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African Court Law Report
Volume 2 (2017-2018)

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

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Volume 2 (2017-2018)

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Editorial

This is the second volume of the *Report of judgments, orders and advisory opinions of the African Court on Human and Peoples' Rights*. This volume covers decisions from 2017 to 2018.

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 second volume of the *African Court Law Report* includes 37 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 (2), while the number after *AfCLR* indicates the page number in this *Report*.

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- Ms. Grace Wakio Kakai, Head of Legal Division
- Dr. Serges Frédéric Mboumegne Dzesseu, Research Assistant to the President of the Court
- Ms. Milka Mkemwa, Documentalist

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Carvajal Carvajal et al v Colombia

Evarist v Tanzania (merits) (2018) 2 AfCLR 402

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William v Tanzania (merits) (2018) 2 AfCLR 426

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European Court of Human Rights

Handyside v United Kingdom

Umuhoza v Rwanda (reparations) (2018) 2 AfCLR 202

Agrotexim and Others v Greece

Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali (merits) (2018) 2 AfCLR 380

Nyamwasa and Others v Rwanda (interim measures) (2017) 2 AfCLR 1

Application 016/2015, *General Kayumba Nyamwasa & Others v Republic of Rwanda*

Order, 24 March 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE and MENGUE

Recused under Article 22: MUKAMULISA

Request for interim measures not granted in a case dealing with referendum on amendment to the Constitution of Rwanda allowing the President of the Republic to seek a third term as the request had been overtaken by the holding of the referendum.

Interim measures (request for interim measures overtaken by events, 35)

I. The Parties

1. The Applicants are General Kayumba Nyamwasa, Mr Kennedy Alfred Nurudin Gihana, Mr Bamporiki Abdallah Seif, Mr Frank Ntwali, Mr Safari Stanley, Dr Etienne Mutabazi and Mr Epimaque Ntamushobora (hereinafter referred to as "the Applicants") requesting certain Interim Measures. The Applicants claim to be citizens of the Republic of Rwanda who are currently in exile in the Republic of South Africa, having fled from Rwanda.

2. The Respondent is the Republic of Rwanda. It ratified the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 22 July 1983 and the Protocol on 6 May 2003, and is party to both instruments. The Respondent deposited, on 22 January 2013 a Declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations, within the meaning of Article 34(6) of the Protocol read together with Article 5(3) of the Protocol.[1]

II. Subject of the Application

3. The Application is based on the exercise in Rwanda to amend the Constitution to allow the President of the Republic of Rwanda to

1 It should be noted that the Respondent withdrew its declaration on 29 February 2016. On the decision of the Court in this regard, see para 22 and 23.

seek election to serve for a third term as President. The Applicants allege that Article 101 of the Constitution of the Republic of Rwanda provides that the President shall serve for only two (2) terms.

4. The Applicants allege that the campaign for the amendment of Article 101 of the Constitution has been conducted against a climate of fear and that any challenges to the amendments of the Constitution would likely not succeed as the judiciary of Rwanda is allegedly not independent, particularly since some judicial officers are also members of the Respondent's Ruling Party.

5. The Applicants further allege that this has been against a backdrop of arbitrary arrests, detentions and trials of leading political figures such as Victoire Ingabire Umuhoza, the former President, Pasteur Bizimungu, the former Minister, Charles Ntakiruntika and Bernard Ntaganda. One of the Applicants, General Kayumba Nyamwasa, states that South African Courts have found that his attempted assassination was conducted by persons linked to the Respondent. The Applicants also allege that another military officer, Lieutenant Colonel Seveline Ngabo has been held *incommunicado* in an unknown location since 20 August 2010 and that despite the East African Court of Justice finding that his detention was unlawful, he has neither been presented in Court nor charged with any offence.

6. The Applicants also claim that the filing of an application by the "Green Party" in the courts in Rwanda to challenge the amendment of Article 101 of the Constitution, is a sham since this Party is a creation of the President and the whole exercise is intended to lend legitimacy to the process of the amendment of the Constitution by allowing these constitutional challenges.

7. The Applicants have filed affidavits in support of the Application. The affidavit by Safari Stanley states that local remedies in Rwanda are neither practical nor effective since the President of the Republic of Rwanda dictates how courts should decide matters before them. They add that, since the President has a personal interest in the matter, the outcome of any action at the local level would be to allow the amendment.

8. The Applicants base their Application on Articles 13 (freedom to participate in government), 19 (equality of peoples), 21 (freedom of peoples to dispose of their wealth), 22 (the right to economic, social and cultural development) of the Charter and Article 23 (prohibiting amendments of constitutions to extend term limits for the presidency) of the African Charter on Democracy, Elections and Governance (hereinafter referred to as 'the Charter on Democracy'). The Applicants state that the Respondent is a party to the Charter and the Charter on Democracy. The Applicants also allege that the planned constitutional amendment is in contravention of Article 6(d) of the Treaty of the East

African Community which sets out the fundamental principles of the East African Community, including "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights".

III. Procedure

9. The Application was filed on 22 July 2015. It was served on the Respondent and transmitted to the States Parties to the Protocol and the Executive Council of the African Union through the Chairperson of the African Union Commission by notices dated 4 August 2015.

10. On 27 October 2015, the Respondent applied for extension of time, by thirty (30) days to file its Response. By a notice dated 13 November 2015, the Respondent was notified of the Court's decision to grant the extension of time to file the Response by 23 November 2015.

11. By a Notice dated 13 November 2015, the Parties were informed that there would be a Public Hearing on legal arguments on the Request for Interim Measures on 25 November 2015 in Arusha, Tanzania in the course of the Court's 39th Ordinary Session.

12. On 18 November 2015, the Respondent filed the Response to the Application and it was transmitted to the Applicants by a notice of the same date.

13. On 18 November 2015, the Applicants requested a deferral of the hearing due to the inability of some of the Applicants to travel to Arusha for the hearing due to lack of travel documents.

14. Following the Applicant's request for a deferral of the hearing, by a Notice dated 20 November 2015, the Parties were informed that the Court had decided to defer the Public Hearing.

15. On 12 December 2015, the Applicant's representative raised an objection to the deferral of the Public Hearing. The Applicant stated that this meant that their Application would be overtaken by events since the referendum with respect to which they sought orders would take place in a few days' time.

16. The Registry responded to the above mentioned communication from the Applicant's representative by a letter dated 29 December 2015, by chronicling the handling of the matter by the Court and emphasizing that the deferral of the public hearing was on the Applicants' request despite the Court having scheduled it due to the urgency of the situation.

17. The Applicants filed the Reply to the Response on 1 February 2016. On 5 February 2016, the Registry notified the Applicants that, since the Reply was filed out of time, they should seek the leave of Court for an extension of time to file the Reply. The Applicants sought this leave, by their notice received on 7 March 2016. The Court granted

the leave and the Reply was served on the Respondent by a notice dated 14 July 2016.

18. By a letter dated 1 March 2016, received at the Registry of the Court on 2 March 2016, the Respondent notified the Court of its deposition of an instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol with respect of Application No. 003/2014, *Ingabire Victore Umuhoza v Republic of Rwanda* wherein the letter stated that:

> "The Republic of Rwanda requests that after deposition of the same, the Court suspends hearings involving the Republic of Rwanda, [including Ingabire Victoire Umuhoza v Republic of Rwanda], until review is made to the Declaration and the Court is notified in due course."

19. By a letter dated 3 March 2016, the Office of Legal Counsel and Directorate of Legal Affairs of the African Union Commission notified the Court of the submission of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol, which was received at the African Union Commission on 29 February 2016.

20. By a notice dated 10 March 2016, the Applicants were notified of the deposit by the Respondent of a declaration withdrawing its Declaration filed under Article 34(6) of the Protocol, and invited to file any comments thereon within fifteen (15) days of receipt of the notice.

21. The Applicants filed observations regarding the Respondent's withdrawal of the Declaration on 16 May 2016. The Respondent did not file a Response to the Applicant's observations.

22. On 3 June 2016, the Court issued a Ruling in Application No. 003/2014, *Ingabire Victoire Umuhoza v Republic of Rwanda* that the Respondent's withdrawal of its Declaration has no effect on that Application and it would continue with the hearing of that Application.

23. On 3 June 2016, the Court issued an Order in the current Application that,

> "the Court's Ruling in Ingabire Victoire Umuhoza v Republic of Rwanda, therefore is to the effect that the withdrawal of Rwanda's Declaration does not have the effect of suspending proceedings of cases that have been filed against Rwanda before the Court" and "unanimously, decides to continue examining this Application".

24. This Order was transmitted to the Parties by a notice dated 5 July 2016.

25. The Court ordered that pleadings in the Application be closed with effect from 16 September 2016.

IV. Prayers of the Parties

A. Applicant's Prayers

26. In the Application, the Applicants are applying for interim measures. They pray that the Court:

"a. Order President Kagame and the Republic of Rwanda to strictly abide by and respect the clear wording of Article 101 of the Republic of Rwanda Constitution, read with Article 13 of the ACHPR and Article 23 of the Democracy Charter

b. Order the Senate of Rwanda not to entertain any motion purportedly instigated by the people of Rwanda to repeal Article 101 because the people exhausted this power after they banned themselves from ever revisiting Article 101

c. Order the government of the Republic of Rwanda to comply with Article 23(5) of the African Charter on Democracy, Elections and Governance which forbids any change of the constitution to give the president third or other term

d. Order any relief(s) as the Court may deem necessary in the circumstances."

27. In their Reply to the Respondent's Response, the Applicants pray the Court to:

"a. Declare that it has jurisdiction in terms of the Protocol and the Rules of procedure to hear the Application

b. Declare the Application duly admissible.

c. Simultaneously order the Respondent to abandon plans to hold a referendum on 17 or 18 December 2015 to amend Article 101 of its Constitution in light of the Article 23(5) prohibition of the Charter on Democracy.

d. Declare that even if, but without conceding that Kayumba Nyamwasa and Safari Stanley for the reasons alleged in the Response have no right to seek remedy, other Applicants have this right and the Respondent by not referring to them anywhere in the Response does admit that the case is admissible in respect to these other Applicants.

e. Order the Respondent to produce the Gacaca and Military Court judgments severally referred to in the Response to enable Kayumba Nyamwasa and Safari Stanley to study

them and make further representations with their rights.

f. Order the Respondent to delete paragraph 31 of the Response threatening the Court against deciding against the Respondent and take necessary measures against the Respondent.

g. Award costs of this Application to the Applicants.

h. Make such orders and reliefs as it deems necessary."

28. In its Response to the Application, the Respondent prays the Court to:

"a. Declare that the Application is frivolous, vexatious, tendentious, politically motivated, an abuse of the process of the Court and an attempt to compromise the integrity of the Honourable Court.

b. Dismiss the Application without the necessity of summoning the respondents to the hearing in accordance with Rule 38 of the Rules of procedure.

c. Declare that criminal convicts still eluding justice cannot have locus standi before the Honourable Court.

d. Declare that the Court has no jurisdiction to hear and deal with the Application on grounds that it is defective and bad in law.

e. Declare the Application inadmissible on grounds that it falls short of admissibility conditions established by the Charter and Rules.

f. Award costs to Respondents.

g. Make such an order as it deems fit."

V. On the request for interim measures

29. In its Response to the Request for Interim measures, the Respondent raised objections, contending that the Application does not indicate what would remain for the Court to decide after issuing interim measures. They allege further that there are no people's lives in danger or serious massive violations of human rights as required under Article 27(2) of the Protocol, to justify a request for interim measures.

30. Citing the Court's Ruling in Application No. 004/2013, *Lohe Issa Konate v Burkina Faso,* the Respondent maintains that the purpose of interim measures is to avoid irreparable damage to the victims during the course of the consideration of the application on the merits. The Respondent further states that, there is no evidence that interim measures can be separated from the merits attributable to this request and the Court cannot grant interim measures without prejudging the potential merits "(if any)" of the Application.

31. In their Reply to the Respondent's objection, the Applicants state that the Court has the mandate to issue interim measures pursuant to Rule 51 of the Rules and that this Application raises a matter of extreme urgency. The Applicants further state that neither is the application for interim measures based on the number of people that have died nor does the Rule require that lives must have been lost for the Court to issue interim measures. The Applicants maintain that the measures requested are to prevent the Respondent from conducting the referendum. The Applicants aver that, the Court should exercise its jurisdiction since the Supreme Court of Rwanda has determined the application filed by the Green Party, to challenge the referendum.

32. This Ruling is with respect to the Applicants' Request for Interim Measures for the Respondent to be ordered not to proceed with the referendum to amend Article 101 of its Constitution, in light of a prohibition in this regard in Article 23(5) of the Charter on Democracy.

33. The Court can indeed, pursuant to Article 27(2) of the Protocol issue the interim measures "[i]n cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons." This provision is mirrored in Rule 51(1) of the Rules which provides that '[p]ursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, the Commission or on its own accord, prescribe to the Parties any interim measure which it deems necessary to adopt in the interest of the Parties or of justice".

34. However, interim measures are ordered to prevent irreparable harm to the rights of the party requesting them, pending determination of an application on the merits.

35. In view of the extreme urgency of the situation, whereby the request for interim measures was to stop the Referendum on amendment of Article 101 of the Respondent's Constitution planned for 17 or 18 December, 2015, the Court decided to hold a Public Hearing on this request on 25 November 2015. The Applicants requested a deferral of the hearing due to the inability of some of the Applicants who wished to travel to Arusha for the same. The referendum was duly held on 17 December 2015, thus defeating the purpose of any interim measures and the request was overtaken by events.

36. In light of the foregoing, the Court cannot order the interim measures requested since the same has been overtaken by events. The Application is therefore of no relevance and is consequently dismissed.

37. For these reasons,

The Court,

Unanimously:

i. Rules that the Court cannot grant the Interim Measures requested.

ii. Rules that the Application be and is hereby dismissed.

African Commission on Human and Peoples' Rights v Kenya (merits) (2017) 2 AfCLR 9

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

Judgment, 26 May 2017. Done in English and French with the English text being authoritative.

Judges: ORE, NIYUNGEKO, RAMADHANI, TAMBALA, THOMPSON, GUISSE, ACHOUR, BOSSA and MATUSSE

Recused under Article 22: KIOKO

The Court found a number of violations of the African Charter in a case dealing with the eviction of an indigenous population, the Ogiek, from the Mau Forest.

Procedure (public hearing, 28; hearing of original complainant, 29; amicable settlement procedure unsuccessful, 31-39)

Jurisdiction (material jurisdiction – Article 58 of the African Charter does not prevent jurisdiction of the Court, 53; personal jurisdiction - standing of original complainant before African Commission irrelevant, 58; temporal jurisdiction – continuing violation, 65)

Admissibility (pending case, 74; standing of original complainant, 88; exhaustion of local remedies – prolonged proceedings, 96, judicial proceedings, 97)

Indigenous peoples (definition, 105-108; application to Ogiek people, 109-112; preservation of culture, 180)

Property (elements of right to property, 124; land rights of indigenous peoples, 128; limitation in public interest, 129, 130)

Interpretation (international instruments, 125)

Equality, non-discrimination (any other status, 138; elements of discrimination, 139; Ogieks not granted same recognition as other similar communities, 142-146)

Life (physical not existential, 154)

Religion (natural environment, traditional rites, 164-169)

Cultural life (respect for and protection of cultural heritage, 179, 182-186; definition of culture, 179

Limitations (state must show justification, 188, 189)

People (definition, 196-199)

Peoples' right to freely dispose of wealth and natural resources (eviction from forest, 201)

Peoples' right to development (lack of consultation, 210)

I. The Parties

1. The Applicant is the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Applicant" or "the Commission"). The Applicant filed this Application pursuant to Article 5(1)(a) of the Protocol**.**

2. The Respondent is the Republic of Kenya (hereinafter referred to as "the Respondent"). The Respondent became a Party to the African Charter on Human and Peoples` Rights (hereinafter referred to as "the Charter") on 25 July 2000, to the Protocol on 4 February 2004, and to both the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ICESCR") on 23 March 1976.

II. Subject matter of the Application

3. On 14 November 2009, the Commission received a Communication from the Centre for Minority Rights Development (CEMIRIDE) joined by Minority Rights Group International (MRGI), both acting on behalf of the Ogiek Community of the Mau Forest. The Communication concerned the eviction notice issued by the Kenya Forestry Service in October 2009, which required the Ogiek Community and other settlers of the Mau Forest to leave the area within 30 days.

4. On 23 November 2009, the Commission, citing the far-reaching implications on the political, social and economic survival of the Ogiek Community and its potential irreparable harm if the eviction notice was carried out, issued an Order for Provisional Measures requesting the Respondent to suspend implementation of the eviction notice.

5. On 12 July 2012, following the lack of response from the Respondent, the Commission seized this Court with the present Application pursuant to Article 5(1)(a) of the Protocol.

A. Facts of the matter

6. The Application relates to the Ogiek Community of the Mau Forest. The Applicant alleges that the Ogieks are an indigenous minority ethnic group in Kenya comprising about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest Complex, a land mass of about 400,000 hectares straddling about seven administrative districts in the Respondent's territory.

7. According to the Applicant, in October 2009, through the Kenya Forestry Service, the Respondent issued a 30-day eviction notice to the Ogieks and other settlers of the Mau Forest, demanding that they

leave the forest.

8. The Applicant states that the eviction notice was issued on the grounds that the forest constitutes a reserved water catchment zone, and was in any event part of government land under Section 4 of the Government Land Act. The Applicant states further that the Forestry Service's action failed to take into account the importance of the Mau Forest for the survival of the Ogieks, and that the latter were not involved in the decision leading to their eviction. The Applicant contends that the Ogieks have been subjected to several eviction measures since the colonial period, which continued after the independence of the Respondent. According to the Applicant, the October 2009 eviction notice is a perpetuation of the historical injustices suffered by the Ogieks.

9. The Applicant further avers that the Ogieks have consistently raised objections to these evictions with local and national administrations, task forces and commissions and have instituted judicial proceedings, to no avail.

B. Alleged violations

10. On the basis of the foregoing, the Applicant alleges violation of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the Charter.

III. Procedure

11. The Application was filed before the Court on 12 July 2012 and served on the Respondent by a notice dated 25 September 2012.

12. On 14 December 2012, the Respondent filed its Response to the Application in which it raised several Preliminary Objections and this was transmitted to the Applicant by a letter dated 16 January 2013.

13. On 28 December 2012, the Applicant requested the Court to issue an Order for Provisional Measures to forestall the implementation of the directive issued by the Respondent`s Ministry of Lands on 9 November 2012 limiting the restrictions on transactions for land measuring not more than five acres within the Mau Forest Complex Area.

14. By a letter dated 23 January 2013, Ms Lucy Claridge, Head of Law, MRGI, Mr Korir Sing'oei, Strategy and Legal Advisor, CEMIRIDE, and Mr Daniel Kobei, Executive Director of Ogiek People's Development Programme (OPDP) sought leave to intervene, and be heard in the case as original complainants before the Commission in accordance with Rule 29(3)(c) of the Rules.

15. On 15 March 2013, the Applicant filed its Response to the Preliminary Objections raised by the Respondent and this was

transmitted to the Respondent by a letter dated 18 March 2013.

16. On 15 March 2013, the Court issued an Order for Provisional Measures directed at the Respondent on the basis that there was a situation of extreme gravity and urgency as well as a risk of irreparable harm to the Ogieks. The Order contained the following measures:

> "1. The Respondent shall immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest Complex and refrain from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the said application;
>
> 2. The Respondent shall report to the Court within a period of fifteen (15) days from the date of receipt hereof, on the measures taken to implement this Order."

17. By a letter dated 30 April 2013, the Respondent reported on the measures it had taken to comply with the Order for Provisional Measures.

18. By a letter dated 14 May 2013, the Registry transmitted to the Applicant, the Respondent's report on its compliance with the Order for Provisional Measures.

19. At its 29th Ordinary Session held from 3 to 21 June 2013, the Court ordered that pleadings be closed and decided to hold a Public Hearing in March 2014.

20. By a letter received at the Registry on 31 July 2013, the Applicant requested leave to file further arguments and evidence and to be granted a 5-month extension of time to do so. By a notice dated 2 September 2013, the Applicant's request was granted with an order to file by 11 December 2013.

21. By letters dated 20 and 26 September 2013 and 3 February 2014, the Applicant notified the Court of alleged acts of non-compliance by the Respondent with the Order for Provisional Measures issued on 15 March 2013.

22. By a letter dated 26 September 2013, the Registry transmitted the allegations of non-compliance with the Order for Provisional Measures to the Respondent. To date, the Respondent has not responded to the allegations.

23. The Applicant's Supplementary Submissions on Admissibility and the Merits were filed on 11 December 2013 and were served on the Respondent by a notice dated 12 December 2013, granting the latter sixty (60) days to respond thereto.

24. By a notice dated 21 January 2014, the Parties were informed that the Public Hearing on preliminary objections and the merits would be held on 13 and 14 March 2014.

25. By a letter dated 17 February 2014, pursuant to Rule 50 of the Rules, the Respondent applied for leave to file arguments and evidence on the merits of the case, requesting to be granted a 5-month extension of time to do so. By a letter dated 4 March 2014, the Respondent was informed that the said leave had been granted and was directed to file its submissions within 60 days.

26. On 12 May 2014, the Respondent filed the additional submissions on the Merits which were served on the Applicant by a letter dated 15 May 2014, and inviting the Applicant to file any observations thereon within 30 days of receipt of the letter. On 30 June 2014, the Applicant filed its Reply to the Respondent's additional submissions on the Merits.

27. On 24 September 2014, in response to the Application made on 23 January 2013, the Registry wrote a letter to Ms Lucy Claridge, Head of Law, MRGI, informing her that the Court has granted her leave to intervene.

28. During its 35th Ordinary Session, held from 24 November - 5 December 2014 in Addis Ababa, Ethiopia, the Court held a public hearing on 27 and 28 November 2014. All Parties were represented, and their witnesses appeared, as follows:

Applicant's representatives

1. Hon Professor Pacifique MANIRAKIZA - Commissionner
2. Mr Bahame Tom NYANDUGA - Counsel
3. Mr Donald DEYA - Counsel
4. Mr Selemani KINYUNYU - Counsel

Applicant's witnesses

1. Mrs Mary JEPKEMEI - Member of the Ogiek Community
2. Mr Patrick KURESOI - Member of the Ogeik Community

Applicant's expert witness

1. Dr Liz Alden WILY - International Land Tenure Specialist

Respondent's representatives

1. Ms Muthoni KIMANI - Senior Deputy Solicitor General
2. Mr Emmanuel BITTA - Principal Litigation Counsel
3. Mr Peter NGUMI - Litigation Counsel

29. Pursuant to Rule 45(1) and Rule 29(1)(c) of the Rules, during the public hearing, the Court heard Ms Lucy Claridge, Head of Law,

MRGI, one of the original complainants in the Communication filed before the Commission.

30. The Court put questions to the Parties to which they responded.

31. At its 36th Ordinary Session held from 9 to 27 March 2015, the Court decided to propose to the Parties that they engage in amicable settlement pursuant to Article 9 of the Protocol and Rule 57 of its Rules.

32. A letter dated 28 April 2015 was sent to the Parties requesting them to respond to the proposal for an amicable settlement by 27 May 2015 and to identify the issues to be discussed, which would then be exchanged between them.

33. By a letter dated 27 May 2015, the Applicant indicated that it was amenable to an amicable settlement.

34. By a notice dated 27 May 2015, the Respondent set out the issues to be discussed and these were transmitted to the Applicant by a notice dated 28 May 2015.

35. By a notice dated 17 June 2015, the Parties were informed that the Court had granted the Applicant a 60-day extension to file the issues for the amicable settlement.

36. On 18 August 2015, the Registry received the Applicant's conditions for amicable settlement and these were transmitted to the Respondent on 21 September 2015. The Respondent was invited to file its response thereto no later than 31 October 2015.

37. On 10 November 2015, the Respondent submitted its response on the conditions and issues for an amicable settlement and these were transmitted to the Applicant by a notice dated 20 November 2015.

38. On 13 January 2016, the Applicant wrote to the Court in response to the conditions proposed by the Respondent. The Applicant indicated that it was not satisfied with the proposal and asked the Court to proceed with the matter and deliver a judgment. The Applicant's request was transmitted to the Respondent by a notice dated 14 January 2016. The Respondent did not react to this notification.

39. Since the attempt to settle the matter amicably did not succeed, at its 40th Ordinary Session held from 29 February to 18 March, 2016, the Court decided to proceed with consideration of the Application and issue the present judgment.

40. By a letter dated 7 March 2016, the Parties were informed of the Court's continuance of judicial proceedings.

IV. Prayers of the Parties

A. Prayers of the Applicant

41. In the Application, the Applicant prays the Court to order the

Respondent to:

"1. Halt the eviction from the East Mau Forest and refrain from harassing, intimidating or interfering with the community's traditional livelihoods;

2. Recognise the Ogieks' historic land, and issue it with legal title that is preceded by consultative demarcation of the land by the Government and the Ogiek Community, and for the Respondent to revise its laws to accommodate communal ownership of property; and

3. Pay compensation to the Ogiek Community for all the loss they have suffered through the loss of their property, development, natural resources and also freedom to practice their religion and culture."

42. In its Supplementary Submissions on Admissibility, the Applicant made the following specific prayer:

> "The Applicant submits that the Application satisfies Article 56 of the African Charter in relation to the requirements for Admissibility, and therefore prays the Court to declare the same Admissible."

43. In its Submissions on the Merits, the Applicant prays the Court to make the following Orders:

"A. To adjudge and declare that the Respondent State is in violation of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights.

B. Declare that the Mau Forest has, since time immemorial, been the ancestral home of the Ogiek people, and that its occupation by the Ogiek people is paramount for their survival and the exercise of their culture, customs, traditions, religion and for the well-being of their community.

C. Declare that the occupation of the Mau Forest through time immemorial by the Ogiek people and their use of the various natural resources therein, including the flora and fauna, such as honey, plants, trees and wild game of the Mau Forest, for food, clothing, medicines, shelter and other needs, was sustainable and did not lead to the rampant destruction or deforestation of the Mau Forest

D. Find that the granting by the Respondent State, of rights such as land titles and concessions in the Mau Forest, at different periods to non-Ogiek persons, individuals and corporate bodies, contributed to the destruction of the Mau Forest, and did not benefit the Ogiek people, thus

amounting to a violation of Article 21(2) of the African Charter.

E. That further to the Orders (A), (B), (C), and (D) hereinabove and by way of a separate judgment of the Court pursuant to Rule 63 of the Rules of Court, that the Honourable Court order the Respondent State to undertake and implement the necessary legislative, administrative and other measures to provide reparation to the Ogieks, through the following measures:[1]

i. Restitution of Ogiek ancestral land, through:

a. the adoption in its domestic law, and through well informed consultations with the Ogieks, of the legislative, administrative and any other measures necessary to delimit,

b. demarcate and title or otherwise clarify and protect the territory in which the Ogieks have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities;

c. implement measures to: (i) delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Ogieks without detriment to other indigenous communities; and (ii) until those measures have been carried out, abstain from any acts that might lead the agents of the State, or third Parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Ogieks; and

d. the rescission of all such titles and concessions found to have been illegally granted with respect to Ogiek ancestral land; such land to be returned to the Ogieks with common title within each location, for them to use as they deem fit;

ii. Compensation of the Ogieks for all the damage suffered as a result of the violations, including through:

a. the appointment of an independent assessor to decide upon the appropriate level of compensation, and to determine the manner in which and to whom such compensation should be paid, such appointment to be mutually agreed upon by the Parties;

b. the payment of pecuniary damages to reflect the loss of their property, development and natural resources;

c. the payment of non-pecuniary damages, to include the loss of their freedom to practise their religion and culture, and the threat to their livelihood;

d. the establishment of a community development fund for the

1 The Applicant asserts that this list is non-exhaustive and the Court is respectfully invited to supplement these methods of reparation with additional requirements.

benefit of the Ogieks, directed to health, housing, educational, agricultural and other relevant purposes;

e. the payment of royalties from existing economic activities in the Mau Forest; and

f. ensuring that the Ogieks benefit from any employment opportunities within the Mau Forest;

iii. Adoption of legislative, administrative and other measures to recognise and ensure the right of the Ogieks to be effectively consulted, in accordance with their traditions and customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land within the Mau Forest and implement adequate safeguards to minimize the damaging effects that such projects may have upon the social, economic and cultural survival of the Ogieks;

iv. An apology to be issued publicly by the Respondent State to the Ogieks for all the violations;

v. A public monument acknowledging the violation of Ogiek rights to be erected within the Mau Forest by the Respondent State, in a place of significant importance to the Ogieks and chosen by them;

vi. Full recognition of the Ogieks as an indigenous people of Kenya, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogieks; and the enacting of positive steps to ensure national and local political representation of the Ogieks;

vii. The legislative process specified in (i) and (iii) above to be completed within one year of the date of the judgment;

viii. The demarcation process specified in (i) above to be completed within three years of the date of the judgment;

ix. The independent assessor on compensation to be appointed within three months of the judgment; the amount of compensation, royalties and the community development fund to be agreed upon within one year of the date of the judgment, and payment to be effected within eighteen months of the date of the judgment;

x. The apology to be issued within three months of the date of the judgment;

xi. The monument to be erected within six months of the date of judgment;

F. To make any further orders as the Court deems fit to grant in the circumstances."

44. That further to the Orders A, B, C, D, E and F, hereinabove, that the Court order the Respondent State to report to the Court on the

implementation of these remedies, including by submitting a quarterly report on the process of implementation - such report to be provided to and commented upon by the Commission - until the Orders as provided in the judgment are fully enforced to the satisfaction of the Court, the Commission, the Executive Council and any other organ of the African Union which the Court and Commission shall deem appropriate."

45. The Applicant reiterated these prayers during the Public Hearing.

B. Prayers of the Respondent

46. In its Response, the Respondent prays the Court to rule that the Application is inadmissible and to order that it be referred back to the Respondent for resolution, notably, through an amicable settlement for a peaceful and lasting solution. The Respondent also made submissions on the merits elaborating on its position thereon and prayed the Court to put the Applicant to strict proof and find that there has been no violations of the rights of the Ogeiks, as alleged by the Applicant. The Respondent did not make any additional prayers.

V. Jurisdiction

47. In accordance with Rule 39(1) of the Rules, the Court shall conduct a preliminary examination of its jurisdiction before dealing with the merits of the Application.

A. Material jurisdiction

i. Respondent's objection

48. The Respondent contends that rather than filing the Application before the Court, the Commission ought to have drawn the attention of the Assembly of Heads of State and Government of the African Union (AU) once it was convinced that the communication before it relates to a special case which reveals the existence of "a series of serious or massive violations of human and peoples' rights" as provided under Article 58 of the Charter.

49. The Respondent further submits that the Court failed to conduct a preliminary examination of its jurisdiction by virtue of Rule 39 of its Rules in accordance with Article 50 of the Charter, and that it has not complied with the above cited provision of the Charter.

ii. Applicant's submission

50. The Applicant submits that bringing to the attention of the Assembly of Heads of State and Government of the AU, a special case which reveals the existence of a series of serious or massive violations of human rights, is not a prerequisite for referring a matter to the Court and is only one avenue provided under Article 58 of the Charter. In this regard, the Applicant argues that with the establishment of the Court, it now has the additional option of referring matters to the Court, as the Court complements the Commission's protective mandate pursuant to Article 2 of the Protocol. On the contention by the Respondent that the Court ought to have conducted a preliminary examination of its jurisdiction in respect of the Application in line with Article 50 of the Charter, the Applicant notes that the rule relating to the preliminary examination of the jurisdiction of the Court is Rule 39, not Rule 40 of the Rules, as cited by the Respondent.

iii. The Court's assessment

51. The Court notes that Article 3(1) of the Protocol and Rule 26(1)(a) of its Rules govern its material jurisdiction regardless of whether an Application is filed by individuals, the Commission or States. Pursuant to these provisions, the material jurisdiction of the Court extends "to all cases and disputes submitted to it concerning the interpretation and application of the Charter, [its] Protocol and any other relevant human rights instrument ratified by the States concerned". The only pertinent consideration for the Court in ascertaining its material jurisdiction in accordance with both Article 3(1) of the Protocol and Rule 26(1)(a) of its Rules is thus whether an Application relates to an alleged violation of the rights protected by the Charter or other human rights instruments to which the Respondent is a Party. In this vein, the Court has held that "as long as the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the State concerned, the Court will have jurisdiction over the matter".[2]

52. In the instant Application, the Applicant alleges the violation of several rights and freedoms guaranteed under the Charter and other international human rights instruments ratified by the Respondent, especially, the ICCPR and the ICESR. Accordingly, the Application satisfies the requirements of Article 3(1) of the Protocol.

2 See *Alex Thomas v United Republic of Tanzania* (Judgment on Merits) 20 November 2015 (hereinafter referred to as Alex Thomas Case) paragraph 45 and *Mohamed Abubakari v United Republic of Tanzania* (Judgment on Merits) 3 June 2016 (hereinafter referred to as *Mohamed Abubakari* Case) paragraphs 28 and 35.

53. In circumstances where the Commission files a case before the Court pursuant to Article 5(1)(a) of the Protocol, Article 3(1) of the same provides no additional requirements to be fulfilled before this Court exercises its jurisdiction. Article 58 of the Charter mandates the Commission to draw the attention of the Assembly of Heads of State and Government where communications lodged before it reveal cases of series of serious or massive violations of human and peoples' rights. With the establishment of the Court, and in application of the principle of complementarity enshrined under Article 2 of the Protocol, the Commission now has the power to refer any matter to the Court, including matters which reveal a series of serious or massive violations of human rights.[3] The Respondent`s preliminary objection that the Commission did not comply with Article 58 of the Charter is thus not relevant as far as the material jurisdiction of the Court is concerned.

54. Regarding the preliminary examination of its jurisdiction in accordance with Rule 40 of the Rules and Article 50 of the Charter, the Court notes that these two provisions do not deal with the jurisdiction of the Court but concern issues of admissibility, in particular, the issue of exhaustion of local remedies, which the Court will address at a later stage in this judgment. In any event and in keeping with its Rules, the final decision of the Court on the question of jurisdiction can only be taken after receiving and analysing submissions from the Parties. The Respondent's objection in this regard is therefore dismissed.

55. From the foregoing, the Court finds that it has material jurisdiction to hear the Application.

B. Personal jurisdiction

i. Respondent's objection

56. The Respondent contends that the original complainants before the Commission lacked standing to invoke the jurisdiction of the Commission as they did not have authority to represent the Ogieks, nor were they acting on their behalf.

ii. Applicant's submission

57. The Applicant, citing its own jurisprudence, submits that it has adopted the *actio popularis* doctrine which allows anyone to file a

3 See also Rule 118(3) of the Rules of Procedure of the African Commission on Human and Peoples' Rights.

complaint before it on behalf of victims without necessarily getting the consent of the victims. For this reason, the Commission was seized with the Communication in November 2009 by two of the complainants: CEMIRIDE and OPDP, which are Non-Governmental Organizations (NGOs) registered in Kenya. The Applicant states that the latter works specifically to promote the rights of the Ogieks while the former has Observer Status with the Commission, and therefore both were competent to invoke the jurisdiction of the Commission.

iii. The Court's assessment

58. The personal jurisdiction of the Court is governed by Article 5(1) of the Protocol which lists the entities, including the Applicant, entitled to submit cases before it. By virtue of this provision, the Court has personal jurisdiction with respect to this Application. The argument adduced by the Respondent according to which the original complainants had no standing to file the matter before the Commission and to act on behalf of the Ogieks is not relevant in the determination of the personal jurisdiction of the Court because the original complainants before the Commission are not the Parties in the Application before this Court. The Court does not have to make a determination on the jurisdiction of the Commission.

59. With regard to its jurisdiction over the Respondent, the Court recalls that the Respondent is a State Party to the Charter and to the Protocol. Accordingly, the Court finds that it has personal jurisdiction over the Respondent.

60. It is also important for this Court to restate that, because the Application before it is filed by the Commission, pursuant to Articles 2 and 5(1)(a) of the Protocol, the question as to whether or not the Respondent has made the declaration under Article 34(6) of the Protocol does not arise. This is because, unlike for individuals and NGOs, the Protocol does not require the Respondent to have made the declaration under Article 34(6) for the Commission to file Applications before the Court.[4]

61. Therefore, the Court holds that it has personal jurisdiction to hear this Application.

4 See *African Commission on Human and Peoples' Rights v Libya* (Judgment on Merits) 3 June 2016 para 51.

C. Temporal jurisdiction

i. Respondent`s objection

62. The Respondent submits that the Charter as well as any other treaty cannot be applied retrospectively to situations and circumstances that occurred before its entry into force. The Respondent cites Article 28 of the Vienna Convention on the Law of Treaties of 1969 which provides that: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to the party". The Respondent further submits that it became a Party to the Charter on 10 February 1992, and that it is from 10 February 1992 that the Respondent's obligations under the Charter become enforceable. The Respondent adds that some of the Applicant's allegations of violations relate to activities that occurred prior to the Respondent ratifying the Charter and therefore the Court cannot adjudicate on those issues but only on issues that occurred after 1992.

ii. Applicant's submission

63. The Applicant submits that it recognises the principle of non-retroactivity of international treaties. The Applicant argues, however, that, it also relies on the established principle of international human rights law, that the Respondent is liable for violations which occurred prior to the ratification of the Charter, where the effects of such violations have continued after its ratification, or where the Respondent either continued the perpetration of the said violations, or did not remedy them, as is the case with the Ogieks.

iii. The Court's assessment

64. The Court has held that the relevant dates concerning its temporal jurisdiction are the dates when the Respondent became a Party to the Charter and the Protocol, as well as, where applicable, the date of deposit of the declaration accepting the jurisdiction of the Court to receive Applications from individuals and NGOs, with respect to the

Respondent.[5]

65. The Court notes that the Respondent became a Party to the Charter on 10 February 1992 and a Party to the Protocol on 4 February 2004. The Court also notes that, though the evictions by the Respondent leading to the alleged violations began before the aforementioned dates, these evictions are continuing. In this regard, the Court notes in particular, the threats of eviction issued in 2005 and the notice to vacate the South Western Mau Forest Reserve issued on 26 October 2009 by the Director of Kenya Forestry Service. It is the Court's view that the Respondent's alleged violations of its international obligations under the Charter are continuing, and as such, the matter falls within the temporal jurisdiction of the Court.

66. In view of the foregoing, the Court finds that it has temporal jurisdiction to hear the Application.

D. Territorial jurisdiction

67. The territorial jurisdiction of the Court has not been challenged by the Respondent, however it should be stated that since the alleged violations occurred within the territory of the Respondent, a Member State of the African Union that has ratified the Protocol, the Court has territorial jurisdiction in this regard.

68. Based on the foregoing, the Court finds that it has jurisdiction to examine this Application.

VI. Admissibility

69. The Respondent raised two sets of objections to the admissibility of the Application. The first set deals with objections relating to the preliminary procedures before the African Commission and the Court, while the second set deals with objections based on non-compliance with the requirements of admissibility enshrined in the Charter and the Rules.

A. Objections relating to some preliminary procedures

70. The Respondent raised two objections under this head, namely that the Application is still pending before the Commission and that the Court did not undertake a preliminary examination of its admissibility in

5 See *The Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples' Rights v Burkina Faso* (hereinafter referred to as *Norbert Zongo* Case) (Ruling on Preliminary Objections) 21 June 2013, paras 61 to 64.

accordance with Rule 39 of its Rules.

i. Objection based on the contention that the Application is pending before the Commission

a. Respondent's objection

71. The Respondent contends that there are pending proceedings before the Commission between the Ogieks and the Respondent on the same facts and issues as those in the present Application. The Respondent maintains that the Application before the Court is seeking substantive orders whereas the same case is before the Commission, and therefore the jurisdiction of the Court cannot be invoked by the Applicant.

b. Applicant`s submission

72. The Applicant argues that the Court's jurisdiction was properly invoked and avers that the case was referred to the Court by the Commission pursuant to Article 5(1) (a) of the Protocol, Rule 33(1) (a) of the Rules and Rule 118(2) and (3) of the Rules of Procedure of the Commission. According to the Applicant, having seized the Court, it can no longer be argued that the matter is pending before the Commission.

c. The Court's assessment

73. With regard to the objection by the Respondent that the matter is pending before the Commission, the Court notes that the Applicant in the present matter is the Commission, which seized the Court in conformity with Article 5(1) of the Protocol.

74. Having seized the Court, the Commission decided not to examine the matter itself. The seizure of the Court by the Commission signifies in effect that the matter is no longer pending before the Commission, and there is therefore no parallel procedure before the Commission on the one hand and the Court on the other.

75. The Respondent's objection to the admissibility on the grounds that this matter is pending before the Commission is thus dismissed.

ii. Objection with respect to the failure to undertake preliminary examination of its Admissibility

a. Respondent's objection

76. The Respondent submits that the Court has failed to conduct a preliminary examination of the admissibility of the Application by virtue of Articles 50 and 56 of the Charter and Rule 40 of the Rules, and that adverse orders should not have been issued against it without being given an opportunity to be heard.

b. Applicant's submission

77. The Applicant submits that the Application meets all the admissibility requirements provided under Article 56 of the Charter, as it was filed before the Court pursuant to Article 5(1)(a) of the Protocol against a State Party both to the Protocol and the Charter, for alleged violations that occurred within the Respondent's territory. The Applicant further states that Article 50 of the Charter does not apply to this Application since it relates to admissibility procedures for "Communications from States", whereas the instant Application is not such an Application. The Applicant maintains that the Respondent has been accorded an opportunity to be heard at the Commission, when the Commission served the original complaint before it on the Respondent and the latter filed submissions on admissibility thereof.

c. The Court's assessment

78. The Court observes that even though the rules of admissibility applied by the Commission and this Court are substantially similar, the admissibility procedures with respect to an Application filed before the Commission and this court are distinct and shall not be conflated. Accordingly, the Court is of the view that admissibility and other procedures relating to a complaint before the Commission are not necessarily relevant in determining the admissibility of an Application before this Court.

79. In any event, as is the case with its jurisdiction, the Court can decide on the admissibility of an Application before it, only after having heard from the Parties.

80. The Respondent's objection is therefore dismissed.

B. Objections on admissibility based on the requirements of the Charter and the Rules

81. Under this head, the Respondent raised two objections, namely, the failure to identify the Applicant and failure to exhaust local remedies.
82. In determining the admissibility of an application, the Court is guided by Article 6(2) of the Protocol, which provides that, the Court shall take into account the provisions of Article 56 of the Charter. The provisions of this Article are restated in Rule 40 of the Rules as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:
>
> 1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> 2. Comply with the Constitutive Act of the Union and the Charter;
> 3. Not contain any disparaging or insulting language;
> 4. Not be based exclusively on news disseminated through the mass media;
> 5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> 6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> 7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

83. The Respondent has raised objections with respect to the conditions of admissibility pursuant to Rule 40(1) and Rule 40(5) of the Rules. The Court will proceed to examine the admissibility of the Application starting with the conditions of admissibility that are in dispute.

i. Objection on non-compliance with Rule 40(1) of the Rules (Identity of the Applicant)

a. Respondent`s objection

84. The Respondent argues that the original complainants before the Commission did not submit a list of aggrieved members of the

Ogiek Community on whose behalf they filed the Communication and did not produce documents authorizing them to represent the Ogiek Community as required by Rule 40(1) of the Rules. The Respondent also submits that CEMIRIDE has not provided evidence of its Observer Status before the Commission.

85. The Respondent further submits that the original complainants before the Commission have not demonstrated that they are victims of an alleged violation as has been established by the Commission's jurisprudence.

b. Applicant's submission

86. The Applicant submits that the Communication filed before it clearly indicates the authors as CEMIRIDE, MRGI and OPDP, on behalf of the Ogiek Community, and that their contact details are clearly provided.

87. The Applicant further submits that it filed the Application before the Court pursuant to Article 5(1)(a) of the Protocol, which entitles it to do so against a State which has ratified the Charter and the Protocol. The Rules of Procedure of the Commission (2010) provide, inter alia, that it may seize the Court "on grounds of serious and massive violations of human rights". The Applicant also argues that seizure of the Court by the Commission may occur at any stage of the examination of a Communication if the Commission deems it necessary.

c. The Court's assessment

88. The Court reiterates that pursuant to Article 5(1)(a) of the Protocol, the Commission is the legal entity recognised before this Court as an Applicant and is entitled to bring this Application. Since the Commission, rather than the original complainants before the Commission, is the Applicant before this Court, the latter need not concern itself with the identity of the original complainants before the Commission in determining the admissibility of the application. Accordingly, the contention that the original complainants did not disclose the identity of aggrieved members of the Ogieks lacks merit. Therefore, the original complainants' observer status and whether or not they were mandated to represent the Ogiek population before the Commission are also immaterial to the Court's determination of the Applicant's standing to file this Application before this Court.

89. The Court consequently concludes that the Respondent`s objection on this point lacks merit and is dismissed.

ii. Objection on non-compliance with Rule 40(5) of the Rules (Exhaustion of local remedies)

a. Respondent`s objection

90. The Respondent objects to the admissibility of the Application on the grounds that it does not comply with Rule 40(5) of the Rules, which requires Applicants before the Court to exhaust local remedies before invoking its jurisdiction. The Respondent states that its national courts are competent to deal with any violations alleged by the Ogieks as the said local remedies are available, effective and adequate to accomplish the intended results and that they can be pursued without impediments. The Respondent submits that judicial procedures in Kenya are adversarial in nature and the length of the proceedings depends on the Parties, which are responsible to move the Courts for hearing dates and relief. The Respondent contends that though some orders issued by the Respondent's courts have not been complied with, the said non-compliance was by a particular Municipal Council and should not be attributed to the Respondent. The Respondent asserts that neither the Applicant nor the original complainants before the Commission filed any case in the Respondent's courts in this regard. The Respondent maintains that the cases that the Applicant claims have been filed before its courts were filed by other entities. Further, the Respondent states that, apart from submitting their case to the national courts, the complainants could have seized its national human rights commission to get redress for the alleged violations before bringing this Application to this Court.

b. Applicant's submission

91. The Applicant submits that, the rule of exhaustion of local remedies is applicable only with respect to remedies which are "available", "effective" and "adequate" and if the local remedies do not meet these criteria, this admissibility requirement is dispensed with. The Applicant argues that the rule does not also apply when local remedies are unduly prolonged or there are a large number of victims of alleged serious human rights violations.

92. The Applicant contends that the Respondent has been aware of the alleged violation of the rights of the Ogieks since the 1960s, and despite the continuing resistance against their eviction from their ancestral home, the Respondent has failed to address their grievances and rather chose the use of force to quell their protest and adopted

actions to frustrate the attempts of the Ogieks to seek domestic redress. In this vein, the Applicant submits that the Ogieks have been repeatedly arrested and detained on falsified charges; and political pressure has been exerted on them by the Office of the President to drop the legal cases challenging the dispossession of their land. In spite of all these, when they get decisions in their favour from domestic courts, the Respondent failed to comply with such decisions: thus, advancing the point that domestic remedies are in fact unavailable, or, their procedure would probably be unduly prolonged. The Applicant maintains that in such cases the requirement of exhaustion of local remedies must be dispensed with.

c. The Court's Assessment

93. Any application filed before this Court must comply with the requirement of exhaustion of local remedies. The rule of exhaustion of domestic remedies reinforces and maintains the primacy of the domestic system in the protection of human rights vis-à-vis the Court. The Court notes that Article 56(5) of the Charter and Rule 40(5) of the Rules require that for local remedies to be exhausted, they must be available and should not be unduly prolonged. In its earlier judgments, the Court has decided that domestic remedies to be exhausted must be available, effective and sufficient and must not be unduly prolonged.[6]

94. The Court also emphasises that the rule of exhaustion of local remedies does not in principle require that a matter brought before the Court must also have been brought before the domestic courts by the same Applicant. What must rather be demonstrated is that, before a matter is filed before an international human rights body, like this Court, the Respondent has had an opportunity to deal with such matter through the appropriate domestic proceedings. Once an Applicant proves that a matter has passed through the appropriate domestic judicial proceedings, the requirement of exhaustion of local remedies shall be presumed to be satisfied even though the same Applicant before this Court did not itself file the matter before the domestic courts.

95. In the instant Application, the Court notes that the Applicant has provided evidence that members of the Ogiek community have litigated several cases before the national courts of the Respondent, some

6 See in this regard *Lohé Issa Konaté v Burkina Faso* (Judgment on Merits) 5 December 2014 (hereinafter referred to as Issa Konate Case) paragraphs 96 to 115; Norbert Zongo Case (Judgment on Merits) 28 March 2014 paragraphs 56 to 106.

have been concluded against the Ogiek and some are still pending.[7] In the circumstance, the Respondent can thus reasonably be considered to have had the opportunity to address the matter before it was brought before this Court.

96. Furthermore, from available records, the Court notes that some cases filed before national courts were unduly prolonged, some taking 10 to 17 years before being completed or were still pending at the time this Application was filed.[8] In this regard, the Court observes that the nature of the judicial procedures and the role played by the Parties therein in the domestic system could affect the pace at which proceedings may be completed. In the instant Application, the records before this Court show that the prolonged proceedings before the domestic courts were largely occasioned by the actions of the Respondent, including numerous absences during Court proceedings and failure to timely defend its case.[9] In view of this, the Court holds that the Respondent`s contention imputing the inordinate delays in the domestic system to the adversarial nature of its judicial procedures is not plausible.

97. Regarding the possibility for the original complainants to have seized the Respondent's National Human Rights Commission with the alleged violations, the Court notes that, the said Commission does not have any judicial powers. The functions of its national human rights commission are to resolve conflicts by fostering reconciliation and issuing recommendations to appropriate state organs.[10] This Court has consistently held that for purpose of exhaustion of local remedies, available domestic remedies shall be judicial.[11] In the instant case, the remedy the Respondent is requesting the Applicant to exhaust, that is, procedures before the National Human Rights Commission, is not

7 See case of Francis Kemai and 9 Others v Attorney General and 3 Others, High Court Civil Application No. 238 of 1999 ; case of *Joseph Letuya and 21 Others v Attorney General and 2 Others*, Miscellaneous Application No. 635 of 1997 High Court of Kenya at Nairobi.

8 See case of *Joseph Letuya & 210 Others v Attorney General & 2 Others*, Miscellneous Application No. 635 of 1997 before the High Court at Nairobi, (completed after 17 years of procedure); case of *Joseph Letuya & 21 Others v Minister of Environment*, Miscellaneous Application No. 228 of 2001 before the High Court at Nairobi, (instituted in 2001 and still pending at the time the Application was filed before this Court);case of *Stephen Kipruto Tigerer v Attorney General & 5 Others*, No. 25 of 2006 before the High Court at Nakuru, (instituted in 2006 and was still pending at the time the Application was filed before this Court).

9 For a detailed account, see Complaints' Submissions on Admissibility, CEMIRIDE, Minority Rights Group International and Ogiek Peoples Development Programme (On behalf of the Ogiek Community), pages 15-24.

10 See Section 3 of the Kenya National Human Rights Commission Act.

11 See *Mohamed Abubakari* Case paras 66 to 70.

judicial.[12]

98. In view of the above, the Court rules that the Application meets the requirements under Article 56(5) of the Charter and Rule 40(5) of the Rules.

C. Compliance with Rule 40(2), 40(3), 40(4), 40(6) and 40(7) of the Rules

99. The Court notes that the issue of compliance with the above-mentioned Rules is not in contention and nothing in the Parties' submissions indicates that they have not been complied with. The Court therefore holds that the requirements in those provisions have been met.

100. In light of the foregoing, the Court finds that this Application fulfils all admissibility requirements in terms of Article 56 of the Charter and Rule 40 of the Rules and declares the Application admissible.

VII. On the merits

101. In its Application, the Applicant alleges violation of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21 and 22 of the Charter. Given the nature of the subject matter of the application, the Court will commence with the alleged violation of Article 14, then examine Articles 2, 4, 8, 14, 17(2) and (3), 21, 22 and 1.

102. However, having noted that most of the allegations made by the Applicant hinge on the question as to whether or not the Ogieks constitute an indigenous population. This issue is central to the determination of the merits of the alleged violations and shall be dealt with from the onset.

A. The Ogieks as an indigenous population

i. Applicant's submission

103. The Applicant argues that the Ogiek are an "indigenous people" and should enjoy the rights recognised by the Charter and international human rights law including the recognition of their status as an "indigenous people". The Applicant substantiates its contention by stating that the Ogieks have been living in the Mau Forest for

12 *Mohamed Abubakari* Case para 64; *Alex Thomas* Case, para 64 and *Christopher Mtikila* Case, para 82.3.

generations since time immemorial and that their way of life and survival as a hunter-gatherer community is inextricably linked to the forest which is their ancestral land.

ii. Respondent's submission

104. The Respondent's position is that the Ogieks are not a distinct ethnic group but rather a mixture of various ethnic communities. During the Public Hearing however, the Respondent admitted that the Ogieks constitute an indigenous population in Kenya but that the Ogieks of today are different from those of the 1930s and 1990s having transformed their way of life through time and adapted themselves to modern life and are currently like all other Kenyans.

iii. The Court's assessment

105. The Court notes that the concept of indigenous population is not defined in the Charter. For that matter, there is no universally accepted definition of "indigenous population" in other international human rights instruments. There have, however, been efforts to define indigenous populations.[13] In this regard, the Court draws inspiration from the work of the Commission through its Working Group on Indigenous Populations/Communities. The Working Group has adopted the following criteria to identify indigenous populations:

> "i. Self-identification;
>
> ii. A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and
>
> iii. A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model."[14]

106. The Court also draws inspiration from the work of the United Nations Special Rapporteur on Minorities, which specifies the criteria to identify indigenous populations as follows:

> "i. That indigenous people can be appropriately considered as "Indigenous communities, peoples and nations which having a

13 See Article 1 of the International Labour Organisation Indigenous and Tribal Peoples Convention No. 169 adopted by the 76th Session of the International Labour Conference on 27 June 1989.

14 Advisory Opinion Of The African Commission On Human And Peoples' Rights On The United Nations Declaration On The Rights Of Indigenous Peoples, adopted by The African Commission On Human And Peoples' Rights At Its 41st Ordinary Session Held In May 2007 In Accra, Ghana, at page 4.

historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems";[15]

ii. That an indigenous individual for the same purposes is "… one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference".[16]

107. From the foregoing, the Court deduces that for the identification and understanding of the concept of indigenous populations, the relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collective; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.[17]

108. These criteria generally reflect the current normative standards to identify indigenous populations in international law. The Court deems it appropriate, by virtue of Article 60 and 61 of the Charter, which allows it to draw inspiration from other human rights instruments to apply these criteria to this Application.

109. With respect to the issue of priority in time, different reports and submissions by the Parties filed before the Court reveal that the Ogieks have priority in time, with respect to the occupation and use

15 Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1986/7/Add.4, paragraph 379.

16 n15 paragraphs 381 to 382.

17 See E/CN.4/Sub.2/AC.4/1996/2, paragraph 69.

of the Mau Forest.[18] These reports affirm the Applicant's assertion that the Mau Forest is the Ogieks' ancestral home.[19] The most salient feature of most indigenous populations is their strong attachment with nature, particularly, land and the natural environment. Their survival in a particular way depends on unhindered access to and use of their traditional land and the natural resources thereon. In this regard, the Ogieks, as a hunter-gatherer community, have for centuries depended on the Mau Forest for their residence and as a source of their livelihood.

110. The Ogieks also exhibit a voluntary perpetuation of cultural distinctiveness, which includes aspects of language, social organisation, religious, cultural and spiritual values, modes of production, laws and institutions[20] through self-identification and recognition by other groups and by State authorities,[21] as a distinct group. Despite the fact that the Ogieks are divided into clans made up of patrilineal lineages each with its own name and area of habitation, they have their own language, albeit currently spoken by very few and more importantly, social norms and forms of subsistence, which make them distinct from other neighbouring tribes.[22] They are also identified by these neighbouring tribes, such as the Maasai, Kipsigis and Nandi, with whom they have had regular interaction, as distinct 'neighbours' and as a distinct group.[23]

111. The records before this Court show that the Ogieks have suffered

18 Report of the African Commission's Working Group on Indigenous Populations/ Communities Research and Information Visit to Kenya, 1-19 March 2010 pages 41 to 42; United Nations Human Rights Committee (UNHRC), *'Cases examined by the Special Rapporteur (June 2009 – July 2010), Human Rights Committee, 15th Session'* (15 September 2010) UN Doc A/HRC/15/37/Add.1, paragraph 268, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf; UNHRC, '*Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples' (26 February 2007)* UN Doc A/HRC/4/32/Add.3, paragraph 37, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement.

19 See the Presidential Commission of Inquiry into the Illegal/Irregular Allocation of Public Land or the Ndung'u Report June 2004 (hereinafter referred to as the Ndung'u Report) page 154 and the Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex March 2009 (hereinafter referred to as the Mau Task Force Report) page 36.

20 CA Kratz, 'Are the Ojiek Really Masai? Or Kipsigis? Or Kikuyu?' (1980) 20 *Cahiers d'Etudes Africaines* 357.

21 Affidavit of Samuel Kipkorir Sungura, Affidavit of Elijah Kiptanui Tuei, Affidavit of Patrick Kuresoi filed by the Applicant; The Final Report of the Truth, Justice and Reconciliation Commission of Kenya 3 May 2013 (hereinafter referred to as the TJRC Report) Volume IIC paragraphs 204 and 240; and UNHRC*, 'Cases examined by the Special Rapporteur (June 2009 – July 2010) availa*ble at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf, at para 268.

22 Kratz (n 20) 355 to 368.

23 Kratz (n 20) 357-358.

from continued subjugation, and marginalisation.[24] Their suffering as a result of evictions from their ancestral lands and forced assimilation and the very lack of recognition of their status as a tribe or indigenous population attest to the persistent marginalisation that the Ogieks have experienced for decades.[25]

112. In view of the above, the Court recognises the Ogieks as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.

113. The Court will now proceed to examine the articles alleged to have been violated by the Respondent.

B. Alleged violation of Article 14 of the Charter

i. Applicant's submission

114. The Applicant contends that the failure of the Respondent to recognise the Ogieks as an indigenous community denies them the right to communal ownership of land as provided in Article 14 of the Charter. The Applicant also argues that the Ogieks' eviction and dispossession of their land without their consent and without adequate compensation, and the granting of concessions of their land to third Parties, mean that their land has been encroached upon and they have been denied benefits deriving therefrom.

115. The Applicant avers that the Constitution of Kenya takes away land rights from the communities concerned and vests it in government institutions like the Forestry Department, adding that for the laws relating to community land rights to be effective, the Constitution and the Land Act of 2012 must be reconciled and community land rights in particular, must be identified and given effect. According to the Applicant, the Forest Act 2005 does not provide for community-owned forests and the Forest Conservation Bill unfortunately does not provide for the procedure of identifying community-owned forests and does not give effect to community land rights.

24 See Verbatim Record of Public Hearing 27 November 2014 page 137; the TJRC Report (2013), paragraphs 32-47 (including other minority and indigenous people in Kenya); UNCESCR 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya' (1 December 2008) UN Doc. E/C.12/KEN/CO/1 page 3 paragraph 12; UNHRC, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples' available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf at paras 41 and 65 to 77.

25 See also TJ Kimaiyo, 'Ogiek Land Cases and Historical Injustices – 1902-2004' (2004).

116. On the Respondent's claim that other communities such as the Kipsigis, Tugen and the Keiyo also lay claim to the Mau Forest, the Applicant submits that the report of the Mau Forest Task Force did not recognise or mention any such rights of these other communities and clearly recommended that the Ogieks who were to be settled in the excised areas of the forest had not yet been resettled.

117. While reiterating the Ogieks' ancestral property rights to the Mau Forest, the Applicant submits that the Respondent did not state whether the evictions were in the public interest as required by Article 14 of the Charter. The Applicant maintains that excisions and allocations made by the Respondent were illegal and done purely to pursue private interests and therefore, are in violation of the Charter.

118. On the Respondent's assertion that the Ogieks were not forcefully evicted but regularly consulted before every eviction and that they have been given alternative land, the Applicant avers that the Ndung'u Report,[26] the Truth, Justice and Reconciliation Commission Report, the Mau Forest Task Force Report indicate the contrary. Hence, the Applicant requests that the Respondent is put to strict proof of this assertion.

119. According to the expert witness called by the Applicant, the Land Act 2012, inspired by the Constitution "is not perfect but is sound". She submitted that this law has very clear provisions that ancestral land and hunter-gatherer lands are community lands; yet the Constitution stipulates that gazetted forests are public lands, which therefore makes the Land Act 2012 contradictory.

ii. Respondent's submission

120. The Respondent contends that the Ogieks are not the only tribe indigenous to the Mau Forest and as such, they cannot claim exclusive ownership of the Mau Forest. The Respondent states that the title for all forest in Kenya (including the Mau Forest), other than private and local authority forest is vested in the State. The Respondent avers that since the colonial administration it was communicated to the Ogieks that the Mau Forest was a protected conservation area on which they were encroaching upon and that they were required to move out of the forest. The Respondent also argues that the Ogieks were consulted and notified before every eviction was carried out and that these were carried out in accordance with the law.

121. The Respondent states that its land laws recognise community

26 Report of the Presidential Commission of Inquiry into the Illegal/Irregular Allocation of Public Land.

ownership of land and provide for mechanisms by which communities can participate in forest conservation and management. The Respondent contends that under its laws, community forest users are granted rights which include collection of medicinal herbs and harvesting of honey among others**.** The Respondent argues that in any event, the Court should look at the matter from the point of view of proportionality.

iii. The Court's assessment

122. 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."

123. The Court observes that, although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right can be individual or collective.

124. The Court is also of the view 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*).

125. However, to determine the extent of the rights recognised for indigenous communities in their ancestral lands as in the instant case, the Court holds that Article 14 of the Charter must be interpreted in light of the applicable principles especially by the United Nations.

126. In this regard, Article 26 of the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous Peoples adopted by the General Assembly on 13 September 2007, provides as follows:

> "1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

127. It follows in particular from Article 26(2) of the Declaration that the rights that can be recognised for indigenous peoples/communities

on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land.

128. In the instant case, the Respondent does not dispute that the Ogiek Community has occupied lands in the Mau Forest since time immemorial. In the circumstances, since the Court has already held that the Ogieks constitute an indigenous community (supra paragraph 112), it holds, on the basis of Article 14 of the Charter read in light of the above-mentioned United Nations Declaration, that they have the right to occupy their ancestral lands, as well as use and enjoy the said lands.

129. However, Article 14 envisages the possibility where a right to property including land may be restricted provided that such restriction is in the public interest and is also necessary and proportional[27]

130. In the instant case, the Respondent's public interest justification for evicting the Ogieks from the Mau Forest has been the preservation of the natural ecosystem. Nevertheless, it has not provided any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area. Different reports prepared by or in collaboration with the Respondent on the situation of the Mau Forest also reveal that the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions.[28] In its pleadings, the Respondent also concedes that "the Mau Forest degradation cannot entirely be associated or is not associable to the Ogiek people".[29] In this circumstance, the Court is of the view that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.

131. In view of the foregoing considerations, the Court holds that by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land

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27 See *Issa Konate* Case paras 145 to154.

28 Report of Mau Complex and Marmanet Forests, Environmental and Economic Contributions Current State and Trends, Briefing Notes Compiled by the team that participated in the reconnaissance flight on 7 May 2008, in consultation with relevant Government departments, 20 May 2008; See also Verbatim Record of Public Hearing 27 November 2014 page 111, Ndung'u Report (Annexure 82) and the Mau Task Force Report pages 6, 9, 18 and 22.

29 See also Respondent's Submission on Merits page 23.

as defined above and as guaranteed by Article 14 of the Charter read in light of the United Nations Declaration on the Rights of Indigenous Peoples of 2007.

C. Alleged violation of Article 2 of the Charter

i. Applicant`s submission

132. The Applicant submits that Article 2 of the Charter provides a non-exhaustive list of prohibited grounds of discrimination and that the expression "or other status", widens the list to include statuses not expressly noted. The Applicant notes that any discrimination against the Ogiek Community would fall within the definition of "race", "ethnic group", "religion" and "social origin" referred to in Article 2. The Applicant urges the Court to act in line with the jurisprudence of other regional human rights bodies and maintains that discrimination on grounds of ethnic origin is not capable of objective justification.

133. According to the Applicant, the differential treatment of the Ogieks and other similar indigenous and minority groups within Kenya, in relation to the lack of respect for their property rights, religious and cultural rights, and right to life, natural resources and development under the relevant laws, constitutes unlawful discrimination and is a violation of Article 2 of the Charter. The Applicant stresses that the Respondent has, since independence, been pursuing a policy of assimilation and marginalisation, presumably in an attempt to ensure national unity and, in the case of land and natural resource rights, in the name of conservation of the Mau Forest. According to the Applicant, while such aims of national unity or conservation may be legitimate and serve the common interest, the means employed, including the non-recognition of the tribal and ethnic identity of the Ogieks and their corresponding rights is entirely disproportionate to such an aim and, is ultimately counterproductive to its achievement. The Applicant is of the view that the Respondent has failed to show that the reasons for such difference in treatment are strictly proportionate to or absolutely necessary for the aims being pursued, and concludes that as a result, the laws which permit this discrimination are in violation of Article 2 of the Charter.[30]

30 These include the Constitution of Kenya, 1969 (as Amended in 1997), the Government Lands Act Chapter 280 of the Laws of Kenya, Registered Land Act Chapter 300 of the Laws of Kenya, Trust Land Act Chapter 285 of the Laws of Kenya and the Forest Act Chapter 385 of the Laws of Kenya.

ii. Respondent's submission

134. The Respondent submits that there has been no discrimination against the Ogieks and that the alleged discrimination in education, health, access to justice and employment is baseless, and lacks justification and documentary evidence. The Respondent submits that the complainants have not demonstrated, as is required, how the Respondent discriminated against the Ogieks. The Respondent calls on the Applicant to prove the discrimination alleged and to establish facts from which the discrimination occurred.

135. The Respondent contends that, in any event, the alleged discrimination would be contrary to its Constitution which provides safeguards against such discrimination. The Respondent cites Articles 10 (National values and principles of governance) and Article 24 of its Constitution, which provide inter alia that, every person is equal before the law and has equal protection and benefit of the law. The Respondent also cites Article 27(4) thereof which prohibits the State from discriminating "directly or indirectly any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth".

iii. The Court's assessment

136. Article 2 of the Charter provides that:

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, birth or any status."

137. Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.

138. 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 by Article 3 of the Charter.[31] The scope of the right to non-discrimination extends beyond the right to equal treatment by the law and also has practical dimension in that individuals should in fact be able to enjoy the

31 *Christopher Mtikila* Case paragraphs 105.1 and 105.2.

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' under 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 shall take into account the general spirit of the Charter.

139. In terms of Article 2 of the Charter, while distinctions or differential treatment on grounds specified therein are generally proscribed, it should be pointed out that not all forms of distinction can be considered as discrimination. A distinction or differential treatment becomes discrimination, and hence, contrary to Article 2, when it does not have objective and reasonable justification and, in the circumstances where it is not necessary and proportional.[32]

140. In the instant case, the Court notes that the Respondent's national laws as they were before 2010, including the Constitution of Kenya 1969 (as Amended in 1997), the Government Lands Act Chapter 280, Registered Land Act Chapter 300, Trust Land Act Chapter 285 and the Forest Act Chapter 385, recognised only the concept of ethnic groups or tribes. While some of these laws were enacted during the colonial era, the Respondent maintained them with few amendments, or their effect persisted to date even after independence in 1963.

141. In so far as the Ogieks are concerned, the Court notes from the records available before it that their request for recognition as a tribe goes back to the colonial period, where their request was rejected by the then Kenya Land Commission in 1933, asserting that "they [the Ogieks] were a savage and barbaric people who deserved no tribal status" and consequently, the Commission proposed that "they should become members of and be absorbed into the tribe in which they have the most affinity".[33] The denial of their request for recognition as a tribe also denied them access to their own land as, at the time, only those who had tribal status were given land as "special reserves" or "communal reserves". This has been the case since independence and is still continuing.[34] In contrast, other ethnic groups such as the Maasai, have been recognised as tribes and consequently, been able to enjoy all related rights derived from such recognition, thus proving differential

32 As above.

33 See also Verbatim Record of Public Hearing 27 November 2014 pages 15 to 16 on the Respondent's Opening Statement.

34 See Ndung'u Report page 154, Mau Task Force Report page 36 and TJRC Report Vol IIC paragraphs 204 and 240.

treatment.[35]

142. The Court accordingly finds that, if other groups which are in the same category of communities, which lead a traditional way of life and with cultural distinctiveness highly dependent on the natural environment as the Ogieks, were granted recognition of their status and the resultant rights, the refusal of the Respondent to recognise and grant the same rights to the Ogieks, due to their way of life as a hunter-gatherer community amounts to `distinction` based on ethnicity and/or 'other status' in terms of Article 2 of the Charter.

143. With regard to the Respondent's submission that, following the adoption of a new Constitution in 2010, all Kenyans enjoy equal opportunities in terms of education, health, employment, and access to justice and there is no discrimination among different tribes in Kenya including the Ogieks, the Court notes that indeed the 2010 Constitution of Kenya recognises and accords special protection to indigenous populations as part of "marginalised community" and the Ogieks could theoretically fit into that category and benefit from the protection of such constitutional safeguards. All the same, this does not diminish the responsibility of the Respondent with respect to the violations of the rights of the Ogieks not to be discriminated against between the time the Respondent became a Party to the Charter and when the Respondent's new Constitution was enacted.

144. In addition, as stated above, the prohibition of discrimination may not be fully guaranteed with the enactment of laws which condemn discrimination; the right can be effective only when it is actually respected and, in this vein, the persisting eviction of the Ogieks, the failure of the authorities of the Respondent to stop such evictions and to comply with the decisions of the national courts demonstrate that the new Constitution and the institutions which the Respondent has set up to remedy past or on-going injustices are not fully effective.

145. On the Respondent's purported justification that the evictions of the Ogieks were prompted by the need to preserve the natural ecosystem of the Mau Forest, the Court considers that this cannot, by any standard, serve as a reasonable and objective justification for the lack of recognition of the Ogieks' indigenous or tribal status and denying them the associated rights derived from such status. Moreover, the Court recalls its earlier finding that contrary to what the Respondent is asserting, the Mau Forest has been allocated to other

35 For instance, Maasai Mau Trust Land Forest, which forms part of the Mau Forest Complex is managed by the Narok County Council rather than the Kenya Forest Service as it is the only Trust Land out of the 22 forest blocks in the complex, thereby, recognising a special designated area for the Maasai; See in this regard, Mau Forest Task Force Report, page 9.

people in a manner which cannot be considered as compatible with the preservation of the natural environment and that the Respondent itself concedes that the depletion of the natural ecosystem cannot be entirely imputed to the Ogieks.[36]

146. In light of the foregoing, the Court finds that the Respondent, by failing to recognise the Ogieks' status as a distinct tribe like other similar groups and thereby denying them the rights available to other tribes, violated Article 2 of the Charter.

D. Alleged violation of Article 4 of the Charter

i. Applicant's submission

147. The Applicant submits that the right to life is the first human right, the one on which the enjoyment of all other rights depend and that it imposes both a negative duty on States to refrain from interfering with its exercise and the positive obligation to fulfil the basic necessities for a decent survival.[37] The Applicant contends that forced evictions may violate the right to life when they generate conditions that impede or obstruct access to a decent existence.[38] According to the Applicant, given their special relationship with and dependence on land for their livelihood, when indigenous populations are forcefully evicted from their ancestral land, they become exposed to conditions affecting their decent way of life.

148. The Applicant argues that, similar to other hunter-gatherer communities, the Ogieks relied on their ancestral land in the Mau Forest to support their livelihood, their specific way of life and their very existence. The Applicant contends further that the Ogieks' ancestral land in the Mau Forest provided them with, a constant supply of food, in the form of game and honey, shelter, traditional medicines and an area for cultural rituals and religious ceremonies and social organisation.

36 See para 130 above.

37 See *Forum of Conscience v Sierra Leone African Commission on Human and Peoples' Rights* Communication No. 223/98 14th Annual Activity Report 2000 to 2001 para 20.

38 Citing the *General Comment of the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) on the Right to Adequate Housing: Forced Eviction*, UNCESCR General Comment No. 7 20 May 1997; the Commission's jurisprudence in the *Endorois* Case Communication No. 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya* 25 November 2009 paragraph 216 27th Annual Activity Report: June to November 2009; and the decision of the Inter-American Court of Human Rights (IACtHR) decision in *Yakye Axa Indigenous Community v Paraguay* Judgment of 17 June 2005 (Merits, Reparations and Costs) Ser C No. 125 paras 160 to 163.

The Applicant argues that, the Respondent acknowledges this intimate relationship that the Ogieks have with their ancestral land.

149. The Applicant submits therefore that the Respondent's removal of the Ogieks from their ancestral and cultural home, and subsequent limiting access to these lands, threatens to destroy the community's way of life and that their hunter-gatherer livelihood has been severely affected by relegation to unsuitable lands. According to the Applicant, their forced eviction means that the Ogieks no longer have a decent survival and consequently, their right to life under Article 4 of the Charter is imperilled.

ii. Respondent's submission

150. The Respondent submits that the Mau Forest Complex is important for all Kenyans, and the government is entitled to develop it for the benefit of all citizens. While the government engages in economic activity for the benefit of all Kenyans in areas where indigenous people live, the Respondent indicates that it may affect the indigenous people and reiterates that this should be seen in the light of the principle of proportionality.

iii. The Court's assessment

151. Article 4 of the Charter stipulates 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"

152. The right to life is the cornerstone on which the realisation of all other rights and freedoms depend. The deprivation of someone`s life amounts to eliminating the very holder of these rights and freedoms. Article 4 of the Charter strictly prohibits the arbitrary deprivation of life. Contrary to other human rights instruments, the Charter establishes the link between the right to life and the inviolable nature and integrity of the human being. The Court finds that this formulation reflects the indispensable correlation between these two rights.

153. The Court notes that the right to life under Article 4 of the Charter is a right to be enjoyed by an individual irrespective of the group to which he or she belongs. The Court also understands that the violation of economic, social and cultural rights (including through forced evictions) may generally engender conditions unfavourable to a decent

life.[39] However, the Court is of the view that the sole fact of eviction and deprivation of economic, social and cultural rights may not necessarily result in the violation of the right to life under Article 4 of the Charter.

154. The Court considers that it is necessary to make a distinction between the classical meaning of the right to life and the right to decent existence of a group. Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life.

155. In the instant case, it is not in dispute between the Parties that that the Mau Forest has, for generations, been the environment in which the Ogiek population has always lived and that their livelihood depends on it. As a hunter-gatherer population, the Ogieks have established their homes, collected and produced food, medicine and ensured other means of survival in the Mau Forest. There is no doubt that their eviction has adversely affected their decent existence in the forest. According to the Applicant, some members of the Ogiek population died at different times, due to lack of basic necessities such as food, water, shelter, medicine, exposure to the elements, and diseases, subsequent to their forced evictions. The Court notes however that the Applicant has not established the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result. The Applicant has not adduced evidence to this effect.

156. In view of the above, the Court finds that there is no violation of Article 4 of the Charter.

E. Alleged violation of Article 8 of the Charter

i. Applicant's submission

157. The Applicant contends that the Ogieks practise a monotheistic religion closely tied to their environment and that their beliefs and spiritual practices are protected by Article 8 of the Charter and constitute a religion under international law. The Applicant refutes the claim that

39 In *Yakye Axa Indigenous Community v Paraguay* Judgment of 17 June 2005 (Merits, Reparations and Costs) Ser C No. 125 paragraph 161, the IACtHR found a violation to the right to life by reasoning that: " … when the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist ... Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated" and further that "the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity". The Commission adopted a similar reasoning in the *Endorois* Case - see para 216.

the Ogieks' religious practices are a threat to law and order, which has been the Respondent's basis for the unjustifiable interference with the Ogieks' right to freely practice their religion. In this regard, the Applicant submits that the Ogieks' traditional burial practices of putting the dead in the forest have evolved such that now they do bury their dead.

158. Further, the Applicant asserts that the sacred places in the Mau Forest, caves, hills, specific trees areas within the forest[40] were either destroyed during the evictions which took place during the 1980s, or knowledge about them has not been passed on by the elders to younger members of their community, as they can no longer access them. The Applicant avers that it is only through unfettered access to the Mau Forest that the Ogieks will be able to protect, maintain, and use their sacred sites in accordance with their religious beliefs. The Applicant adds that the Respondent has failed to demarcate and protect the religious sites of the Ogieks.

159. The Applicant also maintains that though some of the Ogieks have adopted Christianity, this does not extinguish the religious rites they practise in the forest. The Applicant adds that, under the Forest Act, the Ogieks are required to apply annually and pay for forest licences in order to access their religious sites situated on their ancestral lands, contrary to the provisions of the Charter.

160. During the public hearing, Dr Liz Alden Wily, the expert witness called by the Applicant asserted that the livelihoods of hunter-gatherer communities are dependent on a social ecology whereby their spiritual life and whole existence depends on the forest and that there is a big misunderstanding about the hunter-gatherer culture. She emphasised that for such communities, culture and religion are intertwined and therefore cannot be separated. According to her, it is usually perceived that their culture can be easily dissolved or disbanded in situations where the hunter -gatherers have been assimilated by modernism. She stated that many forest dwellers like the Ogieks do the hunting and gathering, not just for their livelihood, but rather, their whole spiritual life and their entire existence depends on the forest and its intactness. She stated that whether or not their livelihood is derived from the forest (as is the case of the Ogieks), people tend to erroneously think that because today the Ogieks have not turned up in skins or hides, then they do not need to hunt or that they have given up their culture.

ii. Respondent's submission

161. The Respondent contends that the Applicant has failed to adduce

40 See Applicant's Reply to the Respondent's Submissions on Merits pages 22 to 23.

evidence to show the exact places where the alleged ceremonies for the religious sites of the Ogieks are located. They argue that the Ogieks have abandoned their religion as they have converted to Christianity and that the religious practices of the Ogieks are a threat to law and order, thereby necessitating the Respondent's interference, to protect and preserve law and order. The Respondent contends that the Ogieks are free to access the Mau Forest, except between 6 pm and 9 am and that they are prohibited from carrying out certain activities, unless they have a licence permitting them to do so.

iii. The Court's assessment

162. Article 8 of the Charter provides:

> "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

163. The above provision requires State Parties to fully guarantee freedom of conscience, the profession and free practice of religion.[41] The right to freedom of worship offers protection to all forms of beliefs regardless of denominations: theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.[42] The right to manifest and practice religion includes the right to worship, engage in rituals, observe days of rest, and wear religious garb, allow individuals or groups to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes, as well as to celebrate ceremonies in accordance with the precepts of one's religion or belief.[43]

164. The Court notes that, in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment. In indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment. Any impediment to, or interference with accessing the natural environment, including land, severely constrains their ability to conduct or engage in religious

41 See also Article 18, ICCPR.

42 UNHRC, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: http://www.refworld.org/docid/453883fb22.html para 2.

43 Article 6 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Thirty-Sixth session, 1981), UN GA Res 36/55, (1981).

rituals with considerable repercussion on the enjoyment of their freedom of worship.

165. In the instant case, the Court notes from the records before it[44] that the Ogieks' religious sites are in the Mau Forest and they perform their religious practices there. The Mau Forest constitutes their spiritual home and is central to the practice of their religion. It is where they bury the dead according to their traditional rituals[45], where certain types of trees are found for use to worship and it is where they have kept their sacred sites for generations.

166. The records also show that the Ogiek population can no longer undertake their religious practices due to their eviction from the Mau Forest. In addition, they must annually apply and pay for a license for them to have access to the Forest. In the opinion of the Court, the eviction measures and these regulatory requirements interfere with the freedom of worship of the Ogiek population.

167. Article 8 of the Charter however allows restrictions on the exercise of freedom of religion in the interest of maintaining law and order. Though the Respondent can interfere with the religious practices of the Ogieks to protect public health and maintain law and order, these restrictions must be examined with regard to their necessity and reasonableness. The Court is of the view that, rather than evicting the Ogieks from the Mau Forest, thereby restricting their right to practice their religion, there were other less onerous measures that the Respondent could have put in place that would have ensured their continued enjoyment of this right while ensuring maintenance of law and order and public health. These measures include undertaking sensitisation campaigns to the Ogieks on the requirement to bury their dead in accordance with the requirements of the Public Health Act and collaborating towards maintaining the religious sites and waiving the fees to be paid for the Ogieks to access their religious sites.

168. On the contention that the Ogieks have abandoned their religion and converted to Christianity, the Court notes from the records before it, specifically from the testimony of the Applicant's witnesses that, not all the Ogieks have converted to Christianity. Indeed, the Respondent has not submitted any evidence to support its position that the adoption of Christianity means a total abandonment of the Ogiek traditional religious practices. Even though some members of the Ogieks might have been converted to Christianity, the evidence before this Court show that they still practice their traditional religious rites. Accordingly,

44 Applicant's Submission on Merits page 184, paras 431 to 432 and the Affidavit of Seli Chemeli Koech filed by Applicant.

45 For instance, placing a dead person under the *Yemtit* tree (*Olea Africana*).

the alleged transformation in the way of life of the Ogieks and their manner of worship cannot be said to have entirely eliminated their traditional spiritual values and rituals.

169. From the foregoing, the Court is of the view that given the link between indigenous populations and their land for purposes of practicing their religion, the evictions of the Ogieks from the Mau Forest rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogieks. The Court therefore finds that the Respondent is in violation of Article 8 of the Charter.

F. Alleged violation of Articles 17(2) and (3) of the Charter

i. Applicant's submission

170. The Applicant, citing its own jurisprudence in the Endorois Case avers that "Culture could be taken to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and in that it encompasses a group's religion, language, and other defining characteristics". On the basis of this, the Applicant submits that the cultural rights of the Ogieks have been violated by the Respondent, through restrictions on access to the Mau forest which hosts their cultural sites. According to the Applicant, their attempts to access their historic lands for cultural purposes have been met with intimidation and detention, and serious restrictions have been imposed by the Kenyan authorities on their hunter-gatherer way of life, after the Respondent forcefully evicted them from the Mau Forest.

171. The Applicant maintains that the Ogieks should be allowed to determine what culture is good for them rather than the Respondent doing so. The Applicant calls on the Court to be inspired by Article 61 of the Charter and urges the Court to find that the Respondent is in violation of Article 17 of the Charter in respect of the Ogieks and prays the Court to issue an Order for reparation.

172. While testifying about the cultural evolution of the Ogieks, the expert witness maintains and reiterates her earlier position as elaborated in the section on religion above in paragraph 161.

ii. Respondent's submission

173. The Respondent argues that it recognises and affirms the provisions of Article 17 of the Charter and has taken reasonable steps both at the national and international levels to ensure that the cultural rights of indigenous peoples in Kenya are promoted, protected and fulfilled. The Respondent submits that it has ratified the ICCPR and ICESCR with specific provisions on the protection of cultural rights enshrined in its Constitution.[46] The Respondent avers that it has also effected numerous legal and policy measures to ensure that cultural rights of ''indigenous people'' in Kenya are upheld and protected. In this regard, the Respondent reiterates that the 2010 Constitution of Kenya protects the right of all Kenyans to promote their own culture.

174. The Respondent underscores that while protecting the cultural rights, it also has the responsibility to ensure a balance between cultural rights vis-à-vis environmental conservation in order to undertake its obligation to all Kenyans, particularly in view of the provisions of the Charter[47] and its Constitution.[48] The Respondent further submits that the cultural rights of indigenous people such as the Ogieks may encompass activities related to natural resources, such as fishing or hunting which could have a negative impact on the environment and these must be balanced against other public interests. The Respondent urges the Court to bear in mind the intricate balance between the right to culture and environmental conservation for future generations.

175. Furthermore, the Respondent stresses that as far as the Ogieks are concerned, their lifestyle has metamorphosed and the cultural and traditional practices which made them distinct no longer exist, thus, the group itself no longer exists and it cannot therefore claim any cultural rights. The Respondent also states that the Ogieks no longer live as hunters and gatherers, thus, they cannot be said to conserve the environment. They have adopted new and modern ways of living, including building permanent structures, livestock keeping and farming which would have a serious negative impact on the forest if they are allowed to reside there.

46 See Article 2(5) and (6) of the Constitution of Kenya, 2010: (5) "The general rules of international shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Article 44 of the Constitution of Kenya, 2010 provides for the right to use the language and to participate in the cultural life of the person's choice.

47 Articles 1 and 24 of the Charter.

48 Article 69 of the Constitution of Kenya, 2010.

iii. The Court's assessment

176. Article 17 of the Charter provides:

> "1. Every individual shall have the right to education.
>
> 2. Every individual may freely, take part in the cultural life of his community.
>
> 3. The promotion and protection of morals and traditional values Recognised by the community shall be the duty of the State".

177. The right to culture as enshrined in Article 17(2) and (3) of the Charter is to be considered in a dual dimension, in both its individual and collective nature. It ensures protection, on the one hand, of individuals' participation in the cultural life of their community and, on the other, obliges the State to promote and protect traditional values of the community.

178. Article 17 of the Charter protects all forms of culture and places strict obligations on State Parties to protect and promote traditional values. In a similar fashion, the Cultural Charter for Africa obliges States to adopt a national policy which creates conditions conducive for the promotion and development of culture.[49] The Cultural Charter specifically stresses "the need to take account of national identities, cultural diversity being a factor making for balance within the nation and a source of mutual enrichment for various communities".[50]

179. The protection of the right to culture goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity. In this respect, culture should be construed in its widest sense encompassing the total way of life of a particular group, including the group's languages, symbols such as dressing codes and the manner the group constructs shelters; engages in certain economic activities, produces items for survival; rituals such as the group's particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality.[51]

180. The Court notes that in the context of indigenous populations, the preservation of their culture is of particular importance. Indigenous populations have often been affected by economic activities of other dominant groups and large scale developmental programmes. Due

49 Article 6, Cultural Charter for Africa adopted by the Organisation of African Unity in Accra, Ghana on 5 July 1976, The Respondent became a State Party to the Cultural Charter on 19 September 1990.

50 n49 Article 3, .

51 Preamble, paragraph 9 and Articles 3, 5 and 8(a) Cultural Charter for Africa. Organisation of African Unity on 5 July 1976

to their obvious vulnerability often stemming from their number or traditional way of life, indigenous populations even have, at times, been the subject and easy target of deliberate policies of exclusion, exploitation, forced assimilation, discrimination and other forms of persecution, whereas some have encountered extinction of their cultural distinctiveness and continuity as a distinct group.[52]

181. The UN Declaration on Indigenous Peoples, states that "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" and States shall provide effective mechanisms to prevent any action that deprives them of "their integrity as distinct peoples, or of their cultural values or ethnic identities".[53] The UN Committee on Economic, Social and Cultural Rights, in its General Comment on Article 15(1)(a) also observed that "the strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, wellbeing and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[54]

182. In the instant case, the Court notes from the records available before it that the Ogiek population has a distinct way of life centred and dependent on the Mau Forest Complex. As a hunter-gatherer community, they get their means of survival through hunting animals and gathering honey and fruits, they have their own traditional clothes, their own language, distinct way of entombing the dead, practicing rituals and traditional medicine, and their own spiritual and traditional values, which distinguish them from other communities living around and outside the Mau Forest Complex, thereby demonstrating that the Ogieks have their own distinct culture.

183. The Court notes, based on the evidence available before it and which has not been contested by the Respondent that the Ogieks have been peacefully carrying out their cultural practices until their territory was encroached upon by outsiders and they were evicted from the Mau Forest. Even in the face of this, the Ogieks still undertake their

52 The ACHPR's work on indigenous peoples in Africa, Indigenous Peoples in Africa: The Forgotten Peoples? (2006), page 17 available at http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf.

53 Articles 8(1) and 8(2)(a), of the United Nations Declaration on the Rights of Indigenous People, 2007 (hereinafter referred to as UNDRIP). NDRI; See also Article 4(2), UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135, available at: http://www.refworld.org/docid/3ae6b38d0.html.

54 UNCESR, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, available at: http://www.refworld.org/docid/4ed35bae2.html paras 36 and 37.

traditional activities: traditional wedding ceremonies, oral traditions, folklores, and songs. They still maintain their clan boundaries in the Mau Forest and each clan ensures the maintenance of the environment within the boundary it is allocated. However, in the course of time, the restrictions on access to and evictions from the Mau Forest have greatly affected their ability to preserve these traditions. In view of this, the Court holds that the Respondent interfered with the enjoyment of the right to culture of the Ogiek population.

184. Having found that there has been interference by the Respondent with the cultural rights of the Ogieks, the next issue for the Court to determine is whether or not such interference could be justified by the need to attain a legitimate aim under the Charter.[55] In this regard, the Court notes the Respondent's contention that the Ogiek population has evolved on their own by adopting a different culture and identity and that, in any event, the eviction measures the Respondent effected against them were aimed to prevent adverse impacts on the Mau Forest which was caused by the Ogiek lifestyle and culture.

185. With regard to the first contention that the Ogieks have evolved and their way of life has changed through time to the extent that they have lost their distinctive cultural identity, the Court reiterates that the Respondent has not sufficiently demonstrated that this alleged shift and transformation in the lifestyle of the Ogieks has entirely eliminated their cultural distinctiveness. In this vein, the Court stresses that stagnation or the existence of a static way of life is not a defining element of culture or cultural distinctiveness. It is natural that some aspects of indigenous populations' culture such as a certain way of dressing or group symbols could change over time. Yet, the values, mostly, the invisible traditional values embedded in their self-identification and shared mentality often remain unchanged.

186. In so far as the Ogiek population is concerned, the testimony tendered by Mrs. Mary Jepkemei, a member of the Ogiek Community, attests that the Ogieks still have their traditional values and cultural ceremonies which make them distinct from other similar groups. In addition, the Court notes that, to some extent, some of the alleged changes in the way the Ogieks used to live in the past are caused by the restrictions put in place by the Respondent itself on their right to access their land and natural environment.[56]

187. With respect to the second contention that the eviction measures were in the public interest of preserving the natural environment of the

55 Issa Konate Case paras 145 to 154.

56 On the same, see, case of the *Sawhoyamaxa Indigenous Community v Paraguay*, IACHR (29 March 29 2006) (Merits, Reparations and Costs) paras 73(3) to 73(5).

Mau Forest Complex, the Court first notes that Article 17 of the Charter does not provide exceptions to the right to culture. Any restrictions to the right to culture shall accordingly be dealt with in accordance with Article 27 of the Charter, which stipulates that:

> "1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
>
> 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

188. In the instant case, the restriction of the cultural rights of the Ogiek population to preserve the natural environment of the Mau Forest Complex may in principle be justified to safeguard the "common interest" in terms of Article 27 (2) of the Charter. However, the mere assertion by a State Party of the existence of a common interest warranting interference with the right to culture is not sufficient to allow the restriction of the right or sweep away the essence of the right in its entirety. Instead, in the circumstances of each case, the State Party should substantiate that its interference was indeed genuinely prompted by the need to protect such common interest. In addition, the Court has held that any interference with the rights and freedoms guaranteed in the Charter shall be necessary and proportional to the legitimate interest sought to be attained by such interference.[57]

189. In the instant case, the Court has already found that the Respondent has not adequately substantiated its claim that the eviction of the Ogiek population was for the preservation of the natural ecosystem of the Mau Forest.[58] Considering that the Respondent has interfered with the cultural rights of the Ogieks through the evictions and given that the Respondent invokes the same justification of preserving the natural ecosystem for its interference, the Court reiterates its position that the interference cannot be said to have been warranted by an objective and reasonable justification. Although the Respondent alleges generally, that certain cultural activities of the Ogieks are inimical to the environment, it has not specified which particular activities and how these activities have degraded the Mau Forest. In view of this, the purported reason of preserving the natural environment cannot constitute a legitimate justification for the Respondent's interference with the Ogieks' exercise of their cultural rights. Consequently, the Court deems it unnecessary to examine

57 See *Issa Konate* Case paras 145 to 154.

58 See section on the Court's Assessment on Alleged Violation of Article 8 of the Charter.

further whether the interference was necessary and proportional to the legitimate aim invoked by the Respondent.

190. The Court therefore finds that the Respondent has violated the right to culture of the Ogiek population contrary to Article 17 (2) and (3) of the Charter by evicting them from the Mau Forest area, thereby, restricting them from exercising their cultural activities and practices.

G. Alleged violation of Article 21 of the Charter

i. Applicant's submission

191. The Applicant contends that the Respondent has violated the rights of the Ogieks to freely dispose of their wealth and natural resources in two ways. Firstly, by evicting them from the Mau Forest and denying them access to the vital resources therein, and secondly, by granting logging concessions on Ogiek ancestral land without their prior consent and without giving them a share of the benefits in those resources.

192. Countering the Respondent's contention that it has incorporated Article 21 of the Charter into the Kenyan Constitution,[59] the Applicant maintains that, there is still no implementing legislation in place in this regard. The Applicant adds that, under the previous Constitution and legislation, the Respondent was unable to implement the framework for protection of the Ogieks, who, could not claim any part of Kenya as their community land like other communities.

193. The Applicant states that the Ogieks neither got land under the Native Land Trust Ordinance 1938, the Constitution of Kenya, 1969, the Land (Group Representatives) Act, Chapter 287 nor under the Trust Land Act. The Applicant adds finally that, the Ogieks have still not benefited from the new constitutional provisions recognising community land and therefore the violations are continuing to date. According to the Applicant, the purpose of Article 21 of the Charter is to facilitate development, economic independence and self-determination of the post-colonial States as well as the peoples that comprise those states, protecting them against multi-nationals as well as against the State itself.

ii. Respondent's submission

194. The Respondent argues that it has not violated the rights of

59 Art 69 of the Constitution of the Republic of Kenya (2010).

the Ogieks to freely dispose of their wealth and natural resources as alleged by the Applicant, and that Article 21 of the Charter calls for reconciliation between the State on the one hand and individuals or groups/communities on the other on the ownership and control of natural resources. For the Respondent, while the right of ownership and control of natural resources belongs to the people, States are the entities that would ultimately exercise the enjoyment of the right in the interest of the people, and efforts are being made to maintain a delicate balance between conservation, a people-centred approach to utilisation of natural resources and the ultimate control of natural resources. The Respondent emphasises that it has adopted a harmonised balancing of the two concepts of the ownership and control of natural resources, through focussing on access to, rather than ownership over natural resources.

iii. The Court's assessment

195. Article 21 of the Charter states that:

> "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
>
> 2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
>
> 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principle of international law
>
> 4. States Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity.
>
> 5. States Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopoles so as to enable their peoples to fully benefit from the advantages derived from their national resources."

196. The Court notes, in general terms, that the Charter does not define the notion of "peoples". In this regard, the point has been made that the drafters of the Charter deliberately omitted to define the notion in order to "permit a certain flexibility in the application and subsequent interpretation by future users of the legal instrument, the task of fleshing

out the Charter being left to the human rights protection bodies."[60]

197. It is generally accepted that, in the context of the struggle against foreign domination in all its forms, the Charter primarily targets the peoples comprising the populations of the countries struggling to attain independence and national sovereignty[61].

198. In the circumstances, the question is whether the notion "people" used by the Charter covers not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State. In other words, the question that arises is whether the enjoyment of the rights unquestionably recognised for the constituent peoples of the population of a given State can be extended to include sub-state ethnic groups and communities that are part of that population.

199. In the view of the Court, the answer to this question is in the affirmative, provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent. It would in fact be difficult to understand that the States which are the authors of the Charter intended, for example, to automatically recognise for the ethnic groups and communities that constitute their population, the right to self-determination and independence guaranteed under Article 20(1) of the Charter, which in this case would amount to a veritable right to secession[62]. On the other hand, nothing prevents other peoples' rights, such as the right to development (Article 22), the right to peace and security (Article 23) or the right to a healthy environment (Article 24) from being recognised, where necessary, specifically for the ethnic groups and communities that constitute the population of a State.

200. In the instant case, one of the rights at issue is the right of peoples to freely dispose of their wealth and natural resources guaranteed under Article 21 of the Charter. In essence, as indicated above, the Applicant alleges that the Respondent violated the aforesaid right insofar as, following the expulsion of the Ogieks from the Mau Forest, they were deprived of their traditional food resources.

201. The Court recalls, in this regard, that it has already recognised for the Ogieks a number of rights to their ancestral land, namely, the right to use *(usus)* and the right to enjoy the produce of the land *(fructus*), which presuppose the right of access to and occupation of the land. In

60 Report of the Rapporteur pages 4 to 5, paragraph 13, cited in F Ouguergouz *The African Charter of Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, (2003) 205, note 682.

61 See paras 3 and 8 of the preamble to the Charter.

62 This interpretation is buttressed by the OAU's adoption of Resolution AHG/R.S. 16(1) of July 1964 on the Inviolability of the Frontiers Inherited from Colonization.

so far as those rights have been violated by the Respondent, the Court holds that the latter has also violated Article 21 of the Charter since the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands.

H. Alleged violation of Article 22 of the Charter

i. Applicant's submission

202. The Applicant contends that the Respondent has violated the Ogieks' right to development by evicting them from their ancestral land in the Mau Forest and by failing to consult with and/or seek the consent of the Ogiek Community in relation to the development of their shared cultural, economic and social life within the Mau Forest. The Applicant states that the Respondent failed to recognise the Ogieks' right to development and as indigenous people, with the right to determining development priorities and strategies and exercising their right to be actively involved in developing economic and social programmes affecting them and, as far as possible, to administering such programmes through their own institutions. They contend that failure on the part of the Respondent to give effect to these facets of the right to development, constitutes a violation of Article 22 of the Charter.

203. With regard to Article 10(2) of the Respondent's Constitution, its Vision 2030 and its budget statements being proof of development for the Ogieks, the Applicant submits that, it is not a matter of whether or not these instruments provide for the right to development, but rather whether the Respondent has discharged its obligation to protect the Ogieks' right to development. According to the Applicant, this would be by establishing a framework which provides for the realisation of this right in its procedural and substantive processes, including consultation and participation.

204. Furthermore, the Applicant contends that despite the provisions of Article 1(2) of the Respondent's Constitution which demonstrates its willingness to consult on issues of development, the Respondent has failed to state how many the representatives of the Ogieks sit in any of the three or four tier electoral structures in the Respondent, that is, the local government, County legislative bodies, Parliament and Senate, or in any government decision making capacity.

ii. Respondent's submission

205. The Respondent argues that it has not violated the right to

development of the Ogieks as alleged by the Applicant. It argues that the Applicant has to show specific instances where development has taken place without the involvement of members of the Ogiek Community, or where development has not taken place at all, or where members of the Ogiek Community have been discriminated against in enjoying the fruits of development. The Respondent submits that the Applicant has not demonstrated how it has failed in undertaking development initiatives for the benefit of the Ogieks or how they have been discriminated against and excluded in the process of conducting development initiatives.

206. The Respondent maintains that its development agenda is guided both by the will and determination of its government and by its laws. On the consultative process leading to development initiatives in the Mau Forest, the Respondent argues that consultation can be achieved in diverse ways. It argues that in the present case, as provided under Article 1(2) of the Constitution of Kenya, consultations were held with the Ogieks' democratically elected area representatives and that the State has established several participatory task forces to review the legal framework and reports applicable to the situation while taking into account the views of the public. Finally, the Respondent argues that its development agenda, that is, Vision 2030, its various budget statements and Article 10(2) of its Constitution, provide that the fundamental criteria for governance include equity, participation, accountability and transparency. The Respondent avers that, it is the responsibility of the Applicant to demonstrate that all these instruments are at variance with development, more precisely that of the Ogiek community.

iii. The Court's assessment

207. Article 22 of the Charter provides that:

> "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

208. The Court reiterates its view above with respect to Article 21 of the Charter that the term "peoples" in the Charter comprises all populations as a constitutive element of a State. These populations are entitled to social, economic and cultural development being part of the peoples of a State. Accordingly, the Ogiek population, has the right under Article 22 of the Charter to enjoy their right to development.

209. The Court considers that, Article 22 of the Charter should be

read in light of Article 23 of the UNDRIP which provides as follows:

> "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

210. In the instant case, the Court recalls that the Ogieks have been continuously evicted from the Mau Forest by the Respondent, without being effectively consulted. The evictions have adversely impacted on their economic, social and cultural development. They have also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.

211. The Court therefore holds that the Respondent violated Article 22 of the Charter.

I. Alleged violation of Article 1 of the Charter

i. Applicant's submission

212. The Applicant urges the Court to apply its own approach[63] and that of the Commission[64] in respect of Article 1 of the Charter, that if there is a violation of any or all of the other Articles pleaded, then it follows that the Respondent is also in violation of Article 1.

ii. Respondent's submission

213. The Respondent made no submissions on the alleged violation of Article 1 of the Charter.

63 *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania.*

64 ACHPR Communications 147/95 & 149/96 Sir *Dawda K. Jawara v Gambia* (2000), 11 May 2000 para 46 13th Annual Activity Report 1999-2000; Communication 211/98 *Legal Resources Foundation v Zambia* (2001), paragraph 62; Communications 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) at para 227 where the nature of Article 1 as expressed in *Dawda Jawara* and *Legal Resources Foundation* are succinctly combined: The Commission concludes further that Article 1 of the Charter imposes a general obligation on all State Parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights; as such any finding of violation of those rights constitutes a violation of Article 1.

iii. The Court's assessment

214. Article 1 of the Charter declares that

> "The Member States of the Organization of African Unity Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".

215. The Court observes that Article 1 of the Charter imposes on State Parties the duty to take all legislative and other measures necessary to give effect to the rights and freedoms guaranteed in the Charter.

216. In the instant case, the Court observes that by enacting its Constitution in 2010, the Forest Conservation and Management Act No. 34 of 2016 and the Community Land Act, Act No. 27 of 2016, the Respondent has taken some legislative measures to ensure the enjoyment of rights and freedoms protected under the Charter. However, these laws were enacted relatively recently. This Court has also found that the Respondent failed to recognise the Ogieks, like other similar groups, as a distinct tribe, leading to denial of access to their land in the Mau Forest and the consequential violation of their rights under Article 2, 8, 14, 17(2) and (3), 21 and 22. In addition to these legislative lacunae, the Respondent has not demonstrated that it has taken other measures to give effect to these rights.

217. In view of the above, the Respondent has violated Article 1 of the Charter by not taking adequate legislative and other measures to give effect to the rights enshrined under Article 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter.

VIII. Remedies and reparations

A. Applicant's submission

218. The Applicant contends that the remedies of restitution, compensation, satisfaction and guarantees of non-repetition would be most suitable to remedy the violations they have suffered by the actions and omissions of the Respondent.

219. On restitution, the Applicant argues that the Ogieks are entitled to the recovery of their ancestral land through delimitation, demarcation and titling process conducted by the relevant Government authorities. With regard to compensation, the Applicant argues that the Ogieks should be granted adequate compensation for all the loss they have suffered. With respect to satisfaction and guarantees of non-repetition, the Applicant urges the Court to adopt measures including full recognition of the Ogieks as an indigenous people of Kenya; rehabilitation of the

economic and social infrastructure; acknowledgment of its responsibility within one year of the date of the judgment; publication of the official summary of the judgment through a broadcaster with wide coverage in the community's region; and establishing a National Reconciliation Forum to address long-term sources of conflict.

B. Respondent's submission

220. On the issue of restitution, the Respondent contends that the Mau Forest Complex is strictly a nature reserve, and that the Respondent is obliged to protect and conserve it for the benefit of its entire citizenry under its national laws as well as under the African Convention on Conservation of Nature and Natural Resources.

221. On the issue of compensation, the Respondent submits that the Ogieks have adopted modern lifestyles, and as they now exist, they do not depend on hunting and gathering for their livelihood and sustainability, and therefore they cannot claim to have sustained any economic loss through lost opportunities. The Respondent reiterates that evicting the Ogieks from the Mau Forest was done in fulfilment of its national and international obligations, and therefore, the issue of compensation does not arise, otherwise, States will be plagued with compensation claims from their citizens in the fulfilment of their international obligations arising from international instruments they have acceded to or ratified.

C. The Court's assessment

222. The Court's power on reparations is set out in Article 27(1) of the Protocol which states that: "if the Court finds that there has been violation of a human and peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation". Further, pursuant to Rule 63 of the Rules, "The Court shall rule on the request for reparation submitted in accordance with, Rules 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' rights or, if the circumstance so require, by a separate decision".

223. The Court decides that it shall rule on any other forms of reparations in a separate decision, taking into consideration the additional submissions from the Parties.

IX. Costs

224. Neither the Applicant nor the Respondent made claims as to costs

225. The Court notes that Rule 30 of its Rules states that, "Unless otherwise decided by the Court, each party shall bear its own costs."
226. The Court shall rule on cost when making its ruling on other forms of reparation.
227. For these reasons, the Court unanimously:

On jurisdiction

i. Dismisses the objection to the Court's material jurisdiction to hear the Application;
ii. Dismisses the objection to the Court's personal jurisdiction to hear the Application;
iii. Dismisses the objection to the Court's temporal jurisdiction to hear the Application;
iv. Declares that it has jurisdiction to hear the Application.

On admissibility

v. Dismisses the objection to the admissibility of the Application on the ground that the Matter is pending before the African Commission on Human and Peoples' Rights;
vi. Dismisses the objection to the admissibility of the Application on the ground that the Court did not conduct a preliminary examination of the admissibility of the Application;
vii. Dismisses the objection to the admissibility of the Application on the ground that the author of the Application is not the aggrieved party in the complaint;
viii. Dismisses the objection to the admissibility of the Application on the ground of failure to exhaust local remedies;
ix. Declares the Application admissible.

On the merits

x. Declares that the Respondent has violated Articles 1, 2, 8, 14 17(2) and (3), 21 and 22 of the Charter;
xi. Declares that the Respondent has not violated Article 4 of the Charter;
xii. Orders the Respondent to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this Judgment;
xiii. Reserves its ruling on reparations;
xiv. Requests the Applicant to file submissions on Reparations within 60 days from the date of this judgment and thereafter, the Respondent

shall file its Response thereto within 60 days of receipt of the Applicant's submissions on Reparations and Costs.

Onyachi and Njoka v Tanzania (merits) (2017) 2 AfCLR 65

Application 003/2015, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*

Judgment, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA and MATUSSE

Two Kenyan men were tried, convicted and sentenced in Tanzania to 30 years imprisonment for armed robbery after being handed over to Tanzania by Kenyan authorities. The two men complained of human rights violations committed in both Kenya and Tanzania. The Court held that it did not have jurisdiction over possible violations committed in Kenya. With regard to the alleged violations in Tanzania, the Court held that procedural irregularities in relation to an identification parade, reliance on a single witness, lack of free legal representation, unjustified delay in delivering copies of the judgment and re-arrest on same facts after acquittal violated the African Charter.

Jurisdiction (material jurisdiction – no need to specify articles of the African Charter, 36; evaluation of facts, 37, 38; constitutionality, 39; personal jurisdiction – allegations against third state, 45, 124)

Admissibility (exhaustion of local remedies, 54-57; submission within reasonable time, receipt of judgment, lay, incarcerated, indigent, 61-69)

Fair trial (extradition, 79; identification parade, 86-88; defence – alibi, 95; legal aid, 104-112; timely delivery of copies of judgment, 118-121)

Personal liberty and security (arbitrary arrest after acquittal, 132-137)

Cruel, inhuman or degrading treatment *(incommunicado* detention, burden of proof, 142-146)

I. The Parties

1. The Applicants, Mr Kennedy Owino Onyachi and Mr Charles John Mwaniki Njoka, are citizens 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 matter of the Application

3. The Application was brought by the Applicants on 7 January 2015. The Application reveals that the Applicants were first arrested in Kenya on 30 November 2002, on suspicion of having committed robbery in the United Republic of Tanzania. They remained in custody until 20 December 2002, when they were arraigned before the Resident Magistrate at the Nairobi Law Courts on charges of armed robbery.

4. Following a request in 2002 for the Applicants' extradition to Tanzania, the Resident Magistrate at the Nairobi Law Courts ordered on 21 March 2003, that the Applicants be extradited to the United Republic of Tanzania to answer armed robbery charges against them. The Resident Magistrate then granted the Applicants leave to appeal the order within 14 days.

5. On 22 March 2003, before the expiry of the 14 days' time for appeal against the order, the Applicants were bundled by Kenyan and Tanzanian police straight into waiting Police cars and transported to Tanzania. However, the relatives of the Applicants appealed on their behalf against the decision of the Resident Magistrate, to the High Court of Kenya. According to the Applicants, the Appellate Judge later delivered his ruling on this application on 30 July 2003. The Applicants did not avail the ruling of the appeal to this Court despite being requested to do so.

6. On arrival at the Namanga border post, the Applicants were received by a contingent of Tanzanian Police and media personnel from the Independent Television Limited (ITV) and Tanzania Television (TVT). The Applicants also allege that they were then immediately taken to the Dar es Salaam Central Police Station on 22 March, 2003, where identification parades were conducted on 25 March, 2003, by which time their images were already published in various local newspapers and television channels. The Applicants aver that this made it easier for witnesses to identify them, as the latter had already seen them in the local media.

7. On 26 March 2003 the Applicants were arraigned at the Kisutu Resident Magistrate's Court in Dar es Salaam and charged with two counts in Criminal Case No. 111 of 2003: conspiracy to commit an offence contrary to Section 384 and crime of armed robbery contrary to Sections 285 and 286 of the Penal Code. On 30 March 2004 the case number was changed to Criminal Case No. 834 of 2002.

8. On 11 March 2005 the Applicants were tried and acquitted by the Kisitu Magistrate's Court, but the Tanzanian Police re-arrested them and detained them at the Central Police Station in Dar es Salaam. The Applicants complain that they remained in the Police cells with no food and were denied communication with anyone until 14 March

2005, when they were arraigned before Court on what they claim are "trumped up and fabricated charges". The new charges against them were of (i) stealing, contrary to Section 265 of the Penal Code in Criminal Case No. 399/2005 and (ii) Armed Robbery, contrary to Section 287 of the Penal Code in Criminal Case No. 400/2005. According to the Applicants, these two charges had already been heard and determined by the Kisutu Resident Magistrate's Court in Dar es Salaam.

9. The Respondent then lodged an appeal in Criminal Appeal No. 125/2005 in the High Court of Tanzania at Dar es Salaam against the Magistrate's decision in Case No. 834/2002, challenging the Applicants' acquittal .

10. On 19 December 2005 the High Court overturned the acquittal of the Trial Magistrate, convicted the Applicants and sentenced them to 30 years' imprisonment. The Applicants then lodged an appeal against the conviction and sentence in Criminal Appeal No. 48 of 2006, in the Court of Appeal. The Court of Appeal affirmed the conviction and dismissed the appeal on 24 December 2009.

11. The Applicants were served copies of the judgment of the Court of Appeal on 2 November 2011, almost 2 years after the dismissal of their appeal.

12. On 9 June 2013, the 2nd Applicant filed at the Court of Appeal for a request for extension of time to file for a review of both the conviction and sentence in the Court of Appeal. The Applicant alleges that his Application for extension of time to file the Application for review was dismissed on 9 June 2014 on the ground that the review should have been filed within 60 days from the date of judgment. This was in spite of the fact that the Applicants received copies of the appeal Judgment almost 2 years after the Court of Appeal delivered the judgment.

III. Alleged violations

13. On the basis of the aforementioned, the Applicants make the following allegations:

"i. That they were held in custody for 3 weeks by the authorities in the Republic of Kenya, in violation of their basic rights, before being arraigned in Court.

ii. That they were deprived of their right of Appeal as the Kenyan and Tanzanian Police transported them to Tanzania on 22 March 2003 before they appealed to the Kenyan High Court.

iii. That at the time the two Applicants were being extradited to the United Republic of Tanzania, the Republic of Kenya and the United Republic of Tanzania did not have an

extradition treaty between them.

iv. That the Kenyan Government, violated all accepted principles of human rights and international law.

v. That the Respondent violated all accepted principles of human rights and international law.

vi. That the Applicants were deprived of their liberty after they were acquitted on 11 March 2005 in Case No. 834/200 at the Kisutu Resident Magistrate's Court in Dar es Salaam by the authorities of the Respondent. That they were detained at the Central Police Station in Dar es Salaam by the authorities of the Respondent from 11 March 2005 to 15 March 2005 without food and denied communication with anyone."

That the conviction and sentence of thirty (30) years' imprisonment was unconstitutional and is contrary to Article 7(2) of the African Charter on Human and Peoples' Rights.

IV Summary of the procedure before the Court

14. The Application was filed on 7 January 2015.

15. On 25 February 2015, the Registry, pursuant to Rule 35(2) and (3) of the Rules of Court (hereinafter, referred to as "the Rules") transmitted the Application to the Respondent State, the Chairperson of the African Union Commission and to the Executive Council of the Union, as well as to all the other States Parties to the Protocol.

16. The Registry also sent a copy of the Application to the Minister of Foreign Affairs of the Republic of Kenya, pursuant to Rule 35(4)(b) of the Rules, and invited the latter, should it wish to intervene in the proceedings, to do so within thirty (30) days of receipt.

17. The Respondent filed its response on 31 July 2015.

18. During its 36th Ordinary Session held from 9 to 27 March 2015, the Court instructed the Registry to request the Pan-African Lawyers` Union (PALU) to provide legal assistance to the Applicants. By a letter dated 16 April 2015, the Registry requested PALU to offer legal representation to the Applicants.

19. By a letter dated 30 June 2015, PALU notified the Registrar and the Respondent that PALU would represent the Applicants and by a letter dated 4 August 2015, the Registrar transmitted a copy of the case file to PALU.

20. By letter dated 25 February 2016, PALU filed the Reply to the Response out of time and requested the Court to deem it as properly filed, stating that the delay was caused by various unforeseen and inevitable circumstances.

21. During its 41st Ordinary Session, held from 16 May to 3 June 2016, the Court granted leave to PALU as requested.

22. On 29 July 2016, the Registry transmitted a copy of the Reply to the Respondent for information and advised the Parties that pleadings were closed.

V. Prayers of the Parties

23. In their respective submissions, the Parties made the following prayers.

On behalf of the Applicants,

The Applicants seek the following orders from the Court:

"1. A declaration that the Respondent State has violated the Applicants` rights guaranteed under the Charter, in particular, Articles 1 and 7

2. A declaration that the Applicants` right to a fair trial was violated when their images were shown on television and in newspapers before the identification parade was held.

3. A declaration that the testimony tendered by Prosecution Witness (PW 8) was unlawful as evidence from the identification parade should have been dismissed in its entirety.

4. A declaration that the Respondent State violated Article 7 of the Charter by not providing legal aid at the Court of Appeal.

5. An order that the Respondent State takes immediate steps to remedy the violations throughout the trial especially at the Appeal.

6. A declaration that the extradition process violated international standards of the right to a fair trial by not affording the Applicants the opportunity to appeal the primary Court`s Extradition Order.

7. An order for reparations

8. Any other orders or remedies that this Court may deem fit."

On behalf of the Respondent State,

The Respondent prays the Court to order as follows, in respect of jurisdiction and admissibility of the Application:

"I. That the Court has no jurisdiction to adjudicate over this Application.

II. That the Applicants have no locus to file the Application before the Court and hence, should be denied access to the Court as per Articles 5(3) and 34(6) of the Protocol.

III. That the Application be dismissed as it has not met the admissibility requirements stipulated under Rule 40(5) of the Rules.

IV. That the Application be dismissed as it has not met the admissibility requirements stipulated under Rule 40(6) of the Rules."

24. With regard to the merits, the Respondent requests the Court to rule that

"i. the Government of the United Republic of Tanzania has not violated accepted principles of Human Rights and International law;

ii. the Government of the United Republic of Tanzania abided by the rule of law during the extradition process.

iii. the Government of the United Republic of Tanzania has not violated Article 3 of the Charter.

iv. the Government of the United Republic of Tanzania has not violated Article 6 of the Charter.

v. the Government of the United Republic of Tanzania has not violated Article 7(1) of the Charter.

vi. the Government of the United Republic of Tanzania has not violated Article 7(2) of the Charter.

vii. the Applicants request for Reparations be denied.

viii. this Application be dismissed in its entirety.

ix. the Applicants are denied all reliefs sought."

VI. Jurisdiction of the Court

25. Pursuant to Rule 39(1) of the Rules, the Court "shall conduct preliminary examination of its jurisdiction …"

26. In its submissions, the Respondent raised objections to the material and personal jurisdiction of the Court. Accordingly, the Court shall first address these preliminary objections to establish its competence to examine the instant matter.

A. Objections to material jurisdiction

i. Respondent's submissions

27. The Respondent objects to the material jurisdiction of the Court averring that neither Article 3(1) of the Protocol nor Rule 26(1)(a) of the Rules allows the Court to sit as a court of first instance or as an Appellate Court. The Respondent argues that the instant Application contains allegations that require this Court to sit both as a first instance and an appellate court.

28. The Respondent submits that, the Applicants are raising the following allegations for the first time before this Court and, their determination would require the Court to sit as a court of first instance:

"i. The allegation that the Tanzanian Government through all its official actions violated all accepted principles of human rights and international law;

ii. The allegation that the Respondent State violated Article 3 of the Charter;

iii. The allegation that the Respondent State violated Article 6 of the Charter by re-arresting the Applicants on 11 March 2005, after their acquittal by the trial Magistrate, of charges of armed robbery and conspiracy to commit crimes, and by detaining them *incommunicado* in a police cell at the Central Police Station in Dar es Salaam for four days without food;

iv. The allegation that the conviction and sentencing of the Applicants to 30 years imprisonment by the High Court is unconstitutional and contrary to Article 7(2) of the Charter."

29. The Respondent also avers that the allegation of the Applicants that the identification parade was flawed with procedural irregularities is a matter requiring the Court to sit as a "supreme appellate court". The Respondent argues that the Applicants are asking the Court to adjudicate on an issue of evidence, which was already addressed and concluded by the Court of Appeal of Tanzania.

30. Finally, the Respondent challenges the material jurisdiction of the Court contending that the Applicants' allegation that it "violated all acceptable principles of human rights" is vague and does not disclose any particular article alleged to have been violated.

ii. Applicants' submissions

31. On their part, the Applicants argue that the Court has material jurisdiction to deal with this Application. In this regard, the Applicants contend that there have been violations of their fundamental human rights as provided in the Constitution of the Respondent and the Charter to which the Respondent is a State Party.

32. Responding to the Respondent's objection that the Application requires the Court to go beyond its jurisdiction and sit as an Appellate Court, the Applicants submit that as long as the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the Respondent, the Court has jurisdiction.

iii. The Court's assessment

33. In order to ascertain its material jurisdiction, the Court will consider three of the preliminary objections raised by the Respondent: the allegation that the conviction and sentence of the Applicants to 30 years' imprisonment was unconstitutional and contrary to Article 7(2) of the Charter; the allegation that the identification parade was flawed with procedural irregularities is a matter that requires this Court to sit as a "Supreme Appellate Court"; and the allegation that the Respondent violated 'all accepted principles of human rights' "is vague" and does not disclose any particular article alleged to have been violated.[1]

34. The Court notes that Article 3(1) of the Protocol provides that the material jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned."

35. In this regard, the jurisprudence of the Court has, in the judgment of *Peter Chacha v The United Republic of Tanzania*, established that:

> "As long as the rights allegedly violated fall under the aegis of the Charter or any other human rights instrument ratified by the State concerned, the Court can exercise its jurisdiction over the matter."[2]

36. The instant Application contains allegations of violations of human rights protected by the Charter and other international human rights instruments ratified by the Respondent, specifically, ICCPR.

1 The Court notes that the other preliminary objections of the Respondent concerning the jurisdiction of the Court are pertinent to the admissibility of the Application and hence, will be addressed in the admissibility section on admissibility.

2 *Peter Joseph Chacha v The United Republic of Tanzania,* Application No. 003/2014 judgment of 8 March 2014 (hereinafter referred to as *Peter Chacha* case), para 114

As such, the substance of the Application falls within the ambit of the material jurisdiction of the Court. Accordingly, the preliminary objection of the Respondent that the Application contains a vague allegation disclosing no particular article of the Charter does not oust the subject matter jurisdiction of the Court to examine the instant Application.

37. Regarding the argument of the Respondent that the Application raises issues involving evaluation of evidence and challenges to the length of penalty specified in the domestic law, matters which require the Court to sit as a "Supreme Appellate Court", this Court, in the matter of *Abubakari v Tanzania*, held that:

> "As regards, in particular, the evidence relied on in convicting the Applicant, the Court holds that, it was indeed not incumbent on it to decide on their value for the purposes of reviewing the said conviction. It is however of the opinion that, nothing prevents it from examining such evidence as part of the file evidence laid before it so as to ascertain in general, whether consideration of the said evidence by the national Judge was in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter in particular."[3]

38. Consequently, in the instant case, the Court has the power to examine whether the evaluation of facts or evidence by the domestic courts of the Respondent was manifestly arbitrary or resulted in a miscarriage of justice to the Applicants. The Court also has the jurisdiction to investigate the manner in which the particular evidence that resulted in the alleged violation of human rights of the Applicants was collected and whether such process was carried out with adequate safeguards against arbitrariness.

39. With regard to the Applicants' submission that the penalty imposed by the domestic legislation for armed robbery violates the Constitution of the Respondent and the rights enshrined in Article 7(1) of the Charter, the Court observes that it does not have jurisdiction to examine the constitutionality of domestic legislation. However, the Court can examine the extent to which such legislation violates the provisions of the Charter or other international human rights instrument ratified by the Respondent. Doing so would not require this Court to sit as a Supreme Court of Appeal because the Court is not applying "the same law as the Tanzanian national courts, that is, Tanzanian law."[4] The Court rather applies exclusively "the provisions of the Charter and any other relevant human rights instrument ratified by the State

3 *Mohamed Abubakari v The United Republic of Tanzania*, Application No. 007/2013 judgment of 20 May 2016, para. 26 (hereinafter referred to as *Abubakari* case)

4 *Ibid*, para 28.

concerned".[5]

40. In view of the above, the Respondent`s preliminary objection to the material jurisdiction of the Court on these grounds is dismissed and therefore, the Court finds that it has material jurisdiction to examine this Application.

B. Personal jurisdiction

i. Respondent's submissions

41. The Respondent challenges the Court's personal jurisdiction stating that the Application contains allegations against a State, the Republic of Kenya, which has not made the declaration accepting the Court's competence to receive complaints from individuals and NGOs as required by Article 34(6) of the Protocol.

ii. Applicants' submissions

42. On their part, the Applicants argue that the Application is not filed against Kenya, and that the allegations against the Republic of Kenya are made to provide a full narrative of events as they unfolded in relation to the case.

iii. The Court's assessment

43. The Court notes that the Application is brought against the Republic of Tanzania, which is a State Party to the Charter and the Protocol, and which deposited the declaration in terms of Article 34(6) of the Protocol on 29 March 2010, accepting the competence of the Court to receive cases from individuals and NGOs filed against the Respondent.

44. Concerning those allegations that implicate the Republic of Kenya, the Court observes that the Republic of Kenya has not made the declaration required under Article 34(6) of the Protocol allowing individuals to directly file an application before this Court. In this regard, the Court notes that the Registry of the Court has, in accordance with Rule 35(2)(b) and (4)(b) of its Rules, invited the Republic of Kenya to intervene in the case, if it so wishes, since the Applicants are its nationals, but the Republic of Kenya did not do so and in these circumstances, the Court lacks personal jurisdiction to entertain

5 *Ibid*.

allegations against Kenya.

45. The Court observes that its lack of competence on some allegations of the Applicants directed to the Republic of Kenya does not prevent it from proceeding with the examination of this Application and address those allegations raised against the Respondent. Articles 5(3) and 34(6) of the Protocol empower the Court to examine allegations brought before it in so far as these allegations involve the Respondent, which has deposited the required declaration.

46. In view of the above, the Respondent`s preliminary objection to the competence of the Court on the basis that the present Application contains allegations which implicate the Republic of Kenya is dismissed and the Court finds that it has personal jurisdiction to examine the allegations against the Respondent in the instant Application.

C. Other aspects of jurisdiction

47. With regard to the other aspects of its jurisdiction, the Court notes:

> "i. that it has temporal jurisdiction since the alleged violations are continuous in nature, the Applicants having remained convicted on grounds which they believe are flawed by irregularities [see the Court's jurisprudence in the *Zongo* case];[6]
>
> ii. that it has territorial jurisdiction in as much as the facts of the case occurred on the territory of a State Party to the Protocol, ie the Respondent State."

48. In view of the foregoing observations, the Court finds that it has jurisdiction to examine this Application.

VII. Admissibility of the Application

49. The admissibility requirements before the Court are provided in Articles 50 and 56 of the Charter, Article 6(2) of the Protocol and Rules 39 and 40 of the Rules. These provisions mandate the Court to conduct a preliminary examination of an Application in accordance with Article 50 and 56 of the Charter. Rule 40 of the Rules provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter… applications to the Court shall comply with the following conditions:
>
> "1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> 2. comply with the Constitutive Act of the African Union or the

6 See African Court especially in the Matter of *Zongo and Others v Burkina Faso* **(**Preliminary Objections**)** Judgment of 21 June 2013, paras 71 to 77.

Charter;

3. do not contain any disparaging or insulting language;
4. are not based exclusively on news disseminated through the mass media;
5. are filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. are filed within a reasonable period from the time local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. do not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instrument of the African Union".

50. In its Response, the Respondent raises objections concerning two of the above conditions, namely, the requirements of exhaustion of local remedies and the time limit for seizure of the Court.

A. Objection based on non-exhaustion of local remedies

i. Repondent's submission

51. The Respondent argues that this Application fails to meet the requirement of Article 56(5) of the Charter. It contends that all allegations of violation of the rights of the Applicants are being raised and brought to its notice for the very first time in the instant Application, although local avenues of redress existed.

52. In this regard, the Respondent asserts that the Applicants had the possibility of lodging a petition regarding the alleged violations of their constitutional rights before the High Court pursuant to the Basic Rights and Duties Act No.9, Chapter 3, 2002. According to the Respondent, the Applicants should have utilised these available local avenues before approaching the Court. The Respondent adds that the Court is not a Court of first instance, but a Court of last resort.

ii. Applicant's submission

53. The Applicants, in their Reply, argue that the local remedies indicated by the Respondent are extra-ordinary remedies, which, pursuant to the jurisprudence of the Court, need not be exhausted.

iii. The Court's assessment

54. The Court notes that six of the allegations made by the Applicants relating to: the alleged violation of 'all accepted principles of international law'; alleged violation of the right to equality before the law and equal protection of the law; the re-arrest of the Applicants after their acquittal; the *incommunicado* detention of the Applicants following their re-arrest; the failure of the Respondent to give copies of judgments of national courts in due time and the non-provision of legal assistance were not explicitly raised in the domestic proceedings. These are matters that are being raised for the first time in this Court. However, these allegations happened in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence to thirty (30) years' imprisonment. They all form part of the "bundle of rights and guarantees" that were related to or were the basis of their appeals. The domestic authorities thus had ample opportunities to address these 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 redress for these claims[7]

55. With regard to the other two claims relating to the procedural irregularities claimed to have existed in the identification parade and the alleged violation of the Applicants' presumption of innocence contrary to Article 7 of the Charter, the records available before the Court show that the Applicants raised these matters before the domestic courts.[8] Therefore, the Applicants have exhausted local remedies with respect to such claims.

56. Furthermore, the jurisprudence of this Court has established that the requirement of exhaustion of local remedies is applicable only with respect to ordinary, available and efficient judicial remedies but not extraordinary or non-judicial remedies. In this regard, the Respondent alleges that the Applicants could have filed a constitutional petition to the High Court before they bring their matter to this Court. On this issue, this Court has held that the said constitutional review is "not common, that it is not granted as of a right and that it can be exercised only exceptionally … and is available as extraordinary remedy" in the Respondent State, thus, the Applicant was not required to pursue it.[9]

7 *Alex Thomas v The United Republic of Tanzania*, Application No. 005/2013, Judgment of 20 November 2015 (hereinafter referred to as *Alex Thomas* case), paras 60-65.

8 Judgment of High Court of Tanzania, p 250.

9 *Abubakari* Case, para 72.

In the same vein, it was not necessary for the Applicants in the instant Application to approach the High Court to seek constitutional redress for the violations of their rights because such remedy was extraordinary.

57. In view of the foregoing, the Court therefore decides that the requirement of exhaustion of local remedies is satisfied in the instant Application in terms of Article 56(5) of the Charter.

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

i. Respondent's submission

58. The Respondent submits that the Application should be found to be inadmissible on the ground that it was not filed within a reasonable time after exhaustion of local remedies. The Respondent contends that the Applicants received the Court of Appeal's judgment on 19 December 2005 (*sic*) and the Respondent deposited the declaration in terms of Article 34(6) of the Protocol on 29 March 2010. According to the Respondent, reckoned from the date when the Respondent deposited its declaration, it was after four (4) years and two (2) months that the Application was filed before the Court on 7 January 2015.

59. With regard to the second Applicant, the Respondent argues that the decision on his Application for review of the Court of Appeal's judgment was delivered on 12 June 2013 and as the Respondent had already accepted the individual complainant mechanism under Article 34(6) of the Protocol on 29 March 2010, this date, that is, 12 June 2013, should be the relevant date to calculate the time under Article 56(6) of the Charter. On this basis, the Respondent submits that three (3) years and two (2) months lapsed when the Application was filed, which according to the Respondent is not a reasonable time.

ii. Applicants' submission

60. On their part, the Applicants argue that the Court of Appeals' judgment was delivered on 24 December 2009, but the copies of the judgment were served on them about two years later, on 2 November 2011. Relying on the Court's jurisprudence,[10] the Applicants contend that the assessment of reasonableness of the time under Article 56(6) of the Charter depends on the circumstances of each case, and in the present case, given that the Applicants are both lay, indigent,

10 *Zongo and others* case (Preliminary Objections), para 121.

and incarcerated persons without the benefit of legal education or assistance, their particular circumstances provide sufficient grounds for this Application to be admissible.

iii. The Court's assessment

61. The Court notes that Article 56(6) of the Charter does not indicate a precise timeline in which an Application shall be brought to this Court. Its mirror provision in the Rules, that is, Rule 40(6) simply provides for "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." It is therefore within the discretion of the Court to determine the reasonableness of the time in which an Application is filed.

62. On several occasions, this Court has emphasized that "whether an Application has been filed within reasonable time after exhaustion of local remedies is decided on a case by case basis depending on the circumstances of each case."[11] The Court has also held that when domestic remedies were exhausted before a State made its declaration under Article 34(6) of the Protocol, reasonable time under Article 56(6) of the Charter shall be reckoned from the date the Respondent deposited the instrument of its declaration.[12]

63. In the instant case, the Court notes that the judgment of the Court of Appeal in Criminal Appeal No. 48 of 2006 was delivered on 24 December 2009 and that the Applicants received the decision of the Court of Appeal only on 2 November 2011. The Court also notes that the second Applicant's application for review of the Court of Appeal decision was dismissed by the Court of Appeal on 9 June 2014. There is no evidence on record showing that the first Applicant also pursued a similar Application for review.

64. Although the judgment of the Court of Appeal was rendered on 24 November 2009 both Applicants received the copies of the judgment only on 2 November 2011. With respect to the first Applicant, the relevant time should thus run from this date when he received copies of the judgment. From this date until the date the Court was seized of the matter, that is, 7 January 2015, about three (3) years and two (2) months had lapsed for the first Applicant.

65. On the other hand, as the second Applicant opted to pursue the application for review proceeding in the Court of Appeal, the date on which his Application for review was dismissed, that is, 9 June 2014,

11 *Ibid*, see also *Peter Chacha* case, para 141, *Abubakari* case, para 91.

12 *Alex Thomas* case, para 73.

should be the relevant date to assess reasonableness under Article 56(6). Accordingly, from this date, about seven months had lapsed until the date when the Application was filed before the Court.

66. The key issue for the Court to determine is whether the three years and two months period for the first Applicant and the seven months' time for the second Applicant are, in view of the circumstances of the case, to be considered as reasonable in terms of Rule 40(6) of the Rules.

67. With respect to the second Applicant, given that he is lay, incarcerated and indigent person with no legal assistance, the Court holds that seven months period is not unreasonable.

68. Regarding the first Applicant, the Court observes that three years and two months' time is relatively long to bring an Application to the Court. However, like the second Applicant, he is also lay, incarcerated and indigent person without the benefit of legal education and legal assistance until this Court assigned PALU to provide him with *pro bono* legal representation services. In view of this, with respect to the first Applicant, too, the Court finds that the time in which the Application was filed is reasonable.

69. The Court thus, finds that the filing of the Application was done within a reasonable time in terms of Article 56(6) of the Charter as restated in Rule 40(6) and therefore, that the Application meets this criterion.

C. Admissibility requirements that are not in contention between the Parties

70. The requirements regarding the identity of Applicants, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence and the *non bis in idem* principle (Rule 40(1), 40(2), 40(3), 40(4), 40(7) of the Rules) are not in contention between the Parties.

71. The Court also notes, for its part, that nothing in the records submitted to it by the Parties suggests that any of the above requirements has not been met in the instant case.

72. Consequently, the Court holds that the requirements under consideration in this regard have been fully met and concludes that the Application is admissible.

VIII. On the merits

73. The Applicants` allegations relate to violations of Articles 1, 3, 5, 6 and 7 of the Charter. The Court now makes an assessment of each of these alleged violations, the Respondent's responses thereto and

the merits of the Parties' claims. In line with the sequence of events which gave rise to the various alleged violations, the Court deems it appropriate to examine first those allegations relating to Article 7 of the Charter.

A. Allegations of violations of the right to a fair trial under Article 7 of the Charter

74. In relation to Article 7, of the Charter, the allegations of the Applicants have several prongs, which are treated separately below.

i. Allegation regarding illegal extradition

a. Applicants' submissions

75. The Applicants submit that they were extradited from Kenya unlawfully as there was no extradition treaty between Kenya and Tanzania. They also allege that they were prevented from exercising their rights of appeal following the order of extradition issued by the Nairobi Law Court on 22 March 2003 as they were immediately taken to the United Republic of Tanzania by a contingent of both Kenyan and Tanzanian police.

b. Respondent's submissions

76. On its part, the Respondent avers that the extradition of the Applicants was not illegal as it was carried out in accordance with the Extradition Acts of both countries on a reciprocal basis. The Respondent annexed a document titled the "Extradition Act, 1965" showing an extradition agreement between the Respondent and the Republic of Kenya. On this basis, the Respondent contends that this allegation lacks merit and that it should be dismissed.

c. The Court's assessment

77. The Court notes that the Applicants` complaint in respect of their extradition has two related facets: first, the claim that the Applicants were extradited without a pre-existing extradition agreement between the Respondent and the Republic of Kenya. Second, the allegation that the Applicants were denied their right to appeal against the extradition order because of the swift implementation of the order by a joint Kenyan and Tanzanian Police force.

78. However, the Court recalls its earlier finding that its jurisdiction

is only limited to allegations involving the responsibility of the Respondent, as the Republic of Kenya has not made a declaration allowing individuals and NGOs to access this Court and is not party to these proceedings.

79. The Court observes that it is the Republic of Kenya which extradited the Applicants and the Respondent may not be held responsible for the conduct of the Republic of Kenya in the course of the extradition. Therefore, the allegation of the Applicants that they were extradited unlawfully and that their extradition violated their right to appeal under Article 7(1)(a) of the Charter is hereby dismissed.

ii. Alleged violations relating to the identification parade

a. Applicants' submissions

80. The Applicants allege that the identification parade exercise of 25 March 2003, was carried out after their pictures and descriptions taken by ITV and TVT media, the day before at the Namanga border, were in most of the local newspapers and had been aired by different TV channels in Tanzania. The Applicants contend that this made it easier for some witnesses to identify them, and therefore, the identification parade was null, as it was not carried out following standard procedures.

b. Respondent's submissions

81. On its part, the Respondent argues that the identification evidence was highly scrutinized by the Court of Appeal in Criminal Appeal No. 48 of 2006, that the Court of Appeal discarded any evidence that was not watertight, and only admitted the identification evidence that met the standard of "proof beyond reasonable doubt". The Respondent submits that this allegation lacks merit and should be dismissed.

c. The Court's assessment

82. Article 7(1) 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."

83. From the submissions of both Parties, the main issue for determination is whether the identification parade that led to the conviction of the Applicants was conducted in manner contrary to the Charter or other international human rights standards.

84. From the records available before it, the Court notes that the only evidence on which the Court of Appeal relied to sustain the conviction of the Applicants by the High Court is the testimony given by an eye witness (PW 8) who claimed to have identified the Applicants during the identification parade.[13]

85. The Court also notes that the witnesses who participated in the identification parade have, while providing their testimony, indicated that they did not see the Applicants on TV before the date of the said parade. However, the Applicants further allege that their images were disseminated not only on TV but also through newspapers before the parade, which the Respondent has not directly refuted.

86. It is a matter of common sense that in criminal proceedings, identification parade is not necessary and cannot be carried out if witnesses previously knew or saw a suspect before the identification parade. The Court notes that this is also the practice in the jurisdiction of the Respondent State.[14]

87. In the instant case, the records of both the High Court and the Court of Appeal do not show that this requirement was fulfilled. Although some of the witnesses provided affidavits stating that they had not watched TV before the identification parade, neither of them (including PW 8 whose only testimony was used to sustain conviction) clearly stated that he/she did not see the images of the Applicants before the said parade in local newspapers. This implies that the identification parade was conducted despite the fact that the witnesses may have had a chance to see the Applicants in local newspapers.

88. In this regard, the Respondent has not supplied evidence showing that the domestic courts took measures to verify whether or not the witnesses read newspapers.[15] In light of the probability that witnesses may have seen the Applicants on local TV channels and

13 Appeal judgment, Court of Appeals, p. 20

14 *Republic v Mwango Manaa* (1936) 3 East African Court of Appeals 29. See also the Police General Order (PGO) No. 232 of Tanzania. One of the conditions to be satisfied for a proper identification parade is that the witnesses shall not see the accused before the parade.

15 Rejoinder, p.9.

newspapers, the safeguards which applied in the assessment of the evidence were inadequate.[16] Given that the conviction of the Applicants depended only on evidence from a single witness testimony obtained during this identification parade, there is an additional reason to doubt the context in which they were convicted. In these circumstances, the Court concludes that the procedural irregularities in the identification parade affected the fairness of the Applicants' trial and conviction.

89. The Court, therefore, holds that there was a violation of the right to a fair trial of the Applicants under Article 7(1) of the Charter.

iii. The allegation concerning the defence of alibi

a. Applicants' submission

90. The Applicants argue that their right to respect for the presumption of innocence under Article 7(1)(b) of the Charter (*sic*) was violated because both the Court of Appeal and the High Court arbitrarily rejected their defence of alibi.[17]

91. The Applicants complain that they submitted evidence attesting that they had never been to Tanzania before their extradition and they were in Kenya on the day and at the time the crime allegedly was committed. The Applicants assert that both the High Court and the Court of Appeal also acknowledged, in their respective judgments, that the passports of the Applicants show nothing suggesting their travel to Tanzania on the day of the crime. The Applicants allege that, this notwithstanding and even though no corroborating evidence was adduced, both Courts disregarded their defence of alibi on a wrong assumption that the Applicants could have used illegal routes ("panya routes") (to enter Tanzania and this would not have been reflected on their passports.

b. Respondent's submission

92. The Respondent has not made any submissions on this allegation.

c. The Court's assessment

93. The Court notes that an alibi is an important instrument of

16 In the same sense, *Abubakari* case, paras 181- 184.

17 Rejoinder p. 9

evidence for one's defense. The defence of alibi is implicit in the right of a fair trial and should be thoroughly examined and possibly set aside, prior to a guilty verdict.[18] In its judgment in *Mohamed Abubakari v Tanzania*, this Court observed that:

> "Where an alibi is established with certitude, it can be decisive on the determination of the guilt of the accused. This issue was all the more crucial especially as, in the instant case, the indictment of the Applicant relied on the statements of a single witness, and that no identification parade was conducted."[19]

94. In the present case, the records of the domestic judicial proceedings clearly evince that the Applicants had invoked an alibi during their trial, and the domestic Courts of the Respondent indeed considered the issue. The Court of Appeal specifically addressed the matter and rejected the defence after weighing it up *vis-à-vis* the testimony given by the witness PW 8 and found that this witness's testimony was strong enough to dispel the defence of alibi raised by the Applicants.[20]

95. The Court however recalls its finding above that the testimony of the single Prosecution Witness (PW8) was obtained following an identification parade which was marred by procedural irregularity. Therefore, the conviction of the Applicants relying solely on this single witness (PW8)'s testimony and on the basis of an uncorroborated assumption that the Applicants might have used other illegal ("panaya") routes to enter Tanzania did not amount to due and serious consideration of the Applicants' alibi defence and thus, violated their right to defence under Article 7(1)(c) of the Charter.

iv. The allegation relating to the Applicants' conviction and sentencing to 30 years' imprisonment

a. Applicants' submissions

96. The Applicants allege that their conviction and sentencing to a 30-years imprisonment term was unconstitutional and contrary to Article 7(2) of the Charter.

18 *Abubakari* judgment, para 192.

19 *Ibid*, para 191.

20 See Court of Appeals Judgment, pp 20-22.

b. Respondent's submissions

97. The Respondent denies the Applicants' allegations and submits that the conviction and sentencing of the Applicants was based on Sections 285 and 286 of the Respondent's Penal Code Cap 16 (which define the offences of robbery and armed robbery), and the Minimum Sentences Act of 1972 as amended by Act No 10 of 1989 and later by Act No. 6 of 1994 (which provides the punishment of the offences of robbery and armed robbery). It submits that the conviction and sentencing of the Applicants were done according to the Respondent's applicable laws and therefore not contrary to the Constitution and Article 7(2) of the Charter. The Respondent also adds that, if the Applicants are complaining of the length of penalty for armed robbery, the Court does not have the authority to examine the constitutionality of the length of a punishment stipulated for a crime in its domestic legislation.

c. The Court's assessment

98. The Court observes from the particulars of the case, that with regard to the length of the imprisonment imposed on them, the Applicants simply assert that their sentence to 30 years imprisonment violates the Constitution of the Respondent and Article 7(2) of the Charter. Article 7(2) of the Charter provides that:

> "No one may be condemned for an act of omission, which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

99. It emerges from the file that the relevant question at stake is whether the penalty to which the Applicants were sentenced on 19 December 2005 and upheld on 24 December 2009 was not provided for in the law.

100. The records before this Court indicate that the armed robbery for which the Applicants were convicted was committed on 5 November 2002. Following their extradition to the Respondent on 24 March 2003, the Applicants were charged at the Resident Magistrate`s Court of Dar es Salaam at Kisutu for crimes of armed robbery and conspiracy to commit crimes contrary to Sections 285 and 286 of the Penal Code as amended by Act No. 10 of 1989. Both crimes were defined in the Penal Code and the amending Act. According to Section 286 of this Penal Code a person convicted of armed robbery is liable to a penalty of life imprisonment with or without corporal punishment. Section 5(b) of the Minimum Sentences Act of 1972 as amended by the 1994 Written

Laws Amendment, also prescribes that the minimum sentence for the said offence is thirty (30) years. The two provisions read together show that the applicable penalty for armed robbery is a minimum of thirty (30) years imprisonment.

101. It follows that the Applicants were convicted and punished on the basis of legislation that existed before the date of commission of the crime, that is, 5 November 2002 and the punishment imposed on them was also prescribed in the same legislation. The Applicants' allegation that their conviction and penalty violates the Charter thus lacks merit and the Court therefore finds that there was no violation of Article 7(2) of the Charter.

v. The alleged violation relating to free legal aid

a. Applicants' submissions

102. In their submissions, the Applicants aver that their rights protected under Article 7(1)(c) of the Charter were violated because they were not given legal assistance in the Court of Appeal, although they were lay, indigent and incarcerated persons facing offences carrying heavy sentences. They further claim that the non-provision of legal aid violated the rule specified in many international instruments, including soft laws, which impose obligations on the Respondent to afford legal assistance.

b. Respondents' submissions

103. The Respondent has not responded to this allegation.

c. The Court's assessment

104. The Court notes that the Charter does not explicitly provide for the right to legal assistance. However, in its previous judgment in the matter of *Alex Thomas v The United Republic of Tanzania*, this Court stated that free legal aid is a right implicit in the right to defence enshrined under Article 7(1)(c) of the Charter. In the same case, the Court identified two cumulative conditions required for an accused person to be eligible for the right of legal assistance: indigence and the interests of justice.

105. In assessing these conditions, the Court considers several factors, including (i) the seriousness of the crime, (ii) the severity of the potential sentence; (iii) the complexity of the case; (iv) the social and personal situation of the defendant and , in cases of appeal,

the substance of the appeal (whether it contains a contention that requires legal knowledge or skill), and the nature of the "entirety of the proceedings", for example, whether there are considerable disagreements on points of law or fact in the judgments of lower courts.[21]

106. The Court observes that, as long as the conditions which would warrant legal assistance exist, free legal assistance should be made available in all trial and appellate proceedings

107. In the instant case, the Court notes that the Applicants were represented by lawyers both at the trial Magistrate`s Court and the High Court, although from the records of the case file it is not clear if the lawyers were contracted by the Applicants themselves or by the Respondent.[22] Thus, it was only in the Court of Appeal that the Applicants were not represented. The issue that shall therefore be addressed is whether the conditions that justify the provision of legal assistance were available during the appellate proceedings at the Court of Appeal.

108. With regard to the first condition of indigence, the Respondent has not disputed the claim of the Applicants that they are indigent. The Court thus considers this requirement as having been met.

109. With respect to the second requirement that the interest of justice must warrant the provision of legal assistance, the Court considers that the crime of armed robbery that the Applicants were convicted of was serious and the 30 years' imprisonment that they were sentenced to was severe with grave repercussions on the right to liberty of the Applicants.

110. The case further contains numerous complex legal and factual questions (involving 22 prosecution and 10 defense witnesses) that require considerable legal knowledge and technical pleading skills, which ordinary and lay individuals, as the Applicants are, do not often have. In this regard, the Court notes that, in the course of the domestic proceedings, the trial Magistrate Court and the High Court made divergent findings both in law and fact. Whereas the trial magistrate acquitted the Applicants, the High Court reversed the acquittal and convicted the Applicants. Furthermore, although the Court of Appeal confirmed the decision and sentence of the High Court, it differed in its reasoning. All these confirm the complexity of the case.

21 *Alex Thomas v The United Republic of Tanzania* judgement, para. 118. *Abubakari* case, paras. 138-139. See also Case of *Granger v The United Kingdom* Application no. 11932/86, European Court of Human Rights, judgment of 28 March 1990, para 44.

22 Judgment of Resident Magistrate`s Court at Kisutu, Dar es Salaam, p 2, Judgment of the High Court of Tanzania, Dar es Salaam, p 2.

111. In these circumstances, the Court is of the view that the interest of justice made the provision of free legal representation particularly indispensable in the appellate proceedings of the Court of Appeal.
112. The Court thus concludes that the failure of the Respondent to provide the Applicants with free legal aid in the Court of Appeal was a violation of their right to defense under Article 7(1)(c) of the Charter.

vi. Allegation concerning the delay in the delivery of copies of the judgment

a. Applicants' submission

113. The Applicants submit that their right to a fair trial was violated by the Respondent's failure to provide them with copies of the judgment of the Court of Appeal in Criminal Appeal No. 48 of 2006 until about two years later. They contend that the delay led to their inability to file a petition for a review of the Appeal Court's judgment, and the subsequent dismissal of their Application for extension of time to file a petition for review.

b. Respondent's submissions

114. The Respondent admits that the judgment in Criminal Appeal No. 48 of 2006 was delivered on 24 December 2009 and that the Applicants received the decision of the Court of Appeal only on 2 November 2011. The Respondent also concedes that the time in which the Applicants could have lodged a request for review of the judgment had already expired when the Applicants received the copies of the said judgment.
115. Nevertheless, the Respondent argues that the reason for the dismissal of the 2nd Applicant's application for extension of time to file a review was not based on the lapse of time, but on the merits of the application, which according to the Judge of the Court of Appeal, did not warrant the granting of the extension of time.

c. The Court's assessment

116. From the submissions of the Parties, the Court deduces that the matter in dispute here is whether the delay in the delivery of copies of judgment of the Court of Appeal affected the right of the Applicants' right to request for review of the judgment and whether this constitutes a violation of their right to have one's cause heard, which is a fair trial right stipulated under Article 7(1) of the Charter.
117. The Court observes that the right of an individual to have his

cause heard includes a set of other rights listed under Article 7(1) of the Charter and other international human rights treaties ratified by the Respondent. The term "comprises" in Article 7(1) of the Charter predicates that the list is not exhaustive and the right to be heard may also include other entitlements available for individuals both in international law and the domestic law of the concerned State. In the instant case, the Applicants have had appeals heard by the High Court and Court of Appeal of the Respondent. The national law further provides for the possibility of a review of the decision of the Court of Appeal in the event that a decision is tainted by procedural irregularities, which have caused injustice to a party.[23]

118. A party would not be in a position to lodge a meaningful application for a review of a particular judgment unless it is in possession of copies of the judgment that it seeks to get reviewed. In this regard, the timely delivery of copies of a judgment is an important consideration especially in circumstances where a considerable delay affects the right of individuals to pursue possible redress available in the domestic system. In *Alex Thomas v. the United Republic of Tanzania*, this Court held that:

> "It was the responsibility of the Courts of the Respondent to provide the Applicant with the Court record he required to pursue his appeal. Failure to do so and then maintain that the delay in the hearing of the Applicant's appeal was the Applicant's fault is unacceptable. …, the Applicant made several attempts to obtain the relevant records of proceedings but the judicial authorities unduly delayed in providing him with these records."[24]

119. The Court notes that in *Alex Thomas v Tanzania*, the delay was related to the provision of court records to pursue an appeal. In contrast, in this instant case, the delay relates to the provision of copies of judgments to enable the Applicants to pursue an application for review. The Court considers that the principle laid down in *Alex Thomas v Tanzania* equally applies in this case in that the right of Applicants to pursue possible redress available in the domestic system was affected by the delay in providing them with copies of the judgment.

120. The Court accordingly considers that the failure of the Respondent to provide the Applicants with copies of the judgment of the Court of Appeal for almost two years, without adducing any justification, is an inordinate delay. The Court also holds that the delay certainly affected the right of the Applicants to request for review within the time specified

23 See Section 66(1) of the Court of Appeal Rules of the Court of Appeal of Tanzania.

24 *Alex Thomas* case, para 109. It is within this general spirit that the African Commission on Human and Peoples` Rights also stated that "All decisions of judicial bodies must be published and available to everyone", *a fortiori*, to the Parties of a case who have a much stake in the judgment.

under the domestic law.

121. In view of the above, the Court finds that the unjustified delay of two years to deliver the copies of the judgment to the Applicants violated their right to be heard under Article 7(1) of the Charter.

B. Allegations relating to arbitrary arrest contrary to Article 6 of the Charter

122. Under Article 6 of the Charter, the Applicants invoke the responsibility of the Respondent for the violation of their right to liberty as a result of their alleged arbitrary arrest in the Republic of Kenya before their extradition and their re-arrest by Tanzanian authorities after they were acquitted of criminal charges by the Magistrate's Court.

i. Allegation relating to the Applicants being held in custody for three weeks

123. The Applicants submit that they were held in custody for 3 weeks by the authorities of the Republic of Kenya before being arraigned in court, and that this was in violation of their basic rights. The Respondent contends that it is directed to the Republic of Kenya, which is not a party to the instant Application.

124. The Court reiterates its position that it lacks personal jurisdiction to entertain allegations against the Republic of Kenya and therefore, dismisses this allegation.

ii. Allegation relating to the re-arrest after acquittal

a. Applicants' submissions

125. The Applicants allege that their rights under Article 6 of the Charter were violated when they were re-arrested by the Police after the trial Magistrate at Kisutu acquitted them. The Applicants argue that after they were acquitted of charges of armed robbery and conspiracy to commit crimes, they were immediately re-arrested and charged before the Resident Magistrate Court of Dar es Salaam at Kisutu with the crime of stealing contrary to section 265 and armed robbery contrary to Section 287 of the Penal Code of the Respondent. They claim that the re-arrest and subsequent charges of stealing and armed robbery violated their right to presumption of innocence.

b. Respondent's submissions

126. The Respondent argues that the Applicants were lawfully re-arrested and that the second charges were subsequently withdrawn in the interest of justice and the rights of the Applicants.

c. The Court's assessment

127. From the records available before it, the Court notes that on 26 March 2003, the Applicants were arraigned at the Kisutu Resident Magistrate Court in Dar es Salaam and charged with two counts under the Penal Code, Cap 16. The first count was conspiracy to commit an offence contrary to Section 384 and the second count was armed robbery contrary to Sections 285 and 286 of the Penal Code. The particulars of the case, undisputed by the Respondent, also show that after the Kisutu Resident Magistrate's acquitted them of these counts, they were, on 14 March 2005, again arraigned before the same Court on two new charges:(i) stealing, contrary to Section 265 of the Penal Code in Criminal Case No. 399/2005 and (ii) armed robbery, contrary to Section 287 of the Penal Code in Criminal Case No. 400/2005.

128. These charges were later dropped when the appeal made on the original charge of armed robbery succeeded at the High Court, where their acquittal was set aside and substituted with conviction and a sentence of 30 years' imprisonment. It appears from this series of facts that the authorities of the Respondent issued a new charge on different sections of the Penal Code against the Applicants on the basis of the same facts as those relied upon in the original armed robbery charge and to the same trial Magistrate.

129. In view of the above, the question this Court should address is whether the re-arrest of the Applicants was contrary to Article 6 of the Charter, which provides that:

> "Everyone shall have the right to liberty and security of his person and that no one shall be deprived of his freedom except for reasons and conditions laid down by law. In particular, no one may be arbitrarily arrested or detained."[25]

130. Under Article 6 of the Charter, the right to liberty prohibits arbitrary arrest and this generally involves the deprivation of liberty of individuals contrary to the law or against the reasons and conditions specified by

25 See also Articles 3 and 9, Universal Declaration of Human Rights (1948) Article 5, European Convention on Human Rights (1950), Article 7, Inter-American Convention on Human Rights (1969), Article XXV, American Declaration of the Rights and Duties of Man (1948), Article 14, Arab Charter on Human Rights (2004).

the law.[26] The notion of arbitrariness also covers deprivation of liberty contrary to the standard of reasonableness, that is, whether it is "just, necessary, proportionate and equitable in opposition to unjust, absurd and arbitrary.[27]

131. The established international human rights jurisprudence sets three criteria to determine whether or not a particular deprivation of liberty is arbitrary, namely, the lawfulness of the deprivation, the existence of clear and reasonable grounds and the availability of procedural safeguards against arbitrariness.[28] These are cumulative conditions and non-compliance with one makes the deprivation of liberty arbitrary.

d. The lawfulness of the detention

132. The Court notes that arrest or detention that lacks any legal basis is arbitrary.[29] Any deprivation of liberty shall have a legal basis or shall be carried out in "accordance with the law".[30]

133. In the case at hand, the Respondent generally argues that the re-arrest of the Applicants was lawful without indicating the specific law on the basis of which the re-arrest was made. Nonetheless, the Court infers from the undisputed submission of the Applicants that they were re-arrested on the basis of section 265 of the Penal Code of the Respondent. The Court thus, holds that there was an adequate legal basis for the re-arrest and that it was conducted "in accordance with the law".

e. The existence of clear and reasonable grounds

134. The Court notes that a deprivation of liberty shall also have clear and reasonable grounds. Although Article 6 of the Charter does not

26 *Ibid*.

27 See *Mukong v Cameroon,* Comm. No. 458/1991, UN Human Rights Committee adopted on 21 July 1994, para. 9.8*, Hugo van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8, *A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (30 April 1997), para 9.2.

28 See Principle 1(b),African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**,** DOC/OS(XXX)247 (2001).

29 General Comment 35, Article 9 (Liberty and security of person), UN HRC, CCPR /C/GC/35 (2014), para. 11 *Essono Mika Miha v Equatorial Guinea*, Communication No. 414/1990, UN Doc. CCPR/C/51/D/414/1990 (1994), para. 6.5.

30 *Ibid*. See also Communication 368/09 *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, African Commission, (2014), paras 79-80; Principle 2, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly A/RES/43/173, 9 December 1988.

explicitly require that the grounds should be clear or reasonable, the expression "reasons and conditions" in the same implies that any arrest or detention should not be conducted without adequate or reasonable grounds.[31]

135. In the present case, the Applicants were arrested on the basis of a criminal charge. It is a trite law that the arrest or detention of individuals for purpose of criminal charge is a common and valid ground for detention recognized by both the domestic legislation of the Respondent and international human rights law.[32] However, the Court considers that the validity of a particular ground for deprivation of liberty shall also be examined in accordance with the circumstances of each case and in the light of the requirement of reasonableness. In the context of criminal proceedings, once an accused is acquitted of a particular crime by a court of law, the fundamental right to liberty and also the standard of reasonableness require that s/he shall be released forthwith and be allowed to enjoy his liberty unhindered.

136. In the instant Application, the Applicants were released in accordance with the decision of the trial Magistrate's Court acquitting them of charges of armed robbery and conspiracy to commit crimes, but re-arrested immediately and kept in detention. They were subsequently charged with another crime of stealing and armed robbery based on the same facts under different sections of the Penal code. The Respondent has not proffered any reason as to why it was necessary to charge the Applicants with a new crime of stealing and armed robbery on the basis of the same facts after a court of law had already acquitted the Applicants of similar charges.

137. The Court is of the view that it is inappropriate, unjust, and thus, arbitrary to re-arrest an individual and file new charges based on the same facts without justification *after* s/he has been acquitted of a particular crime by a court of law. The right to liberty becomes illusory and due process of law ends up being unpredictable if individuals can anytime be re-arrested and charged with *new* crimes after a court of law has declared their innocence. The Court thus finds that there was no reasonable ground for the re-arrest of the Applicants in the time between their acquittal by the Resident Magistrate`s Court and their conviction by High Court for the initial charges.

138. In view of this finding, the Court deems it unnecessary to examine the issue whether the third requirement relating to the availability of

31 Communication No. 379/09 *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, 10 March 2015, para 105,

32 Article 9 of ICCPR expressly envisages a situation where individuals may be deprived of their liberty on the basis of criminal charge. (See para 3).

procedural safeguards against arbitrariness was met.

139. The Court therefore holds that the Respondent has violated the right to liberty of the Applicants under Article 6 of the Charter by arbitrarily re-arresting and charging them with fresh crimes based on the same facts after they were acquitted of the same by a court of law.

C. The alleged *incommunicado* detention of the Applicants in contravention of Article 5 of the Charter

i. Applicants' submissions

140. The Applicants submit that, following their re-arrest by the Respondent's authorities, they were detained for four days in a police cell without food and access to the outside world. They allege that their detention was unlawful and violated their rights as guaranteed under Article 5 of the Charter.

ii. Respondents' submissions

141. The Respondent on its part denies the allegation that the Applicants were detained *incommunicado* without food, and requests that the Applicants be put to the strictest proof thereof.

iii. The Court's assessment

142. The Court notes that it is a fundamental rule of law that anyone who alleges a fact shall provide evidence to prove it. However, when it comes to violations of human rights, this rule cannot be rigidly applied. By their nature, some human rights violations relating to cases of *incommunicado* detention and enforced disappearances are shrouded with secrecy and are usually committed outside the shadow of law and public sight. The victims of human rights may thus be practically unable to prove their allegations as the means to verify their allegation are likely to be controlled by the State.[33]

143. In such circumstances, "neither party is alone in bearing the burden of proof"[34] and the determination of the burden of proof depends on "the type of facts which it is necessary to establish for the purposes

33 Inter-American Court of Human Rights case of *Velásquez-Rodríguez v Honduras*, Judgment of July 29, 1988, paras 127-136.

34 Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), ICJ (30 November 2010), para 56.

of the decision of the case"[35] It is therefore for this Court to evaluate all the circumstances of the case with a view to establishing the facts.

144. In the instant case, the Applicants simply assert that they were detained for four days in a police cell without food and access to the external environment. Given the particular condition of their detention, the Court understands that it may be difficult for them to prove their contention.

145. Nevertheless, the Applicants have not submitted any *prima facie* evidence to support their allegation which could enable the Court to shift the burden of proof to the Respondent. The Court recalls that the Applicants had lawyers both at the Magistrate's Court and the High Court and there is nothing on record to show that they raised the matter before the courts of the Respondent or communicated the condition of their detention to their lawyers, or their government.

146. In view of the foregoing, the Court finds that the allegation lacks merit and is hereby dismissed.

D. Allegation of violation of Article 3 of the Charter

i. Applicants' submissions

147. The Applicants generally allege without providing specifics, that the Respondent has violated their right under Article 3 of the Charter.

ii. Respondent's submissions

148. The Respondent maintains that Articles 12 and 13 of the Constitution of the United Republic of Tanzania firmly guarantee these rights and that the Applicants have failed to demonstrate how these guarantees of equality were not applied to them therefore resulting in the alleged violations. The Respondent also reiterates that Section 9(1) of the Basic Rights and Duties Enforcement Act [Cap 3 RE 2002] also provides adequate safeguards against the alleged violation.

iii. The Court's assessment

149. Article 3 of the African Charter provides that:

> "Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law"

35 *Ibid*, paras 54-55.

150. This provision has two limbs, namely, the right to equality before the law and the right to equal protection of the law.

151. With regard to the right to equal protection of the law, the Court notes that this is recognized and guaranteed in the Constitution of the Respondent. The relevant provisions (Articles 12 and 13) of the Constitution enshrine the right in its sacred form and content on equal par with the Charter, including by prohibiting discrimination.

152. Concerning the right to equality before the law, in their submissions, the Applicants have alleged that their right under Article 3 of the Charter has been violated by the Respondent without specifying how and under what contexts that they have been discriminated against. The Court has, in the case of *Abubakari v Tanzania*, held that "it is incumbent on the Party purporting to have been a victim of discriminatory treatment to provide proof thereof".[36] The Applicants have not indicated circumstances where they were subjected to unjustified differential treatment in comparison to other persons in a similar situation.[37] As this Court has stated in its case law of *Alex Thomas v Tanzania*, "General statements to the effect that [a] right has been violated are not enough. More substantiation is required".[38]

153. The Court therefore dismisses the Applicants' allegation that their rights under Article 3 of the Charter were violated.

E. The allegation concerning the violation of all accepted principles of human rights and international law

i. Applicants' submissions

154. The Applicants also make a general submission that both the Kenyan and the Tanzanian Governments have violated all accepted principles of human rights and international law through their actions.

ii. Respondent's submissions

155. With regard to part of the allegation directed against it, the Respondent State submits that this allegation is not clear and specific. It argues that the Applicants have not specified with precision which principles and what areas of international law have been violated. In

36 *Abubakari* Case, para 153.

37 *Ibid*, para154.

38 *Alex Thomas* case, para 140.

the opinion of the Respondent, the phrase "all accepted principles of human rights and international law" is vague and general.

iii. The Court's assessment

156. The Court has already dismissed the claim of the Applicants against the Government of Kenya for lack of personal jurisdiction as specified above (para. 44).

157. As far as the Respondent is concerned, the Court has previously decided that it can only examine a specific allegation of human rights violation only when either the facts indicating such violation or the nature of the right which was allegedly violated is adequately stated in the Application.[39] The instant allegation lacks precision in both respects. The Applicants have not clearly stated the specific right or principle of human rights or international law, which is said to be violated nor have they sufficiently indicated the factual basis of such alleged violation. As a result, the Court is unable to make a determination on the merits of the substance of the Applicants` allegation because of its generalised nature and finds no violation of a right protected in the Charter or other international human rights instruments ratified by the Respondent.

F. Allegation that the Respondent State has violated Article 1 of the Charter

158. The Applicants allege that the Respondent has breached its obligation under Article 1 of the Charter by failing to give effect to the rights enshrined in it.[40] The Respondent has not made any submission on this allegation.

159. The Court reiterates its position in the matter of *Alex Thomas v Tanzania* that Article 1 of the Charter imposes on States Parties the duty to recognize the rights guaranteed therein and to adopt legislative and other measures to give effect to these rights, duties and freedoms.[41] Accordingly, in assessing whether or not a State has violated Article 1 of the Charter, the Court examines not only the availability of domestic legislative measures taken by the State but also whether the application of those legislative or other measures is in line with the realization of the rights, duties and freedoms enshrined in the Charter, that is, the

39 See *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania*, Application No 009&011/2011, para 12, *Peter Chacha* case, paras 121. 122. 131, 134.

40 Rejoinder, p 7.

41 *Alex Thomas* case, para 135.

attainment of the objects and purposes of the Charter.[42] If the "Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated."[43]

160. In the instant case, the Court has found that the Respondent State has violated Article 6 and Article 7 of the Charter. On this basis, the Court thus concludes that the violation of these rights also simultaneously violates Article 1 of the Charter requiring the Respondent to respect and ensure respect for the rights guaranteed thereof.

IX. Reparations

161. In their Application, the Applicants requested, among other things, the Court to grant reparations and order such other measures or remedies as it may deem fit.

162. On the other hand, the Respondent prayed the Court to deny the request for reparations and all other reliefs sought by the Applicants.

163. 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."

164. In this regard, Rule 63 of the Rules of Court provides that "the Court shall rule on the request for reparation… by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

165. 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.

X. Costs

166. In their submissions, the Applicants and the Respondent did not make any statements concerning costs.

167. The Court notes that Rule 30 of the Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".

168. The Court shall decide on the issue of costs when making a ruling on other forms of reparation.

169. For these reasons:

42 *Ibid.*

43 *Ibid.*

The Court

Unanimously,

i. *Dismisses* the Respondent's preliminary objection on the lack of personal and material jurisdiction of the Court.

ii. *Declares* that the Court has jurisdiction

iii. *Dismisses* the Respondent's preliminary objections on the admissibility of the Application for non-exhaustion of local remedies and for not having been filed within a reasonable period of time after exhaustion of local remedies.

iv. *Declares* the Application admissible.

v. *Declares* that the Respondent has not violated Articles 3, 5, 7 (1) (a), 7(1) (b) and 7(2) of the Charter.

vi. *Finds* that the Respondent violated Articles 1, 6 and 7(1), and 7(1) (c) of the Charter.

vii. *Orders* the Respondent State 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.

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.

Jonas v Tanzania (merits) (2017) 2 AfCLR 101

Application 011/2015, *Christopher Jonas v United Republic of Tanzania*

Judgment, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant had been convicted and sentenced to thirty years imprisonment for robbery. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court found that the evidence in the national proceedings had been evaluated in conformity with the requirements of fair trial but that the fact that the Applicant had not been granted free legal representation constituted a violation of the African Charter.

Admissibility (exhaustion of local remedies, extraordinary remedies, 44; submission within reasonable time, 50-54)

Fair trial (role of African Court in evaluation of evidence, 68; legal aid, 78)

I. The Parties

1. The Applicant, Mr Christopher Jonas, is a national of the United Republic of Tanzania, currently serving a thirty year custodial sentence at the Ukonga Prison in Dar-es-Salaam, United Republic of Tanzania.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as the "Respondent"), which became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 9 March, 1984, 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 February, 2006. It also deposited the declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations on 29 March, 2010. The Respondent has also ratified and acceded to other regional and international human rights instruments, including the International Covenant on Civil and Political Rights (hereinafter referred to as the "Covenant") on 11 July 1976.

II. Subject of the Application

3. The instant Application concerns Criminal Case No. 429 of

2002 before the District Court of Morogoro; before the High Court of Tanzania under reference Criminal Case No. 6 of 2005; and before the Court of Appeal of Tanzania sitting at Dar-es-Salaam, under reference Criminal Case No. 38 of 2006, in which the Applicant was found guilty and sentenced to thirty (30) years imprisonment for armed robbery, an offence punishable under Sections 285 and 286 of the Criminal Code, Chapter 16 of the Laws of Tanzania.

A. The facts

4. The Applicant and one Erasto Samson were jointly charged with stealing money and various items of value from one Habibu Saidi on 1 October 2002, using violence and injuring the victim in the face with a machete.

5. On 13 February 2004, the Morogoro District Court rendered its Judgment finding the Applicant and Erasto Samson guilty of the offence as charged. They were both sentenced to thirty (30) years imprisonment and twelve (12) strokes of the cane, Erasto Samson having been tried *in absentia*.

6. On 26 February 2004, the Applicant filed an Appeal before the High Court of Tanzania in Dar-es-Salaam but that Appeal was dismissed on 12 September 2005.

7. On 21 September 2005, the Applicant filed an Appeal before the Court of Appeal of Tanzania in Dar-es-Salaam. On 27 March 2009, the Appeal was similarly dismissed as regards the 30-year prison sentence. However, the Court of Appeal amended the sentence, setting aside the corporal punishment of twelve (12) strokes of the cane.

B. Alleged violations

8. The Applicant alleges:

"i. That he had been charged and wrongly convicted for armed robbery with thirty (30) year custodial sentence; that the Trial Magistrate and the Appeal Court judges grossly erred in law and fact for having taken into account the key testimony of Prosecution Witness PW1, Habibu Saidi Shomari, which evidence does not corroborate the particulars on the charge sheet, especially the list of the items allegedly stolen, their respective values and the estimated total amount;

ii. That the thirty (30) year sentence pronounced against him by the Trial Magistrate was not in force at the time the robbery was committed (1 October 2002); that Sections 285 and 286 of the Penal Code provide a maximum

punishment of fifteen(15) years imprisonment; that the thirty (30) year prison sentence came into force only in 2004 sequel to decree No. 269 of 2004, as amended and which became Section 287 A of the Penal Code;

iii. That he was denied the right to information;

iv. That he did not have the benefit of Counsel or legal assistance throughout his trial; and

v. That for all these reasons, the Respondent State violated Section 13(b)(c) of the 1977 Constitution of the United Republic of Tanzania as well as Articles 1, 2, 3, 4, 5, 6, 7(1)(c) and 7(2) of the African Charter on Human and Peoples' Rights."

III. Procedure before the Court

9. The Application was received at the Registry on 11 May 2015.

10. By a letter dated 9 June 2015, the Registry, pursuant to Rule 35(2) and (3) of the Rules of Court (hereinafter referred to as "the Rules"), transmitted the Application to the Respondent, the Chairperson of the African Union Commission and, through her, to other States Parties to the Protocol.

11. On 15 July 2015, the Respondent transmitted to the Registry the names and addresses of its representatives; and on 11 August 2015, submitted its Response to the Application.

12. On 17 August 2015, the Registry transmitted the Respondent's Response to the Applicant.

13. On the Court's directive to seek legal assistance for the Applicant, the Registry, on 6 January 2016, wrote to the Pan African Lawyers' Union (PALU), to enquire whether the latter would consider providing legal assistance to the Applicant.

14. By a letter dated 20 January 2016, PALU agreed to provide assistance to the Applicant; and on 30 March 2016, requested an extension of the time for submission of its Reply to the Respondent's Response.

15. On 29 April 2016, the Court granted PALU the extension requested, and the Parties were accordingly notified by a notice of the same date.

16. On 14 June 2016, PALU filed the Reply to the Respondent's Response which was transmitted to the Respondent for information on the same date.

17. At its 42nd Ordinary Session held from 5 to 16 September 2016, the Court, pursuant to Rule 59(1) of the Rules decided to close the written proceedings and to proceed with deliberations.

IV. Prayers of the Parties

18. In the Application, the Court is requested to:

"i. uphold all the rights flouted and violated by the Respondent State;

ii. rehabilitate the Applicant with respect to all his rights;

iii. order reparations for all the damages he suffered".

19. In his Reply to the Respondent's Response, the Applicant prays the Court to:

"i. find that the Respondent has violated his right to full equality before the law and his right to equal protection of the law as enshrined in Article 3 of the Charter;

ii. find that the Respondent has violated his right to a fair trial as enshrined in Article 7 of the Charter;

iii. set aside the guilty verdict and the punishment imposed on him and, consequently order his release from prison;

iv. issue an order for reparation;

v. order such other measures or remedies as this Honourable Court may deem appropriate".

20. In its Response to the Application, the Respondent prays the Court, with respect to its jurisdiction and the admissibility of the Application, to:

"i. Rule that the Application has not evoked (sic) the jurisdiction of the Court and should consequently be dismissed;

ii. Rule that the Application has not met the admissibility requirements stipulated under Rule 40(5) and (6) of the Rules of Court and consequently dismiss it;

iii. Rule that the Court has no jurisdiction to issue an order compelling the Respondent State to release the Applicant from detention".

21. On the merits of the case, the Respondent prays the Court to:

"i. Rule that the Government of the United Republic of Tanzania has not violated Articles 1, 2, 3, 4, 5, 6, 7(1)(c) and 7(2) of the Charter;

ii. Rule that the Government of the United Republic of Tanzania did not breach Article 13(6)(b) and (c) of the Constitution of the United Republic of Tanzania;

iii. Rule that the conviction and sentence imposed on the Applicant by the Trial Court, the High Court and the Court of Appeal of Tanzania were proper and not excessive;

iv. Rule that the thirty (30) year prison sentence for the offence of armed robbery is lawful;

v. Rule that the Government of the United Republic of Tanzania did not discriminate against the Applicant;

vi. Declare that the Government of the United Republic of Tanzania should not pay reparations to the Applicant;

vii. Dismiss the Application in its entirety for lack of merit".

V . Preliminary objections raised by the Respondent

22. In its Response to the Application, the Respondent raised preliminary objections on both the jurisdiction of the Court and the admissibility of the Application.

A. On the jurisdiction of the Court

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

i. Objection with respect to the material jurisdiction of the Court

24. The Respondent argues that the Applicant prays the Court to sit as an appellate court or a supreme court whereas it is not within its power.

25. According to the Respondent, Article 3 of the Protocol does not provide this Court with the jurisdiction to adjudicate over matters raised by the Applicant before the national courts, revise the Judgments of these courts, evaluate the evidence and come to a conclusion

26. The Respondent maintains that the Court of Appeal of Tanzania, in its Judgment in Criminal Appeal Case No. 38/2006, examined all the allegations raised by the Applicant and that this Court (African Court) should respect the judgment of the Court of Appeal of Tanzania.

27. The Applicant for his part refutes this assertion. Citing this Court's jurisprudence in *Alex Thomas* and *Joseph Peter Chacha v United Republic of Tanzania*, the Applicant contends that this Court has jurisdiction as long as there are allegations of violation of human rights.

28. The Court reiterates its position that it is not an appeal court with

respect to the decisions rendered by the national courts.[1] However, as it underscored in its Judgment in *Alex Thomas v United Republic of Tanzania,* and *Mohamed Abubakari v United Republic of Tanzania,* this does not preclude it from ascertaining whether the procedures before national courts are in accordance with the international standards set out in the Charter or other applicable human rights instruments.[2]

29. Be that as it may, the Applicant alleges violation of the rights guaranteed by the Charter.

30. The Court therefore dismisses the objection raised by the Respondent in this regard, and holds that it has material jurisdiction.

ii. Other aspects of jurisdiction

31. The Court notes that its personal, temporal and territorial jurisdiction has not been contested by the Respondent, and nothing in the file indicates that the Court does not have jurisdiction. The Court therefore, holds that:

"i. it has jurisdiction *ratione personae* given that the Respondent is a party to the Protocol and has deposited the declaration required under Article 34(6) thereof, which enables individuals to institute cases directly before it, in terms of Article 5(3) of the Protocol.

ii. it has jurisdiction *ratione temporis* in terms of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers as irregularities;[3]

iii. it has jurisdiction *rationae loci* given that the facts of the matter occurred on the territory of a State Party to the Protocol, that is, the Respondent.

32. From the foregoing, the Court concludes that it has jurisdiction and is therefore competent to hear the instant case.

B. On the admissibility of the Application

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

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

2 *Alex Thomas v United Republic of Tanzania* (Application No. 005 of 2013), Judgment of 20 November 2015, para 130 and *Mohamed Abubakari v United Republic of Tanzania* (Application No. 003 of 2012*),* Judgment of 3 June 2016*,* para 29.

3 *Zongo and Others v Burkina Faso*, preliminary objections, Judgment of 21 June 2013, paras 71 to 77.

56 of the Charter".

34. Pursuant to Rule 39 of the Rules, the Court shall conduct preliminary examination of the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of the Rules.

35. Rule 40 of the Rules which essentially reproduces the content of Article 56 of the Charter, provides that:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:
>
> 1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> 1. Comply with the Constitutive Act of the Union and the Charter;
>
> 2. Not contain any disparaging or insulting language;
>
> 3. Not based exclusively on news disseminated through the mass media;
>
> 4. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
>
> 5. 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;
>
> 6. Not raise any Matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

37. Whereas some of the aforementioned conditions are not in contention between the Parties, the Respondent raised objections with respect to the exhaustion of local remedies and the time frame for seizure of the Court.

i. Conditions that are in contention between the Parties

a. Objection to admissibility on grounds of failure to exhaust local remedies

38. The Respondent, relying on the jurisprudence of the

Commission,[4] contends that it is premature for the Applicant to bring the instant case before an international body given that he still has internal remedies at his disposal.

39. According to the Respondent, the Applicant first of all has the possibility of filing a constitutional petition before the High Court of Tanzania to obtain relief for the alleged violation of his rights, under the Basic Rights and Duties Enforcement Act Chapter 3 as amended in 2002 (*Basic Rights and Duties Enforcement Act [Chapter 3 Revised Edition 2002]).*

40. The Respondent maintains that after the Court of Appeal decision, the Applicant also had the possibility of requesting that same court to review its Judgment under Rule 66 of its Rules.

41. The Respondent, in conclusion, submits that since the Applicant has not exercised the aforesaid remedies available at national level, the Application does not meet the requirements set out in Rule 40(5) of the Rules and must therefore be dismissed.

42. The Applicant maintains that he has exhausted all the local remedies in filing an appeal against the Judgment of the High Court of Tanzania before the Court of Appeal of Tanzania which is the highest court in the country. He adds that since the Court of Appeal has made a ruling on his appeal, it would not be reasonable to require him to file a new application in respect of his right to a fair trial before the High Court which is a court lower than the Court of Appeal.

43. He further contends that the constitutional petition and the review remedy mentioned by the Respondent are extraordinary remedies which he was under no obligation to exhaust before filing the Application before this Court.

44. The Court notes that the Applicant appealed against his conviction before the Court of Appeal of Tanzania which is the highest judicial body in the country, and that Court upheld the Judgments of the Morogoro District Court and the High Court of Tanzania.

45. Concerning the constitutional petition and review, the Court has concluded from other matters filed against the Respondent that these are, in the Tanzanian legal system, extraordinary remedies which Applicants are not obliged to exhaust before filing their Applications in

4 Communication No. 333/06: *Southern African Human Rights NGOs Network and Others v Tanzania*; Communication No. 263/2002: *Kenyan Section of the International Commission of Jurists, Law Society of Kenya, Kituo Cha Sheria v Kenya* ; Communication No. 275/03 *Article 19 v Eritrea.*

this Court.[5]

46. The Court therefore rejects the Respondent's objection to the admissibility of the Application for failure to exhaust local remedies.

b. Objection to admissibility based on non-compliance with a reasonable time in filing the Application before the Court

47. The Respondent argues that the Applicant has not filed his Application within reasonable time. While recognising that Rule 40(6) of the Rules of Court does not prescribe a specific time frame for the submission of cases, the Respondent argues that going by the decisions of regional bodies similar to this Court, a period of six (6) months would be a reasonable time limit within which the Applicant should have filed the Application. It maintains that such was the position of the African Commission on Human and Peoples' Rights in *Michael Majuru v Zimbabwe,* and therefore avers that the period of four (4) years and 10 months in which the Applicant filed the Application is much more than the six (6) months regarded as reasonable time[6].

48. The Applicant refutes the Respondent's assertion, indicating firstly that the Application was filed on 11 May 2015, and not on 28 January 2015. He argues further that the Court's jurisprudence shows that the assessment of the reasonable time for the filing of applications is made on a case-by-case basis; that such was the Court's position in *Alex Thomas v United Republic of Tanzania*, in which the Court took into account the special situation in which the Applicant found himself, namely, that he was illiterate, indigent, incarcerated and without legal assistance, and decided that the timeframe within which the Applicant filed the Application was reasonable.

49. The Court notes that Article 56(6) of the Charter does not set a deadline within which applications should be filed.

50. Rule 40(6) of the Rules which reproduces the substance of Article 56(6) of the Charter, only speaks of a "reasonable time from the date local remedies are exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter".

5 *Alex Thomas v United Republic of Tanzania* (Application No. 005/2013), Judgment of 20 November 2015, paras 60-65 ; *Mohamed Abubakari v United Republic of Tanzania* (Application No. 007/2013), Judgment of 3 June 2016, paras 65-72 ; *Wilfred Onyango v United Republic of Tanzania* (Application No. 006/2013), Judgment of 18 May 2016, para 95.

6 *Majuru v Zimbabwe* (Communication No. 308/2005) [2008] ACHPR 95 (24 November 2008).

51. The Court noes that the local remedies were exhausted on 27 March 2009, being the date on which the Court of Appeal delivered its judgment. It however also notes that as at that date, the Respondent had not deposited the declaration accepting the jurisdiction of the Court to receive cases from individuals as per Article 34(6) of the Protocol. The Court therefore holds that it would not be reasonable to regard the time frame for seizure of the Court as running from the date prior to the deposit of the said declaration, that is, 29 March 2010.

52. Since the Application was filed on 11 May 2015, the Applicant thus seized the Court in five (5) years, one (1) month and twelve (12) days. The question here is whether this time frame can be regarded as reasonable within the meaning of Article 56(6) of the Charter.

53. The Court has established in its previous Judgments that 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]

54. In *Mohammed Abubakari v United Republic of Tanzania*, this Court held that the fact that the Applicant was incarcerated, is indigent, did not have the benefit of free assistance of a lawyer throughout the proceedings at national level, his being an illiterate and his being unaware of the existence of the Court due to its relatively recent establishment - are all circumstances that can work in favour of some measure of flexibility in determining the reasonableness of the time frame for seizure of the Court.[8]

55. Given that the Applicant in the instant case is in a situation similar to that described above, the Court finds that the period of five (5) years, one (1) month and twelve (12) days, in which it was seized is a reasonable period within the meaning of Article 56(6) of the Charter. It therefore dismisses the objection to the admissibility of the Application on the grounds of non-compliance with a reasonable period for filing the Application before the Court.

i. Conditions that are not in contention between the Parties

56. The Court notes that the issue of compliance with sub rules

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7 *Norbert Zongo and Others v Burkina Faso(*Application No. 013/2011) , Ruling on Preliminary Objections, 21 June, 2013, para 121; *Alex Thomas v United Republic of Tanzania,* (Application No. 005/2013), Judgment of 20 November 2015, para 73; *Mohamed Abubakari v United Republic of Tanzania (*Application No. 007/2013), Judgment of 3 June 2016, para 91.

8 Mohamed *Abubakari v United Republic of Tanzania,(*Application No. 007/2013)*,* Judgment of 3 June 2016 para 92.

40(1), (2), (3), (4), and (7) of the Rules is not in contention between the Parties, and nothing in the file indicates that they have not been complied with. The Court therefore holds that the admissibility requirements under those provisions have been met.

57. In light of the foregoing, the Court finds that the instant Application fulfils all the admissibility requirements under Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VI. The merits

58. The Applicant alleges that the Respondent violated Articles 1, 2, 3, 4, 5, 6, 7(1)(c) and 7(2) of the Charter. The Court however notes that the Applicant made submissions only in regard to the violation of the right to fair trial.

59. In the circumstances, only the allegations substantiated by the Applicant, namely, the allegations regarding violation of Article 7 of the Charter, will be examined by the Court.

A. The allegation that the Applicant was charged and convicted on the basis of a deposition which does not corroborate the particulars on the charge sheet

60. In the Application, it is contended that the trial magistrate and the Appellate Judges grossly erred in law and in fact for having taken into account the core statement of Prosecution Witness 1 (PW1), which statement does not corroborate the particulars on the charge sheet, especially the list of the items alleged to have been stolen, their respective value and the total estimated amount.

61. The Respondent refutes this allegation, contending that following an evaluation of the evidence presented, the trial magistrate found that the theft actually took place; that probative testimonies had established that the Applicant was indeed the person who participated in the theft, and that it was on the strength of this evidence that the Applicant was convicted.

62. It further states that the Court of Appeal clearly indicated that the guilty verdict against the Applicant was not grounded on the doctrine of recent possession, but that "he was convicted because he was found, red-handed, along with other people, robbing the complainant"; that in the circumstances, it does not matter whether or not the testimony of the Prosecution Witness 1 (PW1) corroborated the content of the charge sheet as there was direct credible evidence which the Judge duly took into account.

63. The Respondent, in conclusion, submits that this allegation is

baseless and must consequently be dismissed.

64. The relevant section of Article 7(1)(c) of the Charter provides that: "Every individual shall have the right to have his cause heard..."

65. This Article may be interpreted in light of the provisions of Article 14(1) of the Covenant which provides that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to *a fair* and public hearing by a competent, independent and impartial tribunal established by law*…." (italics added)*

66. It is evident from the above two provisions, read together, that everyone has the right to a fair trial**.**

67. The records of proceedings at national level show that the Applicant was caught red-handed committing armed robbery. The Court also notes that the national courts heard the Applicant as well as three eye witnesses, in addition to the victim; and that all declared having seen the Applicant in the act of committing the offence.

68. It is also evident from the judgement of the Court of Appeal that it examined all the pleadings by the Applicant before upholding the decision rendered by the lower courts.

69. The Court recalls that its role in regard to evaluation of the evidence on which the conviction by the national judge was grounded is limited to determining whether, generally, the manner in which the latter evaluated such evidence is in conformity with the relevant provisions of applicable international human rights instruments.[9]

70. In view of the foregoing, the Court finds that the evidence of the national courts has been evaluated in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter.

71. The Court thus dismisses the Applicant's allegation that he had been charged and convicted on the basis of a single deposition which does not corroborate the particulars on the charge sheet, and holds that there was no violation of Article 7(1)(c) of the Charter in this regard.

B. The allegation that during the proceedings the Applicant was not afforded legal assistance

72. In the Application, it is alleged that the Respondent violated the Applicant's right to be represented by Counsel.

73. The Respondent argues that the Applicant has not raised this issue before the national courts. It submits that it has gone through the records of the court procedure as well as the two appeal procedures,

9 *Mohamed Abubakari v United Republic of Tanzania* (Application No. 007/2013), Judgment of 3 June 2016, para 26.

and no where did the Applicant solicit legal assistance and was denied such assistance by the certification authority.

74. The Respondent further maintains that the Applicant nonetheless has legal means to solicit legal assistance in accordance with Article 3 of the law on legal assistance (Criminal Procedure), [Chapter 21 Revised Edition 2002]; that he could have also sought such assistance during the procedure before the Court of Appeal under Rule 31(1), Part II of the 2009 Tanzania Court of Appeal Rules, but he had not availed himself of the said remedies.

75. The Applicant explains that at no time during the procedure was he informed of the possibility of obtaining free legal assistance as prescribed by law; that the Respondent had the positive obligation to notify the Applicant, *suo motu*, of the existence of such right ; that this obligation is even primordial where the individual concerned is a lay person and an indigent detainee facing a serious charge; that this is also the position of this Court in *Alex Thomas* and *Mohamed Abubakari v United Republic of Tanzania,* and that these precedents should equally apply in the instant case.

76. According to Article 7(1)(c) of the Charter,

> "Every individual shall have the right to have his cause heard. This right comprises:
>
> a. …
>
> b. …
>
> c. the right to defence, including the right to be defended by counsel of his choice...".

77. Article 14(3)(d) of the Covenant on its part provides that

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

78. In its Judgment in *Mohamed Abubakari v United Republic of Tanzania*, this Court held that "an indigent individual under prosecution for a criminal offence has the special right to free legal assistance where

the offence is serious and punishment prescribed by law severe".[10]

79. In the instant case, the Applicant being in the same situation as described above, the Court holds that the Respondent should have offered him, *proprio motu* and free of charge, the services of a lawyer throughout the judicial procedure. Having failed to do so, the Respondent violated Article 7(1)(c) of the Charter.

C. The allegation that the thirty (30) year prison sentence was not in force at the time the robbery occurred

80. In the Application, it is argued that the thirty (30) year custodial sentence imposed on the Applicant by the national courts was not in force at the time the alleged robbery with violence was committed; that Sections 285 and 286 of the Penal Code prescribed a maximum sentence of fifteen (15) years; that the thirty (30) year prison sentence came into force only in 2004, following decree No. 269 of 2004, as amended, which became Section 287 A of the Penal Code.

81. The Applicant therefore submits, from the foregoing, that the national courts violated Articles 13(b)(c) of the 1997 Constitution of the United Republic of Tanzania as well as Articles 1, 2, 3, 4, 5, 6, 7(1) (c) and 7(2) of the Charter.

82. The Respondent refutes the Applicant's allegations in their entirety. It contends that in Criminal Case No. 424/2002, the Applicant had been accused of armed robbery which is contrary to Sections 285 and 286 of the Penal Code, Chapter 16 of the Laws of Tanzania; that at the time of conviction and determination of the punishment, the Minimum Sentence Act of 1972 was in force; that, that Act was amended in 1994 by the Miscellaneous Amendment Act No. 6/1994; that the new law abrogated the 20 year imprisonment and introduced an obligatory minimum punishment of thirty (30) years.

83. The Respondent further indicates that it is not the first time the question of armed robbery offence, contrary to Sections 285 and 286 of the Penal Code Chapter 16, has emerged, as well as the punishment commensurate with this offence before 2004; that the Court of Appeal of Tanzania has made a ruling on this issue in the *Matter of William R Gerison v The Republic*, in Appeal Case No. 69/2004.

84. The Respondent submits in conclusion that the Applicant's allegations are without relevance and are baseless given that he was accused of armed robbery in 2002, whereas the minimum punishment had been amended eight (8) years earlier.

10 Judgment of 3 June 2016, para 139. See also *Alex Thomas v United Republic* of Tanzania, Judgment of 20 November 2015, para 124.

85. In his Reply, the Applicant states that he no longer intends to adduce arguments on the legality of the punishment imposed on him and that the Court may therefore consider this issue as no longer in contention between the Parties.

86. The Court notes that the Applicant abandoned this allegation. For its part, the Court has already found that thirty (30) years has been, in the United Republic of Tanzania, the minimum punishment applicable to the offense of armed robbery since 1994.[11] Consequently, it holds that the Respondent has not violated any provision of the Charter in sentencing the Applicant to this term of imprisonment.

D. The allegation that the Respondent violated Article 1 of the Charter

87. In the Application, it is alleged in general terms that the Respondent violated Article 1 of the Charter. The Respondent did not make any submission on this allegation.

88. Article 1 of the Charter provides that: "The Member States of the Organisation of African Unity, Parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them".

89. The Court has found that the Respondent violated Article 7(1)(c) of the Charter for failing to avail the Applicant with free legal assistance. It therefore reiterates its decision in *Alex Thomas v the United Republic of Tanzania.* In that Matter, the Court noted that "…when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated."[12]

90. Having established that the Applicant was denied his right to free legal assistance, in violation of Article 7(1)(c) of the Charter, the Court finds that the Respondent consequently violated its obligation under Article 1 of the Charter.

11 *Mohamed Abubakari v United Republic of Tanzania (*Application No. 007/ 2013), Judgment of 3 June 2016, para 210.

12 *Alex Thomas v United Republic of Tanzania (*Application No. 005/2013*),* Judgement of 20 November, 2015, para 135.

VII. Reparations

91. In the Application, the Court is requested to: (i) restore the Applicant's rights, (ii) annul the guilty verdict and the punishment imposed on him, (iii) order his release from detention, and (iv) order that reparations be made for all the human rights violations established.
92. In its Response, the Respondent prays the Court to dismiss the Application in its entirety for being groundless, and therefore rule that the Applicant is not entitled to reparations.
93. 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."
94. In this respect, Rule 63 of the Rules provides that "the Court shall rule on the request for the reparation by the same decision establishing the violation of a human and people's rights, or if the circumstances so require, by a separate decision".
95. As regards the Applicant's prayer to be set free, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances[13]. In the instant case, the Applicant has not provided proof of such circumstances. Consequently, the Court dismisses the prayer.
96. The Court however notes that such finding does not preclude the Respondent from considering such measure on its own.
97. On the request to annul the conviction and sentence against the Applicant, the Court notes that it does not have the power to annul Decisions rendered by national courts. It therefore dismisses that request.
98. The Court finally notes that none of the Parties made submissions on the other forms of reparations. It will therefore make a ruling on this question at a later stage of the procedure after having heard the Parties.

VIII. Costs

99. In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."
100. Having considered the circumstances of this matter, the Court decides that each party should bear its own costs

13 *Alex Thomas v United Republic of Tanzania (*Application No. 005/2013*)*, Judgment of 20 November 2015, para 157; Mohamed *Abubakari v United Republic of Tanzania* (Application No. 007/2013), Judgment of 3 June 2016, para 234.

101. For these reasons:
The Court
Unanimously:
i. *Dismisses* the objection to the jurisdiction of the Court raised by the Respondent;
ii. *Declares* that it has jurisdiction to hear the instant Application;
iii. *Dismisses* the objection on the admissibility of the Application raised by the Respondent;
iv. *Declares* the Application admissible
v. *Holds* that the Respondent has not violated Article 7(1) of the Charter in terms of the Applicant's allegations that he was charged and convicted on the basis of a deposition which does not corroborate the particulars on the charge sheet and that the 30 year prison sentence was not in force at the time the offence was committed;
vi. *Holds* that the Respondent violated Article 7(1)(c) of the Charter in terms of the Applicant's allegation that he did not have the benefit of free legal assistance**,** and that, consequently, the Respondent also violated Article 1 of the Charter;
vii. *Dismisses* the Applicant's prayer for the Court to directly order his release from prison without prejudice to the Respondent applying such measure *proprio motu*;
viii. *Dismisses* the Applicant's prayer for the Court to set aside his conviction and sentence without prejudice to the Respondent applying such measure *proprio motu.*
ix. *Reserves* its ruling on the Applicant's prayer on other forms of reparation measures;
x. *Requests* the Applicant to submit to the Court his Brief on other forms of Reparations within thirty days of receipt of this Judgment; also requests the Respondent to submit to the Court its Response on Reparations within thirty days of receipt of the Applicant's Brief;
xi. *Rules* that each Party shall bear its own costs.

Diakité v Mali (jurisdiction and admissibility) (2017) 2 AfCLR 118

Application 009/2016, *Diakité Couple v Republic of Mali*

Judgment, 28 September 2017. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Court found the Application inadmissible for non-exhaustion of local remedies in a case where the Applicants, who were victims of robbery, alleged that the crime was not sufficiently investigated by the police.

Admissibility (exhaustion of local remedies, filing civil suit, 46, 51-55)

I. The Parties

1. The Applicants, Mr and Mrs Diakité are citizens of Mali residing in Bamako, Cité du CHU Point-G.

2. The Respondent is the Republic of Mali, which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 22 January 1982 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 20 June 2000. The Republic of Mali also deposited, on 19 February 2010, the Declaration recognizing the jurisdiction of the Court to hear cases filed by individuals and non-governmental organizations. She further, on 16 July 1974, acceded to the International Covenant on Civil and Political Rights of 16 December 1966 (hereinafter referred to as "the Covenant").

II. Subject of the Application

3. The Court was seized of this matter by an Application dated 19 February 2015 together with written observations. Also annexed thereto was the correspondence addressed by the Applicants to the Malian judicial authorities in respect of the instant case.

A. The facts

4. The Applicants submit that, on 14 November 2012, their home was robbed and vandalized by unknown persons. The items stolen included an HP laptop computer, medical appliances, USB flash disks, books, land allocation letter and copies of educational certificates.

5. According to the Applicants, a complaint against an unknown person (complaint against X) was filed on the same day at the Office of the State Prosecutor for Bamako District.
6. Fifteen (15) days after the robbery, a certain Oumar Maré was found in possession of a knife from the home of the Applicants' immediate neighbour, stolen on the same night their home was robbed and vandalized.
7. Mr Oumar Maré was then brought to the Bamako 12th District Police Station which took the statements of the complainants and the witnesses. The suspect was however released after only five days in custody.
8. The Applicants indicate that they seized, one after the other, the Superintendent of the Police Unit concerned, the State Attorney and the Prosecutor General of Bamako, and that no reply was received to their complaint.

B. Alleged violations

9. The Applicants submit that this attitude of the Bamako 12th District Police headquarters constitutes a serious violation of their rights as enshrined in Article 7 of the Charter which stipulates that everyone shall have the right to have his cause heard; in particular, the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.
10. They also submit that by leaving unpunished the aggression of which they have been victim, whereas they did all they could to get one of the criminals arrested, the judicial authorities of Mali violated their right to equality before the law and equal protection of the law as set forth in Article 3 of the Charter; their right to peace as enshrined by Article 23 of the Charter; their right to property as guaranteed by Article 14 of the same Charter as well as Article 2(3)(a) and (b) of the Covenant.

III. Summary of the procedure before the Court

11. The Application was filed on 19 February 2016.
12. On 4 April 2016, the Applicants filed their observations on the question of exhaustion of local remedies. The said observations were subsequently served on the Respondent on 6 April 2016.
13. On 22 April 2016, the Application was transmitted to all States Parties to the Protocol and to the other entities mentioned in Rule 35(3) of the Rules of Court (herein-after referred to as the "Rules").
14. On 13 May 2016, the Respondent submitted its Response which

was transmitted to the Applicants on the same day. On 9 August 2016, the Applicants filed their Reply**.**

15. On 17 August 2016, the Respondent sought leave of Court to file a Rejoinder to the Applicants' Reply.

16. The Court granted the request, and on 9 September 2016, the Respondent filed its Rejoinder.

17. On 26 September 2016, the Registry notified the Parties that the written procedure was closed. The Court decided not to hold a public hearing on the matter.

IV. The Parties' Prayers

18. The Applicants pray the Court to:

"i. declare their Application admissible and founded in fact and in law;

ii. order the Respondent to enact special legislation restricting the preliminary investigation to a set time limit;

iii. rule that failure to observe the set time limit will negatively affect the preliminary investigation report;

iv. order the State of Mali to enact legislation recognizing the responsibility of the State for the procedural misconduct of its agents;

v. order the Respondent to pay them the following sums of money:

1. 10,867,000 CFA F being the value of the items stolen;
2. 7,000,000 CFA F, being the hard-to-assess value of the items and the works stolen;
3. 5,000,000 CFA F being the moral prejudices suffered by the entire members of their family;
4. 9,000,000 CFA F being lawyer's fees for the procedure at local level and for the current procedure;
5. 1,000,000 CFA F being the procedural costs".

19. The Respondent prays the Court :

"i. with respect to form: to declare the Application inadmissible for failure to exhaust the local remedies;

ii. on the merits: should this issue arise, to dismiss the Application as unfounded."

V. Jurisdiction of the Court

20. In terms of Rule 39(1) of its Rules, the Court "…shall conduct

preliminary examination of its jurisdiction ..."

21. The Court notes that the Respondent does not contest its jurisdiction. However, it notes that even if the Respondent has not raised objection regarding its jurisdiction, it must, of its own motion, satisfy itself that it has material, personal, temporal and territorial jurisdiction to hear the Application.

22. As regards material jurisdiction, Article 3(1) of the Protocol provides that:

> "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

23. The Court notes that the violations alleged by the Applicants all relate to the Charter and the Covenant, instruments to which the Respondent is a Party. It therefore holds that it has the material jurisdiction to examine the instant case.

24. As regards the other aspects of its jurisdiction, the Court holds that:

i. it has personal jurisdiction given that the Republic of Mali is a Party to the Protocol, and has also deposited the declaration prescribed under Article 34(6) cited above *(supra* paragraph 2*);*

ii. it has temporal jurisdiction given that the alleged violations occurred after the entry into force of the afore-mentioned instruments in respect of the Respondent *(supra* paragraph 2*);*

iii. it has territorial jurisdiction in so far as the facts occurred on the Respondent's territory.

25. It thus follows from all the foregoing considerations that the Court has jurisdiction to hear the instant case.

VI. Admissibility of the Application

26. In terms of Article 6(2) of the Protocol: "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

27. Rule 40 of the Rules which essentially reproduces the contents of Article 56 of the Charter, provides that:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:
>
> "(1) disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> 2. comply with the Constitutive Act of the Union and the Charter;
>
> 3. not contain any disparaging or insulting language;

4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter;
7. not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

28. Of the seven (7) conditions mentioned above, the Respondent raised only one objection in relation to exhaustion of local remedies.

A. Conditions that are not in contention

29. The Court notes that the conditions mentioned in sub-paragraphs 1, 2, 3, 4, 6 and 7 of Rule 40 of the Rules are not in contention between the Parties.

30. The Court further notes that nothing in the records submitted to it by the Parties suggests that any of the said conditions would not be fulfilled in the instant case.

31. Consequently, it finds that the afore-mentioned conditions have been met in the instant case.

B. The objection to admissibility on the ground of failure to exhaust the local remedies

32. The Respondent submits that it was premature on the part of the Applicants to have brought the instant case before this Court given that there were still local remedies available to them.

33. According to the Respondent, the Applicants, by virtue of Article 62 of Law No. 01-080 of 20 August 2001 on the Code of Criminal Procedure of Mali, could have instituted civil action before the investigating judge. It maintains that this procedure does not even require, as a precondition, discontinuation of a case by the State Attorney.

34. The Respondent maintains that, contrary to the Applicants' allegations, there has been no inaction on the part of the Public Prosecutor's Office or an attempt by the Police to stifle the complaint; that the Applicants had it in their imagination that Mr Oumar Maré apprehended two weeks after the burglary and interrogated on another robbery committed in the home of their neighbour, was the author of the

robbery of which they are victims, whereas the two cases are distinct and have no proven link between them.

35. It contends that in the context of Mr Oumar Maré's arrest, a search was conducted at his home and none of the items stolen from the Applicants' home was found there; that despite all that, the Applicants are intent on getting justice to prosecute and convict Mr Oumar Maré as the author of the robbery, whereas no evidence of guilt has been found against him.

36. It further contends that if the Applicants were so convinced that Mr. Oumar Maré was the perpetrator of the robbery, and given the alleged inaction of the Police and the Office of the State Attorney, they could have brought a civil action before the competent investigating judge; that, in reality, the Applicants were apprehensive of the uncertain outcome of such a procedure and would want this Court to substitute itself for the domestic Courts in order for them to obtain redress.

37. The Respondent, in conclusion, submits that it has not violated any rights of the Applicants in terms of the domestic proceedings.

38. In their Reply, the Applicants maintain that filing a civil suit is not a remedy within the meaning of Article 56(5) of the Charter; that in the Republic of Mali, a victim has the option of referring a case to the State Attorney or to an Investigating Judge; that the use of either option closes the other for the purposes of proper administration of justice; that, besides, the two procedures have the same finality, that is, investigation by an investigating judge.

39. They maintain that the attitude on the part of the judicial authorities of Mali of abandoning the procedure at the initial stage for over three (3) years constitutes an undue prolongation of the procedure within the meaning of Article 56(5) of the Charter.

40. Relying on the Decision of the African Commission on Human and Peoples' Rights in Communication *Dawda K Jawara v The Republic of The Gambia* (Communication No. 147/95-149/96), the Applicants submit that the remedy proposed by the Respondent is neither effective nor sufficient and that, the undue prolongation of local procedures provides justification for the Court to declare their Application admissible.

41. As the Court underscored in its previous judgments, the rule regarding the exhaustion of local remedies prior to referral to an international human rights Court is one that is recognized and accepted internationally.[1]

42. It is clear from the records that the Applicants do not contest

1 Application 004/2013, *Lohé Issa Konaté v Burkina Faso* (Preliminary Objections), Judgment of 5 December 2014, para 78.

that they have not used the totality of the judicial remedies existing in the Respondent State's system. What is in contention between the Parties is, on the one hand, the question as to whether the duration of the procedure at national level has been unduly prolonged within the meaning of Article 56(5) of the Charter and Rule 40(5) of the Rules; and, on the other, the question as to whether referral to the investigating judge is, in the judicial system of the Respondent State, a remedy that is available, effective and sufficient.

43. Whereas the Respondent contends that the procedure was stalled because the Police was unable to apprehend the perpetrator(s) of the robbery, the Applicants, for their part, maintain that the author of the robbery was identified, but that the Police and Office of the State Attorney did not take steps to close the case at their level.

44. The question that arises at this juncture is whether there exists in the Respondent's judicial system a remedy that the Applicants could have exercised to by-pass what they have described as "lack of diligence on the part of the Police and the Office of the State Attorney".

45. In this regard, Article 62 of the Code of Criminal Procedure of Mali states that: "Any person claiming to be aggrieved by a crime or a misdemeanor may lodge a complaint in a civil suit before a competent investigating judge".

46. It is clear from the foregoing provision that the Applicants had, at least, the possibility of bringing the case directly before an investigating judge by filing a civil suit.

47. As regards the effectiveness and sufficiency of this remedy, Article 90 of the Code of Criminal Procedure of Mali provides that: "The investigating judge shall, in accordance with the law, undertake all such acts of information as he deems useful to ensure manifestation of the truth."

48. Article 112 of the same Code stipulates that: "Counsel for the accused and the civil party, both during the investigation and after communication of the proceedings to the registry, may in writing close the hearing of new witnesses, adversarial sessions, expert opinions and all such acts of investigation as they consider relevant for the defense of the accused and the interests of the civil party. The judge shall give reasons for the order by which he refuses to carry out any additional investigative measures requested of him. The accused and the civil party may appeal the order, either by themselves or through their counsel."

49. It is apparent from the foregoing provisions that the investigating judge can undertake all acts of investigation requested of him by the accused or the injured party, and that the latter even has the right to appeal an order that refuses to undertake the investigative measures requested.

50. It is noteworthy at this juncture that a complaint filed together with a civil suit enables the victim to get associated with the conduct of the procedure and that, in his capacity as a Party to the penal process has the right to directly request the investigating judge to commence an investigation.

51. In view of the foregoing, the Court holds in conclusion that referral to the investigating judge is, in the Respondent's judicial system, an effective and sufficient remedy which the Applicants could exercise to obtain, or at least seek to obtain consideration of their complaint.

52. Having failed to exercise this remedy, the Applicants are not founded in submitting that the proceedings have been unduly prolonged or that this remedy has supposedly not resolved their problem.

53. In its previous judgments, the Court established that exhausting local remedies is an exigency of international law and not a matter of choice; that it lies with the Applicant to take all such steps as are necessary to exhaust or at least endeavor to exhaust local remedies; and that it is not enough for the Applicant to question the effectiveness of the State's local remedies on account of isolated incidents[2].

54. In view of the foregoing, the Court finds that the Applicants have not complied with the requirement of exhaustion of local remedies set forth in Article 56 (5) of the Charter, and that, consequently, their Application is inadmissible.

55. Having found that the Application is inadmissible for failure to exhaust local remedies, the Court decides that the matter shall not be examined on the merits.

VII. Costs

56. In accordance with Rule 30 of its Rules: "Unless otherwise decided by the Court, each party shall bear its own costs".

57. Having taken the circumstances of the instant case into account, the Court decides that each Party shall bear its own costs.

58. For these reasons,

The Court

Unanimously

i. *Declares* that it has jurisdiction to hear this matter;

ii. *Upholds* the Respondent's objection regarding the inadmissibility of the Application for failure to exhaust the local remedies;

iii. *Declares* the Application inadmissible;

iv. *Rules* that each Party shall bear its own costs.

2 *Peter Joseph Chacha v United Republic of Tanzania* (Application No 003/2012), Judgment of 28 March 2014, paras 142,143 and 144.

Thomas v Tanzania (interpretation) (2017) 2 AfCLR 126

Application 001/2017, *Alex Thomas v United Republic of Tanzania*

Judgment, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

Rule 66(4) applied in respect of Judges THOMPSON and TAMBALA

Interpretation of judgment delivered by the Court in 2015 requested by Tanzania on the meaning of "all necessary measures" and "precluding reopening and retrial" in reparation of fair trial rights violations. The Court ruled that Tanzania should take measures to eliminate the effects of the violation which could include release of the imprisoned person, but should not include retrial.

Reparations (fair trial, re-opening of domestic proceedings, 34, 42; eliminate effects of violation, 35, 39, 40)

I. Procedure

1. The United Republic of Tanzania filed, pursuant to Article 28(4) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 66(1) of the Rules an Application dated 24 January 2017 and received at the Registry of the Court on 30 January 2017, for interpretation of the Judgment rendered on 20 November 2015 in the above-mentioned matter. The United Republic of Tanzania also filed, pursuant to Practice Direction No. 38 of the Practice Directions of the Court, an application for extension of time to file the Application for interpretation of the Judgment.

2. By a notice dated 3 February 2017, the Registry transmitted a copy of the Application for extension of time to file the Application for Interpretation of Judgment to Mr Alex Thomas, who was invited to file observations within fifteen (15) days of receipt. He filed the observations on 17 February 2017 and these were transmitted to the United Republic of Tanzania, for information, by a letter dated 21 February 2017. In the said observations, Mr Thomas opposed the granting of the extension of time to file the application, maintaining that, the time limit for doing so had expired by 10 months and that there are measures that the United Republic of Tanzania can take to implement the judgment.

3. On 14 March 2017, during the Court's 44th Ordinary Session held from 6 to 24 March 2017, the Court decided to grant, in the interest of justice, the United Republic of Tanzania's request to file the Application for Interpretation of Judgment out of time.

4. The Application for interpretation of Judgment was served on Mr. Thomas by a notice dated 14 March 2017. By the same notice, and pursuant to the provisions of Rule 66(3) of the Rules, Mr. Thomas was invited to submit written observations within 30 days from receipt thereof, which he filed on 18 April 2017.

5. At its 45th Ordinary Session held from 8 to 26 May 2017, the Court, pursuant to Rule 59(1) of the Rules decided to close the proceedings in the matter. In accordance with Rule 66(3) of the Rules, the Court decided not to hold a public hearing in the matter.

II. The request for interpretation

6. As indicated above, the instant Application concerns the Judgment rendered by the Court on 20 November 2015 (the Matter of *Alex Thomas v The United Republic of Tanzania* (Application 005/2013), the relevant paragraphs of which are worded as follows in the operative provisions:

> "For these reasons,
>
> 161. The Court,
>
> holds,
>
> …
>
> vii. Unanimously, that there has been a violation of Articles 1 and 7(1) (a), (c) and (d) of the Charter and Article 14(3)(d) of the ICCPR.
>
> viii. By a vote of six (6) to two (2), Judge Elsie N. THOMPSON, Vice-President and Judge Rafâa BEN ACHOUR dissenting, that the Applicant's prayer for release from prison is denied.
>
> ix. Unanimously, that the Respondent is directed to take all necessary measures within a reasonable time to remedy the violations found, specifically precluding the reopening of the defence case and the retrial of the Applicant, and to inform the Court, within six (6) months, from the date of this judgment of the measures taken."

7. Referring to Rule 66(1) of the Rules, the United Republic of Tanzania, avers that it is encountering difficulties in the implementation of the judgment due to varied interpretations by the actors involved in the administration of criminal justice at the national level, who are required to implement the judgment.

8. Consequently, the United Republic of Tanzania prays the Court to clarify the meaning of the expression "all necessary measures" used in point ix of the operative provisions of the Judgment. More specifically, the United Republic of Tanzania requests clarification on the measures

it is required to implement and what the benchmarks for "all" and for "necessary" are, to enable it take tangible and definitive action.

9. The United Republic of Tanzania asserts that the "violations found" have not been highlighted in the operative provisions of the Judgment therefore they are seeking guidance on whether they relate to what is stated in the text of the judgment or whether the violation to be remedied should be on the aspect of "specifically precluding the reopening of the defence case and the retrial of the Applicant". The United Republic of Tanzania also seeks to understand how to remedy the violation.

10. The United Republic of Tanzania is seeking an interpretation of the word "precluding", stating that it had initially interpreted the word "precluding" to mean excluding but that discussions with stakeholders have brought to light another interpretation to mean "to perform or to include". In this regard, the United Republic of Tanzania wishes to have clarification on whether the order of the Court is "to re-open" the trial and if so, the Court should clarify at what stage the trial should be reopened, whether from the beginning or for the defence's case only.

III. Observations of Mr Alex Thomas

11. Mr Thomas notes that the Application for interpretation of Judgment has been filed out of time without any explanation and also that it has failed to meet the provisions of Rule 66 of the Rules. He maintains that the United Republic of Tanzania has continuously failed to implement the Court's Orders by not reporting on the measures taken to remedy his situation within six (6) months of the Judgment and by failing to respond to his submissions on reparations.

12. Mr Thomas emphasises that the Application for interpretation of Judgment should have preceded the filing of the report on implementation of the Judgment, which he notes has been filed almost eight (8) months out of time. He urges the Court, when considering the admissibility of the Application, to take into consideration the prejudice occasioned to him by the United Republic of Tanzania's failure to adhere to the Court's Orders and the filing of the Application for interpretation.

13. Mr Thomas states that the United Republic of Tanzania has misinterpreted the meaning of the word "precluding" to mean that the Court ordered a re-opening of the defence case and a retrial at the same time.

14. He also contends that there are various options, either taken alone or in combination, which the United Republic of Tanzania can effect in compliance with the Court's Order to *"*take all appropriate measures within a reasonable time frame, to remedy all the violations established*"*; that the United Republic of Tanzania's legislation

provides for many possible remedies for wrongfully convicted persons such as himself; that these remedies include, but are not limited to, the following:

> "a. Remission of sentence, provided for under the Penal Code Chapter 16, which at Section 27 (2) provides for the remission of a prison sentence in respect of which the United Republic of Tanzania could have filed an application at the Court of Appeal for the remission of the Applicant's thirty (30) years prison sentence.
>
> b. Outright or conditional discharge provided for under Section 38 of the Penal Code which confers powers on the Court which convicted an offender to order his absolute or conditional discharge, provided that the offender does not commit another offence during the period of conditional discharge, and such period must not exceed 12 months. In this regard, since the Applicant has served twenty (20) years of his thirty (30) years' sentence and considering the favourable Judgment of this Court and his conduct during his imprisonment, the United Republic of Tanzania could have taken this measure.
>
> c. Presidential pardon, provided for under Section 45 of the Constitution of the United Republic of Tanzania, pursuant to which the President of the United Republic of Tanzania may grant pardon, with or without condition, to any person convicted of an offence by a court."

15. Mr Thomas submits that the delay in implementing the Court's Orders and in submitting the relevant report on compliance thereof has aggravated and unduly prolonged the violation of his rights and in light of this, the Court should set him free to ensure there are no further infringements of his rights.

16. Mr Thomas prays for:

> "1. A Declaration that the Respondent is in default of this Honourable Court's Orders by failing to file a Report within six months of delivery of Judgment.
>
> 2. A Declaration that the Respondent is in further default of Orders by failing to file a Response to the Applicant's Submissions on Reparations on time or at all.
>
> 3. A Declaration that the instant Application is, in any case, frivolous, vexatious and an abuse of the process of this Honourable Court.
>
> 4. An Order to set the Applicant free pending the Judgment on reparations."

IV. Jurisdiction of the Court

17. The instant Application for interpretation concerns the Judgment rendered by the Court on 20 November 2015.
18. In terms of Article 28(4) of the Protocol "… the Court may interpret its own decision.''
19. The Court consequently finds that it has jurisdiction to interpret the said Judgment.

V. Admissibility of the Application

20. Rule 66(1) and (2) of the Rules provide as follows:

"1. Pursuant to Article 28(4) of the Protocol, any party may, for the purpose of executing a judgment, apply to the Court for interpretation of the judgment within twelve months from the date the judgment was delivered unless the Court, in the interest of justice, decides otherwise".

2. The application shall be filed in the Registry. It shall state clearly the point or points in the operative provisions of the judgment on which interpretation is required."

21. It is clear from these provisions that an Application for interpretation of a Judgment can be declared admissible only when it fulfills three conditions:

"a. its objective must be to facilitate the execution of the Judgment;

b. it must be filed within twelve (12) months following the date of the delivery of the Judgment unless the Court, "in the interest of justice' decides otherwise"; and

c. it must clearly state the point or points of the operative provision of the Judgment on which interpretation is required."

22. As regards the purpose of the instant Application, the Court wishes to clarify an aspect of the operative part of the judgment in order to facilitate the execution of the Judgment rendered by the Court on 20 November 2015.
23. The Court notes that the instant Application actually aims to clarify a point in the operative provisions of the Judgment rendered by the Court on 20 November 2015 and thus facilitate its execution.
24. Consequently, it finds that the Application fulfills the first condition provided under Rule 66(1) of the Rules.
25. With regard to the time limit within which such an Application should be filed, the Court notes that the Judgment in respect of which interpretation is requested was rendered on 20 November 2015 and that

the United Republic of Tanzania filed its Application for interpretation on 30 January 2017, just over two (2) months after the twelve (12) month period provided under Rule 66(1) of the Rules. However, Rule 66(1) allows the Court to accept such applications even after the twelve (12) month period specified, if this is in the interest of justice. The Court considered the circumstances of the matter and decided to allow the application on this basis.

26. Lastly, the Court notes that the United Republic of Tanzania clearly stated the points in the operative provisions of the Judgment on which interpretation is required, namely, the terms and expressions used in point (ix) of the operative provisions of the Judgment.

27. In view of the aforesaid, the Court finds that the instant Application for interpretation fulfills all the conditions of admissibility.

VI. Interpretation of the judgment

28. In its judgment of 20 November 2015, the Court ordered the United Republic of Tanzania to take all necessary measures to remedy the violations found.

29. On the first question, the United Republic of Tanzania prays the Court to interpret the expression "all necessary measures" used in point ix of the operative provisions of the Judgment.

30. The Court notes that in examining an Application for interpretation, it does not complete or modify the decision it rendered it being a final decision with the effect of res judicata – but clarifies the meaning and scope thereof.

31. Court wishes to recall the principle generally applied by international jurisdictions that reparation should, as far as possible, erase the consequences of an unlawful act and restore the state which would have presumably existed if the act had not been committed.

32. In this regard, 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 for reparation".

33. As has been stated above the most appropriate form of remedy for violation of the right to a fair trial is to act in such a way that the victim finds himself or herself in the situation that he or she would have been had the violation found not been committed. To attain this objective, the United Republic of Tanzania has two alternatives: it should either reopen the case in compliance with the rules of a fair trial or take all appropriate measures to ensure that the Applicant finds himself in the situation preceding the violations.

34. As regards the first option, the Court is of the view that reopening the case would not be a just measure, in as much as the Applicant has

already spent twenty one (21) years in prison, more than half of the prison sentence, and given that a fresh judicial procedure could be long.[1] Accordingly, the Court has excluded such a measure.

35. Concerning second option, the Court intended to offer the United Republic of Tanzania State room for evaluation to enable it to identify and activate all the measures that would enable it eliminate the effects of the violations established by the Court.

36. The Court specifies at this juncture that in its Judgment of 20 November 2015, it did not state that the Applicant's request was unfounded. It merely indicated that it could order such a measure directly, only in specific and compelling circumstances which have not been established in the instant case.

37. The second question for which the United Republic of Tanzania is seeking clarification is, on whether the violations found are what is stated in the text of the judgment or whether the violation to be remedied should be on the aspect of "specifically precluding the reopening of the defence case and the retrial of the Applicant". The United Republic of Tanzania also seeks to understand how to remedy the violation.

38. The Court notes that point vii of the operative provisions of the Judgment specified the provisions that the United Republic of Tanzania was found to have violated, that is, Articles 1 and 7(1)(a), (c) and (d) of the African Charter on Human and Peoples' Rights and Article 14(3)(d) of the International Covenant on Civil and Political Rights and consequently it should take all necessary measures to remedy these violations.

39. The Court clarifies that the expression "all necessary measures" includes the release of the Applicant and any other measure that would help erase the consequences of the violations established and restore the pre-existing situation and re-establish the rights of the Applicant.

40. The Court further clarifies that the expression "remedy all violations found" should therefore mean to "erase the effects of the violations established" through adoption of the measures indicated in the preceding paragraph.

41. The third question for which the United Republic of Tanzania is seeking an interpretation is on the word "precluding".

42. The word precluding means "preventing, banning or forbidding". It is therefore clear that the Court is prohibiting certain action, specifically that the United Republic of Tanzania should not retry the Applicant or re-open the defence case. As mentioned before, this is because doing so would result in prejudice to the Applicant who has already served

1 Application No. 005/2013 *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 para 158.

twenty one (21) years of his thirty (30) years prison sentence.

VII. Costs

43. In terms of Rule 30 of the Rules, "unless otherwise decided by the Court, each party shall bear its own costs".
44. Taking into account the circumstances of this matter the Court decides that each party should bear its own costs.
45. For these reasons,
The Court,
Unanimously:
i. *Declares* that it has jurisdiction to hear the instant Application;
ii. *Declares* that the Application is admissible;
iii. *Rules* that by the expression "all necessary measures", the Court was referring to the release of the Applicant or any other measure that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicant;
iv. *Rules* that the expression "remedy the violations found" means "erase the effects of the violations found" through the adoption of the measures indicated in point iii above;
v. *Rules* that the term "precluding" means, "rule out or prohibit", which, when read togeSther with the expression "reopening of the defence case and the retrial of the Applicant" means that the reopening of the defence case and the retrial of the Applicant is ruled out;
vi. *Rules* that each Party shall bear its own costs.

Abubakari v Tanzania (interpretation) (2017) 2 AfCLR 134

Application 002/2017, *Mohamed Abubakari v United Republic of Tanzania*

Judgment, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

Rule 66(4) applied in respect of THOMPSON, OUGUERGOUZ and TAMBALA

Interpretation of judgment delivered by the Court in 2015 requested by Tanzania on the meaning of "all appropriate measures" and "remedy all violations established" in reparation of fair trial rights violations. The Court ruled that Tanzania should take measures to eliminate the effects of the violation which could include release of the imprisoned person, but should not include retrial.

Reparations (fair trial, re-opening of domestic proceedings, 34; eliminate effects of violation, 35, 38)

I. Procedure

1. The United Republic of Tanzania, pursuant to Article 28(4) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (herein-after referred to as "the Protocol") and Rule 66(1) of the Rules, filed before the Court an Application for interpretation of the Judgment of 3 June 2016 on the above-mentioned matter.

2. Dated 24 January 2017, the Application was received at the Registry of the Court on 30 January 2017.

3. On 2 February 2017, the Registry served a copy of the Application on Mr Mohamed Abubakari and invited the latter to submit his written observations, if any, within thirty (30) days from receipt thereof, in accordance with the provisions of Rule 66(3) of the Rules.

4. On 28 March 2017, Mr Mohamed Abubakari filed his observations, after the expiry of the 30 days deadline, and prayed the Court to accept the said observations.

5. On 2 April 2017, the Court examined the Applicant's request and decided to grant the same in the interest of justice.

6. By notice dated 11 April 2017, the Parties were notified of the Court's decision to close the written procedure. The Court did not deem it necessary to hold a public hearing.

II. The request for interpretation

7. As indicated above, the instant Application for interpretation concerns the Judgment rendered by the Court on 3 June 2016 in the Matter of *Mohamed Abubakari v The United Republic of Tanzania* (Application 007/2013), the relevant paragraphs of which are worded as follows in the operative provisions:

> "For these reasons, the Court,
>
> Unanimously,
>
> …
>
> ix. *Rules* that the Respondent State has violated Article 7 of the Charter and Article 14 of the Covenant as regards the Applicant's rights to defend himself and have the benefit of a Counsel at the time of his arrest; to obtain free legal assistance during the judicial proceedings; to be promptly given the documents in the records to enable him defend himself; his defense based on the fact that the Prosecutor before the District Court had a conflict of interest with the victim of the armed robbery, to be considered by the Judge; not to be convicted solely on the basis of the inconsistent testimony of a single witness in the absence of any identification parade; and to have his alibi defense given serious consideration by the Respondent State's Police and Judicial Authorities;
>
> …
>
> xii. Orders the Respondent State to take all appropriate measures within a reasonable time frame to remedy all violations established, excluding a reopening of the trial, and to inform the Court of the measure so taken within six (6) months from the date of this Judgment
>
> …"

8. Referring to Rule 66(1) of the Rules, the United Republic of Tanzania avers that it is encountering difficulties in the implementation of the Judgment due to varied interpretations by the actors involved in the administration of criminal justice at the national level, who are required to implement the Judgment.

9. Consequently, it prays the Court to provide it with clarifications on the meaning of the expression ''all appropriate measures" used in point xii of the operative provisions of the Judgment, adding that the interpretation of the said terms will enable it to take tangible and definitive action.

10. The United Republic of Tanzania also seeks to understand what the Court means by the expression "remedy all violations established" given, it emphasizes, that the acts concerned have already been

carried out.

III. Observations of Mr Mohamed Abubakari

11. Mohamed Abubakari first indicates that the Application for interpretation seems to have been filed within the time frame prescribed under Rule 66 of the Rules; that, however, the time frame under the said Rule 66 cannot be interpreted in isolation; and that the other measures in the operative provisions of the Court's Judgment of 3 June 2016 must be taken, in consideration of the clause which enjoins the United Republic of Tanzania to notify the Court of the measures taken to remedy the violations established within six (6) months following the date of the Judgment.

12. He argues that the United Republic of Tanzania filed a report on the measures it has taken outside the specified time of six (6) months set by the Court, and that the said report represents only partial implementation of the measures ordered by the latter.

13. Abubakari further maintains that had the United Republic of Tanzania sought to have all or part of the Judgment interpreted, it could have so requested as soon as possible and in any case, prior to the expiry of the time frame ordered by the Court to receive the Respondent's report; and that the Application for interpretation should therefore have preceded the report on implementation.

14. He further contends that there are various options, either taken alone or in combination, which the United Republic of Tanzania effects in compliance with Court's Order to "take all appropriate measures within a reasonable time frame to remedy all the violations established"; that the United Republic of Tanzania legislation provides for many possible remedies for wrongfully convicted persons such as himself; that these remedies include, but not limited to, the following:

> "a. Remission of sentence, provided for under the Tanzanian Penal Code CAP 16 which at section 27(2) provides for the remission of prison sentence in respect of which the United Republic of Tanzania could have filed an Application at the Court of Appeal for the remission of Applicant's thirty (30) years prison sentence.
>
> b. Outright release or conditional release, provided under section 38 of the Tanzanian Penal Code which confers on the Court which convicted an offender the power to order his absolute or conditional discharge, provided that the offender does not commit another offence during the period of conditional discharge, and such period must not exceed 12 months. In this regard, since the Applicant has already served twenty (20) years of his thirty (30) years'

sentence, and considering the favourable Judgment of this Court and his conduct during his imprisonment, the United Republic of Tanzania could have taken this measure.

c. Presidential pardon, provided under section 45 of the Constitution of the United Republic of Tanzania, pursuant to which the President of the United Republic of Tanzania may grant pardon, with or without condition, to any person convicted of an offence by a national Court."

15. Lastly, Mr Abubakari submits that the delay in implementing the Court's Orders and in submitting the relevant report on compliance thereof, has aggravated and unduly prolonged the violation of his rights; and for these reasons, he prays the Court to:

"i. rule that the United Republic of Tanzania has not complied with the Order of this Court enjoining it to file a report on the implementation of its Orders within six (6) months of delivery of the Judgment";

ii. declare the Application frivolous, vexatious and an abuse of the process of this Honourable Court;

iii. order his release pending the Judgment on reparations."

IV. Jurisdiction of the Court

16. As indicated above, the instant Application for interpretation concerns the Judgment rendered by the Court on 3 June 2016.

17. In terms of Article 28(4) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (herein-after referred to as "the Protocol'') "… the Court may interpret its own decision''.

18. The Court consequently finds that it has jurisdiction to interpret the said Judgment.

V. Admissibility of the Application

19. Rule 66(1) and (2) of the Rules provide as follows:

"1. Pursuant to Article 28(4) of the Protocol, any party may, for the purpose of executing a judgment, apply to the Court for interpretation of the judgment within twelve months from the date the judgment was delivered unless the Court, in the interest of justice, decides otherwise."

2. The Application shall be filed in the Registry. It shall state clearly the point or points in the operative provisions of the judgment on which interpretation is required."

20. It emerges from these provisions that an Application for interpretation of a Judgment can be declared admissible only when it fulfills the following three conditions:

"a. its objective must be to facilitate the execution of the Judgment;

b. it must be filed within twelve (12) months following the date of the delivery of the Judgment unless the Court, "in the interest of justice decides otherwise; and

c. it must clearly state the point or points of the operative provisions of the Judgment on which interpretation is required.

21. As regards the purpose of the instant Application, the United Republic of Tanzania requests interpretation of the expression "all appropriate measures" used in the operative provisions of the Judgment.

22. The Court notes that this request actually aims to clarify a point in the operative provisions of the Judgment rendered by the Court on 3 June 2016, and thus facilitate its execution**.**

23. Consequently, it finds that the Application fulfills the first condition provided under Rule 66(1) of the Rules.

24. With regard to the time limit within which an Application should be filed, the Court notes that the applicable time limit is that which is prescribed under Rule 66(1) of the Rules, and not the time frame of six (6) months allowed by the Court for the Respondent to notify it of the measures taken.

25. The United Republic of Tanzania, having filed its Request for interpretation on 30 January 2017, that is, within the time frame of eight (8) months and twenty-seven (27) days, the Court finds that the United Republic of Tanzania seized the Court of its Application for interpretation within the statutory time frame of twelve (12) months provided under Rule 66 (1) of the Rules.

26. Lastly, the United Republic of Tanzania clearly stated the points in the operative provisions of the Judgment on which interpretation is required, namely, the terms and expressions used in point xii of the operative provisions of the Judgment.

27. In view of the aforesaid, the Court finds that the instant Application for interpretation fulfills all the conditions of admissibility.

VI. Interpretation of the Judgment

28. In its Judgment of 3 June 2016, the Court ordered the United Republic of Tanzania to take all appropriate measures to remedy the violations found.

29. On the first question, the United Republic of Tanzania prays the Court to interpret the expression "all appropriate measures" used in point xii of the operative provisions of the Judgment.

30. The Court notes that, in examining an Application for interpretation, it does not complete or modify the decision it rendered - it being a final decision with the effect of *res judicata* - but clarifies the meaning and scope thereof.

31. In the context of the instant request for interpretation, the Court wishes to recall the principle generally applied by international jurisdictions that reparation should, as far as possible, erase the consequences of an unlawful act and restore the state which would have presumably existed if the act had not been committed.

32. In this regard, 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."

33. As has been stated above, the most appropriate form of remedy for violation of the right to a fair trial is to act in such a way that the victim finds him/herself in the situation that he/she would have been had the violation found not been committed. To attain this objective, the United Republic of Tanzania has two options: it should either reopen the case in compliance with the rules of a fair trial or take all appropriate measures to ensure that the Applicant finds himself in the situation preceding the violations.

34. As regard the first option, the Court is of the view that reopening the case would not be a just measure, in as much as the Applicant has already spent nineteen (19) years in prison, more than a half of the prison sentence, and given that a fresh judicial procedure could be long. Accordingly, the Court has excluded such a measure.

35. Concerning the second option, the Court intended to offer the United Republic of Tanzania room for evaluation to enable it to identify and activate all the measures that would enable it to eliminate the effects of the violations established by the Court.

36. The Court specifies in this respect that in its Judgment of 3 June 2016, it did not state that the Applicant's request to be set free was unfounded. It merely indicated that it could order such a measure directly, only in special and compelling circumstances which have not been established in the instant case.

37. The second question posed reads as follows " … given that these acts have already been carried out, the United Republic of Tanzania would like to understand how to remedy the violation and interpret the term "remedy".

38. The Court clarifies that the expression "all appropriate measures" includes the release of the Applicant and any other measure that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicant.

39. The Court further clarifies that the expression "remedy all

violations established" should mean to "erase the effects of the violations established" through adoption of the measures indicated in the preceding paragraph.

VII. Costs

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

41. Taking into account the circumstances of this matter, the Court decides that each Party should bear its own costs.

42. For these reasons,

The Court,

Unanimously:

i. *Declares* that it has jurisdiction to hear the instant Application

ii. *Declares* that the Application is admissible

iii. *Rules* that by the expression "all appropriate measures", the Court was referring to the release of the Applicant or any other measure that would help erase the consequences of the violations established, restore the pre-existing situation and re-establish the rights of the Applicant

iv. *Rules* that the expression "remedy the violations established" means "erase the effects of the violations established" through the adoption of the measures indicated in point iii above

v. *Rules* that each Party shall bear its own costs.

Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (interpretation) (2017) 2 AfCLR 141

Application, 003/2017, *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Côte d'Ivoire*

Judgment, 28 September 2017. Done in English and French, the French text being authoritative.

Judges: KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

Recused under Article 22: ORE

Request for interpretation of judgment of the Court on the merits of a case involving independence and impartiality regarding the composition of the Independent Electoral Commission. The Court declared the request inadmissible as it did not intend to clarify the operative provisions of the judgment.

Admissibility (need to specify the sections of operative part, 15; request for interpretation 18, 19)

I. Procedure

1. The Republic of Côte d'Ivoire filed before this Court by virtue of Article 28(4) of the Protocol and Rule 66(1) of the Rules, an Application for Interpretation of the Judgment delivered by the Court on 18 November 2016 in the afore-mentioned Matter.

2. The Application dated 4 May 2017 was received at the Court's Registry on the same date and on 8 May 2017 was transmitted to APDH for possible observations.

3. On 19 June 2017, APDH filed its observations which were transmitted to the Republic of Côte d'Ivoire by a notice of the same date.

4. At its 46th Ordinary Session held from 4 to 22 September 2017, the Court, pursuant to Rule 59(1) of the Rules decided to close the written procedure.

5. The Court did not deem it necessary to hold a public hearing.

II. Application for interpretation

6. As stated above, the instant Application for Interpretation concerns the Court's Judgment of 18 November 2016 in the Matter of *APDH v Republic of Côte d'Ivoire* (Application 001/2014), the operative provisions of which read as follows:

"The Court,

(5) *Rules* that the Respondent State has violated its obligation to establish an independent and impartial electoral body as provided under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol, and consequently, also violated its obligation to protect the right of the citizens to participate freely in the management of the public affairs of their country guaranteed by Article 13(1) and (2) of the African Charter on Human and Peoples' Rights;

(6) *Rules* that the Respondent State has violated its obligation to protect the right to equal protection of the law guaranteed by Article 10(3) of the African Charter on Democracy, Article 3(2) of the African Charter on Human and Peoples' Rights and Article 26 of the International Covenant on Civil and Political Rights;

(7) *Orders* the Respondent State to amend Law No. 2014-335 of 18 June 2014 on the Independent Electoral Commission to make it compliant with the aforementioned instruments to which it is a Party;

(8) *Orders* the Respondent State to submit to it a report on the implementation of this decision within a reasonable time which, in any case, should not exceed one year from the date of publication of this Judgment"

7. In its Application for interpretation, the Republic of Côte d'Ivoire prayed the Court to provide answers to the following three questions:

"(i) For the purposes of implementing the Judgment, the State of Côte d'Ivoire prays the Court to avail it of more specific indications on the nomenclature of the new IEC especially with regard to its organization, background, mode of appointment of its members and distribution of the seats.

(ii) The State would also like to know whether or not the possibility of submitting the Electoral Law for control by a constitutional Judge can help guarantee the independence and impartiality of its members.

(iii) If yes, the Court may wish to accept to further enlighten the Ivorian authorities on the notion "laws relating to public freedoms."

8. The APDH submits that none of the three issues raised by the Republic of Côte d'Ivoire calls for the interpretation of the afore-said Judgment. It therefore prays the Court to declare the Application inadmissible.

III. Jurisdiction of the court

9. As indicated above, the instant Application for interpretation concerns the Judgment rendered by the Court on 18 November 2016

10. Article 28(4) of the Protocol provides that: "… the Court may interpret its own decision''.

11. The Court consequently holds that it has the jurisdiction to interpret this judgment

IV. Admissibility of the Application

12. As regards admissibility of the Application, Rules 66(1) and (2) of the Rules stipulates as follows:

> "1. Pursuant to [a]rticle 28(4) of the Protocol, any party may, for the purpose of executing a judgment, apply to the Court for interpretation of the judgment within twelve months from the date the judgment was delivered, unless the Court, in the interest of justice, decides otherwise.
>
> 2. The application shall be filed in the Registry. It shall state clearly the point or points in the operative provisions of the judgment on which interpretation is required ".

13. It is apparent from the content of the foregoing provision that a request for interpretation of a Judgment may be declared admissible only where the three following conditions have been met:

> "a. the request has been filed within twelve (12) months from the date the Judgment was delivered
>
> b. the request states clearly the point or points in the operative provisions on which interpretation is required, and
>
> c. the objective is to facilitate implementation of the Judgment."

14. Given that the judgment was delivered on 18 November 2016, the Court notes that the Republic of Côte d'Ivoire has complied with the statutory 12 months' timeframe prescribed for submission of a request for interpretation.

15. As regards the second condition, the Republic of Côte d'Ivoire merely states that it seeks to interpret the Judgment without specifying the point(s) of the operative provisions of the Judgment of which interpretation is requested.

16. The Court also notes, with regard to the finality of the instant Application, that although the first question seems to relate to the aforementioned paragraph 7 of the operative provisions of the Judgment, it is not intended to clarify the meaning of this point. Rather, it seeks the Court's opinion as to how to implement this point, which, in the Court's view, is the responsibility of the State of Côte d'Ivoire.

17. As regards the other two questions posed by the Republic of Côte d›Ivoire, the Court notes that they do not relate to any of the operative provisions of the Judgment of which interpretation is requested.

18. In view of the foregoing, the Court holds in conclusion that

none of the three questions posed by the Republic of Côte d'Ivoire is intended to clarify the meaning or scope of any point in the operative provisions of the afore-mentioned Judgment delivered by the Court on 18 November 2016.

19. The Court accordingly finds that, although the instant Application for interpretation was filed within the 12-month time limit prescribed in the Rules, it does not meet the other admissibility conditions set forth in Rule**s** 66(1) and (2) of the Rules and must therefore be declared inadmissible.

V. Costs

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

21. Taking into account the circumstances of this matter the Court decides that each party should bear its own costs

22. For these reasons,

The Court,

Unanimously:

i. *Declares* that it has jurisdiction to hear the present Application.

ii. *Declares* that the Application is inadmissible.

iii. *Rules* that each Party shall bear its own Costs.

Mulindahabi v Rwanda (jurisdiction and admissibility) (2017) 2 AfCLR 145

Application 008/2017, *Fidèle Mulindahabi v Republic of Rwanda*

Order, 28 September 2017. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, ACHOUR, BOSSA, MATUSSE, MENGUE, CHIZUMILA and BENSAOULA

Recused under Article 22: MUKAMULISA

In an Application involving property rights, the Court decided to strike out the Application due to the Applicant's failure to provide evidence of exhaustion of domestic remedies.

Admissibility (exhaustion of local remedies, 21, 22)

I. The Parties

1. The Applicant, Fidèle Mulindahabi (hereinafter referred to as "the Applicant") is a citizen of the Republic of Rwanda.

2. The Application is filed against the Republic of Rwanda (hereinafter referred to as "the Respondent") which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 22 July 1983 and to the Protocol establishing the Court on 6 June 2003, and made the declaration on 22 June 2013 accepting the jurisdiction of the Court to receive cases from individuals and non-governmental organizations.

II. Subject of the Application

3. The Applicant alleges that on 18 May 2008, the Minibus Taxi Drivers Union (ATRACO) impounded the Toyota Hiace Vehicle with registration No. RAA 798J belonging to a certain Isaac Twumvibarura for non-payment of contributions; the yellow card of the vehicle was also seized for overload.

4. He further alleges that he recommended to Mr Twumvibarura to refer the matter to the local courts, which he did by bringing the case before the Nyarugenge Regional Court on 4 August 2008.

5. The Applicant affirms that he handed over to **"**Kigali Safari**"** Transport Agency, of which Mr Twumvibarura was the manager, his vehicle with registration No. RAB 762A to be used for lucrative purposes; that he did not receive any proceeds in exchange for the use of the vehicle handed to Mr Twumvibarura who ended up selling the said vehicle in Burundi. He added that all attempts vis-à-vis the police

with a view to resolving the issue proved unsuccessful.

6. He submits that, as a result, he and his family, became victims of intrigues and fraud without protection from the State of Rwanda, blaming the latter for failure to exercise due diligence and for the absence of appropriate measures to protect his right to property.

7. The Application is founded on the alleged violation of Articles 1 and 14 of the Charter, and Article 17 of the Universal Declaration of Human Rights.

8. The Applicant prays the Court to:

"1. Declare that the State of Rwanda has violated the relevant human rights instruments that it has itself ratified;

2. Rule that the State of Rwanda was in the wrong for having impounded the vehicle RAA 798J;

3. Order criminal proceedings allowing the Applicant to pursue the case concerning vehicle No. RAA 798J for and on behalf of Twumvibarura;

4. Order the State of Rwanda to deliver another vehicle to him in replacement of the vehicle with registration No. RAA 798J;

5. Order provisional measures especially the payment of the school fees of his children;

6. Order the payment of damages for the seizure of the vehicle with registration No. RAA798J;

7. Order the State of Rwanda to pay damages for failure to protect him from the violations arising from the actions of Mr. Twumvibarura".

III. Procedure

9. The Application was received at the Registry on 27 February 2017.

10. By a letter dated 3 April 2017, on instructions by the Court at its 44th Ordinary Session held from 6 to 24 March 2017, the Registry asked the Applicant to produce within thirty (30) days the from date of receipt, the Judgments rendered by the local Courts in Rwanda in respect of his allegations.

11. By a letter dated 4 May 2017, the Applicant while acknowledging receipt, sought the Registry's clarifications regarding the request to transmit to the latter, copies of the Judgments rendered by the local Courts, given that he had filed eight (8) such Judgments before the Court.

12. By a letter dated 12 May 2017, the Registry notified the

Applicant that the clarification sought by the latter was in connection with Application 008/2017.

13. By e-mail of 5 and 6 June 2017 the Applicant successively forwarded to the Registry copies of: Judgment RC035/08/TGI/NYGE rendered on 27 January 2011 by the HUYE Commercial Court; and Judgment RC 0039/08/HC/KIG rendered on 6 January 2012 by the Kigali High Court in a civil suit.

IV. The Court's assessment

14. After review of the Judgments tendered as part of the pleadings, the Court notes that the said Judgments have nothing to do with the Application No. 008 pending before it.

15. Judgment RC0357/08/TGI/NYGE in effect lists as Parties to the case *La Banque Populaire du Rwanda* (Applicant) and Twumvibara Isaac (Respondent), and the subject of the dispute as being a loan granted to Twumvibara Isaac by *La Banque Populaire du Rwanda*.

16. In Judgment RC 0039/08/HC/KIG, Twumvibara is the Appellant and ATRACO Company the Respondent; it mentions the State of Rwanda, *La Banque Populaire du Rwanda* as well as a Bailiff of *La Banque Populaire* as persons seeking to be joined in the proceedings. The said Judgment is in respect of an appeal lodged against Judgment 0357/08/TGI/NYGE delivered by the Nyarugenge Regional Court.

17. Rule 34(4) of the Rules of Court on Commencement of Proceedings provides that *"…*the Application shall specify the alleged violation, evidence of exhaustion of local remedies or of the inordinate delay of such local remedies as well as the orders or the injunctions sought…"

18. The Court notes that, although the Applicant has produced copies of the Judgments in respect of exhaustion of local remedies at the Registry's request, the said Judgments do not show that the Applicant is a Party to the cases concerned.

19. The Court notes that at this stage of the proceedings, the Applicant has not produced evidence as to the exhaustion of local remedies within the meaning of Rule 34(4) of the Rules.

20. It further notes that an Application must, *inter alia*, indicate proof of exhaustion of local remedies as set out in Rule 34 of the Rules.

21. In the instant case, the Application indicates that local remedies have been exhausted; yet the evidence produced shows that there has been no such compliance in terms of the requirements set out in Rule 34(6) of the Rules.

22. In view of the foregoing, the Court finds that the Application is not compliant with the provisions of Rule 34 of the Rules in regard to exhaustion of local remedies.

23. For these reasons,
The Court,
Unanimously,
i. *Dismisses* the Application for failure to comply with the requirements set forth in Rule 34(4) of the Rules;
ii. Accordingly, *orders* that the Application be struck off the cause list.

Mugesera v Rwanda (provisional measures) (2017) 2 AfCLR 149

Application 021/2017, *Léon Mugesera v Republic of Rwanda*

Order, 28 September 2017. Done in English and French, French being the authoritative text.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, CHIZUMILA and BENSAOULA

Recused under Article 22: MUKAMULISA

An Application for provisional measures by a detainee was granted by the Court which ordered that he be allowed to access his lawyers, to be visited and communicate with family members, and to have access to medical care.

Provisional measures (only need for *prima facie* jurisdiction, 17-20; extreme urgency, irreparable harm, 28)

I. Subject of the Application

1. The Court received, on 28 February 2017, an Application by Léon Mugesera (hereinafter referred to as "the Applicant"), instituting proceedings against the Republic of Rwanda (hereinafter referred to as "the Respondent"), for alleged violations of human rights.

2. The Applicant, is a Rwandan national, currently held in custody at Nyanza Prison (Mpanga), Nyanza, Republic of Rwanda.

3. The Respondent 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 25 January 2004. On 6 February 2013, the Respondent made the Declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive applications filed by individuals and Non-Governmental organisations.[1]

4. The Application is based on the alleged injustice the Applicant claims to have suffered during the entire procedure before the High Court Chamber for International Crimes[2] and before the Supreme Court of Rwanda between 2012 and 2016. He alleged that he has been detained under deplorable conditions, undergone all forms of torture and had only limited access to his family, without medical or

1 It should be noted that the Respondent withdrew its declaration on 29 February 2016. For the decision of the Court in this regard, see paragraph 20 of this Order.

2 A Chamber within the High Court of the Republic of Rwanda, specialised in "international crimes", which will judge in particular genocide suspects extradited from third countries or by the International Criminal Tribunal for Rwanda (ICTR).

appropriate treatment and without access to counsel.

5. The Applicant alleges further that his right to a fair trial provided for under Article 7 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa has been violated, through in particular:

"a. the refusal by the High Court Chamber for International Crimes to provide a remedy for the violations that occurred during the proceedings in violation of Article 7(1)(a) of the Charter;

b. the impossibility to reply to the pleadings and allegations made against him by the Public Prosecutor's Office during proceedings before the High Court Chamber for International Crimes and the Supreme Court of Rwanda, in violation of Article 7(1)(c) of the Charter;

c. lack of access to legal aid on grounds that he was not considered as indigent, notwithstanding his social and personal condition, the complexity of the case, the seriousness of the charges and the potential sentence he faces if convicted, and the wrongful conviction of his Rwandan lawyer leading to a fine of 400,000 CFA (Euros 610€), in violation of Article 7(1)(c) of the Charter;

d. refusal to allow the Applicant to call his witnesses and other expert witnesses to testify, and refusal to allow him to make submissions in his own defence, in violation of Article 7(1)(c) of the Charter;

e. refusal to translate into French, one of the official languages of the country, when the proceedings were being conducted only in Kinyarwanda, a language that his lawyers do not understand, in violation of Article 7(1)(c) of the Charter;

f. lack of access to the case file, which was later provided in the form of a flash disk, but, as it turned out, was unreadable, in violation of Article 7(1) (c) of the Charter; and

g. lack of fairness and independence of the Court, following the replacement of a Judge who had led the proceedings for more than two years and heard a number of witnesses, in violation of Articles 7(1)(d) and 26 of the Charter."

6. The Applicant claims to have been a victim of cruel, inhuman and degrading treatment, in violation of Article 5 of the Charter, due, in particular, to:

"a. an "… atmosphere of fear and intimidation …" that was created by the systematic iteration in the media of his 1992 speech;

b. his inclusion on the list of people to be executed;

c. constant death threats by security agents, police and prison wardens, a conduct that is in violation of Article 5 of the Charter; and

d. refusal to provide him with sufficient food."

7. The Applicant submits that there has been an attack against his physical and mental integrity, in violation of Article 4 of the Charter notably by:

"a. being deprived of contact with his family and lawyer;

b. cancellation of medical consultations and at times being treated by a warder reconverted as a nurse and without certification;

c. refusal to provide adequate lighting in his cell and lack of provision of an orthopaedic pillow;

d. failure to respect the ophthalmological prescription regarding the lighting in his cell and thus exposing him to the risk of becoming blind as a result of cataracts that he has on both eyes;

e. deprivation of access to a psychiatrist to assess the mental effects of the lack of sleep and trauma from the progressive loss of vision;

f. failure to properly maintain his prescriptions which disappeared from his medical file, or being administered poor treatment;

g. failure to respect his dietary needs composed of fruits, as well as refusal to provide him with anti-cholesterol diet such as brown bread, whereas other detainees of the same prison are given special bread to meet their dietary needs;

h. exposure to difficult detention conditions which led to an increase in his blood pressure to 10/5, a level which is very dangerous for his health; and

i. failure to respect the diplomatic assurances given to Canada according to which he would be given a diet and medical treatment consistent with international standards."

8. The Applicant alleges that his right to communicate with his family has been violated, as has his right of access to information,

provided for under Articles 18(1) and 9(1) of the Charter, respectively, given that, despite having obtained authorisation to that effect, practical obstacles have been put in his way, such as the lack of access to, or delayed provision of a telephone and in instances where he has been able to communicate, he became aware that the telephone line had been tapped.

9. The Applicant claims further that he was transferred to another prison, his family did not know his whereabouts for several days and that the lack of information regarding his fate and the several obstacles he faced were a violation of Articles 6 and 7 of the Charter.

II. Procedure before the Court

10. The Application was received at the Registry on 28 February 2017.

11. By a letter dated 3 April 2017, the Registry served the Application on the Respondent, and requested her to submit, the names and addresses of her representatives within thirty (30) days, the comments on the request for Provisional Measures within twenty one (21) days and the Response to the Application within sixty (60) days.

12. The deadline for submission of comments on the request for Provisional Measures elapsed on 27 May 2017.

13. On 12 May 2017, the Registry received a letter from the Respondent reminding the Court of her withdrawal of the Declaration made under Article 34(6) of the Protocol and informing the Court that she will not take part in any proceedings before the Court and consequently, requesting the Court to desist from transmitting any information on cases concerning Rwanda until she reviews the Declaration and communicates its position to the Court.

14. The Court notes that in the abovementioned letter, the Respondent State has not made observations on the Application for provisional measures.

15. By a letter dated 22 June 2017, the Court responded to the letter of Respondent referred above, noting that "by virtue of the Court being a judicial institution and pursuant to the Protocol and Rules of Court, the Court is required to exchange all procedural documents with the Parties concerned. Consequently, and in line with these requirements, all pleadings on matters to which Rwanda is a party before this Court shall be transmitted to you until the formal conclusion of the same".

III. Jurisdiction

16. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case**.**

17. However, in ordering Provisional Measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.[3]

18. Article 3(1) of the Protocol provides that "the Court has jurisdiction to examine all cases submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant instrument on Human Rights ratified by the State concerned".

19. As indicated the paragraph 3 of this Order, the Respondent became a Party to the Charter and to the Protocol and made the Declaration accepting the jurisdiction of the Court to receive applications filed by individuals and non-governmental organisations.[4]

20. The Court recalls that, in its decision in *Ingabire Victoire Umuhoza v Republic of Rwanda,* the withdrawal of the Declaration filed by the Respondent in terms of Article 34(6) of the Protocol only took effect from 1 March, 2017.[5] However, given that the Application was filed on 28 February**,** 2017, the Court's temporal jurisdiction is established.

21. The rights alleged by the Applicant to have been violated are guaranteed under the provisions of Articles 4, 5,6,7,9 and 18 of the Charter.

22. In light of the foregoing, the Court has satisfied itself that it has *prima facie* jurisdiction to deal with the Application.

IV. On the provisional measures requested

23. The Applicant, considering the extreme urgency which, failing, may lead to irreparable harm,

> "… submits that the Court must order the Respondent to take interim measures in order to prevent or stop the perpetration of serious and irreparable damage that he suffers. Such serious irreparable damage has arisen from the many violations by the Respondent of the rights guaranteed by the African Charter on Human and Peoples' Rights. The said violations have been described in this Application. Four of them call for an urgent situation that must be changed as soon as possible. First, the violation of his Counsel's right of access. Secondly, the inhuman and degrading treatment perpetrated against the Applicant. Thirdly, the violation of the right of access to adequate medical treatment. Fourthly, the violation of his

3 See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures) (15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures) (15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures) (25 March 2011).

4 It should be noted that the Respondent withdrew its declaration on 29 February 2016. For the decision of the Court in this regard, see paragraph 19 of this Order.

5 *Ingabire Victoire Umuhoza v Republic of Rwanda* Application No. 003/2014 (Ruling on Jurisdiction of 3 June 2016) Paragraph 69, iii..

right of access to his relatives."

24. Pursuant to Article 27(2) of the Protocol, "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." This provision is reiterated in Rule 51(1) of the Rules which provides that "Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, the Commission or on its own accord, prescribe to the Parties any interim measure which it deems necessary to adopt in the interest of the Parties or of justice."

25. The Court notes that the letters from the Applicant's Lawyer of 4 May 2016 to the *Procureur General* of Rwanda, and of 28 December 2016 to the President of the National Council for Nurses and Midwives of Rwanda, demonstrate that the Applicant has been facing serious difficulties in accessing medical care.

26. The Court notes further from the Application that the requested Provisional Measures relating to the allegation of inhuman and degrading treatment against the Applicant is mainly linked to the alleged lack of access to medical care.

27. The Court also notes that from his letter of 21 February 2017 to the Director of the Nyanza Prison, the Applicant was requesting for authorisation to communicate with the lawyers representing him before this Court.

28. The Court finds that the situation described above is of extreme urgency and requires Provisional Measures to be issued to avoid irreparable harm being inflicted on the Applicant.

29. For the avoidance of doubt, this Order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and merits of the Application.

30. For these reasons,

The Court**,**

Unanimously**,**

Orders the Respondent State:

i. To allow the Applicant access to his lawyers;

ii. To allow the Applicant to be visited by his family members and to communicate with them**,** without any impediment;

iii. To allow the Applicant access to all medical care required, and to refrain from any action that may affect his physical and mental integrity as well as his health;

iv. To report to the Court within fifteen (15) days from the date of receipt of this Order, on the measures taken to implement this Order.

Johnson v Ghana (provisional measures) (2017) 2 AfCLR 155

Application 016/2017, *Dexter Eddie Johnson v Republic of Ghana*

Order, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant had been convicted of murder and sentenced to death in 2008. He argued that the mandatory death penalty violated the African Charter. At his request, the Court issued provisional measures to the Respondent State to refrain from executing the death penalty until the Application was heard and determined.

Provisional measures (death penalty, 16, 18)

Separate Opinion (1): NIYUNGEKO and BEN ACHOUR

Procedure (time for state to report on implementation, 2, 11, 12)

Separate Opinion (2): MUKAMULISA and BENSAOULA

Procedure (time for state to report on implementation, 7)

I. The Parties

1. The Application is filed by Mr Dexter Eddie Johnson, (hereinafter referred to as "the Applicant), a dual Ghanaian and British national, against the Republic of Ghana (hereinafter referred to as "the Respondent").

2. The Respondent 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 an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), on 16 August 2005. It deposited, on 10 March 2011, a declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations. Furthermore, the Respondent became a party to the International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant"), on 7 September 2000.

II. Subject of the Application

3. The Applicant states that he was convicted of murder and

sentenced to death on 18 June 2008.[1] The Court of Appeal and the Supreme Court of Ghana confirmed the conviction and sentence on 16 July 2009 and 16 March 2011, respectively. The Applicant remains on death row awaiting execution.

4. The Applicant alleges, *inter alia*, that the imposition of the mandatory sentence of death, without consideration of the individual circumstances of the offence or the offender, violates:

"a. The right to life under Article 4 of the Charter;

b. The prohibition of cruel, inhuman or degrading treatment or punishment under Article 5 of the Charter;

c. The right to a fair trial under Article 7 of the Charter;

d. Article 1 of the Charter, by failing to give effect to the aforementioned rights;

e. The right to life under Article 6(1), the right to protection from inhuman punishment under Article 7, the right to a fair trial under Article 14(1) and the right to a review of sentence under Article 14(5) of the Covenant; and

f. The right to life under Article 3, and the prohibition of cruel, inhuman or degrading treatment or punishment under Article 5 of the Universal Declaration of Human Rights (hereinafter referred to as "the Universal Declaration")."

III. Procedure

5. The Application was filed at the Registry of the Court on 26 May 2017.

6. Pursuant to Rule 36 of the Rules of Court, (hereinafter referred to as "the Rules"), by a notice dated 22 June 2017, the Registry served the Application to the Respondent drawing attention to the request for provisional measures and indicating that the Respondent could respond to the same within fifteen (15) days should they so wish. The Respondent was also requested to communicate the names and addresses of its representatives within thirty (30) days and respond to the Application within sixty (60) days of receipt of the notice. The Respondent is yet to comply with these instructions.

IV. Jurisdiction

7. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case.

1 By the Fast Track High Court in Accra.

8. However, in ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction.[2]

9. Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

10. The Court notes that the rights alleged to have been violated are guaranteed under Articles 1, 4, 5 and 7 of the Charter, Articles 6(1), 7, 14(1) and 14(5) of the Covenant and Articles 3 and 5 of the Universal Declaration.

11. As indicated in paragraph 2 of this Order, the Respondent became a Party to the Charter on 1 March 1989, to the Protocol on 16 August 2005 and deposited on 10 March 2011, a Declaration accepting the competence of the Court to receive cases from individuals and Non- Governmental Organisations. Furthermore, the Respondent became a party to the Covenant on 7 September 2000.

12. In light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the Application.

V. On the provisional measures requested

13. The Applicant has requested the Court for:

"i. An order that the Respondent shall not carry out the execution of the Applicant while his application remains pending before the Court; and

ii. An order that the Respondent shall report to the Court within 30 days of the interim order on the measures taken for its implementation."

14. Under Article 27(2) of the Protocol and Rule 51(1) of the Rules, the Court is empowered to order provisional measures *"*in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons …" and *"*… which it deems necessary to adopt in the interest of the Parties or of justice".

15. It is for the Court to decide whether to issue provisional measures depending on the circumstances of each case.

16. The Applicant is on death row and it appears from this Application

2 See Application 002/2013 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures)(15 March 2013) and Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya* (Order for Provisional Measures) (15 March 2013); Application 004/2011 *African Commission on Human and Peoples' Rights v Libya* (Order for Provisional Measures) (25 March 2011).

that there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Applicant.

17. Given the circumstances of this case, where the risk of execution of the death penalty will jeopardise the enjoyment of the rights guaranteed under Articles 4, 5 and 7 of the Charter, Articles 6(1), 7, 14(1) and 14(5) of the Covenant and Articles 3 and 5 of the Universal Declaration, the Court has decided to exercise its powers under Article 27(2) of the Protocol.

18. The Court consequently, finds that the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm and that the circumstances require that an order for provisional measures be issued, in accordance with Article 27(2) of the Protocol and Rule 51 of the Rules, to preserve the *status quo,* pending the determination of the main Application.

19. The Court recalls that the measures it will order will necessarily be provisional in nature and will not in any way prejudge the findings it might make on its jurisdiction, the admissibility of the application and the merits of the case.

20. For the avoidance of doubt, this order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and merits of the Application.

21. For these reasons,

The Court,

Orders the Respondent to:

Unanimously,

i. refrain from executing the death penalty against the Applicant until the Application is heard and determined.

By a vote of seven (7) for and four (4) against, Justices Gérard NIYUNGEKO, Rafâa BEN ACHOUR, Marie-Thérèse MUKAMULISA and Chafika BENSAOULA dissenting,

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

(Partly) Dissenting Opinion: NIYUNGEKO and BEN ACHOUR

1. We voted for the provisional measure to “refrain from executing the death penalty against the Applicant until the Application is heard

and determined".[1] This is because we are convinced about the absolute necessity and urgency of such an order. The Court did well, and on this, we are in perfect agreement that the "situation raised in the present Application is of extreme gravity and represents a risk of irreparable[2] harm" if no action is taken to preserve the *status quo*.

2. That said, we do not share the decision to grant the Respondent State sixty (60) days to report to the Court on the measures taken to implement its decision.[3] In our understanding, this is too long a time limit, and it is not more reasonably defensible than its inconsistency is unwarranted.

3. We note straight away, that the Application was received at the Court Registry on 26 May 2017, and that, unlike other Applications by persons on the death row, it was the Applicant himself who requested an order for provisional measures. In actual fact, unlike other cases, the Court did not take the initiative to pronounce provisional measures on its own accord as authorized by Article 27(2) of the Protocol and Rule 51(1) of its Rules. Upon receipt of the Application, the Court gave the Respondent State sixty (60) days within which to respond to the Application. The latter did not react.

4. Our opinion is presented from two perspectives: firstly, we shall explain why the sixty (60) days' time limit is illogical and unreasonable (I); and secondly, we shall point to the Court's unwarranted inconsistency with regard to time limits when it comes to implementing Rule 51(5) of our Rules (II).

I. Unreasonable time limit

5. To start with, it should be made clear that any such time limit is always counted from the date of receipt of the Court's Order by the Respondent State, rather than from the date of delivery of the said Order by the Court, a provision which protects the Respondent State from any surprises.

6. It should also be emphasized that, by definition, the provisional measures concerned are emergency measures which must be taken quite speedily. Thisplaces the Respondent State in a situation whereby it has to give priority to implementation of the measures in question; measures which must be taken as quickly as possible.

7. Having said that, the question as to how much time a Respondent State should be allowed to report on the measures taken to comply

1 Para (a) of the operative provisions.

2 Para 8.

3 Para (b) of the operative provisions.

with an Order of Court is always a topical one.

8. In deciding to issue an Order for Provisional Measures either in the interest of the Parties or in the interest of justice, the Court must do so with firmness to avoid criticism regarding the immediate and urgent applicability of such measures. Firmness is all the more necessary when it comes to measures aimed at protecting the fundamental right to life,[4] as in this case, to prevent the Applicant subject to capital punishment, from being executed even when the proceedings are pending before the Court.

9. In general, however, it may be said that in granting such a time limit to the Respondent State, the Court's main objective is to give the latter time to put the appropriate measures in place.

10. With regard to this objective, the extent of the time limit will certainly depend on the nature of the measures expected. If, for example, the time is intended for the Respondent State to initiate a legislative process or other similar process, it is obvious that the Respondent State will need a relatively long time to complete the process. If, on the other hand, it is simply a matter of refraining from doing something or of doing something easy, such as allowing the Applicant access to medical care or a lawyer or to receive visits from members of his family, then the Respondent State does not need much time to comply with the Court Order.

11. In the instant case, the Court did not order the Respondent State to urgently enact a law for retroactive abolition of the death penalty or to retry the Applicant, which would have required much time. All that the Court orders is for the Respondent State to temporarily suspend execution of the death sentence imposed on the Applicant by the domestic court, pending the Court's decision on its jurisdiction, admissibility of the Application and on the merits of the case.

12. To ensure that the sixty (60) days' time limit granted meets the logic inherent in the urgency of the provisional measures, it was necessary to take into account the means which the Respondent State must deploy to stay execution of a person under death sentence who, besides, is "on the death row awaiting execution".

4 A right protected by Article 4 of the Charter: "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", and by Article 6 of the International Covenant on Civil and Political Rights: 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

13. In this respect, it seems judicious to recall that, in this matter, the principle is that of immediate stay of execution and to the minute, and that no derogation is effective. By way of illustration, the European Court of Human Rights, in a Judgment issuing provisional measures, strongly reaffirmed that when life and health are at stake, even "*diplomatic assurances*" are ineffective and application of the provisional measure is immediate, urgent and to the minute.[5]

14. Admittedly, under the procedure before this Court and by virtue of Rule 37 of its Rules, the Respondent State has sixty (60) days to respond to an Application filed against it; but to give the same *quantum* when it is comes to informing the Court of the execution of measures to prevent occurrence of unforeseeable, extremely serious violations with irreparable consequences, does not seem logical to us.

15. If in the first case (production of defense brief) the Respondent State must have sixty (60) days to investigate the case, search for, collect and establish the evidence for its claims, this is not the case with regard to this Order.

16. For these reasons, it is our view that the decision to grant the party performing the provisional measure sixty (60) days is neither logical nor reasonable.

II. Time limits of unwarranted inconsistency

17. A global overview of the provisional measures so far issued by the Court reveals that, while the legitimacy of the said measures does not call for comment on our part, justification of the *quantum* of the time limits allowed for the State to submit its report suffers from an unwarranted variation.

18. It is noteworthy that the said time limits oscillate between fifteen (15),[6] thirty (30)[7] and sixty (60) days as in the instant case. Admittedly, the Judge has in this domain a broad power of evaluation in as much as Rule 51 of the Rules in paragraphs 1 and 5 does not spell out cases of necessity, nor does it prescribe a particular time limit. The Rule in question confines itself to stating that: "the Court may … prescribe to

5 *Othman v United Kingdom* ECHR, Fourth Section, 17 January 2012, No. 8139/09, paras 148, 151, 170 and 180). See also *Marcellus S Williams, Petitioner v Cindy Griffith*, *Warden* Supreme Court of the United States, decision suspending execution of the death penalty was followed with immediate effect even though execution of the convict was already scheduled for the very evening of the day of the delivery of stay of execution decision and a report thereon followed.

6 See Order of 25 March 2011, *African Commission on Human and Peoples' Rights v Great Libyan Arab Jamahiriya*; Order of 15 March 2013, *African Commission on Human and Peoples' Rights v Republic of Kenya*.

7 See Order of 18 March 2016, *Armand Guehi v United Republic of Tanzania*.

the Parties any interim measures which it deems necessary to adopt in the interest of the Parties or of justice" and that it may, in addition, "invite the Parties to provide it with information on any issue relating to implementation of the interim measures adopted by it."

19. In light of the foregoing provisions, we believe that in determining the time limit contemplated in paragraph 5 of Rule 51, the Court should take into account certain parameters, including *inter alia,* the very nature of the measure, the degree of implementation or the imminence of the irreparable harm, the attitude of the party performing the provisional measure and the degree of the latter's cooperation in moving forward the procedure.[8]

20. Also to be taken into account is whether or not implementation of the provisional measure requires involvement of other third Parties or whether the implementation involves outside elements, etc.

21. All in all, do the fluctuations of time limits really take into account all the endogenous and exogenous elements inherent in the implementation of the measure dictated by the Court? If not, how does one understand the sixty (60) days' time limit decided in the instant Order?

22. In this case, it must also be said that the Order does not take into account the interest of justice and the need for the performing party to maintain the *status quo* until the conclusion of the proceedings pending before the Court. This is so because the Court's interest in monitoring execution of its decision is emptied of all its substance. The time limit lacks proportionality because it diminishes the State's obligation to report back to the Court. Moreover, it deprives the Court of the opportunity to keep a watchful eye on the rights of which it has the mandate to protect.

23. It is the foregoing reasons that led us to vote against paragraph (b) of the operative part of the Order. We hope the Court will adopt a consistent course of action in this area and be extremely demanding, upon the right to life coming under threat.

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8 When it is established that the performing party is not inclined to full cooperation, the Court should give extremely short time limit, followed by repeated reminders if need be.

Joint Separate Opinion of CHAFIKA and MUKAMULISA

1. We by and large subscribe to the Order rendered by the majority but would like to express our disagreement on point (b) of the operative provisions. In the paragraph (b) of the operative provisions of the Order for Provisional Measures, the Court directs the Respondent to "report to the Court within sixty (60) days from the date of receipt of this Order, on the measures taken to implement this Order."

2. In terms of Article 27 paragraph 2 of the Protocol and Rule 51 of the Rules, the Court shall, in cases of extreme gravity and urgency … adopt such provisional measures as it deems necessary. The Court held in paragraphs 14 *et seq.* of the Order that "the situation raised in the present Application is of extreme urgency and gravity and represents a risk of irreparable harm, and that the circumstances require that an Order for provisional measures be issued". In the case of death sentence, the stay of execution of this sentence was self-evident.

3. However, by granting the Respondent a period of two (2) months to *"report on the measures taken*", the Court ran counter to the very nature of the Order, which is executable forthwith, and to its characterization of the facts which it considers as being of extreme gravity.

4. Besides, it is apparent from the Court's jurisprudence that much shorter time-limits have been granted and in far less serious circumstances. That the death penalty is the most serious sanction imposable on any convicted person, should have provided the explanation for reducing the time limit accorded to the Respondent State to make the report.

5. In his Application, the Applicant prayed the Court to issue an Order for Provisional Measures and to allow the Respondent State one month to make its report. As this deadline is tied to the execution of the provisional measures sought, the Court, by granting a longer time limit without the Respondent requesting the same in its reply to the Applicant's request on this point, has ruled *ultra petita* because, even if the provisional measure lies within the Court's discretionary power, the time limit non-the-less remains a right of the Parties, especially where any of them has raised the same in its Application or Reply.

6. Although the Court did not grant the time-limit requested by the Applicant in favour of the Respondent, it all the same did not give reasons to back the time-limit prescribed in the operative provision of its Order; which runs counter to the terms of Rule 61 of the Rules.

7. Moreover, it is apparent from the Court's jurisprudence that

for similar cases (death penalty),[1] the time limit accorded to the Respondent was less than two months (60 days): as a matter of fact, in its previous Orders, the Court allowed a time limit of thirty (30) days. This instability in jurisprudence is not such as would enhance the reliability of the Court's decisions.

1 See the Orders in: *Evodius Rutechura v United Republic of Tanzania* (Application 004/2016); *Ally Rajabu and Others v United Republic of Tanzania* (Application 007/2017); *Armand Guehi v United Republic of Tanzania* (Application 001/2017).

Umuhoza v Rwanda (merits) (2017) 2 AfCLR 165

Application 003/2014, *Ingabire Victoire Umuhoza v Republic of Rwanda*

Judgment, 24 November 2017. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, RAMADHANI, TAMBALA, GUISSE, ACHOUR and BOSSA

The Applicant, a politician, was convicted for speeches alleged to have minimised the Rwandan genocide. She prayed the Court to repeal certain legislation, order the review of the case, annul decisions taken in relation to the case, order her release and order the Respondent State to pay reparations and costs. The Court held that there were conflicting versions of one of her speeches and one version clearly did not violate the law. Another speech, the Court held, just amounted to political criticism. Her conviction was therefore not necessary and proportional and violated the right to freedom of expression. The Court held that it did not have the power to repeal legislation and that there were exceptional and compelling circumstances to order her release.

Admissibility (exhaustion of local remedies, extraordinary remedy, 70-72)

Fair trial (presumption of innocence, 83, 84; defence, 94-98; non-retroactivity, 116)

Expression (importance, 131; limitations, 132, 139; in line with international human rights standards, 135; legitimate interest, 140, 146; necessary and proportional, 141-143, 147, 161; conflicting versions of speech, 156; speech clearly not violating the law, 158; political criticism should be allowed, 160)

Reparations (repeal national legislation, 166; release, 167)

I. The Parties

1. The Application is filed by Ingabire Victoire Umuhoza (hereinafter referred to as "the Applicant"), pursuant to Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol").

2. The Application is filed against the Republic of Rwanda (hereinafter referred to as "the Respondent State"). The latter became a Party to the African Charter on Human and Peoples` Rights (hereinafter referred to as "the Charter") on 21 October 1986, to the Protocol on 25 May 2004, and to the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") on 23 March 1976. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 22 January 2013, and on 29 February 2016, notified the African

Union Commission of its intention to withdraw the said Declaration[1].

II. Subject of the Application

3. The instant Application emanates from the Judgment of the High Court of Kigali in Criminal Case No. RP 0081-0110/10/HC/KIG delivered on 30 October 2012, and the Judgment of the Supreme Court of Rwanda in Criminal Appeal No. RPA 0255/12, delivered on 13 December 2013. The Application relates to the arrest, detention and trial of the Applicant, on the basis of which she alleges violation of her human rights and fundamental freedoms.

A. The facts of the matter

4. On 3 October 2014, the Applicant seized the Court with the Application stating that when the genocide in Rwanda started in April 1994, she was in The Netherlands in furtherance of her university education in Economics and Business Administration.

5. The Applicant submits that in 2000, she became the leader of a political party known as the *Rassemblement Républicain pour la Démocratie au Rwanda* (RDR) (the Republican Movement for Democracy in Rwanda). She states that a merger of this party and two other opposition Parties (the *ADR and the FRD)* led to the creation of a new political party known as *Forces Démocratiques Unifiées* (FDU Inkingi), which she leads to date.

6. The Applicant avers that in 2010, after spending nearly seventeen (17) years abroad, she decided to return to Rwanda, according to her, to contribute in nation building. Her priorities included the registration of the political party - FDU Inkingi, in compliance with Rwandan law on political Parties, which would have enabled her to popularise the political party at the national level with a view to future elections.

7. The Applicant contends that she did not attain this objective because from 10 February 2010, charges were brought against her by the judicial police, the prosecutor and the tribunals of the Respondent State.

8. The Applicant further maintains that on 21 April 2010, she was remanded in custody by the police, charged with having committed the following:

> "a. The crime of [propagation of] ideology of genocide, an offence punishable under Law No. 18/2008 of 23 July

1 See Ruling of the Court of 3/6/ 2016 of the Respondent's withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.

2008, on the punishment of the ideology of genocide;

b. Aiding and abetting terrorism, an offence punishable under Law No. 45/2008 of 9 September 2008, on the punishment of the offence of terrorism;

c. Sectarianism and divisionism, an offence punishable under Law No. 47/2001 of 18 December 2001; sectarianism and divisionism;

d. Undermining the internal security of the State, spreading of rumours likely to incite the population against political authorities and mount citizens against one another, punishable under Law No. 21/77 of 18 August 1997, instituting the Penal Code;

e. Establishing an armed branch of a rebel movement, an offence punishable under Article 163 of Law No. 21/77 of 18 August 1997, instituting the Penal Code; and

f. Attempted recourse to terrorism, force of arms and such other forms of violence to destabilize established authority and violate constitutional principles, all offences punishable under Articles 21, 22, 24 and 164 of Law No. 21/77 of 18 August 1997, instituting the Penal Code".

B. Alleged violations

9. On the basis of the foregoing, the Applicant alleges violation of some provisions of the following instruments:

"a. Articles 1, 7, 10, 11, 18 and 19 of the Universal Declaration of Human Rights;

b. Articles 3, 7 and 9 of the Charter; and

c. Articles 7, 14, 15, 18 and 19 of the ICCPR".

III. Procedure at national level as presented by the Applicant

A. Pre-trial investigations

10. The Applicant avers that on 10 February 2010, she received a summons requiring her to forthwith appear before a judicial police officer at the Criminal Investigation Department (CID). According to her, she was accused of committing the offence of aiding and abetting terrorism, punishable under Article 12 of Law No. 45/2008 of 9 September 2008, on the punishment of the offence of terrorism. She

states that the allegations were "exclusively based on contacts she is said to have had with some defectors of the *Forces Démocratiques de Libération du Rwanda* (FDLR), with a view to establishing an armed branch of the political party called *Forces Démocratiques Unifiées*, of which she is President". She further submits that she was also charged with "spreading the ideology of genocide, sectarianism and divisionism".

11. According to the Applicant, she was arrested on 21 April 2010, and remanded in custody, and then brought before a Judge at the Gasabo High Court

> "to adduce the means of her defence following a complaint filed by the legal body attached to that Court, in which the said legal department demanded her remand in custody, on the grounds of alleged serious, grave and consistent indications of guilt, which could mean that the Applicant committed the offence of aiding and abetting terrorism and the ideology of genocide as outlined above".

12. The Applicant further indicates that on 22 April 2010, the Gasabo High Court issued a judicial interim release order with certain conditions, such as withholding of her passport, prohibition from leaving the city of Kigali without authorisation, reporting two times a month to the *Organe Nationale des Poursuites Judiciares* - National Prosecution Department (ONPJ). However, on 14 October 2010, she was re-arrested, taken to the CID Headquarters and was again charged with terrorist acts, an offence punishable under Article 12 of Law No. 45/2008 of 9 September 2008.

13. The Respondent did not contest the facts presented by the Applicant.

B. Proceedings before the High Court

14. According to the Applicant, she was arraigned before the High Court on the charges enumerated in paragraph 8 above, adding that "by an order of the President of the High Court the matter was set down to be heard on 16 May 2011. On the day of the hearing, the matter was joined with the case '*the State of Rwanda v Nditurende Tharcisse, Karuta JM Vinney and Habiyaremye Noel*, and the new matter adjourned for 20 June 2011".

15. The Applicant submits that on 20 June 2011, the matter was again adjourned to 5 September 2011, and on the same day, she deplored the "various acts of violation perpetrated against her, such as systematic body search, by the security services". According to her,

> "this situation was vehemently protested before the High Court which, through a pre-trial order, deemed that the said security services had the latitude to carry out body search operations on anyone found in the

courtroom, including the Counsel for the defence."

16. The Applicant claims that this decision of the High Court was appealed against, however, "in accordance with relevant Rwandese law, the appeal could be considered only after a final ruling on the merits of the main matter".

17. The Applicant avers that on 26 September 2011, *in limine litis*, she raised "many objections to admitting that decision based on the fact that the indictment order was issued in violation of certain principles, such as the legality of crimes and penalties, non-retroactivity, lack of jurisdiction, etc." The Applicant claims that on 27 September 2011, she sent a letter to the President of the High Court, with copies to the President of the Supreme Court, the Attorney General and the President of the Bar Association, to inform "all these institutions on how serious the situation was".

18. According to the Applicant, "by a pre-trial order issued on 13 October 2011, the High Court systematically threw out all the objections and petitions". She avers that

> "from that moment, the bench went ahead to examine the merits of the matter, taking into account only the submissions of the prosecution and those of the accused persons who had opted to plead guilty. Each time the defence attempted to question the accused persons to prove that their statements were contrary to the truth and condemn their collusion with the Office of the State Prosecutor and security services, the defence was called to order by the presiding judge, who in actual fact was acting not as a judge but rather as a prosecution body. It is in this climate of mistrust and suspicion that Habimana Michel, a prosecution witness, was heard".

19. Still according to the Applicant, "through a direct summons to a witness introduced at the behest of the Registrar-in-Chief of the High Court a certain Habimana Michel was requested to appear before the Court sitting to examine a criminal matter at the public hearing of 11 April 2012, as prosecution witness". Counsel for the Applicant were able to put questions to the witness to obtain clarification, and according to the Applicant,

> "to all these questions, the witness provided clear, concise and precise answers, thus putting into question the very basis of the charges, showing in broad daylight all the farce and scenario that had been orchestrated based on false statements by the accused, Uwumuremyi Vital, working in connivance with the Office of the State Prosecutor and various services".

20. The Applicant claims that realising that its strategy hitherto based on statements made by the accused persons, Uwumuremyi Vital, Nditurende Tharcisse and Karuta J M Vianney, had been undermined by the witness, the prosecutor seized by panic, "started intimidating the witness by using subterfuges and intimidation manoeuvres". She

alleges that,

> "without the knowledge of the bench and the defence, the State prosecutor ordered prison services to carry out a search on all the personal effects of the witness in his absence. In the evening of 11 April 2012, he was interrogated on the testimony he made in Court".

21. According to the Applicant, during the public hearing of 12 April 2012,

> "the prosecution used such clearly illegal investigation to claim to have discovered reportedly compromising documents against the defence… Upon analysing the content of the report, it was found that (i) the interrogation was held outside applicable legal hours, (ii) the witness was not assisted by a counsel of his choice; (iii) the interrogation dwelt on statements made by the witness in the morning before the Court".

22. Still according to the Applicant,

> "the defence tried in vain to protest before the High Court against such practices but was each time insulted and rudely interrupted by the presiding judge. Such acts have considerably undermined the fair trial nature of the trial and contributed to the Applicant's decision to quit the trial".

23. The Applicant stated that on 30 October 2012, the High Court delivered a judgment on the matter in which it

> "(i) admits the case submitted by the *Organe Nationale des Poursuites Judiciares* and rules it partially founded …(ii) rules in law that Ingabire Victoire Umuhoza is guilty of the offences of conspiracy to undermine established authority and violate constitutional principles by resorting to terrorism and armed force which are punishable under Law No. 21/1977 instituting the Penal Code. It further rules that Ms. Ingabire Victoire Umuhoza is guilty of the offence of minimization of the genocide, an offence punishable under Article 4 of Law No. 6/09/2003 on the punishment of genocide, crime against humanity and war crimes; (iii) sentences her on this count to 8 years of imprisonment with hard labour".

24. The Applicant asserts that in its judgment, the High Court indicated that the appeal "must be done in a period of 30 days following the sentencing".

25. The Court notes that the Respondent State did not contest the facts presented by the Applicant.

C. Petition before the Supreme Court

26. While the matter was still pending before the High Court, the Applicant on 16 May 2012, filed an application before the Supreme Court sitting in Constitutional Matters, seeking annulment of Articles 2 to 9 of Law No. 18/2008 of 23 July 2008, repressing the crime of genocide ideology and Article 4 of Law No. 33 bis/2003 of 6 September 2003, punishing the crime of genocide, crimes against humanity and

war crimes, on grounds of incompatibility with Articles 20, 33 and 34 of the Constitution of the Republic of Rwanda of 4 June 2003, as amended and updated.

27. According to the Applicant,

> "the aforementioned legal provisions have been formulated in unintelligible and ambiguous terms likely to generate confusion and arbitrary decision, to the point of immensely infringing the fundamental human rights of individuals as enshrined in the Constitution, especially with regard to freedom of expression in relation to the genocide which took place in Rwanda. Furthermore, the said legal provisions lend themselves to several interpretations".

28. In its Judgment of 18 October 2012, the Supreme Court

> "(i) declares inadmissible the application filed by Ingabire Victoire seeking annulment of Article 4 of Law No. 33 bis/2003 of 6 September, 2003, punishing the crime of genocide ideology, crimes against humanity and war crimes, as unfounded; (ii) declares inadmissible the request filed by Ingabire Victoire seeking annulment of Articles 4 to 9 of Law No. 18/2008 of 23 July, 2008, repressing the crime of genocide ideology, as groundless; and (iii) however, declares admissible the application filed by Ingabire Victoire seeking annulment of Articles 2 and 3 of Law No. 18/2008 of July, 2008, supressing the crime of genocide ideology, but declares the application groundless".

i. Appeal before the Supreme Court

29. Following the High Court judgment of 30 October 2012, both the Prosecution and the Applicant appealed before the Supreme Court of Rwanda.

30. The Prosecution argued on appeal, *inter alia,* that (i) it was not satisfied with the fact that the Applicant was not convicted of the crime of creating an armed group with the intent to carry out an armed attack, (ii) that the Applicant was acquitted of the offence of intentionally spreading rumours with the intent to incite the population against the existing authorities by disregarding the legislation in force at the time; and (iii) that the sentence the Applicant received on the crimes of which she was convicted was extremely reduced given the gravity of the crimes at issue.

31. For her part, the Applicant submitted on appeal that the High Court had disregarded the preliminary issues raised by her counsel, that the trial proceedings had not respected the basic principles of fair trial and that she was even convicted for crimes she had not committed.

32. According to Applicant, in its judgment of 13 December 2013, the Supreme Court ruled that she "has been found guilty of conspiracy to undermine the Government and the Constitution, through acts of

terrorism, war or other violent means, of downplaying genocide, and of spreading rumours with the intent to incite the population against the existing authorities". She was sentenced to 15 years imprisonment by the Supreme Court.

33. The Court notes that the Respondent State did not contest the facts presented by the Applicant.

ii. Procedure before the Court

34. By a letter dated 3 October 2014, the Applicant seized the Court with the present Application through her Counsel, and the Application was served on the Respondent State by letter dated 19 November 2014, given 60 days within which to file its Response.

35. By a letter dated 6 February 2015, the Registry, pursuant to Rule 35(2) and (3) of the Rules of Court transmitted the Application to the Chairperson of the African Union Commission and, through her, to the Executive Council of the Union, as well as to all the other States Parties to the Protocol.

36. By a letter dated 23 January 2015, the Respondent State forwarded to the Court its Response to the Application.

37. By a letter dated 9 June 2015, the National Commission for the Fight against Genocide of Rwanda applied to the Court for leave to appear as *amicus curiae* in the Application, and on 10 July 2015, the Court granted the request.

38. By a letter dated 6 April 2015, the Applicant filed her Reply to the Respondent's Response.

39. On 7 October 2015, during its 38th Ordinary Session, the Court ordered the Respondent State to furnish additional documentation. The Respondent did not do so.

40. By a letter dated 4 January 2016, the Registry notified the Parties of the Public Hearing set down for 4 March 2016.

41. By a letter dated 1 March 2016, the Respondent State notified the Court of its deposit of an instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol. The Respondent State in its letter contended that after deposition of the same, the Court should suspend hearings involving the Republic of Rwanda until review is made to the Declaration and the Court is notified in due course.

42. By a letter dated 3 March 2016, the Legal Counsel of the African Union Commission notified the Court of the submission of the Respondent State's instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol, which was received at the African Union Commission on 29 February 2016.

43. At the Public Hearing of 4 March 2016, the Applicant was represented by Advocate Gatera Gashabana and Dr Caroline

Buisman. The Respondent State did not appear. The Court heard the representatives of the Applicant on procedural matters in which they requested the Court to:

"a. Reject the *amicus curiae* brief submitted by the National Commission for the Fight against Genocide;

b. Order the Respondent State to facilitate access to the Applicant by her representatives;

c. Order the Respondent State to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court; and

d. Order the Respondent State to comply with the Court's order of 7 October 2015, to file pertinent documents".

44. In an order issued on 18 March 2016, the Court decided as follows:

"a. That Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Court Protocol, within fifteen (15) days of receipt of this Order.

b. That its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Court Protocol shall be handed down at a date to be duly notified to the Parties.

c. That the Applicant file written submissions on the procedural matters stated in paragraph 14 above, within fifteen (15) days of receipt of this Order."

45. On 3 June 2016, the Court delivered a Ruling on the Respondent State's withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol. In that Ruling, the Court decided, among other things, that "the withdrawal of its declaration by the Respondent State has no effect on the instant Application and that the Court has jurisdiction to continue hearing the Application".

46. On 22 March 2017, a Public Hearing was held to receive arguments on jurisdiction, admissibility and the merits. The Applicant was represented by Advocate Gatera Gashabana and Dr Caroline Buisman. The Respondent State did not appear.

47. During the public hearing, the Judges posed questions to the Applicant's representatives to which the latter provided answers.

IV. Prayers of the Parties

A. Prayers of the Applicant

48. The Applicant prays the Court to:

"a. Repeal, with retroactive effect, sections 116 and 463

of Organic Law N° 01/2012 of 2 May 2012, relating to the Penal Code as well as that of Law N° 84/2013 of 28 October, 2013, relating to the punishment of the crime of ideology of the Genocide;

b. Order the review of the Case;

c. Annulment of all the decisions that had been taken since the preliminary investigation up till the pronouncement of the last judgment;

d. Order the Applicant's release on parole; and

e. Payment of costs and reparations".

The Applicant reiterated these prayers during the Public Hearing of 22 March 2017.

B. Prayers of the Respondent State

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

"a. Declare the Application vexatious, frivolous and without merit; and

b. Dismiss the Application with cost".

V. Jurisdiction

50. In accordance with Rule 39(1) of its Rules, the Court shall conduct a preliminary examination of its jurisdiction, before dealing with the merits of the Application.

A. Objection to the material jurisdiction of the Court

51. The Respondent State contends that the Applicant has seized this Court as an appellate Court by requesting the latter to reverse or quash the decisions of the Respondent State's courts, and to replace the Respondent State's legislative and judicial institutions. According to the Respondent, "…the African Court is neither a Court of Appeal nor a legislative body which can nullify or reform court decisions and make national legislation in lieu of national legislative Assemblies". The Respondent State submits in this regard that an "application requesting the Court to take such action should be dismissed".

52. In her Reply to the Respondent State's Response, the Applicant submits that the Respondent State's argument is at variance with all evidence and cannot resist the slightest bit of serious analysis. She substantiates by indicating that the Application mentions "the legal instruments of human rights duly ratified by the State of Rwanda which

have suffered various violations in the course of proceedings or simply ignored". She reiterates that

> "it is clear that this Court was not seized as an appellate jurisdiction as wrongly claimed by the Respondent, but rather as a court responsible for adjudicating disputes resulting from multiple human rights violations that considerably undermine the case between the Applicant and the National Public Prosecution Authority before the High Court and Supreme Court, respectively".

53. This Court reiterates its position as affirmed in *Ernest Francis Mtingwi v Republic of Malawi,*[1] that it is not an appeal court with respect to decisions rendered by national courts. However, as it underscored in its Judgment of 20 November 2015, in *Alex Thomas v United Republic of Tanzania,* and confirmed in its Judgment of 3 June 2016, in *Mohamed Abubakari v United Republic of Tanzania,* this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is a Party.[2]

54. Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as an appellate Court.

55. Furthermore, regarding its material jurisdiction, the Court notes that since the Applicant alleges violations of provisions of some of the international instruments to which the Respondent State is a party, it has material jurisdiction in accordance with Article 3(1) of the Protocol, which provides that the jurisdiction of the Court "shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

B. Other aspects of jurisdiction

56. The Court notes that its personal, temporal and territorial jurisdiction has not been contested by the Respondent State, and nothing in the pleadings indicate that the Court does not have jurisdiction. The Court thus holds that:

> "(i) it has jurisdiction *ratione personae* given that the Respondent State is a party to the Protocol and deposited the declaration

1 Application No. 001/2013. Decision on Jurisdiction 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi*, para 14.

2 Application No. 005/2013. Judgment on Merits 20/11/2015, Alex *Thomas v United Republic of Tanzania* (hereinafter referred to as "the *Alex Thomas Judgment*"), para 130, Application No. 007/2013. Judgment on Merits of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania* (hereinafter referred to as "the *Mohamed Abubakari Judgment*"), para 29.

required under Article 34(6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol;

ii. it has jurisdiction *ratione temporis* in terms of the fact that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what she considers as unfair process;

iii. it has jurisdiction *ratione loci* given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

57. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility

58. Pursuant to Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of … admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules".

59. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:
>
> "1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> 2. Comply with the Constitutive Act of the Union and the Charter;
>
> 3. Not contain any disparaging or insulting language;
>
> 4. Not be based exclusively on news disseminated through the mass media;
>
> 5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
>
> 6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
>
> 7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

60. While some of the above conditions are not in dispute between the Parties, the Respondent State raises an objection relating to the alleged failure by the Applicant to exhaust local remedies, pursuant to Article 56(5) of the Charter and Rule 40(5) of the Rules.

A. Objection relating to non-compliance with Article 56(5) of the Charter and Rule 40(5) of the Rules

61. The Respondent State contends that the Applicant failed to seize the Supreme Court sitting in constitutional matters to challenge the provisions of Rwandan laws that she alleges to be inconsistent with the Charter and other relevant international instruments. The Respondent State contends that the Applicant is challenging the conformity of Law No. 33 *bis* of 6 September 2003, on the punishment of genocide, crimes against humanity and war crimes and that the Constitution of the Respondent State empowers the Supreme Court to hear petitions aimed at reviewing laws that are inconsistent with the Constitution.

62. The Respondent State further contends that in terms of Article 145(3) of the Constitution of Rwanda of 3 June, 2003, "the Supreme Court has jurisdiction and the responsibility to hear petitions aimed at reviewing adopted laws that are inconsistent with the Constitution", and Article 53 of Organic Law N° 03/2012/OL of 13 June 2012, determining the organization, functioning and jurisdiction of the Supreme Court, gives the Court, upon petition by any Applicant, jurisdiction to "partially or completely repeal any Organic Law or Decree-Law for reasons of non-conformity with the Constitution".

63. The Respondent State submits that as the Applicant is alleging that Law No. 33 *bis* of 6 September 2003, is not in conformity with the Constitution, "she must exhaust the local remedies available for the purpose: this being an application made before the Supreme Court sitting in Constitutional Matters…". The Respondent State adds that "having failed to do so, makes the application inadmissible due to non-compliance with Article 56(5) [of the Charter] and Rule 40 of the Rules of Court".

64. The Respondent State avers further that the Applicant failed to seize competent courts to apply for judicial review of the decisions against her. According to the Respondent State, Article 78 of the Organic Law No. 03/2012/OL of 13/06/2012, provides that the Supreme Court shall have exclusive jurisdiction over applications for review of final decisions due to injustice, and Article 81(2) provides that the grounds for an application for review due to injustice, which include, inter alia, the review of a Court decision in disfavour of anyone for injustice, especially when there are provisions in this regard and irrefutable evidence that the judge ignored in rendering the judgment. The Respondent State submits that "by failure to make an application for the Supreme Court to review the decision that she considers unjust, the Applicant has failed to satisfy the requirement set forth in Article 56 of the Charter and Rule 40 of the Rules", and invites the Court to declare the application inadmissible.

65. The Applicant submits that the Respondent State's courts are not empowered to hear disputes concerning interpretation and application of the Charter, the Protocol and other human rights instruments. According to the Applicant, "Rwandan positive law has never put in place special courts or tribunals competent to adjudicate human rights issues". The Applicant concludes in this regard that "in the absence of Rwandan courts and tribunals competent to hear cases and disputes concerning the interpretation and implementation of the Charter, the Protocol and any other human rights instrument", the submission regarding the Applicant's breach of Article 56(5) of the Charter and Rule 40(5) of the Rules are devoid of any legal basis, and the objection must therefore be found "groundless".

66. On the Respondent State's submission that the Applicant failed to challenge the constitutionality of Law No. 33 *bis* of 6 September 2003, before the Supreme Court, the Applicant's Counsel contends that "she filed before the Supreme Court a Motion to challenge the constitutionality of Law No. 33 bis of 6 September 2003, punishing the crime of genocide, crime against humanity and war crimes". To corroborate her argument, she adds that "the case was entered on the cause list as No. RINST/PEN/002/12/CS, examined and pleaded before the Supreme Court for a ruling on the merits of the said Motion in open court on 19 July 2012". The Applicant concludes that "in its open court hearing of 10 October 2012, the Supreme Court dismissed the Motion, having found it groundless", and according to the Supreme Court, **"**Law No. 33 bis of 6 September 2003…is clearly consistent with the Constitution".

67. On the submission that the Applicant failed to avail herself of the of judicial review remedy, the Applicant contents that "the action instituted for review of a final judicial decision on grounds of injustice does not respect the criteria of effectiveness, accessibility, efficiency and other criteria as required by international jurisprudence". According to the Applicant, pursuant to Article 79 of the Organic Law 03/2012 of June 2012, only the Office of the Ombudsman can petition the Supreme Court over applications for review, adding that the remedy of judicial review is subject to the discretion of the Office of the Ombudsman, the General Inspectorate of Courts and the President of the Supreme Court, and that the remedy may be subject to undue prolongation.

68. Regarding the appeal on unconstitutionality, this Court notes from the records before it that the Applicant did approach the Supreme Court of Rwanda, which is the highest court in the Respondent State, to challenge the constitutionality of Law No. 33 *bis* of 6 September 2003, on the punishment of genocide, crimes against humanity and war crimes, and the Supreme Court handed down its decision on 18 October 2012, finding the motion groundless.

69. In relation to the application for review, this Court notes that under Article 81 of Organic Law 03/2012 of June 2012, on the Organization, Functioning and Jurisdiction of the Supreme Court, applications for review may be heard only on the following grounds:

> "1. when there is an unquestionable evidence of corruption, favouritism or nepotism that were relied upon in the judgment and that were unknown to the losing party during the course of the proceedings;
>
> 2. when there are provisions and irrefutable evidence that the judge ignored in rendering the judgment;
>
> 3. when the judgment cannot be executed due to the drafting of its content."

70. An examination of these grounds shows that the review remedy would not have been sufficient to redress the Applicant's complaints which concerned alleged substantive violation of the Applicant's human rights and not only allegations of bias or technical and procedural errors. Moreover, under Article 79 of Organic Law 03/2012 of June 2012, which governs the Procedure for petitioning the Supreme Court over applications for review of a final decision due to injustice:

> "The Office of the Ombudsman shall be the competent organ to petition the Supreme Court over application for review of a final decision due to injustice. When, the final decision is made and there is evidence of injustice referred to under Article 81 of this Organic Law, Parties to the case shall inform the Office of the Ombudsman of the matter. When the Office of the Ombudsman finds that there is no injustice in handing down the decision, it shall inform the Applicant. When the Office of the Ombudsman finds that the decision handed down is unjust, it shall send to the President of the Supreme Court a letter accompanied by a report on the issue and evidence of such injustice and request to re-adjudicate the case".

71. The above provision demonstrates that the capacity to exercise the review remedy lies exclusively with the Ombudsman which, in this regard, uses its discretionary power. The assessment on whether there has or has not been injustice rest with the Ombudsman.

72. In the view of the Court and in the circumstances of this case, therefore, an application for review under the Rwandan legal system is an extraordinary remedy which would not constitute an effective and efficient remedy, and which the Applicant did not have to exhaust.[3]

73. In light of the foregoing, the Court dismisses the Respondent State's objection and finds that this Application fulfils the admissibility requirement under Article 56(5) of the Charter and Rule 40(5) of the Rules.

3 See *Alex Thomas* Judgment, para 63.

B. Compliance with Rule 40(1), (2), (3), (4), (6) and (7) of the Rules

74. The Court notes that the issue of compliance with sub-rules 40(1), (2), (3), (4), (6) and (7) is not in contention, and nothing in the Parties' submissions indicates that they have not been complied with. The Court therefore holds that the requirements under those provisions have been met.

75. In light of the foregoing, the Court finds that the instant Application fulfils all admissibility requirements in terms of Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VII. On the merits

76. The Applicant alleges violation of Articles 3, 7, 9 and 15 of the Charter, Articles 7, 14, 15, 18 and 19 of the ICCPR and Articles 1, 7, 10, 11, 18 and 19 of the Universal Declaration on Human Rights (hereinafter referred to as "the Universal Declaration). It emerges from the case file that the Applicant's allegation focuses on the rights to a fair trial and freedom of opinion and expression.

77. It should be stated here that although in her Application, the Applicant alleges violation of Articles 3 of the Charter, and Articles 7 and 18 of the ICCPR, she did not pursue these allegations in the course of the proceedings, and the Court will accordingly not pronounce itself on them.

A. Right to a fair trial

78. The elements of the right to a fair trial as raised in the instant case are as follows:

"a. the right to presumption of innocence;

(b) the right to defence;

(c) the right to be tried by a neutral and impartial court;

(d) the principle of legality of crimes and penalties and non-retroactivity of criminal law.

i. The right to presumption of innocence

79. The Applicant submits that the Respondent State's allegations linked to the terrorist attacks that occurred in the city of Kigali were a pretext orchestrated by the prosecution to impute to the Applicant the offence of complicity in the terrorism on the basis of the confessions

unlawfully obtained from her co-defendants. According to the Applicant, the co-defendants were allegedly forced to testify against themselves and to plead guilty; and it is on the basis of these irregularities that the prosecution justified remanding her in custody. The Applicant submits in conclusion that this act constitutes a violation of the principle of presumption of innocence.

80. According to the Respondent State, the Applicant's accusations are unfounded because her trial was conducted with all the guarantees provided by law and in accordance with international standards. It avers that the Applicant was given the opportunity to appear in court, to be assisted by Counsel and in the end was lawfully convicted. The Respondent State concludes that the Applicant's right to presumption of innocence and therefore, her right to a fair trial, has not been violated.

81. The Court notes that presumption of innocence is a fundamental human right enshrined in Article 7(1)(b) of the Charter, which provides that:

> "Every individual shall have the right to have his cause heard. This comprises b) the right to be presumed innocent until proved guilty by a competent court or tribunal".

82. Article 14(2) of the ICCPR also provides for the same right in the following terms:

> "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

83. The essence of the right to presumption of innocence lies in its prescription that any suspect in a criminal trial is considered innocent throughout all the phases of the proceedings, from preliminary investigation to the delivery of judgment, and until his guilt is legally established.

84. The Court finds, on the basis of the pleadings, that the Applicant has not adduced evidence to the effect that her right to presumption of innocence has been violated. It therefore dismisses this allegation.

ii. The right to defence

85. The Applicant submits that the prosecuting authorities harassed the defence witness, Mr Habimana Michel, employing subterfuge and intimidation manoeuvres. She alleges that, unknown to the Judge and the defence, the Public Prosecutor ordered the prison services to search all the personal effects of the witness in his absence in the evening of 11 April 2012. She alleges further that the witness was questioned over his testimony in court earlier that day.

86. According to the Applicant, at the public hearing on 12 April 2012, the prosecuting authorities used material obtained from the

search to allege the discovery of compromising documents against her. She avers that the documents seized included a letter referenced 165/PR/2012 dated 11 April 2012, sent by the Remera Prison Superintendent, together with a report on the hearing of the witness.

87. The Applicant further contends that analysis of the report indicated that the questioning took place outside the applicable legal hours; that the witness was not assisted by Counsel of her choice and that the interrogation focused on the statements made in court by the witness in the morning of that day. According to the Applicant, this was an attempt to intimidate the witness; and that through her counsel, she sought to protest such a practice during the trial but to no avail; on the contrary, they were each time thoroughly insulted and rudely interrupted by the President of the Court.

88. The Applicant also avers that there were "various abuses" characterised by systematic searches of the Defence team by the security services. According to her, this security measure was not applied to the prosecution team, thus creating an unequal treatment. She contends that the judges of the High Court "systematically" prevented her team of counsel from speaking. She claims that the written and oral protests of the Defence at both the High Court and the Supreme Court were not heeded.

89. According to the Applicant, the acts of intimidation and the threats to which the Defence witness was subjected undermines the right to defence. She avers that one of the Judges instead stated that the Counsel should not have intervened in favour of a person who was not his client. She added that, following that incident, the President of the Supreme Court terminated the examination of the defence witness followed by the withdrawal of Ingabire's trial. For the Applicant, this is a flagrant violation of her right to a fair trial, contrary to Article 7 of the Charter; Article 14(1) of the ICCPR and Article 10 of the Universal Declaration.

90. The Respondent State submits that the search of the Defence witness was conducted after the witness gave his oral and written testimony in Court. It avers that it is a common practice for prison guards to search prisoners from time to time; and that the search of members of the Defence team was conducted as part of security measures, as there had been grenade attacks in Kigali before the trial.

91. The Respondent State also submits that the Applicant was assisted by a team of two lawyers of her choice, one of whom was an international lawyer, throughout the proceedings, and that they had full latitude to organise her defence without hindrance. It further submits that the trial lasted two years and, therefore, all the Parties had the time needed for them to defend their cause. According to the Respondent State, the allegations of violation of the right to defence are unfounded.

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:

a)……

b)……

c) the right to defence, including the right to be defended by Counsel of his choice".

93. An essential aspect of the right to defence includes the right to call witnesses in one's defence. Witnesses in turn deserve protection from intimidation and reprisals to ensure that they can assist the accused persons and the authorities to reach a just decision.

94. In the instant case, the Court notes that the Applicant submits two main allegations relating to her right to defence: searches conducted on her Defence Counsel at the High Court and secondly, the search of the Defence witness at the prison. Based on the records, at the High Court after the Defence Counsel complained, the High Court ordered that the searches have to be done on all Parties, including the public for security reasons.

95. Regarding the search of prisoners and detainees, the Court notes that, this is a normal practice in prisons. Similarly, searches of the Defence Counsel and the public at the Court may be carried out as part of security measures, given that grenade attacks had happened in Kigali before the Applicant's trial. Thus, as far as the searches in the prison and of the Defence Counsel at the High Court are concerned, the Court is of the view that the Applicant's right to defence was not contravened.

96. The Court however notes from the pleadings that the search conducted in prison resulted in the seizure of certain documents, without the knowledge of the Defence, documents which were allegedly later used against the Applicant before the High Court. Furthermore, the Applicant complained about the Judges' refusal to allow her Counsel to put questions to the co-accused; the questioning and the threats to which the Defence witness was subjected to on account of his deposition upon return to prison; the difficulties faced by the Counsel in visiting their client; the use of the co-accused's statements obtained in suspicious conditions after the latter's stay in a military camp. The Respondent did not refute each of these allegations but made a general denial that the allegations of violation of the right to defence are unfounded.

97. As regards the questioning of a witness by prison authorities over the testimony he/she has given in court, the Court notes that this is not a conduct consistent with standards that aim to promote a fair trial. Such actions may have an intimidating effect on witnesses'

willingness and disposition to cooperate and adduce evidence against the Respondent State. This is especially so for witnesses in detention or already serving prison sentences. However, as the questioning happened after the witness had given testimony in Court, the Court concludes that in the circumstances of the case, this did not violate the right to defence of the Applicant.

98. The Court further observes that the right to defence is not limited to the choice of Counsel. This right also includes principles such as access to witnesses, and opportunity for Counsel to express themselves, consult with their clients and to examine and cross-examine witnesses. The right to defence further includes the right to know and examine documents used against one's trial. In the instant case, the difficulty encountered by the Applicant's Defence Counsel in putting questions to the co-accused, the threats and environment of intimidation faced by the defence witness and the use of documents seized during what the Applicant considers an illegal search, that was later used against her, without giving her the chance to examine it, are incompatible with international standards pertaining to the right to defence. The Court therefore holds that the Applicant's right to defence in this regard was violated, contrary to Article 7(1)(c) of the Charter.

iii. The right to be tried by a neutral and impartial tribunal

99. The Applicant contends that the fact that the Judges of the Supreme Court and the High Court did not react to the national prosecution authorities' intimidation of a Defence witness, in the person of one Habimana Michel, and also that the Court considers the said acts of intimidation as having had no impact on the content of the witness's testimony, is proof of their partiality. The Applicant further argues that, at the Supreme Court, her counsel mounted a strong protest denouncing the abuses and excesses of the prosecution authorities vis-à-vis a defence witness.

100. The Respondent submits that this allegation is unfounded, since according to the latter, all the guarantees provided by law have been observed.

101. The Court notes that the Charter in its Article 7(1)(d) provides that: "Every individual shall have the right to have his cause heard. This comprises "(d) the right to be tried … by an impartial court or tribunal".

Article 14(1) of ICCPR[4] and Article 10 of the Universal Declaration also protect the right to trial by an independent and impartial tribunal.[5]

102. According to the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,

> "the impartiality of a judicial body could be determined on the basis of [the following] three relevant facts:
>
> "1. that the position of the judicial officer allows him or her to play a crucial role in the proceedings;
>
> i. the judicial officer may have expressed an opinion which would influence the decision-making;
>
> ii. the judicial official would have to rule on an action taken in a prior capacity".[6]

103. The aforementioned Guidelines provide that the impartiality of a judicial body would be compromised when:

> "1. a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;
>
> 2. a judicial official secretly participated in the investigation of a case;
>
> 3. a judicial official has some connection with the case or a party to the case; or
>
> 4. a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body".[7]

104. In the instant case, the evidence adduced by the Applicant does not sufficiently demonstrate that any of the above factors existed in the course of her trial. In the circumstances, the Court dismisses this allegation.

iv. The principle of legality and non-retroactivity of the law

105. The Applicant submits that she was first charged and convicted

4 Article 14(1) of the ICCPR provides that: "…All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…".

5 Article 10 of the Universal Declaration: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

6 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle 5.

7 *Ibid*.

for the crime of propagating the ideology of genocide under Law No. 18/2008 of 23 July 2008. Subsequently, the Supreme Court found her guilty of minimising genocide, re-qualifying the acts under a new law, that is, Law No. 84/2013 on the repression of the ideology of the crime of genocide, which entered into force on 28 October 2013. According to her, the reference to this new law by the Supreme Court violates the principle of non-retroactivity of the law and the non-retroactive application of the criminal punishment.

106. The Respondent contends that the principle of legality of crimes and penalties as provided under Article 7(2) of the Charter was fully respected during the trial. For the Respondent, any Judge both at the High Court and the Supreme Court has the last word in terms of re-characterising an offence and applying the appropriate law, and this does not amount to a violation of the principle of legality and non-retroactivity of the law.

107. The Court notes that the relevant provision for the issue at hand is Article 7(2) of the Charter, which states that:

> "No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed..."

108. The non-retroactivity of criminal law is an important rule intrinsic to the principle of legality, which stipulates, among others, that criminal responsibility and punishment must be based only on the prior promulgation of laws which prohibit a particular conduct. The principle of legality requires that society is informed of prohibited behaviour before the law prohibiting or criminalising such behaviour comes into force. In other words, the prohibited conduct must be clear and verifiable and the punishment that an infringement entails should be specified before individuals are held accountable for the same.

109. The rule of non-retroactivity forbids the retrospective application of a criminal law to acts committed before the enactment of the law when such law makes previous lawful acts reprehensible or attaches new punishment to the existing criminal acts. The only exception where a criminal law may apply retroactively is when its application favours an individual by decriminalising a previous criminal conduct which he/she is accused of or provides lighter penalty than the law which was in force during the commission of the conduct.[8]

110. In the instant case, the Court observes that crimes for which the Applicant was convicted were said to have been committed between 2003 and 2010. During this time, there were four criminal laws in the

8 See Article 15(1) of the ICCPR.

Respondent State governing the offences she was charged with: the 1977 law instituting the Penal Code, Law No. 33/2003 of 6 September 2003, on the Repression of Crimes of Genocide and Crimes against Humanity of 2003, Law No. 18/2008 of the 23 July 2008, on the Repression of the Crime of Ideology of Genocide and Law No.45/2008 on Counter-terrorism of 2008. Law No. 18/ 2008 repealed the Law No. 33/2003 to the extent the latter contradicts the provisions of the former.

111. The Court notes that Article 4 of Law No. 33/2003 of 2003 contains a provision criminalising minimisation of genocide while Law No. 18/ 2008 of 2008 on the Crime of the Ideology of Genocide does not have a similar provision. In other words, as far as the crime of minimisation of genocide is concerned; Law No. 33/2003 of 2003 continued to apply. However, in 2013, both Law No. 33/2003 of 2003 and Law No. 18/2008 of 2008 were repealed by Law No. 84/2013 of 2013 on the Crime of Genocide and Other related offences. Similarly, the 1977 Law Instituting the Penal Code was replaced by the 2012 Law Instituting the Penal Code.

112. Under its Article 6, Law No. 84/2013 of 2013 provides for provisions on minimisation of genocide. In comparison to Law No. 33/2003 of 2003, which provides for 10-20 years imprisonment for the crime of minimisation of genocide, Law No. 84/2013 provides for 5-10 years imprisonment for the same crime.[9] On the other hand, for crimes of conspiracy and threatening State security and the Constitution, and crimes of spreading rumours with intent to incite the population against the existing authorities, the 1977 Penal Code provides a criminal punishment extending up to life imprisonment while the 2012 Penal Code provides a maximum penalty ranging from 20- 25 years for the same crimes.

113. The Court takes note that the Applicant was initially charged with propagating the ideology of genocide before the High Court on the basis of Law No 18/2008 of 2008. However, the High Court re-qualified the charge and convicted her for the crime of revisionism of genocide on the basis of Article 4 of Law No. 33/2003 of 2003 and crime of treason to threaten state security and the Constitution under the 1977 Penal Code, and sentenced her to 8 years imprisonment. On appeal, the Supreme Court sustained the conviction but rejected the mitigating circumstances invoked by Applicant and crimes of which she was acquitted at the High Court. The Supreme Court, citing the existence of concurrence of crimes, imposed a punishment of 15 years imprisonment on the basis of Law No. 84/2013 of 2013 and the

9 Article 12(3) Law No. 84/2013 "cum" Article 116 of the 2012 Organic Law Instituting the Penal Code.

2012 Penal Code for the crime of minimising genocide and crimes of conspiracy and threatening State security.

114. The Court is of the view that the rule of non-retroactivity of the law does not preclude the requalification of a criminal charge in the course of a criminal trial resulting from the same facts. What is rather prohibited is the application of new criminal laws, in the instant case, Law No. 84/2013 of 2013 and the 2012 Penal Code, to crimes alleged to have been committed before the coming into force of such law.

115. However, as indicated above, the punishments for the crime of threatening State security and the Constitution in the 1977 Penal Code may extend to life imprisonment and for the crime of minimisation of genocide in the Law No. 33/2003 of 2003 ranges from 10-20 years as opposed to 15 years' imprisonment in the 2012 Penal Code and 5-10 years imprisonment prescribed in the Law No. 84/2013, respectively.

116. It is therefore evident that the application of the 2012 Penal Code and Law No. 84/2013 for the Applicant was in general favourable and is congruent with the exception to the rule of non-retroactivity, that new criminal laws may be applied to acts committed before their commission when these laws provide lighter punishment. The fact that the punishment imposed on the Applicant by the Supreme Court was higher than the penalty that was initially imposed by the High Court was not because of the retroactive application of the new laws. As the records before this Court reveal, this was rather because the Supreme Court had rejected the mitigating circumstances considered by the High Court and convicted the Applicant for an offense (spreading of rumours) for which she had been acquitted by the High Court.

117. The Court, therefore, finds that there was no violation of Article 7(2) of the Charter.

118. For the avoidance of doubt, the Court wishes to state that this finding of the Court relates to the allegation of violation of the principle of non-retroactivity only and is without prejudice to its position with respect to the right to freedom of expression and opinion below.

B. Freedom of opinion and expression

119. The Applicant contends that she was convicted for minimisation of genocide whereas the opinion she expressed in the course of her speech at the Kigali Genocide Memorial concerned the management of power, the sharing of resources, the administration of justice, the history of the country and the attack that led to the demise of the former President of the Republic. The Applicant submits that she had no intention to minimise and trivialise genocide or to practice the ideology of genocide and that the right to express her opinion was protected by the Constitution of Rwanda and other international instruments.

120. The Applicant maintains that the laws of Rwanda which criminalise the negation of genocide are vague and unclear, and do not comply with the requirement that restrictions on the rights of individuals must be necessary. She added that the Respondent State had admitted that there were defects in the laws penalising the minimisation of genocide.
121. The Applicant further contends that she was found guilty of spreading rumours likely or seeking to cause a revolt among the population against established authority. She also contends that in convicting her for propagating rumours, the local courts failed to prove or to substantiate their arguments through specific and corroborative evidence showing that her positions were likely to establish her criminal liability.
122. During the Public Hearing, Counsel for the Applicant, in reference to a letter from the Applicant, said:

> "We are not against a law to punish those who minimize the genocide committed against Tutsis in Rwanda, as is the case for other genocides committed elsewhere. But we demand solid benchmarks to avoid any amalgamation and the use of such a law for political purposes. Thus, we demand that such a law clearly show the border between the legitimate freedom of opinion and the actual crime of minimisation of genocide."

123. For the Applicant, the theory of margin of appreciation invoked by the Respondent State refers to the latitude that the international monitoring bodies are willing to grant national authorities in fulfilling their obligations under the international human rights instruments they have ratified. The theory can also be described as the latitude a government enjoys in evaluating factual situations and in applying the provisions set out in international human rights instruments. This theory is premised on the fact that the process of realising a "uniform standard" of human rights protection must be gradual because the entire legal framework rests on the fragile foundations of the consent of Member States. According to the Applicant, the margin of appreciation provides the flexibility needed to avoid damaging confrontations between human rights tribunals and Member States and enables the Court to strike a balance between the sovereignty of States and their international obligations.
124. The Respondent State argues that the right to express one's opinion is subject to limitations and that considering the social context, the history of and the environment in Rwanda, there was reason to enact laws to penalise the minimisation of genocide. It also notes that the Judgment of the Supreme Court had alluded to the fact that other countries had imposed similar restrictions so as to prevent the minimisation of genocide.
125. The Respondent State affirms that this Court should apply the principles of subsidiarity and adopt a margin of appreciation in its

assessment of the internal situation of Rwanda.

126. The Respondent State submits that in examining the Application, the Court should consider the margin of appreciation in complying with Article 1 of the Charter. In this regard, it argues that "the content given to the right cannot be enforced in a vacuum and as such the ambit of its enforcement will be heavily influenced by the domestic context in which that right operates". To this end, the Respondent State avers that "it is critical that the African Court gives serious contextual consideration to the domestic situation when evaluating a particular State's level of compliance". On the principle of subsidiarity, the Respondent State submits that:

> "… since the initial responsibility rests with the Respondent [State] to give effect to the rights guaranteed by the Charter, she also has to be given an opportunity through her institutions to decide how to discharge this duty".

127. The National Commission for the Fight against Genocide *(CNLG*), intervening as *Amicus Curiae,* argues that the theory of double genocide to which the Applicant referred is nothing but another way of denying the genocide perpetrated in 1994 against Tutsis in Rwanda. According to *CNLG,* revisionism is structured around a number of affirmations which help to conceal the criminal intent that is an integral part of the crime of genocide, without denying the reality of the massacres and to sustain the idea of double genocide. *CNLG* submits further that the theory of double genocide is intended to transform the 1994 genocide against Tutsis in Rwanda into an inter-ethnic massacre, and at the same time, exonerate the perpetrators, their accomplices and their sympathisers.

128. *CNLG* further alleges that the statements made by the Applicant at the Kigali Genocide Memorial constitute a form of expression of the theory of double genocide in Rwanda, a manipulation skilfully executed and sowing the seeds of confusion around the genocide committed against the Tutsis in Rwanda in 1994. According to *CNLG*, this statement signifies that there were two genocides in Rwanda, and that the Tutsis are therefore as guilty as their executioners. It submits that the Applicant's statements are a revisionist manoeuvre with the peculiar feature of using partial and dishonest methodology to select, disguise, divert or destroy information that corroborates the existence of genocide against the Tutsis.

129. The Court notes that the Charter in its Article 9(2) enshrines the right to freedom of expression in the following terms:

> "Every individual shall have the right to express and disseminate his opinions within the law".

130. Article 19 of the ICCPR also provides that:

> "1. Everyone shall have the right to hold opinions without

interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

131. The right to freedom of expression is one of the fundamental rights protected by international human rights law, the respect of which is crucial and indispensable for the free development of the human person and to create a democratic society. It comprises *inter alia*, the freedom to express and communicate or disseminate information, ideas or opinions of any nature in any form and using any means, whether at national or international level. The right to free expression requires that States protect this right from interferences regardless of whether the interferences originate from private individuals or government agents.

132. While freedom of expression is as important as all other rights for the self-development of individuals within a democratic society, it is not a right to be enjoyed without limits. In its Judgment in the Matter of *Lohé Issa Konate v Burkina Faso* of 5 December 2014, this Court emphasised that freedom of expression is not an absolute right and under some circumstances, it may be subject to some restrictions. In that judgment, relying on Article 19(3) of ICCPR and the jurisprudence of the African Commission on Human Rights, and other international and regional human rights bodies, the Court held that the terms "within the law" in Article 9(2) envisage the possibility where restrictions may be put in place on the exercise of freedom of expression provided that such restrictions are prescribed by law, serve a legitimate purpose and are necessary and proportional as may be expected in a democratic society.[10]

133. In the instant case, the Court infers from the undisputed submissions of both Parties that the Applicant was convicted and sentenced both at the High Court and the Supreme Court of the Respondent State for the remarks that she made at the Kigali Genocide

10 Application No. 004/2013. Judgement on Merits of 5/12/2014, *Lohé Issa Konate v Burkina Faso* (hereinafter referred to as "the *Issa Konate Judgment*"), paras 145-166.

Memorial, and her interviews and other statements she expressed on different occasions. It is no question that the said conviction and sentence of the Applicant constitute a restriction on her freedom of expression for the purpose of Article 9(2) and in terms of Article 19(3) of ICCPR. The key issue that the Court should thus address is whether such restriction was reasonable, in that, it was provided by law, served a legitimate purpose, and was necessary and proportional in the circumstances of the case.

i. Whether the interference was provided by law

134. There is no dispute between the Parties that the Applicant's conviction and sentence for the crimes of minimisation (revisionism) of genocide, spreading rumours to undermine the authority of the government, propagating the ideology of genocide and threatening State security and the Constitution were based on the national law of the Respondent State. The records of the case reveal that both the High Court and Supreme Court in their verdicts relied upon Law No. 33/2003, Law No. 84/2013 and the 2012 Penal Code. However, the Applicant challenges the nature of these laws, asserting that they are 'vague and unclear'.

135. The Court recalls its established jurisprudence that the reference to the 'law' in Article 9(2) of the Charter and in other provisions of the Charter must be interpreted in the light of international human rights standards,[11] which require that domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable and compatible with the purpose of the Charter and international human rights conventions and has to be of general application.[12]

136. In the instant case, regarding the Applicant's assertion that the laws relating to the minimisation of genocide is vague and unclear, the Court notes that some provisions of the aforementioned laws of the Respondent State are couched in broad and general terms and may

11 *Issa Konate Judgment*, para 129.

12 *A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/199**3** (1997), para 9.5, *Coard et al. v United States*, IAComHR, case 10.951, Report N° 109/99, 29/91999, paras 42-59, see also *Medvedyev and others v France*, ECtHR, Judgment, 29/32010, paras 92-100.

be subject to various interpretations.[13]

137. Nonetheless, the nature of the offences, that these laws seek to criminalise, are admittedly difficult to specify with precision. In addition, considering the margin of appreciation that the Respondent State enjoys in defining and prohibiting some criminal acts in its domestic legislation, the Court is of the view that the impugned laws provide adequate notice for individuals to foresee and adapt their behaviour to the rules.[14] The Court therefore holds that the said laws satisfy the requirement of "the law" as stipulated under Article 9(2) of the Charter.

ii. Whether the restriction served a legitimate purpose

138. In its submissions, the Respondent alludes that, given its past history of genocide, the kind of restrictions imposed by the domestic law (which were applied on the Applicant) are meant to protect State security and public order. The nature of the crimes for which the Applicant was charged and convicted also relate to the protection of national security, from expressions creating divisions among the people and internal strife against the government.

139. Unlike Article 19(3) of the ICCPR, the Court observes that Article 9(2) of the Charter does not list those legitimate purposes for which the right to freedom of expression may be restricted. Nonetheless, the general limitation clause under Article 27(2) of the Charter requires that all rights and freedoms must be exercised "with due regard to the rights of others, collective security, morality and common interest". In its case law, the Court has also acknowledged that restrictions on freedom of expression may be made to safeguard the rights of others, national security, public order, public morals and public health.[15]

140. In the instant case, the Court considers that the crimes for which the Applicant was convicted were serious in nature with potential grave repercussions on State security and public order and the aims of the abovementioned laws were to protect the same. The Court therefore

13 See for example, Article 8 of Law No. 84/2013 of 28 October 2013 on the crime of the ideology of genocide, which stipulates that: "The minimization of genocide is any intentional act manifested in public aimed at: 1. Minimising the seriousness of the consequences of the genocide; 2. minimising the methods by which the genocide was committed. Whoever commits an act provided for in the preceding paragraph, shall be guilty of an offense of minimization of the genocide". Article 116 of the Code of Criminal Procedure on negation and minimization of the genocide also stipulates that: "Anyone who, publicly, in his words, writings, images or in any other way, denies the genocide perpetrated against the Tutsi, grossly trivializes it, seeks to justify it or to approve its basis or conceals or destroys the evidence, is liable to imprisonment for more than (5) to (9) years".

14 *Issa Konate* Judgment, para 128.

15 *Issa Konate* Judgment, para. 134-135.

holds that the restriction made on the Applicant's freedom of expression served the legitimate interests of protecting national security and public order.

iii. Whether the restriction was necessary and proportional

141. The Court notes that restrictions made on the exercise of freedom of expression must be strictly necessary in a democratic society and proportional to the legitimate purposes pursued by imposing such restrictions.[16] In this regard, the Court wishes to point out that, the determination of necessity and proportionality in the contexts of freedom of expression should consider that some forms of expression such as political speech, in particular, when they are directed towards the government and government officials, or are spoken by persons of special status, such as public figures, deserve a higher degree of tolerance than others.[17]

142. It should also be noted that freedom of expression protects not only" information" or "opinions that are favourably received or regarded as inoffensive, but also those that offend, shock or disturb" a State or any section of the population.[18] As the European Court of Human Rights has stated in its decision in *Handyside v United Kingdom*, these are "the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society.'"[19]

143. The Court is also of the opinion that the assessment of necessity and proportionality under Article 9(2) of the Charter and Article 19(3) of ICCPR cannot be done in a vacuum and due consideration should be given to particular contexts in which the impugned expressions were made.

144. In the instant Application, the Respondent State and CNLG in their submissions aver that the various statements made by the Applicant on different occasions, including those made at the Kigali Genocide Memorial were intended to minimise the genocide committed against Tutsis, by propagating the idea of 'double genocide', and sought to

16 *Issa Konate* Judgment para 145.

17 In17, para 155. *Kenneth Good v Republic of Botswana*, AfComHPR (2010), paragraph 198; case of *Ivcher-Bronstein v Peru*, Judgment of 6/2/2001, para 155, case of *Ivcher-Bronstein v Peru* (IACtHR, Preliminary Objections, Merits, Reparations and Costs), Judgment of 2/7/2004, para 127, case of *Ricardo Canese v Paraguay*, IACtHR, (Merits, Reparations and Costs), judgment of 31/8/2004, para 98.

18 *Handyside v The United Kingdom*, (1976), para 49, see also *Gunduz v Turkey*, Judgment of 4/12/2003, para 37, Human Rights Committee, General Comment 34 (2011), para 11.

19 *Handyside v United Kingdom* (1976), para 49.

undermine the authority of the government by inciting citizens to turn against the government by spreading rumours that create divisions and internal strife among the people of Rwanda. In this regard, the Respondent State prays the Court, in determining the matter, to consider its particular past history and apply the principles of margin of appreciation and subsidiarity.

145. On its part, the Applicant insists that the laws of Rwanda which criminalises the negation and minimisation of genocide do not comply with the requirement that restrictions on the rights of individuals must be necessary. The Applicant also contends that her conviction for spreading rumours likely or seeking to cause a revolt among the population against established authority was not substantiated in the domestic courts through specific and corroborative evidence showing that her positions were likely to establish her criminal liability.

146. The Court wishes to underscore that it is fully aware and cognisant of the fact that Rwanda suffered from the most atrocious genocide in the recent history of mankind and this is recognised as such internationally. This grim fact of its past evidently warrants that the government should adopt all measures to promote social cohesion and concordance among the people and prevent similar incidents from happening in the future. The State has the responsibility to ensure that the laws in this respect are respected and that every offender answers before the law. It goes without saying that it is entirely legitimate for the State to have introduced laws on the "minimisation", "propagation" or "negation" of the genocide.

147. Nevertheless, the laws in question should not be applied at any cost to the rights and freedoms of individuals or in a manner which disregards international human rights standards. The legitimate exercise of rights and freedoms by individuals is as important as the existence and proper application of such laws and is of paramount significance to achieve the purposes of maintaining national security and public order. In all circumstances, it is important that restrictions made on the fundamental rights and freedoms of citizens are warranted by the particular contexts of each case and the nature of the acts that are alleged to have necessitated such restrictions.

148. It is thus incumbent upon this Court to examine the nature of the opinion alleged to have been expressed by the Applicant and determine whether such expression warranted her conviction and imprisonment, and whether such measure was proportional under the circumstances.

149. In this regard, the Court notes from the records of the file that the Applicant's statements that were alleged to have been made on different occasions were of two natures: those remarks made in relation to the Genocide, particularly, at the Kigali Genocide Memorial and those directed against the government, including the President of

the Republic, and the Judiciary (comprising the *Gacaca* Courts).

150. At the Kigali Genocide Memorial, the Applicant claims to have made the following statement in Kinyarwanda:

> "…if we look at this memorial, it only refers to the people who died during the genocide against the Tutsis. There is another untold story with regard to the crimes against humanity committed against the Hutus. The Hutus who lost their loved ones are also suffering; they think about the loved ones who perished and are wondering "When will our dead ones also be remembered?""[20]

151. In its submissions, the Respondent has not made any comments on the authenticity of this statement.

152. However, the Court observes from the records that the Applicant's statement at the Memorial, as indicated in the High Court's judgment of 30 October 2012, reads as follows:

> " … For example, we are honouring at this Memorial the Tutsi victims of Genocide, there are also Hutus who were victims of crimes against humanity and war crimes, not remembered or honoured here. Hutus are also suffering. They are wondering when their time will come to remember their people (…)"[21]

153. On the other hand, the Court further notes from the files that the statements of the Applicant at the Memorial, as recounted by the Supreme Court reads as:

> "… For instance, this memory has been dedicated to people who were killed during the genocide against the Tutsi, however there is another side of genocide: the one committed against the Hutu. They have also suffered: they lost their relatives and they are also asking, "When is our time?" (…)"[22]

154. The key issue at stake is whether in that speech which the Applicant made at the Genocide Memorial she propagated the 'theory of double genocide'. According to Article 5 of Law No. 84/2013 of the 2013 "supporting a double genocide theory for Rwanda" is part of the offence of "negation of genocide". Pursuant to Article 6 of the said law,

> "Minimization of genocide shall be any deliberate act, committed in public, aiming at:
>
> a. downplaying the gravity or consequences of genocide
> b. downplaying the methods through which genocide was committed."

20 See submission of the Applicant (Annex 3).

21 See Paragraph 404 of the Judgment of the High Court of Kigali of 30 October 2012.

22 See paragraph 371 of the Judgment of the Supreme Court of 13 December 2013.

155. From the above, the Court takes note that the versions of the Applicant's speech made at the Memorial, as recited by the High Court and the Supreme Court, are at variance with each other and with the Applicant's version. While the version of the speech as indicated by the Supreme Court talks about "another side of genocide: the one committed against the Hutu", the version of the speech, as recounted by the High Court talks about Hutus being "…. victims of crimes against humanity and war crimes".

156. In the face of these conflicting versions of the speech as quoted by the domestic courts of the Respondent State, the Court is of the view that the doubt should benefit the Applicant. In its assessment, the Court therefore will rely on the speech of the Applicant at the Memorial, as recounted by the High Court. In fact, the High Court's version is similar to what the Applicant herself claims to have said and which was tendered before this Court as evidence, which was not challenged by the Respondent State.

157. The Court acknowledges that, as in any country where there is a history of genocide, the issue is very sensitive, and opinions or comments made in relation to the genocide may not be treated in a similar manner as opinions expressed on other matters. Statements that deny or minimize the magnitude or effects of the genocide or that unequivocally insinuate the same fall outside the domain of the legitimate exercise of the right to freedom of expression and should be prohibited by the law. In the present Application, the Court is however of the opinion that there is nothing in the statements made by the Applicant, which denies or belittles, the genocide committed against the Tutsi or implies the same.

158. Concerning the allegation that the same remarks at the Genocide Memorial propagated the theory of 'double genocide', the Court is also of the opinion that nothing in her remarks suggests that she advanced this view. The relevant paragraph which the High Court used as evidence for the same (quoted above under paragraph 152) are clear that the Applicant admits "the genocide against the Tutsis" but has never claimed that a genocide was committed against the Hutus. The judgment of the High Court of Kigali itself acknowledges that her statements do not refer to genocide against the Hutu but rather reached a different conclusion relying on the context in which they were made. In this connection, the Court understands that the contexts in which statements are expressed may imply a different meaning than the ordinary message that they convey. Nevertheless, in circumstances where statements are unequivocally clear, as is in the present case, putting severe restrictions such as criminal punishments, on the rights of individuals merely on the basis of contexts would create an atmosphere where citizens cannot freely enjoy basic rights and

freedoms, including the right to freedom of expression.

159. The second group of statements made by the Applicant contain severe criticisms against the government and public officials, that includes statements which allege that political power is "dominated by a small clique" that has "a secret parallel power structure around President Kagame, DMI [Directorate of Military Intelligence], the local defence force, … the judiciary and the executive branches of the government"[23]; and stating that she is ready to fight against "the yoke [of fear], poverty, hunger, tyranny, servitudes, corruption, unfair Gacaca court system, repression, prison term for works of general interests (TIG), reasons that lead people to flee the country, inequality, expropriation, homelessness, lack of self-esteem and killing through torture".[24]

160. The Court notes that some of these remarks may be offensive and could have the potential to discredit the integrity of public officials and institutions of the State in the eyes of citizens. However, these 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.[25] 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. An examination of these statements cannot reasonably be considered as capable of 'inciting strife'; creating 'divisions among people' or 'threatening the security of the State'. In fact, even though these statements were made at different times before the Applicant was jailed for the same, there is no evidence showing that the statements caused strife, public outrage or any other particular threat to the security of the State or public order.

161. In light of the foregoing, the Court is of the view that the Applicant's conviction and sentence for making the above statements both at the Kigali Genocide Memorial and on other occasions, was not necessary in a democratic society. Even if this Court were to accept that there was a need to put restrictions on such statements, the Applicant's punishment was not proportional to the legitimate purposes which the conviction and sentence seek to achieve. In this regard, the Court notes that the Respondent State could have adopted other less restrictive measures to attain the same objectives.

23 See *Ingabire Victiore and others v the Prosecution*, Judgment of the High Court of Kigali, para 288

24 *Ibid*, para 306

25 *Issa Konate* Judgment, para 155.

162. The Court therefore finds that there was a violation of Article 9(2) of the Charter and Article 19 of the ICCPR.

IX. Measures requested

163. In the Application, the Court is requested to: (a). Repeal, with retroactive effect, sections 116 and 463 of Organic Law N° 01/2012 of 2 May 2012, relating to the Penal Code as well as that of Law N° 84/2013 of 28 October 2013, relating to the punishment of the crime of the ideology of the Genocide, (b) Order the review of the Case (c) Annulment of all the decisions that had been taken since the preliminary investigation up till the pronouncement of the last judgment, (d) Order the Applicant's release on parole; and (e) Payment of costs and reparations.

164. 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."

165. In this respect, Rule 63 of the R.ules provides that "the Court shall rule on the request for reparation by the same decision establishing the violation of a human and people's rights, or if the circumstances so require, by a separate decision".

166. As regards the Applicant's prayers (a), (b) and (c), the Court reiterates its decision in *Ernest Francis Mtingwi v Republic of Malawi,* that it is not an appeal court with respect to the decisions and does not have the power to repeal national legislation. It therefore does not grant the requests.

167. Regarding the Applicant's prayer to be set free, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances.[26] In the instant case, the Applicant has not provided proof of such circumstances. Consequently, the Court does not grant this prayer.

168. The Court however notes that such finding does not preclude the Respondent State from considering such measure on its own.

169. The Court finally notes that none of the Parties submitted opinion on other forms of reparations. It will therefore make a ruling on this question at a later stage of the procedure after having heard the Parties.

26 *Alex Thomas* Judgment para 157; *Mohamed Abubakari* Judgment para 234.

X. Costs

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

171. Having considered the circumstances of this matter, the Court decides that the question of cost will be addressed when considering reparations.

172. For these reasons:

The Court,

Unanimously

On jurisdiction

i. *dismisses* the objection to the Court's jurisdiction raised by the Respondent State;

ii. *holds* that it has jurisdiction to hear the instant Application;

On admissibility

iii. *dismisses* the objection to admissibility of the Application raised by the Respondent State;

iv. *holds* that the Application is admissible;

On the Merits

v. *declares* that the Respondent State has not violated Article 7 (1) b and d of the Charter as regards the right to presumption of innocence and the right to be tried by a neutral and impartial tribunal;

vi. *finds* that the Respondent State has not violated Article 7(1) (c) of the Charter as regards the searches conducted on the Counsel and on the defense witness;

vii. *finds* that the Respondent State has violated Article 7(1)(c) of the African Charter on Human and Peoples' Rights as regards the procedural irregularities which affected the rights of the defense listed in paragraph 96 of this Judgment;

viii. *rules* that the Respondent State has violated Article 9(2) of the African Charter on Human and Peoples' Rights and Article 19 of the International Covenant on Civil and Political Rights on freedom of expression and opinion;

ix. *orders* the Respondent State to take all the necessary measures to restore the rights of the Applicant and to submit to the Court a report on the measures taken within six (6) months;

x. *dismisses* the Applicant's prayer for the Court to order her direct release without prejudice to the Respondent State's power to take this measure itself;

xi. *defers* its decision on other forms of reparation;

xii. *grants* the Applicant, pursuant to Rule 63 of its Rules, a period of thirty (30) days from the date of this Judgment to file her observations

on the Application for reparation and the Respondent State to file its Response within thirty (30) days from the date of receipt of the Applicant's observations.

Umuhoza v Rwanda (reparations) (2018) 2 AfCLR 202

Application 003/2014, *Ingabire Victoire Umuhoza v Republic of Rwanda*

Judgment, 7 December 2018. Done in English and French, the French text being authoritative.

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

Recused under Article 22 : MUKAMULISA

The Court ordered reparation, having found that the imprisonment of the Applicant, an opposition leader, had violated her freedom of expression.

Reparations (reparation of material prejudice, 39, 40, currency, 45, lawyers' fees, 46; evidence, 48, 49, 51, 52; moral prejudice, 59-62; impact on family members, 68, 69; release does not preclude compensation, 71)

I. Brief background of the matter

1. By the Application filed before this Court on 3 October 2014, the Applicant indicates that; since 10 February 2010, she has been the object of accusations and judicial proceedings for allegedly propagating the ideology of genocide, complicity in terrorism, sectarianism, divisive tendencies and attempts to sabotage the internal security of the State, creating an armed wing of a rebel movement; the use of terrorism, force of arms and other forms of violence with the intent to destabilise the constitutionally established government. After trial by the High Court of Kigali on 30 October 2012, the Applicant was sentenced to eight (8) years imprisonment. On 13 December 2013, the Applicant lodged an appeal before the Supreme Court which subsequently increased her sentence to fifteen (15) years in prison.

2. Aggrieved at her arrest, trial and imprisonment which she felt violated her rights, the Applicant on 3 October 2014 seized the African Court on Human and Peoples' Rights (hereinafter referred to as "the Court").

3. In the Judgment of the matter delivered on 24 November 2017, the Court decided as follows:

> "viii. *Holds* that the Respondent State has violated Article 7(1) (c) of the African Charter on Human and Peoples' Rights as regards the procedural irregularities which affected the rights of the defence;
>
> ix. *Holds* that the Respondent State has violated Article 9(2) of the African Charter on Human and Peoples' Rights and Article 19 of the International Covenant on Civil and Political Rights on freedom of expression and opinion;

x. *Orders* the Respondent State to take all necessary measures to restore the rights of the Applicant and to submit to the Court a report on the measures taken within six (6) months;

xii. *Defers* its decision on other forms of reparations;

xiii. Grants the Applicant, pursuant to Rule 63 of its Rules, a period of thirty (30) days from the date of this judgment to file her observations on the Application for Reparation…"

4. This Application is in respect of the request for reparations filed by the Applicant.

II. Subject matter of the Application

5. The Applicant prayed the Court to annul the sentence of imprisonment and its consequences and award her full compensation for the prejudices suffered by herself, her husband and her three children as a result of the violations of her rights as set out in the Judgment of 24 November 2017.

6. She states that the Court should order the Respondent State to take all the necessary measures to:

"- annul the fifteen (15) years imprisonment sentence;

- release her forthwith;

- expunge her conviction from the judicial records;

- reimburse her the amount of US$ 200,000 for the material prejudice suffered,

- pay her the amount of US$ 100,000 for the moral prejudice suffered."

7. The Respondent State did not file any observation on this claim for reparation.

III. Summary of procedure before the Court

8. In its Judgment of 24 November 2017, the Court granted the Applicant thirty (30) days to file her Application for reparations.

9. On 21 December 2017, Counsel for the Applicant applied for an extension of time up to 4 January 2018 to submit her Application for reparation, justifying this request by the fact that the Applicant was personally notified of the 24 November 2017 judgment of the Court only on 4 December 2017. The request for extension of time was served on the Respondent State on 22 December 2017.

10. On 3 January 2018, the Applicant filed her Application for reparation, with evidence in support thereof.

11. On 4 January 2018, the Applicant transmitted to the Court an explanatory note on the evidence and reiterated her prayer for a public hearing to enable her to more effectively explain the reparations requested. On 15 May 2018, the Registry notified the Applicant that the Court has not deemed it necessary to hold a public hearing on reparations.

12. On 15 January 2018, the Applicant filed a document rectifying her prayer for reparation**.** In that document, the Applicant corrected the amount of the legal fees which she estimated at 68,376 Euros instead of 65,460 Euros as indicated in the Application. The *corrigendum* also indicates that, as regards compensation of moral damage, the Applicant claims for herself, her husband and her children the amount of one hundred thousand (100,000) US dollars instead of one million (1,000,000) US dollars.

13. The Applicant's submissions on reparations were served on the Respondent State on 19 March 2018, in accordance with Rule 36(1) of the Rules of Court.

14. On 3 October 2018, the Registry informed the Respondent State that at its 50th Ordinary Session, the Court decided to grant the latter a final 30 days extension and that, after that deadline, it would be in the interest of justice to decide on the application in default in accordance with Rule 55 of its Rules.

15. Although the Respondent State received all the notifications, it did not respond to any of them.

16. On 23 November 2018, the Applicant informed the Court that she had been set free and has left prison.

17. Consequently, in the interest of justice, the Court will examine the instant brief for reparation in the absence of any response from the Respondent State.

IV. On the reparations

18. Pursuant to Rule 63 of its Rules, "The Court shall rule on the request for the reparation, submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

19. The Court recalls its earlier judgments,[1] and reiterates that to

1 Application No. 013/2011. Judgment of 5/6/2015 (reparations), *Beneficiaries of the Late Norbert Zongo and Others v Burkina Faso* (hereinafter referred to as "*Norbert Zongo v Burkina Faso* Judgment") para 20; Application No. 004/2013. Judgment of 3 June 2016 (reparations), *Lohé Issa Konaté v Burkina Faso* (hereinafter referred to as "*Konate v Burkina Faso* Judgment") para 15.

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.

20. The Court notes 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".[1] Thus, reparation must, in particular, include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-recurrence of the violations, taking into account the circumstances of each case.

21. The Court also retains, as a principle, the existence of a causal link between the alleged violation and the prejudice caused, and places the burden of proof on the Applicant who has to provide evidence to justify her prayers.[2]

22. The Court observes that whenever it is called upon to adjudicate on reparation for damages resulting from violations established by it, it takes into account not only a fair balance between the form of reparation and the nature of the violation, but also the expressed wishes of the victim.

23. In the instant case, the violation of the Applicant's rights, which generated the Respondent State's liability, is the breach by the latter, of Articles 7(1)(c) and 9(2) of the Charter and Article 19 of the ICCPR which affected the Applicant's right to defence and the right to freedom of opinion and expression.

A. Prayer for annulment of the prison sentence and its consequences

24. The Applicant prays the Court to order the Respondent State to annul the criminal conviction and sentence against her, more particularly the fifteen (15) years prison sentence pronounced by the Supreme Court of Kigali.

25. She avers also that the most appropriate form of reparation of the violations of the right to a fair trial is to be set free.

26. The Applicant further prays the Court to order the Respondent State to expunge the conviction from her judicial records, adding that

1 PCIJ, *Chorzow Factory, Germany v Poland*, Jurisdiction, Determination of Indemnities and Merits 26/7/1927, 16/12/1927 and 13/9/1928, Rec. 1927, p 47.

2 Application No. 011/2011. Judgment of 13 June 2014 (reparations), *Reverend Christopher Mtikila v United Republic of Tanzania (*hereinafter referred to as "*Christopher Mtikila v Tanzania* Judgment") para 40.

the measures to be taken in this regard should be such as would re-establish the situation in which she would have been, had the Respondent State not violated her rights as established by this Court.

27. The Court notes that the Applicant's request is for the Court to order the Respondent State to annul her fifteen (15) years prison sentence and to set her free without re-opening the proceedings.

28. The Court recalls that with respect to the prayer to annul the fifteen (15) year sentence, it has already examined the same in paragraphs 48, 168, 169 and 173 xi of its judgment of 24 November 2017 and will thus not re-examine it.

29. The Court also recalls that it has already made a ruling in the aforesaid Judgment of 24 November 2017 on the question of releasing the Applicant.

30. Moreover, the Court notes that on 23 November 2018, it was informed by the Applicant that she had been set free and had left prison.

31. As regards the Applicant's prayer for an order to the Respondent State to expunge the sentence from her judicial record, the Court notes that expunging the sentence presupposes that the conviction has been quashed and the sentence set aside**.**

32. Consequently, the Court dismisses the prayer that the conviction be expunged from the Applicant's judicial record.

B. Prayer for reparation of material prejudice

33. The Applicant submits that since her return to Rwanda, she has suffered "multiple arrests, the brunt of which she continues to bear in the hands of the security services and various other governmental institutions."

34. She also claims that she had to incur several costs not only to defend herself before Rwandese and international courts, but also to meet certain expenses required for her survival in the prison environment.

35. For all the foregoing expenses, the Applicant claims the amount of two hundred thousand (US$ 200,000) United States Dollars to be paid to her in reparation of the material damages suffered. She specifically enumerates the following damages:

"i. Cost of obtaining the release of certain documents from the case file, which amounts to 230,000 Rwandese Francs, equivalent to US$ 269.10 at the 2010 rate;

ii. Cost of representation before the High Court of Kigali, the Supreme Court of Rwanda and the African Court, in terms of the fees paid to her lawyers, which amount to 68,376 Euros, or US$ 83,364;

iii. Expenditure incurred while in prison which amounts to 1,000

Euros per month accounting for a total of US$ 109,728 for the 7 years spent in prison.

iv. The Applicant further states that the amounts presented herein-above do not cover the losses she incurred as a result of her detention. She prays the Court to bring the overall material prejudice suffered to a total of US$ 200,000."

36. The Court notes that the request for reparation of material prejudice arising from the violation of a human right must be substantiated by evidence, and where several prayers have been made, each of these must be accompanied by probative supporting documents and buttressed by explanations establishing the link between the expenditure or material loss and the violation.[3]

37. In the instant case, the Applicant is claiming reimbursement of four (4) different expenditures, three (3) of which relate to procedural costs. These, as the Court has already stated, are part of the *concept* of reparation such that once established, it could order the Respondent State to pay compensation to the victim.

i. Cost of administrative processing of the judicial record

38. Regarding the cost of obtaining the release of certain documents from the case file, the Court notes that the Applicant attached to her Application, copies of two payment receipts; the first in the amount of one hundred and fifty thousand (150,000) Rwandese Francs, and the second for administrative charges in the amount of eighty thousand (80,000) Rwandese Francs issued, on 22 March and 18 May 2011 respectively, by the Rwanda Revenue Authority.

39. As the judicial proceedings instituted against the Applicant started in 2010 and continued right up to 13 December 2013, the date of her last sentence, the Court concludes that the said payment receipts dated between March and May 2011, were in respect of the judicial proceedings against the Applicant.

40. Consequently, the Court grants the Applicant a refund of the costs incurred on administrative processing of her judicial record in the amount of two hundred and thirty thousand (FRw 230,000) Rwandese Francs.

ii. Lawyers' fees

41. The Applicant is claiming reimbursement of the expenditure she

3 *Christopher Mtikila v Tanzania* Judgment, *op cit* para 40.

incurred to cover the fees and travel expenses of the five (5) lawyers who defended her both before Rwandan courts and before this Court. She attached to her application a synoptic list of the fees paid in the amount of fifty-five thousand three hundred (55,300) Euros, receipts of bank transfers to the lawyers, and receipts in respect of the travel tickets of two lawyers in the amount of five thousand six hundred and twenty-nine Euros, ninety-six cents (5,629.96); and five thousand and seventy-two Euros, six cents (5,072.6) respectively.

42. Regarding the fees paid to the lawyers, the Court notes that the file records show that between 2011 and May 2017, four (4) lawyers, namely: Iain Edwards, J. Hofdijk, Gatera Gashabana and Caroline Buisman, received transfers from the Applicant's bank account to their bank accounts in the sum of nine thousand (9000) Euros, three thousand, seven hundred and forty-five Euros, sixty cents (3,745.60), twenty-four thousand seven hundred and fifty-nine (24,759) Euros and fourteen thousand, one hundred and twenty-nine (14,129) Euros, respectively. The total amount thus established as lawyers' fees stands at fifty-one thousand six hundred and thirty-three Euros, and sixty cents (51,633.60) or sixty thousand one hundred and fourty-two United States dollars and seventy-nine cents (US$60,142.79). The fee agreement signed between Advocate Caroline Buisman, the reasons for the transfer and the acknowledgement of receipt of payment signed by the lawyers attest to the link between the said expenditure and the Applicant's case before the courts.

43. The Court also notes that the Applicant's lawyers' travel costs are buttressed by two air tickets purchase receipts by Barrister Caroline Buisman and Barrister Gatera Gashabana, amounting to five thousand six hundred and twenty-nine Euros, ninety-six cents (5,629.96) and five thousand and seventy-two Euros, six cents (5,072.6) respectively, thus representing a total of ten thousand seven hundred and two Euros, fifty-six cents (10,702.56). However, the Court notes that the cost of purchase of these tickets had already been accounted for in the different bank transfers made by the Applicant to the two lawyers.

44. The Court further notes that the fees paid to lawyers Iain Edwars, van J Hofdijk and Gatera Gashabana were not substantiated in a fees agreement. The Court however holds that the Applicant must have incurred these expenses for the purposes of her defence.

45. The Court holds that given that the Applicant is residing in the territory of the Respondent State, the amount of reparation shall be calculated in the currency in use in the said State**.**

46. Since the Applicant has been awarded reparation for part of the damages, the Court holds that it is more appropriate to consider the matter in terms of equity and award the Applicant a lump sum of ten million Rwandese Francs (FRw 10,000,000), as reimbursement for

lawyers' fees.

iii. Expenses incurred while in prison

47. The Applicant also contends that from the time she was incarcerated up to now, her monthly expenses in prison amounts to one thousand (1,000) Euros over the period of 7 years spent in prison; hence the claim for reimbursement of one hundred and nine thousand, seven hundred and twenty-eight (US$109,728) United States dollars. She justifies this claim with a copy of two (2) receipts of transfer of funds amounting to one thousand (1,000) Euros each dated 9 and 13 October 2017, respectively.

48. The Court notes that the Applicant has not substantiated her claim with supporting documents.

49. Consequently, the Court dismisses the claim for reimbursement of the expenses incurred in prison.

iv. Reimbursement of the cost of equipment confiscated

50. The Applicant submits that since the case began, she has been the subject of threats from security services and "various other public institutions". The Applicant further alleges that her homes have been visited in both Rwanda and The Netherlands and subjected to "illegal searches" which have "resulted in the confiscation of her property (computers and telephones, amongst others)." For all these costs, she prays the Court to put the total reparation compensation at two hundred thousand (US$ 200,000) United States dollars.

51. The Court has already underscored in its judgment in *Lohé Issa Konaté v Burkina Faso*,[4] that it does not suffice to show that the Respondent State committed a wrongful act to claim compensation; it is equally necessary to produce evidence of the alleged damages and the prejudice suffered.

52. Since the Applicant has failed to meet the requirement, the Court rules that her claims regarding the nature of the equipment seized or the monetary value of the equipment confiscated are unfounded and therefore dismisses this claim.

C. Prayer for reparation of moral prejudice

53. The Applicant alleges that since her imprisonment, her dreams

4 *Konate v Burkina Faso* Judgment, op cit paras 46 and 47; *Christopher Mtikila v. Tanzania* Judgment*, op cit* para 31.

and ambitions as well as her political and family life have been totally shattered; that she had been arrested on several occasions, ridiculed and insulted and her honour dragged in the mud. Her reputation and morale have been seriously undermined as well as those of members of her family, that is, her husband and her three children.

54. According to the Applicant, all these physical and psychological suffering are as a result of her arrest, imprisonment and trial in violation of the guarantees of a fair trial.

55. Therefore, the Applicant prays the Court to rule *ex aequo et bono (based on equity and conscience)* and order the Respondent State to take the necessary measures to pay her the sum of one hundred thousand (US$ 100,000) United States dollars as damages, or the equivalent in Rwandese Francs.

56. The Applicant's prayer for reparation of moral prejudice concerns not only the Applicant herself but also her spouse and three children.

i. Moral prejudice suffered by the Applicant

57. The Applicant contends that immediately after her speech at the Genocide Memorial, a denigration campaign was orchestrated against her by the media and the political class which branded her a proponent of the genocide ideology, sectarianism and negativism, and thus was monitored and her movements followed until her arrest.

58. She also asserts that her detention condition prior to and after her sentence was highly restrictive, at times characterized by isolation, deprivation of food and prohibition from receiving visitors including her lawyers, two of whom were remanded in custody for more than one day before being expelled from Rwanda.

59. The Court recalls that, in general, when persons are detained under such conditions as have been described by the Applicant, the moral prejudice they invoke is presumed, such that it is no longer necessary to show proof to the contrary.[5]

60. The Court also notes that the campaign of denigration against the Applicant, the number of press articles and the interviews granted by political and administrative figures on the accusations levelled against the Applicant, cast a dark shadow over her personality and her political ambitions.

61. As the International Court of Justice has pointed out in its Advisory Opinion on Application for Review of Judgment No. 158 of the

5 *Norbert Zongo v Burkina Faso* Judgment, para 61. See also Inter-American Court of Human Rights; *Lori Berenson v Peru*, Seriea C, No. 119/2004, para 237; European Court of Human Rights, Application No. 9540/07 (2014), *Murat Vural v Turkey,* para 86.

United Nations Administrative Tribunal, Falsa Case, Advisory Opinion of 12 July 1973: "The injury to the Applicant's professional reputation and employment opportunities must be repaired".[6]

62. The Court finds in conclusion that the Applicant suffered moral prejudice in terms of her reputation and political future, and accedes to her prayer for reparation.

ii. Moral prejudice suffered by the Applicant's spouse and children

63. Regarding members of her family, the Applicant invokes the stress, anxiety and trauma suffered by her husband and three children since her arrest and imprisonment.

64. The Applicant further asserts that her husband was profoundly affected and traumatized by her arrest, the media coverage of her trial and her attendant imprisonment, such that as of today he has been paralyzed and confined to a wheel chair.

65. She further contends that her youngest son suffered serious harassment in school from his school mates who branded him a son of a criminal.

66. The Court recalls that it has already given the interpretation that direct or close members of the family who suffered physically or psychologically from the situation of the victim also fall within the definition of "victim", and may also claim reparation of the moral prejudice caused by the said suffering.[7]

67. In the instant case, the accusations levelled against the Applicant, her imprisonment and the restrictions to her communication with her husband and children are indeed acts which could hugely impact the morale of the family.

68. The Court notes that the consequences of stress and generalized anxiety on members of the Applicant's family are corroborated by the medical reports presented by the doctor at the Neurology Polyclinic in Gouda, The Netherlands, on 27 September 2016 and 25 July 2017, respectively. The said reports mentioned in particular that the Applicant's husband is a non-smoker, does not take alcohol but is steeped in anxiety and is highly stressed as a result of the challenges facing his family.

69. In the circumstances, the Court holds that the violation of the Applicant's rights by the Respondent State also impacted on members

6 United Nations Administrative Tribunal, *Falsa Case,* Opinion No. 12/7/1973, *Rec*., 1973, para 46, p 25.

7 *Norbert Zongo v Burkina Faso* Judgment, *op cit* para 49.

of her family.

70. The Applicant prays the Court to order the Respondent State to pay her the amount of one hundred thousand (US$ 100,000) US dollars in reparation of the moral prejudice.

71. The Court notes that presidential pardon which led to the Applicant's release on 15 September 2018 constitutes a form of reparation of the moral damage, but does not preclude the payment of monetary compensation for the violation of the right to freedom of expression.

72. In that regard, the Court adjudicates in equity and grants the Applicant, the amount of fifty-five million Rwandese Francs (FRw 55,000,000) in reparation of the moral damage suffered by herself, her spouse and children.

73. On costs, the Court notes that these have already been addressed in the context of refund of lawyers' fees.

V. Operative part

74. For these reasons:

The Court,

unanimously,

i. *dismisses* the prayer for the conviction to be expunged from the Applicant's judicial records;

ii. *orders* the Respondent State to reimburse the Applicant the amount of ten million, two hundred and thirty thousand Rwandese Francs (FRw 10,230,000) for the entire material prejudice suffered;

iii. *orders* the Respondent State to pay the Applicant the amount of fifty-five million Rwandese Francs (FRw 55,000,000) as compensation for the moral prejudice she, her husband and her three children suffered;

iv. *orders* the Respondent State to pay all the amounts indicated in sub-paragraph (ii) and (iii) of this operative part within six (6) months, effective from the date of notification of this Judgment, failing which it will also be required to pay interest on arrears calculated on the basis of the applicable rate set by the Central Bank of Rwanda throughout the period of delayed payment and until the amount is fully paid**;**

v. *orders* the Respondent State to submit to it within six (6) months from the date of publication of this Judgment, a report on the status of implementation of all the decisions set forth in this Judgment.

Woyome v Ghana (provisional measures) (2017) 2 AfCLR 213

Application 001/2017, *Alfred Agbesi Woyome v Republic of Ghana*

Order, 24 November 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

Order for provisional measures where the Applicant's property was at risk of being sold in execution of a domestic court judgment.

Provisional measures (*prima facie* jurisdiction, 18; irreparable harm, 26)

I. The Parties

1. The Application is filed by Mr Alfred Agbesi Woyome, (hereinafter referred to as "the Applicant), a national of Ghana, against the Republic of Ghana (hereinafter referred to as "the Respondent State").

2. The Respondent State became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 1 March 1989 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 16 August, 2005. It deposited on 10 March 2011 a Declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. On 30 June 2017 the Applicant filed a matter which was subsequently registered as Application No. 001/2017. The Application arose arising from engineering financial services the Applicant alleges to have provided to the Respondent State pursuant to an agreement for securing funds for the rehabilitation of the Accra and Kumasi Sports Stadia for the Confederation of the African Cup of Nations Tournament of 2008.

4. The Applicant alleges that, by not respecting the terms of the agreement regarding the afore-mentioned services, the Respondent State violated the following rights provided under the Charter:

a. Enjoyment of rights and freedoms recognised in the Charter without distinction (Article 2 of the Charter);

b. Equality before the law and equal protection of the law

(Article 3 of the Charter); and

c. Right to fair trial (Article 7 of the Charter).

5. In the course of the proceedings before this Court on 4 July 2017, the Applicant applied for Provisional Measures to order the Respondent State to stay the execution of a judgment of 8 June 2017 by the Supreme Court requiring him to refund Ghana Cedi 51,283,480.59 to the Respondent State, following a finding that the procurement process relating to which the payments were made for the services was unconstitutional.

6. The Respondent State argues that the question to be determined is whether it is entitled to recover debts owed by the Applicant as provided for under the laws of Ghana. It avers that the issue is not whether alleged irreparable breaches of human rights can be legitimately raised following its efforts to recover the sums in question, and not whether this action would amount to a breach of Ghana's obligation under the Charter, Articles 5(3) and 34(6) of the Protocol the Rules and Article 40 of the 1992 Constitution of the Republic of Ghana.

III. Procedure

7. The Application dated 5 January 2017 was received at the Registry on 16 January 2017.

8. The Application was served on the Respondent State by notices dated 28 April 2017 and 8 June 2017 notifying the Respondent State to file the list of representatives and the Response to the Application within thirty (30) and sixty (60) days of receipt respectively. The second notice was necessitated by the Respondent State's Attorney General's letter received on 31 May 2017 informing the Registry of the Court that they had received only the notice without the Application and attachments thereto.

9. By an application dated 30 June 2017 and received at the Registry on 4 July 2017 the Applicant applied for interim measures.

10. On 16 August 2017 the Respondent State filed a request for extension of time up to 31 August 2017 to file its Response to the Application, stating that the Applicant had filed international arbitration proceedings against the Respondent State in another forum on the same subject matter.

11. On 4 September 2017 the Respondent State filed its Response to the Application, and this was transmitted to the Applicant by a notice dated 12 September 2017 giving him thirty (30) days from date of receipt, within which to file the Reply. The Applicant filed the Reply to the Response on 12 October 2017. The Reply was transmitted to the Respondent State for information, by a notice dated 18 October 2017.

12. On 4 September 2017 the Applicant filed a Supplementary Affidavit in support of an Application for Interim Measures and this was transmitted to the Respondent State by the above-mentioned notice dated 12 September 2017.

13. On 28 September 2017 the Applicant filed another "*Urgent Request for Interim Measures*" alleging that, in spite of the service of the Application for interim measures, the Respondent State has persisted in pursuing the retrieval of the amount of Ghana Cedi 51,283,480.59 from him with the full and active support of the Supreme Court and its Registry in clear violation of the letter and spirit of the Protocol and Rules of Court (herein after referred to as "the Rules").

14. The Applicant states that the Registry of the Supreme Court of the Respondent State has initiated proceedings for execution of judgment against him and is in the process of seizing immovable properties from various locations in Accra, Ghana, some of which belong to his relatives.

15. This second request was transmitted to the Respondent State by a notice dated 2 October 2017 giving the Respondent State until 11 October 2017 to respond thereto.

16. The Respondent State filed the Response to this request on 13 October 2017 and the Court decided, in the interest of justice, to deem it as properly filed. The Response was transmitted to the Applicant by a notice dated 18 October 2017 and granting him seven (7) days from the date of receipt within which to respond. On 31 October 2017 the Applicant filed his Reply to the "Respondent State's Affidavit in Opposition to the Application for Interim Measures".

IV. Jurisdiction

17. In dealing with an Application, the Court has to ascertain that it has jurisdiction on the merits of the case.

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

19. 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

1 See Application No. 002/2013. Order for Provisional Measures 15/3/2003, *African Commission on Human and Peoples' Rights v Libya* and Application No. 006/2012. Order for Provisional Measures 15/3/ 2013, *African Commission on Human and Peoples' Rights v Kenya*; Application No. 004/2011. Order for Provisional Measures 25/3/2011*, African Commission on Human and Peoples' Rights v Libya*.

concerned".

20. The Court notes that the rights alleged to have been violated are guaranteed under Articles 2, 3 and 7 of the Charter.

21. As indicated in paragraph 2 of this Order, the Respondent State, became a Party to the Charter on 1 March 1989 and to the Protocol on 16 August 2005 and deposited on 10 March 2011 a Declaration accepting the competence of the Court to receive cases from individuals and Non-Governmental Organisations.

22. In light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the Application.

V. On the provisional measures requested

23. Under Article 27(2) of the Protocol, "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." In accordance with Rule 51(1) of the Rules, "Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, the Commission or on its own accord, prescribe to the Parties, any interim measure which it deems necessary to adopt in the interest of the Parties or of justice".

24. It is for the Court to decide whether to issue provisional measures depending on the circumstances of each case.

25. The Court notes from the record before it that, the Respondent State is in the process of execution of a court judgment against the Applicant by seizing his property.

26. The Court finds that the situation raised in the present Application is of extreme gravity and urgency on the basis that, should the Applicant's property be attached and sold to recover the amount of Ghana Cedi 51, 283, 480.59, the Applicant would suffer irreparable harm if the Application on the merits is subsequently decided in his favour. The Court finds that the circumstances require that an order for provisional measures be issued, in accordance with Article 27(2) of the Protocol and Rule 51 of the Rules, to preserve the *status quo,* pending the determination of the main Application.

27. For the avoidance of doubt, this order shall not in any way prejudice any findings the Court shall make regarding its jurisdiction, the admissibility and merits of the Application.

28. For these reasons**,**

The Court,

Unanimously,

Orders the Respondent State to:

i. stay the attachment of the Applicant's property and to take all appropriate measures to maintain the *status quo* and to avoid the

property being sold until this Application is heard and determined.
ii. report to the Court within fifteen (15) days from the date of receipt of this Order on the measures taken to implement this Order.

Isiaga v Tanzania (merits) (2018) 2 AfCLR 218

Application 032/2015, *Kijiji Isiaga v United Republic of Tanzania*

Judgment, 21 March 2018. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant had been convicted and sentenced for inflicting bodily harm and aggravated robbery. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court held that the manner in which the domestic courts evaluated the evidence did not disclose any manifest error in violation of the African Charter. The Court also held that the failure to provide the Applicant with free legal representation violated the African Charter but that the Applicant had not shown compelling circumstances for the Court to grant his request for release.

Jurisdiction (alleged violations of the Charter, 33-35)

Admissibility (exhaustion of local remedies, extraordinary remedy, 47; submission within reasonable time, 54-56)

Fair trial (evidence, margin of appreciation, 65, 73; defence, free legal assistance, 79, 80)

Reparations (release, 96)

I. The Parties

1. The Applicant, Mr Kijiji Isaiga, is a national of the United Republic of Tanzania. He is currently serving a term of thirty (30) years' imprisonment at the Ukonga Central Prison in Dar es Salaam, United Republic of Tanzania, following his conviction for the crimes of inflicting bodily harm and aggravated robbery.

2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, the Respondent State deposited the declaration required under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations on 29 March 2010. The Respondent State also became a Party to the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR") on 11 June 1976.

II. Subject of the Application

3. The Application relates to violations allegedly arising from a domestic procedure at the end of which the Applicant was sentenced to thirty (30) years' imprisonment with twelve strokes of the cane for inflicting bodily harm and aggravated robbery.

A. Facts of the matter

4. According to the file and the judgments of domestic Courts, on 4 April 2004, at around 8.00 pm in the village of Kihongera, District of Tarime, in the Mara Region, three individuals armed with a gun and machete burst into the residence of Ms Rhobi Wambura, who was with her two children, Rhobi Chacha and Chacha Boniface.

5. The individuals ordered Ms Rhobi and the children to lie face down, stating that they had come to claim the pension benefits paid to them from the estate of her late husband and the father of the two children. When the family refused to comply, two of the attackers injured the children using a machete, while the third assailant who was keeping guard fired a warning shot.

6. Ms Rhobi took the two assailants who had attacked the children into her bedroom and handed to them one million Tanzanian Shillings (about 450 United States Dollars). After counting the money under the glare of a lantern, the assailants took two bags full of clothes and fled.

7. Following Ms Rhobi's and her children's distress calls, many people, including one, Mr Yusuf Bwiru, came to their rescue. Mr Bwiru subsequently stated in his testimony that he found Ms Rhobi and her children crying and calling the names of their neighbour Mr Bihari Nyankongo, his nephew (the Applicant) and another individual not identified, as the attackers. The victims maintained their accusation before Mr Anthony Michack, the Commander of the local civil defence group and later at the Police Station, where they had been taken.

8. The Police investigation, which opened on 6 April 2004, led to the recovery of an unused bullet and a cartridge from the scene of the attack and subsequently to the arrest of Mr Nyankongo. The latter allegedly admitted to having been involved in the attack, returned the stolen clothing to Ms Rhobi and her children, denounced his accomplices and provided information on their whereabouts. Consequently, on 7 April 2004, the Applicant was arrested in his village.

9. Charged with crimes of inflicting bodily harm and armed robbery contrary to Sections 228 (i), 285 and 286 of the Tanzanian Penal Code in Criminal Case No. 213 of 2004 in the District Court of Tarime, the Applicant was convicted and sentenced to thirty (30) years in prison and twelve (12) strokes of the cane.

10. Following the Applicant's appeal, the conviction and sentence were subsequently confirmed by the High Court of Tanzania sitting in Mwanza on 5 August 2005, in Criminal Case No. 445 of 2005, and by the Court of Appeal of Tanzania on 19 September 2012, in Criminal Appeal No. 192 of 2010.

B. Alleged violations

11. In his Application, the Applicant alleges that the local Courts based their decisions on contestable evidence, in particular, the testimonies and exhibits that were improperly obtained and used. In this regard, the Applicant alleges that the visual identification relied upon by the domestic courts was flawed for the following reasons:

"i. The witnesses did not say where the lamp was located and the direction of its lighting between them and the robbers.

ii. The witnesses had not mentioned the distance between them and the robbers during the crime scene.

iii. The witnesses did not define their condition after the sudden attack and how they were controlled and ability to follow the robbers' orders and instructions. If the witnesses had known well their robbers and named them immediately after the incident, why the Applicant was arrested at his home after two days without escaping the same area.

iv. If the Applicant and his co-accused were very famous to the witnesses, how they were decided to take more time for counting the money at the scene.

v. That, the Court of Appeal was required to caution itself about contradiction of facts of the prosecution evidence. When PW3 had claimed that PW1 did not announce to any one of them the bringing of the stolen money at their home, but firstly was narrated that PW1 had been with money for a month. Furthermore, while PW2 claimed that they raised an alarm which brought in their neighbour to be at the scene, he said about which made him to go there is only burst of the gun."

12. The Applicant submits that he was never in possession of the properties which were alleged to have been stolen and tendered in the Trial Court as exhibits. He maintains that the Court of Appeal "… grossly misdirected itself to apply the doctrine of recent possession against the Applicant while the exhibits alleged in the trial were said to be possessed by the co-accused". The Applicant asserts that the Court

exclusively relied on the absence of a rival claim over the exhibits to dismiss his appeal.

III. Summary of the procedure before the Court

13. The Application was filed on 8 December 2015.

14. By a notice dated 25 January 2016, and pursuant to Rule 35(2)(a) of the Rules of the Court (hereinafter referred to as "the Rules"), the Registry served the Application on the Respondent State, requesting the latter to submit within thirty (30) days of receipt, the names and addresses of its representatives, pursuant to Rule 35(4)(a) of the Rules and respond to the Application within six (60) days of receipt of the notice pursuant to Rule 37 of the Rules.

15. By a notice dated 11 February 2016, in accordance with Rule 35(3) of the Rules of the Court, the Application was transmitted to the Executive Council of the African Union, State Parties to the Protocol and other entities through, the Chairperson of the African Union Commission.

16. By a letter dated 24 March 2016, the Respondent State requested for an extension of time to file the Response to the Application.

17. By a letter dated 8 June 2016, the Registry informed the Respondent State that the Court had granted the request and requested it to file its Response within thirty (30) days from the receipt of the letter.

18. Having failed to file the Response to the Application, within this additional extension of time, by a letter dated 19 October 2016, the Court *suo motu,* decided to grant the Respondent State an additional thirty (30) days from receipt thereof, for the filing of the Response. By the same letter, the Parties' attention was drawn to Rule 55 of the Rules, concerning judgment in default.

19. On 11 January 2017, the Applicant requested the Court to issue a judgment in default.

20. At its 44th Ordinary Session held from 6 to 24 March 2017, the Court decided that it would, in the interest of justice, render a judgment in default if the Respondent State does not file its Response within forty-five (45) days of receipt of the letter. By a letter dated 20 March 2017, the Registry notified the Respondent State of the decision of the Court.

21. The Respondent State filed the Response to the Application on 12 April 2017.

22. This was transmitted to the Applicant by a notice dated 18 April 2017, granting thirty (30) days from the date of receipt, for the filing of the Reply to the Response.

23. The Applicant filed the Reply on 23 May 2017.

24. By a letter dated 16 June 2017, the Registry notified the Parties that the written procedure was closed with effect from 14 June 2017.

IV. Prayers of the Parties

25. In his Application, the Applicant prays the Court to:

"i. restore justice where it is overlooked, and quash both the conviction and sentence imposed upon him, and set him at liberty;

ii. ii) grant reparation pursuant to Article 27(1) of the Protocol;

iii. iii) grant any other order(s) sought that may deem fit in the circumstances of the complaints."

26. In its Response, the Respondent State prays the Court to declare that the Application is not within the purview of its jurisdiction, and that the Application does not fulfil the admissibility requirements specified under Rule 40(5) of the Rules on exhaustion of local remedies and Rule 50(6) on filing an application within a reasonable time.

27. On the merits, the Respondent State further prays the Court to find that**:**

"i. the government of the United Republic of Tanzania has not violated Articles 3 (1) and (2), Article 7(1) (c) of the Charter;

ii. the Court of Appeal considered all grounds of appeal and properly evaluated the evidence before it and rightfully upheld the conviction of the Applicant;

iii. the Court of Appeal properly ruled that the doctrine of recent possession and visual identification of the Applicant was proper and sufficient to land conviction;

iv. the Application be dismissed for lack of merit; and

v. no reparations be awarded in favour of the Applicant"

V. Jurisdiction

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

29. In the instant Application, the Court notes from the Respondent State's submission that the latter disputes only the Court's material jurisdiction. However, the Court shall satisfy itself that it also has personal, temporal and territorial jurisdiction to examine the Application.

A. Objection to the material jurisdiction of the Court

30. The Respondent State argues that the Court does not have jurisdiction to examine the Application as it requires the Court to adjudicate on issues involving the evaluation of evidence and quashing convictions and setting aside sentences imposed by domestic courts. According to the Respondent State, these are matters duly decided by the highest court of Tanzania and entertaining these issues would require this Court to sit as an appellate court to the Court of Appeal of Tanzania.

31. The Applicant submits that the Court has jurisdiction to consider his Application because it concerns issues of application of the provisions of the Charter, the Protocol and the Rules.

32. Pursuant to Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules, the material jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned."

33. Going by these provisions, the Court exercises its jurisdiction over an Application as long as the subject matter of the Application involves alleged violations of rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.[1]

34. The Court is obviously not an appellate court to uphold or reverse the judgments of domestic courts based merely on the way they examined evidence to arrive at a particular conclusion.[2] It is also well-established in the jurisprudence of the Court that where allegations of violations of human rights relate to the manner in which domestic courts examine evidence, the Court has jurisdiction to assess whether such examination is consistent with international human rights standards.[3]

35. In the instant Application, the Court notes that the Applicant raises issues relating to alleged violations of human rights protected by the Charter. The Court further notes that the Applicant's allegations essentially relate to the way in which the domestic courts of the Respondent State evaluated the evidence. However, this does not

1 Application No. 003/2014. Ruling on Admissibility 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania*, para 114.

2 Application No. 001/201. Judgment on Merits, 15/03/2015, *Ernest Francis Mtingwi v The Republic of Malawi,* para 14.

3 Application No. 005/2013. *Judgment on Merits 20/11/2015, Alex Thomas v United Republic of Tanzania,* (hereinafter referred to as "the Alex Thomas Judgment"), para 130, Application No. 007/2013. Judgment on Merits, 20/05/2016, *Mohamed Abubakari v United Republic of Tanzania*. (hereinafter referred to as, "Mohamed Abubakari judgment"), para 26.

preclude the Court from making a determination on the allegations. The Respondent State's objection that the instant Application would require this Court to sit as an appeal court and re-examine the evidence on the basis of which the Applicant was convicted by the national courts is thus dismissed.

36. The Court therefore finds that it has material jurisdiction to examine the Application.

B. Other aspects of jurisdiction

37. The Court notes that other aspects of its jurisdiction have not been contested by the Respondent State and nothing on the record indicates that the Court does not have jurisdiction. The Court thus holds:

> "i. that it has *personal jurisdiction* given that the Respondent State is a Party to the Protocol and deposited the Declaration required under Article 34(6) thereof which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol;
>
> ii. that it has *temporal jurisdiction* on the basis that the alleged violations are continuous in nature, in that the Applicant remains convicted and is serving a sentence of thirty (30) years' imprisonment on grounds which he believes are marred by irregularities[4]; and
>
> iii. that it has *territorial jurisdiction* given that the facts of the matter occurred on the territory of a State Party to the Protocol, that is, the Respondent State.

38. From the foregoing, the Court finds that it has jurisdiction to consider this Application.

VI. Admissibility of the Application

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

40. Rule 40 of the Rules which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

4 See Application No. 013/2011. Ruling on Preliminary Objections, 21/06/2013, *Zongo and Others v Burkina Faso*, (hereinafter referred to as, "*Zongo and Others judgment*"), paras 71 to 77.

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter ;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility that are in contention between the Parties

41. The Respondent State has raised two objections to the admissibility of the Application relating to the requirements of exhaustion of local remedies and the filing of the Application within a reasonable time after the exhaustion of local remedies.

i. Objection relating to non-exhaustion of local remedies

42. The Respondent State contends that rather than filing this Application before this Court, the Applicant had two options that he could have used to get redress for his grievances at domestic level. According to the Respondent State, the Applicant could have either sought a review of the Court of Appeal's judgment on his appeal, or he could have filed a constitutional petition pursuant to the Basic Rights and Duties Enforcement Act [Cap. 3 RE 2002], relating to the alleged violations of his rights.

43. In his Reply, the Applicant asserts that his Application has been filed after exhaustion of local remedies, that is, after the dismissal of his appeal by the Court of Appeal of Tanzania, the highest court in the Respondent State.

44. The Court notes that an application filed before it shall always comply with the requirement of exhaustion of available local remedies, unless it is demonstrated that the remedies are ineffective, insufficient,

or the domestic procedures to pursue them are unduly prolonged.[5] In the Matter of *African Commission on Human and Peoples' Rights v Republic of Kenya*, the Court observed that the rule of exhaustion of domestic remedies "maintains and reinforces the primacy of the domestic system in the protection of human rights vis-à-vis the Court".[6] It follows that in principle, the Court does not have a first instance jurisdiction over a matter which was not raised at the domestic level.

45. In its established jurisprudence, the Court has also consistently held that an Applicant is only required to exhaust ordinary judicial remedies.[7]

46. Concerning the filing of the constitutional petition on the alleged violation of the Applicant's rights, in the Matter of *Alex Thomas v United Republic of Tanzania*, this Court has held that this remedy in the Tanzanian judicial system is an extraordinary remedy which the Applicant was not required to exhaust prior to filing his Application before it.[8]

47. With regard to the application for review of the Court of Appeal's judgment, this Court similarly held in the above-mentioned case that, in the Tanzanian judicial system, this is an extraordinary remedy that the Applicant was not required to exhaust before he seized the Court. [9]

48. In the instant case, the Court notes from the records that the Applicant went through the required criminal trial process up to the Court of Appeal, which is the highest Court in the Respondent State, before bringing his Application to this Court. The Court therefore finds that the Applicant has exhausted the local remedies available in the Respondent State's judicial system.

49. Accordingly, the Court dismisses the objection that the Applicant did not exhaust local remedies.

5 Application. No 004/2013. Judgment on Merits, 5/12/2014, *Lohé Issa Konaté v Burkina Faso*, para 77 (*hereinafter* referred to as, *Lohé Issa Konaté v Burkina Faso Judgment*), see also Peter Chacha judgment, para 40.

6 Application No. 006/2012. Judgment on Merits, 26/05/2017, *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 93 (hereinafter referred to as, "*African Commission on Human and Peoples' Rights v Republic of Kenya*").

7 *Alex Thomas* Judgment, para 64. See also Application No. 006/2013, Judgment on merits 18/03/2016, *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania*, para 95**.**

8 *Alex Thomas* Judgment, para 65.

9 *Ibid*. See also *Mohamed Abubakari* judgment, paras 66-68.

ii. Objection relating to not filing of the Application within a reasonable time

50. The Respondent State contends that, should the Court find that the Applicant has exhausted local remedies, it should reject the Application since the Applicant did not file his Application within a reasonable time after exhausting local remedies, in accordance with the Rules**.** In this regard, the Respondent State asserts that even though Rule 40(6) of the Rules is not specific on the question of reasonable time, international human rights jurisprudence has established six months period as a reasonable time.

51. In his Reply, the Applicant argues that he first learnt of the Court's existence in 2015 and considering that he is a layman and is not represented by a lawyer, his Application should be considered as having been filed within a reasonable time.

52. The Court notes that Article 56(6) of the Charter does not indicate a precise timeline in which an Application shall be filed before the Court. Rule 40(6) of the Rules refers to a "reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter."

53. In the Matter of *Norbert Zongo and Others v Burkina Faso*, the Court stated 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."[10] Accordingly, the Court, taking the circumstances of each case into account, specifies the date from which the time should be computed and then determines whether an application has been filed within a reasonable time from such date.

54. In the instant case, the Court notes that the judgment of the Court of Appeal in Criminal Appeal No. 182 of 2010 was delivered on 19 December 2012. The Application was filed before this Court on 8 December 2015, that is, two (2) years and eleven (11) months) after the judgment of the Court of Appeal. The key issue here is whether this time can be considered as reasonable in light of the particular circumstances of the Applicant.

55. The Respondent State does not dispute that the Applicant is a lay, indigent and incarcerated person without the benefit of legal education or assistance.[11] These circumstances make it plausible that the Applicant may not have been aware of the Court's existence and how to access it.

10 *Zongo and Other*s judgment, para 92.

11 See *Alex Thomas* judgment, para 74.

56. In view of these circumstances, the Court is of the opinion that the filing of this Application two (2) years and eleven (11) months after the exhaustion of local remedies is a reasonable time and therefore, dismisses the Respondent State's objection in this regard.

B. Conditions of admissibility that are not in contention between the Parties

57. The conditions of admissibility regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence, and the principle that an Application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules) are not in contention between the Parties.

58. The Court also notes that nothing in the record before it indicates that these requirements have not been fulfilled. Consequently, the Court holds that these admissibility requirements have been fully met in the instant case.

59. In view of the foregoing, the Court finds that the instant Application fulfils all the admissibility requirements specified in Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VII. The merits

A. Allegations relating to violation of the right to a fair trial

i. Allegation relating to evidence relied on to identify the Applicant

60. The Applicant submits that the visual identification relied upon by the domestic courts to convict him was erroneous. He avers that the victims who testified as witnesses did not indicate the distance between them and the attackers at the time of the commission of the crime; that they did not mention the location and direction of light of the lamp and that they failed to explain their condition and how they were able to comply with the assailants' order after the sudden attack.

61. The Applicant further adds that even though the victims claimed to have known the attackers, he was arrested after two days of the commission of the crime despite his presence in the area. He submits that the victims' testimony that the attackers took time to count the money in front of them does not pass the test of common sense, as the robbers would not do that in front of victims while being aware that the victims know them. Finally, the Applicant argues that Mr Yusuf Bwiru, the prosecution witness who arrived at the scene of the crime did not claim to have seen the robbers but just heard their names from the victims.

62. On its part, the Respondent State reiterates that the Court is not empowered to evaluate the evidence of the Trial Court but rather consider if duly established procedures laid down by the laws of the land were adhered to, otherwise, the Court would vest itself with appellate powers which are not granted to it by the Charter, the Protocol and the Rules.

63. The Respondent State argues that, the Applicant's allegations require the Court to assess the manner in which its domestic courts evaluated evidence. In this regard, the Respondent State submits that during the course of the Applicant's trial, five prosecution witnesses testified and five exhibits were tendered and the Applicant entered his defence after he was given adequate time to prepare it. According to the Respondent State, it is after carefully examining all the evidence, including that of visual identification, that the Trial Court convicted the Applicant and the High Court and the Court of Appeal sustained the conviction.

64. According to the Respondent State, the domestic courts convicted the Applicant after a thorough and appropriate examination of all evidence. The Respondent State maintains that, the Court should defer to the finding of the domestic courts in circumstances where duly established procedures laid down by the laws of the land were adhered to.

65. The Court underscores 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.

66. However, the fact that an allegation raises questions relating to the manner in which evidence was examined by domestic courts does not preclude the Court from determining whether the domestic procedures fulfilled international human rights standards. In its judgment in the matter of *Mohamed Abubakari v Tanzania*, the Court held that:

> "As regards, in particular, the evidence relied on in convicting the Applicant,

> the Court holds that, it was indeed not incumbent on it to decide on their value for the purposes of reviewing the said conviction. It is however of the opinion that, nothing prevents it from examining such evidence as part of the evidence laid before it so as to ascertain in general, whether consideration of the said evidence by the national Judge was in conformity with the requirements of fair trial within the meaning of Article 7 of the Charter in particular."[12]

67. In this regard, the Court observes that "a fair trial requires that the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on strong and credible evidence".[13]

68. The Court also notes that when visual identification is used as evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certitude. This is also the accepted principle in the Tanzanian jurisprudence.[14] This demands that visual identification should be corroborated by other circumstantial evidence and must be part of a coherent and consistent account of the scene of the crime.

69. In the instant case, the record before this Court shows that the domestic courts convicted the Applicant on the basis of evidence of visual identification tendered by three Prosecution Witnesses, who were victims of the crimes. These witnesses knew the Applicant before the commission of the crimes, since he used to come to his uncle's house, who was the Applicant's co-accused. The national courts thoroughly assessed the circumstances in which the crime was committed to eliminate possible mistaken identity and found that the Applicant and his co-accused were positively identified as having committed the alleged crimes.

70. The Court also observes that in addition to the victims' testimony on the Applicant's and his co-accused's identity, the national courts also considered the testimony of other Prosecution Witnesses, namely, that of Mr Yusuf Bwiru and Commander Anthony Michack. The national courts also relied on exhibits collected from the scene of the crime and recovered from the co-accused. Mr Yusuf Bwiru arrived at the scene of the crime immediately after the attackers left and found the victims terrified and crying for help and all of them named the Applicant and his co-accused as attackers.

12 *Mohamed Abubakari* judgment, paras 26 and 173.

13 *Ibid*, para 174.

14 In the *Matter of Waziri Amani v United Republic of Tanzania*, the Court of Appeal declared that "no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight", *ibid*, par 175.

71. The Court further notes from the record that during the trial, the Applicant did not contest the use of the exhibits as evidence. In their statement to the Regional Commander, Mr Anthony Michack, the victims also gave a consistent account of the crime and the identity of the robbers. The Applicant did not invoke any apparent reason as to why the victims could lie nor did he offer a counter evidence to refute the testimony proffered by prosecution witnesses. The evidence secured from the victims' visual identification forms part of a consistent account of the scene of the crime and the identity of the Applicant.

72. The Applicant's allegations that the victims did not state the distance between the intruders and them, that he was arrested only after two days, that the intruders would not count the money in front of the victims knowing that the latter knew them and that the victims did not state the direction and location of the lamp are all details that concern particularities, the assessment of which should be left to the domestic courts.

73. In view of the above, the Court is of the opinion that the manner in which the domestic courts evaluated the facts or evidence does not disclose any manifest error or resulted in a miscarriage of justice to the Applicant and hence, requires the Court's deference. The Court therefore dismisses the allegation of the Applicant that the evidence of visual identification relied upon by the Court of Appeal was erroneous.

ii. The allegation on failure to provide legal assistance

74. The Applicant contends that the Respondent State has violated Article 7(1)(c) of the Charter. The Applicant further submits that with "the inequality of arms in the Respondent State's prosecution system, whereby there is, on the one hand, the State Prosecution backed by professional lawyers; and on the other, the Applicant who was, an indigent, layman, not represented by a lawyer, it can hardly be said that the Applicant has been afforded equal protection of the law and the right to a fair trial".

75. The Respondent State denies this and argues that the Applicant was afforded the right to be heard and defend himself in the presence of his co-accused and witnesses, he was given the opportunity to cross examine all witnesses who testified against him and that he had the right to appeal. The Respondent State admits that the Applicant was not represented by a lawyer during the trial, but argues that the Applicant did not ask for legal assistance as per its Legal Aid Act No. 21 of 1969.

76. In terms of Article 7(1)(c):

> "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."

77. Even though Article 7(1)(c) of the Charter guarantees the right to defence, including the right to be assisted by counsel of one's choice, the Court notes that the Charter does not expressly prescribe the right to free legal assistance.

78. In its judgment in the Matter of *Alex Thomas v The United Republic of Tanzania*, this Court however stated that free legal aid is a right intrinsic to the right to a fair trial, particularly, the right to defence guaranteed in Article 7(1)(c) of the Charter.[15] In its previous jurisprudence, the Court also held that an individual charged with a criminal offence is automatically entitled to the right of free legal aid, even without the individual having requested for it, where the interests of justice so require, in particular, if he is indigent, the offence is serious and the penalty provided by the law is severe.[16]

79. In the instant case, it is not in dispute that the Applicant was not afforded free legal aid throughout his trial. Given that the Applicant was convicted of serious crimes, that is, armed robbery and unlawful wounding, carrying a severe punishment of 30 years and 12 months imprisonment, respectively, there is no doubt that the interest of justice would warrant free legal aid provided that the Applicant did not have the required means to recruit his own legal counsel. In this regard, the Respondent State does not contest the indigence of the Applicant nor does it argue that he was financially capable of getting a legal counsel. In these circumstances, it is evident that the Applicant should have been given free legal aid. The fact that he did not request for it is irrelevant and does not shun the responsibility of the Respondent State to offer free legal aid.

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

B. Alleged violation of the right to equality before the law and equal protection of the law

81. The Applicant asserts that the Court of Appeal, while examining his appeal, did not consider all the relevant facts and arguments that he submitted relating to the evidence used to convict him. By doing so, the Applicant argues that the Respondent State violated his fundamental right under Articles 3(1) and (2) of the Charter, which requires every individual to be entitled to equal protection of the law.

15 *Alex Thomas* judgment, para 114.

16 *Ibid*, para. 123, see also *Mohamed Abubakari* judgment, paras 138-139.

82. The Respondent State on the other hand contends that Article 13(6) of its Constitution provides a similar provision as Article 3 of the Charter, which guarantees the right to equal protection of the law. According to the Respondent State, the Applicant was not discriminated against during his trial and was treated fairly in accordance with the law, he was given the right to be heard and defend himself in the presence of his accusers and the opportunity to cross examine all witnesses; and he had also the right to appeal.

83. The Court notes that Article 3 of the Charter guarantees the right to equality and equal protection of the law in the following terms:

1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law"

84. The Court notes that the right to equal protection of the law requires that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[17] The Court notes that this right is recognised and guaranteed in the Constitution of the Respondent State. The relevant provisions (Articles 12 and 13) of the Constitution enshrine the right in similar form and content as the Charter, including by prohibiting discrimination.

85. The right to equality before the law requires that "all persons shall be equal before the courts and tribunals"[18] In the instant Application, the Court observes that the Court of Appeal examined all grounds of the Applicant's appeal and found that it did not have merit. In the interest of justice, the Applicant was even allowed to file his notice of appeal out of the deadline specified by the domestic law and his appeal was duly considered.[19] In this regard, this Court has not found that the Applicant was treated unfairly or subjected to discriminatory treatment in the course of the domestic proceedings.

86. The Applicant has therefore not adequately substantiated that his right to equality before the law or his right to equal protection of the law was contravened and, thus, the Court dismisses his allegation that the Respondent State violated Articles 3 (1) and (2) of the Charter.

C. Alleged violation of the right to non-discrimination

87. The Applicant submits that the Court of Appeal, by failing to

17 Article 26, ICCPR.

18 Article 14(1), *ibid*. See also UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, 10 November 1989, para 3.

19 Miscellaneous Criminal Cause No. 49 of 2009.

properly evaluate the evidence obtained during his trial, has violated his right under Article 2 of the Charter. On its part, the Respondent State insists that the Court of Appeal did properly address the Applicant's appeal and convicted him only after assessing a set of facts and corroborating evidence.

88. It emerges from Article 2 of the Charter that**:**

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."

89. The principle of non-discrimination strictly forbids any differential treatment among persons existing in similar contexts on the basis of one or more of the prohibited grounds listed under Article 2 above. [20]

90. In the instant case, the Applicant simply asserts that the Court of Appeal violated his right to freedom from discrimination. The Applicant does not indicate the kind of discriminatory treatment that he was subjected to in comparison to persons who were in the same situation as he was, nor does he specify the ground(s) prohibited under Article 2 of the Charter on which basis he was discriminated. The mere allegation that the Court of Appeal did not properly examine the evidence supporting his conviction is not sufficient to find a violation of his right not to be discriminated. The Applicant should have furnished evidence substantiating his contention.

91. In view of the foregoing, the Court finds that the Applicant is not a victim of any discriminatory practice that contravenes the right to freedom from discrimination guaranteed under Article 2 of the Charter.

VIII. Remedies sought

92. In his Application, the Applicant prayed the Court to, among other things, quash his conviction and set him free, grant other reparations and order such other measures or remedies as it may deem fit.

93. On the other hand, the Respondent State prayed the Court to deny the request for reparations and all other reliefs sought by the Applicant.

94. 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."

20 See *African Commission on Human and Peoples' Rights v Republic of Kenya* judgment, para 138

95. As regards the Applicant's request that the Court quash the decision of the national courts, the Court reiterates its decision in the matter of *Ernest Francis Mtingwi v Republic of Malawi*,[21] that it is not an appeal court to quash or reverse the decision of domestic courts, therefore, it does not grant the request.

96. Concerning the Applicant's request for an order of his release, the Court recalls its decision in *Alex Thomas v Tanzania*[22] where it stated that "an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances". In the instant case, the Applicant has not provided proof of such circumstances. Consequently, the Court does not grant the prayer, without prejudice to the Respondent applying such measure *proprio motu*.

97. With respect to other forms of reparation, Rule 63 of the Rules of Court provides that "the Court shall rule on the request for reparation… by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

98. In the instant case, the Court notes that none of the Parties made detailed submissions concerning the other forms of reparation. It will therefore make a ruling on this question at a later stage in the procedure after having heard the Parties.

IX. Costs

99. In their submissions, the Applicant and the Respondent State did not make any statements concerning costs.

100. The Court notes that Rule 30 of the Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".

101. The Court shall decide on the issue of costs when making a ruling on other forms of reparation.

X. Operative part

102. For these reasons:

The Court

Unanimously,

On Jurisdiction:

i. *Dismisses* the objection to the material jurisdiction of the Court.

ii. *Declares* that it has jurisdiction.

On Admissibility:

21 See above note 2.

22 *Alex Thomas* judgment, para 157.

iii. *Dismisses* the objections to the admissibility of the Application.
iv. *Declares* the Application admissible.

On 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.

Kouma and Diabaté v Mali (admissibility) (2018) 2 AfCLR 237

Application 040/2016, *Mariam Kouma and Ousmane Diabaté v Republic of Mali*

Judgment, 21 March 2018. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicants, a mother and her son, were attacked by a man with a machete in 2014. They submitted the case to the Court as the national courts, in their view, had failed to take the necessary measures against their attacker. The Court declared the case inadmissible as the Applicants had contributed to the prolongation of the national proceedings and had not shown that local remedies were insufficient.

Admissibility (exhaustion of local remedies, unduly prolonged, 37, 47, 48; sufficiency of remedy, 53)

I. The Parties

1. The Applicants, Mrs Mariam Kouma and her son Ousmane Diabaté, are citizens of Mali.

2. The Respondent State is the Republic of Mali which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 25 January 2004. The Respondent State also, on 19 January 2010, deposited the declaration prescribed under Article 34(6) of the Protocol recognizing the Court's jurisdiction to receive cases directly from individuals and Non-Governmental Organizations. It is also a Party to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as the "Maputo Protocol") since 25 November 2005, and to the African Charter on the Rights and Welfare of the Child (hereinafter referred to as "the Charter on the Rights and Welfare of the Child ") since 29 November 1999.

II. Subject of the Application

3. The Application was filed by APDF and IHRDA on behalf of Mariam Kouma, a merchant in Bamako, and her son Ousmane Diabaté, and invokes the violation of the Applicants' right to a fair trial

by the Respondent State.

A. The facts

4. In January 2014, Mariam Kouma sold a monkey to Boussourou COULIBALY for the sum of nine thousand (9,000) CFA Francs. The next day, Boussourou came to ask Mariam to take back her monkey and return his money, stating that his mother did not want the domestication of the monkey. Faced with Mariam's refusal to take the animal back, Boussourou left the monkey in the latter's compound and went away. However determined at all cost to have his money, he returned almost every day to the residence of his contracting partner to demand the return of his money.

5. On the night of 13 February 2014, when he returned to Mariam's house, she ordered him *never to set foot* in her house again. Furious, Boussourou rushed to the home of a neighbouring family, fetched a machete, rushed back into Mariam's living room and repeatedly struck her on the head and feet until she fell unconscious.

6. Ousmane Diabaté, Mariam's son, who came to the rescue of his mother, was also wounded by Boussourou during the scuffle. It was then that the neighbors, alerted by the cries of Ousmane, apprehended Boussourou and handed him over to the Police.

7. Following an investigation ordered by the Public Prosecutor's Office, Bousourou was charged with the offense of inflicting simple bodily harm. The case was forthwith brought before the Court of First Instance of Bamako District V.

8. At the public hearing of 20 February 2014, the Public Prosecutor asked for the accused to be released on grounds of dementia.

9. On 27 February 2014, the trial court dismissed the plea of the Public Prosecutor and sentenced Boussourou to one year imprisonment for the offence of inflicting simple bodily harm. The Court however reserved ruling on damages on the ground that the complainant had not yet produced evidence of the alleged incapacity to work.

10. Counsel for Boussourou appealed against that decision on the same day.

11. In its judgment of 24 March 2014, the Court of Appeal, considering that the Trial Judge left the case inconclusive for having not taken a decision on civil damages, decided to refer the matter back to the Court of First Instance of Bamako District V.

12. As at the time of referral to this Court by the Applicants on 1 July 2016, proceedings were pending before the Court of First Instance of Bamako District V.

B. Alleged violations

13. The Applicants allege that the Mali national courts, seized of the dispute between them and Boussourou, did an incorrect classification of the facts of the case. They assert that the fact of classifying the acts of their aggressor as assault rather than attempted murder with premeditation resulted in the violation of their dignity and rights under international human rights instruments, in particular:

"i. The right to dignity and the right to protection from all forms of violence and torture as provided under Article 3 of the Maputo Protocol, Article 5 of the Charter, Article 7 of the ICCPR and Article 5 of the Universal Declaration of Human Rights (UDHR);

ii. Ousmane's right to education as provided under Article 17 of the Charter and Article 11 of the African Charter on the Rights and Welfare of the Child;

iii. Mariam's right to work as provided under Article 15 of the Charter;

iv. The right to health as provided under Article 16 of the Charter, Article 14(1) of the Maputo Protocol and Article 14 of the African Charter on the Rights and Welfare of the Child;

v. The right of access to justice and the right to reparation as provided under Article 7 of the Charter and Article 6 of the Maputo Protocol."

14. The Applicants contend, lastly, that the Respondent State is liable for all the afore-mentioned violations for having failed in its obligation to conduct an in-depth and impartial investigation leading to a fair classification of the offence committed by their aggressor, adding that this constitutes a violation of Article 3(4) of the Maputo Protocol.

III. Summary of the procedure before the Court

15. The Application was received at the Court Registry on 1 July 2016 and served on the Respondent State on 26 July 2016. The Respondent State was requested to forward its Response to the Application within sixty (60) days, pursuant to Rules 35(4) and 37 of the Rules of Court (hereinafter referred to as "the Rules").

16. On 18 October 2016, the Registry transmitted the Application to the other States Parties and entities as mentioned in Rule 35(3) of the Rules.

17. On 28 November 2016, the Respondent State filed its Response

to the Application, which was transmitted to the Applicants on 13 December 2016.

18. On 1 February 2017, the Applicants filed their Reply to the Respondent State's Response which was forwarded to the Respondent State on 2 February 2017.

19. On 21 February 2017, the Registry notified the Parties that the Court would close the written procedure and set down the case for deliberation.

20. On 28 February 2017, the Respondent State transmitted to the Court an application for leave to file additional pleadings in accordance with Rule 50 of the Rules of Court. At its 44th Ordinary Session held from 6 to 24 March 2017, the Court accepted the application; and on 20 March 2017, the Registry notified the Respondent State that it has been allowed thirty (30) days to file its submissions.

21. On 5 April 2017, the Respondent State filed its Rejoinder and this was served on the Applicants on 10 April 2017.

22. At its 47th Ordinary Session held from 13 to 24 November 2017, the Court decided to close the written procedure and to set the case down for deliberation. The Parties were notified of this decision on 22 February 2018.

IV. Prayers of the Parties

23. In the Application, the Court is requested to:

"i. hold the Respondent State liable for failing in its obligation to carry out a thorough and impartial investigation in pursuance of Article 3(4) of the Maputo Protocol, Article 1 of the Charter and Article 16 of the African Charter on the Rights and Welfare of the Child;

ii. declare that the Respondent State has violated their rights guaranteed and protected by Articles 5, 7, 15, 16, et 17 of the Charter; 3, 6 and 14 of the Maputo Protocol; 11 and 14 of the African Charter on the Rights and Welfare of the Child; 7 of the ICCPR and 5 of the UDHR;

iii. Order the Respondent State to pay Mariam Kouma and Ousmane Diabaté, the sums of 110,628,205 Francs and 70,026,000 Francs respectively in reparation for the prejudices suffered".

24. In its defence, the Respondent State prayed the Court to:

"i. With respect to the form, declare the Application inadmissible on grounds of failure to exhaust the local remedies,

ii. On the merits, dismiss the Application as groundless".

V. On the Court's jurisdiction

25. In terms of Rule 39(1) of its Rules: "The Court shall conduct preliminary examination of its jurisdiction..."

26. The Court notes that its material, personal, temporal and territorial jurisdiction is not in contention between the Parties.

27. The Court also notes that, in the instant case, there is no doubt as to its material, personal, temporal and territorial jurisdiction given that:

"i. the Applicants are raising the issue of violation of the rights guaranteed by international human rights instruments ratified by the Respondent State[1];

ii. the Respondent State is a Party to the Protocol and has deposited the declaration prescribed by Rule 34(6) enabling individuals and NGOs to directly bring cases before the Court by virtue of Article 5(3) of the Protocol;[2]

iii. the alleged violations occurred subsequent to the entry into force of the international instruments, as concerns the Respondent State;[3] and

iv. the facts of the case took place on the territory of the Respondent State."

28. In view of the foregoing considerations, the Court holds that it has jurisdiction to hear the case.

VI. On admissibility

29. According to Article 6(2) of the Protocol: "The Court shall rule on the admissibility of a case taking into account the provisions of Article 56 of the Charter."

30. The Respondent State invokes only one inadmissibility objection based on Rule 40(5) of the Rules of Court which stipulates that, "to be admissible, Applications shall be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

31. In its Response, the Respondent State, citing Rule 34(4) of the Rules, contends that the Applicants did not exhaust local remedies

1 See para 2 of this judgment.

2 See para 2 of this judgment.

3 *Idem*.

prior to bringing the case before the Court, and prayed this Court to declare the Application inadmissible.

32. On this point, the Applicants themselves admit that they have not exhausted the local remedies before seizing this Court. They however refer to the provisions of Rule 40(5) of the Rules of Court, and indicate that:

> "i. the case pending before the Bamako Court of Appeal has been unduly prolonged;
>
> ii. the Appeal is not efficient, and
>
> iii. the civil claim, for its part, is already void of its substance because the acts committed by Boussourou, their aggressor, have been underestimated."

33. The Court will now examine the three arguments advanced by the Applicants in support of the objections to the rule of prior exhaustion of local remedies.

A. On the allegation that the domestic procedure has been unduly prolonged

34. The Applicants point out that the case has been pending before the Bamako Court of Appeal for two years and two months; and that a case that was adjudicated in less than a week at the criminal court cannot reasonably take more than two years before the Appeal Court. They therefore prayed the Court to find that the procedure has been unduly prolonged and to accept the exception to the rule of exhaustion of local remedies as provided under Article 56(5) of the Charter and reiterated in Rule 40(5) of the Rules of Court.

35. The Respondent State, in response, contends that at the time this Court was seized, the case had not yet been definitively closed at domestic level; adding that the prolongation was due to procedural difficulties. It further argues that if Mali did not dispose of the case, it was because the judge was still awaiting the Counsel for the Parties in the civil case, who requested that the rights of his clients be reserved until production of a final medical report; that on three occasions, that is, on 12 and 27 October 2016, and 30 November 2016, the Applicants failed to show up at the court hearing on the issue of reparation. The Respondent State infers that it is in no way involved in procedural intricacies.

36. In their Reply to the Respondent State's Response, the Applicants point out that the public hearings of 12 and 27 October 2016 and that of 30 November 2016 at which they did not appear, were subsequent to the referral to this Court. They further stated that the abnormality of the duration of the procedure should be assessed from

the time the case was referred to this Court.

37. The Court reaffirms that, to determine whether or not the duration of a procedure is reasonable, it must take into account the circumstances of the case and of the procedure; and as such 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.[4]"

38. On this point, the Court's analysis takes into account, in particular, the complexity of the case or the related procedure, the behaviour of the Parties themselves and that of the judicial authorities to determine if the latter "has been passive or clearly negligent."[5]

39. In the instant case, the questions at issue are whether the domestic procedure in respect of the Applicants' case is complicated or whether the Parties helped to speed up the said procedure; and more still, whether the judicial authorities showed proof of negligence or inadmissible delays.

40. The evidence on file shows that when the offence was committed, the Police alerted by the neighbours arrested Mr Boussourou, kept him in custody and prepared an investigation report; that this report was later transmitted to the State Counsel at the Court of First Instance of Bamako District V; that the latter, for his part, then seized the Criminal Court for immediate court hearing after placing the culprit under detention.

41. The Court notes that the facts described above do not contain any element of fact or of law which could render the case and, still less, the procedure, so complicated as to justify a relatively lengthy hearing.

42. The Court further notes that the Court of First Instance of Bamako District V which was seized on 20 February 2014, rendered its judgment on 27 February 2014, that is, eight (08) days later. As for the Appeal Court which examined the case on 27 February 2014, the latter gave its decision on 24 March 2014, that is, within twenty-five (25) days**.** The Court finds that such a time frame is not lengthy enough for it to declare the procedure unduly prolonged.

43. The two (2) years and two (2) months delay that the Applicants are complaining about is the duration of the proceedings before the Court of First Instance of Bamako District sitting as a referral court which is expected to dispose of its case by making a ruling on the Applicants' claim for civil damages.

4 See Application No. 013/2011, Judgment of 28/3/2014. *Beneficiaries of The Late Norbert Zongo and Others v Burkina Faso,* para 92 http://www.african-court.org.

5 See matter of *Dobbertin v France*, Judgment of 25 February 1993, Série A, No. 256-D para 44. http://hudoc.echr.coe.int.

44. On this point, as it could be seen from the evidence on file, the defence brief in particular, that the Applicants themselves contributed in delaying the procedure because at the hearing of 20 February 2014, their Counsel prayed the Court to reserve the rights of the civil Parties; and besides, the Applicants had not produced the final medical report concerning Mariam Kouma. The Applicants did not contest this fact.

45. The Court holds that the expeditiousness of a procedure requires the necessary cooperation of the Parties in the trial to avoid undue delay as happened in the case between the Applicants and the Public Prosecutor's Office in the national courts, particularly the Court of First Instance of Bamako District V, since the case was referred to the latter so that it could be disposed of, as regards civil damages.

46. In the instant case, the Court notes that the time that elapsed between 24 March 2014, and 1 July 2016,[6] the date on which the case was brought to it, corresponds to the period when the Court was awaiting the Applicants' medical evidence so as to assess the harm and quantify the reparation.

47. Considering the above elements, the Court holds that the Applicants have contributed to the delay in the proceedings they allege are unduly prolonged.[7] They should have helped to speed up the proceedings by producing early enough, the evidence for reparation of the damages they are claiming.

48. The Court therefore dismisses the Applicants' contention that local proceedings have been unduly prolonged.

B. On the alleged inefficiency of the remedies before the Court of Appeal

49. The Applicants also contend that the remedy before the Court of Appeal is insufficient given that it offers no prospect of re-classification of the offence as a case of attempted murder with premeditation rather than assault and battery; that the State Prosecutor's Office should first have sought medical evaluation to determine the level of incapacitation to work suffered by the victims before proceeding with classification of the facts.

50. The Respondent State contests the Applicants' claims, arguing that this case had been properly managed in local courts contrary to the claims in the Applicants' submissions. It maintains that the

6 Date on which the Court of Appeal referred the case back to the Court of First Instance Bamako District V.

7 See Application No. 001/2012, Judgment of 28/03/2014: *Frank David Omary and Others v United Republic of Tanzania*, paras 133 to 135. http://www.african-court.org.

sentencing of Boussourou to one year imprisonment term by the Court of First Instance of Bamako District V is proof of the fact that the case, at criminal level, has been expeditiously managed with maximum strictness.

51. The Court notes that the Applicants limit themselves to arguing that they did not exercise the remedy of re-classification of the offence based on the facts because there is no prospect of obtaining any such re-classification.

52. As the Court already stated in previous cases, "It is not enough for the Complainants to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences"[8] as a way to discharge themselves of 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".[9]

53. In the instant case, the Court notes that the Applicants have no proof to show that the remedy of re-classification could not lead to another ruling, different from that of the examining magistrate; they contented themselves with casting doubt on the sufficiency of a remedy available to them and which they have deliberately refused to use.

54. Therefore, in the absence of proof on the part of the Applicants that the indictment chamber would not produce the expected results, the Court dismisses the Applicants' argument in this respect.

C. On the allegation regarding the inefficiency of the civil remedy

55. The Applicants contend that the Respondent State's justice system, by classifying the offense as simple assault and battery without awaiting the opinion of the physician in charge, *"shut the door"* to the claims to compensation for 60% incapacitation suffered by Mariam Kouma, as well as the loss of opportunities due to the incapacitation; that Mariam was thus rendered incapable of claiming the cost of her surgery and medicines, and of the physiotherapy she underwent for treating the injuries inflicted on her by Boussourou.

8 See Application No 003/2012, Ruling of 28/03/2012, *Peter Joseph Chacha v United Republic of Tanzania,* para 143; Application No. 001/2012, Judgment of 28/03/2014: *Frank David Omary v United Republic of Tanzania* para 127. http://www.african-court.org. 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*, para 54.

9 See Application No. 003/2012, Ruling of 28/03/2012, *Peter Joseph Chacha. v United Republic of Tanzania,* para 144 *op cit*.

56. The Applicants also argue that the fact that the State Prosecution had avoided conducting the appropriate criminal proceedings but rather undertook correctional proceedings, while ignoring young Ousmane Diabaté's status of victim – all represents proof that the local courts failed in their obligation to conduct thorough and impartial investigations.

57. The Applicants conclude that the local procedures hold no interest for the victims who are seeking a proper classification of the offence, punishment of the culprit commensurate with the crime committed and compensation that takes into account the sufferings endured by the Applicants.

58. The Respondent State refutes all the Applicants' allegations and states that it is because the Appeal Court took into account the civil claims of the Applicants that it referred the case to the trial Judge.

59. The Court notes that it is in considering the civil interest of the Applicants that the Bamako Court of Appeal on 27 February 2014 held that the Trial Court Judge failed to dispose of the case by not deciding on the civil aspects, and accordingly decided to refer the matter to the latter.

60. Moreover, the Court notes that, at the present stage of the domestic procedure, the Applicants can lodge an appeal only after the trial judge's decision on civil damages. It is therefore premature to prejudge the inefficiency of the remedy before the Court of Appeal.

61. Consequently, the Court dismisses the Applicants' contention that the local remedy is inefficient, ineffective and insufficient.

62. The Court finds that the Applicants have not exhausted the local remedies as required under Article 56 of the Charter and Rule 40(5) of the Rules.

63. The Court notes that, according to Article 56 of the Charter, the conditions of admissibility are cumulative and, as such, when one of them is not fulfilled, the Application cannot be admissible. This is the case in the instant matter. The Application therefore must be declared inadmissible.

VII. Costs

64. The Court notes that in the instant case, the Parties have not made any claim as to costs.

65. In terms of Rule 30 of the Rules, which provides that "unless otherwise decided by the Court, each party shall bear its own costs", the Court decides that each party shall bear its own costs.

VIII. Operative part

66. For these reasons
The Court,
unanimously:
i. *Declares* that it has jurisdiction;
ii. *Upholds* the objection based on non-exhaustion of local remedies;
iii. *Declares* that the Application is inadmissible; and
iv. *Declares* that each Party shall bear its own costs.

Anudo v Tanzania (merits) (2018) 2 AfCLR 248

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

Judgment, 22 March 2018. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant's Tanzanian nationality was withdrawn and he was deported to Kenya which, in turn, expelled him back to Tanzania where he was stranded in the no man's land at the border. The Applicant alleged that his right to nationality as guaranteed under the Tanzanian Constitution and the Universal Declaration of Human Rights had been violated. The Court held that neither the African Charter, nor the ICCPR explicitly deals with the right to nationality but that withdrawal of nationality by making a person stateless violates the Universal Declaration of Human Rights which reflects customary international law. The Court further held that the manner in which the Applicant was expelled violated the ICCPR.

Jurisdiction (international instruments ratified by the Respondent State, 35; no need to specify Charter obligations, 36)

Admissibility (exhaustion of local remedies, judicial review, expelled, 52, 53; submission within reasonable time, 57-59)

Interpretation (Universal Declaration forms part of customary international law, 76)

Nationality (withdrawal, statelessness, 78, 79, 87, 88, 102; contested, burden of proof, 80-85; procedure, hearing, 112)

Expulsion (arbitrary, 100-102, 105)

Reparations (annul expulsion decision, 127)

I. The Parties

1. The Applicant is Anudo Ochieng Anudo, who states that he was born in 1979 in Masinono, Butiama, 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 December 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. It deposited the declaration prescribed under Article 34(6) of the Protocol recognizing the jurisdiction of the Court to receive cases from individuals and Non-Governmental organizations on 29 March 2010. The Respondent State also became a Party to the International

Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") on 11 July 1976, and to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ICESCR") on 11 June 1976.

II. Subject of the Application

3. The Application relates to the withdrawal of nationality and expulsion from the United Republic of Tanzania of the Applicant by the Respondent State.

A. Facts as stated by the Applicant

4. The Applicant states that in 2012, he approached the Tanzanian authorities of the Babati District Police Station to process formalities for his marriage. The Police decided to retain his passport on the grounds that there were suspicions regarding his Tanzanian citizenship. His Tanzanian nationality was withdrawn and he was then deported to the Republic of Kenya which, in turn, expelled him back to the United Republic of Tanzania; but because he could not enter the country, he remained in the "no man's land" between the *Tanzania*-Kenya border in Sirari.

5. On 2 September 2013, the Applicant sent a letter to the Minister of Home Affairs and Immigration requesting to know why his travel document was confiscated by the Police.

6. Between April and May 2014, the immigration service opened an investigation and questioned certain residents of the village of Masinono, notably those the Applicant indicated to be his biological parents. Many of them attested that the Applicant was the biological son of Anudo Achok and Dorcas Rombo Jacop, with the exception of his uncle Alal Achock (his father's brother) who stated that the Applicant was born in Kenya to one Damaris Jacobo, and subsequently migrated to Tanzania.

7. The Applicant indicated having written to the Prevention and Combatting of Corruption Bureau informing this Bureau that immigration officers had asked him to give them a bribe, which he refused to do.

8. By a letter dated 21 August 2014, the Minister of Home Affairs and Immigration informed the Applicant that, after careful verification of all the relevant documents, officials of the Immigration Department had come to the conclusion that he was not a citizen of Tanzania, and that his Tanzanian passport No. AB125581 had been issued on the basis of fake documents. The Minister's letter further stated that the Applicant's passport had been cancelled and an order issued for him to report to the Immigration Office for information as to what steps to take to obtain

Tanzanian nationality.

9. In response to that invitation, the Applicant, on 26 August 2014, unaware of the Minister's letter dated 21 August 2014 went to the Immigration Office at Manyara with a view to having his passport returned. He alleges that, upon arrival, he was arrested, detained and beaten. Seven days later, that is, on 1 September 2014, he was expelled, with immigration officers escorting him to the Kenyan border after he was compelled to sign a notice of deportation and a document attesting that he is a Kenyan citizen.

10. On 5 October 2014, the Applicant's father brought the matter to the attention of the Prime Minister of the Respondent State, seeking annulment of the decision to strip his son of his citizenship and for his deportation. The Applicant's father's letter was transmitted to the Minister of Home Affairs and Immigration for consideration and appropriate action. On 3 December 2014, the Minister of Home Affairs and Immigration confirmed the Applicant's expulsion.

11. In Kenya, the Applicant was on 3 November 2014, found in a comatose condition with bruises and injuries, and was taken to hospital. On 6 November 2014, he was arraigned before the Homa Bay Resident Magistrate's Court in Kenya which declared him as being in an "irregular status" in the territory and sentenced him to pay a fine for illegal stay. The Applicant was again expelled to Tanzania following that decision.

12. The Applicant alleges that he has since been living in secret in the "no man's land" between the territory of the Respondent State and the Republic of Kenya, in very difficult conditions, without basic social or health services.

B. Alleged violations

13. The Applicant alleges that the confiscation of his passport, the "illegal immigrant" status issued against him and his expulsion from the United Republic of Tanzania deprived him of his right to Tanzanian nationality, guaranteed and protected under Articles 15(1) and 17 of the Tanzanian Constitution and Article 15(2) of the Universal Declaration of Human Rights.

14. In his Reply to the Respondent State's Response, the Applicant, through his Counsel, further states that by depriving him of his Tanzanian nationality and expelling him to Kenya, which in turn declared him as being in "an irregular situation", the Respondent State violated a number of his fundamental rights:

> "i. the right to freedom of movement and residence in his own country as guaranteed by Article 12 of the Charter, including;

ii. the right to liberty and security of his person and freedom from arbitrary arrest and detention as provided in Article 9(1) of the ICESCR and Article 6 of the Charter;

iii. the right to equality before the law; the right to be presumed innocent until proven guilty; the right to a fair and public hearing guaranteed under Article 15 of the ICCPR and Article 7(b) of the Charter; the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force, under Article 7(a) of the Charter;

iv. the right to participate freely in the government of his country, either directly or through freely chosen representatives, as provided under Article 13(1) of the Charter and Article 25(1) of the ICCPR;

v. the right of access to public office and the use of public services in his country, as provided under Article 13(2) of the Charter and Article 25(2) of the ICCPR;

vi. the right to work as provided under Article 15 of the Charter and Article 6 of the ICESCR;

vii. the right to enjoy the best attainable state of physical and mental health as guaranteed by Article 16 of the Charter;

viii. the right to protection of his family by the Respondent State as provided under Article 18 of the Charter, and the right to an adequate standard of living for himself and his family as provided under Article 11 of the ICESCR;

ix. the right to marry and found a family guaranteed by Article 23 of the ICCPR;

x. the right to take part in the cultural life of his community as provided under Article 17(2) of the Charter".

III. Summary of the procedure before the Court

15. The Application dated 24 May 2015, was lodged at the Registry of the Court by an email sent on 25 May 2015.

16. The issue of the validity of the email and its registration was considered by the Court at its 38th Ordinary Session which decided that the Application be registered.

17. On 15 September 2015, the Application was served on the Respondent State. On the same date, it was transmitted to all the States Parties to the Protocol; and on 28 October 2015, was notified to the other entities listed under Rule 35(3) of the Rules of Court

(hereinafter referred to as "the Rules").

18. On 30 December 2015, the Respondent State filed its Response. On 5 January 2016, the Registry transmitted the Response to the Applicant.

19. At its 39th Ordinary Session, the Court decided to provide the Applicant with legal assistance and instructed the Registry to contact the Non-Governmental Organization (NGO) Asylum Access Tanzania in this regard. On 4 February 2016, Asylum Access Tanzania accepted to represent the Applicant.

20. On 25 March 2016, the Court, pursuant to the provisions of Rule 45(2) of its Rules, sought the opinion of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") on issues of nationality as regards the matter of *Anudo Ochieng Anudo v United Republic of Tanzania*, in view of its expertise in this area. The Commission did not respond to the request.

21. By an Application dated 18 November 2016, received at the Registry on 28 November 2016, the Applicant prayed the Court to issue an order for Provisional Measures to: (i) dissuade the Respondent State from barring him from entering Tanzania; and (ii) allow him to return to his family in Tanzania pending the final decision of the Court. This prayer was transmitted to the Parties on 2 December 2016.

22. On 6 December 2016, the Registry notified the Parties that the matter was set down for public hearing for 17 March 2017. Following a request from the Applicant, the said hearing was held on 21 March 2017. During the hearing, the Parties presented their pleadings, made oral submissions and responded to questions put to them by Members of the Court.

23. At the request of the Respondent State during the public hearing, the Parties were granted leave to file additional evidence.

24. Pursuant to Rule 45(2) of the Rules, the Court, on 4 January 2017, requested the NGO, Open Society Justice Initiative, as an organization with recognized expertise on the regime of nationality and statelessness in international law, for an opinion on the issue.

25. On 7 March 2017, the Open Society Justice Initiative transmitted its comments, and these were forwarded to the Parties for their observations.

IV. Prayers of the Parties

A. The Applicant's prayers

26. The Applicant prays the Court to order that the immigration authorities' decision to expel him from his own country, be declared

null and void.

27. Further, in his Reply to the Respondent State's Response, the Applicant prays the Court to order the following measures:

"i. cancel the *prohibited immigrant notice* issued against him and reinstate his nationality by declaring him a citizen of the United Republic of Tanzania;

ii. (ii) allow him to enter and stay in the Respondent State like all its other citizens;

iii. (iii) ensure his protection by the Respondent State as it does for other citizens and protect him from victimization on account of this case; and

iv. (iv) reform its immigration law to guarantee the right to a fair trial before taking any decision that may deprive a person of his fundamental right, like the right to nationality."

B. The Respondent State's prayers

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

"i. declare that it has no jurisdiction to adjudicate the Application;

ii. declare the Application inadmissible on the grounds that it has not met the admissibility conditions stipulated under Rule 40(5) and (6) of the Rules;

iii. declare that the Respondent has not violated the Applicant's right to personal freedom and the right to life;

iv. declare that the allegations of corruption are false;

v. dismiss the Application for lack of merit, and

vi. grant it leave to file additional evidence pursuant to Rule 50 of the Rules of Court."

V. Jurisdiction

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

30. In this respect, the Respondent State raises objection to the material jurisdiction of the Court on which the Court shall make a ruling before considering other aspects of jurisdiction.

A. Objection to the Court's material jurisdiction

31. The Respondent State raises objection to the material jurisdiction

of the Court by invoking Article 3(1) of the Protocol and Rule 26(1) and (2) of the Rules which provide that "the Court shall have jurisdiction to deal with all the cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant instrument on human rights ratified by the States concerned".

32. The Respondent State argues that, contrary to the above provisions, the Applicant does not request the Court to interpret or apply an Article of the Charter or the Rules, nor invoke any human rights instrument ratified by the United Republic of Tanzania.

33. The Applicant refutes the Respondent State's objection to the Court's material jurisdiction, contending that even in the absence of any express reference to the Charter or the Protocol, the alleged violations fall within the ambit of the international instruments in respect of which the Court has jurisdiction.

34. The Court notes that, in actual fact, the Application does not indicate the articles or human rights instruments guaranteeing the rights alleged to be violated.

35. However, in his Reply to the Respondent State's Response, the Applicant specifies the rights allegedly violated as well as the international instruments which guarantee the said rights. It follows that the Application raises allegations of violations of human rights guaranteed by international legal instruments applicable before this Court and ratified by the Respondent State, particularly the Charter, the ICCPR and the ICESCR.

36. The Court notes its established case law on this issue and reiterates that the rights allegedly breached need not be specified in the Application; it is sufficient that the subject of the Application relates to the rights guaranteed by the Charter or by any other relevant human rights instrument ratified by the State concerned.[1]

37. Accordingly, the Court dismisses the Respondent State's objection and rules that it has material jurisdiction to hear the case.

B. Other aspects of jurisdiction

38. The Court notes that its personal, temporal and territorial jurisdiction is not contested by the Respondent State. Besides, nothing on record indicates that the Court does not have personal, temporal and territorial jurisdiction. The Court accordingly holds that:

1 See Application 005/2013: *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015 para 45; *Frank David Omary and Others* v *United Republic of Tanzania*, Application 001/2012 Judgment of 28 March 2014, para 115; *Peter Chacha* v *United Republic of Tanzania*, Application 003/2012, Judgment of 28 March 2014, para 115.

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

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

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

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

VI. Admissibility

40. Pursuant to Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of … the admissibility of the application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules". The Respondent State raises objection to the admissibility of the Application on the basis of Article 6 of the Protocol and Rule 40(5) of the Rules of Court. It contends not only that the Applicant has not exhausted the available local remedies, but also that the Application has not been filed within a reasonable timeframe.

41. In terms of Rule 40 of the Rules, which in substance restates the content of Article 56 of the Charter, Applications shall be admissible if they fulfil the following conditions:

"1. Indicate their authors even if the latter request anonymity,

2. 2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,

3. 3. Are not written in disparaging or insulting language,

4. 4. Are not based exclusively on news discriminated through the mass media,

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

6. 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and

7. 7. Do not deal with cases which have been settled by these States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the present Charter."

A. Objection based on the non-exhaustion of local remedies

42. The Respondent State avers that the Applicant could have challenged the decision of the Minister of Home Affairs and Immigration by filing before him a petition for waiver or cancellation of the "prohibited immigrant" notice and also introduce an application for authorization to return to the United Republic of Tanzania, stating the reasons for the return. It contends that under The Immigration Act, 1995, the Minister of Home Affairs and Immigration has the discretionary power to grant exemptions in cases of illegal residence; but that the Applicant never attempted to exercise this remedy.

43. According to the Respondent State, the Applicant had the opportunity to challenge the Minister's decision to publish the "prohibited immigrant" notice as provided under the Law Reform Act, (Cap. 310 of the Laws) which offers the right to remedies to people who feel aggrieved by a measure taken through an organ of Government or an administrative authority.

44. The Respondent State further states that the Applicant could have introduced before the High Court of Tanzania, an Application for review as a way to remedy the alleged violation of his rights.

45. The Respondent State argues that the afore-mentioned remedies exist because they are provided under Tanzanian laws; are available and can be exercised without impediment.

46. The Respondent State concludes that since the Applicant did not exercise the aforesaid remedies available locally, the Application does not meet the conditions set forth under Rule 40(5) of the Rules and must therefore be dismissed.

47. The Applicant submits that he has exhausted the local remedies available in the Respondent State in conformity with section 10(f) of the Tanzanian Immigration Act which provides that "…every declaration of the Director…shall be subject to confirmation by the Minister, whose decision shall be final."

48. The Applicant also submits that he appealed the "prohibited immigrant" decision before the Minister through his father, but that the Minister confirmed the decision.

49. The Applicant further submits that after his expulsion from the Respondent State, he wrote to the Prime Minister (through his father), appealing his expulsion, but that the Minister, requested by the Prime Minister to examine his request responded, confirming the said expulsion. He avers that, consequently, the Respondent State was aware of his desire to return to its territory, and that the available domestic remedies have been exhausted.

50. The Applicant also points out that the Tanzanian Immigration Act

does not provide judicial remedy for the decisions of the immigration authorities. According to him, the only other remedy was therefore that of review which is inefficient, unavailable and illogical.

51. The Court notes that the Applicant did in actual fact exercise the remedies provided by the Tanzanian Immigration Act by first seizing the Minister of Home Affairs and Immigration[2] of the matter. He also sent a letter to the Prime Minister.[3] The Court also notes that beyond these remedies exercised by the Applicant, the Tanzanian Immigration Act is silent on whether or how the Minister's decision can be challenged in a court of law.

52. With regard to the Respondent State's contention that the Applicant could have challenged the Minister's decision in the High Court by way of judicial review, this Court notes that at the time the Applicant was in a position to exercise the said remedy, he had already been expelled from Tanzania and was no longer in the territory of the Respondent State. In the circumstances, it would have been very difficult for him to exercise the review remedy.

53. Consequently, the Court dismisses the Respondent State's objection to the admissibility of the Application on grounds of failure to exhaust local remedies.

B. Objection on the ground that the Application was not filed within a reasonable time

54. The Respondent State alleges that the Application was not filed within a reasonable time in conformity with Rule 40(6) of the Rules of Court, arguing that the Applicant seized the Court nine (9) months after the publication of the "prohibited immigrant" notice, a period it considers unreasonable.

55. In his Reply, the Applicant notes that the Minister's letter in response to his appeal was signed in December 2014, and that he filed his Application before this Court in May 2015; meaning that only five (5) months had elapsed between the Minister's final decision and the filing of the matter in this Court.

56. The Court notes that Rule 40(6) of the Rules which in substance reproduces Article 56(6) of the Charter speaks simply of "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

57. The Court has established in its previous Judgments that the

2 See above para 5 of the Judgment.

3 See above para 10 of the Judgment.

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.[4]

58. In the instant case, the Court notes that the Applicant did, as a matter of fact, file the instant Application on 24 May 2015, whereas the Minister's letter in response to his appeal was dated 3 December 2014, thus representing a period of five (5) months and twenty-one (21) days between the two dates. For the Court, this period is reasonable, considering in particular the fact that the Applicant was outside the country.

59. The Court therefore dismisses the objection to the admissibility of the Application for non-submission of the same within a reasonable time.

C. Admissibility conditions not in contention between the Parties

60. The Court notes that compliance with sub-rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules (see paragraph 39 above) is not in contention and that nothing on record indicates that the requirements of the said sub-rules have not been complied with. In view of the aforesaid, the Court finds that the admissibility conditions have been met; and thus, that the instant Application is admissible.

VII. The merits

61. The Court notes that the instant Application invokes the violation of three fundamental rights: (i) the Applicant's right to nationality and the right not to be arbitrarily deprived of his nationality, (ii) the right not to be arbitrarily expelled and (iii) the right to have his cause heard by a court.

62. The Court notes that the rights of which the Application alleges violation concern not only the rights above cited, but also other incidental rights.

4 Application 005/2013, Judgment of 20 November 2015, *Alex Thomas v United Republic of Tanzania,* para 73; *Abubakari v United Republic of Tanzania,* Application 007/2013), Judgment of 3 June 2016, para 91; and in *Christopher Jonas v United Republic of Tanzania*, Application 011/2015, Judgment 28 September 2017, para 52.

A. On violations arising from the withdrawal of nationality and related rights

i. The Applicant's right to nationality and the right not to be arbitrarily deprived of his nationality

63. The Applicant submits that he is a Tanzanian by birth, just like his two parents, namely, his father Achok Anudo and his mother Dorka Owuondo. He further states that he holds a valid Tanzanian birth certificate and a Tanzanian voter's card which were confiscated by the Respondent State's authorities.

64. The Applicant further submits that the Manyara Immigration Office invited him to collect his passport on 26 August 2014 and that when he went to that Office, he was detained for six days, beaten and forced to admit that he is a Kenyan. He states that two documents were handed to him on the sixth day of his detention, that is, on 1 September 2014, one of which was a letter indicating that:

> "a. He is not a citizen of the United Republic of Tanzania;
>
> b. His passport AB125581 was invalidated because he obtained it with fake documents;
>
> c. He will have to go to the Manyara Immigration Office to obtain information as to how to legalize his stay or arrange to leave the country.

65. On the seventh day of his detention, the Applicant was deported under police escort to Kenya.

66. The Applicant also alleges that the decision declaring him "prohibited immigrant" was ill-motivated given that his arrest and detention were based on unfounded and fabricated evidence; that he was arrested, detained and then deported to Kenya without any possibility for him to challenge, in Court, the "prohibited immigrant" notice issued by the Minister of Home Affairs.

67. The Applicant alleges that the proceedings leading to the decision to invalidate his passport did not follow the legal procedure as required by Article 15(2)(a) of the Constitution of the United Republic of Tanzania.

68. The Applicant contended that his father, who is Tanzanian by birth and with whom the Respondent State's authorities claimed to have spoken, had requested a DNA test to ascertain their parental connection but the Respondent State's authorities did not accede to the request.

69. The Respondent State contends that the Applicant's passport was obtained on the basis of false documents, adding that the information on the copy of his father's birth certificate attached to the Applicant's

passport application in 2006 turned out to be contradictory to the statements concerning his parents, obtained during the investigation conducted on 29 November 2012.

70. The Respondent State further contends that the birth certificate issued on 6 September 2015 mentioned by the Applicant and attached to the Application submitted to this Court was obtained on the basis of the false documents that were presented.

71. The Respondent State also submits that the Applicant was declared a non-Tanzanian after the investigation in Masinono village where the Applicant claimed he was born; that in light of the discrepancies between the questionnaire completed by the Applicant at the Immigration Office and the statements obtained during the investigation conducted on 28 November 2015, the immigration authorities concluded that the Applicant is not a citizen of the United Republic of Tanzania.

72. According to the Respondent State, the Applicant had the opportunity to change his status to one that is legal given that he was asked, in a letter dated 21 August 2014, to provide further clarification and to legalize his stay, failing which he would be expelled, but he failed to subject himself to the said formalities.

73. The Court notes that before the Applicant's nationality was withdrawn by the Respondent State, he was considered a Tanzanian national, with all the rights and duties associated with his nationality (See infra 80-81).

74. It is important to state here that the conferring of nationality to any person is the sovereign act of States.

75. The question here is for the Court to determine whether the withdrawal of the Applicant's nationality was arbitrary or whether it conformed with international human rights standards.

76. The Court notes that neither the Charter nor the ICCPR contains an Article that deals specifically with the right to nationality. However, the Universal Declaration of Human Rights which is recognized as forming part of Customary International Law[5] provides under Article 15 thereof that: "1. Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality…"

77. In international law, it is recognized that the granting of nationality

5 See *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v Iran)* [1980] ICJ page 3, Collection 1980. See also Matter of *South-West Africa (Ethiopia v South Africa; Liberia v South Africa*) (Preliminary Objections) (Bustamente, Judge, separate opinion), ICJ, Collection 1962 page 319, as well as Section 9(f)of the Constitution of the United Republic of Tanzania, 1977.

falls within the ambit of the sovereignty of States[6] and, consequently, each State determines the conditions for attribution of nationality.

78. However, the power to deprive a person of his or her nationality has to be exercised in accordance with international standards, to avoid the risk of statelessness.

79. International Law does not allow, save under very exceptional situations, the loss of nationality. The said conditions are: i) they must be founded on clear legal basis; ii) must serve a legitimate purpose that conforms with International Law; iii) must be proportionate to the interest protected; iv) must install procedural guaranties which must be respected, allowing the concerned to defend himself before an independent body.[7]

80. In the instant case, the Applicant maintains that he is of Tanzanian nationality, which is being contested by the Respondent State. In the circumstance, it is necessary to establish on whom lies the burden of proof. It is the opinion of the Court that, since the Respondent State is contesting the Applicant's nationality held since his birth on the basis of legal documents established by the Respondent State itself, the burden is on the Respondent State to prove the contrary.

81. The Court notes that, in this case, the Applicant has always held Tanzanian nationality with all the related rights and duties, up to the time of his arrest, he had a birth certificate and passport like every other Tanzanian citizen.

82. The Court further notes that, in the instant case:

"1. the passport in question, AB125581 delivered by Tanzanian authorities,

2. The Applicant's birth certificate attached to his Application before this Court indicates that his name is Anudo Ochieng Anudo and that his father is Achok Anudo,

3. the Respondent State claims that the Applicant's father's birth affidavit attached to the Applicant's passport application in 2016 bears the name of Anudo Ochieng, but that according to a testimony, his father was rather called Andrew Anudo,

4. Mr Achok Anudo testified, on oath, that he was indeed the Applicant's father and, in addition, requested a DNA test to corroborate his assertions.

5. Mrs Dorcas Rombo Jacop also testified, on oath, that she was the Applicant's mother.

6. Other residents of the village, including old people and community

6 ICJ, *Nottebohm* Case, (*Liechtenstein v Guatemala*) Judgment 6 April 1955, page 20.

7 Report of the Secretary General, Human Rights Council, Twenty-Fifth Session, 19 December 2013.

> leaders, affirmed in writing that the Applicant is Tanzanian, born in Tanzania. Among the residents was one Patrisia O Sondo who asserted having been present and assisted the Applicant's mother at the time of his birth, and clearly describing the place of birth."

83. The Court notes that the Respondent State's argument reposes on the statement of the Applicant's uncle who asserted that the Applicant's mother is a citizen of Kenya, and on the contradiction observed between the information provided by the Applicant and the statements of his supposed relations.

84. The Court notes, also, that the Applicant's citizenship was being challenged 33 years after his birth; that he has used the same citizenship for all those years leading an ordinary life, pursuing his studies in the schools of the Respondent State and in other countries; and that he has always lived and worked, like every other citizen, in the Respondent State's territory where he had been exercising a known profession.

85. The Court further notes that the Respondent State does not contest the Applicant's parents' Tanzanian nationality just as it did not prosecute the Applicant for forgery and making use of forged documents with the intent to defraud.

86. The Court also holds that in view of the contradictions in the witnesses' statements about the Applicant's paternity, the proof would have been a DNA test. A scientific DNA test was what was required and was requested by Achok Anudo, who, until then, claimed to be the Applicant's father.

87. By refusing to carry out the DNA test requested by Achok Anudo, the Respondent State missed an opportunity to obtain proof of its claims. It follows that the decision to deprive the Applicant of his Tanzanian nationality is unjustified.

88. The Court is of the opinion that the evidence provided by the Respondent State concerning the justification for the withdrawal of the Applicant's nationality is not convincing, and therefore holds in conclusion that the deprivation of the Applicant's nationality was arbitrary, contrary to Article 15(2) of the Universal Declaration of Human Rights.

ii. The Applicant's right not to be expelled arbitrarily

89. The Applicant submits that his arrest and expulsion is the result of his refusal to give a bribe to the immigration officers. Subsequently, he wrote to the Prevention and Combating of Corruption Bureau to complain.

90. The Applicant maintains that officials of the Respondent State

unlawfully seized his passport which was still valid, cancelled it, deleted it from the Register, and then deported him to Kenya.

91. He submits that it is unlawful to declare him a "prohibited immigrant" and expel him from his country. He denounces the Tanzanian authorities' application of Section 11(1) of the Tanzanian Immigration Act, which states that "the entry and presence in Tanzania of any prohibited immigrant shall be unlawful".

92. The Respondent State, for its part, contends that the Applicant's passport was cancelled following an investigation conducted by the Immigration Department which provided proof that the information used in obtaining the said passport was false. The decision to expel the Applicant was taken by the Minister of Home Affairs, the only one competent to do so.

93. It submits that the Applicant's stay in its territory was unlawful; that the "prohibited immigrant" notice was issued in accordance with the law and that the Applicant's expulsion was legal.

94. The Respondent State further submits that after the cancellation of his passport, the Applicant had the opportunity to regularize his situation in Tanzania but refused to do so.

95. The Court notes that the Applicant alleged the violation of Article 12 of the Charter which stipulates that: (1) "Every individual shall have the right to freedom of movement and residence ... (2) "Every individual shall have the right to leave any country, including his own, and to return to his country ..."

96. In the opinion of the Court, the relevant portion of this provision which relates to the instant matter is Article 12(2), in particular, the right "to return to his country". In the instant case, the Court will consider this aspect, notwithstanding the fact that the Applicant left the Respondent State's territory involuntarily.

97. Having found that the deprivation of the Applicant's nationality was arbitrary, the question that arises at this juncture is whether a citizen can be expelled from his own country or prevented from returning to his country.

98. In this regard, the United Nations Human Rights Committee has found "... that there are few circumstances in which a ban on entry into one's own country may be reasonable. A State Party may not … by deporting a person to a third country, prevent that person from returning to his own country."[8]

99. The Court notes that the Applicant's expulsion resulted from the arbitrary withdrawal of his nationality by the Respondent State. This

8 United Nations Human Rights Committee, General Observations, No. 27 on Freedom of Movement.

procedure is contrary to the requirements of international law which stipulates that "a State cannot turn its citizen into a foreigner, after depriving him of his nationality for the sole purpose of expelling him".[9]

100. However, the Court notes that even if the Respondent State regarded the Applicant as an alien, it is clear that the conditions of his expulsion did not comply with the rule prescribed in Article 13 of the ICCPR which stipulates that: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."[10]

101. The Court notes that the objective of the afore-cited ICCPR Article is to protect a foreigner from any form of arbitrary expulsion by providing him with legal guaranties. He should be able to present his cause before a competent authority and cannot in any case be expelled arbitrarily.

102. The Court also notes that, in this case, the Applicant was deported to Kenya, which, in turn, declared him as being in an irregular situation. This proves that, prior to his expulsion, the Respondent State failed to take the necessary measures to prevent the Applicant from being in a situation of statelessness. As a matter of fact, prior to his expulsion to Kenya, the Respondent State could have satisfied itself that, if the Applicant is not Tanzanian, he is Kenyan.

103. The Court also notes that the Applicant's present situation whereby he is rejected by both Tanzania and Kenya as a national, makes him a stateless person as defined by Article 1 of the Convention relating to the Status of Stateless Persons.[11]

104. Consequently, the Court holds that given the fact that he had been considered by the Respondent State as a national prior to the withdrawal of his nationality, he could not be arbitrarily expelled.

105. In any event, even if it were to be assumed that he was an alien, the Respondent State could still not expel him in the arbitrary manner

9 Draft Articles on Expulsion of Aliens, International Law Commission, Sixty-Sixth Ordinary Session, United Nations General Assembly, *A/CN.4/L.797, 24 May 2012*.

10 See Article 12.4 of ICCPR.

11 United Nations Convention relating to the Status of Stateless Persons, Article 1(1). Although Tanzania has not ratified the 1954 Convention, the International Law Commission (ILC) has stated that the definition of Article 1(1) "can without doubt be considered to have acquired a customary character", See CDI, Draft Articles on Diplomatic Protection with Commentaries, ILC Yearbook Vol. 2(2)(2006) pp 48-49.

it did, as this would constitute a violation of Article 13 of the ICCPR.

106. The Court therefore holds in conclusion that the manner in which the Applicant was expelled by the Respondent State constitutes a violation of Article 13 of ICCPR.

iii. The Applicant's right to be heard by a Judge

107. According to the Applicant, by depriving him of his nationality and deporting him from his country, the Respondent State violated several of his rights guaranteed by the ICCPR and the Charter, including the right to seize the competent national courts. He further maintained that after his passport was annulled, he was not arraigned before a court in accordance with section 30 of the Immigration Act.

108. The Applicants indicated that, by so doing, the Respondent State's agents condemned him without giving him the opportunity to be heard and defend himself. He concludes that the Respondent State thus failed in its protection duty, condoning arbitrary arrest and expulsion.

109. The Respondent State maintains that the Minister of Home Affairs is the competent authority in this respect, and that the Applicant could have brought the matter to his attention and requested a lifting of the ban and the authorization to return to the country. It further submits that the Applicant had the possibility of challenging the Minister's decision before the High Court, but chose not to do so. The Respondent State also submits that even while outside the country, the Applicant had the opportunity to be heard by the national courts by having himself represented by the one he claims to be his father, as he did by writing to the Prime Minister.

110. Article 7 of the Charter stipulates that:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> a. The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> c. The right to defence, including the right to be defended by counsel of his choice…."

111. Article 14 of ICCPR provides that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…"

112. The Court notes that the African Commission on Human and

Peoples' Rights has held that in matters of deprivation of nationality, the State has "the obligation to offer the individual the opportunity to challenge the decision" and is of the opinion that the State should conduct a judicial enquiry in the proper form in accordance with national legislation.[12].

113. In the instant case, the Court notes that in matters of immigration, the Tanzanian Immigration Law of 1995 defining "illegal immigrant" provides that the decision of the Minister of Home Affairs declaring a person an "illegal immigrant" shall be final [Article 10(f)]. It follows that, in this case, the Applicant was à priori unable to appeal against the Minister's administrative decision before a national court.

114. The Court in any case holds that even if, in the silence of the aforementioned immigration law, the Applicant had, under a general principle of law, the right to seize a national court, The fact that he had been arrested and then expelled immediately to Kenya, did not afford him the possibility of exercising such a remedy. Besides, when he later found refuge in the no-man's land, it was very difficult for him to exercise this remedy.

115. The Court finds in conclusion that, by declaring the Applicant an "illegal immigrant" thereby denying him Tanzanian nationality, which he has, until then enjoyed, without the possibility of an appeal before a national court, the Respondent State violated his right to have his cause heard by a judge within the meaning of Article 7(1)(a), (b) and (c) of the ICCPR.

116. The Court notes further that the Tanzanian Citizenship Act contains gaps in as much as it does not allow citizens by birth to exercise judicial remedy where their nationality is challenged as required by international law. It is the opinion of the Court that the Respondent State has the obligation to fill the said gaps.

B. Other alleged violations

117. The Applicant submits that the Respondent State since 1 September 2014, abandoned him in the "lawless no man's land" in inhuman, humiliating and degrading conditions, characterized by lack of drinking water, food and security, thus subjecting him to numerous physical and psychological ordeals.

118. He also alleges that the Respondent State violated a number of his rights guaranteed under various human rights instruments among which are the African Charter on Human and Peoples' Rights, the

12 Matter of *Amnesty International v Zambia*, Communication No. 21298(1999) paras 36-38. Also see the Study by the African Commission on Human and Peoples' Rights on the Right to Nationality in Africa, 36 (2004).

Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. He refers specifically to: the right to wellbeing, the right to the enjoyment of the highest attainable standard of physical and mental health (Article 16 of the Charter); the right to free movement and to choose one's residence in one's country (Article 12 of the Charter); the right to liberty and security of one's person and protection against arbitrary arrest or detention (Article 9(1) of the ICESCR and Article 6 of the Charter); the right to participate freely in the conduct of public affairs of one's country, either directly or through freely chosen representatives (Article 13(1) of the Charter and Article 25(1) of the ICCPR); the right to access public offices and to use the public services in one's country (Article 13(2) of the Charter and 25(2) of the ICESCR); the right to work (Article 15 of the Charter and Article 6 of the ICESCR); and the right to marry and to found a family (Article 23 of the ICCPR).

119. The Applicant further submits that the said violations resulted from the unlawful deprivation of his nationality and his expulsion from Tanzanian territory, especially the fact that he found himself in a situation of statelessness in a "no man's land" between the Republic of Kenya and the United Republic of Tanzania.

120. The Court notes that some of the alleged violations relate to the Applicant's living conditions in the said "no man's land" while others concern the rights which the Applicant would enjoy had he not lost his nationality and had he not been expelled from the United Republic of Tanzania.

121. In the opinion of the Court, therefore, the violation of the aforesaid related rights is a consequence of the major violations. The Court, having established the violation of the right not to be arbitrarily deprived of his nationality, the right not to be arbitrarily expelled from a State and violation of the right to judicial remedy, defers consideration of the related violations to the stage of consideration of the request for reparation.

VIII. Remedies sought

122. In his Application, the Applicant prayed the Court to: (i) order the annulment of the decision of the immigration authorities to expel him from his own country, including the notice of "prohibited immigrant", and restoration of his nationality by declaring him a citizen of the United Republic of Tanzania; (ii) allow him to return to and remain in the Respondent State like all its other citizens; (iii) order the Respondent State to protect him against victimization as a consequence of the present application; and (iv) order the Respondent State to amend

its immigration legislation in order to guarantee a fair trial for persons likely to be deprived of their right to nationality.

123. During the oral pleadings, the Applicant reiterated his requests for reparation as well as "payment of compensation for prejudices suffered".

124. The Respondent State argues that the decision to annul his passport, declare him an illegal immigrant and expel him, was taken following investigations by the immigration authorities and implemented in accordance with the law. Therefore, for the Respondent State, the Application must be dismissed.

125. Article 27(1) of the Protocol stipulates that "If the Court finds that there has been a violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

126. Rule 63 of the Rules stipulates that: "The Court shall rule on the request for the reparation, submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".

127. The Court holds that it does not have the power to rule on the requests made by the Applicant in paragraph 122 to annul the decision of the Respondent State to expel him.

128. The Court notes that the Parties did not make submissions on other forms of reparation. It will therefore determine this issue at a later stage of the proceedings.

IX. Costs

129. The Court notes that in their pleadings, neither of the Parties made submissions concerning costs.

130. According to Rule 30 of the Rules "Unless otherwise decided by the Court, each party shall bear its own costs".

131. The Court shall decide on the issue of costs when making a ruling on other forms of reparations.

X. Operative part

132. For these reasons,
The Court,
unanimously

on jurisdiction:

i. *dismisses* the objection on lack of jurisdiction;
ii. *declares* that it has jurisdiction;

on admissibility:

iii. *dismisses* the objection on inadmissibility;

iv. *declares* the Application admissible;

on the merits

v. *declares* that the Respondent State arbitrarily deprived the Applicant of his Tanzanian nationality in violation of Article 15(2) 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.

Gombert v Côte d'Ivoire (jurisdiction and admissibility) (2018) 2 AfCLR 270

Application 038/2016, *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*

Judgment, 22 March 2018. Done in English and French, the French text being authoritative.

Judges: KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

Recused under Article 22: ORE

Case declared inadmissible in accordance with Article 56(7) of the African Charter as same claim already decided by the ECOWAS Community Court of Justice.

Admissibility (exhaustion of local remedies, domestic courts' violation of Charter rights, 29; submission within reasonable time, 35-38; previous settlement, 45-49, 52-59)

Separate Opinion: KIOKO and MATUSSE

Admissibility (identity, corporate veil, 3, 5, 9-13, 19)

I. The Parties

1. The Applicant, Mr Jean-Claude Roger Gombert, is Company Director of French nationality, domiciled in Abidjan.

2. The Application is brought against the State of Côte d'Ivoire (herein-after referred to as "Respondent State") which became a Party to the African Charter on Human and Peoples' Rights (herein-after referred to as "the Charter") on 31 March 1992 and to the Protocol on 25 January 2004. The Respondent State on 23 July 2013 made the declaration prescribed in Article 34(6) of the Protocol allowing individuals and Non-Governmental Organizations to lodge applications directly with the Court. It also became a Party to the International Covenant on Civil and Political Rights (herein-after referred to as "the ICCPR) on 26 March 1992.

II. Subject of the Application

3. The Application has its origin in a contractual dispute between private Parties which was brought before the Respondent State's courts. The Applicant mainly alleges the violation by the said courts, of his rights to a fair trial as guaranteed by the Charter.

A. The facts of the matter

4. The Applicant alleges that within the framework of the activities of AFRECO and AGRILAND companies, of which he is founder and majority shareholder, he entered into an agreement with Mr Koné DOSSONGUI, owner of the industrial citrus plantation ANDRE located in Guitry, in the region of Divo in Côte d' Ivoire, for the sale of the said property.

5. The agreement was concluded on 9 June 1999, and the price of Two Hundred Million (200,000,000) CFA Francs was agreed. The vendor received the sum of One Hundred and Sixty Million (160,000,000) CFA Francs but refused to sign the deed of sale prepared by his own Solicitor. The Applicant, who was already occupying the plantation with the approval of the mortgagees, filed a complaint with the competent courts to compel the vendor to honour his commitment.

6. As a result of the numerous proceedings undertaken between February 2000 and June 2014 by both the Applicant and the vendor, several decisions were rendered by the Ivorian courts, including, inter alia the Divo Court, the Daloa Court of Appeal and the Supreme Court of Côte d'Ivoire. Whereas some of the said decisions were in favour of the Applicant, others were not.

7. Believing that some of those decisions violated his rights, the Applicant referred the matter to ECOWAS Court of Justice which delivered two Judgments. By the first judgement referenced ECW/CCJ/JUD of 25 April 2015 on the merits of the case, the Court declared that the Application was baseless. By the second Judgment referenced ECW/CCJ/RUL/08/16 of 17 May 2016, the Court also declared baseless the Application filed by the Applicant in respect of the failure to adjudicate on the case. Dissatisfied, the Applicant decided to bring the matter before this Court by an Application registered at the Registry on 11 July 2016.

B. Alleged violations

8. The Applicant alleges:

"a. that his right to be tried by an impartial court as protected by Article 7(1)(d) of the Charter has been violated owing to:

i. the fact that the Daloa Court of Appeal discarded the agricultural appraisal it had ordered and sought to terminate the pre-hearing at the behest of the opposing party;

ii. the nullification of the receivers' decisions and the

rejection of his request for reinstatement by the special jurisdiction of the Section of the Divo Court;

iii. the appointment of a new counsellor for the pre-hearing; the interruption of the previously ordered appraisal and the closure of the pre-hearing by the Abidjan Court of Appeal;

iv. the fact, on the one hand, that the Supreme Court rejected the Applicant's claims in their entirety while granting all the claims brought by his opponent and, on the other, the fact that the President of the Judicial Chamber moved the case from the 2nd Civil Chamber B to the 1st Civil Chamber whose President has become the new Counsellor-Rapporteur;

b. that his right to equality before the law protected by Article 7 of the Universal Declaration of Human Rights, Article 3 of the Charter and Article 2(2) of the Constitution has been violated due to the rejection of his supplementary pleadings by the Supreme Court on the grounds of inadmissibility whereas the said pleadings have been filed within the statutory time limit;

c. that his right to effective remedy protected by Article 8 of the Universal Declaration of Human Rights, Article 3(4) of the ICCPR and Article 7(1) of the Charter has been violated due to the absence of remedies under Ivorian law against Supreme Court decisions dismissing a case."

III. Summary of the procedure before the Court

9. The Application was filed with the Registry of the Court on 11 July 2016. By a letter dated 19 July 2016, the Registry acknowledged receipt thereof and notified the Applicant of its registration.

10. By a letter dated 29 September 2016, the Registry served the Application on the Respondent State and invited the latter to forward the names of its representatives, as well as its Response, within the time limit prescribed by the Rules of Court.

11. By correspondence dated 18 October 2016, the Registry transmitted the Application to the other entities mentioned in Rule 35(3) of the Rules.

12. On 3 January 2017, the Registry received the Response of the Respondent State which raised objection to the admissibility of the Application and prayed the Court, in the alternative, to declare the Application baseless. By a letter dated 17 January 2017, the Registry transmitted this Response to the Applicant.

13. On 16 February 2017, the Registry received the Applicant's Reply, receipt of which it acknowledged and transmitted a copy thereof to the Respondent State on 17 February 2017 for information.

14. At its 44th Ordinary Session held in March 2017, the Court decided to close the pleadings. By correspondence dated 3 April 2017, the Registry notified the Parties of the closure of pleadings effective from that same date.

IV. Prayers of the Parties

15. The Applicant prays the Court to:

"i. declare that it has jurisdiction to hear the case;

ii. declare that his Application is admissible;

iii. rule that he is the owner of AGRILAND, of which he holds ninety-five percent (95%) of the share capital;

iv. rule that the human rights violations against AGRILAND affect him directly;

v. find that he and his company are victims of human rights violations committed by Ivorian justice;

vi. find the State of Côte d'Ivoire responsible for the said violations;

vii. order the Respondent State to pay him the amount of ten billion (10,000,000,000) CFA Francs as damages;

viii. order the Respondent State to pay the entire cost of the proceedings to Counsel Sonté Emile, Barrister at the Court, as of right."

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

"i. declare the Application inadmissible;

ii. declare the Applicant unfounded;

iii. declare and rule that there has not been any human rights violation by the Respondent State;

iv. dismiss the Applicant's claim for damages

v. order the Applicant to pay the entire cost of the proceedings".

V. On jurisdiction

17. Pursuant to Rule 39(1) of the Rules, the Court "shall conduct preliminary examination of its jurisdiction". The Court must, in that regard, satisfy itself that it has personal, material, temporal and territorial jurisdiction to hear the instant Application.

18. The Court notes that the Parties do not contest its jurisdiction, and that in light of the evidence on file, the jurisdiction is established as indicated hereunder:

"i. Personal jurisdiction: the Application was filed on 11 July 2016, that is, subsequent to the dates mentioned herein-above. The Respondent State ratified the Protocol and deposited the Declaration prescribed under Article 34(6);

ii. Material jurisdiction: the Applicant alleges mainly the violation of the provisions of the Charter and of the ICCPR, instruments to which the Respondent State is a Party.

iii. Temporal jurisdiction: the alleged violations started prior of the deposit of the declaration, but continued thereafter, that is, up to 5 June 2014, the date on which the Supreme Court delivered the Judgment being challenged by the Applicant.[1]

iv. Territorial jurisdiction: the facts occurred on the territory of the Respondent State which does not contest the same."

19. In view of the aforesaid, the Court holds that it has jurisdiction to examine this Application.

VI. Admissibility of the Application

20. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter". Pursuant to Rule 39 of its Rules, "the Court shall conduct preliminary examination**…**of the admissibility of the Application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules".

21. Rule 40 of the Rules which in essence reproduces the contents of Article 56 of the Charter stipulates that:

"In terms of Rule 40 of the Rules of Court, which in substance reproduces the content of Article 56 of the Charter, Applications shall be admissible if they fulfil the following conditions:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language,
4. Are not based exclusively on news discriminated through the

1 Application 013/2011, Judgment of 21 June 2013 on preliminary objection, *Norbert Zongo et al v Burkina Faso*, para 62; Application 001/2014, Judgment of 18 November 2016 on the Merits, *APDH v Côte d'Ivoire*, para 66

mass media,

5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by the States involved in accordance with the principle of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the present Charter."

22. The Court notes that, with regard to the admissibility of the Application, the Respondent State raises three preliminary objections concerning exhaustion of local remedies, belated referral of the case to the Court and the previous settlement of the dispute in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union and the African Charter on Human and Peoples' Rights.

A. Objection on the grounds of non-exhaustion of local remedies

23. The Respondent State contends that, by instituting actions before domestic courts against *La Compagnie de Gestion et de Participation* - **"***CGP"***,** a private law body corporate, the Applicant did not act appropriately and hence has not exhausted the local remedies. It argued that the local remedies should instead have been sought against the Ivoirian State, within the meaning of Article 56 of the Charter and Rule 40 of the Rules of Court.

24. In response, the Applicant argues that, whereas remedies should be available and sufficient, there is no remedy in the legal *corpus* of the Respondent State in respect of the legal situations submitted for consideration before this Court.

25. The Applicant further avers that he has exhausted the local remedies with respect to the case between *Société* AGRILAND and *Société CGP*. He cites the decisions rendered by various domestic courts, including the Divo Court of First Instance, the Supreme Court and the Courts of Appeal of Daloa and of Abidjan. The Applicant refers, in particular, to Judgement No. 405/14 of 5 June 2014 whereby the 1st Civil Chamber B of the Judicial Chamber of the Supreme Court, dismissed his appeal for annulment, after having excluded his supplementary pleadings from the hearing.

26. The Court notes that the evidence on file shows that the highest competent court, that is the Supreme Court of Côte d'Ivoire, dismissed the cassation application filed by the Applicant, thus bringing an end to

the procedures before the national courts.

27. However, the Respondent State alleges failure to exhaust the local remedies on the grounds that the relevant procedures were directed against a private entity. On this point, the Court notes that exhaustion of local remedies proceeds from the use of all the procedural steps provided under the legal system of the Respondent State for the settlement of issues brought before the competent national authorities.[2] Viewed from this perspective, the local remedies are supposed to be directed against the entity which the Applicant considers to be responsible for the alleged violation, be it an individual, a private law entity or a public entity, such as the State.

28. In the instant case, the Court notes that the initial dispute was between AGRILAND of which the Applicant alleges to be the founder and majority shareholder, and CGP Company. Since the two Parties are private law bodies corporate, domestic proceedings could not have been instituted against the State of Côte d'Ivoire, except to prove the latter's liability. It is therefore proper that the proceedings before the domestic courts were instituted against CGP and not the State.

29. On the other hand, in the proceedings before this Court, the Applicant alleges the Respondent State's liability for the domestic courts' violation of his rights guaranteed under the Charter. On this point, the Respondent State does not contest that the Applicant has exercised all the available remedies, since the Supreme Court Judgment is not subject to appeal.

30. In view of the aforesaid, the Court holds that the local remedies have been exhausted, and dismisses the admissibility objection raised in this regard.

B. Objection on the grounds of failure to file the Application at a reasonable time

31. In its Response, the Respondent State recognises that the Court "has the discretionary power to determine the time limit within which Applications should be brought".

32. The Respondent State alleges, however, that the instant Application was not filed within reasonable timeframe. It contends in this regard that whereas the Supreme Court Judgment to which Application refers, was rendered on 5 June 2014, this Court was seized of the matter only on 11 July 2016, that is, two years and one month later.

33. In reply, the Applicant recalls that the provisions of Rule 40(6)

2 *Zongo*, Judgment on preliminary objections, supra, paras 68-70; *APDH* Judgment *supra*, para 68-70. Judgment APDH, *supra*, para 93-106.

of the Rules do not confine actions brought before this Court to a specific time limit beyond which the Application may be found to be belated and inadmissible. According to the Applicant, Article 56(7) of the Charter offers him the option of referring the matter first to the Community Court of Justice, ECOWAS "before going continental" [sic]. Accordingly, the Applicant alleges that the timeframe being challenged by the Respondent State is perfectly reasonable, especially as it concerns the duration of the proceedings before ECOWAS Court of Justice.

34. According to Article 56(6) of the Charter, Applications shall "be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

35. The Court notes that, as it held earlier, the internal remedies have been exhausted in the instant case. The starting point for computing the reasonable time provided under Article 56(6) is therefore the date the Judgement was rendered by the Supreme Court, which is 5 June 2014.

36. The Court recalls that the Application was brought before it on 11 July 2016. While noting that the period that elapsed between the above date and the date the Court was seized is two (2) years and one (1) month, it lies with this Court to determine whether this period is reasonable within the meaning of Article 56(6) of the Charter. According to its jurisprudence on reasonableness of the time, the Court has adopted a case-by-case approach.[3]

37. The Court notes that the remedy exercised before ECOWAS Court of Justice is not a remedy to be exhausted within the meaning of Articles 56(5) and 56(6) of the Charter. However, since Article 56(7) has offered him an option, the fact that the Applicant brought the case before ECOWAS Court of Justice, before seizing this Court is a factor that may be taken into consideration in assessing the reasonableness of the period mentioned in Article 56(6).[4]

38. In view of the aforesaid, the Court holds in conclusion that the timeframe of two years and one month used by the Applicant to file the case before it, is reasonable within the meaning of Article 56(6). It accordingly dismisses the Respondent State's objection based on

3 *Zongo*, Judgment *supra,* para 121; Application No.005/2013 Judgment of 20/11/2015 on the Merits, *Alex Thomas v United Republic of Tanzania*, paras 73-74.

4 See Application 003/2015, Judgment of 28/09/17 on the Merits in *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania*, para 65. It is the opinion of this Court that when the Applicant opts to exercise another remedy such as the review remedy, the period of seizure should begin to count from the date the said remedy was exhausted, that is, the date of dismissal of the application for review.

belated referral.

C. Objection regarding previous settlement of the dispute by the ECOWAS Court of Justice

39. The Respondent State submits that the instant Application is inadmissible given that the Applicant has earlier, using the same wording, brought the matter before the Community Court of Justice, ECOWAS, which, on two occasions, dismissed his prayer relying on the legal instruments mentioned in Article 56(7).

40. The Respondent State alleges further that the same objection relates to the referral of this case to the Centre international pour le règlement des différends relatifs aux investissements (CIRDI) which refused to register the Application on the ground that the matter clearly exceeded its jurisdiction.

41. In reply, the Applicant argues that ECOWAS Court of Justice did not, in any of its two judgements, apply the instruments mentioned in Article 56(7) of the Charter. In this regard, the Applicant submits that, in its first decision, ECOWAS Court of Justice held that evidence of the alleged violations has not been provided, whereas for the second decision, that Court simply reiterated the findings contained in the first decision.

42. The Applicant further contends that the instant Application "is not entirely the same as the one filed with ECOWAS Court of Justice"; that in the latter, he "did not plead the fact that the Daloa Court of Appeal's refusal to exercise jurisdiction amounted to a violation of human rights". The Applicant submits in conclusion that "the instant Application which is brought for the first time does not fall within the provisions of Article 40(7) referred to above".

43. In terms of Article 56(7) of the Charter which is reiterated by Rule 40(7) of the Rules of Court, Applications shall be considered if they "do not deal with cases which have been settled… in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity, or the provisions of the present Charter".

44. In light of the aforesaid provisions, the Court is of the opinion that examining compliance with this condition amounts to making sure both that the case has not been "settled" and that it has not been settled "in accordance with the principles" under reference.

45. The Court notes that the notion of "settlement" implies the convergence of three major conditions: 1) the identity of the Parties; 2) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and

3) the existence of a first decision on the merits.[5]

46. As regards the first condition, it is necessary to establish only the identity of the Applicants, as there is no doubt that the State of Côte d'Ivoire is the Respondent in both cases. The Applicant before this Court, à priori, is Mr. Jean-Claude Roger GOMBERT whereas AGRILAND Company had acted before the Community Court of Justice, ECOWAS. However, a closer scrutiny of the evidence on file reveals that before the ECOWAS Court of Justice, the Company AGRILAND acted as the Applicant "in the actions and proceedings of its Chairman and Chief Executive Officer, Mr. Jean-Claude GOMBERT having elected domicile in the Chambers of his Counsel Advocate Emile SONTE, lawyer at the Court of Appeal of Abidjan ". The Application before this Court was, for its part, filed by "Mr GOMBERT Jean-Claude Roger for whom domicile is elected in the Chambers of his Counsel, Advocate SONTE Emile, lawyer at the Court of Appeal of Abidjan".

47. The Court affirms that, as a human and peoples' rights court, it can make a determination only on violations of the rights of natural persons and groups to the exclusion of private- or public law entities.

48. In this case, the Court notes that, despite the fact that AGRILAND was the Applicant before ECOWAS Court of Justice, the rights claimed by that company directly affect the Applicant's individual rights before the Court given the fact that he is the President, Chief Executive Officer, founder and majority shareholder of this Company.

49. In view of the foregoing, the Court finds that the Parties are identical and that, as such, the first condition has been met.

50. With regard to the second condition, namely, identity of the claims, this Court notes that in the case examined by ECOWAS Court of Justice, the Applicant prayed the Court to "find and rule that the decisions rendered by the Ivorian courts … constitute serious violations of his rights" guaranteed, inter alia, by the Charter and "to order the State of Côte d'Ivoire to pay him the sum of two billion (2,000,000,000) CFA Francs as damages" as well as pay the costs of the proceedings. These claims are identical with those made before this Court with the exception of the claim regarding the partiality of the Daloa Court of Appeal.

51. In its Reply, the Applicant argues that the present Application "is

5 See Communication 409/12 *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and thirteen Others* (AfCHPR 2013) para 112; Reference No 1/2007 *James Katabazi et al v Secretary General of the East African Community and Another* (2007) AHRLR 119 (EAC 2007) paras 30-32; Application 7920, Judgment of 29 July 1988, *Velásquez-Rodríguez v Honduras* CIADH para 24(4); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v Serbia-and-Montenegro*) Judgment of 26 February 2007, ICJ., Collection 2007, p 43.

not entirely identical to that submitted to ECOWAS Court of Justice" given that the Court did not "refer to the situation whereby the Court divested the Daloa Court of Appeal, as a case of human rights violation". Noting that this claim was not expressly invoked before the ECOWAS Court of Justice, this Court observes that the claim is not detachable from those claims examined by ECOWAS; and as such, the issue in reality is one of a bloc of claims. Going by the accepted notion of "settlement" adopted above, the identity of claims also extends to their additional and alternative nature or whether they derive from a claim examined in a previous case.

52. In the instant case, the Court notes that, by his own contention, the Applicant "convinced of the flagrant partiality of the First Civil Chamber of the Daloa Court of Appeal" brought before the Supreme Court of Justice an application for divestiture on the grounds of legitimate suspicion. According to the Applicant, the Supreme Court ruled in that direction, divesting the Daloa Court of Appeal and moving the case to Abidjan Court of Appeal.

53. In the circumstances, the Court is of the opinion that in adjudicating the allegation of violation arising from the proceedings before the Abidjan Court of Appeal, ECOWAS Court of Justice covered the settlement of the allegation of violation founded on the partiality of the Daloa Court of Appeal, the two allegations forming a set of claims. The Court therefore finds that the claims are identical and that the second condition has been met.

54. Lastly, as regards the third condition, this has also been met since the Parties agree that ECOWAS Court of Justice rendered two decisions on the merits of the same case. The decisions include, in particular, Judgment No. ECW/CCJ/JUD of 24 April 2015 on the merits of the case and Judgment No. ECW/CCJ/RUL/ 08/16 of 17 May 2016 on the Application in respect of failure to adjudicate on the aforesaid Judgment.

55. In view of the aforesaid, it follows that the instant Application has been settled by ECOWAS Court of Justice within the meaning of Article 56(7) of the Charter regarding the first condition set by this Article.

56. What remains to be determined is whether the settlement was "in accordance with the principles" invoked in Article 56(7). In this respect, this Court is of the opinion that, of the three instruments mentioned in that Article, the Charter is applicable in this case.

57. In light of the evidence on file, this Court notes that ECOWAS Court of Justice examined the case on the basis of the following provisions of the Charter:

i. Equality of justice, fair trial and impartiality of justice (Article 7 of the African Charter): the Court defined the rights concerned, pronounced itself on their violation in light of

the facts related by the Applicant and the conduct of the national courts, and then declared the claim unfounded by finding either that the right in question had not been infringed or that the evidence thereof was produced.[6]

ii. Equality before the law (Article 3 of the African Charter): after defining the rights concerned, the Court, recalling its jurisprudence, examined the allegations of violation in light of the facts and the conduct of the national courts. Like the previous point, it declared the claim unfounded for lack of evidence.[7]

iii. Effective remedy before national courts (Article 7(1) of the African Charter): by the same reasoning as in the previous claims, the Court ruled in a similar direction.[8]

58. This Court, after comparison, notes that ECOWAS Court of Justice examined the case on the basis of the same provisions of the Charter as those relied upon by the Applicant in this Application. The case has, consequently, been settled *in accordance with* the principles of one of the instruments invoked in Article 56(7) of the Charter, as regards the second condition set by this Article.

59. From the foregoing, the Court holds in conclusion that the instant Application has not fulfilled the condition set by Article 56(7) of the Charter. It therefore upholds the inadmissibility objection on the grounds of an earlier settlement of the dispute by ECOWAS Court of Justice.

60. Having ruled in this direction, the Court holds that there is no need to make a determination on the other condition of admissibility and on the objection raised on the grounds of settlement of the matter by the International Center for the Settlement of Investment Disputes *(CIRDI).*

61. The Court notes that, according to Article 56 of the Charter, the conditions of admissibility are cumulative and, as such, when one of them is not fulfilled, it is the entire Application that cannot be received. In the instant case, the Application does not meet the conditions set forth in Article 56 (7) because the matter has previously been settled by ECOWAS Court of Justice.

62. Consequently, the Court declares the Application inadmissible.

6 *Société AGRILAND v The State of Côte d'Ivoire*, Judgment No. ECW/CCJ/JUD of 24 April 2015, paras 36-39.

7 *Idem,* paras 40-47.

8 *Idem,* paras 48-52.

VII. Costs

63. According to Rule 30 of the Rules of Court, "Unless otherwise decided by the Court, each party shall bear its own costs".
64. The Court notes that in the present procedure, each Party has prayed the Court to order the other to pay the costs. In the circumstances, the Court holds that each party shall bear its own costs.

VIII. Operative part

65. For these reasons
The Court,
unanimously

on jurisdiction:
i. *declares* that it has jurisdiction;

on admissibility
ii. *dismisses* the inadmissibility objection for non-exhaustion of the local remedies;
iii. *dismisses* the inadmissibility objection for failure to submit the Application within a reasonable time;
iv. *upholds* the inadmissibility objection on the grounds that the dispute has been settled within the meaning of Article 56(7) of the Charter;
v. consequently *rules* that the Application is inadmissible;

on costs
vi. *rules* that each party shall bear its own cost.

Joint Separate Opinion: KIOKO and MATUSSE

1. We agree with the Majority Judgment, of which we are both part, in all respects that the Application, as filed by Mr Jean-Claude Roger Gombert against the Republic of Côte d'Ivoire, is inadmissible on the grounds that the dispute has been "settled" within the meaning of Article 56(7) of the African Charter on Human and Peoples' Rights. The provision prescribes that an Application filed before the Court should "not deal with cases which have been settled …in accordance with the

principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter."

2. We have, however, felt the need to make our position known with regard to the issue of the identity of the Applicant and his company AGRILAND which pursuant to Article 56(1) or Rule 40(1) of the Rules is an important admissibility criterion. This is an issue that arose several times in the Judgment.

3. We are of the opinion that the Court should have addressed the issue at the onset and given an elaborate explanation as to why the Applicant and AGRILAND are deemed to be the same person for the purposes of the Application. Though the Applicant and the company are two separate persons, the Court opted to lift the corporate veil of AGRILAND and take the two as one without adequately expatiating on how it arrived at this conclusion. In our considered view, the justifications the Court gave to support its positions are insufficient for the following reasons.

4. First, the Court only mentioned the fact that the Applicant and his company, AGRILAND,[1] are two different personalities at a later stage in the judgment. Given the importance of clearly identifying the identity of the Parties for the Court's assessment of the Application, this exercise should have been made and clearly spelt out at earlier, at least, at admissibility stage (paragraphs. 21-22).

5. Secondly, there are instances where the Court assumed that the Applicant was the one who filed the case before the ECOWAS Court of Justice although it is patently clear from the record that he did not and that it was rather filed by his company, AGRILAND. Had the Court clarified this matter earlier, there would not have been such confusion as to the true identity of the Applicant.

6. Lastly, the issue of identity of Parties is something, which has been dealt with by other international courts in similar cases. The Court's reticence to do the same and reach conclusions without having clearly identified the true identity of the Applicant for no cogent reasons is thus at odds with international jurisprudence. We are of the opinion that the Court should have drawn inspiration from similar jurisdictions that have relevant jurisprudence in this regard.

7. In this regard, we refer to two particular cases, namely *Cantos v Argentina* and *Agrotexim and Others v Greece*.[2] Both these cases dealt with the issue of the identity of individual shareholders and the

1 Application No. 038/2016. Judgment of 22/03/2018, *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, para 46.

2 Inter-American Court of Human Rights, case of *Cantos v Argentina* Judgment of September 7 2001 *(Preliminary Objections) and Agrotexim and Others v Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42.

company as well as the issue of the corporate veil. In both cases the Inter-American Court of Human Rights and the European Court of Human Rights, respectively, were faced with the conundrum of whether or not individual shareholder(s) can be regarded as being the same person as the company.

8. Although the approaches of both Courts in the cases mentioned above were not the same, they both gave detailed reasons for how they reached their conclusions. [3]

9. The Majority Judgment's failure to elaborate on why the Court reached the decision it did in determining that the Applicant and AGRILAND are deemed to be the same person potentially leaves a wide room for various interpretations.

10. This concern becomes more troublesome when we look into the issue of admissibility in terms of Article 56(6) of the Charter, where the Court held that, local remedies had been exhausted although the Party which exhausted remedies at the local level was AGRILAND, as opposed to the Applicant before the Court.

11. We take cognisance of the fact that at the national level the company or corporate veil is lifted under very strict conditions and therefore the shareholders generally do not bear individual responsibility at that level for any violations by their companies but such shareholders can come before this Court to assert violations of their individual rights if they can demonstrate that the Respondent State had an opportunity to rectify such violation through its domestic judicial procedures.[4] In our considered view, such an approach would ensure that the Court adopts a cautious approach when applying Article 56(6) of the Charter and Rule 40(1)in such circumstances.

12. Furthermore, the fact that the shareholders can come before the African Court to assert violations of their individual rights is an illustration of how the corporate veil can be lifted and based on this the identity of the shareholders and the company in question will be deemed to be the same.

13. It is based on the above-mentioned consideration that the Court held that local remedies had been exhausted because the Applicant and his company AGRILAND are one person. Furthermore, since the Applicant and AGRILAND were found to be one person it would have not been necessary for the Applicant to institute a case in local courts based on the same facts and arising from the same matters as the

3 *Cantos v Argentina* (Preliminary Objections), paras 27- 31 and *Agrotexim and Others v Greece* paras 62 and 66.

4 Application No 006/2012. Judgment of 28/05/2017, *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 94.

case that was instituted by his company AGRILAND.

14. Now moving on to the issues of the identity of the Parties as one of the conditions to be fulfilled for *res judicata* to apply under Article 56(7), it is important to note the positions of the aforementioned jurisprudence of the Inter-American Court of Human Rights and European Court of Human Rights.

15. In the case of *Cantos v Argentina,* the Inter-American Court of Human Rights stated the following:

> "Argentina asserts that legal entities are not included in the American Convention and, therefore, its provisions are not applicable to them, since they do not have human rights. However, the Court observes that, in general, the rights and obligations attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or representation."[5]

16. In the case of *Agrotexim and Others v Greece the European Court of Human Rights* noted the following:

> "The Applicants complaint was based exclusively on the proposition that the alleged violation of the Brewery's right to the peaceful enjoyment of its possessions had adversely affected their own financial interests because of the resulting fall in the value of their shares. The Applicants considered that the financial losses sustained by the company and the latter's rights were to be regarded as their own, and that they were therefore victims, albeit indirectly, of the alleged violation. In sum, they sought to have the company's corporate veil pierced in their favour."[6]

17. The European Court of Human Rights further noted that "the piercing of the "corporate veil" or the disregarding of a company's legal personality will be justified only in exceptional circumstances."[7]

18. Based on the above cited passages we are of the opinion that one of the reasons why the Applicant's identity was said to be the same as that of his company in this case is because the corporate veil had been lifted and as a result of this, the rights and obligations which were attributed to the company became the rights and obligations for the Applicant, which in turn meant that the two have the same identity. These are the same observations that were made by the Inter-American Court on Human Rights and the European Court on Human Rights in the above-mentioned passages. It is therefore our opinion that the above-mentioned views should have been adopted

5 *Cantos v Argentina* Judgment of September 7 *2001 (Preliminary Objections),* para 27.

6 *Agrotexim and Others v Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42, para 63.

7 *Agrotexim and Others v Greece* 14807/89, (1996) EHRR 250, [1995] ECHR 42, para 66.

and explicitly stated in the judgment of the majority.

19. One last thing we would like to make emphasis on regarding Article 56(7) of the Charter is the fact that the reason why the corporate veil was lifted and the identity of the Applicant and his company was considered the same in the national level is because it was noted in the judgment (in the Applicants prayers) that the Applicant holds ninety five percent (95%) of the company and is the President, Chief Executive Officer, founder and majority shareholder of AGRILAND.[8] This is to say that the company's losses are his losses and the company's gains are also his gains. We feel that the judgment should have emphasised this point and clarified it.

8 Application No. 038/2016. Judgment of 22/03/2018, *Jean-Claude Roger Gombert v Republic of Côte d'Ivoire*, para 15(iii) and para 48.

Nguza v Tanzania (merits) (2018) 2 AfCLR 287

Application 006/2015, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*

Judgment, 23 March 2018. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA and BENSAOULA

The Applicants had been convicted and sentenced for rape and unnatural offences. They brought this Application claiming violations of their rights as a result of their detention and trial. The Court held that the Applicants did not provide evidence of alleged procedural irregularities except for the denial of access to witness' statements and the opportunity to cross-examine witnesses which constituted violations of the African Charter. The Court further held that the failure to test the First Applicant for his alleged impotence violated his rights under the African Charter.

Jurisdiction (conformity of domestic proceedings with Charter, 35, 36)

Admissibility (exhaustion of local remedies, extraordinary remedy, 52; issues not raised in domestic proceedings, 53; submission within reasonable time, 61)

Evidence (burden of proof, 71, 81, 124; court record, 90)

Cruel, inhuman or degrading treatment (incommunicado detention, evidence, 73)

Fair trial (prompt information about charges, 80; defence, access to witness statements, 99, 100; medical tests, 116, 117)

Reparations (release, moot, 141)

I. The Parties

1. The Applicants, Nguza Viking (Babu Seya), hereinafter referred to as the First Applicant and Johnson Nguza (Papi Kocha) hereinafter referred to as the Second Applicant, allege that they are citizens of the Democratic Republic of Congo who lived and worked as musicians in Dar es Salaam, Tanzania. The Second Applicant is the biological son of the First Applicant.

2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986 and also became a Party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, the Respondent State deposited the declaration prescribed under Article 34(6) of the Protocol on 29 March

2010. The Respondent State became a Party to the International Covenant on Civil and Political Rights (hereinafter referred to as "the Covenant") on 11 June 1976.

II. Subject of the Application

A. Facts of the Matter

3. The Applicants allege that they were arrested by police officers on 12 October 2003 and taken to the Magomeni Police Station in the United Republic of Tanzania. The Applicants, Nguza Mbangu and Francis Nguza, who are also the First Applicant's sons and another person (later identified as a teacher), were arraigned before the Resident Magistrate's Court of Kisutu, Dar es Salaam, on 16 October 2003 on a 10-count charge of rape and an 11-count charge of unnatural offence in Criminal Case Number 555 of 2003. Nguza Viking (Babu Seya) was the First accused, Johnson Nguza (Papi Kocha) was the Second accused, Nguza Mbangu was the Third accused, Francis Nguza was the Fourth accused and the teacher was the fifth (5th) accused, in that case. They pleaded not guilty to all the charges. The ten (10) alleged victims were children aged between six (6) and ten (10) years old, all school pupils in the same class at Mashujaa Primary School, Sinza in Kinondoni District. It was alleged that the ten (10) victims were gang-raped and sodomised in turn by five (5) adults, including the Applicants.

4. On 25 June 2004, save for the Fifth accused, the Applicants and the Third and Fourth accused were found guilty of all charges against them and sentenced to life imprisonment and to pay a fine of Tanzania Shillings two (2) million to each of the victims. The Applicants and the Third and Fourth accused then filed an appeal before the High Court of Tanzania, in Criminal Appeal No. 84 of 2004. In its judgment of 27 January 2005, the High Court held that the evidence adduced fits the definition of gang rape and substituted the offence of unnatural offence with that of gang rape and dismissed the appeal.

5. The Applicants and the Third and Fourth accused filed an appeal before the Court of Appeal of Tanzania in Criminal Appeal No. 56 of 2005. The Court of Appeal's judgment delivered on 11 February 2010, quashed the conviction and sentence of the Third and Fourth accused and convicted the First Applicant of two (2) counts of rape and both Applicants of two (2) counts of gang rape and acquitted them on the rest of the charges. The Court of Appeal substituted their life sentences with sentences of thirty (30) years imprisonment.

6. On 9 April 2010, the Applicants filed a Notice of Motion for Review of the decision of the Court of Appeal. This Application for Review,

Criminal Application No. 5 of 2010**,** was dismissed on 13 November 2013.

B. Alleged Violations

7. The Applicants allege that:

"i. They were not promptly informed of the charges brought against them; they were held *incommunicado* for four (4) days, deprived of the opportunity to contact a Counsel or anyone else; they were maltreated by police officers who insulted them; and it was only after they had spent some time in custody that a police officer informed them of the rape charges;

ii. The trial was not fair for various reasons. First, the Court repeatedly dismissed their requests to adduce evidence; the results of their blood and urine tests were not presented in evidence before the Trial Court, even though the alleged victims claimed to have been infected with HIV/AIDS and gonorrhoea; and the First Applicant's prayer to the Court for a test to be conducted to establish his impotence was rejected;

iii. The Court relied on the alleged victims' statements as evidence, whereas the said statements were memory recollections of the room where the rape allegedly took place and the Court did not take into account the fact that the children and their parents had visited the house of the accused persons before the hearing and had studied the premises several times;

iv. The charges brought against them were fabricated in vengeance and that the judgment rendered was not based on credible evidence;

v. Their right to a fair trial was also flouted;

vi. The Respondent State violated all established human rights and international law principles;

vii. Their trial was inequitable and marred by procedural irregularities attributable to the national courts and other State agencies and institutions; and

viii. The trial was unfair at all levels and that they were harassed and their defence was not given due consideration, all resulting in the violation of Articles 1, 2, 3, 5, 7(1)(b), 13 and 18(1) of the Charter."

III. Summary of procedure before the Court

8. The Application was filed on 6 March 2015 and served on the Respondent State by a notice dated 8 April 2015, directing the Respondent State to file the list of representatives within thirty (30) days and to file the Response to the Application within sixty (60) days of receipt of the notice, in accordance with Rules 35(2) (a) and 35(4)(a) of the Rules of Court (hereinafter referred to as "the Rules").

9. By a notice dated 8 April 2015, the Application was transmitted to the Executive Council of the African Union and to State Parties to the Protocol through, the Chairperson of the African Union Commission in accordance with Rule 35(3) of the Rules.

10. Following the Applicants' request for legal aid, the Court directed the Registrar to seek the assistance of the Pan African Lawyers' Union (PALU) in this regard; PALU accepted to represent the Applicants and the Parties were duly notified by a notice dated 30 June 2015.

11. The Respondent State submitted the list of representatives on 26 May 2015. It submitted its Response to the Application on 10 August 2015, out of time. The Court decided, in the interests of justice, to accept the Response and it was served on the Applicants by a notice dated 30 November 2015.

12. By a letter of 5 January 2016, the Applicants requested the Court to grant them an extension of time to file their Reply to the Respondent State's Response; by a letter dated 11 March 2016, the Registry notified the Applicants of the Court's decision to grant them thirty (30) days extension of time in that regard.

13. By an email dated 15 April 2016, PALU filed the Applicants' Reply to the Response and this was served on the Respondent State by a notice dated 19 April 2016.

14. By a notice dated 14 June 2016, the Registry informed the Parties that the written procedure was closed with effect from 4 June 2016 and notified the Parties of the possibility of filing additional evidence in accordance with Rule 50 of the Rules. Neither of the Parties sought leave to file additional evidence on the basis of this Rule.

15. On 11 July 2016, the Respondent State sought leave to file a Rejoinder to the Applicants' Reply and since pleadings were already closed, the Court did not deem it necessary to grant this request.

16. By a letter dated 16 March 2018 and received at the Registry on the same date, the Applicants' Counsel informed the Court that the Applicants have been released from prison by way of a Presidential pardon, on the occasion of the celebration marking the 56th Anniversary of the Respondent State's Independence Day. This letter was transmitted to the Respondent State on 19 March 2018, for observations, if any.

17. By a letter dated 20 March 2018, the Respondent State informed the Court that the Applicants had been released by way of Presidential Pardon as evidenced in Constitutional (Special Remission of Whole Punishment) Order, 2017 containing the instrument of remission of punishment of sixty three (63) prisoners, including the Applicants. The Respondent argued that the Parties should have been informed that there was not going to be a public hearing on the matter, before they were notified of the delivery of judgment. The Respondent State also prayed that in view of the Applicants' release from prison, the Application should either be withdrawn before the delivery of the Judgment or the delivery of Judgment be postponed. The Respondent State makes this prayer on the basis that the Application has been overtaken by events, the Applicants are satisfied with their release and are appreciative of the Government's decision in this regard and they ought to be personally heard on their status and wishes regarding the Application. This letter was transmitted to the Applicant on 21 March 2018 for their observations, if any.

18. By a letter dated 21 March 2018, the Registrar informed the Respondent State that the Court draws their attention to the provisions of Rule 27(1) of the Rules regarding the written and oral proceedings, the provisions of Rule 58 regarding discontinuance of Applications and that the Applicants' prayers raised matters beyond their release on which the Court has to pronounce itself.

19. By a letter dated 22 March 2018, the Applicants' Counsel sent their observations on the Respondent's letter of 20 March 2018 where they stated that the Rules envisage that it is not a requirement that the Court hold public hearings for all cases. They also stated that they have not received instructions from the Applicants to discontinue the case and called for an expeditious delivery of the judgment.

20. By correspondence dated 22 March 2018, the Registrar informed both Parties that the Court has confirmed the delivery of judgment for 23 March 2018.

IV. Prayers of the Parties

21. The prayers of the Applicant, as submitted in the Application, are as follows:

> "44. We request the Court to facilitate us with free legal representation or legal assistance under rule 31 and Article 10(2) of the Protocol;
>
> 45. We the Applicants pray the Court under rule 45(1) and (2) of the rules of Court on (Measures for taking evidence) with a purpose of obtaining from an expert which in our opinion may provide clarification of the fact of the case

and likely to assist the Court in carrying out its task.

a. Request of the persons, witness or expert likely to assist:

i. Parent of child/children of tender age (6 – 8 years)

ii. Teacher of school children of tender age (6 – 8 years)

iii. Paediatric expert

46. That, the Applicants are hereby reiterating the reliefs that they seek from the honourable court.

i. A declaration that the respondent state violated their rights as guaranteed under Article 1, Article 2, Article 3, Article 5, Article 7(1)(b), Article 13 and Article 18(1) of the African Charter on Human and Peoples' Rights;

ii. Consequently, an order compelling the respondent state to release the Applicants from custody;

iii. That, the Applicants also seek an order for reparations pursuant to Article 27(1) of the protocol and rule 34(5) of the rules of court;

iv. Any other order or remedy that this honourable court may deem fit to grant."

22. In the Reply to the Respondent State's Response, the Applicants reiterate their prayers seeking the following orders from the Court:

"46.a. A Declaration that the Respondent State has violated the Applicants rights under Articles 2, 3, 5, 7(1)(b), 13 and18(1) of the African Charter

b. To facilitate the production of the following witnesses under this Honourable Court's Rules 45(1) and (2):

i. Parents of child/children of tender age of 6-8 years.

ii. Teacher of school children of tender age 6-8 years

iii. Paediatric expert

c. An order compelling the Respondent State to release the Applicants from custody.

d. An order for reparations

e. Any other orders or remedies that this Honourable Court may deem fit."

23. 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:

"1. That the Application has not evoked the jurisdiction of the Honourable Court.

2. That the Application has not met the admissibility

requirements provided under Rule 40(5) of the Rules of the Rules of Court.

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

4. That the Application be declared inadmissible and duly dismissed."

24. With regard to the merits of the Application, the Respondent State prays that the Court grants the following orders:

"1. That the Court rejects the Applicants' request to facilitate the production of … witnesses

2. That the redress sought in the Application is rejected."

25. The Respondent State also seeks orders that it has not violated Articles 1, 2, 3, 5, 7(1)(b), 13 and 18(1) of the Charter.

26. The Respondent further seeks orders:

"10. That the Applicants continue to serve their sentences accordingly.

11. That the Applicants be denied reparations

12. That this Application be dismissed in its entirety for lack of merit."

V. Applicants' request for calling of witnesses by this Court

27. The Applicants requested that the Court facilitates the production of children of tender age and their parents and teacher as well as a paediatric expert, as witnesses.

28. The Respondent State maintains that this request should be rejected.

29. In view of the fact that the Court considered that the written pleadings were sufficient to consider the matter, it did not deem it necessary to grant the Applicants' request.

VI. Jurisdiction

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

A. Objection on material jurisdiction

31. In the Response to the Application, the Respondent State submits that the Applicants are asking the Court to sit as a court of first

instance for some of their allegations, and to adjudicate as a supreme court of appeal on matters of law and evidence that have been duly determined by the Court of Appeal of Tanzania, the highest Court in the Respondent State.

32. The Respondent State also submits that the Court is being asked to reverse a decision of the Court of Appeal of Tanzania, which is, effectively, an appeal against the decisions of the Court of Appeal in Criminal Appeal No. 56 of 2005, and Review Application No. 5 of 2010.

33. The Respondent State makes reference to the Court's Decision in *Ernest Francis Mtingwi v Republic of Malawi*, in which it 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 or similar Courts".[1]

34. The Applicants rebut this allegation and rely on the Court's decisions in *Alex Thomas v United Republic of Tanzania*[2] and *Peter Joseph Chacha v United Republic of Tanzania,*[3] in both of which the Court held that as long as the rights allegedly violated are protected by the Charter or any human rights instrument ratified by the Respondent State, the Court shall have jurisdiction.

35. This Court reiterates its position as affirmed in *Ernest Mtingwi v Republic of Malawi*[4] that it is not an appeal court with respect to decisions rendered by national courts. However, as it underscored in its Judgment of 20 November 2015 in *Alex Thomas v United Republic of Tanzania*, and reaffirmed in its Judgment of 3 June 2016 in *Mohamed Abubakari v United Republic of Tanzania*, this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is a Party.[5] In the instant case, this Court has jurisdiction to examine whether the domestic courts' proceedings relating to the Applicant's criminal charges that form the basis of their Application before this Court were conducted in accordance with

1 Application No. 001/2013.Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi.* para 14.

2 Application No.005/2013.Judgment of 20/11/2015, Alex *Thomas v United Republic of Tanzania.* para 130.

3 Application No. 003/2012.Ruling of 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania.* para 114.

4 Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi.* para 14.

5 Application No. 005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania*, para 130 and Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania.* para 29.

the international standards set out in the Charter and the Covenant. Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as a court of first instance and as an appellate court and finds that it has material jurisdiction to hear the matter.

36. Furthermore, regarding the allegation that the Application calls for the Court to sit as a court of first instance, the Court notes that since the Application alleges violations of provisions of some of the international instruments to which the Respondent State is a Party, it has material jurisdiction. This is in accordance with Article 3(1) of the Protocol, which provides that the jurisdiction of the Court "shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

37. Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as a court of first instance and as an appellate court and finds that it has material jurisdiction to hear the matter.

B. Other aspects of jurisdiction

38. The Court notes that its personal, temporal and territorial *jurisdiction has not been contested by the Respondent State, and nothing* in the pleadings **i**ndicate that the Court does not have jurisdiction. The Court thus holds that:

i. it has jurisdiction *ratione personae* given that the Respondent State is a Party to the Protocol and has deposited the Declaration required under Article 34 (6) thereof, which enabled the Applicant**s** to access the Court in terms of Article 5(3) of the Protocol;

ii. it has jurisdiction *ratione temporis* on the basis that the alleged violations are continuous in nature since the Applicants remain convicted on the basis of what they consider an unfair process;

iii. it has jurisdiction *ratione loci* given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

39. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VII. Admissibility of the Application

40. 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."

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

42. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:
>
> 1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> 2. Comply with the Constitutive Act of the Union and the Charter:
> 3. Not contain any disparaging or insulting language;
> 4. Not be based exclusively on news disseminated through the mass media;
> 5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure in unduly prolonged;
> 6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> 7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

43. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections regarding exhaustion of local remedies and the timeframe for seizure of the Court.

A. Conditions of admissibility in contention between the Parties

i. Objection based on the alleged failure to exhaust local remedies

44. The Respondent State contends that the Application does not meet the admissibility conditions stipulated under Articles 56(5) of the Charter, Article 6 of the Protocol and Rules 40(5) of the Rules.

45. The Respondent State maintains that local remedies were not

exhausted because the following allegations are being raised by the Applicants before this Court for the first time:

> "i. That, after being taken to Urafiki Police Station, the 2nd Appellant, together with his two brothers, were harassed and later transferred to Magomeni Police Station where they found their father who is the 1st Applicant, locked up in a cell which had poor sanitary conditions for a human being.
>
> ii. That when the Applicants were arrested, they were not informed of what charges they were being arrested for and they were put under restraint for four days *incommunicado* and denied a right to call a lawyer or to be visited by anybody.
>
> iii. That whilst still in police custody, they were mistreated by police officers and that at one time they were called by a group of police officers who insulted them and read to them a charge of rape and later taken back to the police cell."

46. The Respondent State further submits that the Applicants, who were assisted by Counsel, could have raised these allegations before the Magistrate's Court pursuant, to Section 9(1) of the Basic Rights and Duties Enforcement Act (Cap.3) and they could also have instituted a constitutional petition before the High Court of Tanzania for reparation of the alleged violations.

47. Lastly, the Respondent State reiterates that the principle of exhaustion of local remedies is crucial in preventing Applicants from inundating the Court with petitions which could have been resolved at the national level.

48. In their Reply to the Respondent State's Response, the Applicants aver that local remedies were exhausted and that any other conceivable measure can only be an "extraordinary measure". They contend that the Court of Appeal being the highest Court of the land, they were under no obligation to resort to extraordinary measures.

49. The Applicants submit that the Court has jurisdiction to hear the instant Application because all local remedies have been exhausted.

50. The Applicants further submit that it would have been unreasonable to require them to resort to extraordinary measures by filing a new Application on their right to a fair trial before the High Court, which is a lower Court in relation to the Court of Appeal.

51. The Court notes that the Applicants filed an Appeal and had access to the highest court of the Respondent State, namely the Court of Appeal, to adjudicate on the various allegations, especially those relating to violations of the right to a fair trial.

52. Concerning the filing of a constitutional petition regarding the violation of the Applicants' rights, the Court has already stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicants are not required to exhaust prior to seizing this Court.[6]

53. With regard to the issues that the Applicants did not raise during domestic procedures but chose to bring before the Court for the first time, the Court, in accordance with the Judgment rendered in *Alex Thomas v Tanzania***,** affirms that these allegations happened in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence to thirty (30) years' imprisonment. They all form part of the "bundle of rights and guarantees" in relation to the right to a fair trial that were related to or were the basis of their appeals. The domestic judicial authorities thus had ample opportunity to address these allegations even without the Applicants having raised them explicitly. It would therefore be unreasonable to require the Applicants to file a new application before the domestic courts to seek redress for these claims.[7]

54. Accordingly, the Court finds that, the Applicants exhausted local remedies as envisaged under Article 56(5) of the Charter and Rule 40(5) of the Rules. The Court therefore overrules this preliminary objection to the admissibility of the Application.

ii. Objection based on the ground that the Application was not filed within a reasonable time

55. The Respondent State contends that the Application does not meet the admissibility conditions stipulated under Articles 56(6) of the Charter and Rules 40(6) of the Rules because it was not filed within a reasonable time after all local remedies were exhausted.

56. The Respondent State contends that though the Court of Appeal rendered its decision on the Applicants' appeal on 11 February 2010, the relevant period in this regard is between 29 March 2010 when the Respondent State deposited the Declaration required under Article 34(6) of the Protocol as read together with Article 5(3) thereof and 6 March, 2015 when the Applicants filed their Application before the

6 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania,* paras 60 to 62; Application No.007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania.* paras 66 to 70; Application No.011/2015. Judgment of 28/9/2017, *Christopher Jonas v United Republic of Tanzania.* para 44.

7 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania*. paras 60 to 65.

Court, that is, four (4) years and eleven (11) months after Tanzania deposited the afore-mentioned Declaration.

57. The Applicants in their Reply to the Respondent State's Response contest the Respondent State's interpretation of what constitutes reasonable time under Rule 40(6) of the Rules. They argue that, given their circumstances, their Application was filed within a reasonable period after the exhaustion of local remedies, adding in this regard that, at all material times they were both lay, indigent, incarcerated persons without the benefit of legal advice. They do not dispute that the Respondent State's Court of Appeal rendered a Judgment on 11 February 2010 and that their Application before this Court is dated 11 February 2015. However, the Applicants submit that their circumstances warrant the Court to admit their Application as there are sufficient reasons to explain why they filed their Application at the time they did.

58. In determining whether the Application was filed within a reasonable time, the Court is of the view that although the process of exhaustion of ordinary remedies stops with the appeal at the Court of Appeal whose decision was rendered on 11 February 2010, the Applicants should not be penalised for choosing to pursue a review of this decision. The Applicants' Application for Review having been dismissed by the Court of Appeal on 13 November 2013, the assessment of reasonableness will be based on the time between this date and 6 March 2015 when they filed their Application.[8]

59. The Court notes that the Applicants filed the Application one (1) year, three (3) months and twenty-one (21) days after the Court of Appeal dismissed their Application for Review.

60. In the Matter of *Beneficiaries of late Norbert Zongo, and Others v. Burkina Faso*, the Court established the principle that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."[9]

61. Considering the Applicants' situation, that they are lay, indigent and incarcerated persons, without counsel or legal aid, and as the records show, the time expended in providing them access to Court records, their attempt to use extraordinary remedies through the

8 Application No. 003/2015. Judgment of 28/9/2017, *Kennedy Owino Onyachi and Another v United Republic of Tanzania.* para 65.

9 Application No. 013/2011. Judgment of 28/3/2014, *Beneficiaries of late Norbert Zongo and Others v Burkina Faso.* para 92. See also: Application No.005/2013. Judgment of 20/11/2015, Alex *Thomas v United Republic of Tanzania*. para 73; Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania*. para 91; Application No.011/2015. Judgment of 28/9/2017, *Christopher Jonas v United Republic of Tanzania.* para 52.

Application for Review of the Court of Appeal's Decision, the Court finds that these constitute sufficient justification as to why the Applicants filed the Application one (1) year, three (3) months and twenty-one (21) days after the Court of Appeal's decision on the request for review.

62. For these reasons, the Court finds that the Application has been filed within a reasonable time as envisaged under Article 56(6) of the Charter and Rule 40(6) of the Rules. The Court therefore overrules this preliminary objection on admissibility.

B. Conditions of admissibility that are not in contention between the Parties

63. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence, and the principle that an Application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules) are not in contention between the Parties.

64. For its part, the Court also notes that nothing on the record which the Parties have submitted suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements under those provisions are fulfilled.

65. In light of the foregoing, the Court finds that the instant application fulfils all admissibility requirements in terms of Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VIII. Merits

A. Alleged violations of the rights to the respect of the dignity and integrity of the person under Article 5 of the Charter

66. The Applicants contend that they were ill-treated by police officers who, at one time, called them and insulted them and then took them back to the police. They also allege that they were held there *incommunicado* for four (4) days.

67. As indicated above, the Applicants further contend that, after being taken to Urafiki Police Station, the Second Applicant, together with his two brothers, the Third and Fourth accused in Criminal

Case No. 555 of 2003, were molested and subsequently transferred to Magomeni Police Station where they found their father, the First Applicant, locked up in a cell which had unbearable sanitary conditions. The Applicants maintain that this conduct by the Respondent State is a violation of Article 5 of the Charter.

68. The Respondent State avers that all Police Stations in its territory have basic facilities and where sanitation is lacking, the matter is addressed under Order 353(14) of the Police General Orders. The Respondent State maintains that the other allegations were never raised before the domestic courts.

69. Article 5 of the Charter provides as follows:

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

70. In the circumstances of this case, before the Court determines whether the Respondent State's conduct is a violation of Article 5 of the Charter as alleged by the Applicant**s**, it must first establish who should discharge the burden of proof in this regard.

71. In its previous judgment in the Matter of *Kennedy Owino Onyachi and Another v United Republic of Tanzania*, the Court has held as follows that: "it is a fundamental rule of law that anyone who alleges a fact shall provide evidence to prove it. However, when it comes to violations of human rights, this rule cannot be rigidly applied. By their nature, some human rights violations relating to cases of *incommunicado* detention … are shrouded with secrecy and are usually committed outside the shadow of law and public sight. The victims of human rights may thus be practically unable to prove their allegations as the means to verify their allegation are likely to be controlled by the State".

72. In the same above-mentioned case, the Court, relying on the jurisprudence of the International Court of Justice[10] also held that "In such circumstances, 'neither party is alone in bearing the burden of proof and the determination of the burden of proof depends on the type of facts which it is necessary to establish for the purposes of the decision of the case'. It is therefore for this Court to evaluate all the circumstances of the case with a view to establishing the facts**"**.

73. In the instant case, the Applicants simply assert that they were ill-treated and held in a police cell *incommunicado* for four (4) days. In addition, they state that the First Applicant was held in a cell with

10 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo),* International Court of Justice, Judgment of 30 November 2010, para 56.

unsanitary conditions. The Applicants have not submitted any *prima facie* evidence to support their allegations which could enable the Court to shift the burden of proof to the Respondent State.

74. In view of the foregoing, the Court finds that these allegations lack merit and the Court therefore dismisses them.

B. Alleged violations of the right to a fair trial under Article 7(1) of the Charter

75. The Applicants have raised several allegations that fall under the aegis of Article 7(1) of the Charter which reads as follows:

> "Every individual shall have the right to have his cause heard. This comprises:
>
> 1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
> 2. The right to be presumed innocent until proved guilty by a competent court or tribunal;
> 3. The right to defence, including the right to be defended by counsel of his choice;
> 4. The right to be tried within a reasonable time by an impartial court or tribunal."

i. Allegations that the Applicants were not promptly informed of the charges against them and they were denied the right to call a Counsel

76. In their Reply to the Respondent State's Response to the Application, the Applicants contend that they were not informed of the charges brought against them, at the time of their arrest and they were denied their right to call a Counsel or to be visited by anybody.

77. The Respondent State for its part contends that the foregoing allegations were never raised before the local courts,and are therefore an afterthought and that they are baseless and should consequently be dismissed.

78. The requirements for an accused person to be informed of the charges they are facing and to be allowed to call a Counsel is to enable them to prepare an effective defence. In accordance with Article 14(3)(a) of the Covenant**,** this is to be done promptly. Article 14(3)(a) of the Covenant provides:

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the

nature and cause of the charge against him."

79. The Court notes that strictly speaking, the Respondent State has not challenged the veracity of the Applicants' allegations in this regard.

80. The record before this Court shows that the Applicants were informed of the charges against them on 16 October 2003 when they were taken before the Resident's Magistrate's Court of Kisutu, that is, four (4) days after they were arrested. In the view of this Court, in the specific circumstances of this case where there were allegations of the rape of children of tender age and the possible need for further investigations, the Applicants were informed promptly of the charges against them and therefore there was no violation of Article 7(1)(c) of the Charter in this regard.

81. With regard to the Applicants' denial of the right to call a Counsel, the judgment of the Court of Appeal shows that the Applicants were represented by Advocate Mabere Marando during their appeal at the Court of Appeal and the Ruling on their application for review shows that this same Counsel represented them in those proceedings. There is no record of proceedings at the Resident's Magistrate's Court to enable the Court verify whether the Applicants had access to Counsel when the charges were read to them and in the course of the trial. In these circumstances, the Court finds that this allegation has therefore not been proven.

82. From the foregoing, the Court concludes that the allegations under consideration are dismissed.

ii. Allegation that the identification of the Applicants was not done properly

83. In their Reply to the Respondent State's Response to the Application, the Applicants elaborated on the claim regarding the methods used in identifying them.

84. The Applicants contend that during the hearing of Criminal Case No. 555 of 2003, the Trial Magistrate simply asked the witnesses to point to the accused persons in the dock after changing their sitting positions.

85. The Applicants allege that the informal manner in which they were identified violated their rights under Article 7(1) of the Charter and that given the gravity of the offences and punishment that they were facing, a formal identification parade ought to have been conducted following the appropriate procedures, with proper checks as required to satisfy the requirements of a fair trial. The Applicants aver that a formal identification parade was crucial to ascertain whether the victims, who

were all under the age of eight (8) at the time, knew the perpetrators of the alleged offences.

86. The Applicants maintain that, at the time of their arrest, the police officers even went with some of the alleged victims to the scene of the crime, and that it is on this basis that the alleged victims saw the Applicants while they were being arrested and also while in remand. They contend further that, although the alleged victims could not identify Papi Kocha, the Second Applicant and instead, they had identified both Nguza Mbangu and Francis Nguza as being Papi Kocha, the Trial Magistrate decided that an identification parade was not necessary.

87. The Respondent State did not respond to these allegations that the Applicants raised in their Reply to the Respondent State's Response.

88. The issue that this Court needs to determine is whether the manner in which the Applicants were identified is in accordance with Article 7(1)(c) of the Charter.

89. The Court is of the view that the decision on evidence to be adduced regarding the form of identification of accused persons is to be left to national courts since they determine the probative value of such evidence and they enjoy a wide discretion in this regard. This Court generally would therefore defer to the national Court's determination in this regard, so long as doing so, will not result in a miscarriage of justice.

90. In the instant case, this Court notes from the record that in the course of domestic proceedings, the Magistrate's Court considered the testimony of witnesses regarding the identification of the Applicants and being satisfied on this, proceeded with the trial. The Court finds that, on the whole, there is nothing on the record to indicate that this specific aspect of proceedings occasioned a miscarriage of justice. The Court consequently holds that there is no violation of Article 7(1)(c) of the Charter.

iii. Allegation that the Applicants were not given copies of Prosecution Witness statements and the material witnesses were not called for cross-examination.

91. The Applicants allege that their request for copies of witness statements during the trial was denied by the Trial Court and this, in their view, violated their right to a fair trial. They further allege that this violated their right to a fair trial because the Prosecution failed to disclose relevant evidence which could have buttressed their defence.

92. The Applicants contend that there was a deliberate failure on the part of the Trial Magistrate to discharge her duty to ensure that material witnesses are called. They state that the persons who ought to

have been called as material witnesses are Selina John, who claimed to have first informed Candy David Mwaivaji (Prosecution Witness 1) about Gift Kapapwa (Prosecution Witness 2) allegedly taking money from the First Applicant; Cheupe Dawa, who was accused of abducting the children and taking them to the First Applicant; Zizel, the First Applicant's grandson and Mangi, who was the owner of the container shop located near the First Applicant's house.

93. According to the Applicants, the effect of this omission was the abuse of the principle of equality of arms. The Applicants maintain that the failure to call the afore-mentioned four (4) persons as witnesses meant that though the Prosecution relied on the information they provided, the defence was unable to cross-examine them because they were never called to testify.

94. The Applicants submit that "equality of arms" is a principle of common law which provides that there must be a fair balance between the Parties. They argue that it is a cardinal tenet of the right to a fair trial and an intrinsic aspect of the right to adversarial procedures. They maintain that each Party must be afforded a reasonable opportunity to present its case especially its evidence, under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent.

95. The Applicants further contend that this principle imposes an obligation on the Prosecution to disclose any material in its possession which may assist the accused in defending himself.

96. The Respondent State submits that, the Applicants must substantiate the allegation that the afore mentioned four (4) persons were not called as witnesses to enable the Applicants cross-examine them. The Respondent State avers that only the victims, and no other persons were better placed to testify to the facts, particularly because the Prosecution has the onus to establish that the victims were familiar with the crime scene.

97. The Court notes that the Respondent State has not challenged the allegation that the Applicants were not provided with the witness statements and that the four witnesses above were not called and were therefore not cross-examined by the Applicants.

98. The Court recalls that in accordance with Article 7(1)(c) of the Charter everyone has a right to defence, and that according to Article 14(3)(b) of the Covenant, in the determination of any criminal charge against him, "everyone shall be entitled … (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". The Court also notes that Article 14(3)(e) of the Covenant provides that "in the determination of any criminal charge against him, everyone shall be entitled… 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".

99. The Court is of the view that in the instant case, the Applicants should have been provided copies of the Prosecution Witness' statements in order to facilitate them to prepare their defence. By this not having been done, the Applicants were placed at a disadvantage vis-à-vis the Prosecution, contrary to the principle of equality of arms. Similarly, by not calling the four (4) afore-mentioned persons to testify, the Applicants were denied the opportunity to cross-examine them and this also placed them at a disadvantage.

100. Consequently, the Court holds that the Applicants' denial of access to the Prosecution's witness's statements and denial of an opportunity for the Applicants to cross-examine persons who would have been material witnesses, was a violation Article 7(1)(c) of the Charter by the Respondent State.

iv. Allegation that the Applicants' alibi defence was unduly rejected

101. In their Reply to the Respondent State's Response to Application, the Applicants contend that the Trial Court rejected their alibi defence and that, by so doing, it violated their rights under Article 7(1)(b) of the Charter. They further submit that the house in which the alleged crimes they were charged with took place was always occupied by members of the *Achigo* Band who did music rehearsals there, making it impossible for the alleged crimes to be committed.

102. The Second Applicant further contends that he was out of Dar-es-Salaam promoting his album at the time the crimes were alleged to have been committed and he could not therefore have been at the alleged crime scene.

103. For its part, the Respondent State submits that in examining the Applicants' guilty verdict, the Court of Appeal reassessed all the evidence, the defence arguments and the *alibi* on each count and made its own findings thereon.

104. In its previous Judgment in the Matter of *Mohamed Abubakari v Tanzania*, this Court held that:

> "Where an alibi is established with certitude, it can be decisive on the determination of the guilt of the accused."[11]

105. In the instant case however, the records of the domestic judicial proceedings show that the Applicants' evidence of an alibi was considered and rejected by the Respondent State's Trial and Appellate

11 Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania*. para. 191.

Courts. The record of proceedings reveals that the High Court and the Court of Appeal specifically addressed the alibi defence and rejected it after weighing it against the testimony of the witnesses, finding that the witnesses' testimony was sufficiently reliable to set aside the Applicants' alibi defence. The Court finds that, on the whole, there is nothing on the record to indicate that the setting aside of the Applicants' alibi defence occasioned a miscarriage of justice.

106. Consequently, the Court holds that the Respondent State has not violated the Applicants' right to defence as enshrined in Article 7(1)(c) of the Charter and thus dismisses the allegation.

v. Allegation that the Applicants' urine and blood tests were not tendered and the First Applicant's request for an impotence test was unduly rejected.

107. In the Reply to the Respondent State's Response to the Application, the Applicants contend that they were taken to hospital on 14 October 2003 where their urine and blood samples were taken for testing. They further contend that the results of the tests were not tendered in evidence, despite the fact that the Second Applicant raised the issue during the trial of Criminal Case No. 555 of 2003.They maintain that they were convicted by the Trial Magistrate, who did not consider or attach due weight to all the available evidence.

108. The Applicants also state that on 14 October 2003, the First Applicant requested to be taken to a doctor for a test to prove his impotence, but his request was rejected whereas the Court ought to have facilitated this test. They maintain that the First Applicant repeated this request in the course of the trial but it was also rejected by the Court. They argue that the Judgment of the Trial Court shifted the burden of proof to them contrary to the well-established principle that the prosecution bears the burden of proof. The Applicants contend that the Respondent State's interpretation of Section 114(1) of the Law of Evidence Act (Cap 6 RE 2002) is inconsistent with the provisions of Section 3(2)(a) of the same Act.[12]

109. The Respondent State, for its part, argues that the foregoing defence was not raised by the Applicants when they filed an Appeal before the High Court in Criminal Appeal No. 84 of 2004; and less

12 Section 3(2)(a) of the Law of Evidence Act provides that in criminal matters, the prosecution must prove the case beyond reasonable doubt; Section 114(1) thereof provides that the accused bears the burden of proof where he or she claims that there are circumstances bringing the case under an exception to the operation of the law creating the offence and this burden can be discharged when there is evidence from the prosecution in this regard.

so, in their Appeal at the Court of Appeal in Criminal Appeal No. 56 of 2005. It notes that the Trial Court found that none of the victims tested positive for HIV, VDRL or HVS, according to the deposition of the doctor (Prosecution Witness 20) who examined the victims, therefore the blood and urine tests results became irrelevant.

110. The Respondent State contends further that, neither the Trial Court, the High Court, nor to a lesser extent, the Court of Appeal of Tanzania, based their guilty verdicts against the Applicants on the results of the blood and urine tests.

111. The Respondent State also affirms that the issue as to whose responsibility it was to establish the First Applicant's sexual impotence was definitively settled by the Court of Appeal which held that it was up to the Applicant to adduce evidence to prove his lack of virility.

112. The Respondent State contends that the First Applicant raised the issue of his impotence and inability to have an erection only when he was being cross-examined by the Prosecution and that the allegations were therefore an afterthought on the Applicants' part.

113. The Respondent State further states that the Court of Appeal determined the matter taking into account the available evidence, namely, that the victims testified that they were raped and their medical reports corroborated their testimony.

114. The Applicants allege here the violation of Articles 2 and 3 of the Charter which protects the right not to be discriminated against and equality before and equal protection of the law, respectively. The Court will however consider this allegation under Article 7(1)(c) of the Charter, as it actually relates to the right to defence.

115. The Court notes that all material evidence impacting on an accused person's defence should be considered and reasons for its exclusion provided. This is because their liberty is at stake.

116. The Court notes that the Applicants' blood and urine test results, which in the Applicants**'** view, would have bolstered their defence, were not tendered in evidence at the Trial Court therefore denying them the opportunity to tender material evidence in their defence**.** The Court also however notes that in the circumstances of the case, neither the High Court nor the Court of Appeal based their guilty verdicts on the results of the blood and urine tests. Therefore, the Applicants' right to defence was not violated in this respect.

117. On the other hand, as regards the impotence test, the Court is of the view that, once the First Applicant raised the issue, the Respondent State should have facilitated the test to be done, since the outcome thereof would determine whether the First Applicant could have committed the crime. Consequently, the Court holds that, to the extent that the Trial Court rejected the First Applicant's prayer to be tested on his impotence, the Respondent State has violated his right provided in

Article 7(1)(c) of the Charter.

vi. Allegation that the trial judge was biased and that some of the Applicants' submissions and evidence were not duly considered and taken into account

118. In the Reply to the Respondent State's Response, the Applicants contend that the Trial Magistrate was biased and did not accord their evidence the weight it deserved. They maintain that although some of the issues were treated by the Court of Appeal, other grounds of appeal were not addressed.

119. The Applicants further contend that the right to a fair trial encompasses the obligation for a court of law to render reasoned judgments and that, in the instant case, the Trial Court's judgment revealed prejudice and contained unjustified remarks about the defence witnesses, suggesting that the Trial Magistrate was biased and had formed her own opinion about the case.

120. For its part, the Respondent State reiterates that the Court of Appeal remedied the alleged infringements when it assessed each of the twenty-one (21) counts on which the Applicants were found guilty of by the Trial Court and as affirmed by the High Court. The Respondent State maintains that after the examination of each count, the Court of Appeal found the Applicants guilty of only the four (4) counts in respect of which they were sentenced. These are, two (2) counts of the rape of two (2) different victims against the First Applicant and two (2) counts each of gang-rape of two (2) victims against both Applicants and that the examination of the arguments and evidence adduced by the defence was an integral part of this assessment.

121. The Court recalls again that at the Trial Court, there were five accused persons, including the Applicants, facing twenty-one (21) counts, ten (10) of rape and eleven (11) of unnatural offence. The Fifth accused, the teacher, was acquitted by the Trial Court while the rest of the accused persons were convicted and sentenced to life imprisonment. The High Court affirmed the Trial Court's conviction of the First, Second, Third and Fourth accused on the ten (10)-count charge of rape but substituted the convictions on eleven (11) counts of unnatural offence with that of gang-rape.

122. The record before this Court shows that the Court of Appeal examined each count and in the end acquitted the Third and Fourth accused, reducing the number of counts that were proven against the Applicants to four (4) as against the original twenty-one (21).

123. In a previous case, this Court has stated as follows:

> "General statements to the effect that this right has been violated are not

enough. More substantiation is required".[13]

124. The Court notes however that, in the instant case, the Applicants have not provided sufficient evidence as to the alleged bias and to the possible implications of the alleged violations on the Trial Court's judgment.

125. Accordingly, the Court finds that the alleged violation has not been proven and therefore dismisses it.

C. Allegations of violation of the right to participate in the government of one's country under Article 13 of the Charter and the right to protection of the family under Article 18(1) of the Charter

126. In their Reply to the Respondent State's Response, the Applicants submit in general terms that the Respondent State violated their rights under Articles 13 and 18(1) of the Charter.

127. The Respondent State did not respond to this allegation.

128. Article 13 of the Charter provides that:

> "1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
>
> 2. Every citizen shall have the right of equal access to the public service of his country.
>
> 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

129. Article 18(1) of the Charter provides as follows:

> "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral."

130. On those points, the Court notes that the Applicants limited themselves to stating that their rights under Articles 13 and 18(1) have been violated by the Respondent State. They have not specified how and in what circumstances the alleged violations occurred.

131. As indicated above, this Court has stated in its previous judgments that, "General statements to the effect that the right has been violated are not enough" and that "More substantiation is required".[14]

132. In view of the aforesaid, the Court finds that the allegations

13 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v. United Republic of Tanzania*. para. 140.

14 As above.

of violation of Articles 13 and 18(1) of the Charter have not been established and, accordingly, dismisses those allegations.

D. Allegation that the Respondent State violated Article 1 of the Charter

133. In their Reply, the Applicants lastly state that the Respondent State has fallen short in its obligations by failing to give effect to the provisions of Article 1 of the Charter.

134. The Respondent State has not responded to this allegation.

135. The Court notes that in instances where an allegation of violation of Article 1 of the Charter has been raised, the Court has held that "when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated".[15]

136. In the instant case, the Court has held that the Respondent State has violated Article 7(1)(c) of the Charter with respect to some of the Applicants' allegations (supra paragraphs 100 and 117). On the basis of the foregoing observations, the Court thus finds in conclusion that, violation of the said rights entails violation of Article 1 of the Charter.

IX. Remedies sought

137. As indicated above (paragraphs 21 and 22), the Applicants have requested the Court to, *inter alia*, issue an order compelling the Respondent State to release them from prison and grant them reparations pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules.

138. As indicated above (paragraphs 23 to 26), the Respondent State has prayed the Court to order that the Applicants continue serving their sentences and deny the Applicant's request for reparations.

139. 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".

140. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for reparation submitted in accordance with

15 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania*. para 135; Application No. 013/2011. Judgment of 28/3/2014, *Beneficiaries of late Norbert Zongo and Others v Burkina Faso.* para 199; Application No. 003/2015. Judgment of 28/9/2017, *Kennedy Owino Onyachi and Another v United Republic of Tanzania.* para 159.

Rule 34(5) of these Rules, by the same decision establishing the violation of a human and people's rights, or if the circumstances so require, by a separate decision".

141. With respect to the Applicants' request to be released from prison, the Court notes that this prayer is moot, considering that, according to both Parties, the Applicants have been released by way of a Presidential Pardon.[16]

142. Concerning the other forms of reparation, the Court notes that none of the Parties made detailed submissions. It will therefore make a ruling on this question in another Judgment after having heard the Parties.

X. Costs

143. The Applicants prayed the Court to order the Respondent State to pay costs.

144. The Respondent State has not made any prayer as to costs.

145. The Court notes in this regard that Rule 30 of its Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs".

146. Having considered the circumstances of this matter, the Court decides to deal with the question of costs when considering the other forms of reparation.

XI. Operative part

147. 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 objections on the admissibility of the Application;

iv. *Declares* the Application admissible.

On the merits:

v. *Finds* that the Respondent State has not violated Article 5 of the Charter;

16 *Supra* paras 16 and 17.

vi. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter as regards: the failure to promptly inform the Applicants of the charges against them and denying them an opportunity to call their Counsel; the manner of the Applicants' identification; the rejection of the Applicant's *alibi* defence; the failure to admit the reports of the Applicants' urine and blood tests as evidence and the alleged partiality of national courts;

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

viii. *Finds* that the allegations of violation of Articles 13 and 18 (1) of the Charter have not been established;

ix. *Holds* that the Applicants' prayer to be released from prison has become moot;

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

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

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

Mango v Tanzania (merits) (2018) 2 AfCLR 314

Application 005/2015, *Thomas Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania*

Judgment, 11 May 2018. Done in English and French, the English text being authoritative.

Judges: ORE; KIOKO, NIYUNGEKO, GUISSE, ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicants had been convicted and sentenced for armed robbery. They brought this Application claiming violations of their rights as a result of their detention and trial. The Court held that the failure and delay in providing the Applicants with witness' statements violated the African Charter. The Court further held that the failure to provide the Applicants with free legal representation violated the African Charter.

Jurisdiction (conformity of domestic proceedings with Charter, 31)

Interpretation (Universal Declaration forms part of customary international law, 33; Court cannot find violations of national law and treaties to which the Respondent State cannot be a party, 35)

Admissibility (exhaustion of local remedies, fair trial, 45, 46; submission within reasonable time, 53-56)

Fair trial (evaluation of evidence, 70, 94, 95, 116, 118; defence, witness statements, 78, 79, free legal representation, 86, 87; reasoning, 111, 112)

Reparations (release, 155)

I. The Parties

1. Messrs Thobias Mang'ara Mango and Mr Shukurani Masegenya Mango (hereinafter referred to as "First Applicant" and "Second Applicant", respectively) are both citizens of the United Republic of Tanzania.

2. The Respondent State, namely, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986 and also became a Party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. Subject of the Application

A. Facts of the matter

3. The Court was seized of the Application on 11 February 2015. In the Application, they allege violation of their rights following their arrest, detention and the manner in which their various cases were treated before the domestic courts of the Respondent State.

4. According to the Application, on 3 July 1999 at about 8.30 am two individuals struck at gunpoint, the Zeid *Bureau de Change* located at Mwanza Hotel and stole large sums of money and travellers cheques. The only witness to the robbery was Ms Fatuma Said who worked as a cashier at this *Bureau de Change.*

5. A police investigation was mounted at the end of which four (4) persons were arrested among whom were the Second Applicant who was arrested on 3 July 1999 and the First Applicant who was arrested on 4 July 1999. They were charged on 5 July 1999 with the offence of armed robbery contrary to Sections 285 and 286 of the Tanzanian Penal Code.

6. Following the trial before the District Court of Mwanza in Criminal Case No. 672 of 1999, the Applicants were convicted and sentenced on 7 May 2004 to a term of thirty (30) years imprisonment each in Criminal Case No. 672 of 1999.

7. The Applicants appealed the conviction and sentences to the High Court of Tanzania in Criminal Appeal No. 201 of 2004. The appeal was dismissed in its entirety by the High Court of Tanzania on 31 October 2005 on the basis that the sentence of thirty (30) years imprisonment was lawful.

8. The Applicants further appealed to the Court of Appeal of Tanzania sitting at Mwanza in Criminal Appeal No. 27 of 2006 and this Appeal was also dismissed in its entirety on 12 May 2010. The Court of Appeal found that there was no error in the findings of the District Court and High Court on the substantive matters under appeal and that the appeal lacked merit.

9. The Applicants then filed an Application for Review at the Court of Appeal in Criminal Application No. 8 of 2010 but this was dismissed on 18 February 2013 on the basis that it showed no ground that raised the need for a review of the Court of Appeal's judgment in Criminal Appeal No. 27 of 2006.

10. The Applicants claim that they subsequently filed on 17 June 2013 a Constitutional Petition at the High Court at Mwanza alleging violation of their human rights under the Basic Rights and Duties Enforcement Act. They claim that the Constitutional Petition was

endorsed with the stamp of the District Registrar of the High Court on 17 June 2013. The Applicants allege that following a considerable period of enquiry about the Constitutional Petition, it was returned to them by the Registrar of the High Court without an official letter. They allege that they were verbally instructed to direct their petition to the Court of Appeal.

B. Alleged violations

11. The Applicants outlined several complaints in relation to the manner in which they were detained by the Respondent State's police authorities and tried and convicted by the Respondent State's judicial authorities. They claim that:

"i. The principles of law and practice governing the matter of visual identification were neither met nor considered by the Trial Court;

ii. They were not represented by a Counsel, were denied medical treatment and overstayed in Police custody;

iii. They were denied a chance to be heard when the presiding Magistrate was changed;

iv. No actual weapon was discovered or tendered in Court to support the charge of armed robbery and the owner of the B*ureau de Change* mentioned on the Charge Sheet was never called before the Court to testify;

v. The trial proceeded despite them being denied some witness statements and some being provided to them after undue delays;

vi. The judgments of the Trial Court, first and second Appellate Courts were defective due to the contradiction between the evidence of Prosecution Witness 2 and Prosecution Witness 3;

vii. The Trial Court tried the case to its finality without considering or according weight to the written submissions;

viii. The High Court concluded the appeal by relying on misapprehension or misdirected evidence;

ix. The Court of Appeal relied on misconceived findings to convict them;

x. Their Constitutional Petition was irregularly rejected and returned to them unprocedurally, with no official letter;

xi. Their Application for Review at the Court of Appeal was dismissed on grounds that it should have been raised in an Appeal;

xii. The sentence meted against them following their conviction is contrary to Sections 285 and 286 of the Penal Code of Tanzania as this sentence did not exist at the time the offence was committed and it was harsh;

xiii. They have suffered irreparable damage and inhuman treatment due to the violation of their human rights."

12. In their Application, the Applicants allege violations of their human rights under:

"i. Articles 1, 2, 3, 5, 6, 7, 8 and 10 of the Universal Declaration of Human Rights;

ii. Articles 3, 7, 7(2), 19, and 28 of the Charter;

iii. Articles 107A (2)(e) and 107B; 12(1) and (2); 13(1), (3), (4) and (6)(c); 26(1) and (2); 29(1), (2) and (5); 30(1), (3) and (5) of the Constitution of the United Republic of Tanzania;

iv. Article 6 of the European Convention on Human Rights.

v. Article 8 of the American Convention on Human Rights; and

vi. Sections 285 and 286 of the Penal Code of the United Republic of Tanzania regarding their illegal sentencing to thirty years' imprisonment."

III. Summary of the procedure before the Court

13. The Application was filed on 11 February 2015. By two separate notices both dated 20 March 2015 pursuant to Rules 35(2) and (3) of the Rules (hereinafter referred to as "the Rules"),the Registry, served the Application on the Respondent State and transmitted it to the Executive Council of the African Union and the State Parties to the Protocol through the Chairperson of the African Union Commission.

14. By a letter dated 31 March 2015 the Registry notified Pan African Lawyers' Union (PALU) of the Court's decision to request its assistance to provide the Applicants with legal assistance and by an email dated 2 April 2015 PALU confirmed that it would represent the Applicants.

15. The Respondent State filed the List of its Representatives on 5 May 2015.

16. On 27 May 2015 the Respondent State requested the Court to grant her an extension of time to file the Response to the Application and by a notice dated 24 June 2015 the Registry notified the Respondent State of the Court's decision to grant her thirty (30) days' extension of time to file the Response.

17. On 20 August 2015 the Respondent State filed the Response to the Application. This was transmitted to the Applicant by a notice dated 26 August 2015.

18. By a letter dated 18 November 2015 the Applicants requested

the Court to grant them an extension of time to file their Reply to the Respondent State's Response; by a notice dated 14 March 2016, the Registry notified the Applicants of the Court's decision to grant them thirty (30) days extension of time to file the said Reply. The Applicants' filed Reply to the Respondent State's Response on 23 March 2016.

19. By a notice dated 10 June 2016 the Registry informed the Parties that the written procedure was closed with effect from 3 June 2016.

IV. Prayers of the Parties

20. In their Reply, the Applicants reiterated their prayers in the Application as follows :

"i. A Declaration that the Respondent State has violated the Applicants' rights guaranteed under the African Charter, in particular: Articles 1 and 7.

ii. A Declaration that the Respondent State violated Articles 2, 3, 5, 7 and 19 of the Charter and Articles 1, 2, 5, 6, 7, 8 and 10 of the Universal Declaration of Human Rights at various stages of the trial process.

iii. A Declaration that s142 of the Evidence Act (Cap 6 R.E 2002) is incompatible with international standards of the right to a fair trial.

iv. An Order that the Respondent State takes immediate steps to remedy the violations.

v. An order for reparations.

vi. Any other orders or remedies that this Honourable Court shall deem fit."

21. In the Response to the Application, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to rule as follows:

"1. That the Application has not evoked the jurisdiction of the Honourable Court.

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

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

4. That the Application be dismissed in accordance to Rule 38 of the Rules of Court."

22. With regard to the merits of the Application, the Respondent State prays the Court for an order that it has not violated Articles 1, 2, 6 and 7 of the United Nations Declaration of Human Rights and Articles

3, 7, 10, 19 and 28 of the Charter.

23. The Respondent State further prays that reparations be denied to the Applicants, they continue serving their sentence and the Application be dismissed in its entirety.

V. Jurisdiction

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

25. The Respondent State raised only one objection, on the material jurisdiction of the Court.

A. Objection on material jurisdiction

26. In the Response to the Application, the Respondent State contends that the Court would sit as a Court of first instance in respect of some allegations and as a "Supreme Appellate Court" in respect of matters of law and evidence that have already been determined yet the Protocol does not give it such jurisdiction. The Respondent State refers to the Court's decision in *Ernest Francis Mtingwi v Republic of Malawi* in this regard.[1]

27. The Respondent State outlines the following allegations as requiring the Court to sit as a Court of first instance:

> "i. That they were not given an opportunity to be represented by counsel, before and after they were charged in Courts of law, they were denied medical treatment and they overstayed in police custody.
>
> ii. That they filed an application in the High Court of Tanzania under the Basic Rights and Duties Enforcement Act, which was endorsed with the stamp of the District Registrar of the High Court on 17 June 2013 and after a considerable period it was irregularly rejected with no official communication to that effect.
>
> iii. That they were sentenced to thirty (30) years imprisonment contrary to Sections 285 and 286 of the Penal Code, that the charge against them was not a legally punishable offence at the time it was committed, in that, the sentence against them was harsh and excessive contrary to their

1 Application No. 001/2013.Decision of 15/03/2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*. (Ernest Mtingwi v Malawi Decision) para 14 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".

rights under Article 7(2) of the Charter and Article 13(6)(c) of the Constitution of the Respondent State of 1977."

28. The Respondent State further argues that the allegations which require the Court to sit as a 'Supreme Appellate Court' are those relating to the Applicants' identification, the non-tendering of evidence of the weapon alleged to have been used to commit the robbery, not calling the owner of the Bureau de Change to testify in Court, the changes of the venue of the hearing of the trial, their conviction on the basis of misconceived findings, the determination of their appeals on misdirected evidence and the dismissal of their Application for Review on the ground that the matters raised could have properly been raised in an appeal.

29. In their Reply to the Respondent State, the Applicants maintain that the Court has jurisdiction to deal with the matter pursuant to the provisions of the Charter and the Protocol because, the Application relates to violations of their human rights which are protected by the Charter and other human rights instruments ratified by the State concerned. They refer to the decision in *Alex Thomas v United Republic of Tanzania* in this regard.[2]

30. Pursuant to Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules of the Court, the material jurisdiction of the court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned".

31. This Court reiterates its position as affirmed in *Ernest Mtingwi v Republic of Malawi*[3] that it is not an appellate court with respect to decisions rendered by national courts. However, as it underscored in its Judgment of 20 November 2015 in *Alex Thomas v United Republic of Tanzania* and reaffirmed in its Judgment of 3 June 2016 in *Mohamed Abubakari v United Republic of Tanzania*, this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which

2 Application No.005/2013.Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania. (Alex Thomas v Tanzania* Judgment*)* para 130 where the Court stated: "Though this Court is not an Appellate body with respect to decision of national courts, 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. […] The Court will examine whether the national courts applied appropriate principles and international standards in resolving the errors".

3 *Ernest Mtingwi v Malawi Decision op cit* para 14.

the Respondent State is a Party.[4] Consequently, the Court rejects the Respondent State's objection that the Court is acting in the instant matter as an appellate Court.

32. Furthermore, regarding its material jurisdiction, the Court notes that since the Applicant alleges violations of provisions of some of the international instruments to which the Respondent State is a Party, it has material jurisdiction in accordance with Article 3(1) of the Protocol.

33. The Court notes that while the Universal Declaration of Human Rights is not an international human rights instrument that is subject to ratification by States, it has previously held in the *Matter of Anudo Ochieng Anudo v Tanzania* that the Declaration has been "recognised as forming part of Customary International Law".[5] As such, the Court is enjoined to interpret and apply it.

34. The Applicants have also invoked the American Convention on Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Respondent State's Constitution and Penal Code.

35. In accordance with Article 3(1) of the Protocol, the Court finds that it cannot establish violations based on the Constitution and Penal Code of the Respondent State which are national laws. The same applies to the American Convention on Human Rights and the European Convention on Fundamental Rights and Freedoms to which the Respondent State is not and cannot be a Party.

36. The Court consequently finds that it has material jurisdiction over the Application.

B. Other aspects of jurisdiction

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

i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and deposited the Declaration required under Article 34(6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of

4 Alex *Thomas v Tanzania Judgment op cit* para 130 and Application No. 007/2013. Judgment of 03/06/2016, *Mohamed Abubakari v United Republic of Tanzania (Mohamed Abubakari v Tanzania* Judgment). para 29.

5 Application No. 012/2015. Judgment of 23/03/2018. *Anudo Ochieng Anudo v United Republic of Tanzania*, *(Anudo Anudo v Tanzania* Judgment*)* para 76; *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States v Iran)* [1980] ICJ Rep 3 p 42, Collection 1980; Article 9(f) of the Constitution of the United Republic of Tanzania, 1977.

the Protocol;

ii. it has temporal jurisdiction on the basis that the alleged violations are continuous in nature since the Applicants remain convicted and are serving a thirty (30) year imprisonment sentence on the basis of what they consider an unfair process;[6]

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

38. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

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

40. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:
>
> 1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> 2. Comply with the Constitutive Act of the Union and the Charter:
> 3. Not contain any disparaging or insulting language;
> 4. Not be based exclusively on news disseminated through the mass media;
> 5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
> 6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> 7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

6 Application No. 003/2015. Judgment of 28/09/2017, *Kennedy Owino Onyachi and Another v United Republic of Tanzania (Kennedy Onyachi v Tanzania* Judgment) para 40.

A. Conditions of admissibility in contention between the Parties

41. While some of the above conditions are not in contention between the Parties, the Respondent State raised two objections regarding exhaustion of local remedies and the timeframe for seizure of the Court.

i. Objection based on the ground of non-exhaustion of local remedies

42. The Respondent State contends that the Applicants should have raised their complaints within the domestic courts as required by Article 56(5) of the Charter, before filing their application before this Court. The Respondent State also alleges that it first became aware of the allegations enumerated in paragraph 11 above, after the filing of this Application. The Respondent State maintains that the Applicants can still pursue a Constitutional Petition within the domestic courts in this regard.

43. The Applicants contend that they exhausted all the local remedies available because they were heard up to the Court of Appeal which is the highest court in the Respondent State. The Applicants state that any other remedies available are to be considered as "extraordinary remedies" which they were under no obligation to pursue.

44. The Applicants have raised thirteen (13) claims before this Court as indicated in paragraph 11 above. The record indicates that eight (8) of the claims indicated at paragraph 11(i), (iii), (iv), (v), (vi), (vii), (viii) and (ix) were raised at various stages during their trial and appeals before the courts of the Respondent State. The record also indicates that, five (5) claims are being raised for the first time before this Court. They are denial of their right to legal representation, prolonged detention in police custody; the dismissal of the Application for Review before the Court of Appeal; the irregular rejection of their constitutional petition and the illegality and harshness of the sentence imposed on the Applicants following their conviction.

45. Any application before the Court must comply with the requirement of exhaustion of local remedies.[7] However, in *Alex Thomas v United Republic of Tanzania*, the Court also held that the Applicant was not required to exhaust domestic remedies in respect of alleged violations of fair trial rights which were occasioned in the course of his

7 Application No. 003/2012. Ruling of 28/03/2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania (Peter Chacha v Tanzania* Ruling), para 40.

trial and appeals in the domestic courts.[8]

46. In the instant case, the Court notes that allegation relating to the denial of legal assistance, prolonged detention in police custody and illegality and harshness of the sentence imposed on the Applicants constitute part of the "bundle of rights and guarantees" related to a fair trial which were not required to have been specifically raised at the domestic level. The Court consequently holds that the Applicants are deemed to have exhausted local remedies with respect to these claims.

47. Concerning the filing of a Constitutional Petition regarding the violation of the Applicants' rights, the Court has already stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicants are not required to exhaust prior to seizing this Court.[9]

48. In sum, the Court therefore finds that the Applicants have exhausted local remedies with respect to all their claims.

49. Accordingly, the Court dismisses the Respondent State's objection to admissibility of the Application for non-exhaustion of local remedies.

ii. Objection based on the ground of not filing the Application within a reasonable time

50. The Respondent State contends that the Application was not filed within a reasonable time as required by Rule 40(6) of the Rules. The Respondent State avers that at the time of the filing of this Application, four (4) years and two (2) months had elapsed from the time of delivery of the Court of Appeal's judgment in the Appeal and two (2) years had elapsed from the time of delivery of the Ruling on the Applicants' Application for Review of the Court of Appeal's judgment. The Respondent State therefore argues that this Application is inadmissible and that it should be dismissed with costs.

51. The Applicants contend that they are both lay, indigent incarcerated persons without legal education. They also contend that they have not had the benefit of legal aid or legal representation until the Court appointed *pro bono* Counsel for them and that the circumstances of their particular case warrants the Court to admit the Application as there are sufficient grounds to justify why they filed it at

8 *Alex Thomas v Tanzania Judgment op cit* para 60.

9 *Ibid* paras 60-62; *Mohamed Abubakari v Tanzania Judgment op cit* paras 66-70; Application No.011/2015. Judgment of 28/09/2017, *Christopher Jonas v United Republic of Tanzania. (Christopher Jonas v Tanzania* Judgment) para 44.

the time they did.

52. The Court notes that Rule 40(6) of the Rules and Article 56(6) of the Charter 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 any other date as determined by the Court.

53. The Court notes that local remedies were exhausted when the Court of Appeal dismissed the Applicants' appeal on 12 May 2010, therefore this is the date from which time should be reckoned regarding the assessment of reasonableness of time as envisaged in Rule 40(6) of the Rules.[10]

54. The Court notes that the Application was filed four (4) years, eight (8) months and thirty (30) days after local remedies were exhausted. As the Court has previously held, the computation of reasonableness of time "…depends on the circumstances of each case and must be assessed on a case-by-case basis."[11]

55. The Court considers in this regard that the Applicants being incarcerated they may not have been aware of the existence of the Court or how to approach it, particularly since the Respondent State had filed the Declaration under Article 34(6) less than two (2) months prior to when local remedies were exhausted. They should also not be penalised for attempting to use an extraordinary remedy, that is, the Application for Review of the Court of Appeal's Judgment, which was dismissed on 18 February 2013. The Court finds that these factors constitute sufficient justification as to why the Applicants filed the Application four (4) years, eight (8) months and thirty (30) days after local remedies were exhausted.

56. For these reasons, the Court finds that the Application has been filed within a reasonable time as envisaged under Article Rule 40(6) of the Rules. The Court therefore overrules this preliminary objection on admissibility.

B. Conditions of admissibility not in contention between the Parties

57. The conditions regarding the identity of the Applicant, the

10 Application No. 038/2016. Judgment of 22/03/2018, *Jean-Claude Roger Gombert v Cote d'Ivoire*. paras 35-37.

11 Application No. 013/2011. Judgment of 28/03/2014, *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso*. (*Norbert Zongo v Burkina Faso Judgment*) para 92; See also: *Alex Thomas v Tanzania Judgment op cit* para 73; *Mohamed Abubakari v Tanzania Judgment* o*p cit* para 91; *Christopher Jonas v Tanzania* Judgment *op cit* par. 52.

Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence, and the principle that an Application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules) are not in contention between the Parties.

58. The Court also notes that nothing on the record suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements under those provisions are fulfilled.

59. In light of the foregoing, the Court finds that the instant application fulfils all admissibility requirements in terms of Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VII. The merits

A. Alleged violation of the right to a fair trial

60. The Applicants have raised several claims that stem from the alleged violation of the right to a fair trial under Article 7 of the Charter which reads as follows:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> a. the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> b. the right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> c. the right to defense, including the right to be defended by counsel of his choice;
>
> d. the right to be tried within a reasonable time by an impartial court or tribunal.
>
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

61. The Applicants also allege violations of Articles 8 and 10 of the Universal Declaration of Human Rights which provide as follows:

"8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

"10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

i. Allegation relating to the Applicants' identification

62. The Applicants allege that considering the gravity of the offence and the sentence they were facing, their identification through an informal identification process was insufficient and did not meet national and international standards. They allege that proper identification processes ought to have been undertaken. The Applicants maintain that no identification parade took place and no documentary evidence relating to their identification was tendered in Court. They claim that Prosecution Witness 3, Inspector Peter Mvulla stated that police investigators took the suspects to the complainant to be identified. The Applicants also argue that the whole evidence adduced in the Trial Court was not in compliance with the principles of law and practice governing visual identification The Applicants maintain that their conviction should be quashed, because they were based on their identification that did not follow the procedure set out in the law.

63. The Respondent State submits that this allegation was a ground of the Applicants' appeal before the Court of Appeal in Criminal Case No. 27 of 2006 and that the Court of Appeal considered the allegation and upheld the findings of the Trial Court and High Court. The Respondent State submits that the allegation lacks merit and should be dismissed.

64. The contention is whether the Applicants were properly identified and whether the Respondent State's Courts applied the appropriate principles and law in evaluating the evidence of witnesses on identification.

65. The record indicates that both the High Court and Court of Appeal considered the issue of visual identification and satisfied themselves that the criterion under the law was met and that the identification parade was carried out properly.[12]

66. The High Court examined the evidence of Fatuma Said, the *Bureau de Change* staff who was manning it when the robbery took place and who testified that she saw both Applicants on the material day and that the Second Applicant pointed a pistol at her. The High Court

12 Referring to *Ezekiel Peter v Republic* [1972] Crim. App. 20-DSM-72.

further noted that Fatuma Said was able to identify both Applicants at the identification parade which was carried out two (2) days later on 5 July 1999.

67. The Court of Appeal also considered both issues relating to identification and observed that there was no dispute in the description that Fatuma Said gave of the robbers. The Court of Appeal also observed that the clothing found in the Second Applicant's possession at the time of his arrest matched the description of the robbers.

68. On the issue of visual identification, this Court notes that the Court of Appeal observed that the identification by a single witness must be absolutely watertight to justify a conviction. The Court notes that the Court of Appeal also considered the principles guiding visual identification as set out in the Respondent State's relevant jurisprudence.[13] The Court of Appeal examined these principles and the findings of the Trial Court and High Court and it was satisfied there was no mistaken identity.

69. Moreover, the record before this Court shows that the Police Form (PF) 186 recording the conduct of the identification parade was tendered in evidence and the Police Officer who conducted the identification parade, Deputy Sergeant Nuhu also testified as Prosecution Witness 5 during the trial.

70. In the view of this Court, nothing on the record shows that the domestic courts did not apply the law appropriately and in light of applicable standards. Both the High Court and the Court of Appeal examined the applicable principles governing the issue of identification and applied them to the evidence tendered in a manner that was fair and just.

71. The Court finds that the Respondent State did not violate the right to a fair trial with regard to the identification of the Applicants.

ii. Allegation relating to the failure and delay in providing the Applicants with some witness statements

72. The Applicants state that they repeatedly requested witnesses' statements and that the trial proceeded despite them not having received them. They state that the trial in Criminal Case No. 672 of 1999 commenced on 8 July 1999 without them having received the witness statements. They allege that they repeatedly requested for them on 9 August 2000, 22 September 2000, 4 July 2001, 10 September 2001, 15 October 2001, 21 January 2002, 29 October 2002 and 12 December 2002. On its part, the Trial Court reminded the Prosecution on several

13 See *Waziri Amani v Republic* (1980) *Tanzania Law Reports* 250.

occasions between 9 August 2000 and 4 July 2001, to supply the Applicants with witness statements, in accordance with their statutory right and the Court's orders in this regard.

73. The Applicants state that, it was not until 22 February 2002 that the Prosecution informed the Court that they had supplied the accused with witness statements, over two (2) and a half years since the trial proceedings started. The Applicants allege that on 16 November 2001, they were subjected to interrogation for requesting the witness statements.

74. The Applicants maintain that the delay in supplying them with the statements violated their right to a fair trial and in particular the right to defence. The Applicants state that 'equality of arms' is a common law principle which imposes on the prosecution an obligation to disclose any material in their possession, which may assist the accused in exonerating himself.

75. The Court notes that the Respondent State has neither responded to this allegation nor challenged the veracity of the Applicants' contention in this regard.

76. The Court recalls that in accordance with Article 7(1)(c) of the Charter everyone has a right to defence. In criminal matters, this right requires that accused persons such as the Applicants should be promptly informed of the evidence that will be tendered to support the charges against them, whether testimonial or in other forms to enable them to prepare their defence in this regard.

77. The Applicants should have been promptly provided with all copies of the Prosecution Witness' statements to facilitate them to prepare their defence. The Court notes that, by the time the prosecution's case started on 28 August 2002, the Respondent State had not provided the Applicants some witness statements and this continued up to two and a half years later despite the orders of the Trial Court in this regard.

78. The Court is of the view that this undue delay in providing the Applicants with the witness statements, affected the Applicants' right to prepare their defence which constitutes a violation of Article 7(1)(c) of the Charter.

79. Consequently, the Court holds that the denial of access to some of the Prosecution's witness's statements and the delay in providing them with some witness statements was a violation of Article 7(1)(c) of the Charter by the Respondent State.

iii. Allegation relating to the Applicants not being given an opportunity to be represented by Counsel

80. The Applicants submit that they were not given any opportunity

to be represented by Counsel at the trial and appellate stages of the proceedings.

81. The Applicants submit that in spite of them being lay, indigent and incarcerated persons facing serious offences carrying heavy sentences they were not assigned legal representation for most of the trial process. They state that they were only briefly represented by Advocate Muna on 9 August 1999 while their bail applications were being heard.

82. The Applicants further argue that the Legal Aid (Criminal Proceedings) Act places a positive obligation on the presiding authority to grant legal aid where it is desirable and necessary, in the interest of justice and where the accused does not have the means to retain legal assistance.

83. The Respondent State avers that the above-mentioned Act entitles accused persons to legal assistance subject to their request. The Respondent State argues that the Applicants never requested for legal aid and that the First Applicant, Thobias Mango was represented by Advocate Feren Kweka during the hearing of the appeal before the Court of Appeal.

84. Article 7(1)(c) of the Charter provides that. "1. Every individual shall have the right to have his cause heard. This comprises: …(c) the right to defense, including the right to be defended by counsel of his choice".

85. It emerges from the file that Advocate Muna represented the Applicants on 9 August 1999 during their bail applications and Advocate Feren Kweka represented the First Applicant during the oral phase of their appeal before the Court of Appeal. The Applicants on the other hand, were not represented during their trial at the District Court of Mwanza and their appeal in the High Court and the Second Applicant was unrepresented during the oral phase of the proceedings in the Court of Appeal.

86. The Court has previously held that the right to a fair trial under Article 7 of the Charter includes the right to free legal representation especially in cases where accused persons are charged with serious criminal offences that attract heavy sentences.[14] The Court has also previously held that for serious offences such as armed robbery that carry heavy custodial sentences, the Respondent State is under an obligation to provide the accused persons, such as the Applicants, *proprio motu* and free of charge, the services of a lawyer throughout

14 *Mohamed Abubakari v Tanzania* Judgment *op cit* paras 138 - 142.

the judicial proceedings in the local courts.[15] In the instant case, the Applicants were charged with armed robbery, an offence that attracts a minimum sentence of thirty (30) years imprisonment.

87. The Court therefore finds that by failing to provide the Applicants with a lawyer to represent them in the proceedings, the Respondent State violated the Applicants' right to defence.

iv. Allegation that the Courts did not apply the required standard of proof

88. The Applicants have raised allegations relating to the standard of proof applied for their cases. The Applicants submit that the charges against them were not proved to the standard required in a criminal trial since no weapon was discovered or tendered to support the charge of armed robbery. The Applicants further submit that the owner of the *Bureau de Change* mentioned in the charge sheet never testified in Court on the ownership of the money allegedly stolen therefrom. The Applicants submit that it is not possible to prove the offence of robbery without first proving theft and in turn, theft can be proven only if the ownership of the item stolen is established.

89. The Respondent State avers that the Applicants raised the issue of non-production of a weapon in their appeal in the High Court but later abandoned this ground of appeal before the Court of Appeal.

90. The Respondent State further submits that the Second Applicant raised the issue of the prosecution not proving the offence against them beyond reasonable doubt on the basis of the lack of testimony in Court by the owner of the *Bureau de Change* that the alleged stolen money was his property. The Respondent State submits that the Court of Appeal found that the evidence tendered by the prosecution met the standard of proof beyond reasonable doubt even without production of weapons or the testimony of the owner of the *Bureau de Change*.

91. The issue for determination by this Court is whether in the absence of testimony of the owner of the *Bureau de Change* and the lack of production of the crime weapon, the national courts failed to apply the required standard of proof.

92. This Court notes that the record before it indicates that the High Court examined the evidence of the victim of the armed robbery, Fatuma Said, the evidence of the police investigators and the Applicants' accomplice's evidence. Fatuma Said acted as a witness

15 *Alex Thomas v Tanzania* Judgment *op cit* para 124; *Mohamed Abubakari v Tanzania Judgment op cit* para 139; Christopher *Jonas v Tanzania* Judgment *op cit* paras 77 - 78.

throughout the trial. The High Court examined the record which shows that Fatuma Said who testified as Prosecution Witness 4 stated that she was attacked by two suspects who pointed a gun at her. The High Court also found that the third Accused in the trial, Mr. Wilfred Wilbert (now deceased) also confessed that he and the Second Applicant robbed Fatuma Said. The record shows that the Third Accused's testimony was corroborated by Detective Constable Shaban and Moses who interrogated and witnessed the Third Accused's confession and testified as Prosecution Witnesses 1 and 2, respectively.

93. This Court also notes that the Court of Appeal examined the record and the findings of the Trial Court and the High Court and found no fault therein. The Court of Appeal found that the absence of the weapon used to commit the crime and of the testimony of the owner of the *Bureau de Change* on their own did not prevent the Applicants from defending themselves and the Courts from finding that the Prosecution had proven the case beyond reasonable doubt since there were other sources of evidence that corroborated the testimony of the victim, Fatuma Said. The Court notes that the Applicants have also not demonstrated how the absence of the weapon and the lack of testimony by the owner of the *Bureau de Change* could lead to the domestic courts to conclude that the required standard of proof was not met.

94. In line with its jurisprudence, in the Matter *of Mohamed Abubakari v United Republic of Tanzania*, this Court is of the view that a fair trial requires that where a person faces a heavy prison sentence, the finding that he or she is guilty and the conviction must be based on strong and credible evidence.[16] In the instant case, the Court notes that the Trial Court, the High Court and the Court of Appeal determined that there was evidence to prove beyond reasonable doubt that the Applicants committed the crime they were charged with despite the fact that the weapon alleged to have been used to commit the crime was not tendered in evidence and the owner of the *Bureau de Change* did not testify.

95. In the view of this Court, there is nothing on the record to show that the domestic courts did not apply the required standard of proof in convicting the Applicants. In any event, the Applicants have not provided sufficient evidence to show that the procedures followed by the domestic courts in addressing the issue of the weapon used to commit the crime and the testimony of owner of the *Bureau de Change* violated their right to a fair trial with respect to the standard of proof.

96. Accordingly, the Court finds that the Respondent State did not

16 *Mohamed Abubakari v Tanzania Judgment op cit* para 174.

violate the Applicants' right to a fair trial in this regard.

v. Allegation relating to the changing of the Magistrate hearing the case

97. The Applicants allege that the changing of the Magistrate denied them a chance to be heard and that therefore they did not have a fair trial.

98. The Respondent State submits that the Court of Appeal considered this matter in Criminal Appeal No. 27 of 2006 and found that the change of magistrates did not occasion an injustice. The Respondent State avers that Section 214 of the Criminal Procedure Act provides for conviction or committal where proceedings are heard partly by one magistrate and partly by another.[17]

99. The issue for determination is whether the change of the Magistrate hearing the case affected the Applicants' right to be heard.

100. The Court notes that the record indicates that the case was heard by three different Magistrates successively, in three different instances. The first Magistrate heard the matter until he was transferred to another duty station. The second Magistrate continued hearing the matter until, following the Applicants' complaints of loss of confidence in her, she recused herself from hearing the case. Thereafter, the third Magistrate completed the hearing of the case and delivered the judgment.

101. The record also indicates that the High Court considered whether the second Magistrate had proper grounds to recuse herself and whether the Applicants were prejudiced when the second and third Magistrates did not address the Applicant's concerns in terms of Section 214 of the Criminal Procedure Act. The High Court examined the circumstances under which a judicial officer may be recused namely, that there should be evidence of a conflict between the litigant and the Magistrate or the latter has a close relationship with the adversary party or one of them, and that the Magistrate or a family member has an interest in the outcome of the litigation other than the administration of justice. After examining these circumstances in light of the facts of the case, the High Court found that there was no justification for the second Magistrate to have disqualified herself.

102. Nonetheless, the High Court found that the failure of the second and third Magistrates to address the accused in terms of Section 214 of the Criminal Procedure Act did not amount to an omission that would

17 Section 214 of the Criminal Procedure Act [Cap. 20 Revised Edition 2002] provides that if a magistrate is unable to continue hearing a case, it is at the discretion of the magistrate who takes it over whether to proceed with the matter based on the evidence recorded so far or start taking the evidence afresh.

occasion an injustice.

103. The Court of Appeal also examined the issue and found that the Trial Court's failure to accord the Applicants an opportunity to address it on whether the trial should have proceeded or started afresh did not constitute a fatal omission as, pursuant to Section 214 of the Criminal Procedure Act, the Trial Court had the discretion to proceed with the hearing without according the Applicants this opportunity. The Court of Appeal found that the second and third Magistrates who heard the case applied the discretion given to them under the law judiciously.

104. The Court notes further that, the Applicants did not prove whether the Magistrates were biased, whether the evidence admitted by the Second Magistrate was prejudicial to their case or how the Magistrates failed to properly apply their discretion by proceeding with the matter rather than hearing it afresh.

105. In light of the foregoing, the Court finds that the replacement of the Magistrate in charge of the case does not violate the Applicants' right to be tried by an impartial court.

vi. Allegation relating to the lack of due consideration of written submissions by the Court of first instance

106. The Applicants submit that during the trial, the Court did not consider or accord any weight to their written submissions tendered in Court as their defense, and that the High Court and Court of Appeal did not draw any adverse inference on this omission by the Trial Court.

107. The Respondent State submits that the Second Applicant raised this allegation as his eleventh ground of appeal before the Court of Appeal, but that the Court of Appeal did not consider it because it could not consider matters of evidence not adduced at the High Court, without good reason.

108. The question for the Court to determine is whether the Applicants' right to be heard would be violated if their written submissions are not referenced in the judgment.

109. The Court is of the view that the right to be tried heard as provided under Article 7(1) of the Charter extends to the right to be given reasons for the decision.[18]

110. In the instant case, the record shows that the Magistrate recorded the Applicants' oral evidence and after the close of the defence case, only the Second Applicant chose to file written submissions. The record

18 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* adopted by the African Commission on Human and Peoples' Rights in 2003 para 2(i).

also shows that the Magistrate acknowledged receipt of the Second Applicant's written submissions and that the Prosecution chose to abandon their right of reply to the same.

111. This Court notes that the Magistrate examined the evidence on record and provided a reasoned ruling on that basis without having to make reference to the written submissions. This Court further notes that record indicates that the lack of reference to the written submissions did not form a ground of appeal before the High Court, but it was raised as a ground of appeal before the Court of Appeal.

112. The Court finds that it has not been proven that the lack of consideration of the Second Applicant's written submissions violated the Applicants' right to be heard.

113. Accordingly, the Court holds that the Respondent State did not violate Article 7(1) of the Charter.

vii. Allegation relating to the judgments being defective and erroneous due to contradictory evidence and therefore being based on the wrong record

114. The Applicants submit that the evidence of Prosecution Witness 2, Detective Constable Moses was prejudiced and contradicted itself with the evidence of Prosecution Witness 3, Assistant Inspector Mvulla who was the officer who arrested, searched and interrogated them. The Applicants further submit that as a result, the findings of the Respondent State's Courts were based on the wrong record which had patent errors.

115. The Respondent State avers that the issue of contradictions in the evidence of Prosecution Witnesses 2 and 3 were never raised as a ground of appeal before the High Court or the Court of Appeal. The Respondent State avers that the Court of Appeal evaluated all the evidence and ruled that the Prosecution Witnesses 1, 2 and 3 were credible. The Respondent State maintains that the Court of Appeal duly evaluated the points of law and evidence adduced and confined its assessment to the substantial issues of evidence.

116. The Court recalls that though it has no power to re-evaluate the evidence on which the domestic courts relied to convict the Applicants, it has jurisdiction to determine whether, the manner in which the domestic courts have evaluated the evidence is compliant with standards set out in applicable international human rights instruments. The issue for determination in this regard is whether the domestic courts' determination on the alleged contradictions between Prosecution Witnesses 1 and 2 was in line with the standards set out in Article 7(1)(c) of the Charter.

117. The record indicates both the High Court and Court of Appeal

examined and evaluated the evidence of Prosecution Witnesses 2 and 3 and found that there were no contradictions and consequently, the record was not erroneous.

118. The Court finds that there is nothing on the record before it indicating that the domestic courts did not comply with the provisions of Article 7(1)(c) of the Charter in assessing the evidence of these prosecution witnesses. Accordingly, the Court holds that the Respondent State did not violate Article 7(1)(c) of the Charter.

viii. Allegation relating to misconstrued and misapplied evidence by the Courts

119. The Applicants submit that the Court of Appeal determined their appeal contrary to principles of law.

120. The Respondent State avers that the Court of Appeal considered the argument and did not find fault with the findings of the Trial Court or the High Court.

121. The Court notes that the Applicants have not elaborated on this claim.

122. In a previous case, this Court has stated that

> "General statements to the effect that this right has been violated are not enough. More substantiation is required".[19]

123. The Court notes that, in the instant case, the Applicants are making general claims regarding the violations of their rights without substantiation.

124. Accordingly, the Court finds that the alleged violations have not been proven, and therefore dismisses the same.

ix. Allegation that the thirty-year Sentence was not in force at the time the robbery was committed

125. In the Application, the Applicants submit that they were condemned to serve a sentence of thirty (30) years imprisonment contrary to Sections 285 and 286 of the Penal Code, and that this was not the sentence for the offence at the time it was committed. They state that the sentences against them were harsh and excessive and therefore in violation of their rights under Article 7(2) of the Charter and Article 13(6)(c) of the Respondent State's Constitution. In the Reply to the Response, the Applicants abandoned this claim.

126. The Respondent refutes this allegation, stating that the Applicant

19 *Alex Thomas v Tanzania* Judgment, *op cit* para 140.

has raised it for the first time before this Court. The Respondent State maintains further that, the applicable law required that conviction for armed robbery attracted a minimum sentence of thirty (30) years' imprisonment.[20]

127. In view of the fact that the Applicants abandoned this claim, the Court finds that this allegation has become moot.

x. Allegations relating to violation of Articles 8 and 10 of the Universal Declaration of Human Rights

128. The Applicants allege that the Respondent State has violated their rights provided under Articles 8 (right to an effective remedy by competent national tribunals for acts violating fundamental rights) and 10 (entitlement in full equality to a fair hearing by an independent and impartial tribunal in determination of rights and obligations and of criminal charges) of the Universal Declaration of Human Rights.

129. The Respondent State did not specifically respond to these allegations.

130. The provisions of Articles 8 and 10 of the Declaration are reflected in Article 7 of the Charter under the aegis of which the Court has already made determinations regarding some allegations of violation of the Applicants' rights by the Respondent State. In this regard therefore, the Court finds that it is not necessary to determine whether the Respondent has violated Articles 8 and 10 of the Universal Declaration of Human Rights.

xi. Allegation that Section 142 of the Respondent State's Evidence Act is incompatible with international standards on the right to a fair trial

131. The Applicants claim that Section 142 of the Respondent State's Evidence Act is incompatible with international standards on the right to a fair trial on the basis that it denies accused persons the opportunity to cross-examine accomplices who testify for the prosecution.

132. The Respondent State did not make submissions regarding this prayer.

133. Section 142 of the Law of Evidence Act [Cap. 6 Revised Edition, 2002] provides that:

> "An accomplice shall be a competent witness against an accused

20 Section 285 and 286 of the Penal Code [Cap 6. As amended by Act No. 10 of 1989], the Minimum Sentences Act [Cap. 90 of 1972] as amended by Act No. 6 of 1994 Written Laws (Miscellaneous Amendments) and Court of Appeal of Tanzania (Criminal Appeal No. 69 of 2004), *William R Gerison v The Republic*.

person; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

134. The Court notes that national laws are considered as fact before international courts and can form the basis of allegations of violations of international law.[21] The Court observes however that it does not appear from the above-mentioned provision that there is a restriction on cross-examination of accomplices. In any event, the Applicants have not elaborated how the aforementioned provision of the Evidence Act does not conform to the international standards on the right to a fair trial. The Court therefore finds that this allegation lacks merit and consequently dismisses it.

B. Allegations of violations of other rights

i. Allegation relating to the dismissal of the Applicants' review and constitutional petition

135. The Applicants submit that their Application for Review of the Court of Appeal's decision of 12 May 2010 was dismissed on the basis that their grounds for review may have been raised in an Appeal. They also submit that their first ground of appeal regarding their identification qualified as a ground for review.

136. The Respondent State maintains that the Applicants' ground for review that the decision was based on a manifest error on the face of the record resulting in a miscarriage of justice did not fall within the criteria set by the Court of Appeal Rules.

137. This Court notes that the Applicants have not provided proof to support this allegation and nothing on record to indicate that the Court of Appeal rejected the Application for Review arbitrarily. This Court accordingly dismisses this allegation for lack of merit.

ii. Allegation relating to the rejection of the Constitutional Petition

138. The Applicants state that they filed an Application in the High Court of Tanzania pursuant to the Basic Rights and Duties Enforcement Act. They claim that their Application was acknowledged as received

21 See Application No. 009/2011 and Application No. 011/2011 (Consolidated). Judgment of 14/06/2013, *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher R Mtikila v United Republic of Tanzania*. paras 91-119; Application No.001/2014. Judgment of 18/11/2016 *Action Pour la Protection des Droits de L'Homme v Republic of Cote d'Ivoire* paras 107-151.

by the stamp of the District Registrar of the High Court at Mwanza dated 17 June 2013. They maintain that after some time they enquired about their Application but that it was irregularly rejected and returned to them without any official correspondence. They allege that they were verbally informed that their complaints should be directed to the Court of Appeal.

139. The Respondent State denies the allegations and puts the Applicants to strict proof. The Respondent State further states that in the event that the Applicants' Application to the High Court was rejected, the Applicants could have pursued the matter administratively or by filling another petition before the Court.

140. The Court notes from the record before it that only copies of correspondence to the Chief Justice, the Judicial Service Commission and the Ministry of Constitutional and Legal Affairs relating to the consideration of their Application for review of the Court of Appeal's decision of 12 May 2010 on their appeal and their constitutional petition filed under the Basic Rights and Duties Enforcement Act are herein attached. Though the correspondence indicates that the Applicants filed a constitutional petition under the Basic Rights and Duties Enforcement Act, it is not enough proof to support their claim that their petition was irregularly rejected.

141. The Court therefore finds that this allegation lacks merits and consequently dismisses it.

C. Allegations relating to violations of Articles 2, 3, 5, 19 and 28 of the Charter and Articles 1, 2, 5, 6 and 7 of the Universal Declaration of Human Rights

142. The Applicants allege that the Respondent State has violated Articles 2 (right to enjoyment of the rights and freedoms recognised in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status), 3 (right to equality before the law and equal protection of the law), 5 (right to respect of one's dignity and to recognition of legal status and prohibition of all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment), 19 (equality of all peoples) and 28 (duty to consider others without discrimination) of the Charter. The Applicants also claim that the Respondent State has violated Articles 1 (recognition of freedom and equality in dignity and rights), 2 (entitlement to the rights and freedoms, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status), 5 (right not to be subjected to torture or to cruel,

inhuman or degrading treatment or punishment), 6 (right to recognition everywhere as a person before the law) and 7 (right to equality before the law and to equal protection of the law) of the Universal Declaration of Human Rights.

143. In the Response, the Respondent State specifically denies violating Articles 3 and 19 of the Charter and Articles 1, 2, and 6 of the Universal Declaration of Human Rights and they do not respond to the other allegations.

144. Other than claiming that they were denied medical treatment and they overstayed in police custody, the Applicants make general statements in this regard.

145. The Court has reiterated that, "General statements to the effect that this right has been violated are not enough. More substantiation is required".[22] The Court notes that, in the instant case, the Applicants are making general claims regarding the violations of these rights without substantiation.

146. Accordingly, the Court finds that the alleged violations have not been substantiated and they are therefore dismissed.

D. Allegation of violation of Article 1 of the Charter

147. In their Reply to the Respondent State's Response to the Application, the Applicants have alleged that the Respondent State has violated Article 1 of the Charter.

148. The Respondent State has not responded regarding the alleged violation of Article 1 of the Charter.

149. The Court recalls its previous decisions[23] in which it held that "when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not been complied with and has been violated."

150. In the instant case, the Court has held that the Respondent State has violated Article 7(1)(c) of the Charter. On the basis of the foregoing observations, the Court thus finds in conclusion that the violation of the said rights entails violation of Article 1 of the Charter.

VIII. Remedies sought

151. The Applicants claim to have suffered irreparable damage due

22 *Alex Thomas v Tanzania Judgment op cit* para 140.

23 *Ibid* para 135; See also *Norbert Zongo v Burkina Faso Judgment op cit* para 199; *Kennedy Onyachi v Tanzania Judgment op cit* para 159.

to the violation of their human rights. As indicated above in paragraphs 11 and 20 of this judgment, the Applicants have requested the Court to, *inter alia*, order their release from custody and grant them reparations. They have not specified the additional reparations they seek.

152. For its part, as indicated in paragraph 23 above of this Judgment, the Respondent State has, among others, prayed the Court to order that the Applicants continue serving their sentences and deny their request for reparations

153. 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."

154. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for reparation submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and people's rights, or if the circumstances so require, by a separate decision".

155.

156. As regards the Applicant's prayer to be set free, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances.[24] In the instant case, the Applicants have not indicated and provided proof of such circumstances. Consequently, the Court dismisses this prayer.

157. The Court however notes that the aforesaid finding does not preclude the Respondent State from considering such a measure on its own.

158. The Court notes that neither Party made detailed submissions concerning the other forms of reparation. It will therefore make a ruling on this question at a later stage in the procedure after having heard the Parties.

IX. Costs

159. The Court notes in this regard that Rule 30 of its Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs".

160. None of the Parties have made a prayer as to costs.

161. Having considered the circumstances of this case, the Court decides that each Party shall bear its own costs.

24 *Alex Thomas v Tanzania Judgment op cit* para 157; *Mohamed Abubakari v Tanzania Judgment op cit* para 234.

X. Operative part

162. 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 objections on the admissibility of the Application;
iv. *Declares* the Application admissible;

On the merits:
v. *Finds* that the Applicants have not established the alleged violation of Articles 2, 3, 5 ,19 and 28 of the Charter and Articles 1, 2, 5, 6 and 7 of the Universal Declaration of Human Rights
vi. *Finds* that the Respondent State has not violated Article 7 of the Charter as regards: the Applicants' identification; the changing of the Magistrate hearing the case; the alleged failure by the national courts to apply the required standard of proof; the alleged lack of consideration of the Second Applicant's written submissions by the Trial Court and the allegation that the judgments against the Applicants were defective and erroneous; *Consequently* finds that the prayer that the Respondent State has violated Articles 8 and 10 of the Universal Declaration of Human Rights has become moot;
vii. *Finds* that the incompatibility of Section 142 of the Evidence Act with the international standards on the right to a fair trial has not been established;
viii. *Finds* that the allegations relating to the dismissal of the Applicants' Application for Review and the rejection of their Constitutional Petition have not been established;
ix. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter as regards: the failure to provide the Applicants with free legal assistance; and the failure to provide the Applicants with copies of some witness statements and the delay in providing them some witness statements; *Consequently finds* that the Respondent State has violated Article 1 of the Charter;

On remedies
x. *Does not grant* the Applicants' prayer for the Court to directly order their release from prison, without prejudice to the Respondent State applying such a measure *proprio motu*; and

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

On costs

xii. *Decides* that each Party shall bear their own costs.

Ramadhani v Tanzania (merits) (2018) 2 AfCLR 344

Application 10/2015, *Amiri Ramadhani v United Republic of Tanzania*

Judgment, 11 May 2018. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant had been convicted and sentenced for robbery of a motor vehicle, attempted suicide and for inflicting grievious bodily harm on his person. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court found that the Applicant's fair trial guarantees had been violated.

Jurisdiction (conformity of domestic proceedings with Charter, 24)

Admissibility (exhaustion of local remedies, extraordinary remedy, 39; submission within reasonable time, 50)

Fair trial (free legal representation, 68, 69)

Reparations (not appellate court, 84; release an exceptional remedy, 85)

I. The Parties

1. The Applicant, Mr Amiri Ramadhani (herein-after referred to as the "Applicant") is a national of the United Republic of Tanzania who is serving a thirty (30) year sentence in Ukonga Central Prison in Dar es Salaam for armed robbery, attempted suicide and for inflicting grievious bodily harm on his person.

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

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges that he was charged on 2 March 1998

with the offence of robbery of a vehicle, attempted suicide and inflicting serious bodily harm on his person in Criminal Case No. 199/98 before the Arusha District Court; On 25 August 1999, the Applicant was convicted and sentenced to thirty (30) years' imprisonment for armed robbery, an offense punishable under Sections 285 and 286 of the Penal Code, Chapter 16 of the Laws of Tanzania; 7 years for attempted suicide under Section 217 of the same Code; and 2 years for causing grievous bodily harm under Section 225 of this Code.

4. On 28 August 1999, the Applicant appealed the Judgment rendered by the Arusha District Court before the High Court of Tanzania in Criminal Case No. 64/2000 and on 22 September 2005, the High Court upheld the 30 years imprisonment sentence set aside the 7 years imprisonment sentence for attempted suicide by reducing the same to 2 years, and dismissed all the other counts.

5. On 25 September 2005, the Applicant filed Criminal Appleal No. 228/2005 before the Court of Appeal of Tanzania sitting in Arusha. By a Judgment of 29 October 2007, the Court of Appeal dismissed this appeal and upheld the sentence of thirty (30) years imprisonment.

B. Alleged violations

6. The Applicant made several complaints in relation to the manner of his detention, trial and sentencing by the Respondent State's judicial authorities. He specifically complains about the following:

"i. Having been accused on the basis of the biased acts of a Police Officer who, acting for and on behalf of the Criminal Investigation Department (CID), obtained and registered the Applicant's statement in a manner contrary to the established procedure;

ii. Having been detained in contravention of the provisions of Sections 50 and 51 of the Criminal Procedure Act;

iii. Having been sentenced on the basis of an error in law and in fact for having taken into account the so-called testimony of a prosecution witness;

iv. The excessive nature of the 30 years prison sentence pronounced by the Court of First Instance contrary to the maximum sentence of 15 years set forth in Sections 285 and 286 of the Penal Code;

v. Having been sentenced in violation of Section 13 (b) (c) of the 1977 Constitution of the United Republic of Tanzania and contrary to the African Charter on Human and Peoples' Rights;

vi. That the Appellate Courts failed to take note that the

30 years prison sentence was excessive and was not applicable at the time the facts occurred;

vii. Having not received the assistance of a lawyer as well as legal aid;

viii. Having thus been discriminated against."

7. That in light of the foregoing, the Applicant submits that the Respondent State has violated Article 13(b)(c) of the Constitution of the United Republic of Tanzania, as well as Articles 1, 2, 3, 4, 6 and 7(c) and (2) of the African Charter on Human and Peoples' Rights.

III. Summary of the procedure before the Court

8. The Registry received the Application on 11 May 2015 and acknowledged receipt thereof on 5 June 2015.

9. By a notice dated 9 June 2015 the Registry, pursuant to Rules 35(2) and 35(3) of the Rules of Court (herein-after referred to as the "Rules"), served the Application on the Respondent State, and transmitted the same to the Chairperson of the African Union Commission and, through her, to all the other States Parties to the Protocol.

10. By a letter dated 14 August 2015 received at the Registry on 18 August 2015 the Respondent State filed its Response.

11. Following the directive of the Court, the Registry requested the Pan African Lawyers Union (PALU) to provide legal assistance to the Applicant. On 20 January 2016 PALU accepted to assist the Applicant and the Parties were notified accordingly. On 29 January 2016 the Registry forwarded to PALU all the relevant documents on the Matter to enable the latter file a Reply to the Response. On 30 May 2016 the Registry informed PALU that the Court had, *proprio motu,* granted it an extension of thirty (30) days within which to file the Reply.

12. On 27 June 2016 PALU filed its Reply which was transmitted to the Respondent State by a notice dated 28 June 2016.

13. On 14 September 2016, the Court decided that the written procedure is closed, and the Parties were notified accordingly.

IV. Prayers of the Parties

14. The Applicant's prayers as contained in the Application are as follows:

"i. Facilitate him with free legal representation or legal aid under Rule 31 of the Rules of Court and Article 10(2) of the Protocol;

ii. Declare the Application admissible and give effect thereto

by invoking the admissibility conditions prescribed in Article 56 of the Charter, Article 6(2) of the Protocol and Rule 40 of the Rules of Court;

iii. Declare that the Respondent State has violated the Applicant's rights guaranteed by Articles 1, 2, 3, 4, 5, 6, and 7(c) and (2) of the Charter;

iv. Consequently, issue an order compelling the Respondent State to set free the Applicant;

v. Issue an order for reparations by virtue of Article 27(1) of the Protocol and Rule 34(5) of the Rules, and such other order or measure as the Court may deem appropriate. should this Honourable Court find merit in the Application and in the prayers sought;

vi. Quash the conviction for armed robbery, the punishment inflicted and release the Applicant from prison."

15. In the Reply to the Respondent State's Response, the Applicant reiterated his prayers, and sought the following orders from the Court:

"A declaration that the Application is admissible and that the Court has jurisdiction to hear the case on the merits as *per* Articles 3(2) of the Protocol and Rules 26(2) and 40(6) of its Rules;

A declaration that the Respondent State has violated the Applicant's right to a fair trial as protected by the Charter under Article 7 on at least two grounds:

(i) failure to provide the Applicant with legal assistance;

(ii) convicting the Applicant on the sole basis of a statement under caution that was uncorroborated and which the Applicant had in any case withdrawn."

16. In its Response, with respect to the jurisdiction and admissibility of the Application, the Respondent State prays the Court to:

"i. Hold that the Application has not invoked the jurisdiction of this Honourable Court;

ii. Dismiss the Application for non-compliance with the admissibility conditions stipulated under Rule 40(5) of the Rules."

17. With respect to the merits of the Application, the Respondent State prays the Court to rule that it has not violated Articles 1, 2, 3, 4, 5, 6, 7 (1)(c) and 7(2) of the Charter.

18. The Respondent State therefore prays the Court to dismiss the Application for lack of merit, as well as the Applicant's request for reparations and rule that the Applicant should continue to serve his

prison sentence.

V. Jurisdiction

19. Pursuant to Rule 39(1) of its Rules, the Court "shall conduct preliminary examination of its jurisdiction…."

A. Objection on material jurisdiction

20. The Respondent State submits that the Applicant requires this Court to act as an Appeal Court or Supreme Court, whereas it does not have the power to do so.
21. According to the Respondent State, Article 3 of the Protocol does not give the Court the latitude to adjudicate on issues that have not been raised by the Applicant before the national courts, review judgments rendered by the said courts, reassess the evidence and make a finding.
22. The Respondent State asserts that in its judgment in Criminal Case No. 228/2005, the Court of Appeal of Tanzania examined all the allegations made by the Applicantand that this Court is bound to respect the Judgment rendered by that Court.
23. The Applicant refutes this assertion. Citing the Court's jurisprudence, particularly in *Alex Thomas v United Republic of Tanzania* and *Peter Joseph Chacha v United Republic of Tanzania*, he submits that the Court has jurisdiction as long as the allegations made are in respect of human rights violations.
24. The Court reiterates its position, that it is not an appellate body with respect to the decisions of national courts.[1] As the Court had emphasised in its 20 November 2015 Judgment in *Alex Thomas v United Republic of Tanzania,* it held that: *"*though this Court is not an appellate body with respect to decisions of national courts this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned".[2] In the instant case, the Court's

1 Application No.005/2013, Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania (Alex Thomas v Tanzania* Judgment), para 130; Application No. 010/2015, Judgment of 28/09/2017, *Christopher Jonas v United Republic of Tanzania (Christopher Jonas v Tanzania* Judgment*),* para 28; Application No. 003/2014, Judgment of 24/11/2017, *Ingabire Victoire Umuhoza v Republic of Rwanda (Ingabire Victoire v Rwanda* Judgment*),* para 52; Application No. 007/2013, Judgment of 03/06/2013, *Mohamed Abubakari v United Republic of Tanzania (Mohamed Abubakari v Tanzania* Judgment*)*, para 29.

2 *Alex Thomas v Tanzania Judgment op cit* para 130.

jurisdiction cannot be contested as long as "the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the Respondent State."[3]

25. In any case, the Applicant has alleged violations of the rights guaranteed by the Charter. Accordingly, the Court dismisses the Respondent State's objection in this regard and holds that it has material jurisdiction.

B. Other aspects of jurisdiction

26. The Court notes that its personal, temporal and territorial jurisdiction is not contested by the Respondent State, and that nothing on record indicates that the Court lacks jurisdiction. It therefore holds:

i. that it has personal jurisdiction, given that the Respondent State is a Party to the Protocol and has deposited the Declaration prescribed under Article 34(6) allowing individuals to bring applications directly to the Court, pursuant to Article 5(3) of the Protocol (*supra,* paragraph 2);

ii. that it has temporal jurisdiction insofar as the alleged violations are of a continuing nature, since the Applicant is still convicted for what he considers to be defects;[4]

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

27. In light of the foregoing considerations, the Court holds in conclusion that it has jurisdiction to hear the case.

VI. Admissibility of the Application

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 39(1) of the Rules, "The Court shall conduct preliminary examination of … the admisibility of the Application in accordance with Article… 56 of the Charter and Rule 40 of these Rules".

30. Rule 40 of the Rules, which in substance restates the provisions

3 *Ibid* para 45.

4 Application No. 011/2013, Ruling of 21/06/2013, (Preliminary Objections), *Beneficiaries of the late Norbert Zongo and Others v Burkina Faso (Norbert Zongo v Burkina Faso Ruling*), paras 71 to 77.

of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:
>
> 1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> 2. Comply with the Constitutive Act of the Union and the Charter;
> 3. Not contain any disparaging or insulting language;
> 4. Not be based exclusively on news disseminated through the mass media;
> 5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure is unduly prolonged;
> 6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter;
> 7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility in contention between the Parties

31. The Respondent State raises two objections regarding the exhaustion of local remedies and the timeframe for seizure of the Court.

i. Objection based on alleged non-exhaustion of local remedies

32. In its Response, the Respondent State argues that the Application has not complied with the admissibility conditions prescribed under Article 56(5) of the Charter and Rule 40(5) of the Rules and that it has not been filed within a reasonable time after local remedies were exhausted.

33. The Respondent State further argues that with regard to the alleged violation of the rights enshrined in the Bill of Rights, Part III, Articles 12 to 29 of the Constitution of the United Republic of Tanzania, as in this case, the Applicant has the possibility to file a Constitutional Petition before the High Court of Tanzania orrequest a review of the decision of the Court of Appeal in accordance with Rule 65 of that Court's Rules.

34. The Respondent State argues in conclusion that the Applicant's

refusal to exercise the available and effective remedies, especially the Constitutional Petition, the review remedy and the request for legal assistance, all constitute tangible proof that the Applicant has not exhausted local remedies and that the Application should therefore be dismissed for non-compliance with the provisions of Rule 40(5) of the Rules.

35. The Applicant, in his Reply, does not contest the existence of the remedies invoked by the Respondent State but rather whether he was required to exhaust them. He argues that the remedies have been exhausted in as far as the Court of Appeal, the highest Court in the United Republic of Tanzania, delivered a Judgment in Criminal Case No. 228/2005, following his appeal.

36. With regard to the constitutional petition remedy and the review remedy, the Applicant alleges that these are "extraordinary remedies" which are not required to be pursued for the purposes of seeking redress before this Court.

37. Consequently, the Applicant argues that he has exhausted all the available local remedies and that the Application meets the admissibility condition set out in Rule 40(5) of the Rules of Court.

38. With regard to local remedies, the Court notes that it has been established that the Applicant filed an appeal against his conviction before the Court of Appeal of Tanzania, the highest judicial organ of the country, and that this Court upheld the judgments of the High Court and the District Court.

39. The key question is whether the two other remedies mentioned by the Respondent State, namely, the Constitutional Petition before the High Court and the Review before the Court of Appeal are remedies that must be exhausted by the Applicant within the meaning of Rule 40(5) of the Rules which in essence restates the provisions of Article 56(5) of the Charter. Regarding the filing of a Constitutional Petition on the violation of the Applicant's rights, the Court has already stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.[5] Similarly for the Application for Review.[6]

40. It is therefore clear that the Applicant has exhausted all the available ordinary remedies that he was required to exhaust. For this reason, the Court dismisses the objection based on the non-exhaustion of all local remedies proposed by the Respondent State.

5 *Alex Thomas v Tanzania Judgment* paras 65; *Mohamed Abubakari v Tanzania* Judgment *op cit* paras 66-70; Application No.011/2015. Judgment of 28/09/2017, *Christopher Jonas v United Republic of Tanzania. (Christopher Jonas v Tanzania Judgment)* para 44.

6 *Alex Thomas v Tanzania* Judgment para 63.

ii. Objection based on alleged non-compliance with a reasonable time

41. The Respondent State submits that the Applicant filed this Application five (5) years and two (2) months, after the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol.

42. The Respondent State maintains that the Application is inadmissible on the grounds that it has not complied with the conditions of admissibility envisaged in Rule 40(6) of the Rules.

43. The Respondent State relying on the jurisprudence of the African Commission on Human and Peoples' Rights in *Majuru v Zimbabwe,*[7] maintains that six (6) months is a reasonable period within which the Application should have been filed.

44. In his Reply, the Applicant refutes the Respondent State's allegations on reasonable time and argues that the Declaration filed under Article 34(6) of the Protocol was deposited thirty (30) months after the Court of Appeal's Judgment in Criminal Case No. 228/2005. The Applicant adds that, at that time, he was already incarcerated following his conviction and moreover, he had no access to information.

45. The Applicant asserts that, in the circumstances, the Application was filed within a reasonable time as envisaged by Article 56(6) of the Charter and Rule 40(6) of the Rules and he prays that the Court should refer to its own jurisprudence which requires that compliance with this requirement should be determined on a case-by-case basis.

46. The Applicant further contends that, in the circumstances, it was difficult for him being a lay person with regard to judicial matters to be aware that new remedies which were hitherto unavailable were now possible.

47. Lastly, the Applicant submits that, if the Court dismisses his Application on the ground that it should have been filed earlier than was the case, this would amount to a flagrant injustice and a continuing violation of the rights set forth in Articles 6 and 7 of the Charter, given that he is still in prison.

48. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 40(6) of the Rules, which, in substance, restates Article 56(6) of the Charter, simply mentions "a reasonable time from the date local remedies were exhausted orfrom the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

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

49. Local remedies were exhausted on 20 October 2007 when the Court of Appeal delivered the judgment. However, it was only on 29 March 2010 that the Respondent State filed the Declaration under Article 34(6) of the Protocol allowing individuals such as the Applicant to file applications before this Court. Therefore, this is the date from which time should be reckoned regarding the assessment of reasonableness as envisaged in Rule 40(6) of the Rules. The Application was filed five (5) years, one (1) month, one (1) week and six (6) days after the Respondent State filed the aforementioned Declaration. On this issue, the Court recalls its jurisprudence in *Norbert Zongo and Others v. Burkina Faso* in which it held that: "the Court finds that the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis".[8]

50. In the instant case, the fact that the Applicant is in prison, restricted in his movements and with limited access to information; the fact that he is indigent and unable to pay a lawyer; the fact that he did not have free assistance of a lawyer since March 1998; and may not have been aware of the existence of this Court before filing the Application- all justify some flexibility in determining the reasonableness of the time for filing this Application. In view of the foregoing, the Court finds that the Applicaiton has complied with the requirement of filing the Application within a reasonable time.

51. Accordingly, the Court dismisses the objection relating to the non-compliance with the requirement of filing the Application within a reasonable time and consequently finds Application admissible.

B. Conditions of admissibility not in contention between the Parties

52. The conditions in respect of the identity of the Applicant, incompatibility with the Constitutive Act of the African Union and the Charter, the language used in the Application, the nature of the evidence and the principle that an application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules), are not in contention between the Parties. The Court notes that nothing on record indicates that any of these conditions has not been fulfilled in this case.

8 *Alex Thomas v Tanzania* Judgment *op cit,* para 73; *Zongo and Others v Burkina Faso* Judgment o*p cit* para 121.

53. In light of the foregoing, the Court finds that this Application meets all the admissibility conditions set out in Article 56 of the Charter and Rule 40 of the Rules and declares the Application admissible.

VII. The merits

54. The Applicant alleges that the Respondent State has violated Articles 1, 2, 3, 4, 5, 6, 7(1)(c) and 7(2) of the Charter. The Court however notes that the Applicant dwelt only on violations of Articles 1 and 7 of the Charter which relate to rights, duties and freedoms, and the right to a fair trial, which this Court will now examine.

A. Alleged violations of the right to a fair trial

55. The Applicant raises several claims that relate to the alleged violation of the right to a fair trial which reads as follows:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> a. the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> b. the right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> c. the right to defense, including the right to be defended by counsel of his choice;
>
> d. the right to be tried within a reasonable time by an impartial court or tribunal.
>
> 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

i. Allegation relating to the defective charge sheet

56. The Applicant complains of procedural defects relating to the Charge Sheet arguing that the courts relied on the statement contained in the "statement under caution*,"* tendered as *Exhibit P1.* which he contests, alleging that it was obtained contrary to Sections 50 and 51 of the Criminal Procedure Act and, consequently, that the charge sheet was defective.

57. The Applicant further argues that where an accused contradicts his statements *ab initio,* the Court must determine the voluntary nature

of the said statements prior to admitting them in evidence. He avers that reliance on the statements contested by the Applicant to justify a conviction constitutes a violation of the principle of presumption of innocence set out in Article 7(1)(b) of the Charter.

58. The Respondent State disputes the Applicant's allegations, pointing out that the Applicant should provide proof to support his claim. According to the Respondent State, the statements made by the Applicant while in detention were compliant with the Criminal Procedure Act Chapter 20 of the Laws of Tanzania and their evidentiary value has been legally admitted and corroborated in accordance with the law of evidence.

59. The Court notes that the record before it shows that the Applicant contested his indictment at the High Court.

60. The Court finds, however, that the Applicant claims that there were procedural defects during his interrogation but does not satisfactorily explain how and whether these irregularities vitiated the decicion against him.

61. For the above reasons, the Court relying on the record, holds that the allegation in respect of irregularities in the charge sheet is not established.

ii. The allegation relating to an error in law with regard to the testimony of Prosecution Witness 1

62. The Applicant alleges that the Trial Judge and the Appelate Judges relied on the statements of Prosecution Witness 1 (PW1) obtained by a police officer acting in lieu of a Criminal Investigation Police Officer who showed up at the crime scene for the purpose of investigation, in breach of the procedure in this respect.

63. The Respondent disputes these allegations and submits that the Applicant has not provided irrefutable proof.

64. It is apparent from the record on file and, more specifically, from a reading of the three judgments delivered by the national courts that the Applicant's guilt was based not only on the statement of witness PW1, but also on witnesses PW2, PW3 and PW4, and at no point in the proceedings was the allegation regarding the annulment of the proceedings in relation to prosecution evidence PW1 raised. The Court further notes that the Applicant has not provided proof of this allegation.

65. The Court holds in conclusion that the allegation regarding procedural error relating to the statement of the prosecution witness PW1 is unfounded**.**

iii. The allegation relating to the lack of legal assistance

66. The Applicant alleges that he is indigent and that he received no legal assistance throughout the procedure which culminated in his conviction, whereas such assistance was imperative in view of the seriousness of the offen**c**e with which he was charged. He infers therefrom that the lack of free legal assistance has led to violation of his right to a fair trial guaranteed under Article 7 of the Charter.

67. **T**he Respondent State claims that The Legal Aid (Criminal Proceedings) Act, of 1 July 1969 as amended in 2002, provides for free legal aid in criminal proceedings involving indigent persons under certain conditions, including a request for that purpose. The Respondent State claims that the records indicate that the Applicant never made such a request to the national courts, and therefore that his claim in this regard is unfounded and must be dismissed.

68. The Court has previously held in the Matter of *Mohamed Abubakari v United Republic of Tanzania* that "an indigent person under prosecution for a criminal offence is particularly entitled to free legal assistance where the offence is serious, and the penalty provided by law is severe".[9]

69. The Applicant, in the instant case, being in the same situation as described above, the Court finds that the Respondent State was under an obligation to provide him, automatically and free of charge, the services of a lawyer throughout the judicial proceedings in the domestic courts. Having failed to do so, the Respondent State violated Article 7(1)(c) of the Charter.

iv. The allegation that the thirty years prison sentence was not in force at the time the facts occured

70. The Applicant submits that the thirty (30) years prison sentence pronounced by the Trial Court against him was excessive in terms of Sections 285 and 286 of the Penal Code which prescribes a maximum sentence of fifteen (15) years; and therefore that his conviction contravened the Constitution of the United Republic of Tanzania. He further submits that the 30 years prison sentence introduced and published by the Official Gazette No. 269 of 2004 in its Section 287 A, was not applicable at the time the facts occurred.

71. The Respondent State contests the above allegations, submitting that it lies with the Applicant to prove it. According to the Respondent State, the punishment applicable to the offence of armed

9 *Mohamed Abubakari v Tanzania* Judgment o*p cit* paras 138-142.

robbery under the Minimum Sentences Act as amended, is a custodial sentence of at least 30 (thirty) years. It states in conclusion that the punishment for armed robbery handed down by the Trial Court in Criminal Case No. 199/1998 was consistent with the Penal Code, the Minimum Sentences Act and Article 13(6)(a) of the Constitution of the United Republic of Tanzania (1977).

72. The Court notes that the issue for determination is whether or not the sentence meted out on the Applicant in 1999 and upheld by the Court of Appeal in 2006 and 2007, is in breach of the law.

73. The Court has already noted that thirty (30) years prison sentence has been, since 1994 the minimum punishment applicable to armed robbery in the United Republic of Tanzania.[10] In this case, the records show that in March 1998, the law applicable at the time the offence in question (armed robbery) was committed is the Tanzanian Penal Code of 1981 and the Minimum Sentences Act of 1972 as amended in 1989 and in 1994; and, consequently, the Applicant's allegation is unfounded.

74. The Court therefore holds that the allegation of a violation with regard to the punishment imposed on the Applicant following his conviction for armed robbery is unfounded and, as such, dismisses the allegation.

B. The allegation regarding the violation of Article 1 of the Charter

75. In the Application, it is alleged that the Respondent State has violated Article 1 of the Charter. The Respondent State, for its part, contends that all the rights of the Applicant have been respected.

76. Article 1 of the Charter provides that:

> "The Member States of the Organisation of African Unity, Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them".

77. The Court has already found that the Respondent State has violated Article 7(1) (c) of the Charter for having failed to provide the Applicant with legal assistance. Consequently, the Court reiterates its finding in *Alex Thomas v United Republic of Tanzania,* that: "… when the Court finds that any of the rights, duties and freedoms set out in the Charter are curtailed, violated or not being achieved, this necessarily means that the obligation set out under Article 1 of the Charter has not

10 *Mohamed Abubakari v Tanzania* Judgment *op cit* para 210.

been complied with and has been violated."[11]

78. After having found that the Applicant was deprived of his right to free legal assistance in violation of Article 7(1)(c) of the Charter, the Court holds that the Respondent State had simultaneously violated its obligation under Article 1 of the Charter.

VIII. Remedies sought

79. As indicated in paragraph 16 of this Judgment, the Applicant prays, *inter alia,* that the Court set aside his conviction, release him from prison and order that reparation measures be taken.

80. As indicated in paragraph 19 above the Respondent State requests that the Application be dismissed in its entirety for lack of merit and that accordingly, the Applicant should not be granted reparation.

81. 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."

82. In this respect, Rule 63 of the Rules stipulates that "the Court shall rule on the request for the reparation … by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

83. The Court recalls its position on State responsibility in *Reverend Christopher R. Mtikila v United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation."[12]

84. As regards the prayer to quash the Applicant's conviction and sentencing, the Court reiterates its decision that it is not an appellate Courts with powers to overturn the decisions of national courts, therefore it declines to grant this prayer.[13]

85. As regards the Applicant's prayer to be set free, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances.[14] In the instant case, the Applicant has not set out such circumstances. Accordingly, the Court dismisses this prayer.

86. The Court notes, however, that its decision does not prevent the

11 *Alex Thomas v Tanzania* Judgment, *op cit* para 135.

12 Application No. 011/2011 Ruling of 13/06/2014, *Reverend Christopher R Mtikila v United Republic of Tanzania,* para 27.

13 Application No.032/2015 Judgment of 23/03/2018, *Kijiji Isiaga v United Republic of Tanzania* para 95.

14 *Alex Thomas v Tanzania* Judgment *op.cit*, para 157; *Mohamed Abubakari v Tanzania Judgment op cit,* para 234.

Respondent State from taking such a measure, itself.

87. The Court, lastly, notes that the Parties did not file submissions regarding other forms of reparation. Hence, the Court shall rule on this issue at a later stage of the proceedings, after hearing the Parties.

IX. Costs

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

89. The Court notes that none of the Parties made prayers as to Costs.

90. Considering the circumstances of this matter, the Court decides that each Party shall bear its own costs.

X. Operative part

91. 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 objections on admissibility of the Application;

iv. *Declares* the Application admissible;

On the merits:

v. *Finds* that the alleged violation of Article 7relating 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 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.

Chrysanthe v Rwanda (jurisdiction and admissibility) (2018) 2 AfCLR 361

Application 022/2015, *Rutabingwa Chrysanthe v Republic of Rwanda*

Judgment, 11 May 2018. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, CHIZUMILA and BENSAOULA

Recused under Article 22: MUKAMULISA

The Applicant commenced this Application challenging the manner of his dismissal by the Respondent State. The Court declared the case inadmissible as the Applicant had failed take the case to the Supreme Court without any explanation.

Admissibility (exhaustion of local remedies, 45, 46; conditions are cumulative, 47)

I. The Parties

1. The Applicant, Rutabingwa Chrysanthe, is a citizen of the Republic of Rwanda.

2. The Respondent State, the Republic of Rwanda, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "Charter") on 21 October 1986 and to the Protocol on 25 May 2004. The Respondent State also deposited the Declaration prescribed in Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations on 22 January 2013. On 29 February 2016, the Respondent State notified the African Union Commission of its withdrawal of the aforesaid Declaration**,** and the African Union notified the Court on 3 March 2016 of the same. The Court issued an Order on 3 June 2016 indicating that the Respondent State's withdrawal will take effect on 1 March 2017.[1]

II. Subject of the Application

A. Facts of the matter

3. The Applicant was recruited by Decision of the Council of

1 See the Court's Order on this matter dated, 3 June 2016 on the Respondent State's withdrawal of the declaration made by virtue of Article 34(6) of the Protocol.

Ministers dated 17 September 1999, to serve as an Audit and Evaluations Expert at the Privatisation Secretariat under the auspices of the Ministry of Finance, and was on 27 February 2001, dismissed by Decision No. *116/PRIV/BR/RU* of the Executive Secretary, for disclosure of confidential documents. The Applicant believes that the decision to dismiss him was unfair and unconstitutional.

4. By an Application dated 19 April 2013, registered as No. 003/2013, the Applicant initially seized the Court for alleged violation of Articles 10 and 11 of the Constitution of Rwanda.

5. Following a promise of amicable settlement from the Respondent State, the Applicant, by a letter dated 21 April 2014, received at the Registry on 22 April 2014, informed the Court that he had met with a representative of the Republic of Rwanda on the matter; and that at the end of the discussion, he decided to abandon the procedure, and consequently requested the Court to strike the case off its Cause List.

6. By an Order dated 14 May 2014, the Court acceded to the Applicant's request and ordered that the Case be struck off its Cause List. The Parties were notified of the Order on 15 May 2014.

7. By a new Application dated 10 November 2014, the Applicant seized the Court with an application alleging violation of Articles 10 and 11 of the Constitution of Rwanda.

B. Alleged violations

8. The Applicant alleges that his dismissal is illegal and unconstitutional, and that having failed to solve his problem up to now, the Respondent State has violated the following rights guaranteed under the Charter:

"i. enjoyment of the rights and freedoms recognized and guaranteed under Article 2 of the Charter;

ii. right to equality and equal protection before the law under Article 3 of the Charter;

iii. right to respect for his life under Article 4 of the Charter;

iv. right to have his cause heard under Article 7 of the Charter;

v. right of access to the public service of his country, the right to work in equitable and satisfactory conditions and to receive equal pay for equal work under Article 15 of the Charter;

vi. right to equal protection of the law and to non-discrimination under Articles 14(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR);

vii. right of every individual to enjoy just and favourable conditions of work under Article 7 (a) of the International

Covenant on Economic, Social and Cultural Rights (ICESCR)."

III. Summary of the procedure before the Court

9. The Application which was received at the Registry on 10 November 2014, was served on the Respondent State on 6 October 2015. The latter was requested to transmit its Response to the Application within 60 days, pursuant to Rules 35(2) and 37 of the Rules.
10. On 13 January 2015, the Registry transmitted the Application to the Chairperson of the African Union Commission and, through the latter, to all the other States Parties to the Protocol, pursuant to Rule 35(3) of the Rules.
11. On 7 December 2015, the Respondent State submitted its Response which was transmitted to the Applicant on 15 January 2016.
12. On 4 March 2016, the Applicant filed his Reply which was transmitted to the Respondent State.
13. On 15 March 2016, the Registry notified the Applicant of the Respondent's filing of the instrument of withdrawal of the Declaration it made under Article 34(6) of the Protocol, and requested his observations.
14. On 29 March 2016, the Applicant submitted its Reply to the issue of Rwanda's withdrawal of its Declaration, a reply transmitted to the Respondent State on 21 April 2016.[2]
15. On 31 May 2016, the Registry notified the Parties of the closure of written pleadings.

IV. Prayers of the Parties

16. In the Application, the Court is requested to:

"i. nullify Decision No. 116/PRIV/BR/RU on the dismissal on the grounds that the said decision did not follow the established procedure, and is unjust and unconstitutional;

ii. ii. reimburse the salaries unpaid since 8 February 2014 on the basis of the gross salary of 300,000 Rwanda Franc (RWF) with effect from the date of dismissal (27 February 2001) up to the day of reinstatement;

iii. iii. order the State to provide him with residential accommodation in lieu of the one he had to sell to meet his needs;

2 *Supra* para 2.

iv. iv. reinstate him in the public service pending his attainment of the retirement age of 65 or place him on early retirement; [and]

v. v. grant the additional prayer for an Order to pay him the sum of US$ 1,000,000 (one million US dollars) in reparation for all the damages and humiliation he suffered".

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

"i. declare the Application inadmissible;

ii. dismiss the Application as manifestly baseless;

iii. order the Applicant to pay the costs;

iv. make all such Order(s) as it deems fit".

V. Jurisdiction

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

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

"i. it has material jurisdiction because the Application alleges violations of the rights guaranteed by international human rights instruments ratified by the Respondent State[3];

ii. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and deposited the Declaration contemplated in Article 34(6) which enables individuals and NGOs to directly access the Court under Article 5(3) of the Protocol;[4];

iii. it has temporal jurisdiction insofar as the alleged violations are of a continuing nature;

iv. it has territorial jurisdiction given that the facts of the Matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State."

20. From the foregoing considerations, the Court finds that it has jurisdiction to hear the instant case.

3 See para 2 of this judgment.

4 See para 2 of this Judgment.

VI. Admissibility

21. The Respondent State raises a preliminary objection based on Rule 67 of the Rules, and two preliminary objections on the admissibility of the Application based on Article 56(5) and 6 of the Charter.

A. Preliminary objection based on Rule 67 of the Rules

22. In its Response, the Respondent State, raises preliminary objection based on Rule 67 of the Rules, arguing that the Court has already made a ruling on the initial application under Application No. 003/2013 which must not be re-opened, unless reintroduced under the conditions set out in Article 28(2) and (3) of the Protocol.

23. The Respondent State alleges that the Application dated 10 November 2014 is inadmissible as per Rule 67 of the Rules on the grounds that the Court's Order of 14 May 2014 was final, and could not be reviewed save under the conditions set out in Rule 67 of the Rules.

24. The Respondent State also argues that in Application 003/2013 brought against it, the Order of 14 May 2014, striking the case off the Cause List was issued at the request of the Applicant. It adds that the Court having already made a ruling thereon, cannot re-open the matter.

25. The Respondent State maintains in conclusion that the Applicant has not adduced any evidence to demonstrate that the Application of 10 November 2014 fulfils the conditions set down in Rule 61 and 67 of the Rules on the review of a judgment.

26. The Applicant did not make any submission on these assertions by the Respondent State.

27. Article 28(3) of the Protocol stipulates that: "without prejudice to Sub-Article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules".

28. Rule 67 of the Rules provides that: "pursuant to Article 28(3) of the Protocol, a Party may apply to the Court to review its judgment in the event of discovery of evidence, which was not within the knowledge of the Party at the time judgement was delivered. Such Application must be filed within six (6) months after that Party acquired knowledge of the evidence so discovered".

29. The Court notes that by Order of 14 May 2014, it struck out Application No. 003/ 2013, filed by the same Applicant.

30. The Court further notes that that the same Applicant filed a new Application on 10 November 2014, which was registered in the Court's Register as Application No. 022/ 2015 versus Rwanda.

31. The Court therefore holds that what is before it is the Application No. 022/2015 versus Rwanda and that in this case, Article 28 of the Protocol and Rule 67 of the Rules do not apply**.**

32. The Court therefore dismisses the objection to the admissibility of the Application based on Rule 67 of the Rules.

B. Objections based on the conditions outlined under Article 56 of the Charter and Rule 40 of the Rules

33. In accordance with 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 39 of the Rules, the Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application in accordance with Articles 50 and 56 of the Charter, and rule 40 of the Rules.

35. Rule 40 of the Rules, which substantially reproduces the content of Rule 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:
>
> 1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> 2. comply with the Constitutive Act of the Union and the Charter;
> 3. not contain any disparaging or insulting language;
> 4. not be based exclusively on news disseminated through the mass media;
> 5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> 6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> 7. not raise any mater or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

36. The Respondent State raises two objections to the admissibility of the Application based on the conditions under Article 56 of the Charter, namely, the non-exhaustion of local remedies under Article 56(5), and that the Application was not filed within a reasonable time as required under Article 56(6) of the Charter.

C. Objection based on the alleged non-exhaustion of local remedies

37. The Respondent State submits that, according to the Declaration made by Rwanda to entitle individuals to directly bring cases before the African Court, the individuals must first exhaust all the local remedies before the competent bodies and courts of the Republic of Rwanda.

38. According to the Respondent State, the requirement of exhausting local remedies is a general principle founded on the conviction that a State must be given the possibility to repair the violations of its obligations in matters of human rights through internal mechanisms prior to such violations being brought before an international body.

39. The Applicant does not make any submissions to challenge the Respondent State's objection to the admissibility of the Application on the ground that he did not exhaust local remedies.

40. The Court notes from the records that the Applicant brought two different cases before the domestic Courts.

41. On 22 May 2002, the Applicant filed an action before the Kigali Court of First Instance for compensation in case No. *RC 37604/02,* in the amount of 3,383,600 RWF for improper dismissal. On 30 July 2003, the Kigali Court of First Instance issued its Judgment in the civil suit action brought by Rutabingwa Chrysanthe and declared that the same was admissible and well founded, and consequently awarded him compensation in the amount of 2,474,727 RWF.

42. On 23 January 2006**,** Rutabingwa Chrysanthe seized the Kigali High Court of Justice with another civil suit referenced R. Ad /0011/06/ HC/KIG for annulment of Decision 361/PRIV/SV/AM of 27 February 2001, in respect of his dismissal.

43. On 21 July 2006**,** the Kigali High Court of Justice found that the Application for annulment of Decision 361/PRIV/SV/AM of 27 February 2001, filed by Rutabingwa Chrysanthe was not in conformity with the law and therefore declared the Application inadmissible.

44. The Court notes that Organic Law No. 03/2012 of 13 June 2012 on the organization, functioning and jurisdiction of the Supreme Court, which is Rwanda's highest court, in its Article 28, confers jurisdiction on the Supreme Court to hear "appeals against judgments rendered in first instance by the High Court ...".

45. The Court notes that, in the instant case, the Applicant did not bring this Application before the Supreme Court. The Court notes also that the Applicant did not give any reason for not doing so.

46. Consequently, the Court declares that the Application of 10 November 2014 is inadmissible on the ground that the Applicant has not exhausted local remedies.

47. The Court notes that, pursuant to the provisions of Article 56

of the Charter, admissibility conditions are cumulative, and as such, where any one of them has not been met, it is the entire Application that cannot stand. This is the case with the present matter. The Application is consequently inadmissible.

48. Having declared the Application inadmissible on the ground of failure to exhaust local remedies, the Court need not pronounce itself on the Respondent State's objection relating to the failure to file the Application within a reasonable time.

VII. Costs

49. The Court notes that, in the instant case, the Respondent State has prayed the Court to order the Applicant to pay costs, and the Applicant did not submit on this issue.

50. According to Rule 30 of the Rules "unless otherwise decided by the Court each Party shall bear its own costs". The Court decides that each Party shall bear its own costs.

VIII. Operative part

51. For these reasons,

The COURT,

unanimously:

i. *Declares* that it has jurisdiction;

ii. *Dismisses* the Respondent State's objection based on Rule 67 of the Rules;

iii. *Rules* that the objection on non-exhaustion of local remedies is founded*;*

iv. *Declares* the Application inadmissible*;*

v. *Rules* that each Party shall bear its own costs.

Kemboge v Tanzania (merits) (2018) 2 AfCLR 369

Application 002/2016, *George Maili Kemboge v United Republic Tanzania*

Judgment, 11 May 2018. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Applicant was convicted and sentenced to 30 year imprisonment for the rape of a minor. He brought this action alleging a violation of his right to equal protection before the law as well as the right to enjoy the best attainable state of health. The Court held that there was no violation of the African Charter.

Jurisdiction (not an appellate court, 19)

Admissibility (exhaustion of local remedies, extraordinary remedy, 33)

Equal protection of the law (allegations require substantiation, 51, 52)

I. The Parties

1. The Application is filed by Mr George Maili Kemboge (hereinafter referred to as "the Applicant"), a citizen of the United Republic of Tanzania, who is currently serving a thirty (30) years prison sentence at the Butimba Central Prison in Mwanza, for the crime of rape of a minor.

2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, the Respondent State deposited the declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. Subject of the Application

A. Facts of the matter

3. The records indicate that on 14 August 2006, in Criminal Case No. 110/2006 before the District Court of Tarime, the Applicant was convicted and sentenced to thirty (30) years' imprisonment, twelve strokes of the cane and payment of a fine of Tanzania Shillings Five Hundred Thousand (TZS 500,000) for having committed the crime of rape of a girl of 15

years of age, an offence punishable under Section 130(1) and (2)(e) and Section 131(1) of the Tanzania Penal Code Cap. 16, as revised in 2002 (hereinafter referred to as the "Penal Code").

4. The Applicant filed Criminal Appeal No. 85/2012 before the High Court of Tanzania sitting at Mwanza (hereinafter referred to as the "High Court"); and Criminal Appeal No. 327/2013 before the Court of Appeal of Tanzania sitting at Mwanza (hereinafter referred to as the "Court of Appeal"). The High Court upheld the Applicant's sentence on 13 September 2013 and this was affirmed by the Court of Appeal on 30 October 2014.

B. Alleged violations

5. The Applicant alleges that the following rights have been violated:

"i. the right to equal protection of the law, provided under Article 3(2) of the Charter;

ii. the right to enjoy the best attainable state of physical and mental health, provided under Article 16 of the Charter."

III. Summary of procedure before the court

6. The Application was filed at the Registry on 4 January 2016 and served on the Respondent State by a notice dated 25 January 2016, inviting the latter to file the list of its representatives within thirty (30) days, and its Response to the Application within sixty (60) days of receipt of the notice, in accordance with Rules 35(2)(a) and 35(4)(a) of the Rules of Court (hereinafter referred to as "the Rules").

7. By a letter dated 11 March 2016 and received at the Registry on 22 March 2016, the Applicant filed an additional written submission and this was served on the Respondent State by a notice dated 29 March 2016.

8. By a notice dated 12 April 2016, the Application was transmitted to the Executive Council of the African Union and, through the Chairperson of the Commission, to all the other State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.

9. By a letter dated 20 January 2017, received at the Registry on 6 February 2017, the Respondent State submitted its Response to the Application justifying that the delay was caused by the need to gather information from all the entities concerned. The Court considered and accepted the Response in the interests of justice.

10. By a letter dated 9 February 2017, the Registry transmitted the Respondent State's Response to the Applicant.

11. By a letter dated 29 March 2017, received at the Registry on 5

April 2017, the Applicant filed his Reply to the Response and this was served on the Respondent State by a notice dated 11 April 2017.

12. The Court decided to close written pleadings with effect from 14 June 2017, pursuant to Rule 59(1) of the Rules.

13. By a letter dated 6 April 2018, the Parties were informed that the Court will make a determination on the matter on the basis of the written pleadings and materials on file without holding a public hearing.

IV. Prayers of the Parties

14. The Applicant prays the Court to:

"i. restore justice by quashing the conviction and sentence imposed on him, and order his release;

ii. grant him reparations for the violation of his rights; and

iii. order such other measures or remedies as the Court may deem fit."

15. The Respondent State prays the Court to:

"i. declare that it has no jurisdiction to hear the matter and that the Application has not met the admissibility conditions;

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

iii. rule that the Applicant is not entitled to reparations;

iv. dismiss the Application for being unfounded;

v. Order that the Applicant pays the costs. "

V. Jurisdiction

16. In accordance with Rule 39(1) of its Rules "[t]he Court shall conduct preliminary examination of its jurisdiction..."

A. Objections to material jurisdiction

17. The Respondent State raises objection to the jurisdiction of the Court, claiming that by asking this Court to re-examine the evidence adduced and examined by its courts, the Applicant is requesting the Court to sit as an appellate court, for which this Court has no jurisdiction. In this regard, the Respondent State cites the Court's decision in Application No. 001/2013 *Ernest Francis Mtingwi v Republic of Malawi.*

18. The Applicant, challenging the Respondent State's claim, asserts that the Court has jurisdiction whenever there is a violation of the provisions of the Charter and other relevant human rights instruments, to review the judgment passed by the domestic courts, re-

examine the evidence, quash the sentence and acquit him. To this end, the Applicant cites the Court's Judgment in Application No. 005/2013 - *Alex Thomas v United Republic of Tanzania.*

19. This Court reiterates its position as affirmed in *Ernest Mtingwi v Republic of Malawi*[1] that it is not an appeal court with respect to decisions rendered by national courts. However, as it underscored in its Judgment of 20 November 2015 in *Alex Thomas v United Republic of Tanzania*, this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is a Party.[2]

20. In the instant case, the Applicant alleges violations of his rights protected by the Charter. This Court, accordingly, has jurisdiction to determine whether the domestic courts' proceedings that form the basis of his Application before this Court had been conducted in accordance with international standards set out in the Charter.

21. In view of the forgoing, the Court dismisses the Respondent State's objection that the Court is acting as an appellate court and finds that it has material jurisdiction to hear the matter.

B. Other aspects of jurisdiction

22. The Court notes that its personal, temporal and territorial jurisdiction has not been contested by the Respondent State; and nothing in the pleadings indicates that the Court does not have jurisdiction. The Court thus holds that:

"i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the required declaration under Article 34(6) thereof, which enables the Applicant to directly access the Court in terms of Article 5(3) of the Protocol;

ii. it has temporal jurisdiction on the basis that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers an unfair process;

iii. it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the

1 Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi,* para 14.

2 Application No.005/2013, Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania (Alex Thomas v Tanzania* Judgment*),* para 130 and Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania (Mohamed Abubakari v Tanzania* Judgment), para 29.

Protocol, that is, the Respondent State."

23. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

24. 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".

25. Pursuant to Rule 39(1) of its Rules, the "Court shall conduct preliminary examination of … the admissibility of the application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules."

26. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:
>
> (1) disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> (2) comply with the Constitutive Act of the Union and the Charter:
>
> (3) not contain any disparaging or insulting language;
>
> (4) not be based exclusively on news disseminated through the mass media;
>
> (5) be filed after exhausting local remedies, if any, unless it is obvious that the procedure in unduly prolonged;
>
> (6) be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
>
> (7) not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

27. The Court notes that the Respondent State raises only one objection to the admissibility of the Application, that is, objection in relation to the requirement of exhaustion of local remedies.

A. Condition of admissibility in contention between the Parties: the objection based on the non-exhaustion of local remedies

28. The Respondent State contends that the Applicant has not

exhausted local remedies with regard to the alleged violation of the right to equal protection of the law and the right to legal assistance. According to the Respondent State, these alleged violations are being raised before this Court for the first time.

29. The Respondent further contends that the right to equal protection of the law is provided under Article 13(1) of the Tanzanian Constitution of 1977, and as such, the alleged violation could have been challenged through a Constitutional Petition in accordance with the Basic Rights and Duties Enforcement Act.

30. In support of its claim, the Respondent State relies on the Commission's jurisprudence in Communication *Article 19 v Eritrea* and the Court's own jurisprudence in Applications No. 003/2012 - *Peter Joseph Chacha v United Republic of Tanzania* and No. 003/2011 – *Urban Mkandawire v Republic of Malawi*.

31. In his Reply, the Applicant reiterates that he has exhausted all local remedies. He claims that, with respect to the constitutional petition, the Judge of the High Court could never make a ruling which would be at variance with the judgment rendered by a bench of judges of the Court of Appeal. With regard to the Respondent State's allegation on legal aid, the Applicant submits that the legal aid sought is that provided for in Rule 31 of the Rules.

32. The Court notes that the Applicant filed an Appeal and had access to the highest court of the Respondent State, namely, the Court of Appeal, with the prayer to adjudicate on the various allegations, especially those regarding violations of the right to a fair trial.

33. Concerning the possibility of filing a constitutional petition, the Court has previously stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust.[3]

34. Regarding the objection of the Respondent State that the issue of legal aid was being raised in this Court for the first time, the Court holds that the said objection is no longer an issue because, according to the Applicant, the legal assistance he referred to in his Application was not in relation to the domestic proceedings, but rather a request to this Court to grant him legal aid in accordance with Rule 31 of the Rules.

35. Accordingly, the Court finds that the Applicant exhausted local remedies as envisaged under Rule 40(5) of the Rules. The Court, therefore, dismisses this preliminary objection to the admissibility of the Application.

3 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 – 62; *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 66 – 70; Application No. 011/2015, Judgment of 28/9/20l7, *Christopher Jonas v United Republic of Tanzania*, para 44.

B. Conditions of admissibility that are not in contention between the Parties

36. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence, the filing of the Application within a reasonable time and the principle that an Application must not raise any matter already determined in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (sub-Rules 1, 2, 3, 4, 6 and 7 of Rule 40 of the Rules) are not in contention between the Parties.

37. For its part, the Court notes that nothing on the record suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements are fulfilled.

38. In light of the foregoing, the Court finds that the instant Application fulfills all admissibility conditions set out in Rule 40 of the Rules, and accordingly, declares the same admissible.

VII. The merits

A. Alleged violation of the right to equal protection of the law

39. The Applicant states that the judgment of the Court of Appeal was obtained "by overlooking the court records and prejudiced [his] defence." The Applicant alleges further that two of his three grounds of appeal were not considered by the Court of Appeal because that court found that the Applicant did not raise them in his appeal before the High Court.

40. The Applicant claims that by overlooking the grounds in question, the Court of Appeal has confined itself only to procedural matters, rather than considering the interests of justice. Accordingly, the Applicant alleges that his right to equal protection of the law provided under Article 3(2) of the Charter has been violated.

41. In his Reply, the Applicant refutes the contention of the Respondent State that he confessed to having committed the crime, and insists that he has always pleaded not guilty. He also claims that, before the domestic courts, the issue should have been about the marriage between him and the victim rather than the crime of rape since he was living with the victim in a marital relationship.

42. In this regard, the Applicant states that there is a contradiction

regarding the age of the victim: on the one hand, the public prosecutor claims that the victim was fifteen (15) years old, whereas the mother, on the other hand, says she was sixteen (16) years old; on her part, before living together with the Applicant, the victim had told the Applicant that she was 18 years old.

43. The Applicant avers that in the community to which they belong, it is common practice for a man and woman to live together under the same roof before formalizing the traditional marriage. He claims that he had offered the victim's mother a dowry that was higher than the one offered by another individual who wanted to marry the victim.

44. The Applicant also claims that even if the victim was under 18, the mother had given her consent for them to live together; otherwise, she would never have kept silent for two weeks without saying anything to her neighbours, only to show up at the Applicant's home after all that time demanding to have her daughter and reporting the case to the police.

45. The Respondent State refutes the Applicant's arguments that the Court of Appeal did not examine his contention regarding the victim's age and the mother's consent. It submits that the Court of Appeal did not take the contentions into consideration because it never considered them relevant for the reason that the Applicant had himself admitted having had sexual intercourse with a minor and that the said arguments have not been raised before the High Court.

46. The Respondent State also submits that the issue requiring determination is the age of the victim. Having been proven that the victim was 16 years old, it remained to be ascertained whether during the time she lived with the Applicant they had intercourse. According to the Respondent State, however, the Applicant himself confessed and confirmed the victim's statement that they had sexual intercourse at least once during the time they lived together in the Applicant's home.

47. The Respondent State alleges that, not only did the Applicant confess to sexual intercourse with the victim, but also that, during cross-examination, the Applicant did not interrogate the victim on the issue of her age and the alleged sexual intercourse**.** According to the Respondent State, this silence amounts to tacit acceptance of the veracity of the victim's testimony.

48. The Applicant alleges violation of Article 3(2) of the Charter which guarantees the right to equal protection of the law. However, it appears from the record and the content of the allegations that the relevant provision is rather Article 3(1) of the Charter, which states that "Every individual shall be equal before the law."

49. In a previous case, this Court has stated that the right to equality before the law requires that "all persons shall be equal before the courts

and tribunals".[4] In the instant case, the Court notes that, in his appeal before the Court of Appeal, the Applicant presented three arguments, namely: (i) the absence of documentary proof that the victim is a minor (birth certificate); (ii) the fact that the absence of parental consent has not been established; and (iii) the fact that the court did not determine the case on the merits after evaluation of all the evidence on record.

50. The Court notes that, according to the records, the Court of Appeal declared itself as lacking the jurisdiction to hear allegations which had not been raised before, nor settled by, the first appellate court.[5] It held, however, that the victim was sixteen (16) years old at the time of the crime and upheld the Applicant's conviction.

51. The Court notes that the Applicant has not demonstrated how the Court of Appeal's refusal to consider two of his three allegations violated his right to equal protection before the law. This Court has, in the past, held that "General statements to the effect that [a] right has been violated are not enough. More substantiation is required."[6]

52. Moreover, the documents in file demonstrate that the Court of Appeal justified the dismissal of the Applicant's two arguments on the grounds that they relate to issues that were not previously raised before the lower courts. In this regard, this Court has not found that the Applicant was treated unfairly or subjected to discriminatory treatment in the course of the domestic proceedings[7].

53. In view of the forgoing, the Court dismisses the Applicant's allegation that his rights under Article 3(1) of the Charter have been violated.

B. The alleged violation of the right to enjoy the best attainable state of physical and mental health

54. In his Reply, the Applicant alleges the violation of his right to enjoy the best attainable state of physical and mental health guaranteed under Article 16 of the Charter, on the grounds that he was not recognized as married to the victim.

55. The respondent State has not made submissions on this

4 *Kijiji Isiaga v Tanzania* Judgment, *op cit*, para 85.

5 "In the event and on the basis of the settled legal position demonstrated by the Court, grounds 2 and 3 having been raised for the first time in a second appeal are not legally before us for determination and there lack merit."

6 *Alex Thomas v Tanzania* Judgment, *op cit*, para 140. See also: *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania* Judgment, *op cit,* paras 150 – 153.

7 Application No. 032/2015. Judgment 21/03/2018 2018, *Kijiji Isiaga v United Republic of Tanzania*, para 85.

allegation.

56. Article 16 of the Charter provides that:

> "1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> 2. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

57. The Court notes that the Applicant alleges the violation of his right to enjoy the best attainable state of physical and mental health on the grounds that he was not recognized as married to the victim.

58. The Court is of the view that the Applicant has not demonstrated how the Respondent State's refusal to recognize his alleged marriage with the victim has violated his right to enjoy the best attainable state of physical and mental health.

59. In view of the forgoing, the Applicant's allegation lacks merit and, therefore, the Court dismisses this allegation.

VIII. Remedies sought

60. In the Application, the Court is requested to order the restitution of the Applicant's rights; the quashing of the conviction and setting aside of the sentence; order his release and reparations to remedy all violations of his fundamental rights.

61. In its Response, the Respondent State prays the Court to dismiss the Application in its entirety as unfounded and, thereby declare that the Applicant is not entitled to any reparation.

62. 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."

63. In this respect, Rule 63 of the Rules provides that: "The Court shall rule on the request for the reparation … by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

64. The Court notes in the instant case that as no violation has been established, the issue of remedies sought does not arise, and therefore dismisses the Applicant's prayer for reparation.

IX. Costs

65. The Respondent prays the Court to rule that the cost of the proceedings be borne by the Applicant.

66. The Applicant has made no specific submission on this matter.

67. The Court notes that Rule 30 of its Rules provides that: "Unless

otherwise decided by the Court, each party shall bear its own costs."

68. The Court holds that in the circumstances of this case, there is no reason for it to decide otherwise and, consequently, rules that each Party shall bear its own costs.

X. Operative part

69. For these reasons,
The Court,
Unanimously,

On jurisdiction
i. *Dismisses* the objection to its material jurisdiction;
ii. *Declares* that it has jurisdiction.

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

On the merits
v. *Declares* that the Respondent State has not violated the Applicant's right to equality before the law, provided for under Article 3(1) of the Charter;
vi. *Declares* that the Respondent State has not violated the Applicant's right to enjoy the best attainable state of physical and mental health, provided for under Article 16 of the Charter;
vii. *Holds* that the issue of reparations does not arise and dismisses the claim for remedies;
viii. *Rules* that each Party shall bear its own costs.

Association pour le Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v Mali (merits) (2018) 2 AfCLR 380

Application 046/2016, *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*

Judgment, 11 May 2018. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Court held that a number of provisions in the Family Law of Mali dealing with marriage and inheritance violated the African Charter.

Admissibility (exhaustion of local remedies, constitutional petition, 39-45; submission within reasonable time, start of period, 51, exceptional crisis, 52-54)

Harmful practices (child marriage, 74-75, 78)

Equality, non-discrimination (different age of marriage for men and women, 77, 78)

Marriage (free consent, 91-94)

Inheritance (women and children, 108-115)

Reparations (amendment of legislation, 130)

I. The Parties

1. *L'Association pour le progrès et la défense des droits des femmes maliennes* (The Association for the Advancement and Defence of Women's Rights) – *APDF,* presents itself as a Malian organisation with Observer Status before the African Commission on Human and Peoples' Rights (herein-after referred to as "the Commission"), with the mission to encourage women's groups to defend their rights and interests against all forms of violence and discrimination.

2. The Institute for Human Rights and Development in Africa (IHRDA) for its part, presents itself as a pan-African Non-Governmental Organisation based in Banjul, The Gambia, with the mission to assist victims of human rights violations in their quest for justice using national, African and international instruments. It declares that it also has Observer Status before the Commission.

3. The two afore-mentioned entities are herein-after referred to as "the Applicants".

4. The Respondent State, the Republic of Mali, became a Party to the African Charter on Human and Peoples' Rights (herein-after

referred to as "the Charter") on 21 October 1986; 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 25 January 2004; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (herein-after referred to as "the Maputo Protocol") on 25 November 2005; and to the African Charter on the Rights and Welfare of the Child (herein-after referred to as "the Children's Charter"") on 29 November 1999. The Respondent State also deposited the Declaration prescribed under Article 34(6) of the Protocol, allowing individuals and Non-Governmental Organisations (NGOs) to directly seize the Court, on 19 February 2010. The Respondent State became a Party to the Convention on the Elimination of All Forms of Discrimination against Women (herein-after referred to as "CEDAW") on 10 September 1985.

II. Subject of the Application

A. Context and facts as related by the Applicants

5. In a bid to modernise its legislation by bringing it in line with the evolving international human rights law, the Government of Mali launched, in 1998, a vast operation to codify the rights of individuals and the family. This project, which was subject to broad popular consultation, received expert input prior to the drafting of Law No. 2011-087 establishing the Persons and Family Code (herein-after referred to as the "Family Code") which was adopted by the National Assembly of Mali on 3 August 2009.

6. This Law which was well received by a broad section of the population as well as human rights organisations, could not be promulgated because of widespread protest movement by Islamic organisations.

7. Submitted for a second reading, the impugned law in the end culminated in the drafting of a new Family Code which was adopted on 2 December 2011 by the National Assembly and promulgated on 30 December 2011 by the Head of State.

8. The Applicants submit that the law as promulgated violates several provisions of international human rights instruments ratified by the Respondent State as referred to in paragraph 4 above.

B. Alleged violations

9. The Applicants allege the following violations:

"i. Violation of the minimum age of marriage for girls (Article

6(b) of the Maputo Protocol and Articles 1(3), 2 and 21 of the African Charter on the Rights and Welfare of the Child (ACRWC);

ii. Violation of the right of consent to marriage (Article 6(a) of the Maputo Protocol and Article 16(a) and (b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);

iii. Violation of the right to inheritance Article 21(2) of the Maputo Protocol and Articles 3 and 4 of ACRWC;

iv. Violation of the obligation to eliminate traditional practices and conduct harmful to the rights of women and children (Articles 2(2) of the Maputo Protocol, 5(a) of the CEDAW and 1(3) of the ACRWC".

III. Summary of the procedure before the Court

10. The Registry received the Application on 26 July 2016.

11. By a letter dated 26 September 2016, the Registry served the Application on the Respondent State. The latter was requested to communicate the name (s) and address(es) of its representative(s) within thirty (30) days as well as its Response to the Application within sixty (60) days pursuant to Rules 35(4) and 37 of the Rules of Court (hereinafter referred to as "the Rules").

12. By notice dated 18 October 2016, the Registry communicated the Application to the State Parties and the other entities in accordance with the Court's directives.

13. On 28 November 2016, the Respondent State filed its Response to the Application, which was transmitted to the Applicants on 13 December 2016.

14. On 1 February 2017, the Applicants filed their Reply which the Registry transmitted to the Respondent State on 2 February 2017, for information.

15. By notice dated 25 April 2017, the Parties were informed that the Court would hold a public hearing on 16 May 2017.

IV. Prayers of the Parties

16. The Applicants pray the Court to order the Respondent State to:

"i. Amend its Persons and Family Code by bringing back the minimum age of marriage for girls to 18;

ii. Eliminate the provisions of the Family Code which allow for age exemptions;

iii. Introduce a sensitisation programme for the population on

the dangers of early marriage;

iv. Amend Articles 283 to 287 of the Family Code to establish similar conditions of consent for marriages contracted before a religious minister;

v. Amend Article 287 to impose the same sanctions on a religious minister who contracts a marriage without having ascertained the consent of the Parties;

vi. Add to Section II titled: "Celebration before a religious minister" a provision requiring the latter to ascertain the consent of the Parties;

vii. Insert in the Family Code a provision requiring an officially recorded Power of Attorney from the man and the woman where they are not present for the religious marriage;

viii. Translate and disseminate the Family Code in the languages accessible to religious ministers;

ix. Introduce a training programme for religious ministers on the procedure for contracting a marriage;

x. Introduce a sensitisation and educational programme for the population on the use of the provisions of the Family Code to ensure equal share of inheritance between the man and the woman;

xi. Develop a strategy to eradicate unequal share of inheritance between the man and the woman;

xii. Develop a programme that ensures that people in the rural areas have access to a notary;

xiii. Develop a sensitisation programme for the population on the use of the provisions of the Family Code which ensure equal share of inheritance between legitimate children and children born out of wedlock."

17. In the Response to the Application, the Respondent State raises two preliminary objections; one, on the Court's jurisdiction and, the other, on the admissibility of the Application on the ground that it was not filed within a reasonable timeframe, in accordance with Article 6 of the Protocol. The Respondent State prays the Court to:

"i. Examine the objections raised;

ii. Declare that it does not have jurisdiction given that the Applicants' claims relate more to the sensitisation, popularisation and harmonisation of national laws with the African Charter on Human and Peoples' Rights rather than to the issue of application and interpretation of the Charter and other conventions which exist neither

technically nor in reality, and have never been proven in the judicial practice of Mali;

iii. Declare the Application inadmissible for having not been submitted within a reasonable timeframe."

18. As regards the merits of the case, the Respondent State prays the Court to dismiss outright the Application as being baseless.

V. Jurisdiction

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

A. Objection to the material jurisdiction of the Court

20. The Respondent State contends that the subject of the Application does not relate to any of the five areas of the Court's jurisdiction set out in Rule 26(1) of the Rules.

21. The Respondent State maintains that it is evident that the areas in question enumerated in Rule 26(1)(a)[1] do not correspond to the subject of the Application which invokes cases of violations of human rights conventions. For the Respondent State, the Application does not pose a problem of interpretation of the Charter or other international human rights instruments.

22. The Respondent State further contends that the said instruments have no application difficulties in the legal and judiciary system of Mali, proof thereof being the fact that Article 116 of the Malian Constitution provides that treaties duly ratified or approved by the State have, upon publication, superior authority over that of laws; that the Family Code cannot therefore pose an obstacle to the interpretation and application of the provisions of duly ratified international conventions.

23. The Respondent State also argues that, in the instant case, only simple technical issues of harmonisation of the Family Code with the said international instruments may be taken into account to make the application of national laws more consistent.

24. The Respondent State maintains, lastly, that the Application is more concerned with issues of sensitisation and popularisation rather than those of interpretation and application of the Charter and other international instruments ratified by Mali, and consequently prays the Court to declare that it does not have jurisdiction.

1 "The Court shall have jurisdiction to deal with all cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned."

25. In their Reply, the Applicants contend that the jurisdiction of the Court is defined by Article 3(1) of the Protocol which provides that the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned; that in promulgating the Family Code, some provisions of which are inconsistent with the ratified treaties, the Respondent State violates the said treaties; that, in other words, the Court is prayed to elucidate the implications for domestic laws, of the ratification of treaties by a State; that the Court is further prayed to make a determination on the application of the said treaties in Mali.

26. The Applicants maintain, in conclusion, that, by virtue of Article 3(1) of the Protocol, the Court is vested with the jurisdiction to interpret and apply the treaties ratified; and therefore pray the Court to dismiss the objection to its material jurisdiction raised by the Respondent State.

27. The Court notes that its material jurisdiction is based on Article 3(1) of the Protocol and that, in the instant case, the alleged violation of rights relates to the human rights guaranteed by the Charter and other instruments ratified by the Republic of Mali.

28. Consequently, the Court holds that its material jurisdiction is established, and dismisses the objection in this respect.

B. Other aspects of jurisdiction

29. The Court notes that its personal, temporal and territorial jurisdiction is not contested by the Respondent State, and that nothing on file indicates that it does not have jurisdiction. Consequently, it holds that:

> "i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has filed the Declaration prescribed under Article 34(6) of the Protocol; and that the Applicants have Observer Status before the Commission;
>
> ii. It has temporal jurisdiction given the fact that the alleged facts occurred subsequent to the entry into force, for the Respondent State, of the aforementioned international instruments;
>
> iii. It has territorial jurisdiction given the fact that the alleged violations occurred in the territory of the Respondent State."

30. In view of the foregoing considerations, the Court holds in conclusion that it has jurisdiction to hear this case.

VI. Admissibility of the Application

31. In terms of Article 6(2) of the Protocol, "The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

32. Pursuant to Rule 39 of its Rules, the Court "shall conduct preliminary examination of … the admissibility of the application in accordance with Articles 50 and 56 of the Charter, and Rule 40 of these Rules".

33. Rule 40 of the Rules, which substantially reproduces the content of Rule 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:
>
> 1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> 2. comply with the Constitutive Act of the Union and the Charter;
> 3. not contain any disparaging or insulting language;
> 4. not be based exclusively on news disseminated through the mass media;
> 5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> 6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> 7. not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

34. Whereas some of these conditions are not in contention between the Parties, the Respondent State raised two objections: the first, concerning the exhaustion of local remedies and, the other, the period within which the Court is to be seized of the Application.

A. Conditions in contention between the Parties

i. Objection to admissibility of the Application on grounds of failure to exhaust local remedies

35. The Respondent State maintains that the Applicants did not exhaust local remedies before seizing the Court with the matter. It

argues that the Applicants had all the opportunities to bring the matter before the national judicial authorities; that the Malian Judiciary is totally independent because it is separate from the Executive and the Legislative arms; that the Applicants however, did not make any effort to submit their alleged violations to the national courts.

36. At the public hearing of 16 May 2017, the Respondent State responding to questions put by the Court, contended, *inter alia,* that the Applicants acted too hastily given that they did not adduce any specific evidence to justify the alleged violations; and that they should have gone to court on the basis of Articles 115 and 116 of the Respondent State's Constitution prior to bringing the case before this Court.

37. The Respondent State in conclusion prays the Court to rule that the Applicants have not exhausted local remedies and consequently, dismiss the Application outright.

38. In their Reply, the Applicants submit that no remedy exists at the national level; that the Respondent State only argues that the Applicants have the opportunity to seize the Malian justice system with the matter without specifying the jurisdiction competent to determine such an action.

39. The Court notes that the only remedy which the Applicants could have utilised is that of filing a Constitutional Petition against the impugned law.

40. In that regard, Article 85 of the Constitution of Mali provides that "The Constitutional Court is the judge of the constitutionality of the laws and it shall guarantee the fundamental rights of the individual and public liberties…"

41. Article 88 of the same Constitution provides that "Organizational laws shall be submitted by the Prime Minister to the Constitutional Court before their promulgation. Other categories of laws, before their promulgation, may be referred to the Constitutional Court either by the President of the Republic, the Prime Minister, the President of the National Assembly, one tenth of the deputies of the National Assembly, the President of the High Council of Collectives or one tenth of the National Counsellors, or by the President of the Supreme Court".

42. The above provision is reproduced *in extenso* by Article 45 of Law No. 97-010 of 11 February 1997 establishing an organic law that defines the organisational and operational rules of the Constitutional Court of Mali as well as the procedure to be followed before it.

43. The above provisions show that human rights NGOs are not entitled to seize the Constitutional Court with applications concerning the unconstitutionality of laws.

44. In view of the aforesaid, the Court finds that no remedy was available to the Applicants.

45. Consequently, the Court dismisses the objection to the

admissibility of the Application for non-exhaustion of local remedies raised by the Respondent State.

ii. Objection to admissibility of the Application for failure to file the Application within a reasonable time

46. The Respondent State, in its Response, affirms that the impugned law was enacted on 30 December 2011 and that it is only on 26 July 2016 that the Applicants brought the matter before this Court, that is, about five (5) years after the promulgation of the impugned law; that the Applicants in their Reply did not adduce any argument to justify this particularly long timeframe in filing the case before the Court.

47. The Applicants, in their Reply, submit that the alleged violations are "continuing" and that, in the circumstances, the period can start to count only after the cessation of the said violations.

48. The Court notes that Article 56(6) of the Charter and Rule 40(6) of the Rules specify that Applications shall be filed within a reasonable time counting from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time within which it shall be seized with the matter.

49. As has been indicated (paragraphs 46 and 47), whereas for the Respondent State the period for seizure of the Court must be reckoned from the date of promulgation of the impugned law; for the Applicants, this period will start to count only after the cessation of the alleged violations, that is, after the abrogation or review of the impugned law.

50. The Court is however of the opinion that, in the instant case, in which no remedy was available to the Applicants at domestic level, the date from which the reasonableness of filing the Application before this Court should be assessed is that on which the Applicants acquired knowledge of the impugned law.

51. The European Court of Human Rights adopted this same position in *Dennis and Others v United Kingdom.* It held that, where it is clear from the outset that no effective remedy is available to the Applicant, the period runs from the date of the act at issue, or from the date of knowledge of that act or its effect on or prejudice to the Applicant".[2]

52. The question here is therefore whether the period of four (4) years, six (6) months and twenty-four (24) days in which the Applicants seized the Court, that is, between 30 December 2011 (date of promulgation of the impugned law) and 26 July 2016 (date of seizure of the Court), is reasonable within the meaning of Article 56(6) of the

2 The European Court of Human Rights in the matter of *Dennis and Others v United Kingdom* (No. 76573/01) Judgment of 2 /7/2002, page 6.

Charter.

53. The Court in its previous judgments established that the reasonableness of the time within which the Application was filed at this Court depends on the particular circumstances of each matter and must be examined on a case-by-case basis.[3]

54. In the instant case, in order for this Court to determine the reasonableness of the period of seizure, it is necessary to take into account two important elements: first, that the Applicants needed time to properly study the compatibility of the law with the many relevant international human rights instruments to which the Respondent State is a Party; and secondly, given the climate of fear, intimidation and threats that characterised the period following the adoption of the law on 3 August 2009, it is reasonable to expect the Applicants to have been affected by that situation as well. The country found itself in a situation of exceptional crisis with a vast protest movement of the religious forces which, according to the Respondent State, could even be "fatal for peace, harmonious living and social cohesion."

55. The Court accordingly dismisses the objection to the admissibility of the Application for failure to abide by a reasonable time limit in submitting the Application to the Court.

B. Conditions not in contention between the Parties

56. The Court notes that the compliance with Sub-rules 1, 2, 3, 4, and 7 of Rule 40 of its Rules is not contested and that nothing on record shows that these sub-rules have not been respected. The Court therefore holds that the said conditions have been met.

57. In light of the foregoing, the Court holds that this Application fulfils all the admissibility requirements listed in Article 56 of the Charter and Rule 40 of its Rules and, consequently, declares the Application admissible.

VII. Merits

58. In the Application, it is alleged that the Respondent State violated Articles 2(2), 6(a) and (b) and 21(2) of the Maputo Protocol; Articles 3 and 4 of the Children's Charter and Articles 1(3) and 5(a) of CEDAW

3 Application No. 013/2011, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo & Burkinabè Movement on Human Rights v Burkina Faso,* Ruling of 21/06/2013 (Preliminary Objections) (*Norbert Zongo v Burkina Faso* Ruling), para 121; Application No. 005/2013, Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania,* para 73; and Application No. 007/2013, Judgment of 03/06/2016 *Mohamed Abubakari v United Republic of Tanzania,* para 91, www.african-court.org.

A. Alleged violation relating to the minimum age of marriage

59. The Applicants aver that Article 281 of the impugned law establishing the Family Code sets the minimum age for contracting marriage at eighteen (18) for boys and sixteen (16) for girls, whereas Article 6(b) of the Maputo Protocol sets that age at 18 for girls.

60. The Applicants further indicate that the impugned law allows for special exemption for marriage as from fifteen (15) years, with the father's or mother's consent for the boy, and only the father's consent, for the girl.

61. The Applicants also aver that according to the World Bank survey conducted in Mali between 2012 and 2013, 59.9% of women aged 18 and 22 were married before the age of 18, 13.6% at 15 years and 3.4% before the age of 12; that despite these alarming statistics on child marriage, Mali has not taken appropriate measures to eradicate this phenomenon.

62. The Applicants recall the relevant provisions of the Children's Charter, namely, Article 1(3) thereof, which provides that "Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency, be discouraged"; Article 2 thereof, defines a child as "every human being below the age of 18 years" and Article 21, which provides that "State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular those customs and practices prejudicial to the health or life of the child; and those customs and practices discriminatory to the child on the grounds of sex or other status".

63. The Respondent State, in its Response, submits that the National Assembly of Mali, on 3 August 2009, enacted the Family Code which contains provisions compliant with the international commitments of Mali, but that this Code could not be promulgated following a "*force majeure*" which affected the process.

64. The Respondent State argues that, prior to the promulgation of the text by the President of the Republic, a mass protest movement against the Family Code halted the process; that the State was faced with a huge threat of social disruption, disintegration of the nation and upsurge of violence, the consequence of which could have been detrimental to peace, harmonious living and social cohesion; that the mobilisation of religious forces attained such a level that no amount of resistance action could contain it.

65. The Respondent State further argues that, in the circumstances,

the Government was obliged to submit the text for a second reading, always involving Islamic organisations, which culminated in the Family Code of 2011, enacted by the National Assembly on 2 December 2011 and promulgated by the President of the Republic on 30 December 2011; that it was therefore unjustified to accuse the State of violating rights whereas the State was only revising the initial text in order to garner consensus and avoid unnecessary disruptions; and that the said revision comprises flexibilities which do not in any way detract from the rights protected by the Charter and other human rights instruments to which the State is a Party.

66. With regard to the allegation of violation of the minimum age of marriage, the Respondent State maintains that the established rules must not eclipse social, cultural and religious realities; that the distinction contained in Article 281 of the Family Code should not be seen as a lowering of the marriage age or a discrimination against girls, but should rather be regarded as a provision that is more in line with the realities in Mali; that it would serve no purpose to enact a legislation which would never be implemented or would be difficult to implement to say the least; that the law should be in harmony with socio-cultural realities; that it would serve no useful purpose creating a gap between the two realities, especially as, according to the Respondent State, at the age of fifteen (15), the biological and psychological conditions of marriage are in place, and this, in all objectivity, without taking sides in terms of the stance adopted by certain Islamist circles.

67. The Respondent State in conclusion asserts that the question is not that of violation of international obligations or maintenance of practices that should be discouraged but rather that of adapting the said obligations to social realities and that for these reasons, the Applicants' argument should be dismissed as unfounded.

68. In their Reply, the Applicants argued that by ratifying the Charter, the Maputo Protocol and the Children's Charter, the Respondent State committed itself fully to the relevant instruments; that the threats generated by the protests cannot justify derogation from the commitments imposed on it as a State Party to the said instruments.

69. Concerning the minimum age for marriage, the Applicants submit that the limitations on which the Respondent State relies to exempt itself from its international obligations are not permitted under Article 6(b) of the Maputo Protocol which, without exemption, sets the minimum age of marriage for girls at eighteen (18) years.

70. With regard to the Respondent State's allegation that the biological and psychological conditions of marriage are in place at age 15 for the girl, the Applicants submit that these assertions are contrary to the jurisprudence of the African Committee of Experts on

the Rights and Welfare of the Child[4], the Committee on the Elimination of Discrimination against Women[5] and the research conducted into the disadvantages of early marriage.

71. Article 2 of the Children's Charter defines a child as "every human being below the age of 18 years".

72. Article 4(1) stipulates that "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".

73. Article 21 of the same Charter stipulates that: "State Parties … shall take all appropriate measures to eliminate harmful social and cultural practices … and those customs and practices discriminatory to the child on the grounds of sex or other status".

74. Article 6(b) of the Maputo Protocol provides that: "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: b) the minimum age of marriage for women shall be 18 years…"

75. The Court notes that the afore-mentioned provisions focus on the obligation for States to take all appropriate measures to abolish negative practices and customs as well as practices discriminatory to children born out of wedlock for reasons of their gender, especially measures to guarantee the minimum age for marriage at 18 years.

76. The Court further notes that, as indicated in paragraphs 67, 68 and 69 above, the Respondent State implicitly admits that the present Family Code, adopted in a situation of *"force majeure"* is not consistent with the requirements of international law.

77. The Court also notes that Article 281 of the impugned Family Code effectively sets the marriage age at 18 for men and 16 for women. Furthermore, the Article also includes the possibility for the administrative authorities to grant special exemption for girls to be married at 15 years for "compelling reasons".

78. The Court holds in conclusion that it lies with the Respondent State to guarantee compliance with the minimum age of marriage, which is 18 years, and the right to non-discrimination; that having failed to do so, the Respondent State has violated Article 6(b) of the Maputo Protocol and Articles 2, 4 (1) and 21 of the Children's Charter.

4 *Centre for Human Rights and Rencontre Africain pour la Défense des Droits de l'Homme v Senegal* (2014), ACRWC 003/12, para 71.

5 General Recommendations No. 21,1994 (Committee 21), para 36.

B. Alleged violation of the right to consent to marriage

79. The Applicants allege that the impugned law, in its Article 300, entitles religious ministers, alongside civil registry officials to perform marriages but that no provision of this law provides for verification of the Parties' consent by the religious ministers.

80. The Applicants further aver that Article 287 of the impugned law prescribes sanctions against any civil registry official who performs marriage without verifying the consent of the Parties, but no sanctions are prescribed against defaulting religious ministers who fail to perform the verification.

81. The Applicants also submit that Article 283 of the same law specifies that consent must be given orally and in person before the civil registry official by each party but that, that provision was not prescribed for religious ministers; the conditions that must be fulfilled by the civil registry official to be able to celebrate a marriage without the presence of the Parties are similarly not required of religious ministers.

82. The Applicants contend that the way religious marriages are performed in Mali poses considerable risk, given that the marriages are forced, in as much as they are generally celebrated without the presence of the Parties; that the marriages consist in the two families exchanging kola nuts in the presence of a specialist of the Muslim religion; that even if these marriages are performed in the mosque, the presence of women is not required; that this practice, combined with traditional attitudes which encourage the marriage of the girl at puberty, is fraught with considerable risk as the marriages are performed without the consent of the girl.

83. The Applicants conclude from the foregoing that by enacting a law that permits the maintenance of the marriage customs and traditions that do not allow for the consent of the Parties, the Respondent State has violated its commitment under Article 6(a) of the Maputo Protocol and Article 16(a) and (b) of CEDAW.

84. In its Response, the Respondent State refutes this allegation. It argues that paragraph 1 of section 283 of the Family Code makes it clear that there is no marriage when there is no consent; that furthermore, section 300 of the same Family Code makes it clear that marriage is publicly celebrated by the religious minister subject to compliance with the substantive conditions of marriage and the prohibitions enshrined by the Family Code; that these constitute guarantees of compliance with the obligation to ensure the consent of prospective spouses before any marriage celebration.

85. With regard to the practical organisation of marriage celebration, the Respondent State indicates that, at any place and at any time, it is left to the discretion of the prospective Parties who may celebrate their

marriage inside a mosque, in their families or at a civil centre with the sole condition to respect public order and the law.

86. The Respondent State further contends that another guarantee of compliance with the conditions is laid down in Sections 303(3) and (304) which regulate the validity of the marriage celebrated by a religious minister, the transmission of the marriage certificate to the civil registrar and its registration in the Civil Register.

87. In their Reply, the Applicants recall that the criticisms against the extant 2011 Family Code are that: (1) it does not prescribe that consent be given orally and in person before the religious minister, (2) it does not provide for sanctions against a religious minister who performs marriage without verifying the Parties' consent, (3) it is silent on the verification of consent by the religious minister in the event of the inability of either of the Parties to do so and, (4) it does not lay down, for the religious minister, the procedures for verifying the consent of the Parties.

88. The Applicants contend that the Respondent State confines itself to stating that the practical organisation of marriage celebration is left at any place and at any time to the discretion of the Parties without adducing any argument to counter the above criticisms.

89. Article 6(a) of the Maputo Protocol stipulates that: "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: a) no marriage shall take place without the free and full consent of both Parties."

90. The Court notes that the Maputo Protocol in its Articles 2(1)(a) and 6 and CEDAW in its Article 10 and 16 set down the principles of free consent in marriage.

91. The Court also notes that despite the fact that the said instruments are ratified by Mali, the extant Family Code envisages the application of Islamic law (Article 751) and entitles religious ministers to celebrate marriages but does not require them to verify the free consent of the Parties.

92. Furthermore, while sanctions are prescribed against the civil status officer for non-verification of the consent of the Parties, no sanction is provided against a religious minister who does not comply with this obligation. Verification of consent given orally and in person is required before the civil status officer in accordance with Article 287 of the Family Code, whereas this obligation to verify is not required of a religious minister.

93. The Court also notes that one condition that must be fulfilled by a civil status officer to celebrate a marriage without the presence of the Parties, is the deposition by the absent party, of an act drawn up by the civil status officer of his area of abode, a condition not required in the

marriage celebrated by a religious minister.

94. The Court further notes that the way in which a religious marriage takes place in Mali poses serious risks that may lead to forced marriages and perpetuate traditional practices that violate international standards which define the precise conditions regarding age of marriage and consent of the Parties, for a marriage to be valid.

95. The Court notes that, in the procedure for celebration of marriage, the impugned law allows for the application of religious and customary laws on the consent to marriage. It also allows for different marriage regimes depending on whether it is celebrated by a civil officer or a religious minister - practices not consistent with international instruments, namely: the Maputo Protocol and CEDAW.

C. Alleged violation of the right to inheritance for women and natural children

96. In the Application, it is argued that the impugned law enshrines religious and customary law as the applicable regime, by default, in matters of inheritance, in as much as the provisions of the new Family Code apply only "where religion or custom has not been established in writing, by testimony, experience or by common knowledge or where the deceased, in his life time, has not manifested in writing or before witnesses his wish that his inheritance should be distributed otherwise" (Article 751 of the Family Code).

97. As regards women, the Applicants maintain that in Mali, Islamic law gives a woman half of what a man receives. They also point out that the majority of the population lacks the capacity to use the services of a notary to authenticate a will; that, besides, notaries estimated at 40 in number in the whole country cannot serve the population of over 15 million Malians.

98. The Applicants submit from the aforesaid that, in adopting the impugned law, the Respondent State violated Article 21 of the Maputo Protocol which provides that: "A widow shall have the right to an equitable share in the inheritance of the property of her husband… Women and men shall have the right to inherit, in equitable shares, their parents' properties".

99. The Applicants state that the Committee on the Elimination of Discrimination against Women has also declared that practices which do not give women the same share of inheritance as men constitute a violation of CEDAW.[6]

100. As regards the child, the Applicants submit that, according to the

6 See Matter of *AT v Hungary* (2005) CEDAW 2/2005, para 9.3.

new Family Code, children born out of wedlock do not have the right to inheritance and that they may be accorded inheritance only if their parents so wish and the conditions set out in Article 751 of the Family Code have been met (see *supra* paragraph 97).

101. The Applicants further submit that the Respondent State also violated Article 4(1) of the Children's Charter, and Article 3 thereof which prohibits all forms of discrimination.

102. The Applicants contend that although the new Code provides for equal share of inheritance between the legitimate child and the child born out of wedlock where inheritance is governed by the provisions of the Family Code, this right is rendered illusory by the application of the customary or religious regime as the law applicable in the absence of a will to the contrary; that the regime applicable to most children born out of wedlock in Mali remains the customary or religious law, and that in the circumstances, the right to inheritance is no longer a right but a favour for children born out of wedlock in Muslim families.

103. In its Response, the Respondent State indicates that, until recently, Mali did not have an inheritance legislation that was entirely customary; that by a commitment entered into, the State of Mali regulated inheritance in the Family Code of 2009 by enshrining equal share for men and women with the participation of the children born out of wedlock in the devolution of estate on the same footing as the legitimate child; but that, under the pressure and for fear of social unrest, the State had to consent to a re-drafting of this text.

104. The Respondent State further submits that the Family Code promulgated in 2011 has the advantage of being flexible in the sense that it allows for reconciliation of entrenched positions, offering each citizen the possibility of determining his mode of inheritance; that anyone who does not wish his succession to be arranged according to customary or religious rules simply expresses his will to have his inheritance devolved according to Family Code rules or his will; that the legislator has simplified the mode of expression of this choice which can be made even by testimony.

105. Based on the above considerations, the Respondent State concludes that it must be recognised that Mali's Family Code offers immense possibilities to every citizen and, therefore, does not violate the right to inheritance.

106. In their Reply, the Applicants maintain the arguments developed in their Application that under Islamic law, granting equal inheritance shares to men and women is a favour and not a right; and also, that equal share between children born in wedlock and children born out of wedlock is similarly a favour.

107. The Applicants therefore pray the Court to rule that, by legalising discrimination against women and children born out of wedlock, the

Respondent State violated Article 21 of the Maputo Protocol, Article 4 of the Children's Charter and Article 16(h) of the CEDAW.

108. With regard to women, Article 21 of Maputo Protocol stipulates that:

> "A widow shall have the right to an equitable share in the inheritance of the property of her husband…. Women and men shall have the right to inherit, in equitable shares, their parents' properties".

109. Regarding the child, Article 3 of the Children's Charter (paragraph 105) recognises for the child, all rights and freedoms and proscribes all forms of discrimination regardless of the basis. The Children's Charter therefore does not make any distinction between children and they all have the right to inheritance.

110. The Court notes from the foregoing provisions (paragraph 105) that in matters of inheritance a predominant place is accorded to the rights of the woman and the child, given that the widow and the children born out of wedlock have the same rights as the others. These guarantee equality of treatment for women and for children without any distinction.

111. The Court notes that in the instant case, the Family Code applicable in Mali enshrines religious and customary law as the applicable regime in the absence of any other legal regime or a document authenticated by a notary. Article 751 of the Family Code stipulates that: "Inheritance shall be devolved according to the rules of religious law or the provisions of this Code ...".

112. The documents on record also show that in matters of inheritance, Islamic law gives to the woman half of the inheritance a man receives, and that children born out of wedlock are entitled to inheritance only if their parents so desire.

113. The Court notes that the superior interest of the child required in matters of inheritance as stipulated under Article 4(1) of the Children's Charter in any procedure, were not taken into account by the Mali legislator at the time of elaboration of the Family Code.

114. The Court finds that the Islamic law currently applicable in Mali in matters of inheritance and the customary practices are not in conformity with the instruments ratified by the Respondent State.

115. The Court therefore holds that the Respondent State has violated Article 21(2) of the Maputo Protocol and Articles 3 and 4 of the Children's Charter.

D. Alleged violation of the obligation to eliminate practices or traditions harmful towards women and children

116. The Applicants submit that by adopting the impugned law, the Respondent State has demonstrated a lack of willingness to eliminate the traditional practices that undermine the rights of women and girls, and children born out of wedlock, especially early marriage, the lack of consent to marriage, the unequal inheritance - all in contravention of Article 1(3) of the Children's Charter.

117. The Applicants assert that the impugned law makes early marriage of girls easier compared to the 1962 Family Code which permits the marriage of girls aged between 15 and 17 only with the consent of their parents, whereas the 2011 law permits the marriage of girls aged between 16 and 17 without parental consent. They further submit that the 1962 Code sets the special exemption for marriage at 15 years for girls with the consent of their father and mother, whereas the impugned law allows for the marriage of 15-year-old girls even where the mother is opposed to it since only the father's consent suffices.

118. In conclusion, the Applicants maintain their arguments and reiterate their prayers in this regard (see supra paragraph 16).

119. In the Response, the Respondent State contends that it is excessive to assert that Mali does not deploy efforts to eliminate the said practices; and that the Family Code of 2009 provides an adequate illustration of this contention. The Respondent State recalls the efforts deployed on this issue, particularly the launch of programmes for sensitisation and promotion of the rights of women and children, and the various laws enacted to guarantee the protection of these rights.

120. Article 2(2) of the Maputo Protocol provides that**: "**States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."

121. Article 5(a) of CEDAW stipulates that:

"States Parties shall take all appropriate measures:

a. To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

122. Article 16(1)(a) and (b) of CEDAW stipulates that:

"State Parties shall take all appropriate measures to eliminate discrimination

against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

a. The same right to enter into marriage;

b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent."

123. Article 21(1) of the Children's Charter provides that:

"State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

a. those customs and practices prejudicial to the health or life of the child; and

b. those customs and practices discriminatory to the child on the grounds of sex or other status."

124. Having established the violation of the rules provisions governing the minimum age for marriage, the right to consent to marriage and the right to inheritance for women and children born out of wedlock, the Court holds in conclusion that, by adopting the Family Code and maintaining therein discriminatory practices which undermine the rights of women and children, the Respondent State has violated its international commitments.

125. In view of the foregoing, the Court holds that the Respondent State has violated Article 2(2) of the Maputo Protocol, Articles 1(3) and 21 of the Children's Charter and Article 5(a) of CEDAW.

VIII. Reparations

126. In the Application, the Applicant prays the Court to order the measures listed in paragraph 16, aimed at amending the law, on the one hand, and the adoption of measures to enlighten, sensitise and educate the population, on the other.

127. In its Response, the Respondent State sought the outright dismissal of the Application as being unfounded.

128. 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."

129. In this respect, Rule 63 of the Rules stipulates that

"The Court shall rule on the request for the reparation … by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

130. With respect to the measures requested by the Applicants in paragraph 16 (i), (ii), (iv), (v), (vi) and (vii), relating to the amendment

of the national law, the Court holds that the Respondent State has to amend its legislation to bring it in line with the relevant provisions of the applicable international instruments.

131. As regards the measures requested in paragraph 16 (iii), (viii), (ix), (x), (xii) and (xiii), the Court notes that Article 25 of the Charter stipulates that State Parties have the duty "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as the corresponding obligations and duties are understood". The Respondent State has the obligation to comply with the commitments under Article 25 of the Charter.

132. In the instant case, neither the Applicants nor the Respondent State has raised the issue of costs.

133. The Court notes, in this respect, that Rule 30 of the Rules stipulates that: "Unless otherwise decided by the Court, each Party shall bear its own costs."

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

X. Operative part

135. For these reasons,

The Court,

Unanimously:

i. *Dismisses* the objection to the Court's jurisdiction;

ii. *Declares* that it has jurisdiction;

iii. *Dismisses* the objection to the admissibility of the Application;

iv. *Declares* that the Application is admissible;

v. *Holds* that the Respondent State has violated Article 6(b) of the Maputo Protocol, and Articles 2 and 21 of the African Charter on the Rights and Welfare of the Child, on the minimum age for marriage;

vi. *Holds* that the Respondent State has violated Article 6(a) of the Maputo Protocol and Article 16(1)(b) of the Convention on the Elimination of All Forms of Discrimination against Women on the right to consent to marriage;

vii. *Holds* that the Respondent State has violated Article 21(1) and (2) of the Maputo Protocol, and Article 3 of the African Charter on the Rights and Welfare of the Child, on the right to inheritance for women and children born out of wedlock;

viii. *Holds* that the Respondent State has violated Article 2(2) of the Maputo Protocol, Articles 1(3) and 21 of the African Charter on the Rights and Welfare of the Child, and Article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women on the elimination of traditional and cultural practices harmful to the rights of

women and children;

ix. *Holds* consequently that the Respondent State has violated Article 2 of the Maputo Protocol, Articles 3 and 4 of the African Charter on the Rights and Welfare of the Child, and Article 16 (1) of the Convention on the Elimination of All Forms of Discrimination against Women on the right to non-discrimination for women and children;

x. *Orders* the Respondent State to amend the impugned law, harmonise its laws with the international instruments, and take appropriate measures to bring an end to the violations established;

xi. *Declares* that the finding of the violations above-mentioned constitutes in itself a form of reparation for the Applicants;

xii. *Requests* the Respondent State to comply with its obligations under Article 25 of the Charter with respect to information, teaching, education and sensitisation of the populations.

xiii. *Orders* the Respondent State to submit to it a report on the measures taken in respect of paragraphs x and xii within a reasonable period which, in any case, should not be more than two (2) years from the date of this Judgment;

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

Evarist v Tanzania (merits) (2018) 2 AfCLR 402

Application 027/2015, *Minani Evarist v United Republic of Tanzania*

Judgment, 21 September 2018. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Court held, in case where free legal representation had not been provided in relation to a serious crime, that the State had violated the right to a fair trial and ordered compensation.

Jurisdiction (national process, 20, 35)

Admissibility (exhaustion of local remedies, extraordinary remedy, 34; submission within reasonable time, 45)

Fair trial (defence, free legal representation, 69, 70)

Equal protection (allegation needs to be substantiated, 75)

Reparations (release, 81; compensation, 84, 85)

Separate Opinion: BEN ACHOUR

Reparations (proportionality, release, 14-18)

Joint Dissenting Opinion: KIOKO, MATUSSE, CHIZUMILA and ANUKAM

Costs (each party to bear its own costs, 6, 11)

I. The Parties

1. The Applicant, Mr Minani Evarist, is a national of the United Republic of Tanzania, currently serving a thirty (30) years' prison term for the crime of rape at Butimba Central Prison in Mwanza.

2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and also became a Party to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, the Respondent State deposited the declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. Subject of the Application

A. Facts of the Matter

3. According to the records, in Criminal Case No. 155/2005 before the District Court of Ngara, the Applicant was convicted and sentenced on 30 March 2006, to 30 years imprisonment for having committed the crime of rape of a fifteen (15) year old girl, an offence punishable under Sections 130(1) and (2)(e) and Section 131(1) of the Tanzanian Penal Code, as Revised in 2002.

4. The Applicant filed Criminal Appeal No. 43/2006 before the High Court of Tanzania at Bukoba (hereinafter referred to as 'the High Court"); and Criminal Appeal No. 124/2009 before the Court of Appeal of Tanzania at Mwanza (hereinafter referred to as 'the Court of Appeal").

5. The High Court and the Court of Appeal upheld the sentence on 29 March 2007 and 16 February 2012, respectively; and the Applicant filed an Application for review before the Court of Appeal on 19 August 2014. The Applicant alleges that this Application is still pending at the time of filing of the Application.

B. Alleged violations

6. The Applicant alleges that:

i. The Court of Appeal of Tanzania "...handed down erroneously its judgment against the Applicant on 16/02/2012; and then caused him severe harm when it did not schedule for a hearing 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 his defence and clustered them into three grounds. This legal proceeding was detrimental to the Applicant insofar as it violated his fundamental 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 afford him legal representation during his trial, he "...was deprived of his right to have his cause heard, which had a prejudicial effect on him. He alleges that this procedure constitutes a violation of the Applicant's fundamental rights as set out in Article 7(1)(c) and (d), of the Charter, and of Sections 1 and 107(2)(b) of the Tanzanian Constitution of 1997"

(hereinafter referred to as "the Tanzanian Constitution").

7. In summary, the Applicant alleges the violation of Articles 3(2) and 7(1)(c) and (d) of the Charter.

III. Summary of the procedure before the court

8. The Application was filed on 10 October 2015 and served on the Respondent State by a notice dated 23 December 2015, directing the Respondent State to file the list of its representatives within thirty (30) days and to file its Response to the Application within sixty (60) days of receipt of the notice, in accordance with Rules 35(2)(a) and 35(4)(a) of the Rules of Court (hereinafter referred to as "the Rules").

9. The Respondent State filed the names and addresses of its representatives on 22 February 2016.

10. On 31 March 2016, the Application was transmitted to the Chairperson of the African Union Commission and through him to the Executive Council of the African Union and to the State Parties to the Protocol, in accordance with Rule 35(3) of the Rules.

11. The Respondent State submitted its Response on 22 May 2017, which was served on the Applicant by a notice dated 30 May 2017.

12. On 28 June 2017, the Applicant filed the Reply to the Response and this was served on the Respondent State by a notice dated 17 July 2017.

13. The Court decided to close the written pleadings with effect from 9 October 2017, pursuant to Rule 59(1) of the Rules and the Registry duly informed the Parties by a notice dated 9 October 2017.

14. On 6 April 2018, the Parties were informed that the Court would not hold a public hearing indicating that written submissions and the evidence on file were sufficient to determine the matter.

IV. Prayers of the Parties

15. 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 reparations for the violation of his rights; and

iii. Order such other measures or remedies that the Court may deem fit to grant."

16. The Respondent State prays the Court to rule that:

"i. the Court has no jurisdiction to hear the matter and that the Application is inadmissible;

ii. the Respondent State "has not violated Articles 3(2), 7(1), 7(1)(c) and 7(1)(d) of the Charter";

iii. the Respondent State "should not pay reparations to the Applicant";

iv. the Application should be dismissed as being baseless; and

v. the costs be borne by the Applicant."

V. Jurisdiction

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

A. Objections to material jurisdiction

18. The Respondent State objects to the Court's jurisdiction to adjudicate on the matters raised by the Applicant arguing that, in praying the Court to re-examine the matters of fact and law examined by its judicial bodies, set aside their rulings and order the release of the convicted individual, the Applicant is in effect asking the Court to sit as an appellate body, whereas this is not within its powers as set out in Article 3(1) of the Protocol and Rule 26 of the Rules. To this end, the Respondent State makes reference to the Court's Decision in Application No. 001/2013: *Ernest Francis Mtingwi v Republic of Malawi*.

19. The Applicant rebuts the Respondent State's allegation and asserts that the Court shall have jurisdiction as long as there is a violation of the provisions of the Charter or of any other relevant human rights instruments, which bestows on the Court the power to review decisions rendered by domestic courts, review evidence and set aside the sentence and acquit the victim of human rights violations.

20. In response to the objection to its material jurisdiction, this Court reiterates its position as affirmed in *Ernest Mtingwi v Republic of Malawi*[1] that it is not an appeal court with respect to decisions rendered by national courts. However, as the Court underscored in its Judgment of 20 November 2015 in *Alex Thomas v United Republic of Tanzania*, and reaffirmed in its Judgment of 3 June, 2016 in *Mohamed Abubakari v United Republic of Tanzania*, that this situation does not preclude it from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is

1 Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi* (hereinafter referred to as "*Ernest Francis Mtingwi v Malawi* Decision"), para 14.

a Party.[2] Indeed, this falls within the very scope of the powers of the Court as provided for under Article 3(1) of the Protocol.

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 has not been contested by the Respondent State, and nothing in the pleadings indicates that the Court lacks jurisdiction. The Court thus holds that:

> "i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the Declaration required under Article 34(6) thereof, which enabled the Applicants to access the Court in terms of Article 5(3) of the Protocol;
>
> ii. it has temporal jurisdiction on the basis that the alleged violations are continuous in nature since the Applicant remains convicted on the basis of what he considers an unfair process;
>
> iii. it has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State."

23. From the foregoing, the Court concludes that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

24. 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".

25. Pursuant to Article 39(1) of the Rules, "the Court shall conduct preliminary examination of (…) the admissibility of the application in accordance with Articles 50 and 56 of the Charter and Rule 40 of these Rules."

26. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article

2 Application No.005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania (*hereinafter referred to as "*Alex Thomas v Tanzania* Judgment*"),* para 130 and Application No.007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania (*hereinafter referred to as "*Mohamed Abubakari v Tanzania* Judgment*"),* para 29.

6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:

"1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;

2. Comply with the Constitutive Act of the Union and the Charter;

3. Not contain any disparaging or insulting language;

4. Not be based exclusively on news disseminated through the mass media;

5. Be filed after exhausting local remedies, if any, unless it is obvious that the procedure in unduly prolonged;

6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and

7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility in contention between the Parties

27. While some of the above conditions are not in contention between the Parties, the Court notes that the Respondent State raised two objections: one relating to the exhaustion of local remedies and the other, regarding the timeframe for filing the Application before the Court.

i. Objection based on the alleged failure to exhaust local remedies

28. The Respondent State argues that "[t]he exhaustion of domestic remedies is a fundamental principle of international law and that the Applicant should have used all domestic remedies before submitting the case to an international body such as the African Court on Human and Peoples' Rights".

29. To buttress its assertions, the Respondent State relies on the African Commission on Human and Peoples' Rights' (hereinafter referred to as "the Commission") jurisprudence in Communication No. 333/20 –*SAHRINGON and Others v Tanzania* and Communication No. 275/03, *Article 19 v Eritrea*.

30. The Respondent State contends that the alleged violation of the provisions of Articles 1 and 107A(2)(b) of the Tanzanian Constitution,

1977 should have been challenged in a constitutional petition,[3] as provided by Article 30(3) of the Tanzanian Constitution and in the Basic Rights and Duties Enforcement Act, Revised Edition, 2002.

31. The Respondent State also claims that the right to legal aid is provided under the Legal Aid Act (Criminal Proceedings), Revised Edition, 2002, but the Applicant never requested for it before the domestic courts.

32. The Applicant refutes the Respondent State's assertion that the Application is inadmissible, arguing that he could not file a constitutional petition since the violation had been committed by the Court of Appeal; nor could he file such a petition before a single High Court Judge against a ruling by the highest court in Tanzania made up of a panel of three Judges.

33. The Court notes that the Applicant filed an appeal and had access to the highest court of the Respondent State, namely, the Court of Appeal, to adjudicate on the various allegations, especially those relating to violations of the right to a fair trial.

34. Concerning the filing of a constitutional petition for violation of the Applicant's rights, the Court has already established that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.[4]

35. With regard to the allegation that the Applicant did not raise the issue of legal aid during domestic proceedings but chose to bring it before this Court for the first time, the Court, in accordance with the Judgment rendered in *Alex Thomas v United Republic of Tanzania*, is of the view that the violation occurred in the course of the domestic judicial proceedings that led to the Applicant's conviction and sentence to thirty (30) years' imprisonment; that the allegation forms part of the "bundle of rights and guarantees" relating to the right to a fair trial which was the basis of the Applicant's appeals. The domestic judicial authorities thus had ample opportunity to address the allegation even without the Applicant having raised it explicitly. It would therefore be unreasonable to require the Applicant to file a new application before the domestic courts to seek redress for these claims.[5]

36. Accordingly, the Court finds that the Applicant has exhausted the local remedies as envisaged under Article 56(5) of the Charter and

3 Petition to the High Court against violations of the fundamental rights and duties provided for in Articles 12 to 29 of the Constitution.

4 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 – 62; *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 66 – 70; Application No.011/2015. Judgment of 28/9/20l7, *Christopher Jonas v United Republic of Tanzania (*hereinafter referred to as "*Christopher Jonas v Tanzania* Judgment*"*, para 44.

5 *Alex Thomas v Tanzania* Judgment*, op cit*, paras. 60 – 65.

Rule 40(5) of the Rules. The Court therefore overrules this preliminary objection to the admissibility of the Application relating to the exhaustion of local remedies.

ii. Objection on the ground that the Application was not filed within a reasonable time

37. The Respondent State argues that, should the Court find that the Applicant has exhausted domestic remedies, it should still dismiss the Application because it was not filed within a reasonable time after local remedies were exhausted.

38. It further contends that, even though Article 40(6) of the Rules of Court is not specific on the issue of reasonable time, international human rights case law has established that six months would be a reasonable time limit within which the Applicant should have filed the Application, maintaining that such was the position of the Commission in Communication No. 308/05, *Michael Majuru v Zimbabwe*.

39. The Respondent State also maintains that three (3) years and six (6) months had elapsed between the decision of the Court of Appeal of Tanzania (16 February 2012) and the date this Court was seized (10 October 2015), and that this timeframe is not reasonable given that the Applicant had no difficulty in filing the Application earlier.

40. The Applicant refutes the Respondent State's allegations regarding the reasonableness of the timeframe for seizing the Court, arguing that there is no provision in the Rules for assessment of the reasonable time for filing applications before the Court. To this end, he cites the Court's decision in Application No. 013/2011: *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso*, that the Court had established that the "reasonableness of a timeframe of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis."

41. The Applicant then states that he was awaiting the decision of the Court of Appeal of Tanzania on his application for review of the decision of 16 February 2012, which took a long time.

42. The Court observes that the question at issue is whether the time that elapsed between the exhaustion of local remedies and filing of the case before it, is reasonable within the meaning of Rule 40(6) of the Rules.

43. The Court notes that the ordinary judicial remedies available in the Respondent State were exhausted on 16 February 2012, the date of the Court of Appeal decision and that the Application was filed before the Court on 10 October 2015. Between the Court of Appeal's decision and the filing of the Application at this Court, three (3) years, seven (7) months and twenty-four (24) days had elapsed.

44. In its Judgment in the Matter of the *Beneficiaries of late Norbert Zongo and Others v Burkina Faso*, the Court set out the principle that "... the reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on case-by-case basis."[6]

45. The Court notes that the Applicant is lay, indigent and incarcerated person without counsel or legal assistance,[7] as well as his attempt to use extraordinary measures, that is, the application for review of the Court of Appeal's decision,[8] and holds that all these constitute sufficient grounds to justify the filing of the Application after three (3) years, seven (7) months and twenty-four (24) days following the Court of Appeal decision.

46. In view of the aforesaid, the Court dismisses this objection to admissibility relating to the filing of the Application within a reasonable time.

B. Conditions of admissibility that are not in contention between the Parties

47. The conditions regarding the identity of the Applicant, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence, and the principle that an Application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union (Sub-Rules 1, 2, 3, 4, and 7 of Rule 40 of the Rules) are not in contention between the Parties.

48. The Court also notes that nothing on the record suggests that these conditions have not been met in the instant case. The Court therefore holds that the requirements under those provisions are fulfilled.

49. In light of the foregoing, the Court finds that the instant Application fulfils all admissibility conditions set out under Article 56 of the Charter and Rule 40 of the Rules, and accordingly, declares the

6 Application No. 013/2011. Ruling on preliminaries objections of 21/06/2013, *Beneficiaries of late Zongo and Others v Burkina Faso*, para 121. *See* also Application No. 005/2013*, Alex Thomas v Tanzania* Judgment*, op cit,* para 73; Application No. 007/2013, Judgment of 3/6/2013*, Mohamed Abubakari v Tanzania* Judgment*, op cit*, para 91; Application No. 011/2015. *Christopher Jonas v Tanzania* Judgment*, op cit,* para 52.

7 *Alex Thomas v Tanzania* Judgment, *op cit*, para 74.

8 Application No. 006/2015. Judgment of 23/3/2018, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania*, para 61.

same admissible.

VII. Merits

A. Alleged violations of the right to a fair trial

50. The Applicant alleges two violations, which fall within the ambit of the right to a fair trial, namely: the violation of the Applicant's right to have his cause heard by a court of law and the violation of the right to legal aid.

i. The alleged violation of the right to have his cause heard by a court of law

51. The Applicant alleges that the Court of Appeal failed to examine all of his arguments, since it grouped them into three 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 fundamental right to have his cause heard by a court of law, as provided for in Article 3(2) of the Charter". The Applicant also contends that there should have been a *voir dire* examination of the witnesses before they were allowed to testify.

52. The Respondent State rebuts the Applicant's allegation, and submits that all his arguments were duly examined by the Court of Appeal, which held that of the three arguments submitted only the third was relevant, which states that "... the prosecution has not been able to gather evidence beyond reasonable doubt ..."

53. The Court notes that the Applicant's allegation does not relate to Article 3(2) of the Charter, as he asserts**,** which provides that "Every individual shall be entitled to equal protection of the law", but rather to Article 7(1), which stipulates that: "Every individual shall have the right to have his cause heard..."

54. The Court observes that the question that arises here is whether the pleas raised in the appeal were duly examined by the Court of Appeal in conformity with the abovementioned Article 7(1) of the Charter. On this point, the Court has consistently ruled that the 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.[9]

55. The Court notes that in the appeal before the Court of Appeal, the Applicant raised two issues, namely: the lack of conclusive evidence on the age of fifteen (15) attributed to the victim and the fact that the crime has not been proven beyond reasonable doubt.

56. The Court notes that the Court of Appeal held that the only important matter was whether the material act of rape (penetration) had been committed by the Applicant, and following examination of the same, it concluded that the Applicant committed the act and confirmed the conviction.

57. The Court notes that the Applicant has not provided sufficient evidence to substantiate his claim as to the age of the victim, and has not demonstrated how the *voir dire* examination would have impacted the decision to convict him. This Court has held in the past that "… general statements to the effect that a right has been violated are not enough. More substantiation is required".[10]

58. The Court further notes that nothing suggests that the Court of Appeal's assessment of the evidence was manifestly erroneous. Therefore, the Court holds that the alleged violation has not been proven and accordingly dismisses it.

ii. Alleged violation of the right to legal aid

59. The Applicant submits that "... he was not afforded legal representation, he was deprived of his right to have his cause heard", which had a prejudicial effect on him and that … "such a position constitutes a violation of his fundamental rights as set forth in Article 7(1)(c) and (d) of the Charter, and also in Articles 1 and 107A(2)(b) of the Tanzanian Constitution."

60. He challenges the Respondent State's arguments, admits that he **"…** never asked for legal aid**"**, and that domestic law provisions on legal aid "… does not provide for a procedure or directives on how to seek legal aid."

61. The Respondent State refutes the Applicant's allegations that its domestic law does not provide for a procedure as to how to seek legal aid, and requests proof in that regard. It contends that legal aid is provided in Section 310 of the Tanzanian Criminal Procedure Act,

9 *Ernest Francis Mtingwi v Tanzania* Decision, *op cit* para 14; *Alex Thomas v Tanzania* Judgment, *op cit* para 130; *Mohamed Abubakari v Tanzania* Judgment, *op cit,* paras 25 and 26, Application No. 032/2015. *Kijiji Isiaga v United Republic of Tanzania*, Application No. 032/2015. Judgment, 21/3/2018 (hereinafter referred to as "*Kijiji Isiaga v Tanzania* Judgment") para 63.

10 *Alex Thomas v Tanzania* Judgment, *op cit*, para 140.

Section 3 of the Legal Aid Act and Rule 31(1) of the Court of Appeal Rules, 2009.

62. It further contends that, at any rate, the competent judicial authority applies for legal aid on behalf of the defendant, where required, provided the following conditions have been met: the defendant must be indigent and unable to pay lawyer's fees; and whether the interests of justice so demand.

63. The Respondent State further prays the Court to take into account the fact that legal aid is progressively being made available and that it is mandatory in cases of murder and homicide. It submits that while legal aid is granted by all its courts, there are however constraints that may impede the mandatory nature of the automatic provision of legal aid in all cases, especially the inadequate number of lawyers to meet this need across the country, as well as the constraint of shortage of financial and other resources.

64. The Respondent State further submits that the right to be represented by a Counsel of one's choice is guaranteed to all those who can afford it. As regards legal aid, however, the Respondent avers that it is neither easy nor practical to provide the defendant with a *pro bono* lawyer of his own choice. It, therefore, prays the Court to take into account the fact that legal aid is not an absolute right and that States exercise their discretionary powers in providing the said aid, depending on their capacity to do so; and this is how the extant legal aid system in the country operates.

65. In conclusion, the Respondent State indicates that the process of review of its legal aid system is ongoing, and that the outcome will be communicated to the Court in due course.

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

> "Every individual shall have the right to have his cause heard. This comprises:
>
> … c) The right to defence, including the right to be defended by counsel of his choice."

67. The Court notes that even though this Article guarantees the right to defence, including the right to be assisted by counsel of one's choice, the Charter does not expressly provide for the right to free legal assistance.

68. However, in its judgment in the *Alex Thomas v United Republic of Tanzania*, this Court held that free legal aid is a right intrinsic to the right to a fair trial, particularly, the right to defence guaranteed in Article 7(1)(c) of the Charter. In its previous jurisprudence, the Court also held that an individual charged with a criminal offence is automatically entitled to the right of free legal aid, even if the individual has not requested for it, whenever the interests of justice so require, in particular, if he/she

is indigent, if the offence is serious and if the penalty provided by the law is severe.[11]

69. In the instant case, the contention that the Applicant was not afforded free legal aid throughout his trial is not in dispute. Given that the Applicant was convicted of a serious crime, that is, rape, carrying a severe punishment of thirty (30) years, there is no doubt that the interests of justice would warrant free legal aid provided that the Applicant did not have the means to pay for the services of a lawyer. In this regard, the Respondent State does not contest the indigence of the Applicant nor does it argue that he was financially capable of hiring Counsel. It is clear in the circumstances that the Applicant should have been provided with free legal aid. The fact that he did not request for it does not exonerate the Respondent State from its responsibility to provide him with free legal aid.

70. As regards the allegations concerning the margin of discretion that the Respondent State should be given in the implementation of the right to legal aid, the non-absolute nature of the right to legal aid and the lack of financial means to offer legal aid to all persons charged with crimes, the Court holds that these allegations are no longer relevant in this instant case, given that the conditions for the compulsory grant of legal aid are all fulfilled.

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

B. Alleged violation of the right to equal protection of the law

72. The Applicant submits that, although he filed his application for review before the Court of Appeal and provided all the materials and evidence to corroborate the same, the application was not scheduled for hearing, whereas other applications filed subsequently were registered, set down for hearing and determined.

73. The Respondent State merely refutes this claim and calls on the Applicant to provide proof thereof.

74. 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.”

75. However, the Court notes that the Applicant has made general allegations without sufficient evidence to substantiate them. Relying

11 *Ibid* para. 123, see also *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 138 and 139.

on its jurisprudence cited in paragraph 57 of this Judgment, the Court therefore holds that the alleged violation has not been proven, and accordingly dismisses the same.

VIII. Remedies sought

76. The Applicant prays the Court to restore justice by setting aside his conviction and sentence; ordering his release from prison; awarding him compensation for the violation of his fundamental rights and, making such other orders as it may deem fit.
77. In its Response, the Respondent State prays the Court to dismiss the Application and the Applicant's prayers in their entirety on the grounds that they are baseless.
78. 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."
79. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for the reparation … by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".
80. The Court notes its finding in paragraph 69 above that the Respondent State has violated the Applicant's rights to be provided with legal aid. In this regard, the Court recalls its position on State responsibility in *Reverend Christopher R Mtikila v United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation."[12]
81. As regards the Applicant's prayer to annul his conviction and sentence and order his release, the Court reiterates its decision that it is not an appellate Court for the reasons that it does not operate within the same judicial system as national courts; and that it does not apply "the same law as the Tanzanian national courts, that is, Tanzanian law".[13]
82. The Court also recalls its decision in *Alex Thomas v United Republic of Tanzania* where it stated that "an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances"[14]. This would be the case, for example, if an Applicant sufficiently demonstrates or the Court itself establishes from

12 Application No. 011/2011. Ruling of 13/6/2014, *Reverend Christopher R Mtikila v United Republic of Tanzania*, *op cit*, para 27.

13 *Mohamed Abubakari v Tanzania* Judgment, para. 28.

14 *Alex Thomas v Tanzania* Judgment, *op. cit.,* para 157.

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. In such circumstances, the Court has pursuant to Article 27(1) of the Protocol the powers to order "all appropriate measures", including the release of the Applicant.

83. The Court observes, however, that such a finding does not preclude the Respondent State from adopting such measures should it deem appropriate.

84. The Court further notes that, in the instant case, the Applicant's right to legal aid was violated but this did not affect the outcome of his trial. The Court further notes that the violation it found caused non-pecuniary prejudice to the Applicant who requested adequate compensation therefor in accordance with Article 27(1) of the Protocol.

85. The Court therefore awards the Applicant an amount of three hundred thousand Tanzania Shillings (TZS 300,000) as fair compensation.

IX. Costs

86. In its Response, the Respondent prays the Court to rule that the costs of the proceedings be borne by the Applicant.

87. The Applicant has made no specific requests on this issue.

88. The Court notes in this regard that Rule 30 of its Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs."

89. In the instant case, the Court decides that the Respondent State shall bear the costs.

X. Operative part

90. 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 the merits:
v. *Finds* that the alleged violation of the Applicant's right to be

heard under Article 7(1) has not been established;
vi. *Finds* that the alleged violation of the Applicant's right to equal protection of the law, provided for in Article 3(2) of the Charter, has not been established;
vii. *Declares* that the Respondent State has violated the Applicant's right to defence under Article 7(1)(c) of the Charter for failure to provide him free legal assistance.
viii. *Dismisses* the Applicant's prayer for the Court to annul his conviction and sentence and to order his release from prison;

On reparations
ix. *Awards* the Applicant an amount of Three Hundred Thousand Tanzania Shillings (TZS 300,000) as fair compensation;
x. *Orders* the Respondent State to pay the Applicant the said sum and report to the Court thereon within six (6) months from the date of notification of this Judgment; and
By a majority of Six (6) for, and Four (4) against, Justices Ben KIOKO, Ângelo V MATUSSE, Tujilane R. CHIZUMILA and Stella I ANUKAM dissenting:

On costs
xi. *Orders* the Respondent State to pay the costs.

Separate Opinion: BEN ACHOUR

1. I voted for the entire Judgment in the Matter of *Minani Evarist v United Republic of Tanzania* captioned above, and I agree with all the reasoning of the Court as well as the entire operative part. However, I have reservations regarding the reasons developed in paragraph 81 of the Judgment.
2. The Court's refusal to order the Applicant's release, in my opinion, reposes on questionable reasons. Indeed, the Court states in paragraph 81 that "the Court reiterates its decision that it is not an appellate Court". This is more than obvious in as much as we are in the presence of a continental court whose "jurisdiction … shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter ... Protocol, and any other relevant Human

Rights instrument ratified by the States concerned".[1] And the Court justifies this assertion by adding that "for the simple reason that it does not belong to the same judicial system as the national courts, it does not apply the same law as the Tanzanian courts; that is, Tanzanian law, and it does not examine the detail of the issues of fact and law that national courts are entitled to deal with". Here again, the justification does not tally with what the Court will say to argue the reasons for its refusal to order release. The latter in fact reposes on the reasons outlined in paragraph 82, which for the first time in the jurisprudence of the African Court, gives a list, albeit not exhaustive, of *"exceptional or compelling circumstances"* which could lead the Court to pronounce a release, reasons unrelated to the fact that the African Court is not a Tanzanian appellate court. By adopting this line of argument, it could be said that the Court forever closes the possibility of it ordering the release of an Applicant in detention or in arbitrary imprisonment.

3. This notwithstanding, I agree with the Court's decision to reject the prayer for release. Indeed, and in this case, the Court rightly took into account only one complaint against the Respondent State, namely, the violation of Article 7(1)(c) on the Applicant's right to defence with the use of legal aid.[2]

4. This violation is certainly as important as any violation of a human right. There is indeed no violation of human rights that is not important. But the consequences of violation are variable when the issue comes to that of reparation.

1 Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

2 Article 3 of the Protocol to the Afric *of the individual that are protected within the rule of law and democracies. Fundamental rights are also called fundamental freedoms, and are inherent in the very notion of individual*" https://droit-finances.commentcamarche.com/faq/23746-droits-fondamentaux-definition. In the context of the European Union, the notion of fundamental right has been enshrined in *The Charter of Fundamental Rights of the European Union* which was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the Nice European Council on 7 December 2000. See L. Burgorgue-Larsen, et al (eds.), 'Treaty Establishing a Constitution for Europe. Part II. The Charter of Fundamental Rights of the European Union'– (2005) *Article Commentary* p 837.

5. The violation established by the Court in this case does not concern a fundamental or intangible human right.[3] Moreover, there has not been a cascade of violations in this case. The only violation established by the Court was not decisive in terms of the lawfulness of the proceedings against the Applicant for the crime of rape of a 10-year-old girl. The Court expressly says so in paragraph 84.

6. According to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[4] restitution as a form of reparation seeks to restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred, and includes: "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property".[5]

7. The Permanent Court of International Justice has pointed out that "It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law",[6] a position reiterated by the European Court of Human Rights which held that "a judgment in which the Court finds a violation entails for the Respondent State the legal obligation to put an end to the violation and to erase the consequences so as to restore as much as possible the situation that existed before the

3 In international human rights law, intangible rights are those excluded by Article 4 of the International Covenant on Civil and Political Rights (ICCPR) from any derogation, namely:
• Right not to be discriminated against based solely on race, color, sex, language, religion or social origin (Article 4 (1) ICCPR)
• Right to life (Art 6. ICCPR)
• Right not to be subjected to torture or to cruel, inhuman or degrading treatment (Article 7 ICCPR)
• Right not to be held in slavery or servitude (Articles 8 (1) and 2 ICCPR)
• Right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11 ICCPR)
• Right not to apply criminal law retroactively (Article 15 ICCPR)
• Right to be recognized as a person everywhere before the law (Article 16 ICCPR)
• Freedom of thought, conscience and religion (Article 18 ICCPR).

4 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; 60/147 Resolution adopted by the General Assembly on 16 December 2005.

5 Principle 19.

6 CPJI, 13 September 1928, *Matter of the Factory at Charzòw (Claim for Indemnity)*, Série A – No. 77.

violation".[7] Further, the august Court adds that: *"*The essential principle, which stems from the very notion of an unlawful act and which seems to emerge from international practice, in particular from the jurisprudence of arbitral tribunals, is that reparation must as far as possible erase all the consequences of the unlawful act and restore the state that would presumably have existed if the act had not been committed. Restitution in kind, or, if it is not possible, payment of an amount corresponding to the value of restitution in kind; allowance, if any, for damages for losses suffered which are not covered by the refund in kind or the payment which takes the place of it".[8]

8. For its part, the African Commission recognized the importance of restitution, and has held that a State in violation of the rights set forth in the African Charter must *"*take measures to ensure that victims of human rights abuses are given effective remedies, including restitution and compensation."[9] A restitution order should specify precisely which rights of the victim should be restored so as to indicate to the State the best way to correct the violation and put the victim in the situation prior to the commission of the violation, as far as possible

9. In its basic principles and guidelines, the United Nations refers to a variety of violations that require specific forms of restitution, including restoration of the right to a fair trial, restoration of freedom, restoration of citizenship and return to one's place of residence, etc.

10. In the event that the violations found by the Court do not require a full restitution measure, such as release or re-opening of proceedings, it goes without saying that the appropriate compensation is pecuniary compensation; and this is the solution chosen by the Court in the instant case.

11. Article 27(1) of the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") states 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". It is clear from that Article that the Court has full discretion to determine measures of reparation such that can *"remedy the situation".*

12. Compared with similar Articles of the European Convention (Article 41) and the Inter-American Convention (Article 63 paragraph

7 CEDH, *Papamichalopoulos and Others v Greece*, Application No. 14556/89, Judgment of 31 October 1995, para 34.

8 Page 47.

9 African Commission: Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE), Sudan, Operative Part para 229(4).

1), the afore-cited Article 27 of the Protocol is rather generous and is very similar to Article 61 of the Inter-American Convention.[10] As we indicated earlier, Article 41 of the European Convention does not confer on the European Court of Human Rights the possibility of pronouncing "just satisfaction" save where the domestic law allows for the erasure of the consequences of a violation and, even in such a case, only '' if it is necessary '' to do so. In other words, the award of just satisfaction does not flow automatically from the finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European Convention on Human Rights. For this reason, the European Court very rarely pronounced an Applicant's release. In contrast, Article 63(1) of the Inter-American Convention is quite liberal in as much as it states that: "When it recognizes that a right or freedom protected by this Convention has been violated, the Court shall order that the party injured be granted the enjoyment of the rights or freedoms infringed. It will also order, where appropriate, the reparation of the consequences of the measure or the situation which gave rise to the violation of the said rights and the payment of fair compensation to the injured party."

13. Even if the Protocol does not speak, like the Inter-American Convention, of the possibility for the Court "to order that the injured party be guaranteed the enjoyment of the right or freedom violated", Article 27 speaks of "appropriate measures to remedy the violation", which amounts to the same thing.

14. It is generally accepted in doctrine[11] and in jurisprudence that release or re-opening of proceedings is necessary only where the Court is of the view that there is no proportionality between the full reparation sought and the violation found, especially if it concerns only one aspect of the right to a fair trial which could not, in view of the elements on file, vitiate the whole of the trial at its various stages. But in the event of a series of substantial violations, the condition of *"exceptional or compelling circumstances"* is met and the full restitution order should be made in the form of an order for release or resumption of the trial in accordance with the norms and international standards of fair trial.

15. The violation of the Applicant's right to legal aid, in addition to not fundamentally vitiating the outcome of the trial, is not, in my opinion, an "exceptional or compelling circumstance" which could have led to the Court to order restitution such as release of the Applicant or

10 See in this sense H Tigroudja, "The Reparation of Human Rights Violations: The Practice of Regional and Universal Bodies". *Audiovisual Library of International Law*, http://legal.un.org/avl/ls/Tigroudja_HR.html#

11 D Shelton *Remedies in international human rights law* (2009).

resumption of the trial.

16. In my opinion, there are *"*exceptional or compelling circumstances" if, and only if, the violation affects a fundamental human right or if there is a cascade of violations, which would have had irreparable consequences which would have substantially vitiated the outcome of the trial. In the remedies ordered by the Court, there must always be proportionality between the seriousness of the human rights abuses, the nature, the magnitude and scope of the remedies. The Court took the welcome initiative in the present judgment to offer some examples of "exceptional or compelling circumstances". For the Court, and I fully agree, "this would be the case, for example, if the Applicant sufficiently demonstrates or the Court itself establishes, from these circumstances that the arrest or conviction of the Applicant is based fully on arbitrary considerations and that his continued imprisonment would result in a denial of justice" (para 82).

17. In my opinion, the crucial criterion for determining the nature and magnitude of reparation measures is the proportionality between the violations found, and the remedy or measures determined. The more serious the violations, or more numerous the violations, the more the reparation must come closer to full restitution such as an order for release or the reopening of proceedings, etc.

18. 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 offense, as estimated by the Court.

19. For all these reasons, I was in agreement with certain nuances in the solution advocated by this Judgment. I remain convinced that the Court, by virtue of Article 27(1) of the Protocol, has the full latitude to determine the nature of *"appropriate measures capable of remedying the situation".*

Dissenting Opinion: KIOKO, CHIZUMILA and ANUKAM

1. We agree substantially with the findings of the majority on the merits of this Application but there is one particular issue relating to costs under paragraph 89 of the judgment where we differ in our

position from the majority. In the said paragraph, on the issue of costs, the majority has decided that "the Respondent State shall bear the costs". In our considered opinion, this decision of the majority requiring the Respondent State to bear all the costs in the instant case is not correct for the reasons we outline below.

2. At the outset, we wish to point out that international human rights litigation is mostly but not exclusively between an individual and a State and due to the nature of the proceedings and the unequal capacity of the Parties, it is not always the rule that the loser party bears costs, which may be the norm in other forms of litigation. In particular, in circumstances where the loser party is the individual, he or she shall not in principle be penalized for exercising his/her right to be heard by being required to bear the entire costs of the litigation.

3. The only exception to this principle would be if the State sufficiently demonstrates that the individual abused his/her rights or acted in bad faith by filing frivolous claims while having been fully aware/ knowing that he was not entitled to make such claims. Even when the bad faith of the individual is sufficiently vindicated, the financial capacity of the individual and the amount of costs that the State incurred should guide the determination of whether the former shall bear the costs. It therefore rests on the discretion of a Court to assess and identify, having regard to the specific contexts of each case, the party which shall incur the costs.

4. In the instant case, it is evident from the facts on record that the Respondent State has prayed the Court to order that the Applicant shall bear the costs. However, the Applicant has neither prayed for costs nor did he provide any supporting documents showing expenses in relation to his Application, if any.

5. On the other hand, the Court has, in our view rightly, found that the Respondent State has violated the right to defence of the Applicant by failing to provide him legal assistance during his trial contrary to Article 7(1)(c) of the Charter (See paragraph 71 of the Judgment). From this finding, it is clear that the Respondent State is the losing party and in accordance with the general default principle, that a losing party meets the costs of the suit, it would ordinarily be the case that it shall be the Respondent State to bear the costs.

6. However, Rule 30 of the Rules provides that "Unless otherwise decided by the Court, each party shall bear its own costs". According to this rule, the default principle for the Court is thus that each party bears its cost unless the Court decides otherwise. In the past, the Court has applied this rule on many occasions and held in majority of cases that each party covers its own costs, even where the Respondent State was found to be in breach of the Charter and other relevant human rights instruments. This has been the case also where neither of the

Parties has filed submissions on costs.[1] This reinforces the fact that costs are not damages for the violations of human rights as such, but a compensation or reimbursement of expenses incurred by a party for the litigation.

7. The opinion of the majority in the instant case is therefore a clear departure from the Court's established position. While we do not have problems with this shift in approach, we nevertheless believe that the departure should have been necessitated by some cogent reasons or, at the minimum, supported by adequate justification, which the majority did not provide. Regrettably in another judgment, in the Matter of *Dicoles William v United Republic of Tanzania,* delivered on the same day with similar facts relating to costs, the Court contradicted itself by deciding that each party shall bear its own costs, in spite of the fact that in that matter, as in the instant Application, the Applicant neither claimed costs nor provided any supporting documentation, and only the Respondent State prayed the Court to order the Applicant to bear the costs, the majority in this case agreed that each party bears its own costs.[2]

8. Consequently, we are of the view that the position of the Court in the instant case reveals an unjustified inconsistency in its decisions with respect to similar cases that the Court has concluded so far.

9. Furthermore, according to the established jurisprudence of other human rights courts, a party is entitled to a refund of costs and expenses only in so far as it is demonstrated that such costs or expenses have been actually and necessarily incurred and are reasonable as to quantum.[3] This requires that the Applicant should substantiate his claims with evidence showing that he incurred the said costs or expenses and were indeed necessary for pursuing his Application.

10. This is not the case in the instant Application. As we indicated earlier, the Applicant has not made any submissions or prayed for costs, or provided documents indicating that he incurred any costs. While ordering the Respondent State to bear the costs, the majority

1 See Application No. 010/2015. Judgment 11/05/ 2018. *Amiri Ramadhani v United Republic of Tanzania*, para 90, Application No. 046/2016, Judgment of 11/05/2018. *APDF & IHRDA v Republic of Mali,* para 134, Application No. 011/2015, judgment 28/09/2017. *Christopher Jonas v United Republic of Tanzania*, para 98, Application No. 032/2015 – *Kijiji Isiaga v United Republic of Tanzania*. Judgment of 21/03/2018 para 101.

2 Application No. 016/2016. Judgment of 21/09/2018. *Diocles William v United Republic of Tanzania*, paras 107-110.

3 Applications 68762/14 and 71200/14. Judgment of 20/09/2018. Case of *Aliyev v Azerbaijan*, para. 236, Series C No. 352. Judgment of 13/03/2018, Case of *Carvajal Carvajal et al v Colombia* Merits, Reparations and Costs. Inter-American Court of Human Rights, para 230.

also did not specify or reckon the necessary and reasonable costs that the Respondent State is expected to bear. Nor did the Court, as it has done in some other cases,[4] indicate in the instant case that it will in a future separate proceeding, determine the exact amount of such costs that the Applicant is entitled to get reimbursement. It is thus not clear what the majority envisaged as costs that should be borne by the Respondent State, since the Applicant is self-represented, and the Court does not charge any fees.

11. We therefore conclude that the majority should, for purpose of maintaining consistency, have followed the Court's established position that, in the absence of submissions or claims on costs from one or both Parties, each party shall bear its own costs. Alternatively, the majority should have provided reasons to justify their departure from the court's established position.

4 In some previous cases, the Court has deferred the issue of costs to a later stage to consider it together with other forms of reparations. See Application No. 012/2015. Judgment of 22 /03/2018. *Anudo Ochieng Anudo v United Republic of Tanzania*, para 131.

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Application 016/2016, *Diocles William v United Republic of Tanzania*

Judgment, 21 September 2018. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant had been convicted and sentenced for rape of a minor. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court found that the Applicant's fair trial guarantees had been violated by not facilitating the hearing of the Applicant's witnesses, failure to undertake DNA test and inadequate evaluation of witness testimony. The Court further held that the failure to provide the Applicant with free legal representation violated the African Charter.

Jurisdiction (fair trail, 28)

Admissibility (exhaustion of local remedies, extraordinary remedy, 42; submission within reasonable time, 52)

Fair trial (evidence, facilitiation of hearing of defence witnesses, 64-66, DNA testing, 76, evaluation of witness testimony, 77; defence, free legal represnetation, 86, 87)

Reparations (not appellate court, 100, release, 101, 104)

I. The Parties

1. The Applicant, Mr Diocles William, is a national of the United Republic of Tanzania, convicted of raping a twelve (12) year old minor and sentenced to 30-years' imprisonment.

2. The Respondent State, the United Republic of Tanzania, became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986, and also to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, the Respondent State deposited the declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. Subject of the Application

A. Facts of the matter

3. The record before the Court indicates that on 11 July 2010, at around 16:00 hours, at Mbale Village, Missenyi District in Kagera Region, the Applicant who was twenty-two (22) years old at the time, allegedly raped a minor aged twelve (12) years.

4. In Criminal Case No. 42/2010 before the Resident Magistrate Court of Bukoba, the Applicant was found guilty and sentenced on 4 August 2010 to thirty (30) years imprisonment and twelve (12) strokes of the cane for the rape of a minor of twelve (12) years of age, under Sections 130(2)(e) and 131(2)(a) of the Tanzanian Penal Code(Revised Edition 2002) as amended by the Sexual Offences Special Provisions Act 1998 (hereinafter referred to as the "Tanzanian Penal Code").

5. The Applicant filed an appeal in Criminal Case No. 23/2011 against the judgment before the High Court of Tanzania at Bukoba (hereinafter referred to as the "High Court"), contesting the credibility of the prosecution witnesses, the consistency of the testimonies and the administration of the corporal punishment; but the appeal was dismissed on 29 May 2014.

6. Aggrieved by the High Court's decision to dismiss his appeal, the Applicant lodged an appeal before the Court of Appeal of Tanzania at Bukoba (hereinafter referred to as the "Court of Appeal") in Criminal Appeal No. 225/2014; which was dismissed the appeal on 24 February 2015 as being baseless.

B. Alleged violations

7. The Applicant alleges that he was deprived of his fundamental right to have his cause heard in a court of law, in violation of Section 231(4) of the Tanzania Criminal Procedure Act, Revised Edition, 2002, and Article 7(1)(c) of the Charter.

8. The Applicant further alleges that Section 130(2)(e), and Section 131(2)(a) of the Tanzanian Penal Code, are clearly in breach of Article 13(2) and (5) of the Constitution of Tanzania 1977.

9. In his Reply, the Applicant also alleges the violation of his right to legal aid.

III. Summary of the procedure before the Court

10. The Application filed on 8 March 2016 and served on the Respondent State by a notice dated 20 April 2016, inviting the latter

to submit a list of its representatives within thirty (30) days, and its Response to the Application within sixty (60) days of receipt of the notice, in accordance with Rules 35(2)(a) and 35(4)(a) of the Rules of Court. The Applicant's prayer for legal aid before this Court was not granted.

11. On 10 June 2016, following its failure to file its Response, the Registry notified the Respondent State of the Court's decision, *proprio motu,* to extend by 30 days the time for the Respondent State to file its Response.

12. On the same date, the Application was transmitted to the Executive Council of the African Union and to the State Parties to the Protocol, through the Chairperson of the African Union Commission in accordance with Rule 35(3) of the Rules.

13. On 9 August 2016, the Respondent State filed its Response, explaining that the delay in doing so had been due to the fact that it needed to collect information from the various entities involved in the proceedings.

14. The Registry transmitted the Respondent State's Response to the Applicant on 17 August 2016, enjoining the latter to file its Reply within thirty (30) days of receipt thereof.

15. The Applicant submitted his Reply on 22 September 2016, and this was served on the Respondent State by a notice dated 4 October 2016.

16. At its 43rd Ordinary Session held from 31 October to 18 November 2016, the Court decided to close the written procedure.

17. On 26 January 2017, the Registry notified the Parties of the closure of the written procedure as from 14 November 2016.

18. On 6 April 2018, the Parties were informed that the Court would not hold a public hearing and indicated that written submissions and the evidence on file are sufficient to determine the matter.

IV. Prayers of the Parties

19. The Applicant prays the Court to:

"i. admit his Application and review all the proceedings in the Respondent State's courts, including the issue of Constitutional petition[1] raised in the Application;

ii. quash the conviction and order his release from prison;

iii. issue such other order(s) or relief(s) as it may deem fit in the circumstances;

1 Petition to the High Court against violations of the fundamental rights and duties provided for in Articles 12 to 29 of the Tanzanian Constitution.

iv. provide him with free legal assistance in accordance with Rule 31 of the Rules and Article 10(2) of the Protocol."

20. The Respondent State prays the Court to declare that:

"i. it lacks jurisdiction to hear the case;

ii. the Application does not meet the admissibility conditions set out in Rule 40(5) and (6) of the Rules;

iii. the Application is inadmissible."

21. The Respondent State also prays the Court to :

"i. declare that it has not violated the Applicant's rights under Articles 2, 3(2) and 7(1)(c) of the Charter;

ii. dismiss the Applicant's prayers;

iii. declare that the Applicant should continue to serve the sentence;

iv. reject the Application for lack of merit;

v. order that the costs are to borne by the Applicant."

22. In his Reply, the Applicant also prays the Court to dismiss the objections to its jurisdiction and reject the contention of the Respondent State contention on the merits of the case.

V. Jurisdiction

23. Pursuant to Rule 39(1) of its Rules: "The Court shall conduct preliminary examination of its jurisdiction..."

A. Objections to material jurisdiction

24. The Respondent State alleges that the Applicant's prayer that the Court should review the evidence adduced before and reviewed by its courts up to the highest judicial level amounts to asking the Court to act as an appellate jurisdiction, which the Respondent State maintains, is not within the purview of the Court.

25. The Respondent State also claims that the Court's mandate is only limited to interpreting and applying the Charter and other relevant human rights instruments in accordance with Article 3(1) of the Protocol, Rules 26 and 40(2) of the Rules, mirroring its own decision in Application No. 001/2013*: Ernest Francis Mtingwi v Republic of Malawi*.

26. The Respondent State further submits that it is the first time that the Applicant raises the issue of alleged violation of Article 13(2) and (5) of the Constitution; Section 130(2) and Section 131(2) of the Tanzanian Penal Code, as well as the violation of Article 7(1)(c) of the Charter concerning legal aid. It maintains that by failing to raise these issues before the domestic courts, the Applicant would be asking this

Court to act as a court of first instance, for which it lacks jurisdiction. The Respondent State emphasises that the Court is not a court of first instance to deal with the question of unconstitutionality.

27. The Applicant refutes the Respondent State's argument that the Court lacks jurisdiction, maintaining that it has jurisdiction over an Application whenever there is a violation of the Charter and other relevant human rights instruments. Therefore, the Court is empowered to review decisions rendered by domestic courts, assess the evidence, and set aside the sentence and acquit the victim, as was the case in its decision in Application No. 005/2013 - *Alex Thomas v United Republic of Tanzania.*

28. On the first objection of the Respondent State that the Court is being asked to act as an appellate court, this Court reiterates its position in *Ernest Mtingwi v Republic of Malawi*[1] that it is not an appeal court with respect to decisions rendered by national courts. However, this does not preclude the Court from examining whether the procedures before national courts are in accordance with international standards set out in the Charter or other applicable human rights instruments to which the Respondent State is a Party.[2] In the instant case, this Court has jurisdiction to determine whether the domestic courts' proceedings with respect to the Applicant's criminal charges that form the basis of his Application before this Court, have been conducted in accordance with the international standards set out in the Charter.

29. Furthermore, concerning the allegation that the Application calls for the Court to sit as a court of first instance, the Court notes that since the Application alleges violations of the provisions of the human rights international instruments to which the Respondent State is a Party, it has material jurisdiction by virtue of Article 3(1) of the Protocol, which provides that the jurisdiction of the Court "shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."

30. Consequently, the Court dismisses the Respondent State's objection that the Applicant is requesting the Court to act as an appellate court and as a court of first instance; and holds that it has material jurisdiction to hear the matter.

1 Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi,* para 14.

2 Application No. 005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania (*hereinafter referred to as "*Alex Thomas v Tanzania Judgment"),* para 130 and Application No. 007/2013. Judgment of 3/6/2016, *Mohamed Abubakari v United Republic of Tanzania (*hereinafter referred to as "*Mohamed Abubakari v Tanzania Judgment"),* para 29. Application No. 032/2015. *Kijiji Isiaga v Tanzania*, paras 34 and 35.

B. Other aspects of jurisdiction

31. The Court notes that its personal, temporal and territorial jurisdiction has not been contested by the Respondent State; and nothing in the pleadings indicate that the Court does not have jurisdiction. The Court thus holds that:

i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the Declaration required under Article 34(6) thereof, which enabled the Applicant to access the Court in terms of Article 5(3) of the Protocol;

ii. it has temporal jurisdiction in as much as the alleged violations are continuous in nature, since the Applicant remains convicted on the basis of what he considers an unfair process;

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

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

VI. Admissibility of the Application

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 39(1) of its Rules, "the Court shall undertake a preliminary examination of (…) the admissibility of the Application in accordance with both Article 50 and Article 56 of the Charter and Rule 40 of the Rules".

35. Rule 40 of the Rules, which in essence restates Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:
>
> "1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> 2. comply with the Constitutive Act of the Union and the Charter;
>
> 3. not contain any disparaging or insulting language;
>
> 4. not be based exclusively on news disseminated through the mass media;
>
> 5. be filed after exhausting local remedies, if any, unless it is obvious that the procedure in unduly prolonged;

6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility in contention between the Parties

36. The Respondent State raised objections in relation to the exhaustion of local remedies and as to whether the application was filed within a reasonable time.

i. Objection based on the alleged failure to exhaust local remedies

37. The Respondent State contests the admissibility of the Application on the grounds that the Applicant cannot plead before this Court the violation of his right to a fair trial under Article 13(6)(a) of the Tanzanian Constitution and 7(1)(c) of the Charter, as he has failed to exhaust available local remedies within its jurisdiction, especially that of filing a constitutional petition, as provided by Article 30(3) of the Tanzanian Constitution and in the Basic Rights and Duties Enforcement Act, as revised in 2002.

38. In this regard, citing the jurisprudence of the Commission,[3] the Respondent State alleges that the Applicant failed to comply with Rule 40(5) of the Rules arguing that at no time was the issue of legal aid raised at the domestic courts, notwithstanding the fact that both Section 3 of Criminal Procedure Act and Rule 31 of the 2009 Rules of Procedure of the Court of Appeal provides for legal aid.

39. The Applicant refutes the objection of the Respondent State to the admissibility of his Application on the grounds that he did not lodge a constitutional petition for he was not obliged to exhaust this remedy.

40. Concerning the question of legal aid, the Applicant contends that, pursuant to the provisions of Section 3 of the Criminal Procedure Act and Rule 31 of the Rules of Procedure of the Court of Appeal, the only condition required for an accused to be afforded legal aid is when,

3 African Commission on Human and Peoples' Rights Communication 263/02 - *Kenyan Section of the International Commission of Jurists, Law Society of Kenya and Kituo Cha Sheria v Kenya.*

in the interests of justice, the judicial authorities deem it desirable to provide such legal aid.

41. The Court notes that the Applicant filed an appeal and had access to the highest court of the Respondent State, namely, the Court of Appeal, for determination of the various allegations, especially those relating to violation of the right to a fair trial.

42. Concerning the filing of a constitutional petition for violation of the Applicant's rights, the Court has repeatedly stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.[4]

43. With regard to the allegation that the Applicant did not raise the legal aid issue during domestic proceedings but chose to bring it before this Court for the first time, the Court, in line with its Judgment in A*lex Thomas v United Republic of Tanzania*, takes the view that this complaint forms part of the "bundle of rights and guarantees" enshrined in the appeal procedures at domestic level which upheld the guilty verdict against the Applicant and the sentence to thirty (30) years' imprisonment. The Court stresses that legal aid forms part of the "bundle of rights and guarantees" in respect of the right to a fair trial, which is the basis and substance of the Applicant's appeal. The domestic judicial authorities thus had ample opportunity to address that allegation even without the Applicant having raised it explicitly. It would therefore be unreasonable to require the Applicant to file a new application before the domestic courts to seek redress for these complaints.[5]

44. Accordingly, the Court finds that the Applicant has exhausted local remedies as envisaged in Article 56(5) of the Charter and Rule 40(5) of the Rules. The Court therefore overrules this objection to the admissibility of the Application.

ii. Objection based on the ground that the Application was not filed within a reasonable time

45. The Respondent State argues that, should the Court take the view that the Applicant has exhausted local remedies, the fact would still remain that he did not file his Application within a reasonable time from the date the domestic remedies were exhausted.

46. The Respondent State further asserts that even if Rule 40(6)

4 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 – 62; *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 66 – 70; Application No. 011/2015. Judgment of 28/9/20l7, *Christopher Jonas v United Republic of Tanzania*, para 44.

5 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 – 65.

of the Rules is not specific on what constitutes a reasonable time, international human rights jurisprudence has established that six (6) months is considered a reasonable time, invoking in particular the decision in respect of Communication No. 308/05, in *Michael Majuru v Zimbabwe,* wherein the Commission is claimed to have applied that timeframe.

47. The Respondent State argues that eleven (11) months elapsed between the decision of the Court of Appeal (24 February 2015) and the date the Court was seized (8 March 2016), thus exceeding the period of six (6) months that is considered reasonable, whereas nothing prevented the Applicant from filing his Application earlier.

48. In his Reply, the Applicant refutes the Respondent State's submission that the deadline for filing an appeal before the Court is six months after exhaustion of local remedies, claiming that reasonableness of a deadline depends on the circumstances of each case. In this regard, the Applicant quotes the Court's ruling in Application 013/2011 – *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso.*

49. The Court is of the opinion that the question that arises at this juncture is whether the period that elapsed between the exhaustion of local remedies and the time within which the Applicant seized the Court, is reasonable within the meaning of Rule 40(6) of the Rules.

50. The Court notes that local remedies were exhausted on 24 February 2015, the date of the Court of Appeal's decision, and that the Application was filed at the Registry on 8 March 2016. One (1) year and thirteen (13) days had elapsed between the Court of Appeal decision and the filing of the Application with the Registry of the Court.

51. In the matter of the *Beneficiaries of late Norbert Zongo and Others v Burkina Faso,* the Court established the principle that "... the reasonableness of the timeline for referrals to it depends on the circumstances of each case and must be assessed on case-by-case basis."[6]

52. The Court notes that, in the instant case, the Applicant is a layman in matters of law, indigent and incarcerated without the benefit of legal counsel or legal assistance.[7] The Court holds that these circumstances sufficiently justify the filing of the Application one (1) year and thirteen (13) days after the Court of Appeal decision.

6 Application No. 013/2011. Ruling on preliminaries objections of 21/06/2013, *Beneficiaries of late Nobert Zongo and Others v Burkina Faso*, para 121. See also Application No. 005/2013*, Alex Thomas v Tanzania* Judgment*, op cit,* para 73; Application No. 007/2013, Judgment of 3/6/2013*, Mohamed Abubakari v Tanzania* Judgment*, op cit*, para 91; Application No. 011/2015, *Christopher Jonas v Tanzania* Judgment*, op cit,* para 52.

7 *Alex Thomas v Tanzania* Judgment*, op cit*, para 74.

53. In view of the aforesaid, the Court dismisses the objection to admissibility that the Application was not filed within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

54. The Court notes that the conditions regarding the identity of the Applicant, the language used in the Application, the nature of the evidence and the *non bis in idem* principle as set out in sub Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules, are not in contention between the Parties.

55. The Court also notes that nothing in the pleadings submitted to it by the Parties suggests that any of the above requirements has not been met in the instant case. Consequently, the Court holds that the requirements under consideration have been fully met in the instant case.

56. In light of the foregoing, the Court finds that the instant Application fulfils all admissibility requirements in terms of Article 56 of the Charter and Rule 40 of the Rules, and accordingly declares the same admissible.

VII. Merits

A. Alleged violations of the right to a fair trial

57. The Applicant alleges the violations of his right to a fair trial, namely: (i) the failure to hear his witnesses, (ii) the fact that the conviction was based on insufficient evidence and conflicting statements of the prosecution witnesses, and the lack of access to legal aid.

i. Allegation that defence witnesses were not heard

58. The Applicant alleges that the trial court refused to order the attendance of his witnesses for examination. He claims, as a result, that he has been deprived of his fundamental right to have his cause heard in violation of Section 231(4) of the Criminal Procedure Act and Article 7(1)(c) of the Charter.

59. He also refutes the Respondent State's claim that the absence of his witnesses was due to his own negligence, adding that he was under arrest and the authorities did nothing to bring the witnesses in question before the court. Further, the Applicant stresses that he was not informed by the authorities that he could benefit from their assistance in producing his witnesses, prior to his decision to give up

on calling witnesses.

60. The Respondent State reiterates that the Applicant never invoked this violation before the domestic courts, notwithstanding the fact that the domestic laws provide for such right and the Applicant had, on two occasions, requested that the hearing be postponed due to the absence of his witnesses; and in the end decided to let the trial proceed without obtaining the appearance of his witnesses.

61. The Court notes that Article 7(1)(c) of the Charter states that:

> "Every individual shall have the right to have his cause heard. This comprises:
>
> c. the right to defence…"

62. The right to effective defence includes, inter alia, the right to call witnesses for the defence.[8] The question arises as to whether obtaining the attendance of witnesses before the Court is the sole responsibility of the accused or whether the competent authorities of the Respondent State also have the responsibility to ensure the presence of the witnesses whom the authorities intend to hear.

63. The Court notes that in all proceedings, more specifically, in criminal matters, a court seized of a case must hear both the prosecution as well as the defence witnesses. If it does not do so, it must provide the grounds for its decision. In this regard, the Court observes Section 231(4) of Criminal Procedure Act of the Respondent State contains provisions which allow national courts to take measures to ensure the appearance of defence witnesses where the absence of such witnesses is not due to the fault of the accused and that where the witnesses appear, there is the likelihood that they would adduce evidence in his favour.[9]

64. In the instant case, it emerges from the file that the Applicant called witnesses on three (3) occasions without success, and in the

8 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa approved by the African Commission on Human and Peoples' Rights (2003) – 6) Rights during a trial: "f) The accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

9 Section 231(4) of the Criminal Procedure Act provides as follows: "If the accused person states that he has witnesses to call but that they are not present in Court, and the Court is satisfied that the absence of such witnesses is not due to any faults or neglect of the accused person and that there is likelihood that they could, if present, give material evidence on behalf of the accused person, the Court may adjourn the trial and issue process or take other steps to compel attendance of such witness."

end, he gave up on getting them to appear.[10] However, he claims before this Court that the reason why he gave up on calling his witnesses was because the judicial authorities did not inform him that they could assist him to obtain their appearance.

65. The Court is of the opinion that even if the Applicant has given up on calling his witnesses, the fact remains that witnesses did not cease to be necessary in the course of the trial proceedings to ensure equality of arms. However, this being the case, the reasons as to why the trial court decided not to take the appropriate measures to hear the Applicant's witnesses are not provided anywhere in the record of the proceedings.

66. The Court is of the view that it was necessary for the Respondent State's judicial authorities to be more proactive, in particular, in ascertaining whether the Applicant no longer intended to call his witnesses either because he did not actually want them to appear on his behalf or because he did not have the means to obtain their attendance. It was also desirable on the part of the Respondent State's judicial authorities to provide, *suo motu*, sufficient information in this regard to the accused, where he is indigent, in detention and without legal aid.

67. The Court therefore holds from the foregoing that the Respondent State has violated the Applicant's right to defence under Article 7(1)(c) of the Charter by failing to ensure the appearance of his witnesses.

ii. Allegations of insufficient evidence and inconsistencies in witness statements

68. The Applicant submits that the evidence presented at the trial court and relied upon to convict him was based only on the victim's (PW4) testimony, who claimed she was at home playing with a friend (PW5) and that the Applicant went to PW2's house (the victim's mother) and told her to follow him to his house where he promised to give her one hundred Tanzania Shillings (TZS 100); that halfway to his house, the Applicant took her to a thicket where he raped her and threatened to stab and beat her with a stick if she told anyone what happened.

69. The Applicant denies having committed such a crime, affirming that on the day in question, he was at the house of the victim's mother (PW2), together with three friends to consume alcohol ("pombe" also known as "Gongo") at around 6:00 pm to 7:00 pm. He then amended

10 At the hearing of 24 November 2010 before Resident Magistrate Court of Bukoba, the Applicant declared: "I have failed to get my witness. I am no longer intending to call them. I am closing my defence case". See page 23 of the document attached to Criminal appeal No. 225/2014 before the Court of Appeal.

his initial statement and said that they had arrived at PW2's house at around 3:45 pm, 45 minutes after they had left their own houses.

70. He disputes the Respondent State's claims regarding examination of evidence, and prays the Court to re-examine the evidence, taking into account the doubts he has raised over the statements of the Respondent State's Attorney.

71. The Respondent State refutes the Applicant's claims and describes the steps that were followed during proceedings at its various courts until the final determination, wherein the Resident Magistrate's Court of Bukoba,[11] the High Court of Tanzania,[12] and the Court of Appeal,[13] all concluded that the Applicant had committed the offence in question.

72. The Court notes that in criminal proceedings the conviction of individuals for a crime should be established with certitude. In this regard, the Court has in the past held "....that a fair trial requires that the imposition of a sentence in a criminal offence, and in particular a heavy prison sentence, should be based on strong and credible evidence. That is the purport of the right to the presumption of innocence also enshrined in Article 7 of the Charter."[14]

73. In the instant case, the Court notes that, as stated in the record of the proceedings, the Applicant was charged and convicted essentially on the basis of information provided by the victim (PW4), corroborated by the testimonies of her family members, especially her mother (PW2), the victim's friend (PW5), the mother of her friend and the victim's aunt (PW1), who recounted what the victim herself had told them. The victim's friend (PW5) is the only eyewitness who allegedly saw the events first hand, and partially witnessed some of the facts affirming that the victim was taken away by the Applicant while she was playing with her.

74. The Court also notes the fact that the items of clothing worn

11 Criminal case No. 42 of 2010, Judgment of 8/12/2010: "27. The Court of Appeal also considered the Applicants defense in its Judgment at para 5, lines 11 – 15 and from pages 10-11 of its Judgment and concluded as follows: "We find no reason for interfering with the finding of the first appellant Court that it was the appellant who committed the offence of rape."

12 Criminal Appeal No. 23 of 2011, Judgment of 29/5/2014: "26. The High Court Judgement also considered the Applicant's defense from pages 4 - line 6 and concluded at page 9, line 13 by stating: "His defense did not raise any doubt against the prosecution case."

13 Criminal Appeal No. 225 of 2014, Judgment of 24/2/2014: "24. The Court of Appeal then considered whether it was the Applicant who committed the offence and stated at page 10 of its Judgement: "The other issue is whether it was the penis of the appellant which penetrated the vagina of the complainant' and held as follows at page 11 "We find no reason for interfering with the findings of the first appellant court that it was the appellant who committed the offence of rape.".

14 *Mohamed Aboubakari v Tanzania* Judgment, *op cit*, para 174.

by the victim at the time of the rape were not presented as evidence before the domestic judicial authorities and the prosecuting authorities merely stated that their production was deemed to be irrelevant.

75. Furthermore, the Court notes that the absence of information in the record of proceedings concerning the steps taken to obtain clarifications on whether the victim's mother sells alcoholic beverages and, if so, determine the trading hours of the business; and whether the Applicant was drinking in her presence on the material day, as she claims, and up to what time; and cross-check this information with the version given by the victim who claims that no adults were at home at the time; the reasons as to why no blood was drawn from the Applicant for testing to confirm whether or not the bodily fluids of the rapist found in the victim's private parts or on her clothing matched the Applicant's DNA (deoxyribonucleic acid) disclose patent anomalies in the domestic proceedings.

76. The Court is of the view that the medical report should not be limited to only confirming the occurrence of rape, but should also ascertain whether the offence had been committed by the Applicant, since the victim was taken for medical examination when she was still wearing the same clothes about one hour after the offence was committed (between 4:00 pm and 5:00 pm). In the instant case, there is no mention that the Respondent State has any technical constraints in that respect, and as such due diligence would have required the DNA testing to clear any doubt as to who committed the offence.

77. The Court recalls its position in the matter of *Mohamed Abubakari v United Republic of Tanzania*,[15] where it emphasised the need to obtain clarification on issues or situations likely to impact the decision of the judges. In the instant case, the Court's understanding is that even if it is accepted that, in offences of sexual nature, the main testimony is given by the victim, as the Respondent State's prosecuting authorities claim, in the specific circumstances of the case, wherein there are signs of contradiction between the statements given by the witnesses, all of whom are relatives of the victim, especially the fact that the accused was not assisted by counsel, it would have been desirable for the prosecuting authorities to exercise greater effort in terms of due diligence to corroborate the victim's statements and clarify the circumstances of the crime.

78. In view of the aforesaid, the Court accordingly considers that the Applicant's right to a fair trial provided for in Article 7 of the Charter has been violated, as the victim's and Prosecution witnesses' statements

15 *Mohamed Abubakari v Tanzania* Judgment, paras 110 and 111. See also Application No. 006/2015, Judgment of 23/3/2018, *Nguza Viking (Babua Seya) and Johnson Nguza (Papi Kocha)*, paras 105 – 107.

were not corroborated, and the circumstances of the crime were not clarified.

iii. Alleged violation of the right to legal aid

79. The question of legal aid was not raised expressly in the Application. However, in his Reply, the Applicant refutes the Respondent State's arguments regarding legal aid, claiming that the only established procedure in Section 3 of the Legal Aid Act is that the judicial authorities order the provision of legal aid where such aid is deemed justified if the interests of justice so demand.

80. The Respondent State contends that at all stages of the proceedings before its judicial authorities, the Applicant never requested for legal aid, nor did he make any such request to the various Non-Governmental Organizations (NGOs) that provide such assistance; and never declared his indigent status in order to qualify for the same.

81. The Respondent State submits that legal aid is mandatory for those accused of manslaughter and murder, and does not require an express request by the accused. It, however, further submits that legal aid is not an absolute right and that States exercise the margin of appreciation in granting such aid within the limits of their capacity; and this is how the current legal aid regime operates in the country. It states also that, with respect to the Court itself, Rule 31 of the Rules makes provision for legal assistance only within the limits of available financial resources.

82. In conclusion, the Respondent State indicates that, in any event, the process of reviewing its legal aid system was ongoing, and the outcome would be communicated to the Court in due course.

83. The Court notes that Article 7(1)(c) of the Charter stipulates

> "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."

84. The Court observes that even though Article 7(1)(c) of the Charter guarantees the right to defence, including the right to be assisted by counsel of one's choice, the Charter does not expressly provide for the right to free legal assistance.

85. However, in its Judgment in the Matter of *Alex Thomas v The United Republic of Tanzania*, this Court stated that free legal aid is a right intrinsic to the right to a fair trial, particularly, the right to

defence guaranteed by Article 7(1)(c) of the Charter.[16] In its previous jurisprudence, the Court also held that an individual charged with a criminal offence is automatically entitled to the right of free legal aid, even without the individual having to request for the same, where the interests of justice so require, and in particular, if he is indigent, if the offence is serious and if the penalty provided by the law is severe.[17]

86. In the instant case, it is not in dispute that the Applicant was not afforded free legal aid throughout his trial. Given that the Applicant was convicted of a serious crime, that is, rape, which carries a severe punishment of thirty (30) years, there is no doubt that the interests of justice would warrant free legal aid where the Applicant did not have the means to engage his own legal counsel. In this regard, the Respondent State does not contest the indigence of the Applicant nor does it argue that he was financially capable of getting a legal counsel. In these circumstances, it is evident that the Applicant should have been afforded free legal aid. The fact that he did not request for it does not exonerate the Respondent State from its responsibility to offer free legal aid.

87. As regards the allegations of the Respondent State relating to the margin of discretion that should be available to States in the implementation of the right to legal aid, its non-absolute nature and the lack of financial capacity, the Court is of the opinion that the allegations are no longer relevant in this case, given that the conditions for the mandatory provision of legal aid have all been met. Accordingly, the Court holds that the Respondent State has violated Article 7(1)(c) of the Charter.

B. Alleged violation of Article 13(2) and (5) of the Constitution of Tanzania

88. The Applicant contends that Sections 130(2)(e) and 131(2)(a) of the Tanzanian Penal Code dealing with Offences against Morality that formed the basis for his conviction clearly violate Article 13(2) and (5) of the Tanzanian Constitution.

89. The Respondent State contests this allegation by arguing that the acts committed by the Applicant fall under the definition of the crime of rape, as *per* the sentence of the trial court, which was upheld by the two appellate courts.

90. The Court observes that it is not mandated to assess the

16 *Alex Thomas v Tanzania* Judgment*, op cit,* para 114.

17 *Ibid*, para 123. See also *Mohamed Abubakari v Tanzania* Judgment, *op cit*, paras 138 and 139.

constitutionality of a specific national legislation. However, this does not prevent the Court from examining the compatibility of a particular domestic legislation with international human rights standards established by the Charter and any other international human rights instruments ratified by the Respondent State.[18]

91. In the instant case, the Applicant alleges that Sections 130(2)(e) and 131(2)(a) of the Tanzanian Penal Code[19] breach Articles 13(2) and (5) of the Tanzanian Constitution, which enshrines the right to equality and equal protection of the law essentially in the same terms as Article 3 of the Charter.[20] It is thus incumbent upon this Court to ascertain whether such sections of the Penal Code contravene Article 3 of the Charter, which states that "Every individual shall be equal before the law [and] …the right to equal protection of the law".

92. The Court notes that Sections 130 (2)(e) and 131(2)(a) of the Penal Code define the material scope of the offence of rape in the Respondent State with the penalty its commission entails. The Court also observes from the file that the national Courts convicted and sentenced the Applicant on the basis of these provisions in accordance with established domestic procedures and there is nothing manifestly erroneous in the process.

93. For the Court, the Applicant's contention that the said sections of the Penal Code contravene the constitution is a mere general allegation which remains unproven. In this vein, the Court recalls its established jurisprudence that "general statements to the effect that a right has been violated are not enough. More substantiation is required".[21]

94. In view of the foregoing, the Court holds that the Respondent has not violated the Applicant's right to equality and equal protection of the law under Article 3 of Charter.

18 See para 29 of this judgment.

19 Section 130(2)(e) of the Penal Code provides that "A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions: … (e) being a religious leader takes advantage of his position and commits rape on a girl or woman. Section 131(2)(a) of the same stipulates that "Notwithstanding the provisions of any law, where the offence is committed by a boy who is of the age of eighteen years or less, he shall: if a first offender, be sentenced to corporal punishment only."

20 Article 13(3)(5) of the Tanzanian Constitution provides that "All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law. For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualification."

21 *Alex Thomas Judgment v Tanzania* Judgment*, op cit*, para 140.

VIII. Remedies sought

95. The Applicant prays the Court to restore justice; quash his conviction and the sentence meted out to him; order that he be released and take such other measures as it may deem appropriate.

96. In its Response, the Respondent State prays the Court to dismiss the Application and the Applicant's prayers in their entirety, as being unfounded

97. Article 27(1) of the Protocol stipulates that: "If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

98. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for the reparation … by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

99. The Court notes its finding in paragraphs 67, 78 and 87 above that the Respondent State violated the Applicant's rights to a fair trial due to (i) the fact that he was not afforded legal aid; (ii) his witnesses were not heard; and that his conviction was based on insufficient evidence and contradictory statements of the Prosecution witnesses. In this regard, the Court recalls its position on State responsibility in *Reverend Christopher R Mtikila v United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation."[22]

100. As regards the Applicant's prayer to quash his conviction and sentence and directly order his release, the Court reiterates its decision that it is not an appellate Court for the reasons that it does not operate within the same judicial system as national courts; and that it does not apply "the same law as the Tanzanian national courts, that is, Tanzanian law". [23]

101. The Court also recalls its decision in *Alex Thomas v Tanzania* where it stated that "an order for the Applicant's release from prison can be made only under very specific and/or, compelling circumstances"[24]. This would be the case, for example, 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 his continued imprisonment would occasion a

22 Application No. 011/2011. Judgment of 13/6/2014; *Reverend Christopher R Mtikila v United Republic of Tanzania*, para 27.

23 *Mohamed Abubakari v Tanzania* Judgment, *op cit,* para 28.

24 *Alex Thomas v Tanzania* judgment, *op cit*, para157.

miscarriage of justice. In such circumstances, the Court has pursuant to Article 27(1) of the Protocol to order "all appropriate measures", including the release of the Applicant.

102. In this regard, the Court refers to the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights. In their case law, both Courts, considering the nature of the violations established and in order to assist states to comply with their human rights obligations, have exceptionally requested Respondent States to ensure the release of individuals with respect to some specific violations where no other options are available to remedy or to put an end to the violations.[25]

103. In the instant case, the Court observes that the Respondent has violated the Applicant's right to a fair trial contrary to Article 7(1) of the Charter by failing to afford him legal aid, denying his witnesses to be heard and convicting him in the face of insufficient and contradictory statements of the prosecution witnesses.

104. The Court considers that in spite of the fact that it has found these violations of the Charter, according to the record before the Court and taking into account the nature and scope of the violations and the nature of the offence, it cannot in this instant case order the Respondent State to release the Applicant from prison.

105. In order to ensure fair and adequate reparations for the violations, the Court finds that the violations affected the right to a fair trial guaranteed in the Charter. Consequently, the trial of the Applicant should be reopened taking into consideration the guarantees of a fair trial pursuant to the Charter and international human rights standards, including the Applicant's right to defence.

106. The Court, lastly, notes that the Parties did not request or file submissions regarding other forms of reparation.

IX. Costs

107. The Respondent State prays the Court to rule that the costs be borne by the Applicant.

108. The Applicant has not made any specific request on this issue.

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

110. In the instant case, the Court decides that each Party shall bear its own costs.

25 *Del Rio Prada v Spain*, European Court of Human Rights, Judgment of 10 July 2012, para 139, *Assanidze v Georgia* [GC] - 71503/01. Judgment 8 April 2004, para 204. Case of *Loayza-Tamayo v Peru*, Inter-American Court of Human Rights, Judgment of 17 September 1997, para 84

X. Operative part

111. For these reasons,
The Court,
unanimously,
On jurisdiction
i. *Dismisses* the objection to jurisdiction of the Court.
ii. *Declares* that it has jurisdiction.

On admissibility
iii. *Dismisses* the objection to the admissibility of the Application;
iv. *Declares* that the Application is admissible.

On the merits
v. *Finds* that the alleged violation of Applicant's right to equal protection before the law provided for in Article 3 of the Charter, the content of which is similar to Article 13(2) and (5) of the Tanzanian Constitution has not been established;
vi. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter by failing to provide the Applicant with legal aid;
vii. *Finds* that the Respondent State has violated Article 7(1)(c) of the Charter by failing to hear the Applicant's defence witnesses;
viii. *Finds* that the Respondent State has violated Article 7 of the Charter by convicting the Applicant on the basis of insufficient evidence and contradictory statements of the prosecution witnesses;
ix. *Dismisses* the Applicant's prayer for the Court to quash his conviction and sentence;
x. Dismisses Applicant's prayer for the court to directly order his release from prison;
xi. Orders the Respondent State to reopen the case within six (6) months in conformity with the guarantees of a fair trial pursuant to the Charter and other relevant international human rights instruments and conclude the trial within a reasonable time and, in any case, not exceeding two (2) years from the date of notification of this judgment.
xii. Orders the Respondent State to report on the implementation of this judgment within a period of two (2) years from the date of notification of this judgment.

On costs
xiii. *Decides* that each Party shall bear its own costs.

Paulo v Tanzania (merits) (2018) 2 AfCLR 446

Application 020/2016, *Anaclet Paulo v United Republic of Tanzania*

Judgment, 21 September 2018. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant was convicted and sentenced to thirty years imprisonment for armed robbery with violence. He brought this Application allegation various fair trial violations. The Court held that the Applicant's right to free legal representation had been violated.

Jurisdiction (rights in the Charter or other human rights instruments, 25)

Admissibility (fair trial guarantees, 41, 42, extraordinary remedy, 43; submission within reasonable time, 50)

Personal liberty and security (bail, 61; legitimate aim of restrictions, 65-68)

Fair trial (absence of accused, 81-83; reconstitution of case file, 85, 86; free legal representation, 92-95)

Reparations (compensation, 106, 107)

I. The Parties

1. The Applicant, Mr Anaclet Paulo, is a citizen of the United Republic of Tanzania, who at the time of filing this Application was serving a thirty (30) years prison term at the Butimba Central Prison in Mwanza, Tanzania.

2. The Respondent State is the United Republic of Tanzania which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment an African Court on Human and Peoples' Rights on 10 February 2006. It deposited the Declaration prescribed under Article 34(6) of the Protocol on 29 March 2010.

II. Subject of the Application

A. Facts of the matter

3. The file record indicates that on the night of 28 July 1997, four

individuals forced their way into the home of a certain Benjamin Mhaya Simon, in the village of Izingo Nshamba; and after tying up the latter and his wife, they made away with a sum of Eight Hundred Thousand Tanzania Shillings (TZS 800,000), a radio cassette player, five trousers, two wrist watches and three pairs of loin cloth.

4. On the same night, the Applicant and three other individuals were arrested by the Police and charged with the offence of armed robbery with violence. By Judgment of the Muleba District Court delivered on 27 November 1997, three of the accused, including the Applicant, were found guilty and each sentenced to a term of thirty (30) years imprisonment.

5. The Applicant lodged an appeal before the High Court of Mwanza and on 6 June 2003, the High Court held a public hearing in the absence of the Applicant and without the original case file. In a Judgment rendered on 17 June 2003, the High Court dismissed the Appeal, and upheld the Judgment of the District Court. The Applicant was notified of the High Court's Judgment on 4 February 2005.

6. On 5 February 2005, the Applicant and his two co-accused filed an appeal before the Court of Appeal of Tanzania sitting at Mwanza. On 28 January 2008, the Registry of the Court of Appeal notified them that their application for appeal had never been received. On 27 February 2008, the Applicants and the co-accused sought an extension of time from the High Court so as to file their appeal before the Court of Appeal of Tanzania.

7. On 29 September 2009, the High Court dismissed the request for extension of time on the basis that the grounds invoked for seeking the extension were irrelevant and that the deadline for appeal had long elapsed.

8. Dissatisfied with the decision dismissing their Application for extension of time to file the appeal, on 18 November 2009, the Applicant and his co-accused, brought the matter before the Court of Appeal in Criminal Appeal No. 120/2012, an appeal dismissed by the Court of Appeal in a Judgment dated 5 August 2013.

B. Alleged violations

9. The Applicant alleges that:

"i. He was denied bail pending his trial, and this, he claims is unjust and in contravention of the Tanzanian Constitution and his right to personal freedom, equality before the law and equal protection of the law as guaranteed by the African Charter on Human and Peoples' Rights;

ii. His conviction and sentence to 30 years in prison was based on a crime which did not exist at the time of the

alleged facts;

iii. He was not afforded the right to be heard, as he was not present at the proceedings at the High Court and the Court of Appeal;

iv. The proceedings before the High Court and the Court of Appeal were flawed because they were conducted without the original record of the proceedings in Criminal Case No. 123 of 1997 before the District Court of Muleba;

v. He was denied the right to be represented by Counsel before the High Court and the Court of Appeal, contrary to Article 7(1)(c) of the Charter."

10. Relying on the foregoing allegations, the Applicant submits in conclusion that the judgments of the Respondent State's courts were in violation of Articles 13(6)(a) and 18(a) of the Constitution of the United Republic of Tanzania as well as Articles 2, 3(1) and (2), 6, 7(1) (a) and (c), and 7(2), 9(1) and 9(2) of the Charter.

III. Summary of the procedure before this Court

11. The Application was filed on 5 April 2016 and was served on the Respondent State on 10 May 2016.

12. On 3 June 2016, the Respondent State transmitted to the Registry the names and addresses of its representatives and filed its Response on 12 July 2016. The Response was transmitted to the Applicant on 9 August 2016 to which he filed his Reply on 15 September 2016.

13. On 10 June 2016, pursuant to Rule 35(2) and (3) of the Rules of Court the Registry transmitted the Application to the Chairperson of the African Union Commission and through him, to the State Parties to the Protocol. On the same day, the Application was communicated to the African Commission on Human and Peoples' Rights.

14. On 18 January 2017, the Registry informed the Parties that the written phase of the procedure had come to a close and that the matter has been set down for deliberation.

15. By a letter dated 6 November 2017 received at the Registry on 8 November 2017, the Applicant informed the Court that his prison term would come to an end on 26 November 2017and submitted his new address to the Court.

16. On 27 June 2018, the Registry requested the Applicant to submit supporting documents for his claim for reparation, but no response has been received as at the time of this Judgment.

17. By a letter dated 11 September 2018, the Officer-in-charge of Butimba Central Prison, informed the Court of the Applicant's release on 25 December 2017.

IV. Prayers of the Parties

18. In his Application and his Reply to the Respondent State's Response to the Application, the Applicant prays the Court to:

"i. intervene in his favour in regard to the violation of the Constitution and his fundamental rights by the courts of the Respondent State;

ii. Grant him reparations pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules;

iii. issue such other order(s) or relief(s) as it deems necessary based on the circumstances of the case".

iv. facilitate his access to legal aid pursuant to Article 10(2) of the Protocol and Rule 31 of the Rules.

v. declare that it has jurisdiction to hear the matter;

vi. declare that his Application is well founded; and

vii. call on the Respondent State to bear the costs."

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

"i. declare that it lacks jurisdiction to hear the matter;

ii. find that the Application does not meet the admissibility conditions set out in Rule 40(5) and (6) of the Rules of Court, and to dismiss the said Application;

iii. find that the Respondent State did not violate the rights of the Applicant under Articles 2, 3(1), 3(2), 6, 7(1)(a) and (c), 7(2) of the Charter;

iv. declare that the Application is unfounded;

v. dismiss the Applicant's prayer for reparation;

vi. hold the Applicant liable to bear the cost".

V. Jurisdiction

20. In terms of Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction and the admissibility of the Application…"

A. Objection on material jurisdiction

21. The Respondent State raises an objection to the jurisdiction of the Court, citing Article 3(1) of the Protocol which provides that: "The

jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned". The Respondent State also invokes Rule 26(1) (a) of the Rules of Court which restates the provisions of Article 3(1) of the Protocol.

22. The Respondent State contends that, in the instant Application, and contrary to the above-mentioned provision, the Applicant seems to pray this Court to act as a Court of First Instance and to adjudicate allegations which the Applicant never raised before domestic courts. The Respondent State notes that, before the domestic courts, the Applicant had not raised the issues which he was bringing up for the first time before this Court, in particular:

"i. denying him bail pending his trial;

ii. application of a penalty based on a crime that was non-existent at the time the incident took place;

iii. the denial of his right to be assisted by Counsel before the High Court and the Court of Appeal;

iv. the conduct of proceedings before the High Court and the Court of Appeal in the absence of the Applicant and without the originals of the record of proceedings on the appeal file."

23. The Respondent State submits, in conclusion, that the Court lacks jurisdiction to hear this Application.

24. The Applicant refutes the Respondent State's argument, stating that since the Court is empowered to deal with issues of human rights violation in the interest of justice and equity, it is also empowered to examine his Application regardless of its shortcomings and whether or not the issues raised before the Court had been brought before domestic courts.

25. The Court recalls its long-standing jurisprudence in the matter and reaffirms that its material jurisdiction is established if the Application brought before it raises allegations of violation of human rights; and that it suffices on this issue that the subject of the Application relates to the rights guaranteed by the Charter or any other relevant human rights instrument ratified by the States concerned.[1]

1 Application No. 005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania (hereinafter referred to as "Alex Thomas v Tanzania* Judgment*"),* para 45; Application No. 001/2012. Judgment of 28/03/2014 (merits), *Frank David Omary and Others v United Republic of Tanzania (hereinafter referred to as "Frank Omary v Tanzania* Judgment*").* para 115; Application No. 003/2012. Ruling of 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania (hereinafter referred to as "Peter Chacha v Tanzania* Judgment*").* para 114.

26. In the instant case, the Court notes that the Application invokes violation of the human rights protected by the Charter and other human rights instruments ratified by the Respondent State**.**

27. Consequently, the Court dismisses the Respondent State's objection and finds that it has material jurisdiction to hear the case.

B. Other aspects of jurisdiction

28. The Court notes that the personal, temporal and territorial aspects of jurisdiction have not been challenged by the Respondent State. Furthermore, there is nothing in the record indicating that it lacks personal, temporal and territorial jurisdiction.

29. The Court therefore finds that:

"i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has deposited the declaration prescribed under Article 34(6) thereof, allowing individuals to institute cases directly before it, in accordance with Article 5(3) of the Protocol;

ii. it has temporal jurisdiction since the alleged violations are continuous, given that the Applicant remains sentenced on the basis of what he considers as irregularities;[2]

iii. it has territorial jurisdiction because the facts took place in the territory of a State Party to the Protocol, that is, the Respondent State."

30. In view of the above considerations, the Court holds in conclusion that it has jurisdiction to hear the instant case.

VI. Admissibility of the Application

31. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter".

32. According to Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with Articles 50 and 56 of the Charter, and Rule 40 of these Rules".

33. Pursuant to Rule 40 of the Rules which in substance restates the content of Article 56 of the Charter,

" ....applications to the court shall comply with the following conditions:

2 Application No. 013/2011. Judgment of 21/6/2013, *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso (hereinafter referred to as "Norbert Zongo v Burkina Faso* Judgment*")*, paras 73-74.

"1. disclose the identity of the Applicant, notwithstanding the latter's request for anonymity;

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

3. not contain any disparaging or insulting language;

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

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

6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time-limit within which it shall be seized with the matter; and

7. not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

34. The Court notes that, with regard to the admissibility of the Application, the Respondent State raises two preliminary objections concerning exhaustion of local remedies and the deadline for seizure of the Court.

A. Conditions of admissibility in contention between the Parties

i. Objection based on failure to exhaust the local remedies

35. The Respondent State contends that the Applicant raises before this Court allegations of violation of his rights, which were never brought before the domestic courts. The Respondent State further avers that the said rights mentioned by the Applicant as having been violated are guaranteed and protected by the Tanzanian Constitution in its Articles 13 and 15, as summarised hereunder:

"i. equality before the law and equal protection of the law - Article 13(1) and (2);

ii. the right to a fair hearing and the right to appeal - Article 13(6)(a);

iii. prohibition of sanctions for acts which do not constitute a crime at the time of its commission - Article 13(6)(c);

iv. the right to individual freedom - Article 15."

36. The Respondent State contends that, pursuant to Article 30 of its Constitution, anyone claiming that his fundamental rights are violated

shall have the right to seek redress before the domestic courts. It further argues that the Applicant should have exercised this remedy before seizing the African Court.

37. The Respondent State also invokes Section 9 of The Basic Rights and Duties Enforcement Act, and contends that the Applicant had the possibility of filing a constitutional petition before the High Court of Tanzania after he was sentenced by the District Court or after the judgment of the High Court.

38. The Respondent State finally submits that the Applicant, having not exercised the aforesaid remedies available at the domestic level, has not met the conditions set forth in Rule 40(5) of the Rules of Court, and therefore his Application must be dismissed for failure to exhaust the local remedies.

39. In reply, the Applicant submits that he is a layman in legal matters and that he was not provided with legal aid to enable him better understand the issues of law and procedure before the domestic courts. However, he prays the Court to take into account his appeals before the High Court and the Court of Appeal, find that he has exhausted the local remedies and declare his Application admissible.

40. The Court notes that, after the District Court Judgment, the Applicant lodged an appeal before the High Court and, subsequently, before the Court of Appeal challenging both the issues of evidence and application of the sentence by the Judges, thus giving the afore-said courts the possibility to adjudicate the different allegations of violation relevant to his trial.

41. The Court notes also that the violations alleged by the Applicant form part of "a bundle of rights and guarantees" which relate to his appeal in the "domestic procedures" that resulted in his being found guilty and sentenced to thirty (30) years prison term. These issues in the instant case are part of "a bundle of the rights and guarantees" relating to the right to a fair trial which were the basis of the Applicant's appeal before the High Court and the Court of Appeal.[3]

42. Given the above findings, the Court holds that the domestic courts had ample opportunity to address the Applicant's allegations even without him having raised them explicitly. The Court notes that it has already in several cases brought before it decided that when alleged violations of the right to a fair trial form part of the Applicant's pleadings before domestic courts, the Applicant is not required to have raised them separately to show proof of exhaustion of local remedies.[4]

3 Application No. 006/2015. Judgment of 23/3/ 2018, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania.* para 53.

4 *Alex Thomas v Tanzania* Judgment. *op cit* para 60.

43. Regarding the constitutional petition, the Court has already determined that this remedy in the Tanzanian judicial system is an extra-ordinary remedy which Applicants are not required to exhaust before seizing this Court.[5]

44. Consequently, the Court dismisses the Respondent State's objection to the admissibility of the Application for failure to exhaust the local remedies.

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

45. The Respondent State contends that the Applicant did not file his Application within a reasonable time as prescribed by Rule 40(6) of the Rules. Citing the Commission's jurisprudence in Communication No. 308/05*: Michael Majuru v Zimbabwe* before the African Commission on Human and Peoples' Rights, the Respondent State argues that international jurisprudence considers reasonable time as being 6 months. Consequently, since the Applicant filed his Application two (2) years and eight (8) months after the Court of Appeal of Tanzania's Judgment of 5 August 2013, this Court has to consider this time frame as unreasonable and declare the Application inadmissible.

46. The Applicant refutes the Respondent State's argument and contends that despite the fact that he is a lay man in matters of law, he was not afforded legal representation before the domestic courts, and it was therefore impossible for him to have an idea as to the existence of this Court and of issues of procedure and deadlines. In conclusion, he prays the Court to admit and hear his Application by virtue of the powers conferred on it.

47. The Court reaffirms that Article 56(6) of the Charter, like Rule 40(6) of the Rules, does not lay down any specific timeframe for seizure.[6] The Rules of Court simply stipulate that cases must be filed "within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

48. The Court notes, in the instant case, that between the date of exhaustion of the last local remedy, that is, the Applicant's appeal before the Court of Appeal which delivered its judgement on 5 August 2013 and seizure of this Court on 5 April 2016, a period of two (2) years

5 *Idem*, paras 60-65; Application No. 007/2013. Judgment of 3/6/2016, Mohamed *Abubakari v United Republic of Tanzania.* paras 65-72; Application No. 011/2015, Judgment of 28/09/2017, *Christopher Jonas v United Republic of Tanzania* (hereinafter referred to as "Christopher Jonas v Tanzania Judgment"). para 44.

6 *Christopher Jonas v Tanzania* Judgment. *op cit* para 36.

and eight (8) months had elapsed.

49. The Court recalls its jurisprudence to the effect that to assess the reasonableness of the timeframe for seizure, the Court takes into account the particular circumstances of each case and determines the issue on a case-by-case basis.[7] In its Judgment of 28 September 2017: *Christopher Jonas v United Republic of Tanzania,* the Court noted that "the fact that the Applicant was incarcerated, is indigent, did not have the benefit of free assistance of a lawyer throughout the proceedings at national level, his being an illiterate and his being unaware of the existence of the Court due to its relatively recent establishment - are all circumstances that can work in favour of some measure of flexibility in determining the reasonableness of the time frame for seizure of the Court."[8]

50. From the record of the instant case, it is inferred that the Applicant is in a situation similar to the one described above because he was self-represented and could not afford the services of a Counsel. The Court further notes that the Applicant, having been in detention since 1997 right up to the date of seizure, he might not have been aware of the existence of this Court. From the foregoing observation, the Court holds in conclusion that the two (2) years and eight (8) months within which it was seized is reasonable in terms of Article 56(6) of the Charter.

51. Consequently, the Court dismisses the Respondent State's inadmissibility objection based on failure to file the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

52. The Court notes that the conditions regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence and the principle that the Application should not concern a 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 (sub-rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules), are not in contention between the Parties.

53. The Court further notes that nothing on the record submitted by the Parties shows that any of these conditions has not been met in the

7 *Norbert Zongo v Burkina Faso* Judgment*, op cit* para 121.

8 *Christopher Jonas v Tanzania* Judgment, *op cit* para 53.

instant case. Consequently, the Court finds that the conditions set out above have been fulfilled.

54. In view of the foregoing, the Court holds in conclusion that this Application meets all the admissibility conditions contemplated in Articles 56 of the Charter and Rule 40 of the Rules, and consequently declares the Application admissible.

VII. Merits

55. The Applicant alleges that the Respondent State violated his right to liberty and to a fair trial. He contests the legality of the sentence meted to him and with regard to all the violations, invokes the failure to abide by Articles 2, 3(1) and (2), 6, 7(1)(a) and (c) and (2), 9(1) and (2) of the Charter.

A. Alleged violation of the right to liberty

56. The Applicant submits that after his arrest and during his remand in custody, he requested bail pending his trial, which was denied. He contends that denying him bail was a violation of his right to freedom guaranteed under Articles 13 and 15 of the Tanzanian Constitution and Article 6 of the Charter.

57. The Respondent State contends that in conformity with relevant constitutional provisions, release on bail is not an absolute right; the requirements of freedom and its limits having been enshrined in Article 15(1) and (2) of the Tanzanian Constitution.

58. The Respondent State further submits that the right to freedom as provided under Article 6 of the Charter is also not absolute in as much as even the said instrument enshrines some exceptions to freedom.

59. To justify the restriction under Tanzanian law, the Respondent State invokes Section 148(5) of the Criminal Procedure Act, and affirms that the detention of the Applicant and the refusal to grant him bail are consistent with the spirit of the provisions of the Tanzanian Constitution and the Charter, arguing, in conclusion, that the said refusal is not a violation of the Applicant's rights to freedom.

60. Article 6 of the Charter which guarantees the right to liberty provides that: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by the law…"

61. The Court notes that the possible limits to freedom mentioned in Article 6 of the Charter particularly arrest or detention, are exceptions which the Charter subjects to the strict requirements of legitimacy and legality. In the instant case, to determine whether the refusal to grant bail

to the Applicant violated his right to freedom, the Court will determine whether the said denial of bail is provided by law, whether it is justified by legitimate reasons and whether the restriction is proportional.

62. On this issue, the Court notes that Article 15(1) and (2) of the Tanzanian Constitution provides two situations wherein limits to freedom may be placed on an individual, where the person is under the execution of a Judgment, an order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence, and under circumstances and in accordance with procedures prescribed by law. The Article in question reads as follows

> "For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only:
>
> a. under circumstances and in accordance with procedures prescribed by law;
>
> or
>
> b. in the execution of a Judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence".

63. The Court also notes that Section 148(5) of Tanzania's Criminal Procedure Act provides that:

> "a Police Officer in charge of a police station, or a court before whom an accused person is brought or appears, shall not admit that person to bail if:
>
> a. this person is accused of:
>
> i. murder, treason, armed robbery or rape".

64. The Court further notes that Section 148(5)(a)(i) is worded in sufficiently clear and precise terms so as to be understandable and to «enable individuals to adapt their behavior to the rule»[9] as required by international standards and jurisprudence. Accordingly, the Court finds that the restriction on liberty is duly provided by law.

65. However, the Court reiterates that it is not enough for a restriction to be provided by law; the restriction must have a legitimate aim and the reasons for the restriction must serve a public or general interest.[10]

66. In the instant case, the restriction on liberty provided under Section 148(5) (a)(i) of the Criminal Procedure Act aims to preserve

9 Application No. 004/2013. Judgment of 05/12/2014 , *Lohé Issa Konaté v Burkina Faso* (hereinafter referred to as *Issa Konaté v Burkina Faso* Judgment, para 129.

10 *Issa Konaté v Burkina Faso* Judgment, *op ci.* para 131.

public security, protect the rights of others and avoid possible repetition of the offense insofar as this provision covers cases of armed robbery. The restriction is further justified by the need to ensure the actual appearance of the accused for the purposes of proper administration of justice. The Court, consequently, notes that the restriction on liberty is underpinned by legitimate objectives.

67. The Court also notes that the restriction is necessary and appropriate to ensure the reality of the aim pursued without compromising the ideal of liberty and personal security provided under Article 6 of the Charter. In circumstances such as those set out in Section 148 (5)(a)(i) of the Criminal Procedure Act, pre-trial detention is undoubtedly the necessary restriction for attainment of the desired objective.

68. The Court finds, in conclusion, that the Applicant's detention pending trial was not without reasonable grounds and that the refusal to grant him bail does not constitute a violation of his right to liberty. Article 6 of the Charter has therefore not been violated.

B. Alleged violation of the right to equal protection of the law and equality before the law

69. The Applicant submits that the refusal to grant him bail is discriminatory, thus violating his right to equality before the law and equal protection of the law as provided under Article 3(2) of the Charter.

70. The Respondent State has not responded to this allegation.

71. The Court recalls that the right to equality before the law requires that all persons shall be equal before the courts and tribunals.[11] It holds however that to claim discrimination or unequal protection of the law, the Applicant must adduce evidence that those in the same or similar situation as he was, have been treated differently.

72. In the instant case, the Court holds, as a fundamental rule of law, that whoever makes an allegation must adduce evidence thereof. In this matter, the Applicant does not provide evidence that persons who were in the same or similar situation as himself had been treated differently.

73. Consequently, in the absence of evidence by the Applicant as to any differential treatment, the Court finds that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law.

11 Application No. 032/2015. Judgment of 21/3/2018, *Kijiji Isiaga v United Republic of Tanzania,* para 85.

C. Alleged violation of the right to a fair trial

74. The Applicant made several allegations of violation of his rights as provided under Article 7(1)(a) and (c) and (2) of the Charter, which stipulates as follows:

"Article 7:

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

a. The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b. …

c. The right to defence, including the right to be defended by Counsel of his choice;

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed…"

i. Alleged violation of the right to defence

75. The Applicant submits that the proceedings before the High Court and the Court of Appeal were conducted in his absence in violation of his right to be heard by a court as contemplated in Article 7(1)(a) of the Charter.

76. The Applicant also submits that the fact that the High Court and the Court of Appeal held their hearing in his absence, whereas the Prosecutor was present, constitutes a violation of his right to equality before the law and his right to express his opinion as guaranteed by Article 9(1) and (2) of the Charter. He contends that, in the circumstances, he was not afforded the same possibility to express himself as the Prosecution had.

77. The Applicant further submits that throughout the appeal proceedings, a record purporting to be presented as the summary of the evidence before the District Court was used in replacement of the original record of proceedings that was found to be untraceable or indeed lost. Arguing that he has serious doubts about the authenticity of this document, which he considers as having already been tampered with, in favour of the Public Prosecutor, the Applicant denounces the irregularity of the procedure.

78. In his view, as at the time of reconstitution of the record of proceedings, the judicial authorities had taken no steps to guard against the risk of falsification of evidence in favour of the Prosecution.

He concludes that the review of his appeal without the original record violates his right to equal protection of the law.

79. The Respondent State refutes the Applicant's allegations, affirming that the latter participated in all stages of the proceedings before the District Court and had opted not to appear at the hearing of the appeal before the High Court. The Respondent State indicates that the Applicant was also present at the hearing before the Court of Appeal and in this regard, that the Applicant cannot hold the Respondent State responsible for his absence at the hearing of the appeal before the High Court.

80. The Respondent State also contests the Applicant's allegations that the appeal proceedings were flawed for lack of the original record of the court's proceedings, arguing that the said records were reconstituted and made available in the end.

81. The Court reiterates that the right for the Applicant to have his cause heard requires that he should be entitled to take part in all proceedings, and to adduce his arguments and evidence in accordance with the adversarial principle. However, the individual as was the case here, has the right to choose whether or not to take part in proceedings, provided this waiver is unequivocally established.[12]

82. The record before this Court indicates that the Applicant took part in his trial before the District Court and the proceedings before the Court of Appeal. In contrast, when the Parties were summoned for the hearing of the appeal before the High Court, the Applicant and his two co-accused reportedly indicated that they had no intention to appear - a statement which the Applicant did not challenge given that, in his Reply, he had stated that he had taken note of the Respondent State's observations in this regard.

83. The Applicant having refused to appear before the Court, the Court in conclusion holds that the hearing before the High Court in the absence of the Applicant does not constitute a violation of his right to have his cause heard.

84. On the Applicant's allegation that he was not heard on account of the Court of Appeal adjudicating on the matter without the original record of proceedings, the Court holds that whereas, in every procedure, original documents constitute crucial and precious evidence in the determination of a case, such that the non-existence of such documents can cast serious doubt on the fairness of the case, the fact remains that it is possible to reconstitute the whole record or parts thereof.

12 *Sejdovic v Italy* no. 56581/00, para 39, ECHR 2004-II; or *Poitrimol v France* no. 14032/88, para 33, ECHR 1993-II.

85. In the instant case, it is apparent from the records before this Court that in order to lodge the Applicant's appeal at the Court of Appeal, his case file was reconstituted from the High Court's Judgment and the notes taken at the hearing before that Court. The Applicant challenges the authenticity of the reconstituted record without proof as to how the reconstituted elements lack credibility.

86. The Court therefore holds that, in the absence of any evidence that the reconstituted record of proceedings has been wholly or partly falsified, it dismisses the Applicant's claims and holds that the procedure before the High Court has not been vitiated as alleged by the Applicant.

ii. Alleged failure to provide legal aid

87. The Applicant complains that he was not afforded legal aid before the High Court and the Court of Appeal. He contends that by not doing so, the domestic courts failed in their duty as set out in Section 3, of the Criminal Procedure Act, thus violating Article 7(1)(c) of the Charter.

88. The Respondent State argues that though the right to defence is an absolute right in its domestic law, the right to legal aid is mandatory only in cases of homicide, murder or manslaughter; that for all other criminal cases, legal aid is granted only at the request of the accused if it is proven that he or she is indigent and cannot afford to pay lawyers' fees. It therefore refutes the allegations made by the Applicant who, it claims, at no time during the proceedings, made any such request for legal aid, but rather chose to represent himself.

89. In his Reply, the Applicant contends that as a layman, he was completely unaware that it was possible to be granted legal aid under the legal provisions, particularly, Section 3 of the Criminal Procedure Act as indicated in the Respondent State's Response. He further submits that, in view of the amendment to the Penal Code on the offence of armed robbery offence raising the minimum sentence from 15 years to a 30 years' imprisonment, it was incumbent on the Respondent State to grant him legal representation before its courts.

90. 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."

91. The Court notes that, though Article 7 of the Charter guarantees the right to defence, including the right to be assisted by Counsel of one's choice, the Charter does not clearly provide for the right to free legal assistance.

92. The Court however recalls that its jurisprudence according to which free legal aid is a right inherent in a fair trial, and that when the interests of justice so require, any person accused of a criminal offence must be informed of his right to legal assistance or to be granted Counsel if he is indigent or where the offence is serious and the penalty provided by law is severe.[13]

93. In the instant case, the Applicant was accused of an offence punishable by a heavy sentence of 30 years imprisonment and it was in the interest of justice to provide him with free legal aid. This was made even more necessary by the fact that the Applicant claims to be a layman in law and was also unable to pay for the services of a Counsel.

94. The Court further notes that at no time was the Applicant informed that he may request and be provided with legal aid even though the Respondent State does not refute the fact that the Applicant was indigent.

95. The Court finds in conclusion that, by failing to do so, the Respondent State violated Article 7(1)(c) of the Charter.

iii. Allegation that the 30 years prison sentence is not provided by law

96. The Applicant submits that the conviction and thirty (30) years prison sentence pronounced against him were based on a non-existent crime and constitute a violation of Article 7(2) of the Charter, which stipulates that: "no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender…". The Applicant avers that the thirty (30) years prison sentence was not applicable at the time the offence of which he is accused was committed; that at the time, the maximum sentence applicable was fifteen (15) years.

97. The Respondent State refutes the Applicant's allegation, arguing that in Criminal Case No. 123/1997, the Applicant was accused of armed robbery, contrary to Sections 285 and 286 of the Penal Code, that at the time of his conviction and sentencing , the law known as the Minimum Sentence Act of 1972 had been amended by Law No. 6/1994; that this new law of 1994 repealed the 15 years sentence and introduced a mandatory minimum sentence of thirty (30) years in cases

13 *Mohamed Abubakari v Tanzania* Judgment. *op cit* para 139. See also *Christopher Jonas v Tanzania* Judgment. *op cit* para 77.

of armed robbery and robbery with violence.

98. The Court notes that, in his Reply, the Applicant affirms having taken note of the Respondent State's observations on this argument. Furthermore, the Court recalls that it has already noted that in the United Republic of Tanzania, the minimum sentence applicable for armed robbery or robbery with violence is 30 years imprisonment since the 1994 law.[14]

99. The Court therefore holds, in conclusion, that the Respondent State did not violate Article 7(2) of the Charter and that the Applicant's conviction and sentence to thirty (30) years imprisonment was in accordance with the law.

VIII. Reparation

100. As stated in paragraph 18 of this Judgment, the Applicant prays the Court to: (i) grant him adequate reparation pursuant to Article 27 of the Protocol; (ii) order the Respondent State to bear the costs; (iii) issue such other order(s) or measure(s) as the Court deems appropriate in the circumstances of the instant case.

101. However, when requested to clarify and substantiate his claim for reparation, the Applicant did not file any submissions.

102. The Respondent State in its submission prayed the Court to dismiss the Applicant's claim for reparation and order him to pay the costs.

103. Article 27(1) of the Protocol provides that: "if the Court finds that there has been violation of a human or people's rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

104. Rule 63 of the Rules, stipulates that: "the Court shall rule on the request for reparation… by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".

105. The Court recalls its jurisprudence in *Reverend Christopher R Mtikila v United Republic of Tanzania* in application of Article 27(1) of the Protocol whereby "…any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation."[15]

106. The Court notes that, in the instant case, the Applicant's right to

14 *Mohamed Abubakari v Tanzania* Judgment. *op cit,* para 210; *Christopher Jonas v Tanzania* Judgment. *op cit* para 85.

15 Application No. 011/2011. Ruling of 13/6/2014, *Reverend Christopher R. Mtikila v United Republic of Tanzania.* para 27.

legal aid was violated but this did not affect the outcome of his trial. The Court further notes that the violation it found caused non-pecuniary prejudice to the Applicant who requested adequate compensation in accordance with Article 27(1) of the Protocol.

107. The Court therefore awards the Applicant a token amount of three hundred thousand Tanzania Shillings (TZS300,000) as fair compensation.

IX. Costs

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

109. The Court notes that the Parties did express their positions on costs even though they did not indicate the amounts. Both Parties requested the Court to order the other Party to bear the costs.

110. In the instant case, the Court decides that the Respondent State shall bear the costs.

X. Operative part

111. For these reasons,
The Court,
Unanimously

On jurisdiction:
i. *Dismisses* the objection to its jurisdiction;
ii. *Declares* that it has jurisdiction*;*

On admissibility:
iii. *Dismisses* the objection to admissibility of the Application;
iv. *Declares* the Application admissible;

On the merits:
unanimously
v. *Declares* that the Respondent State did not violate the Applicant's right to freedom as provided under Article 6 of the Charter;
vi. *Declares* that the Respondent State did not violate Articles 2 and 3(1) and (2) of the Charter on non-discrimination, equality before the law and equal protection of the law;
vii. *Finds* that the Respondent State did not violate the Applicant's right to have his cause heard as provided under Article 7(1)(a) of the Charter;
viii. *Declares* that the 30 years prison sentence is in accordance with the law and is not in violation of Article 7(2) of the Charter;

ix. *Declares* that the Respondent State violated the Applicant's right to defence under Article 7(1)(c) of the Charter for failure to provide him with free legal assistance;

x. *Awards* the Applicant a token amount of Three Hundred Thousand Tanzania Shillings (TZS 300,000) as fair compensation;

xi. *Orders* the Respondent State to pay the Applicant the said sum and report to the Court thereon within six (6) months from the date of notification of this Judgment; and

xii. *Orders* the Respondent State to pay the costs.

Ajavon v Benin (re-opening of proceedings) (2018) 2 AfCLR 466

Application 013/2017, *Sebastien Germain Ajavon v Republic of Benin*

Order, 5 December 2018. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The applicant, a politician, alleged the violation of many provisions of the African Charter, including those relating to the right to a fair trial, following his sentencing to 20 years' imprisonment for drug trafficking. Having already begun its deliberations, the Court ordered the closure of the deliberations and the reopening of the proceedings to consider further submissions and requests from the applicant.

Procedure (closure of the deliberations, reopening of the proceedings, 25, 26)

I. The Parties

1. The Applicant Mr Sébastien Germain Ajavon (hereinafter referred to as "the Applicant") a businessman and politician, is a national of Benin.

2. The Respondent State is the Republic of Benin (hereinafter referred to as "the Respondent State") which became party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 22 August 2014. The Respondent State, on 8 February 2016, also deposited the declaration prescribed under Article 34(6) of the Protocol accepting the jurisdiction of the Court to receive cases directly from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. The Court was seized of the Application on 27 February 2017. The Applicant submits that, between 26 and 27 October 2016, the *gendarmerie* of the Autonomous Port of Cotonou and the Benin Customs Department were alerted to the presence of a large quantity of cocaine in a container aboard the ship "MSC Sophie" transporting frozen goods.

4. Based on the information given by the Intelligence and Documentation Department of the Office of the President of the Republic

of Benin, the Public Prosecutor's Office and the Benin Customs, as of 28 October 2016, initiated legal proceedings against the Applicant and his three employees for trafficking eighteen (18) kilograms of pure cocaine found in a container of frozen goods imported by *Société Comptoir Mondial de Négoce* (COMON SA) of which he is the Chief Executive Officer.

5. On 4 November 2016, the Criminal Chamber of Cotonou First Class Court of First Instance Court, by Judgment No. 262/IFD-16, acquitted the Applicant and one of his employees for lack of evidence and for the benefit of the doubt. The other two employees were also released without being charged.

6. The Applicant also alleges that**,** in the process, the Customs Administration suspended the container terminal of the *Transit and Consignment Brokerage Company* (SOCOTRAC) and withdrew its customs brokerage license. The High Authority for Audiovisual and Communication (HAAC), by two decisions both dated 28 November 2016, disconnected the signals of the radio station SOLEIL FM and the TV channel SIKKA TV. The Applicant alleged that he is the majority shareholder in all these companies.

7. In his application of 27 February 2017, the Applicant indicated that he brought the matter before this Court in the belief that the international drug trafficking case and the subsequent proceedings were part of a conspiracy orchestrated against him and violated his human rights guaranteed and protected by international human rights instruments.

8. Moreover, in October 2018, the Applicant reported the creation by the Respondent State, in July 2018, of a special court to try him once again for the same case of drug trafficking, and actually sentenced him to twenty years in prison.

III. Summary of procedure before the Court

9. The Application was filed on 27 February 2017 and served on the Respondent State on 31 March 2017. The Respondent State filed its Brief on Preliminary Objections on 1 June 2017.

10. In a letter dated 17 July 2017 and received at the Registry on 19 July 2017, the Applicant filed his Reply to the Respondent State's preliminary objections; and on 29 August 2017, the Respondent State submitted its Rejoinder on the Applicant's Reply to the preliminary objections.

11. On 9 October 2017, the Applicant replied to the Rejoinder, and on 14 November 2017, the Respondent State submitted its Response to the Applicant's observations on its Rejoinder.

12. On 27 November 2017, the Registry notified the Parties that the

written proceedings in this case were closed.

13. In a letter dated 6 November 2017, received on 11 December 2017, the Applicant alleged further attacks against his person and the use of new methods by the Respondent State to stifle his companies and as such requested a public hearing of the case. The Applicant reiterated this request on 26 March 2018.

14. On 9 May 2018, the Court held a public hearing, and granted the Respondent State leave to file its Response to the Applicant's further submissions within thirty (30) days. This Response was filed at the Registry on 13 May 2018.

15. In a letter dated 15 October 2018, received on 16 October 2018, the Applicant brought before the Court new allegations in respect of the case in which he indicated that while the judgment of the Court was being awaited by the Parties, the Respondent State, by a Law dated 2 July 2018, established a special court named "Economic Crimes and Terrorism Court (hereinafter referred to as "CRIET") to once again hear the case of international drug trafficking which involves him. He also alleged that the new proceedings involves fresh violations of his rights for which he solicits the Court to issue an order requesting the Respondent State to stay its proceedings before CRIET**.**

16. On 24 October 2018, the Registry notified the Respondent State of the new allegations tendered by the Applicant.

17. On 26 October 2018, the Applicant submitted another letter in which he referred to the CRIET judgment convicting him and requested the Court to issue, as a provisional measure, an order for a stay of execution of that judgment. This letter was registered in the Registry on 31 October 2018.

18. On 31 October 2018, the Registry received from the Applicant a letter dated the same day. In that letter, the Applicant referred to the record of proceedings of the General Assembly of Cotonou Magistrates highlighting the illegality of CRIET and requesting this Court to take all appropriate measures, including a stay of execution of the judgment delivered by CRIET, until consideration of the cassation appeal.

19. On 5 November 2018, the Applicant addressed to the Court a *corrigendum* to the letter dated 31 October 2018, and requested the Court to consider a stay of execution of the CRIET judgment up to the date of its decision rather than until consideration of the cassation appeal. This letter was received at the Registry on 20 November 2018 and served on the Respondent State on the same day.

20. On 7 November 2018, the Registry notified the Respondent State of the Applicant's letters dated 26 and 31 October 2018, respectively.

21. On 12 November 2018, the Applicant reiterated his request for a stay of execution of the CRIET judgment. This letter was received at the Registry on 19 November 2018 and served on the Respondent

State on 20 November 2018.

22. On 13 November 2018, the Respondent State filed its observations on the admissibility of the new allegations submitted by the Applicant. The Respondent State's submissions were received on 14 November 2018 at the Registry, which transmitted the same to the Applicant on the same day.

23. On 20 November 2018, the Registry received the Respondent State's observations as contained in the latter's letter dated 19 November 2018, on the prayer for a stay of execution of CRIET judgment. On the same day, the Registry transmitted the said observations to the Applicant.

24. On 21 November 2018, the Applicant submitted to the Court a set of documents in support of the allegations of violation of his rights, consisting of a study report conducted by the Benin Bar Association on CRIET, the transcript of the statement of the President of the National Union of Magistrates of Benin and a copy of the judgment delivered by CRIET. The said documents were served on the Respondent State on the same day.

IV. Position of the Court

25. The Court notes that the developments that occurred after the matter was placed on the deliberations are linked to the facts alleged in the Application filed on 27 February 2017 and represent an obvious continuity with the facts in question.

26. In this regard, the Court holds that in the interest of proper administration of justice, it has the inherent power to decide to set aside the deliberation, reopen the pleadings and admit the new evidence filed by the Parties after the matter has been placed under deliberation.

V. Operative part

27. For these reasons:

The Court

unanimously,

i. *sets aside* the deliberation on Application No. 013/2017 - *Sébastien Germain Ajavon v Republic of Benin,* and decides to reopen written pleadings**.**

ii. *admits* the new evidence filed by the Parties after the matter was placed under deliberation;

iii. allows the Applicant thirty (30) days from the date of notification of this Order to submit on all aspects of the case, his Reply to the Respondent State's Response.

Ajavon v Benin (provisional measures) (2018) 2 AfCLR 470

Application 013/2017, *Sebastien Germain Ajavon v Republic of Benin*

Order, 7 December 2018. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The applicant, a politician, alleges the violation of many provisions of the African Charter, including those relating to the right to a fair trial, following his sentencing to 20 years' imprisonment for drug trafficking. The Court ordered the respondent State to stay the execution of the judgment of the national court until it had rendered its decision on the merits of the application.

Jurisdiction (provisional measures, prima facie jurisdiction, 28)

Provisional measures (risk of execution of prison sentence, 44-46)

I. The Parties

1. The Applicant is Mr Sébastien Germain AJAVON (herein-after referred to as "the Applicant"), a businessman and politician of the Republic of Benin.

2. The Respondent State is the Republic of Benin (hereinafter referred to as "the Respondent State") which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 22 August 2014. The Respondent State also deposited on 8 February 2016 the declaration prescribed under Article 34(6) of the Protocol accepting the jurisdiction of the Court to receive cases directly from individuals and Non-Governmental Organisations.

II. Subject of the Application

3. The Court was seized of the Application on 27 February 2017. The Applicant submits that, between 26 and 27 October 2016, the *gendarmerie* of the Autonomous Port of Cotonou and the Benin Customs authorities were alerted to the presence of a large quantity of cocaine in a container aboard the ship "MSC Sophie" transporting frozen goods.

4. Based on the information given by the Intelligence and Documentation Department of the Office of the President of the Republic of Benin, the Public Prosecutor's Office and the Benin Customs, as of 28 October 2016, initiated legal proceedings against the Applicant

and his three employees for trafficking eighteen (18) kilograms of pure cocaine found in a container of frozen goods imported by *Société Comptoir Mondial de Négoce* (COMON SA) of which he is the Chief Executive Officer.

5. On 4 November 2016, the Criminal Chamber of Cotonou First Class Court of First Instance Court, by Judgment No. 262/IFD-16, acquitted the Applicant and one of his employees for lack of evidence and for benefit of the doubt. The other two employees were released without charge.

6. The Applicant alleges that, in the process, the Customs Administration suspended the container terminal of the *Transit and Consignment Brokerage Company* (SOCOTRAC) and withdrew its customs brokerage license. The High Authority for the Audiovisual and Communication *(HAAC),* by two decisions both dated 28 November 2016, disconnected the signals of the radio station SOLEIL FM and the TV channel SIKKA TV. The Applicant alleges that he is the majority shareholder in all these companies.

7. In his application of 27 February 2017, the Applicant indicated that he brought the matter before this Court in the belief that the international drug trafficking case and the subsequent proceedings were part of a conspiracy orchestrated against him and violated his human rights guaranteed and protected by international human rights instruments.

8. Moreover, in October 2018, the Applicant reported the creation by the Respondent State, in July 2018, of a special court to try him once again for the same case of drug trafficking, and actually sentenced him to twenty years in prison.

9. The Applicant argued that the sentences passed against him by CRIET on 18 October 2018 violate the international conventions ratified by the Respondent State and place him in a precarious and extremely serious situation. He also argued that the Respondent State basically violated his right to a fair trial in several respects, citing the following violations: the right to be notified of the charges levelled against him; the right of access to the record of proceedings; the right to have his cause heard by the competent national courts; the right to respect for the principle of reasonable time; the right to respect for the principle of the independence of the judiciary; the right to assistance by Counsel; the right to respect for the principle of *non bis in idem* and the right to respect for the principle of two-tier jurisdiction.

III. Summary of procedure before the Court

10. The Request was received at the Registry on 27 February 2017 and was served on the Respondent State on 31 March 2017. By a

letter dated 29 May 2017 received at the Registry on 1 June 2017, the Respondent State filed its brief on preliminary objections.

11. In a letter dated 17 July 2017 received by the Registry on 19 July 2017, the Applicant filed his rejoinder to the preliminary objections raised by the Respondent State; and on 29 August 2017, the Respondent State submitted its rejoinder on the preliminary objections.

12. On 9 October 2017, the Applicant responded to the rejoinder; and on 14 November 2017, the Respondent State submitted its response to the Applicant's observations on its rejoinder.

13. On 27 November 2017, the Registry notified the Parties that the written procedure in the case was closed**.**

14. In a letter dated 6 November 2017 received at the Registry on 11 December 2017, the Applicant alleged further attacks against his person, the use of new methods by the Respondent State to stifle his businesses and, for that reason, solicited a public hearing. He reiterated this prayer on 26 March 2018.

15. On 9 May 2018, the Court held its public hearing, placed the matter under deliberation and allowed the Respondent State leave to file its response to the Applicant's new observations within thirty (30) days. The response was submitted at the Registry on 13 May 2018.

16. In a letter dated 15 October 2018 received on 16 October 2018, the Applicant brought new allegations on the matter before the Court, arguing in his written pleadings that while the Court's decision was being awaited by the Parties, the State of Benin, by a law dated 2 July 2018, created a special court named "Anti-Economic Crimes and Terrorism Court (hereinafter referred to as "CRIET") to once again hear the case of international drug trafficking in which he was involved. Alleging that this new procedure involves further violations of his rights, the Applicant requested that the Court issue an order requesting the Respondent State to stay its proceedings before CRIET.

17. On 24 October 2018, the Registry notified the Respondent State of the Applicant's new allegations.

18. On 26 October 2018, the Applicant filed another letter in which he referred to the CRIET judgment No. 007/3C.COR of 18 October 2018 convicting him, and prayed the Court to issue, as an interim measure, an order for a stay of execution of the said judgment. This letter was registered in the Registry on 31 October 2018.

19. On 31 October 2018, the Registry received from the Applicant a letter dated the same day by which the Applicant tendered the record of proceedings of the General Assembly of Cotonou Magistrates highlighting the illegality of CRIET, and requested the Court to take all appropriate measures, including a stay of execution of the judgment delivered by CRIET until examination of the cassation appeal.

20. On 5 November 2018, the Applicant addressed to the Court

a *corrigendum* to the letter dated 31 October 2018, requesting the Court to consider a stay of execution of the judgment of CRIET until its decision and not until consideration of the cassation appeal. The said letter was received at the Registry on 20 November 2018 and served on the Respondent State on the same day.

21. On 7 November 2018, the Registry notified the Respondent State of the Applicant's letters dated 26 and 31 October 2018, respectively.

22. On 12 November 2018, the Applicant reiterated his request for a stay of execution of CRIET judgment in a letter received at the Registry on 19 November 2018 and served on the Respondent State on 20 November 2018.

23. On 13 November 2018, the Respondent State submitted its observations on admissibility of the new allegations filed by the Applicant. The Respondent State's submissions were received on 14 November 2018 at the Registry, which served the same on the Applicant on the same day.

24. On 20 November 2018, the Registry received the Respondent State's observations as contained in its letter of 19 November 2018, regarding the stay of execution of CRIET judgment. The Registry transmitted the said observations to the Applicant on the same day.

25. On 21 November 2018, the Applicant tendered before the Court a set of documents in support of the allegations of violation of his rights, consisting of a study report conducted by the Benin Bar Association on CRIET, the transcript of the statement of the President of the National Union of Benin Magistrates and a copy of the judgment delivered by CRIET. The said documents were forwarded to the Respondent State on the same day.

26. On 5 December 2018, the Court issued an interim order to set aside the deliberation and reopen the written proceedings. It also admitted the new evidence filed by the Parties after the matter was placed under deliberation.

IV. On *prima facie* jurisdiction

27. In dealing with any Application filed before it, the Court has to ascertain that it has jurisdiction pursuant to Rule 39 of its Rules and Articles 3 and 5(3) of the Protocol.

28. However, in examining a request for provisional measures, the Court need not establish that it has jurisdiction on the merits of the

case, but simply satisfy itself that it has *prima facie*[1] jurisdiction.

29. Article 3(1) of the Protocol stipulates that: "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instruments ratified by the States concerned."

30. In terms of Article 5(3) of the Protocol, "The Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol."

31. As specified in paragraph 2 of this Order, the Respondent State is a party to the Charter and to the Protocol, and also has deposited the declaration accepting the jurisdiction of the Court to receive applications from individuals and non-governmental organizations as per Article 34(6) of the Protocol read together with Article 5(3) thereof.

32. In the instant case, the rights of which the Applicant alleges violation are protected by the provisions of Articles 3(2), 5, 6, 7, 14 and 26 of the Charter.

33. In light of the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the Application.

V. On the provisional measures requested

34. The Applicant prays the Court to order a stay of execution of the 18 October 2018 Judgment No. 007/3C.COR rendered by CRIET.

35. He contends that, notwithstanding his appeal before the Court of Cassation, the Respondent State can at any time proceed with execution of the judgment of CRIET; adding that CRIET decisions are not subject to appeal and that the appeal before the Court of Cassation is an extraordinary remedy.

36. The Applicant submits further that execution of judgment No. 007/ 3C.COR of 18 October 2018 rendered by CRIET, would have unforeseeable consequences for him, and prays the Court take the decision for a stay of execution of the said judgment, as a matter of urgency.

37. The Respondent State submits that the Applicant cannot ask the Court for a stay of execution of a judgment of a Benin court under

1 Application No. 002/2013. Order of 15/3/2013 for Provisional Measures, *African Commission on Human and Peoples' Rights v Libya* (herein-after referred to as *African Commission on Human and Peoples' Rights v Libya,* Order for Provisional Measures") para 10; Application No. 024/2016. Order of 3/6/2016 for Provisional Measures, *Amini Juma v United Republic of Tanzania* (herein-after referred to as *"Amini Juma v United Republic of Tanzania,* Order for Provisional Measures*"*) para 8.

Benin's positive law and the laws declared by the Constitutional Court as being in conformity with Benin's Constitution.

38. It further submits that it is established jurisprudence that community courts do not have jurisdiction to issue injunctions to Member States in respect of their domestic laws and procedures; adding that to admit such injunctions would lead to the obliteration of domestic court decisions. The Respondent State also refers to the Applicant's cassation appeal, describing the same as premature and unfounded.

39. Finally, the Respondent State prays the Court to dismiss the Applicant's claims as premature and baseless. 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".

40. Further, Rule 51(1) of the Rules provides that the Court may:

> "[a]t the request of a party, the Commission or on its own accord, prescribe to the Parties any interim measure which it deems necessary to adopt in the interest of the Parties or of justice."

41. The Court notes that it lies with it to decide for each case, whether in light of the particular circumstances of the matter, it should exercise the jurisdiction conferred on it by the aforementioned provisions.

42. The Court notes that, although in terms of Article 19 paragraph 2 of the Law establishing CRIET, its judgments are subject to cassation appeal,[2] Article 594 of the Benin Code of Criminal Procedure declares invalid the appeal of convicted persons who are not in detention or have not obtained exemption from execution of the sentence.[3]

43. In the circumstances of the instant case, wherein the Applicant is not in detention and has not obtained exemption from execution of the sentence, the Court holds that there is still the risk that the prison sentence would be executed notwithstanding possible cassation appeal.

44. In view of the foregoing**,** the Court finds that the circumstances of this case highlight a situation of extreme gravity and presents a risk of irreparable harm to the Applicant if the CRIET's decision of 18 October 2018 were to be enforced prior to this Court's decision in the

2 "The judgments of the Economic Crimes and Terrorism Court shall be justified. They shall be delivered in open Court and shall be subject to cassation appeal by the convicted person, the Public Prosecutor's Office and the civil Parties."

3 "Persons subject to custodial sentence with or without bail shall be declared incompetent to file any appeal. In order for his Application to be admitted, It is sufficient for the Applicant to present him/herself before the Office of the Prosecutor to undergo the detention."

matter pending before it.

45. The Court therefore holds in conclusion that the said circumstances require it to order Provisional Measures, in accordance with Article 27(2) of the Protocol and Rule 51 of its Rules, so as to preserve the *status quo.*

46. The Court specifies that this Order is necessarily provisional and does not in any way prejudge the findings the Court might make as regards its jurisdiction, admissibility of the Application and the merits of this matter.

VI. Operative part

47. For these reasons,

The Court,

unanimously

Orders 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 in the instant Application;

ii. *report* to this Court within fifteen (15) days of receipt of this Order on the measures taken to implement the same.

Guehi v Tanzania (merits and reparations) (2018) 2 AfCLR 477

Application 001/2015, *Armand Guehi v United Republic of Tanzania (Republic of Côte d'Ivoire intervening)*

Judgment, 7 December 2018. Done in English and French, the English text being authoritative.

Judges: KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

Recused under Article 22: ORE

The Applicant, an Ivorian citizen, was convicted and sentenced to death for the murder of his wife. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court held that some fair trial guarantees had been violated but that the reparations requested by the Applicant were not in line with the violations found. The Court awarded some monetary compensation for the violations established.

Jurisdiction (conformity of domestic proceedings with Charter, 33; consular assistance, 37, 38)

Admissibility (exhaustion of local remedies, fair trial guarantees, 50, extraordinary remedy, 51; submission within reasonable time, 56)

Fair trial (defence, interpretation, 73, 75-78; consular assistance, 95, 96; evidence, 105-111; trial within reasonable time, 124)

Cruel, inhuman or degrading treatment (burden of proof, 132-136)

Reparations (quashing of conviction, 163, release, 164, 165; compensation, 178-183, 186, 189; guarantees for non-repetition; publication of judgment, 195)

Costs (pro bono counsel, 200; supporting documents, 203)

Separate Opinion: BENSAOULA

Procedure (intervention by third party state, 13-15)

I. The Parties

1. The Applicant, Armand Guehi, is a national of the Republic of Côte d'Ivoire. He was sentenced to death for the murder of his wife and is currently detained at the Arusha Central Prison, United Republic of Tanzania.

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 the Protocol on 10 February 2006. The Respondent State also deposited, on 29 March 2010, the declaration under Article 34(6) of the Protocol, accepting the jurisdiction of the Court to receive cases from individuals and Non-

Governmental Organisations.

3. In accordance with Article 5(2) of the Protocol as well as Rules 33(2) and 53 of the Rules, the Republic of Côte d'Ivoire (hereinafter referred to as the "Intervening State") was permitted to join.

II. Subject of the Application

A. Facts of the matter

4. The Applicant moved to Tanzania on 1 May 2004 as a dependant of his wife, an Ivorian citizen, then working for the International Criminal Tribunal for Rwanda (hereinafter referred to as "ICTR"). The Applicant was also undertaking an internship at the ICTR.

5. On 6 October 2005, the Applicant was arrested by security officers of the ICTR in connection with his wife's disappearance. He was handed over to local police and detained. On 18 October 2005, he was charged with the murder of his wife before the High Court of Tanzania at Moshi.

6. On 30 March 2010, he was found guilty, convicted and sentenced to death. He appealed to the Court of Appeal of Tanzania, which on 28 February 2014, dismissed the appeal.

7. On 15 April 2014, the Applicant filed a notice of motion for review of the Court of Appeal's decision.

8. On 6 January 2015, while the request for review awaited hearing in the Court of Appeal, the Applicant filed Application No. 001 of 2015 before this Court alleging that several of his rights were violated in the course of the domestic proceedings.

B. Alleged violations

9. The Applicant alleges that:

"i. Save for the trial in 2010, the Respondent State did not provide him with language assistance at critical stages of the case such as when he was interviewed and recorded his statement at the police station while at the time of his arrest he only properly spoke and understood French.

ii. The Respondent State did not ensure or conduct a proper, fair and professional and diligent investigation of the matter. Consequently, several pieces of evidence which could have led to other suspects besides him were not investigated or were simply destroyed in complicity with the investigation officers. Had these pieces of evidence been investigated or presented to the High Court, they

would have proved that he was in fact not the perpetrator of the crime.

iii. His right to presumption of innocence was "savagely ignored" in this case. There was a clear presumption of guilt which breached his right to a fair trial.

iv. The Respondent State did not provide him with an attorney at the time of recording his statement at the police even though he requested for one. Consequently, the statement recorded was manipulated and used against him during the trial.

v. The Respondent State never facilitated consular assistance.

vi. After his arrest, the Respondent State failed to secure his properties in his house in Arusha and, as a result, the said properties were arbitrary disposed of.

vii. He was arrested in October 2005, but it was not until 2010 that he was actually convicted, that is after a period of almost five years. The whole trial process was unduly prolonged, which constitutes an infringement of his right to be tried within a reasonable time.

viii. He has suffered a lot of mental anguish as a result of the initial arrest, charges being dropped and subsequently another case being opened against him.

ix. During his detention, he was subjected to inhuman and degrading treatment."

III. Summary of procedure before the Court

10. The Registry received the Application on 6 January 2015. By notices dated 8 January 2015 and 20 January 2015 respectively, the Registry acknowledged receipt of the Application and informed the Applicant of its registration in accordance with Rule 36 of the Rules.

11. On 20 January 2015, the Registry served the Application on the Respondent State, the African Commission on Human and Peoples' Rights and the Chairperson of the African Union Commission, as prescribed by Rule 35(2) and (3) of the Rules.

12. On 21 January 2015, and in accordance with Article 5(1)(d) and 5(2) of the Protocol as well as Rules 33(1)(d) and 53 of the Rules, the Registry served the Application on the Republic of Côte d'Ivoire as the Applicant's state of origin for purposes of possible intervention. The Republic of Côte d'Ivoire, which requested for intervention on 1 April 2015, was allowed to join the case and filed its observations and

responses to the submissions made by the Parties on 16 May 2016 and 4 May 2017 respectively.

13. On the Court's direction, by a notice dated 17 March 2015 and in line with Rule 31 of the Rules, the Registry requested the Pan-African Lawyers' Union (PALU) to assist the Applicant who indicated that he did not have a legal representative. On 16 June 2015, PALU agreed to provide the requested support.

14. On their request, Professor Christof Heyns (University of Pretoria) and Professor Sandra Babcock (Cornell University) were granted leave to participate as *amici curiae* by notice dated 29 November 2017 in accordance with Article 26(2) of the Protocol, Rules 45 and 46 of the Rules as well as Directions 42 to 47 of the Practice Directions.

15. In accordance with Rule 36(1) of the Rules, the Respondent State was duly served with the Application and all the submissions of the Applicant, Intervening State, and Amici, and was granted the statutory time and subsequent extensions of time as applicable to file its responses. All Parties were similarly served with the pleadings and annexures, and duly allowed to file their observations.

16. On 18 March 2016, in accordance with Rule 51(1) of the Rules, the Court issued an Order for provisional measures directing the Respondent State to suspend the execution of the death sentence on the Applicant pending determination of the matter on the merits. On 29 March 2016, the Registry notified the Parties and other relevant entities of the Order as prescribed under Rule 51(3) of the Rules. On 23 January 2017, the Respondent State filed its response to the Order as part of its observations to the Intervening State's submissions. On 15 February 2017, the Registry acknowledged receipt of the response with copy to the Parties.

17. By notices dated 22 July 2016 and in accordance with Rule 45(2) of the Rules, the Court sought a legal opinion on the issue of death penalty in Africa from Penal Reform International, Legal and Human Rights Centre - Tanzania, the Death Penalty Project and the African Commission on Human and Peoples' Rights. Only the Legal and Human Rights Centre made a submission.

18. On 16 April 2018, the Registry informed the Parties that the matter was set down for public hearing on 10 May 2018. The Applicant and Respondent State were represented at the public hearing during which they presented their pleadings, made oral submissions and responded to questions put to them by Judges of the Court.

19. On 22 May 2018 and in accordance with Rule 48(2) of the Rules, the Registry served the verbatim records of the hearing on the Parties. On the same date, the Registry further requested the Parties to submit their oral observations in writing and file their submissions on reparations. On 18 June 2018, the Applicant filed his submissions

on reparations, which were served on the Respondent State on 21 June 2018 for response within 30 days. At the expiry of that time and in accordance with Rule 37 of the Rules, the Court *suo motu* granted the Respondent State an extension of fifteen (15) days to submit on reparations failing which the matter would be considered based on pleadings on file.

20. On 16 August 2018, the Registry received the Respondent State's submissions on reparations together with a request for leave to submit the same. On 29 August 2018, the Registry informed the Respondent State that, in the interest of justice, the Court had decided to grant the leave sought. The Applicant and Intervening State were in copy of this notice and were served the said submissions for information.

IV. Prayers of the Parties

21. In his Application, Reply and oral submissions, the Applicant prays the Court to:

"i. Declare that the Respondent State has violated his rights guaranteed under the African Charter, in particular Articles 1, 5, 7 and 14;

ii. Order that the conviction is quashed, the sentence is set aside, and his liberty is restored;

iii. Order the Respondent State to take immediate steps to remedy the violations;

iv. Order that he should be granted reparations;

v. Make any other orders or grant any remedies that it shall deem fit."

22. In its Responses to the Application and to the Intervening State's Application for intervention and substantive pleadings as well as in its oral pleadings, the Respondent State prays the Court to find that:

"i. The African Court has no jurisdiction to entertain this matter and the Application should be duly dismissed;

ii. The Application has not met the admissibility requirement under Rule 40(5) of the Rules of Court and should be declared inadmissible;

iii. The Application has not met the admissibility requirement under Rule 40(6) of the Rules and should be declared inadmissible;

iv. The Respondent State has not violated Article 5 of the Charter;

v. The Respondent State has not violated Article 7 of the Charter;

vi. The Respondent State has not violated Article 14 of the Charter;

vii. The Applicant's conviction is lawful;

viii. The Applicant must continue serving his sentence;

ix. The Application is dismissed for lack of merit;

x. The Applicant's request for reparations is dismissed;

xi. The Applicant must bear the costs of the Application;

xii. The Respondent State is entitled to any other remedies the Court may deem fit to grant."

23. In its Application for intervention and the substantive pleadings filed thereafter, the Intervening State prays the Court to order that:

"i. The Application has met the admissibility requirements and should be declared admissible;

ii. The Application to intervene has met the jurisdiction and admissibility requirements under Rules 35(3)(b) and 53 of the Rules;

iii. The Applicant's rights to a fair trial have been violated;

iv. The Applicant's execution must be stayed as a provisional measure."

V. Jurisdiction

24. Pursuant to Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of its jurisdiction …".

A. Objections to material jurisdiction

25. The Respondent State avers that the Application is asking this Court to act as a tribunal of first instance given that the Applicant's allegations that his statement was taken in a language unknown to him and without the presence of his lawyer are being raised for the first time. According to the Respondent State, the Applicant should have raised these allegations during the trial proceedings or before the Court of Appeal.

26. During the public hearing, the Respondent State reiterated this argument and extended the same to the allegations that it arbitrarily disposed of the Applicant's property, never facilitated him with consular assistance and did not investigate several pieces of core evidence, which could have led to other suspects besides him.

27. The Respondent State further alleges that by asking this Court to quash the conviction, set aside the sentence and set him at liberty,

the Applicant is seeking to have the decision of the Court of Appeal of Tanzania overturned. According to the Respondent State, by examining these allegations, this Court would usurp the prerogative of the Court of Appeal, which duly concluded and finalised matters of evidence.

28. In his Reply, the Applicant contends that this Court is competent to deal with the matter as provided by relevant provisions of the Charter, the Protocol and case law of the Court.

29. At the public hearing, the Applicant reiterated the arguments made in his written pleadings on all aspects of jurisdiction. In response to the Respondent State's oral pleadings, the Applicant submitted that the Court is not being asked to act as an appellate court but to adjudicate on the fairness of the judicial process in light of the rights guaranteed in the Charter. In support of that submission, the Applicant referred to previous judgments of the Court including in the cases of *Alex Thomas*,[1] *Frank Omary*,[2] and *Kijiji Isiaga*[3] involving the Respondent State.

30. On its part, the Intervening State submits that "the Court has *prima facie* jurisdiction to deal with the Application" given that the Respondent State ratified the Charter, and the Protocol, deposited the required declaration and the Applicant alleges the violation of rights protected by various instruments to which the Respondent State is a party.

i. Objection based on the allegation that the Court is being called to act as a court of first instance

31. The Court is of the view, with respect to whether it is called to act as a court of first instance, that, by virtue of Article 3 of the Protocol, it has material jurisdiction so long as "the Application alleges violations of provisions of international instruments to which the Respondent State is a party".[4] In the instant matter, the Applicant alleges violations of rights guaranteed in the Charter.

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

1 Application No. 005/2013. Judgment of 20/11/15, *Alex Thomas v United Republic of Tanzania (hereinafter referred to as "Alex Thomas v Tanzania")*.

2 Application No. 001/2012. Judgment of 03/06/16, *Frank David Omary and Others v United Republic of Tanzania*.

3 Application No. 032/2015. Judgment of 21/03/18, *Kijiji Isiaga v United Republic of Tanzania*.

4 See Application No. 006/2015. Judgment of 23/03/18, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania (hereinafter referred to as "Nguza Viking and Johnson Nguza v Tanzania")*, para 36.

ii. Objection based on the allegation that the Court is being called to assume appellate jurisdiction

33. Regarding the question whether it would be exercising appellate jurisdiction by examining certain claims, which the Court of Appeal of Tanzania had already determined, this Court reiterates its position that it is not an appellate court with respect to decisions of national courts.[5] However, as it has previously held in the case of *Mohamed Abubakari v United Republic of Tanzania*, the Court restates that the fact that it is not an appellate court vis-à-vis domestic courts 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.[6] In the present case, the Applicant alleges the violation of his rights guaranteed in the Charter, which is a human rights instrument duly ratified by the Respondent State as earlier recalled.

34. In light of the above, the Court dismisses the Respondent State's objection on this point.

B. Material jurisdiction regarding the alleged violation of the right to consular assistance

35. The Applicant alleges that the Respondent State violated his right to consular assistance provided for under Article 36(1)(b) and (c) of the Vienna Convention on Consular Relations (hereinafter referred to as "the VCCR") adopted on 22 April 1963. The Applicant specifically avers that, as a consequence, the Respondent State violated his right to a fair trial and, in particular, the rights to be assisted by an interpreter and to be represented by a lawyer.

36. Although the Respondent State did not raise an objection in relation to this point, the Court has to make a determination on whether it has jurisdiction to examine this allegation.

37. The Court notes in that respect that Article 36(1) of the VCCR to which the Respondent State became a party on 18 April 1977 provides

5 See Application No. 001/2013. Decision of 15/03/13, *Ernest Francis Mtingwi v Republic of Malawi*, para 14; *Alex Thomas v Tanzania*, paras 60-65; and *Nguza Viking and Johnson Nguza v Tanzania*, *op. cit.*, para 35.

6 See for instance, Application No. 007/2013. Judgment of 03/06/2016, *Mohamed Abubakari v United Republic of Tanzania (hereinafter referred to as "Mohamed Abubakari v Tanzania")*, para 29; and Application No. 003/2012. Judgment of 28/03/14, *Peter Joseph Chacha v United Republic of Tanzania*, para 114.

for consular assistance.[7] As reflected in the said provision, consular assistance touches on certain privileges whose purpose is to facilitate the enjoyment by individuals of their fair trial rights including the right to be assisted by an interpreter and a lawyer, which the Applicant alleges was violated in the present Application.

38. Given that the said right is also guaranteed under Article 7(1)(c) of the Charter read jointly with Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR")[8] to which the Respondent State became a party on 11 June 1976, the Court has jurisdiction to examine the Applicant's allegation based on the above mentioned provision of the Charter.

C. Other aspects of jurisdiction

39. Considering that there is no indication on the record that it is not competent with respect to other aspects of jurisdiction, the Court holds that:

i. It has personal jurisdiction given that, as ascertained earlier, the Respondent State became a party to the Protocol and deposited the required declaration.

ii. It has temporal jurisdiction as the alleged violations occurred from 2010 and were continuing at the time the Application was filed in 2015, which is after the Respondent State became a party to the Protocol and deposited the declaration.

iii. It has territorial jurisdiction given that the alleged facts occurred within the territory of the Respondent State."

7 Article 36(1) reads as follows:

"1. With a view to facilitating the exercise of consular functions *relating to nationals* of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the *receiving State* shall, without delay, inform the consular post of the sending State if, within its consular district, *a national* of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. …;

(c) consular officers shall have the right to visit *a national* of the sending State *who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation*. …"

8 See *Mohamed Abubakari v Tanzania*, *op.cit.*, paras 137-138. See also, Application No. 012/2015. Judgment of 22/03/18, *Anudo Ochieng Anudo v United Republic of Tanzania*, paras 110-111.

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

VI. Admissibility of the Application

41. Pursuant to Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of … the admissibility of the Application in accordance with Articles 50 and 56 of the Charter, and 40 of these Rules".

42. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> "Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, Applications to the Court shall comply with the following conditions:
>
> "1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> 2. Comply with the Constitutive Act of the Union and the Charter;
> 3. Not contain any disparaging or insulting language;
> 4. Not be based exclusively on news disseminated through the mass media;
> 5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> 6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> 7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union the provisions of the Charter or of any legal instrument of the African Union".

43. While the Parties do not dispute that some of the abovementioned requirements have been met, the Respondent State raises three objections relating respectively to the exhaustion of local remedies, the filing of the Application within a reasonable time and the late submission of the claim that the Applicant's detention was unfairly prolonged without charges being preferred.

A. Conditions of admissibility in contention between the Parties

i. Objection based on the alleged failure to exhaust local remedies

44. The Respondent State avers that the Applicant did not exhaust local remedies with respect to the allegation that he was not accorded an interpreter during his interrogation by police. According to the Respondent State, while he could have done so, the Applicant did not raise this matter either for a trial within the trial, as a ground of appeal or as a basic rights enforcement claim during the trial as provided under the Basic Rights and Duties Enforcement Act. The Respondent State asserts that the basic rights enforcement remedy similarly applies to the Applicant's claim that his right to property was violated.

45. In its oral submissions, the Respondent State reiterated its written observations on the abovementioned issues and further contended that the Applicant could have raised before domestic courts his allegations concerning the defective statement taken by the police, key evidence that was not pursued and the lack of consular assistance.

46. It is also the Respondent State's contention that the review process initiated by the Applicant is evidence that he understood the said process as an available remedy, which he left pending and thus has not exhausted. During the hearing, the Respondent State stressed that the Applicant understood that the review process applied in his case and informed the Court that the hearing of the Applicant's application for review was scheduled for 18 July 2018.

47. In his Reply, the Applicant argues that "the failure to challenge the legality of any of the legal processes that took place in the first instance cannot be interpreted as resulting in the extinction of the Applicant's right to contest the said legality". The Applicant further contends that the provision for filing a basic rights enforcement action with respect to property does not in itself mean that the laws are observed. In support of that contention, he states that his arrest, followed by a lengthy trial process and lack of measures by the Respondent State to preserve his property, resulted in the loss of the said property.

48. In response to the Respondent State's contention that the review process is pending, the Applicant asserts that it is an extraordinary remedy, which, even if sought, would not change the fact that the Court of Appeal is the highest court of the land. The Applicant reiterated these arguments during his oral submissions.

49. The Intervening State submits that the Application meets the requirement of Article 56(5) of the Charter because the Court has

consistently ruled that the review process is an extraordinary remedy, which does not have to be exhausted.

50. The Court considers, with respect to whether it is asked to act as a court of first instance, that as it has held in the earlier mentioned case of *Alex Thomas v Tanzania*, the rights whose violation is alleged are part of a "bundle of rights and guarantees". As such, the domestic authorities had ample opportunity to address the related allegations even if they were not raised expressly by the Applicant during the proceedings that resulted in his conviction. In these circumstances, domestic remedies must be considered to have been exhausted.[9]

51. With respect to whether the Applicant should have completed the review process prior to filing the present Application, this Court has consistently held that, as it applies in the judicial system of the Respondent State, such process is an extraordinary remedy. It is therefore not a remedy that the Applicant is required to exhaust in the meaning of Article 56(5) of the Charter.[10]

52. As a consequence of the above, the Court dismisses the Respondent State's objections that the Applicant failed to exhaust local remedies by raising some issues for the first time before this Court and not awaiting completion of the review process before filing the present Application. The Court therefore finds that local remedies have been exhausted.

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

53. The Respondent State avers that this Application was filed eleven (11) months after exhaustion local remedies, which is not reasonable as per the decision of *Majuru v Zimbabwe*[11] where the African Commission applied the six-month standard of the European and Inter-American human rights conventions. The Respondent State reiterated this argument during the public hearing.

54. The Applicant does not address this issue specifically in his written submissions. In his oral submissions, the Applicant avers that the period of eleven (11) months should be considered as a reasonable time if assessed by the Court's approach, which is to deal with the issue

9 See *Alex Thomas v Tanzania, op. cit.*, paras 60-65; and Application 003/2015. Judgment of 28/09/2017, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania (hereinafter referred to as "Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania")*, para. 54.

10 See *Alex Thomas v Tanzania*, *ibid*; and *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania*, *op. cit.*, para 56.

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

on a case-by-case basis. He further contends that, even though it is an extraordinary remedy, the Court should consider the fact that he tried to have the Court of Appeal's judgment reviewed. Finally, the Applicant avers that the fact that the Respondent State took a year to respond to the Application makes it inequitable to consider unreasonable the period of eleven (11) months within which the present Application was filed.

55. In its established case law, this Court has adopted a case-by-case approach to assessing the reasonableness of the time within which an Application is filed.[12] The Court notes that the Applicant filed the present Application on 6 January 2015 after the Court of Appeal delivered its judgment on 28 January 2014. The issue for determination is whether the period of eleven (11) months and nine (9) days that elapsed between the two events is reasonable.

56. This Court notes that, following the judgment of the Court of Appeal, the Applicant tried to have that judgment reviewed. In the Court's view, he was therefore at liberty to wait for some time before submitting the present Application. As the Court held in the case of *Nguza Viking and Johnson Nguza v Tanzania*, even if the review process is an extraordinary remedy, the time spent by the Applicant in attempting to exhaust the said remedy should be taken into account while assessing reasonableness within the meaning of Article 56(6) of the Charter.[13] As such, the time during which the Applicant attempted to have the Court of Appeal's judgment reviewed before filing this Application cannot be said to be unreasonable.

57. The Court therefore finds that the Application was filed within a reasonable time. As a consequence, the Respondent State's objection is dismissed.

iii. Objection based on the late submission of the claim related to the unfairly prolonged detention without charges preferred

58. In its submissions on reparations, the Respondent State disputes the Applicant's claim of being detained for a long period of time without charges being preferred and being detained unfairly for two (2) years without proceedings. According to the Respondent State, the Court should not consider this claim while dealing with the

12 See Application No. 013/2011. Preliminary Ruling of 28/06/2013, *Norbert Zongo and Others v Burkina Faso*, para 121; and *Alex Thomas v Tanzania*, *op. cit.*, paras 73-74.

13 See *Nguza Viking and Johnson Nguza v Tanzania*, para 61.

reparations because it was not raised in the pleadings or argued during the public hearing.

59. The Court refers to the Applicant's Reply dated 16 May 2016, where the allegation of prolonged detention without charges is made as an additional claim on the merits.[14] This Reply was served on the representatives of Respondent State on 10 June 2016 by United Parcel Services Courier No. 2422. The Court further refers to the verbatim record of the public hearing held in this matter on 10 May 2018 where the Applicant submitted at length on this claim.[15] The Respondent State did not respond to or challenge the abovementioned submissions while it had the opportunity to do so prior to the hearing and also while addressing the Court during the hearing.[16]

60. In light of the above, the Court dismisses the Respondent State's objection on this point.

B. Conditions of admissibility not in contention between the Parties

61. The Court notes that the conditions set out in Article 56 sub-Articles (1), (2), (3), (4) and (7) of the Charter regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language used in the Application, the nature of evidence adduced, and the previous settlement of the case respectively are not in contention.

62. The Court further notes that the pleadings do not indicate that these conditions have not been met and therefore holds that the Application meets the requirements set out under those provisions.

63. As a consequence of the foregoing, the Court finds that the Application fulfils all the requirements set out under Article 56 of the Charter and accordingly declares the same admissible.

VII. Merits

64. The Applicant alleges that the Respondent State violated his rights to a fair trial, consular assistance, property as well as his right not to be subjected to inhuman and degrading treatment. He also alleges

14 See Applicant's Reply, page 10, para 32.

15 See Verbatim Record of the African Court on Human and Peoples' Rights, Application No. 001/2015 *Armand Guehi v United Republic of Tanzania* (10 May 2018) pages 1640 to 1638. The Record was served on the Respondent State by a notice dated 22 May 2018.

16 See Verbatim Record, page 1632 and 1630 where the Respondent listed the issues to address the Court on, and those being raised for the first time.

that he suffered mental anguish.

A. Alleged violation of the right to a fair trial

i. The right to defence

65. The Court notes that some of the violations of fair trial rights alleged in the present Application relate to the right to defence. These are the alleged violations of the right to be assisted by an interpreter, the right to have access to a lawyer and the right to consular assistance. The relevant provision of the Charter with respect to the said rights is Article 7(1)(c), which provides that everyone has "The right to defence including the right to be defended by counsel of his choice".

a. The right to be assisted by an interpreter

66. The Applicant alleges that the Respondent State did not provide him with an interpreter during his interview by the police where he made a statement, which was later used against him during the trial. He asserts that the lack of language assistance at a time he could only properly speak and understand French undermined his right to a fair trial.

67. The Applicant also avers that he expressed his language limitations to the court and requested an interpreter during the committal proceedings, which were conducted in a language he did not understand. He further contends that his failure to repeatedly point this out does not mean that the violation should be overlooked given that the Respondent State had an obligation to provide language assistance at all stages due to the gravity of the offence and the nature of the sentence he faced.

68. During the public hearing, Counsel for the Applicant reiterated these arguments and further submitted that the fact that the Applicant was able to follow part of the proceedings and pleaded not guilty did not mean that he understood English in a way that relieved the Respondent State from its obligation to provide an interpreter. Counsel averred that, had the Applicant been afforded language assistance in the four hours following his arrest, "he would not be in the situation he is in today" as he would have understood the reason for being detained, the extent of the accusations he was facing including their gravity, the existence of his right to have access to a lawyer of his choice to assist him in preparing his defence and the consequences of giving a statement to authorities that could later on be used against him.

69. The Applicant also claims to have raised the issue of his

statement being tampered with because he noticed the statement produced in court had fewer pages than the one he made.

70. It is the Respondent State's contention that the Applicant was "duly conversant" in the English language and that he never raised his language limitations. The Respondent State asserts that the Applicant faced a language barrier only during the trial when witnesses testified in Kiswahili and he was provided with an interpreter.

71. According to the Respondent State, the Applicant was represented at the preliminary hearing and his lawyer should have informed the court if the Applicant had been unable to understand the proceedings.

72. The Respondent State avers that an interpreter was not required during the committal proceedings or during the preliminary hearing because they were conducted in English, which the Applicant never indicated he did not understand. The Respondent State submits that, during the committal proceedings, the accused person is not required to make a plea, but the charges are only read over and explained to him. The Respondent State stresses that the actual plea is made during the preliminary hearing and that, in the instant case, the record of proceedings shows on pages 1 and 2 that the Applicant's lawyer was then present, the charge of murder was read over, and he pleaded guilty without raising any issue to the court. The Respondent State adds that documents of the hearing were served on the Applicant and his Counsel who accepted some and rejected others, did not raise any issue with the conditions in which the statement was given, and even signed the memorandum of undisputed facts. In its oral submissions, the Respondent State reiterated and elaborated the same arguments advanced in the written pleadings.

73. The Court notes that, even though Article 7(1)(c) of the Charter referred to earlier does not expressly provide for the right to be assisted by an interpreter, it may be interpreted in the 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 charge against him; and (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court". It is evident from a joint reading of the two provisions that every accused person has the right to an interpreter.

74. The Respondent State does not dispute the fact that the Applicant was not assisted by an interpreter during the police interview and committal proceedings which were both conducted in English. The fact being disputed is whether the Applicant understood English at the time of these processes and if the fact that he was not provided an interpreter affected his right to a fair trial at the above-mentioned stages of the process.

75. The Court considers that the Applicant's ability to communicate in English should be assessed against his behaviour and the purpose of each of the processes referred to. The Applicant does not dispute the fact that the purpose of being assisted by an interpreter during the police interview, committal proceedings and preliminary hearing is to understand the charges being brought against him and be able to plead and take part in the process accordingly. The Court is of the view that, at such stages of the proceedings, the said purpose does not require one to have an outstanding mastery of the English language.

76. In that respect, the Court first notes that the Applicant himself indicates in his statement given to the police in the English language that, at the time of arrest, he had been an intern at the ICTR for over a year. Secondly, the statement reveals that the Applicant was expressly told that he was being interrogated in relation to the murder of his wife. To that effect, he gave a statement of over fifteen (15) pages in English in which he expressly responded that he understood the purpose of the interrogation and did not need the assistance of anyone to give it. He also read through the statement, confirmed the contents thereof and signed it. Finally, on several occasions, during the committal proceedings and the preliminary hearing, the Applicant who was then assisted by a lawyer, was read over the same charges, pleaded guilty, did not raise any issue regarding his statement and signed the outcome of the processes together with his lawyer after these were served on them.

77. Against these undisputed facts, the reasonable conclusion is that the Applicant had the minimum understanding required to make decisions on whether and how he should participate in the proceedings and possibly object to any part thereof. This Court is of the view that by not objecting, the Applicant understood the processes and agreed to the manner in which they were being conducted. The Applicant did not point to any part of the proceedings where he expressly objected and demanded the presence of an interpreter. During the trial, he only pointed to the fact that the statement had eleven (11) pages instead of five (5). However, the Applicant in the same paragraph stated that he recognised the statement as his and signed it.[17]

78. In light of the above, the Court finds that the lack of provision of an interpreter during the concerned proceedings did not affect the Applicant's ability to defend himself.

79. The Court consequently dismisses the allegation of violation of Article 7(1)(c) of the Charter with regard to the right to be assisted by

17 See Record of Proceedings, High Court of Tanzania at Moshi, Criminal Case No. 40 of 2007, page 129, lines 20 to 24.

an interpreter.

b. The right to have access to a lawyer

80. The Applicant claims that he was not provided with a lawyer during the recording of his police statement even though he requested one. This position was reiterated during the public hearing and the Applicant averred that he was detained for nine (9) days before being informed of his right to a lawyer of his choice, this being contrary to Article 7(1)(c) of the Charter.

81. Without challenging the Applicant's allegation that he was not allowed to communicate with a lawyer during the police interview, the Respondent State avers that, under Section 54(1) and (2) of its Criminal Procedure Act, "upon request by a person who is under restraint", the police should facilitate "communication with a lawyer, a relative or friend of his choice". However, such request may be refused regarding a relative or friend if the police "believes on reasonable grounds that it is necessary to prevent the person under restraint from communicating … for the purpose of preventing the escape of an accomplice … or the loss, destruction or fabrication of evidence relating to the offence".[18]

82. In its oral submissions, the Respondent State asserts that the Applicant was presented with the opportunity to be represented by a lawyer.

83. The Intervening State contends that persons facing criminal charges must be provided legal assistance at all times during the proceedings, including at the first interrogation, and failure to do so violates the right to a fair trial. The Intervening State supports its contention by referring to the judgment of the European Court of Human Rights in the matter of *Abdulgafur Batmaz v Turkey*.[19]

84. The Court recalls, with respect to whether the Applicant was allowed to communicate with a lawyer, that, generally, access to a lawyer is a fundamental right especially in a case where a person is accused of murder and faces the death sentence.[20]

85. The Court refers to the facts as earlier established regarding the allegation that language assistance was not provided during the police interrogation. According to these facts, the Applicant did not demand the assistance of a lawyer before or while giving his statement despite the fact that the police asked him whether he wished to do so in the

18 Criminal Procedure Act [CAP 20 RE 2002], Section 54(1) and (2).

19 *Abdulgafur Batmaz v Turkey*, Application No. 44023/09 Judgment (Merits and Just Satisfaction) ECHR (24 May 2016).

20 *Mohamed Abubakari v Tanzania*, *op. cit.*, para 121.

presence of any person of his choice. Furthermore, the record of the proceedings in the High Court shows that the Applicant acknowledged meeting with a lawyer on 6 October 2005, which was the day of his arrest and this meeting was before he gave his statement. He also requested and was given a phone and spoke to a lawyer.[21]

86. As a consequence, the Court dismisses the allegation of violation of Article 7(1)(c) of the Charter with respect to the right to have access to a lawyer.

c. The right to consular assistance

87. The Applicant alleges that the Respondent State did not facilitate consular assistance, which he avers should not be confused with legal assistance.

88. In response to the Court's enquiry into the kind of assistance he expected, the Applicant referred to Article 36(1)(b) and (c) of the VCCR as quoted earlier, and avers that once he requested consular assistance, it was the Respondent State's obligation to ensure he was granted the same, timely and effectively. He alleges that the failure to do so constituted an infringement of his right to a fair trial. It is the Applicant's contention that, had the Respondent State provided consular assistance, he would have had the opportunity to insist on access to an interpreter and legal representation.

89. The Applicant reiterates these arguments in his oral submissions and further contends that the VCCR is customary international law and that it is therefore irrelevant that the Intervening State, the Republic of Côte d'Ivoire, is not a party to it. According to the Applicant, accessing consular assistance was critical given the charges he faced and the fact that he was not conversant with the Respondent State's judicial system.

90. In its response, the Respondent State asserts that the Applicant had access to counsel during his preliminary hearing, trial and appeal.

91. During the public hearing, the Respondent State averred that it was not under the obligation to provide consular assistance given that it does not have any agreement with the Applicant's state of origin, which is Côte d'Ivoire, to that effect. It is the Respondent State's contention that there was no sending state as provided under Article 36 of the VCCR since the Applicant resided in Tanzania under his wife's consular protection as granted by the ICTR. The Respondent State considers that, as such, it did not have an obligation to inform Côte d'Ivoire of the

21 See Record of Proceedings, High Court of Tanzania at Moshi, Criminal Case No 40 of 2007, page 134.

Applicant's arrest as doing so was the ICTR's responsibility.

92. The Intervening State submits that, based on its connection with the Applicant as one of its nationals, it is entitled to ensure that his fair trial rights are respected. It alleges that the Respondent State had the duty to guarantee the conditions for a fair and equitable trial and facilitate consular assistance.

93. The *Amici Curiae* submit that, in accordance with the VCCR and various international human rights instruments, the right to consular notification is of the utmost importance in cases were foreign nationals face the death penalty, and that related fair trial rights must be afforded without delay. The Amici refer to the concurring opinion of Judge Sergio Ramirez in the Inter-American Court of Human Right's decision interpreting the scope of Article 36 of the VCCR,[22] to the Mexican Supreme Court's decision in the case of *Florence Cassez*[23] to highlight the difficulties that foreign nationals face both from language and cultural standpoints. They also refer to decisions of the United States Court of Appeals for the 7th Circuit,[24] the High Court of Malawi[25] and the Supreme Federal Court of Brazil[26] which have all stressed the fundamental character of consular notification and the enjoyment of related fair trial rights.

94. According to the *Amici*, the failure to respect the consular rights of a capital sentence defendant makes any subsequent execution an arbitrary deprivation of life that is contrary to Article 4 of the Charter. To that effect they refer to the African Commission's General Comment on the right to life.[27] The Amici aver that such violation requires substantial remedies notwithstanding the failure to raise that issue during the trial.[28]

95. The Court notes that, as it is stated in his own submissions and those of the Intervening State, the Applicant's claim is that the lack of consular assistance provided under Article 36(1) of the VCCR

22 Advisory Opinion CC – 16/99 IACHR (1 October 1999) 'The right to information on consular assistance in the framework of the guarantees of the due process of law'.

23 Amparo Directo en Revision 517/ 2011 *Florence Marie Cassez Crepin, Pleno de la Suprema Corte de Justicia*, pages 20-22.

24 *Osagiede v United States*.

25 High Court of Malawi, Sentence rehearing Case No 25 of 2017 (23 June 2017): *The Republic v Lameck Bendawe Phiri*.

26 S.T.F., Ext. No. 954, Relator: Joaquim Barbosa, 17.05.2005; 98 DIARIO DA JUSTICIA 24.05.2005 §para 75.

27 Other cases cited to that effect are: *Mansaraj and Others v Sierra Leone*, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, *Yasseen & Thomas v Guyana*.

28 *Avena and Other Mexican Nationals. (Mexico v United States of America*), Judgment, I.C.J. Reports 2004, p. 12, 121.

deprived him of the possibility to enjoy assistance from his country with respect to the protection of his fair trial rights. The Court further notes the Applicant specifically mentioned the rights to be assisted by an interpreter and a lawyer.

96. As this Court has found earlier, these rights accruing from the provision of Article 36(1) of the VCCR are also protected under Article 7(1)(c) of the Charter. Having also concluded that the related claims made under Article 7(1)(c) of the Charter are unfounded, the Court does not find it necessary to examine the same under the VCCR.

ii. The allegation that the investigation was improper and insufficient

97. The Applicant claims that the Respondent State did not ensure a "proper, fair, professional and diligent investigation of the matter" given especially that "core evidence" that could have led to other potential suspects were not investigated or were destroyed. He alleges that if the evidence referred to had been presented in court it would have proved that he did not commit the crime.

98. It is also the Applicant's contention that two other bodies had previously been discovered at the same place where his wife's body was found, but there was no investigation into whether there was a connection between the three (3) victims, which could have raised a reasonable doubt as to his involvement.

99. The Applicant further avers that extraneous evidence was used to convict him, such as evidence that he had previously beaten his wife and that he was allegedly having an extra marital affair. He also claims that emails allegedly between him and his lover were admitted as evidence, despite the fact that no investigation was conducted to verify their origin and the Applicant denied being the author.

100. In his Reply, the Applicant alleges that the Respondent State failed to investigate several contradictions. First, the Applicant avers that he was convicted on only circumstantial evidence as the Respondent State failed to find evidence directly linking him to the crime. Second, he claims that no investigation was conducted on the deceased's car from which the police did not take fingerprints because they were convinced of his guilt since he had been seen driving it and he was the last person to drive it.

101. Finally, the Applicant alleges that, due to the fact that he was not represented by a lawyer at the time he gave his statement to the police, the said statement was manipulated and used against him during the trial. He further alleges that the fact that the judgment of the High Court did not expressly refer to the statement does not mean it was not used against him.

102. The Respondent State disputes these allegations and avers that

the murder was well investigated in accordance with the provisions of the Criminal Procedure Act. The Respondent State also claims that the allegations are vague and do not specify what "core evidence" could have been pursued during the investigation.

103. During the public hearing, the Respondent State concurred that the Applicant was convicted on the basis of circumstantial evidence but stated that such practice is common in several jurisdictions and deemed as reliable as other types of evidence.

104. With regard to the statement, the Respondent State alleges that the Applicant agreed to and signed the same, which he never challenged during the trial or before the Court of Appeal at which point he was represented by a lawyer. The Respondent State also avers that this claim is immaterial since the statement was never relied on by the trial Judge.

105. The Court considers, with respect to whether the investigation was properly conducted regarding evidence relied on, that, as it has held in the case of *Mohamed Abubakari v Tanzania*, " … the imposition of a sentence in a criminal offence, and in particular a heavy prison sentence, should be based on strong and credible evidence".[29]

106. The Court is of the view that as long as evidence was properly received and considered, the proceedings and decisions of domestic courts cannot be seen as encroaching upon fair trial rights. In the instant matter, the Applicant's allegation in relation to "core evidence" and "extraneous evidence" was considered by the Court of Appeal and dismissed. In such circumstances, it cannot be said that the conviction and sentencing were based on an improper investigation especially where the prosecution proved its case beyond reasonable doubt.

107. Regarding whether the conviction was properly arrived at based solely on circumstantial evidence, the Court first notes that, as records of the domestic proceedings show, both the High Court and Court of Appeal considered a wide range of circumstantial evidence to which they applied both the law and extensive case law on the use of circumstantial evidence. Furthermore, both courts examined the Applicant's *alibi* and defence and arrived at the conclusion that the prosecution proved its case beyond reasonable doubt.[30] More particularly, it is evident from the Court of Appeal's judgment that it undertook a thorough case law-based analysis of conditions in which reliance on circumstantial evidence should apply generally[31] and in

29 *Mohamed Abubakari v Tanzania*, paras 174, 193 and 194.

30 Criminal Case 40 of 2007. Judgment of the High Court, 30 March 2010, pages 14-26; and Judgment of the Court of Appeal, 28 January 2014, pages 16-33.

31 See Judgment of the Court of Appeal, pages 16-19.

cases similar to that of the Applicant in the instant matter.[32]

108. As to whether domestic courts properly arrived at the conviction by ignoring contradictions as well as other evidence, this Court notes that the Court of Appeal considered all the contradictions raised by the Applicant, including those alleged before this Court, and reached the conclusion that they did not affect the credibility of the prosecution's case.[33] It is important to note that, where it decided not to undertake a thorough consideration of issues raised by Counsel for the Applicant because they were deemed immaterial or had been considered, the Court of Appeal provided reasons for doing so including applicable case law.[34] These are the grounds on which the Court of Appeal concluded that the High Court properly arrived at its finding.[35]

109. Turning to the claim that his statement was tampered with and used against him during the trial, the Court notes that the Applicant raised the issue of pages being added. He also raised the use of the statement as a ground of appeal. However, in the Court's view, the determining factor in assessing a breach of due process is whether the alleged reliance on the Applicant's statement outweighed other evidence and considerations.

110. As established earlier, the High Court based its determination of the matter on a wide range of pieces of evidence. Furthermore, the Applicant pleaded guilty of the charge on which he was being tried. Finally, in any event, the Applicant does not adduce any evidence that the High Court relied on his statement in arriving at the conviction. This allegation is therefore dismissed.

111. In light of the above, the Court dismisses as unfounded the allegation of violation of Article 7(1) of the Charter with respect to the manner in which the investigation was conducted.

iii. The right to presumption of innocence

112. The Applicant claims that his right to presumption of innocence was "savagely flown" as there was a "presumption of guilt" against him. He avers in that regard that he had been treated with suspicion and arrested before there was any evidence that a crime had been committed and he was handed over to the police before the investigations were completed.

113. The Applicant also claims that his conviction based solely on

32 See Judgment of the Court of Appeal, pages 19-29.

33 See Judgment of the Court of Appeal, pages 29-31.

34 See Judgment of the Court of Appeal, pages 30-31.

35 See Judgment of the Court of Appeal, page 33.

circumstantial evidence and by ignoring some pieces of evidence and considering others, violated his right to presumption of innocence.

114. According to the Respondent State, the Applicant fails to specify or substantiate the manner in which his right to presumption of innocence was "savagely flown".

115. Article 7(1)(b) of the Charter provides that everyone has "The right to be presumed innocent until proven guilty by a competent court or tribunal".

116. The Court notes that, in the instant case, the Applicant inferred "presumption of guilt" from the allegation that his trial was not conducted in a proper and professional manner. The Court further notes that this allegation has been considered earlier while examining the Applicant's claim that the investigation was improper and insufficient. The finding made earlier applies to the allegation of "presumption of guilt".

117. With respect to the allegation that he was treated with suspicion, the Court notes that the Applicant does not adduce any evidence to support the claim. Regarding the allegation that the Applicant was handed over to the police before investigations were completed, the Court is of the view that in certain circumstances, including where a person is being accused of committing murder, movement may be restricted once investigations are commenced. These are generally known as measures that are implemented to either protect the suspect, prevent him or her from tampering with vital evidence or escaping. The Court however recalls that, in such cases, the restriction imposed must always be done under the law, which the Applicant does not challenge in the instant case.

118. As a consequence of the foregoing, the Court dismisses the allegation of violation of the right to be presumed innocent protected under Article 7(1)(b) of the Charter.

iv. The right to be tried within a reasonable time

119. The Applicant alleges that he was convicted in 2010 after being arrested in October 2005 and that this undue delay infringed his right to be tried within a reasonable time. In his oral submissions, the Applicant avers that the process of *nolle prosequi* entered by the State Attorney, on account of mistakes in terms of procedure, almost two (2) years after he was first charged violates his right to be tried without undue delay.

120. The Respondent State does not address this allegation in its written pleadings and did not respond to the submissions made by the Applicant on the same issue during the public hearing.

121. The Court notes that, as provided under Article 7(1)(d) of the Charter, every individual has the right "to be tried within a reasonable

time by an impartial court or tribunal".

122. In its case law on the right to have one's cause heard within a reasonable time, this Court has taken into account the length of the domestic proceedings and imposed an obligation of due diligence on the Respondent State.[36] The Court has also held that the complexity of the case and the situation of the Applicant must be brought to bear in assessing whether the time being considered is reasonable.[37]

123. In the instant matter, the Court notes that, the Applicant was first charged on 18 October 2005. He was then charged afresh on 24 August 2007 after the State Attorney entered a *nolle prosequi* on the ground that there had been a mistake in procedure.[38] The Applicant had thus remained in custody for one (1) year, ten (10) months and six (6) days.

124. The Court notes that the fact that the Respondent State is responsible for the delay is not in dispute. The Court is of the view that in circumstances where the Applicant was in custody and did not impede the process, the Respondent State bore an obligation to ensure that the matter was handled with due diligence and expeditiously. Moreover, the delay was not caused by the complexity of the case. Finally, even after charging the Applicant afresh, the Respondent State's courts adjourned the matter on numerous occasions and it still took from 24 August 2007 to 1 March 2010, that is, about two (2) years and six (6) months, before the trial actually started. The Applicant was eventually convicted on 30 March 2010. In view of these considerations, the length of the proceedings cannot be considered as reasonable.

125. In light of the foregoing, the Court finds that such delay is in violation of the Applicant's right to have his cause heard within a reasonable time as guaranteed under Article 7(1)(d) of the Charter.

B. Alleged violation of the right to dignity

126. The Applicant alleges that the Respondent State violated his right not to be subjected to inhuman and degrading treatment by detaining him for ten (10) days in very poor conditions, including being given little to no food, having to sleep on the floor without blankets with the same set of clothes, and being deprived of the support of his

36 See Application No. 013/2011. Judgment of 28/03/14 (Merits) *Norbert Zongo and Others v Burkina Faso*, para 152; Application No. 006/2013. Judgment of 18/03/16, *Wilfred Onyango Nganyi v United Republic of Tanzania*, para 155.

37 See *Norbert Zongo v Burkina Faso* (Merits), paras 92-97; *Alex Thomas v Tanzania*, *op. cit.*, para 104; and *Wilfred Onyango Nganyi v Tanzania*, *ibid*.

38 See Applicant's reply, para 3; and verbatim records of the public hearing, pages 1649 and 1639.

friends and relatives.

127. According to the Applicant he was relentlessly questioned without being given food or water for long periods of time and food was only provided to him on two (2) occasions over the course of those ten (10) days, once by a police officer and on another occasion when he was allowed to contact his housemaid.

128. While refuting the Applicant's allegations as vague and general, the Respondent State contends that they refer to the manner in which the Applicant was treated when he was in custody of the ICTR. The Respondent State avers that when he was in police custody, the Applicant was offered the possibility to have his housemaid bring food. During the public hearing, the Respondent State submitted that what it believed should amount to inhuman treatment with respect to a person in custody would be for instance, not having access to their family or a lawyer but not "sharing a cell with five other persons, being given a three-inch mattress to sleep on, and sharing latrines".

129. Article 5 of the Charter provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

130. The Court notes that the allegations being examined relate to deprivation of food, conditions of detention, and restriction of access to friends and relatives.

131. The Court further notes that the prohibition of cruel, inhuman and degrading treatment under Article 5 of the Charter is absolute.[39] Furthermore, such treatment can take various forms and a determination whether the right was breached will depend on the circumstances of each cause.[40]

132. In light of the submissions made by the Applicant and the Respondent State, the Court considers that the determination of the Applicant's allegation bears on evidence. In this regard, the Court is of the view that the ordinary evidentiary rule that who alleges must prove may not apply rigidly in human rights adjudication. The Court restates its position in the earlier cited case of *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania* that in circumstances where the Applicants are in custody and unable to prove their allegations because the means to verify the same are likely to be in the control of

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

40 See *John Modise v Botswana* Communication 97/93 (2000) AHRLR 30 (ACHPR 2000) para 91. With respect specifically to the lack of food, see *Moisejevs v Latvia*, No. 64846/01, 80, 15 June 2006.

the State, the burden of proof will shift to the Respondent State as long as the Applicants make a *prima facie* case of violation.[41]

133. The Court notes that, in the instant case, the Applicant adduced *prima facie* evidence that he was given food two (2) times only in the course of ten (10) days, including once by his house maid. While it does not challenge this assertion, the Respondent State avers that the Applicant's statement shows that he was not prevented from receiving food.

134. In the Court's view, the Respondent State bore the duty to provide the Applicant with food so long as he was in its custody. Once the Applicant adduces *prima facie* evidence that he was not given food on a regular basis, the burden shifts to the Respondent State to prove the contrary. Given that it has not done so in the present circumstances, this Court finds that the Respondent State violated the Applicant's right not to be subjected to inhuman and degrading treatment.

135. With respect to the allegation that the Applicant was left to sleep on the floor without a blanket and restricted from accessing friends and relatives, the Court considers that detention conditions necessarily involve some restrictions of movement, communication and comfort. Furthermore, the Applicant does not adduce any *prima facie* evidence to support his allegation. This allegation is therefore dismissed.

136. In light of the foregoing, the Court finds that the Respondent State violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter with respect to deprivation of food.

C. Alleged violation of the right to property

137. The Applicant alleges that after his arrest, the Respondent State failed to secure his properties left in his house in Arusha and as a result, agents of the Respondent State arbitrarily disposed of the said properties. Upon request by this Court, the Applicant provided an itemised list of all the property with the values. To prove the Respondent State's responsibility in securing his properties, the Applicant alleges that, after his arrest, his son was taken away and the house maid was asked to leave the house. The house was then placed under the custody of the police officers and officers of the ICTR Security Department.

138. The Applicant also avers that ICTR officers came to him at Karanga Prison in Moshi with documents, including two court orders from Côte d'Ivoire, which they requested him to sign in order to dispose

41 See *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania*, *op. cit.*, paras 142-145.

of the properties. He requested for the presence of a lawyer before signing and demanded a copy thereof, which the ICTR officers never provided him.

139. In its Response, the Respondent State claims that the Applicant did not specify the property in question and did not substantiate the claim. It avers that during the trial, the Applicant mentioned that he did not know the whereabouts of his property but did not elaborate as to what property specifically he referred to.

140. In its oral submissions, the Respondent State contends that, pursuant to Article 4 of the host agreement between the Government of the United Republic of Tanzania and the ICTR, and in compliance with Article 37(1) of the Vienna Convention on Diplomatic Relations, the Applicant's wife enjoyed the inviolability of her private residence. It is the Respondent State's contention that, as such, it complied with its related duties by protecting the deceased's properties and allowing her employer, the ICTR, to remove them. The Respondent State declared that the items found in the house at the time of arrest were handed over to the ICTR in accordance with the applicable protocol on United Nations' immunity rules.

141. The Court recalls that, as Article 14 of the Charter provides, "The right to property shall be guaranteed". The issue in dispute in the instant case is that of the Respondent State's responsibility regarding the disposal of the Applicant's property.

142. The Court notes that the fact that police officers of the Respondent State were put in charge of the Applicant's house after arrest is not disputed. However, the Applicant did not challenge the Respondent State's contention that it handed over all the items found in the house to the ICTR as per a standing agreement and in line with its international obligations as earlier recalled.

143. The Court is of the view that in such circumstances, the Respondent State's responsibility is not established regarding the said properties.

144. As a consequence of the above, the Court dismisses the allegation of violation of the right to property protected by Article 14 of the Charter.

D. Allegation that the Applicant suffered mental anguish

145. The Applicant avers that he has suffered a lot of mental anguish as a result of being first arrested, the charges being dropped and another case being opened against him.

146. In its oral submissions, the Respondent State avers that, given that the Applicant's conviction and sentencing are lawful, the emotional anguish is the result of his guilt and there should be no finding of

violation in this regard.

147. The Court notes that this claim arises as a consequence of the delayed proceedings before domestic courts as established earlier. Having found that the consequential delay led to the violation of the Applicant's right to have his cause heard within a reasonable time, the Court is of the view that the present claim is a request for reparation, which will be dealt with later on.

E. Alleged violation of Article 1 of the Charter

148. The Applicant does not substantiate his claim that the Respondent State violated Article 1 of the Charter. The Respondent State challenges the claim without substantiating its contention.

149. As this Court has consistently held, a determination on whether Article 1 of the Charter was violated involves an examination not only of whether the domestic legislative measures taken by the Respondent State are available but also whether the said measures were implemented, which is that the relevant object and purpose of the Charter was attained.[42] In the same case, the Court held that if it finds that any of the rights in the Charter is curtailed, violated or not achieved, then Article 1 is violated.[43]

150. Having found that the Respondent State violated Articles 5 and 7(1)(d) of the Charter, the Court also finds a violation of Article 1 of the Charter.

VIII. Reparations

151. The Applicant requests the Court to order that his liberty be restored. He also asks the Court to order that damages be paid to him by the Respondent State for the moral and material loss suffered by himself and that suffered by his friends and relatives. The Applicant finally requests for orders on measures of satisfaction, non-repetition and costs.

152. The Respondent State prays the Court to dismiss all the reliefs and orders sought by the Applicant for lack of merit or not being supported with evidence.

153. The Court notes that, as Article 27(1) of the Protocol provides, "If the Court finds that there has been violation of a human or peoples' rights it shall make appropriate orders to remedy the violation, including

42 See *Alex Thomas v Tanzania*, *op. cit.*, para 135; *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania*, *op. cit.*, paras 158 and 159.

43 *n42*

the payment of fair compensation or reparation".

154. In this respect, Rule 63 of the Rules provides that "The Court shall rule on the request for the reparation by the same decision establishing the violation of a human and peoples' rights, or if the circumstances so require, by a separate decision".

155. In its case law on reparations, the Court has ruled on "other reparations" in a separate decision where the Parties have not adduced sufficient evidence or none for it to do so in the main judgment[44] or where it was necessary to hear the Parties extensively.[45]

156. The Court notes that written and oral submissions made by the Parties offer sufficient evidence to adequately consider the claims for reparation made in this matter. It is therefore in a position to rule on both the alleged violations as well as all reliefs and other reparations sought in a single judgment.

157. The Court, in line with its previous judgments on reparations, 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 causality and the Applicant must bear the onus to justify the claims made.[46]

158. The Court has earlier found that the Respondent State violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter and his right to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter.

159. It is against these findings that the Court will consider the Applicant's requests for reparation.

A. Order for the Applicant's conviction to be quashed, the sentence to be set aside, and for him to be released

160. The Applicant requests the Court that his conviction be quashed, the sentence set aside and his liberty be restored. He avers that there are specific and compelling circumstances as to warrant the Court to order his release. The Applicant asserts that ordering his release is the

44 See Application No. 011/2011. Ruling on Reparations of 13/06/14, *Reverend Christopher R. Mtikila v United Republic of* Tanzania, para 124 and Application No. 011/2015. Judgment of 28/09/17, *Christopher Jonas v United Republic of* Tanzania, para 97.

45 See *Mohamed Abubakari v Tanzania*, *op. cit.*, para 237.

46 See Application No. 013/2011. Judgment on Reparations of 05/06/15, *Norbert Zongo and Others v Burkina Faso*, paras 20-31; Application No. 004/2013. Judgment on Reparations of 03/06/16, *Lohé Issa Konaté v Burkina Faso*, paras 52-59; and *Reverend Christopher R. Mtikila v Tanzania* (Reparations), paras 27-29.

only way that the prejudice suffered could be restored given the fact that having a re-trial after (thirteen) 13 years would be impossible since the evidence has been destroyed.

161. The Applicant also urges the Court to take into consideration the fact that he has been incarcerated for many years without the support of his friends and family which is vital for a life in prison. He alleges that his incarceration far from his friends and family increases the damages that he has endured and will continue to endure as long as his incarceration continues. It is the Applicant's contention that his continued incarceration may only lead to further violations to occur and not releasing him would have devastating consequences that no amount of pecuniary damages could remedy.

162. The Respondent State submits that the Applicant should serve his time for the crime as he was duly sentenced by domestic courts. The Respondent State further submits that the Applicant did not provide any specific or compelling circumstance to substantiate his request to be released and that he is, as such, not entitled to the relief sought especially because he committed the offence.

163. With respect to the prayer that the conviction be quashed and the sentence set aside, the Court reiterates its position that it is not an appellate court as it does not operate within the same judicial system as national courts; and does not apply the same law**.**[47] This Court cannot therefore entertain the Applicant's prayer.

164. Regarding the prayer for release**,** the Court refers to its established case law where it held that a measure such as the release of the Applicant can only be ordered in special or compelling circumstances.[48] The Court is of the view that such circumstances are to be determined *in casu* bearing in mind mainly proportionality between the measure of restoration sought and the extent of the violation established. Determination must be done with the ultimate purpose of upholding fairness and preventing double jeopardy.[49] As such, the procedural violation that underpins the request for a particular relief has to have fundamentally affected domestic processes to warrant

47 See Application No. 027/2015. Judgment of 21/09/18, *Minani Evarist v United Republic of Tanzania*, para 81; *Mohamed Abuakari v Tanzania*, *op. cit.*, 28.

48 See for instance, *Alex Thomas v Tanzania*, *op. cit.*, para 157.

49 See Application No. 016/216. Judgment of 21/09/18, *Diocles Willian v United Republic of Tanzania*, para 101; *Minani Evarist v Tanzania*, *op. cit.*, para. 82; *Loaysa-Tamayo v Peru*, Merits, IACHR Series C No 33, [1997], paras. 83 and 84; *Del Rio Prada v Espagne*, 42750/09 – Grand Chamber Judgment, [2013] ECHR 1004, para. 83; *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroun* (2000) AHRLR 57 (ACHPR 1997) operative provisions; and Communication No. 796/1998, *Lloyd Reece v Jamaica*, Views under Article 5(4) of the Optional Protocol, 21 July 2003, U.N. Doc. CCPR/C/78/D/796/1998, para. 9.

such a request.

165. In the case at hand, the violations found by the Court did not affect the processes which led to the conviction and sentencing of the Applicant to the extent that he would have been in a different position had the said violations not occurred. Furthermore, the Applicant did not sufficiently demonstrate nor did the Court establish that his conviction and sentencing were based on arbitrary considerations and his continued incarceration is unlawful.[50]

166. In light of the facts and circumstances, this prayer is therefore dismissed.

B. Orders for pecuniary damages

i. Moral damages

167. The Applicant asks the Court to award him damages for the moral prejudice he suffered as well as for the moral prejudice suffered by his friends and relatives. The Applicant also claims that he suffered mental anguish due to being charged twice. He quantifies the prejudice as follows:

> "i. US Dollars Twenty Thousand ($20,000) for the moral prejudice suffered by the Applicant himself (caused by long imprisonment following an unfair trial, emotional anguish during the trial and imprisonment, disruption of his life plan, loss of social status, lack of contact with his family based in Côte d'Ivoire, chronic illnesses and poor health due to lack and failure of treatment; and physical and psychological abuse);
>
> ii. US Dollars Five Thousand ($5,000) for the moral prejudice suffered as indirect victims by each of the family members and friends of the Applicant namely, Mr. Lambert Guehi (father), Ms. Espérance Houeyes (sister) and Ms. Elizabeth Mollel Lesitey (friend)."

168. The Applicant also prays the Court to grant him compensation as a substitute to restitution as he cannot be returned to his situation before incarceration.

169. With respect to the principle of reparation, the Respondent State submits that a request for reparation must fulfil three main conditions, these being, a deliberate or negligent failure of the State to comply with

50 See *Minani Evarist v Tanzania*, *op. cit.*, para. 82.

its international human rights obligations, a recognised harm suffered as a result of the failure and a direct injury to the Applicant. Comparing the present case to that of *Norbert Zongo*,[51] the Respondent State avers that no reparation should be ordered in the instant matter because there is no link between the wrongful act and the prejudice suffered, as agents of the Respondent State were not implicated.

170. The Respondent State also alleges that there is no evidence of victimhood in this case given that the Applicant is not a victim of deliberate actions or negligence of the Respondent State. The Respondent State avers that domestic courts had sufficient evidence to show that the Applicant was involved in the crime, and his conviction and detention were as a result of his actions and the operation of domestic law. According to the Respondent State, such facts cannot be considered to have led to mental damage, emotional suffering and loss of earnings.

171. Regarding the victimhood of relatives, the Respondent State acknowledges the Court's finding in the *Zongo* case, but submits that the finding cannot apply in the instant case because the Applicant caused the deceased's death as established by domestic courts; he is serving a sentence for a crime he committed; and his acts as a dependent of the deceased among many others have caused the direct heirs of the deceased including a son to suffer emotionally, psychologically and financially.

172. With respect to the claims of long imprisonment following an unfair trial and emotional anguish during trial and imprisonment, the Respondent State alleges that they should be dismissed since the domestic processes followed fair trial requirements, and anguish was as a result of the Applicant's guilt.

173. On the loss of his life plan, the disruption of his sources of income and loss of social status, the Respondent State argues that the Applicant decided to quit his job in Côte d'Ivoire to live as a dependent of his wife in Tanzania. In the Respondent State's view, his modest allowance as an intern at the ICTR could not maintain his upkeep or social status and he did not therefore have any meaningful source of income. The Respondent State submits that the Applicant rather disrupted his own life plan along with his source of income and social status.

174. Regarding the lack of communication with the Applicant's family since his incarceration, the Respondent State submits that it has not banned any visits and cannot force relatives to visit the Applicant. The Respondent State avers that it has not denied the Applicant any medical

51 *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit*.

treatment and shall continue to provide the same where necessary.

175. Concerning the claim of physical and psychological abuse, the Respondent State alleges that the Applicant was not arrested by its agents but rather by the ICTR who then handed him over to the police. According to the Respondent State, the Applicant has failed to prove any of the abuses alleged.

176. Finally, with respect to the Applicant's prayers to be compensated because he could not be returned to his situation before incarceration, the Respondent State requests the Court to dismiss it since the incarceration was lawful.

177. As this Court has held in its previous judgments on reparations, the causal link between the wrongful act and moral damage "can result from the human rights violation, as a consequence thereof, without a need to establish causality as such".[52] The Court has also held that the evaluation of quantum in cases of non-pecuniary damage must be done in fairness and taking into account the circumstances of the case.[53] The Court adopted the practice of affording lump sums in such circumstances.[54]

178. With respect to the request for payment of US Dollars Twenty Thousand ($20,000) for moral damage suffered by the Applicant, the Court notes that the claims relating to long imprisonment, emotional anguish during trial and imprisonment, disruption of life plan, loss of social status and lack of interaction with his family in Côte d'Ivoire are based on the alleged unfair trial and sentencing. This Court has earlier found that the only right of the Applicant which was violated in relation to fair trial is that to be tried within a reasonable time. The Court has however concluded that the said violation did not affect the conviction, sentencing and imprisonment of the Applicant. Regarding other claims, they are the lawful consequence of the conviction and sentencing of the Applicant. The reliefs sought cannot therefore be granted as they are not justified by any violation.

179. The Court notes that the same request for compensation is based on chronic illnesses and poor health due to lack and failure of treatment, physical and psychological abuse, and delayed trial. The Court further notes that the Applicant does not adduce evidence that the Respondent State denied him medical attention, or its agents subjected him to abuse. As the Court found earlier, the actions complained of related to restrictions which are inherent to detention

52 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit.*, para 55; and *Lohé Issa Konaté v Burkina Faso* (Reparations), para 58.

53 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op.cit.*, para. 61.

54 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op.cit.*, para. 62.

and imprisonment. The related claims are therefore dismissed.

180. In relation to the same request for compensation in respect of the alleged inhuman and degrading treatment, this Court has earlier found that the Respondent State violated the Applicant's right due to deprivation of food. Based on the fact that this violation lasted ten days and on the basis of equity, the Court grants the Applicant moral damages in the amount of US Dollars Five Hundred ($500).

181. On the compensation claim for delayed proceedings, the Court earlier found that the Respondent State violated the Applicant's right to have his cause heard within a reasonable time. The Respondent State did not justify the delay of at least one (1) year and ten (10) months. The Court is of the view that, in the circumstances of this case where the Applicant was accused of murder and faced the death sentence, such delay is also likely to have caused anguish. The prejudice that ensued warrants compensation, which the Court has discretion to evaluate based on equity. Given the circumstances, the Court grants the Applicant moral damages in the amount of US Dollars Two Thousand ($2,000).

182. Regarding the requests for payment of compensation for moral prejudice suffered by friends and family members as indirect victims, the Court recalls that victimhood must be established to justify damages.[55] Given that the related claims are based on the conviction, sentencing and incarceration of the Applicant, they do not warrant damages as earlier found regarding similar claims made for the Applicant himself. The Court consequently dismisses the claims.

183. Finally, the Applicant requests for payment of damages as a substitute for restitution as he cannot be returned to the situation prior to the violations. In light of its previous findings on the Applicant's conviction, sentencing and incarceration; and given that the order for release was denied and relief granted especially with respect to the delayed proceedings, the Court is of the view that the compensation sought is not warranted. The claim is consequently dismissed**.**

ii. Material damages

184. The Applicant asks the Court to grant him the amount of US Dollars Fifteen Thousand ($15,000) for monetary loss suffered by his friends and family due to his undue detention (the loss resulting among others from his family having to sell their cocoa farm to pay a lawyer and Ms Mollel having suffered from witnessing the Applicant's injuries

55 See, *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit.*, paras 45-54.

and pain, and having to incur costs of a flight to Côte d'Ivoire to inform the Applicant's family about his situation).

185. The Respondent State submits that there is no proof regarding the claims of loss due to the sale of a cocoa farm and a trip by Ms Mollel to Côte d'Ivoire, which are new and fabricated evidence.

186. The Court notes that the claim for US Dollars Fifteen Thousand ($15,000) being the "monetary loss suffered by the Applicant's friends and family members due to his undue detention" is not supported by evidence or justification. The Court further notes that, in any event, the claim relates to the conviction, sentencing and incarceration of the Applicant and does not therefore warrant damages as earlier found. The Court consequently dismisses the request.

iii. Legal fees related to domestic proceedings

187. The Applicant claims the payment of US Dollars Two Thousand ($2,000) for legal fees incurred during proceedings in domestic courts where he was represented by Maro Advocates in the Court of Appeal proceedings. The Respondent State prays the Court to reject the claim as the Applicant was represented by counsel on a *pro bono* basis both before the High Court and the Court of Appeal.

188. The Court recalls that, in line with its case law, reparation may include payment of legal fees and other expenses incurred in the course of domestic proceedings.[56] The Applicant must provide justification for the amounts claimed.[57]

189. In the instant case, the Court concluded earlier that the violations found did not fundamentally affect the conviction and sentencing of the Applicant. The alleged loss is therefore not justified. Furthermore, the Applicant does not challenge the Respondent State's submission that he was provided free legal representation in the course of domestic proceedings. In any event, in absence of evidence to support the claim, the same is dismissed**.**

C. Other forms of reparation

i. Non-repetition

56 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit.*, paras. 79-93; and *Reverend Christopher Mtikila v Tanzania* (Reparations), *op. cit.*, para. 39.

57 *Norbert Zongo and Others v Burkina Faso* (Reparations), para. 81; and *Reverend Mtikila v Tanzania* (Reparations), *op. cit.*, para. 40.

190. The Applicant requests the Court to make an order for guarantee of non-repetition of the violations. The Respondent State prays the Court to dismiss the claim given that there was no violation to warrant an order of non-repetition.

191. The Court notes that, while they seek to prevent the commission of future violations,[58] guarantees of non-repetition are generally used to eradicate structural and systemic human rights violations.[59] These measures are therefore not usually aimed to remedy individual harm but rather to address the underlying causes of the violation. Having said that, the Court is of the view that guarantees of non-repetition can also be relevant, especially in individual cases, where there is evidence that the violation will not cease or is likely to occur again. Such cases include when the Respondent State has challenged or not complied with earlier findings and orders of the Court.[60]

192. In the instant case, the Court found that the Applicant's rights were violated only with respect to his lengthy trial and deprivation of food for which remedy has been granted. These violations are not systemic or structural in nature within the circumstances of this case. Furthermore, there is no evidence that the violations have been or are likely to be repeated. The Court also notes that, in compliance with its Order for provisional measures, the Respondent State has not carried out the execution of the Applicant pending consideration of the merits of the present Application. The Court is of the view that, in the circumstances, the order sought is not warranted. The request is consequently denied.

58 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op.cit.*, paras. 103-106.

59 African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), para. 10 (2017). See also Case of the *"Street Children" (Villagran-Morales et al.) v Guatemala*, Inter-American Court of Human Rights, Judgment on Reparations and Costs (May 26, 2001).

60 See *Reverend Christopher Mtikila v Tanzania* (Reparations), *op. cit.*, para. 43.

ii. Publication of the Judgment

193. The Applicant seeks an order that the Respondent State publishes the judgment in the national Gazette within one month of its delivery as a measure of satisfaction. The Respondent State does not make any specific submission in this respect.

194. The Court reiterates its position that "a judgment, *per se*, can constitute a sufficient form of reparation for moral damages".[61] In its previous judgments, the Court has however departed from that principle to order the publication of its judgments where the circumstances so require or *proprio motu*.[62]

195. The Court restates its earlier finding that the violations found in this case did not fundamentally affect the outcome of the proceedings in domestic courts. Therefore, the findings of the Court in relation to the prayer for an order of non-repetition also apply to the request for publication. Furthermore, the declaratory and compensatory reliefs granted by the Court represent sufficient remedy for the violations found. In light of these considerations, the Court is of the view that publication of the judgment is not warranted. As a consequence, the request is denied.

IX. Costs

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

197. The Court recalls that, in line with its previous judgments, reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.[63] The Applicant must provide justification for the amounts claimed.[64]

A. Legal fees related to the proceedings before this Court

198. The Applicant makes a claim for the payment of US Dollars Ten Thousand ($10,000) for the lead Counsel, and US Dollars Ten Thousand ($10,000) for the two Assistants as legal aid fees for 300 hours of legal aid work in the Application before the African Court (that

61 See *Reverend Christopher Mtikila v Tanzania* (Reparations), para. 45.

62 See *Reverend Christopher Mtikila v Tanzania* (Reparations), paras. 45, 46(5); and *Norbert Zongo and Others v Burkina Faso* (Reparations), *op.cit.*, para. 98.

63 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit.*, paras. 79-93; and *Reverend Mtikila v. Tanzania* (Reparations), *op. cit.*, para. 39.

64 *Norbert Zongo and Others v Burkina Faso* (Reparations), para. 81; and *Reverend Mtikila v Tanzania* (Reparations), para. 40.

is 200 hours for two Assistant Counsel and 100 hours for the lead Counsel, charged at US Dollars One Hundred ($100) per hour for the lead Counsel and US Dollars Fifty ($50) per hour for the Assistants).

199. The Respondent State disputes the claim for payment of legal fees as counsel for the Applicant served on a *pro bono* basis under the African Court's legal aid scheme. The Respondent State further prays the Court to deny the request as it is not supported by any receipts.

200. The Court notes that the Applicant was duly represented by PALU throughout the proceedings under the Court's legal aid scheme. Noting further that the current Court's legal aid scheme is *pro bono* in nature, the request is denied.

B. Other expenses before this Court

201. The Applicant asks for the payment of the following amounts for other expenses:

"i. US Dollars Two Hundred ($200) for postal services;

ii. US Dollars Two Hundred ($200) for printing and photocopy fees;

iii. US Dollars Four Hundred ($400) for the transport to and from the seat of the African Court from the PALU Secretariat and from the PALU Secretariat to Kisongo Prison;

iv. US Dollars One Hundred ($100) for communication fees."

202. With respect to the costs incurred by the Applicant, the Respondent State avers that the claims must be dismissed given that the expenditure relates to postage, printing and photocopying, transport, and communication, which are all paid for by the prison authorities.

203. The Court notes that the requests for payment of US Dollars Two Hundred ($200) for postal services; US Dollars Two Hundred ($200) for printing fees; US Dollars Four Hundred ($400) for transport fees; and US Dollars One Hundred ($100) for communication fees are not backed with supporting documents. They are therefore dismissed.

204. As a consequence of the above, the Court decides that each Party shall bear its own costs.

X. Operative part

205. For these reasons:

The Court,

Unanimously:

On jurisdiction

i. *Dismisses* the objections on the lack of material jurisdiction of the Court;

ii. *Declares* that the Court has jurisdiction;

On admissibility

iii. *Dismisses* the objections on the admissibility of the Application;

iv. *Declares* that the Application is admissible;

On the merits

v. *Finds* that the Respondent State has not violated Articles 7, 7(1) (b) and (c) of the Charter with respect to the claims that the Applicant's rights to be assisted by an interpreter, to have access to a lawyer, to consular assistance, in relation to the allegation that the investigation was improper and insufficient, and to be presumed innocent were breached;

vi. *Finds* that the Respondent State has not violated Article 14 of the Charter in relation to the allegation that the Applicant's property was disposed of by agents of the Respondent State;

vii. *Finds* that the Respondent State has violated Article 5 of the Charter for failing to provide the Applicant with food;

viii. *Finds* that the Respondent State has violated Article 7(1)(d) of the Charter with respect to the allegation that the Applicant's trial was unduly delayed;

ix. *Finds* that the Respondent State has violated Article 1 of the Charter.

On reparations

x. *Does not grant* the Applicant's prayer for the Court to quash his conviction and sentence, and order his release;

xi. *Does not grant* the Applicant's prayers related to compensation for moral prejudice;

xii. *Does not grant* the Applicant's prayer to be paid material damages for monetary loss;

xiii. *Does not grant* the Applicant's prayers related to payment of legal fees incurred in the course of domestic proceedings;

xiv. *Does not grant* the Applicant's prayers related to the guarantee of non-repetition and publication of this Judgment;

xv. *Grants* the Applicant the sum of US Dollars Five Hundred ($500) for being subjected to inhuman and degrading treatment;

xvi. *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;

xvii. *Orders* the Respondent State to pay the amounts indicated in

sub-paragraph (xv) and (xvi) of this part within six (6) months, effective from this date, failing which it will also be required to pay interest on arrears calculated on the basis of the applicable Bank of Tanzania rate throughout the period of delayed payment until the amounts are fully paid;

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

On costs

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

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

Separate Opinion: BENSAOULA

1. I share the opinion of the majority of the judges with regard to the admissibility of the application, the jurisdiction of the Court and the operative part.

2. On the other hand, I think that concerning the intervention made by the Republic of Côte d'Ivoire, the Court should have considered more the question of the admissibility of the application in the form and substance of its merits.

3. While Article 5(2) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights provides that "When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join", Rule 53 of the Rules of Court states that:

> "1. An application for leave to intervene, in accordance with Article 5(2) of the Protocol shall be filed as soon as possible, and, in any case, before the closure of the written proceedings.
>
> 2. The application shall state the names of the Applicant's representatives. It shall specify the case to which it relates, and shall set out:
>
> - the legal interest which, in the view of the State applying to intervene, has been affected;
> - the precise object of the intervention;
> - the basis of the jurisdiction which, in the view of the State applying to intervene, exists between it and the parties to the case.

3. The application shall be accompanied by a list of the supporting documents attached thereto and shall be duly reasoned.

4. Certified copies of the application for leave to intervene shall be communicated forthwith to the parties to the case, who shall be entitled to submit their written observations within a time-limit to be fixed by the Court, or by the President if the Court is not in session. The Registrar shall also transmit copies of the application to any other concerned entity mentioned in Rule 35 of these Rules.

5. If the Court rules that the application is admissible, it shall fix a time limit within which the intervening State shall submit its written observations. Such observations shall be forwarded by the Registrar to the parties to the case, who shall be entitled to file written observations in reply within the timeframe fixed by the Court.

6. The intervening State shall be entitled, in the course of the oral proceedings, if any, to present its submissions in respect of the subject of the intervention".

4. In view of these two attached articles, it is clear that conditions are required for the admissibility of the application for leave to intervene:

- Interest in the matter, subject of the application;
- the time limit for submitting this application, "before the closure of the written proceedings";
- the content of the application;
- the reason of the application;
- supporting documents.

5. The procedure on which the application to intervene is subject is bound by the same procedural requirements as an application for main action, ... notification to the parties for written observations by the Court if it is sitting ... otherwise by the President, the intervening party having the right to speak in case of oral pleadings.

6. This application is also sent to the State Parties concerned as set out in 35(3) of the Rules of Court.

7. It is apparent from the reading of the judgment delivered by the Court on 7/12/2018 subject of this separate opinion, that in its chapter "the parties" the Court considered the intervening State Party to the matter because "authorized to intervene".

8. And it does not appear at any time from the reading of the said judgment that the admissibility of this petition was settled or discussed, which is contrary to Rule 53(5) of the Rules.

9. Moreover, paragraph 12 of Chapter III, "summary of the proceedings before the Court", misconstrued the genesis of the proceedings by certifying that on 21/01/2015 ... and pursuant to Articles 5(1)(d) and 5(2) of the Protocol and Rules 33(d) and (53) of the Rules,

the Registry notified the Application to the Republic of Côte d'Ivoire as the State of which the Applicant is a national.

10. While it appears from the case file that the intervening State - the Republic of Côte d'Ivoire requested its intervention on 1 April 2015, therefore the intervention of the Ivorian State is voluntary since it is stipulated in that same paragraph that the Court has authorized it and it had filed its observations and responses to the submissions of the parties.

11. It is apparent from both paragraphs 15 and 16 of the judgment that the adversarial principle was observed since the observations of the intervening State were notified to the respondent, as is clear from the reading of the judgment that the Respondent State responded to the requests and arguments of the intervening State and the intervening State also responded to its responses by opposing requests.

12. It is evident from the State Party's applications and responses that, in addition to its application concerning the admissibility of its application and the Court's jurisdiction over it, it supports the applicant's requests and allegations (paragraphs 23, 30, 49). 83 and 92 of the judgment).

13. But at no point in the Judgment does it appear that the Court responded to these requests, which, in my respectful view, constitutes a procedural irregularity both with regard to the intervening State to declare its application for intervention admissible and on the merits of its requests approving the applicant's allegations if only by considering them supported by the Court in its decision on the applicant's requests because similar to those of the intervening State.

14. From my point of view, if the Court has held that in responding to the Applicant it also responds to the intervening State, it should have said so expressly throughout the judgment to its operative part.

In conclusion

15. Being a kind of "third-party remedy" with an interest in a case pending before the Court, provided for in the provisions regarding form and merits in both the Rules and the Charter, the Court had to deal with the application for intervention in the same way as was done for the application and the Applicant's requests both in the body of the judgment and in its operative part, regarding the jurisdiction, admissibility and merits.

16. Even if on the merits the State of Côte d'Ivoire was involved with the Applicant and therefore supported him in his allegations and requests.

Werema v Tanzania (merits) (2018) 2 AfCLR 520

Application 024/2015, *Werema Wangoko Werema and Waisiri Wangoko Werema v Republic of Tanzania*

Judgment, 7 December 2018. Done in English and French, English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant had been convicted and sentenced for armed robbery. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court found that there was no manifest error in the way the national courts evaluated the evidence against the Applicant and that the Applicant had not shown any other fair trial violations.

Jurisdiction (evaluation of evidence before national courts, 30, 31)

Admissibility (submission within reasonable time, 49)

Fair trial (evidence, 59-64; right to have one's cause heard, 68, 69)

Joint separate opinion: KIOKO and CHIZUMILA

Fair trial (evidence, 6, 8, 12)

Dissenting opinion : TCHIKAYA

Admissibility (submission within reasonable time, 14, 18)

I. The Parties

1. The Applicants, Werema Wangoko Werema and Waisiri Wangoko Werema are nationals of the United Republic of Tanzania (hereinafter, the Respondent State). The Applicants were sentenced to thirty (30) years' imprisonment each for the crime of armed robbery.

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 of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, on 29 March 2010, the Respondent State deposited the declaration required under Article 34 (6) of the Protocol, accepting 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 Application relates to alleged human rights violations stemming from convictions and sentences of thirty (30) years' imprisonment and twelve (12) strokes of the cane each imposed on the Applicants for the crime of armed robbery. The Applicants are currently serving their sentence in Butimba Central Prison, Mwanza, Tanzania.

4. It emerges from the file that on 25 February 2001 at midnight, a gang of burglars broke into the house of Mr Maiko Matiko Nyisurya and stormed into his room where he was sleeping with his wife, Mrs. Sara Maiko, and their children. It is alleged that the burglars were armed with 'pangas' (machetes**)** and a gun and when Mr. Maiko confronted them, having lit a torchlight, they inflicted eleven panga cuts on his body causing him serious bodily harm. The burglars also stole two (2) suitcases of clothes and cash of Seventy Thousand Tanzania Shillings (75,000 TZS).

5. On the basis of a testimony proffered by six (6) Prosecution Witnesses (PW), including Mr Maiko (PW1) and his wife (PW5), the Applicants were, on 30 November 2001, in Criminal Case No. 169/2001 convicted of armed robbery contrary to Sections 285 and 286 of the Penal Code of Tanzania by the District Court of Tarime and sentenced to thirty (30) years' imprisonment and twelve (12) strokes of the cane.

6. The High Court in Criminal Appeal No. 02/2002 and the Court of Appeal in Criminal Appeal No. 67/2003 subsequently upheld the decision of the District Court on 9 October 2002 and 1 March 2006, respectively.

7. Aggrieved by the verdict, the Applicants filed a request for the review of the decision of the Court of Appeal on the ground that the judgment contained "manifest errors" and that this resulted in a miscarriage of justice. On 19 March 2015, the Court of Appeal declared their request inadmissible asserting that the application for review was not filed within the time prescribed by law.

B. Alleged violations

8. The Applicants submit that both their conviction and the refusal of the Court of Appeal to review the convictions on the basis that their application for review was filed out of time contravene the provisions of the Charter and the 1977 Tanzanian Constitution. In this regard, the Applicants allege that they were convicted based on a mistaken identity and solely on the basis of incriminating evidence of visual identification

which is "perjured, concocted and privy". According to the Applicants:

"i. The primary victim (PW 1) of the alleged crime contradicted himself while testifying and that the victim saw other burglars rather than them. He named them only on 4 March 2001 even though he claimed to have identified them on the day of the incident, that is, 25 February 2001. In addition, though he denied having made his first statement on 26 February 2001, which was tendered in the trial court, his co-witness (PW 3) confirmed that the complainant (PW 1) made two statements, the first on the day of the incident without naming the suspects and the second at a later date mentioning names of suspects.

ii. With regard to the second witness (PW 2), although he claimed to have been present at the scene of the crime, "the trial court had recorded his demeanor while testifying that at the same time he was laughing and joking as [if he] was not serious of what he [was] talking [about]", thus, proving that the witness was lying.

iii. The third prosecution witness (PW 3), who was a crime investigation officer "confirmed that PW 1 made two statements, the first one on the day of the incident without naming any suspects [and the other day, mentioning the names of the Applicants]" despite the fact that PW 1 denied making two statements on different days.

iv. The fourth Prosecution Witness (PW 4) was not at the scene of the incident and named them to the police as was informed by the victim (PW 1) and only a month after the incident.

v. The statements of the fifth Prosecution Witness (PW 5), the wife of PW I, were contradictory. Even if she claimed to have identified them during the incident, it was not possible for her to identify them if, as she confirmed, she hid herself far outside of the house. She also forgot the date when she reported to the police and that her statement indicating that on the day of the incident her husband did not report to the police conflicts with the testimony given by PW 3.

vi. The sixth Prosecution Witness (PW 6), who was a cell leader working under PW 1 claimed that he saw the Applicants at the scene of the crime but he did not justify why he did not raise the alarm during the incident nor did he make a follow up to effect their arrest.

vii. The intimate relationship that existed among the

> Prosecution Witnesses: PW I, PW 2, PW 4 and PW 6, and in view of their contradictory statements, the accusation made against the Applicants was rather a fabrication by PW."

9. The Applicants further state that their conviction on the basis of a mistaken identity was substantiated by the "unfolding truth" that emerged from the investigation of the Tanzanian Commission for Human Rights and Good Governance (CHRGG). The Applicants allege that the observations made by the Commission following such investigation reveal that the victim was later paid compensation by the true burglars under the aegis of the local authority. This, according to the Applicants, was not included in the record of the court proceedings as the said investigation was carried out after all domestic court proceedings were concluded. The Applicants also add that the witnesses admitted to the Applicants' relatives that they made an error in identifying the true culprits of the crime and even offered an apology to the Applicants' relatives.

10. The Applicants accordingly submit that, given the circumstances of their case, the Court of Appeal should have allowed their petition for review by complying with Article 107(A)(2)(c) and (e) of the Constitution of the Respondent State. They contend that the Court`s refusal to allow their request for review violated the Constitution and their conviction on the basis of a mistaken identity and without the Prosecution having proven the charges laid against them beyond reasonable doubt violated Article 3(1) and (2) and Article 2 of the Charter.

11. The Applicants further allege that they "were isolated on the procedure and the decision of the [domestic] courts, thus violating their fundamental rights which need to be served pursuant to Article 27(1) of the Protocol and Rule 34(5) of the Rules of the Court in order to rectify the violation".

III. Summary of the procedure before the Court

12. The Application was filed on 2 October 2015 and was served on the Respondent State on 4 December 2015 in accordance with Rule 35 and Rule 37 of the Rules.

13. On the same date, pursuant to Rules 35 and 53 of the Rules, the Registry also transmitted the Application to all State Parties to the Protocol, the African Union Commission and the Executive Council of the African Union, through the Chairperson of the African Union Commission.

14. On 11 February 2016, the Respondent State requested the Court for an extension of time to file its Response on the basis that it is still collecting information from stakeholders involved in the matter.

15. During its Fortieth Ordinary Session held from 29 February to 18 March 2016, the Court granted a thirty (30) days extension of time to the Respondent State to file its Response from the date of receipt of the notice dated 21 March 2018. The Court also instructed the Registry to request CHRGG for any observations on the Applicants' claims.

16. On 10 May 2016, CHRGG responded by indicating that it does not have any comments to submit on the matter. It stated that as *per* the law, it cannot investigate any matter that has been adjudicated by a court or is *sub-judice*. The Commission also indicated that it only carried out a preliminary rather than a full investigation into the matter.

17. The Registry notified the Respondent State on 7 June 2016 that the Court, *suo motu,* granted sixty (60) additional days for filing of the Response.

18. On 28 November 2016, citing that the Respondent State has failed to defend its case, the Applicants applied for the Court to issue a judgment in default in their favour.

19. On 20 March 2017, the Court *proprio motu* granted forty five (45) days extension of time to the Respondent State to file the Response and indicating that it would proceed to issue a judgment in default should the Response not be filed.

20. The Respondent State filed its Response on 25 May 2017, which was served on the Applicants on 29 May 2017 requesting them to file their Reply within 30 days of receipt.

21. The Applicants filed their Reply to the Response on 21 June 2017 and this was transmitted to the Respondent State for its information by a notice of the same date.

22. On 6 October 2017**,** the Registry notified the Parties of the closure of pleadings.

IV. Prayers of the Parties

23. The Applicants pray to the Court:

"i. To quash both the conviction and the sentence and to set them at liberty;

ii. To redress the violation of their fundamental rights in accordance with Article 27(1) of the Protocol and Rule 34(1) of the Court; and

iii. To restore justice where it was overlooked and to grant any other remedy that deems fit in the circumstances of the complaint."

24. In its Response, the Respondent State prays the Court to grant the following orders:

"i. That, the Court is not vested with jurisdiction to adjudicate

on this Application;

ii. That, the Application has not met the admissibility requirements stipulated under Rule 50(5) of the Rules of the Court and it is therefore inadmissible and be duly dismissed;

iii. That, the Application is dismissed with costs."

V. Jurisdiction

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

26. In the instant Application, the Court notes from the Respondent State's submission that the Respondent State disputes only the Court's material jurisdiction. However, the Court shall also satisfy itself that it has personal, temporal and territorial jurisdiction.

A. Objection to material jurisdiction

27. The Respondent State disputes the jurisdiction of the Court by submitting that the instant Application contains legal and factual issues which were conclusively determined by its domestic courts. According to the Respondent State, the Protocol does not vest the Court with the power to adjudicate on issues involving matters of law and evidence by placing itself as an appellate court; however, in the instant Application, the Court is being requested to make determination on issues that would require it to sit as such. In this regard, the Respondent State indicates three allegations the assessment of which would require the Court to sit as an appellate court:

"i. the visual identification evidence which was used to convict the Applicants was fabricated;

ii. the witnesses who testified against the Applicants contradicted themselves";

and

iii. the Applicants were isolated during the Courts' procedures and decisions."

28. The Applicants do not dispute the Respondent State's assertion that the Court is not vested with appellate jurisdiction. Nevertheless, they argue that their Application relates to the violation of human rights protected by the Charter on which the Court has unlimited jurisdiction.

The Applicants, citing the jurisprudence of the Court,[1] aver that the Court has the power to receive and consider matters, including those relating to decisions of domestic courts and determine whether the proceedings and judgments of the national courts are in accordance with international human rights standards.

29. Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules specify that the material jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned." In this regard, the Court has observed that it exercises its jurisdiction over an Application in so far as the subject matter of the Application involves alleged violations of rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.[2] The Court has further stated that it does not have appellate jurisdiction to uphold or reverse judgments of domestic courts merely depending on the manner in which evidentiary issues were considered in the national proceedings.[3]

30. In the instant Application, the Court notes that the Applicants raise issues relating to alleged violations of human rights protected by the Charter. The Court further notes that the Applicants' allegations essentially challenge the manner in which the domestic courts of the Respondent State evaluated the evidence that was used to justify their conviction.

31. However, the fact that the Applicants question the manner in which domestic courts have assessed evidence does not prevent the Court from making determination on the allegations contained in the Application. It is also well-established in the jurisprudence of this Court that where allegations of violations of human rights relate to the way in which domestic courts evaluate evidence, the Court retains the power to examine whether such assessment is compatible with international human rights standards.[4] This is within the purview of its jurisdiction and doing so, does not require the Court to sit as an appellate Court. The Respondent State's objection in this regard is thus dismissed.

32. The Court therefore finds that it has material jurisdiction to

1 Application No. 005/2013. Judgment of 20/11/2015, *Alex Thomas v United Republic of Tanzania*, (hereinafter referred to as "*Alex Thomas v Tanzania* Judgment").

2 Application No. 003/2014. Ruling on Admissibility of 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania (*hereinafter referred to as "*Peter Chacha v Tanzania* Ruling"*)*, para114.

3 Application No. 001/201. Judgment of, 15/03/2015, *Ernest Francis Mtingwi v The Republic of Malawi*, para 14.

4 *Alex Thomas v Tanzania Judgment*, para 130; Application No. 007/2013. Judgment of 20/05/2016, *Mohamed Abubakari v United Republic of Tanzania*. (hereinafter referred to as "*Mohamed Abubakari v Tanzania* Judgment"), para 26.

consider the instant Application.

B. Other aspects of jurisdiction

33. The Court notes that the other aspects of its jurisdiction are not contested by the Respondent State and nothing on the record indicates that the Court lacks jurisdiction in this regard. The Court thus holds:

"i. that it has personal jurisdiction given that the Respondent State is a Party to the Protocol and deposited the declaration required under Article 34(6) thereof which enabled the Applicants to access the Court in terms of Article 5(3) of the Protocol;

ii. that it has temporal jurisdiction on the basis that the alleged violations are continuous in nature, in that the Applicants remain convicted and are serving a sentence of thirty (30) years' imprisonment on grounds which they consider are wrong and indefensible[5]; and

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

34. From the foregoing, the Court concludes that it has jurisdiction to examine this Application.

VI. Admissibility of the application

35. Pursuant to Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of … the admissibility of the Application in accordance with Article 50 and 56 of the Charter, and Rule 40 of these Rules".

36. Rule 40 of the Rules which in substance restates the provisions of Article 56 of the Charter, provides as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter ;
3. not contain any disparaging or insulting language;

5 See Application No. 013/2011. Ruling on Preliminary Objections, 21/06/2013, *Norbert Zongo and Others v Burkina Faso*, (hereinafter referred to as "*Norbert Zongo and Others* Ruling"), paras 71 to 77.

4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any mater or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility in contention between the Parties

37. The Respondent State has raised two objections to the admissibility of the Application relating first to, the requirement of exhaustion of local remedies and second, to the filing of the Application within a reasonable time after local remedies were exhausted.

i. Objection based on non-exhaustion of local remedies

38. The Respondent State contends that the Applicants have appealed before its High Court and Court of Appeal and both courts upheld their conviction and the request for review of their conviction at the Court of Appeal was struck out for being filed out of the time. The Respondent State submits that the time to apply for review before the Court of Appeal is an ordinary procedure and may be extended for a good cause and the Applicants, rather than filing the Application before this Court, could have sought and may still seek an extension of time and file their request for review. Accordingly, the Respondent State argues that the Application fails to meet the admissibility requirement specified under Rule 40(5) of the Rules on exhaustion of local remedies.

39. On their part, the Applicants contend that the violations of their rights were occasioned by the highest court of the Respondent State through its judgments; thus, the domestic procedures on their application are completed. They add that the records of the Court of Appeal on applications for review show that it does not often grant leave for review. The Applicants therefore submit that they have no other alternative avenues to seek the correction of the wrong done by the Respondent State, and hence, they have exhausted all local remedies.

40. The Court notes that any application filed before it shall meet

the requirement of exhaustion of local remedies and this requirement may only be dispensed with if the said remedies are unavailable, ineffective, insufficient, or the domestic procedures to pursue them are unduly prolonged.[6] In its established jurisprudence, the Court has consistently stressed that in order for this admissibility requirement to be met, the remedies that should be exhausted must be *ordinary judicial* remedies.[7] In this regard, in the Matter of *Alex Thomas v United Republic of Tanzania* and other similar cases filed against the Respondent State, this Court has further held that in the Tanzanian judicial system, the procedure for review of the Court of Appeal's judgments is an extraordinary remedy and Applicants are not required to exhaust this remedy before seizing this Court.[8]

41. In the instant case, the Court notes from the file that, before filing their Application in this Court, the Applicants went through the trial and appellate proceedings for their criminal cases up to the Court of Appeal, which is the highest court in the Respondent State. The Applicants have further attempted to pursue the review procedure at the Court of Appeal, but this application was declared inadmissible due to being filed out of time. Considering that the review procedure in the Court of Appeal is an extraordinary remedy, the Applicants were neither required to pursue it nor seek an extension of time to file their petition for the same. The Court therefore finds that the Applicants have exhausted local remedies available in the Respondent State.

42. Accordingly, the Court dismisses the objection of the Respondent State that the Applicants did not exhaust local remedies.

ii. Objection based on the ground that the Application was not filed within a reasonable time

43. The Respondent State contends that, should the Court find that the Applicants have exhausted local remedies, it should reject the Application on the basis that it was not filed within a reasonable time after local remedies were exhausted**.** In this regard, the Respondent State asserts that even though Rule 40(6) of the Rules is not specific on the question of a reasonable time, international human rights

6 Application No 004/2013. Judgment, 05/12/2014, *Lohé Issa Konaté v Burkina Faso*, (hereinafter referred to as *Lohé Issa Konaté v Burkina Faso* Judgment) para 77; See also *Peter Chacha v Tanzania* Ruling, para 40.

7 *Alex Thomas v Tanzania* Judgment, para 64; See also Application No. 006/2013, Judgment of 18/03/2016, *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania*, para 95**.**

8 *Ibid*; See also *Mohamed Abubakari v Tanzania* Judgment*,* paras 66-68; Application No. 032/2015. Judgment of 21/03/2018, *Kijiji Isiaga v United Republic of Tanzania* (hereinafter referred to as "*Kijiji Isiaga v Tanzania* Judgment"), paras 46-47.

jurisprudence has established six (6) months as a reasonable time but the Applicants in the instant Application seized the Court five (5) years after the Respondent State deposited the declaration required under Article 34(6) of the Protocol providing the individual complaints mechanism.

44. In their Reply, the Applicants dispute the Respondent State's submission and argue that, in accordance with the jurisprudence of the Court, the determination of a reasonable time depends on the circumstances of each case. In the light of the specific circumstances of their case, the Applicants contend that their Application should be considered as having been filed within a reasonable time.

45. The Court observes that Rule 40(6) of the Rules refers to a "reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter."

46. In the Matter of *Norbert Zongo and Others v Burkina Faso*, the Court stated that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis".[9]

47. In the instant case, the Court notes that the judgment of the Court of Appeal in Criminal Appeal No. 182 of 2010 was delivered on 1 March 2006. However, the Applicants were able to file their Application before this Court only after 29 March 2010, the date on which the Respondent State, in accordance with Article 36(4) of the Protocol, deposited the declaration allowing individuals to file cases before the Court.

48. The Court further notes that the Application was filed on 2 October 2015, that is, after five (5) years and five (5) months from the date of the deposit of the said declaration. In the intervening period, the Applicants attempted to use the review procedure at the Court of Appeal, but their application for review was dismissed on 19 March 2015 as having been filed out of time. In this regard, the key issue for determination is whether the five (5) years and five (5) months' time within which the Applicants could have filed their Application before the Court is reasonable.

49. The Court takes note that the Applicants do not invoke any particular reason as to why it took them five (5) years and five (5) months to seize this Court after they had the opportunity to do so, the Respondent having deposited the declaration envisaged under the Protocol, allowing them to directly file cases before the Court. Nonetheless, although they were not required to pursue it, the

9 *Norbert Zongo and Others v Burkina Faso* Ruling, para 92; See also *Kijiji Isiaga v Tanzania* Judgment, para 56.

Applicants chose to exhaust the abovementioned review procedure at the Court of Appeal. It is evident from the file that the five (5) years and five (5) months delay in filing the Application was due to the fact that the Applicants' were awaiting the outcome of this review procedure and at the time they seized this Court, it was only about six (6) months that had elapsed after their request for review was dismissed for filing out of time.

50. In view of these circumstances, the Court dismisses the Respondent State's objection in this regard.

B. Conditions of admissibility that are not in contention between the Parties

51. The conditions of admissibility regarding the identity of the Applicants, the Application's compatibility with the Constitutive Act of the African Union, the language used in the Application, the nature of the evidence adduced, and the principle that an Application must not raise any matter already determined in accordance with the principles of the United Nations Charter, the Constitutive Act of the African Union, the provisions of the Charter or of any other legal instruments of the African Union as required by Sub-Rules 1, 2, 3, 4 and 7 of Rule 40 of the Rules are not in contention between the Parties.

52. The Court also notes that nothing in the record before it indicates that these requirements are not fulfilled. Consequently, the Court holds that these admissibility requirements have been fully met in the instant case.

53. In view of the foregoing, the Court declares that the instant Application is admissible.

VII. The merits

A. Allegations of violations of the right to a fair trial

54. The Applicant makes allegations of violations which fall within the scope of Article 7 of the Charter. The Court will examine them one after the other as follows.

i. Allegation that the Applicants' conviction was based on contradictory evidence

55. The Applicants submit that their conviction in the domestic courts was based solely on incriminating evidence of visual identification which is "perjured, concocted and privy". The Applicants as indicated

in paragraph 8 above, cite what they consider contradictory statements made by the witnesses who testified against them and those that, were not credible enough to support their conviction. The Applicants emphasise that four (4) of the prosecution witnesses have a close relationship which, in view of their contradictory testimonies, attests to their fabrication of the story that the Applicants were the ones who committed the crimes in question.

56. On its part, the Respondent State disputes the Applicants' allegation and submits that the issue of visual identification was analysed and determined by the Court of Appeal. The Court of Appeal, according to Respondent State, thoroughly examined the issue and concluded that the evidence proffered by the witnesses was credible enough to sustain the Applicants' conviction. The Respondent State emphasised that the witnesses testified the truth and there was nothing perjured or concocted in their testimony, the Applicants' allegations lacks merit and, as such, should be dismissed.

57. In their Reply, the Applicants submit that the Respondent State's argument that the matter of their identification was analysed and concluded by the Court of Appeal in one procedure but the other procedure to determine whether their identification was credible was perjured, concocted and contradictory.

58. Article 7(1) of the Charter stipulates that:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
>
> (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
>
> (c) The right to defence, including the right to be defended by counsel of his choice;
>
> (d) The right to be tried within a reasonable time by an impartial court or tribunal."

59. The Court notes that "a fair trial requires that the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on strong and credible evidence".[10]

60. The Court also observes that when visual identification is used as a source of evidence to convict a person, all circumstances of possible mistakes should be ruled out and the identity of the suspect should be established with certainty. This is also the accepted principle

10 *Ibid*, para 174.

in the Tanzanian jurisprudence.[11] In addition, the evidence of visual identification must demonstrate a coherent and consistent account of the scene of the crime. The Court has also previously stated that it is not an appellate court and as a matter of principle, it is up to national courts to decide on the probative value of a particular piece of evidence.[12] The Court cannot assume this role of the domestic courts and investigate the details and particulars of evidence used in domestic proceedings to establish the criminal culpability of individuals.[13]

61. In the instant case, the record before this Court shows that the domestic courts convicted the Applicants on the basis of evidence tendered by six (6) prosecution witnesses, three (3) of whom were present at the scene of the crime. The statements made by these witnesses were generally similar and revealed a consistent account of the scene of the crime.

62. As regards the Applicants' claim that there were some inconsistencies in the testimonies of prosecution witnesses, the Court notes from the record of the trial court that indeed PW 2 was laughing while testifying before the trial court "as [if he] was not serious of what he [was] talking [about]". It is also true that the four (4) prosecution witnesses (PW 1, PW2, PW 4 and PW 6) had a close relationship which might have created the possibility of collusion. Furthermore, the fourth Prosecution Witness (PW 4), an investigation officer "confirmed that PW 1(main victim) made two statements, the first one on the day of the incident without naming any suspects" and the second one, mentioning the Applicants as the perpetrators. This was despite the fact that the PW 1 denied that he made statements on the day of the incident, again disclosing some inconsistencies and casting doubts on the veracity of PW 4's statements.

63. Nevertheless, both the High Court and the Court of Appeal subsequently addressed these and other related issues raised by the Applicants and determined that the evidence was enough to convict the Applicants. This Court is of the opinion that the manner in which the domestic courts evaluated the evidence does not *per se* reveal any manifest error or resulted in a miscarriage of justice to the Applicants and hence, requires the Court's deference.[14] In addition, the Applicants' other allegations questioning the credibility of the testimony of PW 5

11 In the *Matter of Waziri Amani v United Republic of Tanzania*, the Court of Appeal declared that "no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight". Ibid, para 175.

12 *Kijiji Isiaga v Tanzania Judgment*, para 65.

13 *Ibid*.

14 *Ibid,* para 73.

relate to specific details of evidence which this Court is not positioned to assess and thus, leaves this role to the national courts, which have already made their determinations by examining the particular circumstances of the case.

64. In view of the above, the Court thus finds that, the allegation relating to the Applicants' conviction on the basis of contradictory testimony is not founded and therefore, the Respondent has not violated Article 7(1) of the Charter.

ii. Allegation that the Applicant's conviction was based on mistaken identity

65. The Applicants submit that their conviction was based on a mistake of fact with regard to the identity of the actual perpetrators of the crimes in question. The Applicants allege that this was substantiated by the "unfolding truth" that emerged from the investigation of the Commission for Human Rights and Good Governance (CHRGG) of the Respondent State, which reveals that the victim (PW 1) was later paid compensation by the real burglars under the aegis of the local authority. According to the Applicants, this was not included in the record of the court proceedings because the investigation was carried out after all trial and appellate proceedings their cases were concluded.

66. The Applicants also add that the witnesses admitted to their relatives that they made an error in identifying the true perpetrators of the crime and even offered an apology to the relatives. The Applicants further allege that the Court of Appeal's refusal to consider their application for review filed on the basis of the new evidence contravenes the provisions of the Charter.

67. The Respondent State has not responded to this allegation directly but in its submission on admissibility in paragraph 38 above, the Respondent State maintains that the Applicants can still pursue the matter within the domestic courts by seeking an extension of time to file their application for review**.**

68. The Court observes that the right to have one's own cause heard as enshrined under Article 7(1) of the Charter is a fundamental human right that bestows upon individuals a wide range of entitlements pertaining to due process of law, including the right to be given an opportunity to express their views on matters and procedures affecting their rights, the right to file a petition before appropriate judicial and quasi-judicial authorities for violations of these rights and the right to appeal to higher judicial authorities when their grievances are not properly addressed by the lower courts.

69. The Court also notes that the right to have one's cause heard does not cease to exist after the completion of appellate proceedings.

In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place. This is the case if there is new evidence which would potentially lead the trial or appellate court to reverse its decision or make substantially different findings.

70. In the instant case, the Court notes from the file that the Applicants raise an allegation that they are not the real perpetrator of the crime they were charged with and they were convicted as a result of a mistake relating to their identity. In this regard, the Applicants indicate that the prosecution witnesses admitted to have erred in identifying the real culprits and they apologised to the Applicants' relatives for the same. The Applicants substantiate their allegation by submitting a letter which they have received from the Commission for Human Rights and Good Governance (CHRGG), a governmental organ in the Respondent State established under the Constitution, with a mandate of promoting and protecting human rights.

71. The Court observes that in the said letter, which displays the Commission's official stamp, the Commission wrote to the Applicants indicating that from its preliminary investigation into the matter, it had established that the true perpetrators of the crime were other persons and these other persons paid a compensation of six (6) cows and Tanzania Shillings one hundred and twenty thousand (120,000 TZS) to the victim.

72. The key issues for determination therefore are whether this letter from the Commission is properly before it as evidence and can be relied upon in determining the present Application and whether it could be considered to have such value that, had it been available during the trial and appellate proceedings, it would have substantially affected the outcome of the decisions of the national courts of the Respondent State.

73. The Court notes from the Commission's letter that the Applicants were convicted of crimes committed by other persons and this casts some doubt on the Applicant's culpability and conviction. However, as indicated in paragraph 16 above, the findings of the Commission communicated by a letter to the Applicants were said to have been made following a preliminary investigation rather than after a full investigation into the matter. In these circumstances, the Court is thus not in a position to conclude that there would have been a substantially different outcome in the decisions of the domestic courts, had this letter been available during the trial and appellate proceedings.

74. In view of the above, the Court therefore finds that the allegation according to which the Applicants' culpability was based on mistaken identity is not founded and therefore the Respondent State has not

violated Article 7(1) of the Charter.

iii. Allegation that the Applicants were isolated during the domestic proceedings

75. The Applicants contend that they were isolated during the procedures when the decision of the domestic courts were rendered and this violated their fundamental rights.

76. The Respondent State denies the allegation and argues that the Applicants were present during their trial from the time the armed robbery charge was read out to them on 7 May 2001 in which they pleaded not guilty, up to the conclusion of the trial on 16 November 2001. The Respondent State also avers that the Applicants were also present when their appeal was heard at the High Court on 12 August 2002. The Respondent State further indicates that the Applicants were, except at the Court of Appeal, represented by a lawyer and at the Court of Appeal, they were not provided with legal counsel because they did not apply for it, as required under Rule 31 of the Tanzania Court of Appeal Rules, 2009.

77. The Court notes that the right to a fair trial, in particular, the right to defence under Article 7(1) requires that an accused person must be given the opportunity to take part in all the hearings in respect of his trial, and to adduce his arguments and evidence in accordance with the adversarial principle.[15] This is an inherent component of the basic precept of equality of arms, which demands that both the accused and the prosecution must have the possibility to present in an equal manner their case and examine or cross-examine the evidence proffered by the other party.

78. In the instant case, the Applicants generally allege, without indicating the violation of a specific right, that they were isolated during the procedures and the decisions of the domestic courts. In their submissions however, they did not clearly state how and why they were isolated in the domestic proceedings. As submitted by the Respondent State, the Applicants indeed participated in all the trial and appeal proceedings and they were also represented by a lawyer at the District Court and at the High Court. The Court observes in this regard that, nothing on record indicates that the Applicants were kept in isolation or isolated in any manner during their trial and appellate proceedings.

79. The Court is therefore of the view that the allegation that the

15 Application No. 020/2016. Judgment of 21/09/2018. *Anaclet Paulo v United Republic of Tanzania*, para 81.

Applicants were isolated during domestic proceedings is not founded and accordingly, holds that the Respondent State has not violated Article 7(1) of the Charter.

B. Allegation of violation of the right to equality before the law and equal protection of the law

80. The Applicants allege that both their conviction on the basis of a mistaken identity and the refusal of the Court of Appeal to review their conviction to rectify the wrong citing the reason of filing the application of review out of time contravene Articles 3(1) and (2) of the Charter. The Applicants submit that the Court of Appeal should have applied not only the Charter but also Article 107A(2)(c) and (e) of the Respondent State's Constitution to allow their application for review as the victim was paid compensation by the real perpetrators under the aegis of the local authority.

81. On its part, the Respondent State denies the allegation and contends that the Applicants should be put to strict proof thereof. The Respondent State indicates that its Constitution contains provisions similar to Article 3(1) and (2) of the Charter and the rights enshrined therein are therefore duly protected. The Respondent State submits that the Applicants have not showed how their rights in the said provisions were infringed upon to the extent that they have been so aggrieved as to file the instant Application before the Court to seek remedy.

82. The Respondent State avers that, in the course of their trial and appeals, the Applicants had a lawyer of their own choice and they never raised the issue of discrimination during those proceedings, rather they raise the claim of unequal treatment for the very first time before this Court. The Respondent State argues that the Applicants therefore enjoyed the right to defend themselves and to file their first and second appeals and they were not subjected to any wrong procedure in that regard. The Respondent State reiterates its position that the Applicants could have had the chance to apply for review of their conviction, if only they sought an extension of the time to file the application for review.

83. The Respondent State further contends that Article 107A(2)(c) and (e) of its Constitution require national courts to deliver justice in civil and criminal matters in accordance with the laws, which its Courts have duly done. According to the Respondent State, the Applicants have not shown how the Respondent State has breached these provisions of the Constitution.

84. The Court notes from the outset that it does not have jurisdiction to interpret or apply the domestic legislation of the Respondent State, rather it has jurisdiction only to interpret and apply the Charter and other human rights instruments ratified by the Respondent State.

Accordingly, it limits its assessment to the relevant provisions of the Charter and makes reference to the domestic legislation including the Constitution of the Respondent State, only in the course of interpreting and applying those provisions.

85. Article 3 of the Charter provides that:

> "Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law"

86. The Court notes that Article 3 is essentially intertwined with Article 2 of the Charter prohibiting discrimination.[16] For the Court to find a violation of Article 3, it shall be demonstrated either that an Applicant was discriminated against before judicial or quasi-judicial authorities or that the domestic law allows a discriminatory treatment against him or her as compared to other persons who are in the same situation as he or she is.

87. In the present Application, the Court notes that Articles 12 and 13 of the Constitution of the Respondent State provides for the right to equality and equal protection of law in the same terms as the provisions in the Charter, including by prohibiting discrimination among individuals on unjustified grounds. To this extent, the Applicants have the right to equality before the law and equal protection of the law just as any other individuals within the jurisdiction of the Respondent State and there is nothing on record showing that this is not the case with respect to the Applicants.

88. The issue for determination then is whether the Applicants' conviction and, the alleged refusal of the Court of Appeal to review their conviction amounts to a violation of their right to equal protection of the law and equality before the law, that is, whether the domestic courts have treated the Applicants in a discriminatory manner while considering their case. In the case of *Abubakari v United Republic of Tanzania*, this Court held that "it is incumbent on the Party purporting to have been a victim of discriminatory treatment to provide proof thereof".[17]

89. In the instant case, the Applicants merely allege that their conviction and the Court of Appeal's dismissal of their application for review of their conviction reveal discriminatory treatment. The Applicants do not state the circumstances in which they were subjected to unjustified differential treatment in comparison to other persons in a

16 Application No 009&011/2011. Judgment of 14/05/1015.*Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v The United Republic of Tanzania*, paras105.1 and 105.2, Application No. 006/2012. Judgment of 26/0502017. *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 138.

17 *Mohamed Abubakari v Tanzania* Judgment, para 153.

similar situation.[18] As this Court has stated in *Alex Thomas v Tanzania*, "general statements to the effect that a right has been violated are not enough. More substantiation is required."[19]

90. The Court therefore dismisses the Applicants' allegation that their rights under Article 3(1) and (2) of the Charter were violated.

VIII. Reparations

91. In their submissions, the Applicants pray the Court to quash both their conviction and the sentence imposed on them and to set them at liberty, to redress the violation of their fundamental rights in accordance with Article 27(1) of the Protocol and Rule 34(1) of the Rules and to restore justice where it was overlooked and to grant any other remedy that deems fit in the circumstances of the complaint.

92. On the other hand, the Respondent State prays the Court to deny the request for reparation and all other reliefs sought by the Applicants and dismiss the Application with costs.

93. 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."

94. In this respect, Rule 63 of the Rules of Court provides that: "The Court shall rule on the request for the reparation … by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

95. The Court notes in the instant case, that as no violation has been established, the issue of reparation does not arise, and therefore dismisses the Applicant's prayers for reparation.

IX. Costs

96. In its submissions, the Respondent State prays the Court "to dismiss the Application with Costs".

97. The Applicants did not make any submissions concerning costs.

98. The Court notes that Rule 30 of the Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs".

99. The Court holds that in the instant Application, there is no reason for it to depart from the provisions of Rule 30 of the Rules and, consequently, rules that each Party shall bear its own costs.

18 *Ibid*, para 154.

19 *Alex Thomas v Tanzania* Judgment, para 140.

X. Operative part

100. For the above reasons:
The Court,
Unanimously:

On *jurisdiction*:
i. *Dismisses* the objection to the jurisdiction of the Court;
ii. *Declares* that it has jurisdiction.
By a majority of nine (9) for, and one (1) against, Justice Blaise TCHIKAYA Dissenting

On *admissibility*:
iii. Dismisses the objection to the admissibility of the Application;
iv. Declares the Application is admissible;

Unanimously:
On the *merits*:
v. Finds that the Respondent State has not violated the Applicants' right to a fair trial in Article 7 of the Charter
vi. Finds that the Respondent State has not violated the Applicants' right to equality before the law and equal protection of the law provided for in Article 3 of the Charter

On *reparations*:
vii. Consequently, does not grant all requests for reliefs sought by the Applicants.

On *costs*:
viii. Decides that each Party shall bear its own costs.

Joint Separate Opinion: KIOKO and CHIZUMILA

1. We fully agree with the findings of the majority on the merits of this application. However, there is one particular issue in the judgement which we believe that the majority could have been more robust in its reasoning and eventually order the Respondent State, even if as *obiter dictum*, to take necessary steps to clarify the doubt cast by the new evidence obtained from the Commission on Human Rights and Good

Governance (CHRGG), which is the national human rights institution of the Respondent State.

2. The letter from the CHRGG to the Applicants informed them that the former had established, as indicated in Paragraph 70 of the Judgment, that the true perpetrators of the crime were other persons and who had in fact paid compensation of six (6) cows and Tanzania Shillings one hundred and twenty thousand (120,000 TZS) to the victim.

3. The Court in paragraph 73 of its decision has observed that the letter issued by CHRGG was not adequate evidence for it to conclude that it would potentially annul the conviction of the Applicants or likely result in a substantially different outcome to the one reached by the domestic courts. This is, as the majority noted, because of the fact that the said letter, indicating that the true perpetrators of the crime in question were others, not the Applicants, was issued following a preliminary investigation by CHRGG into the matter. However, it should be noted that this aspect was not contained in the letter to the Applicants and was highlighted only in the letter to the Court, perhaps, with the intention of justifying why the Commission could not appear before the Court on this matter.

4. In their submissions, the Applicants have not indicated that the attention of the Respondent State's judicial or justice authorities was drawn to the letter or that they had an opportunity to undertake a further enquiry on the issues raised in it. This is partly because the Applicants received the letter only in 2011 long after the appellate proceedings in the domestic courts were completed in 2006 and it was not practically possible for them to file it as evidence to challenge their conviction in the course of such proceedings. It is also not clear whether the CHRGG on its part communicated the contents of the letter to judicial or justice authorities or whether the latter had attached the letter to their request for review at the Court of Appeal, which was declared inadmissible only in 2015 for being filed out of time.

5. Indeed, if the Applicants had alleged in their application before this Court that the letter was attached to their application for review before the Court of Appeal, in our view, this court would have had to examine whether domestic courts had violated Applicant's rights by not doing substantial justice without regard to technicalities. In the circumstances, we concur with the majority's conclusion that there are no sufficient grounds to find violations of the rights of the Applicants entailing the responsibility of the Respondent State.

6. Granted that the findings of the CHRGG point to the possibility that the Applicants may have spent over 17 years in prison for a crime they did not commit, it is our strong opinion that a human rights court ought to explore all avenues to ensure that the Respondent State undertakes full investigations on this matter to establish the culpability

or otherwise of the Applicants. This could have included requiring the Parties to appear before the Court and making submissions on this matter. In addition, the letter tendered by the Applicants, as the majority observed, comes from a government institution, that is, CHRGG, with a constitutional mandate to protect human rights in the Respondent State. Although it is not clear whether the full investigation have been concluded by CHRGG, we are of the considered view that the fact that it is a constitutionally established body gives some weight to the probative value of the letter.

7. Furthermore, we do not see how the categorical finding by the CHRGG can change even after further investigations. Payment of compensation of cows and money in a traditional setting in an African village cannot be a confidential exercise. In any event, the information given by the CHRGG was collaborated by the Applicants' assertions that the prosecution witnesses had admitted to the former's witnesses that they erred in identifying the real culprits and that they apologised to the Applicants' relatives for the same.

8. Despite the fact that the Respondent State's responsibility is not engaged, we also think that the Court should have given some importance to the said letter and taken judicial notice of its contents to urge or at least, encourage the Respondent State to take necessary measures to clear the shadow of doubt cast on the Applicants' conviction. We understand that the majority's hesitance to do so stems from the lack of an explicit normative basis that would enable the Court to make such order in circumstances where it has not found the Respondent State in breach of its international obligations in the Charter or other human rights treaties to which is it is a party.

9. However, it is also not unusual for international courts to make remarks, including in the form of *obiter dictum* when the need arises, and we are of the view that the majority could have done the same in the instant Application.

10. In view of the above, we regret that the Court failed to nudge or urge the Respondent State to take judicial or other administrative measures to decisively establish the truth of the preliminary findings of the CHRGG and to clear any doubt about the culpability of the Applicants.

11. As the traditional legal adage goes "It is far *better* that ten *guilty* men go *free* than one *innocent* man is wrongfully *convicted". Even after conviction, the right to be heard requires the possibility of review of such conviction when, for example, there is new evidence, which, as is the case in the instant Application, casts doubt on the Applicants' conviction.* Every government owes a duty of care to its citizens and since the CHRGG is a government agency it should not be difficult for the authorities to implement whatever final findings have been reached

relevant to the conviction of the Applicants.

12. Furthermore, in our view, the Court's reasoning should not have been predicated on speculations as to the potential impact of the letter on the Applicants' conviction, had it been available at the time of their trial and appellate proceedings. What is more relevant and which the majority should have relied on, rather, is the fact that there is nothing on record to show that the letter was presented and considered by the domestic courts and yet it was in the possession of the Applicants at the time of the Application for review of the Court of Appeal's decision.

13. In spite of the fact that the Court has not urged the Respondent State to ensure that investigations initiated by CHRGG are concluded and necessary action taken as may be necessary, we express the hope that the State will still do so in exercise of its international responsibility and the duty it owes to its citizens.

Dissenting opinion: TCHIKAYA

14. Having not been able to agree with my colleagues in the decision *Werema Wangoko Werema and Waisiri Wangoko Werema v United Republic of Tanzania*, I hereby explain why I hold a different view. My idea is that this case should have been dismissed as inadmissible by the Court sitting in Tunis. The matter has been brought too late before this Court.

15. In the instant case, the Applicants are serving 30 years prison sentence at Butimba Central Prison in Mwanza, Tanzania, following their conviction for armed robbery. They petitioned the African Court on 2 October 2015. The petition came after the Tanzanian courts (the High Court and the Court of Appeal) upheld their conviction by Judgments of 9 October 2002 and 1 March 2006.[1] The Application was filed before the African Court in 2015, that is, nine years after the last decisions of the domestic courts. This Application should have been rejected by this honourable Court because of the time - too long - elapsing between 2006 and 2015.

16. Procedural incidents seem to have been debated in the case, but this could not convince. The context of the case, indeed, shows

1 Matter of *Werema Wangoko Werema and Waisiri Wangoko v Tanzania*, 7 December 2018, p 3, para 6.

that no legally valid element intervened to breach the nine years period preceding the Application before the African Court. The Court should have proffered as reason for rejecting the Applicant's case the general principle of reasonable time[2].

17. It will therefore be shown that this appeal is manifestly out of time (I). Besides, the imperativeness of reasonable time will be raised as it renders legally incomprehensible the decision of the Court in this case. The appeal of Messers Werema against Tanzania should be deemed inadmissible (II).

I. That the Application was filed out of time is clearly established

18. The mere fact that an appeal is out of time obliges the judge to dismiss it, whatever the cause. This is somehow a counterpart to the obligation on the part of States to organize their judicial system in a way that ensures that their courts can guarantee for everyone the right to obtain a final decision on disputes within a reasonable time.

19. As has been stated, the dates, which are not contested by the Applicants, indicate clear nine years between the Tanzanian domestic judges and the date on which this Court was seized (2006-2015). Two elements, which are fairly broadly recognized in the Court's jurisprudence could have interrupted and reactivated these time frames; they are the present application for review in this case (A) and the incident resulting from a letter from the Tanzania Human Rights Commission(B). The inadmissibility of the application for review as submitted confers no new right in as much as the appeal was submitted out of time. The issue is therefore no longer that of exhaustion of local remedies, since the local remedies had been exhausted in this case. This can therefore be considered as having no legal effect, same as the issue of the letter from the Tanzania Human Rights Commission referred to in the case file.

A. The Applicants' Application for review was out of time, and hence fruitless

20. The review remedy was one of the arguments available to reactivate the case. It is apparent from the case file that the application for review of their conviction before the Court of Appeal was dismissed on the ground that it had been brought out of time. An appeal may be

2 IN Fauveau , 'Duration of international trial and the right to a fair trial',(2010) *Revue québécoise de droit international*, Hors-série, 243.

considered only if it is positive, regardless of its merits. It legitimately must not amount to a maneuver or a diversion. It must fulfill the conditions of admissibility. The appeal for review of a decision must itself be valid and must be filed within deadlines, if the appeal is to reactivate the deadlines.

21. The Applicants could have requested, and could still request, an extension of time. Messers Werema do not challenge this observation, but instead sought to circumvent it through extra-judicial elements, elements that Tanzanian justice refuses to internalize. Even if one holds the view that the national judge must not lend himself to a rigid interpretation of the domestic law[3], he retains the power of control over the time in which to render justice in the interest of all. The view may be held that the Tanzanian judge had been able to assess the merits of the appeal brought before him.

22. Since the time limit had been set, the Applicants could have requested an extension of time. They simply suggest that they hardly cooperated in a proper administration of justice. It is in these circumstances that the Respondent State, concerned about the idea of rendering justice to the victims, was able declare that the Application could not succeed. We are faced in this regard with the assumption from which the idea was forged that the right of access to the courts that benefits the litigants is not absolute; that it has obvious and accepted limitations. This is particularly the case for the conditions of admissibility of an application. The said conditions, by their very nature, call for regulation by the State. The latter has a margin of manoeuver in making assessment.[4] This, indeed, have been accepted by jurisprudence and doctrine. These powers of the State are always in a relation of tension between the offense committed and the administration of a just and proportionate punishment.

B. The incident introduced by the Tanzania Human Rights Commission does not prosper

23. An investigation by the Commission for Human Rights and Good Governance (CHRGG) supposedly revealed that the victim had received reparation from the actual aggressors, at the request

3 ECHR: Judgment *Ivanova and Ivashova v Russia*, 26 April 2017

4 ECHR: Matter of *Luordo v Italy*, 17July 2003 : “The Court also recalls that the right to a tribunal is not absolute; it lends itself to implicitly accepted limitations, particularly with regard to the conditions of admissibility of an appeal, because by its very nature it requires a regulation by the State, which enjoys in this respect a certain margin of manoeuvre in making assessment” (*Ashingdane v United Kingdom*, Judgment of 28/5/1985, Série A No. 93, pp. 24-25, para 57) », para 85.

of the local authorities That procedural incident seemed to show that the conviction of Messers Werema was either wrong or improper. It is presumably based on a mistake of fact as regards the identity of the true perpetrators of the crimes. The Applicants allege that this finding was confirmed by "the unfolding truth". These facts were presumably not mentioned in the records of all the proceedings conducted by the domestic courts.

24. The aforesaid allegations are contained in a letter from the Commission for Human Rights and Good Governance, an organ of the Government of the Respondent State established for the purpose of promoting human rights. The evidence on file shows that the Respondent State was aware of the Commission's findings. In any event, only the national judge, subject to a denial of justice, may re-examine and validly adjudicate on the facts initially placed on the file record of a case.

II. Messers Werema's Application against Tanzania should be deemed inadmissible for having been filed in an unreasonable time

25. An action can only be brought within an acceptable period of time, mindful of the procedure and guaranteeing the rights of others. "Reasonable period of time"[5] presupposes three dimensions, that is, the reasonable period of time to be respected in domestic proceedings, the reasonable period of time within which the international court must render its decision and, finally, the reasonable period of time that the Applicant must observe in submitting his application to the international judge.[6] It is the latter dimension that is at issue in the *Werema* case before this Court. In the same vein, the International Court of Justice recognized a *corpus* of rules in its *Advisory Opinion on the Review of Judgment No. 158 of the United Nations Administrative Tribunal in 1973*,[7] which includes procedural rights, "the right of access to an independent and impartial tribunal established by law, the right to obtain a court decision within a reasonable time ...". This is the line followed

5 Article 8.1 of the Inter-American Convention on Human Rights provides that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law…"

6 Article 7 of the African Charter on Human and Peoples' Rights stipulates that: "Every individual shall have the right to have his cause heard. This comprises: … the right to be tried within a reasonable time by an impartial court or tribunal".

7 ICJ : *Application for review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion,* 12 July1973, Rec. 1973, p. 209, para92

by the Court and as expressed in *Norbert Zongo v Burkina Faso*,[8] of which the famous paragraph 121 states that the Court "appreciates the reasonableness of reasonable time on a case-by-case basis" (A). This analysis leads to the conclusion that the Messers Werema arrived late before the African Court and that their application does not respect the fundamental principle of reasonable time (B).

A. An infringement of the fundamental principle of reasonable time

26. Desperate, the Applicants seem to have simply gone in search of new judgments in disregard of the time and the role of each jurisdiction. In *Ernest Francis Mtingwi v Tanzania*, however, the Court declared that it is not an appellate body for decisions rendered by national courts. This position was also emphasized in its judgment of 20 November 2015 in the matter of *Alex Thomas v Tanzania.* It is up to each court to ascertain whether actions have been brought before it within a reasonable time. The Court had to indicate that it did not deviate from its jurisdiction to ascertain whether the proceedings before the national courts had met the international standards established by the Charter or other applicable human rights instruments[9].

27. It turns out that, in this case, the Court should dismiss this Application for having been filed within unreasonable time. The Applicants in fact lodged an application for review of the judgment of the Court of Appeal on the ground that it contains "manifest errors". On 19 March 2015, the Court of Appeal dismissed the Application on the ground that it had not been filed within the time frame prescribed by law. The Applicants do not dispute the lateness of their application for review pursuant to Article 107(A)(2)(c) and (e) of the Constitution of Tanzania. The time limit for appealing to the Court of Appeal in this case is the one applicable to ordinary proceedings, and this period may be extended for just cause. The Application did not meet the conditions of admissibility set out in Article 40(5) of the Rules concerning the exhaustion of local remedies.

28. It is clear that the application for review was not presented in acceptable terms before the domestic judge who had jurisdiction to hear it. As such, it cannot justify the fact that the Court regards it as an element capable of reactivating the assessment of reasonable

8 Matter of *Norbert Zongo*, Preliminary objection and merits, 29/6/2013 and 28/3/2014

9 Matter of *Norbert Zongo*, Preliminary objection and the merits, 29/6/2013 and 28/3/2014.

time. Presented in 2015, the African Court accepts, in the interest of effective preservation of human rights, that extraordinary remedies do reactivate deadlines, but it is right that the said remedies comply with the law and that they meet the required conditions. The application for review *Werema et al* has been submitted out of time and the Applicants themselves do not dispute this.

29. It was during the *Genie Lacayo* case, subject of the decision of 29 January 1997, that the Inter-American Court was able to adjudicate for the first time on application of Article 8, paragraph 1 of the Inter-American Convention on Human Rights. The Court had defined the principle of reasonable time. On the criteria defined by the inter-American judge in the afore-mentioned important jurisprudence, one of them is notable in the *Werema case*: the non-diligent character of the Applicants[10].

B. A position dismissing the Application in this case would not have contradicted the Court's jurisprudence

30. The Court had two options: (1) to dismiss, by way of an order, after finding that the 19 March 2015 review decision had been dismissed for having been filed out-of- time; or, (2) having associated the merits with the procedure, take a relatively simple decision to dismiss.

31. Our jurisprudence is precise. Applicants are not required to exhaust extraordinary remedies. The Court had noted that in the Tanzania judicial system, the procedure for filing an application for review before the Court of Appeal is an extraordinary remedy which the Applicants are not required to exhaust before bringing a case before it.[11] When they exercise this remedy to activate a deadline, the balance of rights and legal certainty must be recognized in order to recognize the procedural and substantive conditions that must be respected. The *Werema* review application did not meet these conditions.

32. The duty of promptness attached to human rights litigations has been observed by the Tanzania judicial authorities. The deficiencies were not held against them until the late application submitted for review. In *Wong Ho Wing v Peru,*[12] the Inter-American Court analyzed compliance with the right to judicial protection and procedural safeguards. In that case, the Inter-American Court sets forth four

10 Among the three criteria identified for assessing reasonable time, complexity of the case, behavior of the Parties and the attitude of the courts, are recognized.

11 Matter of *Mohamed Abubakari*, 3/6/2016, paras 66 to 68.

12 IACHR Matter of *Wong Ho Wing v Peru*, Preliminary Objection, Merits, Reparation and Costs 30/6/2015.

elements to be taken into account in determining whether a procedure has exceeded the reasonable time. These are: the complexity of the case, the procedural activity of the person concerned, the conduct of the judicial authorities and the sufferings of the person concerned as a result of his legal situation. These conditions were followed in the *Werema* case until rejection of the request for review.

33. To take into account the peculiarity of the case, it may be noted that it involved a period of too long a stagnation. The Court noted that the Court of Appeal delivered its criminal appeal judgment on 1 March 2006. The Court further found that the application was lodged before it on 2 October 2015. The unduly long stagnation period ended. This state of affairs has already been denounced in international human rights law. The Applicants must be diligent and not provoke inactions in the judicial process. The Applicants are required to do so in their own interest and for equilibrium of the law.[13] In view of the foregoing, I file this dissenting opinion as I could not be convinced of the outcome of this case.

13 The time-limits for bringing proceedings leading to inadmissibility (*Melnyk v Ukraine*, para 26, *Miragall Escolano and Others v Spain* para 38). It is however up to the litigants to act with due diligence (*Kamenova v Bulgaria*, paras 52-55).

Makungu v Tanzania (merits) (2018) 2 AfCLR 550

Application 006/2016, *Mgosi Mwita Makungu v Republic of Tanzania*

Judgment, 7 December 2018. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant had been convicted and sentenced for robbery with violence and armed robbery. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court held that the Applicant had been prevented from appealing his conviction and sentence by not being provided with certified true copies of the records of proceedings and judgments in the case. The Court held that there were exceptional and compelling circumstances to order the release of the Applicant who had served 20 years of a 30-year prison sentence.

Admissibility (exhaustion of local remedies, available remedies, 44, extraordinary remedy, 46)

Fair trial (appeal, access to record of proceedings and judgment, 58, 65)

Reparations (release as an exceptional remedy, 84-86)

Separate Opinion: TCHIKAYA

Fair trial (evidence, 6, 13 ,14)

I. The Parties

1. The Applicant, Mr Mgosi Mwita Makungu, a national of the United Republic of Tanzania, was convicted of the offences of robbery with violence and armed robbery and is currently serving a total of thirty (30) years imprisonment for the two convictions.

2. The Respondent State, the United Republic of Tanzania became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "Charter") on 21 October 1986 and to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 10 February 2006. Furthermore, on 29 March 2010 the Respondent State deposited the Declaration as prescribed under Article 34(6) of the Protocol.

II. Subject of the Application

A. Facts of the matter

3. The claim arises from the Respondent State's alleged failure to provide the Applicant with certified true copies of the records of proceedings and judgments of Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 heard at the District Court of Bunda. In Criminal Case No. 278 of 1995, he was charged with the offence of robbery with violence and convicted and sentenced to fifteen (15) years imprisonment on 15 April 1996. The judgment in Criminal Case No. 244 of 1995, where the Applicant was charged with the offence of armed robbery, was delivered on 18 June 1996, convicting him and sentencing him to fifteen (15) years imprisonment.

4. The Applicant indicated his intention to appeal the convictions and sentencing in both cases, by filing notices of appeal on 16 April 1996 with respect to Criminal Case No. 278 of 1995 and on 22 June 1996 with respect to Criminal Case No. 244 of 1995 within the time prescribed by law.

5. The Applicant asserts that, in order to pursue the appeals against these judgments of the District Court of Bunda, he requested for the certified true copies of records of proceedings and judgments in both cases, through numerous requests to the concerned judicial authorities but this has been to no avail. He further alleges that as at the time of filing the Application before this Court, twenty (20) years have elapsed since his conviction and sentencing and he has been unable to file his appeal.

6. The Applicant filed this Application praying the Court to find the Respondent State in violation of some provisions of the Charter. The Applicant appended a request for Provisional Measures to his Application, for the Court to order the Respondent State to provide him with the certified true copies of the records of proceedings and judgments in the two afore-mentioned cases, failure to which it should order his release.

B. Alleged violations

7. In his Application**,** the Applicant alleges that the Respondent State's omission to give him certified true copies of the records of proceedings and judgments in Criminal Cases No. 244 of 1995 and No. 278 of 1995 heard at the District Court of Bunda contravenes his rights that are provided in the Respondent State's Constitution. He claims:

"That the administrative omission of the respondent has all along been, and it is more likely so to prevail if not judicially attacked, contravening the rights and equality before the law as provided for by Article 13(1) of the constitution of the United Republic of Tanzania amongst many others of the constitution".

Specific provisions of the Constitution of Tanzania 1977, which are violated, so the basis of this application: -

That, the basis of this application (violations) is basically pagged (sic) on Article 13(1),3, 4, 6(a) and 26(1), 2 of the constitution of the united Republic of Tanzania, 1977."

8. In the Reply to the Respondent State's Response, the Applicant claims that the Respondent State's failure to provide him with certified true copies of the record of proceedings and judgments is proof of discrimination against him and a violation of his right to equal protection of the law and equal protection of the law as well as to his fair trial rights provided by Articles 2, 3(1) and (2) and Article 7 of the African Charter.

III. Summary of procedure before the Court

9. The Application to which was appended a request for Provisional Measures, was filed on 29 January 2016 and served on the Respondent State on 23 February 2016.

10. The Application together with the request for Provisional Measures was transmitted to the State Parties to the Protocol, the Chairperson of the African Union Commission, the African Commission on Human and Peoples' Rights and the Executive Council of the African Union through the Chairperson of the African Union Commission, on 12 April 2016.

11. On 28 March 2016, on the direction of the Court, the Registry requested Pan African Lawyers' Union (PALU) to provide the Applicant with legal assistance. On 21 April 2016, PALU informed the Registry that it would represent the Applicant.

12. The Respondent State was again, on 1 June 2016, notified of the Applicant's request for Provisional Measures on the provision of the certified true copies of records of proceedings and judgments of the District Court of Bunda, which was appended to the Application. The Respondent State was also directed to file the Response to the request for Provisional Measures within thirty (30) days of receipt of the notice.

13. On 12 May 2016, the Respondent State filed a request for extension of time to file the Response to the Application. The Court granted fifteen (15) days from receipt of a notice dated 15 June 2016,

for the filing of these documents.

14. On 28 June 2016, the Respondent State requested for another extension of time to file its Response to the Application. The Court granted this request by an additional fifteen (15) days, to run from the date of receipt of the notice dated 4 July 2016.

15. On 25 July 2016, the Respondent State filed the Response to the Applicant's request for Provisional Measures and in the interest of justice, the Court deemed it as properly filed. This was transmitted to the Applicant on 28 July 2016 directing that the Applicant should file the Reply thereto within thirty (30) days of receipt.

16. The Respondent State filed the Response to the Application on 27 July 2016 and in the interest of justice, the Court deemed it as properly filed. The Response was transmitted to the Applicant on 28 July 2016 directing him to file the Reply within thirty (30) days.

17. On 1 September 2016, the Applicant filed the Reply to the Respondent State's Response to the Application and the Reply to the request for Provisional Measures. These Replies were transmitted to the Respondent State for information on 7 September 2016.

18. The Parties were informed that pleadings were closed with effect from 19 December 2016.

19. On 30 January 2017, the Applicant filed a new request for Provisional Measures on the basis that he needs the certified true copies of the records of proceedings and judgments to file his appeal and that his continued inability to access them violates his rights under the Charter.

20. On 1 November, 2017 the Registry informed the Parties of the re-opening of pleadings in order to request the Respondent State to file the certified true copies of the records of proceedings and judgments for Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 from the District Court of Bunda within fifteen (15) days of receipt of the notice.

21. The Respondent State did not file the certified true copies of the records of proceedings and judgments as ordered.

22. On 23 March 2018, the Court dealt with the request for Provisional Measures and, having noted that the request is linked to the prayers on the merits of the Application and that granting it would predetermine the matter in that regard, dismissed the request.

23. On 9 April 2018, the Parties were informed of the close of the written procedure and that there would be no public hearing on the matter.

IV. Prayers of the Parties

24. The prayers of the Applicant, as submitted in the Application,

are:

"i. This Hon. Court on Human and People's (sic) Rights to declare the respondent (sic) administrative omission unconstitutional.

ii. Declaratory order to enable the Applicant to be immediately (with time limit) supplied with copies of proceeding(sic) and Judgment (sic), and if the opposes (fail to supply), order the immediate release of the Applicant from prison.

iii. Costs to follow the event, and

iv. Any other order(s)/relief(s) that would suit the current and future interest of justice in the circumstances of the case.

v. That, this Hon. Court be pleased to grant the Applicants(sic) prayer to be facilitated with free legal representation or legal assistance as governed by Rule 31 of the Rules of the court and Article 10(2) of the protocol on the court."

25. In the Reply to the Respondent State's Response, the Applicant also prays the Court to declare:

"That: Since the respondent state (The United Republic of Tanzania) has violated the Applicant's rights provide (sic) under Article 2, 3(1) and (2) and 7(1)(a) of the African Charter on Human and Peoples' Right be pleased to grant and declare orders of merits expressed in this (sic) grounds.

That: the application declared has merit and be granted with costs following the event."

26. In its Response, with regard to the admissibility of the Application, the Respondent State prays the Court to rule:

"i. That the Application has not met the admissibility requirements provided under Rule 40(5) of the Rules and Article 6(2) of the Protocol.

ii. That the Application is inadmissible and be duly dismissed."

27. The Respondent State also prays that the Court declare that it has not violated Articles 2, 3(1) and (2) and 7(1)(a) of the Charter, the Application lacks merit and it should be dismissed with costs.

V. Jurisdiction

28. The Respondent State has not raised an objection to the jurisdiction of the Court. In terms of Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction."

29. With regard to its material jurisdiction, the Applicant has sought

reliefs based on allegations relating to the violation of his rights under Articles 13(1), 13(3), 13(6)(a), 26(1) and 26(2) of the Constitution of the Respondent State.

30. In accordance with Article 3(1) of the Protocol and Rule 26(1)(a) of the Rules, the Court's material jurisdiction relates only to the application and interpretation of human rights instruments to which a State is a Party, rather than to the application and interpretation of the Respondent State's Constitution.

31. The Court notes however, that the rights provided for under the afore-mentioned provisions of the Respondent State's Constitution correspond to the rights set out in Articles 2, 3(1) and (2) and 7(1)(a) of the Charter on the right to non-discrimination, the right to equality before the law and equal protection of the law and the right to appeal to competent national organs against acts violating rights.

32. With regard to the other aspects of its jurisdiction, the Court holds that:

> "i. It has personal jurisdiction over the Parties because the Respondent State deposited the Declaration pursuant to Article 34(6) of the Protocol on 29 March 2010 and this Declaration enabled the Applicant to file the present Application in accordance with Article 5(3) of the Protocol.
>
> ii. It has temporal jurisdiction because the alleged violations are continuous in nature.[1]
>
> iii. It has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State."

33. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VI. Admissibility

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

35. Rule 40 of the Rules which in substance restates Article 56 of the Charter sets outs the requirements for the admissibility of applications as follows:

1 Application No. 013/2011, Judgment of 28/03/2014, *Norbert Zongo and Others v Burkina Faso* (hereinafter referred to as "*Norbert Zongo v Burkina Faso* Judgment"), para 50; Application No. 006/2015. Judgment of 23/03/2018, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (hereinafter referred to as "*Nguza Viking v Tanzania* Judgment"), para 38.

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter;
3. Not contain any disparaging or insulting language;
4. Not be based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. Not raise any matter or issues previously settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

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

A. Condition of admissibility in contention between the Parties

37. The Respondent State contends that the Application does not meet the admissibility conditions stipulated under Articles 56(5) of the Charter, Article 6 of the Protocol and Rules 40(5) of the Rules on exhaustion of local remedies.

38. The Respondent State argues that the Applicant has not made use of the local remedy provided for under the Constitution of the United Republic of Tanzania. In this regard, the Respondent State submits that its Basic Rights and Duties Enforcement Act, which was enacted for the enforcement of the rights and duties provided for under Part III of its Constitution, provides for a procedure for enforcement of constitutional rights such as those the Applicant alleges were violated. The Respondent State avers that the Applicant however failed to pursue this remedy before seizing the Court.

39. The Applicant states that he has been unsuccessful in his attempts to ensure that his basic rights as provided for under Articles 12 to 29, under Part III of the Constitution of the United Republic of Tanzania are respected, because of the unaffordable costs of filing

constitutional petitions at the High Court of Tanzania.

40. The Applicant further contends that the Respondent State's failure to issue him with the certified true copies of the records of proceedings and judgments of the District Court of Bunda made it impossible for him to exhaust local remedies because he could not appeal the decisions in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 without them. The Applicant maintains that the Respondent State has failed to protect and uphold his right to appeal on time.

41. The Court notes that the requirement of exhaustion of local remedies must be complied with before an Application is filed at this Court. However, this condition may be exceptionally dispensed with if local remedies are not available, they are ineffective, insufficient or the domestic procedures to pursue them are unduly prolonged. Furthermore, the remedies to be exhausted must be ordinary judicial remedies.[2]

42. The Court notes that, in the instant case, the Applicant attempted to use the available remedies, by filing a notice of appeal dated 16 April 1996 in respect of Criminal Case No. 278 of 1995 and a notice of appeal dated 22 June 1996 in respect of Criminal Case No. 244 of 1995. Thereafter, he requested for the certified true copies of the records of proceedings and judgments in respect of these cases in order to file the actual appeals. The Applicant followed up with the Magistrate in Charge of the District Court of Bunda and the District Registrar and Presiding Judge of the High Court at Mwanza, in this regard, without any success. He also sought the intervention of the Respondent State's Commission on Human Rights and Good Governance but all his efforts were futile.

43. Having failed to get the records of proceedings and judgments for the two criminal cases, the Applicant filed Miscellaneous Criminal Application No. 6 of 2014 at the High Court at Mwanza on the basis of the right to equality before the law provided for in the Respondent State's Constitution, seeking to be allowed to file the appeals without the certified true copies of the records of proceedings and of judgments. This application was dismissed on 21 September 2015 for lack of merit. In the *obiter dictum*, the High Court observed that the Deputy Registrar of the High Court should ensure that all efforts are made to provide the

2 *Alex Thomas v Tanzania* Judgment *op cit*, para 64; Application No.003/2015. Judgment of 28/09/2017, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania (*hereinafter referred to as *"Kennedy Onyachi and Another v Tanzania* Judgment"*)*, para 56; *Nguza Viking v Tanzania* Judgment *op cit*, para 52; Application No. 032/2015. Judgment of 21/03/2018, *Kijiji Isiaga v United Republic of Tanzania* (hereinafter referred to as "*Kijiji Isiaga v Tanzania* Judgment"), para 45.

Applicant with the records and judgments to facilitate the filing of his appeals but the instruction in the said *obiter dictum* was not followed.

44. Consequently, despite the Applicant having filed the notices of appeal indicating his intention to appeal, he could not pursue his appeals for lack of the certified true copies of the records of proceedings and judgments. In this regard, the Court recalls its position that, for remedies to be considered available, it is not enough that they should be established in the domestic system but also that individuals should be able to use them without any hindrance.[3]

45. Accordingly, in the instant case, the Court concludes that the Applicant was impeded from pursuing the local remedies as a result of the Respondent State's failure to provide him with the certified true copies of the records of proceedings and judgments.

46. With regard to the Respondent State's contention that the Applicant could have filed a constitutional petition regarding the violation of his rights, the Court has already stated that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicant is not required to exhaust prior to seizing this Court.[4] Notwithstanding this, the Applicant filed a petition under the procedure provided in the Respondent State's Constitution for the enforcement of fundamental rights, seeking to be allowed to file his appeal without the records of proceedings and the judgments but this was dismissed for lack of merit.

47. The Court thus finds that though local remedies were available, the Applicant, was unable to utilise them due to the Respondent State's omission and failure to provide him with the necessary documents.

48. The Court therefore dismisses the Respondent State's objection to the admissibility of the Application for lack of exhaustion of local remedies.

B. Conditions of admissibility not in contention between the Parties

49. The Court notes that following its finding that local remedies were not available to the Applicant to exhaust, the issue of compliance with Article 56(6) of the Charter as restated in Rule 40(6) of the Rules

3 *Norbert Zongo v Burkina Faso* Judgment, *op cit*, para 68; Application No. 001/2014. Judgment of 18/11/2016, *Action Pour La Protection Des Droits De L'Homme v Cote d'Ivoire,* paras 94 - 106.

4 *Alex Thomas v Tanzania* Judgment, *op cit*, paras 60 - 62; Application No.007/2013. Judgment of 03/06/2016, *Mohamed Abubakari v United Republic of Tanzania (*hereinafter referred to as "*Mohamed Abubakari v Tanzania* Judgment") paras 66 - 70; Application No.011/2015. Judgment of 28/09/2017, *Christopher Jonas v United Republic of Tanzania,* para 44.

on the filing of an application within a reasonable time following the exhaustion of local remedies becomes moot.

50. The Court notes that there is no contention regarding the compliance with the conditions set out in Article 56, Sub-Articles (1), (2), (3), (4) and (7) of the Charter on, the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively.

51. The Court further notes that nothing on the record indicates that these conditions have not been met and therefore holds that the Application meets the requirements set out under those provisions.

52. In light of the foregoing, the Court finds that the instant Application fulfils all the admissibility requirements in terms of Article 56 of the Charter as restated in Rule 40 of the Rules, and accordingly declares the Application admissible.

VII. Merits

53. The Applicant alleges the violation of the right to appeal, the right to equality before the law and equal protection of the law and the right to non-discrimination, provided for under Articles 7(1)(a), 3(1) and 3(2) and 2 of the Charter, respectively.

A. Alleged violation of the right to appeal

54. The Applicant claims that his right to have his cause heard, including the right to appeal, was violated when the Respondent State failed to supply him with certified true copies of the records of proceedings and judgments of the two cases in which he was convicted by the District Court of Bunda. The Applicant alleges that it is due to this failure that for more than twenty (20) years, he has been unable to file appeal**s** against the decisions of the District Court of Bunda. The Applicant maintains that this failure is a violation of his right under Article 7(1)(a) of the Charter.

55. The Respondent State refutes this allegation. It maintains that the Applicant has the option of instituting a constitutional petition for the enforcement of his basic rights and the remedies sought can be issued by the High Court of Tanzania.

56. The Court observes that the right to appeal is a fundamental element of the right to a fair trial protected under Article 7(1)(a) of the Charter, which provides that:

> "1. Every individual shall have the right to have his cause heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts

> of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;"

57. This right to appeal requires that individuals are provided with an opportunity to access competent organs, to appeal decisions or acts violating their rights. It entails that States should establish mechanisms for such appeals and take necessary action that facilitates the exercise of this right by individuals, including providing them with the judgments or decisions that they wish to appeal from.

58. In the instant Application the Court notes that the Applicant has made numerous attempts to request for the certified true copies of the record of proceedings and judgments from the Respondent State to no avail. In the absence of the said documents, the Applicant was not able to appeal his convictions and sentences in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995, to the High Court and subsequently to the Court of Appeal.

59. The record before this Court shows that on 29 November 2000, the Applicant wrote to District Registrar of the High Court at Mwanza, enquiring on the status of his notice of appeal in respect of Criminal Case No. 278 of 1995. The Court notes that in response to the Applicant's letter dated 16 January 2004, the District Registrar of the High Court at Mwanza wrote to the Applicant on 9 February 2004 informing him that the Court is yet to receive the records of proceedings for his cases from the District Court of Bunda.

60. The record also indicates that the Magistrate in Charge of the District Court at Mwanza, under whose administration the District Court of Bunda falls, wrote to the Applicant on 13 October, 2010 informing him that the records of proceedings for the two criminal cases had not been returned from the High Court where it had been sent through a letter dated 7 November, 2003 and therefore the Applicant should follow up with the High Court at Mwanza to get these records.

61. There is evidence that the Applicant sought the intervention of the Respondent State's Commission on Human Rights and Good Governance in this regard, on Criminal Case No.244 of 1995, through his letter dated 28 December 2011. By its letter dated 3 July 2013, the Commission advised the Applicant that by a letter dated 11 May 2012, the District Registrar of the High Court at Mwanza informed the Commission that despite a lengthy follow-up on the matter, the records of proceedings of the Applicant's cases heard at the District Court of Bunda could not be traced.

62. Besides, the record before this Court further attests to the fact that the Applicant wrote to the Presiding Judge of the High Court at Mwanza to follow up on the records of proceedings, particularly by his letters dated, 14 October 2005, 18 March 2005, 28 June 2005, 2 September 2005, 4 December 2005, 8 January 2006, 2 April 2007, 24

July 2007, 10 September 2007, 7 December 2007, 9 March 2008, 15 June 2008, 30 September 2008, 29 December 2008, 12 April 2009, 24 August 2009, 6 December 2009, 7 April 2010, 2 September 2010, 14 January 2011, 15 August 2011, 18 December 2011, 12 September 2014, 24 January 2015 and 9 April 2015.

63. In his letter dated 28 March 2015 addressed to the Presiding Judge of the High Court at Mwanza the Applicant indicates that his appeals were never mentioned because the records of proceedings and judgment were still being sought, yet the Magistrate in Charge of the District Court of Bunda had advised him that he was waiting for the records to be returned from the High Court where they had been sent.

64. Finally, the Applicant filed a petition at the High Court seeking leave to file his appeal without the records of proceedings but this petition was dismissed because, according to that court, allowing it would have been inappropriate since it would have meant that the appellate Court would have considered the appeal without having the records and judgments of the trial Court that were to be appealed.

65. The Court therefore finds that by failing to provide the Applicant with certified true copies of the records of proceedings and judgments in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 heard at the District Court of Bunda, the Respondent State has violated the Applicant's right to appeal as provided under Article 7(1)(a) of the Charter.

B. Alleged violation of the right to equality before the law and equal protection of the law

66. The Applicant alleges that failure of the Respondent State to provide him with the record of proceedings and the judgments constitutes an administrative omission and a violation of his right to equality before the law and equal protection of the law as provided for in Article 3(1) and 3(2) of the Charter.

67. The Respondent State disputes this and reiterates that the Applicant had the opportunity to file a constitutional petition which was a remedy that was readily available to him just as it is available to everyone and ensuring equality before the law and equal protection of the law.

68. The Court notes that Article 3 of the Charter guarantees the right to equality before the law and equal protection of the law in the following terms:

> "(1) Every individual shall be equal before the law
>
> (2) Every individual shall be entitled to equal protection of the law."

69. In the context of judicial procedures, the right to equality before the law and equal protection of the law requires that everyone should

be treated equally before courts and tribunals. The Applicant has made a general claim that the denial of the opportunity to file an appeal at either the High Court or the Court of Appeal due to the Respondent State's failure to provide him with the certified true copies of the records of proceedings and judgments of the District Court of Bunda has resulted in a violation of this right.

70. The Court reiterates that the Applicant bears the burden of proving this claim,[5] but he has failed to show how his right to equality before the law and equal protection of the law has been violated. The Court has stated that general claims are not enough to establish that the Respondent State has violated a right.[6]

71. The Court therefore finds that the Respondent State has not violated the Applicant's right to equality before the law and equal protection of the law provided under Article 3(1) and (2) of the Charter.

C. Alleged violation of the right to non-discrimination

72. The Applicant submits that by failing to provide him with certified true copies of the record of proceedings and judgments, the Respondent State has violated his right to non-discrimination as set out in Article 2 of the Charter.

73. The Respondent State disputes this allegation and avers that the Applicant has not proved it.

74. 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."

75. In the Matter of the *African Commission on Human and Peoples' Rights v Republic of Kenya*, the Court noted that the principle of non-discrimination prohibits any differential treatment among persons existing in similar contexts, on the basis of one or more of the prohibited grounds listed under Article 2 of the Charter.[7]

76. In the present case, the Applicant has failed to show how his

5 Application No. 003/2015. Judgment of 28/09/2017, *Kennedy Owino Onyachi and Another v United Republic of Tanzania,* para 140; Application No. 005/2015. Judgment of 11/05/2018, *Thobias Mango Mang'ara and Shukurani Masegenya Mango v United Republic of Tanzania,* para 104.

6 *Alex Thomas v Tanzania* Judgment, para 140; *Mohamed Abubakari v Tanzania* Judgment, para 154; *Kijiji Isiaga v Tanzania* Judgment, para 86.

7 Application No. 002/2012. Judgment of 26/05/2017, *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 138.

right not to be discriminated against on the basis of any of the ground(s) prohibited under Article 2 of the Charter has been violated.

77. The Court therefore finds that the Respondent State has not violated the Applicant's right to non-discrimination provided under Article 2 of the Charter.

VIII. Reparations

78. As indicated in paragraphs 24 and 25 and above, the Applicant requests that the Court declare the Respondent State's administrative omission to be unconstitutional, grant him a declaratory order to be immediately supplied with certified true copies of proceedings and judgments in Criminal Cases No. 244 of 1995 and 278 of 1995 and if the Respondent State fails to supply them then the Court should order his immediate release from prison and any other orders or reliefs it may deem fit.

79. In its Response to the Application, as indicated in paragraph 26 and 27 above, the Respondent State did not address the Applicant's prayers on remedies, rather it stated that the Application is inadmissible, the Court should find that it has not violated Articles 2, 3(1) and (2) and 7(1)(a) of the Charter and the Application should be dismissed with costs for lack of merit.

80. 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*".*

81. In this respect, Rule 63 of the Rules stipulates that "the Court shall rule on the request for the reparation … by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision".

82. The Court recalls its position on State responsibility in *Reverend Christopher R Mtikila v United Republic of Tanzania*, that "any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation".[8]

83. With regard to the issue of supplying the certified true copies of the records of proceedings and judgments, the Court had, pursuant to Rule 41 of the Rules, directed the Respondent State to file them, as stated in paragraph 20 above, but the Respondent State did not comply.

84. As regards the Applicant's prayer to be released if the

8 Application No. 011/2011. Ruling on Reparations of 13/06/2014, *Reverend Christopher R Mtikila v United Republic of Tanzania,* para 27.

Respondent State fails to provide him with the certified true copies of the record of proceedings and judgments, the Court has established that such a measure could be directly ordered by the Court only in exceptional and compelling circumstances.[9] The Court has stated that examples of such compelling circumstances include "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 his continued imprisonment would occasion a miscarriage of justice. In such circumstances, the Court has, pursuant to Article 27(1) of the Protocol to order "all appropriate measures" including the release of the Applicant".[10]

85. In the instant case, the Court has found at paragraph 65 of this judgment that the Respondent State has violated the Applicant's right to appeal under Article 7(1)(a) of the Charter by not providing him the certified true copies of the records of proceedings and judgments in the two Criminal Cases. The Court notes that this has resulted in the Applicant having served twenty (20) years in prison, a period which represents two-thirds of the total prison term of thirty (30) years following his convictions, without having exercised his right to appeal.

86. The Court considers that these circumstances have resulted in a miscarriage of justice and are compelling enough to warrant it to grant the Applicant's prayer to be released as being the most proportionate measure to restore the Applicant.

IX. Costs

87. The Applicant has made submissions that costs be granted following the event. The Respondent State has asked for the costs to be borne by the Applicant.

88. The Court notes that Rule 30 of the Rules of Court provides that "unless otherwise decided by the Court, each Party shall bear its own costs".

89. The Court will make a ruling on costs when considering the claim on reparations.

X. Operative part

90. For these reasons,

9 *Alex Thomas v Tanzania* Judgment *op cit*, para 157; *Mohamed Abubakari v Tanzania* Judgment *op cit,* para 234.

10 Application No. 016/2016. Judgment of 21/09/2018, *Diocles William v United Republic of Tanzania*, para 101; See also Application No. 027/2015. Judgment of 21/09/2018, *Minani Evarist v United Republic of Tanzania*, para 82.

The Court,
Unanimously:

On *jurisdiction*
i. *Declares* that the Court has jurisdiction.

On *admissibility*
ii. *Dismisses* the objection on the admissibility of the Application;
iii. *Declares* that the Application is admissible.

On *merits*
iv. *Finds* that the Respondent State has not violated Article 2 of the Charter as regards the right to non-discrimination;
v. *Finds* that the Respondent State has not violated Article 3(1) and 3(2) of the Charter as regards to the right to equality before the law and equal protection of the law;
vi. *Finds* that the Respondent State violated Article 7(1)(a) of the Charter as regards the failure to provide the Applicant with the certified true copies of the records of proceedings and judgments in Criminal Case No. 244 of 1995 and Criminal Case No. 278 of 1995 heard at the District Court of Bunda, to facilitate the Applicant file the appeals therefrom and therefore orders the Respondent State to provide them to the Applicant;

On *reparations*
vii. *Orders* the Respondent State to release the Applicant from prison within thirty (30) days of this Judgment;
viii. *Reserves* its decision on the Applicant's prayer on other forms of reparation;
ix. Allows the Applicant, in accordance with Rule 63 of its Rules, to file his written submissions on the other forms of reparation within sixty (60) days from the date of notification of this Judgment; and the Respondent State to file its Response thereto within thirty (30) days from the date of receipt of the Applicants' written submissions;
x. Orders the Respondent State to submit to the Court a report on the measures taken in respect of paragraphs (vi) and (vii) above within sixty (60) days of notification of this Judgment; and

On costs
xi. *Reserves* its decision on costs.

Separate opinion: TCHIKAYA

1. There are works which though collective and have a common goal, still keep their specificities. The *Mgosi Mwita Makungu v United Republic of Tanzania* decision of the African Court lends credence to this assertion. I agree with the majority of the judges as regards admissibility, jurisdiction[1] and the operative part, but I believe that the Court should have given further thought to the issue of consistency of the evidence before it in this case. The question arose as to the admissibility of Mr *Mgosi*'s assertions in support of his claims; a crucial question, one may say, that the court should have set out in detail.

2. I believe that the court should have paid particular attention to the question which the point of law raises in that judgement. Had Mr Mgosi sufficiently proven his key allegation that the Tanzanian State failed to provide him with the documents necessary for his appeal? The African Court should have made sure that this issue is well tackled and investigated well in advance of any other facets of this dispute. *A fortiori,* it is known that international human rights law has abundant jurisprudence[2] protecting the rights of individuals against the non-availability of documents necessary for procedure. The court was aware of this and it was within its jurisdiction to enforce this fundamental right. But, of course, this must be clearly proven.

3. It is needful to consider not only the insufficiency of the allegations on the ground that the Applicant did not substantiate them (I) but also that proof of claims has always impacted the judgements of the Court.

I. The claims presented are not substantiated

4. The Applicant sought compensation from the Arusha Court sitting in Tunis, for the prejudice generated by the refusal of the State of Tanzania to provide copies of the records of proceedings in the criminal judgments of the *Bunda* District Court and the decisions of 18 June 1996 and 15 April 1996, respectively, finding the Applicant guilty of the offence of armed robbery and sentencing him to 35 years in prison. The Applicant also claimed that he had requested the said

1 There were no objections to jurisdiction or admissibility. As it established in *Alex Thomas v Tanzania,* 20/11/2015 and *Peter Joseph Chacha v Tanzania*, 28/3/2014: …"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".

2 EUCJ, ***Seyersted and Wiberg v Sweden,*** 20/9/2005 (right of access to personal information in the file held by the public services); CEDH ***Ramzy v The Netherlands,*** 20 May 2010; CEDH, ***Gulijev v Lettonia,*** 16 December 2008; CEDH, ***Tsourlakis v Greece,*** 15 October 2009.

records from the Respondent State on several occasions, but to no avail. He said he needed the documents to lodge appeal. He further alleged that twenty years had elapsed between his declaration of guilt and conviction on the one hand, and the filing of his application before the Court on the other. Given the passage of time, it is understandable that the evidence in assessing this allegation would be of paramount importance in the conduct of the trial before the Court.

5. It was clear from his application that the Applicant did not contest the charges levelled against him; on the contrary, his claims were centred on the alleged failure of the Tanzanian State to make legal remedies available to its citizen in accordance with the African Charter on Human and Peoples' Rights[3]. However, it is apparent from the documents before the Court that Mr. Mgosi filed a notice of appeal dated 16 April 1996 in criminal case No. 278 of 1995 and another notice of appeal dated 22 June 1996 in criminal case No. 244 of 1995. In accordance with Tanzanian law, these notices would constitute appeals in the strict sense only if they are accompanied by an appeal file. Such file must be accompanied by records of the trial proceedings. The absence of these documents allegedly handicapped the Applicant in his effort to file a proper appeal. He was reportedly refused the documents, thus making his appeal incomplete or inadmissible.

6. In the instant case, it seems unconvincing: (1) that the key decisive elements emanate from the claims of Mr Mgozi and (2) that the said claims are not verified and sufficiently investigated by the Court, even though the latter relies on them for its proceedings, and (3) that the Court is discarding an approach which it has always adopted. On 23 March 2018, it had this attention in the case of *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania,* which was decided on 23 March 2018. The court emphasised the value of greater scrutiny of the probative value of allegations. The court seemed to have established its jurisprudence based on the evidence adduced by the Parties in the context of its jurisdiction in that case. There was in the *Nguza* dispute, a problem of identification of the accused persons. The Court noted that "the court is of the opinion that the decision on the form of identification of the accused falls within the discretion of the competent national authorities, since it is they which determine the

3 The violations are: "the right to equality before the law and to equal protection of the law (Section 13(1) of the Charter); the right to protection of its interests by courts and public bodies; the right to non-discrimination by persons exercising state functions (Section 13(3) of the Charter); the right to a fair trial, to lodge an appeal or to exercise any other remedy against the decision of a court or any other competent body (Article 13(6)(a)) of the Charter; and also as this led to a failure to observe National Law, there was a breach of the duty to observe and respect the Constitution and laws (Article 26(1))...finally, an infringement of the right to appeal (Article 7(1)(a)).

probative value of the evidence and they have a wide discretion in this respect. The Court generally defers to the decision of national courts as long as this does not give rise to a denial of justice"[4]. The Court adopted a concrete approach to its investigation; a public hearing was required.

7. A litigation is the sum total of litigious material facts[5] in so far as those facts constitute essential elements of the decision. The material accuracy of such elements is consubstantial with the decision. Here is a meeting point between domestic human rights law and international human rights law[6]. The administration of evidence will always be a legal as well as a practical issue. *Mr Mgosi acknowledged before the Court that he had filed two notices of appeal without being able to tender exhibits. Apart from the fact that he does not state before the Court that his appeal would have succeeded, had it been filed, it is further clear that the refusal of the State which he alleges according to the Court, is based only on his claim. He simply alleged that because of the refusal he could not defend his cause before the court of Appeal.* Even if there had been no lawyer, it is possible to suppose that Mr Mgosi, just as he was able to file the notices of Appeal, did not continue the procedure normally, in the belief that because of his heavily sanctioned offences, he was already condemned. It may also be said that the different approaches of the Applicant, some of them through defence organisations, entailed unearthing a dispute that has already been settled. The judgement states that "the president of the Mwanza District Court, on which the Bunda District Court is administratively dependent, wrote to the Applicant on 13 October 2010 to inform him that the record of proceedings in criminal cases had not yet been returned from the High Court, where they had been sent to by letter dated 7 November 2003".[7] Similarly, it is reasonable to assume that subsequent events in which the Applicant "sought the intervention of the Respondent State's Commission for Human Rights and Good Governance in his criminal cases of 1995"[8] cannot be used in judicial decisions. The commission's

4 See CADHP, *NGuza Viking,* 28/3/2018, para 89.

5 DR Mougenot , *La preuve,* Larcier, Bruxelles, 2002, No. 14 -1.

6 L Favore, 'Challenge and evidence before the International Court of Justice. About South West African Affairs', (1965) ***AFDI,*** 233-277 ; also, the matter of the ICC, *Detroit De Corfu, United Kingdom v Albania, 25 March 1948, Rec.* 1948, 15 ; merits, 9 April 1949, *Rec.* 1949, p. 4 ; , ICC, *Temple de Preah-Vihear,* 26 May 1961 and 15 June 1962; M Lalive 'Some remarks on evidence before the Permanent Court and the International Court' (1950) *Swiss Yearbook of International law* 97, note 72).

7 See Judgement, para 45 and seq.

8 *Idem,* para 48.

letter of 3 July 2013, in which it informed the Applicant on 11 May 2012 that the record of proceedings in respect of his cases before the Bunda District Court could not be located, does not concern the point of law raised here, that is, the deadline for appeal. In any event, if the state had actually refused to produce the necessary documents in support of the appeal, after a certain time, the Applicant would have been entitled to file his appeal, within a time which takes into account the general principle of law that a case must be heard. Mr. Mgosi was entitled to appeal without these documents, as the notice of Appeal had been filed.

8. In this view, as one might think, this case does not leave room for reflection on equality of arms, a principle of the common law system that prescribes a fair balance between the Parties; a principle which could have been used had the Applicant established the State's refusal. However, as the court pointed out in the same year, proof of refusal "falls within the discretionary powers of the competent national authorities since it is they who determine the probative value of that evidence and they enjoy a wide discretion in that regard". Coming back to the requests for copies of the record of proceedings and judgements, the application was dismissed on 21 September 2015 on the ground that it was unfounded.

9. The above demonstrates the importance of the provision of evidence that has always impacted on the court's judgements.

II. Proof of claims has always impacted the judgement of the Court

10. Only proven claims form the content of judicial decisions.[9] In AfCHPR*, Abubakari v Tanzania,*[10] the court noted that "it is for the party alleging discriminatory treatment to prove it". This shows the decisive nature of the evidence of claims adduced before a court. It is rightly believed that where claims are proven, this should be reflected in the operative part. In this Mgosi decision, I stand with the majority on the fact that the Court does not grant "the Applicant's request to order his

9 See ECHR, *Gafgen v Germany*, 1 June 2010: the Applicant brought an action before the court alleging a violation of Article 3 ECHR on the ground that the treatment he was allegedly subjected to during the interrogation of the National Police concerning the whereabouts of the child he had abducted amounted to torture. The use of material evidence obtained through his confession, which incriminated him, should have been excluded by respect for the right to a fair trial. The court had issued a decision on this evidence, Article 6 ECHR on the right to a fair trial would have been violated. Also see ECHR, 1 June 2010, *Gafgen v Germany* (application No. 22978/05), reports of judgements and decisions 2010-IV, 327-407.

10 *Mohamed Abubakari v United Republic of Tanzania*, 3/6 2016.

release, without prejudice to the decision of the respondent State to take such a measure on its own initiative ". It had thus rejected that point, which featured among the prayers of the Applicant.

11. The essential nature of the concrete evidence adduced in support of a claim naturally shapes a judicial decision. Mr Mgosi does not provide the court with any concrete evidence of the exercise of appeal, but merely states that he was unable to do so, even though in accordance with the Tanzanian system, he had gone beyond the notice of appeal stage. The court should not grant his requests. It stated in the case of *Alex Thomas v Tanzania*[11] that general claims whereby his right has been violated are not sufficient. Concrete evidence is required. We understand the meaning of its decision in this case.

12. Mr MGosi supposedly did not benefited from the availability of the domestic courts. The violation of Article 7(1)[12] of the African Charter on Human and Peoples' Rights was retained in the operative part of judgement. In my opinion, this aspect - availability of justice - does not form part of the shortcomings actually attributable to the State. While remaining in solidarity with the majority of my colleagues, it should be noted that the question at issue is the Applicant's inconsistency and lack of rigour in the use of the means of action at his disposal. To refuse a litigant all means of action may mean denying him the action in question, but in this case, it seems possible to say that this was not the case. The first point of the operative part should be specific.

13. The Court had to examine the wrongful conduct of the domestic courts. The Applicant in this case pointed to the impartiality of the judges in establishing the breaches enshrined in the Charter. In the case of *Thobias Mango and others v Tanzania,* decision of 11 May 2018, the aim of which was to highlight the lack of judicial fairness. As in the present case, the African Court found that the Applicant had failed to prove that the judges of the national courts were biased and thus generated a violation of the right to be tried by an impartial tribunal.[13] In the present case, the court, while citing its jurisprudence - *Abubakari*[14] - noted that the domestic courts had determined that there was evidence beyond a reasonable doubt that the Applicants had committed the crime of which they were accused. The relevance

11 *Alex Thomas v United Republic of Tanzania*, 20/11/2015.

12 This article states that "every individual shall have the right to have his case heard. This comprises: the right to an appeal to competent national organs against acts of violating his fundamental rights recognized and guaranteed by conventions, laws, regulations and customs in force. ".

13 *Thobias Mang 'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania*, 11/5/2018, para 104.

14 *Mohamed Abubakari v United Republic of Tanzania,* 3/6/ 2016.

to the case at hand lies in the fact that the Mgosi decision sets aside the necessary and thorough verification of the Applicant's claims and allegations concerning his initiative to lodge an appeal. Reasonable doubt persists

14. A special feature is worth noting. It is tied to the specificity of the litigation of the Court. This is also present in the Mgosi case. While the burden of proof did not always rest with the Applicants in human rights cases, it was desirable for the court to make reasonable use of the principle. It is right that the person who alleges a wrongful practice or initiative that causes damage should adduce proof thereof. The adage is universally known: "*actori incumbit probatio, reus in excipiendo fit actor*" (the one who asserts a right must prove it). The material elements of human rights abuses leading to a suit in court, are often extremely damaging, and come after lengthy internal proceedings. The emergence of evidence at international level is necessary as much as it is complex. The African Human Rights judge, as in Mgosi case, must face up to this fact.

15. While sharing the position of my colleagues on the decision on the merits, I nevertheless express this individual opinion to highlight the insufficiency of unsubstantiated or unproven claims before the Court.

Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (Advisory Opinion) (2017) 2 AfCLR 572

Application 001/2013, *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP)*

Advisory Opinion, 26 May 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA and MATUSSE

The Court held that it did not have jurisdiction to consider a request for an Advisory Opinion by an NGO which was not recognised by the African Union.

Jurisdiction (request advisory opinion, African organisation, 46-51, recognized by the African Union, 55, 60, 61, 65)

Separate opinion: BEN ACHOUR

Procedure (operative part, 7, 8)

Separate opinion: MATUSSE

Procedure (decision, 13, 15, 20)

I. Author of the request

1. The Request is submitted by the Socio-Economic Rights and Accountability Project (hereinafter referred to as "SERAP"), a non-profit Non-Governmental Organization (NGO), registered in 2004 and based in the Federal Republic of Nigeria. The primary objective of SERAP is the promotion of transparency and accountability in the public and private sectors, through human rights.

II. Subject matter of the Request

2. SERAP submits that its Request is based on Articles 2, 19, 21 and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the African Charter"), and Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"). It submits further that by virtue of the said Article 4 of the Protocol, the Court has jurisdiction to provide the advisory opinion requested.

3. It emerges from SERAP's request that the Court is required to give an Advisory opinion on the following:

"i. Whether SERAP is an African organization recognized by

the AU; and

ii. Whether extreme, systemic and widespread poverty is a violation of certain provisions of the African Charter, in particular, Article 2 which prohibits discrimination based on any other status."

4. SERAP argues that by virtue of the fact that it is legally registered in Nigeria, it is an African organization. It also maintains that it is an organization recognized by an organ of the African Union (AU), namely, the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission"), having been granted Observer Status by this organ. It argues further that:

> "on the basis of its observer status with the African Commission, and the fact that the African Commission is an organ of the African Union, it has the competence to request an opinion relating to any question within the scope of the African Charter on Human and Peoples' Rights and the African Union Constitutive Act".

5. SERAP also submits that "the non-specific and non-restrictive nature of the word 'organization' used in Article 4 of the Protocol suggests that a non-governmental organization like SERAP was contemplated by the drafters of the Protocol". It notes further that:

> "if the drafters wanted to limit the use of the words 'African Organization' only to 'African Inter-governmental Organizations', they would have specifically mentioned this in Article 4".

6. According to SERAP, the use of the term 'African organization' in Article 4 of the Protocol and repeated in the Rules of Procedure of the Court represents a conscious choice to leave the use for the Court to decide. SERAP submits that:

> "unlike Article 4, Article 5 [of the Protocol] makes specific reference to 'African Inter-governmental organizations' which further goes to show that the drafters' intention in Article 4 was to have a generic category of 'organization' that is broad and all-encompassing to include organizations like SERAP. In fact, the phrase 'African organization' is used throughout the Rules of Court, and there is nothing in the Rules to suggest that the words have any restrictive meaning".

7. On the merits, SERAP relies on a number of UN instruments and reports to establish a relationship between poverty and human rights.

8. SERAP refers to a World Bank report, published in 2013[1] which indicates that the actual number of people living in poverty across Africa has risen in recent times, despite the increasing discovery of wealth and natural resources in many African States. According to SERAP, while the report notes a marginal decline in the overall number of people living in extreme poverty, it also provides proof that Africa still has the highest poverty rate in the world, with 47.5 percent of the population living on US$ 1.25 a day, which accounts for 30 percent of the world's poor.

9. SERAP argues that in the final report of the ex-United Nations Human Rights Commission, titled Human Rights and Extreme Poverty, Leandro Despouy[2] stated that poverty spreads and creates a vicious circle of poverty, noting that, the report speaks of extreme poverty as a state of severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information, and that it "depended not only on income but also on access to social services".

10. SERAP asserts further that these various initiatives were reflected in the recent work of the UN Human Rights Council, in view of the impact of poverty on human rights, and notes that in July 2012, the Special Rapporteur on Human Rights and Extreme Poverty, Magdalena Sepulveda Carmona, submitted her final report on the Guiding Principles on Extreme Poverty and Human Rights to the Human Rights Council, which Principles, according to SERAP, significantly underscores that poverty is not just an economic or developmental matter but also a crucial human rights issue, and that poverty is not an inevitable problem but something "created, enabled and perpetuated by acts and omissions of States and other economic actors".

11. On the definition of the term poverty, SERAP refers to the meaning espoused by the UN Committee on Economic, Social and Cultural Rights, which defines poverty as

> "a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of

1 See World Bank, 2013. 'Africa Development Indicators 2012/13'. (Washington, D.C: World Bank). Quoted by SERAP in its submission received at the Registry on 29 January 2016.

2 Chairman of the United Nations Human Rights Commission, March 2001 – March 2002.

living".[3]

12. SERAP therefore submits that there is a strong relationship between poverty, under-development and lack of respect for human rights guaranteed under the African Charter, noting that this proposition is buttressed by the consensus reached at the World Conference on Human Rights in Vienna in 1993, that extreme poverty and social exclusion should be regarded as violations of human dignity and human rights.

III. Procedure

13. The Request was received at the Registry of the Court on 14 March 2013.

14. By a letter dated 10 June 2013, the Registrar enquired from the African Commission whether the subject matter of the Request relates to a matter pending before the African Commission.

15. By a letter dated 25 June 2013, the African Commission confirmed that the subject matter of the Request does not relate to any matter pending before it.

16. By separate letters, all dated 3 July 2013, the Registry transmitted copies of the Request to the African Commission as well as to Member States of the AU, through the Chairperson of the African Union Commission (AUC); and at its 30th Ordinary Session held from 16 to 27 September 2013, the Court decided to invite the Member States to submit written observations on the Request within 90 days.

17. On 12 August 2013, the Registry received from the Centre for Human Rights, University of Pretoria (hereinafter referred to as "the Centre"), a request for leave to submit an amicus curiae brief on the Request. The Court granted leave to the Centre to act as amicus curiae.

18. On 24 September 2014, the Registry notified Member States and interested parties of the expiry of the time limit prescribed for them to submit their observations, and by letter of the same date, the Registry requested the African Union Commission to transmit to it an official list of organizations that have observer status with the AU.

19. On 13 January 2015, the AUC informed the Court that its records indicate that SERAP is not accredited to the African Union nor has it signed any Memorandum of Understanding with the AUC/Union.

20. At its 38th Ordinary Session held from 31 August to 18 September

3 See SERAP'S submissions of 12 January 2016, citing General Comment No. 8 of the UN Committee on Economic, Social and Cultural Rights 'substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, Statement adopted by the Committee on 4 May 2001. UN Doc E/C. 12/2001/10.

2015, the Court requested SERAP to make submissions on the merits of the Request.

21. On 29 January 2016, the Court received SERAP's submission on the merits of the Request, and by a letter dated 16 February 2016, the submission was transmitted to Member States of the African Union which were requested to make observations thereon, if they so wished, within ninety (90) days of receipt of the notification.

22. Between 5 May and 29 June 2016, the Court received written submissions on the Request from the Republic of Zambia, the Federal Republic of Nigeria, the Republic of Uganda, the Republic of Cape Verde, Burkina Faso and the Republic of Burundi.

IV. Jurisdiction of the Court

A. The position of SERAP

23. Paragraphs 2 to 5 above reflect the submissions of SERAP on the jurisdiction of the Court.

B. Observations from Member States[4]

24. Six (6) Member States of the African Union submitted written observations, some touching on the jurisdiction of the Court. The States are:

i. Republic of Uganda;[5]
ii. Republic of Zambia;[6]
iii. Federal Republic of Nigeria;[7]
iv. Republic of Cape Verde;[8]
v. Burkina Faso;[9] and
vi. Republic of Burundi.[10]

4 No observations were received from AU Organs.

5 On 25 June 2014.

6 On 18 February 2014.

7 On 28 March 2014.

8 On 29 July 2014.

9 On 22 September 2014.

10 On 1 June 2016.

i. Observations of the Republic of Uganda

25. In its observations as to whether SERAP is an African Organization within the meaning of Article 4 of the Protocol, the Republic of Uganda notes that "the … author of the Request [that is, SERAP], does not qualify as an intergovernmental organization", and prays the Court to "disallow the Request".

26. On the question as to whether the African Court has jurisdiction to issue advisory opinion on the Request, Uganda argues that:

> "the Court in the instant case is not vested with jurisdiction to hear this matter. This submission is buttressed by the provision in Rule 26 of the Rules of Court. We invite the Court to find that the matter before it needs interpretation of both law and fact. Whereas, the Articles are self-explanatory, the Applicant, with due respect, did not show how it has been aggrieved or how the Charter has been violated. For these reasons, the Court is implored to find that there is no need for an Advisory Opinion and thus disallow the request".

ii. Observations of the Republic of Zambia

27. In its observations, the Republic of Zambia submits that in considering the Request by SERAP, the Court must first determine whether or not SERAP is entitled to bring a request before it in light of the provisions of Article 4(1) of the Protocol and Rule 68(1) of the Rules. Zambia concludes that:

> "SERAP falls within the category of institutions permitted to request advisory opinion of the African Court on Human and Peoples' Rights, as per Article 4(1) of the Protocol and Rule 68(1) of the Rules of Court, as it appears on the list of civil society organizations which have been granted observer status by the [African Union Commission][11] under the auspices of the AU. This fact implies recognition by the AU. Consequently, SERAP has, for purposes of requesting for advisory opinions of the Court, the requisite legal standing".

iii. Observations of the Federal Republic of Nigeria

28. The Federal Republic of Nigeria submits that SERAP is not an African Organization, adding that "there is a clear distinction between the AU and an organ of the AU. Recognition by an organ of the AU is not the same as recognition by the AU."

11 One may assume that the Republic of Zambia must have been referring here to the African Commission on Human and Peoples' Rights.

29. On SERAP's contention that its Request for Advisory Opinion is not subject to the provisions of Article 34(6) of the Protocol, Nigeria argues that "Article 34(6) has effectively barred the Court from entertaining the request from SERAP, being an NGO registered in Nigeria."

iv. Observations of the Republic of Cape Verde

30. In its observations, the Republic of Cape Verde argues that the Request may, *à priori,* raise the issue as to SERAP's legitimacy to make such a Request before the Court, and submits that:

> "… the *exposé* appended to the Request does effectively indicate that SERAP is a Nigerian NGO whose aim is to promote transparency and accountability in the public and private sectors through human rights. It would appear, then, SERAP is an African organization, and thus precludes the provisions of Article 4, which stipulates that it must be an intergovernmental organization."

31. With respect to the issue as to whether SERAP is recognized by the AU, Cape Verde observes that:

> "SERAP enjoys observer status before the African Commission on Human and Peoples' Rights. … It would appear reasonable to us to conclude that SERAP is recognized by the AU by virtue of having been granted observer status before an organ established by the Union."

v. *Observations of Burkina Faso and Burundi*

32. Burkina Faso and Burundi did not address the question of the jurisdiction of the Court.

V. Observations of the *amicus curiae*: the Centre for Human Rights, University of Pretoria

33. The Centre, acting as *amicus curiae*, and relying on Rule 45(1) of the Rules of Court, argues that

> "the ordinary meaning of the phrase 'any African organization recognized by the OAU', read within the textual context of the Court Protocol as a whole, and in accordance with the object and purpose of the Court's Protocol, supports an interpretation of this phrase that would include NGOs.

34. The Centre argues that the preparatory documents *(travaux preparatoires)* of the Protocol "suggest that the use of the phrase *any African Organization* was understood in its ordinary meaning by all

participants during the drafting of the Protocol",[12] and that the use of the word "*any*" in the phrase "any African Organization" in Article 4(1) of the Protocol also indicates an intention to create wider access to the Court.

35. According to the Centre, the Court has jurisdiction to provide advisory opinions on the request of NGOs, such as SERAP, within the meaning of Article 4, and

> "this is because SERAP meets all the 3 requirements of the third category of entities that may request for advisory opinion from the Court, that is, 'any African organization recognized by the OAU'. First, by virtue of its geographical location in Africa, its predominantly African management and membership, as well as its thematic focus on African issues, it qualifies as 'African'. Second, that it qualifies as an 'organization' within the ordinary meaning and context of Article 4(1) of the Protocol. Third, SERAP 'is recognized by the AU', having enjoyed observer status with the African Commission since 2008".

36. The Centre concludes that SERAP is therefore "an African organization recognized by the African Union", and may consequently request for an advisory opinion from the Court pursuant to Article 4(1) of the Protocol.

VI. Position of the Court

37. In accordance with the provisions of Rule 39, read together with Rule 72 of the Rules, the Court will now decide whether it has jurisdiction to render an advisory opinion on the Request before it. These Rules provide as follows:

> Rule 39(1): The Court shall conduct preliminary examination of its jurisdiction…
>
> Rule 72: The Court shall apply, mutatis mutandis, the provisions of Part IV of these Rules to the extent that it deems them to be appropriate and acceptable.

A. Personal jurisdiction

38. To determine whether the Court has personal jurisdiction, the Court has to satisfy itself that SERAP is one of the entities contemplated under Article 4 of the Protocol, to request for Advisory Opinion.

12 International Commission of Jurists' additional Protocol, Article 28, to the African Charter on Human and Peoples' Rights, 5th workshop on NGO participation in the African Commission on Human and Peoples' Rights (28-30 November 1993) Addis Ababa, Ethiopia

39. Consideration of its jurisdiction will lead the Court to respond to the first issue raised by SERAP, relating to its capacity to seize the Court with a request for Advisory Opinion.

40. Article 4(1) of the Protocol provides that "At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments…".

41. It is not in dispute that SERAP does not fall under the first three categories mentioned in paragraph 39 above.[13] The Court will consequently dwell only on the fourth category, that is, whether SERAP is "an African organization recognized by the AU".

42. Consideration of the above expression requires clarification of the phrases used under Article 4(1) of the Protocol for the purpose of this opinion, namely: "African organization", and "recognized by the AU".

i. The notion of an African organisation

43. The Court notes that neither the Constitutive Act of the African Union nor the Charter nor the Protocol defines the term "African Organisation."

44. On the other hand, in the document titled the Criteria for granting observer status and for a system of accreditation within the AU,[14] the African Union defines an organisation as "a regional integration or international organisation, including sub-regional, regional or inter-African organisation that are not recognised as Regional Economic Communities". It defines an NGO as "an organisation at the sub-regional, regional or inter-African levels, as well as those in the Diaspora as may be defined by the Executive Council". This definition is restated in the Protocol on the Statute of the African Court of Justice and Human Rights which defines African Non-Governmental Organization as "Non-Governmental Organizations at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council".[15]

45. The Court observes from the foregoing paragraph that there is

13 The first three categories of entities entitled to request the Court for advisory opinion are: A Member State of the AU, the AU itself and AU organs.

14 EX.CL/195 (VII) Annex V, adopted by the 7th Ordinary Session of the Executive Council and endorsed by the 5th Ordinary Session of the Assembly held in Sirte, Libya, on 1-2 and 4-5 July 2005, respectively.

15 Protocol on the Statute of the African Court of Justice and Human Rights, Preamble paragraph 6.

still no definition of 'African Organization', but notes however that the term organization is defined.

46. The Court is of the view that the use of the term 'Organization' used in the abovementioned instruments and the expression 'African organization' in Article 4 of the Protocol cover both Inter-governmental and Non-governmental organizations.

47. The Court considers that had the drafters of the Protocol intended to limit the phrase 'African Organization', as used in Article 4 of the Protocol, only to African Inter-governmental Organizations, they would have specifically done so, as they did in Article 5 thereof relating to contentious matters. The Court is of the view that this was not an omission, but a deliberate formulation, aimed at giving wide access to the Court 'African organizations'; which interpretation is in keeping with the letter and spirit of Article 4, as well as the object and purpose of the African Charter.

48. In the light of the above, the Court is of the opinion that an organization can be considered 'African', with regards to NGOs, which are relevant in the present Request, if they are registered in an African State, has structures at the sub-regional, regional or continental level, or undertakes its activities beyond the territory where it is registered, as well as any organization in the Diaspora recognized as such by the African Union.

49. Applying the above definition of an African Organization to the instant matter, the Court notes that SERAP is an organization headquartered in an African country, and operating within that country, as well as at the sub-regional and continental levels. Article 2(a) of its Statute indicates that the objectives of SERAP are "to promote, protect and ensure respect for economic, social and cultural rights in Nigeria in accordance with the Nigerian Constitution, the African Charter on Human and Peoples' Rights, the International Covenant on Economic, Social and Cultural Rights, the Universal Declaration of Human Rights and other similar instruments". Article 3 of the same Statute describes the organization's working methods, which include, inter alia, "collaborate with the local and international organizations and agencies involved in the promotion and protection of human rights and the rule of law, and in particular, encourage a closely-knit and effective network of African human rights advocates and organizations".

50. In the exercise of its mandate, SERAP has brought cases, petitions and requests for advisory opinion before the ECOWAS Community Court of Justice, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, against a number of African countries, including, Nigeria, The Gambia and Libya.

51. It follows from the foregoing that SERAP operates not only in

Nigeria, but also within the West Africa region and the continent as a whole, and thus meets the description of an African organization within the meaning of Article 4 of the Protocol.

ii. The meaning of the expression "recognized by the African Union"

52. It has been argued by the Applicant and certain States as well as the *amicus curiae* that every NGO with observer status before any organ of the African Union, particularly the Commission, is automatically an organization recognized by the African Union within the meaning of Article 4(1) of the Protocol.

53. In the view of the Court, only African NGOs recognized by the African Union as an international organization with its own legal personality are covered by this Article, and may bring a request for Advisory Opinion before the Court. As a matter of fact, not only does Article 4(1) of the Protocol make a clear distinction between "the African Union" on the one hand, and "any organ of the African Union" on the other, but in fact, the African Union has developed a system of recognition of NGOs distinct from that of the Commission.

54. Pursuant to Article 4(1) of the Protocol, in determining the entities empowered to make a request for Advisory Opinion, the Protocol clearly establishes a distinction between the African Union and any organ of the African Union and targets the two separately. However, in describing the African organizations empowered to bring requests for Advisory Opinion before the Court, the same Protocol in the same provision makes reference only to organizations recognized by the African Union and says nothing about those recognized by any organ of the African Union. Had the authors of the Protocol wanted to also target African organizations recognized by any organ of the African Union, they would certainly not have hesitated to make this clear. In particular, had they wanted to target recognition by the Commission through the granting of observer status, they would have explicitly made mention of this as they did in Article 5 in which reference to observer status before the Commission is indicated *expressis verbis*, with respect to seizure of the Court in contentious matters.

55. Given the fact that the Member States of the African Union did not do so, one is obliged to conclude that they deliberately did not wish to include African organizations recognized by any organ of the African Union other than those mandated to engage directly with the

continental organization.[16]

56. In the instant case, the term "recognized by the African Union" cannot be understood as meaning "recognized by the African Commission on Human and Peoples Rights".

57. It is established that in the system of the continental organization, the granting of observer status to an NGO constitutes one of the forms of recognition of the latter.

58. With respect to the Commission, its Rules of Procedure of August 2010 provides in its Article 68 that observer status may be granted to an NGO operating in the field of human rights in Africa, enjoying the rights and discharging the duties as stipulated in a separate resolution. In effect, Resolution No. 33 on the Review of the Criteria for Granting and Enjoying Observer Status to Human Rights NGOs before the Commission adopted at its 25th Ordinary Session held from 26 April to 5 May 1999, spells out in its Annex, the criteria for granting such status, the procedure to be followed before the Commission and the rights and duties of the NGOs granted the status. It naturally specifies that it is the Commission which, as the case may be, grants, suspends or withdraws observer status from NGOs.

59. Furthermore, in Rules 32(3)(e) and 63(1), of its Rules of Procedure, the Commission itself makes a distinction between NGOs with observer status before it on the one hand, and the organizations recognized by the African Union, on the other, as regards the possibility for them to propose or add items for inclusion on the agenda of Ordinary Sessions of the Commission.

60. As regards the African Union *per se*, it has, separately, as an international organization also itself determined not only the criteria for granting observer status to NGOs but also the procedure to be followed and the competent organ in this regard. By its decision EX.CL 195 (VII), Annex V of 1 to 2 July 2005, the Executive Council of the African Union adopted the "Criteria for Granting Observer Status and for a System of Accreditation within the African Union", and this document was endorsed by the 5th Ordinary Session of the Assembly of Heads of State and Government of the African Union in July 2005.

61. On the granting of observer status to NGOs, the document spells out the applicable principles, the procedure for introducing the request as well as the rights and duties emanating from the status for the beneficiaries. It follows from the above, that a request for

16 This interpretation of the term "recognized by the African Union" as *per* Article 4(1) of the Protocol is founded on Article 31(1) of the Vienna Convention of 1969 on the Law of Treaties which states that *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".*

observer status must be submitted to the African Union Commission which then submits it to the Executive Council through the Permanent Representatives' Committee. It follows also that it is the Executive Council that is vested with power to grant, suspend or withdraw observer status from an NGO. The document underscores the fact that "the granting, suspension and withdrawal of observer status of an NGO, are the prerogative of the African Union and shall not be the subject of adjudication in any Court of Law or tribunal" (Section V6).

62. Given the fact that recognition is valid only if it emanates from the competent authority according to the internal rules of the international organization concerned, recognition by the Africa Union is valid only where the said recognition emanates from the competent organ, namely in this case, the Executive Council of the African Union.

63. It follows from the aforesaid distinction between the two systems that NGOs with observer status before the Commission do not automatically have observer status before the African Union and vice versa. The two statuses are therefore not interchangeable and there is no system of equivalence between the two.

64. Consequently, it is clear that the authors of the Protocol intended that requests for Advisory Opinion from NGOs be limited to those with observer status before or a Memorandum of Understanding with the African Union.

65. Accordingly, since SERAP does not have observer status before or a Memorandum of Understanding with the African Union, as referred to in paragraph 61 above, it is not recognised by the latter, and therefore it is not entitled to bring a request for advisory opinion before this Court.

66. For these reasons, the Court, unanimously:

Declares that it does not have personal jurisdiction to give an opinion on the present Request.

Separate opinion: BEN ACHOUR

1. I am by and large in agreement with the reasoning and justifications developed by the Court in ruling that the Applicant for Advisory Opinion (SERAP) "even if it operates not only in Nigeria, but also within the West Africa region and the continent as a whole, and thus meets the description of an African organization within the

meaning of Article 4 of the Protocol" (paragraph 51); but that SERAP does not have observer status before the African Union and having not signed Memorandum of Understanding with the African Union... it is not recognised by the latter, and therefore it is not entitled to bring a request for Advisory Opinion before this Court" (paragraph 65).

2. The Court had no choice and could not have done otherwise. Its hands were 'tied' by the explicit terms of Article 4(1) of its Protocol[1] and by the restrictive practice of the Union in granting observer status to NGOs.

3. It would have been desirable that referrals to the Court in advisory matters should be more open and that the conditions imposed on NGOs should be less rigid. The Court had expressed a similar wish in its Advisory Opinion of 5 December 2014 *(African Committee of Experts on the Rights and Welfare of the Child).* In paragraph 94 of that Opinion, the Court further "notes that the action by the policy organs (insertion of the Committee of Experts among the bodies that could refer cases to the Court in the 2008 Protocol merging the African Court on Human and Peoples' Rights and the Court of Justice of the AU) confirms the view of the Court that it is highly desirable that the Committee should have access to the Court". In the same vein, the Court affirms in point 3 (iii) of the operative section of its Opinion that "the Court is of the view that it is highly desirable that the Committee is given direct access to the Court under Article 5(1) of the Protocol."

4. However, my agreement with the reasons given by the Court in the SERAP Opinion does not amount to my agreement with the operative section of the Opinion.

5. In my opinion, the Court gave its (negative) Opinion on the first of the two questions posed by SERAP in its request for an opinion, namely, "whether SERAP is an African organization recognized by the AU".

6. It is true, as the Court quite rightly notes, that this question boils down to examination of the Court's jurisdiction to give an Advisory Opinion. In paragraph 39, the Court affirms that "consideration of Its jurisdiction will lead the Court to respond to the first question raised by SERAP relating to its capacity to seize the Court with a request for Advisory Opinion".

7. Logically, the operative section of the Opinion should have been worded differently from a rigid 'declaration' of lack of jurisdiction *ratione*

1 "At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission"

personae.

8. In my view, the Court should have concluded its Opinion by reaffirming what it had developed in the reasons, namely that:

i. SERAP is an African organization within the meaning of Article 4(1) of the Protocol

ii. SERAP is not recognized by AU

iii. The Court cannot therefore answer the second question posed by SERAP as to whether extreme, systemic and widespread poverty is a violation of certain provisions of the African Charter, in particular, Article 2 which prohibits discrimination based on "any other status," in the absence of the Applicant's capacity to seek an advisory Opinion.

9. This position is firmly grounded in the jurisprudence of the Permanent Court of International Justice (PCIJ) and in that of its heiress, the International Court of Justice (ICJ).

10. With regard to PCIJ, the august Court had to reject a request on one occasion. The Opinion concerned is that of 23 July 1923 in the matter of the *Status of Eastern Carelia.*[2] In that Opinion, the Court does not declare that it has no jurisdiction. It explains that its discretionary refusal to give the requested Advisory Opinion was motivated by the following factors:

1. the fact that the question raised in the request for an Advisory Opinion related to a dispute between two States (Finland and Russia);
2. the fact that answering the question was tantamount to settling that dispute;
3. the fact that one of the States Parties (Russia) to the dispute in respect of which an Advisory Opinion was sought, was neither a party to the Statute of the PCIJ nor, at that time, a member of the League of Nations, and had refused to give his consent;
4. the fact that the League of Nations did not have jurisdiction to deal with a dispute involving non-member States which refused its intervention on the grounds of the fundamental principle that no State should be obliged to submit its disputes with other States, either for mediation or arbitration, or for any other method of peaceful settlement, without its consent;
5. the fact that, following Russia's refusal, the Court could not establish the facts on equal terms between the Parties, and was therefore faced with the concrete lack of "material information necessary to enable it to pass judgment on the question of fact" raised in the request for Advisory Opinion.

11. The ICJ, for its part, has constantly held that "in principle, a

2 *PCIJ, Advisory Opinion,* Status of Eastern Carelia, 23 July 1923, Serie B No. 5

request for an Opinion must not be refused"[3] and that only compelling reasons could lead the Court to such a refusal of a request for an Advisory Opinion ".[4] The compelling reasons relied on by the Court include the non-juridical[5] nature of the questions, matters which concern cases essentially within the ambit of national jurisdiction,[6] or indeed questions which should lead to a "final determination of a dispute",[7] etc.

12. Like PCIJ, the ICJ refused on only one occasion to respond to a request for an Advisory Opinion. That was the Opinion on the request by the World Health Organization (WHO) on the *Legality of the use of nuclear weapons in armed conflict*.[8] In that request, WHO prayed the Court to rule on the following question: "given the effects of nuclear weapons on health and the environment, would their use by a State in the course of a war or other conflict constitute a breach of its obligations under international law, including the WHO Constitution?." Referring to Article 2 of the Constitution of WHO[9] which lists the 22 functions conferred on the Organization, the Court notes that "none of these points expressly concerns the legality of any activity dangerous to health; and none of the functions of WHO is predicated on the legality of the situations which require it to act "(paragraph 20). Later on, the Court adds, in relation to Article 2 of the Constitution of WHO concerning the Organization's means of achieving its aims, that " the provisions of Article 2 may be read as empowering the organization to address the health effects of the use of nuclear weapons or any other hazardous activity and to take preventive measures to protect the health of populations in the event such weapons are used or such activity is carried out (paragraph 21). However, the Court notes that "the question posed in the present case, relates not to the effects of the use of nuclear weapons on health, but to the legality of the use of such

3 ICJ, Advisory Opinion of 3 March 1950, Competence of the General Assembly of the Admission of a State to the United Nations, Rec. 1950. P. 71.

4 *ICJ, Advisory Opinion of 8 July 1996,* Legality of the Threat or Use of Nuclear Weapon, Rec. P. *235 para. 14, Advisory Opinion of 9 July 2004,* Legal Consequence of the Construction of a Wall in the Occupied Palestinian Territory, *Rec. 2004, p. 156 - 157,* para. 44.

5 ICJ, Advisory Opinion of 20 July 1962, *Certain Expenses of the United Nations,* Rec. 1962, p. 1155.

6 ICJ, Advisory Opinion of 3 March 1950 n38, p. 70.

7 *ICJ, Advisory Opinion of 15 December 1989,* Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations.

8 ICJ, Advisory Opinion of 8 July 1996 n39.

9 The WHO Constitution was adopted and opened for signature on 22 July 1946; it entered into force on 7 April 1948 and was amended in 1960, 1975, 1977, 1948 and 1994.

weapons, given their effects on health and the environment. Whatever the said effects, the competence of the WHO to address them is not dependent on the legality of the acts which produce them. Accordingly, *it does not appear to the Court that the provisions of Article 2 of the WHO Constitution, interpreted in accordance with the above criteria, can be understood as conferring jurisdiction on the Organization to address the legality of the use of nuclear weapons and, hence, to put a question to the Court "*(paragraph 21)[10]. And the Court thus held in conclusion that "Having reached the conclusion that the request for Advisory Opinion submitted by WHO does not concern a question which arises (within the scope of the activities" of that organization in accordance with paragraph 2 of Article 96 of the Charter, the Court finds that an essential condition for founding its jurisdiction in the present case is lacking and that it cannot therefore give the Opinion requested. Consequently, the Court does not have to examine the arguments which have been developed before it concerning the exercise of its discretion to give an Opinion"(paragraph 31).

13. Thus, like this honourable Court, the ICJ held that it had no jurisdiction to give the Opinion. However, in the operative part of the Opinion, the ICJ indicated that "it cannot give[11] the advisory Opinion requested of it under the World Health Assembly resolution WHA46.40 of 14 May 1993 ". This is what the African Court should have said with respect to SERAP.

14. In conclusion, one can only express the hope that the African Union would amend Article 4(1) of the Protocol with a view to opening up possibilities for referrals to African Court and relaxing the conditions required of NGOs to bring their request for advisory Opinion within the ambit of the Court's jurisdiction; or, the way of amendment being uncertain, to extend its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

15. Finally, it is noteworthy that despite their rejection of the requests for Opinion in the case of *Eastern Karelia* and in the *Legality of the use of nuclear weapons,* both PCIJ and ICJ did not hesitate to give a title to their two decisions denying an Advisory Opinion. It is in effect the nature of the request which determines the nature of the decision and its characterization, and not the response to the request.[12]

10 Emphasis not in the text.

11 *Idem*.

12 See on the contrary, the Opinion of Judge Matusse on this Opinion.

Separate opinion: MATUSSE

1. The Court, unanimously, held that it did not have jurisdiction *ratione personae* to issue the Advisory Opinion requested by SERAP, yet names the procedure by which it arrived at that conclusion an "Advisory Opinion", a view that I do not endorse. I, hereby, set my separate opinion on record on the following grounds:

I. The form of the Court's acts

2. The legal instruments governing the Court, namely, the Protocol[1] and the Rules of the Court are silent regarding the designation of each of the different forms that its acts may take. That notwithstanding, the practice that has become the norm is the use of the following terms: "Order", "Ruling", "Decision" and "Judgment".

3. When adopting the terms hereinabove, the Court has not been consistent in its practice in that it has used the same expression to designate different things at different times, as demonstrated herein below.

II. The practice of the Court

4. In the Requests for Advisory Opinion Nos. 002/2011,[2] 001/2012[3] and 001/2014,[4] the Court used the expression "Order" to designate the act through which it struck out the request due to the fact that the applicants had either given up on them or had lost interest in pursuing the matter.

5. In the Request for Advisory Opinion No. 002/2012,[5] the Court used the expression "Order" to hold that it was not going to entertain the request due to the fact that the same was pending before the African Commission on Human and People's Rights (the Commission).

1 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

2 Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Jamahiriya, Judgement of 30 March 2012.

3 Request for Advisory Opinion by The Socio-Economic Rights & Accountability Project (SERAP), "Order" of 15 March 2013.

4 Request No 001/2014 - Coalition on the International Criminal Court Ltd/gte(ciccn),Legal Defence & Assistance Project Ltd/gte (LEDAP), Civil Resource Development & Documentation Center (Cirddoc) and Women Advocates Documentation Center Ltd/gte(WARDC), "Order" of 05 June 2015.

5 Request No 002/2012 - The Pan African Lawyers' Union (PALU) and Southern African Litigation Centre (SALC), "Order" of 15 March 2013.

6. In the Request for Advisory Opinion No. 001/2015,[6] the Court used the expression "Order" to strike out the request for failure, on the part of the author, to specify the legal provision of the Charter or of any other human rights instrument in relation to which the Court's Opinion was sought, as provided for under Rule 68(2) of the Court's Rules.

7. In the Request for Advisory Opinion No. 002/2013,[7] the Court pronounced itself on the merits of the request by means of an "Advisory Opinion".

8. In other words, in instances where the Court did not get to the examination of the merits of the request and decided to strike it out due to either lack of interest on the part of the author or to failure to comply with the requirements laid down in Article 68, the Court has preferred the term "Order".

9. In contentious matters, the Court issued an "Order" to declare that it lacked jurisdiction to examine the matter,[8] to hold that it was to continue examining the matter,[9] to decide that it was going to merge the applications[10] and to strike the application due to lack of interest on the part of the applicant to pursue the matter.[11]

10. Still in respect to contentious matters, the Court used a Judgment to declare that some applications were inadmissible,[12] and to declare that it lacked jurisdiction.[13] The expression "Order" is also used in most

6 Request No 001/2015 - Coalition on International Criminal Court LTD/GTE, "Order" of 29 November 2015.

7 Request No 002/2013 - The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights, "Order" of 05 December 2014.

8 App. No. 019/2015 – *Femi Falana v African Commission on Human and Peoples' Rights*, "Order" of 20 November 2015.

9 App. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 03 June 2016.

10 App. Nos. 009&011/2011 – *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, "Order" of 22 September 2011.

11 App. No. 002/2015 – *Collectif Des Anciens Travailleurs du Laboratoire (ALS) v Republic of Mali*, "Order" of 05 September 2016.

12 App. No. 003/2012 – *Peter Joseph Chacha v United Republic of Tanzania*, "Ruling" of 28 March 2014; App. No. 003/2011 – *Urban Mkandawire v Republic of Malawi*, "Judgment" of 21 June 2013.

13 App. No 001/2008: *Michelot Yogogombaye v Republic of Senegal*, "Judgment" of 15 December 2009; App: No. 001/2011 – *Femi Falana v African Union*, "Judgement" of 26 June 2012.

of the Orders for Provisional Measures that the Court has issued.[14]
11. The Court has extensively used the expression "Decision" to declare that it lacked jurisdiction in contentious matters.[15]

III. Analysis

12. In the instant case, the Court found that it lacks jurisdiction *ratione personae*, and yet it designated the act by which it arrived at that conclusion an "Advisory Opinion", which looks, at least, contradictory.
13. For me, the Court either has jurisdiction hence moves on to issue the Advisory Opinion, or it lacks jurisdiction, in which case it issues no Advisory Opinion.
14. My fellow judges might have been influenced by the fact that, in its Request, SERAP asks the Court to take a position with regard to its *locus standi* to seize the Court in terms of Article 4(1) of the Protocol. Meanwhile, this is an issue that would, in any case, be examined by the Court, since, according to Article 39(1) of the Rules, applicable by virtue of Article 72 of the Rules, "[The] Court shall *conduct preliminary examination* of its jurisdiction and the admissibility of the application ..." (my emphasis), before it can adjudicate on any case brought before it.
15. In my view, Article 39(1) of the Rules requires the Court to conduct preliminary examination in order to ascertain its jurisdiction and the admissibility of the application, a proceeding that under no circumstance can be termed, *per se*, an "Advisory Opinion", even if, in instances where the Court has jurisdiction, the decision on jurisdiction and admissibility becomes part of the Advisory Opinion issued, as it was the case in the Request for Advisory Opinion No. 002/2013.

14 Namely: APP. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 24 March 2017. App. No. 004/2013 – *Lohe Issa Konate v Burkina Faso*, "Order" of 04 October 2013; App. No. 002/2013 – *The African Commission on Human and Peoples' Rights v Libya*, "Order" of 15 March 2013.

15 App. No. 002/2011 – *Soufiane Ababou v Peoples' Democratic Republic of Algeria,* "Decision" of 16 June 2011; App. No. 005/2011 – *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, "Decision" of 16 June 2011; App. No. 006/2011 – *Association des Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d' Ivoire*, "Decision" of 16 June 2011; App. No. 007/2011 – *Youssef Ababou v Kingdom of Morocco*, "Decision" of 02 September 2011; App. No. 008/2011 – *Ekollo M. Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, "Decision" of 23 September 2011; App. No. 010/2011 – *Efoua Mbozo'o Samuel v Pan African Parliament*, "Decision" of 30 September 2011; App. No. 012/2011 – *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Republic of Gabon*, "Decision" of 15 December 2011; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v Republic of South Africa,* «Decision» of 30 March 2013; App. No. 004/2012 – *Emmanuel Joseph Uko and Others v Republic of South Africa*, "Decision" of 30 Marche 2012; App. No. 005/2012 – *Amir Adam Timan v The Republic of Sudan*, "Decision" of 30 March 2012.

16. It is, therefore, my understanding that preliminary examination, as envisaged under Article 39(1) of the Rules, is clearly different from issuing an Advisory Opinion, even though, sometimes, may form part of the issued Advisory Opinion.

17. In other words, when the Court, as a result of the preliminary examination so conducted holds that it has no jurisdiction, by no means it can still term the act by which it arrives to that conclusion an Advisory Opinion.

18. In terms of comparative law, when the Inter-American Court of Human Rights (TIDH) decides not to issue an Advisory Opinion, it adopts a form of "Resolución"[16] in lieu of an "Opinión Consultiva" (*Advisory Opinion*). Even when issuing the "Opinión Consultiva", it makes a clear separation between the section pertaining to its jurisdiction (wherein it ascertains whether or not it has jurisdiction vis-à-vis the request for advisory opinion) from the section pertaining to the Advisory Opinion itself (wherein it gives its opinion on the issue it has been seized with, in the event it finds that it has jurisdiction to issue the Advisory Opinion).[17]

19. The Permanent Court of International Justice (PCIJ), in the Request for Advisory Opinion submitted by the Council of the League of Nations in the case of *Russia v Finland*, implicitly[18] used the expression "Advisory Opinion",[19] when it found that it could issue the Advisory Opinion due to Russia's *ad hoc* refusal to accept its jurisdiction. However, this precedent is an incongruous and isolated dating back a century, and it cannot inform the instant case. In actual fact, this precedent has never informed any of the approaches adopted by the Court in its previous decisions on Requests for Advisory Opinion.

IV. My position

20. I am of the opinion that, for the reasons expounded above,

16 Resolución de la corte interamericana de derechos humanos de 23 de junio de 2016, solicitud de opinión consultiva presentada por el secretario general de la organización de los estados americanos; resolución de la corte interamericana de derechos humanos de 27 de enero de 2009, solicitud de opinión consultiva presentada por la comisión interamericana de derechos humanos.

17 Advisory Opinion Oc-21/14 of August 19, 2014 Requested by The Argentine Republic, The Federative Republic Of Brazil, The Republic Of Paraguay And The Oriental Republic Of Uruguay; Advisory Opinion Oc-20/09 Of September 29, 2009 Requested By The Republic Of Argentina.

18 Why not termed formally as such. Only at the end of the provision is "(...) Present Avis ... (…)" mentioned.

19 Decision of the Third Ordinary Session of 23 July 1923, Dossier F. v V Rôle III. 3, available at http://www.icj-cij.org/pcij/serie_B/B_05/Statut_de_la_Carelie_orientale_Avis_consultatif.pdf , accessed 24.05.2017.

the Court should use the term "Decision" to name the act by which it conducts preliminary examination of its jurisdiction and the admissibility of request for Advisory Opinion, in light of Article 39 of the Rules of the Court. Indeed, the recurring practice of using the term "Decision" when it declares its lack of jurisdiction to adjudicate on contentious matters, is perfectly applicable in matters for advisory opinion. This is because Article 72 of the Rules requires that the Court applies *mutatis mutandis* the procedure for contentious matters to procedure relating advisory opinions.

21. The use of the term "Decision" would avoid giving the wrong impression that the Court issues an Advisory Opinion, even when it has issued none. On the other hand, this Court would benefit by remaining consistent in using appropriate terms for its acts, and this would ensure that it is in line with its well-established jurisprudence wherein it uses the term "Decision" when it determines jurisdiction on contentious matters.

Request for Advisory Opinion by Rencontre Africaine pour la Défense des Droits de l'Homme (Advisory Opinion) (2017) 2 AfCLR 594

Application 002/2014, *Request for Advisory Opinion by Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO)*

Advisory Opinion, 28 September 2017. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA and MATUSSE

The Court held that it did not have jurisdiction to consider a request for an Advisory Opinion by an NGO which was not recognised by the African Union.

Jurisdiction (request advisory opinion, African organisation, 30-32, recognized by the African Union, 36, 37)

Separate opinion: BEN ACHOUR

Jurisdiction (request for advisory opinion, 8, 9)

Separate opinion: MATUSSE

Procedure (decision, 13, 15, 20)

I. The Applicant

1. This Request dated 18 June 2014, was filed at the Registry on 19 June 2014 by *Rencontre Africain pour la Défense des Droits de L'homme* (hereinafter referred to as "the Applicant").

2. The Applicant states that it is a Non-Governmental Human Rights Organisation founded in 1990 in Senegal by Africans of different origins, whose main mission is to "promote, defend and protect human rights in Africa and across the world."

II. Circumstances and subject of the request

3. The Applicant avers that as part of fulfilling its mission, it is "… seized whenever a legal fact, where the violation of human rights and certain provisions of national, regional and international legal instruments occurs. This is the case with unconstitutional changes of government and human rights violations in a State Party to regional and international instruments, such as violations of freedom of movement, freedom of expression, demonstration, meeting and participation, attacks on the independence of the judiciary, torture, crimes against humanity, violations of international law and international humanitarian law." Through this request for Advisory Opinion, the Applicant is of the

view, aims at achieving greater "... efficiency in its actions and ensure better information of the victims..."

4. The Request for Advisory Opinion is based on three key questions:

5. Firstly, the Applicant requests the Court for clarification as to whether, in light of Article 13 of the African Charter on Human and Peoples' Rights (herein-after referred to as "the Charter"); Article 23 of the African Charter on Democracy, Elections and Governance (hereinafter referred to as "the African Charter on Democracy); Article 4 of the Constitutive Act of the African Union; and Article 25 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR"):

a. It is possible to institute legal action before the Commission or the Court against a State following an unconstitutional change of government, especially since no national court has the jurisdiction to examine such an action.

b. If so, which entity would be entitled to initiate such action; the citizens of the country concerned, or any African Non-Governmental human rights Organisation recognized by the African Union and within what time limit?

c. If, following an unconstitutional change of government, presidential elections are organized, will this new factor obviate any action against the State under accusation for the aforesaid change of government?

6. Secondly, the Applicant prays the Court to clarify:

a. The meaning of the expression "serious or massive violations of human and peoples' rights", referred to in Article 58(1) of the Charter;

b. Whether the foregoing provision involves only the direct responsibility of the State or whether it also applies to the State's indirect responsibility, where the violations in question stem from acts committed by pro-government militia or from the inaction of the State; and

c. What criteria should apply in determining the emergency situation referred to in Article 58(3) of the Charter.

7. Thirdly, the Applicant prays the Court to provide clarification on the question as to whether the fairness and impartiality of the justice system as contemplated by Article 7 of the Charter, Article 14 of the ICCPR and the Commission Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003) are compatible with the expression of political support to government by the judiciary or by its senior officers, particularly when such support is expressed collectively (through demonstration) or in the discharge of the judicial function

through various forms of zealous actions, such as the establishment of special chambers to try opposition figures, or the refusal to investigate complaints brought by persons suspected of being hostile to the ruling government.

III. Procedure before the Court

8. The Request for Advisory Opinion dated 18 June 2014, was received at the Registry on 19 June 2014.

9. By a letter dated 23 September 2014, the Registry notified the Applicant of the registration of its Request for Advisory Opinion and urging it to comply with Rule 68 of the Rules of Court (hereinafter referred to as "the Rules") and to resubmit the same within 30 days, if it so wishes.

10. On 8 November 2014, the Applicant filed an amended Request.

11. By a letter dated 17 March 2015, the Registry, pursuant to the provisions of Rule 68 (3) of the Rules, enquired from the Commission whether the subject of the Request relates to any matter pending before it.

12. On 8 June 2015, the Registry transmitted the Request and the annexes to the entities listed under Rule 69 of the Rules.

13. By an email of 13 May 2015, the Commission confirmed that the subject of the Request does not relate to any matter pending before it.

14. At its 38th Ordinary Session held from 31 August to 9 September 2015, pursuant to Rule 70 of the Rules**,** the Court decided to extend to 10 October, 2015, the period initially set for submission of written pleadings by the entities listed in Rule 69 of the Rules.

15. By a letter dated 25 September 2015, the Registry notified the entities in Rule 69 of the Rules that pursuant to Rule 70 of the Rules**,** the Court had extended to 10 October 2015 the period initially set for submission of written pleadings.

16. At its 39th Ordinary Session held from 9 to 22 November 2015, the Court decided, on its own, to extend to 31 January 2016, the period for submission of written pleadings by the entities referred to in Rule 69 of the Rules.

17. By a letter dated 5 January 2016, the Registry notified the entities listed in Rule 69 of the Rules that period for submission of written pleadings has been extended to 15 February 2016.

18. On 30 April 2016, the Registry received written submissions from the Republic of Kenya.

19. Since the Republic of Kenya filed its written observations out of time (see paragraphs 17 and 18 of the instant Opinion), the Court decided, *suo motu,* to accept the said observations in terms of Rules 70(1) of its Rules.

20. At its 41st Ordinary Session, held from 16 May to 3 June 2016, the Court decided to close the procedure for the filing of written submissions.

IV. Jurisdiction of the Court

21. In accordance with the provisions of Rule 39, which is applied by virtue of Rule 72 of the Rules, "The Court shall apply, *mutatis mutandis*, the provisions of Part IV of these Rules to the extent that it deems them to be appropriate and acceptable".
22. In accordance with Rule 39 of the Rules, "The Court shall conduct preliminary examination of its jurisdiction…"
23. From the provisions of these Rules, the Court must determine whether it has jurisdiction to give an opinion on the Request before it.
24. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Applicant is amongst the entities entitled to request for advisory opinion under 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").

IV. Applicant's arguments

25. The Applicant contends that, under Article 4 of the Protocol and Rules 26(b) and 68 of its Rules, the Court has jurisdiction *ratione personae* to examine the Request as it is filed by an organisation recognized by the African Union by virtue of its Observer Status before the Commission.

A. Submissions of the Republic of Kenya

26. The Republic of Kenya, recalling the provisions of Articles 5(3) and 34(6) of the Protocol, holds that seizure of the Court by individuals and Non-Governmental Organisations is contemplated by the texts, and as such, does not contest the Applicant's entitlement to bring a Request for Advisory Opinion before the Court.

B. The position of the Court

27. Article 4(1) of the Protocol provides that "At the request of a Member State of the [African Union], the AU], any of its organs, or any African organization recognised by the [AU], the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments…"

28. The fact that the NGO which filed the request does not fall within the first three categories within the meaning of Article 4(1) of the Protocol is not contested.

29. The first question which arises is whether the NGO is of the fourth category, that is, whether it is an "African organisation" within the meaning of Article 4(1) of the Protocol.

30. On this issue, the Court has, in its Advisory Opinion Socio-Economic Rights and Accountability Project (SERAP) established that the term "organisation" used in Article 4(1) of the Protocol covers both non-governmental organisations and inter-governmental organisations.[1]

31. As regards the appellation "African", the Court has established 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.[2]

32. The Court notes that the Applicant is registered in Senegal and with its Observer Status before the Commission, is entitled to carry out its activities beyond the country in which it is registered. The Court concludes that the Applicant is an "African Organisation" in terms of Article 4(1) of the Protocol.

33. The second question that follows is whether the Applicant is recognised by the African Union.

34. The Court notes that the Applicant has relied on its Observer Status before the Commission to contend that it is recognised by the African Union.

35. In this respect, the Court has, in the afore-mentioned SERAP Advisory Opinion, indicated that Observer Status before any African Union organ does not amount to recognition by the latter. It has thus established that only the NGOs recognised by the African Union itself are covered by Article 4(1) of the Protocol.[3]

36. The Court has further established that recognition of NGOs by the African Union is through the granting of Observer Status or the signing of a Memorandum of Understanding and Cooperation between the African Union and those NGOs.[4]

37. In the instant case, the Applicant has not claimed and has not provided proof as to its Observer Status before the African Union or

1 Request for Advisory Opinion by *Socio-Economic Rights and Accountability Project* (SERAP), Request No. 001/2013, Advisory Opinion of 26 May 2017, Para 46.

2 *Idem*, para 48.

3 *Idem*, para 53.

4 *Idem*, para 64.

that it has signed any Memorandum of Understanding with the Union.

38. From the foregoing, the Court finds that, although the Applicant is an African organisation within the meaning of Article 4(1) of the Protocol, it lacks the second essential condition required by this provision as a basis for the Court's jurisdiction, namely, to be "recognised by the African Union".

39. For the above reasons,

The Court

Unanimously:

i. *Finds* that it is not able to give the Advisory Opinion which was requested of it.

Separate opinion: BEN ACHOUR

1. The four opinions rendered on 28 September 2017, reproduces *in extenso* the grounds adduced in the SERAP Opinion of 26 May 2017. That individual opinion merely affirms the opinion we had expressed in the SERAP Opinion.

2. The Court once again finds itself unable to address the four requests for Advisory Opinion and is constrained to not respond to the legal issues of utmost significance raised by the NGOs[1] in regard to the interpretation of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Protocol to the Charter establishing the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), or other relevant human rights instruments in Africa such as the African Charter on Democracy, Elections and Governance or the Protocol to the Charter on the Rights of Women in Africa (the Maputo Protocol).

3. I am by an large in agreement with the reasoning and justifications developed by the Court on the four Opinions in its ruling that "recognition

1 The NGOs concerned are:

- Centre for Human Rights of the University of Pretoria (CHR) & the Coalition of African Lesbians;
- African Association for the Defence of Human Rights (ASADHO);
- Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO);
- The Centre of Human Rights, University of Pretoria; Federation of Women Lawyers in Kenya ; Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association.

of NGOs by the African Union is subject to the granting of Observer Status or the signing of a Protocol or Cooperation Agreement between the African Union and the NGOs concerned" (paragraph 54 of the Opinion on the Centre and the Coalition).

4. The Court had no choice and could not have done otherwise. Its hands were "tied" by the explicit terms of Article 4(1) of its Protocol[2] and by the restrictive practice of the Union in matters of granting observer status to NGOs.

5. In the four Opinions rendered on 28 September 2017 at the request of several NGOs, all having observer status before the African Commission on Human and Peoples' Rights, the Court came up against the concept of "African organisation recognized by the African Union", as used in Article 4(1) of the Protocol.

6. It is noteworthy that Article 4(1) of the Protocol on institutions entitled to seek the Court's Advisory Opinion is paradoxically more restrictive than Article 5(3) of the Protocol on NGOs entitled to refer cases to the Court. Whereas Article 4(1) provides that "At the request [...] of any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument", Article 5(3) of the Protocol states that "the Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission ... to institute cases directly before it, in accordance with Article 34(6) of this Protocol".

7. Review of this article shows that, in the case of NGOs, referrals in contentious matters are less restrictive than in matters of Advisory Opinion because in seizing the Court on contentious matters, the NGO merely needs to have an observer status with the Commission[3], whereas it needs to be *recognised* by the AU to seek the Court's advisory opinion.

8. The novelty in the four Opinions rendered on 28 September 2017, lies in the formulation of the operative provisions. Instead of stating, as it did in the SERAP Opinion, that the Court "declares that it has no personal jurisdiction to issue the Opinion sought", the Court, in the four Opinions of 28 September 2017, states "that it cannot issue the Advisory Opinion requested of it", thus adopting the position of the

2 "At the request of a Member State of the OAU, the OAU, any of its organs or any African organization recognized by the OAU, the Court may provide an Opinion on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the Opinion is not related to a matter being examined by the Commission".

3 Clearly on condition that the State has subscribed to the jurisdiction clause set forth in Article 34 (6) of the Protocol.

International Court of Justice (ICJ) Advisory Opinion of 8 July 1996 on the *Legality of the threats of use of nuclear weapons,* which Opinion we had advocated in the case of SERAP.

9. In conclusion, we wish to reiterate our hope that the African Union will amend Article 4 (1) of the Protocol with a view to opening up possibilities for referrals to AfCHPR and relaxing the conditions required of NGOS to bring their request for Advisory Opinion within the ambit of the Court's jurisdiction; or, the way of amendment being uncertain, to broaden its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

Separate opinion: MATUSSE

1. The Court, unanimously, held that it did not have jurisdiction *ratione personae* to issue the Advisory Opinion requested by RADDOH, yet names the procedure by which it arrived at that conclusion an "Advisory Opinion", a view that I do not endorse. I, hereby, set my separate opinion on record on the following grounds:

I. The form of the Court's acts

2. The legal instruments governing the Court, namely, the Protocol[1] and the Rules of the Court are silent regarding the designation of each of the different forms that its acts may take. That notwithstanding, the practice that has become the norm is the use of the following terms: "Order", "Ruling", "Decision" and "Judgment".

3. When adopting the terms hereinabove, the Court has not been consistent in its practice in that it has used the same expression to designate different things at different times, as demonstrated herein below.

1 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

II. The practice of the Court

4. In the Requests for Advisory Opinion Nos. 002/2011,[2] 001/2012[3] and 001/2014,[4] the Court used the expression "Order" to designate the act through which it struck out the request due to the fact that the applicants had either given up on them or had lost interest in pursuing the matter.

5. In the Request for Advisory Opinion No. 002/2012,[5] the Court used the expression "Order" to hold that it was not going to entertain the request due to the fact that the same was pending before the African Commission on Human and People's Rights (the Commission).

6. In the Request for Advisory Opinion No. 001/2015,[6] the Court used the expression "Order" to strike out the request for failure, on the part of the author, to specify the legal provision of the Charter or of any other human rights instrument in relation to which the Court's Opinion was sought, as provided for under Rule 68(2) of the Court's Rules.

7. In the Request for Advisory Opinion No. 002/2013,[7] the Court pronounced itself on the merits of the request by means of an "Advisory Opinion".

8. In other words, in instances where the Court did not get to the examination of the merits of the request and decided to strike it out due to either lack of interest on the part of the author or to failure to comply with the requirements laid down in Article 68, the Court has preferred the term "Order".

9. In contentious matters, the Court issued an "Order" to declare that it lacked jurisdiction to examine the matter,[8] to hold that it was to

2 Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Jamahiriya, Judgement of 30 March 2012.

3 Request for Advisory Opinion by The Socio-Economic Rights & Accountability Project (SERAP), "Order" of 15 March 2013.

4 Request No 001/2014 - Coalition on the International Criminal Court Ltd/gte(ciccn),Legal Defence & Assistance Project Ltd/gte (LEDAP), Civil Resource Development & Documentation Center (Cirddoc) and Women Advocates Documentation Center Ltd/gte(WARDC), "Order" of 05 June 2015.

5 Request No 002/2012 - The Pan African Lawyers' Union (PALU) and Southern African Litigation Centre (SALC), "Order" of 15 March 2013.

6 Request No 001/2015 - Coalition on International Criminal Court LTD/GTE, "Order" of 29 November 2015.

7 Request No 002/2013 - The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights, "Order" of 05 December 2014.

8 App. No. 019/2015 – *Femi Falana v African Commission on Human and Peoples' Rights*, "Order" of 20 November 2015.

continue examining the matter,[9] to decide that it was going to merge the applications[10] and to strike the application due to lack of interest on the part of the applicant to pursue the matter.[11]

10. Still in respect to contentious matters, the Court used a Judgment to declare that some applications were inadmissible,[12] and to declare that it lacked jurisdiction.[13] The expression "Order" is also used in most of the Orders for Provisional Measures that the Court has issued.[14]

11. The Court has extensively used the expression "Decision" to declare that it lacked jurisdiction in contentious matters.[15]

III. Analysis

12. In the instant case, the Court found that it lacks jurisdiction *ratione personae*, and yet it designated the act by which it arrived at that conclusion an "Advisory Opinion", which looks, at least, contradictory.

13. For me, the Court either has jurisdiction hence moves on to issue

9 App. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 03 June 2016.

10 App. Nos. 009&011/2011 – *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, "Order" of 22 September 2011.

11 App. No. 002/2015 – *Collectif Des Anciens Travailleurs du Laboratoire (ALS) v Republic of Mali*, "Order" of 05 September 2016.

12 App. No. 003/2012 – *Peter Joseph Chacha v United Republic of Tanzania*, "Ruling" of 28 March 2014; App. No. 003/2011 – *Urban Mkandawire v Republic of Malawi*, "Judgment" of 21 June 2013.

13 App. No 001/2008: *Michelot Yogogombaye v Republic of Senegal*, "Judgment" of 15 December 2009; App: No. 001/2011 – *Femi Falana v African Union*, "Judgement" of 26 June 2012.

14 Namely: APP. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 24 March 2017. App. No. 004/2013 – *Lohe Issa Konate v Burkina Faso*, "Order" of 04 October 2013; App. No. 002/2013 – *The African Commission on Human and Peoples' Rights v Libya*, "Order" of 15 March 2013.

15 App. No. 002/2011 – *Soufiane Ababou v Peoples' Democratic Republic of Algeria,* "Decision" of 16 June 2011; App. No. 005/2011 – *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, "Decision" of 16 June 2011; App. No. 006/2011 – *Association des Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d' Ivoire*, "Decision" of 16 June 2011; App. No. 007/2011 – *Youssef Ababou v Kingdom of Morocco*, "Decision" of 02 September 2011; App. No. 008/2011 – *Ekollo M. Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, "Decision" of 23 September 2011; App. No. 010/2011 – *Efoua Mbozo'o Samuel v Pan African Parliament*, "Decision" of 30 September 2011; App. No. 012/2011 – *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Republic of Gabon*, "Decision" of 15 December 2011; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v Republic of South Africa,* «Decision» of 30 March 2013; App. No. 004/2012 – *Emmanuel Joseph Uko and Others v Republic of South Africa*, "Decision" of 30 Marche 2012; App. No. 005/2012 – *Amir Adam Timan v The Republic of Sudan*, "Decision" of 30 March 2012.

the Advisory Opinion, or it lacks jurisdiction, in which case it issues no Advisory Opinion.

14. My fellow judges might have been influenced by the fact that, in its Request, SERAP asks the Court to take a position with regard to its *locus standi* to seize the Court in terms of Article 4(1) of the Protocol. Meanwhile, this is an issue that would, in any case, be examined by the Court, since, according to Article 39(1) of the Rules, applicable by virtue of Article 72 of the Rules, "[The] Court shall *conduct preliminary examination* of its jurisdiction and the admissibility of the application ..." (my emphasis), before it can adjudicate on any case brought before it.

15. In my view, Article 39(1) of the Rules requires the Court to conduct preliminary examination in order to ascertain its jurisdiction and the admissibility of the application, a proceeding that under no circumstance can be termed, *per se*, an "Advisory Opinion", even if, in instances where the Court has jurisdiction, the decision on jurisdiction and admissibility becomes part of the Advisory Opinion issued, as it was the case in the Request for Advisory Opinion No. 002/2013.

16. It is, therefore, my understanding that preliminary examination, as envisaged under Article 39(1) of the Rules, is clearly different from issuing an Advisory Opinion, even though, sometimes, may form part of the issued Advisory Opinion.

17. In other words, when the Court, as a result of the preliminary examination so conducted holds that it has no jurisdiction, by no means it can still term the act by which it arrives to that conclusion an Advisory Opinion.

18. In terms of comparative law, when the Inter-American Court of Human Rights (TIDH) decides not to issue an Advisory Opinion, it adopts a form of "Resolución"[16] in lieu of an "Opinión Consultiva" (*Advisory Opinion*). Even when issuing the "Opinión Consultiva", it makes a clear separation between the section pertaining to its jurisdiction (wherein it ascertains whether or not it has jurisdiction vis-à-vis the request for advisory opinion) from the section pertaining to the Advisory Opinion itself (wherein it gives its opinion on the issue it has been seized with, in the event it finds that it has jurisdiction to issue the Advisory Opinion).[17]

16 Resolución de la corte interamericana de derechos humanos de 23 de junio de 2016, solicitud de opinión consultiva presentada por el secretario general de la organización de los estados americanos; resolución de la corte interamericana de derechos humanos de 27 de enero de 2009, solicitud de opinión consultiva presentada por la comisión interamericana de derechos humanos.

17 Advisory Opinion Oc-21/14 of August 19, 2014 Requested by The Argentine Republic, The Federative Republic Of Brazil, The Republic Of Paraguay And The Oriental Republic Of Uruguay; Advisory Opinion Oc-20/09 Of September 29, 2009 Requested By The Republic Of Argentina.

19. The Permanent Court of International Justice (PCIJ), in the Request for Advisory Opinion submitted by the Council of the League of Nations in the case of *Russia v Finland*, implicitly[18] used the expression "Advisory Opinion",[19] when it found that it could issue the Advisory Opinion due to Russia's *ad hoc* refusal to accept its jurisdiction. However, this precedent is an incongruous and isolated dating back a century, and it cannot inform the instant case. In actual fact, this precedent has never informed any of the approaches adopted by the Court in its previous decisions on Requests for Advisory Opinion.

IV. My position

20. I am of the opinion that, for the reasons expounded above, the Court should use the term "Decision" to name the act by which it conducts preliminary examination of its jurisdiction and the admissibility of request for Advisory Opinion, in light of Article 39 of the Rules of the Court. Indeed, the recurring practice of using the term "Decision" when it declares its lack of jurisdiction to adjudicate on contentious matters, is perfectly applicable in matters for advisory opinion. This is because Article 72 of the Rules requires that the Court applies *mutatis mutandis* the procedure for contentious matters to procedure relating advisory opinions.

21. The use of the term "Decision" would avoid giving the wrong impression that the Court issues an Advisory Opinion, even when it has issued none. On the other hand, this Court would benefit by remaining consistent in using appropriate terms for its acts, and this would ensure that it is in line with its well-established jurisprudence wherein it uses the term "Decision" when it determines jurisdiction on contentious matters.

18 Why not termed formally as such. Only at the end of the provision is "(...) Present Avis ... (…)" mentioned.

19 Decision of the Third Ordinary Session of 23 July 1923, Dossier F. v V Rôle III. 3, available at http://www.icj-cij.org/pcij/serie_B/B_05/Statut_de_la_Carelie_orientale_Avis_consultatif.pdf , accessed 24.05.2017.

Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians (Advisory Opinion) (2017) 2 AfCLR 606

Application 002/2015, *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians*

Advisory Opinion, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Court held that it did not have jurisdiction to consider a request for an Advisory Opinion by two NGOs, neither of which was recognised by the African Union.

Jurisdiction (request advisory opinion, African organisation, 50, 51, recognized by the African Union, 56, 57)

Separate opinion: BEN ACHOUR

Jurisdiction (request for advisory opinion, 8, 9)

Separate opinion: MATUSSE

Procedure (decision, 13, 15, 20)

I. The Applicants

1. This Request dated 2 November 2015, and received at the Registry on the same date was submitted jointly by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians (hereinafter referred to as "the Applicants").

2. The Centre for Human Rights, University of Pretoria (hereinafter referred to as "the Centre") presents itself as a Department in the University and a Non-Governmental Organisation (NGO) established in 1986 and engaged in human rights education in Africa, wide dissemination of human rights publications in Africa and the improvement of the rights of women, persons living with HIV, indigenous peoples and other disadvantaged or marginalised groups across the continent. The Centre indicates that it has had Observer Status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") since December 1993; that in 2006, it received the UNESCO Prize for Human Rights Education; and in 2012, on the occasion of the celebration of its 25th Anniversary, the Commission conferred on the Centre its "Human Rights NGO Prize".

3. The Coalition of African Lesbians (hereinafter referred to as "the Coalition") presents itself as a network of organisations committed to the equality of Lesbians in Africa. According to the Applicants, the Coalition was

established in 2003 and is registered as a Non-Governmental Organisation in South Africa with its Secretariat in Johannesburg. They also indicate that the goal of the Coalition is to contribute to Africa's transformation into a continent where women in their diversity, including lesbians, enjoy every element of human rights and are recognised as fully-fledged citizens. The Applicants further indicate that the Coalition has Observer Status before the Commission.

II. Circumstances and subject of the request

4. In January 2015, in its Decision on the 37th Activity Report of the Commission, the Executive Council of the African Union (hereinafter referred to as "the Executive Council") requested it (the Commission) to delete from its Activity Report, passages concerning two decisions against the Republic of Rwanda and to give the State the opportunity to present its views in a public hearing on the two cases.

5. In July 2015, in its Decision on the 38th Activity Report of the Commission, the Executive Council requested the Commission to "take into account fundamental African values, identity and good traditions and to withdraw the Observer Status granted to NGOs which may attempt to impose values contrary to African values". In this respect, it requested the Commission to review its Criteria for Granting Observer Status to NGOs and to withdraw the Observer Status granted to the Coalition of African Lesbians.

6. The Executive Council also recommended that the Assembly of the African Union authorise the publication of the Commission's 38th Activity Report only after its update and incorporation therein of the proposals made by Member States.

7. The Executive Council further requested the Commission to "observe the due process of law in making decisions on complaints received, consider reviewing its rules of procedure, in particular, the provisions in relation to provisional measures and urgent appeals, in consistence with the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and to take measures to avoid interference by NGOs and other parties in its activities".[1]

8. The Centre and the Coalition are seeking the opinion of the Court on how the term "considered" as used in Article 59(3) of the Charter should be interpreted. More specifically, they raise the question as to whether, in the afore-cited decision taken in 2015, the Executive Council and the Assembly of the African Union have not exceeded the reasonable limits of their powers to "consider" the Activity Report of the Commission.

1 Doc.EX.CL/921(XXVII), EX.CL/Dec.887(XXVII).

III. Procedure

9. The Request was received at the Court Registry on 2 November 2015.
10. At its 39th Ordinary Session held from 9 to 29 November 2015 the Court considered the Request and decided to transmit it to Member States of the African Union, the Commission and to the African Institute of International Law for possible observations, pursuant to Rule 69 of the Rules of Court, (hereinafter, referred to as "the Rules"). The transmission was effected by letters dated 21 December 2015, 27 and 29 January 2016 indicating a time limit of ninety (90) days for submission of observations, if any.
11. On 2 March 2016, the Commission notified the Court that the Request does not relate to any Application pending before it.
12. On 14 April 2016, the Centre submitted to the Court an application for the intervention of four (4) other NGOs, in the capacity of amici curiae.
13. The Court rejected the Centre's application because it was not the Centre itself that wished to act as amicus curiae, rather, it was the four NGOs. The Court, therefore, requested that each NGO file its individual application specifying its contribution in this regard. None of the four NGOs submitted its application.
14. At its 41st Ordinary Session, held from 16 May to 3 June 2016, the Court decided to extend by sixty (60) days, the time limit for Member States and other entities to submit their observations on the Request, if any.
15. The Republic of Côte d'Ivoire and the Federal Democratic Republic of Ethiopia transmitted their observations to the Court on 6 June and 3 April 2016, respectively.
16. On 20 October 2016, the Registry notified the Parties of the close of the written procedure.

IV. Jurisdiction of the Court

17. In terms of Rule 72 of the Rules: "The Court shall apply, mutatis mutandis, the provisions of Part IV of these Rules to the extent that it deems them to be appropriate and acceptable".
18. In terms of Rule 39 of the Rules, "The Court shall conduct preliminary examination of its jurisdiction…"
19. From the provisions of these Rules, the Court must determine whether it has jurisdiction on the Request before it.
20. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Centre and the Coalition are amongst the entities entitled to institute a request for advisory opinion

under 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").

A. Applicants' arguments

21. The Centre and the Coalition recall that Article 4(1) of the Protocol lists four categories of entities entitled to bring a request for Advisory Opinion before the Court, namely: (1) Member States, (2) the African Union; (3) any of its organs, and (4) any African organisation recognised by the African Union.

22. They maintain that they fall under the fourth category and that the expression "any African organisation recognized by the African Union" should be interpreted within its ordinary meaning and in accordance with the objectives and purposes of the Protocol.

23. According to the Applicants, the term "organisation" defined by the Oxford English Dictionary as "an organized group of persons with a specific objective" is sufficiently wide to cover non-governmental organisations.

24. They assert that, apart from Article 4(1), the term is also used in other articles of the Protocol such as Article 5(1) in which reference is made to "non-governmental organisations"; thus showing that the use of the expression "any African organization" in Article 4(1) is deliberate, intended to place various types of organisation under the generic term "organisation".

25. The Centre and the Coalition further argue that, contrary to Article 5 of the Protocol which concerns the Court's contentious jurisdiction, Article 4 (1) does not make a distinction between Governmental and Non-Governmental Organisations.

26. They therefore conclude that the term "organisation" includes but is not limited to "inter-governmental organisations", and that it also includes African Human Rights NGOs, such as the Centre and the Coalition.

27. As regards the adjective "African", the Centre and the Coalition argue that the Oxford English Dictionary defines it as "that which is related to Africa", that according to this ordinary meaning, this term can also relate to (i) the geographical situation of an organisation which, according to them, is valid for organisations based in Africa, (ii) organisations with a predominantly African management structure even where they are not based in Africa, and lastly, (iii) international human rights NGOs with essentially African composition and mission.

28. They conclude that an organisation is regarded as "African" under Article 4(1) of the Protocol when it fulfils any of the criteria listed in the three aforementioned categories.

29. As regards the requirement of "recognition by the African Union", the Applicants maintain that the recognition of an NGO by an organ or structure of the African Union should amount to recognition by the main body, namely, the African Union.
30. They maintain that it is customary in "modern" international law that an agent is authorised to act on behalf of his/her principal within the context of the mandate received from the latter; that it is therefore logical and practical to consider NGOs with Observer Status before African Union organs, such as the Commission or Civil Society Organisations represented at the Economic, Social and Cultural Council of the African Union (ECOSSOC) as recognised by the African Union under Article 4(1) of the Protocol.
31. They contend that the Centre and the Coalition have had Observer Status before the Commission (since December 1993 for the Centre, and May 2015 for the Coalition) and that, for that reason, the two organisations should be regarded as having met the requirement of recognition by the African Union as set forth under Article 4(1) of the Protocol.

B. Observations of Member States

32. The following are the observations of the Federal Democratic Republic of Ethiopia and the Republic of Côte d'Ivoire.

i. Observations from the Federal Democratic Republic of Ethiopia

33. On the question as to whether the Applicants are African organisations within the meaning of Article 4 of the Protocol, the Federal Democratic Republic of Ethiopia responds that they are not.
34. She states that the African Union adopted a Resolution on the Criteria for Granting Observer Status and a System of Accreditation, and that the term "organisation" in the Protocol should be interpreted in light of the aforesaid system of recognition and accreditation defined by the African Union.
35. According to the Federal Democratic Republic of Ethiopia, the Centre and the Coalition are not organisations within the definition of the term "organisation" adopted by the said African Union Resolution. She indicates that according to that Resolution, an "organisation" is a "regional integration or an international organization, including sub-regional, regional or inter-African organisations which are not recognised as regional economic communities".
36. The Federal Democratic Republic of Ethiopia further submits that the Non-Governmental organisations (NGOs) recognised by the

African Union are accorded Observer Status in accordance with the Criteria for Granting Observer Status before the AU and neither the Centre nor the Coalition has indicated having been recognised by the AU or as having Observer Status in accordance with that procedure. Moreover, even if they have been granted the Observer Status, it would not confer on them the right to seek an Advisory Opinion from the Court because this is not one of the prerogatives recognised for them under the Executive Council decision.

37. She contends that recognition or acquisition of Observer Status before the Organs established by treaty, including the Commission, are not synonymous with recognition by the African Union and that no provision of the Resolution mentioned above envisages this.

38. She avers that the Commission was established by virtue of the Charter to oversee the human rights situations in Africa; that the Commission accords Observer Status to non-governmental organisations on the basis of its own Resolution to facilitate NGOs' participation in human rights promotion on the continent; that this status allows NGOs to participate in sessions of the Commission, submit shadow reports and engage in constructive dialogue on the consideration of the reports of State Parties; that the Centre and the Coalition, as NGOs with Observer Status before the Commission, can enjoy the aforesaid privileges and institute a request without demonstrating that they have an interest in such a request; that such status does not however allow them to request the Court for Advisory Opinion on matters concerning another organisation.

39. The Federal Democratic Republic of Ethiopia also argues that the Commission's Rules of Procedure establish a distinction between "organisations with observer status" and "organisations recognised by the AU", and recalls Rule 32(3)(e) of the said Rules of Procedure which provides that an organisation recognised by the African Union, a national human rights institution with the status of affiliated member or a non-governmental organisation with Observer Status, can propose items for inclusion in the provisional agenda of sessions of the Commission; that in the same vein, Rule 63(1) thereof accords these two types of organisation the right to request the Commission to include in the agenda of an ordinary session a debate on any human rights situation; that in light of the aforesaid provisions, the Rules of Procedure of the Commission treats the two types of organisation differently.

40. The Federal Democratic Republic of Ethiopia concludes that the Observer Status obtained by the Centre and the Coalition before the Commission does not confer on them the capacity to seek an Advisory Opinion from the Court.

ii. Observations from the Republic of Côte d'Ivoire

41. The Republic of Côte d'Ivoire submits that under Article 4(1) of the Protocol, Requests for Advisory Opinion are reserved for Member States of the Union, its organs and African organisations recognised by the latter; that contrary to the assertions of the requesting NGOs, the expression "African organisation recognised by the African Union" used in Article 4 of the Protocol does not cover both African International Organisations and non-governmental organisations having Observer Status before the Commission; that if that were the case, the drafters of the Protocol would not have taken pains to enumerate in Article 5 thereof, these two entities as entitled to file applications against State Parties before the Court.

42. The Republic of Côte d'Ivoire contends that, in law, prohibition from making a distinction where the law does not do so, carries with it the obligation to make such a distinction where the law so does; that consequently, in the absence of specific mention thereof in Article 4 of the Protocol, as was the case in Article 5, NGOs with Observer Status before the Commission must not be considered as entitled to seize the Court with Requests for Advisory Opinion.

43. She further contends that the notion "African organisation" as used in Article 4 of the Protocol concerns African inter-governmental organisations and not NGOs, and that the organisations concerned include, notably, Regional Economic Communities, like the Arab Maghreb Union (AMU), Economic Community of West African States (ECOWAS), West African Economic and Monetary Union (WAEMU), Central Africa Economic and Monetary Community (CEMAC), Indian Ocean Community (IOC) and the East African Community (EAC).

44. The Republic of Côte d'Ivoire also maintains that to offer NGOs with Observer Status before the Commission, the possibility of seizing the Court with a request for Advisory Opinion, would enable them to target States, even those that are yet to make the Declaration prescribed by Article 34(6) of the Protocol, that the initiatives of the Centre and the Coalition clearly falls within this logic; that the real target of their request is, in fact, the African Union which, through the Executive Council, has recommended the withdrawal of the Coalition of African Lesbians' Observer Status before the Commission.

45. The Republic of Côte d'Ivoire therefore requests the Court to rule that it has no jurisdiction to examine the request for Advisory Opinion filed by the Centre and the Coalition.

C. Position of the Court

46. Article 4(1) of the Protocol, which lists the four categories of

entities entitled to apply to the Court for an Advisory Opinion, provides as follows: "[a]t the request of a Member State of the [African Union], the [AU], any of its organs, or any African organization recognised by the [AU], the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments…"

47. The fact that the two NGOs which filed the request do not fall within the first three categories is not contested.

48. The first question which arises is whether these NGOs are of the fourth category, that is, whether they are "African organisations" within the meaning of Article 4(1) of the Protocol.

49. On this issue, the Court has, in its Advisory Opinion in Socio-Economic Rights and Accountability Project (SERAP), established that the term "organisation" used in Article 4(1) of the Protocol covers both non-governmental organisations and inter-governmental organisations.[1]

50. As regards the appellation "African", the Court established 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.[2]

51. The Court notes that the Centre and the Coalition are both registered in South Africa and with their Observer Status before the Commission, they are entitled to carry out their activities beyond the countries where they are registered. It concludes that they are "African Organisations" in terms of Article 4(1) of the Protocol.

52. The second question that follows is whether these organisations are recognised by the African Union.

53. The Court notes that the Centre and the Coalition have relied on their Observer Status before the Commission to contend that they are recognised by the African Union.

54. In this respect, the Court has, in the afore-mentioned SERAP Advisory Opinion, indicated that Observer Status before any African Union organ does not amount to recognition by the African Union. It has thus established that only the NGOs recognised by the African Union itself are covered by Article 4(1) of the Protocol.[3]

55. The Court has further established that recognition of NGOs by the African Union is through the granting of Observer Status or the signing of a Memorandum of Understanding and/or Cooperation

1 Request for Advisory Opinion by *Socio-Economic Rights and Accountability Project* (SERAP), No. 001/2013, Advisory Opinion of 26 May 2017, para 46.

2 *Idem*, para 48.

3 *Idem*, para 53.

between the African Union and those NGOs.[4]

56. In the instant case, the Centre and the Coalition have not claimed and have not provided proof as to their Observer Status before the African Union or that they have signed any Memorandum of Understanding with the Union.

57. From the foregoing, the Court finds that, although the Applicants are African organisations within the meaning of Article 4(1) of the Protocol, they lack the second essential condition required by this provision as a basis for the Court's jurisdiction, namely, to be "recognised by the African Union".

58. For the above reasons

The Court,

Unanimously:

i. *Finds* that it is not able to give the Advisory Opinion which was requested of it.

Separate Opinion: BEN ACHOUR

1. The four opinions rendered on 28 September 2017, reproduces *in extenso* the grounds adduced in the SERAP Opinion of 26 May 2017. That individual opinion merely affirms the opinion we had expressed in the SERAP Opinion.

2. The Court once again finds itself unable to address the four requests for Advisory Opinion and is constrained to not respond to

4 *Idem*, para 64.

3. the legal issues of utmost significance raised by the NGOs[1] in regard to the interpretation of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Protocol to the Charter establishing the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), or other relevant human rights instruments in Africa such as the African Charter on Democracy, Elections and Governance or the Protocol to the Charter on the Rights of Women in Africa (the Maputo Protocol).

4. I am by an large in agreement with the reasoning and justifications developed by the Court on the four Opinions in its ruling that "recognition of NGOs by the African Union is subject to the granting of Observer Status or the signing of a Protocol or Cooperation Agreement between the African Union and the NGOs concerned" (paragraph 54 of the Opinion on the Centre and the Coalition).

5. The Court had no choice and could not have done otherwise. Its hands were "tied" by the explicit terms of Article 4(1) of its Protocol[2] and by the restrictive practice of the Union in matters of granting observer status to NGOs.

6. In the four Opinions rendered on 28 September 2017 at the request of several NGOs, all having observer status before the African Commission on Human and Peoples' Rights, the Court came up against the concept of "African organisation recognized by the African Union", as used in Article 4(1) of the Protocol.

7. It is noteworthy that Article 4(1) of the Protocol on institutions entitled to seek the Court's Advisory Opinion is paradoxically more restrictive than Article 5(3) of the Protocol on NGOs entitled to refer cases to the Court. Whereas Article 4(1) provides that "At the request [...] of any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument", Article 5(3) of the Protocol states that "the Court may entitle relevant non-governmental organizations (NGOs) with observer status review of this article shows

1 The NGOs concerned are:

- Centre for Human Rights of the University of Pretoria (CHR) & the Coalition of African Lesbians;
- African Association for the Defence of Human Rights (ASADHO);
- Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO);
- The Centre of Human Rights, University of Pretoria; Federation of Women Lawyers in Kenya ; Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association.

2 "At the request of a Member State of the OAU, the OAU, any of its organs or any African organization recognized by the OAU, the Court may provide an Opinion on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the Opinion is not related to a matter being examined by the Commission".

that, in the case of NGOs, referrals in contentious matters are less restrictive than in matters of Advisory Opinion because in seizing the Court on contentious matters, the NGO merely needs to have an observer status with the Commission,[3] whereas it needs to be *recognised* by the AU to seek the Court's advisory opinion.

8. The novelty in the four Opinions rendered on 28 September 2017, lies in the formulation of the operative provisions. Instead of stating, as it did in the SERAP Opinion, that the Court "declares that it has no personal jurisdiction to issue the Opinion sought", the Court, on the four Opinions of 28 September 2017, states "that it cannot issue the Advisory Opinion requested of it", thus adopting the position of the International Court of Justice (ICJ) Advisory Opinion of 8 July 1996 on the *Legality of the threats of use of nuclear weapons,* which Opinion we had advocated in the case of SERAP.

9. In conclusion, we wish to reiterate our hope that the African Union will amend Article 4(1) of the Protocol with a view to opening up possibilities for referrals to African Court and relaxing the conditions required of NGOS to bring their request for Advisory Opinion within the ambit of the Court's jurisdiction; or, the way of amendment being uncertain, to broaden its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

Separate opinion: MATUSSE

1. The Court, unanimously, held that it did not have jurisdiction *ratione personae* to issue the Advisory Opinion requested by the Centre for Human Rights and the Coalition of African Lesbians, yet names the procedure by which it arrived at that conclusion an "Advisory Opinion", a view that I do not endorse. I, hereby, set my separate opinion on record on the following grounds:

3 Clearly on condition that the State has subscribed to the jurisdiction clause set forth in Article 34(6) of the Protocol.

I. The form of the Court's acts

2. The legal instruments governing the Court, namely, the Protocol[1] and the Rules of the Court are silent regarding the designation of each of the different forms that its acts may take. That notwithstanding, the practice that has become the norm is the use of the following terms: "Order", "Ruling", "Decision" and "Judgment".

3. When adopting the terms hereinabove, the Court has not been consistent in its practice in that it has used the same expression to designate different things at different times, as demonstrated herein below.

II. The practice of the Court

4. In the Requests for Advisory Opinion Nos. 002/2011,[2] 001/2012[3] and 001/2014,[4] the Court used the expression "Order" to designate the act through which it struck out the request due to the fact that the applicants had either given up on them or had lost interest in pursuing the matter.

5. In the Request for Advisory Opinion No. 002/2012,[5] the Court used the expression "Order" to hold that it was not going to entertain the request due to the fact that the same was pending before the African Commission on Human and People's Rights (the Commission).

6. In the Request for Advisory Opinion No. 001/2015,[6] the Court used the expression "Order" to strike out the request for failure, on the part of the author, to specify the legal provision of the Charter or of any other human rights instrument in relation to which the Court's Opinion was sought, as provided for under Rule 68(2) of the Court's Rules.

1 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

2 Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Jamahiriya, Judgement of 30 March 2012.

3 Request for Advisory Opinion by The Socio-Economic Rights & Accountability Project (SERAP), "Order" of 15 March 2013.

4 Request No 001/2014 - Coalition on the International Criminal Court Ltd/gte(ciccn),Legal Defence & Assistance Project Ltd/gte (LEDAP), Civil Resource Development & Documentation Center (Cirddoc) and Women Advocates Documentation Center Ltd/gte(WARDC), "Order" of 05 June 2015.

5 Request No 002/2012 - The Pan African Lawyers' Union (PALU) and Southern African Litigation Centre (SALC), "Order" of 15 March 2013.

6 Request No 001/2015 - Coalition on International Criminal Court LTD/GTE, "Order" of 29 November 2015.

7. In the Request for Advisory Opinion No. 002/2013,[7] the Court pronounced itself on the merits of the request by means of an "Advisory Opinion".

8. In other words, in instances where the Court did not get to the examination of the merits of the request and decided to strike it out due to either lack of interest on the part of the author or to failure to comply with the requirements laid down in Article 68, the Court has preferred the term "Order".

9. In contentious matters, the Court issued an "Order" to declare that it lacked jurisdiction to examine the matter,[8] to hold that it was to continue examining the matter,[9] to decide that it was going to merge the applications[10] and to strike the application due to lack of interest on the part of the applicant to pursue the matter.[11]

10. Still in respect to contentious matters, the Court used a Judgment to declare that some applications were inadmissible,[12] and to declare that it lacked jurisdiction.[13] The expression "Order" is also used in most of the Orders for Provisional Measures that the Court has issued.[14]

11. The Court has extensively used the expression "Decision" to

7 Request No 002/2013 - The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights, "Order" of 05 December 2014.

8 App. No. 019/2015 – *Femi Falana v African Commission on Human and Peoples' Rights*, "Order" of 20 November 2015.

9 App. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 03 June 2016.

10 App. Nos. 009&011/2011 – *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, "Order" of 22 September 2011.

11 App. No. 002/2015 – *Collectif Des Anciens Travailleurs du Laboratoire (ALS) v Republic of Mali*, "Order" of 05 September 2016.

12 App. No. 003/2012 – *Peter Joseph Chacha v United Republic of Tanzania*, "Ruling" of 28 March 2014; App. No. 003/2011 – *Urban Mkandawire v Republic of Malawi*, "Judgment" of 21 June 2013.

13 App. No 001/2008: *Michelot Yogogombaye v Republic of Senegal*, "Judgment" of 15 December 2009; App: No. 001/2011 – *Femi Falana v African Union*, "Judgement" of 26 June 2012.

14 Namely: APP. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 24 March 2017. App. No. 004/2013 – *Lohe Issa Konate v Burkina Faso*, "Order" of 04 October 2013; App. No. 002/2013 – *The African Commission on Human and Peoples' Rights v Libya*, "Order" of 15 March 2013.

declare that it lacked jurisdiction in contentious matters.[15]

III. Analysis

12. In the instant case, the Court found that it lacks jurisdiction *ratione personae*, and yet it designated the act by which it arrived at that conclusion an "Advisory Opinion", which looks, at least, contradictory.
13. For me, the Court either has jurisdiction hence moves on to issue the Advisory Opinion, or it lacks jurisdiction, in which case it issues no Advisory Opinion.
14. My fellow judges might have been influenced by the fact that, in its Request, SERAP asks the Court to take a position with regard to its *locus standi* to seize the Court in terms of Article 4(1) of the Protocol. Meanwhile, this is an issue that would, in any case, be examined by the Court, since, according to Article 39(1) of the Rules, applicable by virtue of Article 72 of the Rules, "[The] Court shall *conduct preliminary examination* of its jurisdiction and the admissibility of the application ..." (my emphasis), before it can adjudicate on any case brought before it.
15. In my view, Article 39(1) of the Rules requires the Court to conduct preliminary examination in order to ascertain its jurisdiction and the admissibility of the application, a proceeding that under no circumstance can be termed, *per se*, an "Advisory Opinion", even if, in instances where the Court has jurisdiction, the decision on jurisdiction and admissibility becomes part of the Advisory Opinion issued, as it was the case in the Request for Advisory Opinion No. 002/2013.
16. It is, therefore, my understanding that preliminary examination, as envisaged under Article 39(1) of the Rules, is clearly different from issuing an Advisory Opinion, even though, sometimes, may form part of the issued Advisory Opinion.
17. In other words, when the Court, as a result of the preliminary examination so conducted holds that it has no jurisdiction, by no means

15 App. No. 002/2011 – *Soufiane Ababou v Peoples' Democratic Republic of Algeria,* "Decision" of 16 June 2011; App. No. 005/2011 – *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, "Decision" of 16 June 2011; App. No. 006/2011 – *Association des Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d' Ivoire*, "Decision" of 16 June 2011; App. No. 007/2011 – *Youssef Ababou v Kingdom of Morocco*, "Decision" of 02 September 2011; App. No. 008/2011 – *Ekollo M. Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, "Decision" of 23 September 2011; App. No. 010/2011 – *Efoua Mbozo'o Samuel v Pan African Parliament*, "Decision" of 30 September 2011; App. No. 012/2011 – *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Republic of Gabon*, "Decision" of 15 December 2011; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v Republic of South Africa,* «Decision» of 30 March 2013; App. No. 004/2012 – *Emmanuel Joseph Uko and Others v Republic of South Africa*, "Decision" of 30 Marche 2012; App. No. 005/2012 – *Amir Adam Timan v The Republic of Sudan*, "Decision" of 30 March 2012.

it can still term the act by which it arrives to that conclusion an Advisory Opinion.

18. In terms of comparative law, when the Inter-American Court of Human Rights (TIDH) decides not to issue an Advisory Opinion, it adopts a form of "Resolución"[16] in lieu of an "Opinión Consultiva" (*Advisory Opinion*). Even when issuing the "Opinión Consultiva", it makes a clear separation between the section pertaining to its jurisdiction (wherein it ascertains whether or not it has jurisdiction vis-à-vis the request for advisory opinion) from the section pertaining to the Advisory Opinion itself (wherein it gives its opinion on the issue it has been seized with, in the event it finds that it has jurisdiction to issue the Advisory Opinion).[17]

19. The Permanent Court of International Justice (PCIJ), in the Request for Advisory Opinion submitted by the Council of the League of Nations in the case of *Russia v Finland*, implicitly[18] used the expression "Advisory Opinion",[19] when it found that it could issue the Advisory Opinion due to Russia's *ad hoc* refusal to accept its jurisdiction. However, this precedent is an incongruous and isolated dating back a century, and it cannot inform the instant case. In actual fact, this precedent has never informed any of the approaches adopted by the Court in its previous decisions on Requests for Advisory Opinion.

IV. My position

20. I am of the opinion that, for the reasons expounded above, the Court should use the term "Decision" to name the act by which it conducts preliminary examination of its jurisdiction and the admissibility of request for Advisory Opinion, in light of Article 39 of the Rules of the Court. Indeed, the recurring practice of using the term "Decision" when it declares its lack of jurisdiction to adjudicate on contentious matters, is perfectly applicable in matters for advisory opinion. This is because

16 Resolución de la corte interamericana de derechos humanos de 23 de junio de 2016, solicitud de opinión consultiva presentada por el secretario general de la organización de los estados americanos; resolución de la corte interamericana de derechos humanos de 27 de enero de 2009, solicitud de opinión consultiva presentada por la comisión interamericana de derechos humanos.

17 Advisory Opinion Oc-21/14 of August 19, 2014 Requested by The Argentine Republic, The Federative Republic Of Brazil, The Republic Of Paraguay And The Oriental Republic Of Uruguay; Advisory Opinion Oc-20/09 Of September 29, 2009 Requested By The Republic Of Argentina.

18 Why not termed formally as such. Only at the end of the provision is "(...) Present Avis ... (…)" mentioned.

19 Decision of the Third Ordinary Session of 23 July 1923, Dossier F. v V Rôle III. 3, available at http://www.icj-cij.org/pcij/serie_B/B_05/Statut_de_la_Carelie_orientale_Avis_consultatif.pdf , accessed 24.05.2017.

Article 72 of the Rules requires that the Court applies *mutatis mutandis* the procedure for contentious matters to procedure relating advisory opinions.

21. The use of the term "Decision" would avoid giving the wrong impression that the Court issues an Advisory Opinion, even when it has issued none. On the other hand, this Court would benefit by remaining consistent in using appropriate terms for its acts, and this would ensure that it is in line with its well-established jurisprudence wherein it uses the term "Decision" when it determines jurisdiction on contentious matters.

Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and Others (Advisory Opinion) (2017) 2 AfCHR 622

Application 001/2016, *Request for Advisory Opinion by the Centre for Human Rights; Federation of Women Lawyers, Kenya; Women's Legal Centre; Women Advocates Research and Documentation Centre; Zimbabwe Women Lawyers Association*

Advisory Opinion, 28 September 2017. Done in English and French, the English text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Court held that it did not have jurisdiction to consider a request for an Advisory Opinion by NGOs which were not recognised by the African Union.

Jurisdiction (request advisory opinion, African organisation, 41-43, recognized by the African Union, 48, 49)

Separate opinion: BEN ACHOUR

Jurisdiction (request for advisory opinion, 8, 9)

Separate opinion: MATUSSE

Procedure (decision, 13, 15, 20)

I. The Applicants

1. This Request for Advisory Opinion dated 7 January 2016 was filed at the Registry on 8 January 2016 jointly by the Centre for Human Rights of the University of Pretoria, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association (hereinafter referred to as "the Applicants").

2. The Applicants state that they are all registered Non-Governmental Organisations (NGOs) based in South Africa, Nigeria, Kenya and Zimbabwe, respectively, working on women's human rights issues in various capacities, including public interest litigation, provision of legal aid, research and in academia. They also state that they are NGOs with Observer Status with the African Commission on Human and Peoples' Rights (hereinafter referred to as the "Commission"). They have provided copies of the attestation of their Observer Status with the Commission.

3. The Applicants are represented by Ms. Sibongile Ndashe of the Initiative for Strategic Litigation in Africa and Professor Frans Viljoen of the Centre for Human Rights, University of Pretoria, South Africa.

II. Circumstances and subject of the request

4. The Applicants submit that unrecorded and unregistered marriages are common in Africa due to (i) the fact that domestic laws do not stipulate requirements or procedures for the compulsory registration of all forms of marriages and are grossly inadequate; (ii) the cost of registering marriages (iii) onerous requirements for such registrations; (iv) unequal gender relations; (v) lack of awareness; and (vi) lack of legal frameworks regulating the consequences of unrecorded and unregistered marriages.

5. The Applicants state that the issue of non-registration and non-recording of marriages has rendered women vulnerable in that (i) women are unable to provide proof of their marriages, (ii) women are easily divorced, (iii) women are unable to enforce the requirement that a woman's consent must be sought before the man can take a second wife in a polygamous marriage, (iv) women are unable to secure land and property rights and that, (v) it makes it difficult for countries to collect, monitor and analyse vital information about a population.

6. The Applicants are requesting for an Advisory Opinion on the interpretation of Article 6(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereinafter referred to as "the Women's Rights Protocol") and the States' obligations consequent thereto.

7. They indicate that for the purposes of this request and in line with Articles 6(a) and (b) of the Women's Rights Protocol, the term "marriage" shall mean a "marriage entered into with the full and free consent of the parties and the term shall refer only to marriages entered into by women who are at least 18 years of age".

8. The Applicants state that the request is anchored on Articles 2(1)(a) to (e) and 2(2) of the Women's Rights Protocol, which provide for the elimination of discrimination against women by requiring State Parties thereto to prevent all forms of discrimination against women through appropriate legislative, institutional and other measures.

9. The Applicants submit that Article 6(d) of the Women's Rights Protocol imposes an obligation on State Parties to enact national legislative measures to guarantee that every marriage is recorded in writing and registered in accordance with national laws in order to be legally recognised.

10. The Applicants aver that the Court's interpretation of Article 6(d) of the Women's Rights Protocol to include a positive obligation to adopt legislative measures for the registration of marriages, would be in consonance with the obligation set out in Article 21(2) of the African Charter on the Rights and Welfare of the Child which provides that registration of all marriages in an official registry is compulsory.

11. The Applicants contend that the overall purpose of the Women's Rights Protocol and particularly Article 2 thereof require that in addition to "taking legislative measures", State parties are obligated to take measures aimed at promoting awareness of the obligation to register marriages and to allocate financial and other resources aimed at facilitating such registration.

12. The Applicants maintain that the word "shall" in Article 6(d) of the Women's Rights Protocol is peremptory and denotes a duty requiring State Parties to guarantee the registration of marriages in order for them to be legally recognised. The Applicants submit further that there is nothing in this provision suggesting that, in meeting this obligation, States Parties should impose penalties or sanctions for non-compliance with the registration requirements set out in their national laws.

13. The Applicants contend that Article 2 of the Women's Rights Protocol requires State Parties to put in place measures aimed at combatting discrimination, among which are:

a. integrating a gender perspective into their policy and other decisions; and

b. taking positive and corrective actions in those areas where discrimination in law continue to exist.

14. The Applicants submit that in order to give effect to the overall purpose of the Women's Rights Protocol, the commitment towards eliminating discrimination in Article 2 and the rights and protections in marriage established in Articles 6(e) to 6(j) thereof and affirmed in other regional and international human rights treaties, Article 6(d) must be interpreted purposively and in a way that rejects the imposition of unnecessary sanctions for non-compliance by its rights holders and does not perpetuate indirect discrimination against women.

15. The Applicants argue that non-recognition of marriages that are not recorded in writing or registered perpetuates discrimination against women as it results in vulnerability, compromises enjoyment of marital rights enshrined in Article 6(e) to 6(j) of the Women's Rights Protocol and other regional and international instruments. The Applicants submit further that, this discrimination is particular where non-registered marriages are automatically and as a matter of law presumed void, invalid or nullified such that the personal and proprietary consequences and protections in marriage are denied.

16. The Applicants state that Article 6(d) of the Women's Rights Protocol was not intended and should not be interpreted as suggesting that a failure to register will invalidate a marriage, and that while national laws must require registration of marriages, non-compliance with registration requirements should not as a matter of law void, nullify or invalidate the marriage.

17. The Applicants submit that a distinction must be drawn between "validity" and "legal recognition" (as used in the Women's Rights Protocol), and that in their view an action or undertaking which is not legally recognised need not necessarily be presumed or declared invalid. The Applicants argue that an unregistered marriage may simultaneously have the status of being valid but not legally recognised and that drawing a distinction between the concepts of validity and legal recognition for the purposes of elaborating on the precise meaning of Article 6(d) would give greatest effect to the rights and objects enshrined in the Women's Rights Protocol.

18. The Applicants submit that in order to give effect to the overall purpose of the Women's Rights Protocol, the commitment to eliminate discrimination in Article 2 and the rights in marriage established in Article 6(e) to 6(j) thereof and other human rights instruments, the legal consequences of non-registered marriages, which should be stipulated by national laws, should be aimed at preserving the personal and proprietary consequences of marriage that are intended to protect the parties thereto. State Parties to the Women's Rights Protocol are duty bound to also stipulate condonation procedures in their national laws that afford parties to a marriage an opportunity to rectify or correct non-compliance with registration requirements.

19. The Applicants submit that the language in Article 6(d) of the Women's Rights Protocol seems to have been interpreted as meaning that unregistered marriages are invalid and/or should not receive legal recognition and that such an interpretation causes prejudice and injustice to women across Africa, whose marriages are unrecorded and unregistered. They submit further that this interpretation is contrary to the overall purpose of the Women's Rights Protocol and to the objectives of Article 2 thereof.

20. The Applicants state that by maintaining the requirement of recording and registration of marriage as a possible intended precursor to legality, Article 6(d) of the Women's Rights Protocol has the potential to jeopardise the right to equality in marriage and that it is against this backdrop that they make the request to the Court for an Advisory Opinion on the precise meaning of this provision.

21. The Applicants submit that their request is therefore that the Court:

a. Confirm that a failure to enact laws that require and regulate marriage registration constitute a violation of the Women's Rights Protocol by a Member State;

b. Advise on the nature and scope of State obligation that Article 6(d) of the Women's Rights Protocol prescribes in respect of recording and registration of marriages, taking into account the broader duty of State parties to, respect,

protect and promote the rights of women, as enshrined in the Women's Rights Protocol;

c. Confirm that Article 6(d) of the Women's Rights Protocol does not suggest or require that non-registration invalidates a marriage;

d. Advise whether State parties are required to enact national laws that provide for condonation procedures to correct or remedy non- compliance with registration requirements ; and

e. Advise on the legal consequences that flow non-registered marriages, having regard to the overall purpose of the Women's Rights Protocol and the specific protections and commitments set out in Articles 2 and 6(e-j) of the Women's Rights Protocol and other relevant instruments.

II. Procedure before the Court

22. The Request dated 7 January 2016 was received at the Registry of the Court on 8 January 2016 and registered forthwith as Request No.001/2016.

23. By a letter dated 15 February 2016, the Registry requested the Commission to advise whether the Request relates to a matter pending before it. The Commission responded by a letter dated 18 May 2016, indicating that the Request does not relate to any matter pending before it.

24. By a letter dated 15 March 2016, the Registry sought confirmation from the Commission, of the Applicants' Observer Status. By a letter dated 30 March 2016, the Commission confirmed that they have Observer Status before the Commission.

25. By a notice dated 13 June 2016, the Request was notified to African Union Member States, the Commission, the African Union Commission, the Pan African Parliament, the Economic, Social and Cultural Council of the African Union, the African Union Commission on International Law, the Directorate of Women and Gender of the AU Commission and Women's Rights Non-Governmental Organisations. The Court set a ninety (90) day time limit for receipt of observations from the date of receipt. By a notice dated 6 October 2016, the Court extended the time for receipt of such observations by sixty (60) days. This period elapsed on 31 January 2017.

26. One of the entities to whom the request was transmitted pursuant to Rule 69 of the Rules, *L'Association des Femmes Juristes de Cote' d'Ivoire* filed their Observations on the merits of the request on 13 September 2016.

27. By a notice dated 12 July 2017, the Applicants and other entities to whom the Request was transmitted were notified of the close of the procedure for the filing of written submissions.

IV. Jurisdiction of the court

28. In accordance with Rule 72 of the Rules, "The Court shall apply, *mutatis mutandis*, the provisions of Part IV of these Rules to the extent that it deems them to be appropriate and acceptable".
29.
30. In terms of Rule 39(1) of the Rules, "The Court shall conduct preliminary examination of its jurisdiction".
31.
32. From the provisions of these Rules, the Court must determine whether it has jurisdiction on the Request before it.
33. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Applicants are amongst the entities entitled to institute a request for advisory opinion under 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").

A. Applicant's arguments

34. The Applicants state that Article 4(1) of the Protocol as read with Article 68(1) of the Rules confer a discretionary competence to the Court to provide an Advisory Opinion at the request of, among others, any African Organisation recognised by the African Union.
35. The Applicants submit that an interpretation of the clause "any African organisation recognised by the African Union encompasses any organisation with Observer Status with the Commission".
36. The Applicants submit that this interpretation is consistent with the principles of statutory interpretation that requires courts to give effect to every word and clause of a statute, to assume that the construction was intentional and to avoid rendering any statutory language superfluous.
37. The Applicants also submit that on a reasonable construction of the overall text of the Protocol, two types of organisations are envisaged: African Intergovernmental Organisations, as mentioned in Article 5(1)(e) thereof, and Non-Governmental organisations, as mentioned in Article 5(3) thereof, which may or may not have been granted Observer Status with the Commission.
38. The Applicants submit that in their view, the phrase "African Organisations recognised by the African Union" must be construed

as an umbrella term referring to both African Intergovernmental Organisations and Non-Governmental Organisations. They submit that this interpretation is consistent with an overall reading of the text and also gives effect to the unique distinction drawn in the text between types of organisations that may seek the assistance of the Court.

39. The Applicants conclude that they qualify as African organisations **r**ecognised by the African Union for the purposes of Article 4(1) of the Protocol and Article 68(1) of the Rules, thus are entitled to request the Advisory Opinion.

B. Position of the Court

40. Article 4(1) of the Protocol provides that "At the request of a Member State of the [African Union], the [AU], any of its organs, or any African organization recognised by the AU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments…".

41. The fact that the Applicants do not fall within the first three categories within the meaning of Article 4(1) of the Protocol is not contested.

42. The first question which arises, however, is whether they fall under the fourth category, that is, whether they are "African organisations recognised by the AU" within the meaning of Article 4(1) of the Protocol.

43. On this issue, the Court has in the past in the Advisory Opinion in *Socio-Economic Rights and Accountability Project* (SERAP) established that the term "organization" used in Article 4(1) of the Protocol covers both Non-Governmental Organisations and Inter-Governmental Organisations.[1]

44. As regards the appellation "African", the Court noted in the same Opinion 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.[2]

45. The Court notes that the Applicants are registered in South Africa, Kenya, Nigeria and Zimbabwe, respectively and with their Observer Status before the Commission, they are entitled to carry out their activities beyond the countries where they are registered. In view

1 Request for Advisory Opinion by *Socio-Economic Rights and Accountability Project (SERAP)*, Request NO. 001/2013, Advisory Opinion of 26 May 2017, Paragraph 46.

2 *Idem*, Para 48.

of this, the Court concludes that they are "African Organisations" in terms of Article 4(1) of the Protocol.

46. The second question the Court must address is whether these organisations, apart from being African, are recognised by the African Union.

47. The Court notes that the Applicants have relied on their Observer Status before the Commission to contend that they are recognised by the African Union.

48. In this respect, the Court has in the afore-mentioned Opinion held that Observer Status before any African Union organ does not amount to recognition by the African Union, rather that, only NGOs recognised by the African Union itself are envisaged in Article 4(1) of the Protocol.[3]

49. The Court has further established that recognition of NGOs by the African Union is through the granting of Observer Status or the signing of a Memorandum of Understanding between the African Union and those NGOs.[4]

50. In the instant case, the Applicants have not claimed to be and have not provided proof that they have Observer Status with the African Union or have sipned any Memorandum of Understanding with the Union.

51. From the foregoing, the Court finds that, although the Applicants are African organisations within the meaning of Article 4(1) of the Protocol, they lack the second essential condition, required by this provision as a basis for the Court's jurisdiction namely, to be "recognised by the African Union".

52. For the above reasons,

The Court,

Unanimously:

i. *Finds* that it is not able to give the Advisory Opinion which was requested of it.

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3 SERAP Advisory Opinion, para 53.

4 *Idem*, para 64.

Separate Opinion: BEN ACHOUR

1. The four opinions rendered on 28 September 2017, reproduces *in extenso* the grounds adduced in the SERAP Opinion of 26 May 2017. That individual opinion merely affirms the opinion we had expressed in the SERAP Opinion.

2. The Court once again finds itself unable to address the four requests for Advisory Opinion and is constrained to not respond to the legal issues of utmost significance raised by the NGOs[1] in regard to the interpretation of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Protocol to the Charter establishing the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), or other relevant human rights instruments in Africa such as the African Charter on Democracy, Elections and Governance or the Protocol to the Charter on the Rights of Women in Africa (the Maputo Protocol).

3. I am by an large in agreement with the reasoning and justifications developed by the Court on the four Opinions in its ruling that "recognition of NGOs by the African Union is subject to the granting of Observer Status or the signing of a Protocol or Cooperation Agreement between the African Union and the NGOs concerned" (paragraph 54 of the Opinion on the Centre and the Coalition).

4. The Court had no choice and could not have done otherwise. Its hands were "tied" by the explicit terms of Article 4(1) of its Protocol[2] and by the restrictive practice of the Union in matters of granting observer status to NGOs.

5. In the four Opinions rendered on 28 September 2017 at the request of several NGOs, all having observer status before the African Commission on Human and Peoples' Rights, the Court came up against the concept of "African organisation recognized by the African Union", as used in Article 4(1) of the Protocol.

6. It is noteworthy that Article 4(1) of the Protocol on institutions

1 The NGOs concerned are:

- Centre for Human Rights of the University of Pretoria (CHR) & the Coalition of African Lesbians;
- African Association for the Defence of Human Rights (ASADHO);
- Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO);
- The Centre of Human Rights, University of Pretoria; Federation of Women Lawyers in Kenya; Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association.

2 "At the request of a Member State of the OAU, the OAU, any of its organs or any African organization recognized by the OAU, the Court may provide an Opinion on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the Opinion is not related to a matter being examined by the Commission".

entitled to seek the Court's Advisory Opinion is paradoxically more restrictive than Article 5(3) of the Protocol on NGOs entitled to refer cases to the Court. Whereas Article 4(1) provides that "At the request [...] of any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument", Article 5(3) of the Protocol states that "the Court may entitle relevant non-governmental organizations (NGOs) with observer status to institute cases directly before it, in accordance with Article 34(6) of this Protocol".

7. Review of this article shows that, in the case of NGOs, referrals in contentious matters are less restrictive than in matters of Advisory Opinion because in seizing the Court on contentious matters, the NGO merely needs to have an observer status with the Commission[3], whereas it needs to be *recognised* by the AU to seek the Court's advisory opinion.

8. The novelty in the four Opinions rendered on 28 September 2017, lies in the formulation of the operative provisions. Instead of stating, as it did in the SERAP Opinion, that the Court "declares that it has no personal jurisdiction to issue the Opinion sought", the Court, on the four Opinions of 28 September 2017, states "that it cannot issue the Advisory Opinion requested of it", thus adopting the position of the International Court of Justice (ICJ) Advisory Opinion of 8 July 1996 on the *Legality of the threats of use of nuclear weapons,* which Opinion we had advocated in the case of SERAP.

In conclusion, we wish to reiterate our hope that the African Union will amend Article 4(1) of the Protocol with a view to opening up possibilities for referrals to African Court and relaxing the conditions required of NGOS to bring their request for Advisory Opinion within the ambit of the Court's jurisdiction; or, the way of amendment being uncertain, to broaden its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

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3 Clearly on condition that the State has subscribed to the jurisdiction clause set forth in Article 34(6) of the Protocol.

Separate opinion: MATUSSE

1. The Court, unanimously, held that it did not have jurisdiction *ratione personae* to issue the Advisory Opinion requested by the Centre for Human Rights and others, yet names the procedure by which it arrived at that conclusion an "Advisory Opinion", a view that I do not endorse. I, hereby, set my separate opinion on record on the following grounds:

I. The form of the Court's acts

2. The legal instruments governing the Court, namely, the Protocol[1] and the Rules of the Court are silent regarding the designation of each of the different forms that its acts may take. That notwithstanding, the practice that has become the norm is the use of the following terms: "Order", "Ruling", "Decision" and "Judgment".

3. When adopting the terms hereinabove, the Court has not been consistent in its practice in that it has used the same expression to designate different things at different times, as demonstrated herein below.

II. The practice of the Court

4. In the Requests for Advisory Opinion Nos. 002/2011,[2] 001/2012[3] and 001/2014,[4] the Court used the expression "Order" to designate the act through which it struck out the request due to the fact that the applicants had either given up on them or had lost interest in pursuing the matter.

5. In the Request for Advisory Opinion No. 002/2012,[5] the Court used the expression "Order" to hold that it was not going to entertain the request due to the fact that the same was pending before the African Commission on Human and People's Rights (the Commission).

1 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

2 Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Jamahiriya, Judgement of 30 March 2012.

3 Request for Advisory Opinion by The Socio-Economic Rights & Accountability Project (SERAP), "Order" of 15 March 2013.

4 Request No 001/2014 - Coalition on the International Criminal Court Ltd/gte(ciccn),Legal Defence & Assistance Project Ltd/gte (LEDAP), Civil Resource Development & Documentation Center (Cirddoc) and Women Advocates Documentation Center Ltd/gte(WARDC), "Order" of 05 June 2015.

5 Request No 002/2012 - The Pan African Lawyers' Union (PALU) and Southern African Litigation Centre (SALC), "Order" of 15 March 2013.

6. In the Request for Advisory Opinion No. 001/2015,[6] the Court used the expression "Order" to strike out the request for failure, on the part of the author, to specify the legal provision of the Charter or of any other human rights instrument in relation to which the Court's Opinion was sought, as provided for under Rule 68(2) of the Court's Rules.

7. In the Request for Advisory Opinion No. 002/2013,[7] the Court pronounced itself on the merits of the request by means of an "Advisory Opinion".

8. In other words, in instances where the Court did not get to the examination of the merits of the request and decided to strike it out due to either lack of interest on the part of the author or to failure to comply with the requirements laid down in Article 68, the Court has preferred the term "Order".

9. In contentious matters, the Court issued an "Order" to declare that it lacked jurisdiction to examine the matter,[8] to hold that it was to continue examining the matter,[9] to decide that it was going to merge the applications[10] and to strike the application due to lack of interest on the part of the applicant to pursue the matter.[11]

10. Still in respect to contentious matters, the Court used a Judgment to declare that some applications were inadmissible,[12] and to declare that it lacked jurisdiction.[13] The expression "Order" is also used in most

6 Request No 001/2015 - Coalition on International Criminal Court LTD/GTE, "Order" of 29 November 2015.

7 Request No 002/2013 - The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights, "Order" of 05 December 2014.

8 App. No. 019/2015 – *Femi Falana v African Commission on Human and Peoples' Rights*, "Order" of 20 November 2015.

9 App. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 03 June 2016.

10 App. Nos. 009&011/2011 – *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, "Order" of 22 September 2011.

11 App. No. 002/2015 – *Collectif Des Anciens Travailleurs du Laboratoire (ALS) v Republic of Mali*, "Order" of 05 September 2016.

12 App. No. 003/2012 – *Peter Joseph Chacha v United Republic of Tanzania*, "Ruling" of 28 March 2014; App. No. 003/2011 – *Urban Mkandawire v Republic of Malawi*, "Judgment" of 21 June 2013.

13 App. No 001/2008: *Michelot Yogogombaye v Republic of Senegal*, "Judgment" of 15 December 2009; App: No. 001/2011 – *Femi Falana v African Union*, "Judgement" of 26 June 2012.

of the Orders for Provisional Measures that the Court has issued.[14]

11. The Court has extensively used the expression "Decision" to declare that it lacked jurisdiction in contentious matters.[15]

III. Analysis

12. In the instant case, the Court found that it lacks jurisdiction *ratione personae*, and yet it designated the act by which it arrived at that conclusion an "Advisory Opinion", which looks, at least, contradictory.

13. For me, the Court either has jurisdiction hence moves on to issue the Advisory Opinion, or it lacks jurisdiction, in which case it issues no Advisory Opinion.

14. My fellow judges might have been influenced by the fact that, in its Request, SERAP asks the Court to take a position with regard to its *locus standi* to seize the Court in terms of Article 4(1) of the Protocol. Meanwhile, this is an issue that would, in any case, be examined by the Court, since, according to Article 39(1) of the Rules, applicable by virtue of Article 72 of the Rules, "[The] Court shall *conduct preliminary examination* of its jurisdiction and the admissibility of the application ..." (my emphasis), before it can adjudicate on any case brought before it.

15. In my view, Article 39(1) of the Rules requires the Court to conduct preliminary examination in order to ascertain its jurisdiction and the admissibility of the application, a proceeding that under no circumstance can be termed, *per se*, an "Advisory Opinion", even if, in instances where the Court has jurisdiction, the decision on jurisdiction and admissibility becomes part of the Advisory Opinion issued, as it was the case in the Request for Advisory Opinion No. 002/2013.

14 Namely: APP. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 24 March 2017. App. No. 004/2013 – *Lohe Issa Konate v Burkina Faso*, "Order" of 04 October 2013; App. No. 002/2013 – *The African Commission on Human and Peoples' Rights v Libya*, "Order" of 15 March 2013.

15 App. No. 002/2011 – *Soufiane Ababou v Peoples' Democratic Republic of Algeria,* "Decision" of 16 June 2011; App. No. 005/2011 – *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, "Decision" of 16 June 2011; App. No. 006/2011 – *Association des Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d' Ivoire*, "Decision" of 16 June 2011; App. No. 007/2011 – *Youssef Ababou v Kingdom of Morocco*, "Decision" of 02 September 2011; App. No. 008/2011 – *Ekollo M. Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, "Decision" of 23 September 2011; App. No. 010/2011 – *Efoua Mbozo'o Samuel v Pan African Parliament*, "Decision" of 30 September 2011; App. No. 012/2011 – *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Republic of Gabon*, "Decision" of 15 December 2011; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v Republic of South Africa,* «Decision» of 30 March 2013; App. No. 004/2012 – *Emmanuel Joseph Uko and Others v Republic of South Africa*, "Decision" of 30 Marche 2012; App. No. 005/2012 – *Amir Adam Timan v The Republic of Sudan*, "Decision" of 30 March 2012.

16. It is, therefore, my understanding that preliminary examination, as envisaged under Article 39(1) of the Rules, is clearly different from issuing an Advisory Opinion, even though, sometimes, may form part of the issued Advisory Opinion.

17. In other words, when the Court, as a result of the preliminary examination so conducted holds that it has no jurisdiction, by no means it can still term the act by which it arrives to that conclusion an Advisory Opinion.

18. In terms of comparative law, when the Inter-American Court of Human Rights (TIDH) decides not to issue an Advisory Opinion, it adopts a form of "Resolución"[16] in lieu of an "Opinión Consultiva" (*Advisory Opinion*). Even when issuing the "Opinión Consultiva", it makes a clear separation between the section pertaining to its jurisdiction (wherein it ascertains whether or not it has jurisdiction vis-à-vis the request for advisory opinion) from the section pertaining to the Advisory Opinion itself (wherein it gives its opinion on the issue it has been seized with, in the event it finds that it has jurisdiction to issue the Advisory Opinion).[17]

19. The Permanent Court of International Justice (PCIJ), in the Request for Advisory Opinion submitted by the Council of the League of Nations in the case of *Russia v Finland*, implicitly[18] used the expression "Advisory Opinion",[19] when it found that it could issue the Advisory Opinion due to Russia's *ad hoc* refusal to accept its jurisdiction. However, this precedent is an incongruous and isolated dating back a century, and it cannot inform the instant case. In actual fact, this precedent has never informed any of the approaches adopted by the Court in its previous decisions on Requests for Advisory Opinion.

IV. My position

20. I am of the opinion that, for the reasons expounded above,

16 Resolución de la corte interamericana de derechos humanos de 23 de junio de 2016, solicitud de opinión consultiva presentada por el secretario general de la organización de los estados americanos; resolución de la corte interamericana de derechos humanos de 27 de enero de 2009, solicitud de opinión consultiva presentada por la comisión interamericana de derechos humanos.

17 Advisory Opinion Oc-21/14 of August 19, 2014 Requested by The Argentine Republic, The Federative Republic Of Brazil, The Republic Of Paraguay And The Oriental Republic Of Uruguay; Advisory Opinion Oc-20/09 Of September 29, 2009 Requested By The Republic Of Argentina.

18 Why not termed formally as such. Only at the end of the provision is "(...) Present Avis ... (…)" mentioned.

19 Decision of the Third Ordinary Session of 23 July 1923, Dossier F. v V Rôle III. 3, available at http://www.icj-cij.org/pcij/serie_B/B_05/Statut_de_la_Carelie_orientale_Avis_consultatif.pdf , accessed 24.05.2017.

the Court should use the term "Decision" to name the act by which it conducts preliminary examination of its jurisdiction and the admissibility of request for Advisory Opinion, in light of Article 39 of the Rules of the Court. Indeed, the recurring practice of using the term "Decision" when it declares its lack of jurisdiction to adjudicate on contentious matters, is perfectly applicable in matters for advisory opinion. This is because Article 72 of the Rules requires that the Court applies *mutatis mutandis* the procedure for contentious matters to procedure relating advisory opinions.

21. The use of the term "Decision" would avoid giving the wrong impression that the Court issues an Advisory Opinion, even when it has issued none. On the other hand, this Court would benefit by remaining consistent in using appropriate terms for its acts, and this would ensure that it is in line with its well-established jurisprudence wherein it uses the term "Decision" when it determines jurisdiction on contentious matters.

Request for Advisory Opinion by l'Association Africaine de Défense des Droits de l'Homme (Advisory Opinion) (2017) 2 AfCLR 637

Application 002/2016, *Request for Advisory Opinion by L'association Africaine de Défense des Droits de l'Homme*

Order 28 September 2017. Done in English and French, the French text being authoritative.

Judges: ORE, KIOKO, NIYUNGEKO, GUISSE, BEN ACHOUR, BOSSA, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA and BENSAOULA

The Court held that it did not have jurisdiction to consider a request for an Advisory Opinion by an NGO that was not recognised by the African Union.

Jurisdiction (request for advisory opinion, African organisation, 26-9, recognized by the African Union, 32-34)

Separate opinion: BEN ACHOUR

Jurisdiction (request for advisory opinion, 8, 9)

Separate opinion: MATUSSE

Procedure (decision, 13, 15, 20)

I. The Applicant

1. The Request for Advisory Opinion dated 10 May 2016, received at the Registry on 8 July 2016, was submitted by *l'Association Africaine de Défense des Droits de l'Homme* (ASADHO) (hereinafter referred to as "the Applicant"), a non-profit Non-Governmental Organisation (NGO) registered as per Ministerial Edict No. 370/CAB/MIN/J§DH/2010 of 7 August 2010, and based in the Democratic Republic of Congo. The Applicant's main objective is the defense and promotion of human rights.

II. Circumstances and subject of the request

2. The Applicant states that, in discharging its mission, it participated under the platform of African Non-Governmental Organisations operating in the natural resources sector known as the International Alliance on Natural Resources in Africa (IANRA) in case studies on the impact of extractive industries on members of local communities in Angola, Democratic Republic of Congo, Kenya, South Africa and Zimbabwe.

3. The Applicant avers that the said case studies highlighted several negative impacts of the mining activities which are tantamount to breaches of the fundamental rights of members of the communities

affected by mineral extraction, which rights are guaranteed by the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").

4. The Applicant adds that it is in this context that a model mining law for Africa was drafted, titled "Model Law on Mining on Community Land in Africa", which African NGOs intend to present to Member States of the African Union for the purposes of harmonising their mining laws and enhancing the protection of the fundamental rights of the communities affected by extractive industries.

5. The prayer of the Applicant is for the Court to rule that the Draft Model Law on Mining on Community Land in Africa (Draft Model Mining Law for Africa) is consistent with the provisions of the Charter.

III. Procedure before the Court

6. The Request dated 10 May 2016, was received at the Registry of the Court on 8 July 2016.

7. By a letter dated 12 August 2016, the Registrar requested the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") to indicate whether the Applicant has Observer Status before the Commission and whether the subject matter of the Request concerned any matter pending before it.

8. By an email dated 16 September 2016, the Commission advised that the Applicant does not have Observer Status before the Commission but did not respond to the issue whether the subject matter of the Request concerned a matter pending before it.

9. By a letter dated 8 December 2016, during the 43rd Ordinary Session of the Court held from 31 October to 18 November 2016, the Registry, on the Court's instructions, requested the Applicant to produce a number of documents for purposes of clarification of their request.

10. By an email dated 7 March 2017, the Applicant submitted a series of documents attesting to its participation in the study process leading to the development of the Draft Model Mining Law for Africa.

IV. Jurisdiction of the Court

11. In accordance with Rule 72 of the Rules, "the Court shall apply, *mutatis mutandis* the provisions of Part IV of these Rules to the extent that it deems them to be appropriate and acceptable".

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

13. From the provisions of the Rules, the Court must determine whether it has jurisdiction to examine the Request before it.

14. In determining whether it has personal jurisdiction in the instant matter, the Court must satisfy itself that the Applicants are amongst the entities entitled to institute a request for advisory opinion under 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").

A. Applicant's arguments

15. The Applicant bases its request on Article 4 of the Protocol.

16. The Applicant submits that it is registered in the Democratic Republic of Congo and has legal personality in terms of Ministerial Edict No. 370/CAB/MIN/JDH/2010 of 7 August 2010. The Applicant states that, being based in the Democratic Republic of the Congo and having Observer Status before the Commission confers on it the status of an African organization.

17. On the merits, the Applicant makes reference to a number of international legal instruments in its document on implementation of the Draft Model Mining Law for Africa.[1] These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

18. The Applicant also draws from the Draft Model Mining Law for Africa[2] prepared by the International Alliance on Natural Resources in Africa (IARNA). The Applicants state that the aforesaid draft model law is not just about the Democratic Republic of Congo; it also concerns African communities in other countries such as Angola, Kenya, South Africa and Zimbabwe, which countries also participated in the studies leading to the development of the draft model law, whose consistency with the Charter, the Court is being requested to advise on.

19. In the Draft Model Mining Law for Africa implementation document, the Applicant highlights the impact associated with Ruashi Mining's[3] activities in the synopsis of the information gathered during the raids carried out and affirmed that: "Ruashi Mining PLC did not provide employment for the population (inhabitants) of the Ruashi Commune, culminating among other things, in urban banditry, increased

1 Document developed exclusively for the Applicant with financial support from the European Union.

2 This refers to the draft law which the Court is requested to determine consistency thereof with the Charter.

3 Ruashi Mining is a mining company based in the Democratic Republic of Congo on which the investigation was conducted. Vide page 18 of the Draft Model Law for Mining in Africa implementation document.

poverty of the population of the Commune, insecurity, upsurge in robberies, prostitution and children dropping out by abandoning school consequent upon the very high cost of studies for the greatest number of the population".

20. The Applicant also submits that relocation of the population was effected "without the company Ruashi Mining consulting, the specialised services of the municipal administration, so as to be compliant with the requisite procedures".

21. It further submits that the investigation into the Ruashi Mining Company highlighted the existence of negative impacts of the mining activities, which is tantamount to breaches of the fundamental rights guaranteed by the Charter, such as the right to life, health, safety, a healthy environment, physical integrity, the right to justice, the right to work and that, consequently, there is a nexus between the negative impacts of mining activity and the human rights protected by the Charter.

22. The Applicant contends that its Observer Status before the Commission confers on it the status of an African organisation entitled to seek an Advisory Opinion on any matter within the field of application of the Charter.

B. Position of the Court

23. In terms of Article 4(1) of the Protocol, "At the request of a Member State of the African Union (AU), any of its organs, or any African organization recognized by the AU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments ... ".

24. The fact that the Applicant does not belong to the first three categories within the meaning of Article 4(1) of the Protocol is not in contention.

25. The first question which arises is whether the Applicant falls under the fourth category, that is, whether it is an "African organization" within the meaning of Article 4(1) of the Protocol.

26. On this issue, the Court has in its Advisory Opinion in Socio-Economic Rights and Accountability Project (SERAP), established that the term "organisation" used in Article 4(1) of the Protocol covers both non-governmental and intergovernmental organisations.[4]

27. As regards the appellation "African", the Court has established that an organisation may be considered as "African" if it is registered

4 Request for Advisory Opinion by *Socio-Economic Rights and Accountability Project* (SERAP), No. 001/2013, Advisory Opinion of 26 May 2017, para 46.

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.[5]

28. The Court notes that the Applicant is registered in the Democratic Republic of Congo where it undertakes its activities at the sub-regional and continental levels. Articles 28, 30, 31, 39 of the Statutes which establish ASADHO define the organisation's objectives as: Article 28 "voluntarily assist and represent victims of violations, prisoners of conscience and conscientious objectors ...", Article 30 "work through the press to promote and disseminate human rights and denounce violations thereof" and Article 31 "representative offices are branches of the Association based outside the country ..."

29. 29 From the foregoing, it is apparent that the Applicant operates not only in the Democratic Republic of Congo, but also in the Central Africa region and in a significant part of the African continent. Proof thereof is that the studies leading to the adoption of the draft mining law are the inputs of several African States, which in any case are also members of the AU.

30. The Court therefore concludes that the Applicant is an African organisation within the meaning of Article 4 of the Protocol.

31. The second question which follows is whether the Applicant is recognised by the African Union.

32. The Court notes that the Applicant relies on its Observer Status before the Commission to contend that it is recognised by the African Union.

33. In this respect, the Court has, in the afore-mentioned SERAP Advisory Opinion indicated that Observer Status before any African Union Organ does not amount to recognition by the Union. It has thus established that only African NGOs recognised by the African Union itself are covered by Article 4(1) of the Protocol.[6]

34. The Court has further established that recognition of NGOs by the African Union is through the granting of Observer Status or the signing of a Memorandum of Understanding and Cooperation between the African Union and the NGOs concerned.[7]

35. In the instant case, the Applicant has not claimed and has not provided proof as to their Observer Status before the African Union or that it has signed any Memorandum of Understanding with the Union.

36. From the foregoing, the Court finds that although the Applicant is an African organization within the meaning of Article 4(1) of the Protocol,

5 *Idem*, para 48.

6 *Idem*, para 53 .

7 *Idem*, para 65.

it lacks the second essential condition required under this provision as a basis for the Court's jurisdiction, namely to be "recognised by the African Union".

37. For the above reasons,

The Court,

Unanimously,

i. *Finds* that it is not able to give the Advisory Opinion which was requested of it.

Separate Opinion: BEN ACHOUR

1. The four opinions rendered on 28 September 2017, reproduce *in extenso* the grounds adduced in the SERAP Opinion of 26 May 2017. That individual opinion merely affirms the opinion we had expressed in the SERAP Opinion.

2. The Court once again finds itself unable to address the four requests for Advisory Opinion and is constrained to not respond to the legal issues of utmost significance raised by the NGOs[1] in regard to the interpretation of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") and the Protocol to the Charter establishing the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), or other relevant human rights instruments in Africa such as the African Charter on Democracy, Elections and Governance or the Protocol to the Charter on the Rights of Women in Africa (the Maputo Protocol).

3. I am by an large in agreement with the reasoning and justifications developed by the Court on the four Opinions in its ruling that "recognition of NGOs by the African Union is subject to the granting of Observer Status or the signing of a Protocol or Cooperation Agreement between the African Union and the NGOs concerned" (paragraph 54 of the

1 The NGOs concerned are:

- Centre for Human Rights of the University of Pretoria (CHR) & the Coalition of African Lesbians;
- African Association for the Defence of Human Rights (ASADHO);
- Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO);
- The Centre of Human Rights, University of Pretoria; Federation of Women Lawyers in Kenya; Women Advocates Research and Documentation Centre and Zimbabwe Women Lawyers Association.

Opinion on the Centre and the Coalition).

4. The Court had no choice and could not have done otherwise. Its hands were "tied" by the explicit terms of Article 4(1) of its Protocol[2] and by the restrictive practice of the Union in matters of granting observer status to NGOs.

5. In the four Opinions rendered on 28 September 2017 at the request of several NGOs, all having observer status before the African Commission on Human and Peoples' Rights, the Court came up against the concept of "African organisation recognized by the African Union", as used in Article 4(1) of the Protocol.

6. It is noteworthy that Article 4(1) of the Protocol on institutions entitled to seek the Court's Advisory Opinion is paradoxically more restrictive than Article 5(3) of the Protocol on NGOs entitled to refer cases to the Court. Whereas Article 4(1) provides that "At the request [...] of any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instrument", Article 5(3) of the Protocol states that "the Court may entitle relevant non-governmental organizations (NGOs) with observer status to institute cases directly before it, in accordance with Article 34(6) of this Protocol".

7. Review of this article shows that, in the case of NGOs, referrals in contentious matters are less restrictive than in matters of Advisory Opinion because in seizing the Court on contentious matters, the NGO merely needs to have an observer status with the Commission[3], whereas it needs to be *recognised* by the AU to seek the Court's advisory opinion.

8. The novelty in the four Opinions rendered on 28 September 2017, lies in the formulation of the operative provisions. Instead of stating, as it did in the SERAP Opinion, that the Court "declares that it has no personal jurisdiction to issue the Opinion sought", the Court, on the four Opinions of 28 September 2017, states "that it cannot issue the Advisory Opinion requested of it", thus adopting the position of the International Court of Justice (ICJ) Advisory Opinion of 8 July 1996 on the *Legality of the threats of use of nuclear weapons,* which Opinion we had advocated in the case of SERAP.

9. In conclusion, we wish to reiterate our hope that the African

2 "At the request of a Member State of the OAU, the OAU, any of its organs or any African organization recognized by the OAU, the Court may provide an Opinion on any legal matter relating to the Charter or any other relevant human rights instrument, provided that the subject matter of the Opinion is not related to a matter being examined by the Commission".

3 Clearly on condition that the State has subscribed to the jurisdiction clause set forth in Article 34 (6) of the Protocol.

Union will amend Article 4(1) of the Protocol with a view to opening up possibilities for referrals to African Court and relaxing the conditions required of NGOS to bring their request for Advisory Opinion within the ambit of the Court's jurisdiction; or, the way of amendment being uncertain, to broaden its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

Separate opinion: MATUSSE

1. The Court, unanimously, held that it did not have jurisdiction *ratione personae* to issue the Advisory Opinion requested by ASADHO, yet names the procedure by which it arrived at that conclusion an "Advisory Opinion", a view that I do not endorse. I, hereby, set my separate opinion on record on the following grounds:

I. The form of the Court's acts

2. The legal instruments governing the Court, namely, the Protocol[1] and the Rules of the Court are silent regarding the designation of each of the different forms that its acts may take. That notwithstanding, the practice that has become the norm is the use of the following terms: "Order", "Ruling", "Decision" and "Judgment".

3. When adopting the terms hereinabove, the Court has not been consistent in its practice in that it has used the same expression to designate different things at different times, as demonstrated herein below.

II. The practice of the Court

4. In the Requests for Advisory Opinion Nos. 002/2011,[2] 001/2012[3]

1 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

2 Request for Advisory Opinion by Advocate Marcel Ceccaldi on behalf of the Great Socialist People's Libyan Jamahiriya, Judgement of 30 March 2012.

3 Request for Advisory Opinion by The Socio-Economic Rights & Accountability Project (SERAP), "Order" of 15 March 2013.

and 001/2014,[4] the Court used the expression "Order" to designate the act through which it struck out the request due to the fact that the applicants had either given up on them or had lost interest in pursuing the matter.

5. In the Request for Advisory Opinion No. 002/2012,[5] the Court used the expression "Order" to hold that it was not going to entertain the request due to the fact that the same was pending before the African Commission on Human and People's Rights (the Commission).

6. In the Request for Advisory Opinion No. 001/2015,[6] the Court used the expression "Order" to strike out the request for failure, on the part of the author, to specify the legal provision of the Charter or of any other human rights instrument in relation to which the Court's Opinion was sought, as provided for under Rule 68(2) of the Court's Rules.

7. In the Request for Advisory Opinion No. 002/2013,[7] the Court pronounced itself on the merits of the request by means of an "Advisory Opinion".

8. In other words, in instances where the Court did not get to the examination of the merits of the request and decided to strike it out due to either lack of interest on the part of the author or to failure to comply with the requirements laid down in Article 68, the Court has preferred the term "Order".

9. In contentious matters, the Court issued an "Order" to declare that it lacked jurisdiction to examine the matter,[8] to hold that it was to continue examining the matter,[9] to decide that it was going to merge the applications[10] and to strike the application due to lack of interest on

4 Request No 001/2014 - Coalition on the International Criminal Court Ltd/gte(ciccn),Legal Defence & Assistance Project Ltd/gte (LEDAP), Civil Resource Development & Documentation Center (Cirddoc) and Women Advocates Documentation Center Ltd/gte(WARDC), "Order" of 05 June 2015.

5 Request No 002/2012 - The Pan African Lawyers' Union (PALU) and Southern African Litigation Centre (SALC), "Order" of 15 March 2013.

6 Request No 001/2015 - Coalition on International Criminal Court LTD/GTE, "Order" of 29 November 2015.

7 Request No 002/2013 - The African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights, "Order" of 05 December 2014.

8 App. No. 019/2015 – *Femi Falana v African Commission on Human and Peoples' Rights*, "Order" of 20 November 2015.

9 App. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 03 June 2016.

10 App. Nos. 009&011/2011 – *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, "Order" of 22 September 2011.

the part of the applicant to pursue the matter.[11]

10. Still in respect to contentious matters, the Court used a Judgment to declare that some applications were inadmissible,[12] and to declare that it lacked jurisdiction.[13] The expression "Order" is also used in most of the Orders for Provisional Measures that the Court has issued.[14]

11. The Court has extensively used the expression "Decision" to declare that it lacked jurisdiction in contentious matters.[15]

III. Analysis

12. In the instant case, the Court found that it lacks jurisdiction *ratione personae*, and yet it designated the act by which it arrived at that conclusion an "Advisory Opinion", which looks, at least, contradictory.

13. For me, the Court either has jurisdiction hence moves on to issue the Advisory Opinion, or it lacks jurisdiction, in which case it issues no Advisory Opinion.

14. My fellow judges might have been influenced by the fact that, in its Request, SERAP asks the Court to take a position with regard to its *locus standi* to seize the Court in terms of Article 4(1) of the Protocol. Meanwhile, this is an issue that would, in any case, be examined by

11 App. No. 002/2015 – *Collectif Des Anciens Travailleurs du Laboratoire (ALS) v Republic of Mali*, "Order" of 05 September 2016.

12 App. No. 003/2012 – *Peter Joseph Chacha v United Republic of Tanzania*, "Ruling" of 28 March 2014; App. No. 003/2011 – *Urban Mkandawire v Republic of Malawi*, "Judgment" of 21 June 2013.

13 App. No 001/2008: *Michelot Yogogombaye v Republic of Senegal*, "Judgment" of 15 December 2009; App: No. 001/2011 – *Femi Falana v African Union*, "Judgement" of 26 June 2012.

14 Namely: APP. No. 016/2015 – *General Kayumba Nyamwasa And Others v Republic of Rwanda*, "Order" of 24 March 2017. App. No. 004/2013 – *Lohe Issa Konate v Burkina Faso*, "Order" of 04 October 2013; App. No. 002/2013 – *The African Commission on Human and Peoples' Rights v Libya*, "Order" of 15 March 2013.

15 App. No. 002/2011 – *Soufiane Ababou v Peoples' Democratic Republic of Algeria,* "Decision" of 16 June 2011; App. No. 005/2011 – *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines*, "Decision" of 16 June 2011; App. No. 006/2011 – *Association des Juristes d'Afrique pour la Bonne Gouvernance v Republic of Cote d' Ivoire*, "Decision" of 16 June 2011; App. No. 007/2011 – *Youssef Ababou v Kingdom of Morocco*, "Decision" of 02 September 2011; App. No. 008/2011 – *Ekollo M. Alexandre v Republic of Cameroon and Federal Republic of Nigeria*, "Decision" of 23 September 2011; App. No. 010/2011 – *Efoua Mbozo'o Samuel v Pan African Parliament*, "Decision" of 30 September 2011; App. No. 012/2011 – *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v Republic of Gabon*, "Decision" of 15 December 2011; App. No. 002/2012 – *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v Republic of South Africa,* «Decision» of 30 March 2013; App. No. 004/2012 – *Emmanuel Joseph Uko and Others v Republic of South Africa*, "Decision" of 30 Marche 2012; App. No. 005/2012 – *Amir Adam Timan v The Republic of Sudan*, "Decision" of 30 March 2012.

the Court, since, according to Article 39(1) of the Rules, applicable by virtue of Article 72 of the Rules, "[The] Court shall *conduct preliminary examination* of its jurisdiction and the admissibility of the application ..." (my emphasis), before it can adjudicate on any case brought before it.

15. In my view, Article 39(1) of the Rules requires the Court to conduct preliminary examination in order to ascertain its jurisdiction and the admissibility of the application, a proceeding that under no circumstance can be termed, *per se*, an "Advisory Opinion", even if, in instances where the Court has jurisdiction, the decision on jurisdiction and admissibility becomes part of the Advisory Opinion issued, as it was the case in the Request for Advisory Opinion No. 002/2013.

16. It is, therefore, my understanding that preliminary examination, as envisaged under Article 39(1) of the Rules, is clearly different from issuing an Advisory Opinion, even though, sometimes, may form part of the issued Advisory Opinion.

17. In other words, when the Court, as a result of the preliminary examination so conducted holds that it has no jurisdiction, by no means it can still term the act by which it arrives to that conclusion an Advisory Opinion.

18. In terms of comparative law, when the Inter-American Court of Human Rights (TIDH) decides not to issue an Advisory Opinion, it adopts a form of "Resolución"[16] in lieu of an "Opinión Consultiva" (*Advisory Opinion*). Even when issuing the "Opinión Consultiva", it makes a clear separation between the section pertaining to its jurisdiction (wherein it ascertains whether or not it has jurisdiction vis-à-vis the request for advisory opinion) from the section pertaining to the Advisory Opinion itself (wherein it gives its opinion on the issue it has been seized with, in the event it finds that it has jurisdiction to issue the Advisory Opinion).[17]

19. The Permanent Court of International Justice (PCIJ), in the Request for Advisory Opinion submitted by the Council of the League of Nations in the case of *Russia v Finland*, implicitly[18] used the expression

16 Resolución de la corte interamericana de derechos humanos de 23 de junio de 2016, solicitud de opinión consultiva presentada por el secretario general de la organización de los estados americanos; resolución de la corte interamericana de derechos humanos de 27 de enero de 2009, solicitud de opinión consultiva presentada por la comisión interamericana de derechos humanos.

17 Advisory Opinion Oc-21/14 of August 19, 2014 Requested by The Argentine Republic, The Federative Republic Of Brazil, The Republic Of Paraguay And The Oriental Republic Of Uruguay; Advisory Opinion Oc-20/09 Of September 29, 2009 Requested By The Republic Of Argentina.

18 Why not termed formally as such. Only at the end of the provision is "(...) Present Avis ... (…)" mentioned.

"Advisory Opinion",[19] when it found that it could issue the Advisory Opinion due to Russia's *ad hoc* refusal to accept its jurisdiction. However, this precedent is an incongruous and isolated dating back a century, and it cannot inform the instant case. In actual fact, this precedent has never informed any of the approaches adopted by the Court in its previous decisions on Requests for Advisory Opinion.

IV. My position

20. I am of the opinion that, for the reasons expounded above, the Court should use the term "Decision" to name the act by which it conducts preliminary examination of its jurisdiction and the admissibility of request for Advisory Opinion, in light of Article 39 of the Rules of the Court. Indeed, the recurring practice of using the term "Decision" when it declares its lack of jurisdiction to adjudicate on contentious matters, is perfectly applicable in matters for advisory opinion. This is because Article 72 of the Rules requires that the Court applies *mutatis mutandis* the procedure for contentious matters to procedure relating advisory opinions.

21. The use of the term "Decision" would avoid giving the wrong impression that the Court issues an Advisory Opinion, even when it has issued none. On the other hand, this Court would benefit by remaining consistent in using appropriate terms for its acts, and this would ensure that it is in line with its well-established jurisprudence wherein it uses the term "Decision" when it determines jurisdiction on contentious matters.

19 Decision of the Third Ordinary Session of 23 July 1923, Dossier F. v V Rôle III. 3, available at http://www.icj-cij.org/pcij/serie_B/B_05/Statut_de_la_Carelie_orientale_Avis_consultatif.pdf , accessed 24.05.2017.