Mango and others v Tanzania (merits and reparations) (2019) 3 AfCLR 439

Application 008/2015, *Shukrani Masegenya Mango and others v United Republic of Tanzania*

Judgment, 26 September 2019. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

Seven Applicants, five of whom were convicted and sentenced for murder, alleged discrimination in the granting of the presidential prerogative of mercy. In addition, two of the Applicants who were convicted of armed robbery and sentenced to 30 years imprisonment, alleged that they were given a heavier sentence than what the domestic laws at the time of their conviction provided for. The Court declared the claim in relation to the prerogative of mercy inadmissible for failure to exhaust local remedies and found no violation in relation to the convictions meted out for the armed robbery.

Jurisdiction (material jurisdiction, 30)

Admissibility (exhaustion of local remedies, 51, 52, constitutional petition, 57)

Fair trial (legality, 64)

Separate opinion: TCHIKAYA

Admissibility (exhaustion of local remedies, 9)

Dissenting opinion: BENSAOULA

Admissibility (joint Application, 19)

Dissenting opinion: BEN ACHOUR

Admissibility (joint Application, 15; constitutional petition, 17, 18)

I. The Parties

1. Shukrani Masegenya Mango, Ally Hussein Mwinyi, Juma Zuberi Abasi, Julius Joshua Masanja, Michael Jairos, Azizi Athuman Buyogela, Samwel M Mtakibidya (hereinafter referred to as "the Applicants") are all nationals of the United Republic of Tanzania (hereinafter referred to as "the Respondent State"). The First Applicant, Shukrani Masegenya Mango, and the Seventh Applicant, Samwel M Mtakibidya, were both convicted and sentenced for armed robbery while the rest of the Applicants were convicted and sentenced for murder. Although the Applicants

were convicted in different cases and at different times, they filed this Application jointly raising one major common grievance which relates to the exercise of the presidential prerogative of mercy by the Respondent State. With the exception of the Second Applicant, who died on 11 May 2015, all the Applicants are serving their sentences at Ukonga Central Prison in Dar es Salaam.

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

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the Application that the First Applicant, Shukrani Masegenya Mango, was charged with the offence of armed robbery before the District Court at Mwanza. On 7 May 2004, he was convicted and sentenced to serve a term of thirty (30) years imprisonment. The Seventh Applicant, Samwel M Mtakibidya, was also charged with the offence of armed robbery before the District Court of Handeni at Tanga. He was convicted and sentenced to thirty (30) years imprisonment on 5 August 2002.

4. The Second Applicant, Ally Hussein Mwinyi, was charged with the offence of murder before the High Court at Dar es Salaam. He was convicted and sentenced to death on 15 February 1989. On 21 September 2005, his sentence was commuted to life imprisonment. The Third Applicant, Juma Zuberi Abasi, was charged with the offence of murder before the High Court at Dar es Salaam and on 27 July 1983, he was convicted and sentenced to death. On 14 February 2012, his sentence was commuted to life imprisonment.

5. The Fourth Applicant, Julius Joshua Masanja, was charged with the offence of murder before the High Court at Dodoma. On 11 August 1989, he was convicted and sentenced to death. On 13 February 2002, his sentence was commuted to life imprisonment. The Fifth Applicant, Michael Jairos, was charged with the offence of murder before the High Court at Morogoro. On 25 May 1999, he was convicted and sentenced to death. On 12 February 2006, his sentence was commuted to life imprisonment. The Sixth

Applicant, Azizi Athuman Buyogela, was charged with the offence of murder before the High Court at Kigoma. In 1994 he was convicted and sentenced to death. His sentence was commuted to life imprisonment on 28 July 2005.

6. The Applicants have filed a joint Application since they all claim to be aggrieved by the manner in which authorities in the Respondent State have exercised the prerogative of mercy which is vested in the President of the Respondent State. Additionally, the First Applicant and the Seventh Applicant are complaining about the legality of their sentence for the offence of armed robbery.

B. Alleged violations

7. All the Applicants submit that the Respondent State discriminates against prisoners serving long term sentences in the manner in which it implements the prerogative of mercy under Article 45 of its Constitution. In the Applicants' view, the Respondent State automatically excludes prisoners serving long term sentences from the prerogative of mercy thereby violating Article 2 of the Charter and Article 13(1) (2) (3) (4) and (5) of the Respondent State's Constitution. The Applicants further contend that, prisoners serving long term sentences are "isolated" and discriminated against based on their social or economic status; since they do not earn a pardon on the basis of their good behaviour after serving one third of their sentences unlike all other prisoners. This, the Applicants contend, is in violation of Articles 3, 19 and 28 of the Charter.

8. The Applicants further submit that the Respondent State treats prisoners convicted of corruption and other economic crimes lightly and favourably compared to other prisoners since they can access the presidential pardon twice, a condition, which is not afforded to other convicts. The Applicants contend that this violates Article 3(1) and (2) of the Charter, Article 7 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 107A 2(a) of the Respondent State's Constitution.

9. The Applicants also submit that the Respondent State's implementation of the prerogative of mercy discriminates among prisoners who were convicted for the same offence since some are released while others are condemned to life in prison. In the Applicants' view, this amounts to a violation of Article 4 of the Charter.

10. It is also the Applicants' submission that sections 445 and 446 of the Prison Standing Orders (4th Edition) 2003, direct that

every case involving a sentence of life imprisonment should be submitted to the President for review. The Applicants aver that these provisions are not being implemented by the Respondent State especially in connection with prisoners serving long term sentences. The Applicants further submit that the Respondent State applies parole discriminately only benefitting those convicted of minor offences. According to the Applicants, this distinction in the implementation of the law, and the denial of parole is cruel and amounts to a violation of Article 9(1) and (2) of the Charter and Article 5 of the UDHR.

11. The Applicants also submit that prisoners do not get paid for the work they do while in prison and that upon release they are not given a starting capital or pension but simply abandoned, which is in violation of Article 15 of the Charter.

12. The Applicants further submit that their rights were violated by the lengthy period that they spent on remand pending the conclusion of their trials. They submit that the period that they spent on remand was not considered and/or deducted from their sentences which is in violation of Article 5 of the Charter and Article 5 of the UDHR.

13. The Applicants further submit that it is pointless to file a constitutional case in the High Court of the Respondent State because it is not independent, fair and just especially when it adjudicates cases that implicate failures in the judicial system. In the Applicants' view, the Respondent State discredits all such matters without hearing the merits thereby violating Articles 8 and 10 of the UDHR.

14. In addition to the above claims, which relate to all the Applicants, the First Applicant and the Seventh Applicant submit that the sentences imposed on them, thirty (30) years imprisonment, was heavier than the penalty in force at the time of their conviction. It is their submission, therefore, that their sentences are contrary to Article 13(6)(c) of the Respondent State's Constitution and section 285 and 286 of the Respondent State's Penal Code. It is also the contention of the Applicants, that sections 4(c) and 5(a) of the Minimum Sentences Act are invalid as they contravene Article 64(5) of the Constitution of the Respondent State, hence, the sentences imposed upon them are illegal, unconstitutional and in violation of Article 7(2) of the Charter.

III. Summary of the procedure before the Court

15. The Application was filed on 17 April 2015 and on 28 September 2015 it was served on the Respondent State.

16. On 22 September 2016, the Registry received the Respondent State's Response to the Application.

17. On 26 September 2017, the Registry received the Applicant's Reply to the Respondent State's Response and this was transmitted to the Respondent State on 2 October 2017.

18. On 10 May 2018, the Registry received the Applicant's submissions on reparations and these were transmitted to the Respondent State on 22 May 2018.

19. Notwithstanding several reminders and extensions of time, the Respondent State did not file submissions on reparations.

20. On the 11 April 2019, pleadings were closed and the Parties were duly informed.

IV. Prayers of the Parties

21. Although the First Applicant and the Seventh Applicant have an additional claim which is distinct from the allegations that all the Applicants have jointly made, the Applicants have not desegregated their prayers and they have jointly prayed the Court for the following:

"i. An order that the Application is admissible;

ii. An order declaring that their basic rights have been violated through the unconstitutional acts of the Respondent State;

iii. An order that they "regain and enjoy" their fundamental rights in respect of the violations perpetrated by the Respondent State;

iv. An order that the Respondent State recognise the rights and duties enshrined in the Charter and take legislative and other measures to give effect to them;

v. An order nullifying the Respondent State's decisions violating the Applicants rights and ordering their release from custody;

vi. An order for reparations;

vii. Any other order(s)/relief(s)/remedies as the Court may be pleased to grant and as seems just in the circumstances of the case."

22. In respect of the jurisdiction and admissibility of the Application, the Respondent State prays the Court to grant the following orders,:

"i. That, the African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate over this matter.

ii. That, the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court or Article 56 and Article 6(2) of the Protocol.

iii. That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court or Article 56 and Article 6(2) of the Protocol.

iv. That, the Application be deemed inadmissible.

v. That, the Application be dismissed with costs."

23. In respect of the merits of the Application, the Respondent State prays the Court to order the following:

"i. That, the Respondent has not violated Articles 13(1) (2) (3) (4) and (5), 13(6)(c) and 107A(2) (a) of the Constitution of the United Republic of Tanzania.

ii. That, the Respondent has not violated Article 2, 3(1)(2), 4,5,7(2), 9(1)(2), 15,19 and 28 of the African Charter on Human and Peoples' Rights.

iii. That, the Respondent has not violated Articles 5, 7, 8 and 10 of the Universal Declaration of Human Rights.

iv. That, the Respondent State is not unlawfully detaining the Applicants and has not violated their fundamental rights.

v. That, the Respondent State does not discriminate between long term and short term prisoners.

vi. That, Sections 4(c) and 5(a) of the Minimum Sentence Act are valid and do not infringe the fundamental rights of the Applicants.

vii. That, Section 4(c) and 5(a) of the Minimum Sentence Act are in conformity with Articles 64(5) of the Constitution of the United Republic of Tanzania, 1977.

viii. That, the sentence of Thirty years imprisonment for the offence of Armed Robbery was lawful.

ix. That, the Application lacks merits and should be dismissed.

x. That, the Applicants should not be awarded reparations.

xi. That, the costs of this Application be borne by the Applicants."

V. Jurisdiction

24. Pursuant to Article 3(1) of the Protocol, "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned". Further, in terms of Rule 39(1) of the Rules, "the Court shall conduct preliminary examination of its jurisdiction …"

A. Objections to material jurisdiction

25. The Respondent State raises two objections relating to the material jurisdiction of the Court: firstly, that the Applicants are asking the Court to act as a court of first instance, and, secondly, that in so far as the First Applicant is concerned, this action is an abuse of process and it amounts to commencing multiple actions over the same facts.

i. Objection on the ground that the Court is being asked to sit as a court of first instance

26. The Respondent State submits that the Applicants are asking the Court to act as a court of first instance and deliberate over matters that have never been adjudicated on by its municipal courts. The Respondent State further submits that the Court does not have jurisdiction to sit as a court of first instance. In support of its contention, the Respondent State points out that all the Applicants are challenging the constitutionality of Section 51 of the Prisons Act, 1967; sections 445 and 446 of the Prison Standing Orders and also the Parole Act. Additionally, the First Applicant and the Seventh Applicant, are also challenging the constitutionality of Sections 4(c) and 5(a) of the Minimum Sentences Act. All the Applicants are also alleging a violation of Article 13 of the Respondent State's Constitution. It is the submission of the Respondent State that all the Applicants have never raised any of these challenges before its domestic courts.

27. The Applicants, in their Reply, contend that the Court has jurisdiction as per Article 3 of the Protocol and Rule 26(a) of the Rules. It is the Applicants' submission that the essence of their prayers give the Court jurisdiction since their Application is inviting the Court to review the conduct of the Respondent State in light of the international standards and human rights instruments that it has ratified.

***

28. The Court notes that the crux of the Respondent State's objection is that it is being asked to sit as a court of first instance. Although the Respondent State has raised this objection as relating to the

Court's material jurisdiction, the Court notes that the Respondent State has, essentially, argued that the matter is not competently before the Court since all the Applicants never attempted to activate domestic mechanisms to remedy their grievances.

29. In so far as the Respondent State's objection relates to exhaustion of domestic remedies, the Court will address this issue later in this judgment. Nevertheless, the Court recalls that, by virtue of Article 3 of the Protocol, it has material jurisdiction in any matter so long as "the Application alleges violations of provisions of international instruments to which the Respondent State is a party".[1] In the instant Application, the court notes that all the Applicants are alleging violations of the Charter, to which the Respondent State is a Party, and the UDHR. In respect of the UDHR, the Court recalls that in *Anudo Ochieng Anudo v United Republic of Tanzania*, it held that while the UDHR is not a human rights instrument subject to ratification by States, it has been recognised as forming part of customary law and for this reason the Court is enjoined to interpret and apply it.[2]

30. In light of the above, the Court, therefore, finds that it has material jurisdiction in this matter.

ii. Objection alleging that the Application violates the rules on *res judicata*

31. The Respondent State submits that the First Applicant, Shukrani Masegenya Mango, already filed an Application before the Court – Application 005 of 2015 – in which he raised the same matters that he is raising now. For this reason, the Respondent State

1 See, Application 025/2016. Judgment of 28 March 2019 (Merits and Reparations), *Kenedy Ivan v United Republic of Tanzania* (hereinafter referred to as "Kenedy Ivan v Tanzania (Merits and Reparations)"), paras 20-21; Application 024/2015. Judgment of 7 November 2018 (Merits and Reparations), *Armand Guehi v United Republic of Tanzania*, para 31; Application 006/2015. Judgment of 23 March 2018 (Merits), *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*, para 36.

2 Application 012/2015. Judgment of 23 March 2018 (Merits), *Anudo Ochieng Anudo v United Republic of Tanzania* para 76.

contends that the Court does not have jurisdiction to hear the same matters that were already raised before it.

32. The Court notes that the Applicants' did not make any submission on this point.

***

33. The Court notes that this objection only relates to the First Applicant in this Application. The Court recalls that the Applicants in Application 005/2015 were Thobias Mang'ara Mango and Shukrani Masegenya Mango. It is clear, therefore, that the First Applicant in the present matter was indeed party to earlier litigation before the Court. The Court recalls that Application 005/2015 was filed on 11 February 2015 and judgment was delivered on 11 May 2018. As earlier pointed out, the Applicants filed the present Application on 17 April 2015. Clearly, therefore, as at the time the present Application was being filed, the Applicant had a separate but subsisting claim, pending before the Court.

34. The Court also notes, however, that in Application 005/2015 the Applicants raised a range of alleged violations of their rights pertaining to the manner in which they were detained, tried and convicted by the judicial authorities of the Respondent State.[3] Admittedly, as part of the claims, in Application 005/2015, the First Applicant also argued that he was condemned to serve a sentence of thirty (30) years imprisonment for armed robbery when this was not the applicable sentence at the time the offence was committed, which is also exactly the same claim that he is jointly raising with the Seventh Applicant in this matter.

35. The Court observes that although the Respondent State raises this issue as an objection to the Court's material jurisdiction, it is an allegation contesting the admissibility of the First Applicant's claim on the basis that it violates the rules on *res judicata* as captured under Article 56(7) of the Charter. The Court will, therefore, consider this objection, if need be, when it is dealing with the admissibility of the matter.

3 Application 005/2015. Judgment of 11 May 2018 (Merits), *Thobias Mang'ara Mango and Another v United Republic of Tanzania*, paras 11-12.

B. Other aspects of jurisdiction

36. The Court notes that the other aspects of its jurisdiction are not contested by the Parties and nothing on the record indicates that the Court lacks jurisdiction. The Court thus holds that:

i. It has personal jurisdiction given that the Respondent State is a party to the Protocol and it deposited the required Declaration.

ii. It has temporal jurisdiction as the alleged violations were continuing at the time the Application was filed, which is after the Respondent State became a party to the Protocol and deposited its Declaration.

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

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

VI. Admissibility

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

39. Rule 40 of the Rules, which in essence restates Article 56 of the Charter, stipulates that Applications shall be admissible if they fulfil the following conditions:

"1. Indicate their authors even if the latter request anonymity,

2. Are compatible with the charter of the organization of African Unity or with the present Charter,

3. Are not written in disparaging or insulting language’

4. Are not based exclusively on news disseminated through the mass media,

5. Are filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,

6. Are filed within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and

7. Do not deal with cases which have been settled by the States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provision of the present Charter.”

40. While the Parties do not dispute that some of the admissibility requirements have been fulfilled, the Respondent State raises two objections. The first one relates to the exhaustion of domestic

remedies, and the second one relates to whether the Application was filed within a reasonable time after the exhaustion of domestic remedies.

41. The Respondent State avers that the Applicants did not exhaust local remedies because they never raised the allegations presented to this Court before any of its municipal courts. The Respondent State submits that the Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act challenging the alleged violations of their rights especially in relation to the alleged discrimination by virtue of the exercise of the presidential prerogative of mercy.

42. The Respondent State further submits that except for the First Applicant, the Fifth Applicant and the Sixth Applicant, all the other Applicants never applied for review of their original cases though they lodged appeals at the Court Appeal which were dismissed.

43. The Applicants assert that, convicts serving long term sentences who exhaust all local remedies in their original cases have no other available domestic remedy and that the only opportunity to address their grievances is found under Article 45 of the Constitution of the Respondent State which refers to the prerogative of mercy by the President of the Respondent State.

44. The Applicants also submit that it is useless for them to utilise the avenue provided by the Basic Rights and Duties Enforcement Act, since the Respondent State's courts are not independent, fair and just in adjudicating matters that involve the judicial system itself.

45. In their Reply, the Applicants further submit that all of them except the Second Applicant appealed to the Court of Appeal against their convictions but their appeals were dismissed. They further contend that there is no other judicial avenue, in the Respondent State, for pursuing a remedy after the Court of Appeal.

***

46. The Court notes that the crux of the Respondent State's objection is that the Applicants should have first filed a constitutional petition challenging, among other things, the constitutionality of the Prisons Act and the Parole Act.

47. The Court also notes that the gravamen of the Applicants' case revolves around the manner in which Respondent State has implemented the presidential prerogative of mercy. All the other

violations alleged by the Applicants have, in one way or the other, been linked to the exercise of the prerogative of mercy.

48. In resolving the admissibility of this Application the Court considers it apposite to make a distinction among the Applicants before pronouncing itself on this issue. On the one hand, all the Applicants are, primarily, alleging a violation of their rights to equality and non-discrimination by reason of the exercise of the presidential prerogative of mercy and, on the other hand, the First Applicant and the Seventh Applicant, in addition to the claims made by everyone else, are also challenging the legality of their sentences for armed robbery. The Court will proceed to deal with these allegations seriatim.

49. In relation to the alleged violation of the Applicants rights by reason of the exercise of the presidential prerogative of mercy, the Court notes that the Applicants do not dispute that the avenue offered by the Basic Rights and Duties Enforcement Act was available to them whereby they could have challenged, before the High Court, the alleged violation of their rights. Instead, the Applicants contend that "it is so useless and senseless to refile an application to the high court of the respondent state" since "the tribunal/court is not independent, fair and just in adjudicating justice to the parties particularly to which refers to judicial system …"

50. The Court recalls that in *Diakite Couple v Republic of Mali*, it held that "exhausting local remedies is an exigency of international law and not a matter of choice; that it lies with the Applicant to take all such steps as are necessary to exhaust or at least endeavour to exhaust local remedies; and that it is not enough for the Applicant to question the effectiveness of the State's local remedies on account of isolated incidents".[4]

51. In this Application, the Court finds that all the Applicants could have approached the High Court to challenge the legality of the exercise of the presidential prerogative of mercy, the Prisons Act, the Parole Act and other laws which they perceive to be implicated in the discrimination that they allegedly suffered. It was not open

4 Application 009/2016. Judgment of 26 September 2017 (Jurisdiction and Admissibility), *Diakite Couple v Republic of Mali*, para 53.

to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them.

52. In the circumstances, the Court finds that the Applicants failed to exhaust local remedies as stipulated under Article 56(5) of the Charter and as restated in Rule 40(5) of the Rules.

53. The Court recalls that admissibility requirements under the Charter and the Rules are cumulative such that where an Application fails to fulfil one of the requirements then it cannot be considered.[5] In the circumstances, therefore, the Court does not consider it necessary to examine the other admissibility requirements in so far as they relate to the allegation by all the Applicants that their rights were violated as a result of the exercise of the presidential prerogative of mercy.

54. In light of the above, the Court finds that the Application, in so far as it relates to all the Applicants and their allegation of a violation of their rights due to the exercise of the presidential prerogative of mercy, is inadmissible for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules.

55. The above notwithstanding, the Court recalls that the First Applicant and the Seventh Applicant made an additional allegation which is distinct from the allegations made by all the Applicants jointly and this pertains to the legality of their sentence for armed robbery. In this connection the Court notes, firstly, that the legality of their sentence for robbery implicates their right to fair trial.

56. The Court further notes that both the First Applicant and the Seventh Applicant appealed their convictions and sentences to the Court of Appeal which dismissed the appeals. The question of the legality of their conviction and sentence, therefore, was enmeshed in the bundle of rights and guarantees due to the Applicants which the Court of Appeal could have pronounced itself on during the hearing of the appeals. The Court of Appeal, therefore, which is the highest court in the Respondent State, had the opportunity to pronounce itself on the allegation pertaining to the legality of the Applicants' sentences.

57. Secondly, the Court, recalling its jurisprudence, reiterates its position that the remedy of a constitutional petition, as framed in the Respondent State's legal system, is an extraordinary remedy that an applicant need not exhaust before approaching

5 Application 016/2017. Ruling of 28 March 2019 (Jurisdiction and Admissibility), *Dexter Johnson v Ghana*, para 57.

the Court.[6] For this reason, the Court holds that the First Applicant and Seventh Applicant need not have filed a constitutional petition before approaching the Court.

58. The Court, therefore, holds that the Application is admissible in so far as it relates to the allegations by the First Applicant and the Seventh Applicant. The Respondent State's objection is, therefore, dismissed.

59. The Court, having declared inadmissible the joint allegations by all the Applicants and having only admitted the allegation by the First Applicant and the Seventh Applicant will now proceed to examine the merits of this allegation.

VII. Merits

60. The First Applicant and the Seventh Applicant submit that their fundamental rights under Article 13(6)(c) of the Respondent State's Constitution have been violated since they were sentenced to a penalty of thirty (30) years imprisonment when the said penalty was heavier than the penalty in force at the time they were convicted of the offence. They further submit that the offence of armed robbery came into existence via the enactment of Section 287A under Act No. 4 of 2004 which amended the Penal Code.

61. The First Applicant and the Seventh Applicant also submit that Section 4(c) and 5(a)(ii) of the Minimum Sentences Act are invalid as they contravene Article 64(5) of the Constitution.[7] They thus submit that the penalty imposed on them is unconstitutional for violating Article 7(2) of the Charter.

62. The Respondent State submits that the applicable sentence for the offence of armed robbery is a term of thirty (30) years as stipulated under Section 5 of the Minimum Sentences Act. The Respondent State further avers that the offence of armed robbery

6 Application 053/2016. Judgment of 28 March 2019 (Merits), *Oscar Josiah v United Republic of Tanzania*, paras 38-39 and Application 006/2013. Judgment of 18 March 2016 (Merits), *Wilfred Onyango Nganyi and 9 others v United Republic of Tanzania*, para 95.

7 Section 4(c) provides thus: "Where any person is, after the date on which this Act comes into operation, convicted by a court of a scheduled offence, whether such offence was committed before or after such date, the court shall sentence such person to a term of imprisonment which shall not be less than– (c) where the offence is an offence specified in the Third Schedule to this Act, thirty years." And Section 5(a)(ii): "Notwithstanding the provisions of section 4-(a) (ii) if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to imprisonment to a term of not less than thirty years.

was in existence before the enactment of Section 287A of the Penal Code.

63. The Respondent State further submits that Sections 4(c) and 5(a) of the Minimum Sentences Act are valid since they do not in any way contravene Article 64(5) of the Respondent State's Constitution.

***

64. The Court notes that notwithstanding the submissions by the First Applicant and the Seventh Applicant, on the alleged violation of their right to fair trial by reason of their sentence, in their Reply the Applicants stated that they did not dispute the Respondent State's prayers on the legality of sentences under the Minimum Sentences Act. Nevertheless, the Court recalls that it has consistently held that thirty (30) years imprisonment has been the minimum legal sentence for armed robbery in the Respondent State since 1994.[8] The Court, reiterating its jurisprudence, therefore, holds that the sentence of the Applicants to a prison term of thirty (30) years is in accordance with the applicable law in the Respondent State.

65. The allegation by the First Applicant and Seventh Applicant of a violation of Article 7(2) of the Charter by reason of their thirty (30) year sentence is thus dismissed.

VIII. Reparations

66. The First Applicant and the Seventh Applicant pray the Court to order reparations to redress the violations of their fundamental rights in accordance with Article 27(1) of the Protocol and Rule 34(1) of the Rules and to grant any remedy that it deems fit in the circumstances.

67. The Respondent State prays the Court to dismiss the request for reparations.

***

8 Application 011/2015. Judgment of 28 September 2017, *Christopher Jonas v Tanzania* (Merits), para 85.

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

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

70. The Court notes that, in the instant case, no violation has been established and therefore the question of reparations does not arise. The Court, therefore, dismisses the prayer for reparations.

IX. Costs

71. The Applicants pray that costs should be borne by the Respondent State.

72. The Respondent State prays the Court to dismiss the Application with Costs.

***

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

74. In view of the above provision, the Court holds that each Party shall bear its own costs.

X. Operative part

75. For these reasons,

The Court,

Unanimously;

On jurisdiction

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

ii. *Declares* that it has jurisdiction.

On admissibility

By a majority eight (8) for, and two (2) against, Justices Rafaâ BEN ACHOUR and Chafika BENSAOULA dissenting:

iii. *Declares* that the Application is inadmissible in relation to all the Applicants, for failure to comply with the requirement under Article

56(5) of the Charter which is restated in Rule 40(5) of the Rules, in so far as it relates to the allegation of violation of the Applicants' rights by reason of the exercise of the presidential prerogative of mercy;

iv. *Declares* the Application admissible in respect of the allegation by the First Applicant and the Seventh Applicant in relation to the legality of their sentence for armed robbery;

On merits

v. *Finds* that the Respondent State has not violated the First Applicant's and Seventh Applicant's right to fair trial under Article 7(2) of the Charter by reason of their sentences for armed robbery.

On reparations

vi. *Dismisses* the prayer for reparations.

On costs

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

***

Separate Opinion: TCHIKAYA

1. Like my honourable colleagues, I subscribe to the Operative Part of this Judgment (*Shukrani Masegenya Mango and others v United Republic of Tanzania*). The Application which brought the case before this Court was, after lengthy deliberations, ultimately inadmissible. I hereby wish to explain the reasons for this and also show that the Court should have given further consideration to the argument drawn from the presidential pardon which was, in the instant case, heavily impugned. It is true that whatever the consideration, I share the opinion that the Operative Part would have been the same because of the prior inadmissibility. However, the law applicable to the issue of "presidential pardon" in international human rights law deserved to be clarified.

2. Messrs Shukrani Masegenya Mango, Ally Hussein Mwinyi, Juma Zuberi Abasi, Julius Joshua Masanja, Michael Jairos, Azizi Athuman Buyogela, Samwel M. Mtakibidya, nationals of Tanzania, were convicted of murder and armed robbery in various cases. With the exception of Ally Hussein Mwinyi, who died on 11

May 2015, the Applicants are serving their sentences at Ukonga Central Prison in Dar es Salaam. It was a joint Application. The Applicants all claimed therein, without particular legal data, "to be aggrieved by the manner in which authorities in the Respondent State have exercised the prerogative of mercy which is vested in the President of the Respondent State".[1]

3. The case will not renew the jurisprudence of the Court. It is a unique case. Being inchoately in the *Yogogombaye* case (15 December 2009),[2] but obviously present in *African Commission on Human and Peoples' Rights v Libya* of 3 June 2013,[3] the prior consideration of cases has taken a decisive place in the work of the Court. The *Shukrani and others* Judgement confirms a judicial trend: on the one hand, many cases, like the instant case, stumble over the prior requirement of admissibility and, on the other hand, the judge is left only with the duty of jurisdiction, that is to say, the decision to exclude from consideration on the merits cases which do not fulfil the conditions of admissibility.

I. Confirmation of the preliminary rules of admissibility of cases (Article 56 of the Charter and Article 6 of the Protocol)

4. The *Shukrani Masegenya Mango and others* case confirms the doctrine of the African Court on the admissibility of applications, pursuant to Article 56 of the African Charter on Human and Peoples' Rights, Article 6(2) of the Protocol on the establishment of the Court and Rule 40 of the Rules of Court. This aspect of the proceedings also constituted the Respondent State's defence base. Tanzania argued, inter alia, that "the Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act".[4] It was thus emphasizing the Applicants' failure to exhaust domestic remedies. It further submitted, unlike the Applicants, that "except for the first Applicant, the fifth Applicant

1 Application 008/2015. Judgment of 26 September 2019, *Shukrani Masegenya Mango and others v Tanzania*, para 6.

2 Application 001/2008. Judgment of 15 December 2009, *Yogogombaye v Senegal*, 15 December 2009; Dissenting opinion of Judge Fatsa Ouguergouz; see B Tchikaya 'The first decision on the merits of the African Court on Human and Peoples' Rights: the *Yogogombaye v Senegal* case (15 December 2009)' (2018) 2 *African Yearbook of Human Rights* 509.

3 Application 002/2013. Judgment of 3 June 2016, *African Commission on Human and Peoples' Rights v Libya,* Dissenting opinion of Judge Fatsa Ouguergouz.

4 *Shukrani Masegenya Mango and others v Tanzania* (Merits), *op cit*, para 41.

and the sixth Applicant, all the other Applicants never applied for review of their original cases though they lodged appeals at the Court of Appeal which were dismissed".[5] In its reply, the Court confirms the rule, which is constantly recalled in its case-law. It notes that in *Diakite Couple v Republic of Mali,*[6] it held that "exhausting local remedies is an exigency of international law and not a matter of choice; that it lies with the Applicant to take all such steps as are necessary to exhaust (…) and that it is not enough for the Applicant to question the effectiveness of the State's local remedies on account of isolated incidents".[7] The Court concluded, as in the instant case, that the Application was inadmissible.

5. This *Shukrani and others* case had a peculiarity. Two of the seven Applicants had filed an additional application. The first and the seventh Applicants had filed a separate application from the joint grievances. They challenged the legality of the sentence handed down for armed robbery. Thus, for them, there is an issue of the applicants' right to a fair trial. Both of them appealed their convictions and sentences to the Court of Appeal, which dismissed their appeals. As the highest court of the Respondent State, the Court of Appeal therefore had the opportunity to rule on the legality of the sentences invoked by the Applicants. As a result, the application of the first and seventh Applicants was admissible. The Respondent State's objection on that point was therefore dismissed.[8] The Court concluded that "the Respondent

5 *Ibid* para 42.

6 Application 009/2016. Judgment of 28 September 2017 (Jurisdiction and Admissibility), *Diakité Couple v Republic of Mali*, para 53; see also Application 016/2017. Judgment of 28 March 2019 (Jurisdiction and Admissibility), *Dexter Johnson v Ghana*, para 57.

7 *Shukrani Masegenya Mango and others v Tanzania* (Merits), *op cit*, para 50.

8 *Ibid*, para 55, 57 and 75(v).

State has not violated any law”,[9] that it remained in line with its previous decisions[10] and that of the relevant international law.[11]

6. The late Jean Rivero[12] saw the rules of prior exhaustion of local remedies as an influence of domestic law on the international judicial order. This is an instructive paradox, since it is international judicial law that requires the national judiciary to consider supremely and overtly the alleged violations by a national petitioner. The purpose of this being to correct the breach of the law at the place of its commission. This is the main purpose of this rule of prior exhaustion of local remedies. The question is undoubtedly different and special for those rules that affect the reserved areas of the State (*The Westphalian State,* according to Alain Pellet[13]), as it was in the instant case of *Shukrani and others*, with the question raised by the conditions of use of the “presidential prerogative of mercy”.

9 *Ibid*, para 75.

10 *African Commission on Human and Peoples’ Rights v Libya* (Merits), *op cit*, 158; Application 003/2011. Judgment of 21 June 2013 (Admissibility), *Urban Mkandawire v Malawi*; Application 001/2012. Judgment of 28 March 2014 (Admissibility), *Frank David Omary and others v Tanzania* (Admissibility); Application 003/2014. Judgment of *Peter Joseph Chacha v Tanzania* (Admissibility).

11 Application 004/2013. Judgment of 5 December 2014 (Merits), *Lohé Issa Konaté v Burkina Faso*. The Court echoed the Communication on *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Zimbabwe* and stated as follows: “It is a well-established rule of customary international law that before international proceedings are instituted, the various remedies provided by the State should have been exhausted (...). “International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain remedy from the national authorities. It must be shown that the State was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that States are not considered to have violated their human rights obligations if they provide genuine and effective remedies for victims of human rights violations.”(See African Commission on Human and Peoples’ Rights, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe*, communication 293/04, 7-22 May 2008, para 60.

12 J Rivero *Le problème de l’influence des droits internes sur la Cour de Justice de la Communauté* Européenne du Charbon et de l›Acier [The problem of the influence of internal rights on the Court of Justice of the European Coal and Steel Community], *AFDI*, 1958, 295-308.

13 This concept of a Westphalian State, in that it reinforces the juxtaposition of States, gives an extension of this reserved area even more important: A Pellet ‘Histoire du droit international: Irréductible souveraineté?’ G Guillaume *(dir), La vie internationale* [History of international law: Irreducible sovereignty? G Guillaume (ed) *International Life*], Hermann, Paris, 2017, 7-24.

II. Presidential prerogative of mercy, applicable law

7. In a clear statement, the Court goes on to state that: "in so far as it relates to all the Applicants and their allegation of a violation of their rights due to the exercise of the presidential prerogative of mercy, it is inadmissible for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules".[14] Thus, admissibility conditions being cumulative, consideration of the elements drawn from the presidential pardon was superfluous.

8. This power to annul a sentence, or even the annulment of a prosecution procedure, is conferred on the highest political authority in the country. It is a monarchical "snub", and even an infringement on the law, against the power of the judiciary. This power of mercy exists in almost all democratic systems.[15] In the instant case, the Applicants are not disputing the basis, but "primarily alleging a violation of their rights to equality and non-discrimination by reason of the exercise of the presidential prerogative of mercy".[16] The arguments used by the Applicants were even more explicit. They stated that "the Respondent State treats prisoners convicted of corruption and other economic crimes lightly and favourably compared to other prisoners since they can access the presidential pardon twice, a condition which is not afforded to other convicts. The Applicants contend that this violates Article 3(1) and (2) of the Charter, and Article 7 of the Universal Declaration of Human Rights...". The Applicants were thus denouncing an allegedly arbitrary exercise of the presidential pardon. In the instant case, did this Court need to hear it?

9. The international justiciability of the discretionary acts of Heads of State remains debatable.[17] The application of international law, including human rights law, is essentially based on a principle

14 See *Shukrani Masegenya Mango and others v Tanzania*, *op cit*, para 54.

15 F Laffaille '*Droit de grâce et pouvoirs propres du chef de l'État en Italie, Revue internationale de droit comparé'*, [Right of Pardon and Powers of the Head of State in Italy], *International Journal of Comparative Law*, 59, 2007, 761- 804.

16 See *Shukrani Masegenya Mango and others v Tanzania* (Merits), *op cit*, para 48.

17 M Cosnard 'Les immunités du chef d'État' SFDI, *Le chef d'État et le droit international. Colloque de Clermont*" [M Onsard 'Immunities of the head of state' in Colloquium of SFDI, *The head of state and international law. Clermont Conference* (2002) 201.

that dates back as far as the 1927 *Lotus*[18] case, namely: "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty". It follows that the issue is whether the internal acts regarding the presidential pardon are detachable or not from the Office of the President. It is an office whose legal regime belongs globally to the internal sovereignty of States. The law applicable to the exercise of presidential pardon, except arbitrary controlled by international law, is subject to the domestic law of States. It was up to the Applicants, not the Court, to add the elements, the nature of which varies according to the national legal systems. It is indisputable that the control of international law on this aspect is not worthless. But the *Shukrani*

10. Acts of the executive, attached to the power, do not fall within the jurisdiction of the judicial powers normally exercised by the local judge because of the separation of powers. Louis Favoreu[19] proposed to submit them to constitutional power. This seems to be an illusion, since constitutional power remains dependent on the domestic law, which remains under the control of the sovereign power. Supranational law integrated into international law would exercise control over those acts to which would be subjected, not the presidential pardon itself, but its administration or exercise, under two conditions, however: that such acts are detachable from the exercise of the reserved area of the State, and that after validation of the conditions of admissibility, the acts are really tainted with arbitrariness.

11. As a result, even though in the *Shukrani and others* case the Applicants submitted that the Respondent State "automatically excludes prisoners serving long term sentences from the prerogative of mercy thereby violating Article 2 of the Charter and Article 13(1), (2), (3), (4) and (5) of the Respondent State's Constitution",[20] this Court refused to grant the request, as the procedural and substantive elements are not strictly associated.

***

18 See PCIJ, the "*Lotus*" case, France, Judgement of 7 September 1927, Series A, No 10, p 19.

19 D Mauss & L Favoreu 'A constitutional law missionary' (2004) *Revue Francaise De Droit Constitutionnel* 461-463.

20 *Shukrani Masegenya Mango and others v Tanzania, op cit*, para 7.

Dissenting opinion: BENSAOULA

1. I would have shared the opinion of the majority of the Judges with regard to the Operative Part of the Judgment. Unfortunately, the manner in which the Court treated the admissibility of the Application is at variance with the principles governing joint applications.

2. It is clear from the joint Application filed on 17 April 2015 that the Applicants, seven in all, alleged human rights violations by the Respondent State, but it should be noted that: Although Shukrani Masegenya Mango and Samuel Mtakibidya were both convicted and sentenced for armed robbery, the sentences condemning them were not rendered by the same court. The proceedings that led to the conviction of one and the other are completely distinct in dates, in facts and in law. Shukrani Masegenya Mango was prosecuted for armed robbery before the Mwanza District Court, convicted on 7 May 2004 and sentenced to 30 years' imprisonment.

3. While Samuel Mtakibidya was prosecuted for armed robbery before the Handeni District Court in Tanga. He was found guilty and sentenced to 30 years' imprisonment on 5 August 2002.

4. As for Applicants, Ally Hussein Mwinyi and Juma Zuberi Abasi, the former charged with murder before the Dar es Salaam High Court, was convicted and sentenced to death on 15 February 1989 and on 21 September 2005, his sentence was commuted to life imprisonment. The latter charged with murder was convicted by the High Court of Dar es Salam on 27 July 1983 and sentenced to death; his sentence was commuted to life imprisonment on 14 February 2012.

5. As for Applicants Julius Joshua Masanja and Michael Jairos, the former was tried for murder before the Dodoma High Court, convicted and sentenced to death on 11 August 1989, and his sentence commuted to life imprisonment on 13 February 2002. The latter was prosecuted for murder before the Morogoro High Court, convicted and sentenced to death on 25 May 1999, with his sentence commuted to life imprisonment on 12 February 2006. Lastly, Applicant Azizi Athuman Buyogela prosecuted for murder before the Kigoma High Court, was found guilty and sentenced to death, sentence commuted to life imprisonment on 28 July 2005.

6. Although all the Applicants are indeed accusing the Respondent State of human rights violations, Applicants Shukrani and

Samwel are, in addition, challenging the legality of the sentence pronounced against them.

7. It is clear from the foregoing that each Applicant was prosecuted and convicted by different judicial authorities, on different dates, for different events, even though some of the charges have the same characterization and others the same convictions.

8. A reading of the definitions of joint application leads to summarizing it into one action or one legal proceeding or one procedure that allows a large number of persons to sue a legal or natural person in order to obtain an obligation to do, not to do or give.

9. Originally from the United States, the first joint application took place in the 1950s after the explosion of the cargo ship at Texas City, where 581 people perished and the beneficiaries of the victims filed a lawsuit for reparation by joint application. This procedure is now widespread in several Common Law countries and also in several European countries.

10. The advantage of this remedy is that a large number of individual complaints are tried in a single trial when the facts and standards are identical, to avoid repetition over days with the same witnesses, the same evidence and the same issues from trial to trial.

11. It also solves the problem of paying lawyers when the compensation is modest, ensures all applicants the payment of compensation by avoiding that the first to file an application are served first without leaving anything for subsequent applicants, centralizes all the complaints and equitably shares the compensation between claimants in case of victory and, lastly, it avoids discrepancies between several decisions.

12. Victims are of a similar situation, the damage caused by the same person with a common cause, the prejudice must be common, the issues on which the judges should rule must be common in fact and in law.

13. The choice between joint application and individual application must be assessed on a case-by-case basis, since major damages are generally not appropriate for collective processing because the complaint almost always involves issues of rights and facts that will have to be tried again on an individual basis.

14. It follows from comparative law, as well as from certain decisions of international human rights bodies, that a joint application is subject to conditions other than admissibility and jurisdiction over the existence of a sufficient link drawn from the following elements:

- identity of the facts,
- identity of jurisdiction,
- identity of procedure leading to the conviction of the applicants.

15. In its Grand Chamber Judgment on *Hirsi Jamaa and others v Italy* delivered on 23 February 2012, the European Court of Human Rights (ECtHR) was seized by 24 claimants (11 Libyans and 13 Eritreans).

16. In that case, more than 200 migrants had left Libya in three boats bound for the Italian coasts. On 6 May 2009, while the boats were 35 miles south of Lampedusa in international waters, they were intercepted by Italian coast guards and the migrants were taken back to Tripoli. The Applicants (11 Somalians and 13 Eritreans) argued that the Italian authorities' decision to send them back to Libya had, on the one hand, exposed them to the risk of being subjected to ill-treatment and, on the other hand, to the risk of being subjected to ill-treatment if repatriated to their countries of origin (Somalia and Eritrea). They thus invoked the violation of Article 3 of the European Convention on Human Rights. They also felt that they had been subjected to collective expulsion prohibited by Article 4 of Protocol 4. Lastly, they invoked the violation of Article 13 of the ECHR since they considered that they had no effective remedy in Italy to complain about alleged breaches of Articles 3 and 4 of Protocol 4.

17. The application was lodged with the European Court of Human Rights on 26 May 2009. In the judgment rendered, the European Court of Human Rights observed that the applicants were all within the jurisdiction of Italy within the meaning of Article 1 the ECHR, since they complained of the same facts and alleged the same violations. It unanimously concluded on the admissibility of the joint application and the violation of Article 4 of the Protocol.

18. Similarly, in *Wilfried Onyango Nganyi and 9 others v Tanzania*, the African Court on Human and Peoples' Rights considered on 18 March 2016 that the application fulfilled the conditions of admissibility of a joint application cited above, because they were prosecuted for identical facts in an identical procedure before the same courts and in a single judgment at national level.

19. Faced with this state of affairs, the Court in its Judgment which is the subject of this dissenting opinion, declaring the application admissible without basing its decision on legal grounds for the admissibility of the joint application and by ignoring this peculiarity of the application, breached the principles of reasoning decisions

set forth in Rule 61 of the Rules and has completely shifted from its jurisprudence and that of international human rights courts.

***

Dissenting opinion: BEN ACHOUR

1. In the above judgment, *Shukrani Masegenya Mango and others v United Republic of Tanzania*, I do not subscribe to the decision of the majority of the judges of the Court declaring the application inadmissible, on the one hand, “in relation to all the Applicants for failure to comply with the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules, in so far as it relates to the allegation of violation of the Applicants’ rights by reason of the exercise of the presidential prerogative of mercy”[1] and, on the other hand, declaring “[t]he Application admissible in respect of the allegation by the First and Seventh Applicant in relation to the legality of their sentence for armed robbery”[2] and consequently to rule on the merits of the first and seventh Applicants’ claims, which are, by the way, the common claims of all the Applicants. In my opinion, the Application as a whole should have been declared admissible and not inadmissible for some and admissible for others.

2. By using this legal apparatus of treating the same applicants differently, the Court breached the unity of the application submitted by the seven applicants at the same time. Furthermore, and beyond this first objection, by declaring the Application concerning all the Applicants inadmissible as to “the manner in which the right of presidential pardon has been applied”, the Court ignored its established case law on extraordinary remedies, in particular the appeal for unconstitutionality before the Tanzanian courts.

1 Point (iii) of the operative part.

2 Point (iv) of the operative part.

I. Insufficient understanding of the unity of the Application

3. It is important to note from the outset that on 17 April 2015, the Court received the same and only Application, filed by seven individuals "jointly raising one major common grievance, which relates to the exercise of the presidential prerogative of mercy".[3] Two of them (first and seventh Applicants) were convicted and sentenced for armed robbery, while the other five were convicted and sentenced for murder. All these Applicants, with the exception of one of them (second Applicant), are serving their respective sentences at Dar es Salaam Central Prison.[4]

4. It is important to emphasize that none of the seven Applicants has invoked a single grievance of his own, that is, a grievance separate from the one invoked by all the others. In addition to the unity of the Applicants, the Application is also characterized by the unity of its subject-matter and the unity of the grievances invoked.

5. First of all, in examining the admissibility of the Application, as stipulated by Article 6(2) of the Protocol and Rule 39(1) of its Rules, the Court considers the examination of the objections to admissibility raised by the Respondent State, including the recurring objection to the non-exhaustion of local remedies.

6. The Respondent State's main submission is that "[t]he Applicants could have filed a constitutional petition under the Basic Rights and Duties Enforcement Act, challenging the alleged violations of their rights, especially in relation to the alleged discrimination by virtue of the exercise of the presidential prerogative of mercy".[5] It should be noted that, in its submission, the Respondent State did not distinguish between the Applicants. It treated the Application as a whole and sought to dismiss it as a block on the grounds of inadmissibility.

7. In response to this objection of the Respondent State, the Court contends that "in resolving the admissibility of this Application the Court considers it apposite to make a distinction among the Applicants before pronouncing itself on this issue".[6]

8. In this paragraph, the Court's reasoning moves from form to substance. Indeed, the Court is not interested in the issue

3 Para 1 of the judgment.

4 *Idem*.

5 Para 41 of the judgment.

6 Para 48 of the judgment (emphasis added).

of exhaustion of domestic remedies and decides to make a distinction between the Applicants on the basis of their claims before deciding on admissibility. For the Court, while the seven applicants "primarily alleging a violation of their rights to equality and non-discrimination by reason of the exercise of the presidential prerogative of mercy..., the first and seventh Applicants, in addition to the claims made by everyone else, are also challenging the legality of their sentences imposed on them for armed robbery"; and the Court concludes that it "will proceed to deal with these allegations seriatim".[7]

9. However, admissibility does not apply to "allegations" but to the requirements of the format of the application. As stated in Rule 40 of the Rules of the Court, entitled "Conditions for Admissibility of Applications", for the application to be considered, it must "be filed after exhausting local remedies, if any [...]". The question is therefore whether the Applicants, before bringing the case before the African Court, have made use (or at least attempted to make use of) what domestic law provides them with as a judicial means of asserting their rights.

10. Carrying on with its reasoning, the Court states "in relation to the alleged violation of the Applicants' rights by reason of the exercise of the presidential prerogative of mercy, the Court notes that the Applicants do not dispute that the avenue offered by the Basic Rights and Duties Enforcement Act was available to them whereby they could have challenged, before the High Court, the alleged violation of their rights".[8] In so doing, the Court suggests that it is ruling on the merits of the case.

11. In the following paragraphs, the Court revisits the issue of exhaustion of local remedies, first recalling its case law in *Couple Diakité v Republic of Mali,*[9] and further noting that "[t]he Applicants could have approached the High Court[...] It was not open to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them",[10] and then concluding that "in light of the above, the Court finds that the Application, in so far as it relates to all the Applicants and

7 Para 48 of the Judgment (underscored by the author).

8 Para 49.

9 "the exhaustion of local remedies is a requirement of international law and not a matter of choice and it is incumbent on the complainant to take all necessary measures to exhaust or at least attempt to exhaust local remedies; it was not enough for the complainant to question the effectiveness of the State's domestic remedies because of isolated incidents".

10 Para 51.

their allegation of a violation of their rights due to the exercise of the presidential prerogative of mercy, is inadmissible, for failure to fulfil the requirement under Article 56(5) of the Charter which is restated in Rule 40(5) of the Rules". The judgment could have stopped at that point and dismissed the application in its entirety.[11]

12. At this juncture, a question arises, to which we unfortunately do not have an answer: what is the causal relationship between paragraphs 46 and 47 of the judgment on the one hand, and paragraphs 48, 49 and 50 of the judgment on the other?

13. However, and despite the finding that the application is inadmissible, as reiterated in paragraphs 51 and 52 of the judgment, the Court retracts at paragraphs 53 to 56 with the exception of the case of Applicants Nos 1 and 7. For the Court, the said Applicants "made an additional allegation which is distinct from the allegations made by all the Applicants jointly".[12] This is no longer an issue of admissibility but one of merits. This is evidenced by the fact that the Court "notes, firstly, that the legality of their sentence for robbery implicates their right to fair trial".[13]

14. It is therefore not understandable why the Court considers, for the case of five Applicants, that they should have brought this action and not ignored it "offhandedly" and exempted the two other Applicants from the action because they had made additional allegations in relation to their co-Applicants.

15. Thus, after distinguishing where there was no need to distinguish, the Court severed the unity of the Application and did not really consider the objection raised by the Respondent State.

II. Is the appeal for unconstitutionality an extraordinary remedy?

16. Under Article 56(6) of the Charter as reiterated in Rule 40(6), the Court has always held that local remedies must be exhausted before the Application has been brought, including judicial remedies and that such remedies must be available, effective and sufficient.

17. In these particular cases of appeals for review and unconstitutionality before the Court of Appeal in the Tanzanian judicial system, the Court has a wealth of consistent case law. It has always considered that these two remedies are "extraordinary

11 Para 54 of the Judgment

12 Para 55 of the judgment.

13 *Idem*.

remedies" which are neither necessary nor mandatory and that, consequently, the exhaustion requirement of the Charter and the Rules does not apply to them.[14]

18. In the above judgment, the Court gives the impression that it has reversed its case law, or at least partially reversed it. Indeed, the Court considers that, with regard to five of the Applicants, "[t]he Applicants could have approached the High Court to challenge the legality of the exercise of the presidential prerogative of mercy, the Prisons Act, the Parole Act and other laws which they perceive to be implicated in the discrimination that they allegedly suffered". The Court adds that "it was not open to the Applicants to offhandedly dismiss the remedies available within the Respondent State without attempting to activate them".[15] It should be noted that the laws cited in this paragraph do indeed constitute the remedy for unconstitutionality provided for in the Basic Rights and Duties Enforcement Act of the United Republic of Tanzania.

19. It follows from this ground of inadmissibility held by the Court against the five Applicants that the appeal for unconstitutionality is no longer considered by the Court as an extraordinary remedy from which the Applicants are exempted, but now as a necessary and compulsory remedy. However, and unlike the treatment meted out on these five Applicants, the Court refrains from sanctioning the first and seventh Applicants for failure to bring the same action for unconstitutionality. With regard to these two Applicants, the Court reiterates its traditional position. It recalls its position that the remedy of a constitutional petition, as framed in the Respondent State's legal system, is an extraordinary remedy that an Applicant need not exhaust before approaching

14 Application 005/2013. Judgment of 20 November 2015 (Merits), *Alex Thomas v United Republic of Tanzania*; Application 006/2013. Judgment of 18 March 2016, *Wilfred Onyango Nganyi v United Republic of Tanzania*; Application 007/2013. Judgment of 3 June 2016, *Mohamed Abubakari v United Republic of Tanzania;* Application 003/2015. Judgment of 28 September 2017, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*; Application 005/2015. Judgment of 11 March 2018, *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania*; Application 006/2015. Judgment of 23 March 2018, *Nguza Viking (Baba Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania*; Application 011/2015. Judgment of 28 September 2017, *Christopher Jonas v United Republic of Tanzania*; Application 027/2015. Judgment of 21 September 2018, *Minani Evarist v United Republic of Tanzania United Republic of Tanzania*; Application 006/2016. Judgment of 7 December 2018, *Mgosi Mwita Makungu v United Republic of Tanzania*; Application 020/2016. Judgment of 21 September 2018, *Anaclet Paulo v United Republic of Tanzania*; Application 016/2016. Judgment of 21 September 2018, *Diocles William v United Republic of Tanzania*.

15 Para 51.

the Court. For this reason, the Court holds that the first Applicant and seventh Applicant need not have filed a constitutional petition before approaching the Court".[16]

20. The underlying reason for this differential treatment of the Applicants seems to be the consequence of what we have developed above, namely the combination of elements of a different nature concerning the merits of the case on the one hand and the procedure on the other hand.

21. For these reasons, I have voted against this judgment.

16 Para 54 of the judgment.