Gihana and others v Rwanda (merits and reparations) (2019) 3 AfCLR 655

Application 017/2015, *Kennedy Gihana and others v Republic of Rwanda*

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

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

Recused under Article 22: MUKAMULISA

The Respondent State invalidated the passports of the Applicants who were living in exile without informing them. The Applicants argued before the Court that the invalidation of their passports constituted arbitrary deprivation of nationality and rendered them stateless. The Court held that the Respondent State had arbitrarily revoked the Applicants' passports and thereby violated their freedom of movement. Since the Applicants had not been able to return to the Respondent State their right to political participation was also violated.

Jurisdiction (personal 23-28; material, 32-34)

Admissibility (identity of Applicants 42-43; nature of application, 48; disparaging language, 54, 55; exhaustion of local remedies, availability, 73)

Evidence (burden of proof, 85, 86; failure of state to provide information, 87, 91)

Movement (revocation of passports, 87-91, 108)

Nationality (revocation of passport, 97, 98, 102)

Political participation (prevention from returning to home country, 114)

Reparations (moral damages, 143, 144; reinstatement of passports, 148)

Dissenting opinion: BENSAOULA

Admissibility (exhaustion of local remedies, 1, 18, 19)

I. The Parties

1. Messrs Kennedy Alfred Nurudiin Gihana (First Applicant), Kayumba Nyamwasa (Second Applicant), Bamporiki Abdallah Seif (Third Applicant), Frank Ntwali (Fourth Applicant), Safari Stanley (Fifth Applicant), Dr. Etienne Mutabazi (Sixth Applicant) and Epimaque Ntamushobora (Seventh Applicant) are all of Rwandese origin, who were at the time of the filing of the Application, living in the Republic of South Africa.

2. The application is filed against the Republic of Rwanda

(hereinafter referred to as "the Respondent State"). The Respondent State became a State Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and the Protocol on 25 January 2004. The Respondent State deposited, on 22 January 2013, the Declaration by which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations as required under Article 34(6) of the Protocol the Protocol. On 29 February 2016, it notified the African Union Commission of its decision to withdraw the aforesaid Declaration and on 3 March 2016, the African Union Commission notified the Court in this regard. On 3 June 2016, the Court issued an Order stating that the withdrawal of the Declaration would take effect on 1 March 2017.[1]

II. Subject of the Application

A. Facts of the matter

3. It emerges from the file that the Applicants learnt of the invalidation, by the Respondent State, of their passports and those of other Rwandan nationals when one of them was informed upon applying for a visa to travel to the United States of America, that his name appeared on a list of 14 May 2012, indicating the invalidity of the passports held by all persons included on the said list**.**

4. The Applicants were neither officially notified of the invalidation of their passports by the Respondent State nor given the opportunity to appeal against the decision on the invalidation.

B. Alleged violations

5. The Applicants allege that the invalidation of their passports is an arbitrary deprivation of nationality, it has rendered them stateless and has a significant impact on the enjoyment of a number of universally accepted fundamental human rights specifically, the right to:(i) participation in political life; (ii) freedom of movement; (iii) citizenship; (iv) liberty; (v) family life; and (vi) work.

1 Application 003/2014. Ruling on Withdrawal of Declaration of 3 June 2016, *Ingabire Victoire Umuhoza v Republic of Rwanda* (*Ingabire Victoire v Rwanda* (Ruling on Withdrawal)), para 67.

III. Summary of the procedure before the Court

6. The Application was filed on 22 July 2015 and served on the Respondent State and the entities listed under Rule 35(3) of the Rules on 7 August 2015.

7. The Parties filed their submissions within the time stipulated by the Court.

8. On 9 February 2017, the Registry received the Respondent State's letter dated 30 January 2017, informing the Court of its cessation of participation in the present Application.

9. The Applicants made a request for provisional measures regarding the reinstatement of their passports and the Court found that since the prayer for provisional measures was the same as the prayer on merits, it would deal with them jointly.

10. On 15 February 2019, the Parties were informed that following the decision of the Court to combine the consideration of merits and reparations claims, the Applicant should file detailed submissions on reparations within thirty (30) days following receipt of the notice. The Applicants not having filed these submissions, the Court decided to determine the matter on the basis of the pleadings filed.

11. Pleadings were closed on 7 June 2019 and the Parties were duly notified.

IV. Prayers of the Parties

12. The Applicants pray the Court as follows:

"a. Issuance of interim measures against the respondents ordering them to immediately reinstate the passports of the complainants;

b. Ordering respondents to compensate the complainants;

c. Any other relief the Court may so order."

13. They further pray for the:

"[G]rant of interim measures pending the substantive decision on the Case to relieve Applicants hardships this draconian decision has caused them and enable them temporary free movement as contemplated under Article 12 of the African Charter on Human and Peoples' Rights".

14. The Respondent State prays the Court to:

"a. declare that Petitioners SAFARI Stanley and KAYUMBA Nyamwasa do not have *locus standi* before this Honourable Court,

b. strike out the Application for being defective in form and substance,

c. dismiss the Application without the necessity of requiring the Respondent to appear, in accordance with Rule 38 of the Rules of the Court,

d. award costs to the Respondent;

e. make such orders as it deems fit."

V. Jurisdiction

15. By virtue of Article 3 of the Protocol**,**

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

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

16. In accordance with Rule 39(1) of the Rules "The Court shall conduct preliminary examination of its jurisdiction …"

17. On the basis of the above-cited provisions, the Court must preliminarily, conduct an assessment of its jurisdiction and dispose of objections, if any, to its jurisdiction.

A. Objections to jurisdiction

18. The Respondent State has raised two (2) objections regarding the Court's jurisdiction, namely, on the lack of standing of two (2) Applicants and on the failure to disclose a *prima facie* case.

i. Objection on the Second and Fifth Applicants' lack of standing before the Court

19. The Respondent State has raised an objection that the Court lacks personal jurisdiction with regard to Kayumba Nyamwasa and Safari Stanley, the Second and Fifth Applicants, respectively.

20. The Respondent State claims that the Second and Fifth Applicants do not have *locus standi* before this Court because they were convicted in Rwanda for genocide-related crimes and crimes of threatening state security, respectively. The Respondent State further claims that they both absconded from Rwanda after their convictions and that they are thus fugitives from justice.

21. While the Respondent State acknowledges that it has made a Declaration pursuant to Article 34(6) of the Protocol, it also states that in making the Declaration, it did not envisage that persons convicted of serious crimes, such as these two Applicants, would be allowed to file matters before this Court. The Respondent State argues that it would be a travesty of justice for the Court to give *locus standi* to Applicants who have committed serious crimes. The Respondent State therefore prays the Court to deny the Second and Fifth Applicant**s** the standing before it and to

reject their Application.

22. The Applicants claim that their convictions have no relevance to the Application and that any person "even if a convict in a proper court of justice has right of standing to petition".

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23. The Court recalls that Article 5 of the Protocol lists the entities that can submit cases to the Court and sub-Article 3 thereof provides that: "The Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol."

24. Furthermore, Article 34(6) of the Protocol provides that; "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration".

25. The Court notes that Article 5(3) of the Protocol read together with Article 34(6) thereof provides for access to the Court for individuals regardless of their status and the nature of the crimes they are alleged to have committed or to have been convicted of. The only issue for consideration is whether the Respondent State has deposited the Declaration.

26. In the instant case, the Respondent State deposited its Declaration on 22 January 2013 without any reservation.

27. The Respondent State's objection on the Second and Fifth Applicants' standing to file this Application is therefore dismissed.

28. The Court finds that it has personal jurisdiction to deal with the claims by these two (2) Applicants and those of the other five (5) Applicants.

ii. Objection that the Application fails to disclose a *prima facie* case

29. The Respondent State argues that the allegations raised in the Application are vague and do not disclose a *prima facie* case or any prejudice.

30. The Respondent State further argues that the Applicants have not produced any evidence to support the allegation that it declared their passports invalid or they suffered the alleged prejudice.

31. In their Reply, the Applicants attached a list, which they state contains the names of the people whose passports have been declared invalid.

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32. The Court notes that the objection regarding the Application not establishing a *prima facie* case for lack of evidence to support the Applicants' claims and to establish the prejudice they suffered are properly issues of material jurisdiction.

33. The Court also notes that the Applicants allege violations of their rights guaranteed under Articles 6, 12, 13 and 18 of the Charter, and in accordance with Article 3 of the Protocol, the Court has material jurisdiction to deal with the matter.

34. Based on the foregoing, the Court dismisses the Respondent State's objection and finds that it has material jurisdiction over the Application.

B. Other aspects of jurisdiction

35. The Court notes that the other aspects of the jurisdiction of the court having not been contested and nothing on record indicates that the court does not have jurisdiction:

i. It has temporal jurisdiction on the basis that the alleged violations are continuous in nature.[2]

ii. It has territorial jurisdiction given that the facts of the matter occurred in the territory of a State Party to the Protocol, that is, the Respondent State.

36. In view of the aforesaid, the Court finds that it has jurisdiction to consider this Application.

VI. Admissibility

37. In terms of Article 6 (2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter." In accordance with Rule 39(1) of the Rules, "the Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the Application in accordance with articles 50 and 56 of the Charter, and Rule 40 of these Rules".

38. 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 mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

A. Conditions of admissibility in contention between the Parties

39. While some of the above conditions are not in contention between the Parties, the Respondent State has raised objections relating to the non-disclosure of the Applicants' identities, the incompatibility of the Application with the Constitutive Act of the African Union, the use of insulting and disparaging language and the non-exhaustion of local remedies.

i. Objection relating to non-disclosure of the Applicants' identities

40. The Respondent State argues that the Application should be declared inadmissible because it does not meet the requirement of Article 56(1) of the Charter and Rule 40(1) of the Rules on the identification of the authors of the application. It also argues that the Application is inadmissible because the Applicants state that the passports of other Rwandans were also invalidated.

41. The Applicants did not respond to this claim.

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42. The Court notes that the Application has been filed by seven (7) Applicants, Kennedy Alfred Nurudiin Gihana, Kayumba Nyamwasa, Bamporiki Abdallah Seif, Frank Ntwali, Safari Stanley, Dr. Etienne Mutabazi and Epimaque Ntamushobora, who are clearly identified. The reference to 'other Rwandans' does not negate this fact as they are not before this Court and are not part of this Application.

43. The Court finds that the seven (7) Applicants are properly identified in accordance with Article 56(1) of the Charter and Rule 40(1) of the Rules. The Respondent State's objection in this regard is therefore dismissed.

ii. Objection relating to incompatibility with the Constitutive Act of the African Union

44. The Respondent State avers that the allegations raised in the Application are not compatible with the Constitutive Act of the African Union (hereinafter referred to as the "Constitutive Act"). This position is based on the convictions against Kayumba Nyamwasa and Safari Stanley following criminal proceedings in the Respondent State. The Respondent State avers that Kayumba Nyamwasa was convicted of crimes of threatening state security, sectarianism, setting up a criminal gang and desertion from the military. The Respondent State further indicates that Safari Stanley was convicted for genocide, conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity and violations of

Article 3 common to the Geneva Conventions and Additional Protocol II.

45. The Respondent State argues that because the acts for which these Applicants were convicted are against the principles set out in Article 4(o) of the Constitutive Act, this Application does not meet the requirements of Article 56(2) of the Charter and should therefore be dismissed.

46. The Applicants have not specifically responded to the Respondent State's contention on the incompatibility of their Application with the Constitutive Act, rather they refer generally to the irrelevance of the Respondent State's objection in this regard and highlight the injustice of their convictions.

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47. Article 56(2) of the Charter, as restated in Article 40(2) of the Rules, envisages that applications before the Court shall be considered if they are compatible with the Charter of the Organisation of African Unity (OAU), now the Constitutive Act. Article 4(o) of the said Act provides that "the Union shall function in accordance with the principles of the respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities".

48. The Court notes that even though, according to the Respondent State, the First and Fifth Applicants were alleged to have been convicted of crimes which touch on some of the principles in Article 4(o)of the Constitutive Act as aforementioned, the Court is not called upon to decide on the legality or otherwise of such convictions. The Court considers that the provision in Article 56(2) of the Charter addresses the nature of an application and not the applicant's status. The prayer for reinstatement of passports does not require the Court to make a decision that would undermine the principles laid down in Article 4 of the Constitutive Act or any part thereof. On the contrary, this would be in accordance with the Court's obligation to protect the rights allegedly violated as it is required to do in accordance with Article 3(h) of the Constitutive

Act.[3]

49. Consequently, the Court finds that the Application is not contrary to the Constitutive Act and the objection is therefore dismissed.

iii. Objection relating to the use of disparaging and insulting language

50. The Respondent State argues that the Application is full of disparaging and insulting language directed at the Rwandan Judiciary and it should be declared inadmissible for failure to meet the requirements of Article 56(3) of the Charter and Rule 40(3) of the Rules.

51. The Applicants have not responded to this objection. However, in their affidavits filed in support of the Application it was alleged that the judiciary in the Respondent State is not independent because the Courts are biased in favour of the Respondent State's President and that the Courts are instruments of the ruling party.

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52. The Court reiterates its earlier decision that, mere complaints, perceptions and opinions of an applicant, on the State and its institutions in the circumstances of his case do not amount to disparaging language.[4]

53. In *Lohé Issa Konate v Burkina Faso*, this Court drew from the recommendations of the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission"), which held that for language to be considered disparaging or insulting, it must be "aimed at unlawfully and intentionally violating the dignity, reputation and integrity of a judicial official or body" and

3 Article 3(h) of the Constitutive Act provides that a key objective of the Union shall be "to promote and protect human and peoples' rights in accordance with the Charter and other relevant human rights instruments.". See also Application 030/2015. Ruling of 4 July 2019 (Jurisdiction and Admissibility) *Ramadhani Issa Malengo v United Republic of Tanzania,* paras 31- 32.

4 *Lohé Issa Konaté v Burkina Faso* (Merits) (2014) 1 AfCLR 314 (*Lohé Issa Konaté v Burkina Faso* (Merits), paras 69-71. See also Communication 435/12 *Eyob B Asemie v the Kingdom of Lesotho* African Commission on Human and Peoples' Rights (ACHPR) paras 58-60.

must seek to "pollute the minds of the public".[5] The Commission has also noted that "…a Communication alleging human rights violations by its very nature should be expected to contain allegations that reflect negatively on the State and its institutions" and that the Commission "… must make sure that the ordinary meaning of the words used are not in themselves disparaging. The language used by the Complainant must unequivocally demonstrate the intention of the Complainant to bring the State and its institution into disrepute …".[6]

54. In the instant case, the Court is of the view that the language used by the Applicants to express their perceptions about the Judiciary in Rwanda, considered in its ordinary meaning is not in itself disparaging.

55. The Court further notes that the Respondent State itself failed to demonstrate how the Applicants' language was aimed at unlawfully and intentionally violating the integrity of the judiciary and polluting the minds of the public as alleged.

56. The Court therefore dismisses the objection to admissibility of the Application in relation to the use of disparaging and insulting language.

iv. Objection relating to exhaustion of local remedies

57. The Respondent State contends that the Application should be dismissed because the Applicants have not exhausted local remedies. The Respondent State cites the decisions by the Commission in *Kenyan Section of the International Commission of Jurists and others v Kenya, Jawara v The Gambia, Kenya Human Rights Commission v Kenya* and *Civil Liberties Organisation v Nigeria* which explain the mandatory nature of the requirement of exhaustion of local remedies.

58. The Respondent State avers that the Applicants' claim that they could not exhaust domestic remedies in Rwanda because they are not available and effective, lacks merit. The Respondent State refers to the Commission's decisions in *Article 19 v Eritrea and Anuak Justice Council v Ethiopia* where it has held that one cannot argue that local remedies are not available and effective if he has not attempted to make use of them. The Respondent

5 *Lohé Issa Konaté v Burkina Faso* (Merits), para 70, citing the Commission in *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009), para 88.

6 Communication 435/12 *Eyob B Asemie v Kingdom of Lesotho*, African Commission on Human and Peoples' Rights (ACHPR) paras 58-60.

State argues that it is self-defeating for the Applicants to claim that remedies are not available in Rwanda yet they have made no attempt to use them. The Respondent State contends that Rwandan courts are independent and the remedies they grant are not just available but also effective.

59. The Respondent State argues that the independence of Rwandan courts has been attested to by a number of international human rights and criminal courts.The Respondent State refers to *Ahorugeze v Sweden*,[7] *Prosecutor v Jean Uwikindi*,[8] *Prosecutor v Aloys Ndimbati*,[9] *Prosecutor v Kayishema*,[10] *Prosecutor v Sikubwabo*,[11] *Norwegian Prosecution v Bandora*,[12] and *Leon Mugesera v Le Ministre de la Citoyennete et de L'emigration*, *Le Ministre de la Securite Publique et de la Protection Civile*.[13]

60. The Respondent State avers that the laws and procedures in Rwanda, specifically, Article 16 of the Law No 21/2012 relating to Civil, Commercial, Labour and Administrative Procedure, do not require a petitioner's appearance in person in order to institute proceedings and that a claim can be filed by a counsel or any other authorised representative on behalf of a claimant**.** The Respondent State argues that the Applicants could have instituted a case in the Respondent State's courts from their remote location in South Africa.

61. The Respondent State adds that Article 49 of the afore-mentioned law bind a petitioner's representatives to the same extent as they would a petitioner and that the Applicants could have designated Counsel to file the claims in the domestic courts on their behalf. The Respondent State contends that the Applicants ought to have filed an application for judicial review of the administrative decision to invalidate their passports, this being in accordance with Article 334 of Law No. 21/2012 relating to Civil, Commercial, Labour and Administrative Procedure.

62. The Respondent State avers that given the foregoing, the Applicants' arguments that they could not exhaust domestic

7 ECHR Application 37077/09. Judgment of 27 October 2011 paras 123-130.

8 International Criminal Tribunal for Rwanda (ICTR) Referral Case No ICTR-2001-75-R11bis.

9 ICTR Case No ICTR-95-1F-R11bis.

10 ICTR Case No ICTR- 01-67-R11bis.

11 ICTR Case No ICTR-95-1F-R11bis.

12 Case 11-050224ENE-OTIR/O1.

13 Canadian Federal Court Reference 2012 CF32.

remedies because their passports were revoked is without merit since they could have mandated Counsel or any other person they trust to file a claim in the domestic courts on their behalf.

63. The Respondent State supports its aforementioned position with the decisions of the Commission in *Zitha v Mozambique* and *Give more Chari (Represented by Gabriel Shumba) v Republic of Zimbabwe* where the Commission has ruled that where national laws do not require physical presence of a claimant, then the claimant should exhaust local remedies using Counsel.

64. The Applicants state that they have not referred the matter to the national jurisdiction of the Respondent State because they do not have valid passports to travel to the Republic of Rwanda to exhaust local remedies. They aver that local remedies are 'not practical' because the courts in the Respondent State are not independent.

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65. The Court notes that pursuant to Rule 40(5) of the Rules an application filed before the Court shall meet the requirement of exhaustion of local remedies.

66. The rule of exhaustion of local remedies reinforces the primacy of domestic courts in the protection of human rights *vis-à-vis* international human rights bodies. It aims at providing States the opportunity to deal with human rights violations occurring in their jurisdiction before such bodies are called upon to determine the responsibility of the States for such violations.[14]

67. In applying the rule of exhaustion of local remedies, the Commission and the Court have both developed extensive jurisprudence.[15]

68. In the case of *Gabriel Shumba v Zimbabwe*, the Commission has elaborated that, where it is impracticable or undesirable for a

14 Application 006/2012. Judgment of 26 May 2017 (Merits), *African Commission on Human and Peoples' Rights v Republic of Kenya* (*African Commission v Kenya (Merits*)), paras 93-94.

15 Communication 147/95-149/96 *Jawara v Gambia* AHRLR 107 (ACHPR 2000) para 31; Communication 389/10 *Mbiankeu Geneviève v Cameroon* (ACHPR 2015), paras 48, 72 and 82; Communication 275/03 (2007) *Article 19 v Eritrea* AHRLR 73 (ACHPR 2007) para 48; Communication 299/05 (2006) *Anuak Justice Council v Ethiopia* AHRLR 97 (ACHPR 2006); Application 009/2015. Judgment of 28 March 2019 (Merits and Reparations) *Lucien Ikili Rashidi v United Republic of Tanzania*

complainant to seize the domestic courts, the complainant will not be required to exhaust local remedies.[16]

69. The complainant in the *Gabriel Shumba v Zimbabwe* case had been charged with organising, planning or conspiring to overthrow the government through unconstitutional means and thereafter fled Zimbabwe in fear of his life after he was allegedly tortured by the Respondent State's agents.

70. The Commission applied the criteria it set out in *Jawara v The Gambia* that, "... remedies the availability of which is not evident, cannot be invoked by the State to the detriment of the complainant". The Commission also determined that "… [T]he existence of a remedy must be sufficiently certain, not in theory but also in practice. Failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of the generalised fear for his life (or even those of relatives) local remedies would be considered to be unavailable."[17]

71. The Commission found that "the Complainant could not avail himself of the same remedy due to the principle of constructive exhaustion of local remedies, by virtue of being outside the country, due to the fear for his life.".[18] It therefore held that even though in theory the domestic remedies were available, they were not effective, and could not be pursued without much impediment.

72. This Court has, in *Lohé Issa Konaté v Burkina Faso*, also held that "a remedy can be considered to be available or accessible when it may be used by the Applicant without impediment".[19]

73. In the instant case, the Court notes that, the Second and Fifth Applicants faced charges of serious crimes and fled from the Respondent State's territory. They have indicated that they fear for their security. Furthermore, all the Applicants are outside the Respondent State's territory and their travel documents having been invalidated without formal notification. It is reasonable, in view of the manner in which the Applicants learnt of the invalidation of their passports, for them to have been apprehensive about

para 35; *Wilfred Onyango Nganyi and others v Tanzania*(Merits) (2016) 1 AfCLR 507 paras 90-92; *Lohé Issa Konaté v Burkina Faso* (Merits) paras 77 and 96-115; *Beneficiaries of late Norbert Zongo*, *Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (merits) (2014) 1 AfCLR 219 paras 56 -106.

16 Communication 288/04 *Gabriel Shumba v Zimbabwe* (ACHPR 2012).

17 Communication 288/04 *Gabriel Shumba v Zimbabwe* (ACHPR 2012) para 73.

18 Communication 288/04 *Gabriel Shumba v Zimbabwe* (ACHPR 2012) para 74.

19 *Lohé Issa Konaté v Burkina Faso*, (Merits) para 96.

their security and fear for their lives. The serious nature of the crimes relating to the two (2) Applicants may also have resulted in difficulties in all the Applicants designating Counsel to file a claim on their behalf before the domestic courts regarding the invalidation of their passports. In the circumstances of the Applicants' case the Court therefore finds that the local remedies were not available for the Applicants to utilise.

74. The objection to the admissibility of the Application based on non-exhaustion of local remedies is therefore dismissed.

B. Conditions of admissibility that are not in contention between the Parties

75. The Court notes that there is no contention regarding compliance with the conditions set out in Rule 40, Sub-rules, 4, 6 and 7of the Rules on the nature of the evidence adduced, the filing of the Application within a reasonable time after exhaustion of local remedies and the previous settlement of the case, respectively, and that nothing on record indicates that these requirements have not been complied with.

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

VII. Merits

77. The Applicants allege that the invalidation of their passports by the Respondent State (i) amounts to the arbitrary deprivation of their nationality, (ii) has rendered them stateless and (iii) violates their rights to: freedom of movement, political participation, citizenship, liberty, family life and work.

78. In view of the fact that the issue whether the Applicants were arbitrarily deprived of their passports is central to the consideration of all the alleged violations, the Court will first examine this issue.

A. Allegation relating to revocation of the Applicants' passports

79. The Applicants allege that the Respondent State revoked their passports and that this amounts to an arbitrary deprivation of their

nationality and violation of their right to citizenship.

80. The Respondent State has not responded to this allegation.

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81. The Court notes that the Applicants' allegation relating to the revocation of their passports raises two issues: (i) was the revocation of the Applicants' passports arbitrary? (ii) if the answer to the first issue is in the affirmative, is the revocation of their passports tantamount to revocation of their nationality?

i. Was the revocation of the Applicants' passports arbitrary?

82. The Court notes that the factors to be considered in determining whether the revocation of the Applicants' passports was arbitrary or not, are the same as those that apply with regard to the deprivation of nationality. Therefore, such revocation must (i) be founded on a clear legal basis (ii) serve a legitimate purpose that conforms with international law (iii) be proportionate to the interest protected (iv) respect prescribed procedural guarantees, allowing the concerned to challenge the decision before an independent body.[20]

83. The Court notes that Article 34 of the 2011 Rwandan Immigration and Emigration Law provides that "A travel document is the property of the State. It may be withdrawn from the holder in case it is evident that he/she uses it or may use it in an inappropriate manner".[21]

84. Ordinarily, since the Applicants allege that their passports have been revoked arbitrarily, they are required to prove their claim. However, considering that, it is the Respondent State's agencies which have the access to records and monopoly of regulating the issuance and revocation of passports, the Respondent State is in a position of advantage over the Applicants since its agencies have all relevant information relating to process of issuance or

20 Application 012/2015. Judgment of 22 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* (*Anudo Anudo v Tanzania* (Merits) para 79.

21 Article 34 Law 04/2011 of 21 March 2011 on Immigration and Emigration in Rwanda.

revocation of passports.[22] It would therefore be unjust to place the burden of proof on the Applicants considering that, all relevant documentation in this regard is in the Respondent State's custody.

85. On the basis of this imbalance between the individual and the State, the burden of proof will therefore shift to the Respondent State to prove that the Applicants' passports were revoked in accordance with Article 34 of the 2011 Rwandan Immigration and Emigration Law and other relevant standards and that consequently this was not done in an arbitrary manner.

86. The Court notes that by the Respondent State failing to respond to the Applicants' allegation that it revoked their passports, this amounts to the Respondent State not having denied this claim.

87. The Court finds that the Respondent State has not provided proof that its revocation of the Applicants' passport was based on their use of the passports in an inappropriate manner as required under Article 34 of its Immigration and Emigration Law.

88. The Respondent State is also required to demonstrate that the revocation of the Applicant's passports was done in line with the relevant international standards.

89. The Court notes that the pertinent aforementioned international standards are set out in Article 12(2) of the Charter as this provision provides for the right to freedom of movement to which the issue of possession of passports relates. This provision states that: "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

90. The Court further notes that Articles 12(2) and (3) of the International Covenant for Civil and Political Rights (hereinafter referred to as "the ICCPR")[23] has provisions similar to Article 12(2) of the Charter in the following terms: "2.Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

91. In view of the aforesaid provisions, the Respondent State ought to have demonstrated that the revocation of the Applicants' passports was for the purposes of the restrictions set out in Article

22 *Anudo Anudo v Tanzania* (Merits) paras 74 and 77.

23 The Respondent State became a Party to the ICCPR on 16 April 1975.

12(2) of the Charter and Article 12(2) and (3) of the ICCPR. The Respondent State has not provided any explanation regarding the revocation of the Applicants' passports.

92. In view of the foregoing, the Court finds that the Respondent State has arbitrarily revoked the Applicants' passports.

ii. Was the revocation of the Applicants' passports tantamount to arbitrary deprivation of their nationality?

93. Having found that the revocation of the Applicants' passports was arbitrary, the Court will now consider whether such revocation is tantamount to deprivation of their nationality.

94. The Court observes that one is entitled to a passport of a specific country because he or she is its national or meets the conditions provided for issuance of a passport under the applicable law.

95. A passport is, first and foremost, a travel document required for travel outside one's country, to return to the said country and to go to or leave a foreign country. It is a general principle that a passport is also an identification document in a foreign country. A passport may also prove nationality, due to the presumption that, when one carries a passport of a specific state, he or she is a national of that state and it is incumbent upon the entity claiming otherwise to rebut this presumption.

96. Article 34 of the Law No. 04/2011 of 21 March 2011 on Immigration and Emigration in Rwanda provides that Every Rwandan is entitled to a travel document. According to this law, as stated in Article 2 on definitions and Articles 23 to 30 thereof, travel documents include passport, laissez-passer, collective laissez-passer, Autorisation Spéciale de Circulation/Commmunauté Economique des Pays des Grands Lacs (ASC/CEPGL), emergency travel document, refugee travel document and border pass. It is clear from this law that a passport is one of the forms of travel documents issued in the Respondent State.

97. The Court notes further that, for people such as the Applicants who are living outside their country, the passport is their main identification document. For such persons, not having a valid passport exposes them to challenging situations, such as difficulty in securing employment, renewing their residence permit, accessing education and health services in the country they are residing in and restrictions in travel to their own country and to other countries. In such circumstances, the revocation of a passport is not tantamount to a revocation of nationality, rather it impedes the full and effective enjoyment of their civic and

citizenship rights as Rwandan nationals.

98. The Court therefore finds that the claim that the revocation of the Applicants' passports is tantamount to deprivation of their nationality has not been established and is therefore dismissed.

B. Allegation of violation of rights relating to the arbitrary revocation of passports

99. The Applicants allege that the invalidation of their passports by the Respondent State has, as a consequence, rendered them stateless and violates their rights to: freedom of movement, right to political participation, liberty, family life and work. The Court will examine these allegations in turn.

i. Allegation relating to the Applicants being rendered stateless

100. The Applicants allege that, following the revocation of their passports, they have been rendered stateless.

101. The Respondent State has not responded to this allegation.

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102. In the instant case, the Court has determined that the Applicants have not been deprived of their nationality. They are still Rwandan nationals. The Court therefore finds that the Applicants' claim that they have been rendered stateless is moot and it is consequently dismissed.

ii. Allegation relating to violation of the right to freedom of movement

103. The Applicants allege that the revocation of their passports has violated their right to freedom of movement.

104. The Respondent State has not responded to this allegation.

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105. Article 12(2) of the Charter provides that "Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".

106. This Court in *Anudo Ochieng Anudo v Tanzania* cited the views of the United Nations Human Rights Committee that "…there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State Party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country".[24]

107. The Court notes that Article 14 of the 1999 Rwandan Law on Immigration and Emigration states that on returning to Rwanda, wherever they are coming from, Rwandans and members of their families must be in possession of a passport or another document replacing the passport'.[25]

108. By arbitrarily revoking the Applicants' passports, the Respondent State deprived them of their traveling documents and consequently prevented them from returning to their country and traveling to other countries and thus exercising their right to freedom of movement as provided under Article 12(2) of the Charter.

109. In light of the foregoing the Court finds that the Respondent State has violated Article 12 (2) of the Charter.

iii. Allegation relating to violation of the right to political participation

110. The Applicants assert that the alleged revocation of their passports amounts to a revocation of nationality and such deprivation of nationality impacts their right to participate in political life.

111. The Respondent State has not responded to this allegation.

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112. Article 13(1) of the Charter provides that "Every citizen shall have

24 *Anudo Anudo v Tanzania (*Merits), para 98, citing the United Nations Human Rights Committee, *General Comment No 27 on Freedom of Movement*.

25 Article 14 of Rwandan Law 17/99 of 1999 on Immigration and Emigration.

the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

113. In *Purohit and Moore v The Gambia* the Commission stated that 'the right provided for under Article 13(1) of the African Charter is extended to 'every citizen' and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State.'[26]

114. The Court is of the view that the rights set out in Article 13(1) of the Charter are optimally exercised when a State's citizens are in the territory of that State and in some instances, they can be exercised outside the territory of that state. The Court notes that the arbitrary revocation of the Applicants' passports has prevented them from returning to the Respondent State thus severely restricting their right to freely participate in the government of their country.

115. The Court thus finds that by arbitrarily revoking the Applicants' passports, the Respondent State consequently violated Article13 (1) of the Charter.

iv. Allegation relating to violation of the right to liberty

116. The Applicants allege that by revoking their passports, the Respondent State has violated their right to liberty.

117. The Respondent State has not responded to this allegation.

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118. Article 6 of the Charter provides that: "Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained".

119. The Court notes that the provision relates to the issue of prolonged detention without trial and that this situation is considered as arbitrary. The standards espoused in this right require that a person who is charged with an offence should be brought promptly before a judge or other judicial officers and should be tried within a reasonable time or released. A person who is charged with

26 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 75.

an offence also has the right to access a court, to challenge the lawfulness of his or her detention.[27]

120. The Court notes that the Applicants have made general statements as regards the alleged violation of their rights to liberty. They have not provided evidence to establish that the Respondent State has arbitrarily deprived them of their liberty contrary to the afore-mentioned provisions. The Court has held that it does not suffice to make such general claims, rather, there should be a demonstration of how the rights have been violated.[28]

121. In light of the foregoing, the Court therefore dismisses the Applicants' claim as having not been established.

v Allegation relating to violation of the right to family life

122. The Applicants allege that by revoking their passports, the Respondent State has violated their right to family life.

123. The Respondent State has not responded to this allegation.

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124. The Court notes that Article 18 (1) and (2) of the Charter provides:

"1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

2. The State shall have the duty to assist the family which is the custodian or morals and traditional values recognized by the community".

125. The Court also notes the Commission's interpretation of this provision and which it finds to be of persuasive value in view of the Court's and Commission's concurrent jurisdiction to interpret the Charter.[29] In accordance with this provision, the state is required to take all necessary measures to ensure protection

27 Communication 416/12 *Jean-Marie Atangana Mebara v Cameroon* paras 119-131.

28 *Alex Thomas v Tanzania* (Merits) (2015) 1 AfCLR 465 para 140.

29 See the African Commission on Human and Peoples' Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* adopted in November 2010 at the 48th Ordinary Session (Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the Charter). See also *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 212.

of the rights of individuals within families and that the family's integrity is maintained because it is recognised as the cornerstone of society.[30]

126. The Court is of the view that the Applicants have not demonstrated how the Respondent State's actions or omissions had an adverse impact on the needs and interests of their families or how it prevented them from fully benefitting from the filial and social interaction necessary for the maintenance of a healthy family life.

127. The Court therefore finds that the alleged violation of the right to family life contrary to Article 18(1) of the Charter has not been established.

vi. Allegation relating to violation of the right to work

128. The Applicants allege that by revoking their passports, the Respondent State has violated their right to work.

129. The Respondent State has not responded to this allegation.

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130. Article 15 of the Charter provides that "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".

131. The Court notes that this guarantee means that a state "has the obligation to facilitate employment through the creation of an environment conducive to the full employment of individuals within society under conditions that ensure the realisation of the dignity of the individual. The right to work includes the right to freely and voluntarily choose what work to accept". [31]

132. The Court further notes that the claims made by the Applicants as regards the alleged violation of their rights to work are general in nature. They have not elaborated on how the Respondent State has acted contrary to, or made some omissions in relation to the requirements of the provision of this Article. These being

30 Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the Charter para 94; See also *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) para 212.

31 Principles and Guidelines on Implementation of Economic, Social and Cultural Rights in the Charter para 58.

unsubstantiated claims, the Court consequently dismisses them.

VIII. Reparations

133. 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 the payment of fair compensation or reparation".

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

135. The Court has found that the Respondent State violated the Applicants' rights to freedom of movement and their right to freely participate in the government of their country. The reparations claims will therefore only be assessed in relation to these wrongful acts.

136. The Court reaffirms its position[32] that "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim." [33]

137. The Court also restates that the purpose of reparation being *restitutio in integrum* it "…must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."[34]

138. Measures that a State must take to remedy a violation of human rights must include restitution, compensation and rehabilitation of the victim, satisfaction as well as measures to ensure non-repetition of the violations taking into account the circumstances

32 *Mohamed Abubakari v Tanzania* (Merits) (2016) 1 AfCLR 599 para 242 (ix).

33 Application 003/2014. Judgment of 7 December 2018 (Reparations), *Ingabire Victoire Umuhoza v Republic of Rwanda* (*Ingabire Umuhoza v Rwanda* (Reparations), para 19.

34 Application 007/2013. Judgment of 4 July 2019 (Reparations), *Mohamed Abubakari v United Republic of Tanzania*, para 21; Application 005/2013. Judgment of 4 July 2019 (Reparations), *Alex Thomas v United Republic of Tanzania*, para 12; Application 006/2013. Judgment of 4 July 2019 (Reparations), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 16.

of each case.[35]

139. The Court reiterates that with regard to material prejudice, the general rule is that there must be existence of a causal link between the alleged violation and the prejudice caused and the burden of proof is on the Applicant who has to provide evidence to justify his prayers.[36] Exceptions to this rule include moral prejudice, which need not be proven, presumptions are made in favour of the Applicant and the burden of proof shifts to the Respondent State.

A. Pecuniary reparations

i. Material prejudice

140. The Applicants made a general claim for compensation without specifying the nature thereof or providing evidence. The Respondent State did not make submissions on this issue.

141. The Court therefore dismisses this claim.

ii. Moral prejudice

142. The Applicants seek compensation and any other orders that the Court may deem fit to grant without specifying the amounts sought. The Respondent State prays that the Court dismisses the Application and make any orders it deems necessary.

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143. The Court notes that an individual's identity and sense of belonging is intrinsically tied to the social, physical and political connections that they have with their country of origin. The Court further notes that the arbitrary revocation of the Applicants' passports resulted in the violations found against the Applicants. Since 14 May 2012 when the said passports were arbitrarily revoked, the Applicants have been unable to leave their country of residence and to

35 *Ingabire Umuhoza v Rwanda* (Reparations) para 20.

36 *Reverend Christopher R Mtikila v Tanzania* (Reparations) (2014) 1 AfCLR 72 para 40; *Lohe Issa Konaté v Burkina Faso* (Reparations) (2016) 1 AfCLR 346, para 15.

travel back to their country of origin and to other countries. This has adversely affected the aforementioned connections that the Applicants had with their country of origin. The Court finds that this caused them emotional anguish and despair, occasioning them moral prejudice, therefore this entitles them to reparation.

144. The Court, therefore, in exercising its discretion awards an amount of Rwandan Francs Four Hundred and Sixty Five Thousand (RWF465,000) to each of the Applicants as fair compensation for the moral prejudice caused.

B. Non-pecuniary reparations

145. The Applicants pray the Court to order the Respondent State to reinstate their passports.

146. The Respondent State has not responded to this allegation.

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147. The Court notes that the violations found were occasioned by the Respondent State's act of arbitrarily revoking the Applicants' passports. The Court considers that the reinstatement of the said passports is an appropriate measure for the Respondent State to take in order to make restitution to the Applicants.

148. The Court therefore finds that an order for reinstatement of the Applicants' passports is appropriate.

IX. Costs

149. The Applicants did not make any submissions on the costs.

150. The Respondent State submits that it should be awarded costs.

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

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152. The Court finds that in the circumstance of this case, each Party should bear its own costs.

X. Operative Part

153. For these reasons,
The Court,
Unanimously,

On jurisdiction
i. *Dismisses* the objections to the jurisdiction of the Court;
ii. *Declares* that it has jurisdiction.

By a majority of Nine (9) votes for, and One (1) against, Justice Chafika BENSAOULA Dissenting,

On admissibility
iii. *Dismisses* the objections on admissibility;
iv. *Declares* the Application admissible.

On the merits
v. *Finds* that the alleged violations of the right to liberty, the right to work and the right to family life under Articles 6, 15 and 18(2) of the Charter, respectively, have not been established;
vi. *Finds* that the Respondent State has violated the right to freedom of movement under Article 12(2) of the Charter and the right to political participation under Article 13(1) of the Charter as a consequence of arbitrarily revoking the Applicants' passports;

On reparations
Pecuniary reparations
vii. *Grants* the Applicants' prayers for compensation and awards each Applicant**,** the sum of Rwandan Francs Four Hundred and Sixty Five Thousand (RWF465,000) for the moral damages they have suffered.
viii. *Orders* the Respondent State to pay the amounts indicated in (vii) above within six (6) months from the date of notification of this Judgment, free from tax, failing which it will be required to pay interest on arrears calculated on the basis of the applicable rate of the Central Bank of Rwanda throughout the period of delayed payment until the amount is fully paid.

Non-pecuniary reparations

ix. *Orders* the Respondent State to reinstate the Applicants' passports within three (3) months of the date of notification of this judgment.

On implementation of the judgment and reporting

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

On costs

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

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Dissenting opinion: BENSAOULA

[**1.**] In the above-mentioned judgment in *Kennedy Gihana and others v Republic of Rwanda*, I do not agree with the decision of the majority of the judges of the Court declaring the Applicants' application admissible and thus rejecting the objection of inadmissibility raised by the Respondent State concerning non-exhaustion of domestic remedies.

For the good reason that:

- the Court cited its extensive jurisprudence as well as that of the African Commission on Human and Peoples' Rights as the basis for its decision.
- it has made no effort to respond to the relevance of the jurisprudence cited by the Respondent State, which in my opinion, in view of the facts and allegations set out, is more convincing on the one hand.
- and disregarded its assessment of certain conditions required by Articles ...56 of the Charter, 6(2) of the Protocol and Rule 40 of the Rules.

[**2.**] It is common ground in the Court's case-law that it has taken up in many of these judgments, as in paragraph 66 of the present judgment, the conclusion in the African Commission on Human and Peoples' Rights matter (Application 006/12, Judgment of 26 May 2017 *African Commission on Human and Peoples' Rights v Republic of Kenya*) that the condition laid down in Article 56 of the Charter and Rule 40 of the Rules of Court in their paragraph

5 relating to the exhaustion of domestic remedies "reinforces the primacy of national courts over the Court ...", in the protection of human rights and fundamental freedoms aims to give States the opportunity to address human rights violations committed on their territory before an international human rights body is called upon to determine the responsibility of states for their violations"....

[**3.**] In the judgment which is the subject of the Dissenting opinion it appears that the Applicants filed their application with the Court on 22 July 2015, as it is apparent from the same file that the Applicants fled the Respondent State and have since settled in South Africa.

[**4.**] It also appears from the application that the only date in the application is the year 2012, the date on which, according to them, they learned that their names were on a list drawn up by the Respondent State and that they were therefore affected by the decision to invalidate their passports.

[**5.**] The Applicants based their reasons for not exhausting domestic remedies on the following:

- on the fact that they did not have a valid passport and therefore could not travel.
- That domestic remedies are not effective, as the Rwandan courts are not independent subsection (64)

[**6.**] On the basis of these two allegations, the Court will cite its jurisprudence, that of the African Commission on Human and Peoples' Rights (paragraphs 66 to 73), to hold that the applicants in exile were in a situation which made domestic remedies impossible, undesirable, not obvious, with the uncertainty as to the danger to their lives, and in conclusion to state in paragraph 73 that "in the circumstances and in view of the obstacles encountered by the applicants in the exercise of domestic remedies, the Court concluded that they were not available to enable the Applicants to use them".

[**7.**] However, it appears from the file that the two Applicants Kayumba and Stanley were convicted respectively in relation to Kayumba on 14 January 2011 and that an arrest warrant was issued against him on 19 January 2011, which leads to the conclusion that on that date he was already abroad.

[**8.**] As for Stanley, he was convicted on 6 June 2009 and a warrant of arrest was issued against him on 4 October 2012, which leads us to conclude that he was already abroad at that date.

[**9.**] As for the other Applicants, the Respondent State does not give any details about them and the court did not order any investigation in this regard.

[**10.**] It is apparent from the subject-matter of the dispute that the applicants allege that their passports were invalidated by the Respondent State, and as evidence of this they refer to a letter in which their names are among those whose passports were ordered invalidated by the State.

As for the fact that they did not have their valid passport and therefore could not travel.

[**11.**] It appears from the file and the documents attached that the Respondent State referred in its application. 52 to multiple jurisprudence such as Communication 147/95. 149/95 *Sir Dawda Jawara v The Gambia* as to the reasons for the requirement of domestic remedies, in which the principle often cited by the Court in its judgments is taken up, namely "the opportunity given to the Respondent State to remedy the situation through its own national system, thus avoiding the Commission's role as a court of first instance but rather as a body of last resort".

[**12.**] The Commission's case law also held in *Anuak Justice Council v Ethiopia* that if a remedy has the slightest probability of being effective, the Applicant must pursue it ... and that alleging that such domestic remedies are unlikely to succeed without trying to avail themselves of them will in no way influence the Commission".

[**13.**] In the same vein the *Article 19 v Eritrea* case concluded "that it is incumbent on each complainant to take the necessary steps to exhaust or at least attempt to exhaust domestic remedies....

When was the allegation that they could not travel to Rwanda because of the cancellation of their passports?

[**14.**] The Respondent State referred to numerous articles in the Criminal Law Code of Procedure and the fact that the law does not require the complainants to be present in court and to the impossibility of drawing on domestic remedies because they could not travel to Rwanda because of the arbitrary cancellation of their passports.

[**15.**] The Defendant State takes up the provisions of the Code of Civil Commercial, Social and Administrative Procedure, which stipulates that each court sitting at first instance shall be seized by a written or oral application submitted either by the plaintiff himself or by his lawyer or special proxy with power of attorney.

[**16.**] As the law does not oblige the parties to be physically present, and for this reason cites article 49 of the above-mentioned code,

[**17.**] And finally, Article 334, which regulates appeals against administrative decisions, or the applicants could have appealed against the alleged decision to cancel their passport either by themselves or through a lawyer.

[**18.**] Concluding that the African Commission has on several occasions observed that where national laws do not require the physical presence of the complainant, he can avail himself of existing remedies through his counsel, as in the case of *Obert Chinamo v Zimbabwe*, where the Commission concluded that "it is not necessary to be physically present in the country to have access to domestic remedies and the complainant cannot therefore claim that domestic remedies were not available to him. No attempt has been made to exhaust domestic remedies and the commission will not be influenced in any way by the fact that the victim feared for her life.

[**19.**] It is clear that the object of the dispute is the invalidation of the Applicants' passports and that appeals concerning this type of litigation fall within the jurisdiction of the judicial courts sitting in administrative litigation.

[**20.**] It is clear from the file that the Applicants fled the country of their own free will because they do not allege that they were expelled or tortured.

[**21.**] It is also clear that initiating a case of administrative litigation does not require the travel of the complainants, especially since Rwandan law allows for representation;

[**22.**] As it is proved in the application to the court that the Applicants although they have been resident in South Africa since their flight, in 2015 they delegated a lawyer from South Africa to represent them before the African Court.

With regard to the independence, effectiveness and availability of remedies

[**23.**] The Respondent State refers, in rebutting the Applicants' allegation, to the case *Ahorugeze v Sweden* application number 37077/09 where the European Court of Human Rights ruled that "Rwandan courts are not only effective and efficient but also meet international standards".

[**24.**] In the case of the *Prosecutor v Jean Uwikindi* – Referral Decision No. ICTR 2001-75-r11bis and others or the International Criminal Tribunal for Rwanda, the Prosecutor was of the opinion "that the Rwandan legal framework guarantees the independence and impartiality of the judiciary... Article 140 of the Rwandan constitution provides that the judiciary is independent and separate from the legislative and executive branches of government and enjoys administrative and financial autonomy...."

[**25.**] Case No. 11-050224ENE-otir/01 where it is said "the Court was of the opinion that given the reform of the Rwandan laws and legal system and Rwanda's guarantee that Bandora would receive a fair trial if extradited to Rwanda, there were no longer grounds to reject the request".

[**26.**] The case of *Leon Mugesera v Minister of Citizenship and Emigration*, the Ministry of Security and Emergency Preparedness or the Federal Court of Canada concluded "that the Rwandan courts are capable of holding a fair trial within a reasonable period of time" and dismissed Mugesera's application for an order against his deportation from Canada.

[**27.**] The Court did not respond to all this jurisprudence.

[**28.**] On the basis of all that follows, it appears that the Court in its judgment which is the subject of the Dissenting opinion failed to respond to the legal grounds presented by the Respondent State for the plea of exhaustion of local remedies by discussing them first and then opposing them on a contrary basis, and thus failed to ...:

- the obligation to give reasons for its judgments under Article 28/6 of the Rules of Procedure.
- The statement of reasons being the response not only to the applicants' allegations but also to those of the Respondent State.
- And to the objectives pursued by the obligation to have recourse to domestic remedies, which are the Defendant State's right to change its position, which in my opinion is an infringement of the right of States to defend themselves.

[**29.**] What I criticize the Court for is that although the Respondent State has provided a whole body of case law on the objection raised, the Court did not find it useful to respond to it, despite the fact that the case law in question is also that of the African Union, such as the African Commission on Human and Peoples' Rights:

[**30.**] The African Commission's communication in *Anuak Justice Council v Ethiopia* where it stated that "if a remedy has the slightest likelihood of being effective, the applicant must pursue it; alleging that domestic remedies are unlikely to succeed without trying to avail themselves of them will not in any way influence the Commission".

[**31.**] And in the *Article 19 v Eritrea* case "that it is incumbent on each complainant to take the necessary steps to exhaust, or at least attempt to exhaust, domestic remedies. It is not sufficient for the complainant to cast doubt on the adequacy of the State's domestic remedies on the basis of isolated incidents".

[**32.**] Finally, it is clear from the judgment cited above that the Court, after discussing the objections raised by the Respondent State as to the admissibility of the application, disregarded the other conditions set out in paragraphs 4, 6 and 7, although Articles 56 of the Charter, 6(2) of the Protocol and 40 of the Rules of Procedure.

[**33.**] Require the Court to make a preliminary examination of its jurisdiction and the conditions of admissibility as provided for in Articles 50 and 56 of the Charter and Rule 40 of the Rules of Procedure.

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

A. If the parties raise objections to the conditions of jurisdiction and admissibility, the Court must examine them:
   - If one of them proves to be well-founded, it will rule accordingly.
   - If, on the other hand, none of them has done so, the court is obliged to discuss the other elements not discussed by the parties and to conclude accordingly.

B. If the parties do not discuss the conditions, the Court is obliged to do so in the order set out in Article 56 of the Charter and Rule 40 of the Rules.

[**35.**] In the case which is the subject of the Dissenting opinion, it is clear that if the Defendant has raised the objections of inadmissibility relating to the first, second and third paragraphs of section 40 of the Regulation and the Court has answered them in paragraphs 39 to 74.

[**36.**] It did not see fit to discuss the other conditions of the above-mentioned articles referred to in paragraphs 4, 6, 7 and paragraph 75 and merely concluded that there was no dispute as to their observance and that there was nothing in the record to indicate

that these conditions had not been complied with, thus giving the impression that the conditions listed exceeded each other in importance or purpose; this is in no way the spirit of the above-mentioned articles and the intention of the legislator;

[**37.**] Especially since in the present judgment the Court concluded that the application was admissible as regards domestic remedies and failed to file the application within a reasonable time...

[**38.**] In my opinion, this approach is also contrary to Rule 28(6) of the Rules of Court and the Court's obligation to give reasons for its judgments.