


AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
<p style="text-align: center;">AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES</p>		

**THE MATTER OF**

**JEBRA KAMBOLE**

**V**

**UNITED REPUBLIC OF TANZANIA**

**APPLICATION NO. 018/2018**

**JUDGMENT**

**15 JULY 2020**



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**The Court composed of:** Sylvain ORÉ, President; Ben KIOKO, Vice-President; Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, and Stella I. ANUKAM - Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 8(2) of the Rules of Court (hereinafter referred to as "the Rules"), Judge Imani D. ABOUD, member of the Court and a national of Tanzania did not hear the Application.

In the matter of

Jebra KAMBOLE

*Self -represented*

Versus

UNITED REPUBLIC OF TANZANIA

represented by:

- i. Dr Clement J MASHAMBA, Solicitor General, Office of the Solicitor General
- ii. Dr Ally POSSI, Deputy Solicitor General, Attorney General's Chambers
- iii. Ms Caroline Kitana CHIPETA, Acting Director of Legal Unit, Ministry of Foreign Affairs and East African Cooperation
- iv. Ms Alesia MBUYA, Assistant Director, Constitutional Affairs, Principal State Attorney, Attorney General's Chambers
- v. Mr. Mark MULWAMBO, Principal State Attorney, Attorney General's Chambers
- vi. Mr Sylvester MWAKITALU, Senior State Attorney, Attorney General's Chambers
- vii. Ms Neisha SHAO, State Attorney, Attorney General's Chambers

- viii. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs and East African Cooperation.

After deliberation,

*renders the following Judgment:*

## **I. THE PARTIES**

1. Jebra Kambole (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania. He is an advocate by profession and a member of the Tanganyika Law Society. He brings this Application challenging article 41(7) of the Constitution of the Respondent State.
2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepts the jurisdiction of the Court to receive cases directly from individuals and non-governmental organisations (NGOs). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration under Article 34(6) of the Protocol.

## **II. SUBJECT MATTER OF THE APPLICATION**

### **A. Facts of the matter**

3. The Applicant alleges that the Respondent State has violated his rights under the Charter by maintaining article 41(7) in its Constitution, which provision bars any

court from inquiring into the election of a presidential candidate after the Electoral Commission has declared a winner.

#### **B. Alleged violations**

4. The Applicant avers that by barring courts from inquiring into the election of a presidential candidate, after the Electoral Commission has declared a winner, the Respondent State has violated his right to freedom from discrimination under Article 2 of the Charter. The Applicant further avers that the Respondent State has violated his right to equal protection of the law and the right to have his cause heard especially the right to appeal to competent national organs against acts violating his fundamental rights as provided for in Articles 3(2) and 7(1)(a) of the Charter, respectively.
5. The Applicant also alleges that the Respondent State has failed to honour its obligation to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative and other measures to give effect to the Charter as stipulated under Article 1 of the Charter.
6. It is also the Applicant's averment that the Respondent State's conduct also violates article 13(6)(a) of its own Constitution.

#### **III. SUMMARY OF THE PROCEDURE BEFORE THE COURT**

7. The Application was filed on 4 July 2018 and served on the Respondent State on 27 July 2018. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.
8. After several reminders and extensions of time by the Registry, the Respondent State filed its Response on 10 July 2019.

9. Pleadings were closed on 18 January 2020 and the Parties were duly notified.

#### **IV. PRAYERS OF THE PARTIES**

10. The Applicant prays the Court for the following :

- i. The Respondent is in violation of Art. 1, 2, 3(2) and 7(1) of the African Charter on Human and People's Rights.
- ii. That the respondent to put in place Constitutional and Legislative measures to guarantee the rights provided for under Art 1, 2, 3(2) and 7(1) of the African Charter on Human and Peoples' Right.
- iii. Make an Order that the Respondent report to the Honourable Court, within a period of twelve (12) months from the date of the judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders;
- iv. Any other remedy and/or relief that the Honourable Court will deem to grant; and
- v. The Respondent to pay the Applicant's costs.

11. The Respondent State prays the Court for the following orders with respect to jurisdiction and admissibility:

- i. That the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court or Article 56(5) and Article 6(2) of the Protocol.
- ii. That the Application be dismissed in accordance to Rule 38 of the Rules of Court.

12. The Respondent State prays the Court for the following orders with respect to merits:

- i. A declaration that Respondent State is not in violation of 1, 2, 3(2) and 7(1) of the African Charter on Human and Peoples' Rights.
- ii. A declaration that 41(7) of the Respondent State's Constitution is not in violation of Article 7(1) of the Charter hence no need of making any constitutional and Legislative measures to guarantee the rights alleged.
- iii. That the Application be declared inadmissible.

- iv. That, the Application be dismissed.
- v. The Applicant to pay the Respondent's costs.

## V. JURISDICTION

13. The Court observes that Article 3(1) of the Protocol provides as follows:

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.

14. The Court further observes that in terms of Rule 39(1) of the Rules: “[t]he Court shall conduct preliminary examination of its jurisdiction ...”.

15. The Court notes that none of the Parties to this Application has challenged its jurisdiction. This notwithstanding, and on the basis of the above-cited provisions, the Court must, preliminarily, conduct an assessment of its jurisdiction.

16. The Court recalls that jurisdiction has four dimensions: personal, material, temporal and territorial. The Court further recalls that all applications must fulfil the four dimensions of jurisdiction before they can be considered.

17. The Court notes, with respect to its personal jurisdiction, that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, filed the Declaration prescribed under Article 34(6) of the Protocol accepting the jurisdiction of the Court to directly receive applications from individuals and Non-governmental Organizations with observer status with the African Commission on Human and Peoples’ Rights (hereinafter “the Commission”).

18. The Court also recalls that the Respondent State, on 21 November 2019, deposited, with the African Union Commission, an instrument withdrawing its Declaration.

19. As the Court has held, the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending before this Court prior to the deposit of the Declaration, as is the case with the present Application.<sup>1</sup> Further, any such withdrawal of a Declaration only takes effect twelve (12) months after the instrument of withdrawal is deposited and the Respondent State's withdrawal will, therefore, take effect on 22 November 2020.

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

21. With regard to its material jurisdiction, the Court has consistently held that Article 3(1) of the Protocol confers on it the power to examine any application provided it contains allegations of violation of the rights protected by the Charter or any other human rights instrument ratified by the Respondent State concerned. Further, the Court notes that, in accordance with Article 7 of the Protocol, it "shall apply the provisions of the Charter and any other relevant human rights instrument ratified by the State concerned." In the present matter, the Applicant alleges the violation of rights guaranteed in Articles 1, 2, 3 (2), and 7(1)(a) of the Charter. As noted above, the Respondent State is a party to the Charter and to the Protocol. Consequently, the Court finds that its material jurisdiction is established.

22. In relation to temporal jurisdiction, the Court holds that the relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and the Protocol as well as the date of depositing the Declaration under Article 34(6) of the Protocol.

23. The Court observes that the violations alleged by the Applicant stem from article 41(7) of the Respondent State's Constitution. The Court also observes that this

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<sup>1</sup> *Ambrose Cheusi v. United Republic of Tanzania*, AfCHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39. See also, *Ingabire Victoire Umuhoza v. Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 562.



Constitution was adopted in 1977 but it has been amended several times over the years. Nevertheless it is clear that the Respondent State's Constitution was enacted before the Respondent State became a party to both the Charter and the Protocol. Notably, article 41(7) remains a part of the Respondent State's laws to date, long after the Respondent State became a party to both the Charter and the Protocol.

24. The Court finds, therefore, that the violations alleged by the Applicant, though commencing before the Respondent State became a party to the Charter and the Protocol, continued after the Respondent State became a party to these two instruments. Given the foregoing, the Court holds that it has temporal jurisdiction in the present matter.

25. With regard to territorial jurisdiction, the Court observes that the alleged violations are all said to have occurred within the territory of the Respondent State and this has not been contested. The Court, therefore, holds that its territorial jurisdiction is established.

26. In light of all the above, the Court holds that it has jurisdiction to examine the Application filed by the Applicant.

## **VI. ADMISSIBILITY**

27. Pursuant to Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter." In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of ... the admissibility of the Application in accordance with Article... 56 of the Charter, and Rule 40 of the Rules."

28. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides that:

Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the Matter;
7. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

29. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections to the admissibility of the Application.

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

30. The Respondent State raises two objections relating, first, to the requirement of exhaustion of local remedies, and, second, to the filing of the Application within a reasonable time.

**i. Objection on the ground that the Applicant failed to exhaust local remedies**

31. The Respondent State argues that the:

[a]pplicant never made an attempt to exhaust the available local remedies nor has he given the Respondent the opportunity to address his alleged grievances. The right to appeal is also provided under the Constitution of the United Republic of Tanzania together with various enabling statutory provisions. Therefore, it is indeed improper for the Applicant at this stage to raise matters which could have been sufficiently addresses within the national justice system of the Respondent State prior to the application before this Honourable Court.

32. On the basis of the above, the Respondent State argues that the Court should find the Application inadmissible.

33. The Applicant submits that there is no remedy within the judicial system of the Respondent State to address the violations that he is alleging. He raises three grounds to substantiate his assertion. Firstly, he argues that article 74(12) of the Respondent State's Constitution which provides that "no court shall have power to inquire into anything done by the Electoral Commission in the discharge of its functions in accordance with the provisions of this Constitution" ousts the jurisdiction of domestic courts in all cases involving acts or omissions by the Electoral Commission.

34. Secondly, he contends that article 41(7) of the Respondent State's Constitution which provides that "when a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then no court of law shall have any jurisdiction to inquire into the election of that candidate" prohibits recourse to judicial remedies for the purposes of challenging the results of presidential elections. In the Applicant's view, article 41(7) contradicts article 13(6)(a) of the said Constitution and thus is unconstitutional. The Applicant further argues that the Respondent State's Court of Appeal has already ruled that it does not have the power to declare any provision of the Constitution unconstitutional.

The Applicant thus submits that there is no remedy for his grievance within the Respondent State.

35. Thirdly, the Applicant contends that under the Basic Rights and Duties Enforcement Act, a person can only go to court if he alleges a human rights violation covered by articles 12 to 29 of the Respondent State's Constitution. According to the Applicant, the violation he is alleging arises from article 41(7) of the Respondent State's Constitution and is not covered by the remedies offered under the Basic Rights and Duties Enforcement Act. The Applicant thus submits that there is no remedy for him to exhaust in the Respondent State.

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36. The Court reiterates that, in accordance with Article 56(5) of the Charter and Rule 40(5) of the Rules, for an Application to be admissible it must be filed "after exhausting local remedies, if any, unless it is obvious [to the Court] that this procedure is unduly prolonged".

37. The Court recalls that for purposes of exhausting local remedies an Applicant is only required to exhaust judicial remedies that are available, effective and sufficient.<sup>2</sup> As confirmed by both the Commission and the Court, a remedy is available if it can be utilised as a matter of fact without impediment; a remedy is effective if it offers a real prospect of success; and a remedy is sufficient if it is capable of redressing the wrong complained against.<sup>3</sup> However, the Court has always considered that there is an exception to this rule if local remedies are unavailable, ineffective or insufficient, or if the procedure for obtaining such

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<sup>2</sup> *Sir Dawda K Jawara v. The Gambia*, (2000) AHRLR 107 (ACHPR 2000) §§ 31-32.

<sup>3</sup> *Ibid.*

remedies is abnormally prolonged.<sup>4</sup> The Court also notes that an applicant is only required to exhaust ordinary judicial remedies.<sup>5</sup>

38. The Court recalls that “in ordinary language, being effective refers to that which produces the expected result ... the effectiveness of a remedy is therefore measured in terms of its ability to solve the problem raised by the Applicant.”<sup>6</sup> The Court further recalls that a remedy is available if it can be pursued by the Applicant without any impediment.<sup>7</sup>

39. The Court notes that in 1995, the Respondent State enacted the Basic Rights and Duties Enforcement Act which permits litigants to enforce the basic rights and duties set out in Chapter One (1), Part III of its Constitution. Under this Act, the High Court has the power to “make all such orders as shall be necessary and appropriate to secure [an applicant] the enjoyment of the basic rights, freedoms and duties ...”.

40. In considering the powers of the High Court under the Basic Rights and Duties Enforcement Act, the Court takes judicial notice of the fact that the Respondent State’s Court of Appeal in *Attorney General v Mtikila*, held that it did not have the power to nullify any constitutional provisions.<sup>8</sup> Specifically in respect of article 41(7) of the Respondent State’s Constitution, the Court also takes judicial notice of the decision of the Respondent State’s High Court in *Augustine Lyatonga Mrema v Attorney General*<sup>9</sup> in which it held that article 41(7) in unambiguous language has ousted the jurisdiction of courts to inquire into the election of the president once the Electoral Commission has declared the results. According to the High Court, if parliament had intended for courts to have the power to inquire into the election of

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<sup>4</sup> *The Beneficiaries of Late Norbert Zongo and others v. Burkina Faso* (preliminary objections) (2013) 1 AfCLR 197 § 84; *Alex Thomas v. United Republic of Tanzania* (merits) (2015) 1 AfCLR 465 § 64 and *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania* (merits) (2016) 1 AfCLR 507 § 95.

<sup>5</sup> *Oscar Josiah v. United Republic of Tanzania*, AfCHPR, Application No. 053/2016, Judgment of 28 March 2019 (merits) § 38 and *Diocles William v. United Republic of Tanzania*, AfCHPR, Application No. 016/2016. Judgment of 21 September 2018 (merits and reparations) § 42.

<sup>6</sup> *The Beneficiaries of Late Norbert Zongo and others v. Burkina Faso* (merits) (2014) 1 AfCLR 219 § 68.

<sup>7</sup> *Lohe Issa Konate v. Burkina Faso* (merits) (2014) 1 AfCLR 314 § 96.

<sup>8</sup> *The Honourable Attorney General v. Reverend Christopher Mtikila*, Civil Appeal No. 45 of 2009.

<sup>9</sup> [1996] TLR 273 (HC).

a president, clear provision for the same would have been included in the Constitution.

41. In the present circumstances, the Court notes that had the Applicant challenged article 41(7) before the Respondent State's courts the application would have, inevitably, been dismissed on the basis that, no Court in the Respondent State has the power to nullify provisions of its Constitution. In this regard, the Court further notes that a domestic remedy that has no prospects of success does not constitute an effective remedy within the context of Article 56(5) of the Charter.<sup>10</sup> In the circumstances, therefore, the Court finds that the Applicant did not have a remedy that was available for exhaustion before filing this Application.<sup>11</sup>

42. In light of the above, the Court dismisses the Respondent State's objection to the admissibility of the Application on the ground that domestic remedies were not exhausted.

**ii. Objection on the ground that the Application was not filed within a reasonable time**

43. The Respondent State argues that the "Application does not meet the requirements of Rule 40(6) of the Court Rules." According to the Respondent State, "the Applicant's case at the local jurisdiction was concluded in 2010 where the Court of Appeal of Tanzania dismissed the appeal. It has taken eight years for the Applicant to file his application in this Honourable Court." Although the Respondent State concedes that neither the Charter nor the Rules prescribe a time limit within which an individual is required to file an application, it submits that the Application "does not fulfil the provisions of Article 56(6) of the African Charter together with Rule 40(6) of the Court Rules, thus it should be rejected by the Court."

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<sup>10</sup> *Alfred Agbes Woyome v. Republic of Ghana*, AfCHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits and reparations) §§ 65-68.

<sup>11</sup> Cf. *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights (2000) AHRLR (ACHPR 2000) 227.

44. The Applicant submits that there is no time frame stipulated under Article 56(6) of the Charter and that it “falls on the Court to pronounce itself on what in its view is within reasonable time.” In support of his submission, the Applicant cites the decision of the the Commission in *Darfur Relief and Documentation Centre v Sudan*. He argues that although Article 56(6) is meant to encourage applicants to be vigilant and to prevent tardiness in filing of applications, in appropriate cases, where there are good and compelling reasons, fairness and justice require the consideration of applications that have not been filed promptly. Specifically, the Applicant submits that, in relation to his Application:

... the acts complained of are acts that are continuous in nature and do not occur in a specific time. Therefore, due to the continuous violation of this conduct by respondent, the court should consider that the application is within the time frame as provided by the law.

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45. The Court confirms that Article 56(6) of the Charter does not stipulate a precise time limit within which an Application shall be filed before the Court. Rule 40(6) of the Rules simply refers to a “reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter.”

46. As the Court has established, the reasonableness of the period for seizure of the Court depends on the particular circumstances of each case and must be determined on a case-by-case basis.<sup>12</sup>

47. In the present Application, the Court takes cognisance of the fact that the source of the violation alleged by the Applicant lies in a provision of the Respondent State’s Constitution. The Court also recalls that the Respondent State deposited the Declaration under Article 34(6) of the Protocol in March 2010. Strictly speaking,

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<sup>12</sup> *Anudo Ochieng Anudo v. United Republic of Tanzania* (merits) (2018) 2 AfCLR 248 § 57.

therefore, the door for commencing action against the Respondent State, in relation to the violations alleged by the Applicant, was only opened in March 2010. This Application, however, was filed on 4 July 2018, which is eight (8) years and four (4) months after the deposit of the Declaration. In the circumstances, the Court must determine whether, on the facts of the present case, the aforementioned period is reasonable within the meaning of Rule 40(6) of the Rules.

48. At the outset, the Court notes that although the Respondent State has submitted that the “Applicant’s case at the local jurisdiction was concluded in 2010 where the Court of Appeal of Tanzania dismissed the appeal” no details have been provided of the case involving the Applicant which was dismissed in 2010. For example, the Respondent State has not indicated to the Court who were the parties in the 2010 case; what the issues before the Court of Appeal were or even what the registration number of the case was. Given the lack of information about the alleged 2010 case, the Court holds that the Respondent State has failed to demonstrate that there was a 2010 case involving the Applicant which has relevance to the proceedings before it. The Court is reinforced in its finding since it is trite law that he who alleges bears the burden of proving the allegation(s).

49. The Court recalls that Rule 40(6) of the Rules, which restates Article 56(6) of the Charter, emphasises two aspects that the Court must consider for purposes of determining whether or not an application fulfils the requirement of being filed within a reasonable time. The first aspect is that an “application be filed within a reasonable time from the date local remedies were exhausted.” The second aspect requires that an application be filed within a reasonable time “from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter.”

50. In the present Application, since the Court has found that there were no domestic judicial remedies available for the Applicant to exhaust, the question of a reasonable time, after the exhaustion of domestic remedies, within which the



Applicant ought to have filed his Application with the Court does not arise. The Court, therefore, holds that this Application fulfils the requirement in the first limb of Rule 40(6).

51. As for the second aspect of Rule 40(6), the Court recalls that the date from which an application can be filed against any State party is the date on which the particular State deposited the Declaration under Article 34(6) of the Protocol which for the Respondent State is 29 March 2010.<sup>13</sup> In the present Application, however, the Court notes that the Applicant alleges continuing violation of his rights and the Court has found, for purposes of establishing temporal jurisdiction, that the alleged violations have a continuous character, since they are founded in a law adopted in 1977 which remains in force to date.

52. The Court reiterates that the essence of continuing violations is that they renew themselves every day as long as the State fails to take steps to remedy them.<sup>14</sup> The result is that the violations alleged to have been perpetrated by article 41(7) of the Respondent State's Constitution automatically renewed themselves for as long as they were not remedied.

53. The Court notes that in this case it took the Applicant eight (8) years and four (4) months to file his case from the time when the Respondent State deposited its Declaration. However, no local remedy was available for the Applicant to exhaust and the persistence of the violations meant that they automatically renewed themselves. Given this context, the Court holds that, on the facts of the present case, and within the meaning of the second limb of Rule 40(6), it could have been seized of the matter at any time for as long as the law causing the alleged violation remained in force.

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<sup>13</sup>*Mohamed Abubakari v. United Republic of Tanzania* (merits) (2016) 1 AfCLR 599 § 89.

<sup>14</sup> Cf. *Parrillo v. Italy* [GC] No. 46470/11 ECHR 27 August 2015 §§ 109-112 and *FAJ and others v. The Gambia* Suit No. ECW/CCJ/APP/36/15, Judgment No. ECW/CCJ/JUD/04/18, 13 February 2018.

54. In light of the above, the Court, therefore, holds that the Application meets the requirement in Rule 40(6) of the Rules and thus dismisses the Respondent State's objection.

**B. Other conditions of admissibility**

55. The Court notes, from the record, that the Application's compliance with the requirements in Article 56 subarticles (1),(2),(3),(4) and 7 of the Charter, which requirements are reiterated in sub-rules 1, 2, 3, 4, and 7 of Rule 40 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

56. Specifically, the Court notes that, according to the record, the condition laid down in Rule 40(1) of the Rules is fulfilled since the Applicant has clearly indicated his identity.

57. The Court also finds that the requirement laid down in paragraph 2 of the same Rule is also met, since no request made by the Applicant is incompatible with the Constitutive Act of the African Union or with the Charter.

58. The Court also notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 40(3) of the Rules.

59. Regarding the condition contained under paragraph 4 of same Rule, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

60. Finally, with respect to the requirement laid down in Rule 40(7) of the Rules, the Court finds that the present case does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United

Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

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

## **VII. MERITS**

62. The Applicant alleges violation of Articles 1, 2, 3(2) and 7(1)(a) of the Charter.

### **A. Alleged violation of the right to non-discrimination**

63. The Applicant avers that article 13(6)(a) of the Respondent State's Constitution provides that:

When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

64. The Applicant argues that notwithstanding article 13(6)(a), article 41(7) of the same Constitution bars any court from inquiring into the election of any presidential candidate after the Electoral Commission has pronounced a winner which in turn entails that any person aggrieved by the results of a presidential election cannot access a judicial remedy. The Applicant submits that by having a provision such as article 41(7) in its Constitution, the Respondent State has violated Article 2 of the Charter.

65. The Respondent State contends that the right to non-discrimination as provided for under Article 2 of the Charter "is not absolute where there is a legitimate justified purpose or aim that is justifiable." Referring to the Advisory Opinion of the Inter-

American Court of Human Rights on the Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Opinion of 19 January 1984, the Respondent State argues that no discrimination can be said to “exist if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things...” The Respondent State further argues that “the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable.”

66. The Respondent State submits, therefore, that a State Party to the Charter enjoys “a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.” Specifically, in relation to the Applicant’s allegation, the Respondent State submits that a:

... reasonable relationship of proportionality between the means employed by the Constitution of the United Republic of Tanzania in relation to article 41(7) are legally based on an objective and reasonable justification and the aim sought to be realised in protection of the United Republic of Tanzania’s sovereignty, therefore, it is not in violation of Article 2 of the African Charter on Human and Peoples’ Rights.

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67. The Court recalls that Article 2 of the Charter provides as follows:

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

68. The Court recalls that in *APDH v Cote d’Ivoire*, it accepted that discrimination is “a differentiation of persons or situations on the basis of one or several unlawful

criterion/criteria.”<sup>15</sup> This understanding of discrimination, however, is what is often referred to as direct discrimination. In cases where the discrimination is indirect, the key indicator is not necessarily different treatment based on visible or unlawful criteria but the disparate effect on groups or individuals as a result of specified measures or actions.

69. While direct discrimination may be more prominent in human rights discourse, international human rights law prohibits both direct and indirect discrimination. For example, the Convention on the Elimination of Racial Discrimination of 1965 (CERD) in article 1 defines racial discrimination as:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>16</sup>

70. Given that indirect discrimination is an effects-based concept, it is clear that this definition includes a prohibition not only of direct but also of indirect discrimination. This has been confirmed by the Committee supervising the implementation of the CERD, which describes indirect discrimination as relating to “measures which are not discriminatory at face value but are discriminatory in fact and effect”.<sup>17</sup> A similar position obtains under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979 in relation to the definition of discrimination against women under article 1 of the said convention.<sup>18</sup>

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<sup>15</sup> *Actions pour la Protection des Droits de l'Homme (APDH) v. Republic of Cote d'Ivoire* (Merits) (2016) 1 AfCLR 668 §§146-147.

<sup>16</sup> The Respondent State acceded to the CERD on 27 October 1972 – see, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN).

<sup>17</sup> European Commission “Limits and potential of the concept of indirect discrimination” <https://op.europa.eu/en/publication-detail/-/publication/aa081c13-197b-41c5-a93a-a1638e886e61>.

<sup>18</sup> The Respondent State ratified the CEDAW on 20 August 1985 – see, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN).

71. In respect of Article 2 of the Charter, the Court reiterates its position that Article 2 is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.<sup>19</sup>

72. The Court notes that while the Charter is unequivocal in its proscription of discrimination, not all forms of distinction or differentiation can be considered as discriminatory. A distinction or differential treatment becomes discrimination, contrary to Article 2, when it does not have any objective and reasonable justification and, in circumstances where it is not necessary and proportional.<sup>20</sup>

73. As the Court noted in *African Commission on Human and Peoples' Rights v Kenya*,<sup>21</sup> the right not to be discriminated against is related to the right to equality before the law and equal protection of the law as guaranteed under Article 3 of the Charter. However, the scope of the right to non-discrimination extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status. The expression "any other status" in Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter. In determining whether a ground falls under this category, the Court takes into account the general spirit of the Charter.

74. The Court observes that the Respondent State, in its submissions, has not denied the possible distinction effected by article 41(7) of its Constitution but it has argued

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<sup>19</sup> *African Commission on Human and Peoples' Rights (ACHPR) v. Republic of Kenya* (merits) (2017) 2 AfCLR 9 § 137.

<sup>20</sup> *Ibid* § 139. See also, *Tanganyika Law Society and others v. United Republic of Tanzania* (merits) (2013) 1 AfCLR 34 § 106.

<sup>21</sup> *African Commission on Human and Peoples' Rights v. Kenya* (merits) § 138.

that the same is justifiable since there is a reasonable relationship of proportionality between the means adopted and the result sought to be achieved, which is the “protection of the United Republic of Tanzania’s sovereignty...”. The Respondent State has also invoked the doctrine of margin of appreciation as justifying the measures that it has devised through article 41(7) of its Constitution.

75. The Court notes, however, that article 41(7) of the Respondent State’s Constitution creates a differentiation between litigants in that while the Respondent State’s courts are permitted to look into any allegation by any litigant, they are not given equal latitude when a litigant seeks to inquire into the election of a president. The result is that those seeking to inquire into the election of a president are, practically, treated differently from other litigants, especially by being denied access to judicial remedies while litigants with other claims are not similarly barred.

76. The Court emphasises that while article 41(7) of the Respondent State’s Constitution is, seemingly, neutral on its face and that it, in principle, applies to all citizens within the Respondent State, this provision does not have the same effect on all citizens. It is trite that in a multiparty democracy, like the Respondent State, during any election, the electorate would vote for different candidates. In this sense, therefore, there will be, within the broad group of voters, different subgroups depending on their political persuasion. While those supporting winning candidates may not have the motivation to approach the courts for relief in relation to the electoral process, the other subgroups of voters may be desirous of seeking judicial intervention to enforce their rights.

77. By outrightly barring the Courts from considering a complaint by anyone in relation to the results of a presidential election, in effect, article 41(7) of the Respondent State’s Constitution treats citizens that may wish to judicially challenge the election of a president differently and less favourably as compared to citizens with grievances other than those related to the election of a president.

78. The Court recalls that the Respondent State considers that the distinction made by article 41(7) of its Constitution represents a relationship of proportionality between the means used and the objective sought in terms of protection of its sovereignty. However, in its submissions, the Respondent State has not provided details as to how the distinction made in article 41(7) of its Constitution is necessary to protect its sovereignty or how its sovereignty would be jeopardized if this provision was repealed or amended, for example. The Court is aware that, under Article 27 of the Vienna Convention on the Law of Treaties, a State cannot invoke the provisions of its internal laws to justify the non-fulfillment of its obligations under a treaty.<sup>22</sup>

79. Specifically, in respect of the doctrine of margin of appreciation, the Court observes that this doctrine has been recurrent in international jurisprudence, notably the jurisprudence of the European Court of Human Rights (hereinafter referred to as “the ECHR”) and also the former European Commission of Human Rights.<sup>23</sup> In terms of definition, the margin of appreciation can be understood as “the line at which international supervision should give way to a State Party’s discretion in enacting or enforcing its laws.”<sup>24</sup>

80. The Court agrees with the Commission’s position on the relevance of the margin of appreciation for the interpretation and application of the Charter as stated in *Prince v South Africa*, where the Commission held that:

Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples’ rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance

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<sup>22</sup> The Respondent State acceded to the Vienna Convention on the Law of Treaties on 12 April 1976, see: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en).

<sup>23</sup> *Lawless v Ireland*, [1961] ECHR 2, *Ireland v. United Kingdom* [1978] ECHR 1, and *Handyside v. UK* [1976] ECHR 5.

<sup>24</sup> HC Yourow *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (1996: Kluwer Law International) 13.



that need to be struck between the competing and sometimes conflicting forces that shape its society.<sup>25</sup>

81. However, the Court emphasises that while it is for a particular State to determine the mechanisms or steps to be taken for purposes of implementing the Charter, it retains the jurisdiction to assess and review the steps taken for compliance with the Charter and other applicable human rights standards. In particular, the Court's duty is to assess if a fair balance has been struck between societal interests and the interests of the individual as protected under the Charter. The doctrine of margin of appreciation, therefore, while recognising legitimate leverage by States in the implementation of the Charter, cannot be used by States to oust the Court's supervisory jurisdiction.

82. In the absence of clear justification as to how the differentiation and distinction in article 41(7) is necessary and reasonable in a democratic society, the Court finds that article 41(7) of the Respondent State's Constitution effects a distinction between litigants and that this distinction has no justification under the Charter.<sup>26</sup> This distinction is such that individuals within the Respondent State are excluded from pursuing a remedy before the court simply because of the subject matter of their grievances while other individuals with grievances not related to the election of a president are not equally barred.

83. In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution violates the Applicant's right to be free from discrimination as guaranteed under Article 2 of the Charter.

#### **B. Alleged violation of the right to equal protection of the law**

84. The Applicant argues that notwithstanding article 13(6)(a) of the Respondent State's Constitution, article 41(7) of the same prohibits any person aggrieved by

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<sup>25</sup> *Prince v. South Africa* (2004) AHRLR 105 (ACHPR 2004) § 51.

<sup>26</sup> Cf. *Tanganyika Law Society and others v. Tanzania* (merits) § 106.

the results of a presidential election from accessing courts to seek a remedy. The Applicant submits that by having a provision such as article 41(7) as part of its Constitution, the Respondent State has violated Article 3(2) of the Charter.

85. In its Response, the Respondent State contends that the right to equal protection of the law is not absolute and can be limited where there is a legitimate purpose or aim. The Respondent State further argues that “the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable.” The Respondent State further submits that a State Party to the Charter enjoys “a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.”

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86. Article 3(2) of the Charter provides that “[e]very individual shall be entitled to equal protection of the law.”

87. The Court notes that the principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law, does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations.<sup>27</sup>

88. In the present case, the Court notes that article 41(7) of the Respondent State’s Constitution does not deny the Applicant equal protection of the laws in the Respondent State. The Applicant, like other citizens, has been guaranteed the same range of rights in respect of contesting the election of a president. Given these circumstances, the Court finds that the Applicant has failed to prove a violation of Article 3(2).

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<sup>27</sup> *Norbert Zongo and Others v. Burkina Faso* (merits) § 167.

89. In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution does not violate the Applicant's right to equal protection of the law guaranteed under Article 3(2) of the Charter.

**C. Alleged violation of the Applicant's right to have his cause heard**

90. The Applicant avers that by having article 41(7) as part of its Constitution, the Respondent State has violated his right under Article 7(1)(a) of the Charter.

91. The Respondent State disputes the Applicant's allegation of a violation of Article 7(1)(a) of the Charter and argues that as a sovereign State it enjoys:

...exclusive, ultimate and comprehensive powers of law-making, under its fundamental legal framework. Since all powers arise from the people, the Respondent has the right to make provisions in the Constitution or any other written law.

92. It is also the Respondent State's argument that article 41(7) of its Constitution is protected by the doctrine of margin of appreciation. According to the Respondent State:

...given that contracting States possess different legal and cultural traditions, it is inevitable that States shall occasionally view the application of their obligations under the African Charter on Human and Peoples' Rights differently.

93. The Respondent State thus submits that:

the doctrine of the margin of appreciation provides the African Court on Human and Peoples' Rights with the means by which to permit national authorities to enjoy the freedom to apply the African Charter on Human and Peoples' Rights in accordance with their own unique legal and cultural traditions without flouting the ultimate objective and purpose of the Charter.

94. In support of its arguments, the Respondent State has referred the Court to the decisions of the ECHR in *Handyside v United Kingdom* and *James v United Kingdom*.

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95. Article 7(1)(a) of the Charter provides as follows:

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

96. The Court observes that the right to have one's cause heard, as enshrined under Article 7(1)(a) of the Charter, bestows upon individuals a wide range of entitlements pertaining to due process of law, including the right to be given an opportunity to express their views on matters and procedures affecting their rights, the right to file a petition before appropriate judicial and quasi-judicial authorities for violations of these rights and the right to appeal to higher judicial authorities when their grievances are not properly addressed by the lower courts.<sup>28</sup> The Court also notes that the right to have one's cause heard does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place.

97. The Court recalls that the right to a fair hearing encompasses several elements, including the principle of equality of arms for parties to a case in all proceedings; the opportunity to properly prepare a defence; present one's arguments and evidence; and to respond to the arguments and evidence presented by the

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<sup>28</sup> *Werema Wangoko Werema v. United Republic of Tanzania* (merits) (2018) 2 AfCLR 520 §§ 68-69.

opposing side.<sup>29</sup> Article 7 of the Charter permits every person who feels that his/her rights have been violated to bring his/her case before a competent national court. In the realization of this right, the position or status of the victim or the alleged perpetrator of the violation are irrelevant and every complainant is entitled to an effective remedy before a competent and impartial judicial body. It is the duty of all State Parties to the Charter to ensure that their judicial organs are accessible to all and that every litigant is accorded ample opportunity to present his/her claim.

98. The Court notes that :

[t]he protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief.<sup>30</sup>

99. The Court recalls that among the key elements of the right to a fair hearing, as guaranteed under Article 7 of the Charter, is the right of access to a court for adjudication of one's grievances and the right to appeal against any decision rendered in the process. As against this, the Court notes that article 41(7) of the Respondent State's Constitution has ousted the jurisdiction of courts to consider any complaint in relation to the election of a presidential candidate after the Electoral Commission has declared a winner. This entails that irrespective of the nature of the grievance or the merits thereof, as long as the same pertains to the declaration by the Electoral Commission of the winner of a presidential election, no remedy by way of a judicial challenge exists to any aggrieved person within the Respondent State.

100. The Court acknowledges that, in appropriate conditions, rights contained in the Charter may be limited. However, as the Court has previously stated <sup>31</sup>

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<sup>29</sup> *Dino Noca v. Democratic Republic of Congo* Communication No. 286/2004 [2018] ACHPR 10; (22 October 2012) §186-187.

<sup>30</sup> *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) § 213.

<sup>31</sup> *Tanganyika Law Society and others v Tanzania* (merits) § 106.

restrictions on rights must be necessary in a democratic society and they must be reasonably proportionate to the aim pursued.

101. The Court also acknowledges that once a complainant establishes that there is a *prima facie* violation of a right, it behooves on the Respondent State to establish that the right has been legally restricted in line with the provisions of Article 27(2) of the Charter. The Respondent State can discharge its burden by proving that the restriction is authorized by law - both domestic and international - and also by establishing that the restriction serves one of the purposes listed under Article 27(2) of the Charter.<sup>32</sup>

102. Focusing on the position of the Respondent State in this Application, especially in relation to the purported restriction of the right to have one's cause heard, the Court notes that there is nothing in the submissions of the Respondent State which establishes any of the conditions in Article 27(2) of the Charter to justify a limitation of the right to have one's cause heard. Admittedly, there is a constitutional provision – article 41(7) of the Respondent State's Constitution – which prescribes the limitation at issue here. However, it is trite law that a State cannot invoke its domestic laws to justify a breach of its international obligations. Resultantly, therefore, if a State relies on a provision of its domestic law to justify restriction of a right, such a State must be able to demonstrate that the provision(s) in its domestic law do not infringe the Charter.

103. In the context of the present Application, the Court notes that electoral disputes, even those related to the election of a president, implicate rights guaranteed in the Charter. Considering that decisions of the Electoral Commission in relation to the election of a president may have an effect on the rights to be enjoyed by citizens of the Respondent State, the Court finds it anomalous that citizens have not been provided with an avenue for invoking judicial scrutiny of decisions of the Electoral Commission. It is the lack of opportunity given to

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<sup>32</sup> Cf. *Article 19 v. Eritrea*, (2007) AHRLR 73 (ACHPR 2007) § 92.

individuals to have recourse to judicial scrutiny of the declaration by the Electoral Commission of the winner of a presidential election **that** this Court finds to be against the values underlying the Charter.

104. In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution, in so far as it ousts the jurisdiction of courts to consider challenges to a presidential election after the Electoral Commission has declared a winner, violates Article 7(1)(a) of the Charter.

#### **D. Alleged violation of Article 1 of the Charter**

105. The Applicant alleges that the conduct of the Respondent State has violated Article 1 of the Charter while the Respondent State denies the alleged violation.

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106. Article 1 of the Charter provides as follows:

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

107. The Court considers that, as it has held in its earlier judgments, examining an alleged violation of Article 1 of the Charter involves a determination not only of whether the measures adopted by the Respondent State are available but also if these measures were implemented in order to achieve the intended object and purpose of the Charter.<sup>33</sup> Consequently, whenever a substantive right of the Charter is violated due to the Respondent State's failure to meet these obligations Article 1 will be found to have been violated.

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<sup>33</sup> *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477 § 149-150 and *Ally Rajabu and others v. United Republic of Tanzania*, AfCHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations) § 124.

108. In the present case, the Court has found that the Respondent State has violated Articles 2 and 7(1) (a) of the Charter. Resultantly, the Court holds that the Respondent State has also violated Article 1 of the Charter.

### VIII. REPARATIONS

109. In relation to reparations, the Applicant prays the Court to order:

...

(b) That the respondent to put in place Constitutional and Legislative measures to guarantee the rights provided for under Art 1, 2, 3(2) and 7(1) of the African Charter on Human and People's Rights

(c) Make an Order that the Respondent report to the Honourable Court, within a period twelve (12) months from the date of the judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders;

(d) Any other remedy and/or relief that the Honourable Court will deem to grant;

...

110. The Respondent State's Response did not address the question of reparations but simply prayed that the Application be dismissed.

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111. Article 27(1) of the Protocol provides that "[i]f the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

112. Rule 63 of the Rules provides that:

The Court shall rule on the request for the reparation submitted in accordance with Rule 34(5) of these Rules by the same decision establishing the violation of a human and peoples' rights or, if circumstances so require by a separate decision.



113. The Court, recalling its earlier judgments, reiterates the fact that:

to examine and assess claims for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim.<sup>34</sup>

114. The Court also recalls that the purpose of reparation being *restitutio in integrum* it "... must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."<sup>35</sup>

115. Measures that a State can take to remedy a violation of human rights include: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.<sup>36</sup>

116. It is against the above enumerated principles that the Court will consider the claim for reparations by the Applicant.

#### **A. Adoption of constitutional and legislative measures**

117. The Court recalls that, in appropriate cases, it has ordered State Parties to amend their legislation in order to bring it in conformity with the Charter. For example, the Court has previously ordered the Respondent State "to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken."<sup>37</sup> In a different case, the Court ordered Burkina Faso to "amend

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<sup>34</sup>) *Mohamed Abubakari v. United Republic of Tanzania*, AfCHPR, Application No. 007/2013, Judgment of 4 July 2019 (reparations) § 19 and *Majid Goa alia Vedastus and another v. Tanzania*, AfCHPR, Application No. 025/2015, Judgment of 26 September 2019 (merits and reparations) § 81.

<sup>35</sup> *Majid Goa v. Tanzania* (merits and reparations) § 82 and *Wilfred Onyango Nganyi and 9 others v. Tanzania* (merits), § 16.

<sup>36</sup> *Ingabire Victoire Umuhoza v. Rwanda* (jurisdiction) § 20.

<sup>37</sup> *Tanganyika Law Society and others v. Tanzania* (merits)§126.

its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66(2) of the Revised ECOWAS Treaty.”<sup>38</sup> Further, in a case involving the Republic of Mali, the Court held that:

... with respect to the measures requested by the Applicants in paragraph 16 (i), (ii), (iv), (v), (vi) and (vii), relating to the amendment of the national law, the Court holds that the Respondent State has to amend its legislation to bring it in line with the relevant provisions of the applicable international instruments.<sup>39</sup>

118. The Court having found that article 41(7) of the Respondent State’s Constitution violates Articles 1, 2, and 7(1)(a) of the Charter orders the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of Articles 2, and 7(1) (a) of the Charter.

119. The Respondent State is also ordered to report to the Court, within twelve (12) months of this judgment, on the measures taken to implement the terms of this judgment.

#### **B. Other measures of reparations**

120. The Court notes that the Applicant did not specifically request for other measures of reparation but prays the Court to order “any other remedy and/or relief that the Honourable Court will deem to grant.”

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121. The Court recalls that Article 27(1) of the Protocol gives it power to “make appropriate orders to remedy” violations. In the circumstances, the Court reaffirms

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<sup>38</sup> *Lohe Issa Konate v. Burkina Faso* (merits) §176.

<sup>39</sup> *APDF and IHRDA v. Mali* (merits and reparations) (2018) 2 AfCLR 380 §130.

that it can, by way of reparations, order publication of its decisions *suo motu* where the circumstances of the case so require.<sup>40</sup>

122. In the present case, the Court notes that the violations that it has established affect a significant section of the population in the Respondent State by reason of the fact that they relate to the exercise of several rights in the Charter, key among which is the right to political participation guaranteed under Article 13 of the Charter.

123. In the circumstances, the Court deems it proper to make an order *suo motu* for publication of this Judgment. The Court, therefore, orders the Respondent State to publish this Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

## IX. COSTS

124. The Court observes that Rule 30 of the Rules provides that “[u]nless otherwise decided by the Court, each Party shall bear its own costs.”

125. In their submissions, both Parties prayed the Court to order the other to pay costs.

126. In the instant case, the Court rules that each party shall bear its own costs.

## X. OPERATIVE PART

127. For these reasons:

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<sup>40</sup> *Rajabu and others v. Tanzania* (merits and reparations) §§ 165-167.

## THE COURT

### *On jurisdiction*

Unanimously:

- i. *Holds* that it has jurisdiction.

### *On admissibility*

By a majority of Seven (7) for and Three (3) against, Judges Tujilane CHIZUMILA, Blaise TCHIKAYA and Stella ANUKAM dissenting:

- ii. *Dismisses* the objections to admissibility of the Application;
- iii. *Declares* the Application admissible.

### *On merits*

By a majority of Six (6) for and Four (4) against, Judges Sylvain ORÉ, Suzanne MENGUE, Tujilane CHIZUMILA and Blaise TCHIKAYA dissenting:

- iv. *Holds* that article 41(7) of the Respondent State's Constitution, in so far as it bars courts from inquiring into the election of a presidential candidate who has been declared elected by the Electoral Commission, violates Article 2 of the Charter,

By the President's casting vote under Rule 60(4) of the Rules, with Five (5) for – Judges Ben KIOKO, Rafaâ BEN ACHOUR, Angelo MATUSSE, Chafika BENSAOULA and M-Therese MUKAMULISA - and Five (5) against - Judges Sylvain ORE, Suzanne MENGUE , Tujilane CHIZUMILA, Blaise TCHIKAYA and Stella ANUKAM.

- v. *Holds* that article 41(7) of the Respondent State's Constitution does not violate Article 3(2) of the Charter;

By a majority of Nine (9) for and One (1) against, Judge Blaise TCHIKAYA dissenting:

- vi. *Holds* that article 41(7) of the Respondent State's Constitution, in so far as it bars courts from inquiring into the election of a presidential candidate who has been declared elected by the Electoral Commission, violates Article 7(1)(a) of the Charter;

By a majority of Nine (9) for and One (1) against, Judge Blaise TCHIKAYA dissenting:

- vii. *Holds* that by retaining article 41(7) of its Constitution, the Respondent State has violated Article 1 of the Charter.

*On reparations*

- viii. *Orders* the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, and in any case not exceeding two (2) years, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter to eliminate, among others, a violation of Articles 2, and 7(1)(a) of the Charter;
- ix. *Orders* the Respondent State to publish this Judgment on the websites of its Judiciary and the Ministry for Constitutional and Legal Affairs within a period of three (3) months from the date of notification, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

*On implementation of the Judgment and reporting*

- x. *Orders* the Respondent State to report to the Court within twelve (12) months of notification of this judgment on the measures taken to implement the terms

of the judgment and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

*On costs*

xi. *Orders* that each party shall bear its own costs.

**Signed:**

Sylvain ORÉ, President;



Ben KIOKO, Vice-President;



Rafaâ BEN ACHOUR, Judge;



Ângelo V. MATUSSE, Judge;



Suzanne MENGUE, Judge;



M-Thérèse MUKAMULISA, Judge;



Tujilane R. CHIZUMILA, Judge;



Chafika BENSAOULA, Judge;



Blaise TCHIKAYA, Judge;



Stella I. ANUKAM, Judge;



and Robert ENO, Registrar.



In accordance with Article 28 (7) of the Protocol and Rule 60(5) of the Rules, the Dissenting Opinion of Judge Blaise TCHIKAYA and the Joint Separate Opinion of Judge Ben KIOKO and Judge Ângelo V. MATUSSE are appended to this Judgment.

Done at Arusha, this Fifteenth Day of July in the year Two Thousand and Twenty, in English and French, the English text being authoritative.

