Rajabu and others v Tanzania (merits and reparations) (2019) 3 AfCLR 539

Application 007/2015, *Ally Rajabu and others v United Republic of Tanzania*

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

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

Recused under Article 22: ABOUD

The five Applicants were convicted of murder and sentenced to death. The Applicants contended that the review before the Court of Appeal took unreasonably long, that there were grave variances between witness testimony, that the preliminary hearing and trial were conducted before different judges, that the mandatory death penalty violated the right to life and that hanging as a method of execution is cruel, inhuman and degrading. The Court held that there had not been any procedural deficiencies in the domestic proceedings but that the mandatory imposition of the death penalty and hanging, as a method of execution, violates the Charter. The Court ordered a rehearing in relation to the sentencing of the Applicants.

Jurisdiction (material jurisdiction, 29)

Admissibility (exhaustion of local remedies, constitutional petition, 43; submission within reasonable time, 52, 53)

Fair trial (trial within reasonable time, 72; right to be heard, consistency of witness testimony, 80-84)

Life (death penalty, fair trial standards, 104, 107, mandatory imposition, 108-114)

Cruel, inhuman or degrading treatment (hanging as method of execution, 119)

Reparations (material damages, 141, 142; costs, 144; mora damages, 150; rehearing of sentencing, 158; non-repetition, law reform, 163; publication of Judgment, 167)

Separate Opinion: BENSAOULA

Admissibility (exhaustion of local remedies, 19, 20; submission within reasonable time, 24)

Separate Opinion: TCHIKAYA

Life (death penalty, 1, 27, 28)

I. The Parties

1. Messrs Ally Rajabu, Angaja Kazeni alias Oria, Geofrey Stanley alias Babu, Emmanuel Michael alias Atuu and Julius Petro

(hereinafter referred to as the "Applicants") are nationals of Tanzania who were sentenced to death for murder and are currently detained at the Arusha Central Prison.

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

II. Subject of the Application

A. Facts of the matter

3. On 12 September 2006, the Applicants were arrested at Mruma Village, Mwanga District in Tanzania, for killing one Jamal Abdallah. On 24 June 2008, they were charged with murder at the High Court of Tanzania in Arusha.

4. On 25 November 2011, the High Court, found the Applicants guilty and sentenced them to death in Criminal Case 30 of 2008. Dissatisfied with that decision, they appealed to the Court of Appeal of Tanzania in Criminal Appeal 43 of 2012. On 22 March 2013, their appeal was dismissed.

5. On 24 March 2013, the Applicants then filed an application for review, which was still pending before the Court of Appeal when they filed the present Application on 26 March 2015.

B. Alleged violations

6. The Applicants allege:

i. that they were tried for murder contrary to Section 196 of the Penal Code in Criminal case No 30 of 2008;

ii. that they were convicted for murder without having their case fully heard;

iii. that they did not receive the reply to their motion for review to the Court of Appeal despite the fact that the law allows them to apply for review;

iv. that they were convicted in breach of the Constitution and Rules of the Tanzanian courts;

v. that they were sentenced on the basis of manifest error in the decision of the trial court;

vi. that they were convicted on the basis of contradictory evidence;

vii. that they were not tried in accordance with the principle of fair trial with respect to their application for review of the judgment of the Court of Appeal in respect of the fact that the same judge conducted both the preliminary hearing and trial, and the fact that a single police officer conducted the preliminary investigations;

viii. that they were convicted without their defence of *alibi* being carefully reviewed beyond reasonable doubt, infringing Section 110 of the Evidence Act;

ix. that they were convicted in violation of Section 235(1) of the Criminal Procedure Act; and

x. that they were sentenced to death in violation of their rights to life and dignity under the Charter.

III. Summary of the procedure before the Court

7. The Application was received at the Registry of the Court on 26 March 2015.

8. As instructed by the Court, the Registry requested for the services of Advocate William Kivuyo Ernest who agreed to represent the Applicants on a *pro bono* basis.

9. On 18 March 2016, the Court issued an Order for Provisional Measures in the matter enjoining the Respondent State not to implement the death sentence until this Application is concluded on the merits.

10. The Parties filed their pleadings within the time stipulated.

11. Pleadings were closed with respect to the merits of the case on 24 January 2018.

12. On 6 July 2018, the Registry informed the Parties that, during its 49th Ordinary Session, the Court had decided that it would henceforth rule on requests for reparations in the same judgment dealing with the merits of an application. The Parties were therefore requested to file their submissions on reparations.

13. The Applicants filed their submissions on reparations within the time stipulated. The Respondent State did not respond to the said submissions.

IV. Prayers of the Parties

14. The Applicants pray the Court to:

i. Critically evaluate the evidence adduced in the High Court especially on their identification in order to reach a just decision as the trial judge grossly erred in law and fact by convicting them based on unreliable evidence provided by contradicting witnesses.

ii. Declare that the failure to convict the Applicants before sentencing them violates Section 235(1) of the Criminal Procedure Act and that, therefore, they need to be given the benefit of the doubt.

iii. Declare that the Court of Appeal has failed to review its decision despite the powers conferred upon it by the Constitution of the Respondent State and the Rules of the Court of Appeal.

iv. Declare that the decision to convict them was based on manifest error on the face of the record.

v. Declare that the fact that a single police officer conducted the preliminary investigation violated their right to a fair trial.

vi. Declare that the fact that a single judge conducted both the preliminary hearing and the trial violated their right to be heard by a competent tribunal.

vii. Declare that by not amending Section 197 of its Penal Code, which provides for the mandatory imposition of the death penalty in cases of murder, the Respondent State violated the right to life and does not uphold the obligation to give effect to that right as guaranteed in the Charter.

viii. Declare that the mandatory imposition of the death penalty by the High Court and its confirmation by the Court of Appeal violates their rights to life and to dignity.

ix. Quash the conviction, set aside the sentence and release them.

x. Grant them other forms of reparation for material damage, including legal costs, and moral damage to themselves and their family members as follows:

a. United States Dollars Four Hundred Twenty Three Thousand Two Hundred and Eighty Nine (US$ 423,289) to Ally RAJABU;

b. United States Dollars Three Hundred Sixty Eight Thousand One Hundred and Seventy Two (US$ 368,172) to Angaja KAZENI alias Oria;

c. United States Dollars Three Hundred and Seventy Five Thousand (US$ 375,000) to STANLEY alias Babu;

d. United States Dollars Four Hundred Forty Six Thousand Two Hundred and Seventy Eight (US$ 446,278) to Emmanuel MICHAEL alias Atuu; and

e. United States Dollars Four Hundred Thirty Nine Thousand Four Hundred and Ninety Three (US$ 439,493) to Julius PETRO.

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

"i. That, the Honorable African Court on Human and Peoples' Rights lacks jurisdiction to adjudicate over this Application and it should be dismissed.

ii. That, the Honorable Court has no jurisdiction to issue an Order to compel the Respondent State to release the Applicants from prison.

iii. That, the Honorable Court has no jurisdiction to sit as an appellate Court over matters concluded and finalized by the Court of Appeal of the Respondent State.

iv. That, the Honorable Court has no jurisdiction to sit as a Court of First Instance over matters never raised within the Municipal Courts in the Respondent State.

v. That, the application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of the Court and be declared inadmissible and duly dismissed.

vi. That, the application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of the Court and be declared inadmissible and duly dismissed.

vii. That the Application be dismissed."

16. The Respondent State further prays the Court to make the following orders with respect to the merits of the Application:

"i. that, the government of the United Republic of Tanzania has not violated the Applicants' right to be heard.

ii. that, the government of the United Republic of Tanzania has not violated the Applicants' Right to fair trial.

iii. that, the government of the United Republic of Tanzania has not delayed the Applicants' Application to Review the Court of Appeal decision in Criminal Appeal No. 43 of 2012.

iv. that the Applicants were properly identified at the scene of the crime.

v. that there was no contravention of Section 235(1) of the Criminal Procedure Act (Cap 20, RE 2002).

vi. that the improper rendering of sentence by the High Court was cured by the Court of Appeal of Tanzania in Criminal Appeal No. 43 of 2009.

vii. that the conviction and sentence imposed on the Applicants by the High Court during trial and upheld by the Court of Appeal of Tanzania was lawful and proper.

viii. that the Application be dismissed for lack of merit."

17. With respect to reparations, the Respondent State prays the Court to dismiss the Applicants' prayers in their entirety for lack of justification or supporting documents.

V. Jurisdiction

18. Pursuant to Article 3 of the Protocol:

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

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

Court shall decide.

19. In accordance with Rule 39(1) of the Rules, "[T]he Court shall conduct preliminary examination of its jurisdiction …".

20. The Respondent State raises two objections relating, first, to whether the Court will be exercising appellate jurisdiction and, second, to whether the Court will be acting as a court of first instance with respect to the violations alleged by the Applicants.

A. Objection to material jurisdiction

i. Objection on the ground that this Court is being requested to assume appellate jurisdiction

21. The Respondent State avers that this Court lacks jurisdiction to examine the present Application, as the latter is asking the Court to assume appellate jurisdiction with respect to the prayers for the conviction to be quashed, the sentence to be set aside, and the Applicants to be released. The Respondent State submits that doing so will require the Court to re-evaluate the evidence and the decision of the Court of Appeal, which is the supreme court of the land.

22. The Respondent State further submits that the request for the Court to assume appellate jurisdiction is specifically with respect to the fact that one of the Applicants, Geofrey Stanley, seeks to appeal in this Court against his conviction and sentencing. Finally, the Respondent State contends that the allegations referred to were sufficiently dealt with by the Court of Appeal in Criminal Appeal 43 of 2012. The Respondent State cites, in support of its contentions, the judgment of this Court in the case of *Ernest Francis Mtingwi v Republic of Malawi*.

23. The Applicants, in their Reply, submit that this Application is within the jurisdiction of the Court since the violations are constituted and the rights invoked are protected under the Charter. With respect to the Respondent State's submission that this Court is being called to sit as an appellate court, the Applicants submit that they are only seeking to assess the Respondent State's actions, which they believe are wrong. The Applicants aver that the Respondent State's reliance on the *Mtingwi* case is not relevant and that this Court should rather, in the present case, apply its case-law in the

matter of *Alex Thomas v United Republic of Tanzania*.

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24. The Court reiterates its established case-law that it does not exercise appellate jurisdiction with respect to claims already examined by national courts.[1] Having said that, the Court considers that, while it does not have appellate jurisdiction to uphold or reverse judgments of domestic courts, it retains the power to assess the propriety of related proceedings with international human rights standards.[2]

25. In the instant case, the Respondent State's objection is that the Application is asking this Court to evaluate the evidence and review the sentencing of the Applicants. The Court considers that the Applicants are requesting for an assessment of whether the manner in which domestic courts handled their case was in line with international standards, which the Respondent State is obligated to protect.[3] As such, the issues raised fall within the jurisdiction of this Court.

26. The Respondent State's objection in this regard is consequently dismissed.

ii. Objection on the ground that this Court is acting as a court of first instance

27. The Respondent State submits that the Applicants are also calling for the Court to sit as a court of first instance with respect

1 See Application 001/2015. Judgment of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania* (*Armand Guehi v Tanzania* (Merits and Reparations), para 33. See also *Alex Thomas v United Republic of Tanzania* (Merits) (2015) 1 AfCLR 465 (*Alex Thomas v Tanzania* (Merits)), paras 60-65; and Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking and Johnson Nguza v United Republic of Tanzania* (*Nguza Viking and Johnson Nguza vTanzania* (Merits), para 35.

2 See *Armand Guehi v Tanzania* (Merits and Reparations), para 33. See also Application 024/2015. Judgment of 7 December /2018 (Merits), *Werema Wangoko Werema and Another v United Republic of Tanzania* (*Werema Wangoko Werema and Another v Tanzania* (Merits)), para 29; *Alex Thomas v Tanzania* (Merits), para 130; *Mohamed Abubakari v United Republic of Tanzania* (Merits) (2016) 1 AfCLR 599 (*Mohamed Abubakari v Tanzania* (Merits)), para 26; and, *Ernest Francis Mtingwi v Republic of Malawi* (Admissibility) (2013) 1 AfCLR 190 (*Ernest Francis Mtingwi v Malawi*), para 14.

3 See *Werema Wangoko Werema and Another v Tanzania*, para 31.

to the allegation that they were denied the right to be heard. The Respondent State contends that this allegation was never raised before domestic courts and is being considered for the first time before this Court.

28. The Applicants, in their Response, contend that they are asking the Court to assess the conduct of the Respondent State through its organs in the light of international instruments to which it committed itself.

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29. The Court considers that as it has consistently held in its earlier judgments, it has material jurisdiction by virtue of Article 3 of the Protocol so long as the Application alleges violations of rights protected in the Charter or any other relevant international instrument to which the Respondent State is a party.[4]

30. The Court notes that in the present case, the Applicants allege the violation of their rights to life, to dignity, and to a fair trial protected under Articles 4, 5 and 7(1) of the Charter respectively.

31. As a consequence of the foregoing, the Court dismisses the Respondent State's objection on this point and finds that is has material jurisdiction to consider the present Application.

B. Other aspects of jurisdiction

32. The Court notes that the other aspects of its jurisdiction are not contested by the Respondent State and there is no submission on record to suggest that the Court does not have jurisdiction in these respects. The Court therefore holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and deposited the Declaration required under Article 34(6) thereof which enabled the Applicants to access the Court in terms of Article 5(3) of the Protocol;

ii. It has temporal jurisdiction on the basis that while the alleged violations began before the deposit of the Declaration required under Article 34(6), they continued thereafter; and

4 See *Armand Guehi v Tanzania* (Merits and Reparations), para 31. See also *Werema Wangoko Werema and Another v Tanzania* (Merits), para 29. See also *Nguza Viking and Johnson Nguza v Tanzania* (Merits), para 36; and *Peter Joseph Chacha v United Republic of Tanzania* (Merits) (2014) 1 AfCLR 398, para 114.

iii. It has territorial jurisdiction as the facts of the matter occurred in the territory of the Respondent State.

33. In light of the above, the Court holds that it has jurisdiction to examine the present Application.

VI. Admissibility

34. Pursuant to Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter." In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of … the admissibility of the Application in accordance with articles 50 and 56 of the Charter, and Rule 40 of the Rules".

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

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

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

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

A. Conditions of admissibility in contention between the Parties

37. The Respondent State raises two objections relating first, to the requirement of exhaustion of local remedies and second, to the

filing of the Application within a reasonable time.

i. Objection based on failure to exhaust local remedies

38. The Respondent State avers that, with respect to the allegation that they were denied the right to be heard, the Applicants could have raised the issue as a ground of appeal before the Court of Appeal in Criminal Appeal No. 43 of 2012. The Respondent State further contends that the Applicants also had the remedy of filing a constitutional petition at the High Court pursuant to the Basic Rights and Duties Enforcement Act [Cap 3 RE 2002].

39. The Applicants, in their Reply, do not make any submission with respect to the Respondent State's objection that they should have raised the issue of their right to be heard as a ground of appeal. However, they submit that filing a constitutional petition in the High Court is not an applicable remedy in the present case. In support of this contention, they refer to the judgment of this Court in the case of *Alex Thomas v United Republic of Tanzania* and aver that they were not obliged to exhaust that remedy.

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40. The Court recalls that, as it has held in its case-law, remedies to be exhausted within the meaning of Article 56(5) are ordinary remedies. The Applicant is therefore not requested to exhaust extraordinary remedies.[5]

41. With respect to the opportunity of filing an appeal, the Court considers that by its established case-law, the right whose violation is being alleged by the Applicants is part of a bundle of rights and guarantees, which formed the basis of the proceedings before the High Court and the Court of Appeal. Consequently, where the domestic judicial authorities had an opportunity to address the alleged procedural violation, even though the Applicants did not raise them explicitly, local remedies must be considered to have

5 See Application 006/2016. Judgment of 7 December 2018 (Merits), ***Mgosi Mwita Makungu v United Republic of Tanzania***, para 46. See also ***Alex Thomas v Tanzania***, (Merits), paras 60-62; ***Mohamed Abubakari v Tanzania*** (Merits), paras 66-70; and Application 011/2015. Judgment of 28 September 2017 (Merits), ***Christopher Jonas v United Republic of Tanzania*** (***Christopher Jonas v Tanzania*** (Merits)), para 44.

been exhausted.[6]

42. This Court notes that in the instant case, given that the Court of Appeal was in a position to examine several claims of the Applicants with respect to the manner in which the High Court conducted the proceedings, there was ample opportunity to assess whether the right to be heard was upheld by the lower court.

43. Regarding the constitutional petition, the Court finds that as earlier recalled in the present Judgment, this remedy as it applies in the judicial system of the Respondent State is an extraordinary remedy, which an Applicant is not required to exhaust prior to filing a case before this Court.

44. The Court notes that after being sentenced to death by the High Court on 25 November 2011, the Applicants appealed against the decision before the Court of Appeal, which on 22 March 2013, dismissed their appeal. The Court further notes that the Court of Appeal is the highest court of the Respondent State.

45. As a consequence of the foregoing, the Court finds that local remedies have been exhausted and therefore dismisses the Respondent State's objection in relation to non-exhaustion of local remedies.

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

46. The Respondent State submits that the period of two (2) years that it took the Applicants to file the present Application after the Court of Appeal delivered its judgment on 22 March 2013 is not a reasonable time within the meaning of Article 56(5) of the Charter. Referring to the decision of the African Commission on Human and Peoples' Rights (African Commission) in the case of *Michael Majuru v Zimbabwe*, the Respondent State prays the Court to declare the matter inadmissible since the Applicants took more than six (6) months to file the Application after exhausting local remedies.

47. The Applicants on their part contend that the Application must be considered to have been filed within a reasonable time given the circumstances of the matter and their situation as they are lay,

6 See *Armand Guehi v Tanzania* (Merits and Reparations), para 50. See also *Alex Thomas v Tanzania* (Merits), paras 60-65; and Application 003/2015. Judgment of 28 September 2017 (Merits), *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania* (*Kennedy Owino Onyachi and Another v Tanzania* (Merits)), para 54.

indigent and incarcerated persons. They further pray the Court to take into consideration the time that they spent in trying to have their request for review heard before the Court of Appeal where the case was adjourned several times.

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48. The Court recalls that, pursuant to Article 56(6) of the Charter, applications before it are to be filed within a reasonable time after exhausting local remedies *"… or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter"*.

49. The Court notes that, in the present case, the time within which the Application should be filed is to be computed from the date of the judgment of the Court of Appeal, which is 22 March 2013. Since the Application was filed before this Court on 26 March 2015, the period to be considered is of two (2) years and four (4) days.

50. It is established case-law of this Court that the requirement for an Application to be filed within a reasonable time after exhaustion of local remedies is to be assessed on a case-by-case basis.[7] Among other relevant factors, the Court has based its evaluation on the situation of the Applicants, including whether they had tried to exhaust further remedies, or if they were lay, indigent or incarcerated persons.[8]

51. The Court notes that, as earlier recalled in the facts, after filing on 24 March 2013 an application for review of the decision of the Court of Appeal dated 22 March 2013, the Applicants were expected to observe some time while awaiting the outcome of the review procedure before filing the present Application on 26 March 2015. Given that the application for review is a legal entitlement, the Applicants cannot be penalised for exercising that remedy,

7 See ***Armand Guehi v Tanzania*** (Merits and Reparations), paras 55-57. See also ***Werema Wangoko Werema and Another v Tanzania*** (Merits), paras 45-50; ***Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*** (Preliminary Objections) (2013) 1 AfCLR 197 (***Norbert Zongo and others v Burkina Faso*** (Preliminary Objections)), para 121; and ***Alex Thomas v Tanzania*** (Merits), paras 73-74.

8 See ***Christopher Jonas v Tanzania*** (Merits), para 53. See also ***Mohamed Abubakari v Tanzania*** (Merits), para 92; and ***Alex Thomas v Tanzania*** (Merits), para 74.

and the time spent in pursing it should be taken into account while assessing reasonableness under Article 56(6) of the Charter.[9]

52. The Court further notes that, in the case at hand, the Applicants are lay, indigent and incarcerated. As a result of their situation, the Court granted the Applicants assistance by a lawyer through its legal aid scheme.

53. In the circumstances, it cannot be said that the time within which the Application was filed is unreasonable.

54. The Court therefore dismisses the Respondent State's objection based on failure to file the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

55. The Court notes that there is no contention as to whether the Application meets the conditions set out in Article 56 subsections (1),(2),(3),(4), and (7) of the Charter and Rule 40 sub-rules (1), (2), (3), (4) and (7) of the Rules regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language used in the Application, the nature of evidence adduced, and the previous settlement of the case, respectively.

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

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

VII. Merits

58. The Applicants allege that the Respondent State violated their rights to a fair trial, to life and to dignity.

A. Alleged violation of the right to a fair trial

59. Alleged violations of the right to a fair trial relate to the rights (i)

9 See *Armand Guehi v Tanzania* (Merits and Reparations), paras 36-38; Application 016/2017. Judgment of 28 March 2019 (Jurisdiction and Admissibility), *Dexter Eddie Johnson v Republic of Ghana*. See also Application 038/2016. Judgment of 22 March 2018 (Jurisdiction and Admissibility), *Jean Claude Roger Gombert v Republic of Côte d'Ivoire*, para 37; and *Kennedy Owino Onyachi and Another v Tanzania* (Merits), para 65.

to be tried within a reasonable time, (ii) to be heard and (iii) to be tried by a competent court.

i. The right to be tried within a reasonable time

60. The Applicants allege that the delay incurred by the Court of Appeal in completing the review process constitutes a violation of their right to be tried within a reasonable time. The Applicants, in their Reply, submit that although the process was eventually completed, the review was not determined until the filing of the present Application on 26 March 2015 whereas the notice of review was filed on 24 March 2013.

61. The Applicants assert that, at the time of filing their Application before this Court, the hearing of the review application had not been scheduled. They further submit that the delay in completing the review process is not reasonable by any of the factors recognised by the Court, which are the complexity of the case, actions of the concerned parties and the conduct of the judicial authorities.

62. The Respondent State denies the allegation that the review case was delayed and avers that the Applicants have failed to make a copy of their review application available.

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63. Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

64. The Court recalls that, as it has held in its earlier judgments, various factors come to bear while assessing whether justice was dispensed within a reasonable time in the meaning of Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and that of the judicial authorities who bear a duty of due diligence in circumstances where severe penalties applies.[10]

65. The Court notes that, in the instant matter, the review process was completed on 24 May 2017 as evidenced by a copy on file

10 See *Armand Guehi v Tanzania* (Merits and Reparations), paras 122-124. See also *Alex Thomas v Tanzania* (Merits), para 104; *Wilfred Onyango Nganyi and others*

of a judgment of the Court of Appeal dismissing the Applicants' application. Given that the said application was filed on 24 March 2013, the review application had been pending for two (2) years at the time the Applicants brought their case to this Court. However, it took four (4) years and two (2) months in all for the process to be completed. The Court is therefore of the view that the latter period of time is to be considered when assessing reasonableness given that the allegation had remained unaddressed throughout that span of time.

66. The main issue for determination is therefore whether the period of four (4) years and two (2) months that it took the Court of Appeal to complete the review process is reasonable by the above stated factors.

67. With respect to the complexity of the case, this Court notes that, in the instant matter, the delay challenged by the Applicants was that of a review process. The said process was therefore subsequent to their trial and sentencing by the High Court, and an assessment of the outcome of that trial by the Court of Appeal. As such, the latter Court was asked to only examine afresh issues that had been determined twice in fact and in law. Furthermore, as it emerges from the judgment on review, the Court of Appeal dismissed the application for lack of merit after concluding that it did not meet the required criteria warranting the review. In light of these considerations, it appears that such a review process would not have required over four (4) years for completion. This Court is consequently of the opinion that the complexity of the matter is not of a determinant relevance in assessing reasonableness in the present case.

68. Conversely, the Court notes that the main issue in contention between the Parties is that of who bears responsibility for the delay. It is therefore proper to undertake a joint examination of the two others factors in relation to that issue, which are the behaviour of the Applicant and that of the Respondent State's judicial authorities especially in light of their duty of due diligence.

69. The Court notes in this regard, that the Applicants aver that the delay is attributable to the Respondent State as "no substantial step was taken to determine the review". They state in support of that contention that, after the notice was lodged on 24 March

v United Republic of Tanzania (Merits) (2016) 1 AfCLR 507 (***Wilfred Onyango Nganyi v Tanzania*** (Merits)), para 155; and ***Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso*** (Merits) (2014) 1 AfCLR 219 (***Norbert Zongo and others v Burkina Faso*** (Merits)), paras 92-97, 152.

2013, the case was adjourned *sine die* on 23 May 2016 and no hearing had been scheduled more than two (2) years after the notice was filed and until the present Application was submitted. The Respondent State on its part alleges that the Applicants are responsible for the delay as they failed to avail a copy of their application for review to allow the case to be heard.

70. In light of information on file, this Court notes that the Applicants do not prove intent on the part of the Court of Appeal to delay the review process. They do not either give evidence of a timely filing of the copy of the application for review. This Court is of the opinion that intent or fault cannot be established merely by stating that substantial steps were not taken without providing evidence to that effect. Similarly, it would be improper to consider that, as the Applicants aver, adjourning a matter *sine die* automatically resulted in undue delay without assessing the reason for such decision. In any event, the review judgment was rendered on 24 May 2017, which is one year after the matter was adjourned.

71. Conversely, the Court notes that the application for review could not have been heard without a copy thereof being filed by the Applicants. From the above determination, they actually did so upon or after filing the present Application, which caused a delay of over two (2) years out of the four (4) years of the review process.

72. In the circumstances, this Court is of the opinion that, upon submission of the required document, it actually took the Court of Appeal about two (2) years to complete the review process. Such time cannot be said to be unreasonable in a case involving murder punishable by death, where the Court of Appeal required sufficient time for an ultimate ruling, and bearing in mind scheduling constraints in the domestic judicial system.

73. As a consequence of the foregoing, the Court finds that the Respondent State has not violated Article 7(1)(d) of the Charter.

ii. The right to be heard

74. The Applicants allege that there were grave variances between the testimony of two of the prosecution witnesses, which are PW1 and PW2. In support of that contention, they stress the fact that one of the witnesses testified that he "[sic] managed to get out of the house through a window (the only one without mash wire) and he stepped out a pace closer to the bandits next to the armed bandit and flashed on a torch to identify them." The Applicants submit that "[sic] this would have been an exceptional act of brevity, had it happened". The Applicants do not however state

how the evidence by the two witnesses were at variance.

75. The Applicants also aver that the manner in which the preliminary investigations were conducted allowed the police officer in charge to make up the case. They submit in that respect that, the said police officer handled the whole process alone from arresting the accused persons to recording the witnesses' statements; sending the deceased's body to hospital; drawing the sketch map of the crime; and witnessing the post-mortem examination report.

76. The Respondent State on its part avers that the Applicants' allegation is misconceived and should be dismissed. It submits that, in dealing with whether the decision to find the Applicants guilty was based on manifest error, the most important consideration should be their identification evidence. In that respect, the Respondent State contends that the Court of Appeal undertook a fresh assessment of the identification of the Applicants including conditions of the identification, credibility of the witnesses, number of witnesses required by law to prove a fact and whether identification by a single witness can lead to a conviction. It is the Respondent State's submission that no violation occurred since the Court of Appeal held that the conditions for identification were favourable and the Applicants were sufficiently identified at the scene of the crime.

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77. Article 7(1) of the Charter provides:

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

a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b. The right to be presumed innocent until proved guilty by a competent court or tribunal;

c. The right to defence, including the right to be defended by counsel of his choice;

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

78. The Court observes that Article 7(1) of the Charter guarantees the protection of fair trial related rights, which extend beyond those expressly stated in the four abovementioned sub-provisions. That provision can therefore be read in light of Article 14 of the

International Covenant on Civil and Political Rights, which deals with the said rights in a greater detail.[11] The relevant excerpts of Article 14 reads: "(…) In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. (…)".[12] It flows from a joint reading of the provisions of the two instruments that an accused person has the right to a fair hearing.

79. The Court considers that, as it has consistently held, upholding the right to have one's cause heard requires that, in criminal matters, conviction and sentencing should be based on a case proven beyond reasonable doubt.[13] The Court is of the opinion that such a standard applies with greater relevance, generally where a severe penalty is being imposed,[14] and particularly in instances involving the death sentence as is the case in the present Application.

80. The Court further observes that, while it does not substitute national courts when it comes to assessing the particularities of evidence used in domestic proceedings, it retains the power to examine whether the manner in which such evidence was considered is compatible with international human rights norms.[15] One critical concern in that respect is to ensure that the evaluation of facts and evidence by domestic courts was not manifestly arbitrary or did not result in a miscarriage of justice to the detriment of the Applicant.[16]

81. In the present case, the Court observes that the main question arising, regarding both issues of visual identification and the role of

11 See *Armand Guehi v Tanzania* (Merits and Reparations), para 73. See also *Wilfred Onyango Nganyi and others v Tanzania* (Merits), paras 33-36; and Application 012/2015, Judgment of 22 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* (*Anudo Ochieng Anudo v Tanzania* (Merits)), paras 100 and 106.

12 The Respondent State became a Party to the ICCPR on 11 July 1976.

13 *Armand Guehi v Tanzania* (Merits and Reparations), paras 105-111. See also *Werema Wangoko Werema and Another v Tanzania* (Merits), paras 59-64; and *Mohamed Abubakari v Tanzania* (Merits), paras 174, 193 and 194.

14 See Application 053/2016. Judgment of 28 March 2019 (Merits), *Oscar Josiah v United Republic of Tanzania* (*Oscar Josiah v Tanzania* (Merits)), para 51. See also Application 032/2015. Judgment of 21 March 2018 (Merits), *Kijiji Isiaga v United Republic of Tanzania (Kijiji Isiaga v Tanzania* (Merits)), paras 78 and 79.

15 See *Mohamed Abubakari v Tanzania* (Merits), paras 26 and 173. See also *Kijiji Isiaga v Tanzania* (Merits), para 61; *Oscar Josiah v Tanzania* (Merits), paras 52-63; *Armand Guehi v Tanzania* (Merits and Reparations), paras 105-111; *Werema Wangoko Werema and Another v Tanzania* (Merits), paras 59-64.

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

a single police officer raised by the Applicants, is whether domestic courts arrived at the conviction, and subsequent sentencing, in line with standards set out earlier. In that respect, this Court notes that those issues were examined by the High Court in its judgment dated 25 November 2011 as reflected at pages 34 to 37 of the said decision. The High Court examined all evidence tendered and found them credible. Besides, the Applicants do not refer to any provision in Tanzanian domestic law proscribing the involvement of a single police officer in criminal investigations.

82. This Court also notes that, in its judgment dated 22 March 2013, the Court of Appeal stated the issue of identification of the Applicants as being the main one for determination in the appeal case.[17] The Court of Appeal then proceeded with a substantial examination based on the facts and applicable Tanzanian case-law on identification, including reliance on a single witness, and use of visual identification.[18] The Court arrived at the conclusion that the prosecution had established to the standards required under the law that the Applicants killed the deceased, and that the trial court could not be faulted in its finding.[19]

83. This Court finally observes that the Court of Appeal examined the issue whether the conviction was supported by the evidence on record. In that respect, while acknowledging that the trial judge did not enter a conviction before passing sentence, the Court of Appeal used its discretion under Section 388 of the Criminal Procedure Act to correct the irregularities being complained of. Notably, the Court of Appeal did so after determining that the error in question did not occasion a miscarriage of justice.[20]

84. In light of the foregoing, this Court considers that the manner in which the domestic courts, particularly the Court of Appeal, assessed the evidence does not reveal any apparent or manifest error, which occasioned a miscarriage of the justice to the Applicants.

85. As a consequence of the above, the Court holds that the Respondent State has not violated the Applicants' right to a fair hearing protected under Article 7(1) of the Charter.

iii. Right to be heard by a competent court

17 See *Ally Rajabu and others v The Republic*, Criminal Appeal 43 of 2012, Judgment of the Court of Appeal, 22 March 2013, page 5.

18 *Ibid*, pages 9-15.

19 *Ibid*, page 15.

20 *Ibid*, pages 15-17.

86. The Applicants allege that their right to be heard by a competent court was violated due to the fact that the preliminary hearing and trial were conducted before two different judges. It is their contention that doing so was not in compliance with the provisions of Section 192(5) of the Criminal Procedure Act, which requires that the same judge should preside over both the preliminary hearing and trial.

87. The Respondent State on its part avers that the Applicants failed to properly interpret the provisions of the law. The Respondent State submits that the law does not make it compulsory that both phases of the proceedings should be presided over by the same judge. It further submits that the Applicants should have raised the issue during the trial.

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88. Article 7(1)(a) of the Charter provides that everyone shall have "the right to an appeal to competent national organs of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force".

89. The Court notes that the provisions of Section 192(5) of the Tanzanian Criminal Procedure Act whose interpretation is in contention between the Parties reads: "Wherever possible, the accused person shall be tried immediately after the preliminary hearing and if the case is to be adjourned due to the absence of witnesses or any other cause, nothing in this section shall be construed as requiring the same judge or magistrate who held the preliminary hearing under this section to preside at the trial."

90. The Court is of the view that it is self-evident, from Section 192 of the Tanzanian Criminal Procedure Act, that the law does not make it compulsory for the preliminary hearing and trial to be presided over by the same judge. The Applicants' submission in this respect does not hold and is therefore dismissed.

91. As a consequence of the above, the Court finds that the Respondent State has not violated the Applicants' right protected under Article 7(1)(a) of the Charter in respect of the hearing of the preliminary and trial proceedings.

B. Alleged violation of the right to life

92. The Applicants allege that the Respondent State has violated Articles 1 and 4 of the Charter by failing to amend Section 197 of the Penal Code of Tanzania, which provides for the mandatory imposition of the death penalty in cases of murder. It is their contention that, had the Respondent State adopted legislative and other measures stated under Article 1 of the Charter, the High Court and Court of Appeal would have presumably used varied reasoning and arrived at different decisions. In relation to the same allegation, the Applicants also aver that the Respondent State failed to recognise that "human rights are inviolable, and that human beings, the applicants herein inclusive, are entitled to respect for their life and the integrity of person as guaranteed under Article 4 of the African Charter …".

93. The Respondent State did not respond to the Applicants' submission on this point. However, in its response to the Order for Provisional Measures issued in the present Application, the Respondent State avers that the provision for the death sentence in its laws is in line with international norms, which do not prohibit the imposition of the sentence.

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94. The Court notes that the Applicants allege a joint violation of Articles 1 and 4 of the Charter. However, as reflected in its case-law, this Court examines an alleged violation of Article 1 of the Charter only subsequent to finding violation of a substantive provision of the Charter.[21] The Court will, therefore, first examine the alleged violation of Article 4 of the Charter.

95. Article 4 of the Charter provides that "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

96. Before examining the Applicants' claim in the present case, the Court notes that, raised in the context of Article 4 of the

21 See *Armand Guehi v Tanzania* (Merits and Reparations), paras 149-150. See also *Kennedy Owino Onyachi and Another v Tanzania* (Merits), paras 158-159; and *Alex Thomas v Tanzania* (Merits), para 135.

Charter, the question of the death penalty pertains to whether its imposition constitutes an arbitrary deprivation of the right to life. That is because Article 4 of the Charter does not mention the death penalty. The Court observes that, despite a global trend towards the abolition of the death penalty, including the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, the prohibition of the death sentence in international law is still not absolute.

97. Coming to the case at hand, the Court notes that the Applicants allege that the Respondent State has violated the right to life guaranteed in Article 4 of the Charter by not amending the provision of its law on the mandatory imposition of the death penalty. The said provision is Section 197 of the Penal Code of Tanzania, which stipulates that: "A person convicted of murder shall be sentenced to death". The question is therefore whether the legal provision for the mandatory imposition of the death sentence in cases of murder violates the right to life guaranteed in Article 4 of the Charter.

98. The Court notes that, while Article 4 of the Charter provides for the inviolability of life, it contemplates deprivation thereof as long as such is not done arbitrarily. By implication, the death sentence is permissible as an exception to the right to life under Article 4 as long as it is not imposed arbitrarily.

99. There is extensive and well-established international human rights case-law on the criteria to apply in assessing arbitrariness of a sentence of death. The Court notes in this respect that, in the case of *Interights and others (on behalf of Bosch) v Botswana*, the African Commission on Human and Peoples' Rights has emphasised two requirements and these are, firstly, that the sentence must be provided for by law, and, secondly, that it must be imposed by a competent court.[22]

100. The Court further notes that in the matter of *International Pen and others (Ken Saro-Wiwa) v Nigeria*, the Commission took the view that "given that the trial which ordered the executions itself violates Article 7, any subsequent implementation of the sentences renders the resulting deprivation of life arbitrary and in violation of Article 4".[23] With greater emphasis on due process, the Commission has also concluded in the case of *Forum of*

22 See *Bosch v Botswana*, 42-48.

23 See *International Pen and others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), paras 1-10, 103.

Conscience v Sierra Leone that "… any violation of the right to life without due process amounts to arbitrary deprivation of life".[24]

101. The Court notes that the factor relating to due process is affirmed by all main international human rights bodies which apply instruments that include, like Article 4 of the Charter, an exception to the right to life that permits the imposition of the death penalty.[25]

102. With particular respect to the mandatory imposition of the death sentence for murder, it is worth referring to the matter of *Eversley Thompson v St. Vincent & the Grenadines* where the United Nations Human Rights Committee was called to determine the Applicant's claim that the mandatory nature of the imposition of the death sentence and its application in the circumstances constituted an arbitrary deprivation of life. The Committee concluded that "such a system of mandatory capital punishment deprives the complainant of the most fundamental right, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case". The Committee consequently found that the "carrying out the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of Article 6, paragraph 1, of the Covenant" because it did not take into account the particular situation of the offender.[26]

103. The Court also notes that, in interpreting Article 4 of the American Convention on Human Rights, the Inter-American Court of Human Rights has put greater emphasis on due process by holding in the matter of *Hilaire, Constantine & Benjamin v Trinidad & Tobago* that some limitations apply to states that have not abolished the death penalty. These limitations include that "… application is subject to certain procedural requirements" to be strictly observed", and "… certain considerations involving the person of the defendant …".[27] The Court concluded that by "automatically and generically mandating the death penalty for murder, the Respondent's law

24 *Forum of Conscience v Sierra Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), para 20.

25 See Article 6(1) of the ICCPR: "1. Every human being has the inherent right to life. This right shall be protected by law. *No one shall be arbitrarily deprived of his life*."; and Article 4(1) of the American Convention on Human Rights: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. *No one shall be arbitrarily deprived of his life*."

26 See Article 6(2), ICCPR; and *Eversley Thompson v St. Vincent & the Grenadines*, Comm 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000), para 8.2.

27 *Hilaire, Constantine & Benjamin v Trinidad & Tobago*, Inter-Am Ct HR (Ser C) No 94 (June 21, 2002), para 100. See also *Boyce & Joseph v Barbados*, Inter-Am Ct HR (Ser C) No 169 (Nov 20, 2007).

is arbitrary in terms of Article 4(1) of the American Convention.[28]

104. From the foregoing, this Court finds that whether deprivation of life is arbitrary within the meaning of Article 4 of the Charter should be assessed against three criteria: first, it must be provided by law; second, it must be imposed by a competent court; and, third, it must abide by due process.

105. The Court notes, with respect to the requirement of legality, that the mandatory imposition of the death sentence is provided for in Section 197 of the Penal Code of Tanzania. The requirement that the penalty should be provided for in the law is thus met.

106. Regarding the requirement of the death sentence being passed by a competent court following due process, the Court notes that the Applicants' contention is not that the courts of the Respondent State lacked jurisdiction to conduct the processes that led to the imposition of the death penalty. Their submission is rather that the High Court could impose the death sentence only because it was provided for in the law as mandatory without any discretion of the judicial officer.

107. As to whether the mandatory imposition of the death penalty meets the requirement of due process, this Court observes that, by a joint reading of Articles 1, 7(1), and 26 of the Charter,[29] due process does not only encompass procedural rights, strictly speaking, such as the rights to have one's cause heard, to appeal, and to defence but also extends to the sentencing process. It is for this reason that any penalty must be imposed by a tribunal that is independent in the sense that it retains full discretion in determining matters of fact and law.

108. In the present case, this Court, firstly, notes that the mandatory imposition of the death penalty as provided for in Section 197 of the Respondent State's Penal Code is framed as follows: "A person convicted of murder shall be sentenced to death". The automatic and mechanical application of this provision in cases of murder is confirmed by the wording of the sentence as given by the High Court as follows: "There is only one sentence which this Court is authorised by law to give, which is to suffer death by hanging. It is accordingly ordered that all the accused persons are

28 *Hilaire, Constantine & Benjamin v Trinidad & Tobago*, para 103.

29 Article 26 of the Charter reads: "States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

sentenced to suffer death by hanging".[30]

109. The Court observes in light of the above that, the mandatory imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania does not permit a convicted person to present mitigating evidence and therefore applies to all convicts without regard to the circumstances in which the offence was committed. Secondly, in all cases of murder, the trial court is left with no other option but to impose the death sentence. The court is thus deprived of the discretion, which must inhere in every independent tribunal to consider both the facts and the applicability of the law, especially how proportionality should apply between the facts and the penalty to be imposed. In the same vein, the trial court lacks discretion to take into account specific and crucial circumstances such as the participation of each individual offender in the crime.

110. The Court notes that the foregoing reasoning on the arbitrariness of the mandatory imposition of the death penalty and breach of fair trial rights, is affirmed by relevant international case-law.[31] Furthermore, domestic courts in some African countries have adopted the same interpretation in finding the mandatory imposition of the death penalty arbitrary and in violation of due process.[32]

111. As a consequence of the above, the Court finds that the mandatory imposition of the death penalty as provided for in Section 197 of the Respondent State's Penal Code and applied by the High Court in the case of the Applicants does not uphold fairness and due process as guaranteed under Article 7(1) of the Charter.

112. Having found so, the Court notes that the clause impliedly allowing for the imposition of the death penalty in Article 4 of the Charter is only appended to a provision for the right to life, which is qualified as "inviolable", and aiming at guaranteeing the "integrity", and therefore the sanctity, of human life. The Court further notes that Article 4 of the Charter does not include any mention of the death penalty. The Court therefore considers that such strongly worded

30 See *The Republic v Ally Rajabu and others*, Criminal Sessions Case No. 30 of 2008, Judgment of the High Court, 25 November 2011, Operative Part.

31 See *Thompson, op cit; Kennedy v Trinidad & Tobago*, Comm 845/1999, UN Doc CCPR/C/67/D/845/1999 (2002) (UNHRC), para 7.3; *Chan v Guyana*, Comm 913/2000, UN Doc CCPR/C/85/D/913/2000 (2006) (UNHRC), para 6.5; *Baptiste, op cit; McKenzie, op cit, Hilaire and others, op cit; Boyce and Another, op cit*.

32 See *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR; *Mutiso v Republic*, Crim App 17 of 2008 at 8, 24, 35 (30 July 2010) (Kenya Ct App); *Kafantayeni v Attorney General,* [2007] MWHC 1 (Malawi High Ct) and *Attorney General v Kigula* (SC), [2009] UGSC 6 at 37-45 (Uganda Sup Ct).

provision for the right to life outweighs the limitation clause. In the Court's view, this reading of the provision is to the effect that the failure of the mandatory imposition of the death sentence to pass the test of fairness renders that penalty conflicting with the right to life under Article 4.

113. In light of Article 60 of the Charter, the Court's position on this point receives determinant support from a joint reading of key instruments of the international and African bill of rights.[33]

114. From the foregoing, the Court holds that the mandatory nature of the imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania constitutes an arbitrary deprivation of the right to life. The Court therefore finds that the Respondent State has violated Article 4 of the Charter.

C. Alleged violation of the right to dignity

115. The Applicants allege that the execution of the death sentence by hanging constitutes a violation of the prohibition of torture and cruel, inhuman and degrading treatment under Article 5 of the Charter.

116. The Respondent State did not respond to the Applicants' submission on this allegation. However, in responding to the Order for Provisional Measures issued by the Court, the Respondent State avers that the imposition of the death penalty by its courts cannot be said to violate the Applicants' rights as it is not proscribed under international law.

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117. Article 5 of the Charter provides:

"Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade,

33 See Art 3 of the Universal Declaration of Human Rights (which has authority in customary international law, and has inspired subsequent binding international human rights instruments); Articles 1 and 2 of the Second Optional Protocol to the International Covenant on Civil and Political Rights (which abolishes the death penalty in peacetime); Art 5(3) and 30(e) of the African Charter on the Rights and Welfare of the Child, and Art 4(2)(j) of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (both instruments place restrictions on the application of the death penalty).

torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

118. The Court notes that, in the present case, the Applicants challenge the implementation by hanging of the death penalty as imposed in their case. The Court observes that many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto.[34] In line with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should therefore be that, in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible.[35]

119. The Court observes that hanging a person is one of such methods and it is therefore inherently degrading. Furthermore, having found that the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature, this Court finds that, as the method of implementation of that sentence, hanging inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment.

120. As a consequence of the above, the Court finds that the Respondent State has violated Article 5 of the Charter.

D. Alleged violation of Article 1 of the Charter

121. The Applicants allege that for having not amended its Penal Code to remove the mandatory imposition of the death penalty, the Respondent State has not met its obligations under Article 1 of the Charter.

122. The Respondent State did not respond to the Applicants' submissions on this allegation. However, in its report on implementation of the Court's Order for Provisional Measures,

34 See *Jabari v Turkey*, Judgment, Merits, App 40035/98, ECHR 2000-VIII (deporting a woman who risked death by stoning to Iran would violate the prohibition of torture); *Chitat Ng v Canada*, Comm 469/1991, 49th Sess., UN Doc. CCPR/C/49/D/469/1991 (5 November 1993), HR Comm, para 16.4 (gas asphyxiation constitutes cruel, inhuman and degrading treatment due to length of time to kill and available alternative less cruel methods). The United Nations Human Rights Council describes stoning as a particularly cruel and inhuman means of execution, Human Rights Council Res 2003/67, Question of the Death Penalty, E/CN.4/RES/2003/67 at para 4(i) (Apr. 24, 2003); Human Rights Council Res 2004/67, Question of the Death Penalty, E/ CN.4/RES/2004/67 at para 4(i) (21 April 2004); Human Rights Council Res 2005/59, Question of the Death Penalty, E/CN.4/RES/2005/59 at para 7(i), 4(h) (20 April 2005).

35 See *Chitat Ng, op cit*, para 16.2.

the Respondent State avers that the provision for the mandatory imposition of the death penalty by its courts cannot be considered as a violation of the Applicants' rights because that sentence is not prohibited under international law.

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123. Article 1 of the Charter provides: "The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them".

124. The Court considers that, as it has held in its earlier judgments, examining an alleged violation of Article 1 of the Charter involves a determination not only of whether the measures adopted by the Respondent State are available but also if these measures were implemented in order to achieve the intended object and purpose of the Charter. As a consequence, whenever a substantive right of the Charter is violated due to the Respondent State's failure to meet these obligations, Article 1 will be found to be violated.[36]

125. In the present case, the Court found that the Respondent State violated Article 4 of the Charter by providing for the mandatory imposition of the death penalty in its law. The Court also found a consequential violation of Article 5 of the Charter in respect of the execution of that sentence by hanging. The Court notes that the Respondent State enacted its Penal Code in 1981, that is before becoming a party to the Charter but amended the same in 2002, after the Charter came into force. In the instant case, fulfilling the obligation under Article 1 of the Charter would have therefore required the Respondent State to remove it from its laws subsequent to the entry into force of the Charter. It did not do so.

126. The Court consequently finds that the Respondent State violated Article 1 of the Charter in relation to the provision of the mandatory imposition of the death penalty in the Penal Code, and

36 See *Armand Guehi v Tanzania* (Merits and Reparations), para 149-150. See also *Kennedy Owino Onyachi and Another v Tanzania* (Merits), paras 158-159; and *Alex Thomas v Tanzania* (Merits), para 135.

its execution by hanging.

VIII. Reparations

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

128. In this respect, Rule 63 of the Rules of Court provides that: "The Court shall rule on the request for reparation ... by the same decision establishing a human or peoples' right or, if the circumstances so require, by a separate decision."

129. In the present case, the Court decides to rule on both the alleged violations as well as all reliefs and other reparations sought in the present Judgment.

130. The Applicants pray the Court to grant the following:

"i. A declaration that the Respondent State violated their rights to be tried within a reasonable time, to be heard, and to be tried by a competent court protected under Article 7(1) of the Charter.

ii. A declaration that, death penalty imposed by the Respondent State on the applicants herein violates the inherent right to life and human dignity guaranteed by Articles 4 and 5 of the Charter respectively.

iii. A declaration that, by having not amended Section 197 of the Penal Code, Chapter 16 of the Laws of Tanzania (Revised Edition, 2002), the respondent State is in violation of Article 1 of the African Charter in that it has not undertaken legislative or other measures to give effect to the rights guaranteed by the African Charter in its national laws.

iv. An Order compelling the Respondent State to set aside their conviction and sentencing, and release them from detention.

v. An Order compelling the Respondent State to report to this Honorable Court every six (6) months on the implementation of its decision.

vi. An Order for reparations.

vii. Any other Order or remedy that this Honorable Court may deem fit."

131. The Applicants further pray the Court to grant compensation to them and their family members for both material and moral prejudice as stated under the section of this Judgment on the prayers of the Parties.

132. The Respondent State prays the Court to dismiss all the prayers made by the Applicants for reparation as they are unjustified and

not supported with evidence.

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133. The Court considers that, as it has consistently held, for reparations to be granted, the Respondent State should first be internationally responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered. Finally, the Applicant bears the onus to justify the claims made.[37]

134. As this Court has earlier found, the Respondent State violated the Applicants' rights to life and dignity guaranteed under Articles 4 and 5 of the Charter respectively. Based on these findings, the Respondent State's responsibility and causation have been established. The prayers for reparation are therefore being examined against these findings.

135. As stated earlier, the Applicants must provide evidence to support their claims for material damage. The Court has also held previously that the purpose of reparations is to place the victim in the situation prior to the violation.[38]

136. The Court has further held, with respect to non-material damage, that prejudice is assumed in cases of human rights violations,[39] and quantum assessment must be undertaken in fairness and looking at the circumstances of the case.[40] In such instances, the

37 See *Armand Guehi v Tanzania* (Merits and Reparations), para 157. See also, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* ((Reparations) (2015) 1 AfCLR 258 (*Norbert Zongo and others v Burkina Faso* (Reparations)), paras 20-31; *Lohé Issa Konaté v Burkina Faso* (Reparations) (2016) 1 AfCLR 346 (Lohé Issa *Konaté v Burkina Faso* (Reparations)), paras 52-59; and *Reverend Christopher R Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72 (*Reverend Christopher R Mtikila v Tanzania* (Reparations)), paras 27-29.

38 See *Armand Guehi v Tanzania* (Merits and Reparations); Application 009/2015. Judgment of 28 March 2019 (Merits and Reparations), *Lucien Ikili Rashidi v United Republic of Tanzania* (*Lucien Ikili Rashidi v Tanzania* (Merits and Reparations)); and *Norbert Zongo and others v Burkina Faso* (Reparations), paras 57-62.

39 See *Armand Guehi v Tanzania* (Merits and Reparations), para 55; and *Lucien Ikili Rashidi v Tanzania* (Merits and Reparations), para 58.

40 See *Norbert Zongo and others v Burkina Faso* (Reparations), para 61.

Court has adopted the practice of awarding lump sums.[41]

137. The Court notes that the Applicants' claims for reparation are made in United States Dollars. In its earlier decisions, the Court has held that, as a general principle, damages should be awarded, where possible, in the currency in which loss was incurred.[42] In the present case, the Court will apply this standard and monetary reparations, if any, will be assessed in Tanzanian Shillings.

A. Pecuniary reparations

138. In the Application, the Applicants' request to be compensated in various amounts for "emotional anguish during their trial and imprisonment, emotional draining during the appeal processes, missing their wives by virtue of being in prison, lack of care by their children, disruption and loss of income, loss of conjugal rights and increase of baby boys and girls, loss of contact with relatives and close friends, disruption of their relationship with their mothers, deterioration of their health while in detention, and loss of social status".

139. The Applicants further pray the Court to grant compensation to their family members, as indirect victims, for the prejudice suffered given that "the wives were affected by the sudden loss of their husbands who were the sole source of income, they lived with the stigma of having a convict as a husband, they had to bring up the children by themselves, they were not able to increase the number of children"; "the Applicants' mothers have suffered losing their sons to imprisonment and the social stigma of having a son who is a criminal."

140. Finally, the Applicants pray the Court to award them various amounts in legal fees for the costs incurred in proceedings both before domestic courts and this Court.

41 See *Armand Guehi v Tanzania* (Merits and Reparations), *Lucien Ikili Rashidi v Tanzania* (Merits and Reparations); and *Norbert Zongo and others v Burkina Faso* (Reparations), para 62.

42 See *Lucien Ikili Rashidi v Tanzania* (Merits and Reparations); and Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda*, para 45.

i. Material loss

a. Loss of income

141. The Court notes, regarding the prayer for compensation due to loss of income and property, that the Applicants allege that they were business men at the time of their incarceration and lost their cows, chickens, houses, bicycle and other properties as a result. The Applicants do not provide any evidence in support of the claims.[43] The prayer is therefore dismissed.

142. The prayer for compensation due to the deterioration of their health which occasioned expenses related to hospitalisation while in prison is equally dismissed for lack of evidence.

b. Costs of proceedings before domestic courts

143. The Court considers that, in line with its previous judgments, reparation may include payment of legal fees and other expenses incurred in the course of proceedings in national courts.[44] The Applicant however must provide justification for the amounts claimed.[45]

144. The Court notes that the Applicants do not provide any evidence in support of their claim for payment of the costs allegedly incurred in the proceedings before domestic courts. Their respective prayers are therefore dismissed.

ii. Non-material loss

a. Loss incurred by the Applicants

145. With respect to damage caused due to loss of social status, and restricted interaction with their family members due to their trial and imprisonment, the Court notes that it has not made any finding in this Judgment to the effect that the Applicants' incarceration was unlawful.[46] The related claims are therefore baseless and are

43 See *Armand Guehi v Tanzania* (Merits and Reparations), para 178.

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

45 *Ibid*, para 81; and *Ibid*, para 40.

46 See *Armand Guehi v Tanzania* (Merits and Reparations), para 178.

consequently dismissed.

146. The Court however notes that it has found the mandatory imposition of the death penalty in violation of Article 4 of the Charter. When it comes to reparation of that violation, the questions that arise in the circumstances of the present Application are those of the prejudice caused by the wrongful act and how to assess the quantum thereof. On this issue, the Court recalls its earlier cited case-law to the effect that, in respect of human rights violations, moral prejudice is assumed. This notwithstanding, prejudice has to be assessed and quantified even though the Court retains discretion in determining the reparation.

147. In the instant matter, while the death sentence is yet to be carried out, damage has inevitably ensued from the established violation caused by the very imposition of the sentence. The Court is cognisant of the fact that being sentenced to death is one of the most severe punishment with the gravest psychological consequences as the sentenced persons are bound to lose their ultimate entitlement that is, life.

148. The Court further considers prejudice subsequent to the sentencing. It is recalled that the death sentence being served by the Applicants was given by the High Court on 25 November 2011 and confirmed by the Court of Appeal on 22 March 2013. This Court finds that prejudice was caused with effect from the date of sentencing. As a matter of fact, the uncertainty associated with the waiting for the outcome of the appeal process certainly added to the psychological tension experienced by the Applicants. In the eight (8) years that elapsed between the sentencing and the present Judgment, the Applicants therefore lived a life of uncertainty in the awareness that they could at any point in time be executed. Such waiting and its length not only prolonged but also aggravated the Applicants' anxiety.

149. In arriving at its finding with respect to this issue, the Court is persuaded by the conclusions of the European Court of Human Rights in the case of *Soering v United Kingdom*.[47] There, the latter Court had to say about the death penalty that the prolonged period of detention awaiting execution causes the sentenced persons to suffer "… severe mental anxiety in addition to other circumstances, including, …: the way in which the sentence was imposed; lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; … the fact that the judge does not take into

47 *Soering v United Kingdom* Judgment of 7 July 1989, Series A, Vol 161.

consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail."[48]

150. In view of the above, the Court finds that the Applicants endured moral and psychological suffering and decides to grant them moral damages in the sum of Tanzanian Shillings Four Million (Tsh 4,000,000) each.

151. Regarding damage caused due to anguish during their trial and imprisonment, the Court finds that the same reasoning applies as for the alleged loss of social status. The related prayer is therefore dismissed.

b. Loss incurred by the Applicant's family

152. The Court considers that as it has held in its earlier judgments, indirect victims must prove their relation to the Applicant to be entitled to damages.[49] Documents required include birth certificates for children, attestation of paternity or maternity for parents, and marriage certificates for spouses or any equivalent proof.[50] The Court notes that, in the present case, while the Applicants mention the names of their family members, none of the required pieces of evidence is provided to establish the relation.

153. In any event, the alleged prejudice to the Applicants' family members were as a result of their incarceration, which this Court did not find unlawful. The prayers are therefore dismissed.

B. Non-pecuniary reparations

i. Restitution

154. The Applicants pray the Court to quash the conviction, set aside the sentence and order their release. They also pray the Court to order that they should be "restored to the original situation before

48 *Ibid*, para 77.

49 See *Alex Thomas v Tanzania* (Reparations), paras 49-60; *Mohamed Abubakari v Tanzania* (Reparations), paras 59-64.

50 See *Alex Thomas v Tanzania* (Reparations), para 51; *Mohamed Abubakari v Tanzania* (Reparations), para 61.

the violation".

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155. The Court considers, with respect to these prayers, that while it does not assume appellate jurisdiction over domestic courts,[51] it has the power to make any order as appropriate where it finds that national proceedings were not conducted in line with international standards.

156. As the Court has previously held, such orders can be made only where the circumstances so require.[52] The said circumstances are to be determined on a case-by-case basis having due consideration mainly to proportionality between the measure sought and the extent of the violation established. Consequently, the violation that supports the request for a particular relief must have fundamentally affected domestic processes to warrant such a request. Ultimately, determination must be made with the ultimate purpose of upholding fairness and preventing double jeopardy.[53]

157. With respect to the prayer for the conviction to be quashed, the Court notes that, in the present case, its findings do not affect the Applicants' conviction.[54] The prayer is therefore dismissed.

158. Regarding the prayer that the sentence should be set aside, the Court found in the present matter that the provision for the mandatory imposition of the death sentence in the Respondent State's legal framework violates the right to life protected in Article

51 See *Armand Guehi v Tanzania* (Merits and Reparations), para 33; Application 027/2015. Judgment of 21 September 2018 (Merits and Reparations), *Minani Evarist v United Republic of Tanzania (Minani Evarist v Tanzania* (Merits and Reparations), para 81; *Mohamed Abubakari v Tanzania* (Merits), op cit, para 28.

52 See for instance, *Alex Thomas v Tanzania* (Reparations), *op cit*, para 157.

53 See *Armand Guehi v Tanzania, op cit*, para 164; Application 016/216. Judgment of 21 September 2018 (Merits and Reparations), *Diocles William v United Republic of Tanzania*, para 101; *Minani Evarist v Tanzania* (Merits and Reparations), op cit, para 82; *Loayza-Tamayo v Peru*, Merits, IACHR Series C *No* 33 [1997], paras 83 and 84; *Del Rio Prada v Spain*, 42750/09 – Grand Chamber Judgment, [2013] ECHR 1004, para 83; *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon* (2000) *AHRLR* 57 (ACHPR 1997) operative provisions; and Communication 96/1998, *Lloyd Reece v Jamaica*, Views under Article 5(4) of the Optional Protocol, 21 July 2003, UN Doc CCPR/C/78/D/796/1998, para 9.

54 See Application 006/2013. Judgment of 4 June 2019 (Reparations), *Wilfred Onyango Nganyi and others v Tanzania* (Reparations), para 66.

4 of the Charter. However, in light of the Court's finding that the violations did not impact on the Applicants' guilt and conviction, the sentencing is affected only to the extent of the mandatory nature of the penalty. A remedy is therefore warranted in that respect. The Court consequently orders the Respondent State to take all necessary measures for the rehearing of the case on the sentencing of the Applicants through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

159. As for the prayer that the Applicants be released, the Court holds that in light of its earlier findings in respect of the conviction and sentencing of the Applicants, an order for release is not warranted. The prayer is consequently dismissed.

160. Regarding the prayer for restoration in the situation prior to the violations, the Court considers that the finding in respect of the prayer to be released applies. This prayer is equally dismissed.

ii. Non-repetition

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

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162. The Court considers that, as it has held in the case of *Lucien Ikili Rashidi v United Republic of Tanzania*, guarantees of non-repetition are generally aimed at addressing violations that are systemic and structural in nature rather than to remedy individual harm.[55] The Court has however also held that non-repetition could apply in individual cases where there is a likelihood of continued

55 See *Lucien Ikili Rashidi v Tanzania, op cit*, paras 146-149. See also, *Armand Guehi v Tanzania, op cit*, para 191; and *Norbert Zongo and others v Burkina Faso* (Reparations), paras 103-106.

or repeated violations.[56]

163. In the instant case, the Court found that the Respondent State violated Article 4 of the Charter by providing for the mandatory imposition of the death penalty in its Penal Code, and Article 5 by providing for its execution by hanging. The Court finds that its earlier order that the case on the sentencing of the Applicants should be heard afresh amounts to a systemic pronouncement since it will inevitably require a change in the law. The Court therefore makes the consequential order that the Respondent State undertakes all necessary measures to repeal from its Penal Code the provision for the mandatory imposition of the death sentence.

iii. Publication of the judgment

164. The Court notes that the Applicants did not request for the publication of this Judgment.

165. Having said that, the Court considers that it can order publication of its decisions *suo motu* where the circumstances of the case so require.[57]

166. The Court observes that, in the present case, the violation of the right to life by provision of the mandatory imposition of the death penalty as earlier established is beyond the individual case of the Applicants and systemic in nature. The Court further notes that its finding in this Judgment bears on a supreme right in the Charter, that is the right to life.

167. In the circumstances, the Court deems it proper to make an order *suo motu* for publication of the Judgment. The Court therefore orders that this Judgment be published on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and remains accessible for at least one (1) year after the date of publication.

IX. Costs

168. In terms of Rule 30 of the Rules "unless otherwise decided by the

56 See *Lucien Ikili Rashidi v Tanzania, op cit*; See also *Armand Guehi v Tanzania, op cit; and Reverend Christopher R Mtikila v Tanzania* (Reparations), para 43.

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

Court, each party shall bear its own costs."

169. None of the Parties made submissions on costs.

170. In light of the above, the Court holds that in the present case, there is no reason to depart from the provisions of Rule 30 of the Rules and, consequently, rules that each Party shall bear its own costs.

X. Operative part

171. For these reasons:

THE COURT,

Unanimously:

On jurisdiction

i. *Dismisses* the objections on jurisdiction;

ii. *Declares* that it has jurisdiction.

On admissibility

iii. *Dismisses* the objections on the admissibility of the Application;

iv. *Declares* that the Application is admissible.

On the merits

v. *Finds* that the Respondent State has not violated the Applicants' right to be heard protected under Article 7(1) of the Charter;

vi. *Finds* that the Respondent State has not violated the Applicants' right to be tried by a competent court protected under Article 7(1)(a) of the Charter;

vii. *Finds* that the Respondent State has not violated the Applicants' right to be tried within a reasonable time protected under Article 7(1)(d) of the Charter.

viii. *Finds* that the Respondent State violated the right to life guaranteed under Article 4 of the Charter in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;

ix. *Finds* that the Respondent State has violated the right to dignity protected under Article 5 of the Charter in relation to the provision for the execution of the death penalty imposed in a mandatory manner.

On reparations

Pecuniary reparations

x. *Does not grant* the Applicants' prayers for compensation on account of material damage;

xi. *Grants* Tanzanian Shillings Four Million (Tsh 4,000,000) to each of the Applicants for moral damage that ensued from their

sentencing;

xii. *Orders* the Respondent State to pay the amount indicated under sub-paragraphs (xi) free from taxes within six (6) months, effective from the notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

xiii. *Does not grant* the prayers for the conviction to be quashed and the Applicants to be released, and for restitution;

xiv. *Does not grant* the prayer for non-repetition of the violations found with respect to the Applicants;

xv. *Orders* the Respondent State to take all necessary measures, within one (1) year from the notification of this Judgment, to remove the mandatory imposition of the death penalty from its Penal Code as it takes away the discretion of the judicial officer;

xvi. *Orders* the Respondent State to take all necessary measures, through its internal processes and within one (1) year of the notification of this Judgment, for the rehearing of the case on the sentencing of the Applicants through a procedure that does not allow the mandatory imposition of the death sentence and uphold the full discretion of the judicial officer;

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

xviii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xix. *Orders* that each Party shall bear its own costs.

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Separate opinion: BENSAOULA

1. I concur with the opinion of the majority of the judges on the jurisdiction of the Court and the Operative Part of the Judgment.

2. However, in my thinking, the manner in which the Court has treated admissibility of the Application in relation to the objections raised by the Respondent State on the exhaustion of local remedies and on reasonable time deserves further attention.

i. On Admissibility of the Application based on the Respondent State's objection to exhaustion of local remedies

3. In my opinion, the Court's reasoning runs counter to the tenets of the obligation to exhaust local remedies before referral of a case to the Court, and also to the prerogatives and jurisdiction of appellate Judges before national courts.

• The tenets of the obligation to exhaust local remedies before referral to the Court.

4. It is an established fact that the Court has, in its jurisprudence, restated the conclusion of the African Commission on Human and Peoples' Rights[1] according to which the condition set out in Article 56 of the Charter and Rule 40 of the Rules in their respective paragraph 5 on exhaustion of local remedies "reinforces and maintains the primacy of the domestic system in the protection of human rights vis à-vis the Court". The Commission thus aims to afford States the opportunity to address the human rights violations committed in their territories before an international human rights body is called upon to determine the States' responsibility for the said violations.

5. It is however apparent from the judgment under reference in this separate opinion that, in this matter, the Court appropriated the theory of "bundle of rights" to dispose of certain requirements of the obligation to exhaust local remedies.

6. Yet, the tenets of this theory show that it was created and used in matters of property rights, because often among economists,

1 Application 006/2012. Judgment of 26 May 2017 – *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 93; Application 005/2013 – *Alex Thomas v United Republic of Tanzania*, Judgment of 20 November 2015; Application 001/2015. Judgment of 7 December 2018 – *Armand Guéhi v United Republic of Tanzania*.

such rights were the same as private property rights. The demonstration that flows from the theory has, above all, caused common ownership to evolve by highlighting the dismemberments of property, and hence its application in matters of the rights of indigenous peoples.

7. It emerges from the Respondent State's objections that the latter criticizes the Applicants for having failed to present certain claims before the domestic court prior to bringing the same to this Court, thereby disregarding the condition of exhaustion of local remedies. This is also true for their allegations regarding their right to be heard and for the unconstitutionality of the sentence imposed.

8. In response to these allegations, the Court upheld its case-law with regard to constitutionality petition by considering that the local remedies concerned only ordinary remedies.

9. As regards the allegation that their right to be heard has been violated, the Court considers that

"by its established case-law, the right invoked by the Applicants is part of a bundle of rights and guarantees, which formed the basis of the proceedings before the High Court and the Court of Appeal. Consequently, where it is established that the domestic judicial authorities had the opportunity to address the alleged procedural violation, even though the Applicant did not raise the issue, the local remedies must be considered to have been exhausted".[2]

10. The Court further held that

"in the instant case, given that the Court of Appeal was in a position to examine several claims of the Applicants with respect to the manner in which the High Court conducted the proceedings, there was ample opportunity to assess whether the right to be heard had been examined by the lower court".[3]

11. In many of its judgments, the Court used and reiterated this "bundle of rights" theory to dispose of certain claims brought before it under the obligation to exhaust the local remedies.

12. In my opinion, applying this theory in matters of local remedies amounts to distorting its basis and tenets.

13. The Applicants' rights are diverse and different in nature and the allegations thereto related, if in the Charter, can be incorporated into a set of rights such as the right to information, freedom of expression, fair trial.

14. At the domestic level, laws, whichever they are, spell out the scope of and the rules governing each right. It lies with the

2 Para 38 of the Judgment.

3 Para 39 of the Judgment.

national judge to consider certain rights as part of a bundle and to adjudicate them as such.

15. In defining the aforesaid bundle of rights in relation to the national judge, the Court ignored the powers and prerogatives of judges in general and, more restrictively, in matters of appeal, especially as the Applicants have at no time alleged that the appellate judges have the power to do so – since the national texts confer the powers and prerogatives on them – and they could however consider requests brought for the first time before the African Court, as part of a bundle of rights.

ii. On the prerogatives and jurisdiction of appellate judges before national courts

16. It is common knowledge that appeal proceedings" are of two types:

- Appeal that has devolutive effect,, and
- Appeal that is limited to specific points of the Judgment.

* Whereas the devolutive effect of an appeal means that the Court of Appeal has full and total knowledge of the dispute and must adjudicate in fact and in law with the same powers as the trial judge, the devolution occurs only where the appeal relates to all the provisions of the first judgment.

* The scope of the devolutive effect of the appeal will thus be determined by two procedural acts, that is, the statement of appeal or the notice of appeal that will not only limit the applicant's claims, but also the submissions of the parties which may contain new claims not mentioned in the notice of appeal.

- **Limited appeal, for its part, means that the appeal is confined to specific points in the judgment.**

17. Where the judge makes a ruling outside these two types of appeal and adjudicates on claims that have not been expressed, he/she will have ruled *ultra petita*, which will legally impact on the decision.

18. The Court's conclusion as regards local remedies in relation to claims which have not been subjected to such remedies – as pointed out above touches deeply on the prerogatives of the appellate courts, the scope of their jurisdiction over the case brought before them, and on the purpose of imposing the exhaustion of domestic remedies on Applicants as a right of Respondent States to review their decisions and thus avoid being

arraigned before international courts.

19. The Court ought to have consulted the domestic texts which govern the procedure and jurisdiction of appellate judges in criminal matters, rather than rely on the elastic concept of bundle of rights which will time and again give it the power to examine and adjudicate claims that have not been subjected to domestic remedies, and thus minimize the importance of such remedies in referrals to the Court.

20. In my view, this runs counter to the tenets of the obligation to exhaust domestic remedies and to the rights of States in this regard.

iii. As for the objection regarding reasonable time, the application of this concept by the Court runs counter to the provisions of Article 56 of the Charter,,Article 6(2) of the Protocol and Rules 39 and 40 of the Rules

21. Rule 40 of the Rules in its paragraph 6, clearly states that applications must be

"submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter".

22. It is clear from the aforesaid that the legislator laid down two (2) options as to how to determine the starting point of reasonable time:

a. the date of exhaustion of local remedies set by the Court at 22 March 2013 – date of the judgment of the Court of Appeal. Between this date and that of referral of the matter to this Court, there was a time lapse of two (2) years.[4]

b. the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter, that is, the date the application for review was filed, ie. 24 March 2013, which the Court did not take into consideration as a date but as a fact.

23. The Court ignored this date stating only that the facts of the case show that after filing their Application for Review on 24 March 2014, the Applicants were expected to observe some time while awaiting the outcome of the review procedure before bringing the matter before this Court on 26 March 2015.. However, given that the application for review is a legal entitlement, they cannot be

4 Para 46 of Judgment.

penalized for exercising that remedy.[5].

24. Thus, the Court considered the period of two (2) years to be reasonable although it took into account the period spent awaiting the outcome of the application for review; and hence a fact that occurred after the exhaustion of local remedies. However, pursuant to the above-mentioned articles, the Court could have set the date for its referral in relation to the application for review given that the relevant judgment had not been rendered which would have resulted in a more reasonable referral time of one (1) year instead of two (2) years.

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Separate Opinion: TCHIKAYA

1. Like my Honourable colleagues, I have generally adopted the operative part of the judgment, *Ally Rajabu and others v United Republic of Tanzania*, delivered on 28 November 2019. Without opposing the operative part, it is nevertheless necessary, on my part, to say that it would have been clearer for the Court to take a more straightforward line in its motives. While invalidating Tanzania's provisions on the mandatory death penalty, it left this useless "chiaroscuro" on the law applicable to the death penalty in Africa. It missed an opportunity to strengthen international law on this point. This assessment of the law on the death penalty, by distinction of category of crimes or offences, is no longer, *de jure*, likely to be supported. This Court, the Human Rights Court, should align itself with the evolution of international law.

2. An application was presented to the Court of Arusha on 26 March 2015 by Messrs Ally Rajabu, Angaja Kazeni alias Oria, Geofrey Stanley alias Babu, Emmanuel Michael alias Atuu and Julius Petro, Tanzanian nationals sentenced to death for murder. The question of its admissibility and that of jurisdiction did not embarrass the

5 Para 48 of Judgment.

3. Court, which settled them without difficulty.[1] However, on the merits, what remained was to take a clear position on the question of mandatory sentence which was the sentence confirmed by the national judges.

4. The problem arises from the interpretation of para 112 of the judgment which reads as follows: "the Court notes that Article 4 of the Charter, while not prohibiting the death penalty, is essentially devoted to the right to life considered "inviolable" and aims to guarantee "the integrity" and therefore the sanctity of human life. The Court further notes that Article 4 of the Charter makes no mention of the death penalty".[2] However, even though it is said, the prohibitive legal elements of punishment are now legion on the international level.[3] It is up to the judge to give them the desired effect.

5. This opinion will thus undertake to show the emptiness of the so-called mandatory death penalty distinction from other death sentences (I.) which feeds the judgment of Rajabu and others; next, the fact will be examined that the Court could have acceded to a system of prohibition of capital punishment in any form, as it is abundantly suggested in our opinion, Article 4 of the African Charter on Human and Peoples' Rights (II.).

I. The emptiness of the distinction between the death penalty and the so-called compulsory sentence

6. The Applicant told the Court that "by not amending Article 197 of its Penal Code, which provides for *the mandatory death penalty in the event of murder*, the Respondent State has violated the right to life and is not respecting the obligation to give effect to this right as guaranteed by the Charter".[4] It was therefore for the Court to situate this infringement in its legal context: in addition to the right to life, the application of the death penalty was in question. As in its recent *Eddie Johnson Dexter case*, the mandatory death penalty regime was the basis for the controversy between the Applicant and the Respondent State. This distinction in this death sentence

1 AfCHPR, *Matter of Rajabu and others v United Republic of Tanzania*, 8 December 2019, paras 14-53.

2 *Idem*, para 108.

3 Resolution (A/RES/44/128) is titled "Elaboration of a Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty" was voted on 5 January 1990(A/44/PV82, p 8-9).

4 *Idem*., para 14.

is neither operational nor justified in its legal significance. It is very relative.

7. National legislators end up with an extensive criminal power over a subject that is now regulated by international criminal law. It is known that, formally, the death penalty, as a criminal sanction, was a matter of internal public order. This is a matter of the orders of the various States which determine their penal policy and the hierarchy of the penalties inscribed in their Codes. The concept of reserved area, in all its meaning in international law, applied to those "cases which are essentially within the national jurisdiction of a State" within the meaning of Article 2(7) of the Charter (1).[5] The distinction between the two kinds of death sentences in this case is only relative.

A. Relative and insufficient distinction between the two kinds of death sentences

8. Article 197 of the Tanzanian Penal Code provides that: "Any person convicted of murder shall be. sentenced to death". The adjective mandatory does not appear, but the legal language, without putting elements of procedure, interpreted these provisions as requiring capital punishment.

9. This punishment and its effective application, in any event, can only be made following a procedure subject to the judge's assessment. And these elements are as much present in the case of the non-compulsory death sentence, decided by the judge without legislative constraint. This is emphasized by the United Nations Human Rights Committee in the *Dexter case*, saying: "In this context, it recalls its jurisprudence and reiterates that the automatic and mandatory imposition of the death sentence, constitutes an arbitrary deprivation of life, incompatible with article 6(1) of the Covenant, provided that the death sentence is passed without the personal circumstances of the accused or the particular circumstances of the crime being taken into consideration. The existence of a *de facto* moratorium on executions is not sufficient to make the mandatory death penalty

5 W Schabas *The abolition of the death penalty in International Law*, Grotius, Cambridge, 1993, 384.

compatible with the Covenant"[6].

10. On reading these reasons given by the Committee, two elements can be noted: 1) mandatory death penalty is only an embodiment of the initial death penalty; it constitutes an arbitrary deprivation of life and 2) It is not compatible with the requirements of international human rights law. The distinction between the two is decidedly inadequate.

11. This opinion emphasizes that what is condemned in the death penalty is found *mutatis mutandis* in the mandatory death penalty. The latter is of no significant contribution to the distinction that should be made with regard to the initial death sentence. The mandatory death penalty would be like a super death sentence that would apply against supreme crimes. However, a death sentence is by definition a death sentence. The basis of this mandatory death sentence and its procedural elements are not sufficiently distinguishable, a single regime with the original death penalty was more appropriate.

B. A single legal regime is applicable

12. It begins with the 1966 Covenant.[7] The Covenant does not make any distinction: "1. No person subject to the jurisdiction of a State Party to this Protocol shall be executed. 2. Each State Party shall take all appropriate measures to abolish the death penalty within its jurisdiction"(article 1)[8]. As much as "the death penalty is an abomination for all the condemned"[9] (the words of Victor Hugo), the rule of international law refuses to distinguish it in its form: the mandatory death penalty or not. This distinction, which is not a creation of African states, also exists in the United States. The US Supreme Court in restricting the use of the death penalty in the United States has reserved it for murders of crimes against individuals and excluding accomplices whose participation is only

6 HRC *Dexter Eddie Johnson v Ghana Communication*, 28 March 2014, para 9 and following; see also Communication 1406/2005, *Weerawansa v Sri Lanka*, observations adopted on 17 March 2009, para 7.2.

7 *The International Covenant on Civil and Political Rights* (ICCPR) was adopted in New York on 16 December 1966 by the UNGA in resolution 2200 A (XXI), entered into force on 23 March 1976.

8 *UNGA Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, Resolution 44/128 of 15 December 1989.

9 V Hugo *The last day of a condemned man* (1829).

peripheral.[10]

13. The analyses of the United Nations Human Rights Committee on the commonality of these death sentences show this. In *Eversley Thompson v St Vincent and the Grenadines*, the Human Rights Committee ruled on the applicant's assertion that the mandatory nature of the death penalty and its application amounted to an arbitrary deprivation of life. The Committee stressed that "such a system of compulsory imposition of the death penalty deprives the individual of his most fundamental right, the right to life, without considering whether this exceptional form of punishment is appropriate in the particular circumstances of his life. his business". The result was that the mandatory death penalty was an arbitrary deprivation of life in violation of article 6(1) of the Covenant.[11]

14. It was perfectly possible for the African Court to consider in this case that the state of international law recommended a common system of prohibition applicable to all "kinds of death sentences". The European system which excludes reservations by Article 3 of its latest Protocol which prohibits the death penalty sets the tone. It is noted that "No derogations to the provisions of this Protocol shall be made under article 57 of the Convention". The Protocol takes care to stress that "The death penalty shall be abolished. No one shall be condemned to such penalty or executed".[12] It is further indicated that this constitutes "the final step in order to abolish the death penalty in all circumstances".[13]

15. In this decision the Court was very circumspect and "legalistic". It endeavored to observe scrupulously the normative sovereignty of the Respondent State. In its non-pecuniary measures, however, it ordered the Respondent State to "take all the necessary measures, within one year of notification of the present judgment, to abolish the mandatory death penalty its legal system ". Here lies the meaning of this opinion. This "chiaroscuro" maintained

10 In effect in the United States, there is a similar system. See especially the Supreme Court, *Erlich Anthony Coker v State of Georgia*, 28 March 1977; see also Supreme Court, *Patrick O Kennedy v State of Louisiana*, 25 June 2008: The Supreme Court of the United States ruled that the death penalty was unconstitutional under the Eighth Amendment when applied to crimes against individuals that did not cause death. This case involved a girl of less than 12 years old.

11 See: Art 6(2) of the ICCPR; *Eversley Thompson v Saint Vincent and the Grenadines*, Communication 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000), para 8.2.

12 Art 1, Protocol 13 to the *Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, Vilnius, 3 May 2002

13 *Idem*, Preamble to the Protocol.

on the regime of the death penalty deserves discussion. In the state of international law, there are no "death sentences" with variable qualifiers.[14] A single legal regime is applicable. The term "mandatory" does not alter the majority rejection of this sanction by the international community.[15] Moreover, the suppression called for by the judge, in any event, should usefully concern only the death penalty, without further distinction. As the International Court of Justice recalls, "there is a general obligation beyond the texts applicable to specific fields, at the behest of States to prevent the commission by other persons or entities of acts contrary to certain norms of international criminal law".[16] It is an obligation of conformity to the law of the people. Thus in this light, *Rajabu and others*, reflects a limited reading of Article 4 of the Charter.

II. A still limited reading of Article 4 of the Charter

16. This reading will be considered before referring to the remarkable wave of abolitionism that has already taken hold of the continent.

A. The almost total movement against the death penalty in Africa should be reflected in the protection of human rights

17. The international doctrine against the death penalty was built through progressive denunciation of human rights violations, cruel, inhuman and degrading treatment on the one hand and

14 The same was true of the controversial death sentence in time of war. This aspect was discussed when, on 15 December 1980, the UN General Assembly agreed on the elaboration of a draft protocol aiming at the abolition of the death penalty. It reaffirmed its will in 1981. On 18 December 1982, the UNGA requested the United Nations Commission on Human Rights to establish the Second Optional Protocol to the International Covenant on Civil and Political Rights. The Sub-Committee on the Prevention of Discrimination and Protection of Minorities therefore had the task of working on it. The Sub-Commission's rapporteur, Marc J. Bossuyt, a Belgian expert, introduced the wartime exception, because what he said: "a greater number of States will thus be able to become parties to the Second Optional Protocol". ". See Marc Bossuyt, Guide to the Preparatory Works of the International Covenant on Civil and Political Rights, Nijhoff, Dordrecht-Boston-Lancaster, 1987, 851.

15 The first International Covenant on Civil and Political Rights of 1966, which entered into force on 23 March 1976, in accordance with the provisions of Article 49, had in this respect the protection of the right was updated on the subject. The *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty 11 July 1991, in accordance with Article 8.

16 ICJ, Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide of 9 December 1948 Advisory Opinion, 28 May 1951, Rec 1951, p 496; quoted by A Pellet 'From one Crime to Another – State Responsibility for Violating Human Rights Obligations' *Studies in honour of Professor Rafâa Ben Achour – Mouvances du droit*, Konrad-Adenauer-Stiftung, 2015, tome III, 317-340.

violation of the right to life, on the other hand. It is irrefutable that the rejection of this sentence is total today[17]. This could have two complementary explanations: the socio-political complexity of its elevation as a penal sanction and the use that could be made of it, even by a judge. The latter is not exempt from miscarriage of justice.

18. The observation shows that the African continent is part of this international movement whose goal is the abolition of the death penalty. Today, out of the 55 member states of the African Union, nearly twenty do not execute death row inmates, and nearly forty countries are abolitionist in law or in practice ... It is possible to say that the majority of these states refuse this ultimate sanction.[18]

19. It was indeed desirable that a reading of the international provisions should guide the decision of the Court. This reading should be based on international or even national jurisprudence of African states, many of which have introduced moratoria on the execution of the death penalty. A reading that could have also been based on the international normative evolution in this same field.

20. Many countries in Africa have *de facto* moratoria on the death penalty.[19] They refuse the penal execution of individuals. A kind of partial death sentence is like the mandatory death penalty in that it applies to certain crimes. Those African countries that have reduced the scope of the death penalty should eliminate it. This is what Article 4 of the African Charter on Human and Peoples' Rights is already suggesting.

B. Article 4 of the African Charter allowed for an interpretation against the death penalty

21. In addition to the general opinion that the death penalty violates human rights, the right to life remains the right that is violated fundamentally and manifestly by a State order favourable to the death penalty. It is inhuman treatment and involves psychological torture. The wait between the sentence and the execution

17 D Breillat, The global abolition of the death penalty, Concerning the Second Optional Protocol of the International Covenant on Civil and Political Rights aimed at abolishing the death penalty, RSC, 1991, p. 261.

18 At this date, Congo-Brazzaville and Madagascar having abolished capital punishment in 2015 and Guinea in 2016 are the last abolitionist African States.

19 Since the United Nations General Assembly passed the first resolution calling for a moratorium on the use of the death penalty on 27 December 2007, 170 states have either abolished or introduced a moratorium on the death penalty.

constitutes a superfluous punishment. It is observed, on the contrary, that most lifers – real – do not reoffend. Upon release, they resume a normal life.[20] We regularly quote the case of Mr Maurice Philippe, who, while being particular, remains instructive. This man was sentenced to death in 1980, his conviction was commuted to life imprisonment in 1981 for the murder of two police officers. In prison, he studied history and, today on parole, he is a doctor in medieval history and researcher in a graduate school (EHESS, France).

22. The right to life remains the major element of Article 4 of the African Charter on Human and Peoples' Rights: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person: No one may be arbitrarily deprived of this right ". It is this article that is the subject of the Court's judgment. I agree with the purpose of the analysis, but the reasoning of the Court in para 96 remains unclear: "(...) Indeed, Article 4 of the Charter does not mention the death penalty. The Court observes that despite the international trend towards the abolition of the death penalty, in particular through the adoption of the *Second Optional Protocol to the International Covenant on Civil and Political Rights,* the prohibition of this penalty in international law is not yet absolute." This unexplained search for the absolute and the lack of Praetorian commitment limit the Court's power of interpretation.

23. The African Charter is not the only instrument against the capital punishment which, without mentioning the abolition of the death penalty, does not mention this suppression, but proclaims the right to life as to be protected. The Universal Declaration of Human Rights (10 December 1948) has the same approach.[21] These instruments belong to the time of the Cold War dissensions. This explains the advent of the Second Protocol, which is devoted specifically to the abolition of the death penalty. As with the 1948 Declaration, for the African Charter, the option that prevailed was "compromise". The reference to the right to life, in absolute terms,

20 The position that we find in doctrine, especially Alain Pellet, Rapporteur of the French committee chaired by Pierre Truche, wrote: "the Committee is resolutely opposed to the death penalty; as abominable as the offenses, 'to use the logic of death against terrorists, which they practice without mercy, it is for a democracy to embrace the values of terrorists'; the only thing left is perpetual imprisonment." see. in A Ascensio, E Decaux and A Pellet (eds), *Droit international pénal*, Pedone, Paris, 2000, 843.

21 The Declaration does not mention the death penalty. Article 3 states that "Everyone has the right to life, liberty and security of person". It is in the context of the right to life that the question of capital punishment was debated during the preparatory work of the Declaration.

without reference to the abolition of the death penalty.[22] This last idea was nevertheless present.

24. Nigeria, which in its periodic report to the African Commission of 1993 called for the abolition of the death penalty for drug trafficking, the illegal agreements concerning petroleum products, said that the phenomenon of "death row" was incompatible with the African Charter.[23] Finally, it should be noted that the African Charter on the Rights of the Child, which has been extensively ratified, requires that the death penalty not be imposed for crimes committed by minors under the age of 18[24] and that it cannot be executed on pregnant women, or mothers of babies or young children.

25. Despite advances in international criminal law; the judgment on *Rajabu and others* seems to retrogress. It pays little attention to the Praetorian powers of the Human Rights judge to advance the protection of the right to life. There is an interpretive function of the rule of law to be implemented in order to complete and clarify the protection of the right to life that Article 4 of the African Charter assumes. Former Judge F Ouguergouz[25] is accustomed to recalling the liberal character of the *ratione materiae* jurisdiction which States wished to give to the African Court through Article 7 of the Protocol on the Establishment of the African Court, entitled "Sources of law". It is provided that "the Court shall apply the provision of the Charter and any other relevant instruments ratified by the States concerned".

26. The dispute between the Government of Guatemala and the Inter-American Commission over the emergency tribunals established in Guatemala is sufficient illustration of this problem. These courts functioned and sat secretly. The most macabre element of these courts was that they pronounced a series of death sentences, many were executed. The Government of Guatemala justified their legality by arguing that in ratifying the Convention with a

22 A Dieng, Le droit à la vie dans la Charte africaine des Droits de l'Homme et des peuples, *Proceedings of the symposium on the right to life*, F Montant, D Premont, CIO, Geneva, 1992.

23 OAU, Doc. CAB/LEG/24.9/49 (1990), article 46.

24 Article 5: "Death sentence shall not be pronounced for crimes committed by children". Article 30(e) states that "ensure that a death sentence shall not be imposed on such mothers" (Charter of 1 July 1990).

25 F Ouguergouz, *The African Court on Human and Peoples' Rights – Focus on the first Continental Judicial Body, AFDI*, 2006, 213-240.

reservation to Article 4(4)[26] it had done so with the intention of continuing to apply capital punishment for crimes of common law of a political nature. It was necessary for the Commission to use its power of interpretation to reject this reading and to seek the opinion of the Court.[27] The question is identical in this case of *Rajabu and others.*

27. The spirit of Article 4 of the African Charter is interpreted restrictively in that judgment. This limiting interpretation is reminiscent of Article 80 of the Rome Statute of the International Criminal Court (establishing the ICC) which states that "Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part".[28] As has been said, this approach is clearly internal.

28. In this decision the African Court, by dint of the fact that it denounces only the mandatory death penalty, is out of step with the position which can be considered as constant of the United Nations International Law Commission. The International Law Commission has been "convinced that the abolition of the death penalty contributes to the enhancement of human dignity and the progressive extension of fundamental rights".[29] This development is reflected in the pronouncements of the Inter-American Court, which emphasized that the lack of consular assistance is an infringement of fundamental rights. In these circumstances, it continued "the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life, in the terms of the relevant

26 Inter-American Convention on Human Rights (San José, Costa Rica, 22 November 1969), Art 4 entitled Right to Life 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. (…) 4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

27 *Report on the Situation of Human Rights in the Republic of Guatemala*, OEA. / Ser.L/II.61, Doc. 47, Rev 1, October 1983, 43 to 60. C Cerna Inter-American Court on Human Rights-the first case, AFDI, 1983, 300-312

28 However, according to article 77 of the Statute on penalties "the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".

29 Resolution 1997/12, 3 April 1997 (24) and Resolution 1998/8, 3 April 1998.

provisions of the human rights treaties (...)".[30]

29. The Court, while asking Tanzania to review its legislation on a category of death penalty – the mandatory death penalty[31] – is refusing to direct its decision to condemn the death penalty. It allows islands of tolerance to persist. On this judgment, it departs from the trend of international criminal law. As to the universality of the abolition of the death penalty, it must be recalled, without necessarily exaggerating, that in its judgment on *the North Sea Continental Shelf*[32] the International Court of Justice had carefully examined the relationship between conventional and customary standards. It considered that international conventions could produce customary accessions that were applicable.

30 IAHRC, OC, 1 October 1999, 264, para .37 et 268, para 141.

31 Article 197 of the Penal Code of Tanzania states that "Any person convicted of murder shall be sentenced to death"

32 ICJ, North Sea Continental Shelf, ***Denmark and the Netherlands v FRG*** ICJ, 20 February 1969.