Woyome v Ghana (merits and reparations) (2019) 3 AfCLR 235

Application 001/2017, *Alfred Agbesi Woyome v Republic of Ghana*

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

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

The Applicant obtained a monetary judgment against the State related to a contract that was later declared unconstitutionally awarded by the Supreme Court. The Applicant alleged that his right to non-discrimination, equality before the law and right to have one's cause heard had been violated by the Supreme Court and that its impartiality was called into question as a result of remarks made by one of the judges. The Court held that the Applicant's right to be heard had not been violated as the Applicant did participate in the hearings and Supreme Court acted within its powers. The Court also held that the inclusion of judges, on the Review Bench, of judges from the Ordinary Bench did not violate the Applicant's rights.

Jurisdiction (domestication, 31, 32)

Admissibility (exhaustion of local remedies, effectiveness, 65-68); submission within reasonable time, 80-82)

Fair trial (right to be heard, 104-106; review, composition of court, 116-119; impartiality, 120, 128, 129)

Dissenting opinion: NIYUNGEKO

Fair trial (impartiality, 1)

Dissenting opinion: BEN ACHOUR

Fair trial (impartiality, 3)

Dissention opinion: MENGUE

Admissibility (exhaustion of local remedies, 28)

Separate opinion: BENSAOULA

Admissibility (conditions not raised by Parties, 8, 9; reasonable time, 16)

I. The Parties

1. The Applicant, Alfred Agbesi Woyome, is a national of the Republic of Ghana. He is also a businessman, a Board Chairman and Director in three (3) companies, namely, Waterville Holding (BVI) Company, Austro-Investment Company and M-Powapak Gmb Company.

2. The Respondent State is the Republic of Ghana, which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 1 March 1989, to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 16 August 2005. The Respondent State also deposited on 10 March 2011, the Declaration by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organizations.

II. Subject of the Application

A. Facts of the matter

3. It emerges from the Application that in July 2004, the Respondent State won the bid to host the 2008 edition of the Africa Cup of Nations. In 2005, the Central Tender Review Board of the Respondent State accepted the bid of M-Powapak Company and Vahmed Engineering Gmbh & Company to undertake the construction and rehabilitation of two stadia for the tournament. Following this, Vahmed Engineering Gmbh & Company assigned its rights and responsibilities to Waterville Holding Ltd Company (BVI).

4. On 30 November 2005, the Respondent State and Waterville signed a Memorandum of Understanding (MOU) to *inter alia* secure funding for the project on behalf of the Respondent State from Bank Austria Creditanstalt Credit Consalt AG.

5. In December 2005, the Applicant, in alliance with Waterville Ltd Holding (BVI) Company and Austro Investment Company, where he was Board Chairman, engaged M-Powapak Gmb Company, where he was Director, through a contract to provide financial services in respect of rehabilitation and construction services of the two stadia.

6. On 6 February 2006, the Ministry of Education and Sports authorised the construction of the two (2) stadia by Waterville Holding Ltd (BVI) Company.

7. On 6 April 2006, the Respondent State abruptly terminated the contract of December 2005 with Waterville Holding Ltd (BVI) Company, citing high costs and the fact that Waterville Holding Ltd (BVI) Company had failed to secure the funding as agreed in the MOU concluded on 30 November 2005.

8. Waterville Holding Ltd (BVI) Company, through the Applicant, initially protested the termination of the contract but later on conceded and claimed the money for work already done as authorised by the Ministry of Education and Sports. The Respondent State agreed and paid Waterville Holding Ltd (BVI) Company a total of 21.5 million (twenty-one million, five hundred thousand) Euros for certified work up to the point of termination. Following this payment, the company is said to have fully paid the Applicant, as its agent, bringing the relationship between Waterville Holding Ltd (BVI) Company and the Applicant to an end. This payment is not a subject of dispute before this Court.

9. Following a change of government of the Respondent State in 2009, the Applicant, in his personal capacity, claimed from the new government payment of 2% as the total cost for the distinct role he played in raising funds for the project. On 6 April 2010, the Respondent State through the Ministry of Finance agreed to pay the Applicant. This payment is different from the 21.5m Euros payment made to Waterville Holding Ltd (BVI) Company for certified work done in the construction and rehabilitation of the stadia before the termination of the contract. This payment is the one relevant to the dispute before this Court.

B. Procedure at the national level

10. On 19 April 2010, the Applicant, having not received payment of the 2% as agreed with the Ministry of Finance, instituted a suit at the High Court (Commercial Division) against the Respondent State. On 24 May 2010, the Respondent State having failed to file any defence, the High Court rendered a judgment in default in favour of the Applicant.

11. Following negotiations which led to an Out-of-Court Settlement, the default judgment was later substituted for a consent judgment and the Applicant was paid a total sum of Ghana Cedi Fifty-One Million, Two Hundred and Eighty-Three Thousand, Four Hundred and Eighty and Fifty-Nine pesewas (GH₵ 51,283,480.59) in fulfilment of the 2% claimed for raising funds for the project.

12. Following the consent judgment, the former Attorney General of the Republic of Ghana, Mr Martin Amidu, in his personal capacity,[1] invoked the jurisdiction of the Ordinary Bench of

1 Article 2(1)(b) of the Constitution of Republic of Ghana states that "A person who alleges that… any act or omission of any person, is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect" …"

the Supreme Court and challenged the constitutionality of the agreements entered into by the Respondent State and Waterville Holding (BVI) Ltd Company and the Applicant, in relation to the construction of the stadia. Mr Amidu averred that the agreement was in breach of Article 181(5) of the Constitution of Republic of Ghana, because the contracts, being of an international nature, ought to have been approved by Parliament.[2]

13. On 14 June 2013, the Ordinary Bench of the Supreme Court found that the contracts were unconstitutionally awarded and therefore invalid and that the Applicant was not a party to the contracts. The Ordinary Bench, however did not order the Applicant to refund the money already paid to him by the Respondent State, but directed Waterville Holding Ltd (BVI) Company to refund the Respondent State all sums of money paid to it. The Ordinary Bench further directed the Plaintiff, Mr Martin Amidu, to seek redress before the High Court with respect to the issues regarding the Applicant.

14. Dissatisfied with the decision of the Ordinary Bench, with respect to the Applicant, Mr Martin Amidu filed an Application for Review before the Review Bench of the Supreme Court. By a unanimous decision, the Review Bench, in its Judgment of 29 July 2014, confirmed the decision of the Ordinary Bench on the issue of unconstitutionality of the contracts. In addition, it ordered the Applicant to refund the money to the Respondent State.

C. Alleged violations

15. The Applicant alleges that in relation to the judgment of the Review Bench of the Supreme Court, the following rights protected by the Charter have been violated:

i. Right to non-discrimination, guaranteed under Article 2;

ii. Right to equality before the law and equal protection of the law, guaranteed under Article 3; and

iii. Right to have one's cause heard, guaranteed under Article 7.

III. Summary of the procedure before the Court

16. The Application was received at the Registry on 16 January 2017 and transmitted to all entities stated under Rule 35(3) of the Rules

2 Article 181(5) provides that this article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

on 30 June 2017.

17. The Parties were notified of the pleadings and filed their submissions within the time stipulated by the Court.

18. Upon the request of the Applicant filed on 4 July 2017, the Court issued an Order for Provisional Measures dated 24 November 2017, in which it ordered the Respondent State to stay the attachment of the Applicant's property, to take all appropriate measures to maintain the *status quo* and to avoid the sale of the property until the determination of this Application.

19. On 14 March 2018, the Registry informed the Parties that written pleadings were closed.

20. On 8 May 2018, the Court held a public hearing where the Parties were duly represented.

IV. Prayers of the Parties

21. The Applicant prays the Court to:

"i. Find that the Respondent State violated his rights under Articles 2, 3 and 7 of the Charter.

ii. Order interim measures in the interest of justice to forestall irreparable damage being occasioned on the Applicant in refunding the money paid as ordered by the Review Bench of the Supreme Court."

22. On Reparations, the Applicant prays the Court

"i. Find that he is entitled to the sum of Ghana Cedi 51,283,490.59 to be paid to him by the Respondent State as an outcome of the mediation process between the parties and therefore there is no need for him to refund it as ordered by the Review Bench of the Supreme Court;

ii. Order the Respondent State to pay the remaining amount of Ghana Cedi 1, 246, 982.92 of the judgment debt as at 19 October 2010 together with its cumulative interest from 7 October 2010 till date the date of final payment to the Applicant;

iii. Order the Respondent State to refund all monies paid by the Applicant as a result of the Supreme Court orders together with interest;

iv. Order the Respondent State to return with immediate effect all monies seized from the Applicant's accounts through garnishee proceedings to the Ghanaian Banks where the Applicant holds an account;

v. Find that he is entitled to loss of business due to the Review Bench decision, execution process and freezing of company shares – $ 15,000,000.00 for commission, $10,000,000.00 interest from 8 June 2017 to date of the final payment on the basis of the charging order in Civil Motion J8/102/2017 and Ghana Cedi 20,000 per month with interest using the cumulative commercial rate on the basis of the charging order in Civil Motion J8/102/2017;

vi. Order damages to the tune of $ 45,000,000.00 resulting from the comments made by Justice Dotse in his concurring opinion in Case J7/10/2013 of the Ordinary Bench of the Supreme Court;

vii. Order reparations for the defamatory statements by AFAG and the publications by lawyer Ace Anan Akomah on his Facebook page;

viii. Order the Respondent State to expunge from all internet sites, internet search engines such as google, yahoo etc. and other media outlets, any defamatory statements and publications about the Applicant;

ix. The Applicant prays that the Court order the Respondent State to pay legal fees/miscellaneous fees (stationary, secretariat, courier, air tickets, boarding and lodging) for Arbitration fee for the International Chamber of Commerce – $ 1, 100,710.00 and Trip cost for 7 people – $ 14, 700.00; and

x. Any other order that the Court deems fit."

23. In its Response, with regard to the admissibility of the Application, the Respondent State prays the Court to rule:

"i. That the Application has not met the admissibility requirements provided under Article 56 (5) and (6) of the Charter and Rule 40(5) and (6) of the Rules.

ii. That the Application is inadmissible and be duly dismissed."

24. With regard to the merits of the Application, the Respondent State prays the Court to:

"i. Find that the Respondent State did not violate the Applicant's rights as provided under Articles 2, 3 and 7 of the Charter.

ii. Find that the Applicant is not entitled to the sum of Ghana Cedi 51,283,490.59 paid to him by the Government of Ghana and should refund it as ordered by the Review Bench of the Supreme Court…"

25. The Respondent State further prays the Court to find that the proceedings before this Court are a ruse to deflect and frustrate the execution of lawful orders of the laws of the Respondent State and to avoid payment of the monies owed to the tax payers.

26. With regard to the Reparations, the Respondent State prays the Court to:

"i. Find that the Applicant is not entitled to the sum of Ghana Cedi 51,283,490.59 paid to him by the Government of Ghana and should refund it as ordered by the Review Bench of the Supreme Court as the actions taken to recover the said amount were made pursuant to an order to recover made by the Supreme Court of Ghana on grounds that the payments to the Applicant were unconstitutional;

ii. Find that the Applicant is not entitled to loss of business due to the Review Bench decision, execution process and freezing of company shares;

iii. The Respondent State prays the Court to find that the Respondent State cannot be held liable for the defamatory statements by AFAG

and the publications by lawyer Ace Anan Akomah on his Facebook page because there are available avenues under the Ghanaian legal system for the Applicant to seek redress if he so wishes;

iv. Find that the Applicant is not entitled to damages to the tune of $ 45,000,000.00, with respect to Justice Cecil Jones Dotse, the Respondent State submits that the Judge is a justice of the Supreme Court of Ghana and by virtue of that position, he enjoys immunity from any form of legal action or suit in respect of acts or omissions by him in the exercise of judicial power as enshrined in Article 127 (3) of the 1992 Ghanaian Constitution; and

v. Find that the Respondent State in not responsible for the actions of the persons who are not acting on behalf of the State."

V. Jurisdiction

27. Pursuant to Article 3(1) of the Protocol, "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned." In accordance with Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction…"

A. Objections to material jurisdiction

28. The Respondent State raises four objections to the material jurisdiction of the Court as follows:

i. That the Protocol has not been domesticated;

ii. The Application does not raise human rights claims;

iii. That domestic courts have jurisdiction over human rights matters and;

iv. That this Court cannot review decisions of the Respondent State's Supreme Court.

i. Objection that the Protocol has not been domesticated.

29. The Respondent State contends that its courts are not bound by the Protocol because, although it has ratified the Protocol, it is yet to domesticate it into its laws.

30. The Applicant avers that the Court has jurisdiction because the Respondent State has ratified the Protocol and deposited the Declaration required under Article 34(6) of the Protocol.

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31. The Court notes that Article 34 of the Protocol does not make domestication a condition for its entry into force. It only requires[3] the deposit of instruments of ratification or accession for entry into force of the Protocol as far as the State is concerned.[4] Ratification by the Respondent State and the deposit of instruments of ratification signify its final will to be bound by the Protocol. Furthermore, having deposited the Declaration under Article 34(6) which expresses its commitment to the jurisdiction of this Court after ratification, the Respondent State cannot now claim that the non-domestication of the Protocol ousts the jurisdiction of this Court.

32. In any case, according to general international law, a State cannot invoke its domestic legislation to exempt itself from performing its treaty obligations as codified in Article 27 of the Vienna Convention on the Law of Treaties 1986.[5] The Court concurs with the International Court of Justice that Article 27 reflects "a well-established rule of customary law".[6] Consequently, whether or not the Respondent State has domesticated the Protocol, is immaterial as it remains bound by the provisions of the Protocol which it voluntarily ratified**.**

33. In light of the foregoing, the objection of the Respondent State is dismissed.

ii. Objection that the Application does not raise human rights claims

34. The Respondent State contends that the Applicant's claims are not human rights-related and therefore cannot be considered by this Court.

35. The Applicant for his part submits that the allegations of the violations are based on provisions guaranteed under the Charter, as outlined above.

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3 Article 34(3) Protocol.

4 This Protocol enters into force thirty (30) days after the deposit of fifteen instruments of ratification or accession."

5 Article 27 of the Convention stipulates that a State Party to a Treaty "cannot invoke the provisions of its domestic law to justify the non-execution of the Treaty…"

6 Matter of Pulp Mills (*Argentina v Uruguay*) [2010] ICJ Rep, 20 April 2010, para 121.

36. The Court recalls its jurisprudence in the Matter of Frank *David Omary v United Republic of Tanzania* in which it held that it "… has the power to exercise its jurisdiction over alleged violations, in relation to the relevant human rights guaranteed by instruments ratified by the Respondent".[7] The Court also held similar positions in subsequent cases.[8] The Court notes that the Applicant alleges violations of rights guaranteed by the Charter, specifically, Articles 2, 3 and 7 thereof.

37. Based on the foregoing, the Court dismisses this objection.

iii. Objection that domestic courts have jurisdiction over human rights matters

38. The Respondent State avers that its Constitution explicitly spells out the procedure by which domestic courts exercise their jurisdiction over alleged human rights violations which the Applicant was free to pursue.

39. For his part, the Applicant contends that this Court has jurisdiction to hear this matter on the basis of the rights violated in the Charter and other instruments to which the Respondent State is a party to.

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40. This Court affirms the jurisdiction of the Respondent State's courts to adjudicate human rights issues. Indeed, sub-Rule 40(5) of the Rules require that before any Application is filed in this Court, local remedies must have been exhausted. This means that the Applicant must have seized the Respondent State's courts before filing an Application before this Court. However, as stated in paragraph 37 above, the Court has held in *Frank David*

7 Application 001/2012. Ruling of 28 March 2014 (Jurisdiction and Admissibility) *Frank David Omary v United Republic of Tanzania*, para 75.

8 Application 001/2012, Ruling of 28 March 2014 (Jurisdiction and Admissibility) *Frank David Omary v United Republic of Tanzania*, para 75; see also Application 005/2015 Judgment of 20 November 2015 (Merits) *Alex Thomas v Tanzania*, para 45; Application 046/2016, Judgment of 11 May 2018 (Merits and Reparations), *APDF and IHRDA v Republic of Mali*, para 27; Application 001/2015, Judgement of 7 December 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania,* para 31; Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania*, para 27.

Omary v United Republic of Tanzania that it has jurisdiction when human rights violations have been alleged. Therefore, the fact that domestic courts have jurisdiction over human rights issues cannot oust the jurisdiction of this Court which it exercises by virtue of Articles 3, 5 and 34(6) of the Protocol. The Respondent State cannot therefore claim that such jurisdiction is limited only to its domestic courts.

41. Based on the above, the Court dismisses this objection.

iv. Objection that the Court cannot review decisions of the Supreme Court

42. The Respondent State avers that decisions of its Supreme Court cannot be subject to an appeal or review by an international tribunal, including this Court, because the Respondent State is sovereign.

43. The Applicant did not address this issue.

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44. The Court recalls its decision in *Ernest Francis Mtingwi v Republic of Malawi*,[9] in which it noted that it is not an appellate body with respect to decisions of national courts. However, the Court emphasised in the matter of *Alex Thomas v United Republic of Tanzania* that "this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned".[10]

45. Consequently, the objection of the Respondent State is dismissed.

46. From the foregoing, the Court concludes that it has material jurisdiction over this matter.

9 Application 001/2013. Decision of 15 March 2013 (Jurisdiction), *Ernest Francis Mtingwi v Republic of Malawi*, para 14.

10 *Alex Thomas v Tanzania* Judgment (Merits) para 130. See also Application 010/2015. Judgment of 28 September 2017 (Merits), *Christopher Jonas v United Republic of Tanzania*, para 28; Application 003/2014. Judgment of 24 November 2017 (Merits), *Ingabire Victoire Umuhoza v Republic of Rwanda*, para 52;

B. Other aspects of jurisdiction

47. The Court notes that its personal, temporal and territorial jurisdiction are not in contention between the Parties and nothing on file indicates that it does not have jurisdiction. Consequently, it holds that:

i. It has personal jurisdiction given that the Respondent State is a Party to the Protocol and has filed the Declaration prescribed under Article 34(6) of the Protocol to allow individuals and Non-Governmental Organisations to institute cases directly before it;

ii. It has temporal jurisdiction given that the alleged violations happened between 14 June 2013 and 29 July 2014, after the Respondent State had ratified the Charter and the Protocol and deposited the Declaration under Article 34(6) of the Protocol, accepting applications from individuals.

iii. It has territorial jurisdiction given that the alleged violations occurred in the territory of the Respondent State.

48. In view of the foregoing, the Court holds that it has jurisdiction to hear this case.

VI. Admissibility

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

50. Rule 40 of the Rules which in substance restates the provisions of Article 56 of the Charter sets outs the requirements for admissibility of applications as follows:

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

1. . Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. . Comply with the Constitutive Act of the Union and the Charter;
3. . Not contain any disparaging or insulting language;
4. Not be based exclusively on news disseminated through the mass media;

Application 007/2013. Judgment of 3 June 2013 (Merits), *Mohamed Abubakari v United Republic of Tanzania*, para 29.

5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. Not raise any mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

51. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections on the admissibility of the Application, that is, the non-exhaustion of local remedies and that the Application has not been filed within a reasonable time after exhaustion of local remedies.

A. Conditions of admissibility in contention between the Parties

i. Objection based on failure to exhaust local remedies

52. The Respondent State contends that the Application does not meet the admissibility requirements stipulated under Article 56(5) of the Charter and Rule 40(5) of the Rules as local remedies had not been exhausted prior to its filing. It substantiates this by pointing to the on-going execution proceedings of Ghana Cedis Fifty-One Million, Two Hundred and Eighty-Three Thousand, Four Hundred and Eighty and Fifty-Nine Pesewas (GH₵ 51, 283, 480.59).

53. The Respondent State also submits that it is simplistic and misleading for the Applicant to say that merely because the decision on which he is aggrieved was rendered by the Supreme Court in exercise of its review jurisdiction, he could not have resorted to the lower courts of the Respondent State for redress. It avers that even after the Supreme Court renders its decision, subordinate courts, in exercise of their specific jurisdictions, have given judgments in favour of claimants.

54. The Respondent State emphasises that if the Applicant was not confident of the subordinate courts handling this matter, he could have invoked the human rights jurisdiction of the Supreme Court. It states that, by the Applicant failing to do so, the Supreme Court was never availed an opportunity to determine whether the

Applicant's human rights were breached.

55. According to the Respondent State, the matter before the Supreme Court concerned the constitutionality of the two contracts and was not related to a violation of human rights. It argues that the Applicant therefore did not exhaust local remedies with respect to the alleged human rights violations.

56. The Respondent State submits further that remedies for the enforcement of human rights are expressly provided for under Article 33 of its Constitution.[11] It avers that the procedure for the enforcement of human rights is fairly simple, can be completed in a timely manner and meets the international standards of availability, effectiveness and sufficiency.

57. The Respondent State, referring to the Court's jurisprudence,[12] contends that the Applicant cannot rely on the exception provided under Article 56(5) of the Charter because he neglected to pursue domestic remedies.

58. The Applicant states that the procedure for seeking redress for human rights violations provided under Article 33 of the Constitution of the Republic of Ghana is discretionary and accordingly, there is no need for him to exhaust this remedy.

59. The Applicant also states that Article 33(3) of the Constitution of the Republic of Ghana provides that a person aggrieved by the decision of the High Court may appeal to the Court of Appeal and further appeal to the Supreme Court. He contends that it is inconceivable that the High Court or Court of Appeal would reverse a decision of the Review Bench of the Supreme Court, noting that in any case, the Supreme Court would have the final say on appeals from those subordinate courts, in this case, to determine whether it violated the Applicant's rights.

60. The Applicant further avers that his rights guaranteed under Articles 2, 3 and 7 of the Charter have been violated by the Supreme

11 Article 33 of the Constitution of Republic of Ghana states that "where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress. 2. The High Court may, under clause (1) of this article, issue such directions or orders or writs including writs or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warranto as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person, concerned is entitled. 3. A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court…"

12 Application 003/2012. Ruling of 28 March 2014 (Admissibility), *Peter Joseph Chacha v United Republic of Tanzania* (hereinafter referred to as "***Peter Joseph Chacha v Tanzania*** Judgment (admissibility)"), para 142**.**

Court, the highest and final appellate court of the Respondent State and therefore he has exhausted local remedies.

61. In light of the above, the Applicant argues that the procedure under Article 33(1) of the Constitution of the Republic of Ghana is not capable of addressing his complaint. According to him, this is because the procedure envisaged therein is ineffective due to the constitutional impediment posed in challenging a decision of the Supreme Court, (the highest court) at the High Court. He cites *Dawda Jawara v The Gambia*[13] to buttress this point.

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62. The Court notes that the High Court of Ghana has original jurisdiction to consider claims for enforcement of human rights by virtue of Article 33(1) of the Constitution of the Respondent State.

63. The issue for determination before this Court is whether filing a claim at the High Court regarding the alleged violation of the Applicant's human rights by the Supreme Court would have been an effective remedy if the Applicant pursued it before bringing the Application before this Court.

64. In *Norbert Zongo v Burkina Faso* this Court held that "in ordinary language, being effective refers to that which produces the expected result… the effectiveness of a remedy is therefore measured in terms of its ability to solve the problem raised by the Applicant."[14] The Court reaffirmed this in the case of *Lohé Issa Konaté v Burkina Faso* where it also noted that a remedy is effective if it can be pursued by the Applicant without any impediment.[15]

65. The Court finds that, in the circumstances of this case, even though the High Court has original jurisdiction on human rights, it would have been unreasonable to require the Applicant to file a claim before it to call into question, a decision of the Supreme

13 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

14 Application 013/2011. Judgment of 28 March 2014 (Merits), *Beneficiaries of the Late Norbert Zongo and others v Burkina Faso,* para 68.

15 Application 004/2013. Judgment of 5 December 2014 (Merits) *Konate v Burkina Faso* paras 92 and 96.

Court, whose decisions are binding on subordinate courts.

66. This position is buttressed by the fact that in its decision of 29 July 2014, the Review Bench of the Supreme Court indicated that it assumed jurisdiction over the matter to avoid the High Court rendering a contrary decision from its own. It noted as follows "[a]s matters stand now, there is a real danger of the High Court, which is the appropriate forum that this Court referred to may itself give a contrary and conflicting decision quite apart from what this Court has given. The review application in our opinion is an opportunity for the Supreme Court to level up the playing field and give one harmonious judgement for all the persons connected with the 26th April, 2006 CAN 2008 Stadia Agreements and other related matters to know their positions and bring everything to closure."

67. It should also be noted that the Respondent State did not provide proof of decisions showing that the High Court has considered claims of violations of human rights committed by the Supreme Court, as is alleged in the instant case.

68. The Court is therefore of the view that pursuing such a claim at the High Court would not have been capable of addressing the Applicant's grievances and would have therefore been an ineffective remedy. The Court finds that although local remedies were available they would not have been effective to address the Applicant's grievances.

69. Regarding the claim that the execution proceedings relating to the judgment debt of Ghana Cedi Fifty-One Million, Two Hundred and Eighty-Three, Four Hundred and Eighty and Fifty-Nine pesewas (GH₵ 51, 283, 480.59) was pending before domestic courts when this Application was filed, the Court notes that, the basis of the Applicant's claim before it is the decision of the Review Bench of the Supreme Court which was delivered on 29 July 2014. The execution proceedings are immaterial to the Court's determination of whether or not the Applicant exhausted local remedies.

70. The Court therefore finds that the Respondent State's objection that the Applicant failed to exhaust local remedies has no merit and is dismissed.

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

71. The Respondent State contends that the Application was not filed within a reasonable time after exhaustion of local remedies and is therefore not compliant with Article 56(6) of the Charter and Rule

40(6) of the Rules.

72. The Respondent State submits that practice and precedent in international human rights law dictates that a period of six (6) months after exhaustion of local remedies is considered to be a reasonable time for filing such applications and this was not the case with the present Application.

73. The Respondent State argues that the assessment of reasonableness of time for filing this Application should be based on the date of the delivery of the judgment of the Review Bench of the Supreme Court, that is, 29 July 2014,

74. The Respondent State avers that the period of almost three (3) years that the Applicant took after the said judgment to file this Application is an unreasonable delay as there were no impediments in this regard. It adds that the Applicant was neither detained, in custody or under house arrest. According to the Respondent State, the Applicant slept on his rights and his human rights were not violated, rather he was aggrieved by the change in Government which further changed his circumstances.

75. The Respondent State notes that between 2015 and 2016 the Applicant won two criminal cases, Criminal Case Suit No FTRM/115/12 in the High Court of Republic of Ghana, Accra and Criminal Case Suit No H2/17/15 in the Court of Appeal of Republic of Ghana.

76. The Respondent State avers that subsequently, the Applicant filed an action against the Attorney General at the Court of Appeal challenging a Report of a Commission of Inquiry into inordinate payments made from public funds in satisfaction of judgment debts. The Commission of Inquiry examined, inter alia, the payments made to the Applicant and companies associated with him however, these payments did not relate to the substance of his claim before this Court. The Respondent State submits that it is therefore untrue that the Applicant was unable to file an Application before this Court from July 2014 to January 2017.

77. The Applicant insists that the Application was filed within a reasonable time after the exhaustion of local remedies since the decision of the Ordinary Bench of the Supreme Court was delivered on 14 June 2013 and the judgment of the Review Bench of the Supreme Court was rendered on 29 July 2014, whilst the Application before this Court was filed on 5 January 2017.

78. Furthermore, the Applicant contends that before seizing this Court he had to engage with the Commission of Inquiry into inordinate payments made from public funds in satisfaction of judgment debts. He avers that he appealed against these findings before

the Court of Appeal in June 2016[16] on the grounds that neither he nor his lawyer were invited to appear before the Commission to be heard before the determination of the matter.

79. The Applicant submits that he did not "sleep on his rights". He avers that in considering what constitutes reasonable time the Court must take cognisance of the fact that the Charter does not define what constitutes reasonable time and submits that the above-mentioned reasons are adequate justification for the delay in filing the matter before this Court and in the interest of justice and fairness, the Court should admit and consider the Application.

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80. The Court recalls its jurisprudence in the matter of *Norbert Zongo v Burkina Faso*, where it established the principle that "the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis"[17]

81. In determining whether this Application was filed within a reasonable time, the Court considers that ordinary judicial remedies related to the present matter were exhausted when the Review Bench of the Supreme Court rendered its judgment on 29 July 2014.

82. Other proceedings were instituted by the Respondent State relevant to the subject of this Application. In this regard, the Court observes that after the Review Bench of the Supreme Court's judgment, between 2014 and 2017, there were two criminal cases which were instituted by the Respondent State against the Applicant for allegedly defrauding the Government by false pretences and for causing financial loss to the State. The judgment was rendered on 12 March 2015 by the High Court. Subsequently, following an appeal to the Court of Appeal by the Attorney General, the Court of Appeal rendered its judgment in this matter on 10 March 2016. The Court is of the view that it was reasonable for the Applicant to wait for the final determination of these criminal proceedings as they related to the subject matter of the Application before this Court.

83. In addition, the Court notes that, the Respondent State established a Commission of Inquiry with a mandate to look into the inordinate payments made from public funds in satisfaction of judgment

16 *Alfred Woyome v Attorney General* Case H1/42/2017 (Court of Appeal, page 11, Vol. VI attachment AAW1).

17 *Norbert Zongo v Burkina Faso* (Merits), para 92.

debts since the 1992 Constitution came into force, including those made to the Applicant and companies associated with him. The record before this Court shows that the Commission of Inquiry completed its work on 20 May 2015 and submitted its report to the President of the Republic of Ghana on 21 May 2015. The Respondent State published the Commission's report together with the White Paper in 2016.

84. The proceedings of the Commission of Inquiry being quasi-judicial in nature, offered remedies that the Applicant was not required to exhaust. Nonetheless, he had a reasonable expectation that the Commission's findings would have resulted in a decision that was favourable to him and thereby dispensing with the need to file the Application before this Court. The Court considers that despite this expectation, in June 2016, he challenged the findings of the Commission of Inquiry before the Court of Appeal on the basis of the lack of his representative's involvement in the process.

85. The Court notes that although local remedies were exhausted on 29 July 2014 at the Supreme Court, the Applicant had a reasonable expectation that the criminal proceedings filed against him and the proceedings of the Commission of Inquiry would be concluded in his favour.

86. The Court further notes that the time the Applicant spent awaiting the determination of the criminal proceedings instituted against him as well as the case at the Court of Appeal challenging the findings of the Commission of Inquiry is sufficient justification for filing the Application two (2) years, five (5) months and seventeen (17) days after local remedies were exhausted.

87. The Court finds that in the circumstances of this case, the Application has been filed within a reasonable time as envisaged under Article 56(6) of the Charter and Rule 40(6) of the Rules.

88. The Court therefore dismisses the objection on admissibility on the ground of failure to file the Application within a reasonable time.

B. Conditions of admissibility not in contention between the Parties

89. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 40, Sub-rules 1, 2, 3, 4 and 7 of the Rules on, the identity of Applicant, the language used in the Application, compliance with the Constitutive Act of the African Union, the nature of the evidence adduced and the previous settlement of the case, respectively, and that nothing on the record indicates that these requirements have not been complied

with.

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

VII. Merits

91. It emerges from the file that the Applicant alleges his rights guaranteed under Articles 2, 3 and 7 of the Charter were violated. In as much as the allegations of violations of Articles 2 and 3 are related to the allegation of the violation of Article 7, the Court will begin its assessment of the latter.

A. Alleged violation of Article 7 of the Charter

92. The Applicant makes two allegations which fall under Article 7 of the Charter: namely, the alleged violation of the right to be heard by a competent tribunal and the alleged violation of the right to be tried by an impartial tribunal.

i. The right to be heard by a competent tribunal

93. The Applicant alleges that if the Review Bench of the Supreme Court had allowed the case to continue in the High Court as ordered by the Ordinary Bench of the Supreme Court, the facts of the case would have been determined on the merits and the Applicant's role and claims would have been established. Instead the Review Bench of the Supreme Court assumed jurisdiction thus denying the Applicant the right to be tried by the competent tribunal. Furthermore, the Applicant submits that the said claims filed against him before the Review Bench of the Supreme Court did not involve matters for constitutional interpretation, and thus, did not fall within the jurisdiction of that Bench of the Court.

94. The Applicant further contends that even though the Supreme Court has supervisory jurisdiction over decisions made by other courts, including its Ordinary Bench, invoking the review jurisdiction of the Supreme Court is a specialised procedure. Moreover, the decision of the Review Bench of the Supreme Court to truncate the proceedings and assume jurisdiction over the matter denied him the opportunity to present his case on the merits before the High Court.

95. The Respondent State for its part submits that the Review Bench of the Supreme Court rightly assumed jurisdiction over the matter. According to the Respondent State, the Supreme Court, for purposes of hearing and determining any matter

within its jurisdiction, is vested with the power to exercise any authority vested in all courts established by the Constitution of Ghana as provided under Article 129(4) of the Constitution.[18]

96. The Respondent State further contends that the Supreme Court has the power and authority under the Constitution as provided under Articles 2, 130 and 133, to determine matters relating to land, contract or crime which raise issues of constitutionality including review of decisions of its Ordinary Bench. The Respondent State avers further that when courts deliberate over matters that raise issues of constitutionality, they must halt such deliberations and refer the matter to the Supreme Court.

97. In this regard, the Respondent State asserts that the first case determined at the Ordinary Bench was a constitutional matter where Mr. Amidu, sought various declarations regarding the constitutionality of the contracts between the Respondent State and companies associated with the Applicant and the violation of Article 181(5) of the 1992 Constitution.[19] It contends that the Application before this Court is hinged on a wrong assumption that the Supreme Court's jurisdiction is limited to determining constitutional matters and that its exercise of its review power was undue usurpation of the powers of the High Court.

98. In conclusion, the Respondent State contends that the Applicant had the opportunity to be heard, to present and prosecute his case through legal counsel. It maintains that even if the Applicant disagrees with the judgment of the Supreme Court, it is "ill" for him to interpret it as a violation of his human rights, especially because the Supreme Court in its review decision assumed jurisdiction provided under the Constitution to deal with the Applicant's outstanding issues.

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18 Article 129(4) states that "For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law".

19 Article 181(5) provides that this article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

99. The Court notes that Article 7(1)(a) of the Charter provides, *inter alia*, that

"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…."

100. The Court notes that in the present case, the key issue is whether the Applicant's right to be heard by a competent tribunal was violated as a result of the decision of the Review Bench of the Supreme Court hearing the matter rather than referring it to the High Court.

101. The Court observes that the determination on whether a domestic court is competent to hear a matter depends on the legal system of the State concerned. In this regard, domestic courts have the power to interpret the laws and determine their jurisdiction.

102. In the instant case, the Court notes that Article 133(1) of the Respondent State's Constitution provides that "The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court". On the other hand, Article 130 of the Constitution stipulates that the Supreme Court has original jurisdiction over matters regarding constitutional disputes. The Court further notes that the Ordinary Bench of the Supreme Court declared that it lacked jurisdiction because it was incompetent to examine the claims relating to the Applicant, as they did not raise a constitutional dispute.

103. The Court observes that, on the contrary, the Review Bench reversed this decision invoking its review jurisdiction, noting that the Ordinary Bench by declaring that it lacked jurisdiction with respect to the Applicant's claims resulted in a grave miscarriage of justice. The Review Bench stated that "As the matter stands now, there is a real danger that the High Court which is the appropriate forum that this court referred the matter to, may itself give a contrary and conflicting decision quite apart from what this court has given".

104. Considering the margin of discretion domestic courts enjoy in interpreting their own jurisdiction, this Court holds that, on the face of it, there is nothing erroneous or arbitrary in the Supreme Court's Review Bench interpretation of its own jurisdiction. This is significant given that the Supreme Court is the highest court in

the Respondent State.

105. Furthermore, the Applicant has also not demonstrated how the Supreme Court violated any specific legal procedures or acted arbitrarily in assuming its review jurisdiction.

106. Lastly, the Court observes that the Applicant does not contest that he participated in the proceedings at both Ordinary and Review Benches of the Supreme Court and was assisted by a team of lawyers. In both Benches, he challenged the claims of Mr Amidu and at all stages of the proceedings, he was given the opportunity to file his submissions and seek redress.

107. In these circumstances, the Court holds that the Applicant's right to be heard by a competent tribunal, guaranteed under Article 7(1) of the Charter was not violated by the Respondent State.

ii. The right to be tried by an impartial tribunal

108. The Applicant alleges that his right to be tried by an impartial court has been violated on two grounds namely:

a. Whether the participation of eight judges at both the Ordinary and Review Benches casts doubt on the impartiality of the Supreme Court and;

b. Whether the remarks made by Justice Dotse call into question the impartiality of the Review Bench of the Supreme Court

a. Whether the participation of eight judges at both the Ordinary and Review Benches casts doubt on the impartiality of the Supreme Court

109. The Applicant alleges that the Review Bench of the Supreme Court was composed of eleven (11) judges, eight (8) of whom had previously heard the matter at the Ordinary Bench of the Supreme Court resulting in the violation of right to be tried by an impartial tribunal.

110. The Applicant avers that both the Ordinary Bench and the Review Bench of the Supreme Court agreed that the High Court was the proper forum to hear the matter. The Review Bench further reasoned that there would be a real danger if, it allowed the High Court to hear the matter on the merits and the High Court reached a different position or conclusion from that of the Ordinary Bench.[20]

20 The Review Bench of the Supreme Court in its judgment …noted that…As the matters stands now, there is a real danger that a High Court which is the appropriate forum that this court referred to may itself give a contrary and conflicting decision quite apart from what this court has given…".

The Applicant further alleges that by truncating the proceedings in the High Court, the Review Bench of the Supreme Court assumed a jurisdiction it did not have, thereby violating his fundamental rights to a fair trial and hearing by an impartial court.

111. The Applicant contends that based on the concurring decision of the Review Bench, the Court cannot be said to have been impartial.

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112. The Respondent State submitted that the Applicant only alluded to the bias on the part of Justice Dotse, noting that the judgment that the Applicant complained about was unanimously rendered by all eleven (11) judges, including the eight (8) judges who heard the matter at the Ordinary Bench of Supreme Court. The Respondent State also contends that the judgment of the Ordinary Bench of the Supreme Court was mostly in favour of the Applicant.

113. The Respondent State avers that the eight (8) judges who sat on both Benches of the Supreme Court ruled seemingly in the Applicant's favour at the Ordinary Bench which prevented the recovery of the money that the Applicant had unconstitutionally obtained from the State. In this circumstance, the Respondent State questions why the Applicant now makes an allegation of bias simply because the same judges had on the second occasion exercised their review powers to order the reimbursement of the monies paid to him.

114. Furthermore, the Respondent State submits that the Supreme Court was not specifically constituted to try this matter and there is no evidence of manipulation or influence from the Executive. The Respondent State consequently contends that neither the composition of the Court nor an examination of the entire proceedings at the Supreme Court discloses a violation of the Applicant's right to be tried by an impartial tribunal.

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115. The Court notes that it is not in dispute between the parties that eight (8) of the judges of the Ordinary Bench also sat in the Review Bench and participated in the consideration of the same matter in question. The point of disagreement between the Parties and the main issue for determination by this Court is whether the composition of the Review Bench, the majority members who were also part of the Ordinary Bench, casts doubt on the impartiality of the tribunal to the extent that one could not reasonably expect a fair decision.

116. The Court observes that in order to determine the issue at hand, it should recall the common distinction between appeal and review proceedings. While an appeal involves a petition to a higher court or tribunal, a review relates to a petition before the same tribunal which made the decision being challenged in the petition, often with changes in the number of judges constituting the bench. The right to appeal presupposes that the appellate tribunal is higher in authority and different in its composition from the tribunal whose decision is appealed against, but in contrast, a review is usually considered by a special bench of a court which has already examined a matter with a view to correcting any error found.

117. In this regard, the Court notes that it is common amongst those jurisdictions[21] having review procedures for review benches to involve in the review proceedings, judges who previously considered the matter. In such circumstances, the mere fact that a judge or some of the judges participated in the review proceedings does not necessarily imply the absence of impartiality even if this may give rise to an apprehension on the side of one of the parties.

118. The Court notes from the records, that the Review Bench of the Supreme Court was constituted in accordance with the Constitution of the Respondent State which stipulates that the Supreme Court of Ghana is composed of a Chief Justice and not less than nine (9) other justices and when it sits as a Review Bench, it shall be fully composed with not less than seven (7) judges.[22] In line with this, the *Practice Direction* on the practice and procedure of empanelment in the Supreme Court in constitutional cases empowers the Chief Justice to empanel all available justices of

21 Constitution of Kenya, 2010 article 47(3)(a) and Part III of the Fair Administrative Action Act No. 4 Of 2015; Rule 66 of the Tanzania Court of Appeal Rules, 2009; Malawi has (a) judicial review of administrative action-Order 53 and of the Rules of the Supreme Court, 1965 or Order 54 of the Civil Procedure Rules, 1998 and (b) constitutional judicial review Section 108(2) of the Constitution as read with Sections 4, 5, 11(3), 12(1)(a) and 199 of the Constitution.

22 Article 128(1) and Article 133(2) of the Constitution of Ghana.

the Supreme Court or at least seven (7) justices in constitutional matters, This was affirmed by the Supreme Court in the case of *Ghana Bar Association and others v Attorney General and others*.[23]

119. The Court observes that the implications of the above-mentioned provisions of the Constitution of Ghana, together with the practice and jurisprudence, are that the judges of the Supreme Court who considered the matter at the Ordinary Bench may form part of the Review Bench as long as the criteria for the minimum number of judges is observed. There is thus no irregularity or a breach of law as far as the composition of the Review Bench is concerned. Furthermore, an objective assessment of the nature of the composition, involving judges who sat at the Ordinary Bench, does not per se raise any reasonable doubt as to the impartiality of the Review Bench to correct any errors found.

120. On the personal bias of judges, the Court notes that there is no evidence on record showing that the judges were predisposed or had preconceived bias against the Applicant, which would lead to a reasonable conclusion they would not render a fair decision. In fact, the judges who sat at the Ordinary Bench and later at the Review Bench were the same judges who unanimously rendered the decision, which was interpreted by the Applicant to be in his favour, when they ruled that his matter should be examined by the High Court. Therefore, the Applicant's contention that the Review Bench was partial is based on a misapprehension that is neither justified nor objective.

121. In view of the above, the Court concludes that the composition of the Review Bench of the Supreme Court by judges who had participated in the Ordinary Bench does not call into question the impartiality of the Review Bench.

b. Whether the remarks made by Justice Dotse call into question the impartiality of the Review Bench of the Supreme Court

122. The Applicant alleges that his right to be tried by an impartial court has been violated by the Respondent State because the lead judgment of the Review Bench was drafted by Justice Dotse who had expressed biased opinions in a concurring judgment, at the Ordinary Bench. In this regard, the Applicant avers that in his concurring opinion at the Ordinary Bench of the Supreme Court,

23 J1/26/2015) [2016] GHASC (20 July 2016).

Justice Dotse alleged that the Applicant had no contract with the Respondent State and as such, was not entitled to the money that was paid to him. Moreover, in the same opinion, Justice Dotse stated that the Applicant had formed an alliance with another party, Waterville to "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise." and further referred to the Applicant as being at the centre of "the infamous Woyome payment scandal".

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123. The Respondent State submits that the Applicant only alluded to the bias on the part of Justice Dotse, noting that the judgment that the Applicant complained about was unanimously rendered by all eleven judges, including eight judges of the Ordinary Bench of Supreme Court. The Respondent also contends that the judgment of the Ordinary Bench of the Supreme Court was mostly in favour of the Applicant.

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124. The Court observes from the record and it is not in contention between the Parties that Justice Dotse in his concurring opinion at the Ordinary Bench referred to the Applicant as having formed an alliance with another party, Waterville Holding Ltd to "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise" and further referred to the Applicant as being at the centre of "the infamous Woyome payment scandal".

125. The issue for determination is thus whether the remarks of Justice Dotse disclose a perception of bias and in light of the circumstances, call into question the impartiality of the Review Bench of the Supreme Court as a whole.

126. According to the *Dictionnaire de Droit International Public*, impartiality signifies the '"absence of bias, prejudice on the part of a judge, referee or expert in dealings with parties appearing

before him."[24]

127. The Court notes that according to the Commentary on the Bangalore Principle of Judicial Conduct;

"A judge's personal values, philosophy, or beliefs about the law may not constitute bias. The fact that a judge has a general opinion about a legal or social matter directly related to the case does not disqualify the judge from sitting. Opinion, which is acceptable, should be distinguished from bias, which is unacceptable."[25]

128. The Court considers that, to ensure impartiality, any Court must offer sufficient guarantees to exclude any legitimate doubt.[26] However, the Court observes that the impartiality of a judge is presumed and undisputable evidence is required to refute this presumption. In this regard, the Court shares the view that "the presumption of impartiality carries considerable weight, and the law should not carelessly invoke the possibility of bias in a judge"[27] and that "whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of an individual judge but the entire administration of justice is called into question. The Court must, therefore, consider the matter very carefully before making a finding".[28]

129. In the instant case, the Court notes that Judge Dotse's statements were made on the basis of his assessment of the facts of the matter. The Court is of the view that, although the said statements were unfortunate, and went beyond what can be considered as an appropriate judicial comment they however did not give an impression of preconceived opinions and do not reveal bias.

130. Justice Dotse statements concurred with the unanimous decision of the Ordinary Bench in referring the determination of his matter to the High Court.

131. The Court notes that even though Justice Dotse wrote the lead Judgment rendered by the Review Bench which was constituted of eleven (11) Judges, Judge Dotse was only one (1) out of eleven (11) Judges on that Bench. The Court is of the opinion that a

24 J Salmon (ed) *Dictionnaire de droit international public* (Bruyant, Bruxelles, 2001) 562. See also Application 003/2014. Judgment of 24 November 2017, *Ingabire Victoire Umuhoza v Republic of Rwanda,* paras 103 and 104 and *Black's Law Dictionary* (2nd ed 1910).

25 Commentary on The Bangalore Principles of Judicial Conduct, para 60.

26 *Findlay v UK* (1997) 24 EHRR 221 para 73. See also NJ Udombana, 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' 2006(6) *African Human Rights Law Journal* Vol 6/2.

27 *Wewaykum Indian Band v Canada* 2003 231 DLR (4th) 1 (*Wewaykum*).

28 Okpaluba and Juma 'The problems of proving actual or apparent bias: An analysis of contemporary developments in South Africa' 2011 (14) 7 *PELJ* 261.

single judge's remarks cannot be considered sufficient to taint the entire Bench. Furthermore, the Applicant has not illustrated how the judge's remarks at the Ordinary Bench later influenced the decision of the Review Bench.

132. The Court therefore concludes that the Respondent State has not violated the Applicant's right to be heard by an impartial tribunal guaranteed under Article 7(1)(d) of the Charter.

B. The alleged violation of the right to non-discrimination and the right to equality before the law and equal protection of the law

133. The Applicant argues that his right to non-discrimination and right to equality were violated as a result of Justice Dotse's remarks and by the Supreme Court truncating the proceedings.

134. The Respondent State contends that the Applicant has not demonstrated how he has been discriminated against based on race, ethnic, group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Furthermore, it avers that the Applicant has not demonstrated how he was not accorded equal protection of the law.

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135. Article 2 of the Charter states that "Every individual shall be entitled to the enjoyment of rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."

136. Article 3 of the Charter guarantees the right to equality and equal protection of the law in the following terms:

"1. Every individual shall be equal before the law

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

137. In the Matter of *Tanganyika Law Society and Legal and Human*

Rights Centre and Rev Christopher Mtikila v Tanzania[29] the Applicants alleged that the constitutional provisions which prohibited independent candidature had the effect of discriminating against the majority of Tanzanians because only those who are members of and are sponsored by political parties can seek election to the Presidency, Parliament and Local Government positions therefore violating the right to freedom from discrimination enshrined in Article 2 of the African Charter. This Court held that the same grounds of justification do not legitimise the restrictions to not be discriminated against and the right to equality before the law therefore found a violation of Articles 2 and 3(2) of the Charter.

138. In the instant case, the Court holds that the Applicant has not demonstrated or substantiated how he has been discriminated against, treated differently or unequally, resulting into discrimination or unequal treatment based on the criteria laid out under Article 2 and 3 of the Charter.

139. In view of the foregoing, the Court finds that the Applicant's rights to non-discrimination, his right to equality before the law and to equal protection of law as guaranteed under Articles 2 and 3 of the Charter were not violated by the Respondent State.

VIII. Reparations

140. The Applicant prays for several reliefs reflected in paragraph 22 above while the Respondent State's prayers are reflected in paragraph 26 above.

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141. 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."

142. The Court notes that since no violation has been established, the issue of reparation does not arise. Consequently, the Applicant's

29 Application 011/2011. Judgment of 14 June 2013 (Merits), *Christopher Mtikila v United Republic of Tanzania* paras 116-119.

prayers for reparation are dismissed.[30]

IX. COSTS

143. The Applicant did not pray for costs with respect to the Application before this Court.

144. The Respondent State prays that each Party bears its own expenses and costs.

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

146. The Court finds that there is nothing in the instant case, to allow it to decide otherwise. Accordingly, each Party shall bear its own costs.

X. OPERATIVE PART

147. For these reasons,

The Court,

On jurisdiction

Unanimously:

i. Dismisses the objections on the jurisdiction of the Court;

ii. Declares that it has jurisdiction.

On admissibility

By a majority of eight (8) for and one (1) against, Judge Suzanne MENGUE dissenting:

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

iv. Declares that the Application is admissible.

30 *Werema Wangoko Werema and Waisiri Wangoko Werema v Tanzania* (Merits), para 99.

On merits

Unanimously:

v. Finds that the Respondent State has not violated Article 2 of the Charter on the right to non-discrimination;

vi. Finds that the Respondent State has not violated Article 3 of the Charter on equality before the law and equal protection of the law.

vii. Finds that the Respondent State has not violated Article 7 (1) of the Charter on the right to have one's cause heard by a competent tribunal.

viii. Finds that the Respondent State has not violated Article 7 (1) (d) of the Charter on the right to be tried by an impartial tribunal in respect to the composition of the Review Bench of the Supreme Court.

By a majority of seven (7) for and two (2) against, Judges Gérard NIYUNGEKO and Rafaâ BEN ACHOUR dissenting:

ix. Finds that the Respondent State has not violated Article 7(1)(d) of the Charter in respect to the remarks made by Justice Dotse in his concurring opinion before the Ordinary Bench of the Supreme Court.

On reparations,

By a majority of seven (7) for and two (2) against, Judges Gérard NIYUNGEKO and Rafaâ BEN ACHOUR dissenting:

x. Rejects the reliefs sought by the Applicant.

On costs

Unanimously:

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

***

Dissenting opinion: NIYUNGEKO

1. I agree with the findings and decisions of the Court, as reflected in the operative part of the judgment*, except* the finding regarding the non-violation of the right to be heard by an impartial judge, as concerns the comments made by Judge Dotse of the

Respondent State's Supreme Court. In my opinion, this Court should have found that there has been a violation in this respect, not only because of the perception of the Judge's partiality in the circumstances (II), but also because of the perceived partiality on the part of the Review Bench of the whole Supreme Court of which he was a member (III). Before explaining myself on these two points, it is necessary to briefly recall the context in which the question of impartiality arose (I).

I. Update of the facts

2. Judge Dotse who had sat at the Ordinary Bench of the Supreme Court in the matter concerning the Applicant, had at the time attached to the judgment of that Court a concurring opinion in which he had referred to the Applicant as having formed an alliance with another party, Waterville Holding Ltd to "create, loot and share the resources of the country as if a brigade had been set up for such an enterprise", and further referred to the Applicant as being at the center of the "infamous Woyome payment scandal" (paragraph 124 d the judgment). Subsequently, Judge Dotse sat in the same case, but this time in the Review Bench of the Supreme Court, along with other Judges, most of whom, like him, had sat at the Ordinary Bench of the Supreme Court. He even drafted the *lead judgment* of the Review Bench.

3. The question which arises in the circumstances is whether or not Judge Dotse's participation in the Supreme Court Review Bench, after having made the aforesaid comment while sitting at the Supreme Court Ordinary Bench, calls to question, first, his impartiality, and then the impartiality of the Supreme Court as a whole.

II. The question of Judge Dotse's impartiality

4. On this point, this Court holds that although the impugned statements of the Judge were "unfortunate", and "went beyond what can be considered as an appropriate judicial comment, they however did not give an impression of preconceived opinions and do not reveal bias" (paragraph 129 of the judgment). To arrive at this conclusion, the Court relies on two main arguments, (i) that the personal philosophy and moral convictions of a judge cannot be regarded as constituting bias (paragraph 127); and (ii) that the impartiality of a judge is presumed, and undisputable evidence is required to refute this presumption (paragraph 128). The problem is that these arguments, in themselves valid in principle, are not

applicable in the instant case.

5. As to the argument invoking the philosophy and moral convictions of a Judge, Judge Dotse's statements have nothing philosophical or moral in them. To say that the Applicant is a looter of the country's resources and that he is at the heart of a scandal, is an opinion on purported or real facts, whichever, and is not an expression of a philosophical or moral principle. The statements are subjective assessments of the Applicant's conduct and actions, assessments which express the negative feelings he has towards the Applicant and which, as the Court acknowledges, were misplaced. As stated in the *Commentary on the Bangalore Principles on Judicial Conduct*, "A judge's personal values, philosophy or beliefs about the law" refers to "an opinion on a legal or social matter directly related to the current case ...".[1] In this case, however, the Judge concerned expresses, through his remarks, no general opinion on a legal and social question, but only a specific and detailed opinion on pure facts.

6. With regard to the presumption of the Judge's impartiality, this in the instant case is clearly refuted by his undisputed statements. The said statements show, without any shadow of doubt that the Judge concerned had a negative opinion of the acts of the Applicant, acts which were at the center of the case in respect of which he subsequently sat at the Supreme Court Review Bench.

7. In any event, what is at stake here is not the actual partiality of the Judge – which is not established in this case – but the *perception of bias* that his words may have generated in the eyes not only of the party concerned, but also of any reasonable observer. According to the *Commentary on the Bangalore Principles of Judicial Conduct* referred to above:

"Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. Impartiality must exist both as a matter of fact and *as a matter of reasonable perception*. *If partiality is reasonably perceived*, that perception is likely to leave a sense of grievance and of injustice, thereby destroying confidence in the judicial system. *The perception of impartiality* is measured by the standard of a reasonable observer." [2]

8. In the same vein, the Commentary further indicates that:

"Impartiality is not only concerned with the actual absence of bias and prejudice, but also with the *perception of their absence*. This dual aspect

1 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct,* September 2007, para 60, italics added.

2 *Ibidem*, para 52. Italics added.

is captured in the often repeated words that justice must not only be done, *but must manifestly be seen to be done*".[3]

9. As regards the conduct of a Judge, the Commentary provides examples of the following acts of bias:
"…A judge must be alert to avoid behaviour that may be perceived as an expression of bias or prejudice. Unjustified reprimands of advocates, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgments and intemperate and impatient behaviour may destroy the appearance of impartiality, and must be avoided".[4]

10. Lastly, on the same point, the said Commentary makes the following clarification:
"Depending on the circumstances, a reasonable apprehension of bias might be thought to arise in the following cases: … (d)If the judge has expressed views, particularly in the course of the hearing, on any question at issue in such strong and unbalanced terms that they cast reasonable doubts on the judge's ability to try the issue with an objective judicial mind…".[5]

11. In light of the foregoing, one is obliged to conclude that Judge Dotse's statements in his individual opinion at the Ordinary Bench of the Supreme Court gave rise to a perception of partiality when he sat at the Review Bench of the Supreme Court, and that consequently, in accordance with the general principles of law in judicial matters, the Judge should thereafter have refrained from sitting at the Review Bench. As noted by the very *Bangalore Principles of Judicial Conduct*:
"A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially"[6].

12. The fact that the Judge persisted in sitting, despite the risk of perception of bias, must be regarded as a violation of the Applicant's right to be heard by an impartial court, within the meaning of Article 7(1)(d) of the Charter, a violation attributable to the Respondent State of which the court is an organ.

13. I am conscious that Judge Dotse's comments were made in a concurring opinion, at least partially favorable to the Applicant, but this does not change the perception of bias on his part, in as much as he accepted to subsequently sit at the Review Bench of

3 *Ibidem*, para 56. Italics added.

4 *Ibidem*, para 62.

5 *Ibidem*, para 90.

6 *Bangalore Principles of Judicial Conduct,* Annex to the Resolution of the UN Economic and Social Council, ECOSOC 2006/23, 27 July 2006, para 2.5.

the Supreme Court on the same case.

III. The issue of the impartiality of the Supreme Court sitting as the Review Bench

14. It now remains to be determined whether the fact that Judge Dotse was a member of the Supreme Court Review Bench affected the impartiality of the entire Bench. In this respect, the Court replies in the negative, relying mainly on the arguments (i) that the statement of a single judge cannot call to question the impartiality of the other Judges (ten judges in this case), even though the Judge concerned wrote the *lead judgment* (paragraph 131); and (ii) that the Applicant did not show how Judge Dotse's remarks at the Ordinary Bench of the Supreme Court subsequently influenced the decision of the Court's Review Bench (paragraph 131). Neither argument is really convincing.

15. With regard to the argument that the bias of a single judge cannot affect the impartiality of the entire bench, it is important to again distinguish between the *actual impartiality* of a jurisdiction – which is not at issue here – and the *perception of the impartiality* of that jurisdiction. In the instant case, what is at issue is not the impartiality of all the other Judges, but rather the perception of impartiality of the Bench of the Court, arising from the perception of partiality of one of its members.

16. It is generally accepted that the perception of partiality of a member of a Court will also affect, indirectly, the perception of impartiality of the Bench in its entirety. The African Commission on Human and Peoples' Rights established a link between these two situations in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. In its view, the impartiality of a judicial body may be called to question, *inter alia*, "1. if the position of the judicial officer allows him or her to play a crucial role in the proceedings; 2. the judicial officer may have expressed an opinion which would influence the decision-making…"[7]

17. It follows from this principle that where a judge has expressed an opinion that might influence decision-making by the judicial body, there is a problem of impartiality, not just of the judge concerned, but of the judicial body as a whole.

18. With respect to the argument that the Applicant did not provide proof that Judge Dotse's remarks influenced the decision of the

7 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principles Applicable to All Legal Proceedings, 2003, para 5.c.

Supreme Court Review Bench, this requirement is impossible to prove. The Applicant cannot in fact be asked to provide such proof, since by definition he cannot access the deliberations of the Court which occur naturally in private session and are covered by the principle of confidentiality.

19. It follows from the foregoing that Judge Dotse's participation in the Supreme Court Review Bench may have given rise in any reasonable person, to a perception of bias on the part of the entire Bench, even though the other judges honestly adjudicated on the basis of absolute impartially.

20. For all these reasons, this Court to my mind should have found that the Applicant's right to be tried by an impartial tribunal within the meaning of Article 7(1)(d) of the Charter has been violated. Consequently, the Court could have, in the process, determined the nature and form of the reparation to be awarded to the Applicant solely in connection with this violation.

***

Dissenting opinion: BEN ACHOUR

1. In the case of *Alfred Agbesi Woyome v Republic of Ghana*, I concur with all the grounds and the operative part except on one issue and its impact on the claims for reparation.

2. Indeed, I do not share the view of the majority of the Court on "[t]he question of whether Justice Dotse's observations call into question the impartiality of the Review Chamber of the Supreme Court".[1] According to the Court, the remarks made by one of the judges of the Supreme Court of the Respondent State about the Applicant were "[r]egrettable and went beyond what can be considered an appropriate judicial comment".[2] and that consequently "[t]he Respondent State has not violated the right of the Applicant to be tried by an impartial tribunal, as required by

1 Paras 122 – 132.

2 Para 129 of the Ruling.

section 7(1)(d) of the Charter".[3]

3. I consider that the Court should have found a violation of Article 7(1)(b) of the African Charter on Human and Peoples' Rights (hereinafter the Charter), since the tenor of the judge's remarks in question gave rise to a perception of impartiality not only with regard to the author of the remarks but also with regard to the entire bench.

4. It should be recalled that in his concurring opinion dated 14 June 2013, at the hearing before the Ordinary Chamber of the Supreme Court, Judge Dotse found that the petitioner had formed an alliance with others. The Court "deduced from the record that there is no dispute between the Parties; that Judge Dotse, in his concurring opinion before the Ordinary Court, stated that the Petitioner formed an alliance with another party, namely Waterville Holding Ltd, to "create, plunder and share the resources of the country as if a brigade had been assembled to do so", later adding that the Petitioner was at the centre of the "notorious Woyome payments scandal".[4]

5. In analysing the effects of the observations of the Honourable Justice Dotse on the impartiality of the Review Chamber of the Supreme Court, the Court began by setting out the relevant criteria for resolving this problem. It stressed that "In order to ensure impartiality, the court must offer sufficient guarantees to exclude any legitimate doubt in this regard.[5] However, it points out that a judge's impartiality is presumed and that indisputable evidence is required to rebut this presumption. In this regard, the Court was of the view that "this presumption of impartiality is of considerable importance and the law should not imprudently raise the possibility of bias on the part of the judge.[6] and that "whenever an allegation of bias or a reasonable apprehension of bias is made, the decision-making integrity, not only of an individual judge, but of the court administration as a whole is called into question".[7] Subsequently, the Court appears to be moving in the direction of bias, holding in paragraph 129 of the judgment that

3 Para 132 of the Ruling.

4 Para 124 of the Ruling.

5 *Findlay v the United Kingdom* (1997) 24 EHRR 221, para 73. See also NJ Udombana, 'La Commission africaine des droits de l'homme et des peuples et le développement de normes de procès équitable en Afrique' (2006) 6/2 *Revue africaine de Droit des droits de l'homme*.

6 *Wewaykum Indian Band v Canada* 2003 231 DLR (4th) 1 (*Wewaykum*).

7 Para 128 of the Ruling.

"[w]hile these remarks are regrettable and went beyond what may be considered an appropriate judicial commentary, they did not give the impression of the existence of preconceived ideas and did not reveal any bias".

6. Before setting out the reasons for our dissent, and whether or not these comments are of such a nature as to create an impression of bias that permeates the entire judiciary, namely the Review Division of the Supreme Court of the Republic of Ghana, it is necessary to return to the definition of impartiality (I) and to compare the comments of the judge in question with the criteria of impartiality codified in a number of international instruments (II).

I. The notion of impartiality

7. Aware of the fragility of its position, the Court took the trouble to give the doctrinal definition of impartiality [8] on the basis of the definition given in the Dictionary of Public International Law and the commentary on the Bangalore Principles. However, these definitions are in line with the solution contrary to the position adopted by the Court, ie, bias, or at least the impression of bias of Judge Dotse.

8. More precisely, that is to say, in its legal sense, impartiality is the attitude which must make it possible to eliminate all subjectivity in a judgment. It implies that the judge must set aside his feelings of sympathy or antipathy for all those he is going to judge and get rid of any preconceived ideas, prejudices based on any reason for discrimination (gender, religion, color, morals, opinion, etc.) or stereotypes and that he must pronounce himself as objectively as possible. As the Court itself states, impartiality implies "[t]he absence of bias, prejudice, conflict of interest on the part of a judge, arbitrator, expert or similar person with respect to the parties appearing before him or her or with respect to the issue before him or her".[9]

9. In its *Piersack v Belgium* judgment of 1 October 1982,[10] the European Court of Human Rights (hereinafter the ECHR) has identified impartiality "[b]y the absence of prejudice or bias, it may be assessed in a variety of ways, in particular in light of Article 6(1) of the Convention. In this connection, a distinction can be

8 Para 126 of the Ruling.

9 J Salmon (Dir) *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, 562.

10 Judgement 8692/79, Series A No 53.

drawn between a subjective approach, which seeks to determine what a particular judge was thinking in his or her own mind in the circumstances, and an objective approach, which seeks to ascertain whether he or she offered sufficient guarantees to rule out any legitimate doubt in this respect".[11]

10. In the same *Piersack v Belgium* case brought before the ECHR by the Commission, the Applicant had complained that the President of the Assize Court who convicted him had dealt with his case during the investigation in his capacity as Deputy Public Prosecutor. In its judgment of 1 October 1982, the ECHR found an infringement of Article 6(1)[12] of the Convention: the impartiality of the "court" which, on 10 November 1978, had ruled "on the merits" of a "criminal charge" against the person concerned, namely the Assize Court of Brabant, "could appear questionable".[13]

11. In another case, *Daktaras v Lithuania*[14], the ECHR "calls for two aspects in the requirement of impartiality laid down in Article 6(1) of the Convention. Firstly, the tribunal must be subjectively impartial, that is to say, none of its members must manifest any personal bias or prejudice. Personal impartiality is presumed until proven otherwise. Second, the tribunal must be objectively impartial, that is to say, it must offer sufficient guarantees to exclude any legitimate doubt in this regard.[15] With regard to the second aspect (objective impartiality), "[i]t leads to the question whether there are verifiable facts which give rise to a suspicion of the impartiality of the judges" and the European Court adds "[I]n this matter, even appearances may be important. It is a matter of the confidence that the courts in a democratic society have to inspire in their

11 Para 30 of the ECHR judgment.

12 "Everyone has the right to a fair and impartial hearing ... by an independent and impartial tribunal established by law, in the determination of ... any criminal charge against him. (...)".

13 According to the ECHR "[The Belgian Court of Cassation] dismissed Mr Piersack's appeal on the ground that the documents in its possession did not appear to reveal any such intervention by Mr Van de Walle as first substitute for the public prosecutor in Brussels, even if in any form other than a personal statement or a given act of prosecution or investigation (para 17 above).
d) Even with the latter clarification, such a criterion does not fully meet the requirements of Art 6(1). If the courts are to inspire the necessary public confidence, account must also be taken of considerations of an organic nature. If a judge, after having held an office in the public prosecutor's office which is such as to require him to deal with a certain case within the scope of his powers, finds himself seized of the same case as a sitting judge, litigants are entitled to fear that he does not offer sufficient guarantees of impartiality".

14 ECHR. Third Section, Judgment of 10 October 2000, Application 42095/98.

15 Para 30 of the judgment of the ECHR.

citizens, starting with the parties to the proceedings".[16] In the case in question, the president of the Criminal Division of the Supreme Court had submitted a petition for cassation to the judges of that Division, at the request of the judge of first instance, who was dissatisfied with the decision of the Court of Appeal. The President proposed that the appeal judgement be quashed and the judgement of the court of first instance upheld. He then appointed the judge-rapporteur and formed the panel to examine the case. At the hearing, the prosecution supported the president's petition for cassation, which was ultimately upheld by the Supreme Court. According to the Court, "[t]his opinion cannot be regarded as neutral from the point of view of the parties: by recommending the adoption or reversal of a given decision, the President necessarily becomes the defendant's ally or adversary".[17]

12. Furthermore, in the *Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa*, adopted by the African Commission on Human and Peoples' Rights in 2003,[18] In assessing impartiality or bias, it is recommended that three criteria be taken into account:

- Whether the judge is in a position to play an essential role in the proceedings;
- If the judge may have a preconceived opinion that could weigh heavily on the decision;
- Whether the judge must rule on a decision he or she has made in the exercise of another function; and**.**

13. Under these Guidelines, an adjudicative body is impartial if:

(1) A former prosecutor or lawyer shall sit as a judge in a case in which he or she served as a prosecutor or lawyer;

- The magistrate participated secretly in the investigation of the case;
- There is a connection between the judge and the case or any part of the case which may prejudice the decision;
- A judge sits as a member of an appellate court to hear a case which he has already decided or in which he has been involved in a lower court.

16 Para 32 of the judgment of the ECHR.

17 Para 35 of the ECHR judgment.

18 *Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa*, adopted in 2003 by the African Commission on Human and Peoples' Rights (DOC / OS (XXX) 247).

14. In its *Ingabire v Rwanda* (Merits) judgment of 24 November 2017, the Court referred to these same guidelines when deciding whether the Applicant had been tried by a neutral and impartial court or not.[19] and concluded that "[I]n this case, the evidence presented by the Applicant does not sufficiently demonstrate that any of the above factors existed at her trial".

15. Furthermore, *the Bangalore Principles*[20] on Judicial Ethics, cited by the Court in the present Judgment, establish an international standard of judicial ethics for the conduct of judges and provide a framework for regulating their conduct. In the commentaries on the Bangalore Principles, impartiality is recognized as "the fundamental quality required of a judge and the essential attribute of the judiciary. A reasonable appearance of bias may create a sense of unfairness that destroys confidence in the judicial system. The appearance of impartiality is measured by the reasonable observer. A judge may appear to be biased for a number of reasons, such as an apparent conflict of interest, conduct in the courtroom," or "the judge may appear to be biased for a number of reasons".[21]

16. In addition, "[a] judge shall perform his judicial duties without favour, bias or prejudice. Where a judge appears to be biased,[22] public confidence in the justice system is eroded. ... Impartiality is not only about the actual absence of bias and prejudice, but also about their apparent absence. This dual aspect is captured by the often-repeated formula that justice must not only be done but must also be seen to be done".[23] The test usually adopted is whether a reasonable observer, looking at the matter realistically and pragmatically, would (or might) perceive a lack of impartiality on the part of the judge. It is from the perspective of the reasonable observer that one must consider whether or not there are grounds for apprehension of bias.[24] "A judge's personal values, philosophy

19 Application 003/2014, Judgment of 24 November 2017, *Ingabire Victoire Umuhoza v the Republic of Rwanda*, paras 103 and 104.

20 *Bangalore Draft 2001 on a Code of Judicial Ethics*, adopted by the Judicial Group on Strengthening the Integrity of Justice and revised at the Round Table of First Presidents held at the Peace Palace in The Hague on 25 and 26 November 2002. https://www.unodc.org/documents/corruption/bangalore_f.pdf

21 United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct*, September 2007, para 52.

22 It is we who point out.

23 United Nations Office on Drugs and Crime, Commentary on the Bangalore Principles of Judicial Conduct, September 2007, para 52.

24 Commentary on the Bangalore Principles of Judicial Conduct, paras 55 and 56.

or beliefs about the law cannot constitute bias. The fact that a judge has formed a general opinion on a legal or social issue directly relevant to the case at hand does not render the judge unfit to preside. The opinion, which is acceptable, should be distinguished from bias, which is not acceptable".[25]

II. Judge Dotse's attitude reveals a perception of bias that permeates the entire composition of the Review Chamber

17. The crucial question which arises in relation to the words and attitude of Dotse J is not so much that of the influence exerted by this judge on his other colleagues in the Review Chamber but, above all, that of the appearance or perception of bias. In other words, the issue is not whether the judge in question influenced his other colleagues but whether Dotse J. exceeded the obligation of neutrality which must be his. Even if it is assumed that the opinion of this judge did not directly influence the other judges, the fact remains that the mere fact that this senior judge expressed an opinion that appears to be directed against the Applicant exceeds the limits and characteristics of a legal opinion on the case under consideration.

18. In the instant case, the Court observes moreover that Judge Dotse played a crucial role in the proceedings, both before the Ordinary Chamber, on whose judgment he wrote the concurring opinion, and before the Review Chamber, in which he wrote the main judgment. Furthermore, he expressed his opinion when he referred to the Applicant as having formed an alliance with another party, Waterville, to "create, plunder and share the resources of the Republic of Ghana", and that the applicant was at the centre of the notorious Woyome payments scandal.

19. As indicated above, the Court appears, as a first step, to support the bias of the said judge when it "considers ... that these remarks were regrettable and went beyond what can be considered an appropriate judicial commentary".[26] However, the Court is quick to retract, disregarding the criteria of impartiality, when it considers that the statements "did not give the impression of preconceived ideas and did not reveal any bias".[27] Furthermore, the Court adds

25 Commentary to the Bangalore Principles of Judicial Conduct, para 60.

26 Para 129 of the Ruling.

27 *Idem*.

that "[w]here it is clear from the record that there is no dispute between the Parties that Judge Dotse, in his concurring opinion before the Ordinary Chamber, stated that the Petitioner had formed an alliance with another party, namely Waterville Holding Ltd, to "create, plunder and share the resources of the country as if a brigade had been assembled to do so", only to add later that the Petitioner was at the centre of the "notorious Woyome payments scandal".[28]

20. It is impossible to subscribe to this reasoning. In the present case, Judge Dotse clearly demonstrated his bias against the Applicant by his remarks in the concurring opinion before the Ordinary Chamber. It may well be that Judge Dotse merely expressed views without necessarily being biased. However, it is rather regrettable that the Honourable Judge made these remarks while the Petitioner's case was still pending before the High Court, before which judgment was delivered on 12 March 2015, after the judgment of the Review Chamber of the Supreme Court. The findding reached by the Court seems to me questionable: "The Court notes that Judge Dotse prepared the main judgment rendered by the Review Chamber which was composed of eleven (11) judges, [...]. The Court considers that the remarks of a single judge cannot be regarded as sufficient to influence the Chamber as a whole. Nor has the Applicant shown how the remarks made by the judge in the Ordinary Chamber influenced the decision of the Review Chamber downstream.[29]

21. The Court's reasoning does not, in my view, hold water: however acceptable and logical it is in its premises, it is illogical and contradictory in its conclusions.

22. It would appear that the opinion expressed by Judge Dotse, despite the fact that it was expressed in an opinion appended to the Judgment, goes far beyond what is common in the expression of dissenting or individual opinions on a judicial or quasi-judicial decision. This practice, inherited from Anglo-Saxon law by international courts, enables a judge to express his or her position in legal terms. It does not make it possible to attack one of the litigants at trial and pass a value judgment on him or her.

23. A dissenting or separate opinion is defined as "an expression of personal opinion which the members of a court or tribunal may attach to the decision of the court or tribunal". In this regard "a separate opinion is that of a judge who has voted with the majority

28 Para 124 of the Ruling.

29 Para 131 of the Ruling.

with regard to the operative part of a judgment, but who does not accept all or part of the statement of reasons. By attaching a separate opinion to the judgment, the judge can justify his or her partial dissent and state the reasons for accepting the operative part of the judgment anyway.[30] A "dissenting opinion" is that of a judge who did not vote with the majority because he or she disagrees with the operative part of the decision and, therefore, with its reasons. In the dissenting opinion, he or she may give reasons for dissent and thus make public the points that have been the subject of controversy among the judges.[31]

24. Disagreeing with point (ix) of the operative part, I could only dissent from the Court's decision not to award the applicant any compensation for the damage suffered. In the logic of my position, having been convinced of a violation of a human right, I would have awarded the Applicant fair and adequate reparation.

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Separate opinion: MENGUE

1. On 29 July 2017, at the request of Mr Martin Amidou, the Review Bench of the Supreme Court of Ghana unanimously upheld the decision of the Ordinary Bench of that Court on the question of the constitutionality of the construction contract for stadia, and ordered Mr Woyome to reimburse to the State the monies collected.

2. Not satisfied with this decision, Mr Woyome brought the matter before this Court by an Application received at the Registry on 16 January 2017

3. In that Application, he alleges the violation of the following fundamental rights:

- Right not to be discriminated against guaranteed under Article 2 of the Charter,
- Right to equality before the law and equal protection of the law guaranteed under Article 3 of the Charter,

30 J Salmon (Dir). *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, 781.

31 *Idem*, 782.

- Right to have his cause heard guaranteed under Article 7 of the Charter.

4. He also claimed compensation for the damages resulting from these violations.

5. After prior examination of its jurisdiction pursuant to Articles 3(1) of the Protocol establishing the African Court and Rule 39(1) of its Rules, the Court examined the admissibility of the Application, while scrutinizing the inadmissibility objections raised by the Respondent State and the other conditions of admissibility set out in Article 6 (2) of the Protocol and Rule 40 of the Rules.

6. It is the objection on the non-exhaustion of local remedies which will receive attention here, for I remain convinced that, had the Court dug further into this objection, it would have come up with a solution different from the one contained in the judgment.

7. It should be recalled that exhaustion of local remedies means that the case which the Applicant intends to bring before the international forum has been raised, at least in substance, before national bodies where they exist, if such remedies are adequate, accessible and effective.

8. The question that arises in this case is whether, after the decision of the Review Bench of the Supreme Court of Ghana, the Applicant had other remedies at the national level to raise the issue of violation of his fundamental rights and seek redress for the damages suffered.

9. In this regard, Articles 2(1), 33, 130 and 133(1) of the Constitution of Ghana provide as follows:

- Article 2(1): "A person who alleges that any act or omission of any person is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect".
- Article 33:

(1) "Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

(2) The High Court may, under clause (1) of this article, issue such directions or orders or writs including rites or orders in the nature of habeas corpus, certiorari, mandamus, prohibition, and quo warrant as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms to the protection of which the person concerned is entitled.

(3) A person aggrieved by a determination of the High Court may appeal to the Court of Appeal with the right of a further appeal to the Supreme Court..."

- Article 130: "Original jurisdiction of the Supreme Court:

(1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in –

(a) all matters relating to the enforcement or interpretation of this Constitution…"

- Article 133: "Power of the Supreme Court to review its decisions:

(1) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court… ".

10. It is clear from the above-mentioned constitutional provisions that the Ghanaian judicial system provides two specific remedies for the violation of fundamental rights: appeal before the High Court and appeal before the Supreme Court.

11. But are these remedies, although available, effective particularly in this case?

12. The Court in *Nobert Zongo v Burkina Faso* concluded that "the effectiveness of an appeal is its ability to remedy the situation complained of by the person exercising it",[1] measured in terms of the ability to resolve the problem raised by the Applicant. It reaffirmed this in the matter of *Lohé Issa Konate v Burkina Faso,* noting that a remedy is effective if it can be pursued by the Applicant without impediment.[2]

Appeal before the High Court

13. In assessing the effectiveness of the remedy before the High Court, "the Court finds that in the circumstances of this case, it would have been unreasonable to require the Applicant to file a claim at the High Court to call into question a decision of the Supreme Court, whose decisions bind subordinate courts, in respect of a violation of his fundamental rights by the Supreme Court. It would be highly unlikely that the High Court would overturn this decision. "

14. The Court therefore considers that to lodge such an appeal before the High Court could not have settled the Applicant's complaint and that the remedy would therefore have been ineffective.

1 Application No 013/2011. Judgment of 28 March 2014. *Norbert Zongo v Burkina Faso* (on preliminary objections and the merits), para 68.

2 Application No 004/2013. Judgment of 5 December 2014, *Lohé Issa Konaté v Burkina Faso* (preliminary objections), para 111.

The Court finds that remedies were certainly available but that they were not effective in terms of responding to the Applicant's complaints"(see paragraphs 65-66 of the judgment).

15. This analysis does not seem to be relevant. Firstly, the lower court is bound by the decision of the Supreme Court where there is a similarity of subject and cause between the case decided by the Supreme Court and the case newly brought before the lower court. In that case, the decision of the Supreme Court is binding by virtue of the principle of *res judicata.*

16. On the other hand, where the same parties raise a new problem different from that initially settled by the Supreme Court, the lower court can validly adjudicate since there is no similarity of subject or cause. This is the case here.

17. The Supreme Court was seized and it made a final determination on the constitutionality of the contracts at issue. This however did not prevent the parties from undertaking other proceedings at national level, in which the Applicant has often been successful (Here, I am referring to the judgment of 14 June 2013 whereby the Ordinary Bench held that Mr Martin Amidu should appeal to the High Court to seek redress. It is also noted here that it is indeed the Supreme Court judge who indicated that, following his own decision, the aggrieved party should seize the High Court to obtain compensation).

18. Thus, the Applicant who complains of the violation of his fundamental rights, a violation committed in the course of the proceedings before the Supreme Court, had the latitude to appeal to the High Court under the provisions of Article 33 of the Constitution. There is no similarity of subject or cause between this new case and the case originally settled by the Review Bench of the Supreme Court on the constitutionality of the contracts.

19. Secondly, the High Court seized of an application for human rights violation is not required to re-examine the decision of the Supreme Court for invalidation or confirmation. It is required to pronounce on the conformity of the proceedings before the Supreme Court with the provisions of the Constitution as regards fundamental human rights and/or international human rights standards.

20. That is exactly the point of view of the European Court which states in *Gäfgen v Germany* that: exhausting domestic remedies not only requires the use of effective remedies to challenge decisions already rendered, but that the complaint to be made before the Court must first be raised, at least in substance, in the form and within the time limits prescribed by national law before

the appropriate national courts.[3]

21. It follows, therefore, that the High Court could, without prejudice to the principle of *res judicata*, hear Mr Woyome's Application on violation of his fundamental rights, in substance, as presented before this Court.[4]

22. The number of human rights decisions handed down by this Court sufficiently demonstrates the effectiveness of this remedy, that is, the Court's ability to provide solutions to the problems of fundamental rights violation; and the possibility of remedies: the appeal against the decisions of the High Court and the appeal to the Supreme Court constitute a double guarantee of human rights protection.

23. In its conclusion "the Court finds that domestic remedies were available but not effective in responding to the Applicant's complaints".

24. This shows that the Court recognizes that, in addition to the appeal to the High Court, there were other remedies it found to be ineffective without demonstrating this. What exactly is this remedy before the Supreme Court?

Appeal to the Supreme Court

25. If one relies on the hierarchy of jurisdictions to determine that the High Court could not reasonably examine the procedure before the Supreme Court (what we have just demonstrated to be unfounded), should we deduce therefrom that violations committed at the level of the Supreme Court are unassailable at national level? That they cannot be raised or established for the purposes of reparation?

26. Besides, the Court's assertion that "it would be highly impossible for the High Court to overturn that decision" suggests that, in admitting that the Applicant seised the latter in these

3 ECHR, *Gäfgen v Germany*, Application 22978/05, Judgment of 1 June 2010. para 142.

4 In the case of ***Gäfgen v Germany***, ***idem***, the Applicant complained before the Court about the unfairness of his criminal trial based on the violation of Article 6 of the Convention. He alleged that the evidence admitted at his trial had been obtained as a result of the confessions extorted from him. In determining whether the Applicant had exhausted the local remedies, the Court took into account the fact that before the Regional Court, the Applicant prayed the latter to declare that he was totally forbidden from using the various evidence from the criminal trial of which the investigating authorities were aware through the unlawfully obtained statements. The Applicant, in his appeal before the Federal Court, also referred to this application. The Court thus held that the complaint lodged before it had been raised in substance before the national courts and so declared the application admissible.

circumstances, it is the Court (this Court)) which may invalidate or uphold the decision in question, which is contrary to its own case-law according to which it "is not an appellate or cassation court for decisions emanating from the national courts, but that that does not preclude it from examining the relevant procedures before the national authorities to determine whether they are in conformity with the standards prescribed in the Charter or any other human rights instrument ratified by the Respondent State". This is indeed what the High Court, vested with the mission of protecting fundamental rights, was required to do. The violations which the Applicant raises before this Court and which fall within the ambit of its material jurisdiction are those which he was required to raise, even if in substance only, before the national human rights protection authority.

27. To that end, the case-law is sufficiently abundant that exhaustion of domestic remedies does not mean that the Applicant has exercised a remedy likely to culminate in the reversal of a disputed measure or decision, but to bring before the competent national body the complaint which he believes is a violation of his right[5].

28. All in all, in declaring the Application in this case admissible on the ground that the High Court, a lower court, cannot make a determination on fundamental rights violations committed before the Supreme Court, the Court opens a dangerous hiatus, in as much as, henceforth, any victim of human rights violation at that stage (Supreme Court) would now lodge an appeal directly before this Court without having to exhaust the local remedies.

29. It is apparent from the afore-mentioned texts (Articles 2 and 133 of the Ghanaian Constitution) that the Supreme Court adjudicates matters of human rights as a trial court, and as an appellate jurisdiction in respect of its own decisions.

30. In this case, following the decision of the Review Bench of the Supreme Court, the Ghanaian Constitution offers the Applicant the opportunity to exercise his remedy for violation of his fundamental rights before the Supreme Court.

5 ECHR: *Vückovic and others v Turkey* (Preliminary Objections), Application 17153/11 ***et seq***. Judgment of 25 March 2014, para 75. See also ECHR: *Nicklinson and Lamb v United Kingdom,* Application Nos 2478/15 and 1787/15. Decision on Admissibility dated 23 June 2015, para 90; *Ahmet Sadik v Greece*, Application 18877/91. Judgment of 15 November 1996 para 33; *Fressoz and Roire v France*, Application 29183/95. Judgment of 21 January 1999, paras 38 and 39; *Cardot v France* (Preliminary Objections), Application 11069/84. Judgment of 19 March 1991, para 34; *Azinas v Cyprus,* Application 56679/00. Judgment of 28 April 2004, paras 40 and 41.

Separate opinion: BENSAOULA

[**1.**] I share the opinion of the majority of the Judges regarding the admissibility of the Application, the Court's jurisdiction and the Operative Part.

[**2.**] I believe, however, that the way in which the Court dealt with the admissibility of the Application runs counter to the provisions of Articles 56 of the Charter, 6(2) of the Protocol and Rules 39 and 40 of the Rules.

[**3.**] It is noteworthy that, after discussing the Respondent State's objections to the admissibility of the Application (non-exhaustion of local remedies and the filing of the Application within a unreasonable time), the Court held in conclusion in its paragraph 96, that all the other conditions are not in contention between parties and "that the court finds that nothing on the record indicates that any of these conditions has not been fulfilled in this case."

[**4.**] And for that, the Court only reiterated the conditions listed in Articles 56 of the Charter, 6(2) of the Protocol and in Rule 40(6) of the Rules without any discussion or analysis which, in my opinion, is contrary to the very spirit of the afore-cited texts.

[**5.**] In effect, under Rule 39 of the Rules, the Court is required to conduct preliminary examination of its jurisdiction and the conditions of admissibility laid down in Articles 50 and 56 of the Charter and Rule 40 of the Rules.

[**6.**] This clearly implies that:

- If the parties raise objections concerning the conditions governing jurisdiction and admissibility, the Court must examine the same.
- if it turns out that one of them is founded, the Court will so declare, because the said conditions are cumulative.
- if, on the other hand, none is found, the Court has the obligation to discuss the other elements of admissibility not contested by the parties and adjudicate accordingly.
- if the parties do not dispute the conditions, the Court is obliged to do so, and in the order set out in Article 56 of the Charter and Rule 40 of the Rules.

[**7.**] Indeed, it seems to me illogical that the court should select one of the conditions such as reasonable time, for example, whereas identity or any other condition afore-listed may be problematic and therefore not covered.

[**8.**] In the present case, the subject of separate opinion, it is clear that if the Respondent State raised objection in respect to local remedies and reasonable time, which the Court considered

unfounded, the latter did not analyze the other conditions, limiting itself to a quick response, because the said conditions have not been discussed, and nothing on file shows that there are issues regarding compliance therewith.

[**9.**] In my opinion, this quick response in regard to the other conditions not discussed by the parties and the Court, has weakened the Court's decision in respect of the admissibility of the Application.

And as regards assessment of reasonable time

[**10.**] The Court found that the local remedies were exhausted when the Review Bench of the Supreme Court issued its judgment on 29 July 2014 and that as at the date of filing the Application on 5 January 2017, the period of seizure was reasonable.

[**11.**] It is however apparent that in reaching this conclusion, the Court took into consideration the facts which occurred subsequent to the date considered as evidence of the exhaustion of local remedies (2014), the criminal proceedings brought against the Applicant, and the report of the commission of inquiry.

[**12.**] In Rule 40(6) of the Rules, it is clearly stipulated that for an application to be admissible, it must "be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

[**13.**] It is clear that the drafters set down two options as to how to define the commencement of reasonable time.

- date of exhaustion of the local remedies which the Court has set as the date of the judgment of the Review Bench of the Supreme Court, that is, 29/07/2014, the Application having been filed on 5/01/2017.
- the date set by the Court as the commencement of the period within which it shall be seized with the matter. Although the Court set the date of commencement of the referral (date of the judgment of the Review Chamber) it has taken into account the facts that occurred after that date (2014/2017) as "factors that could be taken into account in assessing the reasonableness of the referral period..."

[**14.**] I believe that this way of interpreting the Article referred to above is erroneous and does not respond to the spirit of the text, because the Articles of the Charter and the Rules clearly stipulate the date chosen by the Court and not the facts retained ..... to set the time limit for referral.

[**15.**] In my opinion, in retaining the date of the judgment of the Review Bench (2014) and the date of filing the Application (2017) and taking into account the facts that occurred after the date of the

judgment of the Review Bench, the Court departed from the very meaning of the Article because, by this way of doing things, it has not determined any date as commencement of the time limit for its own referral and has, rather, mixed up the two options offered by the afore-cited Articles. And since the drafters recognize this option for the court, it would have been more logical to consider the date of the judgments rendered between 2014 and 2017 or the date of submission of the report of the commission (2015), and the timeframe for seizure would have been more reasonable, by so doing.

[**16.**] Thus, if the Court in its jurisprudence interpreted the local remedies binding on the Applicant as ordinary remedies, that jurisprudence does not bind it in determining the reasonableness of time since it can, in my opinion, calculate the said reasonable time from the date on which an extraordinary remedy was pursued or a decision was received or other proceedings instituted in close connection with the facts of the Application before the court and that, by so doing, the court would have applied the second rule set forth in Articles 56 of the Charter, 6(2) of the Protocol and Rules 39 and 40(6) of the Rules.