# Guehi v Tanzania (merits and reparations) (2018) 2 AfCLR 477

Application 001/2015, *Armand Guehi v United Republic of Tanzania (Republic of Côte d'Ivoire intervening)*

Judgment, 7 December 2018. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ORE

The Applicant, an Ivorian citizen, was convicted and sentenced to death for the murder of his wife. He brought this Application claiming a violation of his rights as a result of his detention and trial. The Court held that some fair trial guarantees had been violated but that the reparations requested by the Applicant were not in line with the violations found. The Court awarded some monetary compensation for the violations established.

**Jurisdiction** (conformity of domestic proceedings with Charter, 33; consular assistance, 37, 38)

**Admissibility** (exhaustion of local remedies, fair trial guarantees, 50, extraordinary remedy, 51; submission within reasonable time, 56)

**Fair trial** (defence, interpretation, 73, 75-78; consular assistance, 95, 96; evidence, 105-111; trial within reasonable time, 124)

**Cruel, inhuman or degrading treatment** (burden of proof, 132-136)

**Reparations** (quashing of conviction, 163, release, 164, 165; compensation, 178-183, 186, 189; guarantees for non-repetition; publication of judgment, 195)

**Costs** (pro bono counsel, 200; supporting documents, 203)

Separate Opinion: BENSAOULA

**Procedure** (intervention by third party state, 13-15)

## I. The Parties

**1.** The Applicant, Armand Guehi, is a national of the Republic of Côte d'Ivoire. He was sentenced to death for the murder of his wife and is currently detained at the Arusha Central Prison, United Republic of Tanzania.

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

Governmental Organisations.

**3.** In accordance with Article 5(2) of the Protocol as well as Rules 33(2) and 53 of the Rules, the Republic of Côte d'Ivoire (hereinafter referred to as the "Intervening State") was permitted to join.

## II. Subject of the Application

### A. Facts of the matter

**4.** The Applicant moved to Tanzania on 1 May 2004 as a dependant of his wife, an Ivorian citizen, then working for the International Criminal Tribunal for Rwanda (hereinafter referred to as "ICTR"). The Applicant was also undertaking an internship at the ICTR.

**5.** On 6 October 2005, the Applicant was arrested by security officers of the ICTR in connection with his wife's disappearance. He was handed over to local police and detained. On 18 October 2005, he was charged with the murder of his wife before the High Court of Tanzania at Moshi.

**6.** On 30 March 2010, he was found guilty, convicted and sentenced to death. He appealed to the Court of Appeal of Tanzania, which on 28 February 2014, dismissed the appeal.

**7.** On 15 April 2014, the Applicant filed a notice of motion for review of the Court of Appeal's decision.

**8.** On 6 January 2015, while the request for review awaited hearing in the Court of Appeal, the Applicant filed Application No. 001 of 2015 before this Court alleging that several of his rights were violated in the course of the domestic proceedings.

### B. Alleged violations

**9.** The Applicant alleges that:

"i. Save for the trial in 2010, the Respondent State did not provide him with language assistance at critical stages of the case such as when he was interviewed and recorded his statement at the police station while at the time of his arrest he only properly spoke and understood French.

ii. The Respondent State did not ensure or conduct a proper, fair and professional and diligent investigation of the matter. Consequently, several pieces of evidence which could have led to other suspects besides him were not investigated or were simply destroyed in complicity with the investigation officers. Had these pieces of evidence been investigated or presented to the High Court, they

would have proved that he was in fact not the perpetrator of the crime.

iii. His right to presumption of innocence was "savagely ignored" in this case. There was a clear presumption of guilt which breached his right to a fair trial.

iv. The Respondent State did not provide him with an attorney at the time of recording his statement at the police even though he requested for one. Consequently, the statement recorded was manipulated and used against him during the trial.

v. The Respondent State never facilitated consular assistance.

vi. After his arrest, the Respondent State failed to secure his properties in his house in Arusha and, as a result, the said properties were arbitrary disposed of.

vii. He was arrested in October 2005, but it was not until 2010 that he was actually convicted, that is after a period of almost five years. The whole trial process was unduly prolonged, which constitutes an infringement of his right to be tried within a reasonable time.

viii. He has suffered a lot of mental anguish as a result of the initial arrest, charges being dropped and subsequently another case being opened against him.

ix. During his detention, he was subjected to inhuman and degrading treatment."

## III. Summary of procedure before the Court

**10.** The Registry received the Application on 6 January 2015. By notices dated 8 January 2015 and 20 January 2015 respectively, the Registry acknowledged receipt of the Application and informed the Applicant of its registration in accordance with Rule 36 of the Rules.

**11.** On 20 January 2015, the Registry served the Application on the Respondent State, the African Commission on Human and Peoples' Rights and the Chairperson of the African Union Commission, as prescribed by Rule 35(2) and (3) of the Rules.

**12.** On 21 January 2015, and in accordance with Article 5(1)(d) and 5(2) of the Protocol as well as Rules 33(1)(d) and 53 of the Rules, the Registry served the Application on the Republic of Côte d'Ivoire as the Applicant's state of origin for purposes of possible intervention. The Republic of Côte d'Ivoire, which requested for intervention on 1 April 2015, was allowed to join the case and filed its observations and

responses to the submissions made by the Parties on 16 May 2016 and 4 May 2017 respectively.

**13.** On the Court's direction, by a notice dated 17 March 2015 and in line with Rule 31 of the Rules, the Registry requested the Pan-African Lawyers' Union (PALU) to assist the Applicant who indicated that he did not have a legal representative. On 16 June 2015, PALU agreed to provide the requested support.

**14.** On their request, Professor Christof Heyns (University of Pretoria) and Professor Sandra Babcock (Cornell University) were granted leave to participate as *amici curiae* by notice dated 29 November 2017 in accordance with Article 26(2) of the Protocol, Rules 45 and 46 of the Rules as well as Directions 42 to 47 of the Practice Directions.

**15.** In accordance with Rule 36(1) of the Rules, the Respondent State was duly served with the Application and all the submissions of the Applicant, Intervening State, and Amici, and was granted the statutory time and subsequent extensions of time as applicable to file its responses. All Parties were similarly served with the pleadings and annexures, and duly allowed to file their observations.

**16.** On 18 March 2016, in accordance with Rule 51(1) of the Rules, the Court issued an Order for provisional measures directing the Respondent State to suspend the execution of the death sentence on the Applicant pending determination of the matter on the merits. On 29 March 2016, the Registry notified the Parties and other relevant entities of the Order as prescribed under Rule 51(3) of the Rules. On 23 January 2017, the Respondent State filed its response to the Order as part of its observations to the Intervening State's submissions. On 15 February 2017, the Registry acknowledged receipt of the response with copy to the Parties.

**17.** By notices dated 22 July 2016 and in accordance with Rule 45(2) of the Rules, the Court sought a legal opinion on the issue of death penalty in Africa from Penal Reform International, Legal and Human Rights Centre - Tanzania, the Death Penalty Project and the African Commission on Human and Peoples' Rights. Only the Legal and Human Rights Centre made a submission.

**18.** On 16 April 2018, the Registry informed the Parties that the matter was set down for public hearing on 10 May 2018. The Applicant and Respondent State were represented at the public hearing during which they presented their pleadings, made oral submissions and responded to questions put to them by Judges of the Court.

**19.** On 22 May 2018 and in accordance with Rule 48(2) of the Rules, the Registry served the verbatim records of the hearing on the Parties. On the same date, the Registry further requested the Parties to submit their oral observations in writing and file their submissions on reparations. On 18 June 2018, the Applicant filed his submissions

on reparations, which were served on the Respondent State on 21 June 2018 for response within 30 days. At the expiry of that time and in accordance with Rule 37 of the Rules, the Court *suo motu* granted the Respondent State an extension of fifteen (15) days to submit on reparations failing which the matter would be considered based on pleadings on file.

**20.** On 16 August 2018, the Registry received the Respondent State's submissions on reparations together with a request for leave to submit the same. On 29 August 2018, the Registry informed the Respondent State that, in the interest of justice, the Court had decided to grant the leave sought. The Applicant and Intervening State were in copy of this notice and were served the said submissions for information.

## IV. Prayers of the Parties

**21.** In his Application, Reply and oral submissions, the Applicant prays the Court to:

"i. Declare that the Respondent State has violated his rights guaranteed under the African Charter, in particular Articles 1, 5, 7 and 14;

ii. Order that the conviction is quashed, the sentence is set aside, and his liberty is restored;

iii. Order the Respondent State to take immediate steps to remedy the violations;

iv. Order that he should be granted reparations;

v. Make any other orders or grant any remedies that it shall deem fit."

**22.** In its Responses to the Application and to the Intervening State's Application for intervention and substantive pleadings as well as in its oral pleadings, the Respondent State prays the Court to find that:

"i. The African Court has no jurisdiction to entertain this matter and the Application should be duly dismissed;

ii. The Application has not met the admissibility requirement under Rule 40(5) of the Rules of Court and should be declared inadmissible;

iii. The Application has not met the admissibility requirement under Rule 40(6) of the Rules and should be declared inadmissible;

iv. The Respondent State has not violated Article 5 of the Charter;

v. The Respondent State has not violated Article 7 of the Charter;

vi. The Respondent State has not violated Article 14 of the Charter;

vii. The Applicant's conviction is lawful;

viii. The Applicant must continue serving his sentence;

ix. The Application is dismissed for lack of merit;

x. The Applicant's request for reparations is dismissed;

xi. The Applicant must bear the costs of the Application;

xii. The Respondent State is entitled to any other remedies the Court may deem fit to grant."

**23.** In its Application for intervention and the substantive pleadings filed thereafter, the Intervening State prays the Court to order that:

"i. The Application has met the admissibility requirements and should be declared admissible;

ii. The Application to intervene has met the jurisdiction and admissibility requirements under Rules 35(3)(b) and 53 of the Rules;

iii. The Applicant's rights to a fair trial have been violated;

iv. The Applicant's execution must be stayed as a provisional measure."

## V. Jurisdiction

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

### A. Objections to material jurisdiction

**25.** The Respondent State avers that the Application is asking this Court to act as a tribunal of first instance given that the Applicant's allegations that his statement was taken in a language unknown to him and without the presence of his lawyer are being raised for the first time. According to the Respondent State, the Applicant should have raised these allegations during the trial proceedings or before the Court of Appeal.

**26.** During the public hearing, the Respondent State reiterated this argument and extended the same to the allegations that it arbitrarily disposed of the Applicant's property, never facilitated him with consular assistance and did not investigate several pieces of core evidence, which could have led to other suspects besides him.

**27.** The Respondent State further alleges that by asking this Court to quash the conviction, set aside the sentence and set him at liberty,

the Applicant is seeking to have the decision of the Court of Appeal of Tanzania overturned. According to the Respondent State, by examining these allegations, this Court would usurp the prerogative of the Court of Appeal, which duly concluded and finalised matters of evidence.

**28.** In his Reply, the Applicant contends that this Court is competent to deal with the matter as provided by relevant provisions of the Charter, the Protocol and case law of the Court.

**29.** At the public hearing, the Applicant reiterated the arguments made in his written pleadings on all aspects of jurisdiction. In response to the Respondent State's oral pleadings, the Applicant submitted that the Court is not being asked to act as an appellate court but to adjudicate on the fairness of the judicial process in light of the rights guaranteed in the Charter. In support of that submission, the Applicant referred to previous judgments of the Court including in the cases of *Alex Thomas*,[1] *Frank Omary*,[2] and *Kijiji Isiaga*[3] involving the Respondent State.

**30.** On its part, the Intervening State submits that "the Court has *prima facie* jurisdiction to deal with the Application" given that the Respondent State ratified the Charter, and the Protocol, deposited the required declaration and the Applicant alleges the violation of rights protected by various instruments to which the Respondent State is a party.

### i. Objection based on the allegation that the Court is being called to act as a court of first instance

**31.** The Court is of the view, with respect to whether it is called to act as a court of first instance, that, by virtue of Article 3 of the Protocol, it has material jurisdiction so long as "the Application alleges violations of provisions of international instruments to which the Respondent State is a party".[4] In the instant matter, the Applicant alleges violations of rights guaranteed in the Charter.

**32.** The Court therefore dismisses the Respondent State's objection on this point.

1 Application No. 005/2013. Judgment of 20/11/15, *Alex Thomas v United Republic of Tanzania (hereinafter referred to as "Alex Thomas v Tanzania")*.

2 Application No. 001/2012. Judgment of 03/06/16, *Frank David Omary and Others v United Republic of Tanzania*.

3 Application No. 032/2015. Judgment of 21/03/18, *Kijiji Isiaga v United Republic of Tanzania*.

4 See Application No. 006/2015. Judgment of 23/03/18, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania (hereinafter referred to as "Nguza Viking and Johnson Nguza v Tanzania")*, para 36.

### ii. Objection based on the allegation that the Court is being called to assume appellate jurisdiction

**33.** Regarding the question whether it would be exercising appellate jurisdiction by examining certain claims, which the Court of Appeal of Tanzania had already determined, this Court reiterates its position that it is not an appellate court with respect to decisions of national courts.[5] However, as it has previously held in the case of *Mohamed Abubakari v United Republic of Tanzania*, the Court restates that the fact that it is not an appellate court vis-à-vis domestic courts does not preclude it from assessing whether domestic proceedings were conducted in accordance with international standards set out in the Charter and other international human rights instruments ratified by the State concerned.[6] In the present case, the Applicant alleges the violation of his rights guaranteed in the Charter, which is a human rights instrument duly ratified by the Respondent State as earlier recalled.

**34.** In light of the above, the Court dismisses the Respondent State's objection on this point.

## B. Material jurisdiction regarding the alleged violation of the right to consular assistance

**35.** The Applicant alleges that the Respondent State violated his right to consular assistance provided for under Article 36(1)(b) and (c) of the Vienna Convention on Consular Relations (hereinafter referred to as "the VCCR") adopted on 22 April 1963. The Applicant specifically avers that, as a consequence, the Respondent State violated his right to a fair trial and, in particular, the rights to be assisted by an interpreter and to be represented by a lawyer.

**36.** Although the Respondent State did not raise an objection in relation to this point, the Court has to make a determination on whether it has jurisdiction to examine this allegation.

**37.** The Court notes in that respect that Article 36(1) of the VCCR to which the Respondent State became a party on 18 April 1977 provides

5 See Application No. 001/2013. Decision of 15/03/13, *Ernest Francis Mtingwi v Republic of Malawi*, para 14; *Alex Thomas v Tanzania*, paras 60-65; and *Nguza Viking and Johnson Nguza v Tanzania*, *op. cit.*, para 35.

6 See for instance, Application No. 007/2013. Judgment of 03/06/2016, *Mohamed Abubakari v United Republic of Tanzania (hereinafter referred to as "Mohamed Abubakari v Tanzania")*, para 29; and Application No. 003/2012. Judgment of 28/03/14, *Peter Joseph Chacha v United Republic of Tanzania*, para 114.

for consular assistance.[7] As reflected in the said provision, consular assistance touches on certain privileges whose purpose is to facilitate the enjoyment by individuals of their fair trial rights including the right to be assisted by an interpreter and a lawyer, which the Applicant alleges was violated in the present Application.

**38.** Given that the said right is also guaranteed under Article 7(1)(c) of the Charter read jointly with Article 14 of the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR")[8] to which the Respondent State became a party on 11 June 1976, the Court has jurisdiction to examine the Applicant's allegation based on the above mentioned provision of the Charter.

## C. Other aspects of jurisdiction

**39.** Considering that there is no indication on the record that it is not competent with respect to other aspects of jurisdiction, the Court holds that:

i. It has personal jurisdiction given that, as ascertained earlier, the Respondent State became a party to the Protocol and deposited the required declaration.

ii. It has temporal jurisdiction as the alleged violations occurred from 2010 and were continuing at the time the Application was filed in 2015, which is after the Respondent State became a party to the Protocol and deposited the declaration.

iii. It has territorial jurisdiction given that the alleged facts occurred within the territory of the Respondent State."

7 Article 36(1) reads as follows:

"1. With a view to facilitating the exercise of consular functions *relating to nationals* of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the *receiving State* shall, without delay, inform the consular post of the sending State if, within its consular district, *a national* of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. …;

(c) consular officers shall have the right to visit *a national* of the sending State *who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation*. …"

8 See *Mohamed Abubakari v Tanzania*, *op.cit.*, paras 137-138. See also, Application No. 012/2015. Judgment of 22/03/18, *Anudo Ochieng Anudo v United Republic of Tanzania*, paras 110-111.

**40.** In light of the foregoing, the Court finds that it has jurisdiction to hear this Application.

## VI. Admissibility of the Application

**41.** Pursuant to Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of … the admissibility of the Application in accordance with Articles 50 and 56 of the Charter, and 40 of these Rules".

**42.** Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

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

**43.** While the Parties do not dispute that some of the abovementioned requirements have been met, the Respondent State raises three objections relating respectively to the exhaustion of local remedies, the filing of the Application within a reasonable time and the late submission of the claim that the Applicant's detention was unfairly prolonged without charges being preferred.

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

### i. Objection based on the alleged failure to exhaust local remedies

**44.** The Respondent State avers that the Applicant did not exhaust local remedies with respect to the allegation that he was not accorded an interpreter during his interrogation by police. According to the Respondent State, while he could have done so, the Applicant did not raise this matter either for a trial within the trial, as a ground of appeal or as a basic rights enforcement claim during the trial as provided under the Basic Rights and Duties Enforcement Act. The Respondent State asserts that the basic rights enforcement remedy similarly applies to the Applicant's claim that his right to property was violated.

**45.** In its oral submissions, the Respondent State reiterated its written observations on the abovementioned issues and further contended that the Applicant could have raised before domestic courts his allegations concerning the defective statement taken by the police, key evidence that was not pursued and the lack of consular assistance.

**46.** It is also the Respondent State's contention that the review process initiated by the Applicant is evidence that he understood the said process as an available remedy, which he left pending and thus has not exhausted. During the hearing, the Respondent State stressed that the Applicant understood that the review process applied in his case and informed the Court that the hearing of the Applicant's application for review was scheduled for 18 July 2018.

**47.** In his Reply, the Applicant argues that "the failure to challenge the legality of any of the legal processes that took place in the first instance cannot be interpreted as resulting in the extinction of the Applicant's right to contest the said legality". The Applicant further contends that the provision for filing a basic rights enforcement action with respect to property does not in itself mean that the laws are observed. In support of that contention, he states that his arrest, followed by a lengthy trial process and lack of measures by the Respondent State to preserve his property, resulted in the loss of the said property.

**48.** In response to the Respondent State's contention that the review process is pending, the Applicant asserts that it is an extraordinary remedy, which, even if sought, would not change the fact that the Court of Appeal is the highest court of the land. The Applicant reiterated these arguments during his oral submissions.

**49.** The Intervening State submits that the Application meets the requirement of Article 56(5) of the Charter because the Court has

consistently ruled that the review process is an extraordinary remedy, which does not have to be exhausted.

**50.** The Court considers, with respect to whether it is asked to act as a court of first instance, that as it has held in the earlier mentioned case of *Alex Thomas v Tanzania*, the rights whose violation is alleged are part of a "bundle of rights and guarantees". As such, the domestic authorities had ample opportunity to address the related allegations even if they were not raised expressly by the Applicant during the proceedings that resulted in his conviction. In these circumstances, domestic remedies must be considered to have been exhausted.[9]

**51.** With respect to whether the Applicant should have completed the review process prior to filing the present Application, this Court has consistently held that, as it applies in the judicial system of the Respondent State, such process is an extraordinary remedy. It is therefore not a remedy that the Applicant is required to exhaust in the meaning of Article 56(5) of the Charter.[10]

**52.** As a consequence of the above, the Court dismisses the Respondent State's objections that the Applicant failed to exhaust local remedies by raising some issues for the first time before this Court and not awaiting completion of the review process before filing the present Application. The Court therefore finds that local remedies have been exhausted.

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

**53.** The Respondent State avers that this Application was filed eleven (11) months after exhaustion local remedies, which is not reasonable as per the decision of *Majuru v Zimbabwe*[11] where the African Commission applied the six-month standard of the European and Inter-American human rights conventions. The Respondent State reiterated this argument during the public hearing.

**54.** The Applicant does not address this issue specifically in his written submissions. In his oral submissions, the Applicant avers that the period of eleven (11) months should be considered as a reasonable time if assessed by the Court's approach, which is to deal with the issue

9 See *Alex Thomas v Tanzania, op. cit.*, paras 60-65; and Application 003/2015. Judgment of 28/09/2017, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania (hereinafter referred to as "Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania")*, para. 54.

10 See *Alex Thomas v Tanzania*, *ibid*; and *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania*, *op. cit.*, para 56.

11 *Michael Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008).

on a case-by-case basis. He further contends that, even though it is an extraordinary remedy, the Court should consider the fact that he tried to have the Court of Appeal's judgment reviewed. Finally, the Applicant avers that the fact that the Respondent State took a year to respond to the Application makes it inequitable to consider unreasonable the period of eleven (11) months within which the present Application was filed.

**55.** In its established case law, this Court has adopted a case-by-case approach to assessing the reasonableness of the time within which an Application is filed.[12] The Court notes that the Applicant filed the present Application on 6 January 2015 after the Court of Appeal delivered its judgment on 28 January 2014. The issue for determination is whether the period of eleven (11) months and nine (9) days that elapsed between the two events is reasonable.

**56.** This Court notes that, following the judgment of the Court of Appeal, the Applicant tried to have that judgment reviewed. In the Court's view, he was therefore at liberty to wait for some time before submitting the present Application. As the Court held in the case of *Nguza Viking and Johnson Nguza v Tanzania*, even if the review process is an extraordinary remedy, the time spent by the Applicant in attempting to exhaust the said remedy should be taken into account while assessing reasonableness within the meaning of Article 56(6) of the Charter.[13] As such, the time during which the Applicant attempted to have the Court of Appeal's judgment reviewed before filing this Application cannot be said to be unreasonable.

**57.** The Court therefore finds that the Application was filed within a reasonable time. As a consequence, the Respondent State's objection is dismissed.

### iii. Objection based on the late submission of the claim related to the unfairly prolonged detention without charges preferred

**58.** In its submissions on reparations, the Respondent State disputes the Applicant's claim of being detained for a long period of time without charges being preferred and being detained unfairly for two (2) years without proceedings. According to the Respondent State, the Court should not consider this claim while dealing with the

12 See Application No. 013/2011. Preliminary Ruling of 28/06/2013, *Norbert Zongo and Others v Burkina Faso*, para 121; and *Alex Thomas v Tanzania*, *op. cit.*, paras 73-74.

13 See *Nguza Viking and Johnson Nguza v Tanzania*, para 61.

reparations because it was not raised in the pleadings or argued during the public hearing.

**59.** The Court refers to the Applicant's Reply dated 16 May 2016, where the allegation of prolonged detention without charges is made as an additional claim on the merits.[14] This Reply was served on the representatives of Respondent State on 10 June 2016 by United Parcel Services Courier No. 2422. The Court further refers to the verbatim record of the public hearing held in this matter on 10 May 2018 where the Applicant submitted at length on this claim.[15] The Respondent State did not respond to or challenge the abovementioned submissions while it had the opportunity to do so prior to the hearing and also while addressing the Court during the hearing.[16]

**60.** In light of the above, the Court dismisses the Respondent State's objection on this point.

## B. Conditions of admissibility not in contention between the Parties

**61.** The Court notes that the conditions set out in Article 56 sub-Articles (1), (2), (3), (4) and (7) of the Charter regarding the identity of the Applicant, compatibility of the Application with the Constitutive Act of the African Union, the language used in the Application, the nature of evidence adduced, and the previous settlement of the case respectively are not in contention.

**62.** The Court further notes that the pleadings do not indicate that these conditions have not been met and therefore holds that the Application meets the requirements set out under those provisions.

**63.** As a consequence of the foregoing, the Court finds that the Application fulfils all the requirements set out under Article 56 of the Charter and accordingly declares the same admissible.

## VII. Merits

**64.** The Applicant alleges that the Respondent State violated his rights to a fair trial, consular assistance, property as well as his right not to be subjected to inhuman and degrading treatment. He also alleges

14 See Applicant's Reply, page 10, para 32.

15 See Verbatim Record of the African Court on Human and Peoples' Rights, Application No. 001/2015 *Armand Guehi v United Republic of Tanzania* (10 May 2018) pages 1640 to 1638. The Record was served on the Respondent State by a notice dated 22 May 2018.

16 See Verbatim Record, page 1632 and 1630 where the Respondent listed the issues to address the Court on, and those being raised for the first time.

that he suffered mental anguish.

## A. Alleged violation of the right to a fair trial

### i. The right to defence

**65.** The Court notes that some of the violations of fair trial rights alleged in the present Application relate to the right to defence. These are the alleged violations of the right to be assisted by an interpreter, the right to have access to a lawyer and the right to consular assistance. The relevant provision of the Charter with respect to the said rights is Article 7(1)(c), which provides that everyone has "The right to defence including the right to be defended by counsel of his choice".

### a. The right to be assisted by an interpreter

**66.** The Applicant alleges that the Respondent State did not provide him with an interpreter during his interview by the police where he made a statement, which was later used against him during the trial. He asserts that the lack of language assistance at a time he could only properly speak and understand French undermined his right to a fair trial.

**67.** The Applicant also avers that he expressed his language limitations to the court and requested an interpreter during the committal proceedings, which were conducted in a language he did not understand. He further contends that his failure to repeatedly point this out does not mean that the violation should be overlooked given that the Respondent State had an obligation to provide language assistance at all stages due to the gravity of the offence and the nature of the sentence he faced.

**68.** During the public hearing, Counsel for the Applicant reiterated these arguments and further submitted that the fact that the Applicant was able to follow part of the proceedings and pleaded not guilty did not mean that he understood English in a way that relieved the Respondent State from its obligation to provide an interpreter. Counsel averred that, had the Applicant been afforded language assistance in the four hours following his arrest, "he would not be in the situation he is in today" as he would have understood the reason for being detained, the extent of the accusations he was facing including their gravity, the existence of his right to have access to a lawyer of his choice to assist him in preparing his defence and the consequences of giving a statement to authorities that could later on be used against him.

**69.** The Applicant also claims to have raised the issue of his

statement being tampered with because he noticed the statement produced in court had fewer pages than the one he made.

**70.** It is the Respondent State's contention that the Applicant was "duly conversant" in the English language and that he never raised his language limitations. The Respondent State asserts that the Applicant faced a language barrier only during the trial when witnesses testified in Kiswahili and he was provided with an interpreter.

**71.** According to the Respondent State, the Applicant was represented at the preliminary hearing and his lawyer should have informed the court if the Applicant had been unable to understand the proceedings.

**72.** The Respondent State avers that an interpreter was not required during the committal proceedings or during the preliminary hearing because they were conducted in English, which the Applicant never indicated he did not understand. The Respondent State submits that, during the committal proceedings, the accused person is not required to make a plea, but the charges are only read over and explained to him. The Respondent State stresses that the actual plea is made during the preliminary hearing and that, in the instant case, the record of proceedings shows on pages 1 and 2 that the Applicant's lawyer was then present, the charge of murder was read over, and he pleaded guilty without raising any issue to the court. The Respondent State adds that documents of the hearing were served on the Applicant and his Counsel who accepted some and rejected others, did not raise any issue with the conditions in which the statement was given, and even signed the memorandum of undisputed facts. In its oral submissions, the Respondent State reiterated and elaborated the same arguments advanced in the written pleadings.

**73.** The Court notes that, even though Article 7(1)(c) of the Charter referred to earlier does not expressly provide for the right to be assisted by an interpreter, it may be interpreted in the light of Article 14(3)(a) of the ICCPR, which provides that "… everyone shall be entitled to … (a) be promptly informed and in detail in a language which he understands of the nature and cause of the charge against him; and (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court". It is evident from a joint reading of the two provisions that every accused person has the right to an interpreter.

**74.** The Respondent State does not dispute the fact that the Applicant was not assisted by an interpreter during the police interview and committal proceedings which were both conducted in English. The fact being disputed is whether the Applicant understood English at the time of these processes and if the fact that he was not provided an interpreter affected his right to a fair trial at the above-mentioned stages of the process.

**75.** The Court considers that the Applicant's ability to communicate in English should be assessed against his behaviour and the purpose of each of the processes referred to. The Applicant does not dispute the fact that the purpose of being assisted by an interpreter during the police interview, committal proceedings and preliminary hearing is to understand the charges being brought against him and be able to plead and take part in the process accordingly. The Court is of the view that, at such stages of the proceedings, the said purpose does not require one to have an outstanding mastery of the English language.

**76.** In that respect, the Court first notes that the Applicant himself indicates in his statement given to the police in the English language that, at the time of arrest, he had been an intern at the ICTR for over a year. Secondly, the statement reveals that the Applicant was expressly told that he was being interrogated in relation to the murder of his wife. To that effect, he gave a statement of over fifteen (15) pages in English in which he expressly responded that he understood the purpose of the interrogation and did not need the assistance of anyone to give it. He also read through the statement, confirmed the contents thereof and signed it. Finally, on several occasions, during the committal proceedings and the preliminary hearing, the Applicant who was then assisted by a lawyer, was read over the same charges, pleaded guilty, did not raise any issue regarding his statement and signed the outcome of the processes together with his lawyer after these were served on them.

**77.** Against these undisputed facts, the reasonable conclusion is that the Applicant had the minimum understanding required to make decisions on whether and how he should participate in the proceedings and possibly object to any part thereof. This Court is of the view that by not objecting, the Applicant understood the processes and agreed to the manner in which they were being conducted. The Applicant did not point to any part of the proceedings where he expressly objected and demanded the presence of an interpreter. During the trial, he only pointed to the fact that the statement had eleven (11) pages instead of five (5). However, the Applicant in the same paragraph stated that he recognised the statement as his and signed it.[17]

**78.** In light of the above, the Court finds that the lack of provision of an interpreter during the concerned proceedings did not affect the Applicant's ability to defend himself.

**79.** The Court consequently dismisses the allegation of violation of Article 7(1)(c) of the Charter with regard to the right to be assisted by

17 See Record of Proceedings, High Court of Tanzania at Moshi, Criminal Case No. 40 of 2007, page 129, lines 20 to 24.

an interpreter.

## b. The right to have access to a lawyer

**80.** The Applicant claims that he was not provided with a lawyer during the recording of his police statement even though he requested one. This position was reiterated during the public hearing and the Applicant averred that he was detained for nine (9) days before being informed of his right to a lawyer of his choice, this being contrary to Article 7(1)(c) of the Charter.

**81.** Without challenging the Applicant's allegation that he was not allowed to communicate with a lawyer during the police interview, the Respondent State avers that, under Section 54(1) and (2) of its Criminal Procedure Act, "upon request by a person who is under restraint", the police should facilitate "communication with a lawyer, a relative or friend of his choice". However, such request may be refused regarding a relative or friend if the police "believes on reasonable grounds that it is necessary to prevent the person under restraint from communicating … for the purpose of preventing the escape of an accomplice … or the loss, destruction or fabrication of evidence relating to the offence".[18]

**82.** In its oral submissions, the Respondent State asserts that the Applicant was presented with the opportunity to be represented by a lawyer.

**83.** The Intervening State contends that persons facing criminal charges must be provided legal assistance at all times during the proceedings, including at the first interrogation, and failure to do so violates the right to a fair trial. The Intervening State supports its contention by referring to the judgment of the European Court of Human Rights in the matter of *Abdulgafur Batmaz v Turkey*.[19]

**84.** The Court recalls, with respect to whether the Applicant was allowed to communicate with a lawyer, that, generally, access to a lawyer is a fundamental right especially in a case where a person is accused of murder and faces the death sentence.[20]

**85.** The Court refers to the facts as earlier established regarding the allegation that language assistance was not provided during the police interrogation. According to these facts, the Applicant did not demand the assistance of a lawyer before or while giving his statement despite the fact that the police asked him whether he wished to do so in the

18 Criminal Procedure Act [CAP 20 RE 2002], Section 54(1) and (2).

19 *Abdulgafur Batmaz v Turkey*, Application No. 44023/09 Judgment (Merits and Just Satisfaction) ECHR (24 May 2016).

20 *Mohamed Abubakari v Tanzania*, *op. cit.*, para 121.

presence of any person of his choice. Furthermore, the record of the proceedings in the High Court shows that the Applicant acknowledged meeting with a lawyer on 6 October 2005, which was the day of his arrest and this meeting was before he gave his statement. He also requested and was given a phone and spoke to a lawyer.[21]

**86.** As a consequence, the Court dismisses the allegation of violation of Article 7(1)(c) of the Charter with respect to the right to have access to a lawyer.

### c. The right to consular assistance

**87.** The Applicant alleges that the Respondent State did not facilitate consular assistance, which he avers should not be confused with legal assistance.

**88.** In response to the Court's enquiry into the kind of assistance he expected, the Applicant referred to Article 36(1)(b) and (c) of the VCCR as quoted earlier, and avers that once he requested consular assistance, it was the Respondent State's obligation to ensure he was granted the same, timely and effectively. He alleges that the failure to do so constituted an infringement of his right to a fair trial. It is the Applicant's contention that, had the Respondent State provided consular assistance, he would have had the opportunity to insist on access to an interpreter and legal representation.

**89.** The Applicant reiterates these arguments in his oral submissions and further contends that the VCCR is customary international law and that it is therefore irrelevant that the Intervening State, the Republic of Côte d'Ivoire, is not a party to it. According to the Applicant, accessing consular assistance was critical given the charges he faced and the fact that he was not conversant with the Respondent State's judicial system.

**90.** In its response, the Respondent State asserts that the Applicant had access to counsel during his preliminary hearing, trial and appeal.

**91.** During the public hearing, the Respondent State averred that it was not under the obligation to provide consular assistance given that it does not have any agreement with the Applicant's state of origin, which is Côte d'Ivoire, to that effect. It is the Respondent State's contention that there was no sending state as provided under Article 36 of the VCCR since the Applicant resided in Tanzania under his wife's consular protection as granted by the ICTR. The Respondent State considers that, as such, it did not have an obligation to inform Côte d'Ivoire of the

21 See Record of Proceedings, High Court of Tanzania at Moshi, Criminal Case No 40 of 2007, page 134.

Applicant's arrest as doing so was the ICTR's responsibility.

**92.** The Intervening State submits that, based on its connection with the Applicant as one of its nationals, it is entitled to ensure that his fair trial rights are respected. It alleges that the Respondent State had the duty to guarantee the conditions for a fair and equitable trial and facilitate consular assistance.

**93.** The *Amici Curiae* submit that, in accordance with the VCCR and various international human rights instruments, the right to consular notification is of the utmost importance in cases were foreign nationals face the death penalty, and that related fair trial rights must be afforded without delay. The Amici refer to the concurring opinion of Judge Sergio Ramirez in the Inter-American Court of Human Right's decision interpreting the scope of Article 36 of the VCCR,[22] to the Mexican Supreme Court's decision in the case of *Florence Cassez*[23] to highlight the difficulties that foreign nationals face both from language and cultural standpoints. They also refer to decisions of the United States Court of Appeals for the 7th Circuit,[24] the High Court of Malawi[25] and the Supreme Federal Court of Brazil[26] which have all stressed the fundamental character of consular notification and the enjoyment of related fair trial rights.

**94.** According to the *Amici*, the failure to respect the consular rights of a capital sentence defendant makes any subsequent execution an arbitrary deprivation of life that is contrary to Article 4 of the Charter. To that effect they refer to the African Commission's General Comment on the right to life.[27] The Amici aver that such violation requires substantial remedies notwithstanding the failure to raise that issue during the trial.[28]

**95.** The Court notes that, as it is stated in his own submissions and those of the Intervening State, the Applicant's claim is that the lack of consular assistance provided under Article 36(1) of the VCCR

22 Advisory Opinion CC – 16/99 IACHR (1 October 1999) 'The right to information on consular assistance in the framework of the guarantees of the due process of law'.

23 Amparo Directo en Revision 517/ 2011 *Florence Marie Cassez Crepin, Pleno de la Suprema Corte de Justicia*, pages 20-22.

24 *Osagiede v United States*.

25 High Court of Malawi, Sentence rehearing Case No 25 of 2017 (23 June 2017): *The Republic v Lameck Bendawe Phiri*.

26 S.T.F., Ext. No. 954, Relator: Joaquim Barbosa, 17.05.2005; 98 DIARIO DA JUSTICIA 24.05.2005 §para 75.

27 Other cases cited to that effect are: *Mansaraj and Others v Sierra Leone*, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, *Yasseen & Thomas v Guyana*.

28 *Avena and Other Mexican Nationals. (Mexico v United States of America*), Judgment, I.C.J. Reports 2004, p. 12, 121.

deprived him of the possibility to enjoy assistance from his country with respect to the protection of his fair trial rights. The Court further notes the Applicant specifically mentioned the rights to be assisted by an interpreter and a lawyer.

**96.** As this Court has found earlier, these rights accruing from the provision of Article 36(1) of the VCCR are also protected under Article 7(1)(c) of the Charter. Having also concluded that the related claims made under Article 7(1)(c) of the Charter are unfounded, the Court does not find it necessary to examine the same under the VCCR.

### ii. The allegation that the investigation was improper and insufficient

**97.** The Applicant claims that the Respondent State did not ensure a "proper, fair, professional and diligent investigation of the matter" given especially that "core evidence" that could have led to other potential suspects were not investigated or were destroyed. He alleges that if the evidence referred to had been presented in court it would have proved that he did not commit the crime.

**98.** It is also the Applicant's contention that two other bodies had previously been discovered at the same place where his wife's body was found, but there was no investigation into whether there was a connection between the three (3) victims, which could have raised a reasonable doubt as to his involvement.

**99.** The Applicant further avers that extraneous evidence was used to convict him, such as evidence that he had previously beaten his wife and that he was allegedly having an extra marital affair. He also claims that emails allegedly between him and his lover were admitted as evidence, despite the fact that no investigation was conducted to verify their origin and the Applicant denied being the author.

**100.** In his Reply, the Applicant alleges that the Respondent State failed to investigate several contradictions. First, the Applicant avers that he was convicted on only circumstantial evidence as the Respondent State failed to find evidence directly linking him to the crime. Second, he claims that no investigation was conducted on the deceased's car from which the police did not take fingerprints because they were convinced of his guilt since he had been seen driving it and he was the last person to drive it.

**101.** Finally, the Applicant alleges that, due to the fact that he was not represented by a lawyer at the time he gave his statement to the police, the said statement was manipulated and used against him during the trial. He further alleges that the fact that the judgment of the High Court did not expressly refer to the statement does not mean it was not used against him.

**102.** The Respondent State disputes these allegations and avers that

the murder was well investigated in accordance with the provisions of the Criminal Procedure Act. The Respondent State also claims that the allegations are vague and do not specify what "core evidence" could have been pursued during the investigation.

**103.** During the public hearing, the Respondent State concurred that the Applicant was convicted on the basis of circumstantial evidence but stated that such practice is common in several jurisdictions and deemed as reliable as other types of evidence.

**104.** With regard to the statement, the Respondent State alleges that the Applicant agreed to and signed the same, which he never challenged during the trial or before the Court of Appeal at which point he was represented by a lawyer. The Respondent State also avers that this claim is immaterial since the statement was never relied on by the trial Judge.

**105.** The Court considers, with respect to whether the investigation was properly conducted regarding evidence relied on, that, as it has held in the case of *Mohamed Abubakari v Tanzania*, " … the imposition of a sentence in a criminal offence, and in particular a heavy prison sentence, should be based on strong and credible evidence".[29]

**106.** The Court is of the view that as long as evidence was properly received and considered, the proceedings and decisions of domestic courts cannot be seen as encroaching upon fair trial rights. In the instant matter, the Applicant's allegation in relation to "core evidence" and "extraneous evidence" was considered by the Court of Appeal and dismissed. In such circumstances, it cannot be said that the conviction and sentencing were based on an improper investigation especially where the prosecution proved its case beyond reasonable doubt.

**107.** Regarding whether the conviction was properly arrived at based solely on circumstantial evidence, the Court first notes that, as records of the domestic proceedings show, both the High Court and Court of Appeal considered a wide range of circumstantial evidence to which they applied both the law and extensive case law on the use of circumstantial evidence. Furthermore, both courts examined the Applicant's *alibi* and defence and arrived at the conclusion that the prosecution proved its case beyond reasonable doubt.[30] More particularly, it is evident from the Court of Appeal's judgment that it undertook a thorough case law-based analysis of conditions in which reliance on circumstantial evidence should apply generally[31] and in

29 *Mohamed Abubakari v Tanzania*, paras 174, 193 and 194.

30 Criminal Case 40 of 2007. Judgment of the High Court, 30 March 2010, pages 14-26; and Judgment of the Court of Appeal, 28 January 2014, pages 16-33.

31 See Judgment of the Court of Appeal, pages 16-19.

cases similar to that of the Applicant in the instant matter.[32]

**108.** As to whether domestic courts properly arrived at the conviction by ignoring contradictions as well as other evidence, this Court notes that the Court of Appeal considered all the contradictions raised by the Applicant, including those alleged before this Court, and reached the conclusion that they did not affect the credibility of the prosecution's case.[33] It is important to note that, where it decided not to undertake a thorough consideration of issues raised by Counsel for the Applicant because they were deemed immaterial or had been considered, the Court of Appeal provided reasons for doing so including applicable case law.[34] These are the grounds on which the Court of Appeal concluded that the High Court properly arrived at its finding.[35]

**109.** Turning to the claim that his statement was tampered with and used against him during the trial, the Court notes that the Applicant raised the issue of pages being added. He also raised the use of the statement as a ground of appeal. However, in the Court's view, the determining factor in assessing a breach of due process is whether the alleged reliance on the Applicant's statement outweighed other evidence and considerations.

**110.** As established earlier, the High Court based its determination of the matter on a wide range of pieces of evidence. Furthermore, the Applicant pleaded guilty of the charge on which he was being tried. Finally, in any event, the Applicant does not adduce any evidence that the High Court relied on his statement in arriving at the conviction. This allegation is therefore dismissed.

**111.** In light of the above, the Court dismisses as unfounded the allegation of violation of Article 7(1) of the Charter with respect to the manner in which the investigation was conducted.

### iii. The right to presumption of innocence

**112.** The Applicant claims that his right to presumption of innocence was "savagely flown" as there was a "presumption of guilt" against him. He avers in that regard that he had been treated with suspicion and arrested before there was any evidence that a crime had been committed and he was handed over to the police before the investigations were completed.

**113.** The Applicant also claims that his conviction based solely on

32 See Judgment of the Court of Appeal, pages 19-29.

33 See Judgment of the Court of Appeal, pages 29-31.

34 See Judgment of the Court of Appeal, pages 30-31.

35 See Judgment of the Court of Appeal, page 33.

circumstantial evidence and by ignoring some pieces of evidence and considering others, violated his right to presumption of innocence.

**114.** According to the Respondent State, the Applicant fails to specify or substantiate the manner in which his right to presumption of innocence was "savagely flown".

**115.** Article 7(1)(b) of the Charter provides that everyone has "The right to be presumed innocent until proven guilty by a competent court or tribunal".

**116.** The Court notes that, in the instant case, the Applicant inferred "presumption of guilt" from the allegation that his trial was not conducted in a proper and professional manner. The Court further notes that this allegation has been considered earlier while examining the Applicant's claim that the investigation was improper and insufficient. The finding made earlier applies to the allegation of "presumption of guilt".

**117.** With respect to the allegation that he was treated with suspicion, the Court notes that the Applicant does not adduce any evidence to support the claim. Regarding the allegation that the Applicant was handed over to the police before investigations were completed, the Court is of the view that in certain circumstances, including where a person is being accused of committing murder, movement may be restricted once investigations are commenced. These are generally known as measures that are implemented to either protect the suspect, prevent him or her from tampering with vital evidence or escaping. The Court however recalls that, in such cases, the restriction imposed must always be done under the law, which the Applicant does not challenge in the instant case.

**118.** As a consequence of the foregoing, the Court dismisses the allegation of violation of the right to be presumed innocent protected under Article 7(1)(b) of the Charter.

### iv. The right to be tried within a reasonable time

**119.** The Applicant alleges that he was convicted in 2010 after being arrested in October 2005 and that this undue delay infringed his right to be tried within a reasonable time. In his oral submissions, the Applicant avers that the process of *nolle prosequi* entered by the State Attorney, on account of mistakes in terms of procedure, almost two (2) years after he was first charged violates his right to be tried without undue delay.

**120.** The Respondent State does not address this allegation in its written pleadings and did not respond to the submissions made by the Applicant on the same issue during the public hearing.

**121.** The Court notes that, as provided under Article 7(1)(d) of the Charter, every individual has the right "to be tried within a reasonable

time by an impartial court or tribunal".

**122.** In its case law on the right to have one's cause heard within a reasonable time, this Court has taken into account the length of the domestic proceedings and imposed an obligation of due diligence on the Respondent State.[36] The Court has also held that the complexity of the case and the situation of the Applicant must be brought to bear in assessing whether the time being considered is reasonable.[37]

**123.** In the instant matter, the Court notes that, the Applicant was first charged on 18 October 2005. He was then charged afresh on 24 August 2007 after the State Attorney entered a *nolle prosequi* on the ground that there had been a mistake in procedure.[38] The Applicant had thus remained in custody for one (1) year, ten (10) months and six (6) days.

**124.** The Court notes that the fact that the Respondent State is responsible for the delay is not in dispute. The Court is of the view that in circumstances where the Applicant was in custody and did not impede the process, the Respondent State bore an obligation to ensure that the matter was handled with due diligence and expeditiously. Moreover, the delay was not caused by the complexity of the case. Finally, even after charging the Applicant afresh, the Respondent State's courts adjourned the matter on numerous occasions and it still took from 24 August 2007 to 1 March 2010, that is, about two (2) years and six (6) months, before the trial actually started. The Applicant was eventually convicted on 30 March 2010. In view of these considerations, the length of the proceedings cannot be considered as reasonable.

**125.** In light of the foregoing, the Court finds that such delay is in violation of the Applicant's right to have his cause heard within a reasonable time as guaranteed under Article 7(1)(d) of the Charter.

## B. Alleged violation of the right to dignity

**126.** The Applicant alleges that the Respondent State violated his right not to be subjected to inhuman and degrading treatment by detaining him for ten (10) days in very poor conditions, including being given little to no food, having to sleep on the floor without blankets with the same set of clothes, and being deprived of the support of his

36 See Application No. 013/2011. Judgment of 28/03/14 (Merits) *Norbert Zongo and Others v Burkina Faso*, para 152; Application No. 006/2013. Judgment of 18/03/16, *Wilfred Onyango Nganyi v United Republic of Tanzania*, para 155.

37 See *Norbert Zongo v Burkina Faso* (Merits), paras 92-97; *Alex Thomas v Tanzania*, *op. cit.*, para 104; and *Wilfred Onyango Nganyi v Tanzania*, *ibid*.

38 See Applicant's reply, para 3; and verbatim records of the public hearing, pages 1649 and 1639.

friends and relatives.

**127.** According to the Applicant he was relentlessly questioned without being given food or water for long periods of time and food was only provided to him on two (2) occasions over the course of those ten (10) days, once by a police officer and on another occasion when he was allowed to contact his housemaid.

**128.** While refuting the Applicant's allegations as vague and general, the Respondent State contends that they refer to the manner in which the Applicant was treated when he was in custody of the ICTR. The Respondent State avers that when he was in police custody, the Applicant was offered the possibility to have his housemaid bring food. During the public hearing, the Respondent State submitted that what it believed should amount to inhuman treatment with respect to a person in custody would be for instance, not having access to their family or a lawyer but not "sharing a cell with five other persons, being given a three-inch mattress to sleep on, and sharing latrines".

**129.** Article 5 of the Charter provides that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

**130.** The Court notes that the allegations being examined relate to deprivation of food, conditions of detention, and restriction of access to friends and relatives.

**131.** The Court further notes that the prohibition of cruel, inhuman and degrading treatment under Article 5 of the Charter is absolute.[39] Furthermore, such treatment can take various forms and a determination whether the right was breached will depend on the circumstances of each cause.[40]

**132.** In light of the submissions made by the Applicant and the Respondent State, the Court considers that the determination of the Applicant's allegation bears on evidence. In this regard, the Court is of the view that the ordinary evidentiary rule that who alleges must prove may not apply rigidly in human rights adjudication. The Court restates its position in the earlier cited case of *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania* that in circumstances where the Applicants are in custody and unable to prove their allegations because the means to verify the same are likely to be in the control of

39 See *Huri-Laws v Nigeria* Communication 225/98 (2000) AHRLR 273 (ACHPR 2000) para 41.

40 See *John Modise v Botswana* Communication 97/93 (2000) AHRLR 30 (ACHPR 2000) para 91. With respect specifically to the lack of food, see *Moisejevs v Latvia*, No. 64846/01, 80, 15 June 2006.

the State, the burden of proof will shift to the Respondent State as long as the Applicants make a *prima facie* case of violation.[41]

**133.** The Court notes that, in the instant case, the Applicant adduced *prima facie* evidence that he was given food two (2) times only in the course of ten (10) days, including once by his house maid. While it does not challenge this assertion, the Respondent State avers that the Applicant's statement shows that he was not prevented from receiving food.

**134.** In the Court's view, the Respondent State bore the duty to provide the Applicant with food so long as he was in its custody. Once the Applicant adduces *prima facie* evidence that he was not given food on a regular basis, the burden shifts to the Respondent State to prove the contrary. Given that it has not done so in the present circumstances, this Court finds that the Respondent State violated the Applicant's right not to be subjected to inhuman and degrading treatment.

**135.** With respect to the allegation that the Applicant was left to sleep on the floor without a blanket and restricted from accessing friends and relatives, the Court considers that detention conditions necessarily involve some restrictions of movement, communication and comfort. Furthermore, the Applicant does not adduce any *prima facie* evidence to support his allegation. This allegation is therefore dismissed.

**136.** In light of the foregoing, the Court finds that the Respondent State violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter with respect to deprivation of food.

## C. Alleged violation of the right to property

**137.** The Applicant alleges that after his arrest, the Respondent State failed to secure his properties left in his house in Arusha and as a result, agents of the Respondent State arbitrarily disposed of the said properties. Upon request by this Court, the Applicant provided an itemised list of all the property with the values. To prove the Respondent State's responsibility in securing his properties, the Applicant alleges that, after his arrest, his son was taken away and the house maid was asked to leave the house. The house was then placed under the custody of the police officers and officers of the ICTR Security Department.

**138.** The Applicant also avers that ICTR officers came to him at Karanga Prison in Moshi with documents, including two court orders from Côte d'Ivoire, which they requested him to sign in order to dispose

41 See *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania*, *op. cit.*, paras 142-145.

of the properties. He requested for the presence of a lawyer before signing and demanded a copy thereof, which the ICTR officers never provided him.

**139.** In its Response, the Respondent State claims that the Applicant did not specify the property in question and did not substantiate the claim. It avers that during the trial, the Applicant mentioned that he did not know the whereabouts of his property but did not elaborate as to what property specifically he referred to.

**140.** In its oral submissions, the Respondent State contends that, pursuant to Article 4 of the host agreement between the Government of the United Republic of Tanzania and the ICTR, and in compliance with Article 37(1) of the Vienna Convention on Diplomatic Relations, the Applicant's wife enjoyed the inviolability of her private residence. It is the Respondent State's contention that, as such, it complied with its related duties by protecting the deceased's properties and allowing her employer, the ICTR, to remove them. The Respondent State declared that the items found in the house at the time of arrest were handed over to the ICTR in accordance with the applicable protocol on United Nations' immunity rules.

**141.** The Court recalls that, as Article 14 of the Charter provides, "The right to property shall be guaranteed". The issue in dispute in the instant case is that of the Respondent State's responsibility regarding the disposal of the Applicant's property.

**142.** The Court notes that the fact that police officers of the Respondent State were put in charge of the Applicant's house after arrest is not disputed. However, the Applicant did not challenge the Respondent State's contention that it handed over all the items found in the house to the ICTR as per a standing agreement and in line with its international obligations as earlier recalled.

**143.** The Court is of the view that in such circumstances, the Respondent State's responsibility is not established regarding the said properties.

**144.** As a consequence of the above, the Court dismisses the allegation of violation of the right to property protected by Article 14 of the Charter.

## D. Allegation that the Applicant suffered mental anguish

**145.** The Applicant avers that he has suffered a lot of mental anguish as a result of being first arrested, the charges being dropped and another case being opened against him.

**146.** In its oral submissions, the Respondent State avers that, given that the Applicant's conviction and sentencing are lawful, the emotional anguish is the result of his guilt and there should be no finding of

violation in this regard.

**147.** The Court notes that this claim arises as a consequence of the delayed proceedings before domestic courts as established earlier. Having found that the consequential delay led to the violation of the Applicant's right to have his cause heard within a reasonable time, the Court is of the view that the present claim is a request for reparation, which will be dealt with later on.

## E. Alleged violation of Article 1 of the Charter

**148.** The Applicant does not substantiate his claim that the Respondent State violated Article 1 of the Charter. The Respondent State challenges the claim without substantiating its contention.

**149.** As this Court has consistently held, a determination on whether Article 1 of the Charter was violated involves an examination not only of whether the domestic legislative measures taken by the Respondent State are available but also whether the said measures were implemented, which is that the relevant object and purpose of the Charter was attained.[42] In the same case, the Court held that if it finds that any of the rights in the Charter is curtailed, violated or not achieved, then Article 1 is violated.[43]

**150.** Having found that the Respondent State violated Articles 5 and 7(1)(d) of the Charter, the Court also finds a violation of Article 1 of the Charter.

## VIII. Reparations

**151.** The Applicant requests the Court to order that his liberty be restored. He also asks the Court to order that damages be paid to him by the Respondent State for the moral and material loss suffered by himself and that suffered by his friends and relatives. The Applicant finally requests for orders on measures of satisfaction, non-repetition and costs.

**152.** The Respondent State prays the Court to dismiss all the reliefs and orders sought by the Applicant for lack of merit or not being supported with evidence.

**153.** The Court notes that, as Article 27(1) of the Protocol provides, "If the Court finds that there has been violation of a human or peoples' rights it shall make appropriate orders to remedy the violation, including

42 See *Alex Thomas v Tanzania*, *op. cit.*, para 135; *Kennedy Owino Onyachi and Charles John Mwanini Njoka v Tanzania*, *op. cit.*, paras 158 and 159.

43 *n42*

the payment of fair compensation or reparation".

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

**155.** In its case law on reparations, the Court has ruled on "other reparations" in a separate decision where the Parties have not adduced sufficient evidence or none for it to do so in the main judgment[44] or where it was necessary to hear the Parties extensively.[45]

**156.** The Court notes that written and oral submissions made by the Parties offer sufficient evidence to adequately consider the claims for reparation made in this matter. It is therefore in a position to rule on both the alleged violations as well as all reliefs and other reparations sought in a single judgment.

**157.** The Court, in line with its previous judgments on reparations, considers that for reparations claims to be granted, the Respondent State should be internationally responsible, the reparation should cover the full damage suffered, there should be causality and the Applicant must bear the onus to justify the claims made.[46]

**158.** The Court has earlier found that the Respondent State violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter and his right to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter.

**159.** It is against these findings that the Court will consider the Applicant's requests for reparation.

## A. Order for the Applicant's conviction to be quashed, the sentence to be set aside, and for him to be released

**160.** The Applicant requests the Court that his conviction be quashed, the sentence set aside and his liberty be restored. He avers that there are specific and compelling circumstances as to warrant the Court to order his release. The Applicant asserts that ordering his release is the

44 See Application No. 011/2011. Ruling on Reparations of 13/06/14, *Reverend Christopher R. Mtikila v United Republic of* Tanzania, para 124 and Application No. 011/2015. Judgment of 28/09/17, *Christopher Jonas v United Republic of* Tanzania, para 97.

45 See *Mohamed Abubakari v Tanzania*, *op. cit.*, para 237.

46 See Application No. 013/2011. Judgment on Reparations of 05/06/15, *Norbert Zongo and Others v Burkina Faso*, paras 20-31; Application No. 004/2013. Judgment on Reparations of 03/06/16, *Lohé Issa Konaté v Burkina Faso*, paras 52-59; and *Reverend Christopher R. Mtikila v Tanzania* (Reparations), paras 27-29.

only way that the prejudice suffered could be restored given the fact that having a re-trial after (thirteen) 13 years would be impossible since the evidence has been destroyed.

**161.** The Applicant also urges the Court to take into consideration the fact that he has been incarcerated for many years without the support of his friends and family which is vital for a life in prison. He alleges that his incarceration far from his friends and family increases the damages that he has endured and will continue to endure as long as his incarceration continues. It is the Applicant's contention that his continued incarceration may only lead to further violations to occur and not releasing him would have devastating consequences that no amount of pecuniary damages could remedy.

**162.** The Respondent State submits that the Applicant should serve his time for the crime as he was duly sentenced by domestic courts. The Respondent State further submits that the Applicant did not provide any specific or compelling circumstance to substantiate his request to be released and that he is, as such, not entitled to the relief sought especially because he committed the offence.

**163.** With respect to the prayer that the conviction be quashed and the sentence set aside, the Court reiterates its position that it is not an appellate court as it does not operate within the same judicial system as national courts; and does not apply the same law**.**[47] This Court cannot therefore entertain the Applicant's prayer.

**164.** Regarding the prayer for release**,** the Court refers to its established case law where it held that a measure such as the release of the Applicant can only be ordered in special or compelling circumstances.[48] The Court is of the view that such circumstances are to be determined *in casu* bearing in mind mainly proportionality between the measure of restoration sought and the extent of the violation established. Determination must be done with the ultimate purpose of upholding fairness and preventing double jeopardy.[49] As such, the procedural violation that underpins the request for a particular relief has to have fundamentally affected domestic processes to warrant

47 See Application No. 027/2015. Judgment of 21/09/18, *Minani Evarist v United Republic of Tanzania*, para 81; *Mohamed Abuakari v Tanzania*, *op. cit.*, 28.

48 See for instance, *Alex Thomas v Tanzania*, *op. cit.*, para 157.

49 See Application No. 016/216. Judgment of 21/09/18, *Diocles Willian v United Republic of Tanzania*, para 101; *Minani Evarist v Tanzania*, *op. cit.*, para. 82; *Loaysa-Tamayo v Peru*, Merits, IACHR Series C No 33, [1997], paras. 83 and 84; *Del Rio Prada v Espagne*, 42750/09 – Grand Chamber Judgment, [2013] ECHR 1004, para. 83; *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroun* (2000) AHRLR 57 (ACHPR 1997) operative provisions; and Communication No. 796/1998, *Lloyd Reece v Jamaica*, Views under Article 5(4) of the Optional Protocol, 21 July 2003, U.N. Doc. CCPR/C/78/D/796/1998, para. 9.

such a request.

**165.** In the case at hand, the violations found by the Court did not affect the processes which led to the conviction and sentencing of the Applicant to the extent that he would have been in a different position had the said violations not occurred. Furthermore, the Applicant did not sufficiently demonstrate nor did the Court establish that his conviction and sentencing were based on arbitrary considerations and his continued incarceration is unlawful.[50]

**166.** In light of the facts and circumstances, this prayer is therefore dismissed.

## B. Orders for pecuniary damages

### i. Moral damages

**167.** The Applicant asks the Court to award him damages for the moral prejudice he suffered as well as for the moral prejudice suffered by his friends and relatives. The Applicant also claims that he suffered mental anguish due to being charged twice. He quantifies the prejudice as follows:

> "i. US Dollars Twenty Thousand ($20,000) for the moral prejudice suffered by the Applicant himself (caused by long imprisonment following an unfair trial, emotional anguish during the trial and imprisonment, disruption of his life plan, loss of social status, lack of contact with his family based in Côte d'Ivoire, chronic illnesses and poor health due to lack and failure of treatment; and physical and psychological abuse);
>
> ii. US Dollars Five Thousand ($5,000) for the moral prejudice suffered as indirect victims by each of the family members and friends of the Applicant namely, Mr. Lambert Guehi (father), Ms. Espérance Houeyes (sister) and Ms. Elizabeth Mollel Lesitey (friend)."

**168.** The Applicant also prays the Court to grant him compensation as a substitute to restitution as he cannot be returned to his situation before incarceration.

**169.** With respect to the principle of reparation, the Respondent State submits that a request for reparation must fulfil three main conditions, these being, a deliberate or negligent failure of the State to comply with

50 See *Minani Evarist v Tanzania*, *op. cit.*, para. 82.

its international human rights obligations, a recognised harm suffered as a result of the failure and a direct injury to the Applicant. Comparing the present case to that of *Norbert Zongo*,[51] the Respondent State avers that no reparation should be ordered in the instant matter because there is no link between the wrongful act and the prejudice suffered, as agents of the Respondent State were not implicated.

**170.** The Respondent State also alleges that there is no evidence of victimhood in this case given that the Applicant is not a victim of deliberate actions or negligence of the Respondent State. The Respondent State avers that domestic courts had sufficient evidence to show that the Applicant was involved in the crime, and his conviction and detention were as a result of his actions and the operation of domestic law. According to the Respondent State, such facts cannot be considered to have led to mental damage, emotional suffering and loss of earnings.

**171.** Regarding the victimhood of relatives, the Respondent State acknowledges the Court's finding in the *Zongo* case, but submits that the finding cannot apply in the instant case because the Applicant caused the deceased's death as established by domestic courts; he is serving a sentence for a crime he committed; and his acts as a dependent of the deceased among many others have caused the direct heirs of the deceased including a son to suffer emotionally, psychologically and financially.

**172.** With respect to the claims of long imprisonment following an unfair trial and emotional anguish during trial and imprisonment, the Respondent State alleges that they should be dismissed since the domestic processes followed fair trial requirements, and anguish was as a result of the Applicant's guilt.

**173.** On the loss of his life plan, the disruption of his sources of income and loss of social status, the Respondent State argues that the Applicant decided to quit his job in Côte d'Ivoire to live as a dependent of his wife in Tanzania. In the Respondent State's view, his modest allowance as an intern at the ICTR could not maintain his upkeep or social status and he did not therefore have any meaningful source of income. The Respondent State submits that the Applicant rather disrupted his own life plan along with his source of income and social status.

**174.** Regarding the lack of communication with the Applicant's family since his incarceration, the Respondent State submits that it has not banned any visits and cannot force relatives to visit the Applicant. The Respondent State avers that it has not denied the Applicant any medical

51 *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit*.

treatment and shall continue to provide the same where necessary.

**175.** Concerning the claim of physical and psychological abuse, the Respondent State alleges that the Applicant was not arrested by its agents but rather by the ICTR who then handed him over to the police. According to the Respondent State, the Applicant has failed to prove any of the abuses alleged.

**176.** Finally, with respect to the Applicant's prayers to be compensated because he could not be returned to his situation before incarceration, the Respondent State requests the Court to dismiss it since the incarceration was lawful.

**177.** As this Court has held in its previous judgments on reparations, the causal link between the wrongful act and moral damage "can result from the human rights violation, as a consequence thereof, without a need to establish causality as such".[52] The Court has also held that the evaluation of quantum in cases of non-pecuniary damage must be done in fairness and taking into account the circumstances of the case.[53] The Court adopted the practice of affording lump sums in such circumstances.[54]

**178.** With respect to the request for payment of US Dollars Twenty Thousand ($20,000) for moral damage suffered by the Applicant, the Court notes that the claims relating to long imprisonment, emotional anguish during trial and imprisonment, disruption of life plan, loss of social status and lack of interaction with his family in Côte d'Ivoire are based on the alleged unfair trial and sentencing. This Court has earlier found that the only right of the Applicant which was violated in relation to fair trial is that to be tried within a reasonable time. The Court has however concluded that the said violation did not affect the conviction, sentencing and imprisonment of the Applicant. Regarding other claims, they are the lawful consequence of the conviction and sentencing of the Applicant. The reliefs sought cannot therefore be granted as they are not justified by any violation.

**179.** The Court notes that the same request for compensation is based on chronic illnesses and poor health due to lack and failure of treatment, physical and psychological abuse, and delayed trial. The Court further notes that the Applicant does not adduce evidence that the Respondent State denied him medical attention, or its agents subjected him to abuse. As the Court found earlier, the actions complained of related to restrictions which are inherent to detention

52 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit.*, para 55; and *Lohé Issa Konaté v Burkina Faso* (Reparations), para 58.

53 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op.cit.*, para. 61.

54 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op.cit.*, para. 62.

and imprisonment. The related claims are therefore dismissed.

**180.** In relation to the same request for compensation in respect of the alleged inhuman and degrading treatment, this Court has earlier found that the Respondent State violated the Applicant's right due to deprivation of food. Based on the fact that this violation lasted ten days and on the basis of equity, the Court grants the Applicant moral damages in the amount of US Dollars Five Hundred ($500).

**181.** On the compensation claim for delayed proceedings, the Court earlier found that the Respondent State violated the Applicant's right to have his cause heard within a reasonable time. The Respondent State did not justify the delay of at least one (1) year and ten (10) months. The Court is of the view that, in the circumstances of this case where the Applicant was accused of murder and faced the death sentence, such delay is also likely to have caused anguish. The prejudice that ensued warrants compensation, which the Court has discretion to evaluate based on equity. Given the circumstances, the Court grants the Applicant moral damages in the amount of US Dollars Two Thousand ($2,000).

**182.** Regarding the requests for payment of compensation for moral prejudice suffered by friends and family members as indirect victims, the Court recalls that victimhood must be established to justify damages.[55] Given that the related claims are based on the conviction, sentencing and incarceration of the Applicant, they do not warrant damages as earlier found regarding similar claims made for the Applicant himself. The Court consequently dismisses the claims.

**183.** Finally, the Applicant requests for payment of damages as a substitute for restitution as he cannot be returned to the situation prior to the violations. In light of its previous findings on the Applicant's conviction, sentencing and incarceration; and given that the order for release was denied and relief granted especially with respect to the delayed proceedings, the Court is of the view that the compensation sought is not warranted. The claim is consequently dismissed**.**

## ii. Material damages

**184.** The Applicant asks the Court to grant him the amount of US Dollars Fifteen Thousand ($15,000) for monetary loss suffered by his friends and family due to his undue detention (the loss resulting among others from his family having to sell their cocoa farm to pay a lawyer and Ms Mollel having suffered from witnessing the Applicant's injuries

55 See, *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit.*, paras 45-54.

and pain, and having to incur costs of a flight to Côte d'Ivoire to inform the Applicant's family about his situation).

**185.** The Respondent State submits that there is no proof regarding the claims of loss due to the sale of a cocoa farm and a trip by Ms Mollel to Côte d'Ivoire, which are new and fabricated evidence.

**186.** The Court notes that the claim for US Dollars Fifteen Thousand ($15,000) being the "monetary loss suffered by the Applicant's friends and family members due to his undue detention" is not supported by evidence or justification. The Court further notes that, in any event, the claim relates to the conviction, sentencing and incarceration of the Applicant and does not therefore warrant damages as earlier found. The Court consequently dismisses the request.

### iii. Legal fees related to domestic proceedings

**187.** The Applicant claims the payment of US Dollars Two Thousand ($2,000) for legal fees incurred during proceedings in domestic courts where he was represented by Maro Advocates in the Court of Appeal proceedings. The Respondent State prays the Court to reject the claim as the Applicant was represented by counsel on a *pro bono* basis both before the High Court and the Court of Appeal.

**188.** The Court recalls that, in line with its case law, reparation may include payment of legal fees and other expenses incurred in the course of domestic proceedings.[56] The Applicant must provide justification for the amounts claimed.[57]

**189.** In the instant case, the Court concluded earlier that the violations found did not fundamentally affect the conviction and sentencing of the Applicant. The alleged loss is therefore not justified. Furthermore, the Applicant does not challenge the Respondent State's submission that he was provided free legal representation in the course of domestic proceedings. In any event, in absence of evidence to support the claim, the same is dismissed**.**

## C. Other forms of reparation

### i. Non-repetition

56 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit.*, paras. 79-93; and *Reverend Christopher Mtikila v Tanzania* (Reparations), *op. cit.*, para. 39.

57 *Norbert Zongo and Others v Burkina Faso* (Reparations), para. 81; and *Reverend Mtikila v Tanzania* (Reparations), *op. cit.*, para. 40.

**190.** The Applicant requests the Court to make an order for guarantee of non-repetition of the violations. The Respondent State prays the Court to dismiss the claim given that there was no violation to warrant an order of non-repetition.

**191.** The Court notes that, while they seek to prevent the commission of future violations,[58] guarantees of non-repetition are generally used to eradicate structural and systemic human rights violations.[59] These measures are therefore not usually aimed to remedy individual harm but rather to address the underlying causes of the violation. Having said that, the Court is of the view that guarantees of non-repetition can also be relevant, especially in individual cases, where there is evidence that the violation will not cease or is likely to occur again. Such cases include when the Respondent State has challenged or not complied with earlier findings and orders of the Court.[60]

**192.** In the instant case, the Court found that the Applicant's rights were violated only with respect to his lengthy trial and deprivation of food for which remedy has been granted. These violations are not systemic or structural in nature within the circumstances of this case. Furthermore, there is no evidence that the violations have been or are likely to be repeated. The Court also notes that, in compliance with its Order for provisional measures, the Respondent State has not carried out the execution of the Applicant pending consideration of the merits of the present Application. The Court is of the view that, in the circumstances, the order sought is not warranted. The request is consequently denied.

58 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op.cit.*, paras. 103-106.

59 African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), para. 10 (2017). See also Case of the *"Street Children" (Villagran-Morales et al.) v Guatemala*, Inter-American Court of Human Rights, Judgment on Reparations and Costs (May 26, 2001).

60 See *Reverend Christopher Mtikila v Tanzania* (Reparations), *op. cit.*, para. 43.

### ii. Publication of the Judgment

**193.** The Applicant seeks an order that the Respondent State publishes the judgment in the national Gazette within one month of its delivery as a measure of satisfaction. The Respondent State does not make any specific submission in this respect.

**194.** The Court reiterates its position that "a judgment, *per se*, can constitute a sufficient form of reparation for moral damages".[61] In its previous judgments, the Court has however departed from that principle to order the publication of its judgments where the circumstances so require or *proprio motu*.[62]

**195.** The Court restates its earlier finding that the violations found in this case did not fundamentally affect the outcome of the proceedings in domestic courts. Therefore, the findings of the Court in relation to the prayer for an order of non-repetition also apply to the request for publication. Furthermore, the declaratory and compensatory reliefs granted by the Court represent sufficient remedy for the violations found. In light of these considerations, the Court is of the view that publication of the judgment is not warranted. As a consequence, the request is denied.

## IX. Costs

**196.** In terms of Rule 30 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

**197.** The Court recalls that, in line with its previous judgments, reparation may include payment of legal fees and other expenses incurred in the course of international proceedings.[63] The Applicant must provide justification for the amounts claimed.[64]

### A. Legal fees related to the proceedings before this Court

**198.** The Applicant makes a claim for the payment of US Dollars Ten Thousand ($10,000) for the lead Counsel, and US Dollars Ten Thousand ($10,000) for the two Assistants as legal aid fees for 300 hours of legal aid work in the Application before the African Court (that

61 See *Reverend Christopher Mtikila v Tanzania* (Reparations), para. 45.

62 See *Reverend Christopher Mtikila v Tanzania* (Reparations), paras. 45, 46(5); and *Norbert Zongo and Others v Burkina Faso* (Reparations), *op.cit.*, para. 98.

63 See *Norbert Zongo and Others v Burkina Faso* (Reparations), *op. cit.*, paras. 79-93; and *Reverend Mtikila v. Tanzania* (Reparations), *op. cit.*, para. 39.

64 *Norbert Zongo and Others v Burkina Faso* (Reparations), para. 81; and *Reverend Mtikila v Tanzania* (Reparations), para. 40.

is 200 hours for two Assistant Counsel and 100 hours for the lead Counsel, charged at US Dollars One Hundred ($100) per hour for the lead Counsel and US Dollars Fifty ($50) per hour for the Assistants).

**199.** The Respondent State disputes the claim for payment of legal fees as counsel for the Applicant served on a *pro bono* basis under the African Court's legal aid scheme. The Respondent State further prays the Court to deny the request as it is not supported by any receipts.

**200.** The Court notes that the Applicant was duly represented by PALU throughout the proceedings under the Court's legal aid scheme. Noting further that the current Court's legal aid scheme is *pro bono* in nature, the request is denied.

## B. Other expenses before this Court

**201.** The Applicant asks for the payment of the following amounts for other expenses:

"i. US Dollars Two Hundred ($200) for postal services;

ii. US Dollars Two Hundred ($200) for printing and photocopy fees;

iii. US Dollars Four Hundred ($400) for the transport to and from the seat of the African Court from the PALU Secretariat and from the PALU Secretariat to Kisongo Prison;

iv. US Dollars One Hundred ($100) for communication fees."

**202.** With respect to the costs incurred by the Applicant, the Respondent State avers that the claims must be dismissed given that the expenditure relates to postage, printing and photocopying, transport, and communication, which are all paid for by the prison authorities.

**203.** The Court notes that the requests for payment of US Dollars Two Hundred ($200) for postal services; US Dollars Two Hundred ($200) for printing fees; US Dollars Four Hundred ($400) for transport fees; and US Dollars One Hundred ($100) for communication fees are not backed with supporting documents. They are therefore dismissed.

**204.** As a consequence of the above, the Court decides that each Party shall bear its own costs.

## X. Operative part

**205.** For these reasons:

The Court,

Unanimously:

On jurisdiction

i. *Dismisses* the objections on the lack of material jurisdiction of the Court;

ii. *Declares* that the Court has jurisdiction;

On admissibility

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

iv. *Declares* that the Application is admissible;

On the merits

v. *Finds* that the Respondent State has not violated Articles 7, 7(1) (b) and (c) of the Charter with respect to the claims that the Applicant's rights to be assisted by an interpreter, to have access to a lawyer, to consular assistance, in relation to the allegation that the investigation was improper and insufficient, and to be presumed innocent were breached;

vi. *Finds* that the Respondent State has not violated Article 14 of the Charter in relation to the allegation that the Applicant's property was disposed of by agents of the Respondent State;

vii. *Finds* that the Respondent State has violated Article 5 of the Charter for failing to provide the Applicant with food;

viii. *Finds* that the Respondent State has violated Article 7(1)(d) of the Charter with respect to the allegation that the Applicant's trial was unduly delayed;

ix. *Finds* that the Respondent State has violated Article 1 of the Charter.

On reparations

x. *Does not grant* the Applicant's prayer for the Court to quash his conviction and sentence, and order his release;

xi. *Does not grant* the Applicant's prayers related to compensation for moral prejudice;

xii. *Does not grant* the Applicant's prayer to be paid material damages for monetary loss;

xiii. *Does not grant* the Applicant's prayers related to payment of legal fees incurred in the course of domestic proceedings;

xiv. *Does not grant* the Applicant's prayers related to the guarantee of non-repetition and publication of this Judgment;

xv. *Grants* the Applicant the sum of US Dollars Five Hundred ($500) for being subjected to inhuman and degrading treatment;

xvi. *Grants* the Applicant the sum of US Dollars Two Thousand ($2,000) for not being tried within a reasonable time and the anguish that ensued therefrom;

xvii. *Orders* the Respondent State to pay the amounts indicated in

sub-paragraph (xv) and (xvi) of this part within six (6) months, effective from this date, failing which it will also be required to pay interest on arrears calculated on the basis of the applicable Bank of Tanzania rate throughout the period of delayed payment until the amounts are fully paid;

xviii. *Orders* the Respondent State to submit within six (6) months from the date of notification of this Judgment a report on the status of implementation of the Orders herein.

On costs

xix. *Does not grant* the Applicant's prayer related to payment of legal fees and other expenses incurred in the proceedings before this Court;

xx. *Decides* that each Party shall bear its own costs.

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## Separate Opinion: BENSAOULA

**1.** I share the opinion of the majority of the judges with regard to the admissibility of the application, the jurisdiction of the Court and the operative part.

**2.** On the other hand, I think that concerning the intervention made by the Republic of Côte d'Ivoire, the Court should have considered more the question of the admissibility of the application in the form and substance of its merits.

**3.** While Article 5(2) of the Protocol on the Establishment of the African Court on Human and Peoples' Rights provides that "When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join", Rule 53 of the Rules of Court states that:

> "1. An application for leave to intervene, in accordance with Article 5(2) of the Protocol shall be filed as soon as possible, and, in any case, before the closure of the written proceedings.
>
> 2. The application shall state the names of the Applicant's representatives. It shall specify the case to which it relates, and shall set out:
>
> - the legal interest which, in the view of the State applying to intervene, has been affected;
> - the precise object of the intervention;
> - the basis of the jurisdiction which, in the view of the State applying to intervene, exists between it and the parties to the case.

3. The application shall be accompanied by a list of the supporting documents attached thereto and shall be duly reasoned.

4. Certified copies of the application for leave to intervene shall be communicated forthwith to the parties to the case, who shall be entitled to submit their written observations within a time-limit to be fixed by the Court, or by the President if the Court is not in session. The Registrar shall also transmit copies of the application to any other concerned entity mentioned in Rule 35 of these Rules.

5. If the Court rules that the application is admissible, it shall fix a time limit within which the intervening State shall submit its written observations. Such observations shall be forwarded by the Registrar to the parties to the case, who shall be entitled to file written observations in reply within the timeframe fixed by the Court.

6. The intervening State shall be entitled, in the course of the oral proceedings, if any, to present its submissions in respect of the subject of the intervention".

**4.** In view of these two attached articles, it is clear that conditions are required for the admissibility of the application for leave to intervene:

- Interest in the matter, subject of the application;
- the time limit for submitting this application, "before the closure of the written proceedings";
- the content of the application;
- the reason of the application;
- supporting documents.

**5.** The procedure on which the application to intervene is subject is bound by the same procedural requirements as an application for main action, ... notification to the parties for written observations by the Court if it is sitting ... otherwise by the President, the intervening party having the right to speak in case of oral pleadings.

**6.** This application is also sent to the State Parties concerned as set out in 35(3) of the Rules of Court.

**7.** It is apparent from the reading of the judgment delivered by the Court on 7/12/2018 subject of this separate opinion, that in its chapter "the parties" the Court considered the intervening State Party to the matter because "authorized to intervene".

**8.** And it does not appear at any time from the reading of the said judgment that the admissibility of this petition was settled or discussed, which is contrary to Rule 53(5) of the Rules.

**9.** Moreover, paragraph 12 of Chapter III, "summary of the proceedings before the Court", misconstrued the genesis of the proceedings by certifying that on 21/01/2015 ... and pursuant to Articles 5(1)(d) and 5(2) of the Protocol and Rules 33(d) and (53) of the Rules,

the Registry notified the Application to the Republic of Côte d'Ivoire as the State of which the Applicant is a national.

**10.** While it appears from the case file that the intervening State - the Republic of Côte d'Ivoire requested its intervention on 1 April 2015, therefore the intervention of the Ivorian State is voluntary since it is stipulated in that same paragraph that the Court has authorized it and it had filed its observations and responses to the submissions of the parties.

**11.** It is apparent from both paragraphs 15 and 16 of the judgment that the adversarial principle was observed since the observations of the intervening State were notified to the respondent, as is clear from the reading of the judgment that the Respondent State responded to the requests and arguments of the intervening State and the intervening State also responded to its responses by opposing requests.

**12.** It is evident from the State Party's applications and responses that, in addition to its application concerning the admissibility of its application and the Court's jurisdiction over it, it supports the applicant's requests and allegations (paragraphs 23, 30, 49). 83 and 92 of the judgment).

**13.** But at no point in the Judgment does it appear that the Court responded to these requests, which, in my respectful view, constitutes a procedural irregularity both with regard to the intervening State to declare its application for intervention admissible and on the merits of its requests approving the applicant's allegations if only by considering them supported by the Court in its decision on the applicant's requests because similar to those of the intervening State.

**14.** From my point of view, if the Court has held that in responding to the Applicant it also responds to the intervening State, it should have said so expressly throughout the judgment to its operative part.

## In conclusion

**15.** Being a kind of "third-party remedy" with an interest in a case pending before the Court, provided for in the provisions regarding form and merits in both the Rules and the Charter, the Court had to deal with the application for intervention in the same way as was done for the application and the Applicant's requests both in the body of the judgment and in its operative part, regarding the jurisdiction, admissibility and merits.

**16.** Even if on the merits the State of Côte d'Ivoire was involved with the Applicant and therefore supported him in his allegations and requests.