absence of defendants when necessary. It concludes that there was, therefore, no miscarriage of justice.

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76. Article 7(1)(c) of the Charter provides as follows: "[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."

77. The Court notes, that the Applicant's contention is that he was not present during the delivery of judgment and thus he was denied the chance to defend himself.

78. The Court observes that the right to have one's cause heard entitles the Applicant to take part in all proceedings, and to adduce his arguments and evidence in accordance with the adversarial

principle.[21]

79. The Court also recounts that right to participate effectively in a criminal trial includes not only the right of an accused to be present but also to hear and follow the proceedings.[22] This is to ensure the accused is treated as an autonomous part of the proceedings and not simply an object for imposition of punishment.

80. The Court notes in this regard, that the Applicant participated in all the proceedings of the District Court except for the delivery of judgment. The Court further notes from the record that, even though, the judgment was delivered a day after the scheduled date of delivery, the Applicant was duly informed of his sentence and his right to appeal.

81. Furthermore, the Court notes that, at the stage of delivery of judgment, the Applicant's role is limited to giving mitigation before sentencing. Consequently, the Court finds that the Respondent State did not violate the Applicant's right under Article 7(1)(c) of the Charter herein.

C. Alleged violation of the right to free legal representation

82. The Applicant contends that he was not provided with free legal representation during the proceedings in the municipal courts in violation of Article 7(1)(c) of the Charter.

83. The Respondent State argues that according to its laws, suspects charged with rape are not automatically granted legal aid in the form of counsel to assist them. The Applicant, therefore, had to apply for legal aid from the State or from the various NGO's offering legal representation. It contends further that, the Applicant did not do so, and thus he cannot claim a right which is not provided by law.

84. The Respondent State also avers that for one to benefit from legal representation, there are two conditions: a) that the accused must lack sufficient means and b) that legal aid need only be provided "where the interests of justice so require". According to the Respondent State, the Applicant did not demonstrate that he met the two aforementioned conditions and thus this claim should be dismissed.

21 *Anaclet Paulo v Tanzania* (merits) (21 September 2018) 2 AfCLR 446 § 81.

22 ECHR, *Stanford v UK* App no 16757/90 (ECHR, 23 February 1994) § 26.

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85. Article 7(1)(c) of the Charter provides as follows: "[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."

86. The Court notes that Article 7(1)(c) of the Charter does not provide explicitly for the right to free legal assistance. This Court has however, interpreted this provision in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR)[23], and determined that the right to defence includes the right to be provided with free legal assistance.[24] The Court has also held that an individual charged with a criminal offence is entitled to free legal assistance without having requested for it, provided that the interests of justice so require. This will be the case where an accused is indigent and is charged with a serious offence which carries a severe penalty.[25]

87. The Court notes, from the record, that the Applicant was not represented by counsel throughout the proceedings in the municipal courts. Given that the Applicant was charged with a serious offence, that is, rape of a minor, carrying a minimum severe punishment of thirty (30) years imprisonment; the interests of justice required that the Applicant should have been provided with free legal aid irrespective of whether he requested for such assistance.

88. The Court therefore finds that the Respondent State violated Article 7(1)(c) of the Charter and Article 14(3) of the ICCPR by failing to provide the Applicant with free legal assistance.

23 The Respondent State became a State Party to ICCPR on on 11 June 1976.

24 *Thomas v Tanzania* (merits) *op. cit,* § 114; *Kijiji Isiaga v Tanzania* (merits) *op.cit.* § 72; *Kennedy Onyachi and Njoka v Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104.

25 *Thomas v Tanzania op.cit*., § 123, see also *Mohammed Abubakari v Tanzania* (merits) *op.cit* §§ 138-139.

D. Allegation relating to the application for "revision"

89. The Applicant alleges that "his application for review" of the Court of Appeal's decision is yet to be heard by that court. He alleges that the decision has been pending since 6 August 2013, resulting in the violation of his right to be heard and to be tried within a reasonable time.

90. The Respondent State argues that the Applicant did not file a "motion for review" of the Court of Appeal's decision, rather, that he filed a "motion for revision" at the Court of Appeal. The Respondent State argues that this is an erroneous procedure because under its laws, the Court of Appeal has no jurisdiction to revise its decisions. Furthermore, that the Applicant was informed of this error by a letter but he did not do anything to correct it. Moreover, that the decision to grant applications for revision and review is discretionary.

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91. Article 7(1)(d) of the Charter provides: "Every individual shall have the right to have his cause heard. This comprises: … (d) The right to be tried within a reasonable time...".

92. The Court observes that the right to be tried within a reasonable time is one of the cardinal principles of the right to a fair trial and that undue prolongation of the case at appellate level is contrary to the letter and spirit of Article 7(1)(d) of the Charter.[26]

93. In the instant case, the record before this Court shows that the Applicant filed his "motion for revision" of the Court of Appeal's judgment on 6 August 2013. On 19 November 2013, contrary to the Applicant's assertion, he was informed by the Deputy Registrar of the Court of Appeal that his application for "revision" had been rejected as his matter had already been heard by the same court; which is, within a period of two (2) months and twenty-eight (28) days.

94. The Court considers this period to be reasonable and holds that the Respondent State did not violate Article 7(1)(d) of the Charter in relation to the allegation herein.

26 *Thomas v Tanzania* (merits) *op.cit.* § 103.

VIII. Reparations

95. The Applicant contends that before his arrest, he was an entrepreneur and a tailor. He further avers that his income from gardening, farming and tailoring was to the tune of Tanzanian Shillings, five hundred and four thousand (TZS 504,000) per annum; Tanzanian Shillings four million (TZS 4,000,000) per annum and Tanzanian Shillings twenty-thousand (TZS 20,000) per day respectively.

96. He thus prays the Court to grant him the sum of Tanzanian Shillings one hundred and four million, one hundred and twenty thousand (TZS 104,120,000) for the prejudice suffered.

97. As regards non-pecuniary reparation, the Applicant prays the Court to quash his conviction.

98. The Respondent State prays the Court to deny the Applicant's request for reparations.

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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. 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". [27]

101. 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

27 *Mohamed Abubakari v Tanzania* (merits) *op.cit*, § 242 (ix), *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202 § 19.

been committed."[28]

102. Measures that a State may take to remedy a violation of human rights, includes: 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.[29]

103. 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.[30] However, with regard to moral prejudice, the Court exercises judicial discretion in equity.

A. Pecuniary Reparations

104. The Court notes that the violation it established of the right to free legal assistance caused moral prejudice to the Applicant. The Court therefore, in exercising its discretion, awards an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[31]

B. Non-Pecuniary Reparations

105. Regarding the order to quash his conviction, the Court notes that it did not determine whether the conviction of the Applicant was warranted or not, as this is a matter to be left to the national courts. The Court is rather concerned with whether the procedures in the national courts comply with the provisions of human rights instruments ratified by the Respondent State.

106. In this regard, the Court was satisfied that the manner in which the Respondent State determined the Applicant's case did not occasion any error or miscarriage of justice to the Applicant that

28 *Mohamed Abubakari v United Republic of Tanzania*, ACtHPR, Application No. 007/2013. Judgment of 4 July 2019 (reparations) § 21; *Alex Thomas v United Republic of Tanzania*, ACtHPR, Application No. 005/2013, Judgment of 4 July 2019 (reparations) § 12; *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, ACtHPR, Application No. 006/2013, Judgment of 4 July 2019 (reparations) § 16.

29 *Ingabire Umuhoza v Rwanda* (reparations) *op.cit* § 20.

30 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72 § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346 § 15.

31 See *Paulo v Tanzania* (merits) *op.cit* § 107; *Evarist v Tanzania* (merits) *op.cit* § 85.

required its intervention.

107. Therefore, the Court rejects the Applicant's request for his conviction to be quashed.

IX. Costs

108. The Respondent State prays the Court to order Applicant to bear the costs.

109. Pursuant to Rule 32(2) of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

110. Consequently, the Court orders that each party shall bear its own costs.

X. Operative part

111. For these reasons:

The Court

Unanimously,

On jurisdiction

i. *Dismisses* the objection to material jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections on admissibility;

iv. *Declares* the Application admissible.

On merits

v. *Finds* that the Respondent State has not violated Article 7(1) of the Charter as regards the alleged insufficiency of evidence;

vi. *Finds* that the Respondent State has not violated Article 7(1) of the Charter as regards the delivery of the judgment by the District Court *in absentia*;

vii. *Finds* that the Respondent State has not violated Article 7(1)(d) of the Charter in relation to the dismissal of the application for leave to review the Court of Appeal's judgment;

viii. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter and Article 14(3) of the ICCPR as the Applicant was not provided with free legal assistance.

On reparations

Pecuniary reparations

ix. *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);

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

Non-pecuniary reparations

xi. *Dismisses* the Applicant's prayer for the quashing of his sentence and the order for his release from prison.

On implementation and reporting

xii. *Orders* the Respondent State to submit to the Court, within six (6) months from the date of notification of this judgment, a report on the status of implementation of paragraphs (ix) and (x) of this operative part 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.

Ramadhani v Tanzania (reparations) (2021) 5 AfCLR 303

Application 010/2015, *Amir Ramadhani v United Republic of Tanzania*

Judgment, 25 June 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIŽUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

In its earlier judgment, the Court found that the Respondent State had violated the Applicant's right to free legal assistance. On reparations, the Court held that the Applicant was only entitled to damages for the Respondent State's failure to provide free legal assistance.

Reparations (state responsibility to make reparations, 12, 15; currency for reparation,14; material prejudice, 19-20, 24-25; moral prejudice, 29-33; restitution, 37-38; guarantee of non-repetition, 42-45, publication 49-50)

I. Brief background of the matter

1. In his Application filed on 11 May 2015, Mr Amir Ramadhani (hereinafter referred to as "the Applicant") alleged that his rights to a fair trial, including the right to free legal assistance, had been violated by the United Republic of Tanzania (hereinafter referred to as "the Respondent State") in the course of domestic proceedings.[1]

2. On 11 May 2018, the Court rendered its Judgment on the merits whose paragraphs 5 to 11 of the operative part read as follows:
On the merits:

v *Finds that* the alleged violation of Article 7 relating to irregularities in the Charge Sheet has not been established;

vi. *Finds that* the Respondent State has not violated Article 7(1)(b) of the Charter as regards the Applicant's allegation on procedural error in respect of the statement of PW 1;

vii. *Finds that* the Respondent State has not violated Article 7(2) of the Charter as regards the applicability of the sentence at the time the robbery was committed;

viii. *Finds however*, that the Respondent State has violated Article 7(1)(c) of the Charter as regards the failure to provide the Applicant with free

1 See *Amir Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 1.

legal assistance during the judicial proceedings; and consequently, finds that the Respondent State has also violated Article 1 of the Charter;

ix. *Does not grant* the Applicant's prayer for the Court to quash his conviction and sentence;

x. *Does not grant* the Applicant's prayer for the Court to directly order his release from prison, without prejudice to the Respondent State applying such a measure proprio motu;

xi. *Reserves* its decision on the Applicant's prayer on other forms of reparation;

xii. *Decides* that each Party bear its own costs;

xiii. *Allows* the Applicant, in accordance with Rule 63 of its Rules, to file his 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.

3. It is this Judgment on the merits that serves as the basis for the present Application for reparations.

II. Subject of the Application

4. On 30 July 2018, the Applicant filed his written submission on reparations following the judgment on the merits rendered by this Court on 11 May 2018. In the said Judgment, the Court unanimously found that the Respondent State violated the Applicant's right to be provided with free legal assistance protected under Article 7(1)(c) of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").

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 and requested them to file their submissions on reparations.

6. The Parties filed the requested submissions within the time stipulated by the Court.

7. Pleadings were closed on 16 April 2020 and the Parties were duly notified.

IV. Prayers of the Parties

8. The Applicant prays the Court to grant monetary reparations as follows:

i. US Dollar Twenty Thousand (US$ 20,000) to the Applicant as a direct victim for moral damage;

ii. US Dollar Fifteen Thousand (US$ 15,000) to the Applicant's wife and mother of his two children, Mariamu Ramadhani Juma, as an indirect victim for the moral prejudice suffered;

iii. US Dollar Two Thousand (US$ 2,000) to the Applicant's brother, Mr Hussein Ramadhani, as an indirect victim for the moral prejudice suffered;

iv. US Dollar Two Thousand (US$ 2,000) to the Applicant's brother, Mr Issa Ramadhani, as an indirect victim for the moral prejudice suffered;

v. US Dollar Two Thousand (US$ 2,000) to the Applicant's sister, Ms Asia Ramadhani, as an indirect victim for the moral prejudice suffered;

vi. US Dollar Two Thousand (US$ 2,000) to the Applicant's wife, Mariamu Ramadhani Juma, for the material prejudice suffered as a wife;

vii. US Dollar Twenty Thousand (US$ 20,000) to the Applicant for legal fees; and

viii. US Dollar One Thousand and Six Hundred (US$ 1,600) for expenses incurred.

9. The Applicant further prays the Court to order the Respondent State to:

i. Guarantee non-repetition of the violations;

ii. Report to the Court every six (6) months until they satisfy the orders on reparations; and

iii. Publish in the national gazette the Judgment on the merits within one month of delivery of the present Judgment as a measure of satisfaction.

10. The Respondent State prays the Court to order that:

i. The Judgment of the Court on the merits of the matter is sufficient reparation;

ii. The Applicant's claim for reparations is dismissed in its entirety with costs; and

iii. The Respondent State is granted any other relief the Court may deem 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' rights it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

12. In line with its earlier judgments, the Court considers that for

reparation claims to be granted, the Respondent State should be internationally responsible, causation must be established and where it is granted, reparation should cover the full damage suffered. Furthermore, the Applicant bears the onus to justify the claims made[2] save for moral prejudice for which the Court exercises judicial discretion in equity.[3] In such circumstances, the Court awards lump sums.[4]

13. The Court restates that measures, which it may order pursuant to Article 27(1) of the Protocol include restitution, compensation, rehabilition of the victim, satisfaction and any other measures that are aimed at ensuring non-repetition of the established violations in light of the circumstances of each case.[5]

14. The Court further restates, as per its case-law, that damages should be awarded, where possible, in the currency in which loss was incurred.[6] In the instant case, while the Applicant makes his claims in United States Dollars, damages will be awarded in Tanzanian Shillings as all potential awardees reside on the territory of the Respondent State and the single prejudice forming the basis of all the claims occurred in the same country.

15. The Court notes that responsibility of the Respondent State and causation have been established in the Judgment on the merits where it found a violation of the Applicant's right to legal assistance guaranteed under Article 7(1)(c) of the Charter. The Court will therefore, against this finding, examine the Applicant's claims in respect to other forms of reparation.

2 See *Norbert Zongo and Others 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; *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§ 27-29.

3 *Lohé Issa Konaté v Burkina Faso* (reparations), § 58; *Nguza Viking and Johnson Nguza v United Republic of Tanzania*, ACtHPR, Application No. 006/2015, Judgment of 8 May 2020 (reparations), § 15.

4 See *Norbert Zongo and Others v Burkina Faso* (reparations), § 62; *Wilfred Onyango Nganyi and Others v United Republic of Tanzania*, Application No. 006/2013, Judgment of 4 July 2019 (reparations), § 73.

5 See *Mohamed Abubakari v United Republic of Tanzania*, ACtHPR, Application No. 007/2013, Judgment of 4 July 2019 (reparations), § 21; *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20; *Nguza Viking and Johnson Nguza v Tanzania* (reparations), § 14.

6 See *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 45.

A. Pecuniary reparations

i. Material loss

16. The Applicant claims compensation for loss of income due to the fact that his business collapsed after he was imprisoned. He also seeks reparation for disruption of his life plan and costs incurred in the proceedings before domestic courts. The Applicant's prayers for reparation further include monetary compensation for material loss suffered by his wife.

17. The Respondent State submits that the Applicant has failed to adduce evidence in support of these claims but also did not succeed in centering the claims around the established violation of failure to provide legal assistance. The Respondent State prays the Court to dismiss the present request.

18. The Court will consider the Applicant's claims first, with respect to the loss of income and life plan, and secondly, with regard to the costs of proceedings before domestic courts.

a. Loss of income and life plan

19. The Court restates that, with regard to material prejudice, there must be a link between the established violation and the loss alleged.[7] Material damage is therefore not warranted in circumstances where an established violation of the right to free legal assistance did not affect the trial, conviction and sentencing of the Applicant.[8]

20. In the instant case, the Applicant does not prove how the Respondent State's failure to grant him legal assistance during the proceedings before domestic courts has caused him loss of income, affected his life plan and caused material prejudice to his wife. As the records show, prejudice caused by the lack of legal assistance did not indeed impact the proceedings before the High Court and Court of Appeal given that the Applicant avers having actually availed himself representation by recourse to the

7 *Armand Guehi v Republic of Côte d'Ivoire* (merits and reparations) (7 December 2018) 2 AfCLR 477, §§ 178, 186; *Nguza Viking and Johson Nguza v Tanzania* (reparations), §§ 26-28.

8 See *Minani Evarist v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 84; *Anaclet Paulo v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 446, § 106.

services of a lawyer.[9] Furthemore, this Court did not find that the conviction and sentencing of the Applicant were as a result of the lack of legal representation and that domestic courts did not uphold any of the fair trial standards guaranteed in the Charter.

21. As a consequence of the foregoing, the Court dismisses this prayer.

b. Costs of proceedings before domestic courts

22. The Applicant prays the Court to grant him compensation to the tune of United States Dollars Four Thousand (US$ 4,000) for costs incurred in domestic proceedings where he was represented by a lawyer before the High Court and Court of Appeal.

23. The Respondent State submits that the domestic courts did not order any cost during the Applicant's trial and appeal, and that the Applicant does not provide evidence for such cost.

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24. The Court reiterates that costs and other expenses incurred in domestic proceedings may warrant monetary compensation[10] although the Applicant bears the onus to provide documents in support of the claims made.[11]

25. The Court notes that the Applicant does not provide evidence for the claim relating to costs incurred in the proceedings before the High Court and the Court of Appeal of the Respondent State. The Court considers that, while it had found a violation of the right to legal assistance, such finding did not impact on the conviction and sentencing of the Applicant in domestic proceedings. The said violation cannot therefore be said to exonerate the Applicant from supplying evidence on costs allegedly incurred as a result of the said proceedings. The claim is thus rejected.

9 Applicant's Written Submissions for Reparations, § 49.

10 See *Armand Guehi v Tanzania* (merits and reparations), § 188; and *Norbert Zongo and Others v Burkina Faso* (reparations), § 79.

11 See *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 39; *Nguza Viking and Johnson Nguza v Tanzania* (reparations), § 31.

ii. Non-material loss

26. The Applicant prays the Court to grant him compensation for moral prejudice as the lack of legal assistance caused him stress during his proceedings and imprisonment. He further avers that he suffered physical and emotional distress following his imprisonment as he could not take care of his family members and lost his social status and job.

27. The Applicant also seeks compensation for moral damage suffered by his family members as they were emotionally distressed by his imprisonment given that he played a main role in providing for them.

28. The Respondent State prays the Court to reject all claims for reparation on account of non-material loss as the Applicant has failed to justify them.

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29. The Court reiterates that, as an established rule, moral damage is one that causes suffering and afflictions to the victim but also emotional distress to the family members as well as non-material changes in their living conditions.[12] In making a determination on claims relating to non-material loss, the relevant enquiry is therefore whether the violation found by this Court has caused or is likely to have caused the above described state of being.

30. With respect to the Applicant, the Court restates that in instances where the established violation of the right to legal assistance did not affect the outcome of domestic proceedings, non-material prejudice ensues which can be fairly compensated by a token amount.[13] The Court has adopted the consistent standard of

12 See *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 34; *Nguza Viking and Johnson Nguza v Tanzania* (reparations), § 38.

13 See *Minani Evarist v Tanzania* (merits), §§ 84-85; *Anaclet Paulo v Tanzania* (merits), §§ 106-107; *Jibu Amir and Saidi Ally v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019, §§ 94-95; *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 108.

awarding Tanzanian Shillings Three Hundred Thousand (TZS 300,000).[14]

31. The Court, based on its earlier findings and the circumstances of the present case, awards the Applicant Tanzanian Shillings Three Hundred Thousand (TZS 300,000) for the moral prejudice suffered due to the Respondent State's failure to grant him legal assistance.

32. Regarding the indirect victims, the Court considers that, as a general rule, their claims for reparation are determined by their link to the Applicant.[15] As such, the extent of moral harm that may be claimed by the indirect victims cannot in principle supersede the main damage caused to the victim, which is the Applicant.[16]

33. The Court observes that in the instant matter, only the failure to provide the Applicant with legal assistance was retained as the main prejudice from which the indirect victims can draw damage. The Court notes that the Applicant does not justify the said claims by the lack of legal assistance but rather by his imprisonment, which this Court did not find was in breach of any of his rights.

34. As a consequence of the foregoing, the Court finds that reparation is not warranted and dismisses the claims.

B. Non-pecuniary reparations

i. Restitution

35. The Applicant prays this Court to "restore him to his previous situation before his imprisonment occurred" even though he is aware that he cannot be set free before serving his thirty (30) years sentence.[17]

36. The Respondent State prays the Court to dismiss this prayer as the reparation sought is irrelevant and inapplicable in the instant case given that the Applicant was duly tried based on good

14 *Minani Evarist v Tanzania* (merits), § 85; *Anaclet Paulo v Tanzania* (merits), §§ 106-107; *Kalebi Elisamehe v Tanzania*, as above; *Jibu Amir and Saidi Ally v Tanzania*, *op. cit.*, § 95.

15 See *Ally Rajabu and Others v United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019, §§ 152-153; *Ingabire Victoire Umuhoza v Rwanda* (reparations), §§ 66-73.

16 See *Mohamed Abubakari v Tanzania* (reparations), §§ 47, 59, 62; *Alex Thomas v United Republic of Tanzania*, ACtHPR, Application No. 005/2013, Judgment of 4 July 2019 (reparations), §§ 42, 57, 60; and *Wilfred Onyango Nganyi and Others v Tanzania* (reparations), § 73.

17 Applicant's submissions on reparation, § 55.

evidence by a competent court and his appeal was heard and conclusively determined.

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37. The Court restates that the purpose of an order for restitution is to achieve the *status quo ante* that is reinstate the Applicant in the situation prior to the violation.[18] In the circumstances, measures contemplate are those such as expunging the Applicant's conviction from the records, setting aside fines meted against him, or returning his property.[19]

38. The Court notes that in the present case, only the failure to grant legal assistance was established and remedy duly afforded. Considering that this Court did not find any other violation which caused prejudice that would warrant returning the Applicant in his initial situation, the claim for restitution is not justified.

39. The prayer is therefore dismissed.

ii. Non-repetition of the violations and report on implementation

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

41. The Respondent State contends that the prayer for guarantee of non-repetition is redundant given that provision has already been made for all its citizens to be afforded free legal services.

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18 *Lohé Issa Konaté v Burkina Faso* (reparations), § 58; *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application No. 009/2015, Judgment of 29 March 2019 (merits and reparations), § 142.

19 See *Lohé Issa Konaté v Burkina Faso* (reparations), §§ 19-23; *Lucien Ikili Rashidi v Tanzania*, *op.cit.*, § 142.

42. The Court observes that while non-repetition may apply to both systemic and individual cases,[20] its purpose in the latter instances is to prevent the violation from continuing or recurring.[21]

43. As the Court earlier found, the violation of the right to legal assistance was completed as at the time of the domestic proceedings. The likelihood of continuation or repetition is therefore non-existent in respect of the Applicant as far as the present matter is concerned. An order for non-repetition is consequenlty not warranted in respect of the Applicant.

44. The Court is however cognisant of the prospect of systemic violations given that other users of the Respondent State's justice system may suffer the same violation. In this regard, it is worth noting that the Respondent State has in 2017 – that is the year preceding the Judgment on the merits in the present matter – enacted a Legal Aid Act under which assistance is provided to persons facing criminal proceedings.[22] The Court considers that the enactment of the Legal Aid Act has rendered redundant any subsequent order on provision of legal assistance to users of the Respondent State's justice system save for an effective implementation of the Act. An order for non-repetition aimed at preventing systemic situations will therefore be relevant only when the Court examines future requests for reparation involving implementation of the Act.

45. As a consequence, the Court does not make any order on non-repetition.

46. Regarding the report on implementation, the Court restates that related orders have become inherent in its processes as prescribed under Article 30 of the Protocol.[23]

iii. Publication of the decision

47. The Applicant prays the Court to order the Respondent State to publish in the national Gazette, within one month of delivery, the Judgment on the merits as a measure of satisfaction.

20 *Armand Guehi v Tanzania* (merits and reparations), § 191. See also *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 103-106.

21 *Armand Guehi v Tanzania*, as above; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 43.

22 Legal Aid Act, 2017.

23 See *Wilfred Onyango Nganyi v Tanzania* (reparations), § 83; *Nguza Viking and Johnson Nguza v Tanzania* (reparations) § 52; *Kalebi Elisamehe v Tanzania*, *op. cit.*, § 117(xvi).

48. The Respondent State requests the Court to dismiss the prayer on publication since its decisions are published on its website and freely available.

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49. The Court recalls that, as per its case-law, its judgment can in itself constitute sufficient reparation for any given violation especially when it comes to moral damage. Orders such as publication of a decision are therefore made on a case-by-case basis as the circumstances warrant.[24] Such circumstances would include cases of grave or systemic violations that affect the domestic system of the Respondent State; where the Respondent State has not implemented a previous order of this Court in relation to the same case; or where there is need to enhance public awareness of the findings in the case.[25]

50. The Court notes that, as earlier recalled, the present matter involves only the failure to provide legal assistance towards which the Respondent State had acted by adopting a Legal Aid Act in 2017, that is after the filing of the Application but prior to the Judgment on the merits. It must further be noted that this Court has, in other applications, issued several judgments related to the provision of legal aid which it has ordered the Respondent State to publish.[26] Given that the present case does not involve a systemic violation and the Judgment on the merits did not include a specific measure to be implemented by the Respondent State, this Court does not find it necessary to order publication of any of its judgments in the instant matter.

24 *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 45; *Ally Rajabu and Others v Tanzania* (merits and reparations), §§ 151-153; *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020, §§ 173-174.

25 *Armand Guehi v Tanzania* (merits and reparations), § 191. See also *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 45; and *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 103-106.

26 *Andrew Ambrose Cheusi v Tanzania*, *op. cit.*, §§ 174, 184; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 102(ix); *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101; and *Wilfred Onyango Nganyi and Others v Tanzania* (reparations), § 97(viii).

51. The prayer is therefore dismissed.

VI. Costs

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

53. 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.[27] The onus is on the Applicant to provide justification for the amounts claimed.[28]

A. Legal fees related to proceedings before this Court

54. The Applicant prays the Court to order the payment of the following being the legal fees incurred in the proceedings before the African Court:

i. Legal aid fees: 200 hours for two Assistant counsel at US Dollars Fifty (US$ 50) an hour amounting to US Dollars Ten Thousand (US$ 10,000); and

ii. Legal aid fees: 100 hours for the lead counsel at US Dollars One Hundred (US$ 100) an hour amounting to US Dollars Ten Thousand (US$ 10,000).

55. The Respondent State prays the Court to dismiss this prayer as unfounded and baseless given that the Applicant does not provide supporting evidence and the costs of representation were covered under the Court's legal aid scheme.

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56. The Court notes that the Applicant was duly represented by PALU throughout the proceedings under the Court's legal aid scheme.[29]

27 See *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 79-93; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 39; *Armand Guehi v Tanzania* (merits and reparations), § 188; *Andrew Ambrose Cheusi v Tanzania*, *op. cit.*, § 176.

28 *Norbert Zongo and Others v Burkina Faso* (reparations), § 81, and *Reverend R. Mtikila v Tanzania* (reparations), § 40; *Wilfred Onyango Nganyi and Others v Tanzania* (reparations), § 89.

29 See African Court on Human and Peoples' Rights Legal Aid Policy 2013-2014, Legal Aid Policy 2015-2016, and Legal Aid Policy from 2017.

Noting further that its legal aid scheme is *pro bono* in nature, the Court rejects the claim.

B. Other expenses related to proceedings before this Court

57. The Applicant prays the Court to order the reimbursement of costs incurred in the proceedings before this Court as follows:

i. Postage: US Dollars Two Hundred (US$ 200);

ii. Printing and photocopying: US Dollars Two Hundred (US$ 200);

iii. Transportation from the seat of the Court and the PALU Secretariat to the Ukonga prison: US Dollars One Thousand (US$ 1,000); and

iv. Communication: US Dollars Two Hundred (US$ 200).

58. The Respondent State submits that the prayer should be denied since the Applicant was provided legal aid by this Court. The Respondent State also avers that the prayers related to other costs are an afterthought and misconceived since they were not made in the Application.

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59. The Court notes that, in the proceedings before it, the Applicant was represented by PALU under the legal aid scheme. Consequently, the considerations relied on in examining the claim for payment of legal fees before this Court apply to the present claim. The claim is therefore dismissed.

60. As a consequence of the above, the Court decides that each Party shall bear its own costs.

VII. Operative part

61. For these reasons:

The Court,

Unanimously:

Pecuniary reparations

i. *Does not grant* the prayer for material damages sought on account of loss of income, life plan, and costs incurred in the proceedings before domestic courts;

ii. *Grants* the prayer for damages in relation to the failure to be afforded free legal assistance, and awards the Applicant the sum

of Tanzanian Shillings Three Hundred Thousand (TZS 300,000); and

iii. *Orders* the Respondent State to pay the amount indicated under sub-paragraphs (ii) free from taxes within six (6) months, effective from the notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

iv. *Dismisses* the prayers for restitution, non-repetition and publication;

v. *Dismisses* the prayers for reimbursement of legal fees.

On implementation and reporting

vi. *Orders* the Respondent State to submit to the Court, within six (6) months from the date of notification of this Judgment, a report on the measures taken to implement the orders set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

vii. *Dismisses* the prayer related to payment of the costs and other expenses incurred in the proceedings before this Court;

viii. *Orders* each party to bear its own costs.

Motiba v Tanzania (reopening of pleadings) (2021) 5 AfCLR 317

Application 055/2016, *Cleophas Maheri Motiba v United Republic of Tanzania*

Order, 5 July 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant alleged that the Respondent State violated his human rights by allegedly terminating his employment unjustly. The Respondent State failed to file its pleadings despite several reminders but applied to reopen pleadings after the Applicant applied for default judgment to be entered in his favour. The Court granted the Application and made an order for the reopening of pleadings.

Procedure (reopening of pleadings in the interest of justice, 22, 23)

I. The Parties

1. Mr. Cleophas Maheri Motiba (hereinafter referred to as " the Applicant") is a Tanzanian national. The Applicant claims a violation of his right to work by the Ministry of Finance through unjust termination of his employment and forcefully retirement when Tanzania Revenue Authority effectively took over the functions of the Ministry of Finance.

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 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 held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the

withdrawal took effect, being a period of one (1) year after its deposit.[1]

II. Subject of the Application

3. The Applicant alleges the violation of his right to work when his employment was terminated unjustly, and he was forced into early retirement by the Respondent State in public interest on 30 June 1996.

4. Furthermore, that even when, on 1 July 1996, the Tanzania Revenue Authority effectively took over the functions of the Ministry of Finance and he was forced into unlawful retirement, he still remained an employee of the Ministry of Finance, in the revenue section on permanent and pensionable basis and must therefore not suffer loss of any entitlements. He also claims that he should be paid general damages.

III. Summary of the Procedure before the Court

5. The Application was filed on 14 September 2016 and served on the Respondent State on 15 November 2016 with a request to the Respondent State to file its response within sixty (60) days.

6. On 6 December 2016, the Court granted the Applicant legal aid. Counsel Nelson Ndeki agreed to represent the Applicant on 7 December 2016 and the Respondent State was notified on 17 January 2017.

7. On 19 January 2017, the Respondent State filed a request for extension of time without specifying the time frame to file its Response to the Application on the grounds that it was still receiving information from stakeholders involved in the matter.

8. On 1 August 2017, Counsel for the Applicant filed an Application for judgment in default on the basis that the Respondent had not filed its response to the Application even after reminders were sent by the Court on 9 February 2017. The Response was not attached as stated in the Respondents Letter dated 6 February 2017.

9. On 27 June 2018, the parties were notified of the Close of Pleadings with effect from 26 June 2018.

10. On 9 September 2019, the Applicant filed a request for the Court to render a judgment in default because the Respondent State

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACHPR, Application No. 004/2015, Judgment of 26 June 2020, § 38.

had neglected to file its Response to the Application even after it was reminded to do so by the Court on 9 February 2017, 28 August 2017 and 13 September 2017.

11. On 25 January 2018, the Registry sent a Rule 55 letter notifying the Respondent State that judgment would be rendered in default if it does not file its Response. It was given forty-five (45) days to file its Response to the Application.

12. Pleadings were closed on 26 June 2018 and the parties were duly notified.

13. The Respondent State filed its Response to the Application on 17 August 2018, under Practice Direction No. 38 which allows for the Court's discretion to allow for parties to file submissions out of time and the same was transmitted to the Applicant on 29 August 2018. The reason given for the delay was that it was still consulting with stakeholders.

14. On 29 October 2018, the Applicant was granted an additional thirty (30) days to file his submissions on reparations after the initial timeframe had elapsed on 7 October 2018.

15. The Applicant filed his submissions on reparations after 2 reminders were sent on 7 October 2018 and 29 October 2018 and these were transmitted to the Respondent State on 22 March 2019.

16. The Applicant filed his Reply to the Respondent's Response on 3 January 2019.

17. The Respondent State was reminded on 22 March 2019 and on 13 May 2019 to file its Response on reparations. Following, this, the Applicant filed a request on 9 September 2020 to render judgment in default and the pleadings were subsequently closed again on 8 October 2019 before the Respondent State filed its submission on reparations.

18. On 30 September 2019, the Applicant filed a request for the consideration of his case to be expedited on humanitarian grounds, citing advanced age at sixty-three (63) years, hardships being experienced and the delay in getting justice for twenty-three (23) years since he was terminated in 1996.

19. On 2 January 2020 the Respondent State filed its Response to the Applicant's submissions on reparations out of time without requesting for leave to file the same and this was transmitted to the Applicant by letter on 11 May 2021 under Rule 46(3) the Applicant was given forty-five (45) days to file its Response. It is also the basis for the Court to render an Order to re-open pleadings to allow the Applicant to file his Reply.

IV. On reopening of pleadings

20. The Court notes that despite repeated reminder to the Respondent State, it did not file its Response to the Applicant's submissions on reparations and only did so on 20 March 2019, out of time.

21. The Court further observes that Rule 46(3) of the Rules provides that "the Court has the discretion to determine whether or not to reopen pleadings".

22. The Court recalls that, where the interests of justice so require, it is empowered by the Rules to order that pleadings be reopened or grant an extension of time for a Party to file its pleadings. In the present case, after due consideration, the Court considers that it is appropriate, in the interests of justice, to use its discretion to allow the Respondent State's submissions on reparations filed out of time to be deemed as properly filed. Given that pleadings were already closed in this matter and taking into account the letter transmitted to the Applicant on 11 May 2021, notifying him that an Order would be issued to re-open pleadings following an inquiry on the status of his case.

23. The Court considers it necessary that pleadings be re-opened for purposes of:

i. transmitting the Applicant's Response to the Respondent's Reply to the Application filed on 3 January 2019 for information.

ii. accepting the Respondent State's submissions on reparations and availing the Applicant an opportunity to respond thereto.

V. Operative part

24. For these reasons:

The Court

Unanimously,

Orders that:

i. In the interests of justice, pleadings in Application No. 055 /2016 be and are hereby re-opened.

ii. The Respondent State's submissions on reparations be deemed as duly filed and be transmitted to the Applicant for a Reply to be filed within forty-five days (45) of receipt of this Order.

Onyachi & Anor v Tanzania (reopening of pleadings) (2021) 5 AfCLR 321

Application 003/2015, *Kennedy Owino Onyachi & Charles John Mwanini Njoka v United Republic of Tanzania*

Order, 20 July 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

In an earlier judgment, the Court had held the Respondent State in partial violation of the rights of the Applicants but reserved its ruling on reparations. On the Respondent State's Application to reopen pleadings to enable it file a Response, the Court ordered the reopening of pleadings.

Procedure (reopening of pleadings, 14-16)

I. Parties

1. The Applicants, Mr. Kennedy Owino Onyachi and Mr. Charles John Mwaniki Njoka, are nationals of the Republic of Kenya. They are convicted prisoners who are currently serving a sentence of thirty (30) years' imprisonment for the crime of aggravated robbery at the Ukonga Central Prison in Dar es Salaam, United Republic of Tanzania.

2. The Respondent is the United Republic of Tanzania. The Respondent became a State Party to the African Charter on Human and Peoples' Rights (hereinafter, referred to as "the Charter") on 18 February 1984, and the Protocol on 7 February 2006; and deposited the declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organizations on 29 March 2010.

II. Subject of the Application

3. In their Application, the Applicants alleged that their rights to equality and equal protection of the law, liberty and security, freedom against torture and ill-treatments and right to a fair trial had been violated by the Respondent State. The Applicants asserted that the said violations occurred after they were illegally arrested and extradited from Kenya to the Respondent State and were convicted of robbery on the basis of improperly obtained

evidence.

4. On 28 September 2017, the Court rendered its judgment whose operative part on the merits reads as follows:

i. *Declares* that the Respondent has not violated Articles 3, 5, and 7(2) of the Charter.

ii. *Finds* that the Respondent violated Articles 1, 6 and 7(1) (a), (b) and (c) of the Charter.

iii. *Orders* the Respondent State to erase the effects of the violations established through the adoption of measures such as presidential pardon or any other measure resulting in the release of the Applicants' as well as any measure leading to erasing of the consequences of the violations established and to inform the Court, within six (6) months, from the date of this judgment of the measures taken.

iv. *Grants*, in accordance with Rule 63 of the Rules of Court, the Applicants to file submissions on the request for reparations within thirty (30) days hereof, and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant's submissions.

v. *Reserves* its ruling on the prayers for other forms of reparation and on costs.

5. Pursuant to this judgment of the Court on the merits of 28 September 2017, the Applicants, on 30 July 2018, filed their written submissions for reparations.

III. Summary of the Procedure before the Court

6. On 3 October 2017, the Registry transmitted a certified true copy of the judgment on the merits to the Parties.

7. On 10 October 2017, the Applicants' representative, the Pan African Lawyers' Union (PALU) requested extension of time to file the Applicants' submissions on reparations. On 23 October 2017, the Court notified the Applicants that they had been granted thirty (30) days extension of time.

8. On 28 April 2018, the Court *suo motu* granted the Applicants additional fifteen (15) days extension of time.

9. The Applicants filed, through PALU, their submissions on reparations on 30 July 2018. This was transmitted to the Respondent State on 1 August 2018 with a request that it should file its response within thirty (30) days of receipt.

10. On 27 September 2018, the Respondent State requested for extension of time to file its submissions in response and it was granted thirty (30) days extension on 1 October 2018.

11. Despite additional extensions of time and reminders sent on 7 January 2018, 19 September 2019 and 25 March 2020, the

Respondent State failed to file its submissions.

12. Pleadings were closed with effect from 16 November 2020 and the Parties were duly notified. By the same notice, the Parties were also notified that, in the absence of a response from the Respondent State, the Court will enter a judgment in default on the basis of the pleadings submitted by the Applicants in accordance with Rule 63 of the Rules.

13. On 12 May 2021, the Respondent State filed its Response to the Applicant's submissions on reparations, together with a request for leave to file its Response out of time. The Respondent State justified its delay by indicating that it was making consultations and deliberations with different Government Stakeholders before it was able to file its Response.

IV. On the request for reopening of pleadings

14. The Court notes that Rule 46(3) of the Rules provides that "the Court has the discretion to determine whether or not to reopen pleadings". Accordingly, when a party requests for the reopening of pleadings after the close of the same, the Court has the inherent power to order the reopening of pleadings and admit submissions filed by parties.

15. In the present Application, the Court notes that the Respondent State prayed the Court to reopen pleadings and grant leave to file its submissions out of time. It justifies its failure to comply with the deadlines to submit pleadings by pointing out that it needed time to make consultations and deliberations with different Government Stakeholders.

16. Having considered the Respondent State's justifications and in the interests of proper administration of justice, the Court decides to reopen pleadings.

17. For these reasons:

The Court

Unanimously,

i. *Orders* that the proceedings in Application 003/2015 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (reparations) are hereby reopened;

ii. *Rules* that Respondent State's Response to the Applicants' submissions on reparations is deemed as properly filed, in the interest of justice; and

iii. *Orders* the Applicants to submit his Reply to the Respondent State's Response within thirty (30) days of receipt thereof.

Ally v Tanzania (striking out) (2021) 5 AfCLR 324

Application 019/2017, *Ahmed Ally v United Republic of Tanzania*

Order, 3 August 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant who was in custody awaiting execution of a death sentence was found to have been released on a presidential pardon before pleadings were exchanged. The Court ordered the matter to be struck out since all attempts to communicate with the Applicant had failed.

Procedure (Applicant's failure to pursue his case, 14-17)

I. The Parties

1. Mr. Ahmed Ally (hereinafter referred to as "the Applicant") is a national of Tanzania, who at the filing of this Application was on death row at Uyui Prison awaiting the execution of a death sentence meted upon him after a conviction of murder.

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 (hereinafter referred to as "the Protocol") 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 has no bearing on pending cases, and new cases filed before the withdrawal came into effect, one year after its filing, that is, on 22 November 2020.

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges that he was convicted of murder and sentenced to death in the High Court of Tanzania at Dar es

Salaam.

4. According to the Applicant, he appealed this decision to the Court of Appeal, which delivered judgment on 19 April 1994 dismissing his appeal in its entirety.

B. Alleged violations

5. The Applicant alleges violation of Articles 2 and 3(2) of the Charter.

III. Summary of the Procedure before the Court

6. The Application was filed on 13 June 2017 and served on the Respondent State on 15 April 2018. The Respondent State was given sixty (60) days to file its Response.

7. On 19 April 2018, the Court *suo motu* granted the Applicant legal aid under its legal aid scheme. This is because the Applicant was on death row, his Application was incoherent and lacked clarity.

8. On 24 August 2018, 15 February 2019 and 25 June 2019, the Respondent State was reminded to file its Response, but it failed to do so. On 17 September 2018, the Parties were requested to file pleadings on reparations following the decision of the Court during its 49th Ordinary Session (16 April-11 May 2018) to combine judgments on merits with reparations.

9. On 1 February 2019, William Ernest, the legal representative of the Applicant, transmitted a letter to the Court indicating that on 22 January 2019, after a visit to Uyui Prison, where the Applicant was being held, he found out that the Applicant had been released through a presidential pardon.

10. On 17 March 2020, the Legal representative of the Applicant transmitted a letter indicating that following the information about the release of the Applicant, they have tried to contact him but have failed and as such he submits that the Court should decide on the way forward.

11. The Court attempted to contact the Applicant through the prisons' authorities on 13 May 2020, 12 October 2020 and 28 May 2021 without any success.

12. Written pleadings were closed with effect from 10 July 2021 and the Parties were notified thereof.

IV. On the striking out of the Application

13. The Court notes the pertinence of Rule 65(1) of the Rules , which

provides that:

1. The Court may at any stage of the proceedings decide to strike out an Application from its cause list where:

a. An Applicant notifies the Court of his/her intention not to proceed with the case;

b. An Applicant fails to pursue his case within the time limit provided by the Court.

14. The Court notes that the Applicant was pardoned by the President of the Respondent State and therefore released from prison. Furthermore, the legal representatives of the Applicant submitted that they had tried to contact the Applicant so as to pursue the case but to no avail. The Court also tried to contact the Applicant through the prisons' authorities but received no response to its letters.

15. The Court requires that parties to an application should pursue their case with diligence and the failure to do so leads to the conclusion that a party is no longer interested in pursuing their claim.

16. 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 65(1)(b) of the Rules.

17. The decision to strike out the Application does not prevent the Applicant, by showing good cause, from applying for restoration of his matter to the Court's Cause List pursuant to the Rule 65(2) of the Rules.

V. Operative part

18. For these reasons:

The Court,

Unanimously,

i. *Orders* that this Application be struck out from the Cause List of the Court.

Zinsou & Ors v Benin (provisional measures) (2021) 5 AfCLR 327

Application 007/2021, *Romaric Jesukpego Zinsou & 2 Others v Republic of Benin*

Ruling, 2 September 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Following a students' demonstration that resulted in the death of one student, the Applicants brought this Application against the Respondent State, along with a request for provisional measures for an independent investigation into the alleged violations that took place at the University of Abomey Calavi. The Court declined to grant the provisional measures sought on the grounds that doing so would require it to prejudge the merits of the Application.

Jurisdiction (*prima facie*,11, 12, 14; effect of withdrawal of article 34(6) declaration, 13)

Provisional measures (basic conditions for order,18; urgency, 19; irreparable harm, 20; prejudging merit, 21)

I. The Parties

1. Romaric Jésukpégo Zinsou, Landry Adelakoun and Angelo Fifamin Miguèle Houeto (hereinafter, referred to as "the Applicants") are nationals of the Republic of Benin currently residing in Cotonou. They filed an Application together with a request for provisional measures to *inter alia*, seek an independent and impartial investigation of the human rights violations which allegedly took place at the University of Abomey Calavi on 24 March 2020.

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 (Herein after referred to as "the Protocol") on 22 August 2014. On 8 February 2016, the Respondent State deposited 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 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 of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new cases filed prior to the entry into force of the withdrawal, one year after its deposit, that is, on 26 March 2021.[1]

II. Subject of the Application

3. It emerges from the Application that, during the meeting of the Council of Ministers of 17 March 2020, the Respondent State took a series of measures to prevent the spread of the Coronavirus disease (hereinafter referred to as "Covid-19") in the country. The Applicants submit that, in the implementation of the said measures, "the Rector of the University of Abomey-Calavi (hereinafter referred to as "UAC") also issued Memorandum No. 340-2020/ UAC/SG/SA dated 18 March 2020 prohibiting demonstrations of more than 50 people on the Abomey-Calavi University campus".

4. Following the Rector's decision, "*Fédération Nationale des Étudiants du Bénin* (National Federation of Students of Benin), by memo dated 20 March 2020, decided to suspend classes at the UAC as a preventive measure against the spread of Covid-19. Awareness and information sessions on the measures taken were held on Monday 23 and Tuesday 24 March 2020".

5. The Applicants contend that on 24 March 2020, "while awareness-raising on the measures was on-going and as the students were being encouraged to stay home, the police arrested some student leaders. A demonstration for their release then ensued. The demonstrations lasted several hours and resulted in the shooting to death of Théophile Dieudonné DJAHO, a first-year Geography student at the Faculty of Arts, Humanities and Social Sciences... The police officers who used disproportionate force were never identified and sanctioned by the courts. "

III. Alleged violations

6. The Applicants allege the violation of Articles 4 and 7 of the Charter as a result of the death of a student and the failure of the Respondent State to take steps to prosecute and hold accountable

1 *Ingabire Victoire Umuhoza v Republic of Rwanda (*jurisdiction*)* (Order of 3 June 2016) 1 AfCLR 562, § 67; *Hongue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4 and 5 and *Corrigendum* of 29 July 2020.

the perpetrators of the crime.

IV. Summary of the Procedure before the Court

7. The Application together with a request for provisional measures, was filed at the Registry on 10 March 2021.

8. On 1 April 2021, the Application on the merits and the request for provisional measures were served on the Respondent State, which was granted ninety (90) days and fifteen (15) days, within which to respond on the merits and the request for provisional measures, respectively, from the date of receipt of service.

9. The Respondent State has not filed any submissions.

V. *Prima facie* jurisdiction

10. Article 3(1) of the Protocol provides that "[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned."

11. Rule 49(1) of the Rules of Court[2] provides "[t]he Court shall preliminarily ascertain its jurisdiction…". However, with respect to provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, only that it has *prima facie* jurisdiction.[3]

12. In the instant case, the rights allegedly violated by the Applicants are all protected by the Charter to which the Respondent State is a party. The Court further notes that the Respondent State is a party the Protocol and deposited the Declaration under Article 34(6) of the Protocol.

13. The Court further recalls its decision that the withdrawal of the Declaration under Article 34(6) of the Protocol has no retroactive effect and has no bearing on new cases filed before the effective date of the withdrawal.[4] The Court reiterates its position that the withdrawal of the Respondent State's Declaration, which took effect on 26 March 2021,[5] does not in any way affect its personal jurisdiction in the instant case, since the Application was filed on

2 Rules of 25 September 2020.

3 *Komi Koutche v Republic of Benin*, ACtHPR, Application No. 020/2019, Ruling of 2 December 2019 (provisional measures), § 11.

4 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction), § 67.

5 *Houngue Éric Noudéhouenou v Benin*, (provisional measures), §§ 4 and 5.

10 March 2021.

14. The Court concludes that it has *prima facie* jurisdiction to hear the Request for provisional Measures.

VI. Provisional measures requested

15. The Applicants pray the Court to order the Respondent State to conduct an "independent and impartial investigation into the human rights violations that occurred at the University of Abomey Calavi on 24 March 2020."

16. The Respondent State has not filed any submissions.

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17. The Court notes that Article 27(2) of the Protocol provides that "[i]n cases of extreme gravity and urgency and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary."

18. In view of the above, the Court may only order provisional measures *pendente lite* if the basic conditions of extreme gravity or urgency and the prevention of irreparable harm to persons are met.

19. The Court recalls that "urgency, which is consubstantial with extreme gravity, means that an "irreparable and imminent harm will occur before it renders its final judgment".[6] The risk in question must be real and explains the need to remedy it in the immediate future.[7]

20. With respect to irreparable harm, the Court considers that there must be a "reasonable probability of occurrence having regard to the context and the Applicant's/Applicants' personal situation."[8] It is for the Applicant seeking provisional measures to prove

6 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (provisional measures), § 61.

7 *Ibid, § 62.*

8 *Ibid*, § 63.

urgency or extreme gravity as well as irreparable harm.[9]

21. The Court recalls its case-law according to which "it is only required to ascertain the existence of these basic conditions if it is established that the measures sought do not prejudge the merits of the Application(s)."[10] In this respect, the Court has held that "a request for provisional measures prejudges the merits of the Application when it is identical to it, when it seeks to achieve the same result or, in any event, when it touches on an issue on which the Court will necessarily have to rule on, when it addresses the merits of the case."[11]

22. The Court recalls that on the merits of the case, the Applicant is requesting it to find the violation of Articles 4 and 7 of the Charter as a result of the death of a student and the Respondent State's failure to take measures to hold accountable the perpetrators of the alleged crime.

23. The Court considers that, in order to order an independent and impartial investigation about the events of 24 March 2020, it must first confirm that a student died and that the Respondent State failed to take adequate measures to remedy the situation. It follows that, the Court cannot rule on the request for provisional measures without prejudging the merits of the case.

24. The Court concludes, therefore, that there are no grounds for ordering the provisional measures requested.

25. For the avoidance of any 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.

VII. Operative part

For these reasons,
The Court
Unanimously,

i. *Dismisses* the request for provisional measures.

9 *Romaric Jesukpego Zinsou and Others v Benin*, ACtHPR, Application No. 008/2021, Ruling of 10 April 2021 (provisional measures), § 20.

10 *Elie Sandiwidi and Mouvement Burkinabe des droits de l'homme et des peuples v Republic of Benin*, ACtHPR, Application No. 014 and 017/2020, Ruling of 25 September 2020 (provisional measures), § 65.

11 *Elie Sandiwidi and Mouvement Burkinabe des droits de l'homme et des peuples v Benin* (provisional measures), § 66; See also *Jean de Dieu Ngajigimana v United Republic of Tanzania* ACtHPR, Application No. 024/2019, Order of 26 September 2019 (provisional measures), § 25.

Zinsou v Benin (provisional measures) (2021) 5 AfCLR 332

Application 006/2021, *Romaric Jesukpego Zinsou v Republic of Benin*

Ruling, 10 September 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant brought this Application claiming that the Respondent State's COVID-19 quarantine processes were discriminatory and in violation of international human rights law. Along with the Application, the Applicant sought provisional measures for an order to retrocede COVID-19 quarantine fees to all persons who had been victims of discrimination. The Court declined to grant the measures sought on the grounds that doing so would require it to prejudge the merits of the Application.

Jurisdiction (*prima facie*,11, 12, 14; effect of withdrawal of article 34(6) declaration, 13)

Provisional measures (basic conditions for order, 22; urgency, 23,25; irreparable harm, 24, 25; prejudging merit, 26,27)

I. The Parties

1. Romaric Jésukpégo Zinsou (hereinafter, referred to as "the Applicant") is a national of the Republic of Benin currently residing in Cotonou. He filed the Application together with a request for provisional measures seeking an order retroceding Covid-19 quarantine fees to all persons who have been victims of discrimination.

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 (Herein after referred to as "the Protocol") on 22 August 2014. On 8 February 2016, the Respondent State deposited 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 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 of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new cases filed prior to the entry into force of the withdrawal, one year after its deposit, that is, on 26 March 2021.[1]

II. Subject of the Application

3. It appears from the Application that, following the Council of Ministers meeting of 17 March 2020, the Respondent State took a series of measures to prevent the spread of the Covid-19 pandemic in the country, in particular, the systematic and compulsory quarantine of all persons arriving in Benin by air and requisitioning one thousand hotel rooms to accommodate passengers in quarantine.

4. The Applicant submits that the Government decided that "the cost of quarantining nationals will be borne by the State while non-nationals will bear their own costs ". This measure is challenged by the Applicant before this Court as being discriminatory against non-nationals of Benin.

5. It is against this background the Applicant is requesting provisional measures from the Court ordering the Respondent State to retrocede the costs of quarantine for all victims of discrimination.

III. Alleged violations

6. The Applicant alleges violations of Articles 2 and 3 of the Charter and 26 of the International Covenant on Civil and Political Rights (ICCPR).

IV. Summary of the Procedure before the Court

7. The Application was filed on 3 March 2021, together with a request for provisional measures.

8. On 9 March 2021, the Application together with the request for provisional measures were served on the Respondent State, which was granted ninety (90) days and fifteen (15) days, within which to respond on the merits and on the request for provisional measures, respectively, from the date of receipt of service.

1 *Ingabire Victoire Umuhoza v Republic of Rwanda (*jurisdiction*)* (Order of 3 June 2016) 1 AfCLR 562, § 67; *Hongue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4 and 5 and *Corrigendum* of 29 July 2020.

9. On 28 April 2021, the Respondent State filed its Response to the request for Provisional Measures, which was transmitted to the Applicant on 4 May 2021 for information.

V. *Prima facie* jurisdiction

10. Article 3(1) of the Protocol provides that "[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned."

11. Rule 49(1) of the Rules of Court[2] provides "[t]he Court shall preliminarily ascertain its jurisdiction…". However, with respect to provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, only that it has *prima facie* jurisdiction.[3]

12. In the instant case, the rights allegedly violated by the Applicants are all protected by the Charter to which the Respondent State is a Party. The Court further notes that the Respondent State is a Party to the Protocol and deposited the Declaration under Article 34(6) of the Protocol.

13. The Court further recalls that, is has held that the withdrawal of the Declaration under Article 34(6) of the Protocol has no retroactive effect and has no bearing on new cases filed before the effective date of the withdrawal[4] as in the instant case. The Court reiterates its position that the withdrawal of the Respondent State's Declaration which took effect on 26 March 2021,[5] does not in any way affect its personal jurisdiction in the instant case, since the Application was filed on 3 March 2021.

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

VI. On the provisional measures requested

15. The Applicant asks the Court to "order a provisional measure retroceding the quarantine costs to all persons who have been victims" of discrimination.

2 Rules of 25 September 2020.

3 *Komi Koutche v Republic of Benin*, ACtHPR, Application No. 020/2019, Ruling of 2 December 2019 (provisional measures), § 11.

4 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction), § 67.

5 *Houngue Éric Noudéhouenou v Benin* (provisional measures), §§ 4 and 5.

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16. The Respondent State submits that, in accordance with Article 27(2) of the Protocol and Rule 51 of the Rules, provisional measures may only be ordered in cases of urgency or extreme gravity and where the damage is irreparable.

17. Referring to the Court's jurisprudence, the Respondent State alleges that "extreme urgency" exists when the Applicant is sentenced to death[6] or "when he is detained in deplorable conditions, subjected to all kinds of torture..."[7] He asserts that in the instant case, not only is there no urgency or extreme gravity in the prayers requested, but also that the Applicant, who is not one of the alleged victims, does not explain how an urgent measure is sought one (1) year after the contested decisions were taken.

18. With regard to the irreparable nature of the damage, the Respondent State maintains that harm is irreparable only when "the consequences cannot be erased, repaired or compensated for by any means, even by way of compensation". It argues that, in the instant case, the alleged harm does not result from the measures taken by the Government, and that the alleged victims were informed of the measure before they boarded to plane to travel to Benin.

19. Finally, the Respondent State alleges that "the retrocession of costs requested by the Applicant prejudices the merits of the case insofar as it "should be the consequence of the recognition of the alleged violation", which, according to the Respondent, is contrary to the jurisprudence of the Court.

20. It follows, according to the Respondent State, that the measure requested does not meet the requirements of urgency or extreme gravity, nor is the nature of the damage irreparable. The prayer must therefore be dismissed by the Court.

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6 *Dexter Eddie Johnson v Republic of Ghana* (provisional measures) (27 September 2017) 2 AfCLR 155.

7 *Léon Mugesera v Rwanda* (provisional measures) (27 September 2017) 2 AfCLR 149.

21. 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".

22. The Court observes that from this provision, it may only order provisional measures if the conditions of extreme gravity or urgency and the prevention of irreparable harm to persons are met.

23. The Court recalls that "urgency, which is consubstantial with extreme gravity, means that an "irreparable and imminent harm will occur before it renders its final judgment".[8] The risk in question must be real and explains the need to remedy it in the immediate future.[9]

24. 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/Applicants' personal situation.**"**[10]

25. The Court holds that it is for the Applicant seeking provisional measures to prove the existence of urgency or extreme gravity as well as that of irreparable harm.[11]

26. The Court recalls that "it is only required to ascertain the existence of these basic conditions if it is established that the measures sought do not prejudge the merits of the Application(s)".[12] In this respect, the Court has held 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 measure 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".[13]

27. The Court notes that on the merits of the instant case, the Applicant is requesting it to find discrimination against non-national travellers

8 *Sébastien Ajavon v Republic of Benin*, ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (Provisional measures), § 61.

9 *Ibid, § 62.*

10 *Ibid*, § 63.

11 *Romaric Jesukpego Zinsou and Others v Republic of Benin*, ACtHPR, Application No. 008/2021, Ruling of 10 April 2021 (provisional measures), § 20.

12 *Elie Sandiwidi and Mouvement Burkinabe des droits de l'homme et des peuples v Republic of Benin*, ACtHPR, Application No. 014 and 017/2020, Ruling of 25 September 2020 (provisional measures), § 65.

13 *Elie Sandiwidi and Mouvement Burkinabe des droits de l'homme et des peuples v Benin* (provisional measures), § 66; See also *Jean de Dieu Ngajigimana v United Republic of Tanzania* ACtHPR, Application No. 024/2019, Order of 26 September 2019 (provisional measures), § 25.

who bear their own quarantine costs, whereas the Government pays the same costs imposed on nationals. The Court considers that retroceding quarantine fees to all foreigners can only be envisaged if it finds that they have been discriminated against. It follows that the Court cannot rule on the request for provisional measures without prejudging the merits of the case.

28. The Court concludes, therefore, that there are no grounds for ordering the provisional measures requested.

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, the admissibility of the Application and the merits thereof.

VII. Operative part

30. For these reasons,

The Court

Unanimously,

i. *Dismisses* the request for provisional measures.

Balele v Tanzania (judgment) (2021) 5 AfCLR 338

Application 026/2016, *Bernard Balele v United Republic of Tanzania*

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant brought this Application against the Respondent State, claiming that the domestic courts' handling of his appeal against a conviction and sentence for rape violated his human rights. The Court held that the Respondent State had not violated any rights of the Applicant.

Jurisdiction (material jurisdiction, 37, 39; appellate jurisdiction, 38)

Admissibility (exhaustion of local remedies, 53-56; submission within a reasonable time, 61-64)

Fair trial (evaluation of evidence for criminal conviction, 87-91; right to be heard, 92; right to free legal representation, 103-108, 109-111)

Procedure (application of domestic law, 102)

I. The Parties

1. Bernard Balele (hereinafter referred to as "the Applicant") is a national of Tanzania who, at the time of filing the Application was at Butimba Central Prison, Mwanza Region, serving a sentence of life imprisonment having been convicted of the offence of rape of a seven (7) year old minor.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), 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. The Court held that this withdrawal has no bearing on pending

cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. From the record before the Court, it emerges that the Applicant was arrested on 30 October 2008 and that he was charged before the District Court of Geita on 5 November 2008, in Criminal Case No. 560/2008 with the offence of rape of a seven (7) year old minor.

4. On 12 February 2009, the District Court of Geita convicted the Applicant for the offence of rape, sentenced him to serve life imprisonment and ordered him to pay Tanzanian Shillings 100,000 TSH compensation to the victim.

5. The Applicant filed an appeal before the High Court on 17 June 2009. On 24 March 2010, the High Court struck out the Applicant's appeal in Criminal Appeal No. 115/2009, because he had not filed the notice of intention to appeal as required by Section 361(1)(a) of the Criminal Procedure Act.

6. On 13 September 2010, in Misc. Criminal Application No. 31/2010, the High Court sitting at Mwanza granted the Applicant leave to file a notice of intention to appeal and to file the appeal out of time.[2]

7. The Applicant filed an Appeal on 5 October 2010, before the High Court sitting at Mwanza. On 8 December 2010, in Criminal Appeal No. 79/2010, the High Court dismissed the Applicant's appeal in Criminal Appeal No. 79/2010, due to irregularities of the dates mentioned on the appeal and because the appeal was not signed by the Applicant.

8. On 17 December 2010, the Applicant filed Criminal Appeal No. 81/2011, before the Court of Appeal. On 12 March 2013, the Court of Appeal allowed the Applicant's appeal because it found that the High Court should have struck out the appeal due to the irregularities, rather than dismiss it.

9. Accordingly, the Court of Appeal granted the Applicant leave to lodge a fresh petition of appeal at the High Court, which he did

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

2 The date of filing of this Application is not indicated anywhere on the record.

on 19 March 2013. On 7 August 2013, in Criminal Appeal No. 17/2013, the High Court at Mwanza dismissed the Applicant's appeal.

10. On 9 October 2014, the Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Mwanza. In its judgment of 28 October 2014, in Criminal Appeal No. 319/2013, the Court of Appeal dismissed his appeal in its entirety.

11. The Applicant alleges that he has filed an application seeking a review of the Court of Appeal's decision. While this submission by the Applicant is not contested by the Respondent State, the Court notes that evidence of this application for a review of the Court of Appeal judgment is not indicated anywhere on the record before the Court.

B. Alleged violations

12. In his Application, the Applicant alleges that his right to be heard was violated because the Court of Appeal had allegedly not considered all the grounds of appeal separately and instead combined them, and that this constituted a violation of Article 3(2) of the Charter.

13. The Applicant further alleges in his Application that his right to be heard under Article 7(1)(c) and 8 (d) of the Charter and Article 1 and 107A(2)(d) of the Constitution of the Respondent State was violated, as he had no legal representation during the proceedings against him.

14. In his Reply, the Applicant specified that his claim concerning the alleged violation of his right to legal representation concerns the procedure to review the Court of Appeal judgment and not the lack of representation during the trial and appeal procedures.

III. Summary of the Procedure before the Court

15. The Application was filed on 22 April 2016 and was served on the Respondent State on 7 June 2016.

16. The parties filed their pleadings within the time stipulated by the Court.

17. Pleadings were closed on 23 July 2019 and the parties were duly notified.

IV. Prayers of the Parties

18. In his Application, the Applicant prayed the Court to restore justice where it was overlooked, quash both the conviction and

the sentence imposed upon him and set him at liberty. He further prayed the Court to grant reparations pursuant to Article 27(1) of the Protocol and grant any other order(s) or relief(s) sought that may be appropriate in the circumstances of this Application.

19. In a subsequent submission, filed on 17 August 2017, the Applicant informed the Court that he decided to withdraw in part his request to be granted reparations and only retain the prayers for the Court to restore justice where it was overlooked by quashing both the conviction and sentence, and setting him at liberty.

20. In its Response, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to order as follows:

i. That, the Honourable African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate on this Application;

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

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

iv. That, the Application is inadmissible and duly dismissed;

v. That, the Application is dismissed with costs.

21. With regard to the merits of the Application, the Respondent State prays that the Court grants the following orders:

i. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 1 of the African Charter on Human and Peoples' Rights;

ii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 2 of the African Charter on Human and Peoples' Rights;

iii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 3(1)(2) of the African Charter on Human and Peoples' Rights;

iv. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 7(1)(c) of the African Charter on Human and Peoples' Rights;

v. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 8(d) of the African Charter on Human and Peoples' Rights;

vi. That, the Application be dismissed for lack of merit;

vii. That, the Applicant's prayers not be granted;

viii. That, the Applicant not be awarded reparations;

ix. That, costs be borne by the Applicant.

V. Jurisdiction

22. 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.

23. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[3]

24. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

25. In the present Application, the Court notes that the Respondent State has raised two objections to its material jurisdiction.

A. Objections to material jurisdiction

26. The Respondent State argues that the Court is not vested with jurisdiction to adjudicate on this matter. According to the Respondent State, the present Application calls for the Court to sit as an appellate court and adjudicate on matters of law and evidence already finalised by the Respondent State's highest court, the Court of Appeal of Tanzania.

27. Citing the Court's jurisprudence in *Ernest Francis Mtingwi v Malawi,*[4] the Respondent State claims that the Court does not have any appellate jurisdiction to receive and consider appeals in respect of cases already decided upon by domestic and/or regional courts.

28. The Respondent State also asserts that the Court has no jurisdiction to quash the conviction and the sentence imposed on the Applicant and to set him at liberty.

29. Furthermore, the Respondent State asserts that this Application calls for the Court to sit as a Court of first instance and adjudicate on matters that have never been raised before the municipal courts.

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

4 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190.

30. For the preceding reasons, the Respondent State prays that the Application should be dismissed.

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31. In his Reply, the Applicant states that the Court does not have a similar jurisdiction or mandate as that of a court of appeal. The Applicant furthers asserts that the Court is not an appellate body nor does this Application call for the Court to sit as an appellate court. However, he claims that the Court has jurisdiction to adjudicate over this Application because the rights that he alleges to have been violated are protected by the African Charter and by other human rights instruments ratified by the Respondent State.

32. Citing the Court's jurisprudence in *Alex Thomas v Tanzania,*[5] the Applicant clarifies that he is claiming before this Court that the judgment from the Respondent State's Court of Appeal was procured by error and that this Court has jurisdiction to examine whether relevant domestic proceedings are in accordance with the standards set out in the Charter and other human rights instruments ratified by the Respondent State.

33. The Applicant further specified that his claim concerning the prejudice caused by not having legal representation does not concern his past trial and appeal cases, but instead it relates to the absence of legal representation in the proceedings concerning his application for a review of the Court of Appeal's judgment. He claims that due to a lack of representation in this application for review no follow up was undertaken and therefore it is taking a long time for the hearing to take place.

34. For these reasons, the Applicant submits that the Court is vested with jurisdiction to adjudicate on this matter.

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5 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465.

35. 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.[6]

36. The Court notes that the Respondent State's objection is two–pronged in that it simultaneously questions the Court's jurisdiction to sit as a first instance court as well as its power to sit as an appellate court.

37. In relation to the allegation that the Court is being invited to sit as a court of first instance, the Court reaffirms that its jurisdiction, under Article 3 of the Protocol, extends to any application submitted to it, provided that an applicant invokes a violation of rights protected by the Charter or any other human rights instrument ratified by the Respondent State.

38. As regards the contention that the Court would be exercising appellate jurisdiction by examining certain claims which were already determined by the Respondent State's domestic courts, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[7] At the same time, however, and 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.[8] In conducting the aforementioned task, the Court does not thereby become an appellate court and neither does it need to sit as one.

39. Considering the allegations made by the Applicant, which all implicate the right to a fair trial which is protected under Article 7 of the Charter, the Court finds that the said allegations are within the purview of its material jurisdiction.[9] The Court, therefore,

6 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.

7 *Ernest Francis Mtingwi v Malawi* (jurisdiction) §§ 14-16.

8 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema and Another 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.

9 *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.

holds that it has material jurisdiction in this matter and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

40. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

41. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with 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 it has held that the withdrawal of a Declaration 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, or new cases filed before the withdrawal takes effect.[10] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[11] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

42. In light of the above, the Court finds that it has personal jurisdiction to examine the present Application.

43. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant arose after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[12] Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

44. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that it

10 *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39.

11 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

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 §§ 71-77.

has territorial jurisdiction.

45. In light of the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

46. 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".

47. In line with Rule 50(1) of the Rules,[13] "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."

48. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of 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 set by the Court as being the commencement of the time limit within which it shall be 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 Constitutive Act of African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

49. 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 relates to whether

13 Formerly Rule 40 of the Rules of Court, 2 June 2010.

the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

50. The Respondent State argues that the Applicant is raising before this Court, allegations of violations of fair trial rights, specifically the right to legal representation, which he never raised before the High Court and the Court of Appeal of Tanzania. The Respondent argues that the Applicant could have filed a constitutional petition or raised his grievance as a ground of appeal before the High Court or the Court of Appeal.

51. The Respondent State submits that since the Applicant did not pursue any of these available remedies, this Application has not met the admissibility requirement under Rule 40(5) of the Rules[14] and should therefore be dismissed.

52. In his Reply, the Applicant objects to the submissions by the Respondent State. He asserts that he did not apply for legal aid because the legal aid act does not provide for any direction or procedure for applying for the aid. Furthermore, the Applicant alleges that the violation of his right to be granted legal aid relates to his Application for a review of the Court of Appeal's judgment and not to the procedure before the trial court or before the appellate courts.

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53. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2) (e) 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.[15]

54. The Court recalls that it has held that, in so far as the criminal proceedings against an applicant have been determined by the

14 Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.

15 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

highest appellate court, the Respondent State will be deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[16]

55. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 28 October 2014. Therefore, the Respondent State had the opportunity to address the violations allegedly arising from the Applicant's trial and appeals.

56. Regarding the Respondent State's contention that the Applicant ought to have filed a constitutional petition to seek redress for not having been provided legal aid during his trial and appeals, the Court has previously held that the constitutional petition within the Respondent State's judicial system is an extraordinary remedy which applicants are not required to exhaust before filing their applications before this Court.[17] Similarly, the Court has held that an application for review of the Court of Appeal's judgment is an extraordinary remedy which applicants are not required to exhaust.[18] The Court therefore finds that, although the Applicant's application for review was allegedly pending by the time he filed this Application, he is deemed to have exhausted local remedies since the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had upheld his conviction and sentence, following proceedings which allegedly violated his rights.

57. In light of the foregoing, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

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

58. The Respondent State claims that since the Application was not filed within a reasonable time after the local remedies were exhausted, the Court should find that the Application has failed to comply with the provisions of Rule 40(6) of the Rules.[19]

59. The Respondent State recalls that the judgment of the Court of Appeal was delivered on 28 October 2014 and that this Application was filed on 22 April 2016. The Respondent State notes that a

16 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

17 *Alex Thomas v Tanzania* (merits) §§ 63-65.

18 *Mohamed Abubakari v Tanzania*, (merits) § 78.

19 Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

period of one (1) year, four (4) months and 21 days elapsed in between. Relying on the African Commission on Human and Peoples' Rights' decision in *Majuru v Zimbabwe*,[20] the Respondent State argues that the time limit established for filing applications is six (6) months after exhaustion of local remedies and therefore the Applicant ought to have filed the Application within six months after the Court of Appeal's judgment.

60. The Applicant alleges that he filed his Application within a reasonable time after his appeal to the Court of Appeal, the Respondent State's highest court. Furthermore, the Applicant alleges that he was still waiting for his application for review of the Court of Appeal's judgment to be finalised.

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61. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that Applications must be filed "…within 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".

62. The Court has held "…that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[21]

63. From the record before the Court, the Applicant exhausted local remedies on 28 October 2014, being the date, the Court of Appeal delivered its judgment on his final appeal. The Applicant then filed the instant Application on 22 April 2016. The Court therefore must assess whether this period of 1 year, 5 months and 25 days is reasonable in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

64. The Court has previously considered the personal circumstances of applicants and found that, incarcerated, lay and indigent applicants being restricted in their movements, would have little

20 African Commission on Human and Peoples' Rights Communication 308/05 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

21 *Norbert Zongo and Others v Burkina Faso* (preliminary objection) (25 June 2013) 1 AfCLR 197 § 121.

or no information about the existence of the Court.[22]

65. From the record before it, the Court notes that the Applicant has been incarcerated since 2008, and that he claims to be lay and indigent, which is not contested by the Respondent State. Considering these circumstances, the Court finds that the Applicant's filing of his Application after 1 year, 5 months and 25 days is within reasonable limits.

66. In light of the above, the Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application based on failure to file the Application within a reasonable time.

B. Other conditions of admissibility

67. 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 are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

68. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since the Applicant's identity is clear.

69. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

70. The Court further 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 50(2)(c) of the Rules.

71. Regarding the condition contained in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

22 *Christopher Jonas v Tanzania* (merits) § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83; *Armand Guehi v Tanzania* (merits and reparations) § 56; *Werema Wangoko v Tanzania* (merits and reparations) § 49*; Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 55.

72. Finally, with respect to the requirement laid down in Rule 50(2)(g) 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, or the provisions of the Charter.

73. 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 50 of the Rules, and accordingly finds it admissible.

VII. Merits

74. The Applicant alleges the violation of his right to equal protection of the law under Article 3(2) of the Charter and of his right to have his cause heard and his right to legal assistance under article 7(1)(c) and 8(d) of the Charter corresponding to Articles 1 and 107A(2)(d) of the Constitution of the Respondent State.

A. Alleged violation of the right to a fair trial

75. The Court will first consider the alleged violation of the right to have his cause heard and then the alleged violation of the right to legal assistance. These allegations fall within the right to a fair trial protected under Article 7(1) of the Charter.

B. Alleged violation of the right to have one's cause heard

76. The Applicant claims that the first appellate court, the High Court, erred in upholding his conviction by not taking into account that certain fundamental matters were not proven in conformity with the standards stipulated by law. He refers to the visual identification of the Applicant by the victim, taking into consideration the victim's tender age and credibility. The Applicant also claims that the case was not properly investigated and that not all evidence was adequately evaluated.

77. The Applicant further claims that the judgment of the Court of Appeal was procured and pronounced based on a manifest error which resulted in the miscarriage of justice.

78. The Applicant submits that in the memorandum of his appeal of 9 October 2014 to the Court of Appeal, he had presented three different grounds. However, the Court of Appeal did not consider all the different grounds of his appeal separately nor were all

grounds discussed by the Court.

79. The Applicant submits that the procedure of the Court of Appeal to reject the other two grounds of the appeal violated his fundamental rights of being heard in a court of law.

80. The Respondent State states that the Applicant's allegations are baseless since he has not elaborated how the judgment of the Court of Appeal was procured by error against the Applicant. The Respondent State further states that the record shows that the judgment of the Court of Appeal of 28 October 2014, was delivered in accordance with the Court of Appeal Rules of 2009.

81. The Respondent State references different sections of the Court of Appeal's judgment to substantiate the argument that this tribunal thoroughly analysed the evidence on record concerning issues of identification. According to the Respondent State, the Court of Appeal observed that the evidence of PW1 (the victim) was corroborated by the evidence of PW3. The Court of Appeal also noted that the incident took place around 6pm when it was not yet dark and that it took time for the Applicant to grab PW1 and take her to the scene of the crime which enabled PW1 to have time to identify the Applicant.

82. The Respondent State also avers that the PW1 managed to identify the Applicant one day after the incident when he was in the company of two other persons. Further, the Respondent State refers to the fact that the Applicant tried to escape after seeing PW1.

83. The Respondent State submits that the Applicant was duly given the right to be heard as he was present throughout the trial and that the record clearly indicates that he was given the opportunity to cross-examine the prosecution witnesses, to call witnesses to testify in his favour and to object to the documents tendered by the prosecution. The Respondent State references specific sections in the trial court proceedings in Criminal Case No. 560 of 2008, which indicate that the Applicant cross-examined different prosecution witnesses (pages 7, 9, 11, and 12), that he was given a chance to object to the tendering of PF3, the medical examination report, but he did not object (page 8), that he stated "my defence will be on oath" (page 13), that he defended himself (page 14), and that closed his case by stating "I have no witness to call. That is the end of my defense case" (page 14).

84. The Respondent State maintains that the trial and appeal courts properly evaluated and assessed the evidence on record before delivering their judgment. Furthermore, the Respondent State argues that the Court of Appeal delivered its judgment after going through the proceedings and judgments of the trial court and the

High Court.

85. The Respondent also states that the Court of Appeal discussed the grounds of appeal on the issue of visual identification and discussed the *voir dire* examination of the victim. According to the Respondent State, the Court of Appeal duly analysed the evidence on record and did not come to its decision by error.

86. For these reasons, the Respondent State submits that the Applicant's allegation that his right to be heard has been violated lacks merit and should be dismissed.

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87. The Court has held in its previous jurisprudence that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings. [23]

88. The above notwithstanding, the Court can, in evaluating the manner in which domestic proceedings were conducted, intervene to assess whether domestic proceedings, including the assessment of the evidence, was done in consonance with international human rights standards.

89. The record before this Court shows that the prosecution called four (4) witnesses. Admittedly, only PW1, the victim, testified to the actual occurrence of the crime at issue, being rape. Nevertheless, the District Court considered the evidence of PW1 together with the evidence of other witnesses and concluded that PW1 had a good chance to identify her rapist and that PW1 was a credible witness. During the second appeal to the High Court, the credibility of PW1 was also considered and the High Court concluded that PW1 was a credible and reliable witness. On further appeal, the Court of Appeal held that there were no grounds for interfering with the findings of the two lower courts.

90. Given the exhaustive manner in which the question of the identification of the Applicant and the credibility of PW1 was considered by three courts within the Respondent State's system, the Court finds that the manner in which the evidence

23 *Kijiji Isiaga v Tanzania* § 65.

was evaluated does not reveal any manifest errors requiring this Court's intervention.

91. With regard to the Applicant's contention that the Court of Appeal did not discuss all three grounds of appeal, the Court notes that the Applicant's different grounds of appeal all relate to the evaluation of the evidence. The Court further notes from the record before it that the Court of Appeal did evaluate all the evidence available to it before delivering its judgment.

92. Accordingly, the Court holds that the Applicant has failed to prove that the Respondent State violated his right to have his cause heard and therefore dismisses his allegation.

C. Alleged violation of the right to free legal assistance

93. In his Application, the Applicant claimed that since he had no legal representative, his right to be heard, as provided under Article 7(1)(c) and 8(d) of the Charter as well as under Article 1 and 107A(2)(d) of the Constitution of the Respondent State, was violated, leading him to be prejudiced.

94. In his Reply to the Respondent State's Response, the Applicant specified that he does not complain about this issue concerning the procedure before the trial court or appellate courts. Instead, he clarified that his claim concerns the absence of representation for his Application for review of the Court of Appeal's judgment, which, according to the Applicant, had still not been heard at the time of submitting his Reply.

95. The Respondent State disputes the claim that the Applicant was denied the right to legal representation.

96. The Respondent State submits that within its jurisdiction legal aid in the form of defence counsel is automatic in murder and manslaughter cases. However, legal assistance for all other offences is subject to application by an accused person or appellant who must also prove they are indigent and unable to afford legal services.

97. The Respondent State claims that the Applicant was not denied his right to be defended by counsel of his choice. The Respondent State avers that the Applicant could have applied for legal aid during his trial and during his appeals before the High Court or before the Court of Appeal, but he did not. The Respondent State further submits that the Applicant could have contested the lack of legal assistance as a ground of appeal before the High Court or the Court of Appeal, but he did not do so. The Respondent State also asserts that the Applicant could have contested the absence of legal assistance by filing a Constitutional Petition, but that he

did not do so either.

98. The Respondent State further requests the Court to apply the principle of margin of appreciation and consider that although the Respondent State provides defence counsel for homicide offences without application, in all other instances one must apply for legal aid. The Respondent State submits that this system was deliberately chosen by policy makers and legislators after having taken into consideration the State's financial capacity and the number of lawyers available. It was therefore felt prudent that those who need legal assistance in the form of a defence counsel could apply for such aid. The Respondent State claims that it is trying to ensure a progressive realisation of rights while taking consideration its own limited capacity.

99. It is for these reasons that the Respondent State claims that this allegation lacks merit and should be dismissed.

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100. The Court notes that, Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard. This comprises: … (c) the right to defence, including the right to be defended by counsel of his choice."

101. The Court notes that the Charter does not have a provision on Article 8(d) of the Charter, therefore this will be considered as an error on the Applicant's part.

102. The Applicant has also alleged that the failure to provide him legal assistance was a violation of Articles 1[24] and 107A(2)(d)[25] of the Constitution of the Respondent State. Although these provisions of the Respondent State's Constitution do not correspond to Article 7(1)(c) of the Charter, the Court has previously held that in determining, whether the State has complied with the Charter or any other human rights instrument it has ratified, it does not

24 Article 1 of the Respondent State's Constitution provides that: "Tanzania is one State and is a sovereign United Republic."

25 Article 107A(2) of the Respondent State's Constitution provides that: "In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say […] (d) to promote and enhance dispute resolution among persons involved in the disputes."

apply the domestic law in making this assessment.[26] The Court will therefore not apply the provisions of the Respondent State's Constitution cited by the Applicant.

103. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[27] and determined that the right to defence includes the right to be provided with free legal assistance.[28]

104. The Court has also determined that where accused persons are charged with serious offences which carry heavy sentences and they are indigent, free legal assistance should be provided as of right, regardless of whether or not the accused persons request for it.[29]

105. The Court notes the provisions of Article 14(3)(d) of the ICCPR Court which provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

106. The Court notes that, once a person is arrested on suspicion of having committed a serious offence which carries a heavy penalty and where they are indigent, they should promptly be provided with free legal assistance.[30]

107. The Court observes that although he faced a serious charge of rape which carries a heavy penalty, nothing on the record shows that upon his arrest he was promptly informed of the right to legal

26 *Mohamed Abubakari v Tanzania* (merits) *§* 28; *Kennedy Owino Onyachi and another v Tanzania* (merits) § 39.

27 The Respondent State became a State Party to ICCPR on 11 June 1976.

28 *Alex Thomas v Tanzania*, (merits) § 114; *Kijiji Isiaga v Tanzania* (merits) § 72; *Kennedy Owino Onyachi and another v Tanzania* (merits) § 104.

29 *Alex Thomas v Tanzania*, (merits) § *123*; *Kijiji Isiaga v Tanzania* (merits) § 78; *Kennedy Owino Onyachi and another v Tanzania* (merits) §§ 104 and 106.

30 See ACHPR, *Abdel Hadi Ali Radi & Others v Republic of Sudan* Communication 368/09, where the African Commission on Human and Peoples' Rights referred to Articles 25 and 26 of its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and Article 20(c) of the Robben Island Guidelines (Guidelines and Measures for the Provision and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa) which it adopted to elaborate on the right to be provided legal assistance promptly after arrest; See also ECHR Case of *Pavovits v Cyprus*, Application No. 4268/04, Judgment of 11 December 2008 (merits), § 64 and *Case of A.T. v Luxembourg*, Application No. 30460/13, Judgment of 9 April 2015 (merits), §§ 64, 65 and 75.

assistance or that should he be unable to pay for such assistance, it would be provided to him free of charge.

108. The Court further recalls that it has previously held that the obligation to provide free legal assistance to indigent persons facing serious charges which carry a heavy penalty is for both the trial and appellate stages.[31]

109. In the instant case, the Court notes that the Applicant specified in his Reply that he alleges the violation of his right to legal assistance in the procedure to seek review of the judgment of the Court of Appeal and not of his right to legal aid during his trial and appeal procedures.

110. However, from the record before it, the Court notes that the Applicant has not provided evidence that he has applied for a Review of the Court of Appeal judgment. Without such evidence the Court cannot establish that such a procedure is pending and that the Respondent State has failed to provide free legal assistance.

111. The Court, therefore, finds that the Applicant has not provided evidence to establish that the Respondent State violated the right to defence, guaranteed under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, to provide free legal assistance.

D. Alleged violation of the right to equal protection of the law

112. The Court notes that the Applicant has not provided any specific argument or evidence that he was treated differently from other persons in similar conditions and circumstances.

113. In these circumstances, the Court finds that the Respondent State did not violate the Applicant's right to equal protection of the law provided under Article 3(2) of the Charter.

VIII. Reparations

114. The Applicant partly withdrew his request for reparations. As non-pecuniary reparations, he requests the Court to quash his

31 *Alex Thomas v Tanzania* (merits) § 124; *Wilfred Onyango Nganyi 9 Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR §183.

conviction and sentence, and order his release from prison.

115. The Respondent State prays that the Court should not grant the Applicant's prayers and should not award him reparations.

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116. 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."

117. Having found that the Respondent State did not violate any of the Applicants' rights, the Court dismisses the Applicant's prayers for reparations.

IX. Costs

118. The Applicant did not make any submissions on costs.

119. The Respondent State prayed that costs be borne by the Applicant.

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120. Pursuant to Rule 32 of the Rules of Court "unless otherwise decided by the Court, each party shall bear its own costs".

121. The Court finds that there is nothing in the instant case warranting it to depart from this provision.

122. Consequently, the Court orders that each party shall bear its own costs.

X. Operative part

123. 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* the Application admissible.

On merits

v. *Finds* that the Respondent State has not violated the Applicant's right to have his cause heard, as guaranteed by Article 7(1) of the Charter, due to the manner of assessment of the evidence during the domestic proceedings.

vi. *Finds* that the Respondent State has not violated the Applicant's right to defence, provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, to provide him with free legal assistance.

vii. *Finds* that the Respondent State has not violated the Applicant's right to equal protection of the law under Article 3(2) of the Charter.

On reparations

viii. *Dismisses* the Applicant's prayers for reparations.

On costs

ix. *Orders* each party to bear its own costs.

Benyoma v Tanzania (judgment) (2021) 5 AfCLR 360

Application 001/2016, *Chrizostom Benyoma v United Republic of Tanzania*

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant whose conviction and sentence for rape had been upheld by the domestic appellate courts in the Respondent State brought this Application to claim that the trial and appellate processes violated his human rights. The Court held that the Respondent State had violated the Applicant's right to free legal representation and granted damages for the moral prejudice suffered by the Applicant.

Jurisdiction (material jurisdiction, 34; exercise of appellate jurisdiction, 35-36)

Admissibility (exhaustion of local remedies, 49-53; submission within a reasonable time, 58-64)

Fair trial (right to be heard, 81-83; right to free legal representation, 95-102)

Procedure (application of domestic law, 94)

Equality before the law and non-discrimination (burden of proof,117)

Reparation (basis for reparation, 122, 124; material damage, 128-129; moral damage, 131; non-pecuniary damages, 132-135)

I. The Parties

1. Chrizostom Benyoma, (hereinafter referred to as "the Applicant") is a national of Tanzania who, at the time of filing the Application, was at Butimba Central Prison, Mwanza Region, serving a sentence of life imprisonment having been convicted of 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. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), 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. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the file that, on the night of 20 January 2000, the Applicant allegedly raped a five-year old minor at her father's home in Kamuli village, Karagwe District. The Applicant was subsequently charged on 25 February 2000, with the offence of rape.

4. On 28 February 2000, on the basis of his guilty plea, the Applicant was convicted of the offence of rape, by the District Court of Karagwe at Kayanga, in Criminal Case No. 46 of 2000, and sentenced him to life imprisonment.

5. On 12 September 2000, the Applicant filed an appeal against the sentence meted out to him on the basis that the trial court ought to have required the Prosecution to present witness testimony to prove the charge against him.

6. In its judgment of 25 May 2010, in Criminal Appeal No. 58 of 2000, the High Court sitting at Bukoba dismissed his appeal and confirmed the Applicant's conviction and sentence.

7. On 8 June 2010, the Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Mwanza. In its judgment of 24 November 2011 in Criminal Appeal No. 323 of 2010, the Court of Appeal summarily dismissed his appeal.

8. On 11 February 2013, the Applicant filed Miscellaneous Criminal Application No. 11 of 2013 seeking a Review of the Court of Appeal's decision. The application for review was pending by the time he filed the instant Application on 4 January 2016.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

B. Alleged violations

9. The Applicant alleges that his right under Article 3(1) and (2) of the Charter on equality before the law and equal protection of the law were violated when the Court of Appeal summarily rejected his appeal.

10. The Applicant states that that his right to be tried within a reasonable time by an impartial court or tribunal under Article 7(1)(d) of the Charter has been violated because his application to the Court of Appeal for review of its judgment of 24 November 2011, had not been listed or heard as at the time of filing this Application, yet other such applications filed after he had filed his, had been determined.

11. The Applicant alleges that his rights to be heard and be provided with counsel of one's choice under Article 7(1)(c) and 8(d) of the Charter which, according to him, is the same as the provisions of Article 13(6)(a) and 107A(2)(b) of the Constitution of the Respondent State, were violated as he had no legal representation during the proceedings against him.

III. Summary of the Procedure before the Court

12. The Application was filed on 4 January 2016 and was served on the Respondent State on 25 January 2016.

13. The parties filed their pleadings on merits within the time stipulated by the Court.

14. Pleadings on merits were closed on 6 October 2016 and the parties were duly notified.

15. On 27 September 2018, the parties were informed that the Court would henceforth determine the merits and reparations together and that submissions on reparations should then be filed.

16. The Applicant filed the submission on reparations within the time stipulated by the Court. Despite several extensions of time, the Respondent State did not file the Response to the Applicant's submissions on reparations.

17. Pleadings on reparations were closed on 12 June 2019 and the parties were duly notified.

18. On 26 August 2019 the Respondent State filed, out of time, its Response on reparations together with a request that this be accepted as properly filed. On 26 September 2019, the Court issued an Order on re-opening pleadings, to accept the Respondent State's Response on reparations. This Order and the Response were served on the Applicant on 28 September 2019

for his Reply thereto, if any.

19. Pleadings on reparations were again closed on 19 August 2021 and the parties were duly notified

IV. Prayers of the Parties

20. The prayers of the Applicant as submitted in the Application, are that the Court "restore justice where it was overlooked and quash both conviction and sentence imposed upon him and set him at liberty", that he be "granted reparation pursuant to Article 27(1) of the Protocol of the court" and "any other order(s) if relief(s) sought that may deem fit in the circumstances of the complaint".

21. In the Reply to the Respondent State's Response, the Applicant prays the Court to grant the following orders with respect to the Jurisdiction and Admissibility of the Application:

i. That the African Court has jurisdiction to adjudicate over this Application,

ii. That the Application has met the admissibility requirements as stipulated in Rule 40 (5) and (6) of the Rules of the Court,

iii. That the Application be cleared admissible and allowed with costs.

22. In the Reply to the Respondent State's Response, the Applicant prays the Court to grant the following orders with respect to the merits of the Application:

i. That the Government of the United Republic of Tanzania is in violation of the Applicant's rights under Article 3(1) and (2), 7(1)(c) of the African Charter on Human and Peoples' Rights

ii. That the Government of the United Republic of Tanzania is in violation of Applicant's Rights stipulated under Article 13(6) (a) and 107 A (2) (b) of the Constitution of the United of Republic of Tanzania 1977 and Article 7(1)(a) of the African Charter on Human and Peoples' Rights

iii. That the Applicant's Application should be allowed for the strong merit

iv. That cost be borne by the Respondent.

23. In his submissions on reparations, the Applicant prays the Court "to order my acquittal from the custody as basic reparation while the reparation of payment may be considered and assessed by the court on my custody period per the nation ration of a citizen income per year".

24. In the Response, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to rule as follows:

a. That the Application has not evoked the jurisdiction of the Honourable Court.

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

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

d. That the Application be declared inadmissible and duly dismissed.

25. With regard to the merits of the Application, the Respondent State prays that the Court grants the following orders:

i. That the Respondent State is not in violation of the Applicants rights under Article 3 (1) and (2) of the African Charter on Human and Peoples' Rights,

ii. That the Respondent State is not in violation of the Applicants right under Article 7 (1) (c) of the African Charter on Human and Peoples' Rights,

iii. The Respondent State is not in violation of the Applicants rights as provided for under Article 13 (6) (a) and 107A (2) (b) of the Constitution of the United Republic of Tanzania and Articles 7 (1) (c) and 8 (d) of the African Charter on Human and Peoples' Rights,

iv. That the Application should be dismissed for lack of merit, and

v. That costs be borne by the Applicant.

26. On reparations, the Respondent State prays for the following declarations and orders from the Court:

i. A Declaration that the interpretation and application of the Protocol and Charter do not confer appellate criminal jurisdiction to the Court to acquit the Applicant

ii. A Declaration that the Respondent State has not violated the African Charter or the Protocol and that the Applicant was convicted fairly out of due process of the law.

iii. An Order to dismiss the Application for Reparations.

iv. Any other Order this Hon. Court might deem right and just to grant under the prevailing circumstances.

V. Jurisdiction

27. 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.

28. The Court further notes that in terms of Rule 49(1) of the Rules: "The Court shall conduct preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules".[2]

29. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

A. Objection based on the lack of material jurisdiction

30. The Respondent State has raised an objection that this Application fails to meet the requirements of Article 3(1) of the Protocol and Rule 26 of the Rules[3] since the Applicant is calling for the Court to sit as an appellate Court and reconsider the decision of the Respondent's State's highest court, the Court of Appeal of Tanzania. The Respondent State argues that the Court has not been vested with jurisdiction to overturn a conviction and sentence delivered by the Court of Appeal.

31. Citing the Court's jurisprudence in *Ernest Francis Mtingwi v Malawi*[4] the Respondent State argues that the Court cannot grant the Applicant's prayer to "quash both the conviction and sentence imposed upon the Applicant and set him at liberty" because "Article 3 (1) of the Protocol does not provide the Court the jurisdiction to act as an appellate court".

32. The Respondent State further states that the Application seeks the Court to review the evidence brought before the Court of Appeal of Tanzania which is a matter that should be left solely to its courts.

33. The Applicant maintains that the Court has jurisdiction to restore justice where it is overlooked.

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34. 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

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

3 Current Rule 29 of the Rules of Court, 25 September 2020.

4 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190.

the Charter or any other human rights instruments ratified by the Respondent State.[5]

35. The Court recalls, its established jurisprudence, "that it is not an appellate body with respect to decisions of national courts".[6] However "… 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."[7]

36. In the present case, therefore, the Court will not be sitting as an appellate court nor reviewing the evidence brought before the Court of Appeal of Tanzania, by examining the compliance of the judicial proceedings against the Applicant with the standards set out in the Charter and other instruments ratified by the Respondent State. Consequently, the Court dismisses the objection that, by hearing the application, it would be sitting as an appellate court and reviewing the evidence considered by the Respondent State's Court of Appeal.

B. Other aspects of jurisdiction

37. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

38. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that the Respondent State, on 21 November 2019, deposited with 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 it has held that the withdrawal of a Declaration does not have any retroactive effect and it also has no bearing on

5 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465 §§ 45 ; *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65 § 34 -36 ; *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits and reparations) § 18; *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No. 008/2016 Judgment of 25 June 2021 (merits and reparations) § 21.

6 *Ernest Francis Mtingwi v Malawi* (jurisdiction) § 14.

7 *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 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.

matters pending prior to the filing of the instrument withdrawing the Declaration, or new cases filed before the withdrawal takes effect.[8] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[9] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

39. In light of the above, the Court finds that it has personal jurisdiction to examine the present Application.

40. With respect to its temporal jurisdiction, the Court notes that, the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process. Consequently, the Court holds that it has temporal jurisdiction to consider the Application .[10]

41. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that it has territorial jurisdiction.

42. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

43. 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".

44. In line with Rule 50(1) of the Rules,[11] "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".

8 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

9 *Andrew Ambrose Cheusi v* Tanzania (merits and reparations), §§ 35-39.

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) (21 June 2013) 1 AfCLR 197 §§ 71-77.

11 Formerly Rule 40 of the Rules of Court, 2 June 2010.

45. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of 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 set by the Court as being the commencement of the time limit within which it shall be 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 Constitutive Act of the African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

46. 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 relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

47. The Respondent State argues that the Applicant is raising before this Court, allegations of violations of fair trial rights which he never raised before the High Court and the Court of Appeal of Tanzania. The Respondent State further argues that the Basic Rights and Duties Enforcement Act provides for a procedure for enforcement of constitutional basic rights which the Applicant would have utilised to file a constitutional petition in this regard, at the High Court.

48. In his Reply, the Applicant states that he filed an application for Review of the Court of Appeal's judgment which was pending by the time he filed this Application.

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49. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2) (e) 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.[12]

50. The Court recalls that it has held that, in so far as the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[13]

51. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 24 November 2011. Therefore, the Respondent State had the opportunity to address the violations allegedly arising from the Applicant's trial and appeals.

52. Furthermore, the Court has previously held that the constitutional petition within the Respondent State's judicial system is an extraordinary remedy which applicants are not required to exhaust before filing their applications before this Court.[14]

53. Similarly, the Court has held that an application for review of the Court of Appeal's judgment is an extraordinary remedy which applicants are not required to exhaust.[15] The Court therefore finds that, although the Applicant's application for review was pending by the time he filed this Application, he is deemed to have exhausted local remedies since the Court of Appeal of Tanzania, the highest judicial organ in the Respondent State, had, by its judgment of 24 November 2011, upheld his conviction and sentence following proceedings which, the Applicant alleges

12 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017), 2 AfCLR 9, §§ 93-94.

13 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016), 1 AfCLR 599 § 76.

14 *Alex Thomas v Tanzania* (merits) §§ 63-65.

15 *Mohamed Abubakari v Tanzania*, (merits) (3 June 2016) 1 AfCLR 59 § 78 78.

violated his rights.

54. In light of the foregoing, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

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

55. The Respondent State argues that in the event that the Court finds that the Applicant exhausted local remedies, the Court should find that the Application has failed to comply with the provisions of Rule 40(6) of the Rules.[16] The Respondent argues that the Application was not filed within a reasonable time after the local remedies were exhausted.

56. The Respondent State recalls that, the judgment of the Court of Appeal was delivered on 24 November 2011and that this Application was filed on 4 January 2016. The Respondent State notes that a period of four (4) years and one (1) month elapsed in between. Relying on the decision of the African Commission on Human and Peoples' Rights (the Commission) in *Majuru v Zimbabwe*,[17] the Respondent State argues that the time limit established for filing applications is six (6) months after exhaustion of local remedies and therefore the Applicant ought to have filed the Application within six (6) months after the Court of Appeal's judgment

57. The Applicant alleges that his Application complies with Article 40 (6) of the Rules because he appealed to both the High Court and the Court of Appeal, the latter being the Respondent State's highest court. The Applicant argues that he delayed in filing this Application because he was waiting for his application for Review of the Court of Appeal's judgment, which he filed on 11 February 2013, to be finalised.

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58. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion

16 Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

17 African Commission on Human and Peoples' Rights Communication 308/05 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that Applications must be filed "…within 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".

59. The Court has held "…that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[18]

60. From the record, the Applicant exhausted local remedies on 24 November 2011, being the date, the Court of Appeal delivered its judgment on his appeal. The Applicant then filed the instant Application on 4 January 2016. The Court has to therefore assess whether this period of four (4) years, one (1) month and twenty four (24) days is 'reasonable' in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

61. The Court has previously considered the personal circumstances of applicants and found that, incarcerated, lay and indigent applicants being restricted in their movements, would have little or no information about the existence of the Court. It has thus held that, in those circumstances, the period ranging from, four (4) years and thirty six (36) days,[19] four (4) years, two (2) months and twenty three (23) days[20] and four (4) years, nine (9) months and twenty three (23) days[21] that applicants took to file their applications after exhaustion of local remedies, was reasonable.[22]

62. The Court has also considered as a relevant circumstance, the fact of filing of applications for review before the Court of Appeal of the Respondent State and which were either pending or had been determined by the time they filed their applications before this Court. In such cases, the Court has held that it was reasonable for those applicants to await the outcome of that review process. The Court has therefore considered that, this was an additional factor that justified the delay by those applicants in filing their

18 *Norbert Zongo and Others v Burkina Faso* (preliminary objection) (25 June 2013), 1 AfCLR 197 § 121.

19 *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 025/2016 Judgment of 28 March 2019 (merits and reparations) § 53.

20 *Jibu Amir Mussa and another v Tanzania* § 51.

21 *Andrew Ambrose Cheusi v Tanzania* § 71.

22 *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 101 § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018), 2 AfCLR 344 § 83; *Armand Guehi v Tanzania* (merits and reparations) § 56; *Werema Wangoko v Tanzania* (merits and reparations) § 49*; Kijiji Isiaga v Tanzania* (merits) (21 March 2018), 2 AfCLR 218 § 55.

applications before this Court.[23]

63. The Court notes that on 11 February 2013, the Applicant filed an Application for Review of the Court of Appeal's decision which was pending, by the time he filed the application before this Court on 4 January 2016.

64. The Court finds that it was reasonable for the Applicant to wait for his application for review of the Court of Appeal's judgment to be determined and this contributed to him not filing the Application earlier than he did.

65. In the Court's view, these circumstances constitute reasonable justification for the time the Applicant took to file the Application after the judgment of the Court of Appeal on 24 November 2011.

66. In light of the above, the Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application based on failure to file the Application within a reasonable time.

B. Other conditions of admissibility

67. 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 50 (2)(a),(b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

68. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since the Applicant's identity is clear.

69. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is, the promotion and protection of human and peoples' rights. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

70. The Court further 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

23 *Armand Guehi v Tanzania (*merits and reparations) § 56; ***Werema Wangoko v Tanzania***, (merits and reparations) §§ 48-49.

50(2)(c) of the Rules.

71. Regarding the condition contained in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

72. Finally, with respect to the requirement laid down in Rule 50(2)(g) 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 or the provisions of the Charter.

73. 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 50(2) of the Rules, and accordingly finds it admissible.

VII. Merits

74. The Applicant alleges violation of the right to equality before the law and equal protection of the law under Article 3(1) and (2) of the Charter, the right to be heard and be provided counsel of one's choice under article 7(1)(c) and 8(d) of the Charter corresponding to Article 13(6)(a) and 107A(2)(b) of the Constitution of the Respondent State and the right to be tried within a reasonable time by an impartial court or tribunal under Article 7(1)(d) of the Charter.

A. Alleged violation of the right to a fair trial

75. The Court will first consider the alleged violation of the right to be heard and be provided counsel of one's choice as it is the first occurrence in the chronology of events in the proceedings against the Applicant. These allegations fall within the right to a fair trial protected under Article 7(1) of the Charter.

i. Alleged violation of the right to have one's cause heard

76. The Applicant alleges that he was denied the right to be heard because his plea was taken un-procedurally, thus the prosecution did not have proof of his guilty plea.

77. The Respondent State avers that the taking of Applicant's plea during the proceedings at the District Court was procedural. The Respondent State maintains that the charge was read over and explained to the Applicant and he did not contest it or state that he did not understand the matter and that he therefore he needed

legal assistance.

78. The Respondent State argues that, furthermore, Section 228(2) of the Criminal Procedure Act provides for the procedure to be adopted when a person pleads guilty and confesses to an offence. The procedure is as follows:

> If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him unless there appears to be sufficient cause to the contrary.

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79. The Court notes that Article 7 (1) of the Charter provides that "Every individual shall have the right to have his cause heard".

80. The Court notes that, the Applicant avers that the irregularity in the taking of his plea should have resulted in the District Magistrate's Court not accepting his guilty plea and that by doing so, that court acted contrary to the requirement of Article 7(1) of the Charter.

81. The Court notes that the record shows that when the facts and particulars of the charge were read out to the Applicant when he was arraigned before the District Magistrate's Court, the Applicant was asked whether he had committed the offence and understood the facts as presented, to which he replied "Yes it is true". The Applicant was then accorded the right to mitigate his sentence. He prayed the court to reduce his sentence due to the fact that he was drunk while committing the offence. It is therefore clear that the Applicant was accorded the opportunity to respond to the charge against him, which he admitted to and he was therefore sentenced on that basis.

82. The Court also notes that, during the appeals at the High Court and the Court of Appeal, the appellate courts rejected the Applicant's claim that his plea was unequivocal because he had admitted to committing the offence.

83. The Court finds therefore that, nothing on the record shows that the domestic proceedings with regard to the Applicant's plea-taking for the offence he was charged with were contrary to Article

7(1) of the Charter.

84. Consequently, the Court finds that the Respondent State did not violate the Applicant's rights under Article 7(1) of the Charter.

ii. Alleged violation of the right to be defended by counsel of one's choice

85. The Applicant argues that the failure to provide him free legal representation during the proceedings at the national courts is a violation of his right to be heard and be defended by counsel of his choice as provided by Article 7(1)(c) and 8(d) of the Charter and Article 13(6)(a) and 107A(2)(b) of the Constitution of the Respondent State.

86. The Applicant states that this failure started from the trial and continued throughout his appeals, resulting in injustice and prejudice to him and that it ought to vitiate the conviction and sentence meted out to him.

87. The Respondent State disputes the claim that the Applicant was not provided with legal aid during the proceedings at the District Court, the High Court and the Court of Appeal.

88. The Respondent State avers that Article 1(6)(a) of its Constitution provides for the right to a fair trial as follows:

> 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.

89. The Respondent State argues that legal aid is not mandatory for persons, such as the Applicant, who are charged with the offence of rape and that therefore, the Applicant should have applied for legal since it is a right guaranteed to all in the Respondent State.

90. The Respondent adds that legal aid is not an automatic right that people can benefit from because it is difficult to get a lawyer of one's choice. This is due to the fact that the Respondent State has insufficient lawyers, financial constraints and limited resources. The Respondent State asks the Court to take into account the efforts it has made in this regard, such as making provision of legal aid mandatory for serious offences such as murder.

91. The Respondent State argues that the Applicant was never prejudiced nor was he at any disadvantage due to not having a defence counsel. The Respondent State maintains that, the Applicant was always informed of the allegations and procedures against him and that everything was explained to him to enable him defend himself.

***

92. The Court notes that, Article 7 (1) (c) of the Charter provides that: "Every individual shall have the right to have his cause heard. This comprises: … (c) the right to defence, including the right to be defended by counsel of his choice".

93. The Court notes that the Charter does not have an Article 8(d), therefore this will be considered as an error on the Applicant's part.

94. The Applicant has also alleged that the failure to provide him free legal assistance was a violation of Article 13(6)(a)[24] and 107A(2)(b)[25] of the Constitution of the Respondent State. Although these provisions of the Respondent State's Constitution do not correspond to Article 7(1)(c) of the Charter, the Court has previously held that in determining, whether the State has complied with the Charter or any other human rights instrument it has ratified, it does not apply the domestic law in making this assessment.[26] The Court will therefore not apply the provisions of the Respondent State's Constitution cited by the Applicant.

95. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[27] and determined that the right to defence includes the right to be provided with free legal assistance.[28]

96. The Court has also determined that where accused persons are charged with serious offences which carry heavy sentences and they are indigent, free legal assistance should be provided as of

24 This Article provides that: "To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely: (a) 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"

25 This Article provides that: 107A (2) In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say … (b) not to delay dispensation of justice without reasonable ground.

26 *Mohamed Abubakari v Tanzania* (merits) § 28; *Kennedy Owino Onyachi and another v Tanzania* (merits) (§ 39.

27 The Respondent State became a State Party to ICCPR on 11 June 1976.

28 *Alex Thomas v Tanzania* (merits) § 114; *Kijiji Isiaga v Tanzania* (merits) (§ 72; *Kennedy Owino Onyachi and another v Tanzania* (merits) § 104.

right, whether or not the accused persons request for it.[29]

97. The Court notes the provisions of Article 14(3)(d) of the ICCPR Court which provides that:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

98. The Court notes that, once a person is arrested on suspicion of having committed a serious offence which carries a heavy penalty and where they are indigent, they should promptly be provided with free legal assistance.[30]

99. The Court observes that although he faced a serious charge of rape which carries a heavy penalty, nothing on the record shows that, upon his arrest the Applicant was promptly informed of the right to legal assistance or that should he be unable to pay for such assistance, it would be provided to him free of charge.

100. The record before the Court shows that the Applicant pleaded guilty of the charge, before the District's Magistrate's Court, without having the benefit of legal advice prior to the taking of his plea. The fact that the Applicant pleaded guilty to the charge did not discharge the Respondent State's obligation to provide the Applicant with free legal assistance during the trial, as, in any event, the Respondent State could not have foreseen how he would plead.

101. The Court has also previously held that, the obligation to provide free legal assistance to indigent persons facing serious charges which carry a heavy penalty is for both the trial and appellate

29 *Alex Thomas v Tanzania*, (merits) § *123*; *Kijiji Isiaga v Tanzania* (merits) § 78; *Kennedy Owino Onyachi and another Charles Mwanini Njoka v Tanzania* (merits) §§ 104 and 106.

30 See ACHPR, *Abdel Hadi Ali Radi & Others v Republic of Sudan* Communication 368/09, where the African Commission on Human and Peoples' Rights referred to Articles 25 and 26 of its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and Article 20(c) of the Robben Island Guidelines (Guidelines and Measures for the Provision and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa) which it adopted to elaborate on the right to be provided legal assistance promptly after arrest; See also ECHR Case of *Pavovits v Cyprus*, Application No. 4268/04, Judgment of 11 December 2008 (merits), § 64 and *Case of A.T. v Luxembourg*, Application No. 30460/13, Judgment of 9 April 2015 (merits), §§ 64, 65 and 75.

stages. [31]

102. The Court notes that the Applicant was also not provided free legal assistance for the appeal proceedings at the High Court and the Court of Appeal although he chose to be absent during the appeal proceedings at the High Court and to appear in person for the appeal before the Court of Appeal.

103. As a consequence of the foregoing, the Court therefore concludes that the failure of the Respondent State to provide the Applicant with free legal assistance during his trial and appeals was a violation of the right to defence under Article 7(1) (c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

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

104. The Applicant alleges that the delay in hearing his application filed on 11 February 2013 for Review of the Court of Appeal's decision on 24 November 2011 constitutes a violation of Article 7 (1) (d) of the Charter and of Article 107 A (2) of the Respondent's Constitution.

105. The Respondent State denies this allegation on the basis that, an application for Review is an extraordinary remedy and therefore such cases are decided on a first come, first serve basis. The Respondent State argues that the Court should take into consideration the high number of cases pending review at the Court of Appeal and that court's capacity to hold Review Sessions.

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106. The Court notes that, Article 7 (1) (d) of the Charter provides for the "right to be tried within a reasonable time by an impartial court or tribunal".

107. In the instant case, the Court notes that, other than stating that applications for review filed after he filed his own such application before the Court of Appeal, were determined before his own, the Applicant has not provided evidence in support of his claim. The Court finds therefore that the Applicant's general statement cannot

31 *Alex Thomas v Tanzania* (merits) § 124; *Wilfred Onyango Nganyi 9 Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507§183.

sustain the claim that the Applicant's right has been violated.

108. The Court therefore finds that there is no violation of Article 7(1) (d) of the Charter.

B. Alleged violation of the right to equality before the law and equal protection of the law

109. The Applicant alleges that although the Court of Appeal considered his appeal, it summarily rejected it, resulting in a violation of Article 3 (1) and (2) of the Charter. He further alleges that even though the Court of Appeal faulted the procedure followed by the High Court on appeal, it adopted the same procedure which was erroneous. He alleges that this error occurred when the Court of Appeal continued to hear the Appeal and making the "conclusion of rejecting it summarily on ground that it was satisfied that the appeal had been lodged without sufficient ground of complaint".

110. The Respondent State argues that this allegation lacks merit because, by admitting to consider the appeal, the Court of Appeal was rectifying a procedural irregularity occasioned by the High Court. The Respondent State elaborates that, Section 4 (2) of the Appellate Jurisdiction Act allows the Court of Appeal to invoke its powers of Revision on a matter which was the basis of a decision at the High Court.

111. The Respondent State argues that, the Court of Appeal had to rectify the procedure undertaken by the High Court to hear the Applicant's appeal because Section 360 (1) of the Criminal Procedure Act provides that:

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on such plea by a subordinate Court except as to the extent or legality of the sentence.

112. The Respondent State avers further, that the Court of Appeal's action is strengthened by the fact that the High Court determined that the Applicant's plea at the District Court was unequivocal, therefore the High Court should not have proceeded to hear the appeal on merits.

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113. The Court notes the provisions of Article 3 (1) of the Charter which provides that "Every individual shall be equal before the law" and Article 3 (2) of the Charter provides that "Every individual shall be

entitled to equal protection of the law."

114. In the instant case, the Court notes that there is nothing on the record to show that the Applicant's appeals at the High Court and the Court of Appeal were heard in an irregular manner in contravention of Article 3 of the Charter.

115. The Court observes that, where an accused person pleads guilty, the Respondent State's law allows appeals only on sentencing and not on conviction. The Court notes that, the High Court considered the Applicant's appeal on both the conviction and sentence on the basis that, although the Applicant filed it as an appeal against the sentence only, the grounds he set out in support of the appeal related to the conviction.

116. The record shows that the Court of Appeal subsequently dismissed the Applicant's appeal on the basis that the High Court ought not to have considered the appeal on both the conviction and sentence, rather only on the sentence, since the Applicant had pleaded guilty. Since the sentence meted out by the District Court was the minimum sentence for that offence, in the circumstances, the Appeal could therefore not be sustained and was therefore dismissed.

117. The Court notes that, in any event, the Applicant has not established that he was treated differently from other persons who were convicted of their own plea of guilty for the offence of rape, as he was.

118. The Court therefore finds that the Respondent State did not violate the Applicant's right provided under Article 3(1) and (2) of the Charter.

VIII. Reparations

119. The Applicant asks that the Court "grant reparations and order such other measures or remedies it deems fit." Specifically on pecuniary reparations, the Applicant prays "reparation of payment may be considered and assessed by the court on my custody period per the nation ration of a citizen income per year". On non-pecuniary reparations, the Applicant requests the Court to annul his conviction and sentence and order his release from prison.

120. The Respondent State asserts that the Applicant has failed to establish the causal link between the alleged violations and the alleged harm suffered by the Applicant. Citing the Court's jurisprudence in the matter of *Lohe Issa Konate v Burkina Faso*, the Respondent State argues that the Court lacks the criminal appellate jurisdiction to acquit the Applicant. The Respondent State prays the Court to declare that the Applicant was convicted

fairly out of due process of the law. It therefore pray**s** that the Applicant's prayers for reparations should be dismissed and the Court should make any orders it will deem right and just to grant.

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121. 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."

122. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered. Finally, the Applicant bears the onus to justify the claims made.[32]

123. As this Court has earlier found, the Respondent State violated the Applicants' rights to be defended by counsel of one's choice guaranteed under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR. The prayers for reparation will therefore be examined against this finding.

124. As stated earlier, the Applicants must provide evidence to support their claims for material prejudice. The Court has also held previously that the purpose of reparations is to place the victim in the situation prior to the violation.[33]

125. The Court has further held, with respect to moral loss, it exercises judicial discretion in equity.[34] In such instances, the Court has

32 See *Armand Guehi v Tanzania* (merits and reparations), § 157. See also, *Norbert Zongo and Others 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.

33 See *Armand Guehi v Tanzania* (merits and reparations); *Lucien Ikili Rashidi v United Republic of Tanzania,* ACtHPR, Application No. 009/2015. Judgment of 28 March 2019 (merits and reparations), § 118; and *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 57-62.

34 See *Armand Guehi v Tanzania* (merits and reparations), § 181; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 62.

adopted the practice of awarding lump sums.[35]

A. Pecuniary reparations

i. Material prejudice

126. The Applicant prays "reparation of payment may be considered and assessed by the court on my custody period per the nation ration of a citizen income per year".

127. The Respondent State argues that the Applicant has not clearly indicated the alleged loss or damage suffered as a result of the alleged violation to enable the Court fairly assess and award reparations. It argues that the Applicant has not provided evidence in support of his claim as required, pursuant to the Court's decision in the matter of *Reverend Christopher Mtikila v Tanzania*. The Respondent State further argues that, awarding the Applicant reparations on the basis of his unsubstantiated claims will defeat the purpose of reparations which is '*restitutio in integrum'*. It therefore submits that the Court should dismiss the Applicant's requests for reparations.

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128. The Court notes that, in order for a claim for material prejudice to be granted, the Applicant must show a causal link between the alleged violation and the loss suffered, and further, prove the loss suffered with evidence.[36]

129. In the instant case, the Court notes that the Applicant has not established the link between the violation found and the compensation that he claims. Furthermore, he has not provided any evidence to prove that he suffered any loss. Rather, the Applicant based his claim on his incarceration which this Court did not find unlawful.

35 See *Norbert Zongo and Others v Burkina Faso* (reparations), § 62.

36 See *Armand Guehi v Tanzania* (merits and reparations), § 181; *Norbert Zongo and Others v Burkina Faso* (reparations), § 62.

130. The Court therefore dismisses this claim.

ii. Moral Prejudice

131. The Court notes that the violation it established of the right to free legal assistance caused moral prejudice to the Applicant. The Court therefore, in exercising its discretion, awards an amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[37]

B. Non-pecuniary reparations

132. Regarding the order to annul his conviction and sentence, the Court notes that it has not determined whether the conviction and sentence of the Applicant was warranted or not, as this is a matter to be left to the national courts. The Court is rather concerned with whether the procedures in the national courts comply with the provisions of human rights instruments ratified by the Respondent State.

133. In this regard, the Court is satisfied that there is nothing on the record establishing that the manner in which the Respondent State convicted and sentenced the Applicant occasioned any error or miscarriage of justice to the Applicant to warrant its intervention, as the record shows that it was based on a guilty plea, that was procedurally entered.

134. With regard to the Applicant's release from prison, the Court has established that it would make such an order, "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".[38]

135. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant's right to a fair trial for failing to provide him with free legal assistance. Without minimising the gravity of the violation, the Court considers that the nature of the violation in the instant case does not reveal any

37 Minani *Evarist v United Republic of Tanzania* (merits and reparations) (21 September 2018), 2 AfCLR 402§ 85.

38 *Minani Evarist v Tanzania* (merits and reparations), § 82; See also *Jibu Amir alias Mussa and another v Tanzania* (merits and reparations), § 96; *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84; *Kalebi Elisamehe v United Republic of Tanzania,* ACtHPR, Application No 028/2015 Judgment of 26 June 2020 (merits and reparations), § 111.

circumstance that signifies that the Applicant's imprisonment is a miscarriage of justice or an arbitrary decision. The Applicant also failed to elaborate on specific and compelling circumstances to justify the order for his release.[39]

136. In view of the foregoing, this prayer is therefore dismissed.

IX. Costs

137. The Applicant has prayed that costs be borne by the Respondent State.

138. The Respondent State has prayed that costs be borne by the Applicant.

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139. Pursuant to Rule 32 of the Rules of Court[40] "unless otherwise decided by the Court, each party shall bear its own costs".

140. The Court finds that there is nothing in the instant case, warranting it to depart from this provision. Consequently, the Court orders that each party shall bear its own costs.

X. Operative part

141. For these reasons,

The Court,

Unanimously:

On jurisdiction

i. *Dismisses* the objections to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections to the admissibility of the Application;

iv. *Declares* the Application admissible.

39 *Jibu Amir alias Mussa and another v Tanzania* (merits and reparations), § 97; *Kalebi Elisamehe v Tanzania* (merits and reparations), § 112; and *Minani Evarist v Tanzania* (merits and reparations), § 82.

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

On merits

v. *Finds* that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law under Article 3(1) and (2) of the Charter;

vi. *Finds* that the Respondent State has not violated the Applicant's right to have his cause heard, under Article 7(1) of the Charter;

vii. *Finds* that the Respondent has not violated the Applicant's right to be tried within a reasonable time by an impartial tribunal under Article 7(1)(d) of the Charter;

viii. *Finds* that the Respondent has violated the Applicant's right to defence 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, for failure to provide the Applicant free legal assistance.

On reparations

Pecuniary reparations

ix. *Dismisses* the Applicant's prayer for material damages.

x. *Grants* the Applicant damages for the moral prejudice he suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300,000);

xi. *Orders* the Respondent State to pay the sum awarded under (x) above, free from tax, as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay 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.

Non-pecuniary reparations

xii. *Dismisses* the Applicant's prayer for the annulment of his conviction and sentence and his release from prison.

On implementation and reporting

xiii. *Orders* the Respondent State to submit to the Court, within six (6) months from 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

xiv. *Orders* each party to bear its own costs.

Faustin v Tanzania (judgment) (2021) 5 AfCLR 386

Application 018/2016, *Cosma Faustin v United Republic of Tanzania*

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant had unsuccessfully appealed against his conviction and death sentence before domestic courts of the Respondent State. He brought this Application claiming that the manner in which his case was handled by the domestic courts was a violation of his human rights. The Court held that the Respondent State had not violated any of the Applicant's rights.

Jurisdiction (material jurisdiction, 31-33; withdrawal of article 34(6) declaration, 36)

Admissibility (exhaustion of local remedies, 51-55; submission within a reasonable time, 60 -64)

Fair trial (evaluation of evidence for criminal conviction, 79-80, 84-87, 97-100; right to free legal representation, 106-110)

Equality before the law and non-discrimination (burden of proof, 114-116)

I. The Parties

1. Mr Cosma Faustin (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Butimba Central Prison having been convicted of murder and sentenced to death.

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 further deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") 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 this withdrawal had no effect on pending cases as well as all new

cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record, that on 10 April 1999, the Applicant went to the house of Prosecution Witness (PW1) in pursuit of one Petro Nzeimana, in Kijumbula village in Kagera, in a bid to collect money that he was owed. The Applicant having not found Mr. Nzeimana, engaged in a heated argument with Mr. Pereuse Stanslaus, Mr. Nzeimana's brother. The argument subsequently, resulted in the Applicant chasing after the deceased, to a point where they fell into a ditch and he stabbed him, leaving a deep wound to the neck that led to his death.

4. On 5 December 2000, the Applicant was charged with premeditated murder even though, according to him, he had killed the victim accidentally, and that he had carried a knife that day for the purpose of filleting some fish which he had bought from a nearby lake, and not to kill the victim. He considers that the testimony of prosecution witnesses PW1 and PW3, were contradictory and inconsistent due to the lack of coherence in their testimony and, therefore, were not credible. He further submits that PW1 entered the house after the victim had been stabbed, while PW3's testimony before the High Court, contradicted his statements in the police report regarding the incident.

5. On 29 August 2006, the Applicant appealed the death sentence before the Court of Appeal in Mwanza in Appeal No. 103/2007. On 8 November 2011, the Court of Appeal confirmed the death sentence rendered by the High Court and maintained the conviction of premeditated murder.

6. The Applicant further applied to the Court of Appeal in Application No.6 of 2012 for review of its judgment and he alleges that, as at the date of filing the Application before this Court, the review was still pending.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No.004/2015, Judgment of 26 June 2020 (merits and reparations) §39. Also see *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

B. Alleged violations

7. The Applicant alleges that his rights guaranteed under Articles, 3 and 7(1)(a) and (c) of the Charter were violated as follows:

i. The domestic courts failed to take into account the fact that he was provoked by the victim. He avers that he had no intention of killing the victim, but that the latter died as a result of wrongful killing during their quarrel;

ii. The testimonies of the prosecution witnesses were not credible, as they were unreliable. For instance, PW1 arrived at the murder scene after the victim had been stabbed and PW3 changed his statements in the police report;

iii. The domestic courts did not grant him the right to be represented by a lawyer of his choice;

iv. The Court of Appeal did not consider his application to review its judgment, which violated his basic rights.

III. Summary of the Procedure before the Court

8. On 12 April 2016, the Application was filed at the Court and served on the Respondent State on 10 May 2016. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.

9. On 3 June 2016, the Court issued a Ruling on Provisional Measures ordering the Respondent State to stay the execution of the death sentence pending a decision on the merits of the case.[2]

10. On 10 June 2016, the Registry transmitted the Application to the entities listed under Rule 42(4) of the Rules.[3]

11. The Respondent State filed its Response on 23 May 2017, which was transmitted to the Applicant for him to submit his Reply within thirty (30) days of the notification. The Applicant filed his Reply on 13 June 2017 and this was served on the Respondent State on 28 June 2017.

12. Written pleadings were closed on 7 February 2018 and the Parties were duly notified. On 12 November 2018, the Registry notified the parties of the reopening of pleadings, for them to file submissions on reparations.

13. On 11 December 2018, the Applicant filed his submissions on reparations which was served on the Respondent State on 20

2 *Cosma Faustin v United Republic of Tanzania,* Application No.018/2016 (provisional measures) (3 June 2016) 1 AfCLR 652.

3 Formerly Rule 35(3) of the Rules of Court, 2 June 2010.

December 2018. It was requested to file its Response within thirty (30) days of the notification.

14. Pleadings were closed on 16 December 2020 and the Parties were duly notified after the Respondent State failed to file a Response to the submissions on reparations despite several extensions of time by the Court.

IV. Prayers of the Parties

15. The Applicant prays the Court to:

i. Reverse the injustice suffered by ordering the Respondent State to quash both the conviction and sentence and set him free owing to the time he has spent in custody because he was denied free legal representation of his choice during the trial;

ii. Award him reparations proportionate to an individual's annual income for the time he has served in prison;

iii. Issue any order for reparation as it deems appropriate in the circumstances of the case.

16. The Respondent State, on its part, prays the Court to make the following orders:

i. That the Honourable Court does not have jurisdiction to hear the Application;

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

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

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

v. That the costs of this procedure be borne by the Applicant.

17. On the merits, the Respondent State prays the Court to dismiss all of the Applicant's allegations and to find that:

i. The Respondent State has not violated Article 2 of the Charter.

ii. The Respondent State has not violated any of the rights of the Applicant guaranteed by Article 3(1) (2) of the Charter.

iii. The Respondent State has not violated any of the rights of the Applicant guaranteed by Article 7 (1) (d) of the Charter.

iv. Dismiss all the Applicant's prayers.

v. Dismiss the Application in its entirety for lack of merit.

V. Jurisdiction

18. 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 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. Furthermore, Rule 49(1) of the Rules of Court[4] provides that "the Court shall conduct preliminarily examination of its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

20. It follows from the above provisions that the Court must, conduct an examination of its jurisdiction and rule on any objections raised, if any.

21. The Court notes that, in this case, the Respondent State raises an objection to its material jurisdiction.

A. Objection to material jurisdiction

22. The Respondent State submits that the Court lacks material jurisdiction in accordance with the provisions of Articles 3(1) of the Protocol and Rule 26(1)(a)[5] of the Rules, as the Applicant has not raised any point in his Application dealing with the interpretation or application of the Charter, the Protocol or any other human rights instrument ratified by the Respondent State.

23. According to the Respondent State, the Applicant's complaint relates to how the criminal procedure law of the Respondent State was applied in Criminal Case No. 91 of 2000. Furthermore, that, Rule 26 of the Rules lists the issues that fall under the jurisdiction of the Court, which the Applicant failed to invoke. For instance, the Applicant neither requests the Court to consider a case concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the Respondent State, nor does he request an advisory opinion on a legal matter related to the Charter or any other instrument as provided for in Rule 26(1) (b)[6] of the Rules.

24. In addition, the Respondent State submits that the Applicant is neither requesting the Court to initiate an amicable settlement in

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

5 Rule 29(1)(a) of the Rules of Court, 25 September 2020.

6 Rule 29(1)(b) of the Rules of Court, 25 September 2020.

a case before it, in accordance with Rule 26 (1) (c)[7] of the Rules, nor is he requesting for the interpretation of a judgment rendered by the Court in accordance with Rule 26 (1) (d)[8] of the Rules. Furthermore, that he is also not seeking a review of the Court's judgment due to the emergence of new evidence in accordance with Rule 26(1)(e) of the Rules.

25. The Respondent State contends that the Court cannot grant the Applicant's prayer to "quash both the conviction and sentence imposed upon the Applicant and set him at liberty" because it is not within the Court's jurisdiction to act as an appellate court. Also, that the Applicant is asking the Court to sit as an appellate court on matters of evidence and procedures that have already been settled by its Court of Appeal.

26. The Respondent State submits that the Court of Appeal convicted the Applicant of premeditated murder after examining the facts in which the Court of Appeal concluded, that the Applicant's chasing of the fleeing victim and jumping on him after falling into a ditch and stabbing him in the neck indicates an act of malicious aforethought.

27. The Respondent State further contends that the Court of Appeal took into account the Applicant's defence. However, that the Applicant raises before this Court, matters that he did not raise before the High Court, such as the matter of prosecution witnesses before the Court of Appeal. The Respondent State therefore concludes that this Court does not have jurisdiction to hear the instant case.

28. The Applicant submits that, this Court has jurisdiction to decide cases brought before it when a state is a signatory to the Charter. With regard to the instant case, the Applicant invokes specific provisions of the Charter allegedly violated by the Respondent State and submits, on that basis, that the Court has material jurisdiction to hear the case.

29. Moreover, the Applicant avers that the Court has the jurisdiction to examine relevant proceedings in the domestic courts in order to determine whether they are in compliance with the standards set out in the Charter or any other human rights instruments ratified by the Respondent State in accordance with its established jurisprudence in the Court's ruling in *Alex Thomas v The United Republic of Tanzania*.

7 Rule 29(2)(a) of the Rules of Court, 25 September 2020.

8 Rule 29(2)(b) of the Rules of Court, 25 September 2020.

30. The Applicant argues that the alleged violations are of rights provided for in the Charter, which this Court has the jurisdiction to consider.

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31. The Court recalls that, in accordance with its established jurisdiction on the application of Article 3(1) of the Protocol, it has jurisdiction to examine the relevant proceedings before the domestic courts to determine whether they comply with the standards set out in the Charter or in any other human rights instrument to which the State concerned is a party.[9]

32. In the instant case, the Court notes that the Applicant has alleged the violation of rights guaranteed by Articles 3 and 7 (1)(c) of the Charter.

33. Consequently, the Court finds that it has material jurisdiction and dismisses the Respondent State's objection on this point.

B. Other aspects of jurisdiction

34. The Court notes that its personal, temporal and territorial jurisdiction are not contested by the Respondent State. Nonetheless, in line with Rule 49(1) of the Rules,[10] it must ensure that all aspects of its jurisdiction are fulfilled before ruling on the Application.

35. With regard to its personal jurisdiction, the Court recalls that the Respondent State is a Party to the Protocol and that it deposited the Declaration provided for in Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument of withdrawal

9 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190, § 14; *Armand Guéhi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 493, §33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35; *Kenedy Ivan v Tanzania*, ACtHPR, Application No. 025/2016, Judgment of 28 March 2019, (merits and reparations) § 26; *Mhina Zuberi v United Republic of Tanzania*, ACtHPR, Application No. 054/2016, Judgment of 26 February 2021 (merits and reparations), § 22; and *Masoud Rajabu v United Republic of Tanzania*, Application No.008/2016, Judgment of 25 June 2021 (merits and reparations), §§ 21 - 23.

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

of the said Declaration.[11]

36. The Court recalls its jurisprudence that the withdrawal of the Declaration does not have retroactive effect and that it does not come into force until twelve (12) months after its notification, that is, 22 November 2020.[12] The instant Application was filed before the Respondent State deposited its notice of withdrawal, and is, therefore, not affected by the said withdrawal. Accordingly, the Court concludes that it has personal jurisdiction in this case.

37. With respect to its temporal jurisdiction, the Court notes that the alleged violations are based on the Court of Appeal Judgment of 8 November 2011, that is, after the Respondent State had become a party to the Charter and the Protocol and had deposited the Declaration. Moreover, the alleged violations are continuing in nature, with the Applicant remaining convicted after what he considers to be an unfair trial.[13]

38. In view of the foregoing, the Court finds that it has temporal jurisdiction to hear the instant Application.

39. With regard to its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred in the territory of the Respondent State. The Court therefore holds that it has territorial jurisdiction.

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

VI. Admissibility

41. Article 6(2) of the Protocol stipulates that, "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

42. Pursuant to Rule 50(1) of the Rules, "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."[14]

11 See paragraph 2 above.

12 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 35 to 39.

13 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des froits de l'homme et des peuples v Burkina Faso* Application (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

14 Formerly Rule 40 Rules of Court, 2 June 2010.

43. Rule 50(2) of the Rules, which, in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with of the following conditions:
>
> a. Indicate their authors even if the latter requests anonymity,
>
> b. Are compatible with the Constitutive Act of the African Union and with the Charter,
>
> c. Not contain any disparaging or insulting language;
>
> 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 Court 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.

A. Objections to the admissibility of the Application

44. The Respondent State raises two objections to the admissibility of the Application related to the filing of the Application prior to the exhaustion of local remedies and the failure to file the Application within a reasonable time after the exhaustion of local remedies in accordance with Rule 50(2)(e) and (f) of the Rules.

i. Objection based on non-exhaustion of local remedies

45. The Respondent State raises an objection to the admissibility of the Application on the ground that it was filed prior to the exhaustion of local remedies. It submits that the exhaustion of local remedies available is well established in the human rights jurisprudence, and in *Communication No. 333/2006 - SAHRINGON and others v Tanzania*.[15]

46. Citing Judge Antônio Augusto Cançado Trindade on the application of the rule of exhaustion of local remedies in international law, the

15 ACHPR Communication No. 333/2006 – *Southern Africa Human Rights NGO Network v Tanzania.*

Respondent State contends as follows:

> [t]he rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.

47. Referring to *Article 19 v Eritrea*, the Respondent State submits that the onus is on the Applicant to demonstrate that he took all the steps to exhaust domestic remedies and not merely cast aspersions on the effectiveness of those remedies.[16]

48. The Respondent State submits that legal remedies are available to the Applicant before the Court of Appeal, and that the Applicant never challenged the credibility of the prosecution witnesses before the Court of Appeal, and this does not happen automatically as a basis for appeal before that court.

49. The Respondent State argues that the Applicant also had an option of filing a constitutional petition to the High Court by relying on the provisions of the Basic Rights and Duties Act No. 3, where he would have claimed that his fundamental rights had been violated. However, he did not exercise that option. Consequently, it contends that, the requirements of Rule 40(5) of the Rules on the admissibility of an Application, were not met, and it therefore prays the Court to dismiss the Application.

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50. The Applicant submits that it would have been unreasonable for him to seek recourse from the High Court, to challenge the constitutionality of the decision of the Court of Appeal, the highest judicial body in the Respondent State composed of three judges, seeking to overrule it by a ruling of the High Court, which is composed of one judge.

16 ACHPR, *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007).

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51. The Court notes that pursuant to Article 56(5) of the Charter, whose requirements are restated in Rule 50(2)(e) 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.[17]

52. The Court notes that, in so far as criminal proceedings against an Applicant have been determined by the highest appellate court, the Respondent State is deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[18]

53. In its established jurisprudence, the Court has held that an Applicant is required to exhaust ordinary judicial remedies.[19] In addition, in several cases relating to the Respondent State, the Court has reiterated that appeals through a constitutional petition and a petition for review of the judgment of the Court of Appeal are extra-ordinary remedies, and thus the Applicant is not required to exhaust them before seizing this Court.[20]

54. In the instant case, the Court notes that the appeal before the Court of Appeal, the highest judicial body of the Respondent State, was decided on 8 November 2011 by the said Court. Therefore, the Respondent State had the opportunity to remedy the alleged violations resulting from the Applicant's trial and appeals.

55. In view of the foregoing, the Court holds that the Applicant has exhausted the local remedies provided for in Article 56(5) of the Charter and Rule 50(2)(e) of the Rules. The Court therefore dismisses the Respondent State's objection based on

17 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.

18 *Mohamed Abubakari v United Republic of Tanzania* (merits), (3 June 2016) 1 AfCLR 599, §76.

19 *Alex Thomas v United Republic of Tanzania,* (merits) (20 November 2015) 1 AfCLR 465 § 64; *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania*, (merits) (18 March 2016) 1 AfCLR 507, § 95.

20 *Alex Thomas v Tanzania* (merits) § 65; *Mohamed Abubakari v Tanzania* (merits), §§66-70; *Christopher Jonas v United Republic of Tanzania* (merits), (28 September 2017) 2 AfCLR 101 § 44.

non-exhaustion of local remedies.

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

56. The Respondent State argues that the Application was not filed within a reasonable time after the exhaustion of local remedies in accordance with the provisions of Rule 40(6) of the Rules. In this regard, it refers to the Applicant stating that he was aggrieved by the ruling of the Court of Appeal in Mwanza in the Criminal Appeal No. 103 of 2007, in which the Court of Appeal dismissed his appeal to review the sentence on 8 November 2011. Furthermore, that the Applicant submits that its application for review of the judgment of the Court of Appeal No. 6 of 2012 is still pending. The Respondent State submits that the Applicant neither indicates the date of submitting his application for review nor does he attach a copy of the application for review to the registry. Thus, it submits, that the Applicant having not heard from the Court of Appeal decided to file this case before the Court on 24 March 2016, that is, after four (4) years and seven (7) months. According to the Respondent State, this period of time, cannot be considered to be reasonable.

57. The Respondent State contends that although Rule 40(6) of the Rules does not specify a timeframe which should be considered as reasonable time, established international human rights jurisprudence considers six (6) months as reasonable time for filing such an application. The Respondent State cites the decision of the Commission in the Communication of *Majuru v Zimbabwe (2008) AHRLR 146*, in which the Commission stated:

> The Charter does not provide for what constitutes 'reasonable period'. However, the Commission has the mandate to interpret the provisions of the Charter and in doing so, it takes cognizance of its duty to protect human and people's rights as stipulated in the Charter. The provisions of other international/regional instruments like the European Convention on Human Rights and Fundamental Freedoms and the Inter-American Convention on Human Rights, are almost similar and state that they … may only deal with the matter … within a period of six months from the date on which the final decision was taken, after this period has elapsed the Court/Commission will no longer entertain the communication.

58. The Respondent State thus submits that the Applicant should have filed his case before this Court before the expiry of the period of six (6) months rather than waiting for years to elapse. Further, that the fact that the Applicant is incarcerated, does not constitute an impediment for him to reach the Court, as he actually did in this

Application No. 018/2016. The Respondent State concludes that the admissibility requirements for an Application before this Court are cumulative, that is, a failure to fulfil one condition renders the Application inadmissible.

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59. The Applicant, on his part, avers that the Rules of Court do not provide for a specific time frame to file the case before this Court after the exhaustion of local remedies. He submits, that the Application is admissible as long as the local remedies have been exhausted. Furthermore, that this Court, in *Application No. 013/2011, Norbert Zongo and others v Burkina Faso*, concluded that the "…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."[21]

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60. The Court recalls that according to Article 56(6) of the Charter and Rule 50(2)(f) of the Rules, there is no specific time frame within which the case must be brought before the Court. Rule 50(2)(f) of the Rules which restates the provision of Article 56(6) of the Charter, requires an 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."

61. The Court recalls its jurisprudence that: "… the reasonableness of the timeframe for seizure depends on the specific circumstances

21 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme v Burkina Faso* (merits)(28 March 2014) 1 AfCLR 219,§ 92. See also *Thomas v Tanzania (*merits), § 73.

of the case and should be determined on a case-by-case basis."[22]

62. The Court notes that in the instant case, the Applicant filed his Application before this Court on 12 April 2016 after the Court of Appeal had dismissed his appeal on 8 November 2011, that is, four (4) years, five (5) months and four (4) days after the said dismissal. The question is therefore whether the period between the exhaustion of local remedies and the referral to the Court constitutes a reasonable time within the meaning of Article 40(6) of the Rules.[23]

63. The Court notes that, in the instant case, the Applicant is on death row, he is incarcerated and restricted in his movements with limited access to information on the Rules of this Court.[24] The Court further takes into consideration the Applicant's above-mentioned circumstances and finds that the period of four (4) years, five (5) months and four (4) days is a reasonable time.

64. The Court therefore, dismisses the Respondent State's objection to admissibility based on the fact that the Application was not filed within a reasonable time.

B. Other conditions of admissibility

65. The Court notes from the record, that the Application's compliance with the requirements in Article 56(1), (2), (3), (4), and (7) of the Charter and Rule 50(2)(a)(b)(c)(d) and (g) of the Rules[25] is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

66. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since the Applicant has clearly indicated his identity.

67. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Therefore, the Court finds that the Application is compatible with the Constitutive Act

22 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme v Burkina Faso* (merits), § 121.

23 Rule 50(2)(e) of the Rules of Court, 25 September 2020.

24 *Alex Thomas v Tanzania* (merits) § 74; *Evodius Rutechura v United Republic of Tanzania,* ACtHPR, Application No.004/2016, Judgment of 26 February 2021 (merits and reparations), §48.

25 Formerly Rule 40 of the Rules of Court, 2 June 2010.

of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

68. The Court further 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 50(2)(c) of the Rules.

69. Regarding the condition contained in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

70. Finally, with respect to the requirement laid down in Rule 50(2)(g) of the Rules, the Court finds that the present case does not concern a case which has already been settled by 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.

71. In view of the foregoing, the Court finds that all the conditions of admissibility under Rule 56 of the Charter and Rule 50 of the Rules have been met and declares the Application admissible.

VII. Merits

72. The Court notes that the allegations of violations made by the Applicant can be grouped into two claims: i) the right to a fair trial and ii) the right to equality before the law and to equal protection before the law.

A. Alleged violation of the right to a fair trial

73. The alleged violations of the right to a fair trial relate to: the right to have one's cause heard by an impartial court; the right to be represented by counsel of one's choice and the manner in which the evidence was evaluated.

i. Alleged violation of the right to have his cause heard by an impartial court

74. The Applicant contends that the Court of Appeal occasioned a miscarriage of justice by refusing to consider his defence in violation of Article 3 of the Charter.

75. The Respondent State refutes the Applicant's submissions, arguing that the allegation is not substantiated. It submits that it did not violate Article 3(2) of the Charter, and its Constitution guarantees the right to equality of individuals in accordance with Article 13(1) thereof. Furthermore, that the Respondent State's

Criminal Procedure Act grants the accused the right to defend himself without discrimination and to be treated equally before the law, in accordance with Article 290 of that law. On this basis, the Respondent State contends that the Applicant was given the opportunity to consider all the testimonies of the prosecution witnesses, including the complainant. Even so, that, he did not object to these testimonies in accordance with the Respondent State's law. It further argues that the law grants the accused the right to defend his case and to present evidence in his name or through his counsel.

76. The Respondent State avers that the Applicant was present throughout the trial and was granted the right to free legal aid through a state-appointed counsel at the High Court and the Court of Appeal. The Respondent State further submits that the Applicant was capable of challenging all the witness statements through his counsel and by himself as he was granted the right of defence.

77. The Respondent State contends that these procedures can be found in the records of the High Court. The Respondent State concludes that the Applicant fails to substantiate the allegation that he was denied equal protection of the law. Accordingly, the Respondent State submits that the allegation lacks merit and should be dismissed.

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78. The Court notes that the violation alleged by the Applicant does not fall under Article 3 of the Charter,[26] but rather under Article 7(1) of the Charter, which provides that: "Every individual shall have the right to have his cause heard".

79. The Court recalls its jurisprudence that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[27]

26 Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.

27 *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 65.

80. In light of the foregoing, the Court finds that the manner in which the national courts handled the Applicant's trial, conviction and sentence does not disclose any manifest error or miscarriage of justice to the Applicant that requires its intervention.

81. The Court therefore dismiss this allegation and finds that the Respondent state has not violated Article 7(1) of the Charter.

ii. Alleged failure to consider the defence of provocation

82. The Applicant submits that he was aggrieved by the fact that domestic courts did not consider his defence of provocation and that the killing of the victim occurred as a consequence of the said provocation by the deceased. He avers that he had no prior intent to kill the deceased.

83. The Respondent State refutes the Applicant's allegations that the High Court failed to consider his defence of provocation by the victim since the Applicant has not provided evidence to that effect. The Respondent State avers that the High Court considered in detail the defence of provocation on page 41 of the judgment. Furthermore, that, the two witnesses confirmed that this defence came too late after the charge had been proven.

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84. The Court has previously held that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceeding.[28]

85. However, that does not preclude the Court from assessing the manner in which evidence was examined by domestic courts and determine whether the domestic procedures fulfilled international human rights standards.

86. In the instant case, the Court has analyzed the proceedings not only before the High Court but also in relation to the appeal before the Court of Appeal. It emerges from the record of the trial before the High Court, that the judge heard four witnesses (4)

28 *Kijiji Isiaga v Tanania* (merits), § 65.

and concluded that PW1 had adduced credible testimony. The Court of Appeal also held that there was no reason to reject the conclusions of the High Court as the Applicant had carried a knife in his pocket and chased after the victim. In addition, it held that, the deep wound in the victim's neck dispelled all doubt about the Applicant's intent to kill. Moreover, that, the Applicant fled the scene of the crime after he had stabbed the victim with a knife in the neck, which led to his death.

87. Accordingly, the Court considers that given the manner in which the High Court and the Court of Appeal in the Respondent State handled the case, there is no indication of an error that would necessitate its intervention.

88. As for the Applicant's allegation about the contradictions in the testimony of one of the witnesses, the Court found from the records of the High Court and the judgment of the Court of Appeal that the discrepancy in the testimony of one of the witnesses does not call into question the validity of the testimonies of other witnesses, which the two courts considered coherent and convincing.

89. The Court notes that the defence of provocation was considered and dismissed by the domestic courts, after thorough deliberation, as been unsubstantiated.

90. The Court therefore holds that the assessment made by the domestic courts is not inconsistent with the required international human rights' standards.

91. Accordingly, the Court dismisses the allegation of failure by the domestic courts to consider his defence of provocation.

iii. Alleged failure to consider the Applicant's defence that a quarrel resulted in the victim's death

92. The Applicant contends that the court erred in charging him with premeditated murder instead of manslaughter.

93. The Applicant avers that the High Court erred, on the one hand, by relying on the prosecution witnesses who were not credible and, on the other hand, by refusing to consider his defence so as to alter his charge from murder to manslaughter.

94. The Respondent State submits that the Court of Appeal of Bukoba decided that the case was a matter of premeditated murder instead of manslaughter when it concluded that it was the stabbing by the knife that caused the death of the victim. Furthermore, that the chasing of the deceased and causing him to fall into the ditch, enabled the Applicant to jump on him and to stab him on the neck

with a knife, which indicates the intention to kill.

95. The Respondent State contends that the Applicant raises an allegation before this Court for the first time, which he did not raise previously before the domestic courts, namely, questioning the credibility of witnesses before the Court of Appeal.

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96. The Court observes that the question that arises here is the manner in which the High Court and the Court of Appeal dealt with the evidential contentions raised by the Applicant, especially whether the evidence was duly examined in line with Article 7(1) of the Charter.

97. The Court recalls its established position that examining the particulars of evidence is a matter that should be left to domestic courts. However, as further acknowledged by the Court, it may evaluate the relevant procedures before the domestic courts to determine whether they conform to the standards prescribed by the Charter and other international human rights instruments.[29]

98. From its perusal of the record, the Court notes that the Applicant was represented by counsel before the domestic courts. The Court also notes that both the High Court and the Court of Appeal examined and analysed all the grounds of appeal as filed by the Applicant together with the counter-arguments raised by the Respondent State. With regard to the allegation of a quarrel between the Applicant and the victim before the latter's death, the Court notes that the Applicant alleges that a quarrel occurred which led to the accidental death of the victim and that he did not intend to kill the victim. In order to consider this allegation, the Court of Appeal analyzed in detail the facts of the death through the prosecution witnesses and the arguments of the defence.

99. The Court observes that, the Court of Appeal based its reasoning on seven presumptions for which it concluded that a premeditated murder had occurred.[30] The evidence it relied upon was that the Applicant arrived at the house of PW1 in pursuit of one Petro Nzeimana, who fled after he had injured him. Also, the victim and

29 *Minani Evarist v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402 § 54.

30 Judgment of the Court of Appeal at Mwanza, pp. 9-11.

some of the eye witnesses tried to prevent the Applicant from assaulting Petro who managed to escape. Moreover, that after an argument with Mr. Stanslaus, who was Mr. Petro's brother, the Applicant drew a knife out of his pocket, pursued Mr. Stanslaus until the latter fell into a ditch and that subsequently, the Applicant stabbed him, leaving a deep wound to the neck that led to his death.

100. The Court finds that the manner in which the Court of Appeal dealt with the matter does not disclose any manifest error or miscarriage of justice to the Applicant that requires its intervention. The Court, therefore, holds that the Respondent State did not violate Article 7(1) of the Charter herein.

101. Accordingly, this court rejects the claim of the Applicant.

iv Alleged violation of the right to be defended by counsel of his choice

102. The Applicant contends that he was not provided with free legal representation of his choice during the trial proceedings in violation of Article 7(1)(c) of the Charter.

103. The Respondent State avers that throughout his trial at the High Court and the Court of Appeal, the Applicant, was provided with free legal aid services. In its Response, the Respondent State provided the names of the three lawyers who defended the Applicant, as follows, Ms. Philip, and Mr. Kabonga before the High Court and Mr. Faustin Malungu before the Court of Appeal. It submits thus, that the Applicant was provided with free legal representation throughout his trial in the domestic courts.

104. The Respondent State also avers that the Applicant fails to substantiate this allegation and that it is not clear to it on what criterion he bases his claim.

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105. Article 7(1)(c) of the Charter provides as follows: "[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."

106. Although, the Charter does not provide explicitly for the right to free legal assistance, the Court has interpreted the provision

of Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[31] and determined that the right to defence includes the right to be provided with free legal assistance.[32]

107. The Court observes as established in the jurisprudence of the European Court of Human Rights, that, the right to be defended by counsel of one's choice is not absolute when the counsel is provided through a free legal assistance scheme.[33] In this case, the important thing is to know if the Applicant was provided with effective legal representation as opposed to whether he was allowed to be represented by a lawyer of his choice.[34]

108. The Respondent State therefore bears the burden of providing adequate free legal representation to the Applicant. The Court intervenes only if the actual representation is not provided.[35]

109. The Court notes from the perusal of the record that the Applicant was represented by several lawyers during his trial before the domestic courts. These lawyers were appointed by the Respondent State at its own expense. The Court also concludes that there is nothing from the record that shows that the Applicant was not adequately represented or that he raised this issue as a complaint before the domestic courts. Moreover, the Applicant did not substantiate this allegation.[36]

110. In light of the foregoing, the Court holds that the Respondent State did not violate Article 7(1)(c) of the Charter in relation to the allegation herein.

B. Alleged violation of the right to equality before the law and equal protection of the law

111. The Applicant alleges that the Court of Appeal's failure to consider his notice of motion for review of the judgment constitutes a violation of the duty to administer justice and consequently, a violation of Article 3(1(2) of the Charter.

31 The Respondent State became a State Party to ICCPR on 11 June 1976.

32 *Alex Thomas v Tanzania* (merits) §114; *Kijiji Isiaga v Tanzania* (merits) § 118; *Kennedy Onyanchi and Charles Njoka v Tanzania* (merits) §104.

33 ECHR, *Croissant v Germany* (1993) Application No.1361/89 § 29, *Kamasinski v Austria (1989)* Application No.9783/82 § 65.

34 ECHR, *Lagerblom v Sweden* (2003) Application No.26891/95 §§54-56.

35 ECHR, *Kamasinski v Austria* (1989) Application No.9783/82, §65.

36 *Evodius Rutechura v Tanzania,* §74.

112. The Respondent State submits that the Applicant neither indicates the date of submitting his application for review nor does he attach a copy of the said application for review.

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113. The Court observes that Article 3 of the 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.

114. The Court notes in accordance with its established jurisprudence that the onus is on the Applicant to demonstrate how the Respondent State's conduct breached the guarantees of equality before the law and equal treatment of the law resulting in a violation of Article 3 of the Charter.[37]

115. In the instant case, the Court notes that the Applicant did not demonstrate how he was treated differently from others in the same situation. In this regard, the Court reiterates its previous position that "general statements to the effect that a right has been violated are not enough. More substantiation is required."[38]

116. The Court does not find evidence in the Applicant's pleadings nor does the Applicant show how he was treated differently from other individuals in similar circumstances[39] resulting in inequality before the law or unequal protection by the law, in violation of Article 3 of the Charter.

117. Accordingly, the Court dismisses this allegation and finds that the Respondent State did not violate the Applicants' rights under Article 3 of the Charter.

VIII. Reparations

118. The Applicant prays the Court to grant him justice where there was miscarriage, order the Respondent State to quash both the

37 *Alex Thomas v Tanzania* (merits) §140; *Armand Guéhi v Tanzania* (merits and reparations), §157.

38 *Ibid*.

39 *Mgosi Mwita Makungu v United Republic of Tanzania* (merits), (7 December 2018), 2 AfCLR 550, §70; *Alex Thomas v Tanzania* (merits), §140; *Mohamed Abubakari v Tanzania* (merits), § 154; *Kijiji Isiaga v Tanzania* (merits), § 86.

conviction and sentence and set him free. He further prays the Court to award him reparations commensurate to an individual's annual income for the time he served in prison.

119. The Respondent State prays the Court to dismiss all of the Applicant's prayers, though it did not respond specifically to the Applicant's reparation claims.

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120. 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 the fair compensation or reparation.

121. The Court, having found that the Respondent State did not violate any of the Applicant's rights, dismisses the Applicant's prayers for reparations.

IX. Costs

122. The Respondent State prays the Court to order the Applicant to bear the costs.

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123. The Court notes that Rule 32(2) of the Rules[40] provides that "unless the Court decides otherwise, each party shall bear its own costs".

124. Consequently, the Court decides that, each party shall bear its own costs.

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

X. Operative part

125. For these reasons,
The Court,
Unanimously:
Jurisdiction
i. *Dismisses* the objections to its jurisdiction;
ii. *Declares* that it has jurisdiction.

Admissibility
iii. *Dismisses* the objection to the admissibility of the Application;
iv. *Declares* the Application admissible.

Merits
v. *Finds* that the Respondent State has not violated Article 3 (1) and (2) of the Charter with respect to the Applicant's right to equality before the law and to equal protection of the law;
vi. *Finds* that the Respondent State has not violated Article 7(1) of the Charter with regard to the Applicant's right to have his cause heard by an impartial court;
vii. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter with regard to the Applicant's right to free legal assistance.

Reparations
viii. *Dismisses* the Applicant's prayers for reparations.

Costs
ix. *Orders* each Party to bear its own costs.

Godwill v Ghana (striking out) (2021) 5 AfCLR 410

Application 048/2020, *Marizu Godwill v United Republic of Tanzania*

Order, 3 September 2021. Done in English and French, the English text being authoritative.

Judges: ABOUS, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant failed to respond to communications and indicated a lack of interest in continuing with the case. The Court ordered the case to be struck off.

Procedure (striking out, 16-20)

I. The Parties

1. Mr Marizu Godwill (hereinafter referred to as "the Applicant"), is a national of the Federal Republic of Nigeria, who states that he is a businessman. He alleges the violation of the Charter in relation to policy decisions and legislations targeting African businesses in Ghana.

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

A. Facts of the matter

3. The Applicant avers that during his youth, he witnessed the critical situation faced by Namibian students in Nigeria, which prompted him to fight for the unity of Africa. To this end, he launched the

initiative of "African Unity Legacy Project".

4. He thus claims to be disheartened by the "incidents of disunity happening in leading African States who are supposed to be championing African unity…"

5. According to the Applicant, the xenophobic attacks against African citizens in South Africa, as well as the "diplomatic row and stand-off between the Nigerian and Ghanaian governments over the demolition of the Nigerian Embassy and the alleged ill-treatment of the Nigerian citizens and other African citizens residing in Ghana…" do not foster African unity or the concept of *Ubuntu*.

6. He also argues that "these recent events, especially the alleged policy decisions and legislations targeting businesses belonging to African citizens in Ghana…" violate the provisions of the Charter.

7. He finally asserts that "it is in the quest to fight against the above mentioned anomalies which are threatening African unity that the above Application has been made…"

B. Alleged violations

8. The Applicant alleges the violation of Articles 12(5), 23(1) and 27(1), 28, 29(8) of the Charter.

III. Summary of the Procedure before the Court

9. The Application was filed at the Court on 5 December 2020.

10. On 11 December 2020, the Registry acknowledged receipt of the Application and informed the Applicant that his Application had been registered.

11. On 12 December 2020, the Registry requested the Applicant to provide clarification on the facts of the matter and also to provide information on exhaustion of local remedies. However, the Applicant did not submit any information in reply to that request.

12. On 27 July 2021, the Registry sent a reminder to the Applicant to provide the information which had been requested for through the notice of 12 December 2020.

13. In his reply, via email, on 10 August 2021 to the Registry, the Applicant reiterated the administrative steps that he had taken in relation to exhaustion of local remedies. Overall, however, the Applicant offered very little clarification in relation to the facts. Significantly, the Applicant indicated that, he no longer "felt so strong about the Application" and left it to the Court to decide on how to proceed.

IV. On the strike out of the Application

14. The Court notes that, Rule 41(2)(a) of the Rules provides:

> All of the information … that is set out in the relevant part of the Application form, should be sufficient to enable the Court to determine the nature and scope of the Application without recourse to any other document.

15. The Court further notes the pertinence of Rule 65(1) of the Rules , which provides that:

1. The Court may at any stage of the proceedings decide to strike out an Application from its cause list where:

a. An Applicant notifies the Court of his/her intention not to proceed with the case;

b. An Applicant fails to pursue his case within the time limit provided by the Court.

16. The instant situation falls under Rule 41(2)(a) and 65(1)(b) of the Rules in view of the fact that the Applicant has failed to attend to the requests for clarification on his claims which were very general and on exhaustion of local remedies, despite being provided with thirty (30) days to do so.

17. The Court requires that parties to an application should pursue their case with diligence and the failure to do so leads to the logical conclusion, that a party is no longer interested in pursuing their claim.

18. The Court notes that the Application, as filed on 5 December 2020, makes vague references to violations of human rights. Furthermore, the Applicant submits various claims without giving separate factual background or context. The Court notes further, that the Application raises general claims as regards treatment of Africans in Ghana and other African countries without much substantiation. Thus, the Application is insufficient for the Court to determine the nature and scope without recourse to any other document as required under Rule 41(2)(a) of the Rules.

19. Moreover, in view of the Applicant's reply of August 2021, in which he failed to provide the Court with clarity on the facts of the matter and failed to indicate the judicial remedies which he had exhausted; the Court decides, to strike out the Application from its Cause List, in accordance with Rule 65 (1)(b) of the Rules.

20. Nevertheless, the decision to strike out the Application does not prevent the Applicant, by showing good cause, from applying for restoration of his matter to the Court's Cause List pursuant to the Rule 65(2) of the Rules.

V. OPERATIVE PART

21. For these reasons:
The Court,
Unanimously,
i. *Orders* the striking out of the Application from the Cause List of the Court.

Hassani v Tanzania (admissibility) (2021) 5 AfCLR 414

Application 029/2015, *Yusuph Hassani v United Republic of Tanzania*

Ruling, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant who had been convicted and sentenced for armed robbery, brought this Application claiming that his human rights were violated by the manner in which the domestic courts handled his trial and appeals. The Court held the Application was inadmissible on the ground that it had not been filed within a reasonable time.

Jurisdiction (material jurisdiction, 35-36; 46-48 nature of Court's competence, 40-42)

Admissibility (exhaustion of local remedies, 65-69; submission within a reasonable time, 76-84)

I. The Parties

1. Yusuph Hassani (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who at the time of filing the Application, was serving a thirty (30) year prison sentence at Maweni Central Prison, Tanga having been convicted of the offence of armed robbery.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), 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. The Court has held that this withdrawal has no bearing on pending

cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that, on 5 September 2005, the Applicant and three others, Leonard Msangazi, Francis Ngowi and Hashimu Mohamedi, who are not before this Court, allegedly committed armed robbery at a shop, in Bwiti Village, Muheza District.

4. On 29 September 2005, the Applicant and the three above-mentioned persons were jointly charged with armed robbery before the District Court of Muhezaat Muheza, Tanga Region.

5. On 31 August 2006, the Applicant and his co-accused were convicted of the charge and sentenced to thirty (30) years imprisonment, being the statutorily prescribed minimum sentence. They were also ordered to compensate the complainant, the shop owner, Tanzanian Shillings one million, one hundred and thirty-six thousand (TZS 1,136,000), being the value of the stolen property.

6. On 5 January 2007, the Applicant and the three other convicts appealed their conviction and sentence before the Resident Magistrate's Court (with Extended jurisdiction) of Tanga.

7. On 29 May 2008, the Resident Magistrate's Court (with Extended jurisdiction) allowed Leonard Msangazi's and Francis Ngowi's appeal, but dismissed that of the Applicant and Hashimu Mohamedi.

8. On 3 June 2008, the Applicant and Hashimu Mohamedi filed an appeal to the Court of Appeal sitting at Tanga. On 9 March 2010, the Court of Appeal allowed Hashimu Mohamedi's appeal, but dismissed that of the Applicant for lack of merit.

9. The Applicant also claims to have filed on 5 April 2010, a Notice of Motion for Review of the Court of Appeal's judgment with Reference No/112/TAN/1/LV/62, which was pending at the time he filed his Application before this Court on 23 November 2015.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

B. Alleged violations

10. The Applicant alleges: that he was "…wrongly deprived of his rights to be heard" on the grounds of:

a. The trial and appellate courts arrived at their conclusions by considering only the prosecution's evidence which was not necessarily true and credible and they did not consider the defence's evidence, especially his defence of *alibi*.

b. Hearing the case and appeal without providing him with a legal counsel, compared to those charged with capital offences, and that this was contrary to Section 13 of the Constitution of the Respondent State,[2] Section 310 of the Criminal Procedure Act of the Respondent State and the Universal Declaration of Human Rights.

c. The doctrine of 'recent possession' was wrongly invoked as it was not proven that the goods or items the Applicant was found with were those that had recently been stolen from the complainant.

d. The trial and appellate courts erred in law and fact by failing to note that most of the prosecution witnesses were not credible witnesses.

e. The trial court failed to note that his constitutional rights were violated by the police, when they failed to comply with the provisions of Sections 32 (1) and (2)[3] and 33[4] of the Criminal Procedure Act thus making the subsequent proceedings null and void.

f. The trial and appellate courts erred in law and fact by convicting the Applicant on the basis of assertions and relying only on the prosecution's evidence despite the fact that he was not at the scene of the crime during the incident as he was arrested at Mahandakini village and then 'joined to the case'**.** The Applicant states that his defence of '*alibi*' is evidenced by the fact that he was arrested at a place other than the area where the incident occurred.

g. The identification parade conducted by the Police which led to his identification as one of the robbers was not properly done and the

2 Section 13 of the Constitution provides for equality before the law.

3 Section 32 (1) and (2) of the Criminal Procedure Act, Cap 20 of the Laws (R.E 2002) provides that: 1 " when any person has been taken into custody without a warrant for an offence other than the offence punishable with death, the officer in charge of the station to which he is brought may, in any case, and shall if it does not appear practicable to bring him before an appropriate court within twenty four hours he was so taken to custody, inquire into the case and , unless the offence appears to that officer to be of a serious nature, release the person on his executing a bond with or without sureties, for a reasonable amount to appear before a court at a time and place to be named in the bond, but where he is retained in custody he shall be brought before the court as soon as practicable." 2 "where any person has been taken into custody without a warrant for an offence punishable with death, he shall be brought before the court as soon as practicable".

4 Section 33 of the Criminal Procedure Act provides that: "An officer in charge of a police station shall report to the nearest magistrate within twenty four hours or as soon as it is practicable, the case of all persons arrested without a warrant within the limits of his station, whether or not such persons have been admitted on bail".

complainant who allegedly owned the shop that was robbed, failed to prove such ownership by providing his business licence and Value Added Tax agreement.

h. The trial and appellate courts erred in law and fact when they discarded the Applicant's unshaken defence and believed the prosecution theory

i. In all circumstances of the case, the guilty verdict against the Applicant was 'unsafe and unsatisfactory'

j. The Court of Appeal did not follow the established jurisprudence on the consideration of circumstantial evidence

k. The Court of Appeal's decision is prejudicial to the smooth and effective administration of justice in the Respondent State.

11. It also emerges from the Application that, the Applicant alleges that the Court of Appeal of Tanzania delayed in determining his application for review of its judgment of 9 March 2010 which he claims to have filed by notice of motion for review on 5 April 2010.

III. Summary of the Procedure before the Court

12. This Application was filed on 23 November 2015 and was served on the Respondent State on 25 January 2016.

13. The Parties filed their pleadings on merits within the time stipulated by the Court and these were duly exchanged between the Parties.

14. On 2 July 2018 the Applicant was notified that henceforth the Court will determine the merits and reparations together, and he was requested to file submissions on reparations within thirty (30) days of receipt of this notice.

15. The Applicant filed his submissions on reparations on 4 September 2018 and these were served on the Respondent State on 12 September 2018. Despite two extensions of time provided by the Court to file the Response to the submissions on reparations, the Respondent State failed to do so.

16. Pleadings were closed on 13 May 2019 and the parties were duly notified.

17. On 26 August 2019, the Respondent State sought leave to file the Response to the Applicant's submissions on reparations, out of time.

18. On 26 September 2019 the Court issued an order for reopening pleadings and accepted the Respondent State's Response on reparations as properly filed. The said Order and Response were served on the Applicant on 27 September 2019 for the Applicant to file the Reply. The Applicant did not file the Reply to the

Respondent State's Response on reparations.

19. On 14 September, 4 December 2020, and 16 August 2021 respectively, the Applicant was requested to submit evidence that he filed before the Court of Appeal of Tanzania, an application for review of its judgment of 9 March 2010. The Applicant did not respond to the requests for this information.

20. Pleadings were closed again on 10 September 2021 and the parties were duly notified.

IV. Prayers of the Parties

21. In the Application, the Applicant prays the Court to quash the decisions of the national courts and set aside his conviction.

22. In his submissions on reparations, the Applicant reiterated his prayers in the Application and prays to be released from prison rather than being provided compensation. He also prays that the Respondent State be ordered to issue a public apology in the media acknowledging that he is innocent of the crime for which he was convicted.

23. With regard to jurisdiction and admissibility, the Respondent State prays the Court to find respectively, that, it "is not vested with jurisdiction to adjudicate over this Application" and "the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court".

24. With respect to the merits, the Respondent State prays the Court to find that they did not violate the Applicant's rights under Article 7(1), 7(1)(c) and 7(1)(d) of the Charter.

25. In the Response to the Application, the Respondent State also prays:

i. That the application be dismissed for lack of merit.

ii. That the Applicant continue to serve his sentence.

iii. That the Applicant should not be granted reparation.

iv. That the cost of this Application be borne by the Applicant.

26. In the Response to the submissions on reparations, the Respondent State prays for the following declarations and orders from the Court:

i. A Declaration that the interpretation and application of the Protocol and Charter does not confer jurisdiction to the Court to acquit the Applicant.

ii. A Declaration that the Respondent has not violated the African Charter or the Protocol and that the Applicant was convicted fairly out of due process of the law.

iii. An order to dismiss the Application.

iv. Any other Order this Court might deem right and just to grant under the prevailing circumstances.

V. Jurisdiction

27. 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.

28. The Court further notes that in terms of Rule 49(1) of the Rules: "[T]he Court shall conduct preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules".[5]

29. On the basis of the above-cited provisions, the Court must, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

30. The Respondent State raises an objection to the material jurisdiction of the Court on three grounds.

A. Objections to material jurisdiction

31. The Respondent State submits that, this Application is requesting the Court to sit as a court of first instance, a "first court of appeal", and "a court appellate to the Court of Appeal of the United Republic of Tanzania".

i. Objection that the Court is being called to act as a court of first instance

32. The Respondent State contends that the Applicant is raising for the first time, the allegation that, he was not provided a counsel of his choice during his trial and appeals, as is the case for those charged with capital offences, contrary to the requirements of Article 13 of its Constitution, Section 130 of the Criminal Procedure Act and the Universal Declaration of Human Rights.

33. The Respondent State argues that, were the Court to consider this allegation, it would be acting as a court of first instance, yet it lacks jurisdiction to do so.

34. The Applicant did not respond to this issue.

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

***

35. On the objection that the Court lacks jurisdiction since it is not a court of first instance, 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.[6]

36. In the instant case, the Court notes that the Application contains allegations of violation of rights guaranteed under Article 7 of the Charter and the Universal Declaration of Human Rights[7] which are both applicable to the Respondent State. It, therefore, rejects the Respondent State's objection on this ground.

ii. Objection that the Court is being called to act as a first court of appeal

37. The Respondent State contends that the Applicant has raised three allegations which would require the Court to act as "a court of first appeal" yet it lacks jurisdiction to do so. These are:

i. The allegation relating to the doctrine of recent possession;

ii. The allegation relating to the assessment of the credibility of evidence by the trial and appellate courts; and

iii. The allegation relating to the trial court's failure to note that his constitutional rights were violated by the police.

38. In the Respondent State's view, the Applicant ought to have raised these allegations before the first appellate court, that is, the Resident Magistrate's Court (with Extended Jurisdiction) rather than in his Application before this Court.

39. The Applicant did not respond to this issue.

6 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465 §§ 45 ; *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65 § 34-36 ; *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits and reparations) § 18; *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No. 008/2016 Judgment of 25 June 2021 (merits and reparations) § 21.

7 The Court has also held that the UDHR is part of customary international law, see, *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (22 March 2018), 2 AfCLR 248 § 76.

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40. The Court notes that, in accordance with its established jurisprudence, it is competent to examine relevant national court's proceedings, to determine their compliance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned.[8] This competence extends to assessment of the compliance of the proceedings at both trial and appellate levels, with the standards set out in the Charter or any other human rights instrument ratified by the State.

41. This assessment by the Court is not constrained by the grounds of appeal that an individual raises or does not raise in the course of all appeal proceedings. It is therefore immaterial whether the Applicant in the instant case failed to raise certain grounds of appeal as set out by the Respondent State, at the first appellate court, the Resident Magistrate's Court (with Extended Jurisdiction).

42. Furthermore, the violations allegedly arising from the proceedings relating to the Applicant, before the Resident Magistrate's Court (with Extended Jurisdiction), are of rights provided for in the Charter and the Universal Declaration of Human Rights which are applicable to the Respondent State. The Court therefore dismisses this objection.

iii. Objection that the Court is being called to act as a court of appeal

43. The Respondent State argues that the consideration of some alleged violations requires the Court to sit as a court of appeal with respect to the Court of Appeal of Tanzania and that by doing so, the Court would adjudicate points of law and evidence already finalised by its Court of Appeal.

44. The Respondent State argues that this relates to the allegations on the trial and appellate courts' failure to consider the Applicant's defence, particularly the defence of *alibi,* the propriety of the identification parade organised by the Police and the lack of evidence to prove the complainant's ownership of the shop that was robbed.

8 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 025/2016, Judgment of 28 March 2019 (merits and reparations) *§ 26; Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 477 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018), 2 AfCLR 287 § 35.

45. The Applicant did not respond to this contention.

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46. The Court notes that according to its jurisprudence, it can examine the proceedings in the Court of Appeal in order to determine their compliance with the standards set out in the Charter or any other human rights instruments ratified by the Respondent State.[9]

47. Furthermore, the violations allegedly arising from those proceedings are of rights provided for in the Charter and the Universal Declaration of Human Rights which are applicable to the Respondent State.

48. In light of the above, the Court finds that, by considering this Application, it would neither be sitting as an appellate Court vis-à-vis the Court of Appeal of Tanzania nor would it be examining afresh points of law and evidence already determined by that court. The Court therefore rejects this objection by the Respondent State.

49. Consequently, the Court holds that it has material jurisdiction.

B. Other aspects of jurisdiction

50. The Court observes that its personal, temporal or territorial jurisdiction is not in contention. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

51. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this Ruling that, on 21 November 2019, the Respondent State deposited with 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 it has held that the withdrawal of a Declaration 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, or new cases filed before the withdrawal takes effect.[10] Since any such withdrawal of the Declaration takes effect

9 *Ibid.*

10 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[11] This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it.

52. In light of the above, the Court finds that it has personal jurisdiction to examine the present Application.

53. With respect to its temporal jurisdiction, the Court notes that, the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[12] Consequently, the Court holds that it has temporal jurisdiction to consider the Application .

54. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that its territorial jurisdiction.

55. In light of all the foregoing, the Court holds that it has jurisdiction.

VI. Admissibility

56. 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".

57. In accordance with Rule 50(1) of the Rules,[13] "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".

58. The Court notes that Rule 50(2) which in essence restates with the provisions of Article 56 of the Charter, provides that:

> 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;
>
> c. Are not written in disparaging or insulting language directed against

11 *Andrew Ambrose Cheusi v Tanzania,* §§ 35-39.

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 §§ 71-77.

13 Formerly Rule 40 of the Rules of Court, 2 June 2010.

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 set by the Court as being the commencement of the time limit within which it shall be 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 Constitutive Act of the African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

59. The Respondent State raises two objections to the admissibility of the Application. These objections relate to the requirement of exhaustion of local remedies and the requirement that the Application be filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

60. The Respondent State contends that this Application does not meet the admissibility requirement in Rule 40(5) of the Rules,[14] because the Applicant failed to exhaust local remedies available to him at the national Courts.

61. The Respondent State argues that the allegation by the Applicant that he was not provided free legal representation during his trial and appeals, is an allusion to the violation of his constitutional rights. For that reason, it argues that the Applicant was obliged to institute a constitutional petition before the High Court of the Respondent State to have his grievances addressed.

62. The Respondent State further submits that the objective of its enactment of the Basic Rights and Duties Enforcement Act, was to provide for the procedure for the enforcement of constitutional and basic rights, which the Applicant never utilised before seizing this Court. The Respondent State therefore contends, that the Applicant's failure to exhaust these options renders his Application before the Court inadmissible.

14 Rules of Court, 2 June 2010, now Rule 50(2)(e) of the Rules, 25 September 2020.

63. The Respondent State refers the decision of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") in *Kenyan Section of International Commission of Jurists, Law Society and Others v Kenya* [15] on the need for exhaustion of local remedies prior to filing Applications before international judicial mechanisms. The Respondent State concludes that the failure by the Applicant to utilise the option of a constitutional petition before the High Court of Tanzania effectively implies that his Application should not be entertained by this Court.

64. The Applicant did not reply to this objection.

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65. The Court notes that pursuant to Article 56(5) of the Charter, whose provision is restated in Rule 50(2)(e) 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.[16]

66. The Court recalls that it has held that, in so far as the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[17]

67. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 9 March 2010. Therefore, the Respondent State had the opportunity to address the violations allegedly arising from the Applicant's trial and appeals.

15 ACHPR, Communication No. 263/02 (2004) AHRLR 71.

16 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017), 2 AfCLR 9 §§ 93-94.

17 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016), 1 AfCLR 599 § 76.

68. Furthermore, the Court has previously held that the constitutional petition within the Respondent State's judicial system is an extraordinary remedy which applicants are not required to exhaust before filing their applications before this Court contrary to the Respondent State's contention in this regard.[18] Accordingly, the Applicant is deemed to have exhausted local remedies.

69. In light of the foregoing, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

ii. Objection that the Application was not filed within a reasonable time

70. The Respondent State objects to the admissibility of this Application based on the time lapse between the Court of Appeal's judgment on the Applicant's appeal and the filing of the Application before the Court. The Respondent State contends that the Applicant has not complied with Rule 40(6) of the Rules[19] since he took an unreasonably long time before seizing this Court.

71. The Respondent State argues that Applicant's case was concluded by its national courts on 9 March 2010, when the Court of Appeal dismissed his appeal. The Respondent State further contends that even though it deposited its Declaration pursuant to Article 34(6) of the Protocol allowing individuals to access to this Court since March 2010, it took the Applicant five (5) years to file his Application before the Court.

72. The Respondent State also argues that although Rule 40(6) of the Rules[20] does not specify the period within which Applications must be filed after exhaustion of local remedies, the Court must draw inspiration from similar admissibility requirements from other regional judicial mechanisms which set the time at six (6) months. The Respondent State refers to the Commission's decision in *Michael Majuru v Zimbabwe* in this regard.[21]

73. The Respondent State concludes that, since there were no impediments to the Applicant seizing the Court within a reasonable time, the Court should find in its favour and dismiss this Application. The Respondent State also contests the Applicant's claim that he filed an application for review with reference number

18 *Alex Thomas v Tanzania* (merits) §§ 63-65.

19 Rules of Court 2 June 2010, now Rule 50(2)(f) of the Rules, 25 September 2020.

20 *Ibid.*

21 ACHPR, Communication No. 308/2005 ACHPR Annual Activity Report Annex (May- Nov 2008).

No/112/TAN/1/LV/62, which was pending at the time he filed his Application before this Court on 23 November 2015, and that the Applicant be put to strict proof thereof.

74. The Applicant did not reply to the Respondent State's objection.

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75. The Court notes that Article 56(6) of the Charter and Rule 50(2)(f) of the Rules provide that Applications must be filed "…within 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".

76. The Court has held "…that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[22]

77. From the record, the Applicant exhausted local remedies on 9 March 2010, being the date the Court of Appeal delivered its judgment on his appeal. The Applicant then filed the instant Application on 23 November 2015.

78. However, the Court also notes that, when the Court of Appeal of Tanzania delivered its judgment, the Respondent State had not deposited the Declaration by which it accepted the Court's jurisdiction to consider applications filed by individuals. The Respondent State deposited its Declaration on 29 March 2010, therefore it was only from this date, that it was possible for such applications to be filed. The Court has to, therefore, assess whether the period running from 29 March 2010 to 23 November 2015 when the Applicant seized this Court, that is, five (5) years, eight (8) months, and thirteen (13) days is 'reasonable' in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

79. To determine whether an application has been filed within a reasonable time, the Court has previously considered the personal circumstances of applicants, including whether they are lay, indigent or incarcerated.[23]

80. Furthermore, the Court has held that it is not enough for an applicant to plead that he was incarcerated, is lay or indigent, to

22 *Norbert Zongo and Others v Burkina Faso* (preliminary objections) § 121.

23 *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 101 § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (2018)

justify a failure to file an application within a reasonable period of time. As the Court has reasoned, even for lay, incarcerated or indigent applicants they should demonstrate how their personal situation inhibited them from filing their Applications promptly. It is against this background that the Court found that an Application filed after five (5) years and eleven (11) months was not filed within a reasonable time[24] and the same conclusion was also reached for an Application filed after five (5) years and four (4) months.[25] In yet another case, the Court found that the period of five (5) years and six (6) months was also not reasonable within the meaning of Article 56(5) of the Charter.[26]

81. The Court has also considered as a relevant circumstance, the fact of filing of applications for review before the Court of Appeal of the Respondent State and which were either pending or had been determined, by the time applicants filed their applications before this Court. In such cases, the Court has held that it was reasonable for those applicants to await the outcome of that review process. The Court has therefore considered that, this was an additional factor that justified the delay by those applicants in filing their applications before this Court.[27] However, where an applicant does not provide evidence that he utilised the review process or does not justify his failure to provide the said evidence, this factor cannot therefore be considered in the assessment of the reasonableness of time of filing an application.[28]

82. In the present case, although the Applicant is incarcerated, he has not provided the Court evidence, on the basis of which it could conclude that his personal situation inhibited him from filing the Application promptly. He simply asserts that he exhausted local remedies but provided no justification why it took him five (5) years, eight (8) months and thirteen (13) days to file the Application.

2 AfCLR 344 § 50; *Armand Guehi v Tanzania* § 56; *Werema Wangoko v United Republic of Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 520 § 49.

24 *Hamad Mohamed Lyambaka v United Republic of Tanzania*, ACtHPR, Application No. 010/2016. Ruling of 25 September 2020 (admissibility) § 50.

25 *Godfred Anthony and another v United Republic of Tanzania,* ACtHPR, Application No. 015/2015. Ruling of 26 September 2019 (admissibility) § 48.

26 *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application No. 020/2015, Ruling of 28 November 2019, (admissibility) § 55.

27 *Armand Guehi v Tanzania (*merits and reparations) § 56; *Werema Wangoko v Tanzania*, (merits and reparations) §§ 48-49.

28 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, (merits and reparations) §§ 44-45.

83. The Court also notes that, the Applicant claims to have filed an application for review which was pending at the time he filed his Application. The Respondent State contested this claim by the Applicant. The Applicant has neither submitted proof of filing of the Notice of Motion for Review, despite reminders to do so, nor provided a justification for not doing so, therefore this factor cannot be taken into consideration as justifying the delay in filing the Application.

84. In the absence of any justification by the Applicant for the lapse of five (5) years, eight (8) months and thirteen (13) days before the filing of the Application, the Court finds that this Application was not filed within a reasonable time within the meaning of Article 56(6) of the Charter as restated in Rule 50(2)(f) of the Rules.

85. In the light of the foregoing, the Court upholds the Respondent State's objection that the Application was not filed within a reasonable time.

B. Other conditions of admissibility

86. Having found that the Application has not satisfied the requirement in Rule 50(2)(f) of the Rules, the Court need not rule on the Application's compliance with the admissibility requirements set out in Article 56(1), (2), (3), (4), and (7) of the Charter as restated in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules, as these conditions are cumulative [29]

87. Therefore, the Application's non-compliance with Article 56(6) of the Charter as restated in Rule 50(2)(f) of the Rules renders the application inadmissible.

VII. Costs

88. The Applicant has not made submissions on costs.

89. The Respondent State prays that the costs of this Application be borne by the Applicant.

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29 *Jean Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270 § 61; *Dexter Eddie Johnson v Republic of Ghana* ACtHPR, Application No. 016/2017, Ruling of 28 March 2019, (jurisdiction and admissibility) § 57.

90. Pursuant to Rule 32 of the Rules[30] "[u]nless otherwise decided by the Court, each party shall bear its own costs, if any."

91. Considering the circumstances of this case, the Court decides that each party shall bear its own costs.

VIII. Operative part

92. For these reasons:

The Court

Unanimously,

On Jurisdiction

i. *Dismisses* the objections to its jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objection to the admissibility of the Application 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 50(2)(f) of the Rules;

v. *Declares* that the Application is inadmissible.

On costs

vi. *Orders* each party to bear its own costs.

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

Juma v Tanzania (judgment) (2021) 5 AfCLR 431

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

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced to life imprisonment for murder. On appeal, the life sentence was replaced with the mandatory death sentence. The Applicant brought this Application claiming that his trial, conviction and sentence were in violation of his human rights. The Court held that the Respondent State had violated the Applicant's rights to be tried within a reasonable time, dignity and life. The Court granted reparations for the moral prejudice suffered by the Applicant and ordered the Respondent State to take measures to rehear the case on sentencing.

Jurisdiction (material jurisdiction, 21-22)

Admissibility (non-compliance with AU Constitutive Act, 37; insulting or disparaging language, 42-43; exhaustion of local remedies, 48-50; submission within a reasonable time, 57-61)

Fair trial (evaluation of evidence by domestic court, 77-83; effective legal representation, 90-97; right to be tried within a reasonable time, 103-108; right to be tried by impartial tribunal, 112-114)

Right to life (mandatory death penalty, 122-131)

Dignity (execution by hanging, 134-137)

Reparations (basis for reparation, 141-142; purpose, 143; material prejudice, 147-148, 151; moral prejudice, 154-158; indirect victims, 161-162; restitution, 165-166; guarantees of non-repetition, 169-170)

I. The Parties

1. Mr. Amini Juma (hereinafter referred to as "the Applicant") is a national of Tanzania, who at the time of filing of this Application was incarcerated at Butimba Prison in Mwanza, having been convicted of murder and sentenced to death by the High Court of Tanzania Sitting at Arusha.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration

prescribed under Article 34(6) of the Protocol, through which it accepted the jurisdiction of the Court to receive applications from individuals and NGOs (hereinafter referred to as "the Declaration"). On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission (hereinafter referred to as "AUC"), an instrument withdrawing its Declaration under Article 34(6) of the Protocol. The Court held that this withdrawal had no bearing on pending cases and new cases filed before the withdrawal came into effect, one year after its deposit, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. The record before the Court indicates that on 15 December 2003, the Applicant was charged with murder before the High Court of Tanzania sitting at Arusha. He was convicted of the offence, on 18 September 2008 and sentenced to life imprisonment. On 22 September 2008, the Applicant appealed against the conviction and sentence to the Court of Appeal of Tanzania; likewise, on 29 September 2008, the Respondent State petitioned for review of the sentence.

4. The Applicant's appeal was dismissed on 17 October 2011 and his life imprisonment sentence was substituted with a death sentence by hanging, in respect of the Respondent State's appeal.

5. The Applicant submits that, on 1 December 2011, he filed a motion for review of the Court of Appeal's decision which was set for hearing in 2017.

B. Alleged violations

6. The The Applicant alleges that:

i. His "conviction violated the presumption of innocence" protected under Article 7(1)(b);

ii. The Respondent State failed to properly evaluate the prosecution evidence;

iii. The Respondent State infringed on his right to defence;

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

iv. The Respondent State failed to provide the Applicant with effective legal representation;

v. He suffered undue delay between his arrest and trial;

vi. His right to life was violated;

vii. The Respondent State violated his right to dignity

III. Summary of the Procedure before the Pourt

7. The Application was filed on 13 April 2016 and served on the Respondent State on 31 May 2016 and on the entities listed under Rule 42(4) of the Rules[2] on 26 June 2016.

8. On 3 June 2016, the Court issued, *proprio motu,* an Order for provisional measures, having considered the situation of extreme gravity and the risk of irreparable harm associated with the death penalty. The Court ordered the Respondent State to "refrain from executing the death penalty against the Applicant pending the determination of the Application."[3]

9. On 16 May 2018, as instructed by the Court, the Registry requested for the services of Advocate William Kivuyo Ernest, who agreed to represent the Applicant on *pro bono* basis.

10. The Parties filed their pleadings within the time limits stipulated by the Court.

11. Pleadings were closed on 1 July 2021 and the Parties were notified thereof.

IV. Prayers of the Parties

12. The Applicant prays the Court to grant the following orders:

a. That the Respondent has violated the Applicant's rights under Articles 4, 5, and 7 of the African Charter;

b. That the Respondent take appropriate measures to remedy the violations of the Applicant's rights under the African Charter;

c. That the Respondent State set aside the death penalty imposed on the Applicant and remove the Applicant from prison;

d. That the Respondent release the Applicant from prison;

e. That the Respondent pay reparations to the Applicant and his family in such amount as the Court deems fit;

f. That the Respondent amend its penal code and related legislation concerning the death sentence to render it compliant with Article 4 of

2 Rule 35(3) of the Rules of Court, 2 June 2010.

3 *Amini Juma v United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR 658 *§ 18*.

the African Charter.

g. Award reparations of USD 100,000 in moral damages for the Applicant and USD 5,000 each for the Applicant's co-parent and son; USD 76,789 for material loss, USD 715 for material loss suffered by Applicant's co-parent.

13. 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(2) of the Rules of Court

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

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

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

vi. That, the costs of the Application be borne by the Applicant;

vii. That, the Applicant's conviction and sentence be maintained;

viii. That, the Application lacks merit;

ix. That, the Applicant's prayers be dismissed;

x. That, the Application be dismissed with costs;

xi. That, the Applicant not be granted reparations.

V. Jurisdiction

14. 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.

15. In accordance with Rule 49(1) of the Rules,[4] "the Court shall conduct preliminarily examination of its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

16. On the basis of the above-cited provisions, the Court must, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

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

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

A. Objection to material jurisdiction

18. The Respondent State submits that the jurisdiction of the Court has not been properly invoked by the Applicant. It submits that, contrary to Article 3 of the Protocol and Rule 26(1)(a) of the Rules,[5] the Applicant "has at no point made reference to or asked for the interpretation and application of the Charter, Protocol or any other instrument ratified by the United Republic of Tanzania."

19. According to the Respondent State, Rule 26 of the Rules[6] has stipulated the ways in which the jurisdiction of the Court may be invoked, but that the Applicant has not complied with any of the provisions of its sub-Rules (a-e).

20. The Applicant, citing the Court's decision in *Kijiji Isiaga v Tanzania* argues that the Court exercises jurisdiction as long as the subject matter of the Application involves alleged violations of rights protected by the Charter or any other international human rights instrument ratified by the State concerned. The Applicant argues further that his Application alleges specific violations of rights protected by the Charter, namely, right to life, dignity and fair trial under Articles 4, 5, and 7 respectively.

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21. 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.

22. The Court notes that Rule 40(2) of the Rules stipulates that "the Application shall specify the alleged violation". However, the Court recounts that, "there is no insistence with regard to a formal indication of the instrument from which the provision of the

5 Rule 29(1)(a) of the Rules of Court, 25 September 2020.

6 *Ibid.*

alleged violation is based".[7] Therefore, it suffices that the instant Application raises allegations of human rights violations protected under Articles 4, 5 and 7 of the Charter, the consideration of which falls within the purview of its jurisdiction.

23. Consequently, the Court dismisses the objection and holds that it has material jurisdiction in the instant case.

B. Other aspects of jurisdiction

24. 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, it deposited the Declaration with the AUC. On 21 November 2019, it deposited, with the AUC, an instrument withdrawing the Declaration.

25. The Court recalls its jurisprudence 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 withdrawal of the Declaration, as is the case of the present Application. The Court has previously held that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, in this case, on 22 November 2020.[8]

26. In view of the above, the Court finds that it has personal jurisdiction.

27. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains incarcerated on the basis of what he considers an unfair process. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.[9]

28. The Court also notes that it has territorial jurisdiction given that the alleged violations occurred in the Respondent State's territory.

29. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

7 *Frank David Omary and others v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 358; Also see, *Alex Thomas v Tanzania* (merits) (20 November 2015) AfCLR 465 § 45.

8 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Ambrose Cheusi v Tanzania* (merits), §§ 5-39.

9 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71 - 77.

VI. Admissibility

30. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."

31. Pursuant to Rule 50(1) of the Rules, "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."[10]

32. Rule 50(2) 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:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> b. comply with the Constitutive Act of the Union and the Charter;
>
> c. not contain any disparaging or insulting language;
>
> d. not based exclusively on news disseminated through the mass media;
>
> e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
>
> f. 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;
>
> g. 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. Objections to the Admissibility of the Application

33. The Respondent State submits that the Application does not comply with Rules 40(2), 40(3), 40(5) and 40(6) of the Rules[11] on non-compliance with the Constitutive Act of the African Union (hereinafter referred to as "Constitutive Act"), the language used in the Application, non-exhaustion of local remedies and on the requirement to file applications within a reasonable time after

10 Formerly Rule 40 Rules of Court, 2 June 2010.

11 Rule 50(2)(b), (c), (e) and (f) of the Rules of Court.

exhaustion of local remedies**,** respectively.

i. Objection based on non-compliance with the Constitutive Act of the African Union and the Charter

34. The Respondent State submits that the Application does not comply with Rule 40(2) of the Rules[12] as the Applicant has failed to cite provisions of the Charter or principles enshrined in the Constitutive Act of the African Union. Furthermore, that the Applicant has merely focused on technicalities regarding his criminal cases at the municipal courts.

35. The Applicant submits that, failure to make explicit reference to enshrined rights in the Charter does not equate to failure to raise alleged violations. He argues that the Application implicitly made reference to alleged violations of human rights.

36. The Applicant citing *Peter Joseph Chacha v Tanzania* argues that, where only national law has been cited or relied upon in an Application, the Court is still empowered to consider such Applications, if the alleged violations are protected by provisions of the Charter, or any other human rights instrument.

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37. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It further notes that, one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court therefore, finds that the Application is compatible with the Constitutive Act of the African Union and the Charter, and holds that it meets the requirements of Rule 50 (2)(b) of the Rules.

ii. Objection based on the nature of the language used in the Application

38. The Respondent State submits that the Application contains "disparaging and insulting language". According to the Respondent

12 Rule 50(2)(b) of the Rules of Court.

State, the Applicant's submission that: "the Justices of the Court of Appeal failed to inject common sense" is insulting and uncalled for.

39. The Applicant argues that the remark referred to by the Respondent State was a fair and objective criticism of the failure of its judges to properly evaluate the evidence adduced in its national courts.

40. The Applicant, citing the African Commission on Human and Peoples' Rights' (hereinafter referred to as "the Commission"),[13] argues that the expression "…failed to inject common sense" cannot be perceived as calculated to pollute the public's mind against the judiciary.

***

41. .Rule 50(2)(c) of the Rules provides that an Application must not contain "any disparaging or insulting language". Article 56(3) of the Charter, further states that the language in question must not be directed against "the State concerned and its institutions or the OAU".

42. The Court recounts that in determining whether a remark is insulting or disparaging, it has to satisfy itself that the objective of the remark was to unlawfully and intentionally violate the dignity, reputation and intention of a judicial authority or body. Furthermore, the Court has to be satisfied that the language is used in a manner calculated to pollute the minds of the public or any reasonable person to cast aspersions on the administration of justice.[14]

43. In the instant case, the Court considers that the above impugned remark is intended merely to criticize the reasoning of the judges, and not to infringe their right or honour.

44. In light of the foregoing, the Court dismisses the objection relating to the nature of the language used in this Application.

13 ACHPR, *Zimbabwe Lawyers for Human Rights v Zimbabwe*, Communication No. 284/2003 [2009] ACHPR 97; (3 APRIL 2009).

14 *Lohe Issa Konate v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314 § 70. *Sebastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No. 013/2017, Judgment of 29 March 2019 (merits) § 72.

iii. Objection on non-exhaustion of local remedies

45. The Respondent State, citing the decision of the Commission in *Southern African Human Rights NGO Network and Others v Tanzania* 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 the International body like the Court.

46. Referring to the Commission's decision in *Article 19 v Eritrea*, the Respondent State submits that the onus is on the Applicant to demonstrate that he took all the steps to exhaust the domestic remedies and not merely to cast aspersions on the effectiveness of those remedies. It submits that the legal remedies available to the Applicant which he should have exhausted were never prolonged and thus he should have pursued them.

47. The Applicant argues that he exhausted local remedies when he appealed to the Court of Appeal and it rendered its decision**.** He further argues that he was not required to exhaust extra-ordinary remedies such as, filing of a constitutional petition and filing of a motion for review of the Court of Appeal's decision.

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48. The Court recalls that pursuant to Article 56(5) of the Charter, whose requirements are restated in Rule 50(2)(e) 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.[15]

49. The Court notes that, in so far as criminal proceedings against an Applicant have been determined by the highest appellate court, the Respondent State is deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.

15 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.

50. In the instant case, the Court notes from the record that, the Applicant filed an appeal against his conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 17 October 2011, the Court of Appeal upheld the judgment of the High Court. The Respondent State thus had the opportunity to redress the alleged violations. It is therefore clear that the Applicant has exhausted the available domestic remedies.

51. Consequently, the Court dismisses the objection that the Applicant has not exhausted local remedies.

iv Objection on failure to file the Application within a reasonable time

52. The Respondent State submits that the Applicant has not complied with the requirement under Rule 40(6) of the Rules,[16] that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. The Respondent State argues that it "…sanctioned the individual complaints mechanism in March 2010" and since the Applicant seized the Court on 13 April 2016, the seizure was done after the lapse of six (6) years.

53. Noting that Rule 40(6) of the Rules[17] 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 Commission[18] has held a period of six (6) months to be the reasonable time.

54. The Respondent State argues that though the Applicant claims that he filed a motion for review of the Court of Appeal's decision, he has not indicated the date of the application nor given the reference number to assist it "to trace the said review and compute the period of reasonable time."

55. The Applicant avers that he has good reasons for filing the case, four (4) and a half years after exhaustion of local remedies. He submits that he had filed a motion for review on 1 December 2011 which was only set for hearing in 2017.

56. According to the Applicant, it is the Respondent State's delay in determining his review that led to his unintended delay to file his case before the Court. Furthermore, the fact that he did not have the benefit of legal representation before the filing the Application,

16 Rule 50(2)(f) of the Rules of Court.

17 *Ibid.*

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

inevitably contributed to the delay in seizure of the Court because of lack of understanding of the Court's procedure.

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57. The Court notes that Rule 50(2)(f) of the Rules which restates the contents of Article 56(6) of the Charter, requires an 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."

58. In the instant Application, the Court observes, that the judgment of the Court of Appeal was delivered on 17 October 2011, while the Application was filed on 13 April 2016. The Court notes that, four (4) years, five (5) months and (27) days elapsed between the delivery of the judgment of the Court of Appeal and the filing of the Application before this Court. The issue for determination is whether the above mentioned period, constitutes a reasonable time**.**

59. The Court recalls 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."[19]

60. Furthermore, the Court restates its jurisprudence that delay in filing of an application can be justified when the applicants demonstrate that they were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not have assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court.[20] Moreover, the Court has also decided that when Applicants use the review procedure, they are entitled to await the determination of the review application.[21]

61. In the instant case, the Court notes that, although the Applicant claims that he attempted to use the review procedure, he has

19 *Norbert Zongo v Burkina Faso* (merits) § 92. See also *Alex Thomas v Tanzania* (merits) § 73;

20 *Amiri Ramadhani v Tanzania* (merits) (11 May 2018) 2 AfCLR 244 § 50; *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 54.

21 *Werema Wangoko v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 520 § 49.

not presented any evidence of his attempt. Even so, the Court further notes that, given the Applicant has been in prison since 2008, which is prior to the Respondent State's depositing of its Declaration, and in death row subsequently; he was restricted in his movement and lacked information about the Court. These circumstances contributed to his filing the Application, four (4) years, five (5) months and twenty-seven (27) days after the exhaustion of local remedies.[22]

62. In view of the foregoing, the Court finds that the Application was filed within a reasonable time.

B. Other conditions of admissibility

63. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2)(a), (d) and (g) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

64. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

65. 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 50(2)(d) of the Rules.

66. 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 50(2)(g) of the Rules.

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

22 See, *Godfred Anthony and another v United Republic of Tanzania*, ACtHPR, Application No. 015/2015, Judgment of 26 September 2019 (jurisdiction and admissibility) §§ 48-49.

VII. Merits

68. The Applicant alleges the violation of the right to a fair trial, right to life and right to dignity which the court will examine below.

A. Alleged violation of the right to a fair trial

69. The alleged violations of the right to a fair trial relate to:
i. Right to be presumed innocent;
ii. Right to defence;
iii. Right to be tried within a reasonable time; and
iv. Right to be tried by an impartial tribunal.

i. Alleged violation of the right to be presumed innocent

70. The Applicant argues that the Respondent State violated his right to be presumed innocent through its failure to properly assess the evidence tendered by both the prosecution and defence lawyers. Referring to the Court's jurisprudence in *Mohamed Abubakari v Tanzania*, the Applicant submits that the right to a fair trial and the presumption of innocence "requires that the imposition of a sentence, should be based on strong and credible evidence".

71. The Applicant argues that he was convicted on the basis of evidence "that is extremely weak, inconsistent and/or struck from record as unreliable", and the prosecuting authorities failed to corroborate the identification evidence which was "general and imprecise".

72. The Applicant further asserts, that the national courts failed to take proper account of omissions by the prosecution to disclose relevant and potentially exculpatory material. The Applicant submits that an "informant" and another witness to the crime named Saruni should have been called by the prosecution.

73. Moreover, the Applicant avers that the national courts failed to consider the presumption of innocence when they dismissed his *alibi* despite it not being challenged by the prosecution. Also, that the High Court erred by failing to explain the reasoning behind its decision to dismiss the evidence of "defence witness 5" who testified about the *alibi*.

74. On its part, the Respondent State submits that the evidence given by Prosecution Witnesses (PW 3 and PW 4) was credible as it was direct evidence. That such evidence according to the case of *Waziri Amani v Republic*, proves the case beyond reasonable doubt.

75. According to the Respondent State, Prosecution Witness (PW 1) clearly saw the Applicant committing the crime as the offence took place in broad daylight and there was no suggestion that his line of vision was obstructed.

76. Furthermore, the Respondent State refutes the allegations related to the location where the crime took place and the make of the motorcycle produced as evidence and puts the Applicant to strict proof.

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77. Article 7(1)(b) of the Charter provides: "[e]very individual shall have the right to have his cause heard. This comprises: … b) [t]he right to be presumed innocent until proved guilty by a competent court or tribunal".

78. The Court notes that, the Applicant's contention relates to the assessment of evidence in the Respondent State's Court of Appeal, which he argues, was flawed. The Applicant asserts that the Court of Appeal did not evaluate the evidence tendered before it in a fair manner resulting in what he considers an unfair conviction and sentencing.

79. The Court notes that, a fair trial requires that the imposition of sentence in a criminal offence and especially a heavy prison sentence, should be based on strong and credible evidence.[23]

80. The Court notes from the record that the Court of Appeal in its judgment considered the identification of the Applicants as the main issue for determination. The Court of Appeal then undertook a thorough examination of the issue based on the facts and applicable Tanzanian case-law on identification.

81. The Court observes that the Court of Appeal examined the nature and quality of evidence on record. In that respect, the Court of Appeal indicated that the post-mortem report was wrongly admitted but indicated that the cause of death of the deceased could also be proved by PW1 and PW3 who provided direct evidence as they witnessed the killing. The Court of Appeal further held that the witnesses described the motorcycle that was used in the course of the murder and indicated that the inconsistency between PW1

23 *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 174; *Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 67.

and PW2 as to the make of the motorcycle was negligible. Finally, it found that the defence of *alibi* was considered and rightfully rejected. Therefore, the Court of Appeal arrived at the conclusion that the Applicant was convicted on the basis of credible evidence and that the prosecution proved its case beyond a reasonable doubt.

82. The Court considers that the manner in which the domestic courts, particularly the Court of Appeal, assessed the evidence does not reveal any manifest error, which occasioned a miscarriage of justice to the Applicant requiring its intervention.

83. As a consequence of the above, the Court holds that the Respondent State has not violated the Applicant's right to a fair trial protected under Article 7(1)(b) of the Charter.

ii. Alleged violation of the right to defence

84. The Applicant argues that the right to legal representation has to be "practical and effective" as opposed to being abstract or theoretical. Citing *Artico v Italy,*[24] he submits that the appointment of a legal aid lawyer in itself does not satisfy the requirement of effective representation. Furthermore, he contends that Article 14 of the ICCPR and Article 7 of the Charter establishes the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."

85. Citing the Human Rights Committee's Communication in the matter of *Kelly v Jamaica,*[25] the Applicant argues that, when deciding what constitutes effective representation, the Court should consider, "the complexity of the case, the defendant's access to evidence, length of time provided by rules of procedure prior to particular proceedings and prejudice to the defendant." Also, that it is critical for the accused to have legal representation at all stages of the proceedings including the pre-trial stage.

86. The Applicant submits that the Respondent State failed to provide him with an experienced advocate as the advocate he was assigned had only been in practice for one (1) year. Also, the Applicant argues that the advocate he was assigned was required to represent him and his co-accused thereby raising issues of conflict of interest.

24 ECHR, *Artico v Italy*, ECtHR, Judgment of 13 May 1980, Application No. 6694/74.

25 HRC, *Kelly v Jamaica*, Communication No. 537/1993, U.N.Doc. A/51/40, Vol II at 98 (HRC, 1996).

87. The Applicant also avers that his advocate failed to properly prepare and articulate a defence according to his instructions. The Applicant especially contends that his advocate failed to mention the *alibi* defence in his closing statement.

88. Furthermore, the Applicant submits that his advocate failed to adduce evidence of his good character and failed to object to tainted and prejudicial evidence, which evidence was subsequently expunged off the record by the Court of Appeal. In relation to his appellate advocate, the Applicant avers that, his lawyer failed to undertake adequate preparation and refused to take instructions from him.

89. The Respondent State did not respond to this submission.

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90. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[26] and determined that the right to defence includes the right to be provided with free legal assistance.[27]

91. The Court notes that the right to be defended by counsel of one's choice requires that the accused is not only granted a lawyer of their choice but also that legal representation is effective.

92. The Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa provide that a legal aid lawyer should:

1. be qualified to represent and defend the accused or a party to a civil case;
2. have the necessary training and experience corresponding to the nature and seriousness of the matter;
3. be free to exercise his or her professional judgment in a professional manner free of influence of the State or the judicial body;
4. advocate in favour of the accused or party to a civil case; and
5. be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective

26 The Respondent State became a State Party to ICCPR on on 11 June 1976.

27 *Alex Thomas v Tanzania* (merits) *op.cit* § 114; *Isiaga v Tanzania* (merits) § 72; *Kennedy Onyachi and Njoka v Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104.

representation.[28]

93. Principle 7 of the United Nations' Guidelines and Principles on access to legal aid in Criminal Justice Systems[29] establishes the components of legal aid being effective, as: unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence. It should also be prompt and available at all stages of the criminal justice process.

94. The Court notes that in the instant case, the Applicant did not argue that the legal aid advocate was unduly influenced by the state or not sufficiently compensated or that he did not advocate in his favour. Rather, the Applicant firstly, challenges the experience and competence of the legal aid lawyer that represented him in the High Court. The Court observes though, that the Applicant did not raise this point on appeal in the Court of Appeal even though he was represented by another advocate in his appeal. Even so, the Applicant only refers to the advocate's years in practice, claiming that the advocate was inexperienced but did not demonstrate how this impeded the advocate in representing him. From the record, the Applicant's advocate actually pointed out some of the inconsistencies in the evidence adduced that the Applicant seeks to rely on before this Court and he supported his submissions with case law.

95. Regarding the Applicant's contention on conflict of interest, the Court notes that, joint representation of co-accused, does not automatically result in conflict of interest. Rather, the Applicant is required to either object to the joint representation or demonstrate subsequently, that the conflict of interest actually existed and it affected his own representation.[30] In the instant case, there is nothing on record to show that the Applicant challenged the joint representation during his trial. Also, the Applicant has not demonstrated the existence of actual conflict of interest which affected his advocate's performance during trial. Therefore, the Court rejects this submission in relation to ineffective representation.

28 African Commission on Human and Peoples' Rights' Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa (2003) H (e)(1-5).

29 United Nations' Guidelines and Principles on access to legal aid in Criminal Justice Systems, New York 2013. Available at: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf (accessed on 30 March 2021)

30 *Holloway v Arkansas* 435 U.S. 475 (1978).

96. Concerning the Applicant's submission that his trial advocate did not follow his instruction regarding the defence of *alibi*; contrary to the Applicant's assertion, it is evident from the record, that the advocate indicated to the High Court that he would be relying on the defence of *alibi*. Furthermore, the Applicant relied on his *alibi* and gave an in-depth account of it when he testified and Defence Witness 5 testified on his behalf in relation to the *alibi*. Accordingly, the Court dismisses the Applicant's contention in this regard.

97. According to the Applicant, his advocate did not present good character evidence before the High Court nor did he object to "tainted and prejudicial" evidence. The Court notes, that although, the Court of Appeal expunged the "tainted and prejudicial" evidence referred to by the Applicant; it still found that the direct evidence adduced by Prosecution Witnesses 1 and 3 was sufficient to prove the prosecution's case beyond a reasonable doubt.

98. In light of the foregoing, the Court holds that the Respondent State did not violate the Applicant's right to defence.

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

99. The Applicant argues that he was held in remand for approximately five (5) years from his arrest before being tried and convicted; and that he had to wait for a further three (3) years for his appeal to be concluded. He argues that this delay was unreasonable and resulted in denial of a fair trial.

100. In this regard, the Applicant states that police investigation was completed in a matter of days after the offence occurred. He relies on the statement of the judge that "the investigator and the police in general acted fairly fast". The Applicant also argues that the delay is attributable to the Respondent State as it did not provide any explanation for the delay. Also, that the delay was not attributable to himself as he had fully cooperated with the police and his counsel, "…did not make applications to the Court and only called one witness."

101. Citing *Prett and Morgan v Jamaica,*[31] the Applicant alleges that the unjustified delay resulted in his deprivation of liberty, loss of his business, separation from his family and losing contact with

31 Privy Council, ***Prett and Morgan v Jamaica***, Privy Council Appeal No. 10 of 1993, 3 WLR 995.

his "essential alibi witness".

102. The Respondent State did not respond to this claim.

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103. Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

104. The Court recalls that, as it has held in its earlier judgments, various factors are considered when assessing whether justice was dispensed within a reasonable time in the meaning of Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and that of the judicial authorities who bear a duty of due diligence in circumstances where severe penalties apply.[32]

105. The Court notes the period of delay complained about is from 8 December 2003 when the Applicant was charged to 18 September 2008, the date of his sentencing. This amounts to a period of four (4) years, nine (9) months and ten (10) days. With respect to the complexity of the case, the Court notes that the trial period of this case was from 17 June 2008 to 18 September 2008, when the Applicant was sentenced. This amounts to a trial period of three (3) months. During the trial, the prosecution called five (5) witnesses and the defence also called five (5) witnesses. Nevertheless, the witnesses were heard from 17 June 2008 to 19 June 2008, that is, a period of two days. The final submissions by the defence and the prosecution was on 24 June 2008. This means that from the start of the prosecution case to the close of the case, there was a lapse of only one week. Therefore, it is clear that the matter was not complex.

106. As regards whether the Applicant contributed to the delay; the Court notes that, nothing on the record shows that he did and the Respondent State did not challenge this either. The Applicant did not file any motions or seek any adjournments and the presentation of his defence was concluded within a day. It is thus

32 See *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 §§ 122-124. See also *Alex Thomas v Tanzania* (merits) § 104; *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 155; and *Norbert Zongo and Others v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, §§ 92-97, 152.

clear that the Applicant did not contribute to the delay.

107. As to whether the delay was attributable to the Respondent State, the Court notes that the Respondent State did not advance any argument as to why it took close to five (5) years for the Applicant's case to be completed. The Respondent State did not explain what happened between 8 December 2003 when the Applicant was charged and 17 June 2008 when the trial commenced, a period of four (4) years, seven (7) months and nine (9) days. In light of the foregoing, the Court notes that the time taken to complete the Applicant's trial after he was charged, a period of almost five (5) years is unreasonable because of lack of due diligence on the part of the national authorities.[33]

108. The Court thus finds that the Respondent State violated Article 7(1)(d) of the Charter herein.

iv Alleged violation of the right to be tried by an impartial tribunal

109. The Applicant avers that the assessors who were aiding the magistrate in the District Court challenged the veracity of his testimony and also questioned his witness, which he argues is conduct that is proscribed in an adversarial system. Citing the case of the Tanzania Court of Appeal, *Mapuji Mtogwashinge v the Republic*, the Applicant argues that the duty of the assessors is to ask the witnesses questions for clarification purposes rather than cross-examining them. He argues therefore that the cross-examination resulted in "actual or perceived bias".

110. The Applicant argues that as a result of the above mentioned "actual or perceived bias", the Respondent State violated his right under Article 7 of the Charter by failing to try him by an impartial tribunal.

111. The Respondent State did not respond to this claim.

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112. Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or

33 *Wilfred Onyango Nganyi v Tanzania* (merits) § 155.

tribunal".

113. The Court notes that, to ensure impartiality, any court must offer sufficient guarantees to exclude any legitimate doubt.[34] However, the Court observes that the impartiality of a judicial authority 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"[35] 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"[36]

114. The Applicant alleges that the assessors cross-examined him during his trial resulting in bias. Nevertheless, the Applicant has not demonstrated clearly with evidence that the assessors did in fact cross-examine him, as opposed to seeking for clarification. In any case, from the record, the assessors were involved in questioning both the prosecution witnesses as well as the defence witnesses in order to solicit for more information. Thus, the Court does not find any manifest error in their conduct to require its intervention.

115. Consequently, the Court finds that the Respondent State did not violate Article 7(1)(d) herein.

B. Alleged violation of the right to life

116. The Applicant submits that the mandatory death sentence does not respect the right to life rather creates presumption in favour of death. He further argues that, the Respondent State would not have sentenced the Applicant to death if it had considered his circumstances.

117. According to the Applicant, the death penalty is a reserve for the most heinous crimes. The Applicant does not believe that killing of one individual falls under the category of "most heinous crimes".

34 *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits) § 128; *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.

35 *Woyome v Ghana* (merits) *ibid*; *Wewaykum Indian Band v Canada* 2003 231 DLR (4th) 1 (Wewaykum).

36 *Woyome v Ghana* (merits); Okpaluba and Juma "The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa" PELJ 2011 (14) 7 at 261.

Finally, the Applicant submits that the Respondent State's response to this allegation is not satisfactory.

118. The Respondent State argues that the death sentence was the right sentence for the offence of murder according to its laws and the established jurisprudence of its Court of Appeal. Thus, it was rightfully meted out by the Court of Appeal.

119. According to the Respondent State, the imposition of the death penalty has not been abolished by international law. It argues that the ICCPR provides that life should not be arbitrarily deprived but that the death penalty should be imposed for the most serious crimes.

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120. The Court notes that the right to life alleged to have been violated as a result of the mandatory death sentence, is protected under Article 4 of the Charter**.**

121. Article 4 of the Charter provides that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

122. The Court observes that, despite a global trend towards the abolition of the death penalty, including the adoption of the Second Option Protocol to the International Covenant on Civil and Political Rights, the death penalty is still present in the legal system of many states.

123. As regards the substitution of the life sentence for the death penalty by the Court of Appeal, the Court notes that the Court of Appeal made reference to Section 197 of the Respondent State's Penal Code and its own jurisprudence to decide to "set aside the illegal sentence, and impose the appropriate sentence of death." The Court therefore infers that it is the mandatory nature of the death penalty in the Respondent State's books that led to the substitution of the punishment by the Court of Appeal.

124. The Court recalls its jurisprudence:

> a system of mandatory capital punishment deprives the complainant of the most fundamental right, the right to life, without considering

> whether this exceptional form of punishment is appropriate in the circumstances of his or her cause.[37]

125. The Court restates that, the mandatory imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania does not permit a convicted person to present mitigating evidence and therefore applies to all convicts without regard to the circumstances in which the offence was committed.

126. Moreover, in all cases of murder, the trial court is left with no other option but to impose the death sentence. The court is thus deprived of the discretion, which is inherent in every independent tribunal to consider both the facts and the applicability of the law, especially how proportionality should apply between the facts and the penalty to be imposed. In the same vein, the trial court lacks discretion to take into account specific and crucial circumstances such as the degree of participation of each individual offender in the crime.[38]

127. The Court further notes that, the arbitrariness of the mandatory imposition of the death penalty and breach of fair trial rights, is affirmed by relevant international case-law.[39] The Privy council held:[40]

> In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.

128. Furthermore, domestic courts in some African countries, have adopted the same interpretation in finding the mandatory imposition of the death penalty arbitrary and in violation of due

37 *Ally Rajabu v Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations) § 102.

38 *Ibid*, § 109.

39 See *Ally Rajabu and others v Tanzania* (merits and reparations) § 110; *Thompson*, *op. cit.*; *Kennedy v Trinidad & Tobago*, Comm. No. 845/1999, U.N. Doc. CCPR/C/67/D/845/1999 (2002) (U.N.H.C.R.), 7.3; *Chan v Guyana*, Comm. No. 913/2000, U.N. Doc. CCPR/C/85/D/913/2000 (2006) (U.N.H.C.R.), 6.5; *Baptiste*, *op. cit.*; *McKenzie*, *op. cit.*, *Hilaire and Others*, *op. cit.*; *Boyce and Another*, *op. cit*.

40 Privy Council, *Hughes v the Queen* (Spence & Hughes) (unreported, 2 April 2001).

process.[41] To this end, the Supreme Court of Kenya held:[42]

> Therefore … it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavours such as when the appeal is placed before another body for clemency.

129. Furthermore, that:[43]

> Section 204 of the (Kenyan) Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

130. The Court notes that, the mandatory nature of the death penalty as provided for under Section 197 of the Penal Code, leaves the national courts with no choice but to sentence a convict to death, resulting in arbitrary deprivation of life. Therefore, Section 197 of the Penal Code contravenes the right to life.

131. In light of the foregoing, the Court therefore finds that the Respondent State violated Article 4 of the Charter.

C. Alleged violation of the right to dignity

132. The Applicant argues that the Respondent State violated Article 5 of the Charter by executing the death penalty through a brutal way, that is, by hanging. Relying on the Commission's case of *Interights and Ditshwanelo v The Republic of Botswana,*[44] the Applicant submits that the death penalty should be carried out in a manner that will cause the least amount of physical and mental

41 See ***Francis Karioko Muruatetu & Another v Republic*** [2017] eKLR**;** ***Mutiso v Republic***, Crim. App. No. 17 of 2008 at 8, 24, 35 (July 30, 2010) (Kenya Ct. App.); ***Kafantayeni v Attorney General***, [2007] MWHC 1 (Malawi High Ct.) and ***Attorney General v Kigula*** (SC), [2009] UGSC 6 at 37-45 (Uganda Sup. Ct.).

42 ***Francis Karioko Muruatetu & Another v Republic*** [2017] eKLR § 43.

43 ***Ibid*** § 48.

44 ACHPR, Communication 319/06, ***Interrights & Ditshwanelo v Botswana*** (ACHPR).

suffering.

133. The Respondent State did not respond to this allegation.

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134. Article 5 of the Charter provides:

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

135. The Court notes that, in the instant case, the Applicant challenges the execution of the death penalty by hanging. The Court observes that many methods used to implement the death penalty may amount to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto.[45] In line with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should therefore be that, in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible.[46]

136. The Court observes that hanging a person is one of such methods and it is therefore inherently degrading. Furthermore, having found that the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature, this Court finds the method of implementation of that sentence, that is, hanging, inevitably encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment. [47]

137. As a consequence of the above, the Court finds that the Respondent State has violated Article 5 of the Charter.

45 See *Ally Rajabu v Tanzania* (merits and reparations) § 118; *Jabari v Turkey*, Judgment, merits, App No 40035/98, ECHR 2000-VIII (deporting a woman who risked death by stoning to Iran would violate the prohibition of torture).

46 See *Ally Rajabu v Tanzania* (merits and reparations) *ibid*; *Chitat Ng*, *op. cit.*, 16.2.

47 *Ally Rajabu v Tanzania* (merits and reparations) § 119.

VIII. Reparations

138. The Applicant prays the Court to:

a. Award reparations of USD 100,000 in moral damages for the Applicant and USD 5,000 each for the Applicant's co-parent and son; USD 76,789 for material loss, USD 715 for material loss suffered by Applicant's co-parent;

b. Order the release of the Applicant;

c. Order that the Respondent State amend its Penal Code and related legislation concerning the death sentence to render it complaint with Article 4 of the African Charter.

139. The Respondent State prays the Court to reject the prayer of the Applicant for reparations.

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140. 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."

141. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act. Second, causation should be established between the wrongful

142. act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full prejudice suffered. Finally, the Applicant bears the onus to justify the claims made.[48]

143. As this Court has earlier found, the Respondent State violated the Applicants' rights to a fair trial, life and dignity guaranteed under Articles 7, 4 and 5 of the Charter respectively. Based on these findings, the Respondent State's responsibility has been established. The prayers for reparation are therefore being examined against these findings.

144. As stated earlier, applicants must provide evidence to support their claims for material prejudice. The Court has also held previously that the purpose of reparations is to place the victim in

48 See *Armand Guehi v Tanzania* (merits and reparations) § 157. See also, *Norbert Zongo and Others 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 Tanzania* (reparations) §§ 27-29.

the situation prior to the violation.[49]

145. The Court has further held, with respect to moral prejudice, it exercises judicial discretion in equity.[50] In such instances, the Court has adopted the practice of awarding lump sums.[51]

A. Pecuniary reparations

i. Material Prejudice suffered by the Applicant

146. The Applicant submits that he suffered financial loss due to his incarceration. He claims that he was running a successful auto-mechanic business earning Tanzanian Shillings Twelve million (TZS 12,000,000) annually. Thus, the Applicant is claiming an amount of Tanzanian Shillings One Hundred and Eighty million (TZS 180,000,000) as compensation for the fifteen year period that he has spent in prison.

147. The Respondent State submits that the Court should reject this claim.

***

148. The Court recalls that in order for a claim for material prejudice to be granted, the Applicant must show a causal link between the violation found and the loss suffered, as well as demonstrate the loss suffered with evidence.[52]

149. In the instant case, the Court notes that the Applicant has failed to show the link between the violations found and the material prejudice which he claims to have suffered. Furthermore, the Court observes that, the Applicant filed an affidavit that failed to disclose any evidence of the business he claimed to have been running. Also, he did not provide documentary evidence such as

49 See *Norbert Zongo and Others v Burkina Faso* (reparations) §§ 57-62.

50 See *Armand Guehi v Tanzania* (merits and reparations) § 181; and *Lucien Ikili Rashidi v Tanzania*, ACtHPR, Application no. 009/2015, Judgment of 28 March 2019 (merits and reparations) § 119.

51 See *Armand Guehi v Tanzania* (merits and reparations) § 177; *Norbert Zongo and Others v Burkina Faso* (reparations) § 62.

52 *Supra note* 53.

a business licence or registration with the revenue authorities as proof of the existence of business he claimed to have been running before his arrest and conviction. Consequently, the Court rejects this claim.

ii. Material Prejudice suffered by Indirect Victims

150. The Applicant submits that his former fiancée, Ms. Abigael Mcharol suffered financial loss due to his incarceration. He claims that she incurred expenses in handling their son's expenses and also by visiting him in prison. Thus, the Applicant is claiming an amount of Tanzanian Shillings One Million, Six Hundred and Seventy Five Thousand (TZS 1,675,000) as compensation for the material prejudice that his former fiancée suffered.

151. The Respondent State submits that the Court should reject this claim.

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152. Likewise, the Court notes that the Applicant has failed to show the causal link between the violation found and the alleged prejudice suffered herein. Also, he has neither provided documentary evidence to show filiation such as birth certificates for children, attestation of paternity or maternity for parents, and marriage certificates for spouses or any equivalent proof, nor has he provided evidence of the material prejudice claimed, such as receipts. The Court thus dismisses the prayer of the Applicant herein.

iii. Moral Prejudice suffered by the Applicant

153. The Applicant submits that he suffered mental anguish having been on death row for at least seven (7) years. He further submits that his life plan was disrupted through his incarceration. The Applicant did not make a specific claim in this regard.

154. The Respondent State argues that the Applicant's prayer herein should be dismissed.

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155. The Court notes that the disruption of life plan is related to the Applicant's incarceration. The Court, having not found that the Applicant's incarceration was unlawful, dismisses this claim.

156. The Court however notes that it has found the mandatory imposition of the death penalty in violation of Articles 4 and 5 of the Charter. The Court recalls its earlier cited case-law to the effect that, in respect of human rights violations, moral prejudice is awarded in equity on the basis of the court's discretion.

157. In the instant case, the Court is cognisant of the fact that the mandatory nature of the death sentence results in the gravest psychological suffering as convicted persons have no opportunity to argue for a lesser punishment than death.

158. The Court notes that it also found that the Applicant's right to be tried within a reasonable time was violated and finds that the Applicant suffered emotional distress due to the prolonged pre-trial detention.[53]

159. In view of the above, the Court finds that the Applicant endured psychological suffering due to the violations suffered and awards himmoral damages to the tune of Tanzanian Shillings Four Million (TZS 4,000,000).

iv Moral Prejudice suffered by the Indirect Victims

160. The Applicant submits that his former fiancée, Ms. Abigael Mcharol suffered mental anguish out of concern for the Applicant, the father of her child in relation to his incarceration. He also submits that his son, Baraka and his elder brother Nuhu Juma Shoo, also suffered emotional distress in relation to his imprisonment and incarceration.

161. The Respondent State submits that the Court should reject the Applicant's prayer herein.

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162. The Court considers that as it has held in its earlier judgments,[54]

53 See *Armand Guehi v Tanzania* (merits and reparations) § 181.

54 See *Alex Thomas v Tanzania*, ACtHPR, Application no 005/2013, Judgment of 4 June 2019 (reparations) §§. 49-60; *Mohamed Abubakari v Tanzania*, ACtHPR, Application no 007/2013, Judgment of 4 June 2019 (reparations) §§. 59-64.

indirect victims must prove their filiation to the Applicant to be entitled to pecuniary reparations. Documents required include birth certificates for children, attestation of paternity or maternity for parents, and marriage certificates for spouses or any equivalent proof.[55] The Court notes that, in the present case, while the Applicant filed an affidavit to indicate his relations to the indirect victims, he has not provided proof of filiation through a marriage certificate, birth certificate or attestation of paternity.

163. In any event, the alleged prejudice to the Applicants' family members were as a result of his incarceration, which this Court did not find unlawful. The prayers are therefore dismissed.

B. Non-pecuniary reparations

i. Restitution

164. The Applicant prays the Court to order his release.

165. The Respondent State prays the Court to reject the Applicant's prayer for release.

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166. With regard to the Applicant's release, the Court has established that it would make such an order, "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".[56]

167. In the instant case, the Court finds that the circumstances to order the release of the Applicant, have not been fulfilled and thus dismisses the Applicant's prayer.

55 See *Alex Thomas v Tanzania* (reparations) §. 51; *Mohamed Abubakari v Tanzania* (reparations) §. 61.

56 *Jibu Amir Mussa and Another v Tanzania*, ACtHPR, Application no. 014/2015, judgment of 28 November 2019 (merits) §§ 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.

ii. Guarantees of Non-Repetition

168. The Applicant prays the Court to Order the Respondent State to amend its Penal Code and related legislation concerning the death sentence to render it complaint with Article 4 of the Charter.

169. The Respondent State did not respond to this prayer.

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170. The Court considers that guarantees of non-repetition are generally aimed at addressing violations that are systemic and structural in nature rather than to remedy individual harm.[57] The Court has however, also held that non-repetition could apply in individual cases where there is a likelihood of continued or repeated violations.[58]

171. In the instant case, the Court found that the Respondent State violated Article 4 of the Charter by providing for the mandatory imposition of the death penalty in its Penal Code, and Article 5 by providing for its execution by hanging. The Court orders that the Applicant should be sentenced afresh. The Court also orders the Respondent State to undertake all necessary measures to repeal from its laws the provision for the mandatory imposition of the death sentence.

IX. Costs

172. The Respondent State prays the Court to order Applicant to bear the costs. The Applicant did not make any prayer as regards costs.

57 See *Lucien Ikili Rashidi v Tanzania, op. cit.*, §§, 146-149. See also, *Armand Guehi v Tanzania*, *op. cit.*, § 191; and *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 103-106.

58 See *Lucien Ikili Rashidi v Tanzania, op. cit.*; See also *Armand Guehi v Tanzania*, *op. cit.*; and *Reverend Christopher R. Mtikila v Tanzania* (reparations) § 43.

173. Pursuant to Rule 32(2) of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

174. In light of the foregoing, the Court rules that each party shall bear its own costs.

X. Operative part

175. 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 to the admissibility of the Application;

iv. *Declares* the Application, admissible.

On merits

v. *Finds* that the Respondent State has not violated the right to be presumed innocent under Article 7(1)(b) of the Charter;

vi. *Finds* that the Respondent State has not violated the 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 under Article 7(1)(d) of the Charter;

viii. *Finds* that the Respondent State violated the right to be tried within a reasonable time protected under Article 7(1)(d) of the Charter.

ix. *Finds* that the Respondent State violated the right to life under Article 4 of the Charter in relation to the mandatory imposition of the death penalty;

x. *Finds* that the Respondent State has violated the right to dignity under Article 5 of the Charter in relation to method of the execution of the death penalty.

On reparations

Pecuniary reparations

xi. *Rejects* the Applicant's prayer for reparations for material prejudice;

xii. *Rejects* the prayer for reparations for moral prejudice suffered by the indirect victims;

xiii. *Grants* Tanzanian Shillings Four Million (TZS 4,000,000) for moral prejudice suffered;

xiv. *Orders* the Respondent State to pay the amount indicated

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

Non-pecuniary reparations

xv. *Dismisses* the prayer for release;

xvi. *Orders* the Respondent State to take all necessary measures, within one (1) year from the notification of this Judgment, to remove the mandatory imposition of the death penalty from its laws;

xvii. *Orders* the Respondent State to take all necessary measures, through its internal processes and within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and upholds the discretion of the judicial officer;

On Implementation and reporting

xviii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xix. *Orders* each party to bear its own costs.

Karatta & Ors v Tanzania (judgment) (2021) 5 AfCLR 465

Application 002/2017, *Ernest Karatta, Walafried Millinga, Ahmed Kabunga and 1744 Others v United Republic of Tanzania*

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicants, nationals of the Respondent State, were all formerly employed in various institutions and organs of the defunct East African Community. The Applicants unsuccessfully litigated, before the domestic courts, for payment of alleged balances of their terminal benefits by the Respondent State. They brought this Application claiming that the dismissal of their domestic claim was a violation of their human rights. The Court held that the Respondent State had not violated any rights of the Applicants.

Jurisdiction (material jurisdiction, 30-35; temporal jurisdiction, 38-40)

Admissibility (exhaustion of local remedies, 54-60; submission within a reasonable time, 63-66)

Non-discrimination (imperative for enjoyment of other rights, 78; distinction without justification, 79; link to equality and equal protection before the law, 80; burden of proof, 81)

Equal protection of law (differentiated treatment, 86; burden of proof, 87)

Property (elements of right, 93-94)

Work (remuneration as critical component, 102)

I. The Parties

1. Ernest Karatta, Walafried Millinga, Ahmed Kabunga and 1744 others (hereinafter referred to as "the Applicants) are all Tanzanian nationals and former employees of institutions of the East African Community (hereinafter referred to as "the EAC") that was dissolved in 1977. They bring this Application alleging various violations of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ESCR") due to Tanzania's failure to pay their service terminal benefits following the dissolution of the EAC.

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 further 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 this withdrawal has no effect on pending cases as well as all new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. The Applicants state that they were all employed by the EAC in the following institutions: the General Fund Services, the East African Cargo Handling Services Limited, the East African Harbours Corporation, the East African Posts and Telecommunications Corporation, the East African Railways Corporations and the East African Airways Corporation. They further state that they are entitled to their service terminal benefits "to be determined in accordance with the laws of the defunct EAC and as per said Staff's respective EAC employment records …"

4. The Applicants further state that on 9 May 2003 they commenced action before the High Court, Dar es Salaam (Civil Cause No. 95 of 2003) against the Respondent State claiming their terminal benefits. Although this action was initially contested by the Respondent State, in 2005, the Parties reached an out-of-court settlement which culminated in the Applicants' withdrawal of the suit before the High Court**.** In terms of the out-of-court settlement, the Respondent State agreed to pay the Applicants, and other former EAC employees who were not part of Civil Cause No. 95 of 2003, their terminal benefits totalling One Hundred and Seventeen Billion Tanzania Shillings (TZS 117 000 000 000).

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) § 38.

5. The Parties' agreement to settle Civil Cause No. 95 of 2003 (the Deed of Settlement)[2] was executed on 20 September 2005 and presented for filing with the High Court on 21 September 2005. The Deed of Settlement (hereinafter referred to as "the Deed") formed the basis of a consent judgment that was drawn up and entered for the Applicants. The consent judgment was endorsed by the High Court sitting at Dar es Salaam on the same 21 September 2005. The consent judgment, in turn, became the basis of a Decree (hereinafter referred to as "the decree") entered in favour of the Applicants. The Decree is also dated 21 September 2005.

6. It is apparent from the Parties' pleadings that subsequent to the filing of the consent judgment, the Respondent State commenced paying the Applicants their dues.

7. In 2010, however, some of the beneficiaries of the Deed alleged that there was a discrepancy between the amounts being paid by the Respondent State and what was ordered in the consent judgment. As a result of the foregoing, on 15 October 2010, the Applicants applied to the High Court for a certificate of order to issue against the Respondent State in respect of the payment of the balance of their entitlements. On 9 November 2010, the High Court, sitting at Dar es Salaam, dismissed the Application.

8. On 15 December 2010, the Respondent State's Court of Appeal, exercising its powers of revision, in Civil Revision Case 10 of 2020, quashed the decision of the High Court of 9 November 2010 and directed that the Applicants' case be re-heard before a different judge.

9. Following from the Court of Appeal's determination, the Applicants' claim for a certificate of order against the Respondent State was re-heard by the High Court but it was dismissed on 23 May 2011.

10. Aggrieved with the High Court's finding, the Applicants sought and were granted leave to appeal to the Court of Appeal. In a ruling dated 25 January 2016, the Court of Appeal dismissed the Applicants' appeal (Civil Appeal No. 73 of 2014) for lack **of** merit.

B. Alleged violations

11. The Applicants contend that the Respondent State has violated the following Charter rights:

i. the right to be entitled to the enjoyment of all Charter rights without discrimination (Article 2);

2 A deed of settlement is a legal document that formalizes an agreement between parties to resolve a dispute. It outlines the responsibilities and tasks that each party must take in order to settle the dispute.

ii. the right to equal protection of the law (Article 3(2));

iii. the right to property (Article 14);

iv. the right to work under equitable and satisfactory conditions (Article 15).

12. The Applicants further contend that the Respondent State has also violated Articles 6 and 7 of the International Covenant for Economic Social and Cultural Rights (hereinafter referred to as "the ICESCR")[3] in relation to their right to work and right to just and favourable conditions of work respectively.

III. Summary of the Procedure before the Court

13. The Application was filed on 26 January 2017. Since several attachments purported to be part of the Application were missing, the Applicants were, on several occasions, reminded to file the missing documents.

14. On 15 June 2017, the Applicants filed the last of the missing annexures whereupon the Application was served on the Respondent State on 28 June 2017.

15. On 30 August 2017, the Respondent State filed its Response and this was transmitted to the Applicants on 17 September 2017. The Applicants filed their Reply to the Response on 9 October 2017.

16. Pleadings were closed on 31 January 2018 but, pursuant to the Court's decision during its 49th Session, to combine the consideration of the merits and reparations, pleadings were reopened on 29 June 2018 to allow both Parties to file their submissions on reparations.

17. The Parties filed the remainder of their pleadings within the time frames stipulated by the Court and pleadings were closed again on 10 August 2021.

IV. Prayers of the Parties

18. On the merits, the Applicants pray the Court to:

i. Declare that the Respondent is in violation of Article 2 of the African Charter on Human and Peoples' Rights.

ii. Declare that the Respondent is in violation of Article 3(2) of the African Charter on Human and Peoples' Rights

iii. Declare that the Respondent is in violation of Article 14 of the African Charter on Human and Peoples' Rights.

3 The Respondent State acceded to the ICESCR on 11 June 1976.

iv. Declare that the Respondent is in violation of Article 15 of the African Charter on Human and Peoples' Rights.

v. Declare that the Respondent is in violation of Article 6 and 7 of the International Covenant on Economic Social and Cultural Rights.

vi. Make an Order the Government of the United Republic of Tanzania to put in place the necessary constitutional, legislative and other measures to guarantee the right to guaranteed under Article 2, 3(2), 14 and 15 of the African Charter.

vii. Order that the Respondent should respect and fulfil the rights claimed by the Applicants herein.

viii. Order that the Respondent should pay the claimed sums by the Applicants herein.

ix. Order for reparations to the Applicants in respect of trauma, anguish, suffering and unprecedented delay by the Respondent.

x. Order that the Respondent must report to the Executive Council the implementation of this judgment.

xi. Any other such relief(s) and or measures as the Court may deem fit and just to grant.

19. On reparations, the Applicants pray the Court to grant the following:

i. Restoration of the Applicants rightful monies a sum of TSH 564 743 132 202.83. Ought to be payable to the Applicant as direct victims of the prejudice suffered.

ii. The amount of USD 20 000 for each of the 1747 victims for moral damages suffered to them severally.

iii. The amount of USD 6 000 on top of every victim's payments as token compensation for moral damages suffered at least four of their indirect victims. Each USD 1500.

iv. Honourable Court grants the Applicants USD 4000 for legal fees during the national proceedings where he was presented by their Advocates in the High Court and Court of Appeal proceedings.

v. The amount of USD 20 000 in legal fees at the Court.

vi. The amount of USD 15 200 for expenses incurred.

vii. Without prejudice to prayers (i) to (vii) – a written apology by the Respondent to each of the Applicants.

viii. Any other such relief that this Court will deem just and fair to grant to the Applicants

20. The Applicants further pray:

b. … that this Honourable Court applies the principle of proportionality when considering the award for compensation to be granted …

c. …that this Honourable Court makes an order that the Respondent guarantees non-repetition of these violations to them and that the Respondent is required to report back to this Honourable Court every six months until they satisfy the orders this Court shall make

when considering the submission for reparations.

d. … 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.

21. On jurisdiction and admissibility, the Respondent State prays the Court to order:

i. That the Application has not invoked the jurisdiction of the Honourable Court under Article 3(1) and Rule 26 of the Rules of the Court.

ii. That the Application has not met the admissibility requirements stipulated under Rules 26, 40(5) and 40(6) of the Rules of Court, Article 56(5) and 56(6) of the African Charter on Human and Peoples' Rights and Article 6(2) of the Protocol.

iii. That the Application be dismissed in accordance to Rule 38 of the Rules of Court.

iv. That the costs of this Application be borne by the Applicants.

22. With respect to the merits of the Application, the Respondent State prays that:

i. The Court order and declares that the Respondent State has not violated Article 2 of the African Charter on Human and Peoples' Rights.

ii. The Court declares that the Respondent State has not violated Article 3(2) of the African Charter on Human and Peoples' Rights.

iii. The Court declares that the Respondent State has not violated Article 14 of the African Charter on Human and Peoples' Rights.

iv. The Court declares that the Respondent State has not violated Article 15 of the African Charter on Human and Peoples' Rights.

v. The Court declares that the Respondent State has not violated Article 6 of the International Covenant on Economic, Social and Cultural Rights.

vi. The Court declares that the Respondent State has not violated Article 7 of the International Covenant on Economic, Social and Cultural Rights.

vii. The Court order and declare the Respondent State has constitutional provisions, laws and other measures that guarantee the rights under Articles 2, 3(2), 14 and 15 of the African Charter.

viii. The Court declares that the Applicants' claims are baseless and untenable.

ix. The Court order that the Applicants are not entitled to any claims of money as they were paid all their benefits. It is not even clear how much money they are claiming from the Court.

x. The Court order that the Applicants are not entitled to any reparations in respect of the alleged trauma, anguish, suffering and unprecedented delay. They are the cause of the alleged delay by filing endless.

xi. The Court orders that there is no need for the Respondent State to report to the Executive Council the implementation of this judgment.

xii. Any such relief(s) and or such measures as the Court may deem fit and just to grant.

23. In its submissions on reparations, the Respondent State prays for the following:

i. A Declaration that the Respondent State has not violated the cited provisions of the African Charter and ICESCR.

ii. The Applicant's claims for reparations be dismissed in its entirety.

iii. That, the Respondent pray for any other relief(s) this Court may deem fit to grant.

V. Jurisdiction

24. The Court observes that Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

25. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules." [4]

26. On the basis of the above-cited provisions, the Court must preliminarily ascertain its jurisdiction and dispose of objections to its jurisdiction, if there are any.

A. Objections to the jurisdiction of the Court

27. The Respondent State raises two objections in respect of the Court's jurisdiction. Firstly, it argues that the Court does not have material jurisdiction and, second, that the Court lacks temporal jurisdiction.

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

i. Objection alleging that the Court lacks material jurisdiction

28. First, relying on the Court's own jurisprudence,[5] the Respondent State contends that the Applicants have not properly invoked the Court's jurisdiction but "they basically want to revise the order of the Court of Appeal of Tanzania in Civil Appeal No. 73 of 2014." Second, the Respondent State asserts that the Court does not have "jurisdiction to interpret the East African Mediation Agreement Act of 1984 and the Deed of Settlement." In relation to the latter argument, the Respondent State argues that "the East African Mediation Agreement Act of 1984 is not among the instruments envisaged under Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules of the Court."

29. In their Reply, the Applicants argue that the Court's material jurisdiction is established since the Respondent State is a party to the Charter, the Protocol and also that it made the Declaration under Article 34(6) of the Protocol.

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30. 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.[6]

31. With regard to the Respondent's State's objection that the Applicants have invited it to sit as an appellate court, the Court recalls, in accordance with its established jurisprudence, that it is not an appellate body with respect to decisions of national courts.[7] However, and as the Court has emphasised "… this does not

5 *Urban Mkandawire v Malawi* (admissibility) (21 June 2013) 1 AfCLR 283 and *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190.

6 See, for example, *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18, *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

7 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) § 14.

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."[8]

32. In the present case, the Court notes that the Applicants have alleged violations of Articles 2, 3(2), 14 and 15 of the Charter as well as Articles 6 and 7 of the ICESCR, whose interpretation and application falls within the Court's jurisdiction.

33. Given the above, and in light of Articles 3 and 7 of the Protocol, by examining whether or not the Respondent State's conduct is in consonance with the provisions of the earlier mentioned instruments, the Court will be acting within its powers and neither will it be sitting as an appellate court nor will it be exercising power to revise the decision of the Court of Appeal. Consequently, the Court dismisses the objection alleging that it would be sitting to revise the decision of the Respondent State's Court of Appeal in hearing this Application.

34. With respect to the Respondent State's objection that the Court does not have jurisdiction to interpret the East African Community Mediation Agreement Act of 1984 and the Deed of Settlement, the Court recalls that, in the present case, the Applicants have alleged a violation of, among others, Articles 14 and 15 of the Charter as well as Articles 6 and 7 of the ICESCR. It is thus within the Court's remit, in the circumstances, to determine whether or not the allegations raised by the Applicants amount to a violation of the Charter or the ICESCR. In ascertaining whether or not there has been a violation of the Applicants' rights, therefore, the instruments of reference will be the Charter and the ICESCR and not the East African Community Mediation Agreement of 1984.

35. Given the preceding, the Court dismisses the Respondent State's objection alleging that it does not have jurisdiction to interpret the East African Community Mediation Agreement Act of 1984 and the Deed of Settlement. The Court thus holds that it has material jurisdiction in this case.

8 *, Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 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.

ii. Objection alleging that the Court lacks temporal jurisdiction

36. The Respondent State contends that the "Court has no jurisdiction to hear and determine this matter since the cause of action arose even before the establishment of this Court and that the alleged violations occurred before the Respondent State accepted the jurisdiction of the African Court on Human and Peoples Rights." The Respondent State submits, therefore, that "if the Court is seized with an individual application against the Respondent State which alleges the violation of a right founded on facts which occurred before 9th March 2010, the Court does not in principle have jurisdiction to deal with such an allegation."

37. In their Reply the Applicants contend that Court's jurisdiction is confirmed due to the fact that the Respondent State has violated Articles 14 and 15 of the Charter and that these violations "continue to date."

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38. The Court recalls that it has previously held that its temporal jurisdiction is established if, at the time the alleged violation occurred, the Respondent State was a party to the Charter. [9] Further, the Court has confirmed that its temporal jurisdiction is confirmed, for all State's parties to the Protocol, if at the time the Protocol entered into force, the alleged violations were continuing. [10]

39. In the present case, the litigation between the Parties as a result of the unpaid terminal benefits was, initially, concluded by a consent judgment entered on 21 September 2005. It was only when the Applicants thought they were being underpaid that further proceedings were commenced before the High Court on 15 October 2010. The immediate precursor to this Application, therefore, are the proceedings brought by the Applicants seeking to have fresh computations included in a new deed. These proceedings were concluded when the Court of Appeal dismissed

9 *TLS and others v Tanzania* (merits) (14 June 2013) 1 AfCLR 34

10 .*Ibid §* 84.

the Applicants' appeal on 25 January 2016. The Applicants' case before this Court is that their rights were violated through the judgments of both the High Court and the Court of Appeal.

40. As against the preceding background, the Court notes that as of 15 October 2010, when the litigation which is alleged to have violated the Applicants' rights commenced, the Respondent State was a party to both the Charter and the Protocol and it had also already deposited the Declaration and was thus in a position to be sued before the Court. Additionally, given the continuing nature of the alleged violations,[11] the Court finds that its jurisdiction is established and it thus dismisses the Respondent State's objection to its temporal jurisdiction.

B. Other aspects of jurisdiction

41. The Court observes that none of the Parties has raised any objection in respect of its personal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled.

42. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that the Respondent State, on 21 November 2019, deposited with 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 it has held that the withdrawal of a Declaration 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, or new cases filed before the withdrawal takes effect.[12] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[13] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by the said withdrawal.

11 *Jebra Kambole v Tanzania*, ACtHPR, Application No. 018/2018, Judgment of 15 July 2020 (merits and reparations) *§* 24.

12 *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39.

13 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

43. In light of the above, the Court finds that it has personal jurisdiction to examine the present Application.

44. 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 territorial jurisdiction is established.

45. In light of all the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

46. 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".

47. In line with Rule 50(1) of the Rules,[14] "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."

48. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of 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 Organisation of African Unity or the provisions of the Charter.

14 Formerly Rule 40 Rules of Court, 2 June 2010.

A. Objections to the admissibility of the Application

49. While some of the above-mentioned 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 relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of domestic remedies

50. The Respondent State avers that the Applicants have not exhausted domestic remedies in respect of all the claims that they are raising before the Court. According to the Respondent State, "the said allegations [as raised by the Applicants before the Court] have never been raised before the Courts in the United Republic of Tanzania, which is contrary to Rule 40(5) of the Rules of Court …"[15] In support of its averments, the Respondent State cites the decision of the African Commission on Human and Peoples' Rights (hereinafter "the Commission") in *Majuru v Zimbabwe*.

51. The Respondent State also contends that, in respect of the claims by the Applicants, "…the remedies within the United Republic of Tanzania are available, adequate, satisfactory and effective, hence the Applicants should have exhausted first." It is also the Respondent State's further contention that the Applicants could have challenged the alleged violation of their rights under section 4 of the Basic Rights and Duties Enforcement Act by instituting an action for redress before the High Court. The Respondent State thus submits that the Application should be declared inadmissible for failure to exhaust domestic remedies.

52. The Applicants, for their part, submit that they "have exhausted all domestic remedies in regard to the violations complained of in particular and that the violation is continuing." According to the Applicants, when the Court of Appeal delivered its judgment on 29 January 2016 it dealt them " …the final blow, in a judgment which further denies the victims appeal relative to their right to work and right to own property." They further submit that their rights under Articles 14 and 15 of the Charter "…having been violated, having been taken away by the Court of Appeal of Tanzania, the highest

15 Currently Rule 50(2)(e) Rules of Court, 2020.

court in Tanzania [they] has no remedy to fall back to …".

53. In relation to the availability and sufficiency of domestic remedies, the Applicants submit that the remedies alluded to by the Respondent State under its Constitution as well as the Basic Rights and Duties Enforcement Act "…cannot be availed without delay, difficulties and have proved to be ineffective where the Applicants since 1977 have not been paid their terminal benefits and a good number of them even died before getting their entitlement." The Applicants thus submit that the Application is admissible.

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54. The Court recalls that pursuant to Article 56(5) of the Charter, whose requirements are mirrored in Rule 50(2) (e) 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.[16]

55. The Court observes that one of the main contentions by the Respondent State is that the Applicants have raised allegations before it which were never raised in the domestic proceedings. Specifically, these are allegations relating to the violation of the Applicants' rights to non-discrimination, equal protection of the law, to property and to work under equitable and satisfactory conditions including equal pay for equal work. In respect of the Applicants' claims before this Court, it is to be noted that the bone of contention between the Parties is a labour dispute which coalesces around the alleged failure by the Respondent State to pay the Applicants their terminal dues.

56. While the Applicants did not plead their case before the domestic courts in the same manner that they have done before the Court, it is clear that the alleged violation of their rights was occasioned during the domestic proceedings. A claim for underpayment of terminal benefits directly implicates various rights and guarantees under the bundle of labour rights. By way of illustration, the right

16 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.

to dignified working conditions, to choose work, to adequate remuneration, to equal pay for work of equal value and to equal treatment, all fall within the bundle of labour rights.

57. The Court reiterates, therefore, that where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights breaches. This is because the alleged human rights violations form part of the bundle of rights and guarantees that were related to or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.[17] The Court thus accepts that the Applicants should be deemed to have exhausted local remedies with respect to the allegations covered by the bundle of rights and guarantees.

58. In respect of the contention that the Applicants should have commenced action under the Basic Rights and Duties Enforcement Act to vindicate their rights before domestic courts, 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. Notably, 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.[18] The Court also notes that an applicant is only required to exhaust ordinary judicial remedies.[19]

59. In the present case, the Court, in line with its jurisprudence, holds that given the special nature of the constitutional petition procedure, under the Basic Rights and Duties Enforcement Act, in the Respondent State, the Applicants were not bound to exhaust

17 *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 § 37; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465 §§ 60-65, *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 54.

18 *The Beneficiaries of Late Norbert Zongo and others v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197 § 84; *Alex Thomas v United Republic of Tanzania* (merits) § 64 and *Wilfred Onyango Nganyi and Others v United Republic of Tanzania* (merits) (18 March 2016) 1 AfCLR 507 § 95.

19 *Oscar Josiah v United Republic of Tanzania*, ACtHPR, Application No. 053/2016, Judgment of 28 March 2019 (merits) § 38 and *Diocles William v United Republic of Tanzania*, AfCHPR, Application No. 016/2016. Judgment of 21 September 2018 (merits and reparations) § 42.

this procedure as it is an "extra-ordinary remedy".[20]

60. 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

61. According to the Respondent State "… the decision of the Court of Appeal in Civil Appeal No. 73 of 2014 was delivered on the 25th January 2016 but the Applicants lodged this Application …on 26th of January 2017 which is twelve months after the decision of the Court of Appeal." Relying on the decision of the Commission in *Majuru v Zimbabwe*, the Respondent State submits that the Application should have been filed within six (6) months and since no reasons have been given for a failure to file within the earlier mentioned time period, the Application should be dismissed.

62. The Applicants submit that the Application was filed within a reasonable period of time and that it is admissible. They point out that the Respondent State has not been "… willing to pay the Applicants their monies, since 1977 [and] has been very reluctant and unwilling to respect the rights of the Applicants. Even in obtaining copies of judgments the Respondents Courts delayed substantially …".

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63. 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 50 (2) (f) 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."

64. Further, and 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

20 See Application No. 025/2016. Judgment of 26 May 2019 (merits and reparations*) Kenedy Ivan v United Republic of Tanzania;* and *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599 §§ 66-70;

case-by-case basis. [21]

65. In the present case, the Court of Appeal dismissed the Applicants' appeal on 29 January 2016 and the present Application was filed on 26 January 2017. A total of eleven (11) months and twenty-eight (28) days, therefore, lapsed before the Application was instituted before the Court. The Court notes that the litigation between the Parties, in the domestic courts, was lengthy and involved several determinations both by the High Court and the Court of Appeal. The Court also takes notice of the Applicants' submission that "obtaining copies of judgments [from] the Respondent's courts delayed substantially …" and this was not contested by the Respondent State. Given all the preceding facts, the Court finds that, in the present case, the period of eleven (11) months and twenty-eight (28) days, before the Application was filed, is reasonable within the meaning of Article 56(6) of the Charter.

66. In light of the above, the Court, therefore, dismisses the Respondent State's objection to the admissibility of the Application based on failure to file within a reasonable time.

B. Other conditions of admissibility

67. 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 50 (2)(a),(b), (c), (d), and (g) of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

68. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since the Applicants have clearly indicated their identities.

69. The Court notes that the claims made by the Applicants seek to protect their rights as guaranteed under the Charter. It further notes that one of the objectives of the African Union, as stated in Article 3(h) of its Constitutive Act, is the promotion and protection of human and peoples' rights. The Court, therefore, considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

70. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent

21 *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (22 March 2018) 2 AfCLR 248 § 57.

State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.

71. Regarding the condition contained in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

72. Finally, with respect to the requirement laid down in Rule 50(2)(g) 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.

73. 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 50 of the Rules, and accordingly finds it admissible.

VII. Merits

74. The Applicants allege a violation of their rights under Articles 2, 3(2), 14 and 15 of the Charter. They have also pleaded a violation of their rights under Articles 6 and 7 of the ICESCR. The Court will now examine each of the alleged violations in turn.

A. Alleged violation of the right to non-discrimination

75. Specifically in relation to the right to non-discrimination, the Applicants argue that the Respondent State has violated their rights under Article 2 of the Charter by "discriminating them from getting their terminal benefits…".

76. The Respondent State submits that the "…Applicants were not and are not being discriminated in any way …and the Applicants have failed to show on what grounds they were discriminated hence their allegations are afterthought and misconceived and baseless." According to the Respondent State, the Applicants have "…not shown how they have been exactly discriminated."

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77. 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.

78. The Court reiterates its position that Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision 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.[22]

79. At a general level, 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.[23] The Court recalls that it has accepted that discrimination is "a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria." [24]

80. Further, as the Court has noted, 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. [25] 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.

81. In respect of the present case, the Court notes that the Applicants have neither specified the ground(s), among those outlined in Article 2 of the Charter or any other, on the basis of which they

22 *African Commission on Human and Peoples' Rights (ACHPR) v Republic of Kenya* (merits) § 137.

23 *Ibid* § 139. See also, *Tanganyika Law Society and others v United Republic of Tanzania* (merits) (14 June 2013) 1 AfCLR 34 § 106.

24 *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668 §§146-147.

25 *African Commission on Human and Peoples' Rights v Kenya* (merits) § 138.

allege to have been discriminated nor have they identified a comparator group, in a similar situation to them, which has been treated more favourably. The Court reiterates that with regard to discrimination, the burden lays with the person who alleges discrimination to establish the basis on which the discrimination can be inferred before the defendant is required to demonstrate whether or not the discriminatory conduct can be justified.[26]

82. In the present case, the Court finds that the Applicants have simply made a general allegation of discrimination which they have failed to substantiate.[27] In the circumstances, the Court dismisses their allegation of a violation of Article 2 of the Charter.

B. Alleged violation of the right to equal protection of the law

83. The Applicant avers that the Respondent State has violated Article 3(2) of the Charter due to a "…failure to give them protection of their entitlements under the law …"

84. The Respondent State argues that the Applicants negotiated and executed the Deed of their own free will. According to the Respondent State "the negotiation which resulted into the deed of settlement was arrived at by both parties. During the negotiations the Applicants were treated on the equal basis as they were fully represented and the dispute was settled amicably and was registered in Court by the Applicants…". It is thus the Respondent State's submission that "the Applicants were and are still being accorded equal protection before the law."

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85. Article 3(2) of the Charter provides that "[e]very individual shall be entitled to equal protection of the law."

86. 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

26 Cf. *Mohamed Abubakari v Tanzania* (merits) § 153-154.

27 See, *Alex Thomas v Tanzania* (merits) § 140; *George Kemboge v Tanzania* (merits) (11 May 2018) 1 AfCLR 369 § 51 and *Kennedy Owino Onyachi and Charles John Njoka v Tanzania* (merits) § 152.

instances and may allow differentiated treatment of individuals placed in different situations.[28]

87. The Court observes that the only substantiation made by the Applicants of their allegation has been by way of their assertion that the Respondent State has violated their rights under Article 3(2) of the Charter by failing to give protection to their entitlements. Besides this, the Applicants have provided no particulars of precisely how their rights under Article 3(2) have been violated.

88. In the circumstances, the Court finds that the Applicants' have failed to substantiate the alleged violation of Article 3(2) of the Charter.[29] The Court thus dismisses the Applicants' allegations.

C. Alleged violation of the right to property

89. The Applicants' assert that the Respondent State has violated the Charter "… by holding their property …" It is the Applicants' submission that "…the term property includes monetary property which the Applicants are entitled to."

90. The Respondent State contends that the Applicants have never been denied their right to own property since "… in determining the Applicants case the Court of Appeal complied with the laws and Constitution of the United Republic of Tanzania."

91. According to the Respondent State, "… the Applicants allegations are misconceived and out of context as there is no violation of their rights to property whatsoever." The Respondent State also argues that the right to property and the right to just remuneration are two distinct rights. According to the Respondent State, the Applicants' right to property has not been violated since "what the Applicants are claiming is the right to just remuneration and not the right to property. The Applicants were paid all their entitlements." The Respondent State thus puts the Applicants to strict proof with regard to their allegations.

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28 *Norbert Zongo and Others v Burkina Faso* (merits) § 167.

29 Cf. *Minani Evarist v Tanzania* (merits) (21 September 2018) 2 AfCLR 402 § 75.

92. The Court recalls that Article 14 of the Charter provides as follows:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

93. In respect of the right to property, the Court has held that:

> …in its classical conception, the right to property usually refers to three elements namely: the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*), and the right to dispose of the thing, that is, the right to transfer it (*abusus*).[30]

94. The above understanding of the right to property finds concurrence in the decision of the Commission in *Dino Noca v Democratic Republic of Congo* where it was held that:

> The right to property includes not only the right of access to one's property and freedom from violation of the enjoyment of such property or injury to it, but also the free possession and utilization and control of such property, in a manner the owner deems adequate.[31]

95. Although the Applicants have not been detailed in their specification of how their right to property has been violated, the Court notes that the Applicants have argued that their right was violated "when the Court of Appeal of Tanzania, finally issued a judgment which further denied the Applicants their right … to own property." It is the Court's observation, in the circumstances, that the Applicants' grievance is about the litigation before the Respondent State's courts and particularly the final pronouncement by the Court of Appeal in so far as it impacts their right to property, the property being the money they believe is due to them as terminal benefits.

96. In recalling the domestic litigation between the Parties, the Court observes that this litigation involved several determinations by both the High Court and the Court of Appeal. Amidst all the determinations, however, the key event was the Parties' agreement to settle the matter and enter a consent judgment. An inescapable fact of the litigation before the domestic courts, therefore, is that it is the Parties' themselves that drew up the terms on which the litigation was concluded.

97. The Court, having carefully considered all the records of the proceedings before both the High Court and the Court of Appeal, in their entirety, finds no reason(s) for interfering with their findings especially in relation to the alleged violation of the Applicants' right to property. The Applicants' claims for terminal benefits were fairly considered, on their merits, by both the High Court and the Court

30 *African Commission on Human and Peoples' Rights v Kenya* (merits) § 124.

31 Communication 286/2004, ACHPR, *Dino Noca v Democratic Republic of Congo* § 161.

of Appeal and no grounds have been pleaded or proved before this Court necessitating this Court's intervention. The Court thus dismisses the Applicants' claim of a violation of Article 14 of the Charter.

D. Alleged violation of the right to work

98. The Applicants argue that the Respondent State has violated Article 15 of the Charter "... by failure to respect their right to just remuneration objected before the High Court and the Court of Appeal as to the ….existing status of the Applicants benefits/ claims payment exercise." According to the Applicants, they were "lawful employees and are still entitled to all such terminal benefits as claimed which the Respondent has refused to pay hence [constituting] violations under the African Charter." The Applicants also invoke a violation of Articles 6 and 7 of the ICESCR in relation to their right to work as well as their right to just and favourable conditions of work.

99. The Respondent State contends that the Applicants have never been denied their right to just remuneration since "… in determining the Applicants case the Court of Appeal complied with the laws and Constitution of the United Republic of Tanzania." It also submits that the "…right to work which is enshrined under Article 2 of the Constitution of the United Republic of Tanzania is not absolute. The Applicants were employed by the East African Community and not Tanzania." According to the Respondent State, the Applicants have no cause of action in so far as the right to work under equitable and satisfactory conditions is concerned since they were employed by the defunct EAC. The Respondent State also submits that the Applicants have no action against it since they "…withdrew all their claims after entering the Deed of Settlement with the Respondent in September 2005. The Applicants were also paid all their entitlements."

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100. The Court notes 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." The Court further notes that Article 15 of the Charter corresponds to the provisions of Articles 6 and 7 of the ICESCR.

Given the substantive congruence between the provisions of the two instruments earlier referred to, the Court will consider the Applicants' claims under Article 15 of the Charter without conducting a separate analysis of the ICESCR.

101. As the Commission has established in its Principles and Guidelines on the Implementation of Economic, Social and Cultural rights in the African Charter on Human and Peoples' Rights:[32]

> The right to work is essential for the realisation of other economic, social and cultural rights. It forms an inseparable and inherent part of human dignity and is integral to an individual's role within society. Access to equitable and decent work, which respects the fundamental rights of the human person and the rights of workers in terms of conditions, safety and remuneration can also be critical for both survival and human development.

102. In the present case, the Court observes that what is at issue, specifically, is the right to remuneration and that the Applicants' case is that this right has been violated due to the decisions of the Respondent State's courts. In this connection, the Court concedes that the right to remuneration is a critical component of the right to work[33] and that withholding remuneration could amount to a violation of the right.

103. The Court finds that the Respondent State's obligation to pay the Applicants their terminal benefits arose from the arrangements following from the dissolution of the EAC in 1977. While a regional effort involving the then members of the EAC – Kenya, Tanzania and Uganda – was undertaken to facilitate the dissolution of the EAC, culminating in the adoption of the East African Community Mediation Agreement of 1984, the responsibility for the payment of the pension and other benefits was, ultimately, devolved to each of the partner States in respect of its nationals.[34]

104. The Court recalls that the payment of the Applicants' terminal benefits was the focal point of the dispute between the Parties in the domestic courts. As pointed out earlier in this judgment, both the High Court and the Court of Appeal considered the Applicants' claims and dismissed them. As noted by the Court of Appeal,[35]

32 See, https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed 10 August 2021) § 57-58.

33 See, Committee on Economic, Social and Cultural Rights General Comment No. 18- The right to work https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en (accessed 10 August 2021).

34 See, Clause 10.05 of the East African Community Mediation Agreement of 1984.

35 See, pages 15-16 of the judgment of 25 January 2016.

the Applicants commenced proceedings, five (5) years after executing the Deed, seeking a certificate under the Government Proceedings Act claiming a sum other than that which was originally endorsed with their consent. In its reasoning, the Court of Appeal refused to entertain the Applicants' claim because:

> …it makes no sense to issue a certificate to a party who had agreed to be paid a certain amount in settlement of his/her claim and then comes later on to claim for additional payment which did not even form part of the original agreement … coming to court after the payments were made and after a period of five years had elapsed, questioning the deed of settlement, and claiming that the payment was not made in accordance with the Deed of Settlement amounts to asking the Court to reopen negotiations.

105. The Court, recalling the progression of the dispute between the Parties before the domestic courts, and especially paying attention to the findings of both the High Court and the Court of Appeal, finds that the Applicants have failed to substantiate how the Respondent State violated their right to work, generally, and the right to remuneration specifically. In the circumstances, the Court finds no basis for interfering with the findings of the domestic courts and thus dismisses the Applicants' allegations on this point.

VIII. Reparations

106. The Applicants prayed the Court to award them reparations. The specifics of their claims are captured in paragraphs 20 to 21 of this Judgment.

107. The Respondent State prayed the Court to dismiss all the Applicants' claims for reparations.

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108. 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 the fair compensation or reparation.

109. The Court having found that the Respondent State has not violated any of the Applicants' rights dismisses all the claims for reparations.

IX. Costs

110. None of the Parties made any prayer in respect of costs.

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111. The Court notes that Rule 32 of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs, if any".[36]

112. In the present Application, the Court orders that each Party shall bear its own costs.

X. Operative part

113. For these reasons:

The Court

Unanimously:

On jurisdiction

i. *Dismisses* the objections to its jurisdiction;
ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections to the admissibility of the Application;
iv. *Declares* that the Application is admissible.

On merits

v. *Finds* that the Respondent State has not violated the Applicants' right to non-discrimination under Article 2 of the Charter;
vi. *Finds* that the Respondent State has not violated the Applicants' right to equal protection of the law under Article 3(2) of the Charter;
vii. *Finds* that the Respondent State has not violated the Applicants' right to property under Article 14 of the Charter;
viii. *Finds* that the Respondent State has not violated the Applicants' right to work under Article 15 of the Charter.

On reparations

ix. *Dismisses* the Applicants' prayers for reparations;

36 Formerly Rule 30, Rules of Court, 2 June 2010.

On costs

x. *Orders* each party to bear its own costs.

Kodeih v Benin (admissibility) (2021) 5 AfCLR 492

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

Ruling, 30 September 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant operated a hotel business in the Respondent State and claimed that domestic legal proceedings brought against his business and the decisions of the domestic courts in those proceedings were in violation of his human rights. Following the Respondent State's challenge on admissibility, the Court held that the Application was inadmissible for failure to exhaust local remedies.

Jurisdiction (material jurisdiction, 28-31)

Admissibility (exhaustion of local remedies, 48-52, 54-60; effective remedy, 65-66)

I. The Parties

1. Ghaby Kodeih, (hereinafter referred to as "the Applicant") is a national of Benin. He is the sole proprietor and General Manager of the Société d'Hôtellerie, de Restauration et de Loisirs (hereinafter referred to as " SHRL"). He alleges the violation of his rights in the course of legal proceedings initiated against the SHRL.

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. On 8 February 2016, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") through which it accepted 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 an instrument withdrawing the said Declaration. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that

is, on 26 March 2021.[1]

II. Subject of the Application

A. The Facts of the matter

3. It emerges from the Application that, the Applicant established SHRL, where he is the General Administrator and sole proprietor, for the the construction of the five (5) star hotel. He signed an agreement with the Marriott Hotels and Resorts Group allowing him to operate under its franchise. The hotel was to be funded by the following partners: (1) the West African Development Bank (hereinafter "WADB") up to Seven Billion Four Hundred Million (7,400,000,000) CFA Francs; (2) a consortium of banks comprising Société Générale de Banque, Côte d'Ivoire (hereinafter "SGBCI"), Société Générale de Banque, Burkina Faso (hereinafter, "SGBF") and Société Générale de Banque, Benin (hereinafter, "SGB") to the tune of Eleven Billion Nine Hundred Million (11,900,000,000) CFA francs; and (3) by the Applicant to the tune of Eleven Billion Seven Hundred and Fifty-three Million (11,753,000,000) CFA francs.

4. The Applicant states that by notarised deeds dated 13 November and 16 December 2014, the consortium of banks entered into an agreement with SHRL for a credit facility totaling Eleven Billion Nine Hundred Million (11,900,000,000) CFA Francs.

5. He further submits that the notarial was completed by an additional clause dated 27 and 28 February 2017 for mortgage on an incomplete building belonging to the borrowing company with Land Title No.14140 in the Cotonou Land Register measuring 1 hectare 54 acres 34 centiares.

6. The Applicant alleges that he and SHRL, met all the conditions imposed by WADB for the disbursement of its loan, however, those directly incumbent on SGB could not be met for reasons attributable to the latter. For this reason, WADB cancelled its disbursement at a time when the construction of the building was almost completed.

7. He further submits that thereafter, SGB unilaterally denounced the current account binding it to SHRL and demanded to be paid the sum of Fourteen Billion Seven Hundred and Forty-nine Million Four

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, ruling (Provisional measures), 5 May 2020, §§ 4-5 and Corrigendum of 29 July 2020.

Hundred and Twenty-Five Thousand and Eight (14,749,425,008) CFA Francs, following a property seizure payment order dated 4 September 2019.

8. SGB has also initiated legal proceedings for the sale of the mortgaged building, by filing a schedule of charges on 11 September 2019 at the Registry of the Cotonou Commercial Court in Benin.

9. The Applicant alleges that the said Cotonou Commercial Court rendered Judgment No. 14/19/CSI/TTC on 19 December 2019 in first and last instance, the operative part of which reads as follows:

- Ruling publicly after hearing the parties in matters of real estate seizure litigation, before the law, in first and last resort;
- Declares that it has jurisdiction;
- Dismisses the requests for annulment of the order to pay, the schedule of charges and the lawsuit;
- Dismisses the requests for real estate and accounting expertise;
- Rules that the auction will take place on 30 January 2020 in the presence of Mr. Jean Jacques GBEDO, Notary in Cotonou;
- Reserves the costs.

10. On 30 January 2020, the court auctioned the SHRL building at the reserved price of seven billion (7,000,000,000) CFA francs, for lack of a bidder, with the proceeds to be paid to SGB.

11. The Applicant considers that the Cotonou Commercial Court in Benin court erred in rendering the decision of 19 December 2019 which denied him the right to an appeal. He contends that since that court ruled on the principle of a contested claim, the judgment could not be considered as final and not subject to appeal. He argues this on the basis of the provisions of Article 300 of the Organization for the Harmonization of Business Law in Africa Uniform Act Organizing the Harmonization in Africa of Business Law (OHADA) on the organizing of simplified recovery and enforcement procedures (hereinafter referred to as "UASPEP").[2]

12. The Applicant alleges that the judgment of the Cotonou Commercial Court No. 14/19/CSI/TTC of December 19, 2019 violates his rights to file an Application before this Court.

2 Article 300: Judicial decisions rendered in matters of seizure of property are not subject to appeal. They may be appealed only where they rule on the very principle of the claim or on the substantive grounds of the incapacity of one of the parties, the ownership, unseizability or inalienability of the seized property. The decisions of the court of appeal are not subject to opposition. The means of appeal are open under the conditions of common law.

B. The alleged violations

13. The Applicant alleges the violation of the following rights:
i. The right to a fair trial, protected by Article 7(1)(a)(d) of the Charter; and
ii. The right to property, protected by Article 14 of the Charter.

III. Summary of the Procedure before the Court

14. On 14 February 2020, the Applicant filed the Application together with a request for provisional measures. It was served on the Respondent State on 18 February 2020, with a request to file its Response to the request for provisional measures and on the merits within eight (8) and sixty (60) days, respectively from the receipt.

15. In its Order on the request for provisional measures, issued on 28 February 2020, the Court ordered the Respondent State to "suspend any transfer of Land Title No. 14140, Volume LXIX, folio 149 of the Cotonou Land Register to the successful bidder or any third party, and any dispossession of the Applicant of the property", in execution of the Judgment of the Cotonou Commercial Court of 19 December 2019. The Order was served on the parties on 5 March 2020.

16. The parties filed their pleadings on the merits and remedies within the time limits set by the Court.

17. Pleadings were closed on 8 March 2021 and the parties were duly notified.

IV. Prayers of the Parties

18. The Applicant prays the Court to:
i. Declare that it has jurisdiction;
ii. Declare the Application admissible;
iii. Declare that the Republic of Benin violated Articles 7(1) (a), 7(1) (d) and 14 of the African Charter on Human and Peoples' Rights;
iv. Order the annulment of Judgment ADD No.14/19/CSI/TCC of 19 December 2019 with all its legal effects;
v. Order the annulment of the results of the 30 January 2020 auction;
vi. Serve notice to the Applicant to produce evidence of the prejudice he suffered, certified by experts;
vii. Order the State of Benin to pay to him the sum of 72 500 000 000 FCFA as damages;

viii. Order the Republic of Benin to report to the Court within such time as the Court may determine on the implementation of the decision to be taken;

ix. Order the Republic of Benin to pay the costs.

19. The Respondent State prays the Court to:

i. Find that there is no violation of the human rights alleged to have been violated;

ii. Find that the Applicant seeks the annulment of Judgment ADD No. 14/19/CSI/TCC of December 19, 2019 issued by the Commercial Court of Cotonou, as well as the results of the auction sale.

iii. Find that the Court itself has already ruled that it is not Court of Appeal for decisions rendered by domestic courts;

iv. Find that the Court has no jurisdiction;

v. Consequently, declare that it does not have jurisdiction.

vi. Find that at the time of hearing the Application, the local remedies had not been exhausted before the parties brought the case before the African Court;

vii. Find that local remedies are available, effective and offer a chance of success;

viii. Consequently, to declare the request of Mr. Ghaby Kodeih inadmissible.

In the alternative, the Respondent State prays the Court to:

i. Find that there has never been a violation of the right to a fair trial.

ii. Find that the Respondent State has not violated Article 7(1) (a) (d) of the African Charter on Human and Peoples' Rights.

iii. Find that the Respondent State has not violated the Applicant's right to property and therefore has not violated the provisions of Article 14 of the African Charter on Human and Peoples' Rights.

iv. Find that the Applicant did not prove the alleged harm caused him by the Respondent State;

v. Find that the Respondent State did not commit any fault that c\ resulted in any harm requiring any compensation;

vi. Declare that there is no ground for compensation;

vii. Consequently, purely and simply dismiss the Application by Mr Ghaby Kodeih.

V. Jurisdiction

20. Article 3 of the Protocol provides:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned

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

21. Furthermore, according to Rule 49(1) of the Rules of Court, "The Court shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules".[3]

22. Based on the above-mentioned provisions, the Court must, for each application, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

23. The Court notes that in the instant case the Respondent State raises an objection based on the Court's lack of material jurisdiction.

A. Objection based on the Court's lack of material jurisdiction

24. The Respondent State notes that the Applicant seeks the annulment of Judgment No. 19/CSI/TCC of 19 December 2019 rendered by the Cotonou Commercial Court as well as the results of an auction sale.

25. It states that this request is tantamount to asking the Court to question the impugned judgment. It contends that the Court would effectively be exercising appellate jurisdiction, whereas according to its jurisprudence, in particular the judgment of 20 November 2015 in *Alex Thomas v United Republic of Tanzania*, it is not an appellate court with respect to domestic courts.

***

26. The Applicant submits that under Article 3(1) of the Protocol, the Court has jurisdiction insofar as the Respondent State ratified the Charter on 21 October 1986 and the Protocol on 22 August 2014. He further contends that on 8 February 2016, the Respondent State deposited the Declaration.

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

27. The Applicant further submits that the alleged violations relate to rights protected by Articles 7 and 14 of the Charter.

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28. With regard to the Respondent State's objection based on the fact that the Court is requested to sit as an appellate court, the Court notes that, in accordance with its established jurisprudence, it has jurisdiction to examine whether the relevant proceedings before the domestic courts meet the standards prescribed by the Charter or by any other relevant human rights instrument ratified by the State concerned.[4]

29. The Court observes that in the procedure before domestic courts, the Applicant alleges a violation of the right to a fair trial and the right to property protected by Articles 7 and 14 of the Charter respectively, the interpretation and application of which fall within its material jurisdiction.

30. Accordingly, the Court is not called upon to sit as an appellate court but rather to act within its material jurisdiction. It follows that the objection raised by the Respondent State is dismissed.

31. Therefore, the Court concludes that it has material jurisdiction to hear this case.

B. Other aspects of jurisdiction

32. Having found that there is nothing on record showing that it lacks jurisdiction with respect to the other aspects of jurisdiction, the Court concludes that it has:

i. Personal jurisdiction, insofar as the Respondent State is a party to the Charter, the Protocol and has deposited the Declaration. In this regard, the Court recalls its previous position that the Respondent State's withdrawal of its Declaration on 25 March 2020, has no bearing on the instant Application, as the withdrawal was made after

4 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190, § 14; *Kenedy Ivan v Tanzania*, ACtHPR, Application No. 25/2016, 28 March 2019, (merits and reparations) § 26; *Armand Guéhi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 493, §33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35. *Kalebi Elisamehe v United Republic of Tanzania*, *Tanzania*, Application No. 028/2015, Judgment of 26 June 2020, § 18.

the filing of this Application with the Court.[5]

ii. Temporal jurisdiction, insofar as the alleged violations occurred, in relation to the Respondent State, after the Respondent State became a party to the Charter and the Protocol, as mentioned in paragraph 2 of this Ruling.

iii. Territorial jurisdiction, insofar as the facts of the case and the alleged violations took place in the Respondent State's territory.

33. Accordingly, the Court holds that is has jurisdiction to determine the present Application.

VI. Admissibility of the Application

34. 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".

35. According to Rule 50(1) of the Rules of Court,[6] "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".

36. Rule 50(2) of the Rules of Court, which restates the provisions of Article 56 of the Charter, provides:

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. 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;

g. 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 See paragraph 2 of this Ruling.

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

37. The Court notes that the Respondent State raises an objection on admissibility of the Application due to non-exhaustion of local remedies.

A. Objection based on non-exhaustion of local remedies

38. The Respondent State contends that the decision whose annulment is sought by the Applicant was rendered under the provisions of the Uniform Act of Simplified Procedures and Enforcement Procedures (UASPEP) adopted on 10 April 1998 by the States Parties to the 17 October 1993 OHADA treaty, to which Benin is a party, as amended by the treaty of 17 October 2008.

39. The Respondent State assert that although the 19 December 2019 judgment was rendered in the first and last instance by the Cotonou Commercial Court, subsequently, on 31 December 2019, the Applicant appealed to the Cotonou Court of Appeal and also filed on 26 February 2020, an appeal in cassation at the Common Court of Justice and Arbitration (hereinafter referred to as the "CCJA") pursuant to Article 14 of the OHADA Treaty.

40. The Respondent State observes that without waiting for the outcome of the appeal procedure and even before the CCJA had been seized, the Applicant filed this Application before this Court.

41. The Respondent State, therefore concludes that the Application was not filed after the exhaustion of local remedies.

***

42. In his Reply, the Applicant alleges that the domestic courts lack impartiality and independence because of the massive invasion of the executive power in the Superior Council of the Judiciary (hereinafter referred to as "the SCJ") as a result of the new Article 1 of Organic Law No. 2018-02 relating to the SCJ. This law calls into question the principle of separation of powers and the independence of the judiciary justice.

43. The Applicant, further contends that the appeal to the CCJA is not a local remedy since, under Article 13 of the OHADA Treaty, the assessment of disputes relating to the application of uniform acts is a matter for domestic courts at first instance and on appeal.

44. He further submits that the appeal in cassation before the CCJA is an extraordinary remedy since the CCJA rules on law and not on fact, and that in accordance with the judgment in Application

No. 005/2013 *Alex Thomas v United Republic of Tanzania* the Applicant is not required to exhaust an extraordinary remedy. He concludes that local remedies have been exhausted.

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i. The appeal to the Cotonou Court of Appeal

45. The Court notes that the judgment of 19 December 2019 was rendered by the Commercial Court of Cotonou as a court of "first and last instance", in the context of a seizure of property.[7] This Court notes that the judgment in question can only be appealled to cassation before the CCJA.[8]

46. Therefore, the Court considers that the issue to be examined is the remedy of the the cassation appeal before the CCJA in order to determine whether the Applicant had to exhaust this remedy before filing this case before it.

47. In this regard, the Court considers that the exhaustion of the appeal before the Cotonou Court of Appeal is not relevant to the examination of the question of exhaustion of local remedies.

ii. Cassation appeal before CCJA

48. The Court notes that, pursuant to Rule 50(2) of the Rules, in order for an application to be admissible, local remedies must first be exhausted, except where they are unavailable, ineffective or insufficient, or where the proceedings have been unduly prolonged.[9]

49. The Court further considers that the remedies to be exhausted are those of a judicial nature that can be used without obstacle by the Applicant and that are effective, in the sense that they are "capable of giving satisfaction to the plaintiff" or of remedying the

7 Articles 246 to 334 of the Uniform Act Organizing Simplified Collection Procedures and Enforcement Measures adopted on 10 April 1998;

8 Article 14(4) of the OHADA Treaty: "The Court shall rule as above with regard to decisions delivered by the national courts of the States Parties in the same disputes, which are not appealable to the national Court of Appeal".

9 *Norbert Zongo and Others v Burkina Faso* (preliminary objections) *op. cit.* § 84.

situation in dispute. The Court emphasizes that the requirement to exhaust local remedies is assessed, in principle, on the date proceedings are instituted before it.[10]

50. The Court further points out that compliance with this requirement presupposes that the Applicant not only initiates the local remedies, but also awaits their outcome before filing his application with this Court.[11]

51. The Court recalls that the Applicant filed his application with the CCJA on 28 February 2020, that is, after filing the instant application with this Court on 14 February 2020.

52. The Court considers that in such circumstances, the Applicant should have waited for the outcome of this appeal before filing the Application before this Court,[12] in order to comply with the rule of exhaustion of local remedies.

53. The Court recalls that in support of his argument that he was not required to exhaust the remedy before the CCJA, the Applicant alleges that this remedy is not a local remedy, it is extraordinary and ineffective".

a. On the local nature of the appeal

54. The Court notes that the term "local remedies" applies to all the judicial means provided for in the domestic legal order of the State, with a view to enabling a case to be fully examined.

55. It is therefore a question of using all judicial means provided for by domestic legislation in an exhaustive manner.

56. The Court notes that integrating the provisions of the Ohada Treaty into the domestic law of the States does not require any specific procedure. The Rules provided for therein are common rules.[13]

57. The Court further observes that the OHADA Treaty establishes the CCJA, a jurisdiction common to seventeen (17) States, as a judge of cassation to hear all decisions rendered by the appellate courts of the Contracting States in all cases raising questions relating to the application of the Uniform Acts, as well as decisions not subject to appeal rendered by any court of the Contracting

10 *Yacouba Traoré v Republic of Mali*, ACtHPR, Application No. 010/2018, Judgment (jurisdiction and admissibility) 25 September 2020, § 41 et 42 ;

11 *Idem* note 9.

12 *Idem*, § 41.

13 *Idem*, § 41.

States.[14]

58. The Court notes that the CCJA has exclusive jurisdiction over the interpretation and application of matters governed by the Uniform Acts. It replaces not only the domestic supreme jurisdictions concerning appeals in matters governed by OHADA Uniform Acts, but also the domestic courts of the merits through its power of evocation.[15]

59. The Court therefore notes that the CCJA has integrated the judicial system of the Respondent State.

60. Consequently, the Court finds that the cassation appeal before the CCJA is a local remedy.

b. On the ordinary nature of the remedy

61. The Court recalls the Applicant's allegation that "the cassation appeal before the CCJA is an extraordinary remedy since it judges on the law and not on the facts and the Court does not consider such remedy".

62. The Court observes in the instant case that the cassation appeal before the CCJA is the only available remedy against appeal decisions and judgments not subject to appeal, rendered in matters governed by the Uniform Acts;

63. In addition, the rules of procedure before the CCJA indicate the extraordinary remedies of third party opposition and review,[16] which excludes by law the cassation appeal.

64. The Court concludes that the cassation appeal before the CCJA is an ordinary remedy.

c. On the effectiveness of the remedy

65. The Court has recognized that an effective remedy is one that has

14 Art. 1 of the Treaty : "The object of the present Treaty is to harmonise business law in the States Parties by the elaboration and adoption of simple modern common rules (…)".

15 Article 14(3)(4)(5) : "When sitting as a court of final appeal, the Court shall rule on decisions delivered by the Courts of Appeal of States Parties on all matters relating to the Uniform Acts and rules provided for in this Treaty with the exception of decisions administering criminal sanctions.
The Court shall rule as above with regard to decisions delivered by the national courts of the States Parties in the same disputes, which are not appealable to the national Court of Appeal.
Where the Court quashes the decision of the national court, it shall reconsider the case on its merits.

16 The Court shall rule as above with regard to decisions delivered by the national courts of the States Parties in the same disputes, which are not appealable to the national Court of Appeal.

the intended effect. It follows that the effectiveness of a remedy as such is the ability to remedy the situation complained of by the person seeking it.[17]

66. It also decided that the cassation appeal is not a impractical remedy since the cassation appeal can, in certain circumstances, lead to change or alter the merits of the challenged decision. Unless the appeal is made, it is impossible to know what the Court of Cassation would have decided.[18]

67. The Court notes in the instant case that in accordance with paragraphs 3 and 5 of Article 14 of the OHADA Treaty, the CCJA shall rule on decisions rendered in all cases raising questions relating to the application of uniform acts. As Article 14 of the said treaty emphasizes, "Where the Court quashes the decision of the national court, it shall reconsider the case on its merits". This power of evocation of the CCJA attests, to the effectiveness of appeal at the cassation as a remedy since it can lead to the modification of the impugned decision.

68. In the instant case, there is no doubt *a priori* that the CCJA has the ultimate capacity to bring about a change in the situation of the appellant on the merits of the case, should it find violations of the law in the treatment of the case by the court whose judgment is being challenged. As a result, the Court considers that an appeal to the CCJA is an effective remedy.

69. It therefore follows that the Applicant's arguments are not justified.

70. Accordingly, the Court finds that the Applicant has not exhausted local remedies so that the Application does not meet the requirement of Rule 50(2)(e) of the Rules.

B. Other conditions of admissibility

71. Having found that the Application has not satisfied the requirement in Rule 50(2)(e) of the Rules, the Court does not need to rule on the admissibility requirements set out in Article 56(1), (2), (4), (6), and (7) of the Charter and Rule 50(2)(a)(b)(d)(f) and (g) of the Rules,[19] as the admissibility requirements are cumulative. Therefore, if

17 Articles 47 and 49 of the CCJA Rules of Procedure.

18 *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso* (merits) (Judgment of 28 March 2014) 1 AfCLR 219 §68.

19 *Idem*, §70.

one condition is not met, the Application is inadmissible.[20]

72. In view of the foregoing, the Court declares the Application inadmissible**.**

VII. Costs

73. Each party prays that the other party be ordered to pay the costs of this Application.

***

74. According to Article 32(2) of the Rules,[21] "Unless otherwise decided by the Court, each party shall bear its own costs".

75. The Court notes that there is nothing in the circumstances of this case that warrants it to depart from this provision.

76. The Court therefore decides that each party should bear its own costs.

VIII. Operative part

77. For these reasons,

The Court,

Unanimously,

On jurisdiction

i. *Dismisses* the objection to its of jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Upholds* the objection based on non-exhaustion of local remedies;

iv. *Declares* the Application inadmissible.

On costs

v. *Orders* each party to bear its own costs.

20 ***Mariam Kouma and Ousmane Diabaté v Republic of Mali*** (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 237, § 63; ***Rutabingwa Chrysanthe v Republic of Rwanda*** (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 361, § 48; ***Collectif des anciens travailleurs ALS v Republic of Mali***, ACtHPR, Application No. 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

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

Onesmo v Tanzania (judgment) (2021) 5 AfCLR 506

Application 047/2016, *Ladislaus Onesmo v United Republic of Tanzania*

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant had unsuccessfully appealed against his conviction and sentence before the domestic courts of the Respondent State. He brought this Application claiming that his human rights were violated in the course of his trial and appeal before the domestic courts. The Court held that the Respondent State had violated the Applicant's right to defence by failing to provide him with free legal representation. Accordingly, the Court granted the Applicant damages for the moral prejudice suffered.

Jurisdiction (material jurisdiction, 19-21)

Admissibility (exhaustion of local remedies, 34-38)

Fair trial (assessment of evidence by domestic court, 56-57, 64; free legal representation, 69-71)

Reparations (basis for award, 73; measures of reparation, 74; proof of claim, 75; material prejudice, 81-82; moral prejudice, 87; indirect victims, 90; non-pecuniary reparations, 93-94)

I. The Parties

1. Ladislaus Onesmo (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania, who at the time of the filing of the Application was incarcerated at Butimba Central Prison, in Mwanza, serving thirty (30) years' prison sentence.

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

held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, one year after its deposit, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. On 18 May 2011, the Applicant (Second Accused) and Athuman Idd (First Accused) were accused of assaulting one Msinzi Sebabili (victim) with a knife, at Mchungaji Mwema, Ngara District and subsequently stealing his motorcycle. The motorcycle in question was found in the possession of one, Cosmas Revelian who informed the police that it had been handed over to him for custody by the Applicant and his co-accused.

4. The Applicant, was charged jointly with First Accused and Cosmas Revelian (Third accused) with the offence of armed robbery before the District Court at Ngara. By Judgment of 13 March 2012, the Applicant was sentenced to thirty (30) years imprisonment with twenty four (24) strokes of the cane, the First Accused was sentenced to a term of thirty (30) years imprisonment, while the Third accused was acquitted.

5. The Applicant and the First Accused, appealed the conviction and sentence before the High Court of Tanzania sitting at Bukoba[2] and this was dismissed on 27 April 2015 for lack of merit.

6. They then appealed before the Court of Appeal of Tanzania in Criminal Appeal No. 250 of 2015 which, by its Judgment of 15 February 2016, upheld the decision of the High Court. The Applicant then filed the Application before this Court.

B. Alleged violations

7. The Applicant alleges that:

i. "The Court of Appeal had not considered all the grounds then combined to 2 grounds, and that this procedure of the court had isolated him, as it was violating the fundamental right of being heard in the court of law as required by Article 3(2) of the Charter."

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37 to 39.

2 Criminal Appeal No.34 of 2012.

ii. "The judgment of the Court of Appeal pronounced on the 15.02.2016 was procured by error where the court had evaluated the evidence of the prosecution side widely."

iii. He was deprived of his right to legal assistance.

III. Summary of the Procedure before the Court

8. The Application was filed on 23 August 2016. It was served on the Respondent State on 15 November 2016 and to the entities listed in Rule 42(4) of the Rules[3] on 24 January 2017.

9. The Parties filed their pleadings on merits and reparations within the time stipulated by the Court.

10. Written pleadings were closed on 13 August 2021 and the parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the court to:

i. Find that the Respondent State has violated his rights provided for under Articles 2, 3(1)(2), 7(1)(c)(d) of the Charter;

ii. Restore justice where it was overlooked, quash conviction and sentence imposed upon him and set him at liberty;

iii. Grant him reparations pursuant to Article 27(1) of the Protocol to the Court, as follows:

a. United States Dollars Fifty Thousand (USD50,400) for loss of salary for the duration of the seven (7) years (84 months) imprisonment, at the rate of United States Dollars Two Hundred (USD200) per month, multiplied by three;

b. United States Dollars Eighty-Four Thousand (USD84,000) for moral damages at the rate of United States Dollars One Thousand (USD1,000) per month for seven (7) years (84 months) imprisonment;

c. United States Dollars Thirty Thousand (USD30,000), to each of his three children (Beheto Ladislaus, Johanita Ladislaus and Kaizilege Ladislaus), for moral damages;

d. United States Dollars Forty-Thousand (USD40,000) to his spouse, Getrudes Ladislaus, for moral damages;

e. United States Dollars Two Thousand Five Hundred (USD2,500) to each of his parents, Onesmo Petro and Mariam Onesmo;

f. United States Dollars Twenty-Thousand (USD20,000) to each of his two sisters, Merisian Onesmo and Onesta Onesmo.

iv. Order cost on Respondent State;

3 Formerly Rule 35(3) of the Rules of Court of 2 June 2010.

v. Grant any other order(s) or relief(s) sought that may deem fit to the circumstances of the complaint.

12. The Respondent State prays the Court to rule that:

i. The Court has no jurisdiction to adjudicate over the Application;

ii. The Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules[4] of the Court and should be declared inadmissible;

iii. The Respondent State did not violate the Applicant's rights provided under Article 2, 3(1)(2) and 7(1) of the Charter;

iv. The Applicant not to be granted reparations and his prayers be dismissed;

v. That the Application lacks merit and be dismissed in its entirety.

vi. The Application be dismissed with cost.

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 6 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 49(1) of the Rules,[5] "the Court shall conduct preliminarily examination of its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

15. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

A. Objection based on lack of material jurisdiction

16. The Respondent State objects to the Court's jurisdiction to adjudicate on the matters raised by the Applicant, arguing that, by praying the Court to re-examine the matters of fact and law examined by its judicial bodies, set aside their rulings and order his release, the Applicant is in fact asking the Court to sit as an appellate body. The Respondent State contends that in

4 Current Rule 50(2)(e) of the Rules of 25 September 2020.

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

accordance with Article 3(1) of the Protocol, Rule 26 of the Rules[6] and its decision in the matter of *Ernest Francis Mtingwi v Malawi*, the Court does not have jurisdiction over these issues.

17. The Applicant rebuts the Respondent State's allegation and asserts that the Court has jurisdiction as long as there is a violation of human rights, "on which it has mandate to determine upon and interpret them as to conform with the Charter and Protocol of the Court as well as whether the local court had met the test of international law in adjudicating on the matter in question."

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18. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it, provided the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.[7]

19. The Court recalls, its established jurisprudence, "that it is not an appellate body with respect to decisions of national courts".[8] However "… 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."[9]

20. In the present case, therefore, the Court will not be sitting as an appellate court, by examining the compliance of the judicial proceedings against the Applicant with the standards set out in the Charter and other human rights instruments ratified by the

6 Current Rule 29 of the Rules of Court of 25 September 2020.

7 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14; *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 025/2016, Judgment of 28 March 2019 (merits and reparations), § 26; *Mhina Zuberi v United Republic of Tanzania*, ACtHPR, Application No. 054/2016, Judgment of 26 February 2021 (merits and reparations), § 22; and *Masoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No. 008/2016, Judgment of 25 June 2021 (merits and reparations), §§ 21 to 23.

8 *Ernest Francis Mtingwi v Malawi* (jurisdiction) § 14.

9 *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) *§ 26; Armand Guehi v Tanzania* (merits and reparations), § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits), § 35.

Respondent State.

21. Accordingly, the Court dismisses this objection and holds that it has material jurisdiction.

B. Other aspects of jurisdiction

22. The Court notes that its personal, temporal and territorial jurisdiction are not contested by the Respondent State. Nonetheless, in line with Rule 49(1) of the Rules,[10] it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

23. In relation to personal jurisdiction, the Court recalls as indicated in paragraph 2 above, that the Respondent State has ratified the Protocol and deposited the Declaration under Article 34(6) of the Protocol with the Chairperson of the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[11] This Application having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court holds that it has personal jurisdiction.

24. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicants are based on the judgment by the Court of Appeal on 15 February 2016, that is, after the Respondent State ratified the Charter and the Protocol and deposited the Declaration. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[12] Consequently, the Court holds that it has temporal jurisdiction to examine this Application.

25. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State. Consequently, the Court holds that it has territorial jurisdiction.

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

11 *Andrew Ambrose Cheusi v Tanzania*, §§ 35 to 39.

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, §§ 71 to 77.

26. From the foregoing, the court holds that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

27. Article 6(2) of the Protocol provides that "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the charter".

28. Pursuant to Rule 50(1) of the Rules,[13] "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."

29. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> b. comply with the Constitutive Act of the Union and the Charter;
> c. not contain any disparaging or insulting language;
> d. not based exclusively on news disseminated through the mass media;
> e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f. 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;
> g. 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. Objection based on non-exhaustion of local remedies

30. The Respondent State has raised an objection to the admissibility of the Application in relation to the requirement of exhaustion local remedies.

31. Referring to the decision of the African Commission on Human and Peoples' Rights in Communication No. 333/20006, *Sahringon and Others v Tanzania,* the Respondent State argues that the

13 Formerly Rule 40 Rules of Court of 2 June 2010.

exhaustion of domestic remedies is a fundamental principle of international law.

32. The Respondent State avers that the Applicant had one further domestic remedy to exhaust, that is, the application for review of the Judgment of the Court of Appeal, pursuant to Rule 66 of the Rules of Procedure of the Court of Appeal, 2009. It therefore, considers that the domestic remedies were not exhausted and, consequently, the Application must be declared inadmissible.

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33. The Applicant refutes the Respondent State's assertion, arguing that he had "no need to look for an extra remedy from the Respondent State as to apply for Review or Revision of the local court, since the framework of the domestic legal system and the court of Appeal being the superior court to which the applicant applied, and his appeal was dismissed…"

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34. The Court recalls that pursuant to Article 56(5) of the Charter, whose requirements are mirrored in Rule 50(2) (e) 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.[14]

35. The Court recalls that it has held that in so far as the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had had the opportunity to redress the violations alleged by

14 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

the Applicant to have arisen from those proceedings.[15]

36. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 15 February 2016. Therefore, the Respondent State had the opportunity to address the violations allegedly arising from the Applicant's trial and appeals.

37. With respect to review, the Court has held that an application for review of the Court of Appeal's judgment is an extraordinary remedy which applicants are not required to exhaust.[16]

38. Consequently, the Court holds that the Applicant has exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules. Therefore, it dismisses the Respondent State's objection based on non-exhaustion of local remedies.

B. Other conditions of admissibility

39. The Court notes that the requirements of the admissibility of an application laid down in Article 56 sub-articles (1),(2),(3),(4), (6) and (7) of the Charter, which requirements are reiterated in sub-rules 50 (2)(a),(b), (c), (d), (f) and (g) of the Rules,[17] are not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

40. The Court notes that the Applicant has indicated his identity, and holds that the condition set out in Rule 50(2)(a) of the Rules has been met.

41. The Court notes that the claims made by the Applicant seeks to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the African Union stated in Article 3(h) of its Constitutive Act is the promotion and protection of human and peoples' rights. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

42. The Court further 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

15 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 juin 2016) 1 AfCLR 624, § 76.

16 *Mohamed Abubakari v Tanzania* (merits), § 78.

17 Formerly, Rule 40(1)(2)(3)(4)(6) and (7) of the Rules of 2 June 2010.

50(2)(c) of the Rules.

43. With respect to the requirement set out under Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

44. Regarding the filing of the Application within a reasonable period of time, the Court notes that local remedies were exhausted when the Court of Appeal rendered its judgment on 15 February 2016. The Application before this Court was filed six (6) months and seven (7) days later, on 23 August 2016. For the purpose of Rule 50(2)(d) of the Rules, this period of time is manifestly reasonable.

45. Finally, with respect to the requirement laid down in Rule 50(2)(g) 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.

46. In light of the foregoing, the Court holds that the instant Application fulfils all admissibility requirements set out under Article 56 of the Charter and Rule 40 of the Rules, and accordingly, declares it admissible.

VII. Merits

47. The Court notes that the Applicant's alleged violations are related to the right to a fair trial and fall under two categories, namely: i) the allegation related to the assessment of the evidence; and ii) the alleged violation of the right to legal assistance. These allegations fall within the right to a fair trial protected under Article 7(1) of the Charter.

A. Allegation related to the assessment of evidence

48. The Applicant alleges that the Court of Appeal had not considered all the grounds of appeal which were then combined in two grounds and that "… this procedure of the court had isolated him, as it was violating the fundamental right of being heard in the court of law as required by Article 3(2) of the Charter".

49. The Applicant avers that "[t]he judgment of the Court of Appeal pronounced on the 15.02.2016 was procured by error where the court had evaluated the evidence of the prosecution side widely."

50. The Applicant argues that there were contradictions between the descriptions of the motorcycle that was allegedly stolen and the one that was in his possession. He further argues that there were contradictions between the registration numbers of the

two motorcycles. He also submits that the alleged seller of the motorcycle to the victim did not testify in court.

51. The Applicant avers that "the Court of Appeal and its subordinate Court has failed to consider and or had misdirected and non-directed itself on apprising the evidence and or the doctrine of recent possession where all factors therein must co-exist before being relied on". He adds that "the ownership which is the utmost important of the alleged stolen motor cycle was not properly established and was further doubtful and unreliable."

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52. The Respondent State submits that the Court of Appeal found that though the Appellants filed separate memoranda of appeals, there were repetitive issues and grounds of appeal from both appellants. As a result, the Court of Appeal consolidated the appeals on three aspects:

i. the doctrine of recent possession;

ii. proof of, or passing of ownership of the motorcycle from the original owner to the victim of the armed robbery and the adequate description of the motorcycle;

iii. the disparity in the registration card number for the motorcycle that was tendered and what was recorded by the trial magistrate to be an exhibit was pointed out as having weakened the case for the prosecution.

53. The Respondent State further submits that both Appellants were given the opportunity to address the court orally, separately, and at no time was the Applicant isolated from the procedure nor was he deprived of his right to be heard. The Respondent State avers that all the grounds of appeal were duly considered by the Court of Appeal.

54. The Respondent State notes that the right to be heard is provided for under Article 7 of the Charter and not Article 3(2) thereof, which provides that every individual shall be entitled to equal protection of the law. The Respondent State therefore submits that the Applicant was accorded both the right to be heard and equal protection of the law as provided by Articles 7 and 3(2) of the Charter, respectively.

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55. The Court notes that the Applicant's alleged violation does not fall under Article 3 of the Charter,[18] but rather under Article 7(1), which provides that: 1. "Every individual shall have the right to have his cause heard".

56. The Court observes that the question that arises is whether the Applicant's grounds of appeal were duly examined by the Court of Appeal, as required by Article 7(1) of the Charter. On this issue, the Court has consistently held that:

> [T]he examination of particulars of evidence is a matter that should be left for the domestic courts, considering the fact that it is not an appellate court. The Court may, however, evaluate the relevant procedures before the national courts to determine whether they conform to the standards prescribed by the Charter or all other human rights instruments ratified by the State concerned.[19]

57. The Court recalls that it has held that "fair trial requires that the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on a strong and credible evidence."[20] Thus, the assessment of all the arguments presented in the appeals is fundamental.

58. In the instant case, the Court notes from the record that, the Applicant's case was heard successively in the District Magistrate's Court, the High Court and the Court of Appeal. The record also shows that the Applicant had the opportunity to participate in all the proceedings, including during the delivery of the judgment. These facts are not disputed by the Applicant. Accordingly, the Court finds that the Applicant has not established the claim that he was excluded from the proceedings before the national courts.

59. On the consolidation of the grounds of appeal, the Court notes that the grounds were synthesized into three (3) as follows: i) the ownership of the motorcycle ii) the disparity between the registration number of the motorcycle and the registration number recorded during the trial and iii) the application of the doctrine of

18 "1.Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law."

19 *Minani Evarist v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402, § 54. See also *Ernest Francis Mtingwi v Tanzania* (jurisdiction), § 14; *Alex Thomas v Tanzania* (merits), § 130; *Mohamed Abubakari v Tanzania* (merits), §§ 25 and 26; *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65.

20 *Mohamed Abubakari v Tanzania* (merits), § 174.

recent possession.

60. As regards the ownership of the motorcycle, the Court of Appeal found that:

> [t]hough the question of proof of ownership was raised we are however of the settled view that PW1 sufficiently explained, and he was believed that he had bought the motorcycle from one Salum Khalifah but at the time of the commission of the crime he had not formally transferred ownership into his name.[21]

61. The Court of Appeal especially noted that the Applicant had not proved that he was the owner of the motorcycle in his possession.[22] Furthermore, the Applicant and the First Accused contradicted each other on the ownership of the motorcycle.[23]

62. With regard to the disparity of the registration number of the motorcycle and the registration number recorded during the trial, the Court of Appeal found that such contradiction was irrelevant as the evidence of the victim's ownership of the motorcycle was established.[24]

63. The Court notes finally, that the Court of Appeal analysed the doctrine of recent possession and confirmed that all its elements were proven, namely: (i) the property is found with the accused person; (ii) the property is positively identified as that of the complainant; (iii) the property was recently stolen from the complainant; and (iv) the property must relate to the one on the charge sheet. The Court of Appeal therefore dismissed this ground of appeal.

64. The Court notes that the obligation to examine all the arguments on appeal does not imply that they cannot be consolidated in order to facilitate their examination, unless this would result in an injustice. In the instant case, the Court finds no anomaly in the consolidation made by the Court of Appeal and neither has the Applicant demonstrated that such consolidation resulted in any injustice.

65. From the foregoing, the Court holds that the alleged violation by the Applicant has not been established and therefore dismisses

21 Court of Appeal judgment of 15 February 2016, page 5, § 2.

22 *Idem*, page 7, § 2: "They gave no explanation how the motorcycle came into their possession other through the robbery that was perpetrated against PW1."

23 *Idem*, page 7, § 1: "the appellants were throwing the blame at each other in connection to possession of the stolen motorcycle."

24 *Idem*, page 6, § 2: "… the fact that he [trial magistrate] recorded different number alone cannot be the basis of absolving the appellants of culpability in view of other circumstances connecting them to the commission of the crime. The major question in this case is whether it was proved that the appellants were found with motorcycle that was robbed from PW1…"

this allegation.

66. The right to free legal assistance

67. The Applicant contends that he was not represented by a lawyer during the proceedings before domestic courts, which he considers to be a violation of Article 7(1)(c) of the Charter.

68. The Respondent State did not respond specifically to this allegation.

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69. The Court notes that Article 7(1)(c) of the Charter, provides that: "Every individual shall have the right to have his cause heard. This comprises: … c) the right to defence, including the right to be defended by Counsel of his choice".

70. The Court has held that, Article 7(1)(c) of the Charter as read together with Article 14(3)(d)[25] of the International Covenant on Civil and Political Rights (ICCPR),[26] establishes the right to free legal assistance where a person cannot afford to pay for legal representation and where the interest of justice so requires.[27] The interest of justice includes where the Applicant is indigent, the offence is serious and the penalty provided by the law is severe.[28]

71. The Court notes that it is clear from the Judgment of the Court of Appeal that the Applicant was not provided free legal assistance throughout the proceedings in the national courts. The Court further notes that it is not disputed that the Applicant is indigent, that the offence of armed robbery he was charged with is serious and that the thirty (30) years prison sentence set out as the minimum upon conviction in such cases is severe. Therefore, the interest of justice required that the Applicant should have been

25 "3.In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … (d) … To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; …"

26 The Respondent State ratified the International Covenant on Civil and Political Rights on 11 June 1976.

27 *Alex Thomas v Tanzani*a (merits), § 114.

28 *Alex Thomas v Tanzania* (merits), § 116 to 124. See also *Mohamed Abubakari v Tanzania* (merits), §§ 138 to 139; *Minani Evarist v Tanzania* (merits and reparations), § 68; *Diocles William v United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 426, § 85; Anaclet *Paulo v United Republic of Tanzania* (merits) (2018) 2 AfCLR 446, § 92.

provided with free legal assistance, regardless of whether or not he requested for such assistance.

72. The Court therefore holds that by failing to provide the Applicant free legal representation throughout the proceedings before the domestic courts, the Respondent State has violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

VIII. Reparations

73. The Court notes that Article 27(1) of the Protocol stipulates 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."

74. The Court considers that for reparations claims to be granted, the Respondent State should be internationally responsible, the reparation should cover the full damage suffered, there should be the causal nexus between the wrongful act and the harm caused.[29]

75. The Court also restates that measures that a State could take to remedy a violation of human rights can 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.[30]

76. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers.[31] With regard to moral damages, the Court has held that the requirement of proof is not strict [32] since it is presumed that there is prejudice caused when violations

29 *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 to 31; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, §§ 52 to 59; and *Reverend Christopher* R. *Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§. 27 to 29.

30 *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 23 November 2020 (merits and reparations), § 96.

31 *Kennedy Gihana and Others v Republic of Rwanda*, ACtHPR, Application No. 017/2015, Judgment of 28 November 2019 (merits and reparations), § 139; See also *Reverend Christopher R. Mtikila v Tanzania* (reparations), § 40; *Lohé Issa Konaté v Burkina Faso* (reparations), § 15(d); and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

32 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55. See also *Kalebi Elisamehe v Tanzania*, § 97.

are established.[33]

77. The Court has found that the Respondent State violated the Applicant's right to a fair trial by failing to provide him with free legal assistance, contrary to Articles 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

78. It is against these findings that the Court will consider the Applicant's requests for reparation.

A. Pecuniary reparations

79. The Applicant seeks pecuniary reparation for material and moral prejudice.

i. Material prejudice

80. The Applicant alleges that he was a businessman in the hotel and transport industry and that his imprisonment caused him material damage. Therefore, he prays the Court to grant him reparations in the amount of United States Dollars Fifty Thousand (USD50,400), for loss of salary for the duration of the seven (7) years (84 months) imprisonment, at the rate of United States Dollars (USD200) per month, multiplied by three (3).

81. The Respondent State did not respond specifically to this allegation.

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82. The Court recalls that in order for a claim for material prejudice to be granted, an applicant must show a causal link between the alleged violation and the loss suffered, and further, prove the loss suffered, with evidence.[34]

33 *Ally Rajabu and Others v United Republic of Tanzania*, ACtHPR, Application 007/2015, Judgment of 28 November 2019 (merits and reparations), § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application 009/2015, Judgment of 28 March 2019 (merits and reparations), § 119; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

34 *Armand Guehi v Tanzania* (merits and reparations), § 181; *Norbert Zongo & Autres v Burkina Faso* (reparations), § 62.

83. In the instant case, the Court notes that the Applicant has not established the link between the violation found and the compensation that he claims. Furthermore, the Applicant did not submit any documentary evidence to prove the existence of the business, and/or his monthly income before his incarceration.[35] Rather, the Applicant merely based his claim on his incarceration which this Court did not find to be unlawful.

84. The Court therefore dismisses this claim.

ii. Moral prejudice suffered by the Applicant

85. The Applicant prays the Court to grant him reparations in the amount of United States Dollars Eighty Four Thousand (USD84,000), for seven (7) years (84 months) imprisonment, at the rate of United States Dollars (USD1,000) per month.

86. The Respondent State, did not respond on this prayer.

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87. The Court notes that the violation it established of the right to free legal assistance caused moral prejudice to the Applicant. The Court therefore, in exercising its discretion, awards an amount of Tanzanian Shillings Three Hundred Thousand (TZS300,000) as fair compensation.[36]

iii. Moral prejudice suffered by indirect victims

88. The Applicant prays the Court to award damages for moral prejudice suffered by the indirect victims as follows:

a. United States Dollars Thirty Thousand (USD30,000) to each of his three children (Beheto Ladislaus, Johanita Ladislaus and Kaizilege Ladislaus), for moral damages;

b. United States Dollars Forty-Thousand (USD40,000) to his spouse, Getrudes Ladislaus, for moral damages;

35 *Christopher Jonas v United Republic of Tanzania,* ACtHPR, Application No. 011/2015, Judgment of 25 September 2020 (reparations), § 20; *Armand Guehi v Tanzania* (merits and reparations), § 18.

36 *Mhina Zuberi v Tanzania* (merits and reparations), § 106; *Anaclet Paulo v Tanzania* (merits and reparations), § 107; *Minani Evarist v Tanzania* (merits and reparations), § 85; *Kalebi Elisamehe v Tanzania* (merits and reparations), § 108.

c. United States Dollars Two Thousand Five Hundred (USD2,500) to each of his parents, Onesmo Petro and Mariam Onesmo;

d. United States Dollars Twenty Thousand (USD20,000) to each of his two sisters, Merisian Onesmo and Onesta Onesmo.

89. The Respondent State, did not respond on this prayer.

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90. The Court notes that with regard to indirect victims, as a general rule, moral prejudice is presumed with respect to parents, children and spouses while for other categories of indirect victims, proof of existence of moral prejudice is required. In general, reparation is granted only when there is proof of spousal relation, of marital status or for other close relatives, documents showing filiation with an applicant, including birth certificates for children and parents, are adduced.[37] In the case, the Applicant has not presented evidence of a marital or family relationship with the alleged indirect victims.

91. In view of the above, the claim for moral damages for the Applicant's family members, as indirect victims, is dismissed.

B. Non-pecuniary reparations

92. The Applicant prays the Court to set him at liberty.

93. The Respondent State submits that the Applicant's prayer to be set at liberty is beyond the jurisdiction of the Court since it can only be granted in exceptional circumstances, which the Applicant has failed to demonstrate and he is serving a lawful sentence provided for by statute.

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37 *Norbert Zongo and others v Burkina Faso* (reparations), § 54; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135; *Léon Mugesera v Republic of Rwanda*, ACtHPR, Application No. 012/2017, Judgment of 27 November 2020 (merits and reparations), § 148.

94. The Court recalls that it has established that it can only order the release:

> "[I]f 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."[38]

95. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant's right to a fair trial for failing to provide him with free legal assistance. Without minimising the gravity of the violation, the Court considers 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 circumstances to justify the order for his release.[39]

96. In light of the facts and circumstances indicated above, this prayer is therefore dismissed.

IX. Costs

97. The Applicant prays the Court that the costs be borne by the Respondent State, which, in turn, prays that the Applicant be ordered to bear the costs.

98. The Court notes that Rule 32(2) of the Rules[40] provides that "unless otherwise decided by the Court, each party shall bear its own costs".

99. The Court finds that the circumstances of the case do not warrant the Court to depart from this provision. Consequently, the Court orders that each party bears its own costs.

38 *Minani Evarist v Tanzania* (merits and reparations), § 82; See also *Jibu Amir alias Mussa and Saidi Ally alias Mangaya v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits and reparations), § 96; and *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84; and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 111.

39 *Jibu Amir alias Mussa and Saidi Ally alias Mangaya v Tanzania* (merits and reparations), § 97; *Kalebi Elisamehe v Tanzania* (merits and reparations), § 112; and *Minani Evarist v Tanzania* (merits and reparations), § 82.

40 Formerly Article 30(2) of the Rules of Court of 2 June 2010.

X. Operative part

100. For these reasons,
The Court,
Unanimously,
On jurisdiction
i. *Dismisses* the objection to the jurisdiction of the Court;
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objection to the admissibility of the Application;
iv. *Declares* the Application admissible.

On merits
v. *Finds* that the Respondent State has not violated the Applicant's right to be heard under Article 7(1) of the Charter, for poor assessment of the evidence;
vi. *Finds* that the Respondent State has violated the Applicant's right to defence under Article 7(1)(c) of the Charter as read together with Article14(3)(d) of the International Covenant on Civil and Political Rights, for failure to provide him free legal assistance .

On reparations
Pecuniary reparations
vii. *Dismisses* the Applicant's prayer for material damages;
viii. *Dismisses* the Applicant's prayer for reparation for moral prejudice suffered by indirect victims;
ix. *Grants* the Applicant damages for the moral prejudice he suffered and awards him an amount of Three Hundred Thousand Tanzanian Shillings (TZS300,000) as fair compensation;
x. *Orders* the Respondent State to pay the sum awarded under ix 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
xi. *Dismisses* the Applicant's prayer for the Court to order his release from prison.

On implementation of the judgment and reporting
xii. *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

xiii. *Decides* that each party shall bear its own costs.

Onyachi & Anor v Tanzania (reparations) (2021) 5 AfCLR 527

Application 003/2015, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*

Judgment, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

In a 2017 judgment, the Court held that the Respondent State had violated some of the human rights of the Applicants who had been arrested in Kenya and extradited to the Respondent State where they were convicted of armed robbery. In this judgment on reparations, the Court granted the Applicants damages for the moral prejudice suffered and inter alia, ordered their release from prison.

Reparations (basis for award, 18; measures of reparation, 20; proof of claim, 75; material prejudice, 21, 30-31; material prejudice of indirect victims, 36-37; legal fees, 39; moral prejudice, 47-50; moral prejudice of indirect victims, 58-60; non-pecuniary reparations, release as an exceptional relief, 63-66)

I. Brief background of the matter

1. In their Application filed before the Court on 7 January 2015, Messrs Kennedy Owino Onyachi and Charles John Mwanini Njoka (hereinafter referred to as "the Applicants") alleged that their rights to equality and equal protection of the law, liberty and security, freedom against torture and ill-treatment and their right to a fair trial had been violated by the Respondent State. The Applicants asserted that the said violations occurred after they were illegally arrested and extradited from the Republic of Kenya to the Respondent State and were convicted of robbery on the basis of improperly obtained evidence.

2. On 28 September 2017, the Court rendered its judgment whose operative part on the merits at paragraphs v-ix reads as follows:

v *Declares* that the Respondent has not violated Articles 3, 5, and 7(2) of the Charter.

vi. *Finds* that the Respondent violated Articles 1, 6 and 7(1) (a), (b) and (c) of the Charter.

vii. *Orders* the Respondent State to erase the effects of the violations established through the adoption of measures such as presidential pardon or any other measure resulting in the release of the Applicants as well as any measure leading to erasing of the consequences

of the violations established and to inform the Court, within six (6) months, from the date of this judgment of the measures taken.

viii. *Grants*, in accordance with Rule 63 of the Rules of Court, the Applicants to file submissions on the request for reparations within thirty (30) days hereof, and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant's submissions.

ix. *Reserves* its ruling on the prayers for other forms of reparation and on costs.

3. It is this judgment that serves as the basis of the present Application for reparations.

II. SUBJECT OF THE APPLICATION

4. On 30 July 2018, the Applicants filed their written submissions for reparations. In their submissions, the Applicants prayed the Court to award them reparations on the basis of its findings in the judgment on merits.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

5. On 3 October 2017, the Registry transmitted a certified true copy of the judgment on the merits, to the Parties.

6. The Applicants, filed their submissions on reparations on 30 July 2018 after being granted two extensions of time. The submissions were transmitted to the Respondent State on 1 August 2018 with a request that it should file its Response within thirty (30) days of receipt.

7. On 27 September 2018, the Respondent State requested further extension of time to file its submissions in Response and it was granted thirty (30) days extension from 1 October 2018.

8. Despite additional extensions of time and reminders sent on 7 January 2019**,** 19 September 2019 and 25 March 2020, the Respondent State failed to file its Response to the submissions on reparations.

9. Pleadings were closed on 16 November 2020 and the Parties were duly notified. By the same notice, the Parties were also notified that, pursuant to Rule 63 of the Rules, in the absence of a Response from the Respondent State to be filed within forty five (45) days from the date of receipt, the Court would enter a judgment in default.

10. On 12 May 2021, the Respondent State filed its Response to the Applicant's submissions on reparations, together with a request

for leave to file its Response out of time.

11. On 20 July 2021, the Court, in the interest of justice, issued an order for reopening of pleadings and accepted the Respondent State's Response as properly filed. On the same date, the Order re-opening pleadings and the Respondent State's Response were transmitted to the Applicants, requesting them, to file their Reply within thirty (30) days of receipt of the notice.

12. On 20 August 2021, the Registry sent a reminder to the Applicants to file their Reply to the Respondent State's submissions on reparations within fifteen (15) days of receipt.

13. On 23 August 2021, the Respondent State requested the Court to proceed with the determination of the matter, should the Applicants fail to comply with the Court's order to file their Reply within the prescribed time.

14. Pleadings were closed on 6 September 2021 and parties were duly notified.

IV. Prayers of the Parties

15. The Applicants pray the Court to grant the following reparations:

i. Restoration of the Applicants' liberty;

ii. The amount of twenty thousand dollars (USD 20,000) each to the Applicants as a direct victim for the moral prejudice suffered;

iii. The amount of five thousand dollars (USD 5,000) each to Charles John Mwaniki Njoka's indirect victims;

iv. The amount of five thousand dollars (USD 5,000) each to Kennedy Owino's indirect victims;

v. The amount of ten thousand dollars (USD 10,000) to each group of the Applicants' indirect victims for the material prejudice suffered;

vi. The amount of twenty thousand dollars (USD 20,000) in legal fees;

vii. The amount of one thousand six hundred dollars (USD 1,600) for expenses incurred.

16. On its part the Respondent State prays that:

i. The judgment of the Court dated 28th September, 2018 is sufficient reparation to the prayers found in the Applicants' submission for reparations;

ii. The Applicants' claim for reparations be dismissed in its entirety with costs;

iii. Any other relief(s) this Court may deem fit to grant

V. Reparations

17. Article 27(1) of the Protocol provides that: "If the Court finds that

there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

18. 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".[1]

19. The Court also reaffirms 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."[2]

20. Measures that a State must 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.[3]

21. The Court reiterates that with regard to material prejudice, the general rule is that there must be a causal link between the established violation and the prejudice suffered and the burden of proof is on the Applicant who has to provide evidence to justify their prayers.[4] Exceptions to this rule include moral prejudice, which need not be proven, since presumptions are made in favour of the Applicant and the burden of proof shifts to the Respondent State.

22. In the instant case, in its Judgment on the merits, the Court established that the Respondent State violated the Applicants' right to liberty and security and their right to a fair trial contrary to Articles 6 and 7(1)(a), (b) and (c) of the Charter. As a consequence

1 *Mohamed Abubakari v United Republic of Tanzania,* ACtHPR, Application No. 007/2013, Judgment of 4 July 2019 (reparations), § 19; *Alex Thomas v United Republic of Tanzania,* AfCHPR, Application No. 005/2013, Judgment of 4 July 2019 (reparations), § 11; *Lucien Ikili Rashidi v United Republic of Tanzania,* ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and reparations), §§ 119*; Ingabire Victoire Umuhoza v Rwanda*(reparations) (2018) 2 AfCLR 202, § 19.

2 *Mohamed Abubakari v Tanzania* (reparations), § 20; *Alex Thomas v Tanzania* (reparations), § 12; *Umuhoza v Rwanda* (reparations), § 20; *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 118.

3 *Mohamed Abubakari v Tanzania* (reparations), § 21; *Alex Thomas v Tanzania* (reparations), § 13; *Ingabire Victoire Umuhoza v Rwanda* (reparations)*,* § 20.

4 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v Burkina Faso,* (reparations) (2016) 1 AfCLR 346, § 15, *Mohamed Abubakari v Tanzania* (reparations), § 22*, Alex Thomas v Tanzania* (reparations), § 14.

of these violations, the Court also found violation of Article 1 of the same.

23. Relying on the above finding of the Court, the Applicants pray the Court to award them damages in the form of pecuniary and non-pecuniary reparations.

A. Pecuniary Reparations

i. Material Prejudice

a. Material prejudice suffered by the Applicants

24. The Applicants allege that the grant of monetary compensation, based on the principle of equity for the injury suffered would give them the feeling of fair reparation. Citing the jurisprudence of the Inter-American Court of Human Rights in S*awhoyamaxa Indigenous Community v Paraguay* and that of the European Court of Human Rights in the case of *Young*, *James* & *Webster v United Kingdom*, the Applicants assert that pecuniary prejudice includes loss of income suffered by the victims and the expenses incurred such as the loss of earnings and potential for loss of earnings, for example, pension rights, and replacement of objects lost or damaged.[5] The Applicants also aver that a disruption of one's life plan has been ruled to entitle one to reparations.

25. In this regard, the Applicants submit that, they lost their business because of their imprisonment. They claim that before their arrest, they had companies. They contend that the first Applicant's company was named Mwangaza Electrical Work Co. Ltd and the second Applicant owned Tech Dome Ltd with a Certificate of Incorporation No. 102037. According to the Applicants, their life plans were severely disrupted such that they were not able to realise their plan of growing their companies and had no opportunity to make arrangements to organise business while they were away. Moreover, the Second Applicant, Mr. Njoka contends that he had a plan of providing high-quality education to his children but he could not do so as some of his properties were sold to pay off his debts as a result of his imprisonment.

5 S*awhoyamaxa Indigenous Community v Paraguay*. Merits, reparations and costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006), § 216, *Young*, *James* & *Webster v United Kingdom*, 44 Eur.Ct.H.R. (ser. A) (1981), § §10-11.

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26. On its part, the Respondent State concedes that the Court may award reparations to individuals when a State is found to be in violation of human rights and the said violations have caused harm. The Respondent State further asserts that the award of reparations is governed by certain rules of international law, including the principles of burden of proof, standard of proof and the requirement of a causal link between violations of human rights and a State's wrongful conduct.

27. The Respondent State further submits that the burden of proof generally lies with the person seeking remedies. With respect to standard of proof, the Respondent State argues that a victim must show that it is "more probable than not" that he/she is entitled to the reparations requested and in principle and practice, all aspects of the claim, that is , the victim's identity, the harm suffered and causation are subject to this standard of proof. Furthermore, the Respondent State avers that reparations shall accrue only where there is a causal link between the established wrongful act and the alleged prejudice.

28. Relying on the foregoing principles, the Respondent State contends that in the instant Application, the Applicants have failed to prove that they are entitled to reparations in accordance with the standard of proof required of them. It also argues that the Applicants failed to show a causal link between the established violations of the right to legal representation or their right to liberty and the extent of the harm suffered whether directly or indirectly as a result of such violations.

29. The Respondent State adds that in order to assist the Court to assess material loss, an applicant is required to support such claims with evidence relevant to the actual loss suffered as a result of the violation complained of. In the instant Application, the Respondent State asserts that the Applicants failed to provide any evidence supporting their monetary claims; as such, the application for reparation lacks merit. Furthermore, the Respondent State submits that the life plan of the Applicants was disrupted by their own action; that is, if they had not committed any crime, they would not have been detained and sentenced to serve a thirty (30) year sentence in prison.

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30. The Court recalls that in order for a claim for material prejudice to be granted, an applicant must show a causal link between the established violation and the loss suffered, and further prove the loss suffered.[6] In the instant case, the Court notes that the Applicants have not established the link between the violations established and the material loss which they claim to have suffered. Furthermore, though they filed affidavits, they did not provide documentary evidence such as business licences, registration with Revenue Authorities, etc. proving the existence of businesses that they alleged to have had before their arrest and conviction.[7]

31. The Court, therefore, dismisses the Applicants' prayers for pecuniary damages for the material prejudice that they allege to have suffered as a result of their conviction and imprisonment.

b. Material prejudice suffered by indirect victims

32. The Applicants allege that their family and close relatives, the indirect victims, suffered financial loss due to their incarceration. The Applicants elaborate that their family and close relatives' day-to day lives were disrupted when they had to make various trips from Kenya to Dar es Salaam to visit them in prison, attend court hearings, cater for the Applicants' meals, medication, legal assistance and other subsidiary expenses.

33. On this basis, the Applicants pray the Court to grant an amount of United States Dollars Five Thousand (USD 5000) to each group of the Applicants' indirect victims for such material loss.

34. The Applicants list names of family members and close family members who are the alleged indirect victims, as follows:

i. For Mr Kennedy Owino Onyachi - Mary Onyachi, Iscar Onyachi, Hassan Onyachi, George Onyachi, Susan Onyachi Lilian Onyachi, Winnie Onyachi, Jury Onyachi, Oscar Onyachi, Gerald Onyachi, Judy Onyachi and Mercy Onyachi.

6 See *Armand Guehi v Tanzania* (merits and reparations), § 181; *Norbert Zongo and Others v Burkina Faso* (reparations), § 62.

7 *Christopher Jonas v United Republic of Tanzania,* Application No. 011/2015. Judgment of 25 September 2020 (reparations), § 20, *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 18.

ii. For Charles John Mwanini Njoka: Teresiah Wangari Ndengwa (wife), Stephanie Njoki Mwaniki (child), Brian Kiarie Mwaniki (child), Mary Njoki Mukirae (mother), Mosses Mukirae Njoki, Elizabeth Nyakibia, and George Thairu Njoki (siblings), Francis Ndegwa Gituturi (father), Lussiah Warigia Ndegwa (mother in law), David Muroki Ndegwa (deceased), Hannah Heta Ndegwa, Benedict Wanijiku Ndegwa (brother in law), Jane Nyambura Njuguna (cousin).

35. The Respondent State argues that, for indirect victims, the Applicants have failed to submit marriage certificates, birth certificates or any other document showing the level of dependency or previous record of dependency of the alleged indirect victims on the Applicants.

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36. The Court notes that in order to claim reparations for material prejudice, indirect victims have to submit evidence of filiation with an applicant and proof of the alleged prejudice. In the instant Application, the Applicants neither filed evidence of filiation with the aforementioned indirect victims nor adduced any other proof such as medical bills or receipts of payments for transportation, food and legal assistance, to substantiate the claims that the indirect victims indeed sustained material prejudice.[8] The Applicants also did not demonstrate the existence of a causal link between the established human rights violations and the material prejudice allegedly suffered by the indirect victims.

37. The Court therefore dismisses the Applicants' prayers for pecuniary reparations for the material loss allegedly suffered by their indirect victims.

c. Legal fees for proceedings before national courts

38. The Applicants, relying on the Court's decision in the *Zongo* case,[9] pray the Court to grant them United States Dollars Five thousand (USD 5000) each for legal fees incurred to hire a lawyer to defend themselves in national proceedings where they were

8 *Christopher Jonas v United Republic of Tanzania* (reparations), § 27, *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135.

9 *Norbert Zongo and Others v Burkina Faso* (reparations), § 79.

represented by Moses Maira & Co. Advocates of P. O. Box 2826, Dar es Salaam.

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39. The Court recalls that reparations may include the reimbursement of legal fees and other costs incurred during domestic proceedings.[10] It is however, incumbent upon an applicant to provide proof for the amounts claimed.[11]

40. In the instant Application, the Court recalls its finding in the Judgment on merits that the Applicants were represented by lawyers both at the Resident Magistrate`s Court and the High Court.[12] The violation of the right to legal assistance was established only in relation to the Applicants' lack of representation at the Court of Appeal.[13] However, the Applicants have not adduced any evidence, such as retainer agreements with their counsel or receipts of payment of legal fees or bank transfers to substantiate their claims.

41. In these circumstances, the Court dismisses the Applicants' claims for reparations for legal fees incurred in the course of domestic proceedings.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicant

42. In the judgment on merits, the Court established that the Applicants' rights were violated as a result of the re-arrest of the Applicants after they were initially acquitted by the Resident Magistrate's Court, contrary to their right to liberty and presumption of innocence. The Court also established that the Respondent

10 *Ibid*; *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 39; ***Révérend Christopher R. Mtikila v Tanzania*** (reparations), § 39, Application No 012/2017, ACtHPR, Judgment of 12/11/2020*, **Léon Mugesera v Rwanda*** (merits and reparations), § 136.

11 *Ibid*.

12 *Kennedy Owino and Another v Tanzania* (merits) (2018), § 107.

13 *Ibid*.

State violated their right to defence by dismissing their defence of *alibi* and convicting them solely on the basis of testimony obtained from a single witness. Furthermore, the Court found that the Respondent State violated the Applicants' right to free legal assistance by failing to avail them counsel at the Court of Appeal where the Applicants defended themselves on a serious charge of armed robbery which carries a severe punishment.

43. On the basis of the above findings of the Court, the Applicants assert that in the matter of *Konaté v Burkina Faso,* the Court awarded United States Dollars Twenty Thousand (USD 20,000) for moral loss suffered by the Applicant and his family. The Applicants pray that the Court should, on the same basis**,** award each of them, United States Dollars Twenty Thousand (USD 20,000) and award Five Thousand United States Dollars (USD 5,000) to each indirect victim.

44. In this regard, the Applicants state that they have suffered a long imprisonment following an unfair trial, emotional anguish prior to the trial, during the trial process, and imprisonment; loss of social status; chronic illness including diagnosis for high blood pressure and heart condition and general poor health due to poor prison conditions and emotional and physical stress.

45. The Respondent State, on the other hand, reiterates its contention that there is no direct link between the violations suffered and the alleged harm suffered by the Applicants. The Respondent State also avers that the alleged harm lacks proof. In this regard, the Respondent State asserts that there is no proof that Charles John Mwaniki Njoka was diagnosed with diabetes and Kennedy Owino with asthma, high blood pressure and heart condition. It contends that the Applicants did not adduce medical certificates to substantiate their allegations.

46. As regards the Applicants' prayer for an award of United States Dollars Twenty Thousand (USD 20,000) in moral damages, the Respondent State submits that the computation of the indicated amount has been done through guesswork, as it is not substantiated. According to the Respondent State, the Court cannot grant reparations based on mere speculation and gestures as it will amount to unjustly enriching the Applicants.

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47. The Court recalls its established case-law where it has held that

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.[14] The Court has thus adopted the practice of granting a lump sum in such instances.[15]

48. The Court notes, as indicated above, that the Respondent State violated the Applicants' right to security and liberty and their rights to a fair trial contrary to Articles 6 and 7(1)(a), (b) and (c) of the Charter on account of which the Applicants have suffered some moral prejudice. The Applicants are therefore, entitled to moral damages.

49. In assessing the quantum of damages, the Court considers the nature and extent of the violations found. In this regard, the Court recalls its findings in the judgment on merits that the Respondent State violated the Applicants' right to liberty and their right to a fair trial by re-arresting and detaining them after they were acquitted by the Resident Magistrate's Court. In addition, the Respondent State violated the Applicants' right to a fair trial by failing to provide them with free legal assistance at the Court of Appeal and by dismissing their defence of *alibi* without proper consideration.

50. In view of this**,** and in exercising its discretion, the Court therefore awards the Applicants the amount of Tanzanian Shillings Five Million each (TZS 5,000, 000) as fair compensation.

b. Moral Prejudice suffered by Indirect Victims

51. The Applicants submit that their family members have suffered emotional anguish as a result of their trial, conviction and imprisonment. They assert that they were both the sole providers for their family members.

52. The Applicants mention that both of their mothers suffered a great deal of stress and as a result, Kennedy Owino's mother passed away and Charles Njoka's mother is still depressed and in a bad health condition.

53. The Applicants further state that their family members suffered emotional distress after the Applicants were labelled "criminals".

14 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 59; *Christopher Jonas v United Republic of Tanzania* (reparations), § 23.

15 *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; *Christopher Jonas v United Republic of Tanzania* (reparations), § 24.

Further, they assert that the children of Charles Njoka were affected emotionally since they had to grow up without a father and with the thought that their father was a criminal.

54. Accordingly, they pray the Court to award United States Dollars Five Thousand (USD 5,000) to each indirect victim (indicated in paragraph 34 above) in moral damages.

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55. On its part, the Respondent State submits that the beneficiary of the right to legal representation or right to liberty are the Applicants who not only failed to establish prejudice as a result of the established violations but also the causal link between the harm alleged to have been suffered and the said violations.

56. The Respondent State further reiterates that the Applicants have failed to submit marriage certificates, birth certificates or any other document showing the level of dependency or previous record of dependency of the alleged indirect victims on the Applicants.

57. In this regard, the Respondent State contends that pursuant to the Court's own jurisprudence, the purpose of reparation is "*restituo in integrum*" which is to place the victim as much as possible in the situation prior to the violation. Accordingly, the Applicants ought to have provided material evidence to enable the Court to determine the positions they were in before the violations. Furthermore, it avers that not every violation results in loss.

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58. The Court notes that with regard to indirect victims, as a general rule, moral prejudice is presumed with respect to parents, children and spouses while for other categories of indirect victims, proof of existence of moral prejudice is required. In general, reparation is granted only when there is evidence of spousal relation, of marital status or for other close relatives, through documents showing filiation with an applicant, which include, birth certificates for

children and parents.[16]

59. In the instant case, the Applicants have not supplied the Court with any evidence demonstrating their marital or consanguineal relationship with those individuals that they identified by name. The Court emphasises in this regard that it is not sufficient to list the alleged indirect victims for it to award reparations. Apart from this, the Applicants should have provided proof of filiation including birth certificates, marriage certificate or any other document attesting to their relationship with the indirect victims.[17]

60. In view of the foregoing, the Court dismisses the Applicants' prayer for reparations for moral prejudice allegedly suffered by indirect victims.

c. Non-Pecuniary Reparations

i. Restoration of the Applicants' Liberty

61. The Applicants recall the Judgment on the merits, where it requested the Respondent State to "take all necessary measures that would help erase the consequences of the violations established", including "the release of Applicants". Based on this, the Applicants submit that the restoration of their liberty is the only way in which adequate reparations could be said to have been granted given the circumstances of the Applicants. Accordingly, they pray the Court to order their release.

62. The Respondent State contends that the Court has no criminal jurisdiction to quash the Applicants' sentence. It submits that the Court's jurisdiction as per Article 3 of the Protocol, is only limited to the interpretation and application of the Charter, the Protocol and any other human rights instruments ratified by it.

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16 *Zongo and others v Burkina Faso* (reparations), § 54; and *Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135; *Léon Mugesera v Rwanda* (merits and reparations), § 148.

17 *Lucien Ikili Rashidi v Tanzania* (merits and reparations), §§ 135-136.

63. As regards the prayer for release, the Court has stated that it can only be ordered in specific and compelling circumstances. This would be the case "if an Applicant sufficiently demonstrates or the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and his continued imprisonment would occasion a miscarriage of justice."[18]

64. In the instant case, the Court recalls that in the Judgment on merits, it had ordered the Respondent State, among others,

> …to take all necessary measures that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicants. Such measures could include the release of the Applicants. The Respondent should inform the Court within six (6) months, from the date of this judgment of the measures taken.

65. The Court notes that, to date, the Respondent State has not reported of the measures it has taken to remedy the consequences of the established violations. The records before the Court also indicate that the Applicants are still in jail and that, having been in prison for the last eighteen (18) years, they have served almost two-thirds of their thirty (30) year sentence.[19] Taking these factors into account and the specific circumstances of the case, including the nature of the established violations and the fact that the Applicants are imprisoned in a foreign country far from their homes and families, the Court finds that there are compelling reasons to order the Respondent State to ensure their release.[20]

66. Accordingly, the Court grants the Applicants' prayer to be released from prison as, in the particular circumstances of the case, release is the most proportionate measure to remedy the established violations of the Applicants' human rights.[21]

ii. Restitution

67. The Applicants submit that the African Commission[22] recognised the importance of restitution and has held that a State in violation

18 *Minani Evarist v Tanzania* (merits and reparations), § 82.

19 *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (2018) 2 AfCLR 550, § 85.

20 *Ibid*, § 86.

21 *Ibid.*

22 ACHPR, *The Sudan Human Rights Organisation & Centre on Housing Rights and Evictions* (COHRE) vs. *Sudan* § 22.

of rights enshrined in the Charter should take measures to ensure restitution. On this basis, the Applicants pray that in the instant case, as they cannot be returned to the state they were before their imprisonment, the Court should take into account the principle of restitution when considering the amount to award them.

68. The Respondent State submits that where a person has caused suffering by way of armed robbery to his victims and has been duly tried on good evidence by a competent court and his appeal heard and conclusively determined, he is not entitled to restitution since any alleged loss was caused by his own act of committing a crime.

69. The Respondent State submits that in the instant case as well, the Applicants' citation of the decision of the African Commission in *Sudan Human Rights Organisation and Centre on Housing Rights v Sudan* is irrelevant and inapplicable, as the Applicants were duly tried on the basis of adequate evidence by a competent court and their appeal heard and finally determined. Furthermore, the Respondent State contends that restitution is only applicable where other measures such as compensation are not relevant or sufficient.

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70. The Court notes that it has already dealt with this issue when considering the prayers on restoration of the Applicant's liberty in paragraphs 64 and 65 above. Consequently, the Court finds this prayer to be moot.

VI. Costs

71. The Applicants claim legal aid fees for three hundred (300) hours of legal work, two hundred (200) hours for two assistant counsel and one hundred (100) hours for the lead counsel, charged at United States Dollars One Hundred (USD 100) per hour for the lead counsel and United States Dollars fifty (USD 50) per hour for the Assistants. These amounts to United States Dollars Ten Thousand (USD 10,000) for the lead counsel and United States Dollars Ten Thousand (USD 10,000) for the two assistants.

72. Furthermore, the Applicants pray the Court to grant reparations for postage amounting to United States Dollars two hundred (USD 200), printing and photocopying amounting to United

States Dollars two hundred (USD 200), transportation to and from the seat of the Court and PALU Secretariat and from PALU Secretariat to Ukonga Prison amounting to United States Dollars one thousand (USD 1000) and communication costs amounting to United States Dollars two hundred (USD 200).

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73. The Respondent State submits that the prayers of the Applicants on costs are unfounded and baseless. It argues that there is no proof that substantiates the postage fees, stationary fees, transportation cost and communication cost and in any event, the Applicants were represented by PALU, whose costs for legal representation are covered by the Court.

74. Furthermore, the Respondent State contends that the Applicants are convicts and are not allowed to use any other transport, communication, material used or photocopies other than the ones provided by its government through the prison authorities. Accordingly, the Respondent State asserts that claims for transport and stationary costs are unjustified.

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75. In terms of Rule 32(2) of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."[23]

76. The Court recalls, in line with its earlier judgments, that reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.[24] Even so, the applicant

23 Rules of Court, 26 June 2020.

24 *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 79-93; Christopher *Mtikila v Tanzania* (reparations), § 39; *Mohamed Abubakari v Tanzania* (reparations), *§ 81; Alex Thomas v Tanzania* (reparations), *§ 77.*

must provide justification for the amounts claimed.[25]

77. In the instant Application, the Court notes that PALU represented the Applicants on a *pro bono* basis under the Court's legal aid scheme and in any event, PALU did not produce evidence to prove that it incurred the alleged costs. This claim is therefore unjustified and is hereby dismissed.

78. The Court, therefore, holds that each party shall bear its own costs.

VII. Operative part

79. For these reasons,

The Court,

By a majority of Nine (9) for, and One (1) against, Justice Rafaâ Ben Achour Dissenting

On pecuniary reparations

i. *Dismisses* the Applicants' prayer for damages for material prejudice they allegedly suffered;

ii. *Dismisses* the Applicants' prayer for damages for material prejudice allegedly suffered by the indirect victims;

iii. *Dismisses* the Applicants' prayer for damages for moral prejudice allegedly suffered by indirect victims;

iv. *Dismisses* the Applicants' claims for reimbursement for legal fees allegedly incurred during proceedings before national courts.

Unanimously

v. *Grants* the Applicants' prayer for damages for moral prejudice suffered due to the violations found and awards , Mr Kennedy Owino Onyachi and Charles John Mwaniki Njoka, the sum of Tanzanian Shillings Five Million (TZS 5,000, 000) each in reparations.

vi. *Orders* the Respondent State to pay the amounts indicated under (v) above free from taxes effective within 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.

25 *Norbert Zongo and Others v Burkina Faso* (reparations), § 81; *Mtikila v Tanzania* (reparations), § 40.

On non-pecuniary reparations

vii. *Grants* the Applicants' prayer and orders their release from custody.

On implementation and reporting

viii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

ix. *Dismisses* the Applicants' prayer related to legal fees, costs and other expenses incurred in the proceedings before this Court

x. *Orders* each party to bear its own costs.

Said v Tanzania (admissibility) (2021) 5 AfCLR 545

Application 011/2019, *Yusuph Said v United Republic of Tanzania*

Ruling, 30 September 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIŽUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant was tried, convicted, and sentenced to death for murder by the domestic courts of the Respondent State. He brought this Application alleging that the processes of the domestic courts violated his human rights. In this default ruling, the Court held that the matter was not submitted within a reasonable time and was therefore inadmissible.

Procedure (ruling in default of appearance, 14-17)

Admissibility (submission within a reasonable time, 38-45; admissibility conditions cumulative, 46)

I. The Parties

1. Yusuph Said (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Butimba Prison in the Mwanza region, having being convicted of the offence of murder and sentenced to death.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), 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. The Court held that this withdrawal had no bearing on pending cases and new cases filed before the withdrawal came into effect,

that is, on 22 November 2020.[1]

II. SUBJECT MATTER OF THE APPLICATION

A. Facts of the matter

3. It emerges from the record, that, on 9 October 2003, the Applicant and ten (10) others, were allegedly seen inflicting injuries to one Athumani Dadi in broad daylight "with the aid of iron rods and clubs" which led to his death.

4. On 26 October 2006, the Applicant was jointly charged with ten (10) others with the offence of murder at the Resident Magistrate's Court with Extended Jurisdiction sitting at Kigoma, the case having been transferred by an Order of the High Court sitting at Kigoma and therefore giving the Resident Magistrate, the powers of a High Court judge.[2] The Applicant was subsequently convicted on 20 May 2008 and sentenced to death. On 13 March 2009, the Applicant appealed against his conviction and sentence to the Court of Appeal, which dismissed his appeal on 30 June 2011.

B. Alleged violations

5. The Applicant alleges the violation of the following rights:

i. The right to equality protected under Article 3(1) and (2) of the Charter; and

ii. The right to a fair trial protected under Article 7(1) of the Charter.

III. Summary of the Procedure before the Court

6. The Application was filed on 22 March 2019.

7. On 5 July 2019, the Court granted the Applicant legal aid at his request, given that he was a death row inmate, self-represented and his Application lacked clarity.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

2 This is pursuant to Section 256A of the Criminal Procedure Act of Tanzania which provides: "[t]he High Court may direct that the taking of a plea and the trial of an accused person committed for trial by the High Court, be transferred to, and be conducted by a resident magistrate upon whom extended jurisdiction has been granted under subsection (1) of section 173."
"[…] (3) The provisions of this Act which governs the exercise by the High Court of its original jurisdiction shall mutatis mutandis, and to the extent that they are relevant, govern proceedings before a resident magistrate under this section in the same manner as they govern like proceedings before the High Court."

8. The Application was served on the Respondent State on 30 September 2019.

9. The Respondent State did not file a Response despite having benefited from two extensions of time on 9 July 2020 and 10 February 2021.

10. Pleadings were closed on 6 April 2021 and the parties were notified thereof.

IV. Prayers of the Parties

11. The Applicant prays the Court to:

a. Grant him legal aid;

b. Make an order for his acquittal; and

c. Make an order for reparations.

12. The Respondent State did not appear in these proceedings and therefore, did not make any prayers.

V. On the default of the Respondent State

13. Rule 63(1) of the Rules of Court[3] provides that:

> 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 a decision 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.

14. The Court notes that Rule 63(1) sets out three conditions for a Ruling in default and these are: i) the notification of the defaulting party; ii) the default of one of the Parties; and iii) application by the other party or the Court on its own motion.

15. With regards to the notification of the defaulting party, the Court recalls that the Application was filed on 22 March 2019. The Court further notes that, from 30 September 2019, the date of service of the Application to the Respondent State, to 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.

16. On the default of one of the parties, the Court notes that the Application was served on the Respondent State on 30 September 2019 and it was granted sixty (60) days to file its Response but it failed to do so within the time allocated. The Court then sent

3 Formerly Rule 55 of the Rules of Court, 2 June 2010.

two reminders to the Respondent State on 9 July 2020 and 11 February 2021 granting it ninety (90) days and forty-five (45) days respectively to file its Response but it failed to do so. The Court thus finds that the Respondent State has defaulted in appearing and defending the case.

17. Finally, with respect to the last condition, the Court notes that the Rules, empower it to issue a decision in default either *suo motu* or on request of the other party. In the present case, the Applicant having not requested for a default decision, the Court will proceed to issue the decision *suo motu* for proper administration of justice.[4]

18. The required conditions having thus been fulfilled, the Court concludes that it may rule by default**.**[5]

VI. 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 instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

20. The Court further observes that in terms of Rule 49(1) of the Rules "[t]he Court shall conduct preliminarily examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules."

21. The Court notes that, even though nothing on the record indicates that it lacks jurisdiction, it is obliged to determine if it has jurisdiction to consider the Application**.** In this regard, the Court notes that, as earlier stated in this judgment, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration with the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.

22. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect

4 *Fidele Mulindahabi v Rwanda*, ACtHPR, Application no. 010/2017, Ruling of 26 June 2020 (jurisdiction and admissibility) §§ 27-32. *Fidele Mulindahabi v Rwanda*, ACtHPR, Application no. 011/2017, Ruling of 26 June 2020 (jurisdiction and admissibility) §§ 20-25.

5 *African Commision on Human and Peoples' Rights v Libya* (merits) (3 June 2016) 1 AfCLR 153 §§ 38-42.

twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[6]

23. In view of the above, the Court finds that it has personal jurisdiction.

24. As regards its material jurisdiction, the Court notes that the Applicant alleges violation of Articles 3(1) and (2) and 7(1) of the Charter to which the Respondent State is a party and therefore its material jurisdiction has been satisfied.

25. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a party to the Charter, the Protocol and had deposited the Declaration prescribed under Article 34(6) of the Protocol. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.[7]

26. The Court also notes that it has territorial jurisdiction, given the facts of the case, occurred in the Respondent State's territory.

27. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VII. Admissibility

28. 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."

29. Pursuant to Rule 50(1) of the Rules, "[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."

30. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> b. comply with the Constitutive Act of the Union and the Charter;
>
> c. not contain any disparaging or insulting language;

6 *Andrew Ambrose Cheusi v United Republic of Tanzania* (merits and reparations) §§ 37-39.

7 *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.

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

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

f. 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

g. 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.

31. The Court notes that the conditions of admissibility set out in Rule 50(2) 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 50(1) of the Rules, the Court is obliged to determine the admissibility of the Application.

32. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

33. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.

34. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

35. 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 of Rule 50(2)(d) of the Rules.

36. 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",[8] unless they are manifestly unavailable, ineffective

8 *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 64. *See also Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465 § 64;

and insufficient or the proceedings are unduly prolonged.[9]

37. Referring to the facts of the matter, the Court notes that, the Applicant was convicted of murder on 20 May 2008 by the Resident Magistrates' Court with Extended Jurisdiction. He appealed against this decision to the Court of Appeal, the highest judicial organ in the Respondent State, which upheld the judgment of the Resident Magistrates' Court by its judgment of 30 June 2011. The Court, therefore, holds that the Applicant exhausted the available local remedies.

38. With regard to the condition of filing an Application within a reasonable time after exhaustion of local remedies, 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 50(2)(f) of the Rules, which in substance restates Article 56(6) of the Charter, only requires an 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. In the present matter, the Court notes that the Court of Appeal dismissed the Applicant's appeal on 30 June 2011 and that the Applicant filed this Application on 30 September 2019. Therefore, the Applicant filed the Application, eight (8) years and three (3) months after exhaustion of local remedies. The issue for determination therefore, is whether, in the circumstances of the case, the period of eight (8) years and three (3) months is reasonable.

40. The Court has held that,[10] the period of five (5) years and one (1) month was reasonable owing to the circumstances of the applicants. In these cases, the Court took into consideration the fact that the applicants were imprisoned, restricted in their movements and with limited access to information; they were lay, indigent, did not have the assistance of a lawyer in their trials at the domestic court, were illiterate and were not aware of the existence of the Court.

and *Wilfred Onyango Nganyi and 9 others v Tanzania* (merits) (18 March 2016) 1 AfCLR 507 *§ 95.*

9 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314 § 77. *See also Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398 § 40.

10 *Christopher Jonas v Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 54, *Amiri Ramadhani v Tanzania* (merits) (11 May 2018), 2 AfCLR 344 § 50.

41. Furthermore, the Court decided that,[11] applicants, having used the review procedure, were entitled to wait for the review judgment to be delivered and that this justified the filing of their application five (5) years and five (5) months after exhaustion of local remedies.

42. Moreover, the Court held that a period of eight (8) years and four (4) months, satisfied the provisions of Rule 50(2)(f) of the Rules, given that there were no remedies to exhaust and therefore reasonable time did not arise.[12] Also, the Court held that the alleged violations were continuing in nature and thus renewed themselves every day. Consequently, the applicant in that case, could have seized the Court at any time as long as the alleged violations were not remedied.[13]

43. In contrast, the Court has held[14] that, a period of five (5) years and four (4) months was an unreasonable lapse of time before the filing of an application. The Court reasoned that while the applicants were incarcerated and therefore restricted in their movements, they had not "asserted or provided any proof that they are illiterate, lay, or had no knowledge of the existence of the Court".[15] Furthermore, the Court concluded that, while it had always considered the personal circumstances of applicants in assessing the reasonableness of the lapse of time before the filing of an application, the applicants had failed to provide it with material on the basis of which it could conclude that the period of five (5) years and four (4) months was reasonable. [16]

44. In the instant case, the Court notes that the Applicant has not given any reasons as to why he could not seize the Court earlier than the eight (8) years and three months (3) it took him to do so. The Court further notes that even though, he is incarcerated, the Applicant did not indicate how his incarceration impeded him in filing his application earlier than he did. Although the Court has previously admitted a case filed after eight (8) years and four (4) months,[17] the present case is distinguishable. To start with, in the present case, local remedies were available and duly exhausted

11 *Werema Wangoko v Tanzania* (merits) (7 December 2018) 2 AfCLR 520 §§ 48-49.

12 *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application no. 018/2018, Judgment of 15 July 2020 (merits and reparations) § 50.

13 *Ibid* at § 52.

14 *Godfred Anthony and another v United Republic of Tanzania*, ACtHPR, Application No. 015/2015, Ruling of 26 September 2019 (admissibility) § 48.

15 *Ibid.*

16 *Ibid* § 49.

17 *Jebra Kambole v Tanzania* (merits and reparations) *supra note* 13 and 14.

by the Applicant and the violations at issue are not continuing.

45. In light of the foregoing, the Court holds that, in the absence of any clear and compelling justification for the lapse of eight (8) years and three (3) months before the filing of the Application, the Application cannot be considered to have been filed within a reasonable time within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

46. The Court recalls that, the conditions of admissibility of an Application filed before it are cumulative, such that if one condition is not fulfilled then the Application becomes inadmissible.[18] In the present case, since the Application has failed to fulfil the requirement under Article 56(6) of the Charter which is restated in Rule 50(2)(f) of the Rules, the Court, therefore, finds that the Application is inadmissible.

VIII. Costs

47. The Parties did not make any submissions on costs.

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48. The Court notes that Rule 32(2) of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs."

49. Consequently, the Court decides that each Party shall bear its own courts.

IX. Operative part

50. For these reasons,

The Court,

Unanimously and in default:

i. *Declares* that it has jurisdiction;

ii. *Declares* the Application inadmissible;

iii. *Orders* each Party to bear its own costs.

18 *Dexter Johnson v Ghana*, ACtHPR, Application No. 016/2017. Ruling of 28 March 2019 (jurisdiction and admissibility) § 57.

Kone v Mali (provisional measures) (2021) 5 AfCLR 554

Application 001/2021, *Yaya Kone v Republic of Mali*

Ruling, 5 October 2021. Done in English and French, the French text being authoritative.

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

Recused under Article 22: SACKO

The Applicant was given a suspended sentence and ordered to pay a fine for libel. His appeal against the sentence was dismissed by the domestic courts of the Respondent State. Along with his Application claiming that his rights were violated by the processes of his domestic trial, the Applicant brought a request for provisional measures to suspend enforcement of the domestic decision. The Court held that the measures sought were similar to the reliefs sought on the merits and decided to consider the request together with the Application on the merit.

Provisional measures (similarity of request with application on the merit, 13-14)

I. The Parties

1. Yaya Kone (hereinafter referred to as "the Applicant") is a national of Mali and a lawyer. He alleges that he was unjustly sentenced to a six (6) month suspended prison term and ordered to pay Two Hundred Million (200,000,000) CFA francs in damages to Mr. Aliou Diallo, for libel.

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 on 10 May 2000. The Respondent State also deposited, on 19 February 2010, the Declaration provided for in Article 34(6) of the Protocol, by virtue of which it accepts the jurisdiction of the Court to receive applications from individuals and Non-governmental Organisations (hereinafter referred to as "the Declaration").

II. Subject of the Application

3. The Application concerns the conviction of the Applicant by the Court of Appeal of Kayes by judgment No. 26 of 18 March 2019, to six (6) months suspended imprisonment and to a fine of Two Hundred Million (200,000,000) CFA francs as reparation

to Mr. Aliou Diallo for libel. The said judgment was upheld by the Supreme Court of the Respondent State by its judgments No. 101 of 28 November 2019 and No.26 of 19 October 2020.

4. As provisional measures, the Applicant requests that this Court order the cessation of all proceedings for the enforcement of the above-mentioned conviction by the Court of Appeal of Kayes, the stay of the enforcement of the judgment of conviction and more specifically the seizure of property for purposes of enforcement.

III. Summary of the Procedure before the Court

5. The Application was received together with the request for provisional measures on 30 November 2020 and registered on 5 January 2021.

6. On 7 January 2021, the Application, the request for provisional measures and supporting evidence were served on the Respondent State for its Response. On 11 February 2021, the Registry received and also transmitted to the Applicant, the Respondent State's response to the request for provisional measures.

7. On 15 February 2021, the Applicant filed supplementary information and this was transmitted to the Respondent State for its observations within ten (10) days of receipt thereof. The Respondent State did not file the said observations.

8. On 23 February 2021, the Applicant's filed submissions on the Respondent State's response to the request for provisional measures. On 15 April 2021, the Respondent State's filed the Response to the main Application and this was transmitted to the Applicant on the same date for his Reply, if any.

9. On 10 May 2021, the Applicant filed the Reply to the Respondent State's Response on the main Application and this was transmitted to the Respondent State on the same date, for its information.

IV. Provisional measures requested

10. The Applicant requests the Court to grant provisional measures in the form of the cessation of all proceedings by way of enforcement of the judgment of Kayes Appeal Court No. 26 of 18 March 2019 and of the Supreme Court No. 101 of 28 November 2019 and No. 26 of 19 October 2020 on the conviction and the seizure of property for enforcement, pending this Court's decision on the merits of the Application.

11. The Applicant considers that, at the time he filed the instant Application with the Court, the measures to enforce the

sentence of Two Hundred Million (200,000,000) CFA francs were ongoing and that his employer would be enjoined under civil liability. The Applicant argues that this would warrant the Court issuing provisional measures to order the cessation of the said enforcement, as a matter of urgency, to avoid a recourse action being brought against him by his employer.

12. The Respondent State considers that the Applicant has not demonstrated that there is any risk or that there are exceptional circumstances, neither has he demonstrated that provisional enforcement of the three judgments against him has been initiated.

13. The Court notes that the measures requested are the same as those on the merits and are likely to prejudge its decision on the merits of the Application.

14. Consequently, in the interests of the proper administration of justice, the Court decides to consider the request for provisional measures together with the merits and that the situation requires it to expedite the determination of the Application on the merits.

V. Operative part

15. For these reasons,

The Court,

Unanimously,

i. *Decides* to consider the request for provisional measures together with the Application on the merits.

Noudehouenou v Benin (provisional measures) (2021) 5 AfCLR 557

Application 004/2020, *Houngue Éric Noudehouenou v Republic of Benin*

Ruling, 15 November 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant had brought an Application claiming a violation of his human rights in the course of domestic criminal proceedings against him that led to the issuance of arrest warrants against him. Alleging that the Respondent State had failed to comply with earlier provisional measures, the Applicant brought this request for provisional measures to *inter alia* remove impediments to his access to healthcare. The Court granted some of the measures requested.

Jurisdiction (personal jurisdiction, 22-23 *prima facie*, 24)

Provisional measures (urgency, 29-30; irreparable harm, 31; evidence of medical urgency and irreparable harm, 38; subsisting but unimplemented measures, 46; apology from state, 51; disclosure of expert report to Applicant, 58-60; immediacy of measures, 63; issuance of valid national identity card, 79-82)

Dissenting Opinion: KIOKO

Provisional measures (proof of medical urgency, 13-14)

Dissenting Opinion: BEN ACHOUR

Provisional measures (proof of medical urgency, 5-6)

Dissenting Opinion: CHIZUMILA

Provisional measures (irreparable harm, 7-8)

I. The Parties

1. Mr. Houngue Éric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of the Republic of Benin. He is seeking orders for provisional measures with respect to the Judgment of 25 July 2019 of the Court for the Repression of Economic Crimes and Terrorism (hereinafter referred to as "CRIET").

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 virtue of which it accepted the jurisdiction of the Court to receive applications from individuals and Non-governmental Organisations. On 25 March 2020, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument of withdrawal of its Declaration. The Court held that this withdrawal had no bearing on pending cases or new cases filed before the withdrawal came into effect, that is, one year after its filing, on 26 March 2021.[1]

II. Subject of the Application

3. On 21 January 2020, the Applicant filed the Application on the merits together with a first request for provisional measures. He alleged the violation of his rights during criminal proceedings initiated against him before the CRIET. On 6 May 2020, the Court issued a Ruling on this request for provisional measures.

4. On 19 July 2021 and 10 August 2021, the Applicant filed two new requests respectively, for provisional measures in relation to the Judgment of 25 July 2019 of the CRIET which "sentenced him to ten (10) years' imprisonment for abuse of office and unauthorised use of title, issued a warrant of arrest and ordered him to pay the sum of CFA Francs one billion two hundred and seventy seven million, nine hundred and ninety five thousand, four hundred and seventy four (1,277,995,474 CFA) to CNCB as compensation for the prejudice that they had suffered". By the Ruling on provisional measures issued on 6 May 2020, the Court ordered the Respondent State to stay execution of the said judgment.

5. The Applicant claims that in spite of the Ruling of 6 May 2020, he has been forced to go into hiding.

6. He specifically states in the request for provisional measures of 19 July 2021 (hereinafter referred to as the "19 July 2021 request") that his health is continuously and dangerously deteriorating. He states that he is unable to adequately meet his medical needs, as he risks arrest and imprisonment by virtue of a decision that violates his rights. The Applicant further submits that he risks being killed, since he has already escaped an assassination attempt on 31 October 2018.

1 *Houngue Éric Noudehouenou v Republic of Benin,* ACtHPR, Application No. 004/2020, Order of 6 May 2020 (provisional measures), § § 4- 5 and corrigendum of 29 July 2020.

7. In addition, he avers, that although he was able to obtain some medication with difficulty, from September 2020, to ease the pain resulting from the ailments he suffers from; the pain has been increasingly persistent and the anxiety attacks have become more severe, together with insomnia, vomiting, persistent headaches, indigestion and gastric reflux, abdominal and neurological pain.

8. He claims that his state of health requires thorough medical consultations and analyses, hospitalisation for closer observation and specialised medical care, which he is unable to obtain because of the obstacles posed by the Respondent State, notably the arrest warrants resulting from the CRIET Judgment in disregard of the Ruling on provisional measures issued by this Court on 6 May 2020.

9. In the Request for provisional measures of 10 August 2021 (hereinafter referred to as " the Request of 10 August 2021"), the Applicant submits that in execution of the CRIET's Judgment of 25 July 2019, his bank accounts were frozen and from November 2021, he will no longer have the financial resources to meet his family's basic needs and cover his own health costs

10. The Applicant also submits that, he cannot appear personally at a real estate legal proceeding pending before the Cotonou Court, whereas the said Court requires his presence at the hearing of 2 December 2021, failing which, a decision will be entered against him.

11. It is in this context that the Applicant requests the Court to issue a Ruling on provisional measures, ordering the Respondent State to remove the impediments to his medical care, to stay the arrest warrants issued against him, to disclose an expert report, and to issue a public apology. He also requests for provisional measures to unfreeze his bank accounts, issue identity documents and preserve his rights.

III. Alleged violations

12. The Applicant alleges the violation of:

i. his right to be tried by a competent tribunal, equality of all before the courts, to an impartial tribunal, to a reasoned decision respecting the principle of adversarial proceedings, to protection against arbitrariness and to legal certainty, all protected under the Charter and Articles 10 of the Universal Declaration of Human Rights (UDHR) and 14(1) of the International Covenant on Civil and Political Rights (ICCPR);

ii. his rights to defence, including in particular equality of arms, to be defended by counsel, to facilities necessary for the organization of his defence, to the notification of the indictment and the charges,

to participate in his trial, to the adversarial principle, to present evidence and arguments, to cross-examine prosecution witnesses, to be present at his trial, protected under Articles 14(3) of the ICCPR and 7(1)(c) of the Charter;

iii. his right to appeal against judgments protected under Articles 10 of the (UDHR), 7(1)(a) of the Charter and 2(3) of the ICCPR;

iv. his right to have his conviction and sentence reviewed under Article 14(5) of the ICCPR;

v. his right to the presumption of innocence protected under Article 7(1) of the Charter;

vi. his rights to paid work, to property and an adequate standard of living, protected under Articles 6 of the International Covenant on Economic, Social and Cultural Rights (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 ICCPR and 5 of the Charter, and his right to freedom of movement, protected by Articles 12, 14(5) and 17 of the ICCPR.

IV. Summary of the Procedure before the Court

13. On 21 January 2020, the Applicant filed the Application on the merits together with a request for provisional measures. These were served on the Respondent State on 18 February 2020.

14. On 6 May 2020, the Court issued a Ruling on provisional measures ordering the Respondent State to "stay the execution of the judgment of 25 July 2019 delivered by the Court for the Repression of Economic Crimes and Terrorism against the Applicant, Houngue Eric Noudehouenou, until the final decision of this Court". The Order was transmitted to the Parties on 6 May 2020.

15. On 20 July and 10 August 2021, the Applicant filed two further requests for provisional measures. They were served on the Respondent State on 2 August 2021 and 23 August 2021 respectively, to submit its Response within fifteen (15) days of receipt.

16. On 17 August 2021, the Respondent State filed its Response on the Request for provisional measures of 20 July 2021. It however, did not respond to the Request of 10 August 2021 within the time-limit.

17. The Court notes that both requests for provisional measures are related to the CRIET's judgment of 25 July 2019. It therefore decides to join them and issue a single Ruling.

V. *Prima facie* jurisdiction

18. The Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 51(1) of the Rules, in matters of 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.

19. 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 Charter and the Protocol, and has also filed the Declaration provided for in Article 34(6) of the Protocol. He alleges that although the Respondent State withdrew the said Declaration on 25 March 2020, the Court has already held that "this withdrawal can only take effect from 26 March 2021 and has no bearing on cases filed before the Court before that date."

20. The Applicant further alleges that the Respondent State has violated his rights protected by human rights instruments to which it is a party. He asserts that, the Court has *prima facie* jurisdiction to hear the requests for provisional measures.

21. The Respondent State did not respond to this point.

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22. The Court notes that the rights which the Applicant alleges to have been violated, are all protected by the Charter and human rights instruments to which the Respondent State is a party.[2] The Court further notes that the Respondent State is a party to the Protocol and has deposited the Declaration provided for in Article 34(6) of the Protocol. The Court recalls that, in the Ruling of 6 May 2020[3] , it decided that the withdrawal of the Declaration by the Respondent State does not affect its personal jurisdiction in this case.

23. The Court further clarifies that although the requests for provisional measures were filed after the withdrawal came into force on 26

2 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 585, § 67.

3 *Houngue Éric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 004/2020, Order of 6 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.

March 2021, this does not affect its personal jurisdiction in the present case either, since the said requests are related to the Application on the merits filed on 21 January 2020 before the said withdrawal.

24. The Court, therefore, concludes that it has *prima facie* jurisdiction to hear the requests for provisional measure.

VI. Provisional measures requested

25. In the Request of 19 July 2021, the Applicant requests the following provisional measures:

i. Request the Respondent State to take all appropriate measures, first, to remove all obstacles to his right to health, including obstacles to obtaining his file at the CNHU without let or hindrance and all obstacles to medical consultations, medical examinations, hospitalization, medical reviews, and to his surgical operation that he has been awaiting since 2018, and secondly, to ensure that his doctors are effective effectively protected against any prosecution and any arrest, failing that, to provide him with the means and a host country where he will receive adequate health care without being hindered by the Respondent State;

ii. Request the Respondent State to suspend arrest warrants and detention orders and deprivation of liberty until the final decision of this Court on the merits and reparations;

iii. Request the Respondent State to apologise to the Court for having persistently invented and used twenty-four (24) imaginary and false facts before the CRIET and before this Court.

iv. Request the Respondent State to produce, without delay, and "through the Registry of the Court," especially the entire report of the judicial expert written by Mr. ASSOSSOU Pedro d'Assomption and mentioned in the judgment of CRIET;

v. Request the Respondent to implement the above listed measures within three days of notification of the Court's Ruling; and to report to the Court on the implementation of this Ruling within fifteen days of the date of notification of this Ruling;

26. In the request of 10 August 2021, the Applicant requests the following provisional measures:

i. unfreezing of his bank accounts and removal of obstacles to him appearing before the Cotonou Tribunal on 2 December 2021;

ii. Issuance of valid identity document in accordance with paragraphs 1123.xiv and 123.xv of the Judgment of 4 December 2020, Application No. 003/2020;

iii. Request the Respondent State, by virtue of Articles 2(3) and 14(1) of the ICCPR, Article 8 of the UDHR, Articles 7 and 14 of the Charter, to take all appropriate measures to guarantee the Applicant, the effective enjoyment of his right to a ruling in his case concerning his

right to property, his right to an effective remedy, to legal certainty and to a fair trial before the Cotonou Court at the hearing of 2 December 2021 and subsequent days notwithstanding his absence given the presence of his counsel, the fact that he has made submissions on the merits since 27 October 2017.

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27. 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 considers necessary."

28. It notes that it has the duty 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 provision.

29. The Court recalls that urgency, consubstantial with extreme gravity, means a "real and imminent risk that irreparable harm will be caused before it renders its final judgment."[4]

30. It emphasizes that the risk in question must be real, which excludes the purely hypothetical risk and justifies the need to repair it immediately.[5]

31. With regard to irreparable harm, the Court considers that there must exist a "reasonable probability of materialization" having regard to the context and the personal situation of the applicant [6]

A. On the obstacles to medical care and protection

32. The Applicant argues that by not implementing the Court's Order for provisional measures, the Respondent State has made it impossible for him to receive proper health care in his own country, for fear of arrest or assassination. He further argues that his medical providers, housekeeper and family members would be deprived of their liberty for harbouring a criminal if they continue to hide him and provide him with care in such a situation.

33. In this respect, he submits that there is an urgent need to address the worsening headaches, abdominal pain and lower limb pain caused by blood circulation problems.

4 *Ajavon Sébastien v Republic of Benin,* ACtHPR, Application No. 062/2019, Order for provisional measures, 7 April 2020, § 61.

5 *Ibid*, § 62.

6 *Ibid*, § 63.

34. He avers that the growth in the inner tissue of his abdomen, which is in an advanced stage, causes him great pain, prevents him from sitting properly and that he therefore requires surgery.

35. With regard to irreparable harm, the Applicant states that if he is unable to acquire medication and receive proper care as soon as possible, he will suffer irreversible damage to his health and even death.

36. The Respondent State argues that the only way for a sick person to seek treatment is to go to a hospital to receive appropriate treatment, and not to seek injunctions from a court.

37. The Respondent State further argues that nothing prevents the Applicant from going to the hospital if he is really ill, which demonstrates the absence of urgency and irreparable harm.

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38. The Court notes that the Applicant alleges that he is currently suffering from serious health problems requiring urgent treatment and that he is under the care of a personal physician. However, the Applicant has not provided the Court with any evidence of his poor health other than mere assertions. He therefore has not sufficiently demonstrated the urgency and irreparable harm he faces, as required by Article 27 of the Protocol.

39. The Court therefore considers that there is no basis to order the measure requested.

B. On the stay of the arrest warrant issued in accordance with the CRIET's judgment of 25 July 2019.

40. The Applicant argues, as a matter of urgency, that his arrest and deprivation of liberty as a result of the warrants issued against him following the CRIET's judgment of 25 July 2019, may occur at any moment before the Court rules on the merits. He argues that there is a compelling reason for him not to be arbitrarily detained as a result of a judgment rendered in violation of his rights.

41. With regard to irreparable harm, the Applicant argues that in the absence of a stay of execution of the warrants, he is deprived of the means of livelihood since he cannot work, and is unable to receive proper medical care. This situation, he argues is causing his health to deteriorate, and may occasion his death.

42. He also avers, that he is also unable to travel in person to the human rights courts to plead the cases he has instituted.

43. The Respondent State did not respond to this point.

***

44. The Court notes that the CRIET's judgment of 25 July 2019 sentenced the Applicant to ten (10) years' imprisonment for abuse of office and "unauthorised use of title", issued a warrant of arrest and ordered him to pay the sum of CFA francs one billion, two hundred and seventy-seven million, nine hundred and ninety-five thousand, four hundred and seventy-four (CFA 1,277,995.474) to the CNCB as reparation for prejudice suffered;

45. The Court recalls that on 6 May 2020 it issued a Ruling on provisional measures as follows:[7]

> Orders the Respondent State to stay execution of the judgment of 25 July 2019 rendered by the Court of the Repression of Economic Crimes and Terrorism against the Applicant, Houngue Éric Noudehouenou, until the final decision of the Court.

46. In this regard, since the stay of execution pronounced by the Ruling of 6 May 2020 concerns the arrest warrant that is still in force, and the Respondent State is obliged to implement it, the Court considers that there is no need to grant the same measure again.

47. Accordingly, the Court dismisses the requested measure.

C. On the apology by the Respondent State

48. The Applicant argues in the Application on the merits, that the Respondent State based its arguments on twenty-four (24) false and imaginary facts, publicly described the decisions of the Court to be grossly incongruous, as such, in the interests of justice, the Respondent State should be ordered to adduce proof of its allegations, and failing that, it should apologise to the Court and the Applicant.

49. He claims that these lies have created mistrust in the business and labour community concerning him. He further submits that the Respondent State should apologise as a matter of urgency to

7 *Idem.*

avoid irreparable damage to his livelihood and his right to work.

50. The Respondent State did not respond to this point.

***

51. The Court finds that this issue lacks urgency, and therefore cannot be examined at the stage of provisional measures.

52. Accordingly, the Court dismisses the requested measure.

i. Request to produce the expert report referred to in the CRIET judgment

53. The Applicant alleges that he was convicted by the CRIET on the basis of a number of documents including an expert report drafted by Mr. Assossou Pedro d'Assomption which implicated him and estimated the loss suffered by the Respondent State as a result.

54. He maintains that to date the Respondent State has not disclosed these documents to him, thereby violating his right to a remedy and a fair trial.

55. He believes that there is urgency because this Court can rule at any time and there will be irreparable harm if the Application is dismissed on the merits.

56. The Respondent State argues in response that there is no urgency in disclosing the expert report. It argues further that the Court is not a court of appeal from the CRIET and can therefore not rule on the irregularities pleaded against the procedure followed before that court.

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57. The Court notes that the Applicant seeks an order to instruct the Respondent State to provide him with the expert report, claiming that the Respondent State's failure to disclose it during the proceedings before CRIET violated his rights.

58. The Court observes that the Respondent State does not contest the allegation of failure to disclose the expert report, nor does it question the importance attached to it by the Applicant in the

CRIET proceedings in respect of which the Applicant alleges a violation of rights.

59. The Court therefore considers that disclosure of the report is necessary for the Applicant to assert his rights before it and the failure to disclose the report is likely to cause him irreparable harm. Since his Application is under consideration by the Court, submission of the report requires urgent action by the Respondent State. In these circumstances, the Court finds that the measure sought is justified.

60. Accordingly, the Court orders the Respondent State to disclose to the Applicant or his Counsel the expert report referred to in the CRIET's judgment of 25 July 2019.

ii. Enforcement of the Ruling and to report on the enforcement

61. The Applicant submits that all the provisional measures requested herein relate to his fundamental rights, including health and life. Therefore, he submits that the implementation of this Ruling is urgent and should be done within a short time.

62. The Respondent State did not respond to this request.

***

63. The Court notes that the provisional measures it orders are of immediate effect, as such, the measure sought is unnecessary.

64. The Court observes that the measure ordered in the present Ruling to produce the expert report relied upon in the proceedings against the Applicant before the CRIET fulfils the requirements of Article 27(2) of the Protocol as regards urgency and therefore requires immediate implementation. Therefore, the Respondent State should report on the implementation of that ruling as soon as possible.

65. Accordingly, the Court orders the Respondent State to report back within fifteen (15) days from the date of notification of this Ruling.

iii. Request to unfreeze bank accounts and remove obstacles to his presence at the hearing

66. The Applicant contends that on the basis of the CRIET Judgment

of 29 July 2019, all the accounts to which he is a signatory were blocked and arrest warrants issued against him, whereas by the Ruling on provisional measures of 6 May 2020, this Court had ordered a stay of execution of the said judgment.

67. He argues that his bank accounts should be unfrozen urgently to enable him have the financial resources to meet the basic needs of his family and his health care. He explains that without his resources which are blocked, from November 2021, he and his family will be exposed to irreparable harm of indigence leading to an irreversible impact on the future and the full development of his children who are minors.

68. He further argues that failure to appear at the hearing of 2 December 2021 before the Court of Cotonou in relation to a real property belonging to him, and in which the judge requires his presence, he may irreversibly forfeit ownership of the said property.

69. The Respondent State did not respond to this request.

***

70. The Court notes that, on 6 May 2020 in the present Application No. 004/2020, it issued an order to stay execution of the Judgment of 25 July 2019 of CRIET.

71. The Court observes that the CRIET Judgment issued an order to freeze the Applicant's bank accounts. It further notes that the Applicant did not provide evidence that his bank account was blocked in execution of the CRIET judgment.

72. Regarding the obstacles to his presence in court as a result of the CRIET judgment, the Court notes that since the stay of execution of the 10-year sentence ordered by the Ruling of 6 May 2020 remains effective, the Court considers that there is no need to issue the same order again.

73. Accordingly, the Court dismisses this request.

iv Issuance of an identity document

74. The Applicant submits that since he is wanted by the Respondent State in execution of the CRIET Judgment of 7 July 2019, he cannot be issued a valid identity card, pursuant to Inter-Ministerial Decree No. 023/MJL/DC/SGM/DACPG/SA 023SGGG19 dated 22 July 2019, which is still valid as long as the Respondent State

has not repealed it as ordered by the Court in the Judgment of 4 December 2020, Application No. 003/2020, rendered in his favour.

75. He posits that without this document, it is impossible for him to access his bank accounts in the event of unblocking of said accounts.

76. He argues that it is an emergency because from November 2021, he will no longer have financial resources, a situation which is likely to irreversibly prejudice their existence since he would no longer be able to meet his needs or those of his family.

77. The Respondent State did not respond to this request.

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78. The Court notes that on 4 December 2020 it rendered a judgment in Application No. 003/2020, *Houngue Eric Noudehouneou v Republic of Benin*, ruling that "the Respondent State has violated the right "to use public property and services in strict equality of all persons before the law as provided for under Article 13(3) of the Charter" and ordered the Respondent State "to take all measures to repeal Inter-Ministerial Decree No. 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019."[8]

79. The Court notes that the Applicant's inability to obtain the national identity card is due to the Respondent State's failure to comply with the provisional measures ordered in the judgment of 4 December 2020.

80. The Court observes that this situation causes prejudice to the Applicant to the extent that, without a valid identity document, it is impossible for him to carry out banking operations related to his bank account.

81. The Court considers that there is a real possibility that the Applicant may not be able to access his account, and that irreparable harm may result from this.

8 *Houngue Éric Noudehouenou v Republic of Benin,* ACtHPR, Application No. 003/2020, Judgment of 4 December 2020 (merits and reparations), § 123 (x) and (xv).

82. Accordingly, the Court grants the request for issuance of the national identity card.

v Respect of rights by the Cotonou Tribunal

83. The Applicant avers that at the hearing of 15 July 2021 in the context of a real estate procedure between him and one Elbaz David, despite the regular presence of his Counsel before the Cotonou Tribunal, the judge requires his physical presence at the hearing of 2 December 2021, failing which, a decision will be rendered against him.

84. He argues that the intention of the Cotonou Court is to violate, at the hearing of 2 December 2021, his fundamental rights protected by Articles 2(3) and 14(1) of the ICCPR, Articles 7 and 14 of the Charter and Article 8 of the UDHR, hence the urgent need for this Court to avert such violations.

85. Regarding the irreparable harm, he maintains that the court's decision will result in the definitive loss of the disputed real property and consequently the loss of the rental income of the said property.

86. The Respondent State did not respond to this request.

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87. The Court notes that the requested provisional measure is based on potential violation of rights protected by the Charter, ICCPR and UDHR by the Cotonou Court.

88. The Court observes that the Applicant pre-empts the decision of the Cotonou Court. The Court further observes that the Applicant did not provide any evidence to show that the Cotonou Court will violate the alleged rights.

89. Accordingly, the Court dismisses the provisional measure requested.

90. For the avoidance of doubt, this Ruling is provisional in nature and in no way prejudges the decision the Court may take on its jurisdiction and the admissibility and merits of the Application.

VII. Operative part

91. For these reasons,
The Court,
By a majority of Seven (7) in favour and Four (4) against, Judge Ben Kioko, Judge Rafaâ Ben Achour, Judge Tujilane R. Chizumila and Judge Chafika Bensaoula Dissenting,

i. *Dismisses* the requests for provisional measure relating to obstacles to medical care and protection;
ii. *Dismisses* the requested provisional measures to unfreeze the Applicant's bank account and to remove obstacles to his presence before the Cotonou Court;

Unanimously,

iii. *Dismisses* the request to stay execution of the arrest warrant pursuant to the CRIET's judgment of 25 July 2019;
iv. *Dismisses* the request for a public apology;
v. *Dismisses* the request regarding observance of the Applicant's rights by the Cotonou Court;
vi. *Orders* the Respondent State to disclose to the Applicant or his Counsel the expert report referred to in the CRIET judgment of 25 July 2019;
vii. *Orders* the Respondent State to take all measures to issue a valid national identity card to the Applicant;
viii. *Orders* the Respondent State to report to the Court on the implementation of the measures ordered in (vi) and (vii) above, within fifteen (15) days of notification of this Ruling.

***

Dissenting Opinion: KIOKO

1. The Order of Provisional Measures issued in the case referred to, was an important and innovative step forward in the determination of procedural matters at the Court. It has, in fact, given the Court the opportunity, not to proceed to issue an order for joinder of proceedings within the meaning of Rule 62 of the Rules of Court, but to decide, to make one and the same order in the instant case where it was seized with two requests for provisional measures filed on July 19 and August 10, 2021 within the same application.

2. The reason for such a step is to be found in the interests of administration of justice, justified, in this case, by the link between the two requests with the judgment of July 25, 2019 by which the Court of Repression Economic Offenses and Terrorism (CRIET judgment) found the Applicant guilty of the offenses of abuse of office and unauthorised use of title, and sentenced him to a prison sentence of ten (10) years, accompanied by a warrant of arrest as well as a fine in the sum of one billion two hundred and seventy-seven million nine hundred and ninety-five thousand four hundred seventy-four thousand (1,277,995,474) CFA francs. With the solution adopted in this procedural aspect, I agree entirely with my honourable colleagues.

3. In the Request of 19 July 2021, the Applicant prayed for the following provisional measures:

a. Order the Respondent State to take all appropriate measures to remove all obstacles to his right to health, in particular the obstacles to obtaining his file from the CNHU in complete freedom and all obstacles to medical consultations, medical examinations, hospitalisation, medical follow-up and the surgery he has been waiting for since 2018, and secondly to ensure the effective protection of his doctors against any prosecution or arrest, failing that, to provide him with the means and a host country where he will receive proper medical unimpeded by the Respondent State.

b. Order the Respondent State to stay arrest warrants and deprivation of liberty until the final decision of this Court on the merits and reparations;

c. Order the Respondent State to apologise to the Court for having pleaded twenty-four (24) imaginary and false facts before the CRIET and before this Court.

d. Order the Respondent to produce, without delay, and "through the Registry of the Court," the entire report of the judicial expert drafted by Mr. Assossou Pedro d'Assomption and referred to in the judgment of the CRIET;

e. Order the Respondent to implement the above measures within three days of notification of the Court's Order; and to report to the Court on the implementation of this Order within fifteen days of the date of notification of this Order;

4. In the Request of 10 August 2021, the Applicant prayed for the following additional provisional measures:

a. Measures to unblock his bank accounts and remove obstacles to his presence before the Cotonou Court on 2 December 2021;

b. Issuance of the valid identity document in accordance with paragraphs 1123.xiv and 123.xv of the Judgment of 4 December 2020, Application No. 003/2020;

c. Order the Respondent State, under Articles 2(3) and 14(1) of the

ICCPR, Article 8 of the UDHR, Articles 7 and 14 of the Charter, to take all appropriate measures to guarantee the Applicant, the effective enjoyment of his right to be heard in his case concerning his right to property, his right to an effective remedy, to legal certainty and to a fair trial before the Cotonou Court at the hearing of 2 December 2021 and subsequent days notwithstanding his absence given the presence of his counsel, the fact that he made his submissions on the merits since 27 October 2017.

5. I also entirely agree with the majority decision with respect to prayers no: b), c), d), e), and g) as set out in paragraphs 3 and 4 above. That is not the case, however, as regards the other measures requested by the Applicant, namely, prayers no: a), f) and h), as I do not agree at all with the majority decision.

6. I am, in fact, dissenting on the decisions rejecting the measures relating to (I) the lifting of obstacles to medical and protective care, and (II) Request to unblock bank accounts and remove obstacles to the applicant's presence at the hearing listed for hearing in December 2021**.** I believe that the rejection of these measures is based on a partial analysis of the facts of the case, and the fact that the Court completely disregarded the link between the measures requested and those previously ordered by the Court in the same Application and which the Respondent State had failed to implement.

i. On the rejection of the measure relating to the removal of obstacles to health care and protection

a. Partial analysis of the facts of the case

7. It is useful to recall that on 21 January 2020, the Applicant filed the Application on the merits together with a first request for provisional measures, in which he alleged the violation of his rights during legal criminal proceedings initiated against him before CRIET. On 6 May 2020, the Court issued a Ruling on this request for provisional measures, ordering a stay of execution of the judgment of CRIET and all other measures of execution until the determination of the merits of Application. The state was also ordered to submit an implementation report. To date, no such report has been received and nothing on record indicates that the Respondent State has implemented the Order for Provisional measures of 06 May 2020.

8. Indeed, the applicant has contended that all the measures requested for arise from the failure of the Respondent State to

comply with three Orders for provisional measures[1] and four judgments[2] of this Court, thus making it "absolutely impossible for him to obtain documents that are necessary for (enjoyment of) his human rights". Being ill, the Applicant asked the Court to order the removal of the obstacles to medical and protective care.

9. The Applicant's arguments in support of his prayers for provisional measures are to be found in three documents, namely, the main Request in Application 004/2020 dated 1 July 2020 (76 Pages),

1 These are the following Ruling for provisional measures: Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, Ruling on provisional measures of 5 May, 2020 - Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, in which the Court ordered "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, district, town or village elections for the benefit of the Applicant"; Application No. 004/2020 - *Houngue Eric Noudehouenou v Republic of Benin* – Ruling for Provisional measures of 6 May 2020, in which the Court ordered the Respondent State to "to stay the execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant (...)"; Application No. 002/2021, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin* – Ruling for Provisional Measures of 29 March 2021 in which the Court ordered the Respondent State to "stay of execution in respect of Judgments of the Supreme Court of the Respondent State N°209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and N°210/CA (*Société JLR SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020, and N°231/CA (*Société l'Elite SCI v Ministry of Economy and Finance and two others*) of 17 December 2020 until the decision of the Court on the merits";

2 These are the following judgments: Application 059/2019 - *XYZ v Republic of Benin*, Judgment of November 27, 2020, the operative part of which reads, inter alia, "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 "; Application 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* - Judgment of December 4, 2020, the operative part of which reads as follows: Orders the Respondent State to take all measures to repeal Law 28 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;; Orders the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision; Orders the Respondent State to take all measures to repeal Inter-Ministerial Decree 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019; 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 "; Application 010/2020 - *XYZ v Republic of Benin* - Judgment of November 27, 2020 and Application 062/2019 - *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*. These two judgments have, in part, a similar operative part: "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 (...), 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".

the first request for provisional measures dated 20 July 2021 (89 pages plus annexes) and the second request dated 10 August 2021 (46 pages).

10. Despite the Applicant's detailed and precise allegations, the Court rejected this measure in a brief analysis which concludes:

> The Court notes that the Applicant alleges that he is currently suffering from serious health problems requiring urgent treatment and that he is under the care of a personal physician. However, the Applicant has not provided the Court with any evidence of his poor health other than mere assertions. He therefore has not sufficiently demonstrated the urgency and irreparable harm he faces, as required by Article 27 of the Protocol.

11. The Court then decides that there is no basis to order the measure requested. This reasoning shows that the Court undoubtedly did not take into consideration the Applicant's personal situation, the extensive submissions the Applicant has made, the reasons he has given for not submitting medical reports as well as his reliance on previous orders rendered by the Court.

12. Regarding his personal situation, the Applicant argues that in order to obtain the proof required by the Court, he would have had no other choice than to go to hospital. However, in doing so, he would have run the risk of being arrested since, by virtue of the arrest warrant, the Applicant remains a wanted person. Furthermore, he asserts that no doctor was willing to prepare a medical report for him because of fear of arrest for harbouring a wanted person and not surrendering him to the authorities. The applicant has also contended that he survived an assassination attempt on his life on 31 October 2018, three armed assailants while in the custody of the respondent State.

13. Therefore, it becomes pertinent to pose the following question: can the Court reasonably require a wanted person, who is in hiding, to produce evidence which requires him to travel and thus expose him to the risk of arrest in execution of an arrest warrant whose execution the Court had previously suspended? The answer is undoubtedly no. The other questions that arise are as follows: What proof was the Applicant required to produce to satisfy the Court that the order for medical access should be granted? Another related question is whether the Applicant has explained why he could not submit any medical reports in support of his application?

14. Another related question is whether after the Applicant has submitted that under national law he requires an identity card to access medical treatment and official records, the Court can reasonably require him to produce those same records, when it

is on record that he has been denied an identity card? To answer these questions, it is important to review the assertions made and the explanations/pieces of evidence provided in support of the requested measures.

b. Assertions relating to Applicant's current medical condition

15. In his very detailed submissions on this issue of medical care, which are summarised very briefly in paragraphs 6, 7 and 8 of the Ruling of this Court, the Applicant has painted the picture of an extremely difficult and dangerous situation with his health continuously deteriorating in circumstances that make it impossible for him to receive urgently needed medical care. With the arrest warrant hanging over his head, he cannot receive needed medical attention; to obtain any medical care he needs an identity document, the right to which was taken away by "decision of the Inter-Ministerial Order no. 023/MJUDC/SGM/DACPG/SA/023SGG19 of 22 July 2019, which prohibits the issuance of official documents (civil documents and other official documents) to the Applicant, in violation of his human rights protected by the Charter and the UDHR".[3] Furthermore, he claims to require hospitalisation for closer observation and specialised medical care.[4]

16. In his Request, the Applicant asserts that he is

> at the terminal stage of the internal tissue growth, at which stage he is no longer able to sit properly and is writhing in pain, which is why, after consultation with a magnifying glass and several examinations by introducing medical instruments into the applicant's body, he was admitted to post-operative hospitalization on October 30, 2021[5] by Doctor-Professor Olory-Togbe, in charge of surgery at the CNHU-HKM, just before the attempt to assassinate him on October 31, 2018, which caused the suspension of this operation. Consequently, the Court can see the suffering that the Applicant has been enduring since 2018 to date because this surgical operation was suspended by the attempted assassination of the Applicant on 31 October 2018 and the Respondent's refusal to ensure the protection of his life and fundamental rights has forced the Applicant to continue to suffer.[6]

3 The request of 20 July 2021, paragraph 67

4 *Ibid.,* para 61.

5 This date must be a typo (perhaps should have been 2020) because the application was filed on 20 July 2021.

6 The request of 20 July 2021, paragraph 78

17. The Applicant further states that having regard to the obligations of the Respondent and the fact that "the attempted murder of which the Applicant complains of occurred while he was illegally detained by the Respondent, he requested for effective protection of his fundamental rights on 12 June 2019", but no response was received or any action taken by the Respondent State.

18. The Applicant also outlines a number of intended medical interventions that cannot take place because of obstacles put up by the Respondent. First, in addition to the other illnesses for which the applicant is being treated and is awaiting surgery, he claims to be

> suffering from dermatological and neurological problems, as well as psychosomatic disorders and post-traumatic stress disorder with a depressive background, according to the doctors of the CNHU-HKM. These ailments necessitated the hospitalization of the applicant for increased surveillance and special medical care (PEC) with physiotherapy (exhibit n°40 p. 11 to 13).[7]

19. Elaborating further on his medical condition, the Applicant contends that

> as a result of the acute right maxillary sinusitis detected in the CNHU-HKM by means of a scanner (a copy of which will be submitted to the court after the obstacles to the access to the applicant's file have been removed), the applicant has had to live in a dust-free environment, which the defendant deprives the applicant from November 2021, because by not executing the decisions of May 06, 2020, application no. 004/2020, September 25 and December 04, 2020, application no. 003/2020, the defendant puts the applicant in incapacity of access to his resources to maintain his healthy habitat, which will aggravate the cephalus and the condition of acute sinusitis diagnosed in him; as such a condition may relate to the brain, its worsening is of a life-threatening nature.[8]

20. The Applicant states that

> as long as the Respondent has not executed the order of 06 May 2020, application no. 004/2020, any attempt to obtain his medical file at the defendant's CNHU-HKM, would lead to the arbitrary deprivation of the applicant's liberty. Furthermore, since the Respondent did not execute the judgment of 04 December 2020, application no. 003/2020, the Applicant is deprived of obtaining his medical file because the communication of this file is protected, the Applicant has to prove his identity before getting a copy of his medical file, while the Respondent has deprived him of civil or identity documents, despite the fact that

7 *Ibid* paragraph 18.

8 *Ibid* paragraph 107

> the Court has ordered him to annul the Inter-Ministerial decree which forbids the Applicant to obtain the documents of the authority.[9]

21. The Applicant appeals to the Court by virtue of article 4 (2) of the ICCPR, article 3 (1) and article 27 (2) of the Protocol, and of its powers as protector of fundamental rights, to ensure that his continued "submission to inhuman and degrading treatment with consequences as unpredictable as they are harmful to the health and life of the applicant", are brought to an end "otherwise the Court's function of protecting fundamental rights and providing emergency jurisdiction would be futile, since the Court would have allowed a violation of an imperative human rights norm to persist".[10]

22. Indeed, the Applicant has alluded to the possibility of death if he does not receive medical attention. He states that "in the course of suffering from May 31, 2021, in the absence of being able to acquire the health care medicines, due to violation of the judgment of December 4, 2020, application no. 003/2020, rendered by the Court in favour of the Applicant, ….. without health care, the irreparable prejudices go from the degradation of the state of health to the unpredictable situations, including death, whereas these two situations are irreparable, it is an evidence that does not need demonstrations".[11]

23. He also asserts that

> there is urgency because without health care and with the obstacles to the Applicant's right to health on the sole basis of the non-execution of the decisions of May 6, 2021, application no. 004/2020 and September 25, 2020, application no. 003/2020, the Applicant runs the risk of death, this is indisputable evidence, so that there is no need to detain or otherwise document this urgency.[12]

c. The Applicant has explained the Failure to Submit Medical reports

24. The Applicant has explained that he cannot have access,

9 *Ibid., p*ara 67.

10 *Ibid.,* para90. The Applicant also relies on *"Article 4(2) and Article 7 of the ICCPR (prohibition of torture and other cruel, inhuman or degrading treatment or punishment,...)" and on the Court's* order of 17 April 2020, Request n° 062/2019, *Sebastien G. Ajavon v Benin*, § 67.

11 The request of 20 July 2021, paragraph 96.

12 *Ibid.,* para 79. The Applicant has also alluded to the possibility of death in paragraphs 40, 102, 110 and 112 of the Request of 20 July 2020 and in the Addedum to the main Application filed on 28 February 2020.,

even with due diligence, to any documentation relating to his medical condition. He asserts that his medical dossier is at the Respondent's CNHU-HKM , which he cannot access because he needs to go there in person, thus risking arrest and detention. Furthermore, to access those records, he needs to produce an identity card, which he has been denied in spite of a previous order of provisional measures by the Court. Apart from the probable deprivation of liberty, he fears for his life since the last time he was admitted at that hospital, there was an assassination attempt on him by 3 armed men who are still at large, and which forced the intended surgery to be abandoned.

25. In this regard, the Request of 20 July 2021, unequivocally states that:

> apart from the proof that he has provided in relation to his state of health, the Applicant has not produced the entirety of his medical file because the Respondent obstructs it. Indeed, the Respondent not having executed the decisions of the Court rendered in favor of the Applicant, the latter cannot access his medical file with the CNHU-HKM of the Respondent, to produce it in the Court for several years."[13] Furthermore, "concerning the drugs that the applicant may have acquired between November 2018 and April 2021 before being refused access to said drugs for default of identity documents that the Respondent did not issue to him in violation of the December 04, 2020 Ruling, request no. 00312020, the applicant did not produce proof of acquisition because this proof indicating the place of acquisition, will lead to his arbitrary deprivation of liberty, since the defendant has not complied with decisions of the Court rendered in favor of the applicant including the order of May 6, 2020.[14]

26. The Applicant also points out that by not executing the Courts order of May 6, 2020, in request no. 00412020 and the judgment of December 4, 2020, in request no 003/2020, the Respondent State has:

> arbitrarily put obstacles preventing the applicant to have access to his medical file with the CNHU-HKM, whereas this file is necessary for the doctors attending the applicant in order to allow them to treat the applicant taking into account all the history of his medical file in order to avoid medical errors.[15]

13 The Request of 20 July 2021, paragraph 16.1

14 *Ibid., p*ara16.2.

15 *Ibid., p*ara 65.

27. The Applicant also contends that the Respondent state has put him in the untenable choice of requiring him

> either to continue to suffer persecution with arbitrariness, inhuman and degrading treatment and the risk of death weighing on his life (the first untenable choice) or to exercise his right to flee persecution provided for in Article 14 of the UDHR, and thus endanger his vital prognosis for lack of adequate care and means of subsistence blocked by the CRIET (the second untenable choice).

28. The Applicant has also offered to supply these reports from the CNHU-HKM "after the obstacles to the access to the applicant's file have been removed".[16]

d. Conclusion on Prayer for Access to Medical Care

29. From the forgoing summary, it is clear that the Applicant has not only provided a detailed exposition of his current medical condition, but also clearly explained away the reasons why he did not and cannot supply copies of medical reports. Indeed, he contends that the medical file is required by his doctors who are secretly treating him but he does not have access to it.

30. It is my considered opinion that the Applicant's reasoning as to why he cannot supply any documentary evidence is compelling. The detailed explanation by the Applicant cannot be considered as "mere assertions" as indicated in the ruling of the majority. The Court cannot simply reject the requested measures simply on the basis that evidence (medical reports) were not submitted. The Court is obliged to assess the reasons given by the Applicant, as to why he did not submit the reports, which surprisingly was not done. Furthermore, the Respondent has not challenged any of the Applicant's assertions or even attempted to demonstrate that the applicant has been lying or misrepresenting his situation in spite of having been afforded an opportunity to do so.

31. In these circumstances, why would the Court, choose to disbelieve the Applicant bearing in mind the importance accorded to the right to health in international law, due to the fact that it is related intimately to the enjoyment of several other rights?.[17] Without good health, so to speak, one is compromised in claiming other rights. To reason in reverse, if the Applicant had been in detention, it would have been the responsibility of the government

16 *Ibid.,* para 103.

17 2 § 3 (c27) of the ICCPR, 11 of the UDHR, 2 and 13 (3) of the Charter

to provide him with adequate medical care.

32. To this end, this responsibility persists even for persons not under detention except they have some leverage to choose medical facilities with greater latitude as compared to persons under detention, which is not the case here because the Applicant cannot access any medical facilities for the stated reasons. Furthermore, as the Applicant asserts in his request, "in matters of the right to life, it is also necessary to act preventively in order to avoid subjecting the Applicant to a situation that may lead to his death for the sole reason of denial of health care"[18] due to the violation of the decisions of the Court.

33. In my view, the right to general health is implicated and the measure requested should have been granted.

34. The Applicant has also in addition to measures for himself, specifically requested the Court to "enjoin the respondent to take all appropriate measures to remove all obstacles to the applicant's right to health, in particular, the obstacles to obtaining the applicant's file from the CNHU in full freedom and the obstacles to medical consultations, medical examinations to be carried out by the applicant, hospitalization, medical follow-up and the surgical operation for which he has been awaiting surgery since 2018,…….. and also to ensure the effective protection of his doctors against prosecution and arrest within the meaning of articles 1 and 6 of the Charter." This aspect of the request which also strengthens the argument for grant of an order for protective medical care has not been addressed by the Court.

35. Finally, the Court has not addressed the link between the current requests to Respondent's failure to implement previous decisions of the Court. Even though the Applicant has specifically requested for this context to be taken into account, the Court has neither considered it nor pronounced itself on it.

36. The Applicant has asked the Court to consider the two requests in the light of their historical context particularly the impact of the previous orders of the Court that were not implemented, and which obliged the applicant to submit to the Court two other requests for interim measures. The Applicant further asserts that:

> The lack of medical records of the Applicant results only from the failure to execute the decisions of the Court on the part of the Respondent…. which is detrimental to his right *to* health and life.[19]

37. Had the Court considered the context of this matter, I believe

18 Paragraph 102.

19 The Request Para 40

that it would have come to the conclusion that each and every aspect of the requests for provisional measures of 19 July 2021 and 10 August 2021, arise from implementation of the CRIET's Judgment of 25 July 2019, whose execution the Court had ordered be stayed. In these circumstances the Court would have had no difficulty in granting the measures sought.

II. On the measures to Unblock Applicant's Bank Accounts and Remove Obstacles to his Presence Before the Cotonou Court on 2 December 2021

38. In the Request for provisional measures of 10 August 2021, the Applicant submits that in execution of the CRIET's Judgment of 29 July 2019, all the accounts to which he is a signatory were blocked and arrest warrants issued against him, whereas by the Ruling on provisional measures of 6 May 2020, this Court had ordered a stay of execution of the said judgment. Even though the Applicant has specifically requested for this context to be taken into account, the Court has neither considered it nor pronounced itself on it.

39. In dealing with this request, the Court, after a very brief analysis recalls that it had issued an order on 6 May 2020 in the present Application No. 004/2020 to stay execution of the Judgment of 25 July 2019 of CRIET, which inter alia had blocked the Applicants bank accounts, and finds as follows:

> The Court observes that the CRIET Judgment issued an order to freeze the Applicant's bank accounts. It further notes that the Applicant did not provide evidence that his bank account was blocked in execution of the CRIET judgment.
>
> Regarding the obstacles to his presence in court as a result of the CRIET judgment, the Court notes that since the stay of execution of the 10-year sentence ordered by the Ruling of 6 May 2020 remains effective, the Court considers that there is no need to issue the same order again.
>
> Accordingly, the Court dismisses this request.

40. The Court itself acknowledges in its ruling that the CRIET judgment of 25 July 2019 contained an order for freezing of the Applicant's bank accounts. The question that must be asked is whether it is reasonable to assume that this order has not been accrued out since July 2019? What is the reason for disbelieving the Applicant even when the Respondent State has not challenged that assertion?

41. After a careful perusal of the two requests for provisional measures, it is clear that the conclusion by the majority that the

Applicant did not provide evidence that his bank account was blocked in execution of the CRIET judgment has been reached only because the explanations given were ignored and not assessed.

42. In the Request of 10 August 2021, the Applicant has explained that "CRIET ordered the banks to block the bank accounts of which the applicant is a signatory, as the applicant has already pointed out to the Court in his application and in paragraph 148 of the addendum of February 20, 2020." Further, as a result of this blocking of the applicant's accounts, "he and his family are exposed to irreparable damage and to unforeseeable situations of violation of their rights" protected by articles 11 of the ICESCR, 23 of the UDHR, 4, 6, 7, 23 and 24 (1) of the ICCPR, 11 (1), 19 and 20 of the African Charter on the Rights and Welfare of the Child (ACRWC), 4 of the Protocol to the African Charter on the Rights of man and peoples relating to women's rights, 15 and 16 of the Charter (title b.) even though this blocking of the applicant's accounts and assets is an arbitrary obstacle to the above human rights of the applicant and of his family".[20]

43. The Applicant acknowledges that "the Court may find that the applicant has not attached to this request for interim measures the statements of his bank accounts and other documents because on the one hand, since the defendant has not executed the measures … rendered in favour of the applicant [by the Court], the applicant cannot obtain a valid identity card whereas without a valid identity card the applicant cannot obtain from his banks his bank statements and other documents which the Court may need; but the Court can request its documents directly from the Banks; in this case, please the Court to notify the applicant so that he indicates to the Court all the Banks where he has accounts and assets."

44. The Applicant cannot be clearer than this as to why he cannot supply evidence of freezing of his accounts. Apart from the fact that he has been in hiding, without any identity card he cannot access any official services.

45. The Applicant also contends that the other way in which he would have received the documents indicating the freezing of his accounts by CRIET was through the Bailiff.

46. Relying on the judgment of the ECOWAS Court of Justice in *Mohammed Sambo Dasuki v Nigeria*, the Applicant contends that the

20 Request of .. August paragraphs 15, 16, 17 and 17.1.

> The bailiff must do all due diligence to achieve the delivery of his exploit to the person of the person concerned and give him a copy. The judicial officers are required to deliver themselves or through their sworn clerks, the exploit and the copies of documents which they have been charged to serve by conforming to the texts in force.[21]

47. By this assertion, the Applicant is basically arguing that the Bailiff did not serve any documents on him, after freezing his accounts, presumably for failure to pay the fine of 1,277,995,474) CFA francs. Therefore, if the applicant could not access the document at the bank and did not receive it from the bailiff, presumably because he is in hiding, then he had no other known way of accessing it.

48. Regarding the statement by the Applicant that he will run out funds in November 2021, this must be assessed in its proper context. His overall submissions as a whole point to the fact that he is currently facing serious financial challenges, but the situation will become critical in November 2021.

49. The Applicant has underlined that the Respondent state has "endangered his vital prognosis for lack of adequate care and means of subsistence blocked by the CRIET."[22] He has also contended that "due to the non-execution of the decisions of May 6 and May 25, 2020, applications no. 004/2020 and no. 003/2020, the Respondent has financially impaired the Applicant's right to health, because it is obvious that without financial means the petitioner cannot pay for doctors' fees, medical analyses, hospitalization, medicines, rehabilitation, nor pay for the surgical operation to eliminate the may in its final stage and its consequences, etc.[23]

50. With regard to the blocking of his accounts the Applicant has made the following assertions:

- the Respondent has deprived him of sufficient financial means to meet his health care needs and his right to an adequate standard of living, as he has already reiterated in other pleadings (application no. 032/2020) and in the third complaint of the obstacles posed by the Respondent.[24]
- the blocking of his accounts is arbitrary within the meaning of human rights and Articles 4(m) of Constitutive Act and 4(1) of ACDEG because blocking bank accounts of the applicant results from a denial of justice since the judgment of the CRIET is based

21 Judgment n° ECW/CCJ/JUD/23/16, affaire COL. *Mohammed Sambo Dasuki c. Nigeria*, p.48.

22 Request of 20 July 2020, paragraph 40

23 *Ibid.,* para 58.

24 *Ibid., p*ara 58.

on imaginary and untrue facts and the defendant has not been able to provide proof of the reality of his allegations neither during the internal proceedings nor before this Court, whereas this arbitrary blocking creates irreparable damage to the rights of the applicant and his family.

- Except for a miracle, the Applicant is deprived of the financial means to afford the food necessary for his health and life, which entails an imminent violation of his right to an adequate standard of living, his right to life and health because of the non-execution of the decisions of the Court rendered in his favour.[25]
- The Respondent has thus continuously deprived the applicant of the financial means to treat himself, whereas it is obvious that without financial means the applicant cannot treat himself, and the defendant has never provided him with a single CFA franc to purchase the health care medication provided by the doctors.[26]
- Consequently, faced with the requirement of the applicant's presence by the Cotonou Tribunal despite the presence of his counsel, there is urgency as long as the Respondent has not removed the obstacles mentioned in paragraphs 120 to 126 above for the applicant's presence before the Cotonou Tribunal in full enjoyment of his rights to liberty protected by Articles 6 and 12 of the Charter.[27]

51. Whether the critical need for access to his bank account is now or in December is irrelevant. The jurisprudence of the Court is to the effect that "urgency, consubstantial to extreme gravity, means "a real and imminent risk that irreparable harm wilt be caused before it renders its final judgment".[28] Furthermore, the Court has also held there "there is an urgency whenever acts likely to cause irreparable harm can "occur at any time" before the Court renders a final judgment in the case.[29]

52. Court Hearing in December 2021.

53. Regarding the hearing on 2 December 2021, the Applicant submits that, he cannot appear personally at a real estate legal proceeding pending before the Cotonou Court, where the said Court has ordered he be present at the hearing of 2 December 2021, failing which, he may irreversibly forfeit ownership of the

25 *Ibid.,* para 98.

26 *Ibid.,* para 52

27 *Ibid., p*aras132.

28 See Application 004/2020, ***Houngue Eric Noudehouenou v Benin*** (Ruling of 6 May 2020), § 37& 38; See also. ICJ, implementation of the Convention for the Prevention and Punishment of the Crime of Genocide Gambia v Myanmar, 23 January 2020, § 65;

29 *Ibid* § 38;

said property.

54. On this issue, the Court has found in Paragraph 72 of its Ruling as follows:

> Regarding the obstacles to his presence in court as a result of the CRIET judgment, the Court notes that since the stay of execution of the 10-year sentence ordered by the Ruling of 6 May 2020 remains effective, the Court considers that there is no need to issue the same order again.

55. First, I have not seen anything on record suggesting that the hearing in December arises from the CRIET judgment. The Applicant has contended in the second request of August 2021 that it is a property dispute for which a hearing took place in the Cotonou Court for which he had not been given prior notice. He states as follows:

> On the second hand, concerning the urgency, the irreparable damage and the interests of justice…it becomes irreparable damage from December 2, 2021 because it is on July 15, 2021 that the Court of Cotonou required the physical presence of the applicant under penalty of arbitrarily depriving him of his right to property then confirmed by the applicant's land title (Exhibit 121), the acts of the Authority presented to the Beninese judge (Exhibits 122 to 123) since Article 146 of the Land Code provides that the Applicant's Land Title is final and unassailable.[30]

56. In view of the foregoing, the Court ought to have granted the prayer for unblocking the Applicants Bank Accounts.

57. With regard to the attendance at the Cotonou Court hearing on 2 December 2021, the Court should have ordered removal of all obstacles to his presence before the Cotonou Court. Furthermore, in the alternative, the Court could also have reiterated its previous ruling and discharged the Applicant from any obligation to attend the Cotonou Court hearing on 2 December 2021, until the respondent State has implemented its previous decisions.,.

III. Conclusion on the measures sought.

58. The failure of the Respondent State to implement the previous decisions of the Court, have put the Applicant in his current untenable position, where, on the one hand, he is sick and cannot receive treatment and risks arrest and detention if he attends Court, and, on the other hand, risks losing his property if he does not attend Court. Needless to say, he is only in this situation because of the actions or inactions of the Respondent State.

30 Paragraph 129.

In such circumstances, I believe that had the Court seriously considered the evidence submitted and the assertions made by the Applicant, it would have granted the orders sought for access to medical care, for unblocking his bank accounts and for removing obstacles to his attendance at the Cotonou Court hearing on 2 December 2021.

***

Dissenting Opinion: BEN ACHOUR

1. Pursuant to Rule 70(3) of the Rules of Procedure of the Court, I hereby declare that I do not agree with the decisions of the majority of the Court dismissing the Applicant's first two requests for provisional measures, namely,

i. Request for the removal of impediments to medical and protective care, and

ii. Request for the unfreezing of bank accounts and removal of impediments to the Applicant's presence at the hearing scheduled for December 2021.

2. I hereby declare that I fully share the dissenting opinion of the Honourable Justice Ben Kioko in respect of the above order. I agree with the arguments he develops and express the same reservation with regard to the findings of the Court on the dismissal of the two requests mentioned above.

I. Dismissal of the request to remove impediments to medical care and protection

3. As a ground for its refusal to order the removal of impediments to medical care, the Court finds that the Applicant has not provided the Court with any evidence of his poor health other than mere assertions:

> The Court notes that the Applicant alleges that he is currently suffering from serious health problems requiring urgent treatment and that he is under the care of a personal physician. However, the Applicant has not provided the Court with any evidence of his poor health other than mere assertions. He therefore has not sufficiently demonstrated the urgency and irreparable harm he faces, as required by Article 27 of the Protocol.

4. In fact, the Court discounted the personal situation of the Applicant, his detailed submissions and the reasons given by him for his inability to submit medical reports. The Court also failed to take into account previous orders of the Court in the same case.

5. In his dissenting opinion, which I join, Judge Ben Kioko, sufficiently developed the arguments advanced by the Applicant and which the Court should have upheld to order the requested measure based on the personal situation of the Applicant.[31] his poor health[32] and the fact that it was materially impossible for him to produce the medical reports.[33]

6. It emerges from the voluminous records that the Applicant not only provided a detailed account of his personal situation, but also a precise description of his current state of health as well as the reasons for his inability to provide copies of medical reports**.**

II. Dismissal of the request for the unfreezing of bank accounts and the removal of impediments to appearing at the hearing of 2 December 2021 before the Cotonou Tribunal

7. Ruling on the request for the unfreezing of bank accounts and the removal of impediments to the presence of the Applicant before the Cotonou Tribunal, the Court recalls that it had issued an order on M ay 2020 in relation to the same Application No. 004/2020, ordering the stay of execution of the judgment of July 25, 2019 of the Court of Repression of Economic Offences and Terrorism (CRIET), which had, inter alia, frozen the Applicant's bank accounts. To this effect, the Court observes:

> The Court observes that the CRIET Judgment issued an order to freeze the Applicant's bank accounts. It further notes that the Applicant did not provide evidence that his bank account was blocked in execution of the CRIET judgment.
>
> Regarding the obstacles to his presence in court as a result of the CRIET judgment, the Court notes that since the stay of execution of the 10-year sentence ordered by the Ruling of 6 May 2020 remains effective, the Court considers that there is no need to issue the same order again
>
> Accordingly, the Court dismisses this request.

8. The above ground for dismissing the request is surprising, since

31 See in particular: § 12 and 13 of the Opinion of Judge Kioko.

32 See in particular: § 16, 18, 19 and 20 of the Opinion of Judge Kioko.

33 See in particular: § 24, 25, 26, 27 of the Opinion of Judge Kioko.

the Court explicitly admits that "the CRIET's judgment issued an order to freeze the Applicant's bank accounts", only to make a U-turn one sentence later, and state that " the Applicant did not provide evidence that his bank account was frozen in execution of the CRIET judgment." (!)

9. The fact of the matter, though, is that the Applicant provided the Court with all the necessary evidence to convince it of the hard times he was going through due to the lack of resources. The Court decided otherwise even though urgency and irreparable harm were amply proven.

***

Dissenting Opinion: CHIZUMILA

Pursuant to Rule 70(3) of the Rules of the Court, I hereby declare that I disagree with the majority ruling of the Court that "Dismisses the requests for provisional measures relating to obstacles to medical care and protection, to unfreeze the Applicant's bank account and to remove obstacles to his presence before the Cotonou Court. "

1. In this regard, I agree with the dissenting opinion expressed by Judge Ben Kioko concerning the Court's dismissal of the above-mentioned requests.

2. In my view, the Court's reasoning for dismissing the requests is unpersuasive and fails to take into consideration some important elements of the case.

3. In the Request of 19 July 2021, the Applicant prayed for the following provisional measures:

> Order the Respondent State to take all appropriate measures to remove all obstacles to his right to health, in particular the obstacles to obtaining his file from the CNHU in complete freedom and all obstacles to medical consultations, medical examinations, hospitalisation, medical follow-up and the surgery he has been waiting for since 2018, and secondly to ensure the effective protection of his doctors against any prosecution or arrest, failing that, to provide him with the means and a host country where he will receive proper medical unimpeded by the Respondent State.

4. In its ruling,

> "the Court notes that the Applicant alleges that he is currently suffering from serious health problems requiring urgent

treatment and that he is under the care of a personal physician. However, the Applicant has not provided the Court with any evidence of his poor health other than mere assertions. He therefore has not sufficiently demonstrated the urgency and irreparable harm he faces, as required by Article 27 of the Protocol. The Court recalls that urgency, consubstantial with extreme gravity, means a "real and imminent risk that irreparable harm will be caused before it renders its final judgment." The court emphasizes that the risk in question must be real, which excludes the purely hypothetical risk and justifies the need to repair it immediately. The Court therefore considers that there is no basis to order the measure requested."

5. I do not agree with this reasoning which did not take into consideration the Applicant's extensive and detailed submissions on this issue, in which he explained clearly and step by step, why he cannot receive the needed medical attention as he has an arrest warrant hanging over his head; the connection between his inability to obtain any medical care and the fact that he does not have an identity document, a right that was taken away by "the decision of the Inter-Ministerial Order no. 023/MJUDC/SGM/DACPG/SA/023SGG19 of 22 July 2019, which prohibits the issuance of official documents (civil documents and other official documents) to the Applicant, in violation of his human rights protected by the Charter and the UDHR".[34]

Furthermore, 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 considers necessary."

6. With reference to Article 27(2) of the Protocol, the Court notes that it has the duty 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 provision.

7. With regard to irreparable harm, the Court considers that there must exist a "reasonable probability of materialization" having regard to the context and the personal situation of the applicant

8. In light of the foregoing, I am of the strong view that the requests for provisional measures based on the three requirements of Article 27(2) (extreme gravity, urgency and irreparable harm) have been met and were amply highlighted by the Applicant who devoted extensive parts of his request to them. The finding that the detailed explanations by the Applicant are "mere assertions"

34 The request of 20 July 2021, paragraph 67

as indicated in the ruling of the majority, does not reflect the facts and the jurisprudence cited by the Applicant.

9. As Judge Kioko cites all these facts in his dissenting opinion, it is not necessary for me to go over them again. With this dissenting opinion, I am only expressing my dissent, endorsing and supporting the opinion of my distinguished colleague.

Noudehouenou v Benin (provisional measures) (2021) 5 AfCLR 592

Application 032/2020, *Houngue Éric Noudehouenou v Republic of Benin*

Ruling, 22 November 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant alleged that the procedures of the domestic courts of the Respondent State in a civil matter involving him were in violation of his human rights. In his Application before the Court, he brought this request *inter alia* for provisional measures to stay execution of the judgment of the domestic courts. The Court granted the order for stay of the judgment as requested.

Jurisdiction (*prima facie*, 15-20)

Provisional measures (urgency, 33, 42; irreparable harm, 34; specific nature of measures requested, 37 - 40; urgency in enforceable domestic judgment, 42; vague request, 46)

Dissenting Opinion: KIOKO

Provisional measures (requirements for grant, 26-27)

Dissenting Opinion: BEN ACHOUR

Provisional measures (requirements for grant, 5)

I. The Parties

1. Mr. Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") is a national of Benin. He seeks the stay of execution of the judgment delivered against him in a civil case on 5 June 2018, by the Cotonou Court of First Instance (hereinafter referred to as the "Cotonou CFI").

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 or 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 the main Application, the Applicant alleges that following a civil procedure in which he had voluntarily intervened, , the Cotonou Court of First Instance rendered on 5 June 2018, without his knowledge, a judgment in the case opposing Collectivité Houngue Gandji, Akobande Bernard, Mrs Anne Pogle, née Kouto as plaintiffs and Gabriel Kouto, as defendant.

4. The Applicant submits that the judgment of the Cotonou Court of First Instance, of which was never notified to him, infringed on his right of ownership. Part of its operative section reads as follows:

> For these reasons,
>
> Ruling publicly, adversarially, in civil matters of land and state property law and in the first instance;
>
> Homologates the framework agreement dated 4 October 2016, the amicable settlement dated 4 April 2016 and the minutes dated 4 May 2017 and makes them enforceable;
>
> Acknowledges that Houngue Gandji group has withdrawn its action;
>
> Note that Mrs Anne Pogle née Kouto and Gabriel Kouto are presumed owners of the "S" plots of Lot No. 3037 of Agla estate, plotted under number 1392 and "R" of Lot No. 3037 of Agla estate, plotted under number 1462 F;
>
> Note that the DJA-VAC association represented by Koty Bienvenue acquired landed property of 4ha 62a 58ca from the Houngue Gandji group;
>
> - Confirms the property rights of: Pedro Julie on Plots Numbers 403h and EL 404h at Agla estate;
> - Mrs Anne Pogle, née Kouto on Plot "S" of Lot 3037 of Agla estate, under number 1392 F;
> - Kouto Gabriel on Plot "R" of lot 3037 of Agla estate under number 1462 F;

1 *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (Ruling of 3 June 2016) 1 ACtHPR 540 § 67; *Houngue Eric Noudehouenou v Republic of Benin* ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4- 5 and Corrigendum of 29 July 2020.

- DJA-VAC association on land the size of 4ha 62a 58ca;
- Dismisses the Application by Trinnou D. Valentin, Houenou Eleuthère, Alphonse Adigoun and Houngue Eric and orders them to pay costs;
- Notifies the parties that they have a period of one (1) month to appeal.

5. He submits that he is bringing this Application for the purpose of praying this Court to:

i. Order the Respondent State to remove "the obstacles to the exercise of his right to evidence" and to "ensure the enjoyment of his right to search for, obtain and produce all documents (...) for the exercise of his right to appeal and his right to defence in the proceedings concerning him" before this Court;

ii. Order the Respondent State to "stay the execution of the judgment of the Cotonou Court of First Instance until the Court delivers its final judgment";

iii. In the alternative, "grant it the benefit of the Court's legal aid fund for all acts and procedures that the Court deems necessary to suspend the judgment of the Cotonou Court of First Instance, in view of the continued violations of the decisions of the Court by the Respondent State.

III. Alleged violations

6. The Applicant alleges violation of the following rights:

i. The right to property, protected by Article 14 of the Charter;

ii. The rights to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter and the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR ");

iii. The right to have one's cause heard, protected 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

7. The Application was filed on 15 October 2020. It was served on the Respondent State on 20 October 2020, giving it ninety (90) days to respond.

8. On 8 June 2021, the Applicant filed the instant Application for provisional measures which was duly notified to the Respondent State, which was given fifteen (15) days from the date of receipt to file its response.

9. As of 6 July 2021, when the time for filing the response to the Application for provisional measures elapsed, the Registry had

not received any response from the Respondent State.

V. *Prima facie* jurisdiction

10. The Applicant asserts, on the basis of Article 27(2) of the Protocol and Rule 51 of the Rules of Court (hereinafter referred to as "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 submits that the Court has jurisdiction insofar as the Republic of Benin has ratified the African Charter, the Protocol and deposited the Declaration provided for in Article 34 (6) thereof; and insofar as he alleges violations of rights protected by human rights instruments.

12. He further submits that although the Respondent State withdrew its Declaration on 25 March 2020, this withdrawal only took effect on 26 March 2021.

13. The Respondent State did not respond to this point.

***

14. Article 3(1) of the Protocol provides:

> 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. Furthermore, Rule 49(1) of the Rules 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.[3]

16. In the instant case, the rights the Applicant alleged to have been violated are all protected by the Charter and the ICCPR,

2 This Article of the former Rules of 2 June 2020 corresponds to Rule 59 of the new Rules which came into force on 25 September 2020.

3 *Ghati Mwita v Republic of Tanzania,* ACtHPR, Application No. 012//2019, Ruling of 9 April 2020 (provisional measures), § 13.

instruments to which the Respondent State is a Party.

17. The Court further notes that the Respondent State has ratified the Protocol and it has also deposited the Declaration.

18. The Court observes, as mentioned in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

19. The Court also recalls that it has held that the withdrawal of a Declaration filed in pursuant to 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, [4] as is the case in the instant case. The Court reiterated its position in its Ruling of 5 May 2020 *Houngue Eric Noudehouenou v Republic of Benin,*[5] and held that the Respondent State's withdrawal of the Declaration would take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal has no bearing on its personal jurisdiction in the instant case.

20. From the foregoing, the Court finds that it has *prima facie* jurisdiction to hear the instant Application for provisional measures.

VI. Provisional measures requested

21. The Applicant requests the Court to order the Respondent State to "remove the hindrances to the exercise of the right of evidence" and to "ensure the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning him" before this Court.

4 *Ingabire Victoire Umuhoza v Republic of Rwanda (*jurisdiction*)* (Ruling of 3 June 2016) 1 ACtHPR 540 § 67.

5 *Houngue Eric Noudehouenou v Republic of Benin,* ACtHPR, Application No. 003/2020 Ruling of 5 May 2020 (provisional measures), § 4- 5 and *Corrigendum* of 29 July 2020.

22. Furthermore, that by failing to comply with three Orders for provisional measures[6] and four judgments[7] of this Court, the Respondent State has made it "absolutely impossible for him to obtain documents that are necessary for his human rights".

23. In this regard, he notes that there is an urgent need to preserve his right to a fair trial and that the violation of Article 4[8] and Article

6 These are the following Ruling for provisional measures: Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, Ruling on provisional measures of 5 May, 2020 - Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, in which the Court ordered "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, district, town or village elections for the benefit of the Applicant"; Application No. 004/2020 - *Houngue Eric Noudehouenou v Republic of Benin* – Ruling for Provisional measures of 6 May 2020, in which the Court ordered the Respondent State to "to stay the execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant (...)"; Application No. 002/2021, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin* – Ruling for Provisional Measures of 29 March 2021 in which the Court ordered the Respondent State to "stay of execution in respect of Judgments of the Supreme Court of the Respondent State N°209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and N°210/CA (*Société JLR SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020, and N°231/CA (*Société l'Elite SCI v Ministry of Economy and Finance and two others*) of 17 December 2020 until the decision of the Court on the merits";

7 These are the following judgments: Application 059/2019 - *XYZ v Republic of Benin*, Judgment of November 27, 2020, the operative part of which reads, inter alia, "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 "; Application 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* - Judgment of December 4, 2020, the operative part of which reads as follows: Orders the Respondent State to take all measures to repeal Law 28 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; Orders the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision; Orders the Respondent State to take all measures to repeal Inter-Ministerial Decree 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019; 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 "; Application 010/2020 - *XYZ v Republic of Benin* - Judgment of November 27, 2020 and Application 062/2019 - *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*. These two judgments have, in part, a similar operative part: "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 (...), 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".

8 Article 4 ICCPR states: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the

7[9] of the ICCPR is imminent.

24. The Applicant states that it was after a third party initiated a procedure before the Cotonou Court that he obtained, on 1 June 2021, a copy of the certificate of non-appeal and non-opposition of the Cotonou CFI's judgment and a copy of the order authorizing the sale issued on 24 February 2020 (hereinafter referred to as the "authorization of sale"). According to him, the urgency and irreparable harm he suffered "was not brought to his attention until September 2020".

25. The Applicant requests the stay of execution of the judgment of the Cotonou C FI, arguing that urgency arises from the enforceability of the said judgment insofar as he has produced the certificate of non-opposition or appeal thereof. He further submits that it is on this basis that the authorization of sale of the building was delivered. He further submits that he is unable to participate in the proceedings of domestic courts to present his arguments, his evidence and to obtain a fair trial.

26. He argues that staying the execution of the judgment of the Cotonou CFI will put an end to the irreparable harm that he could suffer and guarantee the equality of the parties, their interests and the effectiveness of the Court's final judgment.

27. According to the Applicant, irreparable harm "results from domestic law" which, "by interfering with his rights protected by Articles 1, 2, 5, 7, 8, 14 and 17 of the Charter, Article 27 of the Protocol, Articles 2, 7 and 18 of the ICCPR, and Article 1(h) of the ECOWAS Democracy Protocol, causes him irreparable harm that cannot be reversed even if the final decision on the merits favours him".

present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

9 Article 7 ICCPR states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation".

28. He submits that the said provisions of domestic law are, in particular, Articles 30 to 34,[10] 528 and 530[11] of the Land Code as well as Articles 547 and 570 of the Code of Civil Procedure.

29. In the alternative, the Applicant requests the Court to "grant him the benefit of the Court's legal aid fund for any acts and proceedings that the Court may deem necessary for the stay of execution, in view of the continued violations of the Court's decisions by the Respondent State.

30. The Applicant asserts that in the absence of a ruling staying the execution of the Cotonou CFI judgment, he will suffer irreparable harm.

31. He underlines, to this effect, that the current illegal occupants of the building in question will counter-argue that failure to diligently comply with Court's directives is synonymous with acquiescence to the execution of the judgment of the TPI of Cotonou.

***

10 Article 30 provides: "Within the meaning of this code, extinctive prescription is the annulment of a pre-existing presumptive right of ownership by peaceful, notorious, uninterrupted and unequivocal possession of ten (10) years"; Article 31: "Prescription is acquired when the last day of the term is over. The period referred to in the preceding article is counted from date to date"; Article 32: "The statute of limitations does not run against the person who is unable to act as a result of an impediment resulting from the law, an agreement or a case of force majeure. The occupation of a building supported by acts of violence cannot be the basis for prescription. Nor can exploitation or occupation as a result of authorization or simple tolerance be the basis for prescription. Those who possess by others cannot prescribe. In any case, the farmer, custodian, guardian, lessee, bailee, usufructuary and all other operators or occupants who precariously hold the owner's property cannot prescribe it. Ascendants, descendants and collaterals of operators or occupants on a precarious basis cannot prescribe either. Between spouses, prescription does not run"; Article 33: "The plea of prescription is of public order. It may be invoked in any case and even ex officio by the judge"; Article 34: "When prescription has expired, the action to claim the property of the presumed pre-existing owner is inadmissible".

11 These articles provide: "Article 528: "The execution of a court decision, judgments, or rulings ordering forced eviction shall be preceded by a stage of amicable negotiation with a view to the purchase, by the party taking part in the proceedings, of the occupied property (...)"; Article 530: "In all cases, the property pre-empted or expropriated in application of the preceding articles shall be the subject of a lease purchase, as a matter of priority, in favour of the parties taking part. The modalities for the implementation of the provisions of this article are fixed by a Cabinet.

32. The Court notes that Article 27(2) of the Protocol provides that:

> [i]n 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.

33. The Court recalls that urgency, which is consubstantial with extreme gravity, means that an "irreparable and imminent risk that irreparable harm will be caused before it renders its final judgment".[12] The risk in question must be real, which excludes a purely hypothetical risk and which explains the need to cure it immediately.[13]

34. With respect 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.[14]

35. The Court notes that the two conditions that must be satisfied under the above-mentioned Article, is that of extreme gravity or urgency and irreparable harm which are cumulative, to the extent that where one of them is absent, the measure requested cannot be ordered.

36. In light of the foregoing, the Court will examine the measures requested to determine whether they meet the required conditions.

A. On the measure to "remove obstacles to the exercise of the right to evidence" and to "the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning the Applicant" before this Court

37. The Court emphasises that an application for provisional measures is necessarily made in the context of a specific procedure on the merits to which it is attached, and therefore cannot be general in nature and extend to other procedures on the merits.

38. The Court notes that the provisional measure requested by the Applicant extends to all the procedures that he has initiated and that are pending before the Court. The measure is, in fact, intended to enable him to exercise certain rights "in the procedures

12 *Sébastien Ajavon v Republic of Benin,* ACtHPR, Application No. 062/2019, Ruling of 17 April 2020 (provisional measures), § 61.

13 *Ibid*, § 62.

14 *Ibid*, § 63.

concerning him before the Court ".

39. The Court notes that, in addition to the instant procedure, the Applicant has filed three Applications before the Court, which are pending.[15]

40. In view of the general nature of the measure requested, which the Applicant intends to extend to all the pending procedures to which he is a party before the Court, the Court cannot grant it.

41. In any event, the Applicant has not demonstrated, even for the instant procedure, that the requirements of Article 27(2) of the Protocol have been met. Accordingly, the Court dismisses the prayer for the measure requested.

B. Stay of execution of the Cotonou CFI judgment

42. The Court notes that in the instant case, it is true that the certificate of non-opposition and non-appeal produced by the Applicant attests that the judgment of the Cotonou Court of First Instance is enforceable. As such, it is synonymous with urgency, consubstantial with extreme gravity in the sense that objectively, there is no longer any obstacle to the execution of the said judgment. This execution can, so to speak, take place at any time before the Court renders its judgment. Therefore, the existence of a real and imminent risk is established.[16] This risk is exacerbated by the order authorizing the sale dated 24 February 2020, issued in execution of the judgment of the Cotonou Court of First Instance and on which the Applicant relies.

43. Regarding the requirement on irreparable harm, the Court considers that it is also met.

44. In view of the foregoing, the Court orders the Respondent State to stay the execution of the Cotonou CFI judgment.

C. The measure relating to the benefit of the legal aid fund

45. The Court emphasises that the conditions for granting legal aid are governed by the Legal Aid Policy of the Court.

46. The Court notes that the Applicant's request is vague and that in any case, the measure cannot be granted by way of an order on

15 Applications Nos. 004/2020, 020/2020, 028/2020;

16 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No.002/2021, Ruling (Provisional measures) du 29 mars 2021, § 39-40;

provisional measures.

47. Accordingly, the Court dismisses the request.

48. For the avoidance of doubt, the Court recalls that this Ruling is provisional in nature and in no way prejudges the Court's decision on its jurisdiction, on admissibility and on the merits of the case.

VII. Operative part

49. For these reasons,

The Court

By a majority of Seven (7) in favour and Four (4) against, Judge Ben Kioko, Judge Rafaâ Ben Achour, Judge Tujilane R. Chizumila and Judge Chafika Bensaoula Dissenting,

i. *Dismisses* the measure seeking to "remove the hindrances to the exercise of the right of evidence" and to "ensure the enjoyment of the right to search for, obtain and produce all documents (...) necessary for the exercise of the rights of appeal and defence in the proceedings concerning the Applicant" before this Court;

ii. *Dismisses* the request for legal aid;

Unanimously,

iii. *Orders* the stay of execution of the Cotonou Court of First Instance Judgment of 5 June 2018.

iv. *Orders* the Respondent State to report to the Court on the implementation of the measure ordered in point (iii) of this operative part, within fifteen (15) days of notification of this Ruling.

***

Dissenting Opinion: KIOKO

1. I agree with the Majority Ruling, on the most part, in the findings and conclusions reached in the matter of Mr. Houngue Eric Noudehouenou, (hereinafter referred to as "the Applicant") against the Republic of Benin, in which he seeks provisional measures for stay of execution of a judgment delivered on 5 June 2018 against him in a civil case by the Cotonou Court of First Instance (hereinafter referred to as the "Cotonou CFI").

2. The Applicant alleges that following a civil proceeding in which he had voluntarily intervened, the Cotonou CFI delivered the

judgment without his knowledge on 5 June 2018. According to him, this judgment, which was never served on him, deprived him of his right to property.

3. The Applicant prays the Court to:

i. Order the Respondent State to remove "the obstacles to the exercise of his right to evidence" and to "ensure the enjoyment of his right to search for, obtain and produce all documents (...) for the exercise of his right to appeal and his right to defence in the proceedings concerning him" before this Court;

ii. Order the Respondent State to "stay the execution of the judgment of the Cotonou Court of First Instance until the Court delivers its final judgment";

iii. In the alternative, "grant it the benefit of the Court's legal aid fund for all acts and procedures that the Court deems necessary to suspend the judgment of the Cotonou Court of First Instance, in view of the continued violations of the decisions of the Court by the Respondent State.

4. I am in agreement with the reasons advanced by the majority for granting prayer no: (ii) for a stay of execution of the order of the Cotonou Court of First Instance (CFI) of 24 February 2020 authorizing the sale of the Applicants property pursuant to the judgment of the CFI of 5 June 2018 and for the Respondent to report to the Court within 15 days. Similarly, I agree with the Court's decision not to issue an order granting the request for legal aid as this is a matter falling within the administrative jurisdiction of the Court, which cannot be dealt with through a Court order.

5. However, I have a divergence of opinion with the majority with respect to prayer (i) in which the Court has rejected the request for an order to exercise the right to evidence.

6. Having carefully perused the detailed Request submitted by the Applicant, I find that the reasoning in the majority Ruling with respect to prayer (i) problematic. As indicated in Paragraph 22 of the Ruling, the Applicant has submitted that by failing to comply with three

Orders for provisional measures[1] and four judgments[2] of this Court, the Respondent State has made it "*absolutely impossible for him to obtain documents*" that he requires to prosecute his case before this Court in order to overturn the decision that deprived him of his property.

7. Basically, what the Applicant is seeking is what in common law is referred to as discovery of documents. The discovery of documents is intended to provide the parties with the relevant documentary

1 These are the following Ruling for provisional measures: Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, Ruling on provisional measures of 5 May, 2020 - Application No. 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin*, in which the Court ordered "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, district, town or village elections for the benefit of the Applicant"; Application No. 004/2020 - *Houngue Eric Noudehouenou v Republic of Benin* – Ruling for Provisional measures of 6 May 2020, in which the Court ordered the Respondent State to "to stay the execution of the judgment of 25 July 2019 of the Court for Repression of Economic Crimes and Terrorism against the Applicant (...)"; Application No. 002/2021, *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin* – Ruling for Provisional Measures of 29 March 2021 in which the Court ordered the Respondent State to "stay of execution in respect of Judgments of the Supreme Court of the Respondent State N°209/CA (*COMON SA v Ministry of Economy and Finance and two (2) others*) and N°210/CA (*Société JLR SA Unipersonnelle v Ministry of Economy and Finance*) of 5 November 2020, and N°231/CA (*Société l'Elite SCI v Ministry of Economy and Finance and two others*) of 17 December 2020 until the decision of the Court on the merits";

2 These are the following judgments: Application 059/2019 - *XYZ v Republic of Benin*, Judgment of November 27, 2020, the operative part of which reads, inter alia, "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 "; Application 003/2020 - *Houngue Eric Noudehouenou v Republic of Benin* - Judgment of December 4, 2020, the operative part of which reads as follows: Orders the Respondent State to take all measures to repeal Law 28 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;; Orders the Respondent State to comply with the principle of national consensus enshrined in Article 10(2) of the ACDEG for any constitutional revision; Orders the Respondent State to take all measures to repeal Inter-Ministerial Decree 023MJL/DC/SGM/DACPG/SA 023SGG19 dated 22 July 2019; 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 "; Application 010/2020 - *XYZ v Republic of Benin* - Judgment of November 27, 2020 and Application 062/2019 - *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*. These two judgments have, in part, a similar operative part: "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 (...), 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".

material before the trial so as to assist them in appraising the strength or weaknesses of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at trial. It is also in the interest of justice since discovery ultimately allows the Court to establish the truth of the allegations before it.

8. What I find troubling is that the majority have not appreciated that it is in the interest of justice that a party should have access to documents, which the party needs to prepare for his case unless there is a valid reason to withhold them. In the instant case, no valid reason has been adduced by the Respondent state, which in fact did not respond to the request.

9. In its brief consideration of this prayer, the Court has in five paragraphs dismissed this prayer by noting that the measure requested by the Applicant applies to all the procedures that he has initiated and that are pending before this Court; the measure requested is to enable the Applicant exercise certain rights "in the procedures concerning him before this Court, where he has three Applications, which are pending'.[3] Furthermore, the Court concludes that it cannot grant the measure requested for two reasons, in view of their generality, whose application, the Applicant intends to extend to all the pending procedures to which he is a party before this Court; and that, in any event, the Applicant has not demonstrated, even for the instant Application, that the requirements of Article 27(2) of the Protocol are met. Accordingly, the Court dismisses the prayer for the measure requested.

10. Having carefully gone through the Application, I find that the reasoning of the Court ignores the detailed submission made by the applicant with respect to the evidence he seeks to collect, why he requires such evidence, the jurisprudence he relies upon with respect to the right to evidence as well submissions on the requirements of Article 27 of the Protocol.

A. Evidence that the Applicant wishes to search for, obtain and produce before this Court

11. According to the Applicant, the respondent is withholding evidence that would allow this court to assess the truthfulness of the allegations made. In this regard, he seeks a Court order to access the following pieces of evidence:

3 Applications Nos. 004/2020, 020/2020, 028/2020.

i. Obtaining and producing any document issued by the bodies of the respondent before the Court of Cassation, for example, the applicant could not and cannot obtain from the Court of Cotonou the certificate of non-appeal[4]

i. The expert commission order in Exhibit 6, the expert report as carried out by ASSOSSOU Pedro d'Assomption and its use by CRIET which was used to condemn the applicant to 10 years in prison with a fine of the billion to be paid to the CNCB.[5]

ii. "due to lack of financial means and accessibility to the Court of Cotonou, due to the non-execution of the decisions of the Court by the defendant, it is impossible for the applicant to identify the current occupants of his domain who are availing themselves of the ongoing execution of judgment no 006 / 2DPF / -18 of 05 June 2018 of the TPI of Cotonou referred to the Court of Cassation, in order to submit the list of these persons and the numbers of the plots in the applicant's domain which they occupy in violation of his fundamental rights", from the Court;[6]

iii. Indeed, the applicant cannot make the list of occupants because to do so, he must first obtain an order authorizing entry of the domain from the Court of Cotonou because without this order, he will be arrested for violation of the home. arbitrarily deprived the applicant by the contested judgment referred to the Court, then on the basis of this order, the applicant must request the services of a bailiff and the police to carry out the service of the said order and identification of the names and surnames of the occupants of their domain.

iv. the certificate of life and charge on the filiation of his three children[7]

v. to produce the documents of filiation of the other members of his family who are affected, including his three brothers and four sisters. as well as his adoptive mother and his wife who were illegally placed in detention by the defendant on the count of this case and who on this count alone deserves comfortable reparation;[8]

vi. The correspondence exchanged between FISC Consult Sari Company and CNCB and which formed part of the allegations made against him in the CRIET judgment.[9] The letters of the Fisc Consult Sari company that the applicant signed in his capacity as manager

4 The Request para 28.

5 *Ibid* para 76.

6 *Ibid* para 51.

7 *Ibid* para 87.

8 *Ibid* para 87.1.

9 *Ibid* para 57 and 57.1.

of Fisc Consult, the Court will easily observe that the company had done everything to avoid undue expenses at the CNCB;[10]

vii. "The signed sale agreements followed by the affixing on it of the fingerprints of the legal representatives of the HOUNGUE GANDJI Collectivity (exhibit no 2) and the bailiff's exploits attesting to the sale of the 2.5 hectares located in Agla to the applicant by the HOUNGUE GANDJI Collectivity (exhibits no 3 and 5) produced at the Court to prove his right of ownership, the applicant wants to produce".[11]

12. The applicant also seeks evidence, in the possession of the Respondent State, which was never notified to him and yet served to convict him to a sentence to ten years in prison, in violation of his presumption of innocence because "by virtue of the principle of the presumption of innocence, the right to have 'the necessary facilities' for the preparation of the defence should be understood as ensuring that individuals cannot be sentenced on the basis of evidence to which they or their lawyers do not have full access":[12] This evidence which he requests the Court to order the Respondent to produce is itemised as follows:

i. In the judgment of July 25, 2019 rendered by CRIET, the Respondent cited an extract from the judgment of July 25, 2019 in his brief of April 30, 2020. This extract is unknown to the applicant;[13]

ii. The audit report carried out by the Ministry of Public Transport since the defendant cited it in his judgment of March 20, 2019 as confirming offenses against the applicant;[14]

iii. The minutes of the interrogations of the Applicant during the police investigation and the investigation as well as the evidence which he submitted there since the Respondent affirmed on page 18 of his judgment of March 20, 2019, that the facts against the Applicant were established during these interrogations and he was sentenced to 10 years in prison;[15]

iv. The forensic expert report carried out by Sieur ASSOSSOU Pedro d'Assomption which would have evoked the pecuniary responsibilities

10 *Ibid* para 57.

11 *Ibid* para 55.

12 *Human Rights Committee. Onoufriou v Cyprus*. doc. UN CCPR / C / 100 / D / 1636/2007. 20W. §6.11; Concluding Observations, Canada, doc. UN CCPR / C / CAN / CO / 5. 2006. § 13. See ***CP! Prosecutor v Katanga and Ngudjolo*** (ICC-01 / 04- 01 / 06-2681-Red2), Trial Chamber i. Decision on the Prosecution's Request for the Non-Disclosure of Information, a Request to lift a Rule 81 (4) Redaction and the Application of Protective Measures pursuant to Regulation 42, March 14, 2011. §27. Johannesburg Principles, Principle 20.

13 The Request para 32.1.

14 *Ibid* para 32.2.

15 *Ibid* para 32.3.

advanced on pages 21 and 22 of the judgment of March 20, 2019 of the CRIET;[16]

v. The Appointment letter by which the public authority appointed the applicant "fiscal advisor of the CNCB" and of the act of taking up his post at the CNCB;[17]

vi. Proof that all of the evidence listed above was served on the applicant at least during the period of his unlawful detention from 20 February 2018 to 31 October 2018.[18]

vii. Other documents in its physical archives in relation to the said fields, including the surveys and work of the IGN (National Geographic Institute), the list of persons previously identified by the IGN in relation to the areas of the collectivity HOUNGUE GANDJI, the QIP numbers (district, block, plot) of the plots making up the applicant's domain, photos and with GPS location from IGN.[19]

13. In conclusion, the applicant requests that "by virtue of the obligation of loyalty in search of the truth, of the applicant's human rights referred to in the case, of Articles 26 of the Protocol, 39 (2), 41 and 45 of the Rules, please the Court to order the defendant to produce before it, and without delay, the entire judgment of July 25, 2019 of CRIET, the audit report carried out by the Ministry of Transport, the minutes of interrogation of the applicant during the police investigation and the investigation as well as the evidence that he submitted, of the forensic expert report carried out by the Sieur ASSOSSOU Pedro d'Assomption, evidence of the quality of tax adviser of the CNCB attributed to the Applicant, the advice he provided and the irregular nature of the payments resulting therefrom, and notification of the evidence of such evidence to the applicant before his sentence to 10 years in prison".[20]

ii. Why is it necessary to search & obtain this evidence?

14. Citing the jurisprudence of the Court, the Applicant asserts that "it should be remembered that the Court has always held that "fair trial requires that the conviction of a person to a criminal sanction and in particular to a heavy prison sentence, be based on solid

16 *Ibid* para 32.4.

17 *Ibid* para 32.5.

18 *Ibid* para 32.7.

19 *Ibid* para 55.4.

20 The Request para 36.

and credible evidence".[21] Based on this, he contends he has a right to see the evidence that was used to convict him.

15. He also contends that the execution of the Court's order, in disregard of the Court order suspending execution, "constitutes a means of asphyxiating the applicant and preventing him from properly defending himself before this Court. …. because the Respondent does not want the plaintiff to defend himself and does not want the truth to be revealed".[22]

16. The Applicant contends that "since the case-law of the Court has imposed the burden of proof on the applicant, it must also be taken into account that it is in principle that the right to evidence is a prerequisite to the burden of proof and that consequently, if, prior to imposing the burden of proof on the Applicant, the Court does not order the Respondent to remove the obstacles which it has arbitrarily imposed on the Applicant's right to evidence, in violation of the decisions of the Court, the burden of proof imposed on the applicant by the case-law of the Court subjects him to risks."[23]

17. Thus, in the view of the Applicant the Court cannot deny him an order for access to evidence and subsequently decide that he failed to prove his allegations. Indeed the applicant cautions with respect to "the future decisions of the Court looming on the horizon, the Applicant having seized it, there is an urgent need for the Court to order the Respondent to remove all obstacles which it has arbitrarily imposed on the Applicant's right to evidence, and this in order to prevent the applicant from being subjected to the risk of inhuman and degrading treatment within the meaning of Articles 4 (2) and 7 of the ICCPR, otherwise, in the light of the Court's case-law, his future decisions will be unfairly prejudicial to the applicant for lack of proof of his claims because of the constraints arbitrarily imposed on his right to evidence and on his rights protected by Articles 4(2) and 7 of the ICCPR stem only from violations of the Court's decisions of 06 May 2020, application no 004/2020, 25 September 2020 and 04 December 2020, application no 003/2020."[24]

21 *Mohamed Abubakari v United Republic of Tanzania (merits), § 174; Armand Gue hie United Republic of Tanzania (merits and reparations), § 105. See also Kijiji Isiaga v United Republic of Tanzania* § 66 and 67.

22 The request para 85.

23 *Ibid* para 74.

24 *Ibid* para 75.

iii. Jurisprudence relied upon by the applicant

18. According to the Applicant,[25] "the 'right to evidence' includes the right to seek evidence, the right to obtain evidence and the right to adduce evidence. In this regard, the Applicant relies on the judgment G. Goubeaux, according to which, "it is a right to obtain evidence, which is exercised against the adversary or third parties; it is a right to produce evidence, which is addressed, this time to the judge."[26]

19. Relying on Articles 2 and 17 of the ICCPR, 26 (1) and 28 (2) of the Protocol and the case law of the Court, the applicant further argues that in the present case, he "continues to suffer irreparable damage from violations of his fundamental rights on account of the fact that the respondent has made it impossible for him to enjoy his right to evidence in violation of the decisions of the Court".[27]

20. The Applicant recalls the decision of the court in Application no 062/2019, in which it stated as follows: "The Court considers that the non-execution of the judgment of March 29, 2019 generates prejudice against the Applicant to the extent that, without a clean criminal record, it is impossible for him to submit his candidacy on the list of his party".[28] He adds that "it is indisputable that the non-execution of the decisions of 6 May, Application no 004/2020, 25 September and 4 December 2020, request no 003/2020 rendered in favour of the applicant, is generating prejudices to the applicant's right to evidence subject to this provisional measure".

21. The Applicant asserts that "Evidence is necessary for the success" of the claims before the judge. Distinct from the "right of evidence", the "right to evidence" is protected by the right to a fair trial, by the interests of justice and by the particular nature of the international trial before the Court, which is intended to protect people. The right to evidence therefore appears to be a

25 *Ibid* paragraphs 22 to 26.

26 In C. Perelman and P. Foriers - The proof ..., ***op. cit.***, p. 281. See also Fred Deshayes, contribution to a theory of proof before the European Court of Human Rights, § 105; ECHR, ***Ruiz Mateos v Spain***, 23 June 1993, series A no.262, § 67.

27 *Ibid* paragraph 27.3 and 27.4.

28 Order of April 17, 2020, Application No. 062/2019, ***Sebastien G. Ajavon v Benin***, § 67.

complementary or corollary right to the right to a fair trial".[29]

22. He also contends that according to pro-victim international case law on the right to evidence, the right to a fair trial before the Court requires that the applicant actually enjoy "a reasonable opportunity to present his case - including his evidence in conditions which do not place him. in a situation of clear disadvantage compared to its adversary".[30] He also notes that in *Komi Koutche v Republic of Benin* the Court ruled "that it is also empowered to order an interim measure which it considers to be in the interest of justice or of the parties".[31]

23. According to the Applicant, the interest of justice is the manifestation of the truth, and in the matter of human rights, the interest of justice is to ensure the effective protection of all human rights including the right to the truth to deliver justice effectively; as such, the international doctrine of human rights recognizes that "the right to evidence is an indispensable condition for the achievement of international justice"[32]

24. The Applicant has also made an assertion, which I fully agree with, that "the violation of Article 30 of the Protocol by the Respondent cannot allow the Court to allow the Respondent to continue to deprive the Applicant of his right to Evidence, nor to impose the burden of evidence to the applicant if the Respondent does not remove the obstacles to the applicant's right to evidence".

iv. Have the requirements of article 27 of the Protocol been met?

25. As indicated above, the Ruling of the Court merely says that "the Applicant has not demonstrated, that the requirements of Article 27(2) of the Protocol are met". I do not think it is proper for a Court to make a general finding that cannot be easily understood by the parties or by a reader.

26. Article 27(2) of the Protocol provides that in cases of extreme gravity and urgency and when necessary to avoid irreparable

29 Fred Deshayes, contribution to a theory of proof before the European Court of Human Rights, § 105; ECHR, *Ruiz Mateos v Spain*, 23 June 1993, series A no.262, § 67.

30 ECHR, October 27, 1993, *Bombo Beheer BV v Netherlands*, serie A, no 274, § 33; CEDH, May 13, 2008, *NN and TA v Belgium*, no 65097/01, §42), or, in other words that the applicant can effectively enjoy the "right to evidence" (ECHR, October 10, 2006, *LL v France*, no 7508/02, § 40).

31 Decision of November 02, 2019, request no 020/2019, case of *Komi Koutche v Republic of Benin.*

32 JC WITENBERG - The theory of evidence before international courts, RCADI, 1936-II, p. 22.

harm to persons, the Court shall adopt such provisional measures as it deems necessary. The question that arises is which aspect of Article 27 has not been met.? Is the Court saying that all three aspects of extreme gravity, urgency and irreparable harm have not been met?

27. I am of the view that this finding is not borne by the submissions made by the Applicant, which have devoted extensive parts of the Request to show why there is extreme gravity, urgency and irreparable harm, by way of facts, arguments and even jurisprudence. Indeed, Paragraphs 59 to 182.11 of the Request is devoted to an expose of these three aspects. Nothing can be further from the truth than the finding that the Request is general in nature. Furthermore, from the. brief summary hereinabove, it is clear to me that these three aspects have been proved beyond a reasonable doubt leave lone on a balance of probability.

28. It is telling that the Applicant also avers that "on account of the constraints arbitrarily imposed on his right to evidence, by way of violation of the previous decisions of the Court, there are irreparable damages under Article 28(2)[33] of the Protocol, owing to the infringements of the applicant's right to evidence, since if the application is dismissed for lack of evidence, "he will no longer be able to raise the same violations before another body such as the African Commission, the ECOWAS Court of Justice and the UN Human Rights Committee so that manifestly, the prejudices at issue are irreparable and justify the Court ordering the requested measure."[34]

v. Does it matter if the Applicant indicates that these measures are applicable to all pending applications?

29. This is one aspect of the Ruling of the Court that is deeply troubling. The Court has neither demonstrated why this is a problem nor has it explained why the orders cannot be examined in relation to the Application in which it was submitted. Indeed, the Court has not examined the formulation of the request where the Applicant has tried to link the pending application.

30. Having gone through the Request, out of 182.11 paragraphs (46 pages), it is only in one paragraph, under 'Conclusion on the interim measures requested from the Court' where the Applicant could be said to have tried to link the provisional measures to the

33 "The judgment of the Court is taken by majority; it is final and cannot be appealed."

34 The Request para 92.

pending applications:

> to order the defendant to remove all obstacles to the applicant's right to evidence and to ensure the applicant the enjoyment of his right to search, obtain and produce all administrative, judicial and legal documents. civil status for the exercise of his right to appeal and his rights of defence in the pending proceedings concerning him, including in particular the present case.

31. This statement is neither here nor there because in his prayers, the Applicant did not link the provisional measures to all the pending applications. Even if the Applicant did so, which in my view he did not, being a human rights court, the Court cannot properly dismiss the prayer on a procedural basis; rather, it should have proceeded to consider the request within the context of the instant Application.

b. Conclusion

32. There is no doubt in my mind that the documents the Applicants wishes to have access to would be relevant for the determination of the matter at the merits stage. The Applicant has asserted that he needs the documents now to prepare for his case before the Court. If it turns out at the merits stage that the documents were necessary, will the Court dismiss the matter for lack of documentary evidence, which it failed to order access to?

33. The court should draw inspiration from the following contention by the Applicant:

> In these circumstances, if the Court does not order the requested measure by requiring the Respondent to remove the obstacles sheltered from the applicant's right to evidence, the applicant's right to a fair trial before the Court will continue to be infringed, all the more so as according to the case-law of the Court, its decisions will continue to conclude that the applicant has not proved his allegations (see for example § 35[35] of the Order of November 27, 2020, Request no 028/2020, §§ "29 and 30,"[36] the order of 29 March 2021, Request no 032/2020) while in the particular circumstances of the applicant, the latter is unable to enjoy his right to seek evidence, his right to

35 "... Moreover, he does not provide proof of the intimidation to which members of his family are the object. It notes that the Complainant is making hypothetical allegations."

36 "On the other hand, the only suspensive appeal which could, in this case, be lodged is the appeal. The absence of this appeal must, in principle, be attested by a certificate of non-appeal, issued by the registry of the court before which it should be filed. However, in the present case, the Applicant has not provided such proof. It follows from the foregoing that the judgment of the CFI of Cotonou is not enforceable, so that the risk of realization of the prejudice invoked is not imminent. It follows that the condition of urgency required by Article 27 (2) is not fulfilled".

obtain the evidence and his right to produce said evidence before the Court because the Respondent continues to violate the decisions of the Court of May 6, 2020, Request no 004/2020, September 27 and December 4, 2020, Request no 003 / 2020 rendered in favour of the applicant.

34. A court of law, and more so a human rights court, cannot shut the door to discovery of evidence, which on the one hand, will lead to the establishment of the truth, and on the other, lead to irreparable damage to a party before it. The Court has previously ruled against the Applicant for lack of evidence. The Applicant has finally appreciated where the problem is, and is now requesting the court to order access to required documentary evidence. I see no valid reason why the majority rejected the request.

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Dissenting Opinion: BEN ACHOUR

1. Pursuant to Rule 70(3) of the Rules of the Court, I hereby declare that I disagree with the majority ruling of the Court that "Dismisses the request for an order to remove "the obstacles to the exercise of his right to evidence" and to "ensure the enjoyment of his right to search for, obtain and produce all documents (...) for the exercise of his right to appeal and his right to defence in the proceedings concerning him" before this Court.

2. However, I agree with the dissenting opinion expressed by Judge Ben Kioko concerning the Court's dismissal of the above-mentioned request.

3. In my view, the Court's reasoning for dismissing the request is unpersuasive and fails to take into consideration some of the elements of the case. The Applicant submits that by failing to comply with three Rulings for provisional measures and four judgments of this Court, the Respondent State has made it "absolutely impossible for him to obtain documents" that he requires to prosecute his case before this Court in order to overturn the decision that deprived him of his property". The Respondent State has provided the Court with no valid justification to contradict the Applicant's claims although the documents sought by the

Applicant are readily available with the Respondent State.

4. Moreover, the Court holds that "the Applicant has not demonstrated that the requirements of Article 27(2) of the Protocol are met", which is far from certain.

5. As a matter of fact, the three requirements of Article 27(2) (extreme gravity, urgency and irreparable harm) have been met and were amply highlighted by the Applicant who devoted extensive parts of his request to them. Stating that the request is general in nature does not reflect the facts and jurisprudence provided by the Applicant.

6. As Judge Kioko cites all these facts in his dissenting opinion, it is not necessary for me to go over them again. With this dissenting opinion, I am only expressing my dissent, endorsing and supporting the opinion of my distinguished colleague.

Fory & Ors v Côte d'Ivôire (ruling) (2021) 5 AfCLR 616

Application 034/2017, *Kouadio Kobena Fory, Spouse, Sons and Daughters v Republic of Côte d'Ivoire*

Ruling (change of title of Application), 25 November 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant who alleged that he was a victim of double arrest and long-term detention by the Respondent State stated in his originating Application that he was acting for himself and on behalf of his spouse and children. The Respondent State challenged the inclusion of members of the Applicant's family as parties. The Court ordered that the title of the matter be amended to exclude the names of members of the Applicant's family.

Procedure (indirect victims cannot be applicants, 11)

I. The Parties

1. Mr Kouadio Kobena Fory, self-represented and declaring to act on behalf of his wife Jeanne Yavo and his three (3) children Jean-Eudes Wilfried, Akoua Merveille Laetitia and Linda De-la-Sainte Face, (hereinafter, referred to as "the Applicants" is a national of Cote d' Ivoire, as are those he represents.

2. The Application is filed against the Republic of Cote D'Ivoire (hereinafter referred to as "the Respondent State"), which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 31 March 1992 and to the Protocol 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 23 July 2013, the Respondent State deposited 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 having observer status with the African Commission on Human and Peoples' Rights. On 29 April 2020, the Respondent State deposited with the African Union Commission an instrument of withdrawal of its Declaration. The Court has ruled that this withdrawal has no bearing on pending cases and on new cases filed before the entry into force of the

withdrawal one year after its deposit, that is, on 30 April 2021.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges that, in 1995, he was arrested, convicted and sentenced to ten (10) years in prison, payment of a fine and damages to the Respondent State for acts of embezzlement of public funds. One week after his release from prison in 2005, he was re-arrested and held without trial until his release in 2011.

4. Believing that his fundamental rights and those of his wife and children were violated by the Respondent State, the Applicant, acting on his own behalf and on behalf of his wife and three children, filed this Application with the Court on 8 November 2017.

B. Alleged violations

5. The Applicant alleges that the Respondent State violated his rights to a fair trial, to physical and moral integrity, to freedom of opinion as well as his right to property. He further alleges that his right as well as that of his wife to work and to adequate remuneration were violated and that the double detention violated his right to protection of the right to a family for his wife and children.

III. Summary of the Procedure before the Court

6. The initial Application was received by the Registry on 8 November 2017. On 8 May 2018, the Applicant, at his own initiative, filed additional submissions to his Application.

7. On 2 July 2018, the Application and the additional submissions were served on the Respondent State.

8. On 12 October 2021, pleadings were closed and the parties were duly informed.

IV. Change of title of Application

9. The Respondent State avers that while the standing of Kouadio

1 *Suy Bi Gohore Émile and others v Republic of Côte d'Ivoire*, ACtHPR, Application No. 044/2019, Judgment of 15 July 2020 (merits and reparations), § 67; *Ingabire Victoire Umuhoza v Republic of Rwanda*, (jurisdiction) (3 June 2016) 1 AfCLR 540 § 69.

Kobena Fory, the alleged direct victim of human rights violations, does not pose a problem, the same is not true for his wife Jeanne Yavo, son Jean-Eudes Wilfried and daughters Akoua Merveille Laetitia and Linda De-la-Sainte Face who obviously do not have standing as Applicants. It contends that the family members on whose behalf the Applicant claims to be acting are all of legal age and have the ability to bring a case directly before the Court.

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10. The Court recalls its previous jurisprudence that "neither the Charter, nor the Protocol, nor the Rules require that the Applicant and the victim have to be the same,"[2] and that any person who can sue can do so on his or her own behalf and/or on behalf of others if they obtain the consent or authorization of the persons on behalf of whom they are acting.

11. In this case, the Court notes that the Applicant submits that the alleged violations of the rights of his wife and his children are closely related to his legal predicament since his double arrest and his detention. It can be inferred that the Applicant's wife and children are indirect or vicarious victims and are therefore not considered as Applicants in this case.

12. In light of the foregoing, the Court finds that Mr Kouadio Kobena Fory is the only Applicant in the instant case and declares the objection of the Respondent State to be founded.

13. The Court, having thus concluded, considers it necessary to amend the title of Application No. 034/2017: *Kouadio Kobena Fory, spouse, son and daughters v Republic of Côte d'Ivoire* and retain the identity of the sole Applicant Kouadio Kobena Fory.

V. Operative part

14. For these reasons,

The Court,

Unanimously,

i. *Finds* that Kouadio Kobena Fory is the sole Applicant in the instant case;

2 *Sébastien Germain Ajavon v Republic of Benin*, ACtHPR, Application No. 062/2019, Judgment (merits) (4 December 2020), § 58.

ii. Orders that the title of the Application "N°034/2017: *Kouadio Kobena Fory, spouse, son and daughters v Republic of Cote d'Ivoire*" shall be amended to read as follows: "N°034/2017: *Kouadio Kobena Fory v Republic of Côte d'Ivoire*".

Mwambipile & Anor v Tanzania (provisional measures) (2021) 5 AfCLR 620

Application 042/2020, *Tike Mwambipile and Equality Now v United Republic of Tanzania*

Ruling, 29 November 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicants brought this Application to challenge the Respondent State's policy that excludes pregnant and parenting girls from attending public schools. The Applicants also brought a request for provisional measures along with the main Application. The Court held that the measures sought were similar to the reliefs sought on the merits and held that it would consider the request together with the Application on the merits.

Provisional measures (similarity of request with application on the merit, 11-12)

I. The Parties

1. The Applicants are Tike Mwambipile, a national of the United Republic of Tanzania and Equality Now, a Non-Governmental Organisation with Observer Status before the African Commission on Human and Peoples' Rights. They challenge the Respondent State's policies that exclude pregnant and parenting girls from public schools.

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. Furthermore, on 29 March 2010, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter 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 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal had no effect on pending cases or on new cases filed before 22 November 2020, which is the day on which

the withdrawal took effect, being a period of one year after its deposit.[1]

II. Subject of the Application

3. The main Application concerns the ban by the Respondent State of pregnant girls from attending public primary and secondary schools and preventing them from re-accessing the schools even after delivery, which allegedly violates the rights to education and non-discrimination.

4. The Applicants seek as provisional measures an order to stay the implementation of Regulation No. 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002, to stay the implementation of directives of the Respondent State to ban the resumption of studies in public schools by girls after giving birth and to stop any further expulsions pending the final determination of this case by this Court.

III. Summary of the Procedure before the Court

5. The main Application was filed on 19 November 2020 together with the request for provisional measures.

6. On 22 December 2020, the main Application together with the request for provisional measures and additional evidentiary documents were served on the Respondent State.

7. On 26 February 2021, the Court informed the Respondent State that it had decided in the interest of justice to grant it an extension of time to file its Response to the request for provisional measures within fifteen (15) days.

8. The Respondent State has not submitted its Response to the request for provisional measures, although the time to do so elapsed on 17 March 2021.

IV. Provisional measures requested

9. In the main Application, the Applicants pray the Court, among others, to order the Respondent State to put an end to the policy of excluding pregnant girls and young mothers from schools, including by repealing Regulation No. 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools)

1 *Andrew Ambrose Cheusi v United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) § 38.

of 2002 and other exclusionary governmental directives, and to amend its legislation to protect the right to education.

10. As provisional measures, the Applicants pray the Court to order the Respondent State to stop the exclusion of pregnant girls and young mothers from schools pending the final determination of this Application and to order the stay of implementation of Regulation No. 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002 and other exclusionary governmental directives.

11. The Court notes from the foregoing that the main Application and the request for provisional measures have the same objective and are inextricably linked such that ruling on the request for provisional measures amounts to ruling on the merits of the Application.

12. The Court, therefore, decides that in the interest of a proper administration of justice it will determine the request for provisional measures together with the merits of the Application and to expedite the determination of the main Application.

V. Operative part

13. For these reasons:

The Court,

Unanimously,

i. *Decides* that it will consider the request for provisional measures together with the merits of the Application.

Ajavon v Benin (admissibility) (2021) 5 AfCLR 623

Application 027/2020, *Sébastien Germain Marie Aikoue v Republic of Benin*

Ruling, 2 December 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant claimed that the proceedings and decisions of the domestic courts of the Respondent State in tax and criminal matters involving him were in violation of his human rights. In his Application before the Court, he also requested for provisional measures, *inter alia,* to stay execution of the judgment of the domestic courts. The Court held that the Application was inadmissible for failure to exhaust local remedies.

Jurisdiction (material jurisdiction, 37-39; exercise of appellate jurisdiction, 46-49)

Admissibility (exhaustion of local remedies, 73-82; admissibility requirements are cumulative, 84)

I. The Parties

1. Sébastien Germain Marie Aîkoué Ajavon (hereinafter referred to as "the Applicant") is a national of Benin, a politician and a company director. He challenges the tax and criminal procedures initiated against him and against his company.

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. On 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the said Protocol (hereinafter referred to as "the Declaration") 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 Chairperson of the African Union Commission the instrument of withdrawal of the said Declaration. The Court has ruled that this withdrawal has no bearing, on the one hand, on pending cases and, on the other

hand, new cases filed before the entry into force of the withdrawal on 26 March 2021.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that the Applicant is the managing director and sole shareholder of the company COMON SA which is specialised in the import and export of food products. The Applicant states that this company imports these products from Europe and Asia and, in accordance with domestic regulations, exports them mostly to the countries bordering the Respondent State, namely Nigeria and Niger. The Applicant affirms that he benefits from value added tax (VAT) refund.

4. He states that by a letter dated 20 June 2011,[2] the Respondent State notified COMON SA of its refusal to refund VAT credits for the 3rd to 6th bimester of 2009 and the 1st to 6th bimester of 2010, in the amount of Thirteen Billion Four Hundred and Eighty-Seven Million Two Hundred and Forty-Six Thousand Eight Hundred and Ninety-Three (13,487,246,893) CFA francs, on the basis of the measure prohibiting exportation of goods to Nigeria and the fact that the Ambassador of the Respondent State did not sign the certificate of entry of goods.

5. In reaction, COMON SA appealed to the Administrative Chamber of the Supreme Court against the said letter of 20 June 2011. Additionally, on 14 October 2011, he sued, the Respondent State before the Cotonou Court of First Instance for the payment of the above-mentioned amount and Fifty Billion (50,000,000,000) CFA francs as damages before the Court of First Instance of Cotonou.

6. By a judgment of 8 February 2013,[3] the said Court of First Instance of Cotonou ordered the Respondent State to reimburse COMON SA the sum of Thirteen Billion Four Hundred and Eighty-Seven Million Two Hundred and Forty-Six Thousand Eight Hundred and Ninety-Three (13,487,246,893) CFA francs, a decision against

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Ruling of 5 May 2020 (Provisional measures), §§ 4- 5 and corrigendum of 29 July 2020.

2 Letter No. 488/MEF/DG/SGM/DGID/DGE/SA-1 of 20 June 2011.

3 Judgment No. 16/13/1st - CCM of 8 February 2013 of the Court of First Instance of Cotonou.

which both parties appealed.

7. The Applicant states that there followed a series of reactions by the Respondent State, including:

- Letter No. 260/MEF/DC/SGM/DGID/DGE/SA-1 of 30 December 2011, that deals with tax adjustments of VAT and the advanced payment of tax on profits, for a total amount of Thirty-Five Billion Two Hundred and Twenty-Five Million One Hundred and Thirty-Three Thousand Six Hundred and Thirty (35,225,133,630) CFA francs which was confirmed by Letter No.026/MEF/DC/SGM/DGID/DGE/SA-1 of 29 February 2012. COMON SA responded by filing a hierarchical appeal with the Minister of Economy and Finance against the said letter.
- Letter No.133/MEF/DC/SGM/DGID/DGE/SA-1 of 27 July 2012, that reduces the amount of tax adjustments to the sum of Thirty-Two Billion Seven Hundred and Twenty-Five Million Sixteen Thousand One Hundred and Thirty - Three (32,725,016,133) FCFA and a tax notice of 27 August 2012 of this amount. Again, COMON SA filed a hierarchical appeal to the Minister of Economy and Finance.
- Complaint No.149-c/MEF/DC/SGM/DGID of 4 March 2013, addressed to the Public Prosecutor at the Court of First Instance of Cotonou, against Mr. Sébastien Ajavon, in his capacity as General Director of COMON SA, for attempted VAT fraud, forgery and use of forgery.

8. The Applicant adds that the parties subsequently settled their differences amicably by a memorandum of understanding of 31 October 2014, approved by judgment n° 007/ UD-PD / 15 of 9 February 2015 of the Court of First Instance of Cotonou. He avers that this judgment, which has not been appealed against, has become final.

9. The Applicant further submits that in accordance with their commitments, COMON SA withdrew its case from the Supreme Court, which confirmed the same through a judgment of 19 November 2015. He notes that the Judicial Officer of the Treasury notified the memorandum of understanding to the Public Prosecutor, who, having given due notice on 24 March 2015, closed the criminal proceedings opened against the Applicant. He further avers that the State of Benin had even started refunding the VAT credits.

10. The Applicant asserts that, against all expectations, the Respondent State ceased to honour its pecuniary commitments resulting from the memorandum of understanding with COMON SA. He believes that the Respondent State's refusal to pay was due to the contentious political relations between him and President Patrice Talon arising from the so-called "18 kg of

cocaine" case.

11. He affirms that COMON SA was compelled to send a notice dated 16 May 2017 to the Respondent State demanding the payment of the sum of Two Billion Four Hundred Thirteen Million Eight Hundred Forty-Nine Thousand Two Hundred Twenty-Three (2,413,849,223) CFA francs, being the tax refund in respect of the 6th bimester of 2009 and the 6th bimester of 2010.

12. The Applicant further states that in November 2017, the Respondent State, based on facts that led to the judgment of approval rendered on 9 February 2015 by the Cotonou Court of First Instance, filed a complaint against him, with civil party status, for forgery of an authentic or public document by forged signature, complicity and fraud, before the 1st Investigating Chamber of the Cotonou Court of First Instance.

13. Subsequently, he indicates that in 2018 the criminal proceedings were transferred to the Investigation Commission of the CRIET, which changed the charge to "forgery of public documents, complicity in forgery of public documents and fraud".

14. The Applicant asserts that without any examination on the merits or confrontation, and without his counsel having appraised the evidence in the proceedings, the Public Prosecutor's Office issued a final indictment on 27 May 2020, following which the CRIET Investigating Committee issued the judgment of 29 May 2020, partially dismissing the case in part and referring it to the CRIET Judicial Chamber.[4] This judgment was upheld by the judgment of 18 June 2020[5] rendered by the Investigating Division of the Appeals Chamber of the CRIET, against which he filed a cassation appeal on 18 June 2020.

15. Finally, the Applicant states that the proceedings initiated against him is an illegal resumption of a case that was the subject of a memorandum of understanding that was duly approved by a court decision that has become final. According to him, the proceedings against him are proof of the Respondent State relentlessly persecuting him and violating his fundamental rights, which has caused him material and moral harm.

4 Judgment No. 21/CRIET/COM-I/2020.

5 Judgment No. 003/CRIET/CA/SI.

B. Alleged violations

16. The Applicant alleges the violation of the following rights:

i. The right to a fair trial by infringement of the principle of "*electa una via*" protected by Article 7(1)(a) of the Charter.

ii. The right to a fair trial due to the inadmissibility of the civil procedure by virtue of a *res judicata* settlement protected by Article 7(1)(a) of the Charter.

iii. The right to a fair trial due to the impossibility for the plaintiff to initiate a criminal procedure, protected by Article 7(1) of the Charter.

iv. The right to a fair trial by violation of the rights of defence protected by Article 7(1)(c) of the Charter.

v. The right to property protected by Article 14 of the Charter.

vi. The right to adequate housing protected by Articles 14, 16 and 18 of the Charter.

III. Summary of the Procedure before the Court

17. On 22 June 2020, the Applicant filed the main Application together with a request for provisional measures. These were notified to the Respondent State on 22 September 2020 as well as to other entities provided for in Rule 42(4) of the Rules.

18. On 27 November 2020, the Court issued a Ruling declaring the Request for provisional measures moot. The Ruling was notified to the Parties on 11 December 2020.

19. On 4 February 2021, the Applicant filed a second request for provisional measures, which was notified to the Respondent State on 17 February 2021, with a request to submit its response within fifteen 15 days of receipt. On 29 March 2021, the Court ruled that the request was moot. The Ruling was served on the Parties on 9 April 2021.

20. On 5 March 2021, the Applicant filed a third request for provisional measures, which was notified to the Respondent State on 9 March 2021, for its response within fifteen (15) days from the date of receipt. On 1 April 2021, the Court "ordered a stay of execution of Judgment No. 41/CRIET/CJ/1S. Cor of 1 March 2021, rendered by the First Section of the CRIET's Judgment Chamber, pending consideration of the Application on the merits". The Ruling was served on the Parties on 16 April 2021.

21. The Parties filed their submissions within the stipulated timelines.

22. Pleadings were closed on 27 September 2021 and the Parties were duly notified.

IV. Prayers of the Parties

23. The Applicant requests the Court to:

i. Declare that it has jurisdiction;

ii. Declare the Application admissible;

iii. Find that the Republic of Benin has violated Articles 7(1)(a), 7(1)(c), 14, 16 and 18 of the Charter;

iv. Order the annulment of Judgment No. 021/CRIET/COM/2020 of 29 May 2020, partially dismissing the case and referring it back to the CRIET's Judgment Chamber ruling on criminal matters, and any act, be it a judicial decision or a conviction that is the direct consequence thereof

v. Order the State of Benin to pay the following amounts

- Three Billion Eight Hundred and Sixty-Nine Million Seventy-One Thousand Two Hundred and Twenty-Four (3,869,071,224) CFA francs in respect of funds blocked by the State of Benin, together with interest at the discounted rate of the Central Bank of West African States (BCEAO)
- 1,500,000,000 CFA francs for the moral harm suffered by the Applicant;

vi. Order the Republic of Benin to report to the Court within a time limit to be set by the Court on the implementation of the decision to be handed down;

vii. Order the State of Benin to pay the costs.;

24. On its part, the Respondent State prays the Court to:

i. Find that no situation of human rights violation has been invoked;

ii. Find that the African Court cannot challenge the decision of a domestic court;

iii. Find that the Court is not a judge of appeal of decisions of domestic courts;

iv. Find that the Court lacks jurisdiction;

v. Find that local remedies have not been exhausted and to declare that the request is inadmissible;

vi. Find that the Judicial Officer of the Treasury is not a party to the civil proceedings with respect to the facts in issue in casu;

vii. Find that the principle of electa una via cannot be invoked against him;

viii. Declare that the Judicial Officer of the Treasury bringing a civil lawsuit before a criminal judge is regular;

ix. Find that the transaction was based on fraudulent grounds;

x. Find that fraud corrupts everything;

xi. Find that new charges call into question the agreement reached;

xii. Declare that a fraudulent transaction is deprived of its effects;

xiii. Find that the Applicant claims to have been unable to access the trial docket;

xiv. Note that he does not prove this allegation;

xv. Note that according to Articles 187 and 478 of the Code of Penal Procedure (CPP), such a situation can be brought before a trial judgment;

xvi. Note that the trial judge may request additional information;

xvii. Find that there is no violation of human rights;

xviii. Find that the right "to be heard" guaranteed by Article 7(1) of the Charter is distinct from a litigation in respect of enforcement;

xix. Declare that there is no violation of the right "to be heard";

xx. Find that the Applicant does not characterize any actual violation of the right to property;

xxi. Find that the Applicant submits that there are potential violations of the right of property;

xxii. Find that there is no violation of the right of property;

xxiii. Find that the State has committed no misconduct causing harm to Applicant;

xxiv. Find that the Applicant does not prove the alleged harm suffered owing to the actions of the Respondent State;

xxv. Accordingly, find that the Application is unfounded and that there is no ground for reparation.

V. Jurisdiction

25. The Court notes that Article 3 of the Protocol 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, 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.

26. Under Rule 49(1) of the Rules,[6] "The Court shall preliminarily ascertain its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

27. On the basis of the above-mentioned provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections to its jurisdiction, if any.

6 Rule 39(1) of the former Rules of the Court of 2 June 2010.

28. The Court notes that the Respondent State raises an objection based on lack of material jurisdiction.

A. Objection based on lack of material jurisdiction

29. In support of its objection, the Respondent State alleges, on the one hand, that the Applicant merely refers to articles of the Charter without linking them to facts of violation and, on the other hand, that the Court is called upon to act as a court of appeal and judge of execution of domestic decisions.

i. Argument based on the mere mention of articles of the Charter without connecting them to any facts of the violation

30. The Respondent State submits that under Article 3(1) of the Protocol, the Applicant must refer a dispute that has to do with the Court's instruments. The mechanical invocation of the articles of the Charter is not sufficient to establish the Court's jurisdiction. To establish the Court's jurisdiction, the statement of facts must refer to actual instances of human rights violations.

31. The Respondent State alleges that the Applicant merely invokes the alleged violation of Article 7(1)(a); 7(1)(c), 14, 16, and 18 of the Charter. It submits that the Applicant must set out an actual factual situation of human rights violation in order for the Court to perform its function. The Respondent State further contends that nothing in the Applicant's submission shows that the State of Benin has taken any measures restricting the latter's rights.

32. The Respondent State further avers that in any case, referring cases to criminal courts for investigation of offences cannot be interpreted as a case of violation of human rights.

33. The Respondent State concludes that the Court lacks jurisdiction.

34. In reply, the Applicant submits that the Court's jurisprudence has consistently held that Article 3(1) of the Protocol confers upon it the prerogative to consider any application that contains allegations of violations of human rights protected by the Charter or any other relevant human rights instrument ratified by the Respondent State.

35. He asserts that he has expressly cited, in detail, the articles of the Charter that have been violated by the Respondent State.

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36. The Court notes that under 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".

37. It considers that for it to have material jurisdiction, it is sufficient that the rights allegedly violated are protected by the Charter or by any other human rights instrument ratified by the State concerned.[7]

38. It notes in the instant case that the application contains allegations of violations of rights protected by Article 7(1)(a); 7(1)(c), 14, 16, and 18 of the Charter.

39. The Court therefore dismisses the Applicant's argument based on the mere mention of the articles of the Charter without connection to facts of violation.

ii. Argument based on the Court being called upon to act as an appellate court and judge of execution of decisions of domestic courts

40. The Respondent State asserts that the Applicant seeks the annulment of the dismissal Judgment No. 021/CRIET/COM/2020 of 29 May 2020 and the mandatory execution of Judgment No. 16/13/1st -CCM of 8 February 2013, the memorandum of understanding of 31 December 2014 and its approval Judgment No. 007/AUD-PD of 9 February 2015. According to the Respondent State, these requests do not fall within the jurisdiction of the Court**.**

41. To this end, the Respondent State argues that the Court is not the judge of the execution of domestic decisions and titles, and it cannot guarantee the execution of a fraudulent agreement which is subject to the appreciation of the domestic criminal courts.

42. The Respondent State further submits that the application to set aside the judgment of dismissal seeks to challenge a decision of the domestic court. It submits the Court has recalled in its jurisprudence that it is not a court of appeal against decisions rendered by the domestic courts.

43. The Applicant, for his part, asserts that the Court cannot remain inert in the face of a flagrant violation of human rights, regardless

7 *Franck David Omary and Others v United Republic of Tanzania,* (admissibility) (28 March 2014) 1 AfCLR 358, § 74*; Peter Chacha v United Republic of Tanzania,* (admissibility) (28 March 2014) 1 AfCLR 398, § 118.

of the act which gave rise to this violation.

44. He adds that it is not a question of reviewing the legality of a decision rendered by a national court but of finding the manifest violation of human rights contained in a judicial act.

***

45. The Court notes that the objection raised by the Respondent State relates to the fact that the Applicant requests it to sit as an appellate court and as a judge for the enforcement of domestic decisions and titles.

46. Regarding the argument that the Court is being asked to sit as an appellate court, the Court notes that, according to its established jurisprudence, it does not have appellate jurisdiction to consider appeals in respect of cases already determined by domestic or regional and similar Courts".[8] However, "... that does not preclude it from assessing whether domestic proceedings were conducted in accordance with international standards set out in the Charter and other international human rights instruments ratified by the State concerned.[9]

47. The Court also notes, with regard to the second argument, that the Applicant's request is in line with the jurisdiction that has arisen, since it is being called upon to determine whether the refusal to enforce final court decisions and the acts and new criminal proceedings before the CRIET comply with the international norms indicated in the Charter or other human rights instruments ratified by the State of Benin.

48. The Court does not accept the argument that it would be acting as an enforcement and appellate court if it were to rule in the instant case.

49. Accordingly, the Court dismisses the objection against its jurisdiction and finds that it has material jurisdiction to hear the instant Application.

B. Other aspects of jurisdiction

8 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190 § 14.

9 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 482, §130.

50. The Court notes that no objection has been raised to its personal, temporal or territorial jurisdiction. However, in accordance with Rule 49(1) of the Rules, the Court must ensure that all aspects of its jurisdiction are satisfied before proceeding to hear the Application.

51. With regard to its personal jurisdiction, the Court recalls, as already indicated in paragraph 2 of this Ruling, that on 25 March 2020, the Respondent State deposited the instrument of withdrawal of the Declaration provided for in Article 34(6) of the Protocol.

52. The Court reiterates its position that the withdrawal of the Declaration has no retroactive effect and has no bearing on any cases pending at the time of filing the instrument of withdrawal or on any new cases filed before the withdrawal of the Declaration takes effect on 26 March 2021. Given that the Application was filed prior to the withdrawal of the Declaration taking effect, it is not affected by the withdrawal. The Court therefore finds that it has personal jurisdiction over this Application.

53. With regard to its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant occurred after the Respondent State became a party to the Charter and filed the Declaration. Accordingly, it finds that it has temporal jurisdiction in the instant case.

54. As to its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred in the territory of the Respondent State. It therefore concludes that its territorial jurisdiction is established.

55. Accordingly, the Court finds that it has jurisdiction in the instant case.

VI. Admissibility

56. 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".

57. In line with Rule 50(1) of the Rules of Court, "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".[10]

10 Rule 40 of the former Rules of the Court of 2 June 2010.

58. Rule 50(2) of the Rules of Court, which restates the provisions of Article 56 of the Charter, provides:

> 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. 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;
>
> g. 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 or the provisions of the Charter.

59. The Court notes that the Respondent State has raised an objection to the admissibility of the Application based on non-exhaustion of local remedies.

A. Objection based on non-exhaustion of local remedies

60. The Respondent State, relying on the jurisdiction of the European Court of Human Rights of the 10 March 1977, *Guzzardi v Italia*, submits that an individual can bring a case against a State before an international court only after providing the judicial authorities of that State the opportunity to address the effects of the impugned decision or the dispute State fact. The Respondent State contends that this is a requirement which derives from the sovereignty of the State.

61. It further submits that the Applicant must have invoked "in substance" before domestic courts the complaint he or she is making before this Court.

62. The Respondent State points out, in the instant case, that on June 18, 2020 the Applicant filed a cassation appeal before the Respondent State's Supreme Court against Judgment No. 003/CRIET/CA-S1 of 18 June 2020, and that he referred the matter to this Court on 22 June 2020. The Respondent State concludes that as at the date of filing the application with the Court, the

Applicant has not met the requirement to exhaust local remedies.

63. The Respondent State therefore prays that the Application be declared inadmissible.

64. The Applicant states in response that the issue of exhaustion of local remedies requires that the available judicial remedies be both effective and capable of resolving disputes in a timely manner. He argues that the Supreme Court does not meet the requirements of effectiveness.

65. He contends to this effect that the Supreme Court is dysfunctional since it has been unable to implement the judgment of the African Court of 29 March 2019 rendered between the same parties, which overturned the judgment of 4 October 2018 rendered by the CRIET sentencing him to 20 years imprisonment.

66. He further asserts that the Supreme Court lacks independence from the executive branch since the president of the Judicial Chamber, who was due for retirement on January 1, 2019, has had his term of office exceptionally extended under Law No. 2019-12 of 25 February 2019, amending and supplementing Law No. 2001-35 of 21 February 2003 on the status of the judiciary. He states that this law empowers the President of the Republic to extend the term of office of a magistrate due for retirement at age sixty (60) up to age sixty-five (65).

67. The Applicant contends that, in any event, the Court stated in the judgment in Application No. 062/2019, *Sébastien Ajavon v Republic of Benin*, that the judiciary of the Respondent State is not independent.

68. Finally, relying on the judgment in Application No. 013/2017, *Sébastien Ajavon v Republic of Benin*, the Applicant submits that, given the political context and his personal situation, he should be exempted from exhausting local remedies since the prospects of success were negligible. He states that the dismissal of his cassation appeal of 18 June 2020 by Supreme Court judgment of 29 January 2021 confirms his fears.

69. In response, the Respondent State asserts, with regard to the implementation of the Court's judgment of 29 March 2019, that it is not for the judge of cassation to rule on such an aspect when it has not been seized with such a remedy, and the supposed failure to enforce a foreign decision rendered by an external court is not sufficient to invoke the malfunctioning of a domestic court.

70. The Respondent State also points out that the extension of a judge's term of office, which is organised by law, is not abnormal and meets a need for justice as a public service. It further submits that this extension cannot be interpreted as a situation of

dependence on the executive power.

71. Finally, the Respondent State asserts, with regard to the judgments referred to by the Applicant in Application No. 013/2017 and Application No. 062/2019, that the authority of *res judicata* applies to those cases only and not to any other.

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72. The Court recalls that in accordance with Article 56(5) of the Charter and Rule 50(2)(e) of the Rules of Procedure, applications must be filed after the exhaustion of local remedies, if any, unless it is clear that the procedure for such remedies is being unduly prolonged.

73. The Court emphasizes that the local remedies to be exhausted are judicial in nature. These must be available, that is, they must be available to the Applicant without let or hindrance, and effective in the sense that they are "capable of satisfying the complainant" or of remedying the situation at issue".[11]

74. The Court also pointed out that compliance with the requirement of Article 56(5) of the Charter and Rule 50(2)(e) implies that the Applicant must not only initiate the local remedies, but also await their outcome.[12] The Court further emphasises that the requirement to exhaust local remedies is assessed, in principle, as at the date of filing the Application before it.[13]

75. In the instant case, the Court notes that on 18 June 2020, the Applicant lodged a cassation appeal with the Respondent State's Supreme Court against Judgment No. 000/CRIET/CA-S1 of 18 June 2020 and filed the instant Application without awaiting the outcome of the appeal.

76. The Court further observes that to justify this referral to the Court without awaiting the decision of the Supreme Court, the Applicant advances three (3) arguments, namely, the dysfunction of the

11 *Beneficiaries of the late Norbert Zongo, Aboulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabè des droits de l'homme et des peuples v Burkina Faso*, Judgment (merits) (5 December 2014), 1 AfCLR 219, § 68; *Ibid*. *Konaté v Burkina Faso* (merits) §108.

12 *Yacouba Traoré v Republic of Mali*, ACtHPR, Application No. 010/2018, Judgment of 25 September 2020 (jurisdiction and admissibility) §§ 46 et 47.

13 *Komi Koutché v République du Bénin*, ACtHPR, Application No. 020/2019, Judgment of 25 June 2021, §61.

Supreme Court, the alleged lack of independence of the Supreme Court and, finally, the political context and his personal situation. The Court will examine these claims one by one.

77. With regard to the dysfunction of the Supreme Court due to the non-execution of the Court's judgment of 29 March 2019, the Court notes that no provision of Law No. 2004-07 of 23 October 2007[14] grants the Supreme Court jurisdiction over the execution of decisions of the African Court. Therefore, the Court cannot find in this case that the Supreme Court is dysfunctional.

78. Regarding the arguments of the lack of independence of the Supreme Court, the Court notes, in relation to the first aspect of the said argument, that the retirement age of the President of the Judicial Chamber of the Supreme Court was extended in January 2019, that is, seventeen (17) months before the Applicant filed the cassation appeal before the said Court on 18 June 2020. Furthermore, the Applicant does not demonstrate that this fact, based on a law[15] that, by nature, is general and impersonal, constitutes an infringement of the independence of the Respondent State's Supreme Court.

79. The Court further emphasizes, regarding the second aspect, that the requirement to exhaust local remedies is assessed, in principle, in relation to the date the Application is filed before it, so that an Applicant cannot rely on circumstances subsequent to the filing of the Application in order to be exempted from exhausting local remedies. Therefore, the Court's judgment of 4 December 2020, on which the Applicant relies, being subsequent to the filing of his Application on 22 June 2020, cannot be considered a circumstance of such nature to support his allegations.

80. Finally, with regard to the argument on to the political context and his personal situation, the Court notes that the Applicant relies on the Court's judgment of 29 March 2019 in Application 013/2017 *Sébastien Germain Ajavon v Benin*. The Court notes that in the said judgment it only examined a procedural impediment that rendered the cassation appeal before the Supreme Court ineffective.[16]

14 Law on the organization, functioning and powers of the Supreme Court of the Respondent State.

15 This is Law No. 2019-12 of 25 February 2019 amending and supplementing Law No. 2001-35 of 21 February 2003 on the status of the judiciary in the Republic of Benin, in its new Article 36.

16 *Sébastien Germain Ajavon v Republic of Benin*, Judgment (merits) (29 March 2019) 3 AfCLR 130, §115.

81. The Court observes that in the instant case, the Applicant does not indicate any procedural impediment, or any other impediment for that matter, in relation to the cassation appeal before the Supreme Court. Moreover, the Court notes that the Supreme Court decided his appeal by a decision rendered on 29 January 2021, that is, seven (7) months after the date on which the Application filed his cassation appeal.

82. In light of the above, the Court finds that the Applicant's arguments are unfounded and that he prematurely lodged his appeal before this Court. The Court holds that the Applicant should have awaited the outcome of his cassation appeal, unless the procedure of this appeal was unduly prolonged, that this is not the case, given that he seized this Court only four (4) days after he filed his cassation appeal.

83. The Court therefore finds merit in the objection based on the non-exhaustion of local remedies and concludes that the Application does not meet the requirement of Rule 50(2)(e) of the Rules.

B. Other admissibility requirements

84. Having concluded that the Application does not meet the requirement of Rule 50(2)(e) of the Rules, the Court need not rule on the admissibility requirements set out in paragraphs 1, 2, 4, 6, and 7 of Article 56 of the Charter as restated in Rule 50(2)(a)(b)(d)(f) and (g) of the Rules, insofar as the admissibility requirements are cumulative and, as such, when one of them is not fulfilled, the Application cannot be admissible.[17]

85. In view of the foregoing, the Court declares the Application inadmissible.

VII. Costs

86. The Applicant did not submit on this point.

87. The Respondent State requests that the Court order the Applicant to pay costs.

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17 *Mariam Kouma and Ousmane Diabaté v Republic of Mali (*jurisdiction and admissibility) (21 March 2018) 2 AfCLR 237, § 63; ***Rutabingwa Chrysanthe v Republic of Rwanda*** (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 361, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACtHPR, Application No. 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39.

88. Rule 32(2) of the Rules[18] provides that "unless the Court decides otherwise, each party shall bear its own costs, if any".

89. In view of the foregoing, the Court decides that each Party shall bear its own costs of the proceedings.

VIII. Operative part

90. For these reasons,

The Court,

Unanimously,

On jurisdiction

i. *Dismisses* the objections to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Upholds* the objection to the admissibility of the Application based on non-exhaustion of local remedies;

iv. *Declares* the Application inadmissible.

On costs

v. *Orders* each Party to bear its own costs.

18 Rule 30(2) of the former Rules of the Court of 2 June 2010.

Anudo v Tanzania (reparations) (2021) 5 AfCLR 640

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

Judgment, (reparations), 2 December 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Court had held in its judgment of 22 March 2018 that the Respondent State had violated certain human rights of the Applicant. In this reparations judgment, the Court granted the prayers for reparation on material prejudice for certain losses incurred by the Applicant.

Reparations (state responsibility to make reparation, 17; scope of reparations, 18; types of reparations, 19; material prejudice, 20, 29; reparation currency, 21; proof of material harm, 30-35, 43-45, 49-50, 54-55, 58; quantum of damages, 36-37; moral prejudice, 65-71; indirect victims, 77-84; restitution, 90-91; measures of satisfaction,94-95)

Costs (duty to justify, 99)

Jointly Dissenting Opinion: MUKAMULISA, ANUKAM and SACKO

Reparations (material harm, 6; material prejudice, 16-18)

I. Brief background of the matter

1. In his Application filed before the Court on 25 May 2015, Mr. Anudo Ochieng Anudo (hereinafter referred to as "the Applicant") alleged that the action by the United Republic of Tanzania (hereinafter referred to as "the Respondent State") to confiscate his passport, declaring him an "illegal immigrant" and expelling him from Tanzania violates his right to Tanzanian nationality and a number of his fundamental rights.

2. On 22 March 2018, the Court rendered judgment on the merits whose operative part at paragraphs (v) to (xi) reads as follows:

v *Declares* that the Respondent State arbitrarily deprived the Applicant of his Tanzanian nationality in violation of Article 15 of the Universal Declaration of Human Rights

vi. *Declares* that the Respondent State has violated the Applicant's right not to be expelled arbitrarily.

vii. *Declares* that the Respondent State has violated Articles 7 of the Charter and 14 of the ICCPR relating to the Applicant's right to be heard.

viii. *Orders* the Respondent State to amend its legislation to provide

individuals with judicial remedies in the event of dispute over their citizenship;

ix. *Orders* the Respondent State to take all the necessary steps to restore the Applicant's rights, by allowing him to return to the national territory, ensure his protection and submit a report to the Court within forty -five (45) days.

x. *Reserves* its Ruling on the prayers for other forms of reparation and on costs.

xi. *Allows* the Applicant to file his written submissions on other forms of reparation within thirty (30) days from the date of notification of this Judgment; and the Respondent State to file its submissions within thirty (30) days from the date of receipt of the Applicant's submissions.

3. It is this Judgment on merits that serves as the basis of the present Application for reparations.

II. Subject of the Application

4. On 1 June 2018, the Applicant filed his written submissions on reparations, praying the Court to award him reparations on the basis of its findings in the judgment on the merits.

III. Summary of the Procedure before the Court

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

6. The Applicant filed his written submissions on reparations on 1 June 2018 and these were served on the Respondent State on 19 June 2018.

7. The Respondent State filed its Response on 5 December 2019 and this was served on the Applicant on 17 December 2019 for a Reply. The Applicant did not file a Reply even after extension of time by the Court on 7 February 2020.

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

9. In the course of the 58th Ordinary Session (September 2020), the Court decided, in the interests of justice, to reopen pleadings to allow the Applicant file the Reply to the Respondent State's Response.

10. The Parties filed additional pleadings within the time stipulated by the Court.

11. On 21 September 2021 pleadings were closed again and the Parties were duly notified.

IV. Prayers of the Parties

A. Prayers of the Applicant

i. Pecuniary reparations

12. The Applicant prays the Court to apply the principle of equity in calculating the amount to be awarded as damages for the moral and material prejudice he suffered and also, to consider the principle of restitution when calculating these amounts.

13. The Applicant also prays the Court to grant him the following reparations:

i. The sum of United States Dollars fifty thousand (USD 50,000) for psychological trauma resulting from major depression;

ii. The sum of United States Dollars one hundred thousand (USD 100,000) for his four children;

iii. The sum of United States Dollars fifty thousand (USD 50,000) for both his parents;

iv. The sum of United States Dollars twenty thousand (USD 20,000) for his sister and his grandmother;

v. The sum of United States Dollars one hundred and thirty-seven thousand, five hundred (USD 137,500) as material damages;

vi. The sum of United States Dollars four thousand (USD 4000) as transportation and stationery costs.

ii. Non-pecuniary reparations

14. The Applicant prays the Court to order the Respondent State to guarantee non-repetition of the violations and to publish the decision in the Official Gazette as a measure of satisfaction.

B. Prayers of the Respondent State

15. The Respondent State contends that the Applicant does not provide evidence of material and moral prejudice suffered and accordingly requests the Court to:

i. Dismiss the Application in its entirety;

ii. Dismiss the request for guarantee of non-repetition;

iii. Dismiss the request for just satisfaction, the Court's judgment on the merits being sufficient;

iv. Dismiss the request for reparations for lack of evidence;

v. Make any order it deems necessary in the circumstances of this case.

V. Reparations

16. 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".

17. In accordance with its settled case-law, the Court recalls that:

> To examine and assess applications for reparation of harms 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.[1]

18. The Court also recalls 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."[2]

19. The measures that a State may take to remedy a human rights violation may include restitution, compensation, rehabilitation of the victim, satisfaction and measures to ensure that the violations are not repeated, taking into account the circumstances of each case.[3]

20. With regard to material prejudice, the Court reiterates the general rule that there must be a causal link between the alleged violation and the harm caused and that the burden of proof lies with the Applicant, who must therefore provide evidence to justify the measures requested. As regards moral prejudice, the Court notes that it is presumed in cases of human rights violations,[4] and that, consequently, the burden of proof shifts to the Respondent State which is contesting the claims of moral prejudice, to prove the contrary.

1 *Ingabire Victoire Umuhoza v Rwanda*, Application No 003/2014, ACtHPR, Judgment of 7 December 2018 (reparations) § 19.

2 *Mohamed Abubakari v Tanzania* (reparations), ACtHPR, Application No 007/2013, Judgment of 4 July 2018 (reparations) § 19; ***Alex Thomas v Tanzania,*** ACtHPR, Application No 005/2013, Judgment of 4 July 2018 (reparations), *§* 11; Lucien ***Ikili v Tanzania,*** ACtHPR, Application No 009/2015, Judgment of 28 March 2019, (merits and reparations), § 118.

3 *Ingabire Victoire Umuhoza v Rwanda,* § 20.

4 *Beneficiaries of the late Norbert Zongo, and others v Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258 § 61; *Lohé Issa Konaté v Burkina Faso*, (reparations) (3 June 2016) 1 AfCLR 346 § 58.

21. The Court further restates, as per its case-law, that damages should be awarded, where possible, in the currency in which the loss was incurred. In the instant case, while the Applicant make his claims in United States Dollars, damages will be awarded in Tanzanian Shillings as most of the potential awardees reside on the territory of the Respondent State and the single prejudice forming the basis of all the claims occurred in this State. [5]

22. In the instant case, in its Judgment on the merits, the Court found that the Respondent State violated the Applicant's right not to be arbitrarily deprived of his nationality, contrary to Article 15 of the Universal Declaration of Human Rights, his right not to be arbitrarily expelled and his right to be heard as provided for in Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights.

23. Relying on the above finding of the Court, the Applicant prays the Court to award him pecuniary and non-pecuniary reparations.

A. Pecuniary reparations

i. Material prejudice

24. The Applicant prays the Court to grant him reparations under the following heads:

i. Loss of income owing to loss of employment
ii. Loss of income from his business and school
iii. Loss of income owing to the abandonment of his land and the lack of maintenance of two houses under construction
iv. Losses related to two motor vehicles and one motorcycle
v. Losses related to payment of rent

a. Loss of income through loss of employment

25. The Applicant states that he was employed as the Director of an NGO called "Tanzania Human for Peoples Rights," and Coordinator of the Fog Water Project at Ped World, that he had a substantial salary that enabled him to support his extended family and that his income enabled him to carry out other investments. He submits that the loss of his salary had a major financial impact

5 *Ingabire Victoire Umuhoza v Rwanda* (reparations), § 45; *Amir Ramadhani v United Republic of Tanzania*, Application No. 010/2015. Judgment of 25 June 2021 (reparations), § 14.

on him and on the members of his family. He further claims to have lost the sum of United States Dollars, seventy-six thousand, five hundred (USD 76,500) which is equivalent to forty-five (45) months' salary from the date of his expulsion to 1 June 2018, when he filed his submissions on reparations before this Court.

26. The Respondent State considers that the Applicant does not prove the material and moral prejudice caused to him or the causal link between the violation of his rights and the alleged prejudice. The Respondent State, therefore describes the request for reparations as speculation. The Respondent State recalls the jurisdiction of the Court according to which it is the Applicant's responsibility to prove the losses claimed, and the causal link between those losses and the violations of rights found.

27. With regard to the material prejudice, the Respondent State argues that the Applicant does not prove his sources of income, and that therefore the Seventy-Six Thousand and Five Hundred (USD 76,500) United States Dollars, which is the amount he purports to have lost, is unfounded.

28. The Respondent State further submits that the Applicant, who claims to have been a Director of the NGO "Tanzania Human for Peoples Rights", does not produce any valid employment contract in support of his claim. The Respondent State notes that the contract produced by the Applicant only bears the signature of the president of the said NGO and not that of the Applicant, which would have been proof of existence of a contract. On this same point, the Respondent State notes that there is no evidence of the registration of the said NGO, which is also unknown to the Tanzanian Revenue Authority, the body in charge of taxes. For this reason, the Respondent State raises doubts over the legitimacy of the proof of payment and even the existence of the NGO alleged to have been the Applicant's employer.

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29. The Court recalls that, in order for a claim for material prejudice to be granted, the Applicant must show a causal link between the violation established and the harm suffered, and further, prove the

harm suffered with documentary evidence.[6]

30. The Court also recalls its jurisprudence according to which:

> [i]t is not sufficient to establish that the Respondent State has violated provisions of the Charter, it is also necessary to provide evidence of the harm for which the Applicant seeks compensation from the Respondent. In principle, a violation of the Charter is not sufficient to establish material harm".[7]

31. However, in deciding whether supporting documents are required with respect to particular claims for damages, human rights bodies and courts must proceed on a case by case basis and are especially sensitive to the "difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances."[8] In many cases, such difficulties arise due to the human rights violations themselves, such as where records are lost during displacement or burned during the destruction of a home.[9]

32. Where evidence is unavailable or limited for any of these reasons, courts frequently look to "the internal consistency, the level of detail, and the plausibility of the applications vis-à-vis the evidence as a whole."[10] It is also common to award some reparations in fairness, even where documentation of damages is incomplete or non-existent, particularly where it is logical that at least some damages would have been incurred as a direct result of the violations established.[11]

33. In the instant case, the Court will take into account the difficult conditions under which the Applicant was arrested, detained and arbitrary expelled from the territory of the Respondent State and is now a refugee in the Republic of Uganda.[12]

6 *Beneficiaries of Norbert Zongo and others* v Burkina Faso, § 60; *Christopher Mtikila v Tanzania* (reparations), § 40; *Lohé Issa Konaté v Burkina Faso,* (reparations), § 15. *Mohamed Abubakari v Tanzania* (reparations), § 22*, Alex Thomas v Tanzania* (reparations), § 14.

7 *Reverend Mitikila v Tanzania* (reparations) (13 June 2014) 1 AfCLR, §§, 31-32.

8 International Criminal Court, See *Prosecutor v Katanga*, Case No. ICC-01/04-01/07, Order for reparations pursuant to Article 75 of the Statute, § 39. (24 March 2017) § 47.

9 Inter-American Court of Human Rights, Case of the *Mapiripán Massacre v Colombia*, at § 266.

10 Inter-American Court of Human Rights, See Case of *Plan de Massacre de Sánchez. v Guatemala*, (reparations); § § 267 - 278.

11 *Prosecution v Katanga*, § 39.

12 The Applicant submitted a copy of a Refugee Identity Card issued by the Department of Refugees in the Office of the Prime Minister, Republic of Uganda, on 8 February 2019, valid until 8 February 2024.

34. With respect to the loss of his employment, the Court notes that the Applicant has produced two copies of salary payment slips bearing the name of the employer, which is the NGO "Tanzanian Human for Peoples Rights" and the Fog Water Project at Ped World. The Court notes that in labour law, generally, the relationship between an employee and their employer is evidenced in a written document, that is, the employment contract. However, this is not always the case because a contract may be oral or implied and still be valid.[13] The Court finds that under the circumstances, although the Applicant does not produce copies of the employment contract, this does not negate the existence of a working relationship with his employer. The Court finds that the copies of the salary payment slips are sufficient evidence of an employment relationship between the Applicant and the NGO in question.

35. The Court is also convinced that the loss of employment resulting in the Applicant losing his income is the direct result of the violation of his rights, which violations were established by the Court in its judgment on merits of 22 March 2018. It is therefore logical to consider that given his illegal expulsion by the Respondent State from its territory and the difficult circumstances in which the Applicant suddenly found himself, it was impossible for him to produce other documentary proof. The Applicant lost his employment and consequently his source of income. The Court notes that based on the information contained in the two salary payment slips, the Applicant had a total monthly salary of Tanzanian Shillings Three Million Four Hundred Thousand (TZS 3,400,000) in his position as Director of the human rights NGO and Coordinator of the FOG Water Project at Ped World.

36. The Court notes that, the Applicant did not produce a copy of his employment contract as the director of "Tanzanian Human for Peoples Rights and as Coordinator of FOG Water Project at Ped World". It is therefore not possible to determine the period he would have continued working with these organisations had he not been expelled from the Respondent State's territory. In these circumstances, to assess the quantum to be awarded under this request, the Court will exercise its judicial discretion and consider the period running from 1 September 2014 until the date of the Judgment on the merits and will use the Applicant's last salary of

13 See Tanzania Employment and Labour Relations Act, Chapter 366 14 (2): "A contract with an employee shall be in writing if the contract provides that the employee is to work outside the United Republic of Tanzania".

Tanzanian Shillings Three Million, Four Hundred Thousand (TZS 3,400,000) for the computation.

37. Accordingly, the Court awards the Applicant the sum of Tanzanian Shillings One Hundred and Forty-Six Million Two Hundred Thousand (TZS 146, 200,000) as reparations for the forty-two (42) months and twenty-one (21) days, of salary lost from the date of his expulsion from the country, that is, 1 September 2014, to the date of the delivery of the Judgment on merits, that is, 22 March 2018.

b. Loss of income from the business and secondary school

38. The Applicant claims that he had a "Sawmill" which brought him income, but which he lost because of his expulsion from the Respondent State's territory. He claims to have lost all his investment in the business. He further submits that his timber stock was damaged and that he lost his clients' trust to the extent that it is virtually impossible for him to recommence that business. The Applicant estimates the loss from his sawmill business to be United States Dollars Ten Thousand United States (USD 10000). Furthermore, the Applicant claims that he was the proprietor of a secondary school named Kihesa Mgagao Secondary School, which also brought him income.

39. The Applicant also affirms that he was the owner of the private secondary school named "Kihesa Mgagao Secondary School", which also brought him income.

40. The Respondent State submits that the Applicant does not prove that his business was functioning, neither does he submit supporting documents showing its annual returns nor accounting records to prove the same. The Respondent State points out that there are no records of the company's accounts showing its financial activities such as payments, salaries, taxes and other levies.

41. The Respondent State also submits that the Applicant does not prove that he had income from the secondary school, as he does not provide accounting records to establish income, expenditure and the amount invested to help ascertain his cash flow.

42. The Respondent State considers that the Applicant does not prove either the material damage caused to him or the causal link between the violation of his rights and the alleged prejudice.

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43. The Court notes that to substantiate his allegations, the Applicant produced copies of the Certificate of Business Registration and Tax Certificate for the "Sawmill". The Court also notes that the Applicant produced a copy of the Certificate of Registration issued to him in respect of Kihesa Mgagao Secondary School as well as a copy of the receipt for payment for this certificate of registration.

44. The Court finds that these documents alone suffice to prove that the Sawmill and Kihesa Mgagao Secondary School were commercial ventures belonging to the Applicant. The Court considers that the accounting records, bank transaction records, and the balance sheet of these firms could have proved if they were profitable or not, as the Respondent State argues. However, the Court can infer from the mere fact that they exist, that the Applicant made investments in them and it was logical for him to have expected income from them. For the Court, taking into consideration the circumstances in which he was expelled from the territory, the normal standard of material evidence cannot be applied to him strictly.

45. The Court, based on the foregoing, and using its discretionary power, grants the Applicant's prayer and awards him a lump sum of Tanzanian Shillings Ten Million (TZS 10,000,000) for the loss of the Sawmill. As regards the loss relating to the secondary school, the Applicant did not provide any financial estimation to support his claim, therefore the Court dismisses this prayer.

c. Loss of income owing to the abandonment, and lack of supervision of, two houses under construction

46. The Applicant avers that he owned two houses which were under construction and that his expulsion from the country resulted in the houses not being completed as well as their lack of supervision and maintenance. He claims that the lack of maintenance of these building projects resulted in an estimated loss of Fifteen Thousand United States Dollars (USD 15 000).

47. For its part, the Respondent State contends that the Applicant does not prove that he is the owner of the houses in question. It further notes that the Applicant failed to produce a title deed for them and to prove any causal link between the losses alleged and the violations of his rights. The Respondent State further submits that the Applicant does not have a customary right of

occupancy certificate to show ownership of the land and that a mere photograph of a house does not constitute a title deed, nor does the Applicant prove any link between the violation of rights and the condition of the property.

48. The Respondent State further contends that if it is true, as the Applicant asserts, that he had a family, his family could have taken care of the property and other assets, if such property existed at all.

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49. The Court finds that the copies of the payment certificate for the purchase of land, the land purchasing contract and the deed of land ownership constitute sufficient proof that the Applicant is the owner of the land on which the houses were built. However, the Court notes that the Applicant does not prove the loss of income owing to the abandonment of his land, neither does he prove the lack of maintenance of the two houses under construction. The Applicant also produced photos of the houses said to be under construction. However, the Court notes that the Applicant has not proved the loss of income linked to the abandonment of his site and the lack of maintenance of the two houses under construction.

50. The Court further notes that the Applicant has also not produced a detailed evaluation of his investments with regard to the two houses, their current condition, neither does he produce an estimate of income that would have accrued to him had he been able to complete the said houses.

51. Accordingly, the Court dismisses this prayer.

d. Losses related to two motor vehicles and one motorcycle

52. The Applicant alleges that he owned two cars and a motorcycle and that since his expulsion from the Respondent State, these have not been used or maintained, resulting in damage to them, and that, this damage constitutes a significant loss to him. He estimates the loss incurred to be in the amount of Twelve Thousand United States Dollars (USD 12000).

53. For the Respondent State, the Applicant does not adduce any evidence to show any link between the state of the cars and

motorcycle and the violation of human rights. Furthermore, the Respondent State submits that the copies of registration of the cars and motorcycle do not prove ownership as they are not certified to show the authenticity. According to the Respondent State, the Applicant's family members, if they exist as he claims, could have maintained the said property.

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54. The Court notes that, the certified copies of the registration cards for the two cars and motorcycle provide sufficient evidence that the Applicant owned them.

55. The Court finds that the arbitrary expulsion of the Applicant from the territory of the Respondent State under difficult conditions certainly did not allow the Applicant to take measures to maintain and protect his property. The Court considers that this situation is sufficient ground to award reparation for losses related to damages caused to his vehicles and motorcycle. Accordingly, the Court grants the Applicant's prayer and awards him in equity the lump sum of Three Million Tanzanian Shillings (TZS 3,000,000).

e. Losses related to payment of rent

56. The Applicant alleges that he rented a house since 2014 and that since his expulsion, his landlord could not rent out the said house because some of his belongings remained in it and that consequently he has been paying rent in order to safeguard his property. The Applicant estimates the loss from paying the rent, at United States Dollars Two Thousand Three Hundred and Twenty Dollars (USD 2,320) for a period of four (4) years.

57. The Respondent State contests these allegations and contends that a copy of the lease agreement, only, which is also not certified by an attorney and without a title deed to the house, cannot be sufficient proof of the existence of the said house. The Respondent State also contends that the Applicant also fails to link the alleged loss to the violations of his rights, adding that the Applicant does not produce an invoice for payment of rent from the landlord.

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58. The Court finds that the Applicant does not prove the claim that he continued paying rent for the house he lived in prior to his expulsion, in order to safeguard his belongings that are still in the house. Such evidence could include invoices issued by the landlord, records of funds transfers to pay the rent as well as receipts issued in respect of such payments. The Court further notes that, in support of his request, the Applicant produced a lease agreement between him and the owner of the house, for the period from 1 May to 31 October 2013. The said contract expired before the Applicant was arrested on 31 October 2013 and before he filed the instant Application with the Court on 24 May 2015. Accordingly, the Court dismisses this prayer.

ii. Moral prejudice

a. Moral prejudice suffered by the Applicant

59. The Applicant asserts that as a direct victim of deprivation of the right to nationality, he suffered emotional and psychological torment after his expulsion. He further claims to have to have lost his fiancée, who subsequently got married to another man.

60. He further alleges that he suffered psychological trauma resulting from acute depression due to his isolation for four (4) years. He also avers that he suffered extreme physical pain resulting from acts of torture and is seeking reparation amounting to, Fifty Thousand United States Dollars (USD 50,000).

61. The Applicant affirms that he is the sole breadwinner for his immediate family, that is, his wives and children, as well as for his extended family. He asserts that since his forced expulsion from the Respondent State, he has been distressed due to concern whether his family members have food, health care and clothing.

62. The Applicant also avers that at the time of his arrest he was planning to marry a lady of Burundian nationality, but because of his expulsion from the country, the marriage did not take place, which caused him prejudice.

63. The Respondent State contends that the Applicant does not prove the emotional and psychological suffered. It considers that the Applicant does not explain how he arrived at the various amounts claimed for himself as a direct victim, and for his family members

and other relatives as indirect victims, nor does he provide any evidence of marriage to his wives.

64. The Respondent State also contends that the Applicant does not provide any evidence of a marriage contract with his alleged fiancée or wife, nor any evidence of prejudice caused.

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65. 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.

66. The Court also recognises that moral prejudice includes, *inter alia*, pain and suffering, mental suffering, humiliation, loss of enjoyment of life and loss of social or marital relations, and that compensation for non-pecuniary damage is generally calculated on the basis of an assessment of fair compensation.

67. The Court further notes that the Applicant has invoked its jurisdiction in equity and requested compensation amounting to Fifty Thousand United States Dollars (USD 50,000) for the moral prejudice he suffered.

68. In its judgment on the merits, the Court held that there was a violation of the Applicant's right not to be arbitrarily deprived of his right to nationality, that he was arbitrarily expelled from Tanzania and denied his right to be heard. These violations, particularly that related to nationality and his arbitrary expulsion, in and of themselves, affected the Applicant's status in the Respondent State and consequently had an adverse impact on his ability to access services availed to citizens of the Respondent State.

69. The Court also recalls that the Applicant was arrested and then detained in a police station for several days and that his passport was confiscated before he was expelled to Kenya. He was also removed from Kenya following which he lived in a no man's land between Tanzania and Kenya for at least four (4) years in clearly very difficult conditions. The Applicant is now a refugee in Uganda. The Court also notes that the Applicant's intended marriage to a Burundian lady did not take place as planned, since he was expelled from the Respondent State.[14]

14 *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) ACtHPR. Application No. 012/2015 Judgment of 22 March 2018 (merits) §§, 4-12.

70. Under these circumstances, it is undisputed that the Applicant has suffered physically and psychologically from the situation in which he found himself as a result of the Respondent State's wrongful acts. Furthermore, the destabilisation of the Applicant's social and family life as a result of the violations found, invariably caused him distress and anguish which must be repaired.

71. The Court therefore awards the Applicant the sum of Twenty Million Tanzanian Shillings (TZS 20,000,000) as fair compensation for the moral prejudice he suffered.

b. Moral prejudice suffered by indirect victims

72. The Applicant considers that his expulsion had consequences on the survival of his immediate and extended family, including his parents, siblings and other relatives. He states that before his departure from the country, he was their sole provider ensuring that they had food, health care and clothing.

73. The Applicant submits that his parents (father and mother), children (five children), "three companions" his sister and grandmother were greatly humiliated by unlawful acts committed by the Respondent State, and prays that all of them should be considered as indirect victims.

74. In support of his allegations, the Applicant refers the Court not only to its own jurisprudence but also Principle V (8), of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law (Human Rights), Serious Violations and Violations of International Humanitarian Law.

75. The Applicant prays the Court to award the following amounts to the indirect victims:

i. One hundred thousand United States Dollars (USD 100,000) for his five children.

ii. Fifty thousand US Dollars United States Dollars (USD 50,000) for his parents.

iii. Twenty thousand United States Dollars (USD 20,000) for his sister and grandmother.

76. The Respondent State prays the Court to dismiss this request on the ground that the Applicant does not prove the marital relationship with his alleged wives, nor does he explain how he arrived at the quantum of the amounts claimed.

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77. The Court notes that it has already held that direct or close family members who have suffered physically or psychologically as a result of the victim's situation also fall within the definition of "victims". They are indirect victims and can claim reparation for the suffering caused to them.[15]

78. The Court has also held that spouses, parents and children are automatically presumed to be indirect victims because they are presumed to have also suffered moral prejudice as a result of the violations against an applicant.

79. However, the Court has stated that an applicant should produce marriage certificate or any equivalent proof regarding filiation to their spouses, birth certificates or any other equivalent evidence as proof of filiation to their children. As for parents, the Court has held that there must be evidence of attestation of the paternity or maternity or any other equivalent proof.[16]

80. For other persons such as siblings, the Court has held that for them to be also considered as indirect victims, the applicant must demonstrate and prove that he or she was responsible for their welfare and provided for them, such that the violations against the Applicant also adversely impacted their social situation. The Applicant must also prove, with relevant documentation, the filiation between him or her and these other persons.

81. The Court notes in the instant case, that Applicant's children, spouse(s) and parents are presumed to have suffered moral prejudice due to the violations found. Furthermore, the nature of these violations had a direct impact on these indirect victims' family relationship with the Applicant.

82. The Court notes that the Applicant produced copies of the birth certificates of his four (4) children, namely, Lucas Anudo, Lightness Anudo, Nuru Anudo, and Fatuma Anudo, whereas he listed five (5) children as indirect victims. The Applicant has not provided an explanation for the failure to provide a copy of the fifth child's birth certificate. He also provided a copy of his birth certificate which proves his filiation with his father Achok Anudo, and his mother Dorka Owuondo.

83. In view of the foregoing, the Court therefore finds that a lump sum of Ten Million Tanzanian Shillings (TZS 10,000,000) each is fair compensation for the moral prejudice suffered by the Applicant's

15 *Idem*, § 50.

16 *Idem* § 60; *Mohamed Abubakari v Tanzania*, § 60; *Alex Thomas v Tanzania* (reparations), § 50; *Wilfred Onyango v Tanzania*, 1 AfCLR , 507 *§ 71; Lucien Ikili vTanzania,* § 135.

four children, that is, a total of Forty Million Tanzanian shillings (TZS 40,000,000). The Court further finds that a lump sum of Five Million Tanzanian Shillings (TZS 5, 000,000) each is fair compensation for the moral prejudice suffered by his parents, that is, a total of Ten Million Tanzanian Shillings (TZS 10,000,000).

84. The Court notes that, the Applicant has not provided any document to prove that Pelister Akeyo, Alice Muga are his sister and grandmother respectively. The Applicant has also not provided documentary evidence that, Semi Dagaro and Hawayawezi Kamiliare his companions. and that he was responsible for their upkeep as well as that of his alleged fiancee. Accordingly, this prayer is dismissed.

B. Non-pecuniary reparations

85. The Applicant prays the Court to award him reparations based on the principle of restitution. He also requests the Court to order the Respondent State to guarantee the non-repetition of the violations.

86. The Applicant additionally prays the Court, to order the Respondent State to publish this judgment in the Official Gazette as a measure of satisfaction.

87. Relying on the jurisprudence of the Court in *Lucien Ikili Rashidi* v *Tanzania* case, the Respondent State prays the Court to dismiss the request for guarantees of non-repetition because the violations are not repetitive or systemic.

88. The Respondent State also considers that the Court's judgment on the merits finding violations of the Applicant's rights already constitutes a form of "reparation and satisfaction".

89. The Respondent State therefore prays the Court to dismiss all of the Applicant's claims for non-pecuniary reparations because they are unfounded and unjustified.

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90. The Court notes that restitution consists of restoring the victim to the situation that existed prior to the wrongful act. Some aspects of restitution are, *inter alia*, restoration of liberty, restoration of identification documents and nationality, facilitation to return to one's place of residence, reinstatement in employment and return

of property.

91. In this regard, in its Judgment on merits of 22 March 2018, the Court ordered the Respondent State, "to take all the necessary steps to restore the Applicant's rights by allowing him to return to the national territory, ensure his protection and submit a report to the Court within forty-five (45) days".[17]

92. With regard to the request for guarantees of non-repetition, the Court recalls its Judgment on the merits in which it ordered the Respondent State "to amend its legislation to provide individuals with judicial remedies in the event of dispute over their citizenship".[18]

93. However, despite several reminders, the Respondent State has yet to submit any report on the implementation of the orders on restitution of the Applicant's citizenship and amendment of the law to allow for judicial remedies in the event of a challenge to an individual's citizenship.

94. As regards the request for measures of satisfaction, the Court recalls its jurisprudence, in particular in the *Zongo* and *Mtikila* cases,[19] in which it noted that the publication of judgments of international human rights courts as a measure of satisfaction was common practice. On this basis, it therefore ordered the publication of the two judgments on merits and reparations in those cases.

95. In the instant case, in the judgment on merits, the Court found that the arbitrary revocation of the Applicant's nationality and consequently his arbitrary expulsion from the Respondent State[20] was based on the "illegal immigrant" status that he was labelled with by virtue of the notice issued by the Minister of Home Affairs.[21] The Court notes that, in view of these circumstances and the nature of these violations, as well as the need to emphasise on, and raise awareness on the Respondent State's obligations and the reparations required, the Court deems it necessary for the judgment on merits and this judgment on reparations be publicised. The prayer for the Court's judgment to be published is therefore granted.

17 *Anudo Anudo v Tanzania* (merits) § 132 (ix).

18 *Ibid* § 132 (viii).

19 *Beneficiaries of the Late Norbert Zongo and Others v Burkina Faso*, § 98.

20 *Anudo Anudo v Tanzania* (merits) §§ 73-88 and §§ 95-106.

21 *Ibid* §§ 113-116.

VI. Costs

96. The Applicant requests the Court to order the reimbursement of the transport costs between Babati and other villages, stationery and communications costs and postal charges that he allegedly paid, amounting to Four Thousand United States Dollars (USD 4,000).

97. On its part, the Respondent State requests the Court to dismiss all of the Applicant's claims for reparations and to order him to bear the costs.

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98. Rule 32(2) of the Rules [22] provides: "Unless otherwise decided by the Court, each party shall bear its own costs, if any."

99. The Court recalls, in line with its previous judgments, that reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.[23] The Applicant must provide justification for the amounts claimed.[24]

100. Although the Applicant provided receipts in respect of payments for courier services by DHL, it is important to note that *Asylum Access, Tanzania* and *Dignity Kwanza* through Mrs. Janemary Ruhundwa and Ms. Mwajabu Khalid, represented the Applicant on a *pro bono* basis under the Court's legal aid scheme. The Court facilitated these representatives' incidental costs under this scheme. The Applicant's prayer for reimbursement of costs is therefore unjustified and is accordingly dismissed.

101. The Court, taking into consideration the provisions of Rule 32(2) of the Rules therefore holds that each Party shall bear its own costs.

22 Rules of Court, 2 June 2020.

23 *Norbert Zongo and Others v Burkina Faso* (reparations), §§ 79-93; Christopher *Mtikila v Tanzania* (reparations), § 39; *Mohamed Abubakari v Tanzania* (reparations), *§ 81; Alex Thomas v Tanzania* (reparations), *§ 77.*

24 *Norbert Zongo and Others v Burkina Faso* (reparations), § 81; *Mtikila v Tanzania* (reparations), § 40.

VII. Operative part

102. For these reasons,
The Court,
Unanimously,
Pecuniary reparations

i. *Dismisses* the Applicant's prayer for reparation for material prejudice for loss of income from his school, Kihesa Mgagao Secondary School;
ii. *Dismisses* the Applicant's prayer for reparation for material prejudice supposedly caused by the abandonment of two houses under construction;
iii. *Dismisses* the Applicant's prayer for reparation for material prejudice allegedly resulting from the Applicant continuing to pay rent for a house to store his belongings;
iv. *Dismisses* the Applicant's prayer for reparation for moral prejudice allegedly suffered by his sister, grandmother, companions and alleged fiancée;

By a majority of Seven (7) for, and Three (3) against, Justice M-Thérèse Mukamulisa, Justice Stella I. Anukam and Justice Modibo Sacko, Dissenting:

v. *Grants* the Applicant's prayer for reparation for material prejudice for the loss of income from his employment and awards him the sum of One Hundred and Forty-Six Million Two Hundred Thousand Tanzanian Shillings (TZS 146, 200,000);
vi. *Grants* the Applicant's prayer for reparation for material prejudice from the loss of his Sawmill businesses and awards him a lump sum of Ten Million Tanzanian Shillings (TZS 10,000,000);
vii. *Grants* the Applicant's prayer for reparation for material prejudice owing to damage caused to two motor vehicles and one motorcycle and awards him a lump sum of Three Million Tanzanian Shillings (TZS 3,000,000).

Unanimously,

viii. *Grants* the Applicant's prayer for reparation for moral prejudice he suffered due to the violations found and awards him the sum of Twenty Million Tanzanian Shillings (TZS 20,000,000);
ix. *Grants* the Applicant's prayer for reparation for moral prejudice suffered by the following indirect victims and awards them compensation as follows:
    a. Ten Million Tanzanian Shillings (TZS 10,000,000) to each of his four children Lucas Anudo, Lightness Anudo, Nuru Anudo and

Fatuma Anudo, that is, a total of Forty Million Tanzanian Shillings (TZS 40,000,000,000).

b. Five Million Tanzanian Shillings (TZS 5,000, 000,) each to his father Achok Anudo, and mother Dorka Owuondo, that is, a total of Ten Million Tanzanian shillings (TZS10, 000, 000).

x. *Orders* the Respondent State to pay the amounts stated under (v, vi, vii, viii and ix) 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 the United Republic of Tanzania, throughout the period of delayed payment until the amount is fully paid.

Non-pecuniary reparations

xi. *Orders* the Respondent State to take all the necessary steps to restore the Applicant's rights, by allowing him to return to the national territory, ensuring his protection and submitting a report to the Court within forty-five (45) days of notification of this Judgment;

xii. *Orders* the Respondent State to amend its legislation to provide individuals with judicial remedies in the event of a challenge to their citizenship;

xiii. *Orders* the Respondent State to publish the Judgment on the merits of 22 March 2018 and this Judgment on reparations, on the website of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and to ensure that the these Judgment remain accessible for at least one (1) year after the date of the publication.

On implementation and reporting

xiv. *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 of the judgment.

On costs

xv. *Orders* each Party to bear its own costs.

Jointly Dissenting Opinion: MUKAMULISA, ANUKAM, SACKO

1. We disagree with the Court's decision with respect to some of the Applicant's prayers relating to the alleged material prejudice he suffered, namely:

i. Loss of income owing to loss of employment

ii. Loss of income accruing from the Applicant's business

iii. Losses related to two vehicles and a motorcycle.

I. Loss of income owing to loss of employment

2. In his allegations, the Applicant states that he was employed as the Director of an NGO called "Tanzania Human for Peoples Rights," and Coordinator of the NGO "Fog Water Project" at Ped World, that he was paid a substantial salary. He further claims to have lost the sum of, Seventy-Six Thousand, Five Hundred United States Dollars (USD 76,500) which is equivalent to forty-five (45) months' salary, starting from the date he was expelled to 1 June 2018 when he filed his submissions on reparations before this Court.

3. In its decision, the Court found that the copies of the salary payment slip tendered are sufficient evidence of an employment relationship between the Applicant and the NGO "Tanzania Human for Peoples Rights" and Fog Water Project at Ped World.

4. We agree with the reasoning of the Court regarding the supporting documents that "human rights bodies and courts must proceed on a case-by-case basis and are especially sensitive to the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or the unavailability of evidence in the relevant circumstances".[1]

5. However, we note that in the instant case, the Applicant resided in Tanzania where the assets in question were located and where the violations established by the Court took place. Moreover, the NGOs, *Tanzania Human for Peoples Rights* and *Ped World Organization*, from which the Applicant alleges he received his monthly salary, operate there and the Applicant was assisted by a

1 In that regard the Court refers to *Prosecutor v Katanga*, Case No. ICC-01/04-01/07, International Criminal Court, Ruling on reparation under Article 75 of the Statute, para 39 (24 March 2017), § 47.

lawyer throughout the proceedings before this Court.

6. In light of the above, there is nothing in the records to indicate that evidence in support of the Applicant's claims has been destroyed or that it is absolutely impossible to obtain, the relevant legal consequences must be drawn.

7. Regarding material prejudice in general, the Court has consistently stated, as it does in the instant Judgment[2] that "[i]t is not sufficient to establish that the Respondent State has violated provisions of the Charter, it is also necessary to provide evidence of the harm for which the Applicant seeks compensation from the Respondent. In principle, a violation of the Charter is not sufficient to establish material harm".[3] It is in this regard that the Court required the Applicant to prove, among other things, the prejudice suffered with documentary evidence.[4]

8. The Applicant tendered the following documents as evidence of the salary that he earned:

- a copy of the employment contract between Ochieng Anudo and Ped World;
- a copy of a payment *voucher dated* 15 March 2013 issued by *Tanzania Human for Peoples Rights* according bearing the sum of Tsh 600,000 Tanzanian Shillings paid to the Applicant as salary for the month of February;
- a copy of a payment receipt dated 30 March 2013, again, issued by the NGO. Tanzania Human for Peoples Rights bearing an amount of 2,800,000 Tanzanian Shillings paid the Applicant as salary in respect the month of March 2013.

(a) Employment contract

9. The Applicant tendered a copy of a contract of cooperation between him and the NGO PED World. The document, which was signed only by Bernhard Kuppers, president of the NGO, bears the name of Ochieng Anudo who, as indicated by the Respondent State in its Reply, did not sign the contract.

10. Besides, the document in question states that he was on temporary employment from 1 July 2011 to 30 June 2012. Therefore, there is nothing in the records to suggest that the contract was renewed

2 Paragraph 30.

3 *See also Reverend Mitikila v Tanzania* (reparations) (13 June 2014) 1 ACtLR 81, §§ 31 to 32.

4 Paragraph 29.

or was still in effect at the time of the Applicant's deportation on 1 September 2014.

(b) Salary for the month of February

11. The Applicant tendered in Court a copy of the payment voucher from Tanzania Human for Peoples' Rights according bearing an amount of 600,000 Tanzanian Shillings paid to him on 15 March 2013 as salary for the month of February. It is indicated on the copy that the said payment was made and authorized by Ped World.

12. This document, on which the Applicant relies, also raises a number of issues. Not only is it a simple copy that was not certified by any competent authority, but it also does not bear the signature or seal of Ped World even though that NGO signed and authorized the payment. Moreover, it is difficult to ascertain the link between Tanzania Human for Peoples' Rights and Ped World, which raises the question as to why the receipt was issued by Tanzania Human for Peoples' Rights instead of Ped World.

(c) Salary for the month of March 2013

13. The Applicant submitted to the Court a copy of the payment receipt issued by the NGO Tanzania Human for Peoples Rights in respect of his salary amounting to Tsh. 2,800,000 for the month of March 2013 as one of the documents supporting the loss of income owing to the loss of employment that he suffered.

14. It should be noted, on the one hand, that the document in question is a simple copy and, on the other, that it does not bear the seal of the organization or the name and position of the person who authorized the payment.[5] Furthermore, even though the Applicant alleges that he was the Director of the NGO Tanzania Human for Peoples' Rights, no contract or other document was tendered in Court to establish the link between the NGO and him.

15. Regarding the Applicant's loss of salary, the Court indicated[6] that it "will exercise its judicial discretion and consider the period running from 1 September 2014 until the date of the Judgment on the merits and will use the Applicant's last salary of Three Million, Four Hundred Thousand Tanzanian Shillings (TZS 3,400,000) for

5 Before the name of the person who authorized the payment, one only reads "THPR".

6 Paragraph 36.

the computation".

16. The observations above relating to the evidence adduced by the Applicant show that, under the circumstances of the case, it is difficult to state with certainty that the Applicant's last salary was 3,400,000 Tanzanian Shillings.

17. In view of the foregoing, it is clear that there are still many grey areas in this case with regard to the material prejudice suffered by the Applicant owing to the loss of employment.

18. In the light of these findings, the Court had the option, in the interests of justice, as it has done in various cases,[7] to request additional evidence that would have enabled it decide the instant case based on solid and reliable evidence. It should be recalled that pleadings were closed on July 15, 2020, but in the interest of justice, the Court decided to reopen them to allow the Applicant to file his Reply to the Respondent State's Response. Finally, it should be noted that the Rules of Procedure of the Court [8] grant the Court discretionary power to request that parties file additional exhibits or evidence.

19. Hence, since the Court had found that some evidence in support of the Applicant's allegations were not before it, as already indicated above, it should have taken advantage of the reopening of the pleadings to request the Applicant's Counsel to produce additional evidence as proof of material prejudice.

II. Loss of income accruing from his business

20. The Applicant claims that he had a "Sawmill" which brought him income, but which he lost because when he was deported. He further submits that his timber stock was damaged and that he lost his clients' trust to the extent that it is "virtually impossible for him to recommence that business" and estimates the loss from his business to be United States Dollars Ten Thousand United States (USD 10000).

21. In its reasoning, the Court took account of the fact that the Applicant produced copies of the Certificate of Business Registration and

7 *Gozbert Enrico v Tanzania*, ACtHPR, Application no 056/2016, Judgment of 2 December 2021 (merits and reparations). *Akwasi Boateng and 351 others v Ghana*, ACtHPR, Application no 059 /2016, (jurisdiction). *Alfred Agbesi Woyome v Ghana*, ACtHPR, Application no 001/2020 (merits and reparations).

8 Rule of 25 September 2020 revised in April 2021. Rule 51 (1) provides that: "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".

Tax Certificate for the said "Sawmill".

22. After finding that the accounting records, bank transaction records, and the balance sheet of these firms could have proved if they were profitable or not, as the Respondent State argues, the Court nonetheless considered that the documents tendered by the Applicant constitute preliminary proof that the Applicant made investments and it was logical for him to have expected income from them.

23. With respect to the sawmill, the fact that the Applicant owns it is not in contention in the instant case. The problem is that nothing in the records indicates that the sawmill was actually operating and, more importantly, that it was generating income.

24. Moreover, the Court appears to contradict itself in its decision given its reasoning on the Applicant's loss of income owing to the abandonment and lack of supervision of two houses. Regarding this allegation, the Court found that the Applicant "has also not produced a detailed evaluation of his investments with regard to the two houses, their current condition, neither does he produce an estimate of income that would have accrued to him had he been able to complete the said houses."

25. Similarly, in the *Wilnifred Onyango and others*[9] Judgment, the Court noted, regarding the alleged loss of income suffered due to the termination of the delivery contract, that: "the contract for supply and termination letter adduced by the Applicant are *prima facie* evidence of the existence of a contract but not of the actual income flowing from such a contract."

26. The Court also stated that "further evidence in the form of bank statements or tax certificates attesting to taxes paid with respect to the alleged annual income and the gross income …should have been tendered. In the absence of these documents, there is insufficient proof of the alleged loss and related compensation claim". It is important to note that the Court followed the same

9 *Wilfred Onyango and others v Tanzania*, ACtHPR, Application No. 006/2013, Judgment of 4 July 2019, (reparations): In this case, one of the Applicants averred that he ran a chicken supply business and that the net annual income accrued from the business was approximately Forty-one Thousand Two Hundred and Fifty US Dollars (41,250) Dollars. He tendered evidence to that effect, that is, a contract for services and a letter terminating that contract due to non-delivery of goods as agreed. The Applicant prayed the court to award him the sum of Two Hundred and Eighty-Eight Thousand, Eight Hundred and Eighty-Nine US Dollars (US$ 288,889) for the loss suffered over the entire period of his incarceration.

reasoning with respect to the allegations of other Applicants.[10]

27. This example only goes to confirm that the Court is inconsistent in its rulings on reparations awarded for the alleged loss of income.

28. In the instant case, the Court repeatedly emphasized[11] that it would consider the fact that the Applicant was illegally expelled from the territory of the Respondent State and the difficult circumstances in which he suddenly found himself. It therefore considered that it was impossible for him to produce other documentary evidence.

29. However, it should be noted that in its previous judgments[12] the Court dismissed the allegations of applicants, even when they were incarcerated, on the grounds that they did not adduce evidence of the material harm they allegedly suffered, although their situation did not allow them to have access to evidence in support of their allegations.

30. It is regrettable that the Court did not apply its own jurisprudence, hitherto consistent, in the instant case.

III. Losses related to two vehicles and one motorcycle

31. The Applicant alleges that he owned two vehicles and a motorcycle and that since his deportation from the Respondent State, these have not been used or maintained, resulting in damage to them, and that, this damage constitutes a significant loss which he estimates to be in the amount of Twelve Thousand United States Dollars (USD 12000).

32. In its reasoning, the Court found that the arbitrary expulsion of the Applicant from the territory of the Respondent State under difficult conditions certainly did not allow the Applicant to take measures to maintain and protect his assets and, accordingly, granted the Applicant in fairness the lump sum of Three Million Tanzanian Shillings (TZS 3,000,000).

33. It appears from the records that the Applicant tendered two registration certificates covering his two vehicles: the first dated 11 November 2005 for a Toyota Corolla 1991 model, which means that, at the time of its registration, the vehicle was 14 years old, and the second dated 13 June 2011, for a Toyota Opa 2002

10 Paragraphs 35 and 37.

11 Paragraphs 35, 44, 55.

12 *Alexis Thomas v Tanzania*, ACtHPR, Application no 005/2013, Judgment of 2 November 2015 (reparations); *Mohamed Abubakari v Tanzania*, ACtHPR, Application no 007/2013, Judgment of 4 July 2019, (reparations).

model, which shows that, at the time of its registration, it was 9 years old.

34. The Applicant also submitted to the Court a certificate of registration issued on 19 February 2011 for his Honda motorcycle which shows that it was manufactured in 1987. According to that date, at the time of its registration, the motorcycle had been in use for 24 years and, at the time of his expulsion on 1 September 2014, it was 27 years old!

35. Based on the numbers of years and the depreciation of the said vehicles, it is easy to have an idea of the condition of the two vehicles and the motorcycle which were not new when they were purchased.

36. In order to produce solid evidence that would hold up to sound legal analysis, the Applicant should have demonstrated in an irrefutable manner the impact of his absence on the deterioration of the above-mentioned vehicles and motorcycle.

37. However, in the instant case, the Applicant failed to provide the court with information about the condition of his vehicles when they were bought and their condition at the time he was deported from Tanzania. As for the motorcycle which was 27 years old at the time of the Applicant's deportation, in the absence of any other proof of its condition other than the certificates produced, it can be concluded that it was not in a good functional condition since it had already depreciated.

38. As noted above, due to the lack of convincing evidence, the Court could have asked for additional evidence in the interests of justice, or could have found that there were insufficient evidence, as it did in the judgment referred to above.

Former Somadex SA Employees v Mali (admissibility) (2021) 5 AfCLR 668

Application 006/2018, *Former Somadex SA Employees v Republic of Mali*

Ruling, 2 December 2021. Done in English and French, the French text being authoritative.

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

Recused under Article 22: SACKO

The Applicants are nationals of the Respondent State and former employees of a mining company with operations within the territory of the Respondent State. The Applicants alleged that they were forced to work under unfavourable conditions while some of their colleagues were unlawfully arrested and detained. They also alleged that they were dismissed illegally. They further claimed that their dismissal and overall ill treatment violated their human rights and that the Respondent State was complicit in their ill treatment and the dissolution of the company that mistreated them without fulfilling its obligations to its employees. The Court held that the Application was inadmissible for failure to exhaust local remedies.

Admissibility (identity of applicants, 41-44; exhaustion of local remedies, 52-56)

I. The Parties

1. The Applicants are Malian citizens and former employees of SOMADEX SA[1] which was subcontracted by Morila SA to work on its gold mine at Mines d 'or Morila (Sikasso Region) within the Republic of Mali.[2] They challenge their dismissal and the non-payment by their employer of their performance bonus for exceeding production targets.

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 on 20 June 2000. The Respondent State also deposited with the African Union Commission Chairperson, on 19 February

1 See the list of the former employees annexed hereto.

2 SOMADEX SA was a subcontracting company of Morila SA. According to the Application filed with the Court, the Applicants are four hundred forty-five (445) in total.

2010, 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.

II. Subject of the Application

A. Facts of the case

3. In their Application, the Applicants allege that a production excess was achieved for the period 2000 to 2003, at the Morila SA gold mine, which produced a total of eighty-three tonnes two hundred and sixteen (83,216) kilograms per year over four (4) years of operation (2000, 2001, 2002, 2003),[3] instead of the initial forecast of eleven (11) tonnes per year. According to the Applicants, the collective bargaining agreement that they signed with SOMADEX SA provided for the payment of a performance bonus in the event production targets were exceeded to the tune of Seventeen Billion (17 000 000) Francs CFA.

4. According to the Applicants, only a total of three hundred and fifty million (350,000,000) CFA francs were paid to the employees in this regard. SOMADEX has since refused to pay the remainder, in complicity with the Respondent State, and closed its doors for good between 2008 and 2009, without fulfilling its obligations to its former employees.

5. The Applicants further allege that as part of the initiatives to improve their working conditions, the Union Committee gave a strike notice on 21 June 2005. The notice announced a work stoppage for 6, 7, and 8 July 2005. However, the company's management considered this strike to be illegal on the grounds that the notice period provided for by law, that is, fifteen (15) days before the commencement of the strike, had not been observed. SOMADEX SA then sent a notice of dismissal to all employees. Subsequently, on 9 July 2005, SOMADEX SA dismissed the Allo Traoré Group and Two hundred Fifteen (215) others for gross misconduct after they had abandoned their posts. On 31 July 2005, the company decided to terminate the contracts of another Three hundred and Eleven (311) employees for abandoning their posts.

3 Year 2000: 4,208 Kg ; Year 2001 : 23,442 Kg ; Year 2002 : 38, 915 Kg ; Year 2003 : 16, 650 Kg.

6. The Applicants claim the termination of the employees' contracts was illegal and they denounced the undignified working and living conditions resulting from the non-payment of their performance bonus, despite the employees having obtained a decision in their favour during arbitration proceedings concluded on 10 February 2004.

7. The Applicants further state that on the night of 14 September 2005, two buses belonging to SOMADEX were set on fire in the courtyard of the city's gendarmerie. Subsequently, thirty-two (32) former employees, including union representatives, were arrested and detained for several weeks without a committal order.

8. The Applicants claim that SOMADEX accused them of having set the two buses on fire, as a result of which it terminated the contracts of another seventeen (17) employees.

9. Finally, the Applicants allege that the Respondent State was complicit in the dissolution of SOMADEX SA, in order to obstruct the filing of new evidence to compel the company to fulfil its obligations in relation to the rights of its former employees. According to the Applicants, the company was subsequently restructured and renamed "MARS" before becoming "Gounkoto Mining Services (GMS)". The Applicants contend that this was the reason the Sikasso Court on 26 May 2014 dismissed their case, on the ground that they lacked standing as former employees, given that there was no contractual link between them as employees and the renamed company.

B. Alleged violations

10. The Applicants allege a violation of their rights under Articles 3, 4, 6 and 7 of the Charter. They also claim that the termination of their contracts constitutes a violation of Article L231 of the Labour Code of the Respondent State[4] and Convention No. 87 of the International Labour Organization (ILO) on Freedom of

4 Article L.231: A strike does not breach a contract of employment, except in cases of gross negligence on the part of the employees. Lockouts and strikes are unlawful during the conciliation procedure and once an arbitration decision has become enforceable. A lock-out or strike in violation of the provisions of the preceding paragraph shall entail.

a) for the employers:
- the paying employees for the days of wages lost as a result,
- ineligibility for membership of the chambers of commerce for three years.
- prohibition from being a member of the Higher Council of Labour and from participating in any way in a work enterprise or supply contract on behalf of the State or a public body.

b) for the employees:

Association and Protection of the Right to Organize of 4 July 1950.[5]

III. Summary of the Procedure before the Court

11. The Application was filed on 20 February 2018.

12. On 13 July 2018, the Registry requested the Applicants to file their submissions on reparations within thirty (30) days from the date of receipt.

13. On 27 July 2018, the Registry received the Respondent State's response and notified it to the Applicants on the same day for their Response within thirty (30) days from the date of receipt.

14. On 4 September 2018, the Registry received the Applicants' submissions on reparations which were notified to the Respondent State on the same day for its Response to be filed within thirty (30) days from the date of receipt.

15. On 12 March 2019, the Registry sent a reminder to the Respondent State, notifying it that the time limit for responding to the Applicants' submissions had expired, and requesting it to submit its Response within thirty (30) days from the date of receipt of the reminder.

16. On 17 April 2019, the Registry received the Respondent State's Response which was served on the Applicants on the same date with a request to respond within thirty (30) days from the date of receipt of the said notification.

17. On 18 July 2019, the Registry requested additional information from both Parties. By the same notice, the Registry informed the Parties that the title of the Application had been changed from "Yaya Fane and 43 others" to» Anciens travailleurs de SOMADEX SA versus Republic of Mali."

18. On 26 August 2019, the Registry received the Applicants' response to the request for additional information and notified it to Respondent State and on 3 October 2019, the Registry received the Respondent State's response.

- termination of the contract taking effect from the day of the cessation of work, with no rights other than the salary and the paid vacation allowance accumulated as of that date.

5 The Respondent State ratified the Convention on 22 September 1960.

19. On 16 October 2019 pleadings were closed and the Parties were duly informed.

IV. Prayers of the Parties

20. The Applicants pray the Court for the following orders:

i. Declare that the thirty-two (32) imprisoned former employees have rights that must be respected and order the Respondent State to pay them the sum of ten million (10,000,000) CFA Francs each as damages for the harm suffered;

ii. Order the Respondent State to pay the sum of 17,000,000,000 (Seventeen Billion) CFA Francs to the former employees, as performance bonus that had not been paid by SOMADEX SA ;

iii. Order the Respondent State to pay the sum of 6,000,000 (Six Million) CFA Francs to each employees, as compensation for the losses suffered;

iv. Order the Respondent State to pay the former employees the sum of 3,000,000,000 (three billion) CFA francs as accumulated salaries for the period between July 2005 and 31 December, 2017;

v. Order the Respondent State to issue a certificate of employment for each former employee;

vi. Order the Respondent State to pay a penalty of 2,000,000 (two million) CFA Francs per day of delay, starting from the Judgment date;

vii. Order the Respondent State to pay half of the sums listed in the judgment urgently;

viii. Order the Respondent State to pay legal costs;

ix. Order the Respondent State to pay Three Million (3,000,000) CFA Francs to cover the costs of the case;

x. Order the Respondent State to pay the round-trip transportation to the Court, and other living expenses of the lawyer, amounting to 4 Million (4,000,000) CFA Francs;

xi. Order the Respondent State to pay the sum of Seven Million (7,000,000) CFA Francs as costs of the proceedings.

21. For its part, the Respondent State prays the Court for the following:

i. As a matter of form, declare the Application inadmissible on the grounds that it does not meet the admissibility requirements;

ii. Exceptionally, if the Court decides otherwise;

iii. On the merits, dismiss the Application as unfounded and dismiss all of the Applicants' prayers and order them to pay costs.

V. Jurisdiction

22. Article 3 of the Protocol provides:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, 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.

23. Furthermore, Rule 49(1) of the Rules[6] provides: "The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules".

24. Based on the above provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections to its jurisdiction, if any.

25. The Court notes that the Respondent State has not raised any objections to its jurisdiction. Nevertheless, the Court must satisfy itself that it has jurisdiction before proceeding to examine the Application.

26. The Court observes that the violations alleged by the Applicants relate to proceedings before domestic courts which nevertheless concern rights under the Charter, namely, the right to equality before the law and the right to equal protection before the law, the right to life, the right to liberty and the right to a fair trial. The Court thus finds that its material jurisdiction is established.

27. With regard to its personal jurisdiction, the Court recalls that the Respondent State is a Party to the Protocol and that it has deposited the Declaration provided for in Article 34(6) of the Protocol with the Chairperson of the African Union Commission, as earlier outlined in paragraph 2 of this Ruling. The Court's thus concludes that its personal jurisdiction is established.

28. With respect to its temporal jurisdiction, the Court notes that all of the violations alleged by the Applicants are based on the judgment of the Sikasso Labour Court No. 4 of 26 May 2014, that is, after the Respondent State became a party to the Charter and the Protocol and deposited the Declaration. The Court also notes

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

that the alleged violations are continuous in nature.[7]

29. In view of the foregoing, the Court finds that it has temporal jurisdiction to hear the instant Application.

30. With regard to its territorial jurisdiction, the Court notes that the violations alleged by the Applicants all occurred in the territory of the Respondent State. The Court, therefore, considers that it has territorial jurisdiction.

31. In view of the foregoing, the Court concludes that it has jurisdiction to hear the instant Application.

VI. Admissibility

32. Article 6(2) of the Protocol provides: "[t]he Court shall rule on the admissibility of cases, taking into account the provisions of Article 56 of the Charter."

33. Rule 49(1) of the Rules[8] of Court further provides that "[t]he Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules."

34. Rule 50(2) of the Rules,[9] which restates in substance Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all of the following requirements:
>
> 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 set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
>
> g. Do not deal with cases which have been settled by those States

7 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso (Preliminary objections)* (21 June 2013) 1 AfCLR 197, §§ 71 to 77.

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

9 Rule 40 of the Rules of 2 June 2010.

involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

35. The Respondent State has raised two preliminary objections to the admissibility of the Application. The first relates to the identity of the Applicants, and the second to the exhaustion of local remedies.

i. Objection based on identification of the Applicants

36. The Respondent State submits that the application by the former employees is filed on behalf of a group called the Former Employees of SOMADEX SA and that it is signed by one Yacouba TRAORE, who is their representative. However, in order to be able to bring legal action, an applicant must be a natural person enjoying the exercise of his or her civil rights, or a legal person under public or private law with legal personality.

37. The Respondent State maintains that the said Former Employees of SOMADEX SA do not have legal personality, or at least do not provide proof of their separate legal existence, which proof would give them standing to act, either as plaintiff or as defendant. The Respondent State further submits that the Court should note this legal and judicial anomaly, which makes the Application inadmissible, as it was filed in the name of a de facto group and not in the name of a legal person.

38. The Respondent State points out that the group Former Employees of SOMADEX SA represented by "Yacouba Traoré" have variously referred to themselves as "the Applicants" and sometimes as "Yaya Fane and 43 others" or represented by "Yacouba Traoré" and sometimes by "Allo Traoré" and others. In addition, the Respondent State also points out that information on the Applicants is incomplete, because the list produced includes only surnames, first names, numbers and signatures, with no indication of date of birth, nationality, place of residence, occupation or other descriptions.

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39. For their part, the Applicants contend that the Respondent State's submissions are unfounded, since the application was filed with a special mandate before the Court, together with the list and the mandate legalized by the political authorities of the Respondent State. The Applicants allege that the mandate was granted in accordance with the relevant provisions of the Labour Code (Article 241) and Code of Civil, Commercial and Social Procedure, as well as the provisions of the, which are very clear: "Anyone who intends to represent or assist a party must prove that he has received the mandate or mission". (Article 424 of Code of Civil, Commercial and Social Procedure of the Respondent State).

40. The Applicants further submit that the Respondent State's Labour Code clearly demonstrates the weakness of the Respondent State's submissions. According to the Applicants, Mr. Yacouba Traoré was appointed by the Former Employees of SOMADEX SA and by the executive bodies of its trade union to defend the interests of the Employees. Moreover, his name appears in the conciliation minutes signed between Confédération Syndicale des Travailleurs du Mali CSTM and the Government of the Respondent State. The Applicants submit that the Application was filed with the Court with a warrant bearing the names, titles and registration numbers of all those concerned, and also that the said warrant was legalized by the competent authorities of the Respondent State.

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41. The Court notes that pursuant to Article 56(1) of the Charter and Rule 50(2)(a) of the Rules, applications must identify the Applicant, even if the Applicant requests to remain anonymous.

42. In its jurisprudence,[10] the Court has settled the issue of applicants' identification by holding that when a list of Applicants is filed, the Applicants are deemed to have been identified within the meaning of Rule 50(2)(a) of the Rules.

43. The Court notes that the docket of the Application before it contains a list of the names of the Applicants, who are the former

10 *Collectif des anciens travailleurs du Laboratoire ALS v Republic of Mali,* ACtHPR, Application No. 45/2016, Judgment of 28 March 2019 (jurisdiction and admissibility), § 23.

employees of SOMADEX SA.

44. The Court finds, therefore, that in filing the list, the Applicants have identified themselves in accordance with the provisions of Rule 50(2)(a) of the Rules.

45. In view of the foregoing, the Court dismisses the Respondent State's objection to the admissibility of the Application.

ii. Objection based on non-exhaustion of local remedies

46. The Respondent State submits that the Applicants have provided neither evidence of the exhaustion of local remedies nor evidence that the judicial authorities unduly prolonged the remedies available to them. The Respondent State further submits that the last judicial decision in this regard was rendered by the Sikasso Labour Court in the case between the Applicants and SOMADEX SA on 26 May 2014. The Applicants, according to the Respondent State, neither applied for an appeal or review of the decision but instead opted for non-judicial remedies by writing to the Mediator of the Republic and the Minister of Justice.

47. In addition, the Respondent State submits that some of the Three hundred and eleven (311) dismissed employees, including Allo Traore and Two hundred and fifteen (215) others, brought a case before the Sikasso Labour Court (Court of First Instance) by Application No. 21 /R.G/2009 dated 25 September 2009, and a case by Application No. 66/RG dated 13 May 2011. In its decision rendered on 13 December 2010, the Court of First Instance dismissed the Applicants' case on the grounds that their claims were without merit. The Applicants appealed the decision to the Social Chamber of the Bamako Court of Appeal, which declared the case inadmissible on 1 December 2011. Another group of former employees of the same company, including Yaya Fane and 80 (eighty) others, in turn also brought the case before the labour Court (Court of First Instance) of Sikasso on 18 November 2013. On 26 May 2014, the Tribunal dismissed their case due the Applicants' lack of standing.

48. The Respondent State further submits that the Applicants have not explained how its judiciary prevented them from exercising the available remedies. The Respondent State contends that the Applicants appear to be complaining about the excessive slowness of the judiciary in deciding their case, which allowed SOMADEX SA to fold up, legally transforming itself into MARS and then into GMS between 2009 and 2010. According to the Respondent State, the Applicants, having refrained from exercising the available remedies, cannot invoke any procedural

delay and it is, therefore, appropriate to dismiss their case before this Court.

49. As for the other employees, who are also Applicants before this Court, the Respondent State submits that they cannot deny that they had the possibility of appealing the decision of the Court of First Instance, in addition to the possibility of appealing to the Cassation Court, which they did not do.

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50. For their part, the Applicants submit that in order to understand the circumstances of the case better, it is necessary to follow the development of the decisions of the Court of First Instance and the Court of Appeal in the Respondent State. The Applicants draw attention to the fact that they sent a letter of denunciation to the Minister of Justice dated 8 December 2014, referenced CATM 002 to which they did not receive a response. They also indicate that they wrote to the Ombudsman of the Republic, who replied by letter No. 446 dated 12 December 2014 dismissing their case on the grounds that the case was pending before the courts. The Applicants believe, therefore, that the excessive slowness of domestic procedures orchestrated by the courts of the Respondent State should not escape the scrutiny of the Court.

51. According to the Applicants, the Respondent State was complicit in the dissolution of SOMADEX SA between 2009 and 2010. The Applicants allege that the Respondent State obstructed the course of justice by concealing evidence that could have helped them to vindicate their rights. They thus submit that the Respondent State is responsible for the violation of their rights by SOMADEX SA since the company changed its name to “Mars” before subsequently becoming “Gounkoto Mining Services (GMS)”, which contributed to the decision of the Sikasso Court in its judgment of 26 May 2014 dismissing the case for lack of standing.

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52. The Court recalls that according to Article 56(5) of the Charter and Rule 50(2) (e) of the Rules, local remedies that must be exhausted are ordinary judicial remedies, unless it is clear that the procedure for exhausting such remedies is unduly prolonged. The issue before the Court, therefore, is whether or not the Applicants have exhausted local remedies.

53. The Court notes, from the documents on record, that the Applicants in the instant Application brought three separate actions before the courts of the Respondent State. First, Application No. 21 /R.G/2009 dated 25 September 2009, the Allo Traore Group and 215 (Two hundred and fifteen) other former SOMADEX SA employees brought an action before the Sikasso Labour Court (Court of First Instance). This case was dismissed on 13 December 2010 for lacking merit. Secondly, the same group of employees, by Appeal No. 66/RG of 13 May 2011 appealed to the Social Chamber of the Court of Appeal of Bamako against the decision of the Sikasso Court. By Judgment No. 101 dated 1 December 2011 the Social Chamber of the Court of Appeal declared the case inadmissible. Finally, Yaya Fane and 80 (eighty) other former SOMADEX SA employees brought a case before the Sikasso Labour Court (Court of First Instance) by Application No. 012/R. G/2013, this time against Gounkoto Mining Service-SA. On 26 May 2014 the said Court, by Judgment No. 04, declared the case inadmissible for lack of standing in the absence of an employment contract binding the employees to Gounkoto Mining Service-SA, the company against which they had brought the action.

54. Given the foregoing, the Court finds that the group of Allo Traoré and two hundred fifteen (215) others had the possibility of appealing to the Supreme Court against Judgment No. 101 of 1 December 2011 rendered by the Social Chamber of the Court of Appeal of Bamako. This is in accordance with Article L217 of Law No. 92-020 of 23 September 1992 on the Labour Code of the Respondent State which provides that:

> The Supreme Court hears appeals in cassation against final judgments and judgments of the Court of Appeal. The appeal is lodged and judged in the forms and conditions provided for by the laws on the organization and procedure of the Supreme Court.

55. It is also to be noted that the above provision notwithstanding, Yaya Fane's group did not appeal against the decision of the Sikasso Court of First Instance No. 4 of 26 May 2014 before the Court of appeal (Article L213 of the Labour Code).

56. In view of the foregoing, the Court considers that the Applicants did not exhaust the available local remedies. Consequently, the

Court finds that the Application does not meet the admissibility criteria provided for in Article 56(5) of the Charter.

B. Other admissibility requirements

57. Having found that the Application is inadmissible for failure to exhaust local remedies, the Court does not need to consider the other admissibility requirements of Rule 50(2) of the Rules, which are restated in Article 56 of the Charter, because these requirements are cumulative such that if one of them is not met an application cannot be admissible.[11]

VII. Costs

58. In their submissions, both parties requested that the Court order that the other party bear costs of the proceedings.

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59. According to Rule 32(2) of the Rules:[12] "Unless otherwise decided by the Court, each party shall bear its own costs, if any".

60. Accordingly, the Court decides that each party shall bear its own costs.

VIII. Operative part

61. For these reasons:

The Court:

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Dismisses* the objection to admissibility based on the identification of the Applicants;

11 *Collectif des anciens travailleurs du laboratoire ALS v Republic of Mali* (jurisdiction and admissibility*), §39. Mariam Kouma and Ousmane Diabaté v Republic of Mali, (*merits) Application No. 040/2016 Judgment of 21 March 2018 2 AfCLR 237, § 63.

12 Rule 30(2) of the Rules of 2 June 2010.

iii. *Upholds* the objection to the admissibility of the Application on the ground of non-exhaustion of local remedies;
iv. *Declares* the Application inadmissible.

On costs
i. *Orders* that each Party to bear its own costs

Fory v Côte d'Ivôire (judgment) (2021) 5 AfCLR 682

Application 034/2017, *Kouadio Kobena Fory v Republic of Côte d'Ivoire*

Judgment, 2 December 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicant, a former official of the Respondent State alleged that, based on an accusation of fraud, he was a victim of double arrest and long-term detention by the Respondent State. He claimed that his double arrest, long-term detention, trial, and conviction were in violation of several of his human rights and the rights of his family members. The Court held that the Applicant's right to be tried within a reasonable had been violated. Accordingly, the Court granted damages for the moral prejudice suffered by the Applicant, his wife and children.

Jurisdiction (temporal jurisdiction, 30-35)

Admissibility (exhaustion of local remedies, 47-52, 53-59, 60-65; submission within a reasonable time, 70-73)

Fair trial (right to be tried in a timely manner, 85-88)

Reparations (state responsibility to make reparation, 90; scope of reparations, 91; proof of material harm, 97; moral prejudice, 102-105; indirect victims, 107-110; non-pecuniary reparations, 117-119)

I. The Parties

1. Mr. Kouadio Kobena Fory, (hereinafter referred to as "the Applicant") is an Ivorian national. The Applicant alleges the violation of his rights following two imprisonments, the first between 1995 and 2005 and the second between 2005 and 2011.

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 "Charter") on 31 March 1992 and to the Protocol establishing an African Court on Human and Peoples' Rights on 25 January 2004. The Respondent State also deposited, on July 23, 2013, the Declaration provided for in Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") by which it accepted the Court's jurisdiction to receive applications from individuals and non-governmental organizations having observer status before the Commission. On 29 April 2020, the Respondent State deposited with the Chairperson of the African

Union Commission the instrument of withdrawal of its Declaration. The Court ruled that this withdrawal has no bearing on pending cases or on new cases filed before the entry into force of the withdrawal one year after it was filed, that is on 30 April 2021.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant avers that on Friday, 21 July 1995, he took part in a meeting at the administrative centre of the Gagnoa region to approve the budget of the Commune of Guiberoua, of which he is the revenue officer. He further avers that during this meeting, a decision was taken to lift the debt ceiling and to pay off Government suppliers who had been awaiting their payments for over seven months. He submits that it was at that time that he withdrew the sum of Fifteen Million Seven Hundred and Forty-Two Thousand Five Hundred (15,742,500) CFA francs from the Gagnoa branch of *Société Générale de Banque en Côte d'Ivoire* (SGBCI). He also avers that he returned to post and proceeded on the same day to pay the suppliers. He states that at the end of the payment operation, at around 7 p.m., he deposited the vouchers for the said payments inside the counter of the clerk's office to be entered in the cash book the following working day, that is on Monday, 24 July 1995.

4. On Sunday, 23 July 1995, at about 6 p.m., while he was at home, a fire broke out in the premises of the Commune's revenue office, at the municipal revenue collection office. security officers who intervened to put out the fire reported finding a plastic can with a strong smell of gasoline and bird feathers that had probably been used to spray the gasoline before setting the premises on fire.

5. On Monday, 24 July 1995, the regional treasurer of Gagnoa (hereinafter referred to as "the regional treasurer"), accompanied by several officials from his treasury and security officers, returned to the scene of the fire to continue their investigations. On the evening of the same day, 24 July 1995, the Applicant was arrested at his home by security officers following a complaint by the regional treasurer for misappropriation of public funds to

1 *Suy Bi Gohore Émile and Others v Republic of Côte d'Ivoire*, ACtHPR, Application No.044/2019, Judgment of 15 July 2020 (merits and reparations), § 67; *Ingabire Victoire Umuhoza v Republic of Rwanda*, (jurisdiction) (3 July 2016) 1 AfCLR 562 § 69.

the tune of Thirty-Three Million Eight Hundred Thousand Eight Hundred and Thirty-Seven (33,800,837) CFA francs.

6. On 5 June 1996, the Gagnoa Court of First Instance sentenced the Applicant to ten (10) years in prison, a fine of Five Hundred Thousand (500,000) CFA francs and damages of Twenty-Five Million Nine Hundred Sixty-One Thousand Eight Hundred Thirty-Seven (25,961,837) CFA francs to the Respondent State.

7. The Applicant states that on 31 July 2005, after having served the ten (10) year sentence, he was released and then re-arrested on 5 August 2005, and without any indictment or trial, was incarcerated at the Abidjan MACA, together with political prisoners from "*Rassemblement des Républicains"* (hereinafter referred to as "RDR") and "*Front Populaire Ivoirien"* (hereinafter referred to as "FPI") until 1 August 2011, the day they were freed.

8. Believing that his fundamental rights and those of his wife and children have been violated by the Respondent State, the Applicant, acting on his own behalf and on behalf of his wife and three children, filed this application with the Court on 8 November 2017.

B. Alleged violations

9. The Applicant alleges that the Ivorian judiciary and public administration premeditatedly violated his rights and those of his family members. He lists the alleged violations as follows:

i. the right to equal protection by the law as guaranteed in Article 3(2) of the Charter and Article 26 of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR");

ii. the right to physical and moral integrity, dignity, respect for one's reputation and privacy guaranteed under Articles 4, 5 and 16 of the Charter; Articles 8 (3), 10 (1) and 17 of the ICCPR and Article 11 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the "CAT");

iii. the right to liberty and security of the person as guaranteed in Article 6 of the Charter;

iv. the right to a hearing and to a remedy under Article 7(1) (a) (b) (c) and (d) of the Charter and Article 14 (3) and (5) of the ICCPR;

v. the right to freedom of association as guaranteed under Article 10 of the Charter;

vi. the right to work and to adequate remuneration as guaranteed in Articles 13(2), 15 and 28 of the Charter and Articles 6(1) and 7(1) (C) of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the "ICESCR");

vii. the right to property as guaranteed in Article 14 of the Charter;

viii. the right to protection of the family guaranteed in Articles 18(1), (2) and (3) of the Charter and 10(1) of the ICESCR;

ix. the right not to be compelled to testify against oneself under Article 14 (3)(g) of the ICCPR;

x. the obligation of the State to guarantee the independence of the courts and to promote human rights and freedoms guaranteed under Articles 2 and 26 of the Charter.

III. Summary of the Procedure before the Court

10. The Application was received at the Registry on 8 November 2017. On 8 May 2018, the Applicant, on his own initiative, filed additional submissions to his Application.

11. On 2 July 2018, the Application and the additional submissions were served on the Respondent State.

12. On 1 October 2018, the Registry notified the Chairperson of the African Union Commission and the Executive Council of the African Union as well as the other entities referred to in Rule 42(4)[2] of the Rules of Procedure of the Application

13. On 10 March 2020, the Applicant and the Respondent State were invited to submit to the Registry certain documents in support of the request for reparations made in the Application and reiterated in the Applicant's Reply, specifically the public administration workers classification document, the salary scale of the public servants as well as all other documents serving as proof of ownership of certain buildings mentioned in the Application.

14. The Parties filed their submissions within the stipulated timeline.

15. On 12 October 2021, the pleadings were closed, and the parties were duly informed.

16. By a Ruling of 25 November 2021, the Court amended the initial title of the Application "*Kouadio Kobena Fory, spouse son and daughters v Republic of Côte d'Ivoire*" to read "*Kouadio Kobena Fory v Republic of Côte d'Ivoire*".

IV. Prayers of the Parties

17. The Applicant prays the Court to find that the Respondent State violated his fundamental rights and those of his family members, and to condemn it with pecuniary and property measures so as to cure and totally erase the said violations and the damages

2 Rule 35(3) of the former Rules of 2 June 2010.

suffered as if they never occurred. In particular, he requests:

i. That he be reinstated in his position as Paymaster or in a similar position in the grade corresponding to twenty-two (22) years of career and be paid the sum of Twenty Million United States dollars ($20,000,000) as back pay and related benefits since June 1996 until the day of his reinstatement;

ii. That his wife, Mrs. Yavo Jeanne, be reinstated in her post as Secretary General of the Regional Directorate of National Education or in a similar position, taking due account of the changes that have occurred in her supervisory Ministry and the current structure thereof. He further requests that she be paid the sum of Two Million United States dollars ($2,000,000) to her as back pay and related benefits;

iii. That he be reimbursed the sum of Four Thousand United States dollars ($4,000) being the fees of two lawyers before the domestic courts;

iv. The reimbursement of the sum of Thirteen Thousand One Hundred and Twenty United States dollars ($13,120) being expenses incurred by his family to visit him in prison, as well as the sum of Twenty Thousand United States dollars ($20,000) being his travel expenses from Gagnoa to Abidjan for the referral of his case to the Disciplinary Board of the Civil Service and the National Human Rights Commission of Cote d'Ivoire (CNDHCI);

v. The immediate restitution of landed properties that were taken from him during his incarceration and subsequently sold or assigned to other persons or the payment in money equal to their respective values, the total of which amounts to one Billion One Hundred and Eighty-Eight Million United States dollars ($1,188,000,000), as well as damages;

vi. The payment as soon as possible of the sum of Eight Billion United States dollars ($8,000,000,000) as compensation for the extra-patrimonial damage suffered as a result of the infringement of his fundamental rights by the Respondent State;

vii. The pure and simple annulment, both from a criminal and civil point of view, of Judgment No. 218/1996 of 5 June 1996, sentencing him to ten (10) years in prison and the confirmatory Judgment No. 276 of 25 July 1997;

viii. That adequate measures be taken to establish responsibility for the failure to process cassation Appeal No. 13 of 29 July 1997, as well as for the disappearance of his case docket from the judicial circuits of the Respondent State, and to order the retrieval of the docket;

ix. That adequate measures be implemented to improve the reliability of investigation procedures and recording of testimony by the parties and witnesses.

x. Amendment of the General Statute of the Civil Service

xi. That an article be published in the "FRATERNITE MATIN" daily newspaper, exposing, on the one hand, the arbitrary nature of his arrest, detention and conviction and, on the other hand, the irregular manner in which his career, his salary and related benefits were suspended;

xii. That such other steps as the Court may deem appropriate be taken to prevent the reoccurrence of the violations contemplated in the Application.

18. The Applicant prays the Court to order such security measures as it deems appropriate to protect him and his family members from retaliation, such as "seeking asylum in an embassy or other secure locations».

19. In his Reply, the Applicant prays the Court to:

i. declare the Application admissible in all its aspects;

ii. declare that the security measures requested in the application are necessary;

iii. find that the Respondent State has committed all the violations mentioned in the Application and in the Reply and to order the Respondent State to make full reparations;

iv. order the Respondent State to implement the corrective measures requested;

v. dismiss the arguments of the Respondent State and dismiss its claims and demands.

20. In its Response, the Respondent State prays the Court to

i. declare that it lacks *rationae personae* jurisdiction over Mrs Jeanne Kouadio, nee Yavo, Wilfried Fory, Akoua Yiouasson Merveille Laeticia Fory and Linda De-la-Sainte-Face Fory;

ii. declare the Application inadmissible for failure to exhaust local remedies and for having been filed outside the stipulated time limit;

iii. declare that the Respondent State has not violated the Applicant's human rights;

iv. dismiss the Applicant's request for remedial and pecuniary measures;

v. dismiss all of the Applicant's claims and order him to pay the costs.

V. Jurisdiction

21. 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, 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.

22. The Court further notes that under Rule 49(1)[3] of the Rules:

> The Court shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules.

23. Based on the above-mentioned provisions, the Court must, in each application, make a preliminary examination of its jurisdiction and rule on objections to its jurisdiction, if any.

24. In the instant case, the Respondent State requested the Court to find that the Applicant has no standing to act on behalf of his family, and not to consider the latter as Applicants. The Court has already examined the preliminary issue in the Ruling of 25 November 2021 and found it meritorious. Accordingly, the Court ordered the title of Application No. 034/2017 to be amended as it appears in the instant judgment.

25. The Court therefore notes that its material, personal, territorial and temporal jurisdiction are not in dispute between the parties. However, the Court must ensure that these four aspects of jurisdiction are met.

26. On material jurisdiction, the Court notes that it is established insofar as the Applicant alleges a violation of his rights under the Charter and other international human rights instruments to which the Respondent State is a party.[4]

27. With regard to personal jurisdiction, the Court recalls, as already indicated in paragraph 2 of this judgment, that on 29 April 2020, the Respondent State deposited the instrument of withdrawal of the Declaration provided for in Article 34(6) of the Protocol.

28. The Court reiterates its position that the withdrawal of the Declaration does not have retroactive effect and has no bearing on any cases pending at the time of depositing the instrument of withdrawal or any new cases filed before the withdrawal of the Declaration takes effect on 30 April 2021.[5] Since the filing of the instant Application on 8 November 2017, predates the Respondent State's withdrawal of its Declaration, the withdrawal has no effect on the Court's personal jurisdiction. Accordingly, the Court concludes that it has personal jurisdiction over this Application.

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

4 The Respondent State became a party to the International Covenant on Civil and Political Rights ("ICCPR") on 26 March 1992. It also became a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 5 March 1997.

5 *Suy Bi Gohore Émile and Others v Republic of Côte d'Ivoire*, ACtHPR, Application No.044/2019, Judgment of 15 July 2020 (merits and reparations), § 67.

29. On territorial jurisdiction, the Court observes that it is established, insofar as the facts of the case took place in the territory of the Respondent State.

30. With regard to temporal jurisdiction, the Court notes that the Applicant alleges a series of violations, some of which are consequential to the proceedings leading to his trial, conviction and detention from July 1995 until his release from prison on 31 July 2005, and other violations consequential to his detention from 5 August 2005 to 1 August 2011, the date of his release.

31. In this regard, and with regard to the alleged violations of the right to equal protection before the law, the right not to be compelled to give incriminating evidence against one's self, the right to the protection of the family and the right to be tried in a timely manner, allegedly committed between 1995 and 25 January 2004, the Court observes that the facts giving rise to these alleged violations occurred before the entry into force of the Protocol for the Respondent State, that is on 24 January 2004.

32. The Court recalls that in *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso*, with regard to the right to life of the four persons assassinated on 13 December 1998, it established that "... although Burkina Faso had already ratified the Charter at the time of the alleged crime, the Court lacks *ratione temporis* jurisdiction to consider the alleged violation of the right to life resulting from the murder of Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo, because, in the case of Burkina Faso, "this instantaneous and completed incident" occurred before the entry into force of the instrument, that is, the Protocol, which gives the Court jurisdiction to hear, inter alia, the alleged violations of the Charter".[6] On this basis, the Court considers that in the instant case, as the Respondent State ratified the Protocol on 25 January 2004, its temporal jurisdiction is established only with respect to alleged violations committed after that date, except in the case of a continuing violation.[7]

33. In this case, the Court notes that it has temporal jurisdiction in relation to the alleged violation of the right to be tried in a timely manner, insofar as the alleged violation is of a continuing nature, since the Supreme Court, which heard the Applicant's cassation appeal on 29 July 1997, is yet to issue a decision on it. The Court

6 *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso* (merits), (28 March 2014) 1 AFCLR 219, § 67 and 68.

7 On the issue of continuing violation see: *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso* (merits), (28 March 2014) 1 AfCLR 219, § 73.

therefore does not have temporal jurisdiction over the other alleged violations mentioned in paragraph 31 above, which arose out of the trial proceedings before the Gagnoa Court of First Instance in June 1996.

34. With regard to the alleged violations committed after the date of entry into force of the Protocol with respect to the Respondent State, namely, between 5 August 2005 and 1 August 2011, these are of a continuing nature, insofar as the Applicant still remains "suspended from office" and deprived of his property rights at the time of filing the Application with the Court in 2017. Thus, the Court's temporal jurisdiction is established with respect to these alleged violations committed after the Respondent State became a Party to the Protocol.

35. In conclusion, the Court has jurisdiction to hear the following alleged violations: the right to be tried in a timely manner; the right to freedom of association and political opinion; the right to liberty, security of the person and prohibition of arbitrary arrest or detention; the right to work and to remuneration; the right to physical and moral integrity and to respect for the inherent dignity of the human person, the right to a better state of health and the right to property.

VI. Admissibility

36. 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".

37. Rule 50(1) of the Rules[8] reads as follows: "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".

38. Rule 50(2) of the Rules of Court,[9] which restates in substance the provisions of 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;

8 Rule 40 of the Rules of 2 June 2010.

9 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 set by the Court as being the commencement of the time limit within which it shall be seized with the matter;

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 Constitutive Act of the African Union or the provisions of the Charter.

A. Objections based on the inadmissibility of the Application

39. The Respondent State raised two objections to the admissibility of the Application, namely, objection based on non-exhaustion of local remedies and objection based on failure to file the application within reasonable time.

i. Objection based on non-exhaustion of local remedies

40. The Respondent State submits that after the Applicant was convicted by the Gagnoa Court of First Instance, he first appealed to the Appeal Court of Daloa, which upheld the first instance judgment in all its aspects. He then appealed to the Supreme Court on 29 July 1997.

41. It asserts that the Applicant, who subsequently appealed the Appeal Court judgment of 19 July 1997 before the Supreme Court, cannot invoke the exhaustion of local remedies since he did not produce proof that the Supreme Court to which he appealed had already issued a decision. It submits therefore that since the case was still pending before the Supreme Court, the Court should declare the Applicant's Application inadmissible for non-exhaustion of local remedies.

42. The Respondent State, therefore, submits that the Court should declare the Application inadmissible on the ground that the Applicant has not exercised any remedy for damages resulting from the alleged malfunctioning of the judiciary.

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43. The Applicant rebuts the arguments of the Respondent State and states that he has exhausted all local remedies available to him, since he filed his appeal before the Supreme Court, the highest court of the Respondent State, four days after the judgment of the Appeal Court, on 29 July 1997.

44. The Applicant alleges that the cassation appeal he filed with the Supreme Court, more than 21 years ago, has not been heard**,** despite all the steps he has taken for the Supreme Court to rule on this appeal since his release from prison, 10 years ago.

45. He further contends that the fact that his cassation appeal before the Supreme Court is still pending after more than twenty-one (21) years is manifestly unusual and constitutes undue delay. He considers that this state of affairs clearly manifests an abnormally long delay in the processing of his appeal, as is evident from the Rules of Procedure of the Court, and which justifies both his appeal to the Court and the admissibility of his application.

***

46. The Court notes that the Respondent State maintains, on the one hand, that the local remedy exercised by the Applicant is still pending before the Supreme Court and, on the other hand, that he has not exercised any remedy before the domestic courts for compensation for alleged harm.

ii. Applicant‘s cassation appeal to the Supreme Court

47. The Court recalls that it has already established that the local remedies to be exhausted in accordance with the requirements of Article 56(5) of the Charter, are judicial remedies.[10] These must, moreover, be available and exercisable by the Applicant without let or hindrance.[11] In the instant case, the Court notes that after the judgment of the Appeal Court, the Applicant appealed to the Supreme Court, which is the highest court in the country, on 29 July 1997. It also notes that both parties have acknowledged that as at the date of filing the instant application before this Court on

10 *Alex Thomas v United Republic of Tanzania* (merits), (20 November 2015) 1 AfCLR 465, § 64.

11 *Lohé Issa Konaté v Burkina Faso* (merits), (5 December) 1 AfCLR 314 § 96.

8 November 2017, that is twenty (20) years, three (3) months and ten (10) days after the Applicant filed his appeal, the proceedings before the Supreme Court are still pending.

48. It is clear from the provisions of Article 56(5) of the Charter and Rule 50(2)(e) of the Rules that there is an exception to the requirement of prior exhaustion of local remedies if it is clear that the proceedings in these remedies are being unduly prolonged. In so doing, the question is whether the Applicant's appeal to the Supreme Court, which has been pending for twenty (20) years, three (3) months and ten (10) days, has been unduly prolonged within the meaning of Article 56(5)[12] of the Charter and Rule 50(2)(e) of the Rules.[13]

49. In assessing whether a proceeding is unduly long, the Court shall take into account the circumstances of each case and in particular whether the case is complex, whether the parties and the domestic judicial authorities, in this case the Supreme Court, have acted with the required speed and diligence.[14]

50. The Court notes that in the instant case, the Applicant, assisted by his counsel, filed an appeal in cassation in the form and within the time limits prescribed by Article 578 of the Criminal Procedure Code of 14 November 1966. It appears from the record that during the Applicant's detention, his counsel followed up on the proceedings in order to have the Supreme Court rule on the Applicant's appeal, without ever succeeding. It also appears from the record that the Applicant, upon his release from prison, undertook numerous negotiations to have the Supreme Court issue its decision, but that all of them proved unsuccessful.

51. With regard to the Respondent State, the Court recalls that it has already established that "Due diligence obliges the State to act and react with the dispatch required to ensure the effectiveness of available remedies".[15] In the instant case, the Court notes that the Respondent State does not provide the reasons that could have accounted for such a long delay of twenty (20) years, three (3) months and ten (10) days in processing the cassation appeal lodged by the Applicant before the Supreme Court, but that it simply relies on the failure to await the final decision of

12 Rule 40(2)(e) of the Rules of 2 June 2010.

13 *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso* (merits), (28 March 2014) 1 AfCLR 219, § 88.

14 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (admissibility), (21 March 2019) 2 AFCLR, 237, §§ 37 and 38; *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso*, Judgment *(*merits) *Ibidem*. § 92.

15 *Ibidem* § 152 and following.

the Supreme Court as evidence that local remedies were not exhausted.

52. In these circumstances, the Court considers that the Applicant was not obliged to wait for the hearing of his cassation appeal before the Supreme Court prior to bringing the case before it, and that there is in this case an exception to the requirement to exhaust local remedies. Accordingly, the Court dismisses the objection raised by the Respondent State.

iii. Local remedies exercised by the Applicant did not address the reparation measures requested

53. The Court recalls that the requirement to exhaust local remedies stipulates that the issues submitted to it, be raised, at least in substance, before the domestic courts having jurisdiction in the matter,[16] and that it is not sufficient for the Applicant merely to have brought proceedings concerning him before those courts.

54. In the instant case, the Court notes that the violations alleged before it by the Applicant relate to the criminal proceedings instituted against him since the fire outbreak at the Guiberoua revenue offices on 23 July 1995 and which essentially raise the question of the merits of the charges brought against him and his double detention from 1995 to 2005 and from 2005 to 2011.

55. In the instant case, the Court having concluded that it only has jurisdiction in respect of events occurring after the entry into force of the Protocol for the Respondent State on 25 January 2004, it was necessary to examine whether the Applicant exhausted local remedies in respect of each of the alleged violations referred to in paragraph 35 of this judgment.

56. With regard to the alleged violation of the right to work and remuneration, it appears from the documents in the case docket that on 4 October 2011, the Applicant petitioned the Civil Service Disciplinary Board, a body empowered by the Civil Service Statute of the Respondent State, to request his reinstatement in his position as Paymaster. After hearing the Applicant, the Judicial Officer of the Treasury and the Inspector General of the Treasury at its 30 March 2012 meeting, the Civil Service Disciplinary Board deliberated on 6 June 2012 and concluded that although the Applicant was not removed from the Civil Service, he would have to produce the ruling of the Supreme Court on his appeal before any final decision by the Board. The Court also noted

16 *Sébastien Germain Ajavon v Benin* (merits), *op. cit.*, § 98.

that the Applicant had the possibility of appealing the decision of the Disciplinary Board to the administrative courts to exhaust domestic remedies.

57. Regarding the alleged infringement of the Applicant's right to landed properties, it is clear from the documents in the docket that the Applicant brought an action before the Gagnoa Court of First Instance, respectively in 2012, on 26 May 2015, on 26 November 2015 and on 15 January 2016, to assert his property rights over his landed property and to claim, on the one hand, the restitution of some of his landed property and, on the other hand, the eviction of encroachers on his rural lands measuring 250 and 125 hectares located, respectively in, Kabehoa and Zabéza.

58. The Applicant also asserts that at the time of filing the Application with the Court on 7 November 2017, the said appeals were still pending before the domestic courts. The Court recalls that the exception to the rule of exhaustion of local remedies is allowed only if they are unduly prolonged. In the instant case, the Court does not consider that the periods of two (2) years five (5) months and twelve (12) days and one (1) year nine (9) months and twenty-four (24) days respectively, unduly long such that they can exempt the Applicant from the requirement to exhaust local remedies prior to bringing the case to the Court.

59. From the foregoing, the Court finds that the Applicant has not exhausted local remedies with respect to the alleged violations of his property rights over his real estate and with respect to his right to work and to renumeration.

60. Regarding the alleged violations of the right to freedom of association and political opinion; the right to liberty, security of the person and the prohibition of arbitrary arrest or detention, as well as the right to physical and moral integrity and the right to respect for dignity, the Court notes that these violations relate to the arrest and detention of the Applicant, without indictment and without trial, from 5 August 2005 to 1 August 2011 at the Abidjan MACA prison, together with other political prisoners from the RDR and FPI, until his release.

61. The Court notes that during his detention and even after his release, the Applicant did not take any action against what he describes as an attack on his opinion, his freedom, the security of his person and his dignity, to denounce the arbitrary nature of his detention.

62. The Court notes however that Article 373 of the Penal Code provides that "*whoever, arrests, detains or sequesters one or several persons without an order from the constituted authorities, and except in cases where the law orders the seizure of the*

perpetrators of offences, shall be liable to five to ten years' imprisonment and a fine of 500,000 to 5,000,000 francs". It emerges from this provision that arbitrary arrest or detention is punishable, and the Applicant had a remedy to exercise and exhaust against his arrest on 5 August 2005 and his detention until 1 August 2011.

63. Consequently, the Court considers that the Applicant did not exhaust local remedies in relation to the alleged violations of his right to freedom, to safety and the prohibition of arbitrary arrest or detention, as well as the right to physical and moral integrity and the right to the respect of dignity.

64. With regard to the right to be tried in a timely manner, the Court notes that the Applicant intended to assert his alleged rights during the cassation appeal since, upon his release from prison in August 2011, he undertook several steps, in particular by submitting correspondence, all dated 7 March 2017, to the Inspector General of Judicial Services, the President of the Supreme Court and the Minister of Justice, Human Rights and Public Freedoms, respectively, on the issue of his cassation appeal in order to have it heard.

65. The Court concludes that with regard to the alleged violation of the right to be tried in a timely manner, the Applicant had no remedy to exhaust.

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

66. The Respondent State cites Article 56(6) of the Charter and Rule 50(f)[17] of the Rules and argues that this Application was filed "beyond reasonable time".

67. It alleges that while it is true that neither "timely manner" nor "unduly long time limits" have been defined, the fact remains that the Court considered three (3) years and eighteen (18) months [Sic][18] as unduly long time limits, and that therefore the Applicant, by bringing the case before the Court more than twenty (20) years after his appeal in cassation, did not submit his Application within a reasonable time.

17 Rule 40(6) of the Rules of 2 June 2010.

18 The Respondent State refers here to two decisions of the African Commission on Human and Peoples' Rights, namely Communications No. 199/97: *Odjouriby Cossi Paul v Benin* and *250/02 Liesbeth Zegaveld* and *Mussie Ephrem v Eritrea*.

68. The Respondent State maintains that, in any event, the Applicant cannot rely on the inertia of the Supreme Court to justify the late filing of his Application. It therefore asks the Court to declare the Application inadmissible.

69. The Applicant refutes the arguments of the Respondent State and argues that the delay in filing the Application, which is considered to be too long, is due to the Respondent State itself, acting through its departments and employees.

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70. The Court observes that neither the Charter nor the Rules set a specific time limit within which applications must be filed after the exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules simply provide that Applications must be "submitted within a reasonable period from the time local remedies are exhausted or from the date the Court is seized of the matter".

71. The Court recalls its previous jurisprudence that, in the absence of an indication of a specific time limit within which an application must be submitted after the exhaustion of local remedies, the reasonableness of any time limit and how to calculate reasonable time are to be assessed on a case-by-case basis, taking into account the circumstances of each case.[19] The Court recalls that the reasonable time within which an application may be submitted to it begins to run from the date of the last local remedy pursued and exhausted by the Applicant, which means that the proceedings to which the Applicant was a party will have come to an end at the time the Application is filed with the Court.[20]

72. In the instant case, the Court notes that, with regard to the alleged violation of the right to be heard within a reasonable time, it cannot be said that the Application was filed within an unreasonable time, given that the Applicant's appeal to the Supreme Court is still pending.

19 *Norbert Zongo and Others v Burkina Faso (Preliminary objections) (25 June 2013*) 1 AfCLR 219*,* § 121.

20 *Komi Koutché v Republic of Benin*, ACtHPR, Application No.020/2019, Judgment of 25 June 2021, §61.

73. Based on these two findings, the Court dismisses the Respondent State's objection in relation to the alleged violation of the right to be tried in a reasonable time.

B. Other admissibility requirements

74. The Court notes that in this case, the parties do not dispute that the Application complies with Rule 50(2)(a)(b)(c)(d)(g) of the Rules. Nevertheless, the Court must be satisfied that the requirements of these rules are met.

75. The Court notes that in accordance with Rule 50(2)(a) the Applicant has clearly stated his identity.

76. The Court notes that the requests made by the Applicant are intended to protect his Charter rights. It also notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h), is the promotion and protection of human and peoples' rights. Accordingly, the Court considers that the Application is consistent with the Constitutive Act of the African Union and the Charter and therefore finds that it satisfies the requirement of Rule 50(2)(b) of the Rules.

77. The Court further notes that the Application does not contain any offensive or insulting language and therefore satisfies the requirement of Rule 50(2)(c) of the Rules.

78. The Court further notes that the facts and pleas in the present Application are not based exclusively on information disseminated through the mass media but rather on challenges brought before the courts of the Respondent State. The Application therefore meets the requirement of Rule 50(2)(d).

79. Finally, the Court finds that the requirement of Rule 50(2)(g) is satisfied insofar as there is no indication that the instant Application concerns a matter that has already been resolved 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.

80. From the foregoing, the Court finds that all the admissibility requirements set out in Article 56 of the Charter and Rule 50[21] have been met in relation to the alleged violations of the right to be heard in a timely manner.

21 Rules 40 of the Rules of 2 June 2010.

VII. Merits

81. In the instant case, the Court, taking into account its findings on its jurisdiction (paragraph 35) and admissibility (paragraph 80), will examine only the alleged violation of the right to be tried in a timely manner.

82. Regarding this alleged violation, the Applicant relies on Article 7 of the Charter and Article 14 of the ICCPR,[22] and contends that his cassation appeal, which he filed in the legal form and within the legal time limit before the Supreme Court, more than twenty (20) years ago, and which has still not been dealt with by the said Court, constitutes a violation of his right to be judged within a reasonable time.

83. The Respondent State did not submit any observations on this point.

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84. Article 7(1)(d) of the Charter provides that "Every individual shall have the right to have his cause heard. This right comprises: (a) [...]; (d) the right to be tried within a reasonable time by an impartial tribunal."

85. The Court recalls that it has already stated that in analysing the reasonableness of the length of proceedings, it takes into account the circumstances of the case and that "determination as to whether the duration of the procedure in respect of local remedies has been normal or abnormal should be carried out on a case-by-case basis depending on the circumstances of each case".[23] On this point, the Court's analysis takes into account, in particular, the complexity of the case or of the proceedings relating to it, the conduct of the parties themselves and that of the judicial authorities in order to determine whether the latter "has

22 The Respondent State is a party to the International Covenant on Civil and Political Rights ("ICCPR") on 26 March 1992. It is also a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 5 March 1997.

23 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (admissibility), (21 March 2018), 2 AfCLR 237, § 37; *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso* (merits) (28 March 2014), 1 AfCLR 219*, op. cit, §* 92.

been passive or clearly negligent."[24]

86. In the instant case, the Court notes that the Applicant filed an appeal in cassation on 29 July 1997[25] while he was already in custody. It is also clear from the case docket that the Applicant, with the assistance of his counsel, attempted on numerous occasions to follow up on the progress of the cassation appeal during his detention and after his release from prison in 2011.[26] The Court further notes that until the date the Application was filed with it in November 2017, that is twenty (20) years, three (3) months and ten (10) days later, the Applicant has never been heard despite all the steps he took to see the domestic courts rule on his appeal.

87. In this regard, the Court considers that the domestic courts have been negligent and the failure of the Supreme Court to rule on the Applicant's appeal for twenty (20) years, three (3) months and ten (10) days violates the latter's right to be tried within a reasonable time**.**

88. Accordingly, the Court 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.

VIII. Reparations

89. Article 27(1) of the Protocol provides:

> If the Court finds that there has been violation of a human of peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

90. The Court recalls its jurisprudence[27] and reaffirms that, in considering claims for damages resulting from human rights violations, it takes into account the principle that the State found to have perpetrated an internationally wrongful act is under an obligation to make full reparation for the consequences of that act, so as to remedy all the harm suffered by the victim.

24 *Mariam Kouma and Ousmane Diabaté v Mali* (merits), *ibidem* § 38.

25 Appeal N°13; Attachment No. 4 and annex No. 36.

26 See the following exhibits attached to the Application: Exhibit No. 63_1 to 3; Exhibit No.63_1 to 3; Exhibit No. 64_1 to 64_3; Exhibit No. 67.

27 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema a.k.a. Ablasse, 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 258, § 20; *Lohé Issa Konaté v Burkina Faso (*reparations) (3 June 2016) 1 AfCLR 346, § 15; *Ingabire Victoire Umuhoza v Republic of Rwanda,* (reparations) (7 December 2018) 2 AfCLR 202 § 19.

91. The Court also recalls that it has established that compensation for harm resulting from a violation of a human right must, as far as possible, erase all the consequences of the wrongful act and restore the state that would probably have existed if the violation had not been committed.[28]

A. Pecuniary reparations

i. Material prejudice

a. Prejudice related to the right to work, to remuneration and to landed property

92. The Applicant prays the Court to order the Respondent State, pecuniary and property measures, in order to make full reparation for the harm that he suffered as a result of the violations of his rights. He prays the Court to order the Respondent State to pay him the sum of One Billion One Hundred and Eighty-Eight Million (1,188,000,000) United States dollars as the damages.

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93. The Court notes that it has declared inadmissible the alleged violations of the Applicant's right to work, to remuneration and to landed property, for failure to exhaust local remedies and will therefore not examine these allegations.

b. Prejudice related to expenses incurred by the Applicant's family during his detention

94. Applicant contends that during his detention at the Abidjan MACA between 2005 and 2011, his family members made 82 trips to visit him. He estimates the cost of these trips at Thirteen Thousand

28 *Mohamed Abubakari v United Republic of Tanzania*, Application No. 007/2013. Judgment of 4 July 2019 (reparations), § 21; *Alex Thomas v United Republic of Tanzania* Application No. 005/2013. Judgment of 4 July 2019 (reparations), § 12. *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, Application No. 006/2013. Judgment of 4 July 2019 (reparations), § 16.

One Hundred and Twenty (13,120) United States dollars.

95. The Respondent State disputes the measure sought by the Applicant and argues that the travel expenses referred to were incurred by the members of the Applicant's family and that it is up to them to claim payment personally if the claims are justified.

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96. To prove the visits of his family members, the Applicant attached to the docket two communication permits issued by the Minister of Justice to his wife, Mrs. Yavo Jeanne Kouadio, in August 1997.

97. The Court recalls that it has established that the burden of proof for a claim for damages resulting from a violation of a human right rests with the Applicant, who must provide supporting evidence.[29] In the instant case, the Applicant does not support his claim with documents covering the travel expenses.

98. Accordingly, the Court dismisses the Applicant's request.

ii. Moral prejudice

99. The Applicant states that he filed the present Application in order for the Court to note the numerous violations of his rights and the distress that his wife, children and relatives suffered for more than twenty years as well as to order the Respondent State to pay damages for the harm suffered both directly and indirectly. For these extra-patrimonial damages, the Applicant estimates the amount of compensation to be Eight Billion (8,000,000,000) United States dollars.

a. Moral prejudice suffered by the Applicant

100. The Applicant submits that the false charges brought against him and the entire judicial process that led to his **"**wrongful and legally flawed conviction", while he was in the prime of his life at the age of 36, totally shattered his promising professional and political life. He contends that the degrading and inhumane treatment he suffered in Abidjan prison caused serious damage to his health,

29 *Reverend Christopher R. Mtikila v Tanzania* (reparations) (13 June 2014) 1 AfCLR 72 § 40.

honour, reputation and psychological trauma that continues even after his release. The Applicant further submits that because of his illegal detention he was torn away from the affection of his close relatives and family members, including his wife and children who were still minors.

101. The Respondent State opposes any idea of compensation for moral prejudice suffered by the Applicant and argues that the Applicant was subjected to due process of law without any intention to harm his dignity.

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102. The Court recalls its previous jurisprudence that moral prejudice suffered by victims of human rights violations is presumed[30] and in the instant case, it has found that the Respondent State violated the right of the Applicant to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter.

103. The Court notes in the instant case that until his retirement in 2019, the Applicant was never reinstated to his position following this violation, since the Public Service Disciplinary Council demanded to see the Supreme Court's judgment on appeal before authorising the Applicant to resume work.

104. The Court further notes that this series of events necessarily affected the Applicant's retirement benefits and the calculation of its amount, given that since the amendment of the law of 4 April 2012,[31] the calculation of public servants' retirement benefits takes into account the years of highest salary of beneficiaries. It follows that the Applicant, whose career was interrupted for twenty-four (24) years (he was thirty-six (36) years old at the time), will only be paid benefits that border on the minimum.

105. Based on these considerations, the Court holds that the Applicant certainly suffered moral prejudice and awards him in fairness a lump sum of Forty Million (40,000,000) francs CFA.

30 *Lohé Issa Konaté v Burkina Faso*, (reparations), § 58.

31 See Ordinance No. 2012-303 of 4 April 2012 on the organization of pension plans managed by the general fund for the retirement of state employees, abbreviated to CGRAE.

b. Moral prejudice suffered by the Applicant's family

106. The Applicant asserts that his wife Jeanne Yavo Kouadio, his son Jean-Eudes Wilfried Fory, his daughters Akoua Yiouasson Merveille Laetitia Fory and Linda De-la-Sainte-Face Fory suffered from his arrest and detention, particularly his transfer from Gagnoa Prison to the Abidjan MACA prison, where they were further distanced from him and forced to travel more than 300 km each time they wished to visit him. He maintains that the numerous violations of his rights have undermined the harmonious development, respectability and moral integrity of his family, which has sunk into sudden poverty and some of whose members have died of grief and moral torture.

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107. The Court notes that in the instant case, it has found that the Applicant suffered morally from the long delay in his appeal to the Supreme Court and considers that his family members also suffered from this, particularly from the fact that the numerous negotiations undertaken by the Applicant did not lead to any satisfactory result. The Court also considers that in addition, the Applicant's family members suffered by seeing that the Applicant was never able to resume work until he went on retirement in 2019.

108. However, compensation is granted only when there is proof of marital status for the spouses or, for the children, documents showing their filiation with the Applicant, including their birth certificates.[32]

109. It emerges from the birth certificates submitted by the Applicant and confirmed by the Respondent State that Jean-Eudes Wilfried Fory, Akoua Yiouasson Merveille Laetitia Fory and Linda De-la-Sainte-Face Fory are the children of the Applicant and bear the surname Fory. It is also clear from the same documents in the docket, in this case the marriage certificate, that Jeanne Yavo

32 *Zongo and Others v Burkina Faso* (reparations), § 54*; and Lucien Ikili Rashidi v Tanzania* (merits and reparations), § 135*; Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations) § 68.

Kouadio is married to Kouadio Kobéna Fory.

110. Consequently, the Court considers Jeanne Yavo Kouadio, Jean-Eudes Wilfried Fory, Akoua Yiouasson Merveille Laetitia Fory and Linda De-la-Sainte-Face Fory to be indirect victims and awards to the Applicant's wife, Jeanne Yavo Kouadio, the sum of Two Million (2,000,000) CFA francs and to each of the three children the sum of One Million (1,000,000) CFA francs as reparation for the moral prejudice they suffered.

B. Non-pecuniary reparations

i. Guarantees of non-repetition

111. The Applicant prays the Court to order the Respondent State to remove from the Ivorian Code of Criminal Procedure paragraph 4 of Article 115, in order to improve the reliability of the investigation procedures and to bring the Code of Criminal Procedure more in line with international standards, and for the safety of citizens.

112. The Respondent State submits that the Applicant's request proves the Applicant's disregard for the laws and the functioning of the country's justice system. It adds that the justice sector is undergoing reform, so that the measures requested by the Applicant are moot.

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113. The Court notes that as of the date of this judgment, the said provision had been repealed by Law No. 2018-975 of 27 December 2018 on the Criminal Procedure Code, and the requirement that the lawyer reside at the place of the investigation no longer features in the provisions of the said new Code.

114. The Court concludes that since the new Ivorian Criminal Procedure Code of 2018 has already remedied the inadequacy of the procedural law, the Applicant's request has become moot.

ii. Request to publish an article in the government daily newspaper

115. The Applicant prays the Court to order the Respondent State to publish an article in the daily newspaper "FRATERNITE MATIN",

detailing the arbitrary character of his arrest, detention and conviction. The same article should also mention the irregular manner in which his career and his salary as well as the related benefits were suspended.

116. The Respondent State submits that the Court publishes its decisions through its means of publication, and the Applicant who wishes to publish a judicial decision favourable to him, is free to choose his means of publication.

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117. The Court recalls that the publication of its decisions at the expense of the Respondent States is also a form of non-pecuniary reparation that it may order when the said publication is deemed to be a moral and psychological satisfaction of the victim(s) or when the publication is intended to produce informational effects to third parties.

118. In the instant case, the Court considers that the publication of the instant judgment by the Respondent State contributes to the information of third parties, in particular the Ministry of Justice and the Supreme Court.

119. In this regard, the Court orders the Respondent State to take steps to publish this judgment on the websites of the Government, the Ministry of Justice and the Supreme Court for a period of at least for one (1) year.

iii. Request to grant the Applicant asylum in an Embassy or at any other secure location.

120. In his Application, the Applicant prayed the Court to order security measures of a nature to protect him and his family members from reprisals, such as "providing asylum in an embassy or other secure location".

121. Regarding the Applicant's request to be provided asylum in an Embassy, the Court considers this request falls outside its purview.

122. As to the request to find a secure location for him and his family, the Court notes that the Applicant does not specify the nature or imminence of reprisals that he mentions, on account of which he requests to be placed in a secure location. Consequently, the request is dismissed.

IX. Costs

123. The Court notes that the Respondent State requests the Court to order the Applicant to pay the costs. The Applicant has not submitted any observations on the costs.
124. Under Rule 32(2) "Unless otherwise decided by the Court, each party shall bear its own costs, if any".
125. In the instant case, the Court considers that there is no reason to depart from the principle set out in Rule 32(2).
126. The Court therefore decides that each party shall bear its own costs.

X. Operative part

127. For these reasons:
The Court:
Unanimously,
On jurisdiction
i. *Finds* that it has jurisdiction to hear the alleged violations committed after the date of entry into force of the Protocol in regard to the Respondent State;

On admissibility
ii. *Finds* that the objection based on inadmissibility is founded in relation to the prohibition of arbitrary arrest and detention and the alleged violation of the right to the respect of his political opinion;
iii. *Declares* inadmissible the alleged violation of the right to work, to remuneration and to property;
iv. *Dismisses* the objection based on the alleged violations of the right to be tried within a reasonable time;
v. *Declares* the Application admissible;

On merits
vi. *Finds* that the Respondent State has violated the Applicant's right to a hearing within a reasonable time as guaranteed in Article 7(1)(d) of the Charter;

On reparations
On pecuniary reparations
vii. *Finds* that the request for reparation for prejudice related to the right to work, to remuneration, and to property is moot;
viii. *Dismisses* the request for the reimbursement of travel expenses purportedly incurred by the Applicant's family members to visit him during his detention;

ix. *Orders* the Respondent State to pay the Applicant the sum of Forty-five million (45,000,000) CFA francs, broken down as follows:
   a. Forty million (40,000,000) CFA francs for the moral prejudice he suffered;
   b. Two million (2,000,000) CFA francs as compensation for the moral prejudice suffered by the Applicant's wife;
   c. One million (1,000,000) CFA francs to each of the Applicant's three (3) children for the moral prejudice they suffered;

On non-pecuniary reparations

x. *Dismisses* the Applicant's request to be provided a secure location;

xi. *Orders* the Respondent State to publish this judgment on the website of the Government, the Ministry of Justice, and the Supreme Court for at least one (1) year;

On implementation of the judgment and reporting

xii. *Orders* the Respondent State to report within six (6) months from the date of notification of this Judgment on the measures taken to implement paragraph (ix) and within one (1) year, paragraph (xi) above and thereafter every six (6) months until the Court considers that the judgment has been fully implemented;

On costs

xiii. *Orders* that each Party shall bear its own costs.

Hossou & Anor v Benin (admissibility) (202) 5 AfCLR 709

Application 016/2020, *Glory C. Hossou & Landry A. Adelakoun v Republic of Benin*

Ruling, 2 December 2021. Done in English and French, the French text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

The Applicants, who are nationals of the Respondent State, brought an Application to challenge the Respondent State's withdrawal of the declaration allowing individual and NGO access to the Court. They claimed that the withdrawal was a violation of the Respondent State's human rights obligations. The Court upheld the Respondent State's objection to admissibility on the grounds that the Court lacked material jurisdiction.

Jurisdiction (material jurisdiction, 26-36)

Dissenting Opinion: BENSAOULA

Jurisdiction (material jurisdiction, 10-14)

I. The Parties

1. Glory C. Hossou and Landry A. Adelakoun (hereinafter referred to as "the Applicants") are nationals of the Republic of Benin, jurists by profession and residents of Abomey-Calavi in Benin. They challenge the Republic of Benin's withdrawal of the Declaration deposited under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court (hereinafter "the Protocol").

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 on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") through which it accepted 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 (hereinafter referred to as "the Commission") an instrument withdrawing the said Declaration. The Court held that this withdrawal has no bearing, on the one

hand, on pending cases, and on the other hand, on new cases filed before the withdrawal came into effect, that is, on 26 March 2021.[1]

II. Subject of the Application

A. Facts of the matter

3. On 7 May 2020, the Applicants filed an Application before this Court to challenge the Respondent State's withdrawal of its Declaration accepting the jurisdiction of the Court to receive applications from individuals and NGOs having observer status before the African Commission on Human and Peoples' Rights. In the Application, the Applicants also pray 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 allowing individuals and NGOs having observer status before the African Commission on Human and Peoples' Rights to seize the Court directly after exhausting local remedies. The Applicants aver that the Respondent State withdrew the Declaration following a written notice to the African Union Commission dated 25 March 2020.

B. Alleged violations

5. The Applicants allege that, in withdrawing the Declaration, the Respondent State:

i. Violates the Charter and international human rights standards.

ii. Prevents its citizens from directly accessing the regional judicial system to initiate proceedings and seek redress for the prejudice they have suffered within their domestic system, which constitutes a regression of rights.

III. Summary of the Procedure before the Court

6. The Application instituting proceedings, together with the request for provisional measures, were received at the Registry on 7 May 2020 and served on the Respondent State on 8 July 2020.

1 *Houngue Eric Noudehouenou v Republic of Benin*, ACtHPR, Application No. 003/2020, Ruling (Provisional measures), 5 May 2020, §§ 4-5 and Corrigendum of 29 July 2020.

7. 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.[2]

8. On 26 August 2020, the Respondent State responded to the request for provisional measures.

9. On 25 September 2020, the Court issued a ruling dismissing the request for provisional measures.

10. On 8 October 2020, the Respondent State filed its Response to the main Application and this was served on the Applicants on 19 October 2020 to file the Reply within thirty (30) days of receipt. On 25 November 2020 the Applicants were given an extension of thirty (30) days to file the Reply but they did not do so.

11. Pleadings were closed on 30 March 2021 and the Parties were duly notified.

IV. Prayers of the Parties

12. The Applicant prays the Court to:

i. Declare the Application admissible;

ii. Find that the decision of the Respondent State withdrawing the Declaration violates the Charter and international human rights standards.

iii. Declare that the Respondent State violated the right of the citizens to access justice due to its decision to withdraw the Declaration.

13. The Respondent State prays the Court to:

i. Find that that the Applicants are attempting, on the basis of their Application, to contest the right of the Republic of Benin to withdraw its Declaration of recognition of the Court's jurisdiction.

ii. Declare and rule that the Republic of Benin is a sovereign State with power to enter into or withdraw from any convention.

iii. Find that the Court lacks material jurisdiction to consider the matter;

iv. Verify that the Applicants did not sign the Application filed before this Court.

v. Find that the lack of signature is a reason for inadmissibility, and consequently declare the Application inadmissible.

vi. Find that the Applicants have not established how the withdrawal of the said Declaration by the Republic of Benin constitutes a human rights violation.

2 By a Press Release issued on 20 May 2020, in response to the COVID -19 Pandemic, the Court had suspended the computation of time limits for all matters, except provisional measures, from 1 May to 31 July 2020.

vii. Find that the Declaration of jurisdiction is not mandatory and therefore cannot be adhered to.

viii. Consequently, dismiss the Application.

V. Jurisdiction

14. Article 3 of the Protocol provides:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. The Court notes that in terms of Rule 49(1) of the Rules; "[t]he Court shall conduct preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

16. Based on the above-mentioned provisions, the Court must, for each application, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

17. The Court notes that in the instant case the Respondent State raises an objection based on the Court's lack of material jurisdiction.

18. The Respondent State argues that it is a sovereign entity as can be inferred from basic principles of international law.

19. The Respondent State avers that in international law, and particularly in the area of accepting the jurisdiction of an international court, sovereignty is manifested in the principle of consent. The consent of a State is thus "a sine qua non of the jurisdiction of any international court, regardless of the time and the manner in which such consent is expressed."[3]

20. The Respondent State affirms that it is clear from the instruments governing this Court, as well as its jurisprudence, that States are free to decide whether or not to accept the jurisdiction of the Court.

21. The Respondent State further affirms that the Declaration is optional and not binding on any State. Consequently, it cannot be imposed on those States that have recognised its jurisdiction to remain under it, otherwise such act would be an infringement of their sovereignty.

22. The Respondent State further asserts that while the Court, through its jurisprudence, has clarified its jurisdiction with regard to the

3 Individual Opinion of Judge Fatsah OUGUERGOUZ, *Michelot Yogogombaye v Senegal* (jurisdiction) (15 December 2009)1 AfCLR 1.

question of the legal effects of the Respondent State's withdrawal of the Declaration on the ongoing proceedings, it cannot admit the present application as this would be tantamount to rejecting the sovereign right of the Respondent State to withdraw its Declaration.

23. The Respondent State also submits that the subject matter of this Application falls outside the jurisdiction of the Court which, for the time being, can only decide the legal effects of the withdrawal. It is also the Respondent State's submission that the Court is fully aware of this position as it has never prevented any State from withdrawing its Declaration.

24. The Applicants did not respond to the Respondent State's objection based on the lack of material jurisdiction.

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25. The Court notes that, in accordance with Article 3 of the Protocol, its jurisdiction "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. The Court also notes that to establish that it has material jurisdiction it suffices 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.[4]

27. In the instant case, the Applicants allege that the withdrawal by the State of Benin of the declaration deposited under Article 34 (6) of the Protocol constitutes a violation of human rights protected by the Charter. The Court will examine whether it has jurisdiction to decide if the withdrawal of the declaration constitutes a violation of human rights.

28. In determining the validity of the withdrawal of the declaration by the Respondent State, the Court will be guided by the relevant rules governing declarations accepting jurisdictions as well as by

4 See, for example, ***Kalebi Elisamehe v United Republic of Tanzania***, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18, ***Armand Guehi v United Republic of Tanzania*** (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; ***Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*** (merits) (23 March 2018) 2 AfCLR 287, § 35.

the principle of State sovereignty in international law, in addition to the relevant rules of the law of treaties contained in the Vienna Convention on the Law of Treaties of 23 May 1969 (hereafter The Vienna Convention).

29. As regards the application of the Vienna Convention, the Court notes that while the declaration made under Article 34 (6) is provided for in the Protocol, which is governed by the law of treaties, the declaration in itself, is a unilateral act of the State not backed by the law of treaties.

30. Accordingly, the Court finds that the Vienna Convention does not apply to the declaration made under Article 34 (6) of the Protocol.

31. Concerning the rules governing the acceptance of the jurisdiction of international courts, the Court notes that similar declarations are optional. This is true for the provisions on the recognition of the jurisdiction of the International Court of Justice,[5] the European Court of Human Rights prior to the coming into force of Protocol No. 11[6] and the Inter-American Court of Human Rights.[7]

32. The Court notes that, by its nature, the declaration provided for in Article 34 (6) is similar to those mentioned above. The reason is that although the Declaration is provided for under Article 34(6) of the Protocol, it is optional. Thus, as a unilateral act, the declaration is an act separable from the Protocol and can, therefore, be withdrawn without leading to a withdrawal or a denunciation of the Protocol.

33. The Court further considers that the optional nature of the declaration and its unilateral character derive from a basic principle of international law, that is, the principle of sovereignty of the States. Indeed, the latter prescribes that States are free to make commitments and that they retain the power to withdraw their commitments in accordance with the relevant rules of each treaty.[8]

34. The Court considers that the matter being discussed before it pertains to the a right accorded the States. This right is the very one by which the States ensure the establishment of mechanisms that complement their domestic human rights implementation

5 See Article 36 (2) of the Statute of the International Court of Justice.

6 See Article 46 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and, before its entry into force, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which restructured the control mechanism established for this purpose.

7 See Article 62 (1) of the American Convention on Human Rights.

8 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540, § 54-59.

mechanisms.

35. The Court finds that the Respondent State is entitled to withdraw the declaration that it deposited under Article 34 (6).

36. Consequently, the Court upholds the objection based on lack of material jurisdiction raised by the Respondent State and declares that it has no material jurisdiction to hear the instant case.

VI. Costs

37. None of the Parties made any prayer in respect of costs.

38. According to Article 32(2) of the Rules,[9] "Unless otherwise decided by the Court, each party shall bear its own costs".

39. The Court notes that there is nothing in the circumstances of this case that warrants it to depart from this provision. The Court, therefore, decides that each party should bear its own costs.

VII. Operative part

40. For these reasons:

The Court

By a majority of ten (10) to one (1), Judge Chafika Bensaoula dissenting:

On jurisdiction

i. *Upholds* the objection to its material jurisdiction;

ii. *Declares* that it lacks jurisdiction.

On costs

iii. *Orders* each party to bear its own costs.

***

Dissenting Opinion: BENSAOULA

1. I totally refute the reasoning and the operative part of the above-mentioned judgment delivered in the case of *Glory C. Hossou and Landry Adelakoun* by a majority of ten (10) votes to one (1). The operative part reads as follows

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

"On jurisdiction,

i. [....]

ii. *Declares* that it lacks jurisdiction.... "

In the instant case, the Applicants challenge the withdrawal by the Republic of Benin of its Declaration made under Article 34/6 of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court and request the Court to

1. *Declare* the application admissible
2. *Find* that the decision of the Respondent State withdrawing the Declaration violates the Charter and international human rights standards.
3. *Find* that the Respondent State prevents its citizens from directly accessing the regional judicial system to initiate proceedings and seek redress for the prejudice they have suffered within their domestic system, which constitutes a regression of rights.

2. In its judgment, the Court upheld the Respondent State's objection based on the Court's lack of material jurisdiction and found that it lacked material jurisdiction, holding that the Respondent State has the right to withdraw the Declaration it made under Article 34/6 of the Protocol and that the withdrawal does not constitute a violation of human rights.

3. I am not satisfied with this decision for the following reasons:

i. It contradicts the Court's previous jurisprudence,

ii. The Court finds that the withdrawal of the Declaration does not violate the Charter or international human rights instruments and, therefore, does not constitute a violation of human rights.

iii. The finding did not take the African context into account;

iv. The Court's finding with respect to the justiciability of human rights

v. The Court only ruled on the Applicants' second request without addressing the others.

A. The Court's decision contradicts its previous jurisprudence:

In my view**,** the Court's decision in the instant case is totally at variance with what it has previously stated in its settled jurisprudence.

4. Indeed, in the case of *Ingabire Victoire Umuhoza v Republic of Rwanda*, (Application No. 003/2014), the Applicant seised the Court for alleged human rights violations. In the course of the proceedings, the State of Rwanda withdrew the Declaration it had made under Article 34/6 of the Protocol and requested the Court to suspend all cases involving it.

5. The Court, ruling on its jurisdiction over the issue of withdrawal, and relying on Articles 3 (1) and 34 (6) of the Protocol, clearly stated that it notes that the Republic of Benin is a State Party to the Protocol, of which it deposited the instrument of ratification on 6 June 2003, and made the Declaration provided for in Article 34(6) of the Protocol on 22 June 2013. The Court considers that under Article 3 (1), it has jurisdiction to interpret and apply the Protocol, holding that in accordance with Article 3(2), the Court has the power to decide in case its jurisdiction is disputed. Accordingly, the Court considers that it has jurisdiction to hear the application in the instant case regarding the withdrawal of the Declaration of the Respondent State[10] (Paragraphs 51 and 52).

6. In other words, the Court declared that is has jurisdiction because the subject of the allegation is set out and protected by human rights instruments, in application of the Articles referred to, which define the scope of jurisdiction in all human rights matters, although withdrawal of the Declaration is not mentioned in the Protocol!

7. In the application that is the subject of this Opinion, it is clear that the Applicants pray the Court to declare that the withdrawal violates the Charter and international human rights standards, which constitutes a violation of human rights.

8. The contradiction, in my view, lies in the Court's interpretation of the Applicants' request in the *Ingabire* case and in the instant case. Indeed, although the applicant in the Ingabire case dwelt on the effects of the withdrawal of the Declaration in relation to his filed and pending application, the Court, well before examining the request, first considered whether or not it had jurisdiction in the matter and, therefore, whether the withdrawal was a right protected by a human rights instrument. Having made a determination, the Court declared that it had jurisdiction. (Paragraph 48).

9. This finding is certainly binding on the Court. This is because if in the instant case the request clearly relates to the withdrawal being qualified as a violation of human rights, the Court could not judge differently, especially since the withdrawal is not mentioned in the Protocol! Moreover, in the above-mentioned *Ingabire*[11] case, the Court clearly stated that the requirement of prior notice is necessary in the event of a withdrawal, considering in particular that the Declaration deposited under Article 34(6) of the Protocol is not only an international commitment made by the state but

10 § 51 and 52 of the judgment.

11 § 61 of the judgment.

also, more importantly, a means by which it creates subjective rights for individuals and groups. (Paragraph 61).

10. In my opinion, the Court should have retained its material jurisdiction and proceeded to the admissibility stage and the merits if the Application was declared admissible.

11. On the other hand, in its Ruling of 25 September 2020, where Applicants Glory Cyriaque Hossou and other, requested the Court to take provisional measures by revoking Benin's decision to withdraw the Declaration pending judgment on the main application, the Court retained its *prima facie* jurisdiction by stating in paragraph 14 that, a) the alleged violations relate to rights protected in instruments to which the Respondent State is a Party, b) the applicants specifically alleged that the withdrawal is a violation of the Charter and that it deprives citizens of access to regional judicial mechanisms. Accordingly, the Court has jurisdiction to consider the application.[12]

12. Prima facie jurisdiction assumes that the Court has found presumptions that the case was within its jurisdiction and that the allegations were *a fortiori* well-founded until proven otherwise. Except that in this same Ruling the Respondent State clearly emphasised in its reply on the fact that the Court had in previous decisions (*Ingabire victory against Rwanda* quoted above and in the Ruling of 6 May 2020 *Houngue Eric versus the Republic of Benin*)[13] dismissed the request and made it null and void because it had already been definitively decided by the Court.

13. By declaring that it has *prima facie* jurisdiction, the Court could not be content with giving reasons for its lack of material jurisdiction in the case on the merits, but rather could proceed to the merits and dismiss the request, since its jurisprudence on the subject was established.

14. Moreover, in its Ruling, it could declare that it lacked jurisdiction because the subject of the request had been settled in its previous jurisprudence and that it therefore did not have prima facie jurisdiction, since it was clear that the subject of the request had been settled by consistent jurisprudence and that it clearly lacked jurisdiction with regard to the case on the merits.

12 § 14 of the judgment.

13 Ruling on provisional measures of 6 May 2021

B. The withdrawal of the Declaration violates the Charter and international human rights instruments

15. Still in the Ingabire judgment, the Court, while recognizing the right of states to withdraw the Declaration, considered it as a unilateral act. It however confirmed that the withdrawal was not absolute because the Declaration created rights for third parties, the enjoyment of which requires legal security.[14] By this reasoning, the Court confirms that the Protocol does not only create a system but creates rights as well!

16. Thus, the Court declared that states are obliged to give notice of their intention to withdraw the Declaration, considering in particular that the Declaration constitutes not only an international commitment of the state but more importantly creates subjective rights for individuals and groups.

17. It is therefore clear that although the Court recognised the right of states to withdraw, it imposed a requirement for the withdrawal, namely, the notice period, which it qualified as essential to ensure legal certainty and prevent the sudden suspension of rights.[15]

18. Moreover, the Court clearly qualified the Protocol as an instrument for the application of the Charter, which guarantees the protection and enjoyment of human and peoples' rights enshrined in the Charter and in other relevant human rights instruments, and concluded that an abrupt withdrawal without notice is likely to weaken the human rights protection regime provided for by the Charter, and that therefore the notice period is obligatory in the event of a withdrawal of the Declaration.[16]

19. Consequently, the Court should have maintained its jurisprudence in its judgment that is the subject of this opinion and, although it recognised the right of the States to withdraw the Declaration, it should have declared the withdrawal invalid because it was not preceded by a notice period.

20. By this jurisprudence the Court has not only amended the Protocol by adding the right of withdrawal but has also linked this withdrawal to a condition *sine qua non*, namely, the notice period.

21. Consequently, having clearly stated that the Declaration is not only an international commitment of the state but, more importantly, that it creates subjective rights for individuals and groups. The enjoyment of which requires legal security and that the Protocol

14 § 60 of the *Ingabire judgment.*

15 § 62 of the judgment.

16 § 64 of the judgment.

does not only create a system but rights as well. The Court could only declare in the subject matter of the dissenting opinion, that the withdrawal is a human rights violation!

C. The reasoning excludes the African context

22. According to the preamble of the Universal Declaration of Human Rights, human rights are an ideal to be achieved by all peoples and all nations and as such are a work in progress and never finished. Therefore, States and the international community are called upon and urged to do more, and to refrain from lowering the levels of protection afforded to individuals.

23. Through the preamble of the Charter, African States adhere to this vision of an ideal to be achieved since it is clearly stated "that the African States ... parties to the present Charter reaffirm the pledge they solemnly made in Article 2 of the said Charter .... to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa ... having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights". This clearly reflects a twofold commitment to go the extra mile when it comes to the rights and welfare of Africans.

24. The principle that States have an obligation to maintain ever higher standards when it comes to the protection of human rights is affirmed and the Court has already recalled it in its jurisprudence. Indeed, in the judgment of 4 December 2020, *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, the Court endorsed the opinion of the Committee on Economic, Social and Cultural Rights in paragraph 9 of General Comment No. 3, 1990 on Article 2(1) of the ICESCR, which states that "The corollary of the principle of non-regressive measures is the idea that States Parties to the Covenant must take steps with a view to "achieving progressively the full realisation of the rights". The concept of progressive realisation implies that full realisation of the 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".[17] Better still, the Court explained that it "considers that when a state party recognises a fundamental right, any regressive measure, i.e., "any measure which directly or indirectly marks a step backwards with regard to the rights

17 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, Application No. 062/2019, Judgment of 4 December 2020, § 136.

recognized in the Covenant is a violation of the ICESCR itself".

25. While Article 1 of the Charter states the commitment of the States to recognize the rights, duties and freedoms it guarantees and to adopt legislative and other measures to implement them, Article 7 clearly recognizes "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".

26. Article 3 of the Protocol establishes a regional court whose jurisdiction "shall extend to all … 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 " Better still, Article 2 of the Protocol provides that "the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the by the African Charter on Human and Peoples' Rights". Moreover, it confers on individuals and NGOs the right of remedy before the Court, just as it did with the Commission. The Protocol therefore reinforces the right to remedy established by the Charter, even though the Protocol requires the States to first make the declaration accepting the jurisdiction of the Court.

27. As for the Court's characterisation of the Declaration as "optional in nature",[18] it is clear from Article 34(6) of the Protocol that any State that has ratified the Protocol has the option to make a Declaration accepting the Court's jurisdiction, but does not specify the time limit within which this Declaration must be made after ratification of the Protocol.

28. This leeway granted to the States only concerns the time limit within which they can make the declaration and is not an exemption from the obligation to do so. In my view, the fact that the legislator did not mention the right to withdraw the declaration is neither an oversight nor an omission but a choice based on the simple reason that while many international and regional human rights conventions provide for the possibility of withdrawal and clarify the relevant rules, a reading of the various African human rights instruments shows that all of them, unlike the situation of the instruments cited, do not have provisions on withdrawal or denunciation.

29. In my view, this clearly indicates that African states have chosen to adopt a particular approach that would offer an additional

18 § 32 of the judgment.

guarantee for human rights, which could support the assertion that the issue was not simply one of neglect or omission, especially since the preliminary draft of the Charter had mentioned withdrawal or denunciation of the Charter, although this provision was not captured in the final version.[19] I should add that the ratification of an international text is a source of domestic law and, for the respect of the parallelism of forms, it is a well-established principle that the rules and procedures followed in depositing an instrument must be the same for its withdrawal.

30. Thus, the Court did not have to rule on the withdrawal of the Declaration without taking into account the provisions of Article 35(1) of the Protocol, which confers exclusive power on another authority to make any changes to the Protocol. Without considering the provisions of Article 35(1) of the Protocol, the Court believed that it was considering the withdrawal as a separate act and added a possibility that was not provided for in the Protocol.

D. The Court's finding with regard to the justiciability of human rights

31. Without any doubt, the human rights that are universally claimed today emanate from treaties (Conventions, Covenants, Charters or Protocols...) adopted between States which commit to recognise and guarantee rights and freedoms to their citizens. Thus, it is through human rights that the individual found space in the sphere of international law, which was, and remains by essence, a right of the States. Thanks to human rights, the individual has become fully and entirely a "subject of international law" who can avail himself of the commitments made by the States under certain international instruments, in this case human rights instruments.

32. The first consequence of this prerogative conferred on the individual by international human rights law is that in this matter, the States have given up part of their "sovereignty", given that henceforth in international law, the prerogatives recognized to the States are partly shared with the individual, as was established by the International Court of Justice (ICJ) when it held that certain principles of international law are exorbitant from the common law

19 See Article 61 of the draft resolution of the African Charter on Human and Peoples' Rights, which states that States Parties to the Charter may denounce it five years after its entry into force by sending a notice one year before the denunciation comes into force. This notice shall be addressed to the Secretary General of the Organization of African States, who shall inform the other States Parties. This denunciation does not affect the obligations of the State for the violations that occurred before the entry into force of this denunciation.

of human rights,[20] including the obligation to continue protecting human rights even when a contracting state does not respect human rights or when it violates the rights of citizens of another state, which replaces the principle of reciprocity.[21]

33. The second consequence is the possibility offered to the individual or to groups of individuals to demand that the State respect its international obligations. The individual now has a right to justice against States or a right of remedy against States when the latter do not fulfil their obligations or only do so partially. The individual is thus authorised to demand that the State implement the rights guaranteed in the instruments to which it is a Party, and even to claim compensation for prejudice suffered as a result of the failure or the shortcomings of the States in the implementation of the rights guaranteed in the human rights instruments that they have ratified. Consequently, this is the genesis of the justiciability of human rights, and ratification is the expression of the States' willingness to submit to it.

34. The phenomenon of the justiciability of human rights at domestic and international levels develops and imposes itself over time since it emanates from texts that guarantee individuals rights and freedoms.

35. In addition to the obligations to promote, protect and defend human rights, States have the obligation to set up mechanisms to protect the rights of individuals and to provide remedies against human rights violations.

36. At the international level, these mechanisms, whether quasi-jurisdictional or judicial, follow both horizontal and vertical procedures; the procedure is horizontal when a state can complain of a human rights violation against another State, it is vertical

20 See ICJ, Barcelona Traction case, Judgment of 5 February 1970 Para. 33:" When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the inter- national community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved [the human rights of individuals, all States can be held to have a legal interest in their protection; they are obligations *erga omnes".*

21 ICJ, Interhandel Case (***Switzerland V United States of America***) (Preliminary Objections) Judgment of 21st March 1959, page 21 "Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration".

when it is the individual who exercises this prerogative against one or more States. Except that when the remedy exercised by a State against another State for violation of human rights is exempted from particular requirements in relation to individuals, international law imposes certain requirements on the exercise of such a remedy, including the requirement to exhaust local remedies and time limits within which the individual can exercise his remedy.

37. However, Article 2 of the Protocol provides that the African Court complement human rights protection mandate that the Charter conferred on the African Commission on Human and Peoples' Rights, and added an exception to the practice before the Commission, namely, the Declaration!

38. Indeed, Article 5(3) of the Protocol provides: "the Court may entitle relevant Non-Governmental Organization (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article (6) of this Protocol". Article 34(6) provides: "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a Declaration".

39. In the case of Application No. 016/2020: *Glory Cyriaque Housou and Another v Republic of Benin* submitted to the Court, the question that arises is whether the fact that a State made this Declaration confers a human right on individuals, so that the withdrawal of the Declaration constitutes a violation of the right conferred.

40. Many are of the view that in the African human rights system, the Protocol is not considered as an instrument intended to guarantee human and peoples' rights. However, the fact remains that beneath the letter of the Protocol is an underlying human right, which the Court clearly articulated in the above-mentioned judgment and stated in bold in one of the paragraphs of my opinion.

41. First, when Article 5(3) speaks of ".... the Court may entitle relevant Non-Governmental Organization (NGOs) with observer status before the Commission, and individuals to institute cases directly before it … ...", it does not create a new right. Rather, it restates the principle of the justiciability of the rights enshrined in the Charter and the right of remedy open to individuals and NGOs, the only difference being that this right of remedy is fully exercisable before the Commission, whereas its exercise before the Court is

subject to prior deposition of the Declaration. Now, it is precisely because the Declaration confers a prerogative on the individual that the Protocol does not make it an admissibility requirement but an element of the Court's jurisdiction. The Court's jurisprudence is totally consistent with this. Individuals and NGOs therefore have a human right conferred by the Declaration because it is the latter that makes the right of individuals and NGOs effective.

42. Thus, the obligation of States to offer remedies to citizens is not limited to the establishment of domestic human rights protection mechanisms, since there is a right of remedy before recognized international jurisdictions. This assertion is all the more valid because the exercise of the right of remedy before international human rights protection mechanisms is subject to requirements, as we present under the heading "admissibility requirements for applications".

43. Individuals and NGOs derive this right directly and simultaneously from the Charter and the Protocol, and it is not surprising that Article 6(2) of the Protocol, which deals with the admissibility of applications, refers to the provisions of Article 56 of the Charter. Now, if by making the Declaration, States recognize the right of individuals and NGOs to bring cases before the Court, can they withdraw their Declaration without infringing this right?

44. I cannot conclude without referring to the preamble of the Universal Declaration of Human Rights which holds that human rights are an ideal to be attained by all peoples and all nations and as such, they are a work in progress and never finished. Therefore, States and the international community are called upon and urged to do more and to refrain from lowering the levels of protection afforded to individuals.

45. Through the preamble of the Charter, African States have adhered to this vision of an ideal to be achieved since it is clearly stated that" the African States ... parties to the present Charter reaffirm the pledge they solemnly made in Article 2 of the said Charter .... to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa [...] having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights". This clearly reflects a twofold commitment to go the extra mile when it comes to the rights and welfare of Africans.

46. The principle that States have an obligation to maintain ever higher standards when it comes to the protection of human rights is affirmed. The Court is not unaware of this since it has already recalled it in its jurisprudence. Indeed, in the judgment of 4 December 2020, *Sébastien Germain Marie Aikoué Ajavon v Republic of Benin*, the Court endorsed the opinion of the

Committee on Economic, Social and Cultural Rights in paragraph 9 of General Comment No. 3, 1990 on Article 2(1) of the ICESCR, which states that "The corollary of the principle of non-regressive measures is the idea that States Parties to the Covenant must take steps with a view to "achieving progressively the full realisation of the rights". The concept of progressive realisation implies that full realisation of the 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".[22] Better still, the Court explained that it "considers that when a state party recognises a fundamental right, any regressive measure, i.e., "any measure which directly or indirectly marks a step backwards with regard to the rights recognized in the Covenant is a violation of the ICESCR itself".

47. While Article 1 of the African Charter on Human and Peoples' Rights states the commitment of the States to recognize the rights, duties and freedoms it guarantees and to adopt legislative and other measures to implement them, Article 7 clearly recognizes "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".

48. Article 3 of the Protocol establishing an African Court has established a regional court whose jurisdiction "shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned " (Article 3). Better still, when Article 2 of the Protocol provides that "the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the by the African Charter on Human and Peoples' Rights", it confers on individuals and NGOs the right of remedy before the Court, just as it did with the Commission. The Protocol has therefore reinforced the right to remedy established by the Charter, even though the Protocol requires prior deposition of the declaration by the States accepting the jurisdiction of the Court.

49. As for the Court's characterisation of the Declaration as "optional in nature" (para. 32), it is clear from Article 34(6) of the Protocol that the legislator obliges the State to make a declaration accepting the Court's jurisdiction, but does not specify the time

22 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, Application No. 062/2019, Judgment of 4 December 2020, § 136.

limit within which this Declaration must be made after ratification of the Protocol.

E. The Court adjudicated one allegation only without addressing the Applicant's other requests

50. In their application, the Applicant's prayed the Court to declare that their application was admissible and that, by the Respondent State's decision to withdraw the Declaration, it violated the right of citizens to access the judicial system.

51. The Court, in deciding on its material jurisdiction, only examined the question of the violation of the Charter and international human rights instruments without examining the rest of the applicants' requests.

52. In my opinion, the Court should have addressed these requests either by declaring them to be subservient to the main request and therefore lacking material jurisdiction, or by simply stating that the requests had become moot.

Kisase v Tanzania (judgment) (2021) 5 AfCLR 728

Application 005/2016, *Sadick Marwa Kisase v United Republic of Tanzania*

Judgment, 2 December 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant had been tried, convicted, and sentenced for armed robbery by the domestic courts of the Respondent State. His appeal before the national courts had failed and he was serving a 30-year term of imprisonment when he filed this Application. The Applicant claimed that the domestic legal processes from his trial to the denial of his appeal were in violation of his human rights. The Court held that the Respondent State had violated the Applicant's right to defence due to the failure to provide free legal representation to the Applicant. The Court therefore granted the Applicant damages for the moral prejudice he suffered.

Jurisdiction (material jurisdiction, 19-22 ; exercise of appellate jurisdiction, 20)

Admissibility (exhaustion of local remedies, 35-45; submission within a reasonable time, 48-53)

Fair trial (right to be heard, 65-70, 73-74; free legal assistance, 77-79; equal protection of law, 82-84)

Reparations (state responsibility to make reparation, 88; moral prejudice, 91; non-pecuniary measures,93)

I. The Parties

1. Sadick Marwa Kisase (hereinafter referred to as "the Applicant") is a Tanzanian national who, at the time of filing the Application, was serving a thirty (30) years' imprisonment sentence at Butimba Central Prison, Mwanza, after being convicted for the offence of armed robbery. The Applicant alleges the violation of his rights to a fair trial in relation to proceedings before domestic courts.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), 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. The Court held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. From the record before this Court, it emerges that the Applicant was convicted and sentenced on 30 June 2008 by the District Court of Geita to thirty (30) years imprisonment and twelve (12) strokes of the cane in criminal case N° 598 of 2007 for having committed the crime of armed robbery, an offence punishable under sections 287 A of the Tanzanian Penal Code.

4. Dissatisfied with this decision, the Applicant filed criminal appeal No. 85/2009 of 17 August 2009 before the High Court of Tanzania, which on 18 March 2011 upheld the judgment of the District Court.

5. The Applicant then appealed the High Court's judgment before the Court of Appeal, which on 26 July 2013 upheld the lower court's decision. The Applicant avers that, on 21 March 2014, he filed an application for review of the judgment of the Court of Appeal, which he states was pending at the time of submitting the present Application.

B. Alleged Violations

6. The Applicant alleges that:

i. The Court of Appeal of Tanzania in Mwanza "handed down erroneously its judgment against the applicant on 26 July 2013 and then caused him severe harm when it did not schedule for a hearing of his review request, whereas other applications lodged after his had been registered and scheduled for hearing".

ii. The Court of Appeal "had not considered all the grounds of this defense and clustered them in to nine grounds. This legal proceeding was detrimental to the applicant insofar as it violated his fundamental

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

right to have his cause heard by a court of law as provided for in article 3(2) of the Charter".

iii. As the Respondent State did not offer him legal representation during his trial, he "was deprived of his right to have his cause heard, which had a prejudicial effect on him; and this constitutes a violation of his fundamental rights as set out in article 7(1)(c) and (d) of the Charter and articles 1 and 107 (2) (b) of the Tanzanian Constitution of 1997".

III. Summary of the Procedure before the Court

7. This Application was filed on 13 January 2016 and served on the Respondent State on 15 February 2016.

8. The Parties filed their pleadings within the time stipulated by the Court.

9. Pleadings were closed on 26 April 2020 and the Parties were duly notified.

IV. Prayers of the Parties

10. The Applicant prays the Court to

i. Render justice by annulling the guilty verdict and the sentence meted out to him and order his release;

ii. Grant him reparation for the violation of his rights; and

iii. Order such other measures or remedies that the Court may deem fit to grant.

11. The Respondent State prays the Court the rule that

i. The Court does have jurisdiction to hear the matter and that the application is inadmissible;

ii. The Respondent State has not violated Articles 3(1)(2) and 7(1)(c) of the African Charter on Human and Peoples' Rights;

iii. The Respondent State should not pay reparations to the Applicant;

iv. The Application should be dismissed as being baseless.

V. Jurisdiction

12. 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.

13. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[2]

14. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

15. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction.

A. Objection to material jurisdiction

16. The Respondent State objects to this Court's jurisdiction to consider the present Application on the ground that the Applicant is in effect asking the Court to exercise appellate jurisdiction that is to examine matters of facts and law already settled by domestic courts. Relying on the Court's ruling in the matter of *Ernest Francis Mtingwi v Republic of Malawi*, the Respondent State avers that it is not within the powers of this Court to set aside decisions of domestic courts and order the release of a convicted person.

17. The Applicant rebuts the Respondent State's objection and asserts that the Court has jurisdiction to review decisions of domestic courts as long as there is a violation of provisions of the Charter or of any other relevant human right instrument.

***

18. 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.[3]

19. The issue arising is whether by examining the present Application, this Court exercises appellate jurisdiction vis-à-vis domestic courts.

20. The Court recalls that, as is now firmly established in its case-law, it does not exercise appellate jurisdiction with respect to

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

3 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.

claims already examined by national courts.[4] However, the Court reiterates its position that 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.[5]

21. In the present matter, the Applicant is asking this Court to determine whether the proceedings before domestic courts were conducted in line with the Respondent State's obligations under the Charter. Furthermore, the allegations made by the Applicant related to fair trial rights guaranteed under Article 7(1) of the Charter. It cannot therefore be said that this Court is exercising appellate jurisdiction.

22. In light of the above, the Respondent State's objection is dismissed; and the Court consequently holds that it has material jurisdiction to hear this Application.

B. Other aspects of jurisdiction

23. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

24. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with 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 it has held that the withdrawal of a Declaration 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, or new cases filed before the withdrawal takes effect.[6] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22

4 *Ernest Francis Mtingwi v Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, §§ 14-16.

5 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Werema Wangoko Werema and Another 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.

6 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations) §§ 35-39.

November 2020.[7] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

25. In light of the above, the Court finds that it has personal jurisdiction to examine the present Application.

26. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant arose after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[8] Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

27. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred within the territory of the Respondent State, which is a state party to the Protocol. In the circumstances, the Court holds that it has territorial jurisdiction.

28. In light of the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

29. 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".

30. In line 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."

31. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of 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;

7 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67.

8 *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.

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

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 set by the Court as being the commencement of the time limit within which it shall be 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 Constitutive Act of African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

32. The Respondent State raises two objections to the admissibility of the Application. The first objection relates to the requirement of exhaustion of local remedies while the second one relates to whether the Application was filed within a reasonable time.

B. Objection based on non-exhaustion of local remedies

33. The Respondent State argues that the Application does not meet the requirement of exhaustion of local remedies as the Applicant should have challenged the alleged violations of his rights under the Basic Rights and Duties Enforcement Act. The Respondent State also avers that local remedies were not exhausted because the Applicant never requested for legal aid in the course of domestic proceedings and that he is therefore raising the issue of legal aid for the first time before this Court.

34. The Applicant refutes the Respondent State's objection and argues that he could not file a constitutional petition under the Basic Rights and Duties Enforcement Act since the concerned violations are alleged to have been committed in the proceedings before the Court of Appeal. The Applicant contends that such petition could not be filed before a single High Court judge to challenge the ruling of the Court of Appeal which is the highest court of the land made up of a panel of three judges.

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35. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) 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.[10]

36. The Court observes that the issues arising for determination regarding admissibility in the present case are firstly, whether the Applicant did not exhaust local remedies by failing to request for legal aid in the course of domestic proceedings prior to raising it before this Court, and secondly, whether the Applicant ought to have challenged the alleged violations under the Basic Rights and Duties Enforcement Act.

37. On the first issue, the Court recalls its case-law that it does not necessarily exercise first instance jurisdiction when an issue is brought before it without having been expressly raised by the Applicant in the course of domestic proceedings.[11] As the Court has previously held, it can examine such issue as long as it is part of a "bundle of rights and guarantees", which the domestic courts ought to have observed while adjudicating the Applicant's case.[12]

38. In its case-law, this Court has held that the "bundle of rights and guarantees" applies, among others, in circumstances where: i) the issue to be bundled should be inherently connected to other issues that were expressly raised and adjudicated in the course of domestic proceedings;[13] or ii) the said issue was or is deemed to have been known to the domestic judicial authorities.[14] It follows that the bundle of rights and guarantees is understood to encompass all measures that the courts are meant to consider and decide on in the course of judicial proceedings without the parties having to request for them. The question is whether, in

10 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

11 *Ibid.*, § 60.

12 *Idem*.

13 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 53; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 314, § 46.

14 *Alex Thomas v Tanzania* (merits), § 60.

the present Application, access to legal aid meets the "bundle of rights" requirement earlier recalled.

39. In this respect, the Court first notes that, issues raised and adjudicated in domestic courts involved the Applicant's fair trial rights, including assessment of evidence, consideration of arguments, and failure to examine a request for review. The Court observes that the question of legal aid, which the Respondent State avers is being raised for the first time before this Court, is intrinsically connected to the rights whose violation is alleged in the Application before this Court.

40. Secondly, in the present Application, the Court observes that in so far as the proceedings against the Applicant have been determined by the Court of Appeal, the issue of legal aid is deemed to have been known to the domestic judicial authorities.[15] The latter therefore had an opportunity and ought to have addressed the issue even if it was not raised by the Applicant.

41. Consequently, the Court finds that, in the present Application, legal aid is inherent in the bundle of rights as earlier elaborated.

42. In light of the above, this Court dismisses the Respondent State's objection related to the request for legal aid before domestic courts.

43. On the second issue, the Court restates its established position that, the constitutional petition provided under the Basic Rights and Duties Enforcement Act of the Respondent State is an extraordinary remedy, which the Applicant is not required to exhaust.[16]

44. On the basis of the foregoing, this Court dismisses the Respondent State's objection related to the failure to file a constitutional petition.

45. As a consequence of the above, this Court finds that domestic remedies have been exhausted in this matter.

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

46. The Respondent State claims that the Application does not meet the requirement of being filed within a reasonable time given that it was filed sixteen (16) months after the judgment of the Court of Appeal whereas the African Commission's decision in the *Majuru*

15 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 624, § 76.

16 *Alex Thomas v Tanzania* (merits), §§ 63-65.

case suggests that applications should be filed within six (6) months of exhausting local remedies.

47. The Applicant on his part refutes the Respondent State's objection and argues that there is no provision in the Rules for assessing what constitutes a reasonable time to file an application. According to the Applicant, the Court should consider that his Application was filed within a reasonable time bearing in mind that he filed a review of the Court of Appeal's judgment on 26 July 2013 and had still been waiting for the review request to be listed for hearing at the time the present Application was filed before this Court.

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48. The issue arising for determination is whether the time observed by the Applicant before bringing his Application before this Court is reasonable within the meaning of Article 56(6) of the Charter.

49. From the record before the Court, the Applicant exhausted local remedies on 26 July 2013, which is the date on which the application for review of the Court of Appeal's judgment was filed. The present Application was filed on 13 January 2016. The Court therefore must assess whether the period of two (2) years, five (5) months and fifteen (15) days that elapsed between the two events is reasonable within the meaning of Article 56(6) of the Charter.

50. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that applications must be filed "… within 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". As such, the Respondent State's reference to the period of six (6) months cannot be justified.

51. In its previous decisions, the Court has held "… that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[17] Circumstances considered by the Court includes the Applicants being incarcerated, lay, indigent restricted

17 *Norbert Zongo and Others v Burkina Faso* (preliminary objection) (25 June 2013) 1 AfCLR 197, § 121.

in their movements or having little or no information about the existence of the Court.[18]

52. The Court notes that in the instant matter, the Applicant has been incarcerated, did not have legal representation during the proceedings before domestic courts and is self-represented before this Court. Most notably, the facts of the case occurred between 2007 and 2013, which is in the early years of the Court's operation when members of the general public, let alone persons in the situation of the Applicant in the present case, could not necessarily be presumed to have sufficient awareness of requirements governing proceedings before this Court. Finally, the Respondent State filed its Declaration in 2010. In such circumstances, this Court considers that the period of time that it took the Applicant to file the case should be considered reasonable.

53. In light of the foregoing, the Court dismisses the Respondent State's objection and finds that the Application has been filed within a reasonable time.

D. Other conditions of admissibility

54. 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 are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must ascertain that these requirements have been fulfilled.

55. In particular, the Court notes that the requirement laid down in Rule 50(2)(a) of the Rules is met since the Applicant's identity is known.

56. The Court also notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. The Application also does not contain any claim or prayer that is incompatible with the said provision of the Act. Therefore, the Court considers that the

18 *Christopher Jonas v Tanzania* (merits) § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83; *Armand Guehi v Tanzania* (merits and reparations) § 56; *Werema Wangoko v Tanzania* (merits and reparations) § 49*; Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 55.

Application meets the requirement of Rule 50(2)(b) of the Rules.

57. The Court further 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 50(2)(c) of the Rules.

58. Regarding the condition stated in Rule 50(2)(d) of the Rules, the Court notes that the Application fulfils the said condition as it is not based exclusively on news disseminated through the mass media.

59. Finally, with respect to the requirement laid down in Rule 50(2)(g) 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, or the provisions of the Charter. The Application therefore meets this condition.

60. 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 50 of the Rules, and accordingly finds it admissible.

VII. Merits

61. The Applicant alleges the violation of his rights to a fair trial, namely his right to have his cause heard and his right to legal assistance, protected under Article 7(1) of the Charter. The Applicant also alleges the violation of his right to equal protection of the law under Article 3(2) of the Charter

A. Alleged violation of the right to a fair trial

62. The Court will first consider the alleged violation of the right to have one's cause heard and then the alleged violation of the right to legal assistance.

i. Alleged violation of the right to have one's cause heard

63. The Applicant alleges that the Court of Appeal did not examine all his arguments but rather grouped them into nine clusters although each of his grounds of appeal were invoked for different purposes. According to the Applicant, this affected the merits of each of his pleas and consequently violated his right to have his cause heard. The Applicant further alleges that, although it was filed on 26 July 2013, his application for review of the Court of Appeal's judgment had not been scheduled for hearing at the time

the present Application was filed.

64. The Respondent State rebuts the Applicant's allegation, and submits that all his arguments were duly examined by the Court of Appeal. It is the Respondent State's submission that the Court of Appeal held that of the three arguments submitted only the third one was relevant, which states that "… the prosecution has not been able to gather evidence beyond reasonable doubt …". With respect to the review of the Court of Appeal's judgment, the Respondent State avers that the Applicant has failed to prove his allegation and has never produced evidence that the request for review was filed.

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65. The Court notes that Article 7(1) of the Charter provides that "every individual shall have the right to have his cause heard …". In its case law, this Court has held that such right imposes an obligation on the judicial authorities to undertake a proper assessment of arguments and evidence submitted by the Applicant.[19] The provisions of Article 7(1) are also to the effect that requests filed before courts of law must be examined and claims by the applicant be answered.

66. The Court further notes that the allegation of violation of the right to have one's cause heard is two-fold. The first limb relates to the propriety of the proceedings before the Court of Appeal, while the second limb involves the review process in the same court.

ii. Examination of the Applicant's argument in the Court of Appeal

67. The Court observes that, according to the Applicant, the Court of Appeal did not conduct a proper examination of his arguments by failing to consider that two prosecution witnesses contradicted each other, evidence of one witness was admitted contrary to the law, discrepancy in evidence of the same witness was ignored, one prosecution witness and an accused were family members,

19 See *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, §§ 97-111; *Mohmed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 559, §§ 174, 193, 194.

the applicant's defence of alibi was ignored, the generator was wrongly admitted as evidence and one witness evidence on the generator was not trustworthy, and the applicant had no legal representation throughout the trial.

68. The Court further observes that the Respondent State does not expressly make submission on each of the above points stated by the Applicant but generally avers that all arguments and evidence of the Applicant were duly considered and domestic courts gave reasons for considering only some but not all of them.

69. From the record of the case, the Court notes that the Applicant's alibi was considered and rejected by the High Court whose finding was upheld by the Court of Appeal. Similarly, on the eight grounds of appeal raised by the Applicant, the Court of Appeal, referring to domestic law and established case-law, dismissed four of them on the ground that they were never raised in the proceedings before the first appellate court that is the High Court. Besides, the Court of Appeal fully considered the eight grounds and found that the ground relating to the Applicant's conviction based on contradictory prosecution evidence constituted the most important one. On the said ground, the Court of Appeal found that there was no room to fault the first appellate court as its determination was based on the doctrine of recent possession. After dismissing that ground for having no merit, the Court of Appeal further concluded that its finding thereon sufficed to dispose of the case.[20]

70. This Court considers that, in light of the above, given that the Applicant was heard and actually reiterated his alibi, and also challenged prosecution evidence on the doctrine of recent possession, therefore the Court of Appeal cannot be said to have ignored his arguments as he avers. Furthermore, the Court of Appeal decided to not consider other arguments made by the Applicant only after demonstrating why the ground relating to the contradictory prosecution evidence was decisive in arriving at the conviction of the Applicant.

71. In the circumstances, this Court finds that the Applicant's claim is not founded and dismisses the same.

iii. Failure of the Court of Appeal to examine the Applicant's review

72. The Court notes that the Applicant's claim in respect of this

20 See *Sadick Marwa Kisase v The Republic*, Criminal Appeal No. 83 of 2012, Judgment of the Court Appeal of Tanzania at Mwanza, 26 July 2013.

allegation is that the Court of Appeal did not consider his application for review. The claim is challenged by the Respondent State on the ground that the Applicant has failed to prove that the application was ever filed.

73. The Court recalls the general principle of law that who alleges must prove.[21] In the present matter, the Applicant ought to have proved that he actually filed the application for review of the Court of Appeal's judgment. From the record of the case, such evidence is not adduced by the Applicant and therefore, the burden cannot shift to the Respondent State.

74. In light of the above, the Court dismisses the Applicant's claim in relation to his application for review of the Court of Appeal's judgment.

B. Alleged violation of the right to free legal assistance

75. The Applicant alleges that he was not afforded legal representation throughout the proceedings in domestic courts, which constitute a violation of his right to legal assistance.

76. The Respondent State refutes the Applicant's allegation and contends that the Applicant was not afforded legal representation because he did not request for it under the Legal Aid (Criminal Proceedings) Act. It is also the Respondent State's contention that the Applicant could have challenged before the trial courts the absence of legal assistance in the course of domestic proceedings, which he did not do.

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77. The Court recalls that the right to defence protected under Article 7(1)(c) of the Charter, interpreted in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[22] includes the right to be provided with free legal assistance.[23]

21 See also *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, §§ 142-146; *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, §§ 66-74.

22 The Respondent State became a State Party to ICCPR on 11 June 1976.

23 *Alex Thomas v Tanzania* (merits) § 114; *Kijiji Isiaga v Tanzania* (merits) § 72; *Kennedy Owino Onyachi and Another v Tanzania* (merits) § 104.

The Court has also determined that where accused persons are charged with serious offences which carry heavy sentences and they are indigent, free legal assistance should be provided as of right, regardless of whether or not the accused persons request for it.[24]

78. The Court notes that, in the instant matter, the Applicant was convicted of armed robbery and sentenced to thirty (30) imprisonment. It is also evident from the facts of the case that the Applicant was indigent given that he did not engage a lawyer when the Respondent State failed to grant him legal aid throughout the domestic proceedings. In the circumstances, the duty lay with the Respondent State to grant the Applicant legal aid even if he did not make a request to that effect. Failure to do so amounts to a breach of the Applicant's right to legal assistance.

79. As a consequence, the Court finds that the Respondent State has violated the Applicant's right to free legal assistance as protected under Article 7(1)(c) of the Charter, interpreted in light of Article 14(3)(d) of the ICCPR.

C. Alleged violation of the right to equal protection of the law

80. The Applicant submits that, although he filed his application of review before the Court of Appeal on 21 March 2014 and provided all the material and evidence to corroborate the same, the application was not scheduled for hearing, whereas other application filed subsequently were registered, set down for hearing and determined. According to the Applicant this constitutes a violation of his right to equal protection of the law.

81. The Respondent State refutes this claim and calls on the Applicant to provide proof thereof.

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82. The Court notes that the situation described by the Applicant as a violation of his right to equal protection of the law relates to Article 3(2) of the Charter, which stipulates that: "Every individual shall be entitled to equal protection of the law".

83. The Court notes that the Applicant has not provided any specific argument or evidence that he was treated differently from other persons in similar conditions and circumstances. More specifically,

24 *Alex Thomas v Tanzania* (merits) § 123; *Kijiji Isiaga v Tanzania* (merits) § 78; *Kennedy Owino Onyachi and Another v Tanzania* (merits) §§ 104 and 106.

the Court recalls that, as earlier found, the Applicant did not adduce evidence that he actually filed an application for review.

84. In these circumstances, the Court finds that the Respondent State did not violate the Applicant's right to equal protection of the law provided under Article 3(2) of the Charter.

VIII. Reparations

85. The Applicant prays the Court to quash his conviction and sentencing, and order the Respondent State to set him at liberty. He also requests the Court to grant him reparation for the violations suffered including the amount of Tanzanian Shilling Ninety-Eight Million (TZS 98,000,000) for loss of income, mental and stress shock, physical pain and general damages.

86. The Respondent State prays the Court to find that the Applicant is not entitled to any reparation.

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87. The Court notes that Article 27(1) of the Protocol stipulates 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.

88. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible of the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered. Finally, the Applicant bears the onus to justify the claims made.[25]

89. The Court has further held, with respect to moral loss, it exercises judicial discretion in equity.[26] In such instances, the Court has adopted the practice of awarding lump sums.[27]

90. As this Court has earlier found, the Respondent State violated the Applicants' right to defence, provided under Article 7(1)(c) of the

25 *Norbert Zongo and Others 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.

26 *Norbert Zongo and Others v Burkina Faso* (reparations), § 55. See also *Kalebi Elisamehe v Tanzania*, § 97.

27 *Ally Rajabu and Others v United Republic of Tanzania*, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019, § 136; *Armand Guehi v Tanzania* (merits and reparations), § 55; *Lucien Ikili Rashidi v United Republic of Tanzania*, ACtHPR, Application No. 009/2015, Judgment of 28 March 2019 (merits and

Charter, as read together with Article 14(3)(d) of the ICCPR, by failing to provide him with free legal assistance.

A. Pecuniary reparations

91. The Court, based on its earlier conclusions, finds that the violation of his right to free legal assistance caused moral prejudice to the Applicant. In light of its consistent case-law[28] and circumstances earlier outlined in the present judgment, the Court, therefore, in exercising its discretion, awards him the amount of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.

92. In respect of the pecuniary compensation sought for prejudice allegedly ensuing from loss of income, mental and stress shock, physical pain and general damages, the Court notes that the Applicant does not adduce evidence in support of the claims. They are therefore dismissed.

B. Non-pecuniary reparations

93. Regarding the order to annul his conviction and sentence, and release him from prison, and without minimising the gravity of the violation, the Court considers 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 elaborate on specific and compelling circumstances to justify the order for his release.[29]

94. In view of the foregoing, this prayer is therefore dismissed.

IX. Costs

95. In their submissions both Parties prayed the Court to order the other pays the costs.

reparations), § 119; *Norbert Zongo and Others v Burkina Faso* (reparations), § 55; and *Kalebi Elisamehe v Tanzania* (merits and reparations), § 97.

28 *Christopher Jonas v United Republic of Tanzania*, ACtHPR, Application No. 025/2016, Judgment of 25 September 2020 (reparations); *Kenedy Ivan v United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48; *Diocles William v United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 426.

29 *Alex Thomas v Tanzania* (reparations), § 157.

96. Pursuant to Rule 32(2) of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs".

97. In the instant Case, the Court decides that each Party will bear its own costs.

X. Operative Part

98. For these reasons

The Court,

Unanimously,

Jurisdiction

i. *Dismisses* the objection to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

Admissibility

iii. *Dismisses* the objections to the admissibility of the Application;

iv. *Declares* the Application admissible.

Merits

v. *Finds* that the Respondent State has not violated the Applicant's right to have his cause heard, as guaranteed by Article 7(1) of the Charter, due to the manner of assessment of the evidence during the domestic proceedings.

vi. *Finds* that the Respondent State has not violated the Applicant's right to equal protection of the law under Article 3(2) of the Charter in respect of the alleged failure to examine the application for review.

vii. *Finds* that the Respondent State has violated the Applicant's right to defence, 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.

Reparations

Pecuniary reparations

viii. *Does not grant* the Applicant damages sought for loss of income, mental shock, stress, physical pain and general damages;

ix. *Grants* the Applicant damages for the moral prejudice he suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300,000);

x. *Orders* the Respondent State to pay the Applicant the sum ordered in paragraph (ix) above, free from tax and 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.

Non-pecuniary reparations

xi. *Dismisses* the Applicant's prayer for the annulment of his conviction and sentence and his release from prison.

Implementation and reporting

xii. *Orders* the Respondent State to submit to the Court, within six (6) months from the date of notification of this Judgment, a report on the status of implementation of the order set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

Costs

xiii. *Orders* each party to bear its own costs.

Kone v Mali (judgment) (2021) 5 AfCLR 748

Application 001/2021, *Yaya Kone v Republic of Mali*

Judgment, 2 December 2021. Done in English and French, the French text being authoritative.

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

Recused under Article 22: SACKO

The Applicant alleged that as representative of a company at which he was employed in the Respondent State, he was the target of criminal accusation and conviction. After a series of appeals and counter appeals before the domestic courts, the Applicant brought this Application contending that the various proceedings and judgments of the domestic courts, were in violation of his human rights. The Court held the Applicant's human rights had not been violated.

Jurisdiction (material jurisdiction, 31)

Admissibility (exhaustion of local remedies, 46-48)

Equal protection (discriminatory treatment, burden of proof, 64-67)

Fair trial (right to be heard, 76-79)

I. The Parties

1. Mr. Yaya Kone (hereinafter referred to as "the Applicant") is a national of Republic of Mali, and a lawyer responsible for managing Human Resources at a mining company, Société des Mines de Loulo SA (hereinafter referred to as "SOMILO SA"). He challenges his conviction for an offence of false accusation ("dénonciation calomnieuse'') which he claims was wrongful.

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 on 10 May 2000. On 19 February 2010, the Respondent State deposited with the Chairperson of the African Union Commission, 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 Organizations (hereinafter referred to as "the Declaration").

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record that on 13 June 2013, the Applicant acting on behalf of his employer SOMILO SA, filed a complaint before the Gendarmerie (police) of Kéniéba alleging that a roll of electric cable belonging to SOMILO SA had been stolen by an unknown person. In his complaint, the Applicant indicated that the said cable was found in the warehouse of Mr. Aliou Diallo, a contractor of EMBC, a service provider of SOMILO SA.

4. Following his complaint, the Gendarmerie conducted investigations and referred the matter to the Public Prosecutor, who filed charges against four suspects including Mr. Aliou Diallo before the Civil Court of Kéniéba.

5. On 19 November 2013, by Judgment No. 223, the Civil Court of Kéniéba found Mr. Abdramane Traore, one of the four suspects, guilty of theft and sentenced him to six months' imprisonment and acquitted the other suspects, including Mr. Aliou Diallo. Subsequently, the latter and the Public Prosecutor filed a case of false accusation against the Applicant before the Criminal Court of Kéniéba.

6. On 22 July 2014, by Judgment No. 146, the Criminal Court convicted the Applicant of the offence of false accusation and sentenced him to six (6) month suspended imprisonment and a fine of One Hundred Seventy-Five million (175,000,000) CFA francs to be paid to Mr Diallo as reparation for moral and material prejudice. The said judgment also stated that SOMILO SA would be fully liable for the above-mentioned pecuniary sentence against its employee-defendant (the Applicant).

7. On 17 April 2014, the Applicant, representing his company, appealed against the judgment No. 223 of 19 November 2013 of the Civil Court of Kéniéba before the Court of Appeal of Kayes.

8. On 16 March 2015, the Court of Appeal of Kayes by Judgment No 25 overturned the decision of the Civil Court of Kéniéba. The court further sentenced Mr. Traore to a fine of Five Hundred Seventy Nine Million Nine Hundred Seventy Nine Thousand and Nine Hundred Sixty-Six (579, 979,966) CFA francs to be paid to SOMILO SA as damages.

9. On 18 and 19 March 2015, the Public Prosecutor with some lawyers representing SOMILO SA filed a cassation appeal before the Supreme Court against the Kayes Court of Appeal's Judgment No. 25 of 16 March 2015. By its judgment N° 77 of 21

November 2016, the Supreme Court dismissed the said appeal as inadmissible.

10. On 8 May 2017, following an appeal filed by the Applicant and SOMILO SA, the Court of Appeal of Kayes by Judgment No. 18, upheld Decision No. 146 of 2014 of the Civil Court of Kéniéba and the amount to be paid by SOMILO SA to Mr Aliou Diallo.

11. On 19 February 2018, following an appeal lodged by the Applicant and SOMILO SA against the judgment of the Court of Appeal of Kayes No. 18 of 8 May 2017, the Supreme Court, by its Judgment No. 21, set aside and annulled the said judgment and, in the interest of justice, referred the case and the parties to the Court of Appeal of Kayes, for the said court to consider the matter with a recomposed bench of judges.

12. On 18 March 2019, by its judgment No. 26, the Court of Appeal of Kayes confirmed Judgment No. 146 of 22 July 2014. The same Court increased the fine to the sum of two hundred million (200,000,000) CFA francs, to be paid as compensation for the damage Mr Aliou Diallo suffered as a result of the offence of false accusation. The said Court further declared SOMILO-SA civilly liable for the Applicant and guarantor of the civil sentence pronounced against him.

13. On 28 November 2019, the Supreme Court dismissed by its judgment No. 101, the appeal of the Applicant and SOMILO-SA against judgment No. 26 of 18 March 2019 of the Court of Appeal of Kayes.

14. On 19 October 2020, the Supreme Court also dismissed by its judgment No. 126, the appeal of the Minister of Justice of the Respondent State seeking a review of judgment No. 26 of 18 March 2019 of the Court of Appeal of Kayes.

15. The Applicant subsequently filed the instant Application before the Court challenging those aforesaid judgments which were ruled against him and SOMILO-SA.

B. Alleged violations

16. In the Application, the Applicant alleges the following violations of his rights:

i. The right to equality before the law and equal protection of the law guaranteed under Articles 3(1) and (2) of the Charter.

ii. The right to a fair trial guaranteed under Articles 7 of the Charter, and Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).[1]

III. Summary of the Procedure before the Court

17. The Application together with a request for provisional measures was received on 25 November 2020.

18. On 7 January 2021, the Application, and the Request for Provisional Measures and the additional evidence were transmitted to the Respondent State. On 11 February 2021, the Registry received and notified the Applicant of the Respondent State's response to the Request for Provisional Measures.

19. On 15 February 2021, the Applicant filed supplementary pleadings, which were transmitted on the same day to the Respondent State for its response within ten (10) days of receipt. The Respondent State did not file the said response.

20. On 23 February 2021, the Applicant filed his reply to the Respondent State's response on the request for provisional measures. On 15 April, 2021, the Respondent State submitted its response to the main Application, which was notified to the Applicant on the same day for his reply, if any.

21. On 10 May 2021, the Applicant submitted his reply to the Respondent State's Response to the Main Application, which was transmitted to the Respondent State on the same day for its information.

22. On 5 October 2021, the Court issued an order to the effect that the request for provisional measures would be considered together with the Application on the merits.

23. On 12 October 2021, the proceedings were closed, and the Parties were duly notified.

IV. Prayers of the Parties

24. The Applicant prays the Court to:

i. Declare that it has jurisdiction to examine the human rights violations mentioned [paragraph 16 above];

ii. Consequently, find that the judgments [of the domestic courts] constitute a violation of the Applicant's human rights, insofar as it violates the Charter, the Constitution of the Respondent State, as

1 The Respondent State became a party to the ICCPR on 16 July 1974.

well as Law No. 01-79 of 20 August 2001 on the Criminal Code of the Respondent State;

iii. Order the Respondent State to cease the said violations, by annulling the aforementioned decisions of conviction, through the prohibition of any mention of the conviction in any official document of the Respondent State;

iv. Order the Respondent State to publish the various judgments in two media outlets.

25. As compensation for the financial, moral and professional harm suffered, the Applicant requests that the Respondent State be ordered to pay reparation for the harm suffered as follows:

i. Ten Million (10,000,000) CFA francs as reparation for the financial loss suffered;

ii. One Hundred and Fifty Million (150,000,000) CFA francs for the moral harm suffered by the Applicant, his wife and two (2) children;

iii. Five Hundred Million (500,000,000) CFA Francs for the professional harm suffered by the Applicant;

iv. Order the impugned parties jointly and severally to pay all costs.

26. Regarding provisional measures, the Applicant requests the Court to:

i. Order the cessation of all enforcement proceedings of the judgments of conviction pending the Court's consideration of the merits of the instant Application;

ii. Order the Respondent State to stay the execution of the judgment of conviction and, more specifically, the seizure of his property for the purpose of the said enforcement;

iii. Request the Respondent State to report back to the Court within one month on the measures taken to stay the execution of the judgment.

27. For its part, the Respondent State prays the Court for the following:

1. As a matter of form, to rule as appropriate;

i. On the merits, find that the Applicant has not proved the alleged violations;

ii. Consequently, dismiss his application and all the claims that follow.

V. Jurisdiction

28. 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.

29. The Court observes that pursuant to Rule 49(1) of the Rules, it

"shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules." [2]

30. On the basis of the above-cited provisions, the Court must preliminarily ascertain its jurisdiction and dispose of objections to its jurisdiction, if there are any. In the instant case, the Respondent State has not raised any preliminary objections. However, the Court should still satisfy itself that it has jurisdiction to examine the Application.

31. As regards material jurisdiction, the Court finds that it has material jurisdiction insofar as the Applicant alleges a violation of Articles 3(1) and (2) and 7 of the Charter to which the Respondent State is a party.

32. With regard to its personal jurisdiction, the Court finds that it has personal jurisdiction insofar as the Respondent State is a party to the Charter the Protocol and has deposited the Declaration provided for in Article 34(6) that allows individuals and Non-Governmental organisations with Observer Status with the African Commission on Human and Peoples' Rights to file cases directly before the Court.

33. With regard to its temporal jurisdiction, the Court observes that all the violations alleged by the Applicant are based on the Kayes Court of Appeal's judgment No. 26 of 18 March 2019, upheld by two judgments of the Respondent State's Supreme Court, namely Judgment No. 101 of 28 November 2019, and Judgment No. 126 of 19 October 2020, that is, after the Respondent State became a Party to the Charter and the Protocol and had deposited the Declaration.

34. The Court thus, holds that it has temporal jurisdiction.

35. With respect to its territorial jurisdiction, the Court notes that the violations alleged by the Applicant occurred in the territory of the Respondent State and therefore, it falls within the territorial domain of the Court's jurisdiction.

36. In view of the foregoing, the Court concludes that it has jurisdiction to consider the instant Application.

VI. Admissibility

37. Article 6(2) of the Protocol provides that "[t]he Court shall rule on the admissibility of cases, taking into account the provisions of Article 56 of the Charter".

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

38. Rule 49(1) of the Rules of Court further provides that "The Court shall ascertain (…) the admissibility of an Application in accordance with the Charter, the Protocol and these Rules".

39. Rule 50(2) of the Rules,[3] which restates in substance Article 56 of the Charter, provides:

> 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 set by the Court as being the commencement of the time limit within which it shall be 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 Constitutive Act of the African Union or the provisions of the Charter.

40. The Court notes that the Respondent State does not contest the admissibility of the Application. Nonetheless, pursuant to Rule 50(1) of the Rules, it shall examine whether the abovementioned admissibility requirements set out in Rule 50(2) of the Rules are fulfilled.

41. The Court notes that the requirement specified in Rule 50(2)(a) of the Rules has been met, as the Applicant has clearly stated his identity.

42. The Court notes that the requests made by the Applicant are intended to protect his rights protected in the Charter. It notes that one of the objectives of the Constitutive Act of the African Union, as set out in Article 3(h), is the promotion and protection of human and peoples' rights. Accordingly, the Court finds that the Application is consistent with the Constitutive Act of the African Union and the Charter, and therefore, finds that it meets the requirement of Rule 50(2)(b) of the Rules.

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

43. The Court further notes that the Application does not contain any words that are disparaging or insulting to the Respondent State, its institutions or the African Union; thus, it complies with the requirement of Rule 50(2)(c) of the Rules.

44. As regards the requirement specified in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated in the mass media.

45. The Court further notes that the requirement to exhaust local remedies under Rule 50 (2)(e) of the Rules must also be satisfied prior to bringing a case before it. However, an exception may be made to this requirement if local remedies are not available, are ineffective, insufficient or if proceedings before the domestic courts are unduly prolonged. Furthermore, the remedies to be exhausted must be ordinary judicial remedies.[4]

46. The Court notes that in the instant case, the Applicant exercised the available remedies, twice before the Supreme Court by Appeal No. 005 of 8 May 2017 against the judgment of the Court of Appeal of Kayes No. 18 of 8 May 2017. The Criminal Division of the Supreme Court by Judgment No. 21 of 19 February 2018 referred the case and the parties before a reconstituted bench of the Court of Appeal of Kayes. Subsequently, the Applicant filed Appeal No. 008 of 20 March 2019 before the Supreme Court on 28 November 2019 against Judgment No. 26 of 18 March 2019 of a reconstituted bench of Court of Appeal of Kayes. The Criminal Division of the Supreme Court by its Judgment No. 101 of November 28, 2019 dismissed the said Applicant's appeal. Finally, on 19 October 2020, the Supreme Court by Judgment No. 126 of 19 October 2020, dismissed the appeal by the Respondent State's Minister of Justice seeking a review of Judgment No. 26 of 18 March 2019.

47. In this regard, the Court notes that in the judicial system of the Respondent State, the appeal before the Supreme Court is the final judicial procedure that the Applicant could have recourse to get redress for his grievances. In accordance with Article 159 of Law No. 2016-046 of 23 September 2016 on the organic law establishing the structure, operating rules of the Supreme Court and the procedure thereof: "Where an appeal in cassation is dismissed, the party who lodged the appeal shall not be eligible

4 *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65, § 56 *Kijiji Isiaga v United Republic of Tanzania*, (merits), (21 March 2018), 2 AfCLR 218, § 45. *Benedicto Daniel Mallya v United Republic of Tanzania.* ACtHPR .Application No. 018/2015, Judgment of 26 September 2019 (merits), § 26.

to file a new appeal against the same judgment." Article 186 of the same law also provides that: "Where an appeal to the Supreme Court has been dismissed, the party who lodged the appeal may no longer appeal to the Supreme Court against the same judgment or ruling, under any pretext and by any means whatsoever ".

48. In view of the foregoing, the Court therefore finds that the Applicant has exhausted all local remedies.

49. Rule 50(2)(f) of the Rules further requires that applications be submitted to the Court within a reasonable time after all local remedies have been exhausted or from the date on which the Court considers that the time limit for bringing the case before it has begun to run. The Court notes in the instant case that, after filing the appeal in cassation against the judgment of the Court of Appeal of Kayes before the Supreme Court, the Supreme Court of the Respondent State rendered its judgment N° 101 of 29 November 2019. The same court then rejected the Minister of Justice's appeal by judgment no. 126 of 19 October 2020. The Applicant then filed the Application before the Court on 25 November 2020.

50. The Court notes that between the date of filing of the Application before it, that is, 25 November 2020 and the date of the last judgment issued in the case by the Respondent State's Supreme Court, that is, Judgment No. 126 of 19 October 2020, one (1) month and six (6) days elapsed. The Court finds that this period is reasonable.

51. Finally, the Court notes that the instant 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, the provisions of the Charter or any legal instrument of the African Union. It therefore meets the requirement of Rule 50(2)(g) of the Rules.

52. In view of the foregoing, the Court finds that the Application meets the admissibility requirements set out in Article 56 of the Charter and Rule 50(2) of the Rules. Accordingly, the Court declares the Application admissible.

VII. Merits

53. The Applicant alleges that the Respondent State violated his right to equality before the law and equal protection of the law and the right to a fair trial.

A. Alleged violation of the right to equality before the law and equal protection of the law

54. The Applicant argues that the judgment acquitting Aliou Diallo[5] violates the principles of a fair trial. He further submits that the libel trial seems to have been "organized" in such a way that the civil party, that is, the Applicant's employer, could not appear before the Justice of the Peace of Kéniéba to testify.

55. He further contends that contrary to all fair trial principles, the procedures that led to his conviction consistently had one thing in common, namely, partiality and the violation of those procedures guaranteeing him equal treatment with Mr. Alou Diallo as well as the right to a fair trial.

56. The Applicant is of the opinion that he is wrongfully being prosecuted on criminal charges. He states that he did not commit the acts with which he is charged. He further contends that he is not the complainant since he only represented his employer, in whose name and on whose behalf the complaint was lodged. He elaborates that it is in the name and on behalf of his employer, which is a legal entity whose Managing Director is mandated to represent it legally, in accordance with the provisions of the Organisation for the Harmonisation of Business Law in Africa (OHADA) Uniform Act on commercial companies and the Economic Interest Grouping (EIG) and not in the name of the Applicant.

57. The Applicant contends that in order to prevent him from appearing to defend his interests before courts, an imaginary summons before the Court of First Instance of Kénièba was "fabricated" giving the impression that he was regularly summoned but deliberately refused to appear. He asserts that he was deprived of his right to a double degree of jurisdiction provided for by international human rights instruments since Judgment No. 25 of 16 March 2015 of the Court of Appeal of Kayes on his employer's appeal expressly recognizes that the fraudulent summons that was served on 27 June 2013 on the Applicant's employer bears the "erroneous date of 13 August 2013" prevented the civil party from appearing in the first instance, not to mention that this squarely constitutes forgery, an offence that has not been prosecuted and punished by the State.

58. The Respondent State considers that the Applicant cannot be unaware that false accusation is an offence provided for and

5 Judgment No. 223 of 19 November 2013 of the Civil Court of Kénièba.

punished by Article 247 of the Criminal Code. It submits that the facts reported by the Applicant, which led to the complaint of false accusation, were assessed by a competent court.

59. The Respondent State further submits that the Applicant has focused on the position of the Court of Appeal of Kayes' Public Prosecutor, who requested his acquittal. In this regard, the Respondent State recalls that the Public Prosecutor is a party to the criminal trial in the same way as the plaintiff and the defendant. While the Applicant can make requests, the decision belongs to the judge, that is, to the court's appreciation, with the understanding that libel procedure is initiated through the complaint of an individual.

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60. 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:

i. Every individual shall be equal before the law;

ii. Every individual shall be entitled to equal protection of the law.

61. The Court notes that Article 247 of the Criminal Code of the Respondent State provides that:

> Whoever makes false accusation verbally or in writing to public authorities against one or more individuals, shall be liable for imprisonment of one month to three years and a fine of twenty-five thousand (25,000) to three hundred thousand (300,000) CFA francs.
>
> False accusation is the intentional spread of false statements, likely to expose someone to the subject of an administrative sanction or to legal proceedings.

62. The Court notes that the case record shows that the courts of the Respondent State examined all the Applicant's grounds of appeal on nine (9) occasions.[6] In its Judgments No. 21 of 19 February

6 Kéniéba Tribunal Judgment No. 223 of 19 November 2013;
Kéniéba Tribunal Judgment No. 146 of 22 July 2014;
Court of Appeal of Kayes Judgment No.°25 of 16 March 2015;
Supreme Court Judgment No. 77 of 21 November 2016;
Court of Appeal of Kayes Judgment No 18 of 8 May 2017;
Supreme Court Judgment No. 21 of 19 February 2018;
Court of Appeal of Kayes Judgment No 26 of 19 March 2019;
Supreme Court Judgment No 101 of 28 November 2019;
Supreme Court Judgment No. 126 of 19 October 2020.

2018, No. 101 of 28 November 2019 and No. 126 of 19 October 2020, the Supreme Court, which is the highest court of the Respondent State, amply examined the Applicant's grievances on both the nature and the elements that constitute an offence of false accusation under the Respondent State's Criminal Code.

63. The Court observes that it was the Applicant who signed the complaint for the theft of the electric cable as a lawyer, in charge of human resources at SOMILO SA, against any perpetrator, accomplices and/or receivers of the theft of the electric wire roll. In the said complaint, it is mentioned that the roll was hidden under bags of lime in the yard of Mr. Aliou Diallo, representing the company EMBC, which at the time had the contract to purchase industrial waste from SOMILO SA.

64. The Court has consistently held that "it is incumbent on the Party purporting to have been a victim of discriminatory treatment to provide proof thereof".[7] In the instant Application, the Applicant has not indicated the circumstances in which he was subjected to wrongful differential treatment, as compared to other persons in a similar situation.[8] In particular, the Applicant has not proven that during his trial before the said courts, he was the victim of manifestly unequal treatment or that he was given unequal protection before the law in relation to SOMILO SA and Mr. Aliou Diallo.

65. The Court further notes that the national courts have dealt extensively with the issues raised and have characterised the facts as false accusation committed with a bad faith on the side of the Applicant. In this regard, the Court finds that there is nothing manifestly erroneous in the assessment of the domestic Courts which would require its intervention. Furthermore, the Court recalls that "general statements to the effect that this right has been violated are not enough. More substantiation is required"[9] .

66. As regards the Applicant's contention that he was not summoned to appear before Kéniéba Tribunal, the Court notes from the record that the Court of Appeal of Kayes established that the summons were issued in the name of the Applicant and delivered

7 *Mohamed Abubakari v United Republic of Tanzania*, (merits), (3 June 2016) 1 AfCLR 599, §153.

8 *Ibid,* § 154.

9 *Alex Thomas v United Republic of Tanzania,* (merits), (20 November 2015) 1 AfCLR 465, § 140.

to him accordingly.

67. The Court therefore concludes that the Respondent State did not violate the Applicant's right to equality and equal protection of the law.

B. Alleged violation of the right to a fair trial

68. The Applicant alleges bias and violation of fair trial procedures insofar as he was convicted on the basis of a denunciation by Mr. Aliou Diallo. He argues that, not a single piece of evidence was produced to confirm that Mr. Aliou Diallo was mentioned in the complaint filed by him on behalf of his company, nor did the Applicant ever named Alliou Diallo a suspect when he was interrogated at the gendarmerie, let alone during the robbery trial.

69. The Applicant contends that he should not have been prosecuted for two reasons; first, because in the instant case, the offence of false accusation as provided for in Article 247 of the Respondent State's criminal code was not constituted either in substance or in intent and, secondly, the Office of Public Prosecutor asserted that it was sparing the Applicant this manifestly wrongful prosecution, given that the Applicant obviously acted in his capacity as an employee, in the name of and on behalf of a legal entity, that is his employer.

70. The Respondent State argues that a court of law is sovereign in assessing the facts and applying the law to them. Thus, the Court of Justice of the Peace of Kéniéba dismissed three defendants, including Aliou Diallo, from the case for complicity of robbery. It further submits that the Applicant does not dispute that the civil party was summoned.

71. The Respondent State contends that the Applicant above all does not provide evidence that the judgment date was unknown to him or his employer. It argues that a summon is a document drawn up by a judicial officer, for the purpose of informing a person that the trial in which he or she is a party is to be held on a certain date. It further submits that in the case in point, a copy of the summons was not placed in the docket of the instant case for the Court and the Respondent to determine whether there was deception regarding the date on which the Court of Kéniéba was to render judgment.

72. The Respondent State further states that the Court cannot rely on the mere fact that the Court of Appeal of Kayes cancelled the summons to find a violation of a principle of criminal procedure. In any case, the Respondent State questions why the Applicant did not file a complaint against the bailiff if he was convinced that the

summons to the civil party was a forgery.

73. The Respondent State also submits that an analysis of the judgments in the docket of the instant procedure shows that the Court of Appeal of Kayes annulled the trial judgment based on the failure to summon SOMILO-SA as civilly liable and guarantor of the pecuniary sentences (Judgment No. 26 of 18 March 2019).

74. Finally, the Respondent State contends that the Court of Appeal of Kayes independently considered that the complaint drafted by the Applicant, even if it was in the name and on behalf of his employer, and this did not anonymise the identity of M. Aliou Diallo and that the latter's acquittal was never challenged. Thus, the Respondent State argues that there is no legal basis for imputing to its domestic courts any violation of a principle of equality of arms in the criminal proceedings.

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75. The Court notes that Article 7(1) of the Charter provides: "Every individual shall have the right to have his cause heard".

76. The Court notes that the right to be heard is an important element of the right to a fair trial. The right entails that individuals are given the opportunity to take their grievances before a judicial or administrative authority for redress, including through appeal to a higher judicial or administrative organ of a State. In criminal proceedings, the right to be heard also requires that an accused is given a fair hearing and conviction should be only based on solid evidence.

77. In the instant case, the Court notes from the records that, starting from the moment of the alleged theft of the wire cable of his employer, the Applicant was able to file his matter, on several occasions, before the competent national courts of the Respondent State. He was also able to appeal against those decisions which he considered unfavourable to him and his company. Furthermore, the domestic courts relied for his conviction on the preliminary investigation reports and his original complaints filed before the gendarmerie of Kéniéba. The Court further notes that the Applicant adduced no evidence to show that the Courts were partial or displayed bias in the proceedings that led to his conviction. The Applicant's allegations that he was not given a fair hearing and that his conviction was not based on

proper evidence thus lacks merit.

78. As regards the Applicant's allegation that the enforcement of the decision requiring his company to pay compensation to Mr Aliou Diallo is pending and that this leaves the possibility of a recourse action against him, the Court notes that the Applicant did not provide any evidence that the said enforcement will affect him or his tenure in the company. In this vein, the Court observes from the analysis of the decisions of the national courts that the common feature in those judgments rendered by the domestic courts is the assertion of joint and several liability of the Applicant and his employer. In fact, the Court of Appeal of Kayes in its judgment of 18 March 2019 clearly stated that it was SOMILO AS, the Applicant's employee, which should pay the compensation to Mr Aliou Diallo. In view of this, the Court finds that the Applicant's contention that he would be obliged to pay compensation to Mr. Diallo lacks merit.

79. Accordingly, the Court concludes that the Respondent State did not violate the Applicant's right to a fair trial.

VIII. Reparations

80. Article 27(1) of the Protocol provides "If the Court finds that there has been violation of a human and peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation of reparation".

81. The Court notes that in the instant case no violation has been found against the Respondent State and therefore there is no reason to order any reparation. Accordingly, the Court dismisses the Applicant's request for reparations.

IX. Costs

82. The Applicant requests that the Court order the Respondent State to pay all costs.

83. The Respondent State has not made submissions on cost.

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84. According to Rule 32(2) of the Rules:[10] "Unless otherwise decided by the Court, each party shall bear its own costs, if any".

85. Considering the circumstances of this case, the Court decides that each Party shall bear its own costs.

X. Operative part

86. For these reasons,

The Court,

Unanimously,

On jurisdiction

i. *Declares* that it has jurisdiction

On admissibility

ii. *Declares* the Application admissible.

On merits

iii. *Finds* that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law under Article 3 of the Charter;

iv. *Finds* that the Respondent State has not violated the Applicant's right to a fair trial under Article 7 of the Charter;

On reparations

v. *Dismisses* the claim for reparations

On costs

vi. *Orders* that each Party shall bear its own costs.

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

Makene v Tanzania (ruling) (2021) 5 AfCLR 764

Application 028/2017, *Layford Makene v United Republic of Tanzania*

Ruling (admissibility), 2 December 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced by the domestic courts of the Respondent State and was serving a 30-year term of imprisonment. In his Application before the Court, the Applicant claimed that the domestic legal processes and outcomes, including his unsuccessful appeals, were in violation of his human rights. The Court upheld the Respondent State's objection to admissibility of the Application and found the matter inadmissible for failure to be filed within a reasonable time.

Jurisdiction (material jurisdiction, 20-22; temporal jurisdiction, 25-27; continuing violation, 25)

Admissibility (exhaustion of local remedies, 39-43; submission within a reasonable time, 46-51)

I. The Parties

1. Layford Makene (hereinafter referred to as "the Applicant") is a Tanzanian national who, at the time of filing the Application, was incarcerated at Uyui Central Prison, Tabora, having been convicted and sentenced to thirty (30) years' imprisonment for the offence of rape. He alleges a violation of his right to non-discrimination as well as his right to fair trial.

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 further 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 this withdrawal had no effect on pending cases as well as all new cases filed before 22 November 2020, which is the day on which

the withdrawal took effect, i.e. one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that in 2006, the Applicant was charged with the offence of rape before the District Court of Kahama. At the end of trial, the District Court convicted the Applicant and sentenced him to thirty (30) years imprisonment and twenty-four (24) strokes of the cane.

4. Aggrieved with the verdict of the District Court, the Applicant appealed to the High Court sitting at Tabora. On 4 November 2008, the High Court dismissed his appeal. Subsequently, the Applicant appealed to the Court of Appeal, sitting at Tabora, which also dismissed his appeal on 29 June 2011.

B. Alleged violations

5. The Applicant alleges a violation of Article 2 of the Charter due to the manner in which the Court of Appeal treated his appeal and Article 7(1)(c) of the Charter due to the fact that he was not accorded legal representation during his trial.

III. Summary of the Procedure before the Court

6. The Application was filed on 14 September 2017 and served on the Respondent State on 27 April 2018.

7. The Respondent State filed its Response on 27 August 2018.

8. The Parties filed the rest of their submissions within the time stipulated by the Court and pleadings were closed on 17 June 2021 and the Parties were duly notified.

IV. Prayers of the Parties

9. The Applicant "… prays this Court to quash both the conviction and sentence pronounced on the Applicant and to order his release".

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) § 38.

10. In his submissions on reparations, the Applicant prays the Court to order the Respondent State to pay him the sum of Forty Eight Million Six Hundred and Forty Thousand Tanzanian Shillings (TZS48 640 000) as compensation. He also prays the Court to order the Respondent State to pay further compensation as reparation for indirect harm suffered, in an amount to be determined by the Court.

11. With regard to jurisdiction and admissibility, the Respondent State prays the Court:

i. To find that the African Court on Human and Peoples' Rights lacks jurisdiction to hear the Application.

ii. To find that the Application does not meet the admissibility requirements provided for under Rule 40(5) of the Rules of Court;

iii. To find that the Application does not meet the admissibility requirements provided for under Rule 40(6) of the Rules of Court

iv. To find that the Application be declared inadmissible

v. To dismiss the Application.

12. Regarding the merits of the Application, the Respondent State prays the Court:

i. To find that the Government of the United Republic of Tanzania has not violated the Applicant's rights provided for under Article 2 of the African Charter on Human and Peoples' Rights;

ii. To find that the Government of the United Republic of Tanzania has not violated the Applicant's rights provided for under Article 3(1), (2) of the African Charter on Human and Peoples' Rights

iii. To find that the Government of the United Republic of Tanzania has not violated the Applicant's rights provided for under Articles 7(1)(c) of the African Charter on Human and Peoples' Rights and Article 10(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

iv. To dismiss the Application for lack of merit.

v. To dismiss all of the Applicant's prayers.

vi. To dismiss the Applicant's request for reparations.

vii. To order the Applicant to bear the costs of the proceedings.

13. In its submissions on reparations, the Respondent State prays the Court:

i. To find that the Respondent State has not violated the African Charter or the Protocol and that the Respondent State Applicant treated the Applicant fairly and with dignity;

ii. To dismiss the request for reparations;

iii. To make any other order that this Court deems appropriate and and necessary under the circumstances of the instant case.

V. Jurisdiction

14. 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.

15. The Court observes that pursuant to Rule 49(1) of the Rules, it "shall conduct preliminary examination of its jurisdiction… in accordance with the Charter, the Protocol and these Rules".[2]

16. Based on the above-cited provisions, the Court must, preliminarily, ascertain its jurisdiction and rule on objections to its jurisdiction, if there are any.

17. In the instant Application, the Respondent State has raised two objections to the Court's jurisdiction in relation to its material and temporal jurisdiction. These will be addressed in turn.

A. Objections to jurisdiction

i. Objection that the Court lacks material jurisdiction

18. The Respondent State contends that the Court does not have material jurisdiction with regard to "the prayers sought by the Application to quash the conviction and sentence." According to the Respondent State, the Court lacks jurisdiction to quash the conviction and sentence of the Applicant and that if it did so, it would be "overturning the decision of the Court of Appeal of Tanzania, the highest court of the land".

19. The Applicant did not make any submissions on this point.

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20. 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

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

the Charter or any other human rights instrument ratified by the Respondent State.

21. The Court notes that the Respondent State submits that, if the Court assumed jurisdiction, it would be acting as an appellate court with respect to a decision rendered by the highest court of Tanzania. The Court recalls its consistent jurisprudence, according to which "…it is not an appellate body with respect to decisions of national courts".[3] The foregoing notwithstanding, and as the Court has previously emphasised, "… 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".[4]

22. The Court thus holds that, in considering the instant case, therefore, it will not be sitting as an appeal court with respect to the decision of the Respondent State's Court of Appeal. In view of the foregoing, the Court dismisses the Respondent State's objection.

ii. Objection alleging that the Court lacks temporal jurisdiction

23. The Respondent State submits that the Court does not have temporal jurisdiction "as the facts alleged by the Applicant are not ongoing." According to the Respondent State, "the Applicant is serving a lawful sentence for committing an offence, in application of the law."

24. The Applicant did not make any submissions on this point.

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25. Regarding temporal jurisdiction, the Court recalls that the same is established insofar as the violations alleged occurred after the Respondent State became a party to the Charter and the

3 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18.

4 *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 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.

Protocol.[5] In respect of continuing violations, the Court further recalls that it has established that their essence is that they automatically renew themselves for as long as the Respondent State does not take steps to remedy them.[6]

26. As pointed out earlier, the Respondent State became a Party to the Charter in 1986 and the Protocol in 2006 and it further deposited the Declaration in 2010. In this context, the Court notes that the violations alleged by the Applicant stem from judicial proceedings which commenced in 2006 and ended in 2011, when the Court of Appeal dismissed the Applicant's appeal.

27. Accordingly, the Court finds that the Respondent State was a Party to both the Charter and the Protocol and had also deposited the Declaration at the time the alleged violation of the Applicant's rights was committed. The Court, therefore, concludes that it has temporal jurisdiction to hear the instant Application and dismisses the Respondent State's objection.

B. Other aspects of jurisdiction

28. The Court observes that the Respondent State does not raise any objection to its personal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled.

29. Regarding its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment, that the Respondent State, on 21 November 2019, deposited with 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 it has held that the withdrawal of a Declaration does not have any retroactive effect and has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or on new cases filed before the withdrawal takes effect.[7] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[8] This Application having been filed before the Respondent

5 *TLS and others v Tanzania* (merits) (14 June 2013) 1 AfCLR 34 *§* 84.

6 See, *Jebra Kambole v Tanzania*, ACtHPR, Application No. 018/2018, Judgment of 15 July 2020 (merits and reparations) *§* 52.

7 *Andrew Ambrose Cheusi v United Republic of Tanzania* §§ 35-39.

8 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

State deposited its notice of withdrawal is thus not affected by it.

30. In view of the foregoing, the Court finds that it has personal jurisdiction to examine the instant Application.

31. Regarding its territorial jurisdiction, the Court notes that it is not disputed that the violations alleged by the Applicant occurred within the territory of the Respondent State. In the circumstances, the Court considers that it has territorial jurisdiction.

32. In view of the foregoing, the Court concludes that it has jurisdiction to hear Application.

VI. Admissibility

33. Article 6(2) of the Protocol provides: "[t]he Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter."

34. Rule 50(1) of the Rules provides: "[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." [9]

35. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of 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 Organisation of African Unity or the provisions of the Charter.

9 Formerly Rule 40 Rules of Court, 2 June 2010.

A. Objections to the admissibility of the Application

36. The Respondent State raises two objections to the admissibility of the Application. The first objection relates to the requirement to exhaust local remedies while the second relates to whether the Application was filed within a reasonable time.

i. Objection based on non-exhaustion of local remedies

37. The Respondent State argues that the Applicant "…had legal remedies provided for in domestic law to address his grievances. The Applicant however did not exercise these remedies as stated above". Specifically, the Respondent State affirms that the Applicant could have applied for legal aid both before the High Court and before the Court of Appeal and that he could also have raised the lack of legal aid as ground for appeal. Given that the Applicant alleges that his trial was delayed, the Respondent State submits that he could have raised this either as a ground for his appeals or for requesting a review of the Court of Appeal's judgment. The Respondent State submits that by failing to avail himself of the aforementioned legal remedies, the Applicant did not exhaust local remedies.

38. The Applicant contends that he exhausted local remedies when the Court of Appeal dismissed his case.

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39. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies. The Court confirms that the rule of exhaustion of local remedies aims at providing States the opportunity to cure human rights violations within their jurisdictions before an international human rights protection body is called upon to determine the State's responsibility for any such violations.[10]

40. The Court recalls that it has held that once criminal proceedings against an applicant have been determined by the highest

10 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 93-94.

appellate court, the Respondent State will be deemed to have had had the opportunity to cure the violations which, according to the Applicant, resulted from the proceedings.[11]

41. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest court of the Respondent State, was determined when that Court rendered its judgment on 29 June 2011. Therefore, the Respondent State had the opportunity to cure the violations allegedly committed during the Applicant's trial in first instance and on appeal.

42. With respect to review, the Court has held that an application for review of the Court of Appeal's judgment, within the Respondent State's jurisdiction, is an extraordinary remedy which applicants are not required to exhaust.[12]

43. Consequently, the Court holds that the Applicant exhausted local remedies as stipulated under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules. Accordingly, it 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

44. The Respondent State submits that "… the Application was not filed within a reasonable period of time." According to the Respondent State, "the Court of Appeal delivered its judgment on 30 June 2011 and the Applicant filed the instant Application …on 14 September 2017 …Thus, a period of seven (7) years and six (6) months elapsed between the date on which the Respondent accepted the competence of the Court and the date on which the Applicant filed his Application with the Court." While conceding that reasonable time is determined on a case by case basis, the Respondent State submits that "the period of seven (7) years and six (6) months cannot be described as reasonable".

45. The Applicant did not make any submissions on this point.

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11 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 76.

12 *Ibid* 78.

46. The Court recalls that Article 56(6) of the Charter and Rule 50(2)(f) of the Rules do not specify any period within which Applicants should seize the Court. Rather, these provisions mention the filing of Applications within a reasonable time from the date when local remedies were exhausted or from the date the Commission is seized of the matter. The Court notes that, in the instant case, the time within which the Application should have been filed must be computed from the date the Court of Appeal dismissed the Applicant's appeal, i.e. 29 June 2011. Since the Application was filed with the Court on 14 September 2017, the period to be considered is six (6) years, two (2) months and sixteen (16) days.

47. In its jurisprudence, the Court has consistently reiterated 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."[13] Some of the factors that the Court considers in determining the reasonableness of time include the personal situation of the Applicant, that is, whether he/she is incarcerated, is a lay person in matters of law, or is indigent, or if the Applicant attempted to exhaust extraordinary remedies.[14]

48. Importantly, the Court has confirmed that it is not enough for an applicant to simply plead that he/she was incarcerated, is lay or indigent, for example, to justify his/her failure to file an Application within a reasonable period of time. As the Court has previously pointed out, even for lay, incarcerated or indigent litigants there is a duty to demonstrate how their personal situation prevented them from filing their Applications timeously. It was because of the foregoing that the Court concluded that an Application filed after five (5) years and eleven (11) months was not filed within a reasonable time.[15] The Court reached the same conclusion in respect of an Application filed after five (5) years and four (4) months.[16] In yet another case, the Court found that the period of five (5) years and six (6) months was also not a reasonable period

13 See, *Norbert Zongo and others v Burkina Faso* (preliminary objections) (25 June 2013) 197 § 121.

14 See, *Christopher Jonas v United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101 § 44.

15 *Hamad Mohamed Lyambaka v United Republic of Tanzania,* ACtHPR, Application No. 010/2016. Ruling of 25 September 2020 (admissibility) § 50.

16 *Godfred Anthony and another v United Republic of Tanzania*, ACtHPR, Application No. 015/2015. Ruling of 26 September 2019 (admissibility) § 48.

of time within the meaning of Article 56(5) of the Charter.[17]

49. The Court recalls that in yet another case, where the Applicant took five (5) years and eight (8) months to file his application, while noting that the Applicant was incarcerated and restricted in his mobility, it, nevertheless dismissed the application for failing to comply with Article 56(5) of the Charter.[18] In this Case, the Court emphasised the need for applicants to demonstrate**,** not just that they were indigent or incarcerated, for example, but also that their personal situation materially affected their ability to file their applications within a reasonable time.

50. In the instant case, the Applicant simply affirms that he exhausted local remedies. Although the Applicant was, at the material time, incarcerated he has provided the Court with neither evidence not cogent arguments to demonstrate that his personal situation prevented him from filing the Application timeously.

51. In the absence of any cogent explanation(s) as to why the Applicant took six (6) years, two (2) months and sixteen (16) days to file the Application, the Court upholds the Respondent State's objection and holds that this Application was not filed within a reasonable period of time as required by Article 56(6) of the Charter, restated in Rule 50(2)(f) of the Rules.[19]

B. Other conditions of admissibility

52. Having found that the Application has not satisfied the requirement in Rule 50(2)(f) of the Rules, the Court need not rule on the Application's compliance with the admissibility requirements set out in Article 56(1), (2), (3), (4), and (7) of the Charter as restated in Rule 50(2)(a), (b), (c), (d) and (g) of the Rules, as these conditions are cumulative. [20]

53. In view of the foregoing, the Court declares the Application inadmissible.

17 *Livinus Daudi Manyuka v United Republic of Tanzania*, ACtHPR, Application No. 020/2015. Ruling of 28 November 2019, (admissibility) § 55.

18 *Yusuph Hassani v United Republic of Tanzania,* ACtHPR, Application No. 029/2015. Ruling of 30 September 2021 (admissibility) § 82-84.

19 Formerly Rule 40(6) Rules of Court, 2 June 2010.

20 *Ghaby Kodeih v Republic of Benin*, ACtHPR, Application No. 006/2020, Ruling 30 September 2021 (jurisdiction and admissibility) § 71 and *Yusuph Hassani v United Republic of Tanzania*, ACtHPR, Application No. 029/2015 Ruling 30 September 2021 (jurisdiction and admissibility) § 86.

VII. Costs

54. The Applicant did not make any prayers in respect of costs.
55. The Respondent State prayed that "the cost of this Application be borne by the Applicant".

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56. The Court notes that Rule 32(2) of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs." [21]
57. In the instant Application, the Court decides that each Party shall bear its own costs.

VIII. Operative part

58. For these reasons,
The Court,
Unanimously:
Jurisdiction
i. *Dismisses* the objections based on jurisdiction;
ii. *Declares* that it has jurisdiction.

Admissibility
iii. *Dismisses* the objection based on non-exhaustion of local remedies;
iv. *Upholds* the objection that the Application was not filed within a reasonable time;
v. *Declares* the Application inadmissible.

Costs
vi. *Orders* each party to bear its own costs.

21 Formerly Rule 30 Rules of Court, 2 June 2010.

Marwa v Tanzania (judgment) (2021) 5 AfCLR 776

Application 014/2016, *Mohamed Selemani Marwa v United Republic of Tanzania*

Judgment, 2 December 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant had been convicted and sentenced by the domestic courts of the Respondent State and was serving a 30-year term of imprisonment. In his Application before the Court, the Applicant challenged the domestic legal processes and outcomes, including his unsuccessful appeals, and alleged that the same were in violation of his human rights. The Court held that the Applicant had not proved any violation of his rights.

Jurisdiction (material jurisdiction, 24-26)

Admissibility (exhaustion of local remedies, 44-48; submission within a reasonable time, 57-67)

Fair trial (quality of evaluation of evidence by domestic court, 87-93; duty to prove allegations, 94)

I. The Parties

1. Mohamed Selemani Marwa (hereinafter referred to as "the Applicant") is a national of Tanzania who, at the time of filing the Applicant was serving a thirty (30) year prison sentence at Butimba Central Prison, Mwanza Region, having been convicted of the offence of armed robbery. He challenges the circumstances of his trial.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), 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. The Court held that this withdrawal has no bearing on pending

cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record before the Court, that the Applicant was arrested on 17 October 2005 and charged on 24 October 2005, before the District Court of Nyamagana at Mwanza, in Criminal Case No. 1122/2005, with the offence of armed robbery. The Applicant was convicted on 2 August 2007 and sentenced to thirty (30) years in prison.

4. The Applicant filed an appeal on 17 October 2008, before the High Court sitting at Mwanza, being Criminal Appeal No. 71/2008, and on 3 August 2009 this appeal was dismissed.

5. On 6 August 2009, the Applicant filed a further appeal to the Court of Appeal of Tanzania sitting at Mwanza, being Criminal Appeal No. 26/2010. In its judgment of 17 September 2012, the Court of Appeal dismissed this appeal in its entirety.

6. On 9 November 2012, the Applicant filed an application for Review of the Court of Appeal's decision, under Miscellaneous Criminal Application No. 7/2014. On 18 September 2014, the Court of Appeal, dismissed the application for review in its entirety.

B. Alleged violations

7. In his Application, the Applicant alleges that the Respondent State violated his rights, notably:

i. The right to non-discrimination, protected by Article 2 of the Charter; and

ii. The right to equality before the law and equal protection of the law, protected by Article 3(1) and (2) of the Charter.

8. In his Reply, the Applicant alleges in addition the violation by the Respondent State of:

i. Its obligations under the Charter, guaranteed under Article 1 of the Charter;

ii. The right to dignity, guaranteed under Article 5 of the Charter;

iii. The right to a fair trial, protected by Article 7 of the Charter;

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.

iv. Peoples' rights to equality, protected by Article 19 of the Charter; and

v. Its duty to guarantee the independence of its Courts, protected by Article 26 of the Charter.

III. Summary of the Procedure before the Court

9. The Application was filed on 3 March 2016 and was served on the Respondent State on 21 April 2016.

10. The Parties filed their pleadings within the time stipulated by the Court.

11. Pleadings were closed on 23 July 2019 and the Parties were duly notified.

IV. Prayers of the Parties

12. In his Application, the Applicant prays the Court "to grant the application and quash the applicant's conviction and set him at liberty under Article 27 of the Protocol".

13. In his Reply, the Applicant prays the Court to order the following measures**:**

i. A Declaration that the respondent state has violated the applicant's rights guaranteed under the African Charter, in particular, Article 1 and 7.

ii. A Declaration that the respondent state violated Articles 2, 3, 5, 7, 19 and 26 of the Charter of the Court.

iii. An order that the Respondent State takes immediate steps to remedy the violations.

iv. An order for reparations.

v. Any other orders or remedies that this Honourable Court shall deem fit.

14. In his submissions on reparations, the Applicant prays the Court to order his acquittal as basic reparation and adding the reparation of payment, to be "considered and assessed by the Court according to the custody period per the national ratio of a citizen income per year in the country."

15. The Applicant further requests the Court to order his acquittal after the Court finds that his conviction and sentence was caused by the prejudice of the Respondent State in failing to avail him of legal assistance.

16. In its Response, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to order the following measures:

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

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

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

iv. That, the Application be declared inadmissible and duly dismissed.

v. That, the costs of this Application be borne by the Applicant.

17. With regard to the merits of the Application, the Respondent State prays the Court to order the following measures:

i. That, the Government of the United Republic of Tanzania did not violate the Applicant's rights provided by Article 2 of the African Charter on Human and Peoples' Rights.

ii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 3(1) and (2) of the African Charter on Human and Peoples' Rights;

iii. That, the Government of United Republic of Tanzania did not violate the Applicant's rights provided under Article 7 of the African Charter on Human and Peoples' Rights;

iv. That, the Applicant's conviction was based on evidence proven beyond reasonable doubt.

v. That, the Applicant's prayers be dismissed.

vi. That, the Application be dismissed in its entirety for lack of merits.

vii. That, the cost of this Application be borne by the Applicant.

V. Jurisdiction

18. 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.

19. The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[2]

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

20. In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

21. In the present Application, the Court notes that the Respondent State has raised an objection to its material jurisdiction.

A. Objection to material jurisdiction

22. The Respondent State argues that the Court is not vested with jurisdiction to adjudicate on this matter. According to the Respondent State, the present Application calls for the Court to sit as an appellate court and adjudicate points of law and evidence already finalised by the Respondent State's highest court, the Court of Appeal of the United Republic of Tanzania. For this reason, the Respondent State prays that the Application should be dismissed.

23. In his Reply, the Applicant states that his Application is not aimed at inviting the Court to sit as an appellate court, rather he is seeking the Court to evaluate in respect of international human and peoples' rights standards, the manner in which the Respondent State's courts examined and determined the evidence before them.

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24. 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.[3]

25. In relation to the objection that it would be exercising appellate jurisdiction, the Court reiterates its position that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[4] At the same time, however, and even though the Court is not an appellate court *vis-à-vis* domestic courts**,** it retains the power to assess the propriety of domestic proceedings against standards set out in international human

3 *Kalebi Elisamehe v United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020, § 18.

4 *Ernest Francis Mtingwi v Malawi* (jurisdiction) §§ 14-16.

rights instruments ratified by the State concerned.[5] In conducting the aforementioned task, the Court does not thereby become an appellate court.

26. In the instant case and in view of the allegations made by the Applicant, which all involve rights protected under the Charter, the Court finds that the said allegations are within the purview of its material jurisdiction.[6] The Court, therefore, dismisses the Respondent State's objection and holds that it has material jurisdiction.

B. Other aspects of jurisdiction

27. The Court observes that no objection has been raised with respect to its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules, it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

28. In relation to its personal jurisdiction, the Court recalls, as stated in paragraph 2 of this judgment that, on 21 November 2019, the Respondent State deposited with 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 it has held that the withdrawal of a Declaration 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, or new cases filed before the withdrawal takes effect.[7] Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date for the Respondent State's withdrawal was 22 November 2020.[8] This Application having been filed before the Respondent State deposited its notice of withdrawal is thus not affected by it.

5 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 § 33; *Werema Wangoko Werema and Another 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.

6 *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.

7 *Andrew Ambrose Cheusi v United Republic of Tanzania,* §§ 35-39.

8 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562 § 67.

29. In light of the above, the Court finds that it has personal jurisdiction to examine the present Application.

30. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicant arose after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains convicted on the basis of what he considers an unfair process.[9] Given the preceding, the Court holds that it has temporal jurisdiction to examine this Application.

31. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicant happened within the territory of the Respondent State. In the circumstances, the Court holds that it has territorial jurisdiction.

32. In light of the above, the Court holds that it has jurisdiction to determine the present Application.

VI. Admissibility

33. 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".

34. In line with Rule 50(1) of the Rules,[10] "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."

35. The Court notes that Rule 50(2) of the Rules, which in substance restates the provisions of 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

9 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71-77.

10 Formerly Rule 40 of the Rules of Court, 2 June 2010.

that this procedure is unduly prolonged;

f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; 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 Constitutive Act of African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

36. 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 relates to whether the Application was filed within a reasonable time.

B. Objection based on non-exhaustion of local remedies

37. The Respondent State argues that since the provisions of the Charter alleged to have been violated are also guaranteed under the Constitution of the Respondent State, the Applicant should have first instituted a constitutional petition under the Basic Rights and Duties Enforcement Act.

38. The Respondent State contends that the Applicant's failure to institute a constitutional petition at the High Court is evidence that the Applicant has not afforded the Respondent State an opportunity to redress the alleged wrong within the framework of its domestic legal system before it is dealt with at the international level.

39. The Respondent State submits that it is premature for the Applicant to have instituted this matter before this Court before having exhausted the available local remedy of instituting a constitutional petition at the High Court of the Respondent State for the enforcement of the alleged violation of his rights.

40. For these reasons, the Respondent State submits that the Application does not meet the admissibility requirement under Rule 40(5) of the Rules of Court[11] and must accordingly be declared inadmissible.

41. In his Reply, the Applicant disputes the submission by the Respondent State. According to the Applicant, he was not

11 Corresponding to Rule 50(2)(e) of the Rules of 25 September 2020.

compelled by the procedure under the Basic Rights and Duties Enforcement Act to institute a constitutional petition, because he had already applied and appeared before the Court of Appeal and his appeal was dismissed in its entirety by the highest court of the Respondent State. The Applicant submits that to turn to the High Court which is a lower court than the Court of Appeal is illogical.

42. The Applicant further submits that this procedure is an extra-ordinary remedy which he is not bound to exhaust.

43. The Applicant therefore claims that the Respondent State's objection is baseless and should be dismissed in its entirety.

***

44. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2) (e) 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.[12]

45. The Court recalls that it has held that, in so far as the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[13]

46. In the instant case, the Court notes that the Applicant's appeal before the Court of Appeal, the highest judicial organ of the Respondent State, was determined when that Court rendered its judgment on 17 September 2012. Therefore, the Respondent State had the opportunity to address the violations allegedly arising from the Applicant's trial and appeals.

47. Regarding the Respondent State's contention that the Applicant ought to have filed a constitutional petition, the Court has previously held that the constitutional petition within the Respondent State's

12 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

13 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 76.

judicial system is an extraordinary remedy which applicants are not required to exhaust before filing their applications before this Court.[14]

48. In light of the foregoing, the Court dismisses the Respondent State's objection based on the non-exhaustion of local remedies.

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

49. The Respondent State contends that since the Application was not filed within a reasonable time after the local remedies were exhausted, the Court should find that the Application has failed to comply with the provisions of Rule 40(6) of the Rules.[15]

50. The Respondent State recalls that the judgment of the Court of Appeal was delivered on 17 September 2012 and that this Application was filed on 3 March 2016, that is three (3) years and six (6) months after the Court of Appeal decision.

51. Relying on the African Commission on Human and Peoples' Rights' decision in *Majuru v Zimbabwe*,[16] the Respondent State argues that the time limit established for filing applications is six (6) months after exhaustion of local remedies and therefore the Applicant ought to have filed the Application within six months after the Court of Appeal's judgment.

52. The Respondent State further submits that the Applicant has not stated any impediment which caused him not to lodge the Application within six (6) months.

53. For these reasons the Respondent State submits that the admissibility requirement provided by Rule 40(6) of the Rules[17] has not been met and the Application should be declared inadmissible and duly dismissed.

54. The Applicant alleges that he filed his Application within a reasonable time after his appeal for a review of the Court of Appeal's judgment was dismissed in its entirety on 18 September 2014.

55. The Applicant further submits that according to its Rules, the Court needs to weigh what constitutes a reasonable time to file the Application according to the circumstances of the case at hand. In

14 *Alex Thomas v Tanzania* (merits) §§ 63-65.

15 Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

16 African Commission on Human and Peoples' Rights Communication 308/05 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

17 Corresponding to Rule 50(2)(f) of the Rules of 25 September 2020.

the instant case, the Applicant claims not to be a lawyer and that he is a layman, indigent and a prisoner who was not represented by any lawyer at any stage and that he did not benefit from any counsel or advice after the decision of the Respondent State's highest court.

56. In these circumstances, the Applicant submits that his Application complies with the admissibility requirements.

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57. The Court notes that neither the Charter nor the Rules specify the exact time within which Applications must be filed, after exhaustion of local remedies. Article 56(6) of the Charter and Rule 50(2)(f) of the Rules merely provide that Applications must be filed "…within 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".

58. The Court has held "…that the reasonableness of the time frame for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[18]

59. From the record before the Court, the Applicant exhausted local remedies on 17 September 2012, being the date, the Court of Appeal delivered its judgment on his final appeal. Thereafter the Applicant filed the instant Application before this Court on 3 March 2016.

60. The Court therefore must assess whether this period of three (3) years, five (5) months and fifteen (15) days is reasonable in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

61. The Court has previously considered the personal circumstances of applicants and found that, incarcerated, lay and indigent applicants being restricted in their movements, would have little or no information about the existence of the Court.[19]

62. From the record before it, the Court notes that the Applicant has been incarcerated since 2005, and that he claims to be lay and

18 *Norbert Zongo and Others v Burkina Faso* (preliminary objection) (25 June 2013) 1 AfCLR 197 § 121.

19 *Christopher Jonas v Tanzania* (merits) § 54; *Amiri Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344 § 83; *Armand Guehi v Tanzania* (merits and reparations) § 56; *Werema Wangoko v Tanzania* (merits and

indigent, which is not contested by the Respondent State.

63. The Court further notes that the Applicant filed an application for review of the Court of Appeal's judgment which was dismissed in its entirety by the Respondent State's Court of Appeal on 18 September 2014.

64. The Court has considered as a relevant circumstance, the fact of filing of an application for review before the Court of Appeal of the Respondent State. In such cases, the Court held that it was reasonable for applicants to await the outcome of that review process. The Court therefore considered that this was an additional factor that may justify the delay by those applicants in filing their applications before this Court.[20]

65. Accordingly, the Court finds that it was reasonable for the Applicant to wait for his application for review of the Court of Appeal's judgment to be determined and that this contributed to him not filing the Application earlier than he did.

66. In the Court's view, all the foregoing circumstances constitute reasonable justification for the time the Applicant took to file the Application after the judgment of the Court of Appeal on 17 September 2012. The Court therefore finds that the period of three (3) years, five (5) months and fifteen (15) days the Applicant took to file the Application is reasonable in terms of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.

67. In light of the above, the Court, dismisses the Respondent State's objection to the admissibility of the Application based on the alleged failure to file the Application within a reasonable time.

D. Other conditions of admissibility

68. 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 are reiterated in sub-rules 50(2)(a), (b), (c), (d), and (g) of the Rules, are not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

69. Specifically, the Court notes that, according to the record, the condition laid down in Rule 50(2)(a) of the Rules is fulfilled since the Applicant's identity is clear.

reparations) § 49*; Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 55.

20 *Armand Guehi v Tanzania (*merits and reparations) § 56; *Werema Wangoko v Tanzania*, (merits and reparations) §§ 48-49.

70. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union, as stated in Article 3(h) thereof, is the promotion and protection of human and peoples' rights. Therefore, the Court considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

71. The Court further 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 50(2)(c) of the Rules.

72. Regarding the condition contained in Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

73. Finally, with respect to the requirement laid down in Rule 50(2)(g) 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, or the provisions of the Charter.

74. 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 50 of the Rules, and accordingly finds it admissible.

VII. Merits

75. The Applicant alleges that the Respondent State's courts convicted him on the basis of evidence which was not proven in accordance with the standards required by law, that is, beyond reasonable doubt. The Applicant contends that this is contrary to Article 3(1) and (2) of the Charter.

76. The Applicant alleges that his conviction merely relied on his identification at the scene of the incident. He also states that the prosecution's evidence did not establish the intensity and location of the source of light at the scene of the crime, the distance between the Applicant and observers of the incident, the size of the area (room) of the scene and the description of the Applicant.

77. The Applicant further claims that the evidence has fundamental contradictions and inconsistencies. According to him, these matters confirm that the case was not proven beyond reasonable doubt.

78. The Respondent State disputes the Applicant's allegation and states that he was convicted based on evidence proven beyond reasonable doubt.

79. The Respondent States submits that there were no contradictions and inconsistencies in the prosecution's evidence and that the High Court held that the differences in the evidence were minor. The Respondent State argues that the evidence against the Applicant was "watertight and proven beyond reasonable doubt". The Respondent State also submits that these elements were duly considered by the Court of Appeal which also found no ground for concern. Therefore, the Respondent State submits that this allegation lacks merit and should be dismissed.

80. The Respondent State further claims that the Applicant was properly identified at the scene of the crime. Specifically, the Respondent State states that the evidence on record clearly shows that the prosecution witnesses PW1 and PW3 knew the Applicant before the incident, recognised his voice and his face at the scene of the crime as they were in close proximity to the Applicant for a considerable time during the incident while light was on, and that these two witnesses gave a clear description of the Applicant right after the said incident.

81. The Respondent States further states that the Applicant was not discriminated as he was afforded equal treatment and protection of the law as stipulated under Article 3(1) and (2) of the Charter.

82. For these reasons, the Respondent State claims that the Applicant's allegation lacks merit and should be dismissed.

83. In his Reply, the Applicant maintains that he was not properly identified at the scene of the crime by PW1 and PW3. The Applicant further states that the evidence of PW3 was expunged by the trial court and that the Applicant was acquitted on his second count in relation to the alleged armed robbery involving PW3.

84. The Applicant alleges that PW1 and PW3 failed to name their assailant at the earliest possible moment. He claims that there was a contradiction in the evidence, whereby the witnesses allegedly first reported the crime to the street chairman (PW2), while from the record it appears that the street chairman (PW2) had stated to have been awoken and found a lot of people at his house, who informed him about the armed robbery.

85. The Applicant also submits that he was not arrested while wearing a black long coat and hat, nor were these clothing items tendered in the Respondent State's court as exhibits despite the prosecution relying on them as part of the basis for his identification.

86. He also avers that no independent witnesses from the various persons gathered at the scene of the crime were called to testify.

According to the Applicant, the Respondent State's prosecution was aware that if they brought any of them to testify, they would exonerate the Applicant.

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87. The Court has held in its previous jurisprudence that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings. [21]

88. The above notwithstanding, the Court can, in evaluating the manner in which domestic proceedings were conducted, intervene to assess whether domestic proceedings, including the assessment of the evidence, was done in consonance with international human rights standards.

89. The record before this Court shows that the prosecution called four (4) witnesses. The Court further notes that the Respondent State's domestic courts considered that the prosecution witnesses PW1 and PW3 identified the Applicant as their neighbour with whom they share a common street chairman (PW2), that the prosecution witnesses recognised the Applicant's voice and his face at the scene of the crime and that they were in close proximity to the Applicant for a long time during the incident.

90. The Court also takes notice that the Respondent State's trial and appellate courts took into consideration that a light was on at the material time, that the two witnesses gave a clear description of the Applicant and that he was named and identified at the earliest possible opportunity.

91. The Court further notes that the appellate courts considered the differences in the prosecution's evidence and concluded that these differences were not of any nature to undermine the finding that the Applicant was positively identified.

92. The Court observes that the question of identification of the Applicant was considered exhaustively by the trial and appellate courts and that the Applicant did not provide proof that the manner in which these courts evaluated this evidence revealed manifest

21 *Kijiji Isiaga v Tanzania* § 65.

errors requiring this Court's intervention.

93. Accordingly, the Court holds that the Applicant has failed to prove that the Respondent State violated his rights and therefore dismisses his allegation.

94. Furthermore, the Court notes that the Applicant has not made specific submissions nor provided evidence that the Respondent State violated its obligations under the Charter (Article 1 of the Charter), that he was discriminated against (Article 2 of the Charter), that he was not treated equally before the law or did not enjoy equal protection of the law (Article 3 of the Charter), that his right to dignity was violated (Article 5 of the Charter), that his fair trial rights were violated (Article 7 of the Charter), that his peoples' rights to equality were violated (Article 19 of the Charter), or that the Respondent State violated its duty to guarantee the independence of its Courts (Article 26 of the Charter).

95. In these circumstances, the Court finds that the Respondent State did not violate Articles 1, 2, 3, 5, 7, 19 and 26 of the Charter.

VIII. Reparations

96. The Applicant prays the Court to order his acquittal as basic reparation and adding the reparation of payment, to be "considered and assessed by the court according to the custody period per the national ratio of a citizen income per year in the country."

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

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98. 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."

99. Having found that the Respondent State has not violated any of the Applicant's rights, the Court dismisses the Applicant's prayers for reparations.

IX. Costs

100. The Applicant did not make any submissions on costs.
101. The Respondent State prayed that costs be borne by the Applicant.

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102. Pursuant to Rule 32 of the Rules of Court "unless otherwise decided by the Court, each party shall bear its own costs".
103. The Court finds that there is nothing in the instant case warranting it to depart from this provision.
104. Consequently, the Court orders that each party shall bear its own costs.

X. Operative part

105. 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 to the admissibility of the Application.
iv. *Declares* the Application admissible.

On merits
v. *Finds* that the Respondent State has not violated Articles 1, 2, 3, 5, 7, 19 and 26 of the Charter.

On reparations
vi. *Dismisses* the Applicant's prayers for reparations.

On costs
vii. *Declares* that each party shall bear its own costs.

Munyandilikirwa v Rwanda (admissibility) (2021) 5 AfCLR 793

Application 023/2015, *Laurent Munyandilikirwa v Republic of Rwanda*

Ruling, 2 December 2021. Done in English and French, the English text being authoritative.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: MUKAMULISA

The Applicant, a human rights defender and a national of the Respondent State brought an Application alleging that the Respondent State unlawfully obstructed and interfered with the operations of the independent human rights organisation which he headed. He alleged further that the Respondent State engineered his removal from office and forced him into exile. He also claimed that the conduct of the Respondent State violated his human rights. The Court held that the matter was inadmissible for failure to exhaust local remedies.

Procedure (criteria for decision in default, 41-46)

Admissibility (action based on news from mass media, 63; exhaustion of local remedies, 73-93)

Dissenting Opinion: BEN ACHOUR

Admissibility (exhaustion of local remedies, 15-16)

Dissenting Opinion: KIOKO

Admissibility (exhaustion of local remedies, 2-3)

I. Parties

1. Laurent Munyandilikirwa (hereinafter referred to as "the Applicant") is a national of Rwanda, a human rights lawyer and former president of the Rwandan League for the Promotion and Defence of Human Rights (hereinafter referred to as "LIPRODHOR"). The Applicant alleges that he served LIPRODHOR as President from December 2011 to July 2013 when he was forced to go into exile after having been 'illegally' ousted from his position. He challenges the lawfulness of the removal of the Board of LIPRODHOR.

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 has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 1 March 2017.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant states that he is the former President of LIPRODHOR, a human rights organisation that has been monitoring the human rights situation and conducting advocacy on human rights issues in Rwanda since 1994.

4. The Applicant alleges that over the years, various forms of administrative obstacles, threats and arbitrary arrests of its leaders, and active interference by the Respondent State's government have constrained the ability of LIPRDODHOR to carry out its independent human rights work. He avers that, notwithstanding the persistent repression, under his leadership, LIPRODHOR remained committed to operating as an autonomous organisation.

5. The Applicant contends that, on 21 July 2013, an informal consultation ('secret meeting') was called to remove the duly appointed leadership of LIPRODHOR, including the Applicant, because they were considered as being too critical of the human rights violations allegedly committed or tolerated by the Respondent State. He submits that the participants at the informal consultation proceeded to conduct a vote, in violation of LIPRODHOR's internal bylaws and Rwandan legislation governing national NGOs. This vote, resulted in the removal from office of the "independent, legitimate leadership of LIPRODHOR and unlawfully elected a new executive committee comprising government sympathizers who would no longer be critical of the Respondent State's observance of its human rights obligations".

6. The Applicant asserts that, despite the highly irregular and unlawful nature of the alleged vote to oust the legitimate board of directors of LIPRODHOR, those who attended the 'secret meeting'

1 *Ingabire Victoire Umuhoza v United Republic of Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 562, § 67, *Laurent Munyandilikirwa v Republic of Rwanda,* Application No. 023/2014, Order on Withdrawal of Declaration of 03 June 2016, § 10.

decided to qualify it as a General Assembly meeting. He further states that the Rwandan Governance Board, the government body responsible for civil society oversight and recognition, immediately approved the 'illegal' ousting of the legitimate board of directors.

7. The Applicant alleges that on 22 July 2013, in compliance with LIPRODHOR's statute and national laws, he and other members of the legitimate board submitted a complaint to LIPRODHOR's internal dispute resolution organ regarding the purported General Assembly meeting and "election" of the new and 'illegitimate' board of directors.

8. The Applicant contends that, on 23 July 2013, LIPRODHOR's internal dispute resolution organ issued a decision which was favourable to him. According to the Applicant, the organ decided that the 21 July 2013 'secret meeting' was held in contravention of the organisation's statute, and further declared that the legitimate board should continue to operate as the functioning leadership of LIPRODHOR.

9. The Applicant avers that, despite the internal dispute resolution organ's decision and prior notice to the Rwandan Governance Board on 24 July 2013, the latter sent a letter to LIPRODHOR stating its official recognition of the new, unlawfully elected "board of directors" as the functioning board of LIPRODHOR.

10. According to the Applicant, on 24 July 2013, the Respondent State's police prevented a previously scheduled event organised by LIPRODHOR's 'legitimate board', which was intended to provide information on the process of stakeholder submissions before the Universal Periodic Review of the United Nations Human Rights Council.

11. In response, on 25 August 2013, the Applicant and other members of LIPRODHOR's 'legitimate' board filed a complaint before the *Tribunal de Grande Instance* of Nyarugenge (hereinafter referred to as "the Tribunal") against the 'illegitimate and unlawfully' elected board. They sought a temporary injunction against the transfer of power to the new board and the reopening of LIPRODHOR's bank accounts, which were closed upon the request of the newly elected border members. On 2 September 2013, the Tribunal rejected the request for the temporary injunction indicating that the bank accounts were already reopened and thus, the request for temporary injunction had no merit.

12. The Applicant asserts that a hearing on the merits of the afore-mentioned complaint at the Tribunal was held on 6 March 2014. Despite being an action for injunctive relief, and while the Rwandan Governance Board acted swiftly to approve the

'illegitimate' board within three (3) days of the illegal vote, roughly nine (9) months elapsed between the time the legitimate board filed their complaint before the Tribunal and when it heard the case on the merits.

13. On 8 August 2014, the Tribunal dismissed the case on a technicality, holding that the complainants should have named "LIPRODHOR" as the defendant rather than the members of the 'illegitimate and unlawfully elected' board. The Tribunal also found that the Applicant and the legitimate board members did not obtain a decision from the internal dispute resolution organ before filing a complaint with the court.

14. Dissatisfied with the decision of the Tribunal, the Applicant and other members of the LIPRODHOR's 'legitimate board' appealed to the High Court of Kigali on 24 February 2015.

15. On 23 March 2015, the High Court reversed the Tribunal's finding that the case was not submitted against the right defendant. However, according to the Applicant, despite the evidence establishing the contrary, the High Court erroneously upheld the Tribunal's decision on the second ground of appeal that the complainants did not attempt to resolve the conflict through LIPRODHOR's internal dispute resolution organ.

16. The Applicant alleges that the filing of the matter before the national judiciary was followed by numerous death threats against him and other members of the legitimate board, as a continuation of previous harassments related to their human rights work. As a result, the Applicant claims that, fearing for his own safety and the safety of his family, he fled the country on 3 March 2014; yet, the death threats continued to the date of filing the Application.

17. The Applicant asserts that on 21 November 2014, other members of the 'legitimate board' were arbitrarily arrested while they were planning for an extraordinary session scheduled for 23 November 2014 to review the status of LIPRODHOR. Although members of 'legitimate board' were subsequently released pursuant to an order of the High Court of Kigali, the Mayor of Nyarugenge District issued a Communiqué prohibiting the extraordinary session from being held.

18. The Applicant states that, even though the organisation remains under the name of LIPRODHOR, it no longer operates autonomously, as the unlawfully elected leadership of LIPRODHOR has censored the organisation's human rights work that is deemed to be too critical of the Respondent State's lack of observance of its human rights obligations.

B. Alleged violations

19. The Applicant alleges the violation of his:

i. right to freedom from discrimination (Article 2);

ii. right to equality and equal protection of the law (Article 3),

iii. right to a fair trial (Article 7);

iv. right to receive information and freedom to express his opinions (Article 9);

v. right to freedom of association and assembly (Article 10); and

vi. right to work; and by failing to prevent and sanction private violations of human rights through independent and impartial courts, the Respondent State has violated Articles 1, 2, 3, 7, 9, 10, 11, 15 and 26 of the Charter.

III. Summary of the Procedure before the Court

20. The Application was filed on 23 September 2015 and served on the Respondent State on 4 December 2015.

21. On 23 August 2016, the Registry notified the Parties of the close of pleadings and drew their attention to Rule 63 of the Rules[2] regarding the submission of additional evidence and judgment in default, respectively.

22. On 9 September 2016, Mr. Maina Kiai, the UN Special Rapporteur on Freedom of Association and Assembly (hereinafter referred to as the "UN Special Rapporteur") sought leave to participate in the proceedings as *amicus curiae*.

23. On 24 September 2016, the legal representative of LIPRODHOR requested that LIPRODHOR should also be heard before the Court reaches a decision that might be prejudicial to the organisation.

24. At its 43rd Ordinary Session, held from 31 October to 18 November 2016, the Court decided to re-open pleadings and to accept the requests of the UN Special Rapporteur to participate in the case as *amicus curiae* and to hear LIPRODHOR.

25. The UN Special Rapporteur, filed his submissions on merits on 5 January 2017.

26. On 16 January 2017 the legal representative of LIPRODHOR filed his submissions on behalf of LIPRODHOR which, together with the submissions of the UN Special Rapporteur, were transmitted to the Parties on 25 January 2017, for their information.

27. On 30 January 2017, the Respondent State notified the Court of its decision to discontinue participating in the proceedings in this

2 Formerly, Rule 55 of the Rules of Court, 2 June 2010.

Application and it did not file its response to the Application.

28. On 2 October 2018, the Registry sent a letter to the Respondent State again drawing its attention to Rule 63 of the Rules concerning judgment in default.

29. On 22 October 2018, the Applicant filed his submissions on reparations and this was transmitted to the Respondent State on 6 November 2018 with a request that it file its Response within thirty (30) days of receipt. The Respondent State did not file its Response.

30. Pleadings were closed on 2 March 2019 and the parties were duly notified.

31. Having considered the submissions of the Applicant and that of LIPRODHOR, the Court decided to seek clarifications from parties on grey areas and outstanding issues and on 25 August 2020, the Registry sent to the Applicant and LIPRODHOR a notice with a set of issues to respond to within twenty (20) days of receipt of the same. By the same notice, the Applicant was requested to file evidence in support of his claims for reparations.

32. On 17 September 2020, the Applicant requested to be sent documents supposedly filed by LIPRODHOR and to be granted extension of time to respond to the request for clarification of grey areas that the Court had sent him on 25 August 2020.

33. On 12 October 2020, the Registry notified the Applicant of the grant of twenty (20) days' extension of time. The Registry also informed the Applicant that LIPRODHOR had not filed some annexes that it listed in its submissions.

34. On 11 November 2020, the Applicant filed his Reply to the issues for which clarification had been sought, together with additional documents (exhibits) as proof of his claims for reparations.

35. Neither the Respondent State nor LIPRODHOR filed any response to the requests for clarifications on outstanding issues despite reminders to do the same.

IV. Prayers of the Parties

36. The Applicant prays the Court to order the Respondent State to:

i. Publicly recognize and accept responsibility for the violations perpetrated against the Applicant and the legitimate board of LIPRODHOR, giving effect to the decision of the Court and issuing a public apology;

ii. Nullify the respective decisions of the High Court and Rwanda Governance Board denying rightful relief to the Applicant and the legitimate board;

iii. Immediately and fully restore the Applicant and the legitimate board to their rightful positions of leadership in LIPRODHOR prior to their unlawful ousting;

iv. Immediately initiate effective and impartial investigation into the threats and acts of intimidation against the Applicant and the legitimate board, in order to ensure that those responsible are brought to justice;

v. Issue reparations, including prompt and adequate compensation to the Applicant, the legitimate board and their representatives including material damage, psychological and social services material damages, loss of opportunities, and moral damage, among others that the Court should see fit;

vi. Publicly condemn threats and other forms of intimidation against independent human rights defenders and recognize the importance of their action in favour of the promotion and protection of human rights and fundamental freedoms;

vii. Reform the domestic legal framework regulating Non-Governmental Organizations in order to remove impermissible restrictions on the rights to freedom of association, assembly, and expression;

viii. To take immediate and all necessary steps to strengthening independence of the judiciary;

ix. Initiate a broader legal reform process with the purpose of creating an enabling environment for civil society in the country; and

x. Take all other necessary steps to redress the alleged human rights violations.

37. The Applicant further prays the Court to order the Respondent State to:

i. Reinstate the lawful LIPRODHOR 'legitimate board';

ii. Guarantee his safe return from exile;

iii. Investigate ongoing threats and intimidation against him and other members of the 'legitimate board' of LIPRODHOR;

iv. Nullify the respective decisions of the High Court and of the Rwandan Governance Board that denied his rightful relief to him and the legitimate board of LIPRODHOR;

v. Pay monetary compensation in the amount of 1,082, 515 euros for the material prejudice to himself and his family members relating to costs associated with fleeing Rwanda, lost earnings, legal fees, travel expenses as well as for material loss incurred by LIPRODHOR;

vi. Pay 55,000 euros for moral prejudice suffered by the Applicant as result of psychological distress and anguish, reputational harm, disruption of his social and occupational life;

vii. Pay 55,000 euros for moral prejudice suffered by his wife as well as 75,000 euros in compensation for the moral prejudice that his three children have suffered;

viii. Pay 200,000 euros to the other members of the LIPRODHOR's rightful board members and staff;

ix. Pay compensation to LIPRODHOR for the moral damage inflicted through the illegal takeover of its board and the ensuing disparagement of its human rights work;

x. Publication of the Court's judgments and its summary within six months, effective from the date of the judgment in English or French;

xi. Make a public apology and official acknowledgment of wrongdoing;

xii. Issue official declaration restoring the dignity and reputation of LIPRODHOR, the Applicant and other legitimate board members and acknowledge the role of human rights defenders;

xiii. Include an accurate account of this case and information about the importance of civil society organisations in educational materials throughout Rwandan society;

xiv. Guarantee non-repetition by condemning threats and intimidation against independent human rights defenders;

xv. Undertake legal reforms by amending laws governing the freedom of association, assembly and expression; and

xvi. Improve judicial independence and ensure all proceedings thereof abide by due process standards.

V. *Amicus curiae* submissions

38. The UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, intervening as *amicus curiae*, filed submissions on the merits. The Special Rapporteur recalls that the Respondent State is a full member of the United Nations and thus, is bound by the human rights obligations set out in regional and universal human rights treaties to which it is a party as well as by the interpretations and standards expounded by the implementing bodies enforcing the treaties.

39. The Special Rapporteur submits that the right to freedom of association protects a group of individuals or legal entities collectively involved in an act to express, pursue or defend common interests. In this regard, citing international human rights jurisprudence,[3] he asserts that the Respondent State has

3 *Ouranio Toxo and others v Greece*, App. No. 74989101, Eur. Cl H.R., para.43 (Oct. 20, 2005), Human Rights Committee, CCPR General Comment No. J1 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), CCPR/C/2liRev Li Add.l3, tl8 (May 26.20014); *Civil Liberties Organisation (in respect of Bar Association) v Nigeria,* Comm. No 101/93, Afr. Comm'n H.P.R., para.l4-16 (Mar.22, 1995); see also *International Pen and Others (on behalf of Saro-Wira) v Nigeria*, Comm. 137194,139194,154/96 and161197, Afr. Comm'n H.P.R., para.107-10 (Oct. 31, 1998), *Tanganyika Law Society, the Legal and*

dual obligations: first, a positive obligation to create an enabling environment, in law and in practice, in which individuals freely exercise their right to freedom of association; and second, a negative obligation to refrain from interference with the rights guaranteed. The Special Rapporteur further states that any restrictions to freedom of association must be provided by law; serve a legitimate aim such as collective security, morality, common interest and the rights and freedoms of others; and be necessary and proportionate towards that aim sought within a democratic society.

VI. On the default of the Respondent State

40. Rule 63 (1) of the Rules provides that:

> 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 decision 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.

41. The Court notes that the afore-mentioned provision sets out three cumulative conditions for the passing of a decision in default, namely: i) the default of a party; ii) the notification to the defaulting party of both the application and the documents pertinent to the proceedings; and iii) a request made by the other party or the court acting on its own motion.[4]

42. With regard to the first requirement of default by a party, the Court notes that the Application was served on the Respondent State on 1 August 2018 and several reminders and extensions of time to file its response were sent, including on 5 February 2016, 14 July 2020, and 20 March 2017. The Respondent State communicated its decision to withdraw from participating in the proceedings on 9 February 2017 alleging lack of impartiality and independence of the Court. The Respondent State's attention was drawn to Rule 63 of the Rules concerning judgment in default, on 20 March 2017 and 2 October 2018 but it still failed to file its response within the prescribed time. It is clear, therefore, that the Respondent State decided not to defend itself.

Human Rights Centre v Tanzania, Application 009/2011; *Reverend Christopher R. Mtikila v Tanzania*, Application 011/2011 (Consolidated Applications), Judgment, 14 June 2013 (2013) 1 AfCLR 34.

4 *Léon Mugesera v Republic of Rwanda*, ACtHPR, Application No. 012/2017, Judgment of 27 November 2020 (merits and reparations), § 14.

43. On the application for a judgment in default, the Court notes that, in his response to the withdrawal of the Respondent State's Declaration under Article 34 (6) of the Protocol, the Applicant prayed the Court to proceed with the examination of the Application, in effect, requesting the Court to enter a judgment in default.

44. Lastly, with regard to the notification of the defaulting party, the Court notes that the Application was filed on 23 September 2015. It further notes that from 1 August 2018, the date of service of the Application on the Respondent State to 2 March 2019, the date of close of the pleadings, the Registry transmitted to the Respondent State all the pleadings and documents pertinent to the proceedings that were submitted by the Applicant and the *amicus curiae, the UN Special Rapporteur on the rights to Freedom of peaceful assembly and association.* Furthermore, the Registry, upon the request of the Court, apprised the Respondent State of all other additional documents that were filed after close of pleadings. In this regard, the Court also notes from the record the proof of delivery of those notifications.

45. The Court thus concludes that the Respondent State was duly notified of the Application and the pertinent documents and the failure to file its Response is as a result of its decision not to participate in the proceedings.

46. The required conditions having thus been fulfilled; the Court concludes that it may rule by default.[5]

VII. Jurisdiction

47. 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.

48. The Court further observes that in terms of Rule 49(1) of the

5 *African Commission on Human and Peoples' Rights v Libya* (merits) (3 June 2016) 1 AfCLR 153, §§ 38-43. See also *Léon Mugesera v Republic of Rwanda*, ACtHPR, Application No. 012/2017, Judgment of 27 November 2020 (merits and reparations), § 18. See *also Yusuph Said v United Republic of Tanzania*, ACtHPR, Application 011/2019, Judgment of 30 September 2021 (jurisdiction and admissibility), § 18.

Rules:[6] "[t]he Court shall conduct preliminary examination of its jurisdiction and the admissibility…."

49. 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.

50. The Court notes that, even though nothing on the record indicates that it lacks jurisdiction, it is obligated to determine if it has jurisdiction to consider the Application.

51. Regarding its material jurisdiction, the Court has previously held that Article 3(1) of the Protocol gives it the power to examine an Application provided that it contains allegations of violations of rights protected by the Charter or any other human rights instruments ratified by the Respondent State.[7] The present Application contains allegations of violations of several rights and freedoms guaranteed under Articles 1, 2, 3, 7, 9, 10, 11, 15 and 26 of the Charter. Accordingly, the Court has material jurisdiction to examine this Application.

52. Concerning its personal jurisdiction, the Respondent State is a Party to the Protocol and deposited the Declaration prescribed under Article 34 (6) of the Protocol, which enabled the Applicant to file this Application, pursuant to Article 5 (3) of the Protocol. The Court recalls in this regard that, the withdrawal of the Declaration does not have any retroactive effect and it also has no bearing on matters pending prior to the deposit of the instrument of withdrawal of the Declaration, as is the case with the present Application.[8] Accordingly, the Court has personal jurisdiction

53. The Court holds that it has temporal jurisdiction on the basis that the alleged violations were committed in 2013, after the Respondent State became a party to the Charter, that is, on 21 October 1986, to the Protocol on 25 May 2004 and deposited the Declaration required under Article 34 (6) thereof on 22 January 2013

54. The Court also holds that it has territorial jurisdiction given that the facts of the case occurred in the territory of the Respondent State.

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

7 *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465, § 45; *Oscar Josiah v United Republic Tanzania,* ACtHPR, Application No. 053/2016, Judgment of 28 March 2019 (merits)*,* § 24. *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, §§ 35-36; *Godfred Anthony and Anthony Ifunda Kisite v United Republic of Tanzania*, ACtHPR, Application No. 015/2015, Ruling of 28 September 2019 (jurisdiction and admissibility), §§ 19-21.

8 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540, § 67; *Laurent Munyandilikirwa v Rwanda (*Order on Withdrawal of Declaration), § 10.

55. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VIII. Admissibility

56. 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."

57. Pursuant to 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."

58. Rule 50 (2) of the Rules, which in essence restates the provisions of Article 56 of the Charter, provides that:

> 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,
> 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 Court 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 Constitutive Act of the African Union or the provisions of the Charter.

59. The Applicant submits that his Application fulfils all admissibility conditions specified under Rule 50 of the Rules. Despite the lack of submissions by the Respondent State on the admissibility of the Application, the Court will undertake an assessment of compliance with these conditions, based on the record before it.

60. Regarding identity, the Applicant's identity is known. Accordingly, the Court holds that the Application fulfils the requirement of Rule 50 (2)(a) of the Rules.

9 Formerly Rule 40 Rules of Court, 2 June 2010.

61. On the compatibility of the Application with the Constitutive Act and the Charter, the Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the African Union stated in Article 3(h) of its Constitutive Act is the promotion and protection of human and peoples' rights and that nothing on the file indicate that the Application is incompatible with the two instruments. Therefore, the Court holds that the Application meets the requirement of Rule 50(2)(b) of the Rules.

62. Regarding the language used, there is nothing in the Application that would, be considered as disparaging or insulting within the terms of Rule 50 (2) (c) of the Rules. Accordingly, the Court holds that the Application complies with Rule 50 (2) of the Rules.

63. On the nature of evidence used, the Court observes from the record that the Applicant cited some media reports. However, the Application was not exclusively based on such reports, which the Applicant mentions only to shed some light on the general human rights situation in the Respondent State.[10] The Court therefore holds that the Application fulfils the requirement of Rule 50(2)(d) of the Rules.

64. With respect to Rule 50(2)(e) of the Rules on exhaustion of local remedies, the Applicant avers that he first sought to get redress for his grievances at the Internal Dispute Resolution Mechanism of LIPRODHOR, then filed his matter at the *Tribunal de Grande Instance* and dissatisfied with the decision of the Tribunal, he later appealed to the High Court. According to the Applicant, based on Article 28 of Rwanda's Organic Law Determining the Organisation, Functioning and Jurisdiction of the Supreme Court, the Applicant and the legitimate board did not have a basis for appealing their case from the High Court to the Supreme Court.

65. The Applicant argues that even though he went through the motions of obtaining a final decision from the Respondent State's judiciary, he should not be required to exhaust local remedies as local remedies were not available, effective, and sufficient. The Applicant asserts that despite domestic remedies being formally available, evidence suggests that they are in reality not available, effective, and sufficient in practice, in particular when a case involves an individual or entity known to be critical of the government, because the political atmosphere robs the judiciary of its independence. The Applicant cites reports of Human Rights Watch and Freedom House to substantiate this.

10 *Frank David Omary and Others v United Republic of Tanzania* (admissibility) (2014) AfCLR 358, § 96.

***

66. The Respondent State, having failed to participate in the proceedings, did not respond to these allegations.

67. The lawyer representing LIPRODHOR disputes the Applicant's submissions. He asserts that, contrary to Article 27 of Organic Law N° 04/2012 of 9 April 2012, the Applicant prematurely took his matter to the *Tribunal de Grande Instance* on 25 July 2013 despite the fact that the Internal Dispute Resolution Committee of LIPRODHOR had summoned the Applicant and other members of the 'lawful board' and the 'unlawful board' to a hearing on the matter on 2 August 2013. According to the lawyer for LIPRODHOR, pursuant to Article 19 of the Statute of LIPRODHOR, the decision of the Committee would be final only after it is referred to the General Assembly and the latter made its own decision.

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68. The Applicant contests the submissions of the lawyer for LIPRODHOR and contends that, the Dispute Resolution Committee has made a final determination as far as his issues are concerned and his decision to take his matter to the tribunal on 25 July 2013 was legitimate and complied with the provisions of Article 19 of the Statute and Article 27 of Organic Law N° 04/2012 of 9 April 2012. He states that members of the 'unlawful board' convened the illegal meeting of 21 July 2013 alleging that the Applicant and other members of the lawful Board decided to withdraw LIPRODHOR from the Coalition League for the Defence of Human Rights (hereinafter referred to as "CLADHO") without consulting the General Assembly.

69. The Applicant asserts that the Committee's summoning of illegal board members for a meeting on 2 August 2013 was just to hear members of the 'unlawful board' about their underlying dispute relating to the said withdrawal from CLADHO, not with regard to the issue of leadership of LIPRODHOR. He contends that the Committee did not summon the Applicant or other members of the legitimate Board. According to the Applicant, the Committee had already determined with finality the dispute over who rightfully controlled leadership of LIPRODHOR, and this question

was no longer an issue and was not on the agenda for any further proceedings to take place at the 2 August 2013 meeting. Accordingly, he submits that he did not need to wait until the said date for him to seize the competent court.

70. As regards the purported requirement that decisions of the Dispute Resolution Committee should be submitted to the General Assembly, the Applicant contests the submissions of the lawyer for LIPRODHOR and avers that the General Assembly did not need to adopt or endorse the decision of the Dispute Resolution Committee for it to be final. The Applicant alleges that the lawyer's argument seems to be based on the French version of Article 19 of the LIPRODHOR Statute, which appears to require that the decision of the Internal Dispute Resolution Committee should be submitted to the General Assembly for adoption before the same is taken to the competent Rwandan Court.

71. The Applicant submits that both the English and Kinyarwanda versions of Article 19 of the LIPRODHOR Statute do not have such a requirement of adoption by the General Assembly. In this regard, he argues that both LIPRODHOR's common practice as well as national law and practice determine acceptance of Kinyarwanda as the controlling text of the Statutes. The Applicant also submits that Article 8 of the Rwandan Constitution identifies Kinyarwanda as the national language and the first official language while English and French are listed as other official languages.

72. In addition, the Applicant contends that, nowhere in LIPRODHOR's Statute is the General Assembly given any role or power in relation to the Internal Dispute Resolution Committee save that the Committee's members are elected by the Assembly. Consequently, he asserts that the Court should not rely on the French version alone to introduce an additional requirement into Article 19 of the LIPRODHOR Statute.

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73. The Court notes that the rule of exhaustion of local remedies aims at providing States the opportunity to deal with human rights violations within their respective jurisdiction before an international human rights body is called upon to determine the

State's responsibility for the same.[11]

74. The Court has previously held that this requirement can be dispensed with only if local remedies are not available, they are ineffective or insufficient or the domestic procedure to pursue them is unduly prolonged.[12] The Court has also emphasised that an Applicant is only required to exhaust ordinary judicial remedies.[13]

75. In the instant case, the Court takes note of the Applicant's submissions that following the 'unlawful' takeover of the LIPRODHOR's leadership and transfer of power to the 'illegitimate' board, he and other members of the 'legitimate board' filed a complaint on 25 July 2013 and sought a temporary injunction at the *Tribunal de Grande Instance* of Nyarugenge. On 2 September 2013, the Tribunal rejected the request for a temporary injunction.

76. It is evident from the record that a hearing of the case was held on 6 March 2014 and that on 8 August 2014, the Tribunal dismissed the case on a technicality. The Tribunal held that the complainants should have named "LIPRODHOR" as the defendant rather than the members of the 'illegitimate and unlawfully elected' board. The Tribunal also found that the Applicant and the legitimate board members did not obtain a decision from the internal dispute resolution organ of LIPRODHOR before filing a complaint with the court.

77. The Court notes that following the decision of the Tribunal, the Applicant and the other members of the 'legitimate Board' appealed to the High Court on 24 February 2015. On 23 March 2015, the High Court dismissed the case, on the ground that the complainants did not attempt to resolve the conflict through LIPRODHOR's internal dispute organ, as required by law.

78. The Court notes that both the Tribunal and the High Court based their decisions on Article 27 of Organic Law N° 04/2012 of 9 April 2012, Governing National Non-governmental organisations,

11 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.

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 (2013) 1 AfCLR 197, § 84. *Alex Thomas v Tanzania* (merits), § 64. See also *Wilfred Onyango Nganyi and Others v United Republic of Tanzania (merits)* (2016) 1 AfCLR 507, § 95.

13 *Alex Thomas v Tanzania* (merits), § 64. See also *Wilfred Onyango Nganyi and 9 Others v Tanzania* (merit), § 95; *Oscar Josiah v Tanzania* (merits and reparations), § 38; *Diocles William v United Republic of Tanzania*, ACtHPR, Application No. 016/2016, Judgment of 21 September 2018 (merits and reparations), § 42.

which prescribes that:

> Any conflict that arises in the national non-governmental organisation or among its organs shall be first resolved by the organ charged with conflict resolution….
>
> In case that procedure fails, the concerned party may file a case to the competent court of Rwanda.

79. The Court takes note of the Applicant's contention that he has complied with this provision and adduced Minutes of the Internal Dispute Resolution Committee of LIPRODHOR dated 23 July 2013. In the said Minutes, the Committee found that the meeting of 21 July 2013 in which the Applicant and other Board Members were removed was not in accordance with the bylaws of LIPRODHOR and concluded that:

> …we consider that the means followed to resolve the problem have not respected the statutes and the Rules of the League. We also believe that the body which is the Board of Directors is empowered to take the decision to continue working with CLADHO or to withdraw, on the understanding that it represents the members who elected it.
>
> For these reasons, we seek:
>
> 1. The summon of the member who chaired the meeting of 21/07/2013, namely Mr. Gahutu Augustin and the members elected to different administrative positions during this meeting, on 02/08/2013
> 2. We request the Board of Directors elected by the General Assembly at the meeting of 9-10/12/2011 to continue to discharge its functions
> 3. To forward the conclusions of the Committee to the Members, after hearing both parties, for adoption by the General Assembly of LIPRODHOR.

80. In view of this, the key issue for determination is whether the Applicant could be said to have finalised the dispute resolution process through the Internal Dispute Resolution Committee before he took his matter to the competent court, in compliance with the provisions of Article 27 of Organic Law N° 04/2012 of 9 April 2012 and in compliance with Article 19 of the Statute of LIPRODHOR.

81. The Court observes that in accordance with the aforementioned provision of Article 27 of Organic Law N° 04/2012 of 9 April 2012, ordinary courts of the Respondent State cannot entertain cases relating to disputes occurring in a national Non-Governmental Organisation unless such disputes are first addressed by the internal dispute resolution organ of the organisation in question. In this regard, the Applicant also agrees that the resolution of the disputes in the internal dispute resolution organ is a prerequisite to access "the competent court of Rwanda" in terms of Article 27. The Applicant's assertion however is that he did so and met this

requirement before he filed his case at the *Tribunal de Grande Instance* on 25 July 2013.

82. The Court also notes that Article 19 of the Statute of LIPRODHOR is written in three languages: English, French and Kinyarwanda. The English and Kinyarwanda versions are identical but the French version has an additional clause that gives a role to the General Assembly of LIPRODHOR in the process of a dispute resolution. The relevant part of the provision is reproduced in French and translated to English below:

> Tout litige qui surgit au sein de la ligue entre les organes ou entre les membres et la ligue doit être réglé préalablement par l'organe de résolution des conflits avant d'être soumis à l'Assemblée générale.
>
> À défaut de règlement par cet organe, la partie intéressée peut soumettre le litige à la juridiction rwandaise compétente après décision de l›Assemblée générale.
>
> *English translation*
>
> Any dispute arising within the league between the organs or between the members and the league must first be settled by the conflict resolution body before being referred to the General Assembly.
>
> In the event the dispute is not settled by this body, the party concerned may refer the dispute to the competent Rwandan court after a decision of the General Assembly. (Translation by the Court)

83. The Court observes that the Statute does not contain any provision dealing with potential divergences between the different versions and similar to laws enacted in the Respondent State, uses the three languages each being equally authoritative and authentic. In this regard, the Court notes that although it makes Kinyarwanda a national language, Article 8 of the 2013 (as amended in 2015) Constitution of the Respondent State makes Kinyarwanda, English and French official languages, thereby making all the three equally authoritative.

84. As far as the practice of LIPRODHOR is concerned, it may indeed be the case that Kinyarwanda is generally used as the default language of communication and business. Nonetheless, it appears from the Minutes of the Internal Dispute Resolution Committee, which the Applicant himself relies on for his Application, that the Committee used the French version of the Statute. In the conclusions reproduced in paragraph 81 above, the Committee held that it sought "to forward the conclusions of the Committee to the Members, after hearing both parties, for adoption by the General Assembly of LIPRODHOR".[14] It can be inferred from this

14 Emphasis added.

that the Committee considered adoption of the conclusions by the General Assembly as a necessary phase in the dispute resolution mechanism that must be followed before a dispute is referred to the competent Rwandan Court in accordance with Article 19 of the Statute of LIPRODHOR.

85. In this regard, the Applicant has not claimed that the decision that he obtained from the Internal Dispute Resolution Committee had been submitted to the General Assembly for adoption, before he took his case to Tribunal on 25 July 2013. In fact, as indicated above, the Committee had already summoned members of the new Board for a meeting on 2 August 2013, "to hear both parties" and submit its decision to the General Assembly for adoption. It is therefore clear that the Applicant took his matter to the "competent court" before the process in the internal dispute resolution committee was finalised. It is for this same reason that both the *Tribunal de Grande Instance* and the High Court decided to dismiss his case at its preliminary stage, without making a determination on the merits.

86. Regarding the Applicant's contention that the General Assembly is not mandated in the Statute of LIPRODHOR to adopt the decisions of the Internal Dispute Resolution Committee, the Court notes that under Article 9 of the Statute, the provision setting out the powers and functions of the General Assembly, the Assembly has the power, among others "to elect and dismiss…members of the Board of Directors…". It is evident from the substance of the Applicant's submissions that, his Application relates to the dismissal of the former members of the Board of Directors including the Applicant himself. His matter therefore falls within or at least, relate to the power of the General Assembly as regards the dismissal of members of the Board of Directors.

87. The Court has also considered the Applicant's assertion that the meeting of 2 August 2013 was to resolve the underlying sources of disputes in the organisation relating to the withdrawal of LIPRODHOR from CLADHO, not on who has the right to control leadership. Nevertheless, the Court does not find anything in the Minutes of the Internal Dispute Resolution Committee suggesting that the meeting of 2 August 2013 would only consider the issue of LIPRODHOR's withdrawal from CLADHO. The Committee clearly stated that it sought to "hear both parties" on the matter without specifying that the hearing will only cover the purported underlying issues.

88. Furthermore, the Court takes note of the Applicant's contention that, though he had accessed the national courts, he should not be required to do so as the Respondent State's remedies are

not properly available, effective, and sufficient as a result of the lack of independence of the Courts. The Court has considered the various reports of human rights organisations and bodies on the Respondent State that the Applicant filed to substantiate his contention.

89. The Court however reiterates its position as established in previous cases, "[i]t is not enough for the Complainants to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences"[15] to justify their exemption from the obligation to exhaust the local remedies. In the final analysis, "it is incumbent on the Complainant to take all necessary steps to exhaust or, at least, attempt the exhaustion of local remedies".[16] Resultantly, the Applicant's general contention in this regard lacks merit.

90. Finally, the Court notes that despite his doubts on the effectiveness of the remedy available in national courts, the Applicant has attempted to access the Courts of the Respondent State. Nonetheless, the Respondent States' Courts were not able to make determination on the merits of his case because of the Applicant's own failure to meet the requirement of exhaustion of the internal dispute resolution mechanism of LIPRODHOR. In this regard, the Court finds nothing manifestly erroneous in their assessment requiring its intervention or from the information available on record, for it to draw a different conclusion.

91. The Court also underscores that a mere attempt to access ordinary judicial remedies is not sufficient to meet the requirement of exhaustion of local remedies within the terms of Rule 50 (2) (e) of the Rules. This is particularly important when an applicant fails to fulfil procedural or substantive legal requirements to access domestic courts, which is the case in the instant Application.

92. In view of the foregoing, the Court holds that the Applicant has not exhausted local remedies as required under Rule 50(2)(e) of the Rules.

93. The Court recalls that, the conditions of admissibility of an Application filed before it are cumulative, such that if one condition

15 *Peter Joseph Chacha v United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, § 143; *Frank David Omary v United Republic of Tanzania* (admissibility) (28 March 2014) AfCLR 358, § 127 . See also ACHPR, Communication No. 263/02: *Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v Kenya*, in 18th Activity Report July-December 2004, para 41;ACHPR, Communication No.299/05 *Anuak Justice Council v Ethiopia*, in 20th Activity Report January – June 2006, § 54.

16 *Peter Joseph Chacha v Tanzania* (admissibility), § 144.

is not fulfilled then the Application becomes inadmissible.[17] In the present case, since the Application has failed to fulfil the requirement under Article 56(6) of the Charter which is restated in Rule 50(2)(f) of the Rules, the Court, therefore, finds that the Application is inadmissible.

IX. Costs

94. The Applicant prays the Court to order the Respondent State to pay for the costs of the Application.
95. The Respondent State did not file a Response.

***

96. The Court notes that Rule 32(2) of its Rules[18] provides that "unless otherwise decided by the Court, each party shall bear its own costs."
97. Therefore, the Court decides that each Party shall bear its own costs.

X. Operative part

98. For these reasons,
The Court,
Unanimously
On Jurisdiction
i. *Declares* that it has jurisdiction
By a majority of Eight (8) for, and Two (2) against, Justice Rafaâ BEN ACHOUR and Justice Ben KIOKO dissenting

On admissibility
ii. *Declares* that the Application is inadmissible

17 *Mariam Kouma and Ousmane Diabaté v Republic of Mali* (jurisdiction and admissibility) (21 March 2018) 2 AfCLR 246, § 63; *Rutabingwa Chrysanthe v Republic of Rwanda* (jurisdiction and admissibility) (11 May 2018) 2 AfCLR 373, § 48; *Collectif des anciens travailleurs ALS v Republic of Mali*, ACtHPR, Application No. 042/2015, Judgment of 28 March 2019 (jurisdiction and admissibility), § 39; *Dexter Johnson v Ghana*, ACtHPR, Application No. 016/2017. Ruling of 28 March 2019 (jurisdiction and admissibility) § 57.

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

On costs

iii. *Orders* each Party to bear its own costs

***

Dissenting Opinion: BEN ACHOUR

1. I do not agree with the Court's near-unanimous decision that found Application No. 023/2015 *Laurent Munyandilikirwa v Republic of Rwanda* inadmissible on the ground that the Applicant failed to exhaust local remedies.

2. Contrary to the near-unanimous ruling of the Court, I am convinced that the Applicant exhausted all normal, available, effective legal and other remedies. (**I**). Besides, the Court relied on a provision in the Respondent State's law in one of the three versions of Article 19 of the Rwandan League for the Promotion and Defence of Human Rights (LIPRODHOR), to the exclusion of the other two equally authentic versions of the said law in English and Kinyarwanda (**II**).

I. The Applicant exhausted all local remedies

3. It should be noted that this Application was filed in response to a decision taken on 21 July 2013 based on a vote at a "consultation meeting", which meeting was subsequently qualified as a General Assembly of the Rwandan League for the Promotion and Defence of Human Rights (LIPRODHOR), and as a result of which LIPRODHOR's Board of Directors, chaired by the Applicant since 1994, was ousted and replaced by another Board.[1]

4. The Applicant challenged the decision before several bodies. In accordance with the provisions of the law on NGOs[2] and LIPRODHOR statute, he first referred the matter to the LIPRODHOR's internal dispute resolution body, complaining

1 Officially, the "consultation meeting" was convened to discuss LIPRODHOR's decision to leave the Rwandan Collective of Leagues and Associations for the Defence of Human Rights (CLADHO), an umbrella organization of eight human rights associations including LIPRODHOR.

2 Organic Law No. 04/2012 of 9 April 2012 on the organization and functioning of national non-governmental organizations.

about a vote held during a consultation described as a General Assembly and the election of a new Board of Directors (a). As LIPRODHOR failed to comply with the decisions of the internal dispute resolution body, he turned to the Respondent State's courts for redress (B).

a. Referral to LIPRODHOR's internal dispute resolution body

5. The law on NGOs provides:

> "Any conflict that arises in the domestic non-governmental organisation or among its organs shall be first resolved by the body in charge of conflict resolution….
>
> In case this procedure fails, the concerned party may file a case to the competent court of Rwanda".[3]

6. The Applicant submits that, in accordance with the provisions of Article 27 of the above-mentioned Law on NGOs and LIPRODHOR statute, he referred the matter to LIPRODHOR's internal dispute resolution body on 22 July 2013.

7. That same day, the Applicant and members of the ousted board of directors filed an application with the Rwandan Governance Office in which they denounced "the illegal meeting wrongly described as a General Assembly and the illegitimacy of the newly elected Board of Directors".[4]

8. On 23 July 2013, LIPRODHOR's internal dispute resolution body issued a decision in favour of the Applicant, in which it held that the 21 July secret meeting (described as a General Assembly) was held in contravention of the organization's statute, and that the board of directors chaired by the Applicant should continue to operate as the functioning leadership of LIPRODHOR.[5]

9. However, and in spite of the internal dispute resolution organ's decision, and in spite of the decision having been notified, the

3 *Idem*.

4 Paragraph 34 of the Initial Application.

5 In the said Minutes, the Committee found that the meeting of 21 July 2013 contained the following:
…we consider that the means followed to resolve the problem have not respected the statutes and the Rules of the League. We also believe that the body which is the Board of Directors is empowered to take the decision to continue working with CLADHO or to withdraw, on the understanding that it represents the members who elected it.
For these reasons, we seek:
The summon of the member who chaired the meeting of 21/07/2013, namely Mr. Gahutu Augustin and the members elected to different administrative positions during this meeting, on 02/08/2013.

Rwandan Governance Board, the government body responsible for the oversight and registration of civil society,[6] on 24 July 2013 decided to ignore the findings of the internal dispute resolution body and hastily sent a letter to LIPRODHOR, by which letter it officially approved the ouster of the Board of Directors chaired by the Applicant, and legally recognized the new Board of Directors elected on 21 July 2013 as LIPRODHOR's functioning board .

10. That was the first essential phase of the recourse to local remedies. It was fully accomplished.

b. Referral to the Respondent State's courts

11. In accordance with Article 27(2) of the law, which provides "[i]n case that procedure fails, the concerned party may file a case with the competent court of Rwanda" and, faced with a legal stalemate, on 25 August 2013, the Applicant and other members of the LIPRODHOR's ousted Board filed an application before the *Tribunal de Grande Instance* of Nyarugenge against the board elected on 21 July 2013 and installed at the head of LIPRODHOR by the Rwandan Governance Office. The Applicants prayed the Court to place an injunction on the installation of a new Board of Directors, and to order the unfreezing of LIPRODHOR's banks accounts which had been frozen at the request of the newly elected Board of Directors.

12. On 8 August 2014, the *Tribunal de Grande Instance* of Nyarugenge dismissed the complaints on the ground that the Applicants should have named LIPRODHOR as the defendant rather than the members of the newly elected Board and that the Applicant and his members did not obtain a decision from the internal dispute resolution body before seizing the court.

13. On 24 February 2015, the Applicants lodged an appeal before the High Court of Kigali. On 23 March 2015, the High Court partially upheld the judgment of the *Tribunal de Grande Instance* of Nyarugenge, based on the fact that the co-applicants had failed to attempt to resolve the dispute through LIPRODHOR's internal

We request the Board of Directors elected by the General Assembly at the meeting of 9-10/12/2011 to continue to discharge its functions.
To forward the conclusions of the Committee to the Members, after hearing both parties, for adoption by the General Assembly of LIPRODHOR.

6 Article 5(1) of Law No. 56/2016 of 16/12/2016 establishing the Rwandan Governance Office determining its responsibilities, organisation and functioning: « 1 regularly monitor service, delivery and compliance with the principles of good governance in the public and private sectors as well as in non-governmental organizations".

dispute resolution body.

14. The Applicant's experience before LIPRODHOR's internal dispute resolution body and before the judicial authorities shows that he exhausted the available internal remedies provided by law. However, the Court found otherwise, wrongly agreeing with the position of LIPRODHOR's counsel who argued that the Applicant seized the *Tribunal de Grande Instance* prematurely, and this, after the decision of the internal dispute resolution body, he should have referred the matter to LIPRODHOR's General Assembly. Apart from the fact that it did not exist Recourse to this General Assembly, is by definition ineffective as the Assembly had already endorsed the *fait accompli.*

15. Unfortunately, this Court based its decision on an uncertain text of questionable legality, that is, the French version of Article 19 of the LIPRODHOR Statutes which provides: "[in the absence of a settlement by this body, the concerned party may submit the dispute to the competent Rwandan court after a decision is rendered by the General Assembly". The Court affirms that: "Nonetheless, the Respondent States' Courts were not able to make determination on the merits of his case because of the Applicant's own failure to meet the requirement of exhaustion of the internal dispute resolution mechanism of LIPRODHOR".[7] The Court further held that: "a mere attempt to access ordinary judicial remedies is not sufficient to meet the requirement of exhaustion of local remedies within the terms of Rule 50 (2) (e) of the Rules. This is particularly important when an applicant fails to fulfil procedural or substantive legal requirements to access domestic courts, which is the case in the instant Application".[8] The fact that the domestic courts did not raise this issue is not binding on the Court.

16. I am of the view that the Court did not need to take into consideration the provisions of LIPRODHOR's statute because the text, which is strictly internal to the NGO, does not have to add any procedural requirement to a statutory provision that is clear. The Organic Law simply requires that only one condition be met before recourse to the competent jurisdictions, i.e., recourse to the internal dispute resolution body. The Applicant met all legal provisions. The internal legal text of an organization cannot in any way contradict the law and cannot institute proceedings not provided for by lawmakers. That Article 19 of Article 19 of

7 § 90 of the Judgment.

8 § 91 of the Judgment.

the Statute of LIPRODHOR was taken into consideration is questionable from a second point of view, which I set out briefly below.

17. Moreover, it makes little sense to insist that the Applicant return before the General Assembly, that is, before the same body that decided to oust the Board of Directors chaired by the Applicant, because that body had refused to comply with the decision of the internal dispute resolution organ and had sanctioned the Applicant and his counsel. This is an ineffective remedy which, according to the Court's jurisprudence.[9] does not even need to be attempted.

II. Consideration of the French version of Article 19 of LIPRODHOR's statute

18. The Court ignored the Organic Law on NGOs and relied on a clause in Article 19 of the French version of the LIPRODHOR statute that does not appear in the English and Kinyarwanda versions. In this regard, "The Court also submits that Article 19 of the LIPRODHOR statute exists in three languages: English, French and Kinyarwanda. The English and French versions are identical but the French version has an additional clause that gives a role to the General Assembly of LIPRODHOR's in the process of a dispute resolution. The relevant part of the provision is produced in French:

> Tout litige qui surgit au sein de la ligue entre les organes ou entre les membres et la ligue doit être réglé préalablement réglé par l'organe de résolution des conflits avant d'être soumis à l'Assemblée Générale.
>
> À défaut de règlement par cet organe, la partie intéressée peut soumettre le litige à la juridiction rwandaise compétente après décision de l'Assemblée Générale.

19. The Court however observes that the Statute does not contain any provision dealing with potential divergences between the different versions and, like similar laws enacted in the Respondent State, uses the three languages, all equally authentic.

20. If all the versions are equally authentic, then the question that arises is why did the Court give precedence to the French version to the detriment of the other two versions of the Statute?

21. To answer this question, the Court uses a reasoning which, in my view, lacks probative force. Indeed, the Court refers to a

9 See for example: ACtHPR. ***Sébastien Germain Marie Aïkoue Ajavon v Republic of Benin***, Application No. 065/2019, Judgment of 29 March 2021, § 75 where "The Court emphasises that the local remedies required to be exhausted must be available, effective and adequate".

hypothetical linguistic practice within LIPRODOHR, disregarding the provisions of the Rwandan constitution on the equality of languages. According to the Court, and "as far as the practice of LIPRODHOR is concerned, it may indeed be the case that Kinyarwanda is generally used as the default language of communication and business. Nonetheless, it appears from the Minutes of the Internal Dispute Resolution Committee, which the Applicant himself relies on for his Application, that the Committee used the French version of the Statute".[10]

22. Moreover, instead of diving into the analysis of this linguistic practice of LIPRODOHR, the Court could have given the Applicant the benefit of the doubt owing to the contradictions between the versions of the Statute.

23. In addition to the arguments in the first section, the Court could have based its decision on the two most favourable versions, which moreover, are in accordance with the law or, at any rate, it could have noted that, given the contradiction in the texts and considering their legal nature, it would concentrate only on legal provisions which do not give rise to any doubt.

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24. By finding Application No. 023/2016 inadmissible, the Court leaves the questions raised by the Application on freedom of association unanswered. This is highly regrettable.

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10 § 84 of the Judgment.

Dissenting Opinion: KIOKO

1. Pursuant to the provisions of Rule 70 (2) of the Rules of Procedure of the Court, I hereby declare that I do not share the decision of the majority of the Court that "Declares that the Application is inadmissible" for non- exhaustion of local remedies.

2. I have also read the dissenting opinion of Judge Rafaâ Ben Achour on the rejection by the Court of the Application, and I share his opinion that the Applicant exhausted local remedies since he was not required to seize the General Assembly of LIPRODHOR, a human rights NGO operating in Rwanda, before accessing the First Instance Court and the High Court of Rwanda.

3. In deciding that local remedies were not exhausted, the Court has relied largely on the French version of Article 19 of the Statute of LIPRODHOR which is written in three languages: English, French and Kinyarwanda. While the English and Kinyarwanda versions are identical, the French version has an additional clause that gives a role to the General Assembly of LIPRODHOR in the process of a dispute resolution.[1]

4. It is rather strange that the Court resorted to this reliance on the French version to decide that local remedies were not exhausted, even after finding that "although Article 8 of the 2013 (as amended in 2015) Constitution of the Republic of Rwanda makes Kinyarwanda, English and French official languages, it makes Kinyarwanda a national language". Furthermore, the Applicant's assertion that "both LIPRODHOR's common practice, as well as national law and practice, determine acceptance of Kinyarwanda as the controlling text of the Statutes", and that the NGO had always used Kinyarwanda in its deliberations since 1994 until the disputed events in 2013, remains, in my view, uncontroverted.

5. In addition, the Court seems to have placed undue weight to the fact that the Minutes of the Internal Dispute Resolution Committee (IDRC), within the LIPRODHOR, and which the Applicant had used to demonstrate that he had exhausted local remedies, had used the French version of the Statute and ordered that the Minutes be referred to the General Assembly for adoption. The Applicant has explained that, even if such reference was to be

1 The French version (translation by the Court) provides that any dispute arising within the league between the organs or between the members and the league must first be settled by the conflict resolution body before being referred to the General Assembly.
In the event the dispute is not settled by this body, the party concerned may refer the dispute to the competent Rwandan court after a decision of the General Assembly.

accepted, it would have been as a formality since the Assembly has no role in dispute resolution within LIPRODHOR. This was again not controverted by any example to the contrary.

6. Indeed, a careful reading of the French version indicates that the two paragraphs are different. The first paragraph suggests a mere reference to the General Assembly where the IDRC has resolved the matter, as in this case, as opposed to the requirement of an Assembly endorsement, in the second paragraph, where the dispute is not settled by that body. This is one additional reason to conclude that this was an appropriate application in which to grant the benefit of doubt to the Applicant.

7. Curiously, the Court's Ruling is based largely on the facts, analysis and argumentations of one of the *Amici Curiae*, the current LIPRODHOR board, which from their submissions turned out to be an interested party in the case. I am of the view that this development deserved some analysis by the Court and, ultimately, an informed position on, for example, whether this *amicus curiae* ought to have applied to be enjoined as a party to the matter or not. The Court had decided**,** as indicated in the Ruling, to re-open pleadings and to accept the requests of the UN Special Rapporteur to participate in the case as *amicus curiae* and **"***to hear LIPRODHOR",* without defining the nature of that hearing, and without basing the distinction on any specific Rule.

8. In this regard, it should be noted that the only pertinent Rule under the 2010 Rules was Rule 45(2) entitled Measures for Taking Evidence, which stipulated: "*The Court may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point*. Since this was the only relevant Rule applicable to both Amicus and any other party to be heard, I am even more convinced that this issue required a deeper examination on, for example, a clarification on its application to both categories.

9. Accordingly, I associate myself with the analysis and arguments contained in the Dissenting Opinion of my colleague, Judge Rafaâ Ben Achour that all available local remedies were exhausted.

Richard v Tanzania (judgment) (2021) 5 AfCLR 822

Application 035/2016, *Robert Richard v United Republic of Tanzania*

Judgment, 2 December 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant was tried, convicted, and sentenced to life imprisonment by a domestic court of the Respondent State for an offence against a minor. In his Application before the Court, he claimed that the domestic legal processes and outcomes, especially his appeal which was pending at the time of filing the Application, were in violation of his right to be tried within a reasonable time. After he filed the Application, the High Court of the Respondent State quashed Applicant's conviction and ordered his release. The Respondent State did not participate in these proceedings before the Court. The Court held that the Respondent State had violated the Applicant's right to be tried within a reasonable time.

Procedure (criteria for decision in default, 14-18)

Jurisdiction (personal jurisdiction, 21-22)

Admissibility (exhaustion of local remedies, 36-38)

Fair trial (right to be tried within a reasonable time, 46-50)

Reparations (state responsibility to make reparation, 53; moral prejudice, 55-56; non-pecuniary reparations, 59-60)

Dissenting opinion: TCHIKAYA

Reparations (scope and purpose of reparations, 13-16, 18-21)

I. The Parties

1. Robert Richard (hereinafter referred to as "the Applicant"), is a national of Tanzania, who at the time of filing the Application, was imprisoned at Ukonga Central Prison having been convicted of sodomy and sentenced to life imprisonment. He alleges the violation of his right to be tried within a reasonable time.

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

referred to as "the Declaration"), 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 an instrument withdrawing its Declaration with the Chairperson of the African Union Commission. The Court held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit. [1]

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the record that the Applicant was charged on 22 August 2004 with sodomizing a child who was one (1) year and five (5) months old. He was convicted and sentenced to the statutory penalty of life imprisonment.

4. The Applicant alleges that he appealed against his conviction and sentence at the High Court of Tanzania at Dar es Salaam in Criminal Appeal No. 84 of 2008. He contends that the hearing of his appeal began on 15 April 2009 but was pending at the time of filing of the Application on 8 June 2016.

5. On 26 September 2018, the High Court of Tanzania sitting in Dar es Salaam, delivered its judgment in Criminal Appeal No. 84 of 2008, *Robert Richard v the Republic* in which the judge allowed the appeal, quashed the conviction, "set aside the sentence of life imprisonment" meted out to the Applicant and ordered his release.

B. Alleged violations

6. The Applicant alleges the violation of his right to be tried within a reasonable time as guaranteed under Article 7(1)(d) of the Charter.

III. Summary of the Procedure before the Court

7. The Application was filed on 8 June 2016 and served on the Respondent State on 7 September 2016.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACHPR, Application No. 004/2015, Judgment of 26 June 2020 § 38.

8. On 1 September 2017, the Respondent State transmitted its list of representatives, but failed to file its Response despite the fact that it was sent reminders in that regard, on 24 January 2017, 7 December 2017, 6 August 2018, 25 September 2018, 26 November 2018, 20 February 2019 and 9 July 2020. In addition, the Respondent State was informed on 25 September 2018 and 20 March 2019 that if it failed to file a Response within the stipulated time, the Court would proceed to deliver judgment in default.

9. On 6 August 2018, the Court requested the Applicant to file submissions on reparations but the Applicant failed to do so, despite having being sent reminders on 26 November 2018, 29 January 2019, 19 February 2019 and 30 July 2020.

10. The pleadings were closed on 6 May 2021 and the parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to find in his favour and grant the appropriate relief.

12. The Respondent State did not participate in these proceedings and therefore did not make any prayers.

V. On the default of the Respondent State

13. Rule 63(1) of the Rules of Court provides that:

> 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 decision 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.

14. The Court notes that the afore-mentioned Rule 63(1) of the Rules sets out three conditions, namely: i) the notification to the Respondent State of both the application and the documents on file; ii) the default of the Respondent State; and iii) application by the other party or the Court on its own motion.

15. With regards to the first condition, namely, the notification of the Respondent State, the Court recalls that the Application was filed on 8 June 2016. The Court further notes that from 7 September 2016, the date of service of the Application on the Respondent State, to the date of the close of pleadings, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. In this regard, the Court also notes from the record, the

proof of delivery of those notifications. The Court concludes thus that the Respondent State was duly notified.

16. In respect of the second condition, the Court notes that, in the notice of service of the Application, the Respondent State, was granted sixty (60) days to file its Response. However, it failed to do so within the time allocated. The Court further sent seven (7) reminders to the Respondent State on the following dates: 24 January 2017, 7 December 2017, 6 August 2018, 25 September 2018, 26 November 2018, 20 February 2019 and 9 July 2020. Notwithstanding these reminders, the Respondent State did not file its Response. The Court thus finds that the Respondent State has failed to defend its case within the prescribed time.

17. Finally, on the third condition, the Court notes that it can render judgment in default either *suo motu* or on request of the other party. The Applicant having not requested for a default judgment, the Court decides *suo motu*, for the proper administration of justice to render the judgment by default**.**

18. The required conditions having thus been fulfilled, the Court enters this judgment by default.[2]

VI. Jurisdiction

19. 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. In accordance with Rule 49(1) of the Rules "[t]he Court shall conduct preliminary examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules".

21. The Court notes that, even though nothing on the record indicates that it lacks jurisdiction, it is obligated to determine if it has jurisdiction to consider the Application. In this regard, the Court notes, as earlier stated in this judgment, that, the Respondent State is a party to the Protocol**,** and that, on 29 March 2010, it deposited the Declaration with the African Union Commission. However, on 21 November 2019, it deposited an instrument withdrawing its Declaration.

2 *African Commission on Human and Peoples' Rights v Libya* (merits) (2016) 1 AfCLR 153 §§ 38-42.

22. In accordance with the Court's jurisprudence, the withdrawal of the Declaration does not apply retroactively. It only takes effect twelve (12) months after the notice of such withdrawal has been deposited. In this case, the effective date was 22 November 2020.[3]

23. In view of the above, the Court holds that it has personal jurisdiction.

24. As regards its material jurisdiction, the Court notes that the Applicant alleges violation of Article 7(1)(d) of the Charter to which the Respondent State is a party. Therefore, its material jurisdiction has been satisfied.

25. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State ratified the Charter and the Protocol. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.[4]

26. The Court further holds that it has territorial jurisdiction as the facts of the case occurred in the Respondent State's territory.

27. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VII. Admissibility

28. 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." Pursuant to Rule 50(1) of the Rules, "[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."

29. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> b. comply with the Constitutive Act of the Union and the Charter;
>
> c. not contain any disparaging or insulting language;
>
> d. not be based exclusively on news disseminated through the mass media;

3 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 37-39.

4 *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.

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

f. 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

g. 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 Court notes that the conditions of admissibility set out in Rule 50(2) of the Rules are not in contention between the Parties, as the Respondent State did not to take part in the proceedings. However, pursuant to Rule 50(1) of the Rules, the Court is required to determine if the Application fulfils all the admissibility requirements as set out in Rule 50(2).

31. The Court notes that the Applicant has indicated his identity, and holds that the condition set out in Rule 50(2)(a) of the Rules has been met.

32. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union stated in Article 3(h) is the promotion and protection of human and peoples' rights. The Court therefore considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

33. The Court further 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 50(2)(c) of the Rules.

34. With respect to the requirement set out under Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

35. With regard to Rule 50(2)(e) of the Rules on the exhaustion of local remedies, the Court reiterates what 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

5 *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 64. *See also Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465 § 64; and *Wilfred Onyango Nganyi and 9 others v Tanzania* (merits) (18 March 2016) 1 AfCLR 507*, § 95.*

proceedings are unduly prolonged.[6]

36. Referring to the facts of the matter, the Court notes that the Applicant pursued local remedies by appealing against his conviction and sentence to the High Court in 2008, after which, through letters sent to the High Court Registry on 7 June 2012, 10 May 2013, 20 September 2013, 3 October 2013, 18 November 2013, 16 September 2014 and 3 August 2015, he made a follow-up on his case.

37. From the record, the Applicant received a response from the Deputy Registrar of the High Court on 12 August 2015 indicating that he "should be patient" and that the High Court would find a solution to his grievance. However, at the time of filing his Application, that is 8 June 2016, his appeal had not been determined**.** The Court notes that this is about seven (7) years later. Furthermore, the Respondent State did not take part in the proceedings before this court and consequently did not respond as to why it took so long for the Applicant's appeal to be determined, and there is nothing on record to indicate that the matter was fraught with complexity. It is evident that, the delay cannot be attributable to the Applicant since he sent seven letters of enquiry to the Respondent State regarding the delay **in** the finalisation of his appeal.

38. In light of the foregoing, the Court observes that the appeal in the domestic courts which had not been decided after the lapse of seven (7) years indicates that local remedies were unduly prolonged. In these circumstances, the Applicant could not have exhausted local remedies and thus falls within the exception under Rule 50(2)(e) of the Rules.

39. With regard to Rule 50(2)(f) of the Rules, which in substance restates Article 56(6) of the Charter, the Court notes that the Rule only requires an 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."

40. 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.[7]

41. In the present Application, the Court notes that the Applicant was unable to exhaust local remedies because they were

6 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 77. *See also Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, § 40.

7 *Anudo v United Republic of Tanzania* (merits) (22 March 2018) 2 AfCLR 248 § 57.

unduly prolonged, the Court thus finds that the issue of filing the application within a reasonable time does not arise.[8]

42. Furthermore, 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 50(2)(g) of the Rules.

43. The Court, therefore, finds that this Application is admissible.

VIII. Merits

44. The Applicant argues that his right to be tried within a reasonable time was curtailed as his appeal filed in 2008 had not been determined at the time of filing his Application. He avers that seven (7) years had lapsed without his appeal being determined. This was despite the fact that he sought for an explanation, and a resolution to the matter, by transmitting seven (7) letters of enquiry on the status of his appeal to the Deputy Registrar and the Judge of the High Court.

***

45. Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

46. The Court notes that various factors need to be considered when assessing whether justice was dispensed within a reasonable time, in accordance with Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and the conduct of the judicial authorities who bear a duty of due diligence.[9]

47. The Court notes that the Applicant filed his appeal in 2008. The hearing commenced on 15 April 2009 but was not finalised until 26 September 2018. This amounts to a period of almost ten (10) years**.** With respect to the complexity of the case, the Court notes that there is nothing on record to show that his case involved

8 See *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550 § 49.

9 See *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 §§ 122-124. See also *Alex Thomas v Tanzania* (merits) § 104; *Wilfred Onyango Nganyi and Others v Tanzania* (merits) § 155; and *Norbert Zongo and Others v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, §§ 92-97, 152.

complex issues that require such a long time to finalise his appeal.

48. The Court also notes that nothing on the record shows that the Applicant contributed to the delay. If anything, he demonstrated due diligence by requesting a quick resolution to his case through transmitting seven (7) letters of enquiry on 7 June 2012, 10 May 2013, 20 September 2013, 3 October 2013, 18 November 2013, 16 September 2014 and 3 August 2015 to the Deputy Registrar and the High Court Judge responsible for his appeal. Thus, the delay cannot be attributed to him.

49. As to whether the delay was attributable to the Respondent State, the Court notes that since the Respondent State did not respond to the Application, there is nothing on the record to explain why it took almost ten (10) years to determine the Applicant's appeal. When the Deputy Registrar of the High Court replied to the Applicant's seventh letter of enquiry on 12 August 2015, that is, at least six (6) years after the Applicant's first letter of enquiry about the status of his appeal, he urged the Applicant to be patient and that his matter would be resolved. Thus, the period of almost ten (10) years which the High Court took to determine the appeal of the Applicant is unreasonable because of lack of due diligence on the part of the national authorities.[10]

50. The Court thus finds that the Respondent State has violated the Applicant's right to be tried within a reasonable time, contrary to Article 7(1)(d) of the Charter.

IX. Reparations

51. The Applicant prays the Court to find in his favour and grant the appropriate relief.

***

52. 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."

53. As it has consistently held, the Court considers that, for reparations to be granted, the Respondent State should first be intentionally

10 *Wilfred Onyango Nganyi v Tanzania* (merits)(18 March 2016) 1 AfCLR 507 155.

responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the prejudice suffered. Finally, the Applicant bears the onus to justify the claims made.[11]

54. The Court has earlier found that the Respondent State violated the Applicant's right to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter. Based on these findings, the Respondent State's responsibility and causation have been established. The prayers for reparation are therefore being examined against these findings.

A. Pecuniary reparations

55. The Court observes, with respect to moral prejudice, that quantum assessment must be undertaken in fairness, and by looking at the circumstances of the case.[12]

56. The Court notes its finding that the Applicant's right to be tried within a reasonable time was violated, and observes that the Applicant suffered emotional distress due to the unduly prolonged wait for a decision on his appeal and therefore awards the Applicant the sum of Tanzanian Shillings Five Million (TZS 5,000,000).

B. Non- Pecuniary reparations

57. The Court notes that the Applicant requested for a decision in his favour and requested to be granted appropriate relief. The Court further notes that, in accordance with Article 27(1) of the Protocol, it has the power to order appropriate measures to remedy situations of human rights violations, including ordering the Respondent State to take the necessary measures to vacate the Applicant's conviction and sentence as well as to release him.[13]

58. In the instant case, the Court has found that the Respondent State violated the Applicant's right to be tried within a reasonable

11 See *Armand Guehi v Tanzania* (merits and reparations) § 157. See also, *Norbert Zongo and Others 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 Tanzania* (reparations), §§ 27-29.

12 See *Norbert Zongo and Others v Burkina Faso* (reparations) § 61. *Armand Guehi v Tanzania* (merits and reparations) § 177.

13 *Alex Thomas v Tanzania* (merits) § 157; *Diocles William v Tanzania* (merits) (21 September 2018) 2 AfCLR 426 § 101; *Minani Evarist v Tanzania* (merits) (21 September 2018) 2 AfCLR 402 § 82; *Jibu Amir Mussa and Saidi Ally alias*

time as the High Court did not deliver judgment on his appeal until 26 September 2018. The Court notes however, that by the judgment of 26 September 2018, the High Court, allowed his appeal, quashed his conviction, and ordered his release.

59. Nevertheless, the Court observes that given the extent of the time which the Applicant waited for his exoneration, a duration of almost ten (10) years, it is appropriate for the Respondent State to publish this judgment.

60. In the circumstances, therefore, the Court 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.

X. Costs

61. The Applicant did not make any submissions on costs.

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62. The Court notes that Rule 32(2) of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs."

63. Thus, the Court decides that each Party shall bear its own costs.

XI. Operative part

64. For these reasons,

The Court,

Unanimously and in default:

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Declares* that the Application is admissible.

Mangaya v United Republic of Tanzania, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits) § 96; *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 570 § 84.

On merits

iii. *Finds* that the Respondent State violated the right of the Applicant to be tried within a reasonable time protected under Article 7(1)(d) of the Charter.

By a majority of Ten (10) for and One (1) against, Justice Blaise TCHIKAYA dissenting,

On reparations

Pecuniary reparations

iv. *Grants* Tanzanian Shillings Five Million (TZS 5,000,000) as reparations for moral prejudice in relation to the inordinate delay of the Applicant's appeal.

v. *Orders* the Respondent State to pay the amount indicated under sub-paragraphs (iv) free from taxes within six (6) months, effective from the notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

vi. *Orders* the Respondent State to publish this Judgment on the websites of the 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 and reporting

vii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

viii. *Orders* each party to bear its own costs.

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Dissenting Opinion: Tchikaya

1. I do not fully share the opinion of my dear and honourable colleagues concerning compensation for damages in the Richard Robert case, the subject of the Judgment of 2 December 2021. I endorse the Judgment as a whole but I would like to distance myself from its operative part which, in an iterative and indistinct manner, awards sums of money as a form of compensation for the breach of due process. Also, the wrongfulness of the violation in question is not disputable either.

2. Mr Richard, a Tanzanian national, was accused of sodomizing a one- year and five-month-old female toddler on 22 August 2004. He was found guilty of the act and sentenced to life imprisonment as provided by Tanzanian law. He is being held in Ukonga Central Prison and has brought his case before the Court because the appeals proceedings against his sentence, which started on 15 April 2009, was not decided until 8 June 2016, the date he decided to file the Application. Thus, it took seven years for the judicial decision to be rendered.

3. This is a partly dissenting opinion. The partial dissent is based on the fact that, in the reparation granted to Mr. Richard Robert, the damages awarded are completely dissociated from the original offence and, as far as I am concerned, it appears that the amount to be paid by the Respondent State was set separately from, and independently of the original offence.

4. In the first section, it will be shown how much this Judgment echoes the Court's jurisprudence on reparations and legal issues are resolutely resolved (I). In the second section, I will, strictly speaking, address the problem of reparations with the aim of possibly going beyond the Court's traditional approach (II).

I. Richard Robert, a Judgment consistent with its jurisprudence

5. In terms of structure, the Richard Robert Judgment cannot be challenged. The Court applies its previous jurisdiction to respond to the issues raised.

A. The Richard Robert case, questions and answers

6. One of the preliminary issues before the Court was the absence or the default of the Respondent State. This comes in the wake of Tanzania's withdrawal of the optional Declaration accepting the Court's jurisdiction. Therefore it was settled fairly quickly when

the Court held that the Judgment could be delivered by default pursuant to Rule 63(1) of its Rules which provides: "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 a decision 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".

7. The withdrawal of the Declaration has no retroactive effect and it will only enter into force 12 months after the deposit of the notice of withdrawal, that is, on 22 November 2020. We approve of the step taken in view of the fact that the Application was filed on 8 June 2016 and notified to the Respondent State on 7 September 2016.

8. There was the issue of the 7-year time lapse after the last domestic decision before referral to the Court. It was explained that domestic courts were deficient and proceedings were unduly prolonged. The Court found that local remedies were clearly exhausted in 2008. As of the time the Application was filed with the Court on 8 June 2016, the appeal lodged before the High Court on 15 April 2009 had not been heard. Given the excessive delay which characterized the case, the Court considered that the principle of filing within reasonable time could not be held against the Applicant.

B. The imputation of the prolonged wait for the domestic decision

9. This issue is crucial since it establishes the responsibility of the State in international law, including its international human rights commitments . It is addressed by the Court and captured in paragraph 46 of its Judgment. Although I am not against the majority's approach on the matter, it can be noted that the Court seems to settle the question with a single stroke of the pen, notwithstanding its essential nature. It states: " As to whether the delay is attributable to the Respondent State, the Court notes that, as the Respondent State did not submit a brief in response to the Application, there is nothing on record to show why the Applicant's appeal was still pending after seven (7) years" . This is essentially the reasoning of the Court.

10. I agree only partially with the Court's approach because it does not deal with the matter as a whole. Two aspects can be noticed: a) the Court could not substitute itself for the Parties and find an argument in support of their claims and b) the purpose seems

to be the same insofar as the State is responsible as long as a violation is found, so that the Applicant should be awarded. My agreement is partial because there is need for the Court to further analyse the charge against the State. The Court's intervention in relation to the violation attributed to the State must be on the basis of reparation, not compensation. The difference between the two is not only rhetorical.

11. This is a problem pertinently raised by the Robert Richard Judgment rendered on 2 December 2021, clearly on account of its facts, namely, an act of paedophilia involving the sodomizing of a one- and- a- half-year-old toddler. The jurisprudence of the African Court was not entirely devoid of precedent.

12. The Applicant's offence does not interfere with the determination of reparation as the Applicant was found not guilty at the end of the criminal procedure . The Court assessed the reparation independently of the offence that resulted in the Robert Richard case. As judge of the violations committed by the State, the Court is well justified to do so. However, the question deserves further probing.

II. Richard Robert, the reparations problem

13. Given its complexity, the issue requires thorough examination since international courts must apply known provisions of international law on reparations.

14. The Resolution of 2000 quoted above provides that "Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law…". These international provisions are prudent and meticulous.

15. To the credit of the African Court, its jurisprudence is prolific on the matter of reparations. Moreover, in 2018, it decided, when necessary, to render separate judgments on reparations and on the merits. In the Judgment on reparations of 5 June 2015, in the *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Republic of Burkina Faso*, the Court unanimously found that "that the Judgment of 28 March 2014 on this matter represents a form of reparation for the moral prejudice suffered by the Burkinabé Movement on Human and Peoples' Right". By way of full reparation, the Court, in addition, ordered «the Respondent to pay a token sum of (1) franc to MBDHP, as reparation for the said prejudice". This is a

unique approach that is not often adopted.

16. In the 2021 *Amir Ramadhani* case, the Court recalled its consistent standard - a notion to which this opinion will return - to determine and structure the reparations it would grant if moral prejudice was established. It was placing itself in a difficult situation in relation the plethora of contentious situations that would follow.

17. It is this approach that has caused the problem and sown the "bad seed".

A. An approach to reparations that already exists in the jurisprudence

18. A reading of Article 27(1) sufficiently reveals the secondary nature of monetary payment, which the Court has established as automatic. It reads as follows: "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 a fair compensation or reparation". The payment of money is only one of the options according to the basic document. Yet this approach has been adopted, at least, since the 2016 in *Abubakari v Tanzania* Judgment of 3 June 2016. The Court held that "In the instant case, the Court will decide on certain forms of reparation in this judgment, and rule on other forms of reparation at a later stage of the proceedings." . This idea of forms of reparations cannot be without a purpose. At the very least, it implies that the Court cannot be locked into a specific nature and scope of reparations awarded to Applicants who are victims of violations.

19. The decision in *Armand Guehi v Tanzania* (Republic of Côte d'Ivoire intervening), Judgment of 7 December 2018 seems to have paved the way for this form of reparations by the Court. In paragraph 205 of the Judgment, while it failed to "grant the Applicant's prayers related to compensation for moral prejudice» and similarly failed to «grant the Applicant's prayer to be paid material damages for monetary loss", it " grants the Applicant the sum of US Dollars Five Hundred ($500) for being subjected to inhuman and degrading treatment; and "Grants the Applicant the sum of US Dollars Two Thousand ($2,000) for not being tried within a reasonable time and the anguish that ensued therefrom".

20. This approach should be weighed against the practice of other courts. Before the European Court of Human Rights , applicants against the United Kingdom of Great Britain and Northern Ireland, who do not have British nationality …

21. The decision in *Minani Evariste v Tanzania*, Judgment of 21 September 2018 was a landmark on the issue. The Court rightly

held that as "… the conditions for the compulsory grant of legal aid are all fulfilled…. the Respondent State has violated Articles 7 (1) of the Charter" . Consequently, the Court awarded "the Applicant an amount of three hundred thousand Tanzania Shillings (TZS 300,000) as fair compensation". This decision is one in the series to be considered.

22. The spirit of this reparation is summarized by Judge Ben Achour "In the instant case, the violation as indicated did not "affect the outcome [of] the trial". Reparation for the violation of Article 7(1) (c) of the Charter established by the Court can, in my opinion, only be resolved by pecuniary compensation, and this is what the Court has done for the first time, by awarding the applicant a lump sum compensation, the amount of which was absolute and depended on the material on file and the gravity of the criminal offence, as estimated by the Court" .

23. It is well understood that the divergence is partial. This is because we are not discussing the basis for reparation, and we must not forget the seriousness of the originating violation. The Respondent State is obliged to ensure due process both for accused persons who are able to ensure their own defence and those who cannot do so a fortiori for serious offences, The divergence stems from the mode of assessment, that this mode of reparation entails which, in my opinion, is partial. In this type of reparation, the act that is the subject to reparation is totally dissociated from the original offence, and the amount to be paid by the Respondent State is set automatically.

B. A model of reparation as «consistent standard » that must change

24. This reparation model (300.000 TZH) which the Court refers to as « consistent standard » has to change . If the State is clearly responsible for the violation of a right, the reparation that the State provides to a victim of violation must be understood in all its complexity . The reparation, which is its established corollary of the said violation cannot be automatically determined, so that it is limited, in particular to the sole reading of the violation. Such an approach, once supported by international law , would be too restrictive. Unfortunately, this seems to be the approach adopted by the Court, especially in the instant case, Robert Richard.

25. In Article 37, the ILC's Draft article opens a panoply of choices in terms of reparation. It states that "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot

be made good by restitution or compensation", Without excluding the payment of sums of money, the Draft Article further states that "Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality". Understandably, the ILC's list is also not exhaustive as it leaves many possibilities open.

26. In paragraph 56 of the Robert Richard Judgment, the Court ruled that "the Applicant's right to be tried within a reasonable time was violated, and finds that the Applicant suffered emotional distress due to the unduly prolonged wait for a decision on his appeal and therefore awards the Applicant the sum of Five Million Tanzanian Shillings (TZS 5,000,000)". It is for moral prejudice that sum was awarded. This should apply in some cases and not automatically . The same approach was adopted in *Majid Goa alias Vedastus v Tanzania* , Judgment of 26 September 2019. This could have been interrogated and improved by taking into consideration all the complexity of the issue.

27. In *Gomes Lund and others (« Guerrilha do Araguaia ») v Brazil* of 2010, the Inter-American Court held that «"it has set a period of 24 months as of notification of this Judgment, for those interested to present irrefutable evidence, in conformity with the legislation and domestic procedures, regarding (…) so as to allow the State to identify them, and were applicable, consider them victims in the terms set by Law No. 9.140/95 and the present ruling, adopting the appropriate reparation measures in their favour". This reasoning of the Inter-American Court includes various financial measures .

28. This was the subject of a heated debate before the European Court of Human The doctrine, which was critical, had denounced the "abusive commercialization of human rights litigation", see Flauss (J.-f), "Le contentieux de la satisfaction équitable devant les organes de la Cour européenne des droits de l'homme. Développements récents », Europe, juin 1992, p. 1. See also, Flauss (J.-F.), « « Réquisitoire contre la mercantilisation excessive du contentieux de la réparation devant la Cour européenne des droits de l'homme. A propos de l'arrêt *Beyeler c. Italie* du 28 mai 2002 », D. 2003, p. 227).). In a number of cases, the Court considers that the finding of violation constitutes sufficient satisfaction in respect of non-material damage .

29. The European Court considers that, in view of the measures indicated under Article 46 of the Convention, which seek to alleviate the damage resulting from the transfer of applicants to the Iraqi authorities when they risked being sentenced to death death), the findings of a violation constitutes sufficient just satisfaction for the moral damage suffered by the applicants . If the

State undertakes to review domestic legislation deemed contrary to the Conventions, the Court may consider that the findings of a violation constitute sufficient just satisfaction. (ECHR, Gr. Ch., *Folgeo et al. v Norway*, 29June 2007).

III. Conclusion

30. The challenge facing the Court is how to move away from its 'consistent standard' as enunciated, in particular, in *Ramadhani* (ACtHPR, *Amir Ramadhani v Tanzania*, 25 June 2021). This standard seems to set a limiting, inseparable and binding framework. The exercise of the power to determine reparations should be better organized and be more open.

31. It is a known fact that the common law has engendered a punitive system in the international treatment of reparations owed by States. It entails the award of a sum of money, distinct from any reparation stricto sensu, as punitive damages to the victim of a violation. The aim is to punish the State responsible, and to prevent any violations. However, this measure is short-sighted. Unfortunately, this could be the cause of Court's situation in the matter of reparation .

32. In the practice of the Court, awarding financial compensation appears to be the preferred form of reparation. This should not obscure the sociological and collective nature of other forms of reparation such as full restitution, when necessary. In the instant case, satisfaction gives rise to a variety of possible reparations, regulatory and practical, public or individual. It is up to us, from the outset, to work in this spirit. For, it is known that the solemn pronouncement of the violation and its recognition by the Respondent State may constitute effective means of reparation. Undoubtedly, a decision of the Court already constitutes a sufficient form of reparation.

33. As noted in paragraph 10: "My agreement is partial because there is need for the Court to further analyse the charge against the State" » in order to determine the type of reparations to award. There is need to go further. The issue of how to actually correct violations must be addressed. To that end, various measures are appropriate and feasible by the State in favour of a victim. The proclamation of the amounts to be paid is only one of them. The aim is to avoid awarding sums of money that often have no impact on the collective and individual outcomes of violations.

34. Simply apply the principle adopted by the United Nations General Assembly in 2005: "Victims should be treated with humanity and respect for their dignity and human rights, and appropriate

measures should be taken to ensure their safety, physical and psychological well-being …" (Point VI, Treatment of Victims)

Shaban v Tanzania (judgment) (2021) 5 AfCLR 842

Application 026/2015, *Hamis Shaban alias Hamis Ustadh v United Republic of Tanzania*

Judgment, 2 December 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant filed this Application following his trial, conviction and sentence to a 30-year term of imprisonment for sodomy against a minor. He alleged that the entire domestic legal process, including his unsuccessful appeals, was in violation of his human rights. The Court held that the Respondent State had violated his right to free legal representation.

Jurisdiction (material jurisdiction, 32-35)

Admissibility (exhaustion of local remedies, 50-53)

Fair hearing (quality of evaluation of evidence by domestic court, 71-75; right to free legal representation, 90-94)

Reparations (state responsibility to make reparation, 96; moral prejudice, fair compensation for violation of right to free legal representation, 102; non-pecuniary reparations, 105-108)

I. The Parties

1. Mr. Hamis Shaban alias Hamis Ustadh (hereinafter referred to as "the Applicant") is a national of the United Republic of Tanzania, who at the time of filing the Application was serving a thirty (30) year prison sentence at the Butimba Central Prison, in the Mwanza region, following a conviction of an unnatural offence of sodomy of a ten (10) year old girl. He challenges the lawfulness of his trial.

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. The Respondent State also on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol, by which it accepted the jurisdiction of the Court to receive applications directly from individuals and Non-Governmental Organizations (NGOs) on Human and Peoples' Rights (hereinafter referred to as "the Declaration").

On 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration with the Chairperson of the African Union Commission. The Court held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit. [1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the record, that the Applicant was arrested on 16 November 2001 and subsequently charged before the District Court of Nyamagama at Mwanza with the unnatural offence of sodomy of a ten (10) year old girl. On 5 April 2004, he was convicted, sentenced to thirty (30) years' imprisonment and ordered to pay compensation of Tanzanian Shillings Three Hundred Thousand (TZS 300,000) to the victim.

4. On 7 March 2005, the Applicant appealed his conviction and sentence to the High Court of Tanzania at Mwanza, and on 30 June 2006, the High Court dismissed his appeal for lack of merit.

5. On 7 September 2010, the Applicant appealed to the Court of Appeal of Tanzania sitting at Mwanza and on 14 March 2013, the Court of Appeal dismissed his appeal for lack of merit.

6. On 29 September 2014, the Applicant filed before the Court of Appeal an Application for review which was registered as Criminal Application No.09/2014 and was pending at the time the Applicant filed his Application before this Court, that is, on 2 October 2015.

B. Alleged violations

7. The Applicant alleges the following:

i. That the procedure in the Court of Appeal relating to his appeal was unfair and therefore, a violation of his right to be heard;

ii. That the denial of free legal assistance violated his rights under Articles 7(1) (c) and (d) of the Charter, "same as Article 13(6) (A) and 107 a 2(b) of the country Constitution 1977";

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 § 38.

iii. That his rights to equality before the law and equal protection of the law and to a fair trial were violated due to the delay by the Court of Appeal in the hearing of his application for review.

8. However, subsequently, the Applicant withdrew the allegation on the delay of the hearing of the review after his application for review was heard. He thus contests the decision on his application for review which, according to him, occasioned a miscarriage of justice.

III. Summary of the Procedure before the Court

9. The Application was filed on 2 November 2015 and served on the Respondent State on 4 December 2015. It was also transmitted to the entities listed under Rule 42(4) of the Rules[2] on the same date.

10. On 4 January 2016, the Applicant requested for legal aid from the Court. His application was subsequently considered by the Court but denied because he did not meet the Court's criteria for provision of legal aid. He was subsequently notified of this decision.

11. The Respondent State filed its Response on 6 February 2017 and this was transmitted to the Applicant on 9 February 2017.

12. On 21 March 2017, the Applicant filed a Reply to the Response of the Respondent State, which was transmitted to the Respondent State on 16 June 2017.

13. Pleadings were closed on 16 June 2017 and the Parties were duly notified.

14. On 9 March 2018, pleadings were re-opened to allow the Applicant to submit "additional evidence" relating to his Application for Review No 09/2014 filed on 4 January 2018 and on 23 February 2018. The Applicant informed the Court that, the Court of Appeal sitting at Mwanza had heard his application for review and issued its decision on 2 December 2017. In view of the above circumstance, he decided to withdraw the allegation in relation to the violation of his right to equality before the law and to equal protection of the law as well as to a fair trial. However, he also submitted "additional evidence" relating to the Court of Appeal's judgment on his application for review.

15. On 9 March 2018, the Respondent State was requested to file a Response to the additional evidence, within thirty (30) days of receipt thereof.

2 Formerly Rule 35(3) of the Rules of Court 2 June 2010.

16. On 2 July 2018, the Parties were informed that the Court had decided to consider the merits and reparations jointly, and the Applicant was requested to file his submissions on reparations within thirty (30) days of receipt of the notice.

17. On 6 August 2018, the Applicant filed his submissions on reparations and these were served on the Respondent State on 21 August 2018 requesting the Respondent State to file its submissions on reparations within thirty (30) days of receipt thereof.

18. On 3 July 2019 the Respondent State filed its Response to the Applicant's additional evidence and this was transmitted to the Applicant on 31 July 2019 for his Reply thereto within thirty (30) days of receipt thereof.

19. On 16 September 2020, the Applicant was reminded to file his reply but did not do so. Furthermore, the Respondent State was sent a reminder, to file its Response on the submissions of reparations within thirty (30) days of receipt thereof. However, the Respondent State did not respond.

20. Pleadings were closed on 18 October 2021 and the Parties were duly notified.

IV. Prayers of the Parties

21. The Applicant prays the Court to:

i. Restore justice where it was overlooked and quash both conviction and sentence imposed upon him and set him at liberty;

ii. Grant him reparations pursuant to Article 27 (1) of the Protocol;

iii. Grant any other order(s) or reliefs it deems fit in the circumstances of the complaint.

22. The Respondent State prays the Court with respect to the merits of the Application, to find that:

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

ii. The Government …. did not violate Article 3(2) of the African Charter on Human and Peoples' Rights.

iii. The Government ….. did not violate Article 7(1)(c) of the African Charter on Human and Peoples' Rights.

iv. The Government ….. did not violate Article 7(1)(d) of the African Charter on Human and Peoples' Rights.

v. The Government…. did not contravene Article 107A (2) (b) of the Constitution of the United Republic of Tanzania, 1977.

vi. The Government ….. Tanzania did not contravene Article 107A (2) (c) and 107B of the Constitution of the United Republic of Tanzania, 1977.

vii. The Government … did not contravene Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977.

viii. The Application be dismissed for lack of merit.

ix. The costs of this Application be borne by the Applicant.

V. Jurisdiction

23. 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.

24. The Court notes that in accordance with Rule 49(1) of the Rules;[3] "[t]he Court shall conduct preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

25. On the basis of the above-cited provision, the Court must in every application, conduct preliminary assessment of its jurisdiction and dispose of objections thereto, if any.

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

A. Objection to material jurisdiction

27. The Respondent State contends, that the Court is not vested with the powers to consider this Application since the Applicant is requesting the Court to sit as an appellate Court over matters already finalized by its Court of Appeal, being the highest Court in its judicial system. This is especially since the order to set the Applicant at liberty would require this Court so act as such.

28. Citing the Court's jurisprudence in *Alex Thomas v United Republic of Tanzania,* the Respondent State further contends that some of the allegations in the Application were never raised before the national courts and are being raised for the first time before this Court. These allegations are, that the Applicant "was isolated from the procedure of the Court of Appeal", that the Applicant had no legal representative and that he was deprived of the right to be heard.

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

29. The Respondent State further cites Article 3(1) of the Protocol, and Rule 26 of the Rules,[4] and argues that the Court has jurisdiction only with respect to cases concerning the application and interpretation of the Charter, the Protocol, and any other relevant human rights instrument ratified by the State concerned. It concludes that for these reasons, the Court should find that it does not have jurisdiction to consider this Application.

30. The Applicant contends that the Court has jurisdiction to consider this Application. The Applicant further argues that the rights alleged to have been violated by the Respondent State, are rights protected under the Charter to which the Respondent State is Party.

31. The Applicant therefore, prays, the Court to disregard the argument of the Respondent State on the issue, and consider his matter in the interests of justice.

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32. 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.[5]

33. The Court recalls, its established jurisprudence, "that it is not an appellate body with respect to decisions of national courts".[6] However "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

4 Currently, Rule 29 of the Rules of the Court, 25 September 2020.

5 *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465 §§ 45 ; *Kennedy Owino Onyachi and Another v United Republic of Tanzania* (merits) (28 September 2017), 2 AfCLR 65 § 34 -36 ; *Jibu Amir alias Mussa and another v United Republic of Tanzania*, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits and reparations) § 18; *Massoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No. 008/2016 Judgment of 25 June 2021 (merits and reparations) § 21.

6 *Ernest Francis Mtingwi v Malawi* (jurisdiction) § 14.

concerned."[7]

34. The Court notes that, the Applicant alleges the violation of his right to a fair trial and to equality before the law and equal protection of the law which are provided for in the Charter to which the Respondent State is a party. Thus, the Court is not being requested to sit as an appellate court or as a court of first instance as alleged by the Respondent State, but rather is acting within the confines of its powers.[8]

35. In view of the foregoing, the Court therefore rejects the Respondent State's objection and finds that it has material jurisdiction to consider this Application.

B. Other aspects of jurisdiction

36. The Court observes that even though no objection has been raised with respect to its personal, temporal or territorial jurisdiction, pursuant to Rule 49(1) of the Rules, the Court must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

37. 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, it deposited the Declaration provided for under Article 34(6) of the Protocol with the African Union Commission. On 21 November 2019, it deposited an instrument withdrawing the Declaration with the African Union Commission.

38. The Court recalls its jurisprudence 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, or new cases filed before the withdrawal takes effect. Since any such withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, the effective date of the Respondent State's withdrawal was 22 November 2020. This Application having been filed before the Respondent State deposited its notice of withdrawal of the Declaration is thus not affected by the said withdrawal.

7 *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 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.

8 *Massoud Rajabu v United Republic of Tanzania*, ACtHPR, Application No. 008/2016, judgment of 25 June 2021 (merits and reparations), *§ 22.*

Application.[9]

39. In view of the above, the Court finds that it has personal jurisdiction.

40. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State became a Party to the Charter and the Protocol. Furthermore, the alleged violations are continuing in nature since the Applicant remains incarcerated on the basis of what he considers an unfair process. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.[10]

41. The Court also notes that it has territorial jurisdiction given that the alleged violations 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. 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".

44. In accordance with Rule 50(1) of the Rules,[11] 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".

45. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> b. comply with the Constitutive Act of the Union and the Charter;
>
> c. not contain any disparaging or insulting language;
>
> d. not be based exclusively on news disseminated through the mass media;
>
> e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
>
> f. be filed within a reasonable time from the date local remedies

9 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR 540 § 67; *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 37-39.

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) (21 June 2013) 1 AfCLR 197 §§ 71 - 77.

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

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

g. 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. Objections to the admissibility of the Application

46. The Respondent State objects to the admissibility of this Application on the ground that the Applicant did not exhaust local remedies before filing the Application before this Court.

47. The Respondent State contends that the requirement to exhaust local remedies is a fundamental principle under international law, and that a complainant is required to exhaust all legal remedies available within his national judicial system before seizing an international judicial body like this Court.

48. The Respondent State submits that its enactment of the Basic Rights and Duties Enforcement Act (2002) was to provide the procedure for enforcing constitutional rights and related matters, and that the Applicant has not explored this option available to him at its national courts before filing this Application. It therefore prays the Court to dismiss this Application with costs, for failure to meet the admissibility requirements under the Rules.

49. The Applicant argues that his Application satisfies the admissibility requirements under the Rules. He further argues, that having appealed to the Court of Appeal which is the highest court of the Respondent State, the Application satisfies this admissibility requirement.

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50. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2) (e) of the Rules, any application filed before it, has to 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.[12]

51. The Court recalls its jurisprudence that, in so far as the criminal proceedings against an applicant have been determined by the highest appellate court, the Respondent State will be deemed to have had had the opportunity to redress the violations alleged by the Applicant to have arisen from those proceedings.[13]

52. In the instant case, the Court notes from the record that, the Applicant's appeals against his conviction and sentence were considered and dismissed by the High Court of Tanzania. On 14 March 2013, the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, upheld the judgment of the High Court. The Respondent State thus had the opportunity to redress the alleged violations. It is therefore clear that the Applicant has exhausted the available domestic remedies.

53. Consequently, the Court dismisses the objection that the Applicant has not exhausted local remedies.

B. Other conditions of admissibility

54. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2)(a), (b), (c), (d), (f) and (g) of the Rules. Even Nevertheless, the Court must, in accordance with Rule 50(1) of the Rules cited above, satisfy itself that these conditions have been met.

55. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

56. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is, the promotion and protection of human and peoples' rights. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union. Therefore, the Court holds that the requirement of Rule 50(2)(b) of the Rules is met.

57. The Court finds that the language used in the Application is not insulting or disparaging to the Respondent State or its institutions in compliance with Rule 50(2)(c) of the Rules.

12 *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017), 2 AfCLR 9, §§ 93-94.

13 *Mohamed Abubakari v United Republic of Tanzania* (merits) (3 June 2016), 1 AfCLR 599 § 76.

58. 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 50(2)(d) of the Rules.

59. With respect to Rule 50(2)(f) on filing an Application within a reasonable time after exhaustion of local remedies, the Court notes that the Court of Appeal's judgment against the Applicant was delivered on 14 March 2013, while the Application was filed on 2 October 2015, that is, two (2) years, six (6) months and eighteen (18) days after exhaustion of local remedies. The Court notes that the Applicant is incarcerated, lay, and the facts of the case occurred between 2001 and 2013, which is in the early years of the Court's operation when members of the general public, let alone persons in the situation of the Applicant in the present case, could not necessarily be presumed to have sufficient awareness of the rules governing proceedings before this Court.

60. The Court also notes that the Applicant was self-represented in the proceedings before the domestic courts. Therefore, the Court holds that the two (2) years, six (6) months and eighteen (18) days taken to seize the Court is reasonable.[14]

61. Furthermore, the Court finds that 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 instruments of the African Union.

62. Based on the foregoing, the Court declares that this Application is admissible.

VII. Merits

63. The Applicant alleges the violation of his right to a fair trial in respect of:

i. the proceedings at the Court of Appeal;

ii. the delay in the determination of his application for review and

iii. the denial of free legal assistance.

14 See *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018), 2 AfCLR 218, §§ 54-56; *Anaclet Paulo v United Republic of Tanzania* (merits) (21 September 2018), 2 AfCLR 446, §§ 47-50; *Dismas Bunyerere v United Republic of Tanzania,* ACtHPR, Application No. 031/2015, Judgment of 28 November 2019 (merits), §§ 47and 48.

A. Allegation relating to the proceedings at the Court of Appeal

64. The Applicant alleges that the judgment of the Court of Appeal was delivered after an unfair procedure resulting in the miscarriage of justice. According to the Applicant, two (2) exhibits were missing from the record of the Court of Appeal which he would have relied upon during the hearing. He further alleges, that the Court of Appeal made reference to the missing evidence without considering his own reliance on this evidence.

65. The Applicant alleges that since he could not make reference to the missing document, the Court of Appeal ought to have resolved the issue by complying with Articles 107B, and 107A (2) C of the Constitution of the United Republic of Tanzania 1977, rather than resorting to foreign judicial authorities.

66. The Applicant further contends, that on the basis of the missing documents, the Court of Appeal ought to have set him free in accordance with Rule 4(2) of its own Rules (2009), in order to achieve substantive justice under Rule 2 of the same Rules.

***

67. The Respondent State disputes the Applicant's allegation and notes that, the latter agreed to proceed with the hearing without making reference to the missing exhibits, and also, to abandon the second and third grounds of his appeal which made reference to the said missing evidence.

68. The Respondent State further argues, that the Applicant's appeal was heard and decided without any regard to the discarded evidence that made reference to the lost exhibits as complained by the Applicant but was rather decided on the basis of the available jurisprudence.

69. The Respondent State further contends, that in upholding the Applicant's conviction, there was sufficient evidence against the Applicant, and as such, the Court of Appeal did not have any reason to resort to the evidence in the missing documents. It argues further, that in doing this, the Court of Appeal did not violate any provision of its Constitution relevant to the case. It thus prays the Court to dismiss this allegation for lack of merit.

***

70. Article 7(1) of the Charter provides that "every individual has the right to have his cause heard".

71. The Court recalls its jurisprudence that:

> …domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[15]

72. Furthermore, the Court notes from the record, that the Court of Appeal of the Respondent State acknowledged the missing documents which it described as "... PF3 and a medical report…", and both of which were relied upon by the prosecution during the trial of the Applicant at the lower courts. The Court further notes, that at the hearing of the Court of Appeal on 11 March 2013, the Applicant himself agreed to proceed with his appeal without making reference to the said missing documents in the case file, and the Court of Appeal accepted the Applicant's proposal, by disregarding any evidence that made reference to the said missing exhibits.

73. The Court also observes that, the Applicant elected to abandon two (2) grounds of his appeal, which touched on the said missing exhibits. The Court of Appeal thereafter proceeded to hear the Applicant's appeal on the above terms and concessions, including resorting to other evidence in its record that were not contested by the Applicant.

74. The Court thus considers that the manner in which the Court of Appeal, conducted its proceedings regarding the assessment of the evidence, does not reveal any manifest error, which occasioned a miscarriage of justice to the Applicant requiring its intervention.

75. The Court therefore concludes that the Respondent State did not violate the Applicant's right to be heard.

15 *Kijiji Isiaga v United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218 § 65.

B. Allegation relating to the application for review before the Court of Appeal

76. The Applicant alleges that the Court of Appeal delayed in determining his application for review of its decision, which he filed on 29 September 2014. He contends that the said application for review, No. 09 of 2014 was yet to be listed for hearing, by the time he filed the Application before this Court, while others which were filed later than his own had been listed for hearing.

77. The Applicant's 'additional evidence' relating to this claim, is of arguments indicating that the Court of Appeal erred in dismissing his application for review. He states that "there were manifest errors" in the judgment of the Court of Appeal of 14 March 2013, which caused a miscarriage of justice that led the Court of Appeal to review its judgment". The Applicant also argues that the said judgment was 'procured by fraud' or a 'dishonest trick' and that the Court of Appeal overlooked and wrongly dismissed his grounds of application for review and 'misapprehended' them. The Applicant maintains that the Court of Appeal wrongly distinguished his case from that of some cases relating to the review which had similar circumstances as his case.[16] The Applicant alleges that under the above circumstances, the Court of Appeal's ruling "isolate's him and deprives him of his rights to be heard."

***

78. On its part, the Respondent State contends that a period of one (1) year and four (4) months' delay in hearing an application for review, is not an unreasonable delay in the context of the Respondent State's judicial system. It further argues, that the Court should apply the principles of margin of appreciation in this case, in the computation of what amounts to reasonable time.

79. In response to the Applicant's additional evidence relating to the application for review, the Respondent State argues that applications for review are listed for hearing based on the year

16 *Muhudin Ally alias Muddy and 2 Others v Republic*, Criminal Application No. 2 of 2006 and *Chandrakant Joshu Bhai Patel v Republic* (2004) TLR 2018 or 2006) TLR 219; Mbikima Mpigaa and Another v Republic, Civil Application No. 03 of 2011 (Court of Appeal of Tanznia (unreported).

in which they were filed and that the Applicant's application for review was duly heard by the Court of Appeal.

80. The Respondent State argues that the Court of Appeal considered all of the Applicant's grounds for review and properly applied its relevant jurisprudence in determining them. The Respondent State further argues that the Court of Appeal found that contradictions and inconsistencies in evidence do not amount to errors which were obvious on the face of the record and that the Applicant failed to prove how the judgment was delivered as a result of the alleged fraud or dishonesty.

81. The Respondent State avers that the Applicant was accorded the right to be heard in the course of and through the proceedings at the District Court, the High Court and the Court of Appeal and that this right was not violated

82. The Respondent State concludes that this allegation lacks merits, and prays the Court to dismiss it accordingly.

***

83. The Court notes that the Applicant's partial withdrawal of the claim before this Court regarding the Application for review relates to the delay in the listing for hearing of that application. This concerns the alleged violation of his right to equality before the law and equal protection of the law under Article 3(1) and (2) of the Charter. The Court will therefore not make a finding on this aspect of the claim.

84. As regards the allegation that the consideration of the Application for review by the Court of Appeal violated the Applicant's right to a fair trial, the Court finds that the Applicant raises the same arguments as he raised regarding the conduct of his appeal before the Court of Appeal. More importantly, the record before the Court shows that there is nothing relating to those proceedings that indicates that the Court of Appeal's consideration of his Application for review resulted in a miscarriage of justice thus violating his right to a fair trial.

85. The Court therefore dismisses this allegation.

C. Allegation relating to the provision of free legal assistance

86. The Applicant alleges that he had no legal representation during his trial, and as such, his right to a fair trial was violated.

87. The Respondent State disputes this allegation and contends that the right to be represented by a legal counsel is not mandatory under its Criminal Procedure Act. It argues, that there are specific situations where the state may provide free legal aid in the form of defence counsel, where it appears to the certifying authority that it is desirable to do so, and in the interests of justice.

88. The Respondent State further argues, that the provision of legal aid is contingent on the indigence of the accused and if it is in the interests of justice. It argues that since the Applicant was not charged with murder or treason, where legal aid is automatically provided, the Applicant ought to have applied for legal aid, and since he did not, he was never afforded any. The Respondent State also argues, that the fact that the Applicant was not represented by legal counsel does not imply that he was prejudiced in any way, since the Applicant was present at his trial, and that all the evidence in relation to his case was adduced in his presence.

89. The Respondent State prays the Court to dismiss this allegation for lack of merit, and to dismiss the whole Application in its totality, for being unsubstantiated and void of merits.

***

90. The Court notes that Article 7(1)(c) of the Charter which provides for the right to defence by a counsel of one's choice, does not explicitly provide for the right to legal aid. However, the Court has held that the said provision, when read together with Article 14(3)(d) of the International Covenant on Civil and Political Rights (hereinafter referred to as the "ICCPR"),[17] establishes the right of an accused to free legal assistance when the interests of justice so demands, and where he cannot afford one.[18] The interests of justice here contemplated, includes where the Applicant is

17 The Respondent State became a party to the International Covenant on civil and Political Rights on 11 June 1976

18 *Alex Thomas v Tanzania* (merits), §§ 114.

indigent, where the offence is serious, and where the penalty provided by law is severe.[19]

91. The Court notes from the record that the Applicant had no legal representation at his trial. The Court also notes that on 7 September 2005, during his Appeal at the High Court, Advocate Rutaisire appeared for the Applicant, but promptly informed the Court that he was withdrawing his services, even before the proceedings commenced. The Applicant thereafter was not represented throughout his appeals.

92. The Court further notes that the Respondent State only contends that the Applicant did not make a request for legal assistance. It has not disputed the fact that he was in fact, not afforded legal aid, nor that the offence he was charged with is a serious one.

93. Considering that the Applicant was charged with an offence which carries a minimum sentence of thirty (30) years imprisonment, the Respondent State had a duty to provide the Applicant with free legal assistance without him having to request for it.[20]

94. The Court therefore, finds that the Respondent State violated Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

VIII. Reparations

95. Article 27 of the Protocol provides that: "if the Court finds that there has been a violation of human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation and reparation".

96. The Court recalls its established jurisprudence that, "to examine and assess Applications for Reparations of prejudices resulting from human rights violations, it takes into account the principles 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".[21]

97. Measures that a State may take to remedy a violation of human rights, includes: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the

19 *Alex Thomas v Tanzania* (merits), § 123. See also *Mohammed Abubakari Tanzania*, (merits) §§ 138-139; *Minani Evarist v Tanzania*, (merits) § 68; *Diocles Williams v Tanzania* (merits), § 85; *Anaclet Paulo v Tanzania* (merits) § 92.

20 *Kalebi Elisamehe v Tanzania* (merits and reparations) § 57.

21 *Mohammed Abubakari v Tanzania* (merits), § 242(ix); *Ingabire Victoire Umuhoza v Republic of Rwanda* (reparations), (2018) 2 AfCLR 202, § 19.

violations taking into account the circumstances of each case.[22]

98. 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 onus is on the Applicant to provide evidence to justify his prayers.[23] With regard to moral prejudice, the Court exercises judicial discretion in equity.[24]

A. Pecuniary reparations

99. The Applicant requests the Court to grant him reparation for the violation of his rights commensurate to the period of time he spent in prison, to be calculated based on the national annual income of an average citizen of the Respondent State.

100. The Respondent State did not respond to this claim.

***

101. The Court notes that it did not make a determination regarding the lawfulness or otherwise of the Applicant's imprisonment and it can therefore not grant the Applicant's request to be awarded reparation commensurate with the period of time he spent in prison.

102. With regard to the allegation of the denial of free legal assistance, the Court notes its finding of the violation of Article 7(1)(c) of the Charter, read together with Article 14(3)(d) of the ICCPR, for failure to be provided with free legal aid, which caused him moral prejudice. Accordingly, in the exercise of its discretion, the Court awards the Applicant an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation.[25]

22 *Mohamed Abubakari v United Republic of Tanzania,* ACtHPR, Application No. 007/2013, Judgment of 4 July 2019 (reparations), § 21; *Alex Thomas v United Republic of Tanzania,* ACtHPR, Application No. 005/2013, Judgment of 4 July 2019 (reparations), § 13.

23 *Reverend Christopher R. Mtikila v United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72 § 40; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346 § 15.

24 *Mohamed Abubakari v Tanzania* (reparations), § 22*, Alex Thomas v Tanzania* (reparations), § 14.

25 See *Paulo v Tanzania* (merits) *op.cit* § 107; *Evarist v Tanzania* (merits) *op.cit* § 85.

B. Non-pecuniary reparations

103. The Applicant prays the Court to quash his conviction and sentence, and set him free.

104. The Respondent State did not respond to this claim.

***

105. As regards the prayer to quash his conviction and sentence, the Court notes that it has not determined whether the conviction or sentence of the Applicant was warranted or not as this is a matter to be left to the national courts. The Court is rather concerned with whether the procedures in the national courts comply with the provisions of human rights instruments ratified by the Respondent State. In this regard, the Court is satisfied that there is nothing on the record establishing that the manner in which the Applicant was tried, convicted and sentenced caused him miscarriage of justice to warrant its intervention.

106. With respect to the question of release, the Court has held that this would only be granted "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".[26]

107. In the instant case, the Court recalls that it has found that the Respondent State violated the Applicant's right to a fair trial for failing to provide him with free legal assistance. Without minimising the gravity of the violation, the Court considers that the nature of the violation in the instant case does not reveal any circumstance that signifies that the Applicant's imprisonment amounts to a miscarriage of justice or an arbitrary decision. The Applicant also failed to elaborate on specific and compelling circumstances to

26 *Mgosi Mwita Makungu v United Republic of Tanzania*, ACtHPR, Application No. 006/2016 Judgment of 7 December 2018 (merits and reparations) § 84; *Diocles William v United Republic of Tanzania,* ACtHPR, Application No. 016/2016 Judgment of 21 September 2018 (merits and reparations) § 101*; Minani Evarist v United Republic of Tanzania* (merits), § 82.

justify the order for his release.[27]

108. In view of the foregoing, this prayer is therefore dismissed.

IX. Costs

109. The Respondent State prays the Court to order that the cost of this proceedings be borne by the Applicant, while the Applicant did not pray for costs.

110. Pursuant to Rule 32(2) of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs, if any".

111. The Court finds no reason to depart from this provision. Consequently, the Court rules that each party shall bear its own costs.

X. Operative part

112. For these reasons,

The Court

Unanimously:

On jurisdiction

i. *Dismisses* the objection to its material jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objection to the admissibility of the Application;

iv. *Declares* the Application admissible.

On merits

v. *Finds* that the Respondent State has not violated the Applicant's right to have his cause heard under Article 7(1) of the Charter with regard to the proceedings on appeal and review at the Court of Appeal;

vi. *Finds* that the Respondent State is in violation of Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR, for failure to provide the Applicant with free legal assistance.

On reparations

Pecuniary reparations

vii. *Grants* the Applicant's prayer for damages for the moral prejudice he suffered and awards him the sum of Tanzanian Shillings Three

27 *Jibu Amir alias Mussa and another v Tanzania* (merits and reparations), § 97; *Kalebi Elisamehe v Tanzania* (merits and reparations), § 112; and *Minani Evarist v Tanzania* (merits and reparations), § 82.

Hundred Thousand (TZS 300,000);

viii. *Orders* the Respondent State to pay the amount indicated under sub-paragraph (vii) above free from tax as fair compensation to be made within six (6) months from the date of notification of this Judgment, failing which it will be required to pay 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.

Non-pecuniary reparations

ix. *Dismisses* the Applicant's prayer to quash his conviction and sentencing and his prayer for release from prison.

On implementation of the judgment and reporting

x. *Orders* the Respondent State to submit a report 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

xi. *Orders* each party to bear its own costs.

Request for Advisory Opinion by the Pan African Lawyers Union (PALU) (Advisory Opinion) (2021) 5 AfCLR 863

Application 001/2020, *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Right to Participate in the Government of One's Country in the Context of an Election Held During a Public Health Emergency or a Pandemic such as the Covid 19 Crises*

Advisory Opinion, 16 July 2021. 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 the right to participate in the government of one's country in the context of an election held during a public health emergency or a pandemic such as the Covid 19. The Court held that the decision whether to conduct elections during health or other emergencies is a prerogative of states, which must be exercised on the basis of prior consultation with relevant stakeholders.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Jurisdiction (personal jurisdiction, 22-26; African organisation, 23; material jurisdiction, 28-30; nature of advisory jurisdiction, 45-47)

Admissibility (identity of author, 36; pendency before the African Commission, 37; circumstances of request, 38)

Right to participate (scope of right, 42; obligation under AU Constitutive Act, 44; decision to conduct elections during pandemic, 50-51, 54-55; postponement of elections, 52-53; state obligation to ensure effective participation, 65-70; role of the Court, 71-72; conditions for limitation of right, 73-79, 84; core content of right, 80-81; state obligation in the event of decision to postpone elections, 96-97, 98-103)

I. The Author of the Request

1. This Request for Advisory Opinion (hereinafter referred to as "the Request") was submitted by the Pan African Lawyers Union (hereinafter referred to as "the Author").

2. The Author states that it is an African organisation based in Arusha, United Republic of Tanzania. It further states that it is recognised by the African Union (hereinafter referred to as "the AU"). In support of this assertion, the Author has provided the Court with a copy of the Memorandum of Understanding (hereinafter referred to as "MoU") between itself and the AU, dated 8 May 2006.

II. Circumstances and subject matter of the Request

3. The Author submits that the "Covid-19[1] crisis presents unprecedented challenges for democratic governance and rule of law in Africa" and that, "in response to the Covid-19 pandemic, AU Member States have mostly taken measures to protect the right to life by limiting such rights as freedoms of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective states, especially (although not limited to) through regular, free and fair elections."

4. The Author affirms that those measures taken "also have the practical effect of constraining democratic competition, could preclude election observation, and potentially interfere with both campaigning and the exercise of franchise."

5. The Author avers that "across the continent, elections invariably frame stability. Their acceptability, or lack thereof, could be a useful predictor for instability or fragmentation. With the Covid-19 crisis, all African countries going through elections over [2021] confront contemporaneous crises of public health, fiscal crunch, political stability and governmental legitimacy. In countries with limited institutional buffers, the consequences could be unpredictable for citizens, countries, regions and Africa's partners."

6. The Author submits that "at least 22 AU Member States are currently scheduled to hold presidential and/or legislative and/ or local government elections in 2020. At least 11 of these are for the position of President or Prime Minister."

7. They aver that "while State Parties unquestionably enjoy considerable latitude in managing this unprecedented public health emergency, it remains the case that, in the absence of formal derogations, State Parties remain bound by their obligations to safeguard the right to effectively participate in government as enshrined in the Constitutive Act of the African Union, the African Charter and its Protocols, ACDEG and other legal instruments under the AU or regional economic communities (RECs) recognised by the AU."

8. In these circumstances and for these reasons, the Author requests for an Advisory Opinion from the Court on the following questions:

a. Whether this Honourable Court cannot be seized with the question of this advisory opinion in terms of "Safeguarding the Right to

1 For the World Health Organization, Covid-19 is the disease caused by a new coronavirus called SARS-CoV-2. See https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (accessed on 11.6.2021).

Participate in Government under Articles 1 and 13(1) of the African Charter on Human and Peoples' Rights in Elections in Africa Affected by the Covid-19 Crisis."

b. Whether this Honourable Court cannot interpret and lay down in terms of treaty law applicable to State Parties, standards for conducting elections during or affected by the Covid-19 crisis.

If either or both of the above questions are resolved in the affirmative, this Honourable Court is invited to further dispose of the following questions:

a. What, if any, are the applicable obligations of State Parties for ensuring effective protection of the citizen's right to participate in the government in the context of an election held during the pendency of a declaration of a public health disaster or emergency, such as the Covid-19 crisis, in light of the express provisions of Articles 1 and 13 of the African Charter, and Articles 2(1) (2) (3) (4) (10) and (13); Articles 3(1) (4) (7) (10) and (11); Articles 4, 5, 6, 7, 12, 13, 15, 17, 24, 25; Articles 32(7)(8); Articles 38(1) and 39 of the ACDEG?

b. What, if any, are the legal standards founded in treaty law applicable to the State Parties that choose to conduct elections *vis-à-vis* Member States that choose not to conduct elections during the pendency of the Covid-19 disaster or emergency measures?

c. What, if any, are the legal standards applicable to States precluded by reason of a public health emergency, such as the one caused by the Covid-19 pandemic, from organising elections as the basis of the democratic mandate of government?

III. Summary of the Procedure before the Court

9. The Request was received at the Registry of the Court on 3 June 2020, together with the Application requesting the Court to "abridge the time and process for procuring the Advisory Opinion". This request was rejected by the Court on 2 November 2020.

10. On 9 June 2020, the Registry requested the African Commission on Human and Peoples' Rights (hereinafter referred as "the Commission"), pursuant to Article 4 of the Protocol, to confirm that the subject matter of the Request was not related to any matter pending before it. On 14 June 2021, the Commission informed the Registry that no case relating to the subject matter of this advisory opinion is pending before it.

11. On 11 August 2020, 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.

12. On 28 January 2021, the AU Member States and entities indicated above were given an extension of forty-five (45) days to submit their observations on the Request. In the same letter, four new entities were added to the list: Electoral Law and Governance Institute for Africa, COVID-DEM, Journal of African Law and International IDEA.

13. On 26 April 2021, the SOAS Centre for Human Rights Law, on behalf of the Journal of African Law, deposited an *amicus curiae* brief after it had been granted, *suo motu*, an extension of time of seven (7) days. Apart from this *amicus curiae* brief, the Court did not receive any submission from the entities notified of the Request.

14. By a notice dated 22 June 2021, the Author and all entities cited in paragraphs 11 and 12 above, were notified of the closure of pleadings.

IV. Jurisdiction

15. 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"),[2] 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.

16. The Court observes that Rule 87 of the Rules provides that "[t]he Court shall apply, *mutatis mutandis*, the provisions of Part IV of [the Rules] to the extent that it deems appropriate, to advisory procedure/proceedings." [3] In line with the provisions of 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

2 Formerly Rule 68, Rules of Court 2010.

3 Formerly Rule 72, Rules of Court 2010.

accordance with the Charter, the Protocol and these Rules." [4]

17. From the foregoing follows that in all advisory proceedings the Court must ascertain its jurisdiction.

18. The Court reiterates that in a request for an advisory opinion, given that such requests do not involve contestation of facts between opposing parties, the issue of territorial and temporal jurisdiction does not arise.[5] For this reason, the Court will only consider whether the Request satisfies the requirements for (A) personal and (B) material jurisdiction.

A. Personal jurisdiction

19. The Author submits that it "brings together the continent's 5 regional lawyers' associations, over 55 national lawyers' associations and over 1,000 lawyers from Africa and the Diaspora. Citing the Court case law,[6] it submits that "by virtue of having signed an MoU with the AU … it is accordingly formally recognised by the AU, thus meeting the criteria set forth by this Honourable Court."

20. To illustrate its involvement all over Africa, it affirms that it "is routinely involved in the activities of the Office of the Legal Counsel of the AU (OLC-AU); Department of Political Affairs of the African Union Commission (DPA-AUC); African Court; African Commission; African Union Commission on International Law (AUCIL); African Union Advisory Board on Corruption (AUABC) and the Pan African Parliament (PAP), amongst others".

21. The Author affirms that it "also regularly engages the African Regional Economic Communities (RECs), including the East African Community (EAC), Economic Community of West African States (ECOWAS), Common Market for Eastern and Southern Africa (COMESA), Inter-Governmental Authority on Development (IGAD), Southern African Development Community (SADC) and the International Conference of the Great Lakes Region (ICGLR),

4 Formerly Rule 39(1), Rules of Court 2010.

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. See also *The Pan African Lawyers Union (PALU),* ACtHPR, Request for Advisory Opinion No. 001/2018, Advisory Opinion of 4 December 2020, § 19.

6 Request for Advisory Opinion by *The Centre for Human Rights, University of Pretoria, and Others* (Advisory Opinion) (28 September 2017) 2 AfCLR 622, para 49.

especially on their interface with the AU."

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22. 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.[7] In the instant case, the question that arises is whether the Author is an "African organization recognised by the AU" in the meaning of this provision of the Protocol.

23. The Court recalls that it has held that "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."[8]

24. In the instant Request, the Court notes that the Author 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.

25. The Court recalls that, and as confirmed by the AU Commission's Legal Counsel, on 8 May 2006, the Author 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.[9] The Court finds, therefore, that the Author is an organization recognised by the AU within the meaning of Article 4(1) of the Protocol.

7 Request for Advisory Opinion by *The Socio-Economic Rights and Accountability Project* (Advisory Opinion) (26 May 2017) 2 AfCLR 572, § 38.

8 *Request for Advisory Opinion by L'Association Africaine de Defense des Droits de l'Homme* (Advisory Opinion) (28 September 2017) 2 AfCLR 637, § 27.

9 *The Centre for Human Rights, University of Pretoria, and Others* (Advisory Opinion), § 49. See also *Socio-Economic Rights and Accountability Project* (Advisory Opinion), §§ 56 à 65.

26. Consequently, the Court finds that it has personal jurisdiction to deal with this Request.

B. Material jurisdiction

27. The Author submits that "this Request for an Advisory Opinion is a legal matter, relating to the guarantees for the effective protection of the right to participate in government in the context of Covid-19 pandemic and crisis." It submits further that the Request is also sought in terms of the Constitutive Act of the AU, the Maputo Protocol and ACDEG, all of which are human rights instruments within the meaning of Article 4 of the Protocol.

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28. The Court recalls that Article 4(1) of the Protocol, whose provisions are restated in Rule 82(2) of the Rules,[10] stipulates that the Court can give an advisory opinion on "any legal matter relating to the Charter or any other relevant human rights instrument …."

29. The Court observes that in the instant Request, it is requested to give its opinion about the application of Articles 1 and 13 of the African Charter, and Articles 2(1)(2)(3)(4) (10) and (13); Articles 3(1)(4)(7)(10) and (11); Articles 4, 5, 6,7, 12, 13, 15, 17, 24, 25; Articles 32(7)(8); Articles 38(1) and 39 of the ACDEG in relation to citizens' right to effective participation in the government of their states, especially (although not limited to), through regular, free and fair elections, in the context of the Covid-19 pandemic. In these circumstances, the Court holds that it has material jurisdiction in respect of the Request.

30. Accordingly, the Court declares that it has jurisdiction to issue an opinion in the instant Request. Hence, the Court considers that it has answered the question raised in paragraph 8(a) concerning the first set of questions of this Opinion, in relation to the issue of whether it can be seized with the question on "Safeguarding the Right to Participate in Government under Articles 1 and 13(1) of the African Charter on Human and Peoples' Rights in Elections in

10 Formerly Rule 68(2), Rules of Court 2010.

Africa affected by the Covid-19 Crisis".

31. The Court also considers it has answered the question raised in paragraph 8(b) of the first set of questions of this Opinion on whether it can "interpret and lay down in terms of treaty law applicable to State Parties, standards for conducting elections during or affected by the Covid-19 crisis."

V. Admissibility

32. The Court observes that Article 4(1) of the Protocol, whose provisions are restated in Rule 82(3) of the Rules,[11] 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."

33. Rule 82(2) of the Rules, provides that "[a]ny request for advisory opinion … shall specify … the context or background giving rise to the request as well as the names and addresses of the representatives of the entities making the request."

34. It follows from the above that for determination of the admissibility of a Request for Advisory Opinion, the Court must determine if the Author of the Request is properly identified, the Request is not related to a matter pending before the Commission, and the circumstances of the Request have been specified.

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35. According to the Author, the Request is admissible since (i) it is properly identified, (ii) the Request does not relate to any application pending before the Commission, and (iii) the circumstances of the Request have been specified.

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11 Formerly Rule 68(3), Rules of Court 2010.

36. The Court notes that the Author is well identified and that its representatives are explicitly indicated.

37. The Court further notes that on 14 June 2021, in response to its request dated 9 June 2020, the Commission informed the Registry that no case related to the subject matter of this advisory opinion is pending before it.

38. The Court also confirms that the Author has provided the context within which the Request arises, which is the political, economic and social crisis wrought upon Africa, and the rest of the World, by the Covid-19 pandemic and which poses serious challenges to democratic governance, the rule of law and the promotion and protection of human and peoples' rights, more generally, and the organisation of elections, more specifically.

39. From the foregoing, the Court thus finds that the Request is admissible.

VI. On the questions presented to the Court

40. The Court notes that in paragraph 8 of this Opinion, the Author poses a number of questions. The first set of questions, which relates to the Court's jurisdiction, have already been answered in the affirmative (see paragraphs 30 and 31 above).

41. With regard to the second set of questions (see paragraph 8 above), the Court condenses them as follows:[12]

a. On the decision to conduct or not to conduct elections in the context of a public health emergency or a pandemic, such as the Covid-19

b. On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis

c. On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic, such as the Covid-19 crisis

42. The Court notes that the citizens' right to participate freely in the government of their countries is very broad. It does not cover only direct and indirect participation in the government of their countries through elections. However, in the instant Request, the Author limits its question to the participation of citizens in the government of their respective countries within an electoral framework. Thus, the Court's response will be limited to the material scope as set out by the Author.

12 *The Pan African Lawyers Union (PALU)* (Advisory Opinion), § 33.

43. In relation to the instruments invoked by the Author, the Court notes that the Charter[13] and the ACDEG[14] have been ratified by fifty-four (54) and thirty-four (34) of the fifty-five (55) Member States of the AU, respectively.

44. The Court observes that some Member States of the AU have not ratified the instruments that the Author has invited it to interpret in responding to its questions. Nevertheless, the Court notes that, under Article 3(h) of the Constitutive Act, 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 rights instruments." By making this commitment, they assumed the obligation to uphold human rights in all circumstances.

45. In exercising its advisory jurisdiction, the Court does not resolve factual disputes between opposing parties. Its main duty is to provide its opinion by answering questions raised by the Author of the Request, as envisaged by Article 4(1) of the Protocol.[15] Any use of examples simply serves to highlight the practical dimensions of the opinion and does not amount to a decision on any factual situation described in those illustrations.[16]

46. The Court further recalls that it can be requested to provide an advisory opinion 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. Therefore, the Court reaffirms that its advisory opinions are designed to provide guidance to all Member States of the AU in fulfilling their international human rights commitments.[17]

47. The Court makes it clear that this Opinion does not seek to examine the lawfulness of any specific elections that were held or postponed during the Covid-19 Pandemic, much less to assess

13 https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf (accessed on 25 May 2021).

14 https://au.int/sites/default/files/treaties/36384-sl-AFRICAN%20CHARTER%20ON%20DEMOCRACY%2C%20ELECTIONS%20AND%20GOVERNANCE.PDF (accessed on 25 May 2021)

15 *The Pan African Lawyers Union (PALU)* (Advisory Opinion), § 36. See also, 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.

16 *Ibidem.*

17 *The Pan African Lawyers Union (PALU)* (Advisory Opinion), § 37. See also, 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, § 64.

the extent to which they were free, fair and transparent.

A. On the decision to conduct or not to conduct elections in the context of a public health emergency or a pandemic, such as the Covid-19

48. The Author avers that while the scheduling of national elections is a matter of sovereignty of State Parties, the conduct of elections is a matter of continental treaty law relating to the citizen's rights to effectively participate in the government of their countries as well as to standards of good governance enshrined in treaty law by African states.

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49. It emerges from the *Amicus Curiae* brief that States can decide to conduct elections in the context of a public health emergency or a pandemic, what matters though are the measure need to be taken to guarantee that elections are conducted in accordance with the applicable international treaty laws.

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50. The Court recalls that AU Member States have adopted democracy as their political system[18] and are committed to respecting the principles of the rule of law and to promoting and protecting human and peoples' rights under the provisions of Article 3 (g) and (h) of the AU Constitutive Act.[19]

51. The Court considers that one of the fundamental principles of democracy is the regular conduct of transparent, free and fair

18 ACHPR, Communication 318/06 – *Open Society Justice Initiative v Republic of Côte d'Ivoire* (27 May 2016), §164.

19 Article 3: "The objectives of the Union shall be to: g) promote democratic principles and institutions, popular participation and good governance; h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments."

elections[20] aimed at creating the conditions for the possibility of democratic alternation[21] and, at the same time, affording the electorate the opportunity to regularly evaluate and politically sanction the performance of those elected officials, through universal suffrage.[22] It follows, then, that State Parties can decide to conduct elections within the timeframe provided for by law, notwithstanding the situation of the Covid-19 pandemic, if they deem it possible.

52. Concerning the postponement, the Court notes that, Article 13(1) of the Charter, as supplemented by Articles 2 and 3 of the ACDEG, by referring to domestic law, the determination of conditions for the exercise by citizens of the right to participate freely in the governance of their countries, gives the competent bodies of each State the power to decide to postpone elections in accordance with its domestic law.

53. The Court notes that in the absence of specific provisions on the postponement of elections, the provisions concerning the scheduling and holding of elections, including during a situation of emergency are applicable to their postponement. Indeed, those who can schedule elections also must be able to call them off or postpone them if the conditions for holding the elections are not met because of the emergency situation, as is the case with the Covid-19 pandemic. If necessary, appropriate legislation can be adopted for this purpose.

54. The Court is of the view that even though the decision to conduct or not to conduct elections, remains with the competent organs of the State concerned, because of the situation of a public health emergency or a pandemic, a consultation of health authorities and political actors, including representatives of civil society, is

20 ACDEG, Article 2: "The objectives of this Charter are to: 3. Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments;" Article 3: "State Parties shall implement this Charter in accordance with the following principles: 4. Holding of regular, transparent, free and fair elections."

21 ACDEG, Article 23: "State Parties agree that the use of, inter alia, the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union: 4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections. 5. Any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections."

22 ACDEG, Article 2: "The objectives of this Charter are to: "4.Holding of regular, transparent, free and fair elections."

necessary to ensure the inclusiveness of the process.[23]

55. The consultation should concern not only the decision to hold elections but also the measures necessary to ensure that they are conducted in a transparent, free and fair manner. In this regard, the Court recalls that the provisions of the ECOWAS Protocol on Democracy and Elections, which requires that the consent of the majority of political actors needs to be obtained when substantial changes are made to the electoral laws within six (6) months before the elections,[24] are an important source of inspiration for states that decide to conduct elections during a situation of public health emergency.

B. On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis

56. The Author submits that with the Covid-19 crisis, all African countries going through elections in 2021 "confront contemporaneous crises of public health, fiscal crunch, political stability and governmental legitimacy. In countries with limited institutional buffers, the consequences could be unpredictable for citizens, countries, regions and Africa's partners."

57. The Author submits that "[i]n response to the Covid-19 pandemic, AU Member States have mostly taken measures to protect the right to life by limiting such rights as freedoms of movement,

23 ACDEG: Article 3: State Parties shall implement this Charter in accordance with the following principles: 7. "Effective participation of citizens in democratic and development processes and in governance of public affairs." Article 8: State Parties shall eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance. 2. State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups. 3. State Parties shall respect ethnic, cultural and religious diversity, which contributes to strengthening democracy and citizen participation." Article 13: "State Parties shall take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace." Article 28: "State Parties shall ensure and promote strong partnerships and dialogue between government, civil society and private sector."

24 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, Article 2(1): 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.

assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective states, especially (although not limited to) through regular, free and fair elections."

58. The Author affirms that "[t]hese measures have affected the enjoyment of basic rights such as the rights to freedom of movement, assembly, association and information, and also the right of citizens to effectively participate in the governance of their respective countries, especially (although not limited to) through regular, free and fair elections. They also have the practical effect of constraining democratic competition, which could preclude election observation, and potentially interfere with both campaigning and the exercise of franchise."

59. The Author submits that in the absence of formal derogations, State Parties remain bound by their obligations to safeguard the citizens' right to effectively participate in government of their countries. In this vein, it maintains that harmonized approaches that safeguard the right to participate in government, as enshrined in the African Charter and ACDEG, amongst other legal instruments, should be envisaged.

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60. According to the *Amicus Curiae*, "[i]f elections are to be held, the authorities must decide how they should be conducted in response to the threat posed by Covid-19." It avers that "[t]hey have to take into consideration public health imperatives, the legal framework governing elections in the country concerned, political, operational and financial factors, and States' regional and international human rights obligations."

61. Citing the report of the International IDEA, it affirms that "at least 78 countries and territories across the globe have decided to postpone national and subnational elections due to Covid-19; … 52 countries and territories have held elections that were initially postponed due to concerns related to Covid-19; in Africa, countries where elections have been held include: Algeria, Burkina Faso, Burundi, Cabo Verde, Cameroon, Central African Republic, Côte d'Ivoire, Egypt, Ghana, Guinea, Guinea Bissau, Kenya, Liberia, Malawi, Mali, Niger, Nigeria, Seychelles, Tanzania, Togo and

Uganda at the national level."

62. Citing several sources, the *Amicus Curiae* affirms that "[i]n several countries where elections were held, observers raised a series of concerns regarding the electoral process. These included restrictions pertaining to campaigning, the adverse impact on voter registration, the inability of members of vulnerable groups to effectively participate in the process, impediments faced by impartial election observers and the risk of heightened insecurity."

63. The *Amicus Curiae* is of the view that State Parties when deciding whether to hold or postpone scheduled elections, should consider the opportunity for deliberation (free and fair election requires that voters have the opportunity to deliberate over the issues at stake in the election and time to formulate preferences in response to individual and collective concerns); equality of contestation; inclusivity in, and equality of, participation in elections (including by vulnerable or marginalised groups in society); robust electoral management system and institutionalisation (institutional clarity to ensure trust in the system and to prevent any undemocratic power grabs).

64. The *Amicus Curiae* submits that "measures imposed to combat Covid-19 risk undermining electoral principles such as accurate voter registration or effective (safe) campaigning. To counter these risks, restrictions to the rights to freedom of expression, information, privacy, assembly and association must be kept to the absolute minimum necessary. Campaigning methods that involve physical proximity such as door-to-door visits may be limited. Ensuring the freedom of voters to form an opinion must in such circumstances be made through alternative campaigning methods, including by taking into consideration how changes made impact the overall playing field."

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65. The Court notes that the electoral period provides a framework for the general mobilisation of political parties, candidates and their supporters, and public institutions involved in the electoral process, notably, those responsible for issuing documents and validating candidatures. National and international observers, and civil society organisations participating in the civic and voter

education campaigns, are also involved in the electoral process.

66. The Court is of the view that conducting elections in a situation of emergency, as is the case with the Covid-19 Pandemic, a disease that is easily transmissible, including through contact between humans and between humans and contaminated objects, requires that appropriate measures be taken to prevent its transmission, without undermining the integrity of the electoral process.

67. The Court observes that, as noted by the Author and the *Amicus Curiae*, after the WHO declared the Pandemic, a number of countries that organised elections took restrictive measures that negatively impacted the right of citizens to participate in the government of their countries through elections and the exercise of other rights during the election period. These measures include restrictions on rights during the election period, including the right of movement of candidates and voters, to register, to obtain documents necessary for submission of candidatures, to participate in meetings related to elections, to access information related to the electoral process, as well as election observation by domestic and international observers.

68. Also following the declaration of a pandemic, different national and international institutions, including the WHO itself, the AU's relevant bodies, Regional Economic Communities (RECs), and certain civil society organisations issued instructions or guidelines on measures to be taken to mitigate the spread of the disease, including in an electoral context.

69. The Court particularly notes the Communiqué of the AU Peace and Security Council, which recommends to States that decide to organise elections during this period

> to create the necessary conducive conditions to ensure safety and security of the population against Covid-19, in line with safeguard protocols issued by World Health Organization (WHO) and the CDC Africa, as well as to preserve the gains made and to maintain the current momentum in the fight against the pandemic and other public health emergencies.[25]

70. The Court also notes the Commission's Press Statement on human rights-based effective response to the novel Covid-19 virus in Africa,[26] in which it called the attention of Member States to the fact that measures to combat Covid-19 must respect

25 Communiqué PSC/PR/COMM.(CMLXXVI) § 3, adopted at its 976th meeting held on 29 January 2021, on AU Guidelines on Elections in Africa in the Context of the Novel Coronavirus (Covid-19) Pandemic and Other Public Health Emergencies.

26 https://www.achpr.org/pressrelease/detail?id=522 (accessed on 2 June 2021).

human rights, including the principles of legality, legitimate aim, non-discrimination and proportionality, under Article 27 (2) of the Charter. It should also be recalled that the Commission had already adopted a number of Resolutions on elections in Africa.[27]

71. For its part, the Court advocates that, as a judicial body, it is not its role to develop policy guidelines for States on how to conduct elections in a situation of emergency. The Court is of the view that this role falls essentially on the entities that promote human rights at the continental and domestic levels, which indeed have been doing so since the outbreak of the pandemic, as noted above.

72. The Court notes that in a pandemic context, where States take measures that are restrictive of human and peoples' rights or postpone elections, it is incumbent on the Court to share with those concerned, through this Opinion, the legal standards applicable to restrictions or suspension of rights under the Charter and other human rights instruments that the Court interprets and applies.

73. The Court recalls that one of the specific features of the Charter is that it does not explicit have provisions for derogation of rights even in emergency situations. This means that, under the Charter, States that choose to conduct elections during a state of emergency, as is the case with Covid-19, are obliged to respect human rights. Where they take measures that restrict human rights, they must observe the provisions of Article 27(2) of the Charter, which sets out that "[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."

74. The Court further notes that measures restrictive of rights must also comply with Article 2 of the Charter, which 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, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

75. The Court also considers applicable to the regime of restrictions Article 4(1) and (2) of the International Covenant on Civil and

27 ACHPR/Res.23(XIX)96 – Resolution on Electoral Process and Participatory Governance; ACHPR/Res.138(XXXXIV)08 Resolution on Elections in Africa; ACHPR/Res.164 (XLVII)10 Resolution on the 2010 Elections in Africa; ACHPR/Res.232 (EXT.OS/XIII) 2013 Resolution on Elections in Africa; ACHPR/RES 239 (EXT.OS/XIV) 2013 Resolution on the 2013 Elections in Africa; ACHPR/Res.272 (LV) 2014 Resolution on the 2014 Elections in Africa; ACHPR/Res.293 (EXT.OS/XVII) 2015 Resolution on 2015 Elections in Africa; ACHPR/Res.307 (EXT.OS/XVIII) 2015 Resolution on the Development of Guidelines on Access to Information and Elections in Africa; ACHPR/Res. 331 (EXT.OS/XIX) 2016 Resolution on Elections in Africa.

Political Rights (ICCPR), which provides that

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.[28]

76. In view of the above, the Court restates its position that measures restricting rights must be in the form of a general law; must be proportionate;[29] must not undermine the essential content of rights;[30] must not derogate the rights provided for in Articles 6, 7, 8(1) and (2), 11, 15, 16, and 18 of the ICCPR;[31] and must not constitute a form of discrimination against persons.

77. With regard to the aim pursued, the Court considers that the restrictions imposed to protect the health and life of persons in the context of elections conducted during a public health emergency or a pandemic must pursue a legitimate aim, which is the satisfaction of the collective interest, as required by Article 27(2) of the Charter.

78. As regards proportionality, the Court emphasizes that the restrictions must be appropriate to the intended purpose, including their territorial extent and duration in time; they must be necessary in a democratic society,[32] in the sense that there are no alternative measures less burdensome for the rights of individuals and peoples; and they are not abusive (proportionality *stricto sensu*), in the sense that they are surrounded by safeguards so as to avoid their abusive application.

28 These provisions relate, respectively, to the right to life; the prohibition of torture, cruel, inhuman or degrading treatment or punishment; the prohibition of all forms of slavery, the slave-trade and servitude; the ban of prison for breach of contract; the principle of non-retroactivity of criminal law; the right of everyone to legal personality; the right to freedom of thought, conscience and religion or to adopt a belief of his choice.

29 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits), § 107.1.

30 *Ibidem*.

31 ACHPR, Communication 275/03, *Article 19 v Eritrea* (30 May 2007), § 98.

32 ACHPR, *Kenneth Good v Republic of Botswana*, Communication No. 313/05, Decision of 26 March 2010, § 187.

79. The Court further considers that measures restricting rights may not negate the essential content of the restricted rights. That is, the practical effect of the restrictions may not imply the annulment of the essential features of the restricted rights.[33]

80. In the instant Request, the Court is of the view that there are some aspects which form the essential content of the right of citizens to freely participate in the government of their countries through elections.[34] These aspects comprise the effective participation in the electoral process, including campaigning, fair and equitable access to the State controlled media; the monitoring of the electoral process by candidates, political parties and the competent voter registration public institutions; the secret ballot; participation in the process of vote counting and publication of the election results by political parties, candidates and any other relevant actors for the transparency of the elections; the possibility of contesting the results before the competent administrative and judicial bodies, if appropriate.

81. These aspects of citizens' right to participate in the government of their countries cannot be suppressed, even in an emergency situation such as the Covid-19 Pandemic, without undermining the integrity of the electoral process.

82. The Court is of the opinion that particular attention should be given to the right of movement of persons during the election period,

33 ACHPR, *Media Rights Agenda and Others v Nigeria, African Commission on Human and Peoples' Rights*, n.º 105/93, 128/94, 130/94 and 152/96, of 31 October 1998, in which the Commission held that: 67. In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.68. The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2, that is that the rights of the Charter "shall be exercised with due regard to the rights of others, collective security, morality and common interest." 69. The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained. 70. Even more important, a limitation may never have as a consequence that the right itself becomes illusory. "

34 ACHPR, Communication 320/06 - *Pierre Mamboundou v Gabon* (25 July 2013), § 48-49. See also Article 17 of the ACDEG: 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. 2. Establish and strengthen national mechanisms that redress election related disputes in a timely manner. 3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections. 4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels."

so restrictions on movement, besides not being absolute, other measures should be considered to mitigate restrictions such as creating conditions for meetings to be held virtually, which requires improving the coverage of the telecommunications network, lifting restrictions on the use of online communication platforms, namely social media.

83. On polling day and at electoral events involving crowds of people, appropriate protective measures such as social distancing, the wearing of masks, the sanitation of polling booths and ballot papers, and the protection of polling agents are required, among other such measures that States may deem appropriate.[35]

84. Finally, measures restricting rights must not be discriminatory. That is, a State should seek to ensure that, within the overall framework, the measures taken do not, in practice, create an advantage for one party, notably, the incumbent governing parties or candidates, to the detriment of other candidates or parties.

85. From the above, the Court is of the opinion that States should regularly conduct elections within the electoral calendar. In a situation of an emergency, such as the Covid-19 Pandemic, it is incumbent upon the States which are sovereign to determine when to conduct elections and to take appropriate measures to protect the health and life of people without undermining the integrity of the elections.

C. On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic, such as the Covid-19 crisis

86. The Author considers that several elections in AU member states are scheduled to be held during the Covid-19 pandemic. In 2020 alone, elections were scheduled in twenty-two (22) AU member states. Therefore, the Author finds it pertinent for the Court to respond to the "growing calls for harmonized approaches that safeguard the right to participate in government, as enshrined in the African Charter and ACDEG, amongst other legal instruments",

35 https://www.who.int/emergencies/diseases/novel-coronavirus-2019 (accessed on 24.6.2021); https://africacdc.org/africa-mask-week-23-30-november-2020/ (accessed on 24.6.2021).

in case of postponement of elections.

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87. The *Amicus Curiae* submits that "[i]n case of a postponement of elections, it needs to be determined who has the authority to decide on a new date, in what process and based on what criteria. They have to take into consideration public health imperatives, the legal framework governing elections in the country concerned, political, operational and financial factors, and States' regional and international human rights obligations."

88. The *Amicus Curiae* submits that "[a]vailable data indicates that States have taken decisions primarily based on specific local or national contexts. National elections were postponed in Chad, Ethiopia, Gabon, Gambia, Kenya, Liberia, Nigeria, Somalia, with subnational elections postponed in Botswana, Libya, South Africa, Tunisia and Zimbabwe. Postponements varied considerably, from a one-month delay to allow for adjustments made in Liberia to a delay of around ten months in Chad and Ethiopia. The decision to postpone elections has been made by executive bodies, parliaments, and electoral bodies."

89. The *Amicus Curiae* submits that "[e]lection experts have raised concerns about the lack of consultation with relevant actors and transparency in taking such decisions. Judicial challenges have been brought in several countries in relation to elections during the Covid-19 period. Legislative approval for public health measures and election schedules has been deemed crucial in countries such as Malawi (*Kathumba and Others v President of Malawi*), the United States of America (U.S.) *(Wisconsin Legislature v Palm*; *Republican National Committee v Democratic National Committee*) and *Singapore (Daniel De Costa Augustin v Attorney General*)."

90. Referring to European Convention on Human Rights, it considers that[36] postponement is a restriction to the periodicity of elections under article 3 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms that has

36 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 009, adopted on 20 March 1952, entered into force on 18 May 1954.

to be foreseen by law, be necessary and proportionate.

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91. The Court recalls that it is asked whether it is possible to postpone elections because of a situation of emergency, as is the case with the Covid-19 Pandemic. First of all, the Court reaffirms the principle that elections must be held regularly on the scheduled timeframe, as stated above (paragraph 51 above). The postponement, therefore, constitutes an exception to this principle.

92. The Court notes that, unlike the holding of elections in a public health emergency or a pandemic, in which rights are restricted in order to protect the health and lives of the people, the postponement of elections entails the suspension of the right of citizens to participate regularly in the governance of their countries through elections, as provided for in Article 13(1) of the Charter and Articles 2(3) and 3(4) both of the ACDEG.

93. The Court considers that the question may arise whether the Charter and other instruments which it applies are susceptible to suspension in whole or in part in emergency situations. The Court takes the view, however, that the question of partial suspension of the Charter would arise only if the aspect of the right in question is directly governed by the Charter. To that end, it is necessary to examine the relevant provisions of the Charter as supplemented by the ACDEG.

94. The Court notes that 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."

95. The Court notes that Article 2(3) of the ACDEG, an instrument that complements the Charter.[37] provides that "The objectives of the present Charter are to: Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments." In turn, Article 3(4) of the same instrument provides that "[t]he State Parties shall implement this Charter in accordance with the following principles: Holding of regular, transparent, free and fair

37 *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (18 November 2016) 1 AfCLR 668, § 63.

elections."

96. The Court is of the view that the above provisions refer back to domestic law the definition of the conditions for the exercise by the citizens of their right to participate in the government of their countries through elections, including in particular their postponement. As these aspects are not directly regulated by the Charter and the ACDEG, the Court considers that it is for the domestic law to define the conditions for postponing elections, namely (i) specific the criteria for postponement and (ii) the regime applicable in the event the term of office of the elected officials expires without elections having been held.

97. The Court recalls that it has held that "whilst the said clause envisages the enactment of rules and regulations for the enjoyment of the rights enshrined therein, such rules and regulations may not be allowed to nullify the very rights and liberties they are to regulate."[38] Thus, domestic regulations must comply with international standards in determining the conditions of exercise of the right in question.

i. Specific criteria for the postponement of elections

98. The Court notes that the reference to domestic law to outline the criteria for postponing elections in declared emergencies is subject to certain conditions. The Court is of the view that the regime of restrictions provided for in Article 27(2) of the Charter is applicable *mutatis mutandis* to the suspension of rights. That is, the postponement must be made in application of a general law, must aim at the legitimate purpose, be proportionate to the intended purpose and must not undermine the essential content of rights, as demonstrated above.

99. In addition, the Court recalls that as stated above (see paragraph 92), the postponement of elections entails the suspension of the right of citizens to participate regularly in the governance of their countries through elections. In this regard, Article 4(1) of ICCPR provides that:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required

38 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits), § 109; ACHPR, Amnesty International v Zambia, African Commission on Human and Peoples' Rights, Comm. No. 212/98 (5 May 1999), § 50.

by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

100. Accordingly, a State concerned who invokes the situation of emergency to postponed elections, must declare it through a general law.[39]

101. The Court considers that, in the instant Request, the postponement is legitimate if it aims at protecting the health and life of the people, as well as allowing the creation of conditions for the holding of transparent, free and fair elections.

102. The Court notes that, from the point of view of proportionality, the postponement of elections must be a last resort, without which it will not be possible to protect the health and lives of the people and ensure the integrity of the electoral process.[40] In that sense, the period of postponement must be strictly necessary to create the conditions that are required for the elections to take place under the best possible conditions, in accordance with acceptable international standards in the context of an emergency.

103. Lastly, the Court considers that the deferral period cannot be used to undermine the obligation of regular legitimization of the elected officials and become a form of unduly prolonging their term of office.

ii. Applicable standards in the event the term of office of the elected officials expires without elections having been held

104. The Court notes that elections can be postponed and still be held before the end of the term of office of the elected officials. In that case, it is only the electoral timetable that has changed, without this implying the expiration of the term of office and the consequent lapse of the organs. In cases where elections are held after the end of the term of office of the organs or the electoral process is completed afterwards, there is a situation of expiration of the organs. The question then arises as to how the problem of the apparent vacancy of power is to be solved.

39 General Comment No. 29 State of Emergency (Article 4 of the ICCPR), § 2, adopted by the UN Committee of Human Rights on 24 July 2001 during its 1950the session.

40 *Ibidem*, § 4.

105. The Court recalls that it has already stated above that the details for the exercise of the right of citizens to participate in the government of their countries are governed by domestic law. It is therefore for the latter to define the legal regime applicable when the term of office of elected officials expires. In other words, it is up to the law to define whether interim replacement mechanisms are triggered; whether the elected officials remain in office with full powers; or whether they remain in office but in a caretaker management arrangement, that is, with limited powers.

106. The Court recalls that situations of emergency are neither a new phenomenon for States, nor a new phenomenon for the law. Only the causes underlying their declaration vary. Accordingly, in principle, States must have their own legislation on the consequences of the expiry of the term of office of elected officials without elections being held due to the declaration of a state of emergency.

107. The Court holds that if such legislation exists, it must be applied, otherwise new legislation should be enacted by the competent bodies. However, the Court is of the view that (see paragraph 54 above), considering that this is a specific context in which the rights of other political and social players at stake, consultation with these actors is required before the legislation in question is enacted by the competent bodies.

VII. Operative part

108. 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

On the decision to conduct or not conduct elections in the context of a public health emergency or a pandemic

iii. *Finds* that states may decide to conduct or not to conduct elections in the context of a public health emergency or a pandemic. Such a decision requires prior consultation with health authorities and political actors, including representatives of civil society.

On the obligations of State Parties to ensure effective protection of citizens' right to participate in the government of their countries in the context of an election held during a public health emergency or a pandemic, such as the Covid-19 crisis

iv. *Finds* that measures restricting rights, applied by States in elections conducted during a public health emergency or a pandemic, must, in accordance with Article 27(2) of the Charter, be in the form of general law; pursue a legitimate purpose; be proportionate; must not undermine the essential content of rights; must not derogate the rights provided for in Articles 6, 7, 8(1) and (2), in Articles 11, 15, 16 and 18, in accordance with Article 4(2) of the ICCPR; and must not be discriminatory.

On the obligations of State Parties that decide to postpone elections because of a public health emergency or a pandemic, such as the Covid-19 crisis

v. *Finds* that the postponement of an election because of a public health emergency or a pandemic must comply with Article 27(2) of the Charter mutatis mutandis and Article 4(1) of the ICCPR.

On the standards applicable in the event the term of office expires

vi. *Finds* that it is for domestic law to outline the applicable legal standards when the term of office of elected officials expires, including to an interim replacement, to an extension of term of office with full powers, or to a caretaker arrangement. Where appropriate legislation does not exist at the time of a public health emergency or a pandemic, a law may be enacted by the competent bodies, based on prior consultation with political actors, including representatives of civil society.

Request for Advisory Opinion by the Pan African Parliament (PAP) (Advisory Opinion) (2021) 5 AfCLR 889

Application 001/2021, *Request for Advisory Opinion by the Pan African Parliament (PAP) on The Application of the Principle of Regional Rotation in the Election of the Bureau of the PAP*

Advisory Opinion, 16 July 2021. Done in English and French, the English text being authoritative.

The Clerk of the Pan African Parliament brought this request on behalf of the Parliament to seek the Court's interpretation of the core instruments of the Parliament as it relates to the application of the principle of rotation in the election of the Bureau of the Parliament. The Court held that it does not have the jurisdiction to entertain the request since the instruments sought to be interpreted are not human rights instruments.

Judges: ABOUD, TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Procedure (urgency under Rule 59 not applicable to requests for advisory opinion, 17-19; expedited consideration of request for advisory opinion, 19-20; legal capacity of author, 22-24)

Jurisdiction (personal jurisdiction, 31-33; African organisation, 23; material jurisdiction, 34-51)

I. The Author of the Request

1. This Request for Advisory Opinion (hereinafter referred to as "the Request") was filed by the Pan African Parliament (hereinafter referred to as "PAP" or "the Author") represented by Mr Vipya Harawa, Clerk of PAP.

II. Subject of the Request

2. This Request, as it emerges from the Author's submissions, arises from the suspension on 1 June 2021 of the election of the Bureau of the PAP. The incident occurred after the election process was disrupted due to an argument over the application of the principle of regional rotation in the election of the Bureau.

3. The Author submits that, there is currently a strong dispute within PAP regarding the interpretation of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (hereinafter referred to as "the

PAP Protocol")[1] and the Rules of Procedure of PAP (hereinafter referred to as "the PAP Rules")[2] with respect to the election of the Bureau of the Institution. According to the Author, the said dispute is mainly on whether its abovementioned instruments prescribe for the application of the principle of regional rotation adopted by the African Union (AU), and whether the said principle is binding and enforceable when electing the Bureau of PAP.

4. According to the Author, the Southern Caucus of PAP is of the view that the principle of rotation provided for in Article 12(2) and (4) of the PAP Protocol is binding and enforceable and therefore elections of the Bureau that do not apply rotation among the five regions of the African Union would be invalid. The Author submits that, the dispute also arose from the Southern Caucus' contention that regional rotation is compulsory in light of not only the PAP statutes but also AU practice and past decisions of the AU Executive Council on the issue. This position, the Author avers, is wrongly based on an Opinion which the Southern Caucus sought from the AU Legal Counsel who erred in interpreting the afore mentioned provisions as prescribing rotation in respect of the elections of the Bureau.

5. The Author submits that these contradicting interpretations of the PAP statutes and practices adopted by the Institution over the years in respect of the matter led to stalemate which requires clarification.

6. PAP, therefore, requests for an opinion from the Court on the following questions:

a. Whether the regional rotation principle observed by the AU in general, is stipulated in Rule 12 of the PAP Protocol and Rules 14-16 of the Rules of Procedure when electing the Bureau or not.

b. And if rotation is not stipulated in the Protocol and Rules of Procedure of PAP, is the principle and practice of rotation binding and enforceable when the PAP elects its Bureau members (President and Vice-President)?

c. And whether if the elections of the Bureau are conducted in accordance with the Protocol and Rules of Procedure as they stand currently, that is, without following regional rotation, such elections would be valid and compliant with the PAP Protocol and Rules of Procedure or not.

d. And whether the Court is of the opinion that the Rules of Procedure will have to be amended to make regional rotation binding and enforceable or not.

1 Adopted, 2 March 2001; entered into force, 14 December 2003.

2 Adopted, 21 September 2004; amended, 10 October 2011.

e. And if the Court is of the opinion that to be binding and enforceable, the Rules of Procedure must be amended, whether the elections of the new Bureau should be conducted first to facilitate the amendment of the Rules or not.

7. PAP requests the Court to use its inherent jurisdiction provided in terms of Rule 59(1) and (2) of the Rules of Procedure of the Court (hereinafter referred to as "the Rules of Court"), either based on this request and/or its own accord and treat this matter as urgent, and issue the Advisory Opinion as requested on an urgent basis.

III. Summary of the Procedure before the Court

8. The Request was filed at the Registry of the Court on 18 June 2021.

9. On 21 June 2021, the Registry informed the Author that the Request had been received and registered.

10. On 23 June 2021, the Registry received a supplementary submission from the PAP relating to the Request.

11. On 23 June 2021, the Court 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.

12. On 24 June 2020, the Court received a communication from the Commission in which it advised that the subject matter of the Request is not related to any matter before it.

IV. Alleged urgency under Rule 59(1) of the rules of Court

13. The Author asks the Court to consider the Request on an urgent basis and cites the provisions of 59(1) of the Rules of Court.

14. According to PAP, the elections of Members of its Bureau should be conducted as soon as possible to prevent the Institution from facing further disruption in its operation than has already been caused due to the afore mentioned suspension of the May-June 2021 sitting. The Author submits that the next possible time to hold the elections is during the August 2021 Committee meetings.

15. The Author further submits that, given that the wide media coverage of the disruption of the sitting has negatively impacted on the image of PAP, it is important that this Court urgently considers the Request and issues an opinion to help the Institution hold the election and restore its democratic image.

16. PAP finally avers that an urgent consideration of the Request will prevent the matter from spilling into a political and diplomatic crisis mainly in light of the forthcoming AU Summit.

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17. The Court notes that urgency as alleged by the Author under Rule 59(1) of the Rules of Court is not justified as the Rule governs the granting of provisional measures. The Court recalls that urgency as provided for under the said Rule is applicable to contentious matters and not to advisory procedures as it the case in the present Request.

18. The Court observes, with reference to its practice,[3] that requests on grounds of urgency made under Rule 59(1) of the Rules of Court as part of advisory processes are to be considered as requests for an expedited consideration of the concerned matter and examined as such.

19. The Court notes that the present Request by PAP is not a contentious matter. Conversely, it emerges from the Author's submissions that what is sought from this Court is that the issue placed before it be considered urgently in order to allow PAP resume the normal course of its operations as soon as possible. In this respect, the Court notes that the failure to complete the elections of its Bureau during the May-June 2021 sitting has left PAP in an institutional limbo which has inevitably disrupted and continue to disrupt its effective operations, and therefore negatively impacts on the discharge of its mandate. In view of the possible scheduling of fresh elections at the August 2021 sitting of the PAP Committees, this Court considers that the determination of the present Request warrants urgency.

20. In the circumstances, and in light of the above, the Court grants the request for expedited consideration of this Request.

V. Capacity of the Clerk to file the present Request on behalf of PAP

21. The Author submits that its Clerk is the appropriate authority to make this Request when there is a vacancy in the whole Bureau

3 See ***Jeremy Baguian v Burkina Faso***, Application No. 014/2019; and ***Ulrich Dibgolongo v Burkina Faso***, Application No. 013/2019, Registry Letters dated 24 September 2020 informing the Applicants that their requests for expedited consideration had been granted; and Request No. 001/2020 for Advisory Opinion by the Pan African Lawyers Union on obligations of States in respect of holding elections in time of covid-19, Registry Letter dated 2 November 2020 informing the Author that the request for provisional measures has been declined, and expedited consideration granted.

as is currently the case. According to PAP, its Clerk is tasked by the statutes to assist the Bureau in managing the Institution, including to act as head of the Secretariat; organise the elections of the Bureau; be responsible to Parliament on accounting issues; and manage the day-to-day administrative affairs of Parliament.

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22. The Court recalls that as a general principle, when it comes to representation, capacity is vested with any person who, by the legal authorisation of the applicant, has the power to act on behalf of the latter. There lies the principle encapsulated in Rule 40(1) of the Rules of Court, which provides that Applications filed before the Court may be signed by the Applicant or his or her representative. Several other provisions of the Rules of Court expound on how capacity applies before the Court, including Rules 41(1)(a), (b), and (c) of the Rules of Court respectively on the filing of Applications by legal person, and on their behalf; and on the signing of Applications by representatives including those of a legal person. In particular, Rule 41(3)(d) of the Rules of Court provides that the representative of a legal person has to prove capacity to act on behalf of the said person.

23. In the present matter, the Court notes that, pursuant to Rule 12(5), 20 and 21 of the PAP Rules, the Clerk is the Head of the Secretariat of the PAP, and is empowered to assist the Bureau in managing the Institution. In particular, Rule 21(b) of PAP Rules provides that the Clerk shall organise the elections of the President and Vice-President of PAP; while Rule 21(g) prescribes that the Clerk "shall manage the day-to-day administrative affairs of Parliament".

24. The Court observes that the above cited provisions suggest that the Clerk is empowered by the PAP Rules to perform institutional acts that involve the operation of PAP including when the Bureau is on duty. In light of these considerations, there is nothing to suggest to the Court that the Clerk of PAP is not empowered to file the present Request for Advisory Opinion as the representative and on behalf of the Author.

VI. Jurisdiction

25. Article 4(1) of the Protocol to the African Charter on Human

and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), whose provisions are reiterated in Rule 82(1) of the Rules of Court, 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 [the African Charter on Human and Peoples' Rights] 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.

26. The Court observes that Rule 87 of its 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." In line with the prescription 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."

27. Following from the provisions of Rule 49(1) of the Rules, therefore, in all advisory proceedings, the Court must ascertain its jurisdiction.

28. In the present Request, the Author submits that the Request is made under Rules 82 to 86 of the Rules of Court. It also avers that the Request concerns a legal dispute about the proper interpretation of the PAP statutes as they relate to elections, that is the PAP Protocol and its Rules.

29. In its supplementary submissions, the Author avers that the Request relates to legal and human rights issues affecting the rights of individuals as well as the integrity of PAP. The Author also submits that the legal issue arising in the matter relates to basic governance questions provided for in the Charter such as non-discrimination under Article 2, equality before the law and equal protection of the law under Article 3, and the right to participate in public service under Article 13; and in the principles stated in Articles 2, 3, 11 and 17 of the African Charter on Democracy, Elections and Governance. The Author finally states that the Permanent Committee on Rules, Privileges, and Discipline whose function is to assist PAP in interpreting rules related to elections has been dissolved and the advice it gave on the matter were largely ignored.

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30. The Court recalls that in advisory opinions, given that such requests do not involve contestation of facts between opposing parties, the issue of territorial and temporal jurisdiction does not arise.[4] For this reason, therefore, the Court will only interrogate whether the Request satisfies the requirements for personal and material jurisdiction.

A. Personal jurisdiction

31. 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.[5]

32. Considering the entities listed in Article 4(1) of the Protocol, the Court observes that PAP is an organ of the AU as expressly provided for under Article 17 of the AU Constitutive Act.

33. Given the above, the Court concludes that it has personal jurisdiction to deal with the Request.

B. Material jurisdiction

34. With respect to 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 of Court, it may provide an advisory opinion on "any legal matter relating to the Charter or any other relevant human rights instrument …".

35. The Court notes that, from the reading of these provisions, two main conditions govern its advisory jurisdiction in respect of subject matter: i) the request for advisory opinion ought to raise a legal question; and ii) the concerned legal question must pertain to either the Charter or a relevant human rights instrument. Furthermore, a literal interpretation of the above stated provisions suggests that the Court cannot exercise jurisdiction unless both conditions are met. In determining whether it has material jurisdiction to entertain the present Request, the Court must therefore consider both conditions in turn.

36. As to whether the question arising in the present Request is a legal matter, the Court observes that the Author mainly seeks an

4 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (Advisory Opinion) (5 December 2014) 1 AfCLR 725, § 38.

5 *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (Advisory Opinion) (26 May 2017) 2 AfCLR 572, § 38.

answer to whether the principle of regional rotation in electing the Bureau of PAP is binding, enforceable and failure to apply same renders any election null and void.

37. The Court notes that, as the Author rightly submits, the question thus posed pertains to the understanding of prescriptions made under the PAP Protocol and its Rules of Procedure, as well as the application of decisions of the policy organs of the AU, which are legal instruments whose provisions govern elections of the Bureau of PAP. The Court observes that the principle of regional rotation in electing Members of AU Organs appears to be grounded in norms and practices of the Union.[6] With a particular reference to PAP, it is worth mentioning Decision EX.CL/Dec.979(XXXI) of 2017 in which the AU Executive Council "calls upon the Pan African Parliament to apply the African Union values, rules and regulations in managing all activities of the organ, including rotation of the Bureau and presidency …". It flows from the foregoing, that questions pertaining to whether and how the principle of regional rotation applies in conducting elections within AU Organs qualify as legal issues as they are sourced from AU norms which are legal in nature.

38. Noting further that the dispute which forms the subject of the present Request relates to conflicting interpretations within PAP of its Protocol, Rules of Procedure and abovementioned decisions of the AU Executive Council, this Court finds that the Request pertains to a legal matter.

39. Turning to whether the legal matter arising from the present Request relates to the Charter or a relevant human rights instrument, the Court considers that the requirement of the nature of the instrument contemplated under Article 4(1) of the Protocol is preliminary to the relevance of the same instrument. It must therefore be considered first whether the Request pertains to a human rights instrument and, should the Court answer in the negative, it would be superfluous to examine the criterion of relevance.

40. The Court recalls that, in reference to its case-law, a human rights instrument is identified by its intended purpose. Such purpose, as the Court has held, is determined through either an express provision for subjective rights to be enjoyed by individuals or groups; or obligations on State Parties from which the said rights

6 See for instance, EX.CL/Dec.907(XXVIII) on the modalities on implementation of criteria for equitable geographical and gender representation in the African Union Organs whose paragraph 2(ii) provides that "where applicable, one (1) seat shall be a floating seat and will rotate among the five (5) regions".

can be derived.[7] More specifically, the Court has held that legal matters pertaining to human rights as intended under Article 4(1) of the Protocol are those "relating to the enjoyment of human rights guaranteed in the aforementioned instruments".[8]

41. The Court notes that, in the instant matter, the Author seeks an answer to whether, pursuant to Article 12(2) and (4) of the PAP Protocol and Rules 14 to 16 of its Rules, the principle of regional rotation applies while electing the Bureau of PAP. The Court observes that these provisions pertain to the administrative operation of PAP as they relate exclusively to the composition of its Bureau and how the elections of the Bureau Members should be conducted. The same provisions do not provide subjective rights for individuals or groups, nor do they prescribe obligations from which such rights may be derived. As such, the PAP Protocol and its Rules cannot be said to be human rights instruments within the meaning of Article 4(1) of the Court Protocol.

42. The Court is cognisant of the fact that provisions of the PAP Protocol other than those invoked by the Author include references to human rights. For instance, the preamble to the PAP Protocol refers to the commitment of AU Member States to "human rights in accordance with the Charter"; while Article 11(1) of the same instrument entrusts PAP with the advisory and consultative powers to "examine, discuss and make recommendations in relation to, inter alia, matters pertaining to respect of human rights, …".

43. The question which may arise is whether their references to human rights suffice for the PAP Protocol, and ancillary its Rules of Procedure to qualify as "human rights instruments" within the meaning of Article 4(1) of the Court Protocol. The answer is again, as earlier found, that the above cited provisions of the PAP Protocol which include mentions of human rights do not enunciate individual subjective rights or prescribe corresponding obligations for State Parties to the instrument. Notably, as an instrument, the PAP Protocol is only meant to establish PAP as an organ of the African Union and its human rights references merely aim to qualify the nature of the functions and specify the mandate of the Institution and not to confer human rights or impose obligations on State Parties to the PAP Protocol. A different understanding would suggest that the AU law-makers intended to adopt the

7 *APDH v Côte d'Ivoire* (merits) (18 November 2016) 1 AfCLR 668, § 57.

8 *Request for Advisory Opinion by the Pan African Lawyers Union on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, Request No. 001/2018 (Advisory Opinion, 4 December 2020), § 27.

PAP Protocol as a human rights instrument as would qualify, for instance, the Protocol to the Charter on the Rights of Women in Africa. Such understanding cannot be established for lack of legislative intent.

44. The Court takes notes that, in attempting to establish the human rights nature of the instruments invoked in the present Request, the Author makes reference to the provisions of Article 2, 3, and 13 of the Charter on the rights to non-discrimination, equality before the law, and participation in public affairs; and those of Articles 2, 3, 11 and 17 of the Charter on Democracy relating to the conduct of elections. In this regard, the Court reiterates its earlier finding on the human rights nature of the PAP Protocol and its Rules. Furthermore, the Court notes that the provisions of both Charters relating to elections and participation thereto are expressly said to apply to *citizens* and in respect of elections conducted at the *national level* within AU Member States.

45. The Court observes that, in the present Request, the question posed by the Author is specifically whether the PAP Protocol and its Rules of Procedure prescribe the principle of regional rotation in electing Members of the Bureau of the Institution; and if the non-observance of the principle would render any election void. As such, references made by the Author to the Charter and the Charter on Democracy are not relevant as none of the two instruments includes provisions governing how elections of the Bureau of PAP should be conducted and whether regional rotation would apply.

46. In light of the above, while the question arising in the present Request is indisputably a legal matter within the meaning of Article 4(1) of the Protocol, the Court's material jurisdiction is not established with respect to whether the PAP Protocol and its Rules of Procedure are human rights instruments.

47. Having said that, the Court cannot overlook both the paramount importance of the mandate entrusted to PAP and the fact that the present Request involves a situation that threatens the smooth operation of the Institution as it faces a legal quandary, which must be solved. Against this backdrop and in light of the fact that the present Opinion is being given within its advisory jurisdiction, the Court considers that the matter at hand warrants that PAP still be enlightened as to what legal means could be effectively utilized to resolve the predicament that it faces.

48. On this point, the Court notes that Article 20 of the PAP Protocol provides that

> The Court of Justice shall be seized with all matters of interpretation emanating from this Protocol. Pending its establishment, such matters

shall be submitted to the Assembly which shall decide by a two-thirds majority.[9]

49. The Court further notes that, as stated in the afore mentioned provisions, the Court of Justice of the African Union was subsequently established and vested with jurisdiction, under Article 19(1)(b) of its Protocol, to examine "all disputes and applications which relate to the interpretation, application or validity of Union treaties …".[10] In a comparative approach, rules on jurisdiction in other regions and globally reveal a trend to specialisation that entrusts Courts of Justice with competence to examine general affairs and interpretation of treaties of general nature, including community law, as opposed to human rights treaties. Illustrations include the European Court of Justice and the European Court of Human Rights for Europe; the International Court of Justice and Human Rights Treaty Bodies for the United Nations at the global level; and the Court of Justice of the AU and the African Court on Human and Peoples' Rights in Africa.

50. The Court observes that, in any event, the PAP Protocol does not make provision for any exception to the jurisdiction of the Court of Justice other than the AU Assembly of Heads of State and Government. While it is not ignored that the Court of Justice of the AU has not begun its operations despite the entry into force of its Protocol since 2009, this Court cannot arrogate itself jurisdiction that it was not granted in its own Protocol for the mere reason that the legally competent judicial body is not yet operational. Without a doubt, Article 20 of the PAP Protocol ousts the jurisdiction of this Court when it comes to interpretation of the said Protocol.

51. Besides, the AU law-makers have unequivocally provided for jurisdiction to be vested in the Assembly pending the operation of the Court of Justice. This Court cannot therefore exercise jurisdiction on the question arising in the present Request without overstepping jurisdictional boundaries vis-à-vis both the Court of Justice and the Assembly.

9 The 2014 Protocol extending the mandate of the PAP also includes a similar provision vesting jurisdiction with the African Court of Justice and Human Rights (ACJHR) of the AU "on all questions of interpretation of this Protocol".

10 See Protocol of the Court of Justice of the African Union; adopted, 1 July 2003; entered into force, 11 February 2009.

VII. Operative part

52. For the above reasons:
The Court,
Unanimously,
i. *Finds* that it does not have jurisdiction to give the Advisory Opinion requested.