Kambole v Tanzania (judgment) (2020) 4 AfCLR 460

Application 018/2018, *Jebra Kambole v United Republic of Tanzania*

Judgment, 15 July 2020. Done in English and French, the English text being authoritative.

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

Recused under Article 22: ABOUD

The Applicant brought this action alleging that by reason of a provision in its Constitution, which barred national courts from inquiring into the election of a presidential candidate after the electoral commission had declared a winner, the Respondent State had violated the rights to equality, equal protection of law, non-discrimination, and to be heard. The Court, by a majority, held that the rights to equality and to be heard had been violated.

Admissibility (exhaustion of local remedies, 37, 38, 41; reasonable time to file, 45-46, 50; continuing violations 51, 52)

Discrimination (direct and indirect, 68-73, proportionality, 78, margin of appreciation 79-81)

Fair trial (scope, 96-98; due process, 96; equality of arms, 97, access to court, 99; right to appeal, 99)

Reparations (adoption of constitutional or legislative measures, 118, publication of judgment 123)

Dissenting opinion: TCHIKAYA

Admissibility (reasonable time to file, 24-26)

Separate opinion: KIOKO AND MATUSSE

Equality (non-discrimination, 4-5)

I. The Parties

1. Jebra Kambole (hereinafter referred to as "the Applicant"), is a national of the United Republic of Tanzania. He is an advocate by profession and a member of the Tanganyika Law Society. He brings this Application challenging article 41(7) of the Constitution of the Respondent State.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as the "the Charter") on 21 October 1986 and the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through

which it accepted the jurisdiction of the Court to receive cases directly from individuals and non-governmental organisations (NGOs). On 21 November 2019, the Respondent State deposited, with the African Union Commission, an instrument withdrawing its Declaration under Article 34(6) of the Protocol.

II. Subject matter of the Application

A. Facts of the matter

3. The Applicant alleges that the Respondent State has violated his rights under the Charter by maintaining article 41(7) in its Constitution**,** which provision bars any court from inquiring into the election of a presidential candidate after the Electoral Commission has declared a winner.

B. Alleged violations

4. The Applicant avers that by barring courts from inquiring into the election of a presidential candidate**,** after the Electoral Commission has declared a winner, the Respondent State has violated his right to freedom from discrimination under Article 2 of the Charter. The Applicant further avers that the Respondent State has violated his right to equal protection of the law and the right to have his cause heard especially the right to appeal to competent national organs against acts violating his fundamental rights as provided for in Articles 3(2) and 7(1)(a) of the Charter, respectively.

5. The Applicant also alleges that the Respondent State has failed to honour its obligation to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative and other measures to give effect to the Charter as stipulated under Article 1 of the Charter.

6. It is also the Applicant's averment that the Respondent State's conduct also violates article 13(6)(a) of its own Constitution.

III. Summary of the Procedure before the Court

7. The Application was filed on 4 July 2018 and served on the Respondent State on 27 July 2018. The Respondent State was requested to file its Response within sixty (60) days of receipt of the Application.

8. After several reminders and extensions of time by the Registry, the Respondent State filed its Response on 10 July 2019.

9. Pleadings were closed on 18 January 2020 and the Parties were duly notified.

IV. Prayers of the Parties

10. The Applicant prays the Court for the following:

i. Find that the Respondent is in violation of Art. 1, 2, 3(2) and 7(1) of the African Charter on Human and People's Rights.

ii. Order the respondent to put in place Constitutional and Legislative measures to guarantee the rights provided for under Art 1, 2, 3(2) and 7(1) of the African Charter on Human and Peoples' Right.

iii. Make an Order that the Respondent report to the Honourable Court, within a period of twelve (12) months from the date of the judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders.

iv. Any other remedy and/or relief that the Honourable Court will deem to grant; and

v. Order the Respondent to pay the Applicant's costs.

11. The Respondent State prays the Court for the following orders with respect to jurisdiction and admissibility:

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

ii. Order that the Application be dismissed in accordance to Rule 38 of the Rules of Court.

12. The Respondent State prays the Court for the following orders with respect to merits:

i. A declaration that Respondent State is not in violation of 1, 2, 3(2) and 7(1) of the African Charter on Human and Peoples' Rights.

ii. A declaration that 41(7) of the Respondent State's Constitution is not in violation of Article 7(1) of the Charter hence no need of making any constitutional and Legislative measures to guarantee the rights alleged.

iii. That the Application be declared inadmissible.

iv. That, the Application be dismissed.

v. The Applicant to pay the Respondent's costs.

V. Jurisdiction

13. The Court observes that Article 3(1) of the Protocol provides as follows:

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.

14. The Court further observes that in terms of Rule 39(1) of the Rules: "[t]he Court shall conduct preliminary examination of its jurisdiction …".

15. The Court notes that none of the Parties to this Application has challenged its jurisdiction. This notwithstanding, and on the basis of the above-cited provisions, the Court must, preliminarily, conduct an assessment of its jurisdiction.

16. The Court recalls that jurisdiction has four dimensions: personal, material, temporal and territorial. The Court further recalls that all applications must fulfil the four dimensions of jurisdiction before they can be considered.

17. The Court notes, with respect to its personal jurisdiction, that, as earlier stated in this Judgment, the Respondent State is a party to the Protocol and on 29 March 2010, filed the Declaration prescribed under Article 34(6) of the Protocol accepting the jurisdiction of the Court to directly receive applications from individuals and Non-governmental Organizations with observer status with the African Commission on Human and Peoples' Rights (hereinafter "the Commission").

18. The Court also recalls that the Respondent State, on 21 November 2019, deposited, with the African Union Commission, an instrument withdrawing its Declaration**.**

19. As the Court has held, the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending before this Court prior to the deposit of the Declaration, as is the case with the present Application.[1] Further, any such withdrawal of a Declaration only takes effect twelve (12) months after the instrument of withdrawal is deposited and the Respondent State's withdrawal will, therefore, take effect on 22 November 2020.

As the Court has held**,** the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending before this Court prior to the deposit of *the instrument withdrawing* the Declaration, as is the case with the present Application. Further, any such withdrawal of a Declaration only takes effect twelve (12) months after the instrument of withdrawal

1 *Ambrose Cheusi v United Republic of Tanzania*, AfCHPR, Application 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39. See also, *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 562.

is deposited and the Respondent State's withdrawal will, therefore, take effect on 22 November 2020.

20. In light of the foregoing, the Court finds that it has personal jurisdiction to examine the present Application.

21. With regard to its material jurisdiction, the Court has consistently held that Article 3(1) of the Protocol confers on it the power to examine any application provided it contains allegations of violation of the rights protected by the Charter or any other human rights instrument ratified by the Respondent State concerned. Further, the Court notes that, in accordance with Article 7 of the Protocol, it "shall apply the provisions of the Charter and any other relevant human rights instrument ratified by the State concerned." In the present matter, the Applicant alleges the violation of rights guaranteed in Articles 1, 2, 3 (2), and 7(1)(a) of the Charter. As noted above, the Respondent State is a party to the Charter and to the Protocol. Consequently, the Court finds that its material jurisdiction is established.

22. In relation to temporal jurisdiction, the Court holds that the relevant dates, in relation to the Respondent State, are those of entry into force of the Charter and the Protocol as well as the date of depositing the Declaration under Article 34(6) of the Protocol.

23. The Court observes that the violations alleged by the Applicant stem from article 41(7) of the Respondent State's Constitution. The Court also observes that this Constitution was adopted in 1977 but it has been amended several times over the years. Nevertheless, it is clear that the Respondent State's Constitution was enacted before the Respondent State became a party to both the Charter and the Protocol. Notably**,** article 41(7) remains a part of the Respondent State's laws to date, long after the Respondent State became a party to both the Charter and the Protocol.

24. The Court finds, therefore, that the violations alleged by the Applicant, though commencing before the Respondent State became a party to the Charter and the Protocol, continued after the Respondent State became a party to these two instruments. Given the foregoing, the Court holds that it has temporal jurisdiction in the present matter.

25. With regard to territorial jurisdiction, the Court observes that the alleged violations are all said to have occurred within the territory of the Respondent State and this has not been contested. The Court, therefore, holds that its territorial jurisdiction is established.

26. In light of all the above, the Court holds that it has jurisdiction to examine the Application filed by the Applicant.

VI. Admissibility

27. Pursuant to 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 preliminary examination of … the admissibility of the Application in accordance with Article… 56 of the Charter, and Rule 40 of the Rules."

28. Rule 40 of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides that:

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 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;
7. not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

29. While some of the above conditions are not in contention between the Parties, the Respondent State has raised two objections to the admissibility of the Application.

A. Conditions of admissibility in contention between the Parties

30. The Respondent State raises two objections relating, first, to the requirement of exhaustion of local remedies, and, second, to the filing of the Application within a reasonable time.

i. Objection on the ground that the Applicant failed to exhaust local remedies

31. The Respondent State argues that the:
[a]pplicant never made an attempt to exhaust the available local remedies nor has he given the Respondent the opportunity to address his alleged grievances. The right to appeal is also provided under the Constitution of the United Republic of Tanzania together with various enabling statutory provisions. Therefore, it is indeed improper for the Applicant at this stage to raise matters which could have been sufficiently addressed within the national justice system of the Respondent State prior to the application before this Honourable Court.

32. On the basis of the above, the Respondent State argues that the Court should find the Application inadmissible.

33. The Applicant submits that there is no remedy within the judicial system of the Respondent State to address the violations that he is alleging. He raises three grounds to substantiate his assertion. Firstly, he argues that article 74(12) of the Respondent State's Constitution which provides that "no court shall have power to inquire into anything done by the Electoral Commission in the discharge of its functions in accordance with the provisions of this Constitution" ousts the jurisdiction of domestic courts in all cases involving acts or omissions by the Electoral Commission.

34. Secondly, he contends that article 41(7) of the Respondent State's Constitution which provides that "when a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then no court of law shall have any jurisdiction to inquire into the election of that candidate" prohibits recourse to judicial remedies for the purposes of challenging the results of presidential elections. In the Applicant's view, article 41(7) contradicts article 13(6)(a) of the said Constitution and thus is unconstitutional. The Applicant further argues that the Respondent State's Court of Appeal has already ruled that it does not have the power to declare any provision of the Constitution unconstitutional. The Applicant thus submits that there is no remedy for his grievance within the Respondent State.

35. Thirdly, the Applicant contends that under the Basic Rights and Duties Enforcement Act, a person can only go to court if he alleges a human rights violation covered by articles 12 to 29 of the Respondent State's Constitution. According to the Applicant, the violation he is alleging arises from article 41(7) of the Respondent State's Constitution and is not covered by the remedies offered under the Basic Rights and Duties Enforcement Act. The Applicant thus submits that there is no remedy for him to exhaust in the Respondent State.

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36. The Court reiterates that, in accordance with Article 56(5) of the Charter and Rule 40(5) of the Rules, for an Application to be admissible it must be filed "after exhausting local remedies, if any, unless it is obvious [to the Court] that this procedure is unduly prolonged".

37. The Court recalls that for purposes of exhausting local remedies an Applicant is only required to exhaust judicial remedies that are available, effective and sufficient.[2] As confirmed by both the Commission and the Court, a remedy is available if it can be utilised as a matter of fact without impediment; a remedy is effective if it offers a real prospect of success; and a remedy is sufficient if it is capable of redressing the wrong complained against.[3] However, the Court has always considered that there is an exception to this rule if local remedies are unavailable, ineffective or insufficient, or if the procedure for obtaining such remedies is abnormally prolonged.[4] The Court also notes that an applicant is only required to exhaust ordinary judicial remedies.[5]

38. The Court recalls that "in ordinary language, being effective refers to that which produces the expected result … the effectiveness of a remedy is therefore measured in terms of its ability to solve the problem raised by the Applicant."[6] The Court further recalls that a remedy is available if it can be pursued by the Applicant without any impediment.[7]

39. The Court notes that in 1995, the Respondent State enacted the Basic Rights and Duties Enforcement Act which permits litigants to enforce the basic rights and duties set out in Chapter One (1), Part III of its Constitution. Under this Act, the High Court has

2 *Sir Dawda K Jawara v The Gambia*, (2000) AHRLR 107 (ACHPR 2000) §§ 31-32.

3 *Ibid*.

4 *The Beneficiaries of Late Norbert Zongo & ors v Burkina Faso* (preliminary objections) (2013) 1 AfCLR 197 § 84; *Alex Thomas v United Republic of Tanzania* (merits) (2015) 1 AfCLR 465 § 64 and *Wilfred Onyango Nganyi & ors v United Republic of Tanzania* (merits) (2016) 1 AfCLR 507 § 95.

5 *Oscar Josiah v United Republic of Tanzania*, AfCHPR, Application 053/2016, Judgment of 28 March 2019 (merits) § 38 and *Diocles William v United Republic of Tanzania*, AfCHPR, Application 016/2016. Judgment of 21 September 2018 (merits and reparations) § 42.

6 *The Beneficiaries of Late Norbert Zongo & ors v Burkina Faso* (merits) (2014) 1 AfCLR 219 § 68.

7 *Lohe Issa Konate v Burkina Faso* (merits) (2014) 1 AfCLR 314 § 96.

the power to "make all such orders as shall be necessary and appropriate to secure [an applicant] the enjoyment of the basic rights, freedoms and duties …".

40. In considering the powers of the High Court under the Basic Rights and Duties Enforcement Act, the Court takes judicial notice of the fact that the Respondent State's Court of Appeal in *Attorney General v Mtikila*, held that it did not have the power to nullify any constitutional provisions.[8] Specifically in respect of article 41(7) of the Respondent State's Constitution, the Court also takes judicial notice of the decision of the Respondent State's High Court in *Augustine Lyatonga Mrema v Attorney General*[9] in which it held that article 41(7) in unambiguous language has ousted the jurisdiction of courts to inquire into the election of the president once the Electoral Commission has declared the results. According to the High Court, if parliament had intended for courts to have the power to inquire into the election of a president, clear provision for the same would have been included in the Constitution.

41. In the present circumstances, the Court notes that had the Applicant challenged article 41(7) before the Respondent State's courts the application would have, inevitably, been dismissed on the basis that, no Court in the Respondent State has the power to nullify provisions of its Constitution. In this regard, the Court further notes that a domestic remedy that has no prospects of success does not constitute an effective remedy within the context of Article 56(5) of the Charter.[10] In the circumstances, therefore, the Court finds that the Applicant did not have a remedy that was available for exhaustion before filing this Application.[11]

42. In light of the above, the Court dismisses the Respondent State's objection to the admissibility of the Application on the ground that domestic remedies were not exhausted.

8 *The Honourable Attorney General v Reverend Christopher Mtikila*, Civil Appeal No. 45 of 2009.

9 [1996] TLR 273 (HC).

10 *Alfred Agbes Woyome v Republic of Ghana,* AfCHPR, Application 001/2017, Judgment of 28 June 2019 (merits and reparations) §§ 65-68.

11 Cf. *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, African Commission on Human and Peoples' Rights* (2000) AHRLR (ACHPR 2000) 227.

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

43. The Respondent State argues that the "Application does not meet the requirements of Rule 40(6) of the Court Rules." According to the Respondent State, "the Applicant's case at the local jurisdiction was concluded in 2010 where the Court of Appeal of Tanzania dismissed the appeal. It has taken eight years for the Applicant to file his application in this Honourable Court." Although the Respondent State concedes that neither the Charter nor the Rules prescribe a time limit within which an individual is required to file an application, it submits that the Application "does not fulfil the provisions of Article 56(6) of the African Charter together with Rule 40(6) of the Court Rules, thus it should be rejected by the Court."

44. The Applicant submits that there is no time frame stipulated under Article 56(6) of the Charter and that it "falls on the Court to pronounce itself on what in its view is within reasonable time." In support of his submission, the Applicant cites the decision of the the Commission in *Darfur Relief and Documentation Centre v Sudan.* He argues that although Article 56(6) is meant to encourage applicants to be vigilant and to prevent tardiness in filing of applications, in appropriate cases, where there are good and compelling reasons, fairness and justice require the consideration of applications that have not been filed promptly. Specifically, the Applicant submits that, in relation to his Application:

> … the acts complained of are acts that are continuous in nature and do not occur in a specific time. Therefore, due to the continuous violation of this conduct by respondent, the court should consider that the application is within the time frame as provided by the law.

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45. The Court confirms that Article 56(6) of the Charter does not stipulate a precise time limit within which an Application shall be filed before the Court. Rule 40(6) of the Rules simply refers to 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 of the matter."

46. As the Court has established, the reasonableness of the period for seizure of the Court depends on the particular circumstances

of each case and must be determined on a case-by-case basis.[12]

47. In the present Application, the Court takes cognisance of the fact that the source of the violation alleged by the Applicant lies in a provision of the Respondent State's Constitution. The Court also recalls that the Respondent State deposited the Declaration under Article 34(6) of the Protocol in March 2010. Strictly speaking, therefore, the door for commencing action against the Respondent State, in relation to the violations alleged by the Applicant, was only opened in March 2010. This Application, however, was filed on 4 July 2018, which is eight (8) years and four (4) months after the deposit of the Declaration. In the circumstances, the Court must determine whether, on the facts of the present case, the aforementioned period is reasonable within the meaning of Rule 40(6) of the Rules.

48. At the outset, the Court notes that although the Respondent State has submitted that the "Applicant's case at the local jurisdiction was concluded in 2010 where the Court of Appeal of Tanzania dismissed the appeal" no details have been provided of the case involving the Applicant which was dismissed in 2010. For example**,** the Respondent State has not indicated to the Court who were the parties in the 2010 case; what the issues before the Court of Appeal were or even what the registration number of the case was. Given the lack of information about the alleged 2010 case, the Court holds that the Respondent State has failed to demonstrate that there was a 2010 case involving the Applicant which has relevance to the proceedings before it. The Court is reinforced in its finding since it is trite law that he who alleges bears the burden of proving the allegation(s).

49. The Court recalls that Rule 40(6) of the Rules, which restates Article 56(6) of the Charter, emphasises two aspects that the Court must consider for purposes of determining whether or not an application fulfils the requirement of being filed within a reasonable time. The first aspect is that an "application be filed within a reasonable time from the date local remedies were exhausted." The second aspect requires that an application be filed within a reasonable time "from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

50. In the present Application, since the Court has found that there were no domestic judicial remedies available for the Applicant to

12 *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (2018) 2 AfCLR 248 § 57.

exhaust, the question of a reasonable time, after the exhaustion of domestic remedies, within which the Applicant ought to have filed his Application with the Court does not arise. The Court, therefore, holds that this Application fulfils the requirement in the first limb of Rule 40(6).

51. As for the second aspect of Rule 40(6), the Court recalls that the date from which an application can be filed against any State party is the date on which the particular State deposited the Declaration under Article 34(6) of the Protocol which for the Respondent State is 29 March 2010.*13* In the present Application, however, the Court notes that the Applicant alleges continuing violation of his rights and the Court has found, for purposes of establishing temporal jurisdiction, that the alleged violations have a continuous character, since they are founded in a law adopted in 1977 which remains in force to date.

52. The Court reiterates that the essence of continuing violations is that they renew themselves every day as long as the State fails to take steps to remedy them.[14] The result is that the violations alleged to have been perpetrated by article 41(7) of the Respondent State's Constitution automatically renewed themselves for as long as they were not remedied.

53. The Court notes that in this case it took the Applicant eight (8) years and four (4) months to file his case from the time when the Respondent State deposited its Declaration. However, no local remedy was available for the Applicant to exhaust and the persistence of the violations meant that they automatically renewed themselves. Given this context, the Court holds that, on the facts of the present case, and within the meaning of the second limb of Rule 40(6), it could have been seized of the matter at any time for as long as the law causing the alleged violation remained in force.

54. In light of the above, the Court, therefore, holds that the Application meets the requirement in Rule 40(6) of the Rules and thus dismisses the Respondent State's objection.

B. Other conditions of admissibility

55. The Court notes, from the record, that the Application's compliance

13 *Mohamed Abubakari v United Republic of Tanzania* (merits) (2016) 1 AfCLR 599 § 89.

14 Cf. *Parrillo v Italy* [GC] No. 46470/11 ECHR 27 August 2015 §§ 109-112 and *FAJ & ors v The Gambia* Suit No. ECW/CCJ/APP/36/15, Judgment No. ECW/CCJ/JUD/04/18, 13 February 2018.

with the requirements in Article 56 sub articles (1),(2),(3),(4) and 7 of the Charter, which requirements are reiterated in sub-rules 1, 2, 3, 4, and 7 of Rule 40 of the Rules, is not in contention between the Parties. Nevertheless, the Court must still ascertain that these requirements have been fulfilled.

56. Specifically, the Court notes that, according to the record, the condition laid down in Rule 40(1) of the Rules is fulfilled since the Applicant has clearly indicated his identity.

57. The Court also finds that the requirement laid down in paragraph 2 of the same Rule is also met, since no request made by the Applicant is incompatible with the Constitutive Act of the African Union or with the Charter.

58. The Court also notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 40(3) of the Rules.

59. Regarding the condition contained under paragraph 4 of same Rule, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

60. Finally, with respect to the requirement laid down in Rule 40(7) of the Rules, the Court finds that the present case does not concern a case which has already been 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.

61. As a consequence of the foregoing, the Court finds that the Application fulfils all the admissibility requirements set out under Article 56 of the Charter as restated in Rule 40 of the Rules, and accordingly declares it admissible.

VII. Merits

62. The Applicant alleges violation of Articles 1, 2, 3(2) and 7(1)(a) of the Charter.

A. Alleged violation of the right to non-discrimination

63. The Applicant avers that article 13(6)(a) of the Respondent State's Constitution provides that:

> When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

64. The Applicant argues that notwithstanding article 13(6)(a), article 41(7) of the same Constitution bars any court from inquiring into the election of any presidential candidate after the Electoral Commission has pronounced a winner which in turn entails that any person aggrieved by the results of a presidential election cannot access a judicial remedy. The Applicant submits that by having a provision such as article 41(7) in its Constitution, the Respondent State has violated Article 2 of the Charter.

65. The Respondent State contends that the right to non-discrimination as provided for under Article 2 of the Charter "is not absolute where there is a legitimate justified purpose or aim that is justifiable." Referring to the Advisory Opinion of the Inter-American Court of Human Rights on the Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Opinion of 19 January 1984, the Respondent State argues that no discrimination can be said to "exist if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things…" The Respondent State further argues that "the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable."

66. The Respondent State submits, therefore, that a State Party to the Charter enjoys "a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment." Specifically, in relation to the Applicant's allegation, the Respondent State submits that a:

> … reasonable relationship of proportionality between the means employed by the Constitution of the United Republic of Tanzania in relation to article 41(7) are legally based on an objective and reasonable justification and the aim sought to be realised in protection of the United Republic of Tanzania's sovereignty, therefore, it is not in violation of Article 2 of the African Charter on Human and Peoples' Rights.

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67. The Court recalls that Article 2 of the Charter provides as follows:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

68. The Court recalls that in *APDH v Cote d'Ivoire*, it accepted that discrimination is "a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria."[15] This understanding of discrimination, however, is what is often referred to as direct discrimination. In cases where the discrimination is indirect, the key indicator is not necessarily different treatment based on visible or unlawful criteria but the disparate effect on groups or individuals as a result of specified measures or actions.

69. While direct discrimination may be more prominent in human rights discourse, international human rights law prohibits both direct and indirect discrimination. For example, the Convention on the Elimination of Racial Discrimination of 1965 (CERD) in article 1 defines racial discrimination as:
Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[16]

70. Given that indirect discrimination is an effects-based concept, it is clear that this definition includes a prohibition not only of direct but also of indirect discrimination. This has been confirmed by the Committee supervising the implementation of the CERD, which describes indirect discrimination as relating to "measures which are not discriminatory at face value but are discriminatory in fact and effect".[17] A similar position obtains under the Convention on the Elimination of All Forms of Discrimination Against Women

15 *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire* (Merits) (2016) 1 AfCLR 668 §§146-147.

16 The Respondent State acceded to the CERD on 27 October 1972 – see, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN.

17 European Commission "Limits and potential of the concept of indirect discrimination" https://op.europa.eu/en/publication-detail/-/publication/aa081c13-197b-41c5-a93a-a1638e886e61.

(CEDAW) of 1979 in relation to the definition of discrimination against women under article 1 of the said convention.[18]

71. In respect of Article 2 of the Charter, the Court reiterates its position that Article 2 is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.[19]

72. The Court notes that while the Charter is unequivocal in its proscription of discrimination, not all forms of distinction or differentiation can be considered as discriminatory. A distinction or differential treatment becomes discrimination, contrary to Article 2, when it does not have any objective and reasonable justification and, in circumstances where it is not necessary and proportional.[20]

73. As the Court noted in *African Commission on Human and Peoples' Rights v Kenya*,[21] the right not to be discriminated against is related to the right to equality before the law and equal protection of the law as guaranteed under Article 3 of the Charter. However, the scope of the right to non-discrimination extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status. The expression "any other status" in Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter. In determining whether a ground falls under this category, the Court takes into account the general spirit of the Charter.

74. The Court observes that the Respondent State, in its submissions, has not denied the possible distinction effected by article 41(7) of its Constitution but it has argued that the same is justifiable since there is a reasonable relationship of proportionality between the

18 The Respondent State ratified the CEDAW on 20 August 1985 – see, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=TZA&Lang=EN.

19 *African Commission on Human and Peoples' Rights (ACHPR) v Republic of Kenya* (merits) (2017) 2 AfCLR 9 § 137.

20 *Ibid* § 139. See also, *Tanganyika Law Society & ors v United Republic of Tanzania* (merits) (2013) 1 AfCLR 34 § 106 .

21 *African Commission on Human and Peoples' Rights v Kenya* (merits) § 138.

means adopted and the result sought to be achieved, which is the "protection of the United Republic of Tanzania's sovereignty…". The Respondent State has also invoked the doctrine of margin of appreciation as justifying the measures that it has devised through article 41(7) of its Constitution.

75. The Court notes, however, that article 41(7) of the Respondent State's Constitution creates a differentiation between litigants in that while the Respondent State's courts are permitted to look into any allegation by any litigant, they are not given equal latitude when a litigant seeks to inquire into the election of a president. The result is that those seeking to inquire into the election of a president are, practically, treated differently from other litigants, especially by being denied access to judicial remedies while litigants with other claims are not similarly barred.

76. The Court emphasises that while article 41(7) of the Respondent State's Constitution is, seemingly, neutral on its face and that it, in principle, applies to all citizens within the Respondent State, this provision does not have the same effect on all citizens. It is trite that in a multiparty democracy, like the Respondent State, during any election, the electorate would vote for different candidates. In this sense, therefore, there will be, within the broad group of voters, different subgroups depending on their political persuasion. While those supporting winning candidates may not have the motivation to approach the courts for relief in relation to the electoral process, the other subgroups of voters may be desirous of seeking judicial intervention to enforce their rights.

77. By outrightly barring the Courts from considering a complaint by anyone in relation to the results of a presidential election, in effect, article 41(7) of the Respondent State's Constitution treats citizens that may wish to judicially challenge the election of a president differently and less favourably as compared to citizens with grievances other than those related to the election of a president.

78. The Court recalls that the Respondent State considers that the distinction made by article 41(7) of its Constitution represents a relationship of proportionality between the means used and the objective sought in terms of protection of its sovereignty. However, in its submissions, the Respondent State has not provided details as to how the distinction made in article 41(7) of its Constitution is necessary to protect its sovereignty or how its sovereignty would be jeopardized if this provision was repealed or amended, for example. The Court is aware that, under Article 27 of the Vienna Convention on the Law of Treaties, a State cannot invoke the provisions of its internal laws to justify the non-fulfillment of its

obligations under a treaty.[22]

79. Specifically, in respect of the doctrine of margin of appreciation, the Court observes that this doctrine has been recurrent in international jurisprudence, notably the jurisprudence of the European Court of Human Rights (hereinafter referred to as "the ECHR") and also the former European Commission of Human Rights.[23] In terms of definition, the margin of appreciation can be understood as "the line at which international supervision should give way to a State Party's discretion in enacting or enforcing its laws."[24]

80. The Court agrees with the Commission's position on the relevance of the margin of appreciation for the interpretation and application of the Charter as stated in *Prince v South Africa*, where the Commission held that:

> Similarly, the margin of appreciation doctrine informs the African Charter in that it recognises the respondent state in being better disposed in adopting national rules, policies and guidelines in promoting and protecting human and peoples' rights as it indeed has direct and continuous knowledge of its society, its needs, resources, economic and political situation, legal practices, and the fine balance that need to be struck between the competing and sometimes conflicting forces that shape its society.[25]

81. However, the Court emphasises that while it is for a particular State to determine the mechanisms or steps to be taken for purposes of implementing the Charter, it retains the jurisdiction to assess and review the steps taken for compliance with the Charter and other applicable human rights standards. In particular, the Court's duty is to assess if a fair balance has been struck between societal interests and the interests of the individual as protected under the Charter. The doctrine of margin of appreciation, therefore, while recognising legitimate leverage by States in the implementation of the Charter, cannot be used by States to oust the Court's supervisory jurisdiction.

82. In the absence of clear justification as to how the differentiation and distinction in article 41(7) is necessary and reasonable in

22 The Respondent State acceded to the Vienna Convention on the Law of Treaties on 12 April 1976, see: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang = _en.

23 *Lawless v Ireland*, [1961] ECHR 2, *Ireland v United Kingdom* [1978] ECHR 1, and *Handyside v UK* [1976] ECHR 5.

24 HC Yourow *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (1996: Kluwer Law International) 13.

25 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) § 51.

a democratic society, the Court finds that article 41(7) of the Respondent State's Constitution effects a distinction between litigants and that this distinction has no justification under the Charter.[26] This distinction is such that individuals within the Respondent State are excluded from pursuing a remedy before the court simply because of the subject matter of their grievances while other individuals with grievances not related to the election of a president are not equally barred.

83. In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution violates the Applicant's right to be free from discrimination as guaranteed under Article 2 of the Charter.

B. Alleged violation of the right to equal protection of the law

84. The Applicant argues that notwithstanding article 13(6)(a) of the Respondent State's Constitution, article 41(7) of the same prohibits any person aggrieved by the results of a presidential election from accessing courts to seek a remedy. The Applicant submits that by having a provision such as article 41(7) as part of its Constitution, the Respondent State has violated Article 3(2) of the Charter.

85. In its Response, the Respondent State contends that the right to equal protection of the law is not absolute and can be limited where there is a legitimate purpose or aim. The Respondent State further argues that "the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable." The Respondent State further submits that a State Party to the Charter enjoys "a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

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86. Article 3(2) of the Charter provides that "[e]very individual shall be entitled to equal protection of the law."

26 Cf. *Tanganyika Law Society & ors v Tanzania* (merits) § 106.

87. The Court notes that the principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law, does not necessarily require equal treatment in all instances and may allow differentiated treatment of individuals placed in different situations.[27]

88. In the present case, the Court notes that article 41(7) of the Respondent State's Constitution does not deny the Applicant equal protection of the laws in the Respondent State. The Applicant, like other citizens, has been guaranteed the same range of rights in respect of contesting the election of a president. Given these circumstances, the Court finds that the Applicant has failed to prove a violation of Article 3(2).

89. In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution does not violate the Applicant's right to equal protection of the law guaranteed under Article 3(2) of the Charter.

C. Alleged violation of the Applicant's right to have his cause heard

90. The Applicant avers that by having article 41(7) as part of its Constitution, the Respondent State has violated his right under Article 7(1)(a) of the Charter.

91. The Respondent State disputes the Applicant's allegation of a violation of Article 7(1)(a) of the Charter and argues that as a sovereign State it enjoys:

> …exclusive, ultimate and comprehensive powers of law-making, under its fundamental legal framework. Since all powers arise from the people, the Respondent has the right to make provisions in the Constitution or any other written law.

92. It is also the Respondent State's argument that article 41(7) of its Constitution is protected by the doctrine of margin of appreciation. According to the Respondent State:

> …given that contracting States possess different legal and cultural traditions, it is inevitable that States shall occasionally view the application of their obligations under the African Charter on Human and Peoples' Rights differently.

93. The Respondent State thus submits that:

> the doctrine of the margin of appreciation provides the African Court on Human and Peoples' Rights with the means by which to permit national authorities to enjoy the freedom to apply the African Charter on Human and Peoples' Rights in accordance with their own unique legal and

27 *Norbert Zongo & ors v Burkina Faso* (merits) § 167.

cultural traditions without flouting the ultimate objective and purpose of the Charter.

94. In support of its arguments, the Respondent State has referred the Court to the decisions of the ECHR in *Handyside v United Kingdom* and *James v United Kingdom*.

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95. Article 7(1)(a) of the Charter provides as follows:

(1) Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

96. The Court observes that the right to have one's cause heard, as enshrined under Article 7(1)(a) of the Charter, bestows upon individuals a wide range of entitlements pertaining to due process of law, including the right to be given an opportunity to express their views on matters and procedures affecting their rights, the right to file a petition before appropriate judicial and quasi-judicial authorities for violations of these rights and the right to appeal to higher judicial authorities when their grievances are not properly addressed by the lower courts.[28] The Court also notes that the right to have one's cause heard does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place.

97. The Court recalls that the right to a fair hearing encompasses several elements, including the principle of equality of arms for parties to a case in all proceedings; the opportunity to properly prepare a defence; present one's arguments and evidence; and to respond to the arguments and evidence presented by the opposing side.[29] Article 7 of the Charter permits every person who feels that his/her rights have been violated to bring his/her case

28 *Werema Wangoko Werema v United Republic of Tanzania* (merits) (2018) 2 AfCLR 520 §§ 68-69.

29 *Dino Noca v Democratic Republic of Congo* Communication No. 286/2004 [2018] ACHPR 10; (22 October 2012) §186-187.

before a competent national court. In the realization of this right, the position or status of the victim or the alleged perpetrator of the violation are irrelevant and every complainant is entitled to an effective remedy before a competent and impartial judicial body. It is the duty of all State Parties to the Charter to ensure that their judicial organs are accessible to all and that every litigant is accorded ample opportunity to present his/her claim.

98. The Court notes that:

> [t]he protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief.[30]

99. The Court recalls that among the key elements of the right to a fair hearing, as guaranteed under Article 7 of the Charter, is the right of access to a court for adjudication of one's grievances and the right to appeal against any decision rendered in the process. As against this, the Court notes that article 41(7) of the Respondent State's Constitution has ousted the jurisdiction of courts to consider any complaint in relation to the election of a presidential candidate after the Electoral Commission has declared a winner. This entails that irrespective of the nature of the grievance or the merits thereof, as long as the same pertains to the declaration by the Electoral Commission of the winner of a presidential election, no remedy by way of a judicial challenge exists to any aggrieved person within the Respondent State.

100. The Court acknowledges that, in appropriate conditions, rights contained in the Charter may be limited. However, as the Court has previously stated [31] restrictions on rights must be necessary in a democratic society and they must be reasonably proportionate to the aim pursued.

101. The Court also acknowledges that once a complainant establishes that there is a *prima facie* violation of a right, it behoves **on** the Respondent State to establish that the right has been legally restricted in line with the provisions of Article 27(2) of the Charter. The Respondent State can discharge its burden by proving that the restriction is authorized by law - both domestic and international - and also by establishing that the restriction serves one of the

30 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) § 213.

31 *Tanganyika Law Society & ors vl Tanzania* (merits) § 106.

purposes listed under Article 27(2) of the Charter.[32]

102. Focusing on the position of the Respondent State in this Application, especially in relation to the purported restriction of the right to have one's cause heard, the Court notes that there is nothing in the submissions of the Respondent State which establishes any of the conditions in Article 27(2) of the Charter to justify a limitation of the right to have one's cause heard. Admittedly, there is a constitutional provision – article 41(7) of the Respondent State's Constitution – which prescribes the limitation at issue here. However**,** it is trite law that a State cannot invoke its domestic laws to justify a breach of its international obligations. Resultantly, therefore, if a State relies on a provision of its domestic law to justify restriction of a right, such a State must be able to demonstrate that the provision(s) in its domestic law do not infringe the Charter.

103. In the context of the present Application, the Court notes that electoral disputes, even those related to the election of a president, implicate rights guaranteed in the Charter. Considering that decisions of the Electoral Commission in relation to the election of a president may have an effect on the rights to be enjoyed by citizens of the Respondent State, the Court finds it anomalous that citizens have not been provided with an avenue for invoking judicial scrutiny of decisions of the Electoral Commission. It is the lack of opportunity given to individuals to have recourse to judicial scrutiny of the declaration by the Electoral Commission of the winner of a presidential election that this Court finds to be against the values underlying the Charter.

104. In the circumstances, the Court holds that article 41(7) of the Respondent State's Constitution, in so far as it ousts the jurisdiction of courts to consider challenges to a presidential election after the Electoral Commission has declared a winner, violates Article 7(1)(a) of the Charter.

D. Alleged violation of Article 1 of the Charter

105. The Applicant alleges that the conduct of the Respondent State has violated Article 1 of the Charter while the Respondent State denies the alleged violation.

32 Cf. *Article 19 v Eritrea*, (2007) AHRLR 73 (ACHPR 2007) § 92.

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106. Article 1 of the Charter provides as follows:

The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

107. The Court considers that, as it has held in its earlier judgments, examining an alleged violation of Article 1 of the Charter involves a determination not only of whether the measures adopted by the Respondent State are available but also if these measures were implemented in order to achieve the intended object and purpose of the Charter.[33] Consequently, whenever a substantive right of the Charter is violated due to the Respondent State's failure to meet these obligations Article 1 will be found to have been violated.

108. In the present case, the Court has found that the Respondent State has violated Articles 2 and 7(1) (a) of the Charter. Resultantly, the Court holds that the Respondent State has also violated Article 1 of the Charter.

VIII. Reparations

109. In relation to reparations, the Applicant prays the Court to order:

b. That the respondent to put in place Constitutional and Legislative measures to guarantee the rights provided for under Art 1, 2, 3(2) and 7(1) of the African Charter on Human and People's Rights

c. Make an Order that the Respondent report to the Honourable Court, within a period twelve (12) months from the date of the judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders;

d. Any other remedy and/or relief that the Honourable Court will deem to grant;

…

110. The Respondent State's Response did not address the question of reparations but simply prayed that the Application be dismissed.

33 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477 § 149-150 and *Ally Rajabu & ors v United Republic of Tanzania,* AfCHPR, Application 007/2015, Judgment of 28 November 2019 (merits and reparations) § 124.

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

112. Rule 63 of the Rules provides that:

> The Court shall rule on the request for the reparation submitted in accordance with Rule 34(5) of these Rules by the same decision establishing the violation of a human and peoples' rights or, if circumstances so require by a separate decision.

113. The Court, recalling its earlier judgments, reiterates the fact that:

> to examine and assess claims 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.[34]

114. The Court also recalls 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."[35]

115. Measures that a State can take to remedy a violation of human rights include: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.[36]

116. It is against the above enumerated principles that the Court will consider the claim for reparations by the Applicant.

A. Adoption of constitutional and legislative measures

117. The Court recalls that, in appropriate cases, it has ordered State Parties to amend their legislation in order to bring it in conformity with the Charter. For example, the Court has previously ordered the Respondent State "to take constitutional, legislative and all

34 *Mohamed Abubakari v United Republic of Tanzania,* AfCHPR, Application 007/2013, Judgment of 4 July 2019 (reparations) § 19 and *Majid Goa alia Vedastus & anor v Tanzania*, AfCHPR, Application 025/2015, Judgment of 26 September 2019 (merits and rteparations) § 81.

35 *Majid Goa v Tanzania* (merits and reparations) § 82 and *Wilfred Onyango Nganyi & 9 ors v Tanzania* (merits) *,* § 16.

36 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) § 20.

other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken."[37] In a different case, the Court ordered Burkina Faso to "amend its legislation on defamation in order to make it compliant with Article 9 of the Charter, Article 19 of the Covenant and Article 66(2) of the Revised ECOWAS Treaty."[38] Further, in a case involving the Republic of Mali, the Court held that:

> … with respect to the measures requested by the Applicants in paragraph 16 (i), (ii), (iv), (v), (vi) and (vii), relating to the amendment of the national law, the Court holds that the Respondent State has to amend its legislation to bring it in line with the relevant provisions of the applicable international instruments.[39]

118. The Court having found that article 41(7) of the Respondent State's Constitution violates Articles 1, 2, and 7(1)(a) of the Charter orders the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of Articles 2, and 7(1) (a) of the Charter.

119. The Respondent State is also ordered to report to the Court, within twelve (12) months of this judgment, on the measures taken to implement the terms of this judgment.

B. Other measures of reparations

120. The Court notes that the Applicant did not specifically request for other measures of reparation but prays the Court to order "any other remedy and/or relief that the Honourable Court will deem to grant."

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121. The Court recalls that Article 27(1) of the Protocol gives it power to "make appropriate orders to remedy" violations. In the circumstances, the Court reaffirms that it can, by way of reparations, order publication of its decisions *suo motu* where the

37 *Tanganyika Law Society & ors v Tanzania* (merits)§126.

38 *Lohe Issa Konate v Burkina Faso* (merits) §176.

39 *APDF and IHRDA v Mali* (merits and reparations) (2018) 2 AfCLR 380 §130.

circumstances of the case so require.[40]

122. In the present case, the Court notes that the violations that it has established affect a significant section of the population in the Respondent State by reason of the fact that they relate to the exercise of several rights in the Charter, key among which is the right to political participation guaranteed under Article 13 of the Charter.

123. In the circumstances, the Court deems it proper to make an order *suo motu* for publication of this Judgment. The Court, therefore, orders the Respondent State to publish this Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

IX. Costs

124. The Court observes that Rule 30 of the Rules provides that "[u] nless otherwise decided by the Court, each Party shall bear its own costs."

125. In their submissions, both Parties prayed the Court to order the other to pay costs.

126. In the instant case, the Court rules that each party shall bear its own costs.

X. Operative part

127. For these reasons:

The Court,

On jurisdiction

Unanimously

i. Holds that it has jurisdiction.

On admissibility

By a majority of Seven (7) for and Three (3) against, Judges Tujilane CHIZUMILA, Blaise TCHIKAYA and Stella ANUKAM dissenting:

ii. Dismisses the objections to admissibility of the Application;

iii. Declares the Application admissible.

40 *Rajabu & ors v Tanzania* (merits and reparations) §§ 165-167.

On merits

By a majority of Six (6) for and Four (4) against, Judges Sylvain ORÉ, Suzanne MENGUE, Tujilane CHIZUMILA and Blaise TCHIKAYA dissenting:

iv. Holds that article 41(7) of the Respondent State's Constitution, in so far as it bars courts from inquiring into the election of a presidential candidate who has been declared elected by the Electoral Commission, violates Article 2 of the Charter,

By the President's casting vote under Rule 60(4) of the Rules, with Five (5) for – Judges Ben KIOKO, Rafaâ BEN ACHOUR, Angelo MATUSSE, Chafika BENSAOULA and M-Therese MUKAMULISA - and Five (5) against - Judges Sylvain ORE, Suzanne MENGUE , Tujilane CHIZUMILA, Blaise TCHIKAYA and Stella ANUKAM.

v. Holds that article 41(7) of the Respondent State's Constitution does not violate Article 3(2) of the Charter;

By a majority of Nine (9) for and One (1) against, Judge Blaise TCHIKAYA dissenting:

vi. Holds that article 41(7) of the Respondent State's Constitution, in so far as it bars courts from inquiring into the election of a presidential candidate who has been declared elected by the Electoral Commission, violates Article 7(1)(a) of the Charter;

By a majority of Nine (9) for and One (1) against, Judge Blaise TCHIKAYA dissenting:

vii. Holds that by retaining article 41(7) of its Constitution, the Respondent State has violated Article 1 of the Charter.

On reparations

viii. Orders the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, and in any case not exceeding two (2) years, to ensure that article 41(7) of its Constitution is amended and aligned with the provisions of the Charter to eliminate, among others, a violation of Articles 2, and 7(1)(a) of the Charter;

ix. Orders the Respondent State to publish this Judgment on the websites of its Judiciary and the Ministry for Constitutional and Legal Affairs within a period of three (3) months from the date of notification, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

On implementation of the Judgment and reporting

x. Orders the Respondent State to report to the Court within twelve (12) months of notification of this judgment on the measures taken to implement the terms of the judgment and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

xi. Orders that each party shall bear its own costs.

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Dissenting opinion: TCHIKAYA

[1] To say that I disagree with the majority of my honourable colleagues in favour of the Court's judgment in the *Jebra Kambole* case is an understatement, given the many differences of opinion. These differences of opinion have run through the whole case before the Court. They begin with the identification of the legal question raised, through the procedure followed, to the point where the Court believes that this is the solution.

[2] The special feature of a judicial decision on human rights is that it finds violations and, if appropriate, orders reparations. The *Jebra Kambole* decision singularly succeeds in the ruse of departing from this principle, not because of the nature of the case, but because the Court focuses on non-issues, on points of rights that are not rights, even though the only Article 7 paragraph 1 that could be discussed here was sufficient - even if, in this case, the account was not there either. The legal "mille-feuille" generated by the Court in this case gives the impression of a great opacity.

[3] To tell the truth, I was even able to consider, for solid reasons that must be reiterated, that the Court's jurisdiction was not established and was open to discussion. The heavy question of public law raised - the proclamation of the President of the Republic - required that the "Court strengthen its argument" (Words dear to Judge Suzanne Mengué). In view of the material basis of the dispute, the conviction that the Court was able to judge this question was not so prominent in the camp of those

who supported this judgment.

[4] I am of the opinion that it would be better to obtain, through internal discussion, a judicial decision that is rigorous in law rather than the time taken for a dissenting opinion. From this point of view, my regret is total. This is all the truer given that the African Court, by its decisions, after more than a decade (or nearly fifteen years), has earned admiration and respect. It has become an indispensable judicial relay for the functioning of democracies on the continent.

[5] Before getting to the substance of the *Kambole* case, it will be necessary to consider the reflections of Charles Evans Hughes, Judge at the Permanent Court of Arbitration (PCA) and Member of the Permanent Court of International Justice (PCIJ). His words sum up my current situation very well:

"A dissenting opinion expressed in a court of last resort is an appeal to the ever-present spirit of the law, to the intelligence of a future day when a later decision may rectify the error into which the judge giving that opinion believes the court has fallen".[1]

[6] The following discussion will be based on two pillars: on the one hand, on a few discordant points retained by the court (I.); on the other hand, on the fundamental inconsistencies with international human rights law that appear in the decision (II).

I. The *Jebra Kambole* Decision: a few discordant points

[7] The threads of the "Gordian knot" in which the Court set itself begin with the way in which it identified the question brought by *Mr. Kambole*. The problem had to be put there, although it seemed in many ways specific. It was, in fact, by its nature, out of all proportion to the Court's usual applications.

A. The special nature of the Jebra Kambole case

[8] The question put by the Applicant was of a special nature. Tanzanian lawyer, *Jebra Kambole*, is a member of the Tanganyika Law Society. By an application filed on 4 July 2018, he challenges the provisions of Article 41(7) of the Constitution of the Republic of Tanzania. This application was to be considered by the Court despite the fact that the Respondent State had filed a declaration of withdrawal on 21 November 2019 under Article 34(6) of the

1 v. in Philip C. Jessup, *The Development of International Law by the International Court*, 1958, note 10, p. 66; Mr. Charles Evans Hughes was elected a judge of the CPJI in 1928..

Protocol allowing individual and NGO applications. The Court also confirmed by Order that the withdrawal had no retroactive effect and had no impact on pending cases.[2]

[9] The Court is therefore, in this rare instance, seised of a question of public law, which appears to be of the first order: the result of the election of the President of the Republic. This Applicant's connection to the question raised may surprise as to his interest in acting, since he was not a priori a candidate for that result, but the Court will rightly,[3] hear the case.

[10] I do not agree with the analyses of my honourable colleagues on this case. I disassociate myself from the methodology of the examination used and the legal issues assumed to be relevant to this proceeding. Thus, in its entirety, the operative part of the Judgment obliges me to this dissenting opinion.

[11] In the third paragraph of its judgment, the Court recalls that Mr Kambole asks the Court to sanction the following:

"The fact that the Respondent State allowed the Constitution to contain such a provision prohibiting any person who felt aggrieved by the results of the presidential election from bringing proceedings before the Tanzanian courts constitutes a violation of Articles 1, 2, 3(2) and 7(1)(a) of the African Charter".[4]

The Tanzanian has thus allegedly failed to fulfil its obligations.

[12] The constitutional provision challenged by the Applicant is Article 41(7), according to which ...:

"Where a candidate is declared duly elected by the Electoral Commission in accordance with this Article, no court shall have jurisdiction to investigate his election".

[13] While the point of law is clear, the same cannot be said of the choices made by the majority of the Court. Leaving aside the question of harm to the individual, the Court was faced with a classic review of conventionality. The Court had to rule on the validity of a domestic text in the light of the principles of the international human rights order. Two elements would judicially

2 v. *Ingabire Victoire Umuhoza v* Rwanda, Judgment on Jurisdiction, 03 June 2016, v. *Ingabire Victoire Umuhoza v Rwanda*, Decision (Jurisdiction), 03 June 2016 1 RJCA 584 § 67; v also; in the Ghati Mwita case, the Court confirmed that the withdrawal of the said withdrawal will take effect twelve months after the date of deposit of the instrument of withdrawal, in this case 22 November 2020; AfCHPR, *Ghati Mwita v United Republic of Tanzania* (Provisional Measures Order), 9 April 2020, §§ 4 and 5..

3 In addition to Article 56 of the Charter and Article 30 of the Rules of Procedure, which lay down the conditions for bringing a case before the Court, it is understandable that, since suffrage is universal, the remedies attached to it are also universal.

4 AfCHPR, *Jebra v United Republic of Tanzania*, 11 July 2020, § 3.

follow:

- Was the Applicant's application admissible?
- Was the application valid in law?

The majority choices of the Court on these two points are surprising.

B. The points identified by the Court

[14] From the foregoing, the Court concludes firstly that the Respondent State has acted in a discriminatory manner. Article 41(7) of the Tanzanian Constitution would introduce discrimination. I do not share this view. The Court cites its decision in *APDH v Côte d'Ivoire*, in which it recognized that discrimination is:
"A differentiation between persons or situations on the basis of one or more non-legitimate criteria".[5]

This definition from Professor Jean Salmon's dictionary[6] is defensible, but it is manifestly inappropriate in the present case because it does not say what the specificity of the situation is. This is not a case of a constitutional provision that is available to everyone, which would be denied to others on the basis of an unjustified criterion.

[15] Whatever definition of discrimination is used,[7] it will not be taken into account. It cannot be accepted that the constituent power of the Respondent State intended to support one group or individual over another by adopting the provisions of Article 41(7). What is understandable is that the elected President, by virtue of his position (which will have to be reconsidered) has benefited from adjustments that would be favourable to him by virtue of his new functions. This is far from any discriminatory situation.[8] The Court seems to suggest that any statutory claim is a challenge for

5 AfCHPR, *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire* (Merits), 18 November 2016, *RJCA*, p. 697, § 147.

6 *Dictionnaire des droits de l'homme*, edited by Andriantsimbazovina (J.), Hélène Gaudin (H.), Maguenaud (J.-P), Rials (S.) and Sudre (F.), PUF, 2008, p. 284

7 The African Charter is careful not to use the term "discrimination". The term has been reinvested by African case-law, but its contribution in the present case is questionable in that it assimilates discrimination to the principle of equality and does not bring out its nuances. v AfCHPR, *Tanganyika Law Society & ors v United Republic of Tanzania (Merits) (2013)*, *1 RJCA* p. 697, § 147. 34, §106; and the Court stated in *African Commission on Human and Peoples' Rights v Kenya*, Order (Interim Measures), 15 March 2013 that "the right not to be discriminated against is linked to the right to equality before the law and equal protection of the law, rights enshrined in Article 3 of the Charter". Section 3 simply states that "All persons are equal before the law. All persons are entitled to equal protection of the law"

8 Weil (P.), *Liberté, égalité, discriminations*, Ed. Grasset and Fasquelle, 2008, pp. 9-10.

non-discrimination.

[16] The Court's basic argument is that section 41(7) does not have the same effect on all citizens. Thus, the Court points out that:

"While those who support the winning candidates may have no incentive to apply to the courts for redress as part of the electoral process, other sub-groups of voters may be willing to seek judicial intervention to enforce their rights".[9]

[17] It should be noted, on the one hand, that these voters expressed themselves in this way and, on the other hand, that they expressed themselves democratically on the basis of a democratic process. Article 41(7) applies to all voters without distinction. All are bound by it. One wonders why the reasoning of the august Court in this case begins its consideration of the merits of the case with the inappropriate idea of discrimination, albeit indirect.

[18] The majority in this decision is tempted by the equal protection of the law enshrined in s. 3(2) of the Charter:

"All persons are entitled to equal protection of the law.

The approach is similar to that followed in importing the previous concept. It is all in all, the Court seems to say in passing, on the same basis, to the consideration of equality before the law. It notes:

"The principle of equality before the law, which is implicit in the principle of equal protection of the law and equality before the law.[10] (...) Nevertheless, equal protection of the law also presupposes that the law protects every individual, without discrimination".

[19] The Court sees in this case a link between equality before the law and the principle of access to the courts. While this link clearly exists, it is not automatic in this case. Without referring to the specific characteristics of these principles, it should be recalled that access to the courts - to be considered solely in terms of this principle - involves prior procedural rules and may be subject to adjustments, depending on the matters and persons concerned. In judicial law, not everything is melted into a mould. The questions lead to specific or specific procedures. Prisoners' rights before the judge may differ from those of a citizen enjoying full civil and political rights. Rather, it was a question of trying to understand the meaning and useful effect of Article 41(7) of the Constitution of the Respondent State. The question posed by the court was

9 AfCHPR, *Jebra Kambole v United Republic of Tanzania*, op. cit. § 74..

10 *AfCHPR, Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabé Movement of Human and Peoples' Rights v Burkina Faso,* (Preliminary Objections), 21 June 2013, 1 RJCA, p. 204; Judgment (Merits), 28 March 2014, 1 ***RJCA*** 226, Judgment (Reparations), 5 June 2015, 1 RJCA, p. 265

why the person elected in a presidential election was removed from judicial scrutiny.

[20] The same applies where the Court considers that there is an alleged violation of the Applicant's right to have his case heard. It concludes that the Respondent State violated his right under Article 7(1)(a) of the Charter.[11] There is a question of identification of the actual issue before the Court. The majority of my dear colleagues argue that:

"This means that, whatever the nature of the grievances, whether well-founded or not, as far as they relate to the declaration of the winner in the presidential election by the Electoral Commission, no judicial remedy is available to any person who feels aggrieved in the respondent State".[12]

[21] The majority of my honourable colleagues thought that there was a dispute over the electoral procedure. The question of law put to the Court relates to the preposition directly contained in Article 41(7): "in so far as it relates to the declaration of the winner in the presidential election". This preposition in the sentence of the Article in question is as essential as it is blindingly obvious. The whole of the *Jebra Kambole* judgment does not see it. Yet this preposition, the main one here, obliged the Court to examine the special status of the newly elected President of the Republic. This special status is enshrined in all the advanced legal systems of the world.

[22] After this reading of a few selected points, it is appropriate to consider the main points of disagreement on which the Court has mistakenly based its decision.

II. The *Jebra Kambole* Decision: fundamental points of disagreement

[23] Undoubtedly, the *Kambole* case should have had a different judicial outcome. The decision handed down raises questions, including on the basis of admissibility.

11 Section 7(1)(a) of the Charter: "(1) Everyone has the right to have his or her case heard. This right includes: (a) the right to bring before the competent national tribunals any action violating the fundamental rights granted and guaranteed to him by the conventions, laws, regulations and customs in force"

12 AfCHPR, *Jebra Kambole v United Republic of Tanzania*, op. cit, § 97

A. The fundamental flaw in the decision: A flagrant inadmissibility of the application

[24] The Court should have dealt with the admissibility of the application in a precise manner, an aspect on which, as a matter of settled law, it has previously ruled.[13] Clearly, *Mr Kambole's* Application was not presented to the Court within a reasonable time. Moreover, the Court acknowledges that:

"The possibility of bringing an action against the Respondent State in relation to the violation alleged by the Applicant was only offered from March 2010. However, the present Application was filed in July 2018, eight (8) years and four (4) months after the filing of the declaration"[14]

[25] This period of more than 8 years is prohibitive. The Court innovates and overturns all its previous jurisprudence without giving a solid justification. It justifies itself as follows:

"Consequently, even if, in the present case, the Applicant brought the matter before the Court eight (8) years and four (4) months after the Respondent State filed its declaration, in view of the lack of any remedy available to the Applicant and the continuing nature of the alleged violation, the Court concludes that it is not necessary to set a time-limit as provided for in the first aspect of Article 40(6) of the Rules of Court".[15]

This argument of my Honourable Colleagues in the majority comes up against two stumbling blocks: (i) it confuses the nature of the violation with its continuing nature and (ii) the procedure applicable to the Court must take account of a reasonable, i.e. not excessive, time-limit for bringing the matter before the Court. Even before ruling on the question, the Court must be sure of its procedural time limits.[16]

[26] This time-limit must be contained. It corresponds to a period of time which allows the victim, under conditions of law and fact to be determined by the Court, to submit his or her complaint.

13 Article 6.2 of the Protocol states that: "The Court shall rule on the admissibility of applications having regard to the provisions of Article 56 of the Charter"; in particular Article 39, which presents it as "the Court shall decide on the admissibility of applications having regard to the provisions of Article 56 of the Charter"

14 AfCHPR*, Jebra Kambole v United Republic of Tanzania, § 47*

15 AfCHPR, *Jebra Kambole v United Republic of Tanzania*, §§ 48-53.

16 The universality of this approach may be recalled. see in particular ICJ, East Timor, *Portugal v Australia*, 30 June 1995; the Hague Court holds that the ***erga omnes*** opposability of a norm and the rule of consent to jurisdiction are two different things. The lawfulness of the conduct of a State cannot be determined when the decision to be taken involves an assessment of the lawfulness of the conduct of another State which is not a party to the proceedings. This latter rule is the basis of international procedure. In such cases the Court cannot rule, even if the right in question is enforceable ***erga omnes***.

The most important thing is not that the Court should assume that the time limit is fixed under section 56 of the Charter, but that it should consider how reasonable the time limit for referral appears to be. This reasonable time is required for any application after the exhaustion of domestic remedies, regardless of the alleged violation. The Court has in fact established that the reasonableness of the time limit for its referral depends on the particular circumstances and must be assessed on a case-by-case basis.[17] *Mr. Kambole* will have waited more than eight (8) years to submit the application to the Court. This excessively long time is unfortunate and should motivate the rejection of the application, given that the Applicant is a lawyer and also a member of the Tanganyika Law Society which is an NGO with observer status at the African Commission on Human and Peoples' Rights.

[27] This last point is central. The combination of two major qualities means that the Petitioner is very familiar with the laws of his country. Could he be unaware of the existence of such an important text of the Constitution? This renders unjustifiable the delay of more than 8 years for a violation that is said to be continuous, and therefore visible, for a lawyer of his quality. In addition, the *Tanganyika Law Society*, a learned society to which *Mr. Kambole* says he belongs, has often appealed to the Court. It has some practice in this regard.[18] The delay of more than 8 years especially taken in this case should be sanctioned by the Court. It is sufficient in itself to establish the procedural vacuity of the application. Neither the Petitioner nor the Tanganyika Law Society are profane or "indigent" in constitutional matters.

[28] The decision to the contrary on this point is novel. It is in a way the end of the earlier case law,[19] developed by the Court itself, in which it held that the Applicant's indigence could justify a delay. The lay nature of the law was also one of the grounds.

[29] Paradoxically, the excessively long time-limit in the present case does not lead to rejection even though the Applicant is a lawyer.

17 *Anudo Ochieng Anudo v United Republic of Tanzania (Merits) (2018)* 2 RJCA 257, § 57

18 See in particular AfCHPR, *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, Decision (joinder), 22 September 2011, 1 JCJA, p. 33; Judgment (merits), 14 June 2013 (2013), 1 JCJA, p. 34; Judgment (reparations), 13 June 2014, 1 JCJA, p. 74

19 v. AfCHPR, *Alex Thomas v United Republic of Tanzania*, 20 November 2015, § 66 et seq., the Court noted that "the applicant maintains that his application was lodged within a reasonable time after domestic remedies had been exhausted, having regard to the circumstances and his particular situation as a lay person, indigent and in detention"

In so doing, the Court reverses a case-law position which it has held without interruption since at least 2015, in which it has shown and held that the Applicant's indigence and profane nature removed the requirement of a reasonable time limit. This position of the Court appears, inter alia, in AfCHPR, *Onyachi and Njoka v Tanzania*, 28 September 2017, 2 RJCA p. 65; *Jonas v Tanzania*, 2 RJCA, 28 September 2017, p. 101.

[30] A position that the Court has upheld throughout 2018, including AfCHPR, *Isiaga v Tanzania*, 21 March 2018, 2 RJCA, p. 218; *Gombert v Côte d'Ivoire*, 2 RJCA, 2018, 2 RJCA, p. 270; *Nguza v Tanzania*, 23 March 2018, 2 RJCA p. 287; *Mango v Tanzania*, 11 May 2018, 2 RJCA, p. 314. The Court clearly reiterated this in *Evarist v Tanzania*. Tanzania, 21 September 2018, 2 JCAR, p. 402; *Guehi v Tanzania*, 7 December 2018, 2 JCAR, p. 477 ...and many others.[20]

[31] Surprising position taken in Kambole, as it runs counter to the regime applicable to continuing violations. It is recognized that even in the face of continuing violations the Court retains control over its rules of procedure. Its role is not open to the ad vitam æternam plaintiffs. A continuing violation cannot postpone the time limit for appeal indefinitely. The judges require the applicants to show diligence and initiative in the face of continuing breaches by the State. The abundant case-law on this point, in particular ECHR, *Sargsyan v Azerbaijan*,[21] is very clear in § 129 on a disappearance case:

"When examining the Turkish Government's plea of non-observance of the six-month time-limit, the Court recalled that the human rights protection mechanism established by the Convention had to be concrete and effective, that this principle applied not only to the interpretation of the normative clauses of the Convention but also to its procedural provisions, and that it had implications for the obligations incumbent on the parties, both the governments and the Applicants. For example, where speed is of the essence in resolving a matter, it is incumbent on the Applicant to ensure that his or her complaints are brought before the Court with the necessary promptness to enable them to be decided properly and fairly".

[32] This obligation on Applicants to be diligent in the presentation of appeals is important for legal certainty. The European Court makes it quite clear that this "is an obligation incumbent on the

20 V notamment AfCHPR, ***Ramadhani v Tanzania***, (2018) 2 RJCA, p. 344 ; ***William v Tanzania***, (2018) 2 RJCA, p. 426 ; ***Paulo v Tanzania*** (2018) 2 RJCA, p. 446 ; ***Werema v Tanzania***, (2018), 2 RJCA, p. 520

21 ECHR, ***Sargsyan v Azerbaïdjan***, 14 December 2011

parties, both the governments and the Applicants". It expresses it as follows in § 31 of the *Kolosov & ors v Serbia* judgment:

"Nevertheless, the Court recalls that the continuing situation may not postpone the application of the six-month rule indefinitely. The Court has, for example, imposed a duty of diligence and initiative on Applicants wishing to complain about the continuing failure of the State to comply with its obligations in the context of ongoing disappearances or the right to property or home (…) While there are, admittedly, obvious distinctions as regards different continuing violations, the Court considers that the Applicants must, in any event, introduce their complaints "without undue delay", once it is apparent that there is no realistic prospect of a favourable outcome or progress for their complaints domestically".[22]

This should be the exact way to address the effect of the continuing nature of the infringement of the procedure before the Court.

[33] As such, the *Kambole* decision would not have passed the admissibility stage. It should have been declared inadmissible. Moreover, the decision contains only a weak statement of reasons in terms of the national margin of appreciation, which is a major right under the Tanzanian system of law applicable to the President-elect.

B. A summary approach to the NPM (the national margin of appreciation)

[34] The Court has developed a legal tradition that has not yet been contradicted in its judicial work. Traditionally, when a principle is relevant to a case, it considers it, then rejects or validates it. This is even attached to the function of judging. The most fundamental remains the way in which the Court gives reasons, if any, for its rejection.[23] This was not the case with the so-called "national margin of appreciation" (NMA) standard in the *Jebra Kambole*

22 ECHR, *Sokolov & ors v Serbia*, 14 January 2014.

23 In particular, one can consider the *Court's reasoning in Mohamed Abubakari* of 2016. The Applicant is rebuked by the State for failing to cite the exact provision to justify the Court's jurisdiction. The Court will take up the issue to show the basis for that jurisdiction. In § 32 of this case the Court states: "jurisdiction is a question of law which it must itself determine, whether or not that question has been raised by the parties to the proceedings. It follows that the fact that a party has relied on provisions which are allegedly inapplicable is of no consequence, since in any event the Court is aware of the law and is able to base its jurisdiction on the appropriate provisions. ... the Court rejects the objection to its jurisdiction raised here by the Respondent State. The Court considers that it has jurisdiction ratione materiae to consider the present case, inasmuch as the alleged violations all concern ***prima facie*** the right to a fair trial,6 as guaranteed in particular by Article 7 of the Charter". The demonstrative and inductive approach used by the Court in these elements shows the Court's effort of persuasion. v AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016.

case. It would be superfluous to demonstrate its relevance in the present case, since the matter falls within the primary civil service and the sphere of State sovereignty.

[35] It has been established that the State has a national margin of appreciation (NOM)[24] on its territory, a concept recognized since 1976 in international human rights law. So many States have the disputed provisions in their domestic law. These provisions can only be legally understood through the NPM. States may, in certain cases, restrict rights and freedoms for reasons of public order, public health, national security... This is a moderating concept, which would be well reconciled with the African community interest in that it allows, as in other continents, the pluralism of constitutional systems.

[36] The proclamation of the President and his or her internal status, which are of the very nature of domestic public law, should be considered more rigorously. The elements of the Judgment do not only partially convey this conviction in the sense. They do not draw sufficient conclusions from it. The Court decides as follows: "The Court notes that the margin of appreciation left to the State is a recurring feature of international jurisprudence .... The margin of appreciation refers to the limit at which international supervision must give way to the State party's discretion to enact and enforce its laws".[25]

[37] The Court goes on, endorsing the position of the African Commission on Human and Peoples' Rights, recalling that: "Similarly, the doctrine of appreciation guides the African Charter, in that it considers the Respondent State to be better disposed to adopt policies, (...) given that the State is well aware of its societý, its needs, its resources, (...) and the fair balance needed between the competing and sometimes conflicting forces that make up its society".[26]

[38] The Court does not give the fundamental reason why it rejects the NPM in this case. However, the applicable case-law has laid down criteria for assessing its relevance in the event of invocation

24 The European Court puts it in the following terms in its ***Handyside*** judgment §§ 49 and 50: "the Court has jurisdiction to give a final judgment on whether a 'restriction' or 'sanction' is compatible with freedom of expression as protected by Article 10 (art. 10). The national margin of appreciation thus goes hand in hand with European supervision. The latter concerns both the purpose of the disputed measure and its "necessity". It relates both to the basic law and to the decision applying it, even when it emanates from an independent court. In this connection, the Court refers to Article 50 (art. 50) of the Convention ("decision taken or (...) measure ordered by a judicial or other authority") as well as to its own case-law (Engel & ors judgment of 8 June 1976). ECHR, ***Handyside v the United Kingdom***, 7 December 2016

25 AfCHPR, ***Jebra Kambole v Tanzania***, §§ 79

26 AfCHPR, ***Jebra Kambole v Tanzania***, §80 citing the Commission, ***Prince v South Africa*** (2004), AHRLR 105 (ACHPR 2004), § 51

by a State.[27] Rather, it will conclude on this point with a surprising argument:

"This distinction is such that individuals within the Respondent State do not have the possibility of bringing proceedings simply because of the subject-matter of their complaints, while other individuals with complaints unrelated to the presidential election are not excluded".[28]

[39] Even considering the established human rights provisions, it is not trivial to deprive a State of its sovereignty of domestic legal order, which international human rights law otherwise recognizes. The NAM has this vocation, in that it preserves, under the control of the human rights judge, a diversity of internal laws, on issues such as the status of the elected President. As Professor Pellet[29] said, in any event:

"The breakthrough of human rights in international law does not call into question the principle of sovereigntý, which seems to remain (if correctly defined) a powerful organizing factor of the international societý and an explanation, always enlightening, of international legal phenomena".

[40] There remains, therefore, the feeling of a genuine "misunderstanding". In its most accurate sense: a misunderstanding that consists in taking one thing for another.

B. The feeling of a genuine "misunderstanding" in the decision

[41] Mr Kambole challenges the provisions of Article 41(7) which remove any challenge after the proclamation of the elected candidate. In the grounds of its decision, the Court rejects the "complaints relating to the presidential election". Disputes relating to the electoral procedure or operations are not the same as those

27 v. elements of discommendation and assessment of this theory formulated by the European Court, ECHR, *Observer and Guardian v the United Kingdom*, 26 November 1991: "The Contracting States enjoy a certain margin of appreciation in assessing the existence of such a need, but this is coupled with European supervision of both the law and the decisions applying it, even when they emanate from an independent court. The Court therefore has jurisdiction to give the final ruling on whether a "restriction" is compatible with the freedom of expression protected by Article 10 (art. 10). (d) It is not the task of the Court, when exercising its review, to substitute itself for the competent domestic courts, but to review under Article 10 (art. 10) the decisions which they have given in exercise of their discretion. It does not follow that it should confine itself to ascertaining whether the respondent State has used this power in good faith, carefully and reasonably"

28 AfCHPR, *Jebra Kambole v Tanzania*, § 82

29 Alain Pellet, Droits-de-l'hommisme et droit international", Droits fondamentaux, N. 01, 2001, p. 4820; La mise en oeuvre des normes relatives aux droits de l'homme, CEDIN (H. Thierry and E. Decaux, eds.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme*, Montchrestien, Paris, 1990, p. 126.

relating to the status of the winning candidate.

[42] No country in the world opens the challenge of the President-elect to all after the election procedure has been completed.[30] Article 41(7) of the Respondent State formulates it in its own way, no more than that. This is not the issue on which the Court decides in the decision. It talks about the right of Tanzanian citizens to challenge the election of the President. It does not address the question of the legal status that Tanzanian domestic law attributes to the elected President. Do the provisions of Article 41(7) consider the result to be final or not? This main question, the only one contained in Mr Kambole's appeal, is not discussed. There seems to be a real "misunderstanding".

[43] The Court believed, on examining the terms of Article 41(7), that the Tanzanian constituent refused to accept the election in the proceedings. There is undoubtedly a "quidproquo" because, in my view, the terms of that Article refer to the elected candidate. Once it is enshrined and final, it becomes free from challenge. That is common public law. There is a misunderstanding of the subject matter of the dispute.

[44] Article 46, paragraph 2, of the Guinean Constitution of 7 May 2010, as revised on 7 April 2020, does not say any more: "If no dispute relating to the regularity of the electoral process has been filed by one of the candidates with the registry of the Constitutional Court within eight days of the day on which the first overall total of the results was made public, the Constitutional Court shall proclaim the President of the Republic elected". Any procedural operation shall take place prior to the proclamation. In the same vein, the Kenyan Constitution of 2010.

[45] The Constitution of neighbouring Kenya of 5 August 2010 also does not provide for a procedure to challenge the proclaimed elected candidate. Article 138 of the Constitution states in paragraph 10 that

"Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall- (a) declare the result of the election; and (b) deliver a written notification of the result to the Chief Justice and the incumbent President".

[46] The issue that the Court addresses is that of the regularity of the electoral operations. This is a different matter altogether. It figures prominently in many constitutions. The choice consists, as

30 France, tempted by an opening, restricts the submission of appeals to two days following the ballot. However, the final result will not be contested

in the Beninese[31] and Congolese,[32] Senegalese[33] constitutions, in particular, in making a provisional proclamation. This does not concern the regime that rightly applies to the elected candidate. The final result is not open to question. For obvious reasons, the electoral quarrels took place earlier. That is what is ultimately formulated, in other words, the provisions of Article 41.7.

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[47] There will undoubtedly be a after *Jebra Kambole*...The Court's decisions on admissibility, including on the reasonable time limit, will undoubtedly be read and scrutinized. However, the Court's path in this decision was not so simple: to uphold a restrictive reading of the "normative margins" of States or to say the domestic law of the State, which in any case legitimately restricted a right... but which one? The pan-African jurisdiction will undoubtedly have new opportunities to clarify the content of the national margin of appreciation, subsidiarity, proportionality, etc., in the application of Article 7 of the Protocol (applicable law).

[48] In Professor Flauss' classification of human rights trends,[34] one of them is not lacking in interest. That of the advocates of "moderate evolutionism". According to this trend, the protection of human rights would benefit from relying more on the established rules of international law and taking them into consideration more frequently, while advocating, in certain cases, the particularization of the rules of international law. The Court does not appear to be

31 Article 49, paragraph 3, of the Beninese Constitution of 11 December 1990, as revised on 7 November 2019, is *mutatis mutandi*s a prototype of this provision: "... If no dispute as to the regularity of the electoral process has been lodged with the Registry of the Court by one of the candidates within five days of the provisional proclamation, the Court shall declare the ... President of the Republic ... definitively elected ...".

32 v. Article 72 of the Congolese Constitution, 15 October 2015

33 v. Article 35, paragraph 2, of the Constitution of Senegal of 22 January 2001, as revised on 5 April 2016

34 Flauss (J.F.), La protection des droits de l'homme et les sources du droit international, S.F.D.I., Strasbourg Colloquium, La protection des droits de l'homme et l'évolution du droit international, Pedone, Paris, 1998, pp. 13-14.

following such an approach in the present decision.[35]

[49] Far from being complacent, it is with deep regret that I note that I have not been able to convince the majority of my Dear Colleagues of a better approach. I therefore accept this dissenting opinion, which I would have wanted to avoid.

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Joint separate opinion: KIOKO AND MATUSSE

[1] We agree with the majority in terms of the finding of a violation of Articles 1, 2 and 7(1)(a) of the Charter. We also voted in favour of the Court finding a violation of Article 3(2) of the Charter. On the latter point, the majority found that the Respondent State did not violate Article 3(2) of the Charter and it is on this account that we proffer this separate opinion.

[2] The Court, correctly in our view, held that article 41(7) of the Constitution of the United Republic of Tanzania violates Article 2 of the African Charter on Human and Peoples Rights (the Charter). Article 2 of the Charter, it must be recalled, guarantees the right to non-discrimination in relation to the enjoyment of all rights and freedoms enshrined in the Charter. We agree that the practical effect of article 41(7) of the Constitution of Tanzania is to impose a distinction among litigants such that litigants seeking to challenge the results of a presidential election are treated differently from other litigants. We, however, differ with the majority and hold the view that the same conduct, which was correctly found to have infringed Article 2 of the Charter, also automatically, on the facts of the present case, infringed Article 3(2) of the Charter.

[3] In our view, the Charter's provisions on non-discrimination and equality broadly follow the scheme contained in the International Covenant on Civil and Political Rights (ICCPR). Just as is the

35 The African human rights system does not include a safeguard clause. This constitutes for its Arusha Court a source of obligation of vigilance on the restrictions of the rights which accrue to States. v Les développements de Ouguergouz (F.), *La charte africaine des droits de l'homme*, Ed. PUF, 1993, p. 255; v Virally (M.), Des moyens utilisés dans la pratique pour limiter l' effet obligatoire des traites, *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme,* IV ème colloque du départernent des droits de l'homme, Université Catholique de Louvain, Bruxelles, Bruylant, 1982, pp. 14-15.

case with the ICCPR, the Charter has a provision proscribing discrimination of any kind in relation to the enjoyment of all rights in the Charter (article 2) and a separate provision that, in a general way that is not limited to Charter rights, seeks to secure equality before the law and equal protection of the law. The corresponding ICCPR provisions are articles 2 and 26.

[4] The result of the scheme created by Articles 2 and 3 of the Charter is that while Article 2 limits the application of the principle of non-discrimination to rights contained in the Charter, Article 3 does not have a similar restriction. Ultimately, therefore, Article 3 stipulates that all persons are equal before the law and entitled to equal protection of the law without any discrimination. In doing this, Article 3 does not simply replicate the provisions of Article 2 but creates an autonomous right proscribing discrimination in law and in fact in any field regulated and protected by public authorities.[1] Specifically in terms of national laws and Article 3(2) of the Charter, the obligation of State Parties is to ensure that the content of any legislation adopted is not discriminatory in substance or effect.

[5] The presentation of the Articles 2 and 3 in the Charter and articles 2 and 26 of the ICCPR, demonstrates clearly the affinity between non-discrimination, on the one hand, and equality, on the other hand, as principles of human rights law. As a matter of fact, it is correct to view the principle of non-discrimination as possessing two dimensions: non-discrimination and equality.[2] It is, therefore, not uncommon to see the two terms used interchangeably since they are, in any event, two sides of the same coin. "Equality" represents the positive statement of the principle while "non-discrimination" stands for the negative statement of the principle. Thus, in practice, one can say he/she has been treated equally if he/she has not been discriminated against and conversely one can say he/she has been discriminated against if he/she has not been treated equally.

[6] The right to equality before the law requires that "all persons shall be equal before the courts and tribunals".[3] In *Institute for*

1 "CCPR General Comment No. 18: Non-discrimination" <https://www.refworld.org/docid/453883fa8.html>

2 Mpoki Mwakagali "International Human Rights Law and Discrimination Protections: A Comparison of Regional and National Responses" <https://brill.com/view/journals/rpcd/1/2/article-p1_1.xml?language=en>

3 *Kijiji Isiaga v United Republic of Tanzania* (merits) (2018) 2 AfCLR 218 § 85 and *George Maili Kemboge v United Republic of Tanzania* (merits) (2018) 2 AfCLR 369 § 49.

Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 ors v Angola,[4] the African Commission on Human and Peoples' Rights (the Commission) referred to the United States Supreme Court decision in *Brown v Board of Education of Topeka*[5] wherein the right to equal protection of the law was defined as the right of all persons to have the same access to the law courts and to be treated equally by the law courts, both in the procedure and in the substance of the law. Further, in *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* the Commission stated that:

> … the right to equal protection of the law envisaged under Article 3 of the African Charter consists of the right of all persons to have the same access to the law and Courts, and to be treated equally by the law and Courts, both in procedures and in the substance of the law. While it is akin to the right to due process of law, it applies particularly to equal treatment as an element of fundamental fairness. It is a guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property.[6]

[7] Article 41(7) of the Respondent State's Constitution, in our view, has the effect of removing from judicial scrutiny any determination by the Electoral Commission pronouncing a candidate as a winner of a presidential election. Notably, however, a challenge against the declaration of a winner of a presidential election may implicate the rights of the Respondent State's citizens, for example, under Article 13 of the Charter. The net result of article 41(7) of the Respondent State's Constitution, however, is that irrespective of the grievances that one may have with the declaration of the winner of a presidential election, no court can inquire into any such grievance. Citizens in the Respondent State, therefore, do not have the same opportunity in terms of accessing the Courts for relief on their grievances.

[8] We also feel obliged to highlight that although the Respondent State pleaded the doctrine of margin of appreciation, this doctrine does not amount to a blanket licence for States to choose haphazardly the measures for implementation of Charter rights. Even within the context of the doctrine of the margin of appreciation, and as States craft measures for the Charter's

4 *IHRDA (on behalf of Esmaila Connateh and 13 ors v Angola* (2008) AHRLR (ACHPR 2008) 43 § 46.

5 *Brown v Board of Education of Topeka* 347 US 483 (1954).

6 *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* (2011) AHRLR 3 (ACHPR 2011) § 59.

implementation, it remains important that States preserve the spirit of the Charter and the values underlying it.

[9] In relation to the present case, we find that the Respondent State has failed to provide details, which would justify barring any court of law from inquiring into the election of a president subsequent to the Electoral Commission announcing the results of an election.

[10] Further, in the absence of arguments by the Respondent State as to the reasonableness or necessity of the provisions of article 41(7) of its Constitution, we believe the Court should have found that the Applicant's right to equal protection of the law guaranteed under Article 3(2) of the Charter has been violated.

[11] We particularly find it difficult to understand how the same conduct which the majority correctly determined to be against the principle of non-discrimination could somehow pass the test for equal treatment. In our view, the same reasoning used to support a finding of a violation of Article 2 could have been used to support a violation of Article 3(2) of the Charter.