Mornah v Benin & ors (intervention by Mauritius) (2020) 4 AfCLR 586

Application 002/2020, (*Application for Intervention by Mauritius*) in Application 028/2018, *Bernard AnbaTaayela Mornah v Republic of Benin & 7 ors*

Ruling (intervention), 25 September 2020. Done in English and French, the French text being authoritative.

Judges: KIOKO, MATUSSE, MENGUE, MUKAMULISA, BENSAOULA, TCHIKAYA, and ANUKAM.

Recused under Article 22: ORÉ, BEN ACHOUR, CHIZUMILA and ABOUD

The Applicant State brought this application for leave to intervene in an action brought against eight other states. The Court granted the Applicant State leave to intervene.

Jurisdiction (*prima facie*, 13)

Procedure (determination of intervenor's interest, 16)

Self-determination (*erga omnes* nature, 20)

Separate Opinion: TCHIKAYA

Procedure (nature of proceedings for intervention, 9,10, 14)

I. Background

1. The Republic of Mauritius is a Member State of the African Union (hereinafter referred to as "the AU") and brings this Request for Leave to Intervene in the Application filed by Bernard Anbataayela Mornah (hereinafter referred to as "the Applicant"). Together with its Request, it also makes its submissions on the merits of the main Application.

2. On 14 November 2019, the Applicant, a Ghanaian national and the National Chairman of the Convention of People 's Party a political party in Ghana filed his Application against the Republic of Benin, Burkina Faso, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia (hereinafter collectively referred to as "the Respondent States").

3. The Respondent States became Parties to the African Charter on Human and Peoples' Rights (hereinafter the "African Charter" or "the Charter") as follows: Benin – 21 October 1986; Burkina Faso – 21 October 1986; Côte d'Ivoire –31 March 1992; Ghana –1 March 1989; Mali –21 October 1986; Malawi 17 November 1989;

Tanzania – 21 October 1986; and Tunisia – 21 October 1986.

4. The Respondent States all became Parties to the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter "the Protocol"), as follows: Benin 22 August 2014; Burkina Faso – 25 January 2004; Cote d'Ivoire – 25 January 2004; Ghana –25 January 2004; Mali –25 January 2004; Malawi –9 September 2008 –; Tanzania –29 March 2010; Tunisia –21 August 2007.

5. All the Respondents have also made a Declaration under Article 34(6) of the Protocol permitting individuals and Non-Governmental Organisations (NGOs) to directly bring cases against them before the Court (hereinafter referred to as "the Declaration") as follows: Benin: 8 February 2016; Burkina Faso: 28 July 1998; Côte d'Ivoire: 23 July 2013; Tanzania: 23 March 2010; Ghana: 10 March 2011; Malawi: 9 October 2008; Mali: 19 February 2010; Tunisia: 13 April 2017.

II. Subject matter of the request

A. Facts of the Matter

6. The Request for Leave to Intervene is in relation to the Application filed on 14 November 2018 by the Applicant wherein he alleges that by failing to protect the sovereignty, territorial integrity and independence of the Sahrawi Arab Democratic Republic (hereinafter, SADR), the Respondent States have violated Articles 3 and 4 of the Constitutive Act of the African Union; Articles 1, 13, 19, 20, 21, 22, 23 and 24 of the Charter; Articles 1 and 2 of the International Covenant on Civil and Political Rights and Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights.

7. The Republic of Mauritius requests that the Court should allow it to intervene in this matter alleging that it has interest in the Application as it is an AU Member States whose decolonisation is still not completed and given the *erga omnes* character of the right to self-determination.

B. Intended Intervener's Prayers

8. In its Request for Leave to Intervene, the Republic of Mauritius prays the Court "for leave to intervene to make written submission in respect of the right to self-determination and decolonization" in accordance with Article 5(2) of the Protocol, Rule 33 (2) and Rule

53 of the Rules of the Court.

III. Summary of the Procedure before the Court

9. The Request for intervention was filed on 31 August 2020.

10. On 8 September 2020, the Registry sent a notice to the Parties requesting them to submit their observations, if any, on the request for intervention, within fifteen (15) days of receipt of the notice.

11. No observations were received from any of the Respondent States or any other entity within the time prescribed by the Court

IV. *Prima facie* jurisdiction

12. Pursuant to Article 3(1) of the Protocol, the jurisdiction of the Court extends to "all cases and disputes submitted to it concerning the interpretation and application of the Charter [the] Protocol and any other relevant human rights instrument ratified by the States concerned." Further, in terms of Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction … of the Application in accordance with Article 50 and Rule 40 of these Rules".

13. The Court observes that in the instant Application, the Applicant alleges violation of human rights and freedoms protected by the Charter and the Application is filed against Respondent States which have ratified the Protocol and deposited the Declaration under Article 34 (6) of the same. The Court thus finds that it has *prima facie* jurisdiction to examine the Application.

14. As regards the Request for Leave to Intervene, the Court notes that Article 5(2) of the Protocol provides as follows: "When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join." This is reiterated in Rule 33(2) of the Rules which declares that: "In accordance with Article 5(2) of the Protocol, a State Party which has an interest in a case may submit a request to the Court to be permitted to join in accordance with the procedure established in Rule 53 of these Rules".

15. Rule 53 of the Rules stipulates that:

1. An application for leave to intervene, in accordance with article 5 (2) of the Protocol shall be filed as soon as possible, and, in any case, before the closure of the written proceedings.
2. The application shall state the names of the Applicant's representatives. It shall specify the case to which it relates, and shall set out:

a. the legal interest which, in the view of the State applying to intervene, has been affected;

b. the precise object of the intervention; and

c. the basis

d. 'of the jurisdiction which, in the view of the State applying to intervene, exists between it and the parties to the case.

16. The Court notes that the determination of whether an intervenor has interests in a case in terms of Article 5 (2) of the Protocol and Rule 53 of the Rules depends on the nature of issues involved in the case, the identity of the intervenor and the potential impact of any of the decision of the Court on the intervenor and third parties.[1]

17. The Court observes that the instant Application mainly relates to the rights and freedoms of the people of SADR, which the Applicant alleges have been violated as a result of the continued occupation of the territory of SADR by the Kingdom of Morocco and the failure of the Respondent States to protect the sovereignty, territorial integrity and independence of SADR. In its request, the Republic of Mauritius avers that, as an AU Member State whose process of decolonisation is still incomplete and considering the *erga omnes* character of the right to self-determination, it should be granted leave for intervention in the Application. It also states that the purpose of its intervention is to make written submissions in respect of the said right to self-determination and decolonization.

18. The Court notes that the instant Application raises issues pertaining to the rights and freedoms of the people of SADR. However, the rights and freedoms alleged to have been violated by the Respondent States' failure to protect the independence and territorial integrity of SADR have wider significance beyond the people of SADR.

19. Indeed, the rights that the Applicant claims to have been violated, specifically, the right to self-determination and freedom from colonisation and oppression, the right of people to freely dispose of their wealth and natural resources, and the right to national and international peace and security protected under Articles 20, 21 and 23 of the Charter, respectively, have particular relevance to the African continent at large due to its colonial past. In addition, the basis of the main Application essentially relates to the decision of African Union, an organization to which the Republic of Mauritius is a Member State, to readmit the Kingdom of Morocco to the

1 Jurisdictional Immunities of the State (*Germany v Italy: Greece* intervening), Application by the Hellenic Republic for Permission to Intervene, ICJ, Order of 4 July 2011, § 22.

Union despite its continued occupation of the territory of SADR.

20. Furthermore, the Republic of Mauritius alleges that its decolonization is not complete yet; thus, making the Application a matter of great importance to it and its people. In this regard, the Court takes judicial notice of the recent Advisory Opinion of the International Court of Justice (ICJ) on Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,[2] where the ICJ affirmed the *erga omnes* nature of the right to self-determination and that the decolonisation process of the Republic of Mauritius was not lawfully completed under international law.

21. In view of the foregoing, the Court is of the view that the Republic of Mauritius, as a Member State to the African Union has an interest in seeking to intervene in this matter for the purpose of submitting its observations on issues of relevance to the rights and freedoms of its people as well as the people of SADR. The Court, therefore, grants its Request for Leave to Intervene in the instant Application.

V. Operative part

22. For these reasons:

The Court,

Unanimously,

i. *Grants* leave for the Republic of Mauritius to intervene in the instant Application;

ii. *Decides* that the submissions of the Republic of Mauritius on the merits of the main Application

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Separate Opinion: TCHIKAYA

1. I have followed the final and majority position of the Court in the operative part of this decision, but I am nevertheless eager to see more precision in the wording. The presentation in the form of

2 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion (25 February2019)

an order[1] does not seem to be justified and is, for that matter, a shortcoming. It is the subject of this opinion. Following the orders, I was keen to raise this issue because their content, which is of major legal significance, should be presented in the form of a judgment of the Court.

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2. This is not the first time that the institution of intervention in international judicial proceedings is causing a stir at the African Court. While its development at the International Court of Justice has been laborious[2] since 1951,[3] Judge Roberto Ago predicted rather surprisingly in the Continental Shelf Case, (*Libya v Tunisia* of 1981)[4] that the judgment at the end of Malta's intervention could "sound the death knell of the institution of intervention in international trials". The Orders of the African Court on Mauritius and the Saharawi Republic of 25 September 2020 have in fact added to the confusion over a concept whose use was already not so obvious in international judicial proceedings.

1 AfCHPR, *Orders for interventions by Republic of Mauritius and the Sahrawi Arab Democratic Republic (SADR) – Matter of Bernard Anbataayela Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Tanzania and Tunisia*, 25 September 2020.

2 The issue of institution came up again at the International Court of Justice in the case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Application by Equatorial Guinea to intervene v ICJ*, Order of 21 October 1999. Equatorial Guinea was an intervener following the judgment on preliminary objections in the main proceedings. Third party States were questioned by the Court on the impact that the future judgment might have on the merits (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria),* Preliminary Objections, Judgment of 11 June 1998, §116).

3 Gonidec (P.-F.), *L'Affaire du droit d'asile* , *RGDIP*, 1951, p.547; Cuba's intervention in *Peru v Colombia* on the interpretation of the Havana Convention of 1928 and the right to asylum; ICJ, Judgment, *Haya de la Torre, Colombia v Peru*, 13 June 1951, pp. 76 s.

4 ICJ, ICJ, *Continental Shelf (Libya Arab Republic v Malta), Request by Italy for permission to intervene*, Judgment, 21 March 1984, Dissenting opinion by Judge Ago, § 22; see also Sperduti (G.), *Notes sur l'intervention dans le procès international, AFDI*, 1984, pp. 273-281. ; Decaux (E.), ICJ Judgment on the application by Malta for permission to intervene, *AFDI.*, 1981, pp. 177-202 ; Decaux (E.), *ICJ Judgment on the application by Malta for permission to intervene*, *AFDI.*, 1981, pp. 177-202

3. On 14 November 2019, a Ghanaian national[5] filed a motion to institute proceedings against seven States: the Republic of Benin, Burkina Faso, the Republic of Côte d'Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia. These States were named as Respondent States. In addition to being parties to the Charter, they became parties to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[6] On various dates, they accepted the Court's jurisdiction to receive applications brought against them by individuals and non-governmental organisations (NGOs) with observer status with the African Court on Human and Peoples' Rights.

4. In addition to the obvious questions of jurisdiction, admissibility and merits regarding the initial application which the Court will subsequently have to deal with, the Court was faced with an exercise relating to its perception of the applications for intervention by two countries - Mauritius and the Sahrawi Republic - as reflected in the two Orders. The majority opinion was that the two countries could intervene in the proceedings and be welcomed by the Court. The purpose of this separate opinion is, therefore, to clarify a specific point of law: the Court should accept these interventions by way of a judgment. It is already clear from the material in the case file that this intervention was not optional in nature. The Court had to rule on the substance, *a priori* and by interlocutory decision with regard to the interests at stake.[7]

5. We shall then examine the questions raised by the order (I.), before going on to review the state of the law as it relates to a judgment at the end of the intervention (II).

I. Status of the questions raised by the Order

6. The first question put to the Court was the designation of the proceedings relating to the decision for intervention, and whose conceptual scope would best reflect the Court's position. The

5 He is the national President of the Convention of People's Party in Ghana.

6 On the following dates, respectively: Benin, 22August 2014; Burkina Faso, 25January 200; Côte d'Ivoire, 25 January 2004; Ghana, 25 January 2004; Mali, 25January 2004; Malawi, 9 September 2008; Tanzania, 29 March 2010; Tunisia, 21 August 2007

7 This does not include an intervention in an advisory case or of the nature of an amicus curiae brief. Hervé Ascensio, Amicus curiae before international jurisdictions, ***RGDIP***, 2001, pp. 905 s.

indication here was that this was not a question of pure semantics.

i. Beyond the dilemma of semantics

7. There was an assumption that we were faced with a semantic choice between two concepts, that of "order" and that of "judgment", without appreciating their substance. However, judicial practice adequately dictates the use of these concepts, unless they are defined otherwise.

8. The identification of the rights contained in "third party intervention" in international litigation is an issue that is "as old as Methuselah", and is a complex one. Judge Rony Abraham wondered whether the institution conferred on:

"Third party states a right to intervene in a trial, or, on the contrary, grants them a mere option which they may request to exercise, but only with authorisation of a discretionary nature that the Court may or may not decide to grant them"[8]

The various and sometimes contradictory interpretations that have followed have focused on both substance and semantics.

9. For some reason, perhaps, the Court does not explain, why it refers to the document by which it received the intervention of Mauritius and the SADR as an "order for intervention". It is by a Judgment that this Court should have ruled on the said applications. In the legal world, it is customary to call "a spade a spade" and "apricots are not to be confused with tomatoes". Words definitely have a meaning. Judge Ago recalled in one of his captivating writings that:

" (…) the most correct use of terms, i.e. the one which, either because of its link with the etymological origin of the term or especially because it corresponds to common and traditional usage, is most suitable to facilitate understanding and avoid misunderstandings".[9]

10. The Court should have used the established instrument, namely, ruling by way of a judgment or in the form of a decree. This is not mere rhetoric. The parties to a conflict are in conflict because of interests. They represent opposing views and arguments out of interest. This is, moreover, what is meant by the famous phrase by the Hague Court found in the decision on *Mavrommatis Palestine*

8 He added " The debate is obscured, however, by the fact that the notion of a "right" (to intervene) is ambiguous and, according to how that notion is understood, it is possible to argue both in favour of and, on the contrary, against the existence of such a right, without those arguments necessarily contradicting one another." v Abraham (R.), Dissenting Opinion, Intervention Judgment, Application by Honduras, 4 May 2011.

9 Ago (R.), *Droit positif et droit international*, *AFDI*, 1957, pp. 14-62

and Jerusalem Concessions:
"An international dispute is a disagreement on a point of fact or of law, a conflict of legal views or of interests between two people"[10]

11. This is the definition of an international dispute, whatever its nature. It is, at least *prima facie*, a view that the Court has of the interests involved in considering an application for intervention and in making its decision, which is not covered by an order in the international judicial tradition. This has been endorsed by the Court in the more than 100 orders it has issued to date. Orders for provisional measures issued by the Court do not presume interests. They do not have the force of *res judicata* in the main proceedings. The phrase is well known. It appears in all the reasons for orders of provisional measures issued by the Court, namely:
"The Court specifies that this Order is necessarily provisional and does not in any way prejudge the findings the Court might make as regards its jurisdiction, admissibility of the Application and the merits of this matter."[11]

12. Paradoxically, through the Order of 4 July 2011 permitting Greece to intervene in the case of *Jurisdictional Immunities of the State, Germany v Italy,* the International Court of Justice itself was able to create the impression that an order could cover the important subject of intervention. The reason for the order was that the court had to decide and order the limits of the intervention in this particular case. The court authorized it but at the same time circumscribed the scope of the intervention. The Greek application was limited.

13. The Court stated as much right from the second "whereas clause" of the Order:
"Whereas, in its Application, the Hellenic Republic […] states that "its intention is to solely intervene in the aspect of the procedure relating to judgments rendered by its own (domestic Greek) Tribunals and Courts on occurrences during World War II and enforced (exequatur) by the Italian Courts".[12]

This restriction seemed to justify the order.

10 PCIJ, *Mavrommatis Concessions in Palestine and Jerusalem*, *Greece v United Kingdom*, ICJ, 30 August 1924 and 26 March 1925.

11 See, in particular, AfCHPR, *Sébastien Germain Ajavon Order,* 7 December 2018, § 47; see also: "For the avoidance of doubt, this Order is provisional in nature and in no way prejudges the Court's conclusions on its jurisdiction, admissibility and the merits of the Application instituting proceedings", in AfCHPR, *Guillaume Kigbafori Soro v Cote d'Ivoire*, 15 September 2020, § 35

12 ICJ, *Jurisdictional Immunities of the State (Germany v Italy), application, to intervene, order of 4 July 2011,*§ 2.

14. I further submit that, although the order was a judicial document of the Court,[13] it was not sufficient reason to issue the interlocutory ruling which is more of a judgment of the Court. The question raised is therefore not merely semantic; the applications submitted are on the merits, and the Court is not required to rule on them at this stage. This is the meaning of the applicable ordinary law.

ii. Orders are inappropriate and contrary to the ordinary law of intervention

15. African human rights law cannot deviate from the legal bases established for this intervention mechanism. Third party intervention is governed by the provisions of the Protocol establishing the African Court, as explained further here below (see *infra*, § 20 et seq.).

16. It can be said in brief that the same is true of the European system. Article 36 of the European Convention[14] provides for third party intervention. The first paragraph states in particular that:

"In all cases before a Chamber or the Grand Chamber, a High Contracting Party whose national is an applicant may submit written comments and take part in hearings."[15]

17. This is a right that the Contracting Parties and the Commissioner for Human Rights derive from Protocol No. 14, which is incorporated into the Convention. It is enshrined in abundant case law.[16] One may also recall the case concerning seventeen asylum seekers and four families of Albanian, Bosnian and Kosovar nationals accompanied by children aged between one and eleven years at the time. They complained under Article 3 of the Convention that for several months, they had been accommodated by the French authorities in inhuman and degrading conditions, in a camp made of tents and located in a car park (...), and that they had not received material and financial support provided for by

13 Rule 68 of the new Rules of Court, 25 September 2020: "In the exercise of judicial functions, the Court will render its decisions in the form of a judgment, ruling, order, opinion, instruction, direction or any other form of pronouncement as the Court deems necessary. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950. Introduced by Art. 13 of Protocol No. 14 of 13 May 2004.

14 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

15 Introduced by Art. 13 of Protocol no 14 of 13 May 2004.

16 For example, the Armenian Government, which exercised its right to intervene under Article 36 § 1 of the Convention, was represented by its Agent, Mr G. Kostanyan.

the national law.[17] The alleged violations were dismissed, but the Court accepted the applications for intervention by human rights organisations. On the basis of Article 13, the Section President in the instant case authorized the observations received from the respondent government and those submitted in reply by the applicants, as well as the comments received on 12 November 2013 from non-governmental organisations, the *Comité Inter-Mouvements Auprès des Evacués* (CIMADE), the *Groupe d'information et de soutien des immigrés* (GISTI) and the National Human Rights Advisory Commission (NHRAC). This is confirmed by the various rulings. It is the practical meaning of the provisions of the aforementioned 2010 European protocol.

18. The Inter-American Convention on Human Rights[18] provides for automatic intervention in pending cases. It states, inter alia, that: "The Commission shall appear in all cases before the Court." (Article 57 of the Convention).

19. It follows from these examples and the state of the applicable law that the African Court had only one possibility with regard to the cases in question: to rule collegially on the application of the provisions of Article 5.2 of the Protocol[19] by taking a full decision on the applications for intervention by the two applicants, the Republic of Mauritius and the SADR. This is the appropriate judgment that would take account of the interests at stake and the state of the applicable law.

II. State of the applicable law, a decision authorizing intervention

20. On the one hand is the law applicable by this Court and, on the other, the elements that are peculiar to the case. Contrary to its usual litigation that is strictly confined to international human rights law, the pending case is interesting in terms of rights of the States – the *Western Sahara*[20] dispute in particular - which

17 ECHR, ***B.G et al v France***, 10 September 2020.

18 Adopted in San José, Costa Rica, on 22 November 1969

19 Restated in Rule 39 of the Rules of Procedure of the Court: "In accordance with Article 5(2) of the Protocol, a State Party which has an interest in a case may submit a request to the Court to be permitted to join in accordance with the procedure established under Rule 61 of these Rules.

20 ***Western Sahara, ICJ, Order***, 22 May 1975; ***Avis consultatif***, 16 October 1975, ***Rec.***,p.6 ; Chappez (J.), ***RGDIP***, 1976, p.1132; Condorelli (L.), ***Cta.I.***1978, p.396; Flory (M.), ***AFDI***, 1975, p.253; Janis (M. W), ***Harvard ILJ***, 1976, p.609; Prévost (J.-F), ***JDI***, 1976, p.831; Shwa (M.), ***BYbIL***, 1978, p.118.

underlies Mr. Bernard Anbataayela Mornah's application.

21. The Armand Guehi Case of 2015 set a precedent at the African Court. It however provides a different solution from the one the Court opted for.

i. The Protocol establishing the Court and the Rules of Court providing for a judgement for intervention

22. States which consider that they have an interest in a case may submit an application to the Court for leave to intervene, in accordance with the above-mentioned provisions of the Protocol. It is not specified how the Court will deal with such an application. Nor are the Rules of Procedure precise enough.

23. Yet, seven paragraphs are devoted to this issue in Article 61 of the Rules. The first paragraph recalls that under Article 5, paragraph 2 States Parties have the right to intervene. In the second paragraph, the possibility of intervention is, rather singularly, extended to "any other person" having an interest in a case. It is not certain whether this was intended by the Protocol. The third paragraph lists the constituent elements of the application,[21] while the fourth paragraph basically sets a time-limit for the submission of the application, which is before the closure of the written proceedings. The parties are informed of this (paragraph 5) and may submit observations. It is paragraph 6 which does not seem to specify the nature of the proceedings through which the Court must interpret its decision. It simply states that:

"Where the Court rules that the Application is admissible, it shall fix a time limit within which the intervening party shall submit its written observations. Such submissions shall be forwarded by the Registrar to the parties to the case, who may file written submissions in reply within a deadline set by the Court."[22]

24. The Rule concludes that the intervening party has the right to submit observations on the subject of the intervention during the hearing, if the Court decides to hold one (paragraph 7). It follows that both the treaty law establishing the Court and secondary legislation (the Rules) do not specify the nature and scope of the proceedings authorising a State to intervene. It is understandable

21 Article 61, paragraph 3 of the Rules: " An Application to intervene shall indicate: a) the names and addresses of the Applicant or his/her representatives, if any; b) the Applicant's interest in the case; c) the purpose of the intervention; and d) a list of all supporting documents.

22 Rule 61, paragraph 6 of the Rules of Court, 25 September 2020.

that the Court should be able to give an answer to this question.

25. The Application of the Republic of Mauritius[23] set the Court on the right track in two respects: (a) This application for leave to intervene, which is in line with the present provisions of Rule 61 of the Rules of the Court is in the form of a discussion, and (b) it speaks to the merits of the case:

"As the International Court of Justice (ICJ) stressed in its Advisory Opinion of 25 February 2019 on the Legal Effects of the Separation of the Chagos Archipelago from Mauritius in 1965, respect for the right to self-determination is an obligation *erga omnes.* All States have a legal interest in protecting that right."

26. The Saharawi Republic in its application stated that:

"Since the substance of the issues raised in the application before the Honourable Court mainly concerns our country, the Sahrawi Arab Democratic Republic has a primary interest in joining the case and following the proceedings thereof."

27. Arguments for intervention were therefore formulated and the Court had to assess them in full by means of a judgment. The solution in the Armand Guehi case, which set a precedent, appears to be only a compromise.

ii. The middle-ground solution in the Armand Guehi decision of 2015

28. There is a precedent in the case law of the Court. The Court did not want to proceed in the same way. The precedent concerns the *Armand Guehi* case of 2015 in which the applicant, an Ivorian citizen, was found guilty of the murder of his wife and was sentenced to death by the Tanzanian courts.[24] However, he claimed before this Court that his rights had been violated in the national proceedings. The Court found that certain guarantees of a fair trial had been violated. The said violations had not, according to the Court, vitiated the decision of the Tanzanian courts regarding the applicant's guilt. The Court also dismissed his application for release. It had, however, awarded compensation for the violations found.

29. The Armand Guehi case is of interest with respect to the Mauritius and the SADR intervention orders because of the presence of a third State in the proceedings, namely, Côte d'Ivoire. As soon

23 Application for leave to intervene by the Republic of Mauritius, 31 August 2020, in 6 points.

24 State of the territory where he is held as a prisoner

as Côte d'Ivoire was informed of the current proceedings on 21 January 2015, it requested to intervene on 1 April 2015 in its capacity as the applicant's State of origin. It was authorised to bring a case as an intervening State in the proceedings. Côte d'Ivoire filed its observations on 16 May 2016 and 4 May 2017. The judgment was delivered on 7 December 2018.[25] The Court's approach in this case with regard to the third party intervener is a middle-ground approach that, on the one hand, avoids clearly defining the status and rights of the intervening State and, on the other hand, allows the third party to participate in the proceedings to a certain extent. No decision on the intervention was taken; the judgment of 7 December 2018 is unique.

30. This situation should lead the Court to issue a judgement authorising intervention and stating: a) the *ratione personae*, the status of the third party intervener in the proceedings and, b) the *ratione materiae*, circumscribing the litigious rights covered by the intervention. These aspects, which are not proceedings *per se*, are akin to them, and it is therefore desirable in proceedings to issue a separate judgment of the Court. The judicial reason for this will be to ensure clarity and distinction between the rights of each party. This is what the Algerian Judge, Bensaoula, who sat in this case, seemed to advocate in her separate opinion appended to the *Armand Guehi* single judgment:[26]

> "... at no point in the judgment does it appear that the Court responded to those requests, which, in my respectful view, constitutes a procedural irregularity both with regard to the intervening State to declare its application for intervention admissible, and on the merits of its request approving the applicant's allegations, even if only by considering them as supported by the Court in its decision on the applicant's requests because similar to those of the intervening State."[27].

31. Although I approve of the operative part of the two intervention orders of Mauritius and the Sahrawi Republic, I however note that they perpetuate a lack of clarity already introduced by the 2015 *Guehi* case law. The institution of intervention appears to be a delicate matter in international litigation, and even more so when it applies to international human rights law. In a general reflection, one may wonder about the nature of the rights that an

25 AfCHPR, *Armand Guehi v Tanzania – Cote d'Ivoire intervening State*, 7 December 2018.

26 An Order dated 18 March 2016 granting provisional measures was issued by the Court. It stayed the execution of the death sentence.

27 Judge Bensaoula, Separate Opinion, AfCPHR, *Armand Guehi,* see also *2 RJCA*, vol. 2, 2017-2018, p. 493.

intervention by a third party - be it a State or an individual - could cover in the field of human rights. The Court will no doubt give its decision on the merits.

32. However, still on the issue of delineation, the Court refrains from analysing and exploring the already known status of non-party intervener, which requires setting a framework. On 13 September 1990, in the Land, Island and Maritime Frontiers Case,[28] the International Court of Justice granted Nicaragua leave to intervene. The purpose of Nicaragua's intervention was to inform the Court about the rights at issue in the dispute. The Court in The Hague held that:

"…the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party."[29]

33. Having been informed of the pleadings submitted by El Salvador and Honduras, Nicaragua considered that it had an interest of a legal nature that could be affected by the ruling in the case. The Court allowed Nicaragua to submit a written declaration and El Salvador and Honduras to submit written observations on the declaration. Nicaragua was then asked to make oral submissions as a *non-party in the proceedings*. These are some of the possibilities offered by the applications for intervention by Mauritius and the SADR, which the Court could exploit.

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34. Legal theory may have created the impression that the institution of intervention "had seven lives".[30] In its orders on Mauritius and the SADR, the African Court may have found the eighth one... This last life seems to have no future because, when faced with such a reasoned application for intervention, the Court must, *volens nolens*, rule on the interests at stake. It will have to deliver a judgment.

28 ICJ, Land, Island and Maritime Frontier Dispute (*El Salvador v Honduras*), Application for permission to Intervene, Judgment, 13 December 1990, Reports, 1990, p. 92.

29 *Idem*, see § 100 and 101.

30 Patrick (J.), *L'intervention devant la Cour internationale de Justice à la lumière des décisions rendues en 2011: lente asphyxie ou résurrection?* AFDI, 2011, p. 213.

35. It would no doubt be considered inappropriate to order a *subject of law to intervene* in proceedings, except for reasons of parochial legalism.