Mulindahabi v Rwanda (ruling) (2020) 4 AfCLR 328

Application 005/2017, *Fidèle Mulindahabi v Republic of Rwanda*

Ruling (admissibility), 26 June 2020. Done in English and French, the French text being authoritative.

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

Recused under Article 22: MUKAMULISA

The Applicant, who had lost domestic legal action against an insurance company, brought this action against the Respondent State alleging a violation of a number of his Charter protected rights. The Court declared this action inadmissible for failure to file within a reasonable time after exhaustion of legal remedies.

Admissibility (assessment of reasonableness of time limit, 43-46)

Separate opinion: BEN ACHOUR AND TCHIKAYA

Jurisdiction (material jurisdiction, 6,10)

I. The Parties

1. Fidèle Mulindahabi (hereinafter referred to as "the Applicant"), is a national of the Republic of Rwanda, residing in Kigali, an owner of vehicle no. PAA0162.

2. The Application is filed against the Republic of Rwanda (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 Charter") on 21 October 1986 and to the Protocol on 25 May 2004. It also deposited on 22 January 2013, the Declaration provided for under Article 34(6) of the Protocol by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 29 February 2016, the Respondent State notified the Chairperson of the African Union Commission of its intention to withdraw the said Declaration. The African Union Commission transmitted to the Court, the notice of withdrawal on 3 March 2016. By a ruling dated 3 June 2016, the Court decided that the withdrawal by the Respondent State would take effect from 1 March 2017.[1]

1 See *Ingabire Victoire Umuhoza v Republic of Rwanda* (jurisdiction) (2016) 1 AfCLR 540 § 67.

II. Subject of the Application

A. Facts of the matter

3. The Applicant alleges that on 3 March 2013, his vehicle No. PAA0162 was involved in a traffic accident with a Toyota Carina ERAB620A insured by CORAR Insurance Company, which was found to be at fault for the accident.

4. On 25 March 2013, the Applicant wrote to CORAR Insurance Company, requesting payment of one million Rwandan francs (RWF 1,000,000), as an advance, to repair his house, which had been destroyed by a natural disaster.

5. On 5 April 2013, CORAR Insurance Company granted the Applicant one million Rwandan francs (RWF 1,000,000) as an advance payment. The repair of his vehicle was completed on 18 June 2013. On 23 June 2013, the Insurance Company paid him the cost of repairing the vehicle, amounting to One Hundred and Ten Thousand and Eight Hundered Rwandan francs (RWF 110,800) as well as the cost of transporting the vehicle from the scene of the accident to the garage and the cost of processing the police documents .

6. On 12 August 2013, the Applicant wrote to CORAR Insurance Company requesting compensation for the loss of income suffered during the three (3) months that his vehicle was in the garage for repairs. The company replied that it did not owe him anything, as the advance of one million Rwandan francs (RWF 1,000,000) that had been paid to him for the repair of the vehicle had instead been used to renovate his house, which is the reason why the vehicle had remained in the garage for an extended period of time.

7. The Applicant filed a lawsuit against CORAR Insurance Company, alleging loss of income and the case was registered at the registry of the Court of First Instance under number Rc0865 / 13 / TGI / NYGE. On 4 February 2014, the Court of First Instance dismissed his complaints on the grounds that he had used the money paid to him by CORAR Insurance Company to carry out repair work on his house, even though he had indicated that he was not able to repair his house because he had not obtained the authorisation from the competent authorities to do so.

8. The Applicant appealed to the Supreme Court, which was registered in the Court Registry under number RCA0087 / 14 / HC / KIG; on 24 November 2014, the Supreme Court delivered its judgment confirming the judgment of the Court of First Instance

on the same grounds.

9. With regard to the house, the Applicant submits that, he had maintained that he had not carried out any repairs in contradiction to the judgment where the, Court concluded (with regard to the vehicle) that he had used the advance payment made to him by CORAR Insurance Company to repair the house, and this violates his right to a fair trial.

B. Alleged violations

10. The Applicant contends that the Respondent State is responsible for:

i. violating his right to a fair trial by an independent and impartial tribunal to determine his rights and obligations under Article 10 of the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR") and Article 14 (1) of the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR").

ii. Failure to ensure that the competent authorities execute the judgment rendered in favour of the Applicant pursuant to Article 2(3)(c) of the ICCPR.

iii. Failure to guarantee his right to have his case heard under Article 7(1)(a)(d) of the Charter.

iv. Failure to ensure the independence of the judiciary and the availability, establishment and improvement of competent national institutions for the promotion and protection of the rights and freedoms guaranteed by the Charter and provided for in Article 26 thereof.

v. Failure to guarantee the right to equality before the law and equal protection of the law, in accordance with Article 7 of the Universal Declaration of Human Rights, Article 26 of the ICCPR and Article 3 of the Charter.

III. Summary of the Procedure before the Court

11. The Application was filed on 24 February 2017. The Respondent as well as other entities mentioned in the Protocol were notified .

12. On 9 May 2017, the Registry received a letter from the Respondent State reminding the Court that it had withdrawn its Declaration under Article 34(6) of the Protocol and that it would not participate in any proceedings before the Court. The Respondent State therefore, requested the Court to cease communicating any information relating to cases concerning it.

13. On 22 June 2017, the Court acknowledged receipt of the Respondent State's said correspondence and informed the Respondent State that it would nonetheless be notified of all the

documents in matters relating to Rwanda in accordance with the Protocol and the Rules .

14. On 25 July 2017, the Court granted the Respondent State an initial extension of forty-five (45) days to file its Response. On 23 October 2017, the Court granted a second extension of forty-five (45) days, indicating that it would render a default judgment after the expiration of this extension if the Respondent State failed to file a Response.

15. On 19 July 2018, the Applicant was given thirty (30) days to file his submissions on reparations but no response was received,

16. On 18 October 2018, the Respondent State was notified that it was granted a final extension of forty-five (45) days to file the Response and that, thereafter it would render a judgment in default in the interest of justice in accordance with Rule 55 of its Rules.

17. Although the Respondent State received all the notifications, it did not respond to any of them. Accordingly, the Court will render a judgment in default in the interest of justice and in accordance with Rule 55 of the Rules.

18. On 28 February 2019, pleadings were closed and the parties were duly notified.

IV. Prayers of the Parties

19. The Applicant prays the Court to take the following measures:

i. find that Rwanda has violated the human rights instruments to which it is a party.

ii. revise the judgment in case No. RCA0087 / 14 / HC / KIG and annul all the judgments rendered.

iii. order the Respondent State to comply with human rights law.

20. The Applicant did not file any specific claim for compensation.

21. The Respondent State did not participate in the proceedings before this Court. Therefore, it did not make any prayers in the instant case.

V. Non appearance of the Respondent State

22. Rule 55 of the Rules provides that:

1. Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings.

2. Before acceding to the application of the party before it, the Court

shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law.

23. The Court notes that the afore-mentioned Rule 55 in its paragraph 1 sets out three conditions, namely: i) the default of one of the parties; ii) the request made by the other party; and iii) the notification to the defaulting party of both the application and the documents on file.

24. On the default of one of the parties, the Court notes that on 9 May 2017, the Respondent State had indicated its intention to suspend its participation and requested the cessation of any transmission of documents relating to the proceedings in the pending cases concerning it. The Court notes that, by these requests, the Respondent State has voluntarily refrained from asserting its defence.

25. With respect to the other party's request for a judgment in default, the Court notes that in the instant case it should, in principle, have given a judgment in default only at the request of the Applicant. However, the Court considers, that, in view of the proper administration of justice, the decision to rule by default falls within its judicial discretion. In any event, the Court shall have jurisdiction to render judgment in default suo motu if the conditions laid down in Rule 55(2) of the Rules are fulfilled

26. Lastly, with regard to the notification of the defaulting party; the Court notes that the Application was filed on 24 February 2017. The Court further notes that from 31 March 2017, the date of transmission of the notification of the Application to the Respondent State to 28 February 2019, the date of the closure of pleadings, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. The Court concludes thus, that the defaulting party was duly notified.

27. On the basis of the foregoing, the Court will now determine whether the other requirements under Rule 55 of the Rules are fulfilled, that is: it has jurisdiction, that the application is admissible and that the Applicant's claims are founded in fact and in law.

VI. Jurisdiction

28. Pursuant to Article 3(1) of the Protocol, "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned". Furthermore, under Rule 39 (1) of its Rules, "the Court shall conduct a preliminary examination of its

jurisdiction ...".

29. After a preliminary examination of its jurisdiction and having found that there is nothing in the file to indicate that it does not have jurisdiction in this case, the Court finds that it has:

i. material jurisdiction by virtue of the fact that the Applicant alleges a violation of Articles 7(1)(a)(d) and 26 of the Charter, Articles 2(3)(c) and 14(1) of the ICCPR to which the Respondent State is a party and Article 10 of the UDHR[2].

ii. personal jurisdiction, insofar as, as stated in paragraph 2 of this Ruling, the effective date of the withdrawal of the Declaration by the Respondent State is 1 March 2017.[3]

iii. temporal jurisdiction, in so far as, the alleged violations took place after the entry into force for the Respondent State of the Charter (31 January 1992), of the ICCPR (16 April 1975), and the Protocol (25 January 2004).

iv. territorial jurisdiction, since the facts of the case and the alleged violations occurred in the territory of the Respondent State.

30. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VII. Admissibility

31. Pursuant to the provisions of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter".

32. Furthermore, under Rule 39(1) of the Rules "The Court shall conduct preliminary examination of … the admissibility of the application in accordance with articles 50 and 56 of the Charter, and Rule 40 of these Rules".

33. Rule 40 of the Rules which restates the provisions of Article 56 of the Charter, sets out the conditions for the admissibility of applications as follows:

Pursuant to the provisions of article 56 of the Charter to which article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter'srequest for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;

2 See *Anudo Ochieng Anudo v United Republic of Tanzania*,(merits) (2018) 2 AfCLR 248, §76; *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* (merits) (2018) 2 AfCLR 314, §33.

3 See paragraph 2 of this Judgment.

4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obviousthat this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and;
7. not raise any mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union ".

34. The Court notes that the conditions of admissibility set out in Rule 40 of the Rules are not in contention between the parties, as the Respondent State having decided not to take part in the proceedings did not raise any objections to the admissibility of the Application. However, pursuant to Rule 39(1) of the Rules, the Court is obliged to determine the admissibility of the Application.

35. It is clear from the record that the Applicant is identified. The Application is not incompatible with the Constitutive Act of the African Union or the Charter. It does not contain disparaging or insulting language and is not based exclusively on information disseminated through the media. There is also nothing on the record to indicate that the present Application concerns a case which has been settled in accordance with either the principles of the United Nations Charter, the OAU Charter or the provisions of the Charter.

36. With regard to the exhaustion of local remedies, the Court reiterates that, as it has established in its case-law: "... the remedies which must be exhausted by the Applicants are ordinary judicial remedies"[4], unless it is clear that such remedies are not available, effective and sufficient or that the procedure provided for exhausting them is unduly prolonged.[5]

37. Having regards to the facts of the case, the Court finds that the Applicant had instituted a case before the Court of First Instance, which dismissed it in a judgment delivered on 4 February 2014. He then appealed against the decision to the Supreme Court, which upheld the decision of the Court of First Instance on 24

4 *Mohamed Abubakari v Tanzania* (merits) (2016) 1AfCLR 599 § 64. See also *Alex Thomas v Tanzania* (merits) (2015) 1 ACCR 465 § 64 and *Wilfred Onyango Nganyi v Tanzania* (merits) *op.cit.*, § 95.

5 *Lohé Issa Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, § 77. See also *Peter Joseph Chacha v Tanzania* (admissibility) (2014) 1 AfCLR 398, § 40.

November 2014. The Court, therefore, finds that the Applicant has exhausted the available local remedies.

38. With regard to the conditions for filing applications within a reasonable time, the Court notes that Article 56(6) of the Charter does not specify any time limit within which a case must be brought before it. Rule 40(6) of the Rules of Court, which essentially restates the provisions of Article 56(6) of the Charter, simply requires the Application to "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.

39. It emerges from the record that local remedies were exhausted on 24 November 2014, when the Supreme Court delivered its judgment. It is therefore that date which must be regarded as the starting point for calculating and assessing the reasonableness of the time, as provided for in Rule 40(6) of the Rules and Article 56(6) of the Charter.

40. The present Application was filed on 24 February 2017, two (2) years and three (3) months after the exhaustion of local remedies. The Court must, therefore, decide whether or not this period is reasonable within the meaning of Charter and the Rules.

41. The Court recalls that "... the reasonableness of a time-limit for referral depends on the particular circumstances of each case, and must be assessed on a case-by-case basis ..."[6]

42. The Court has consistently held that the six-month time limit expressly provided for in other international human rights instruments cannot be applied under Article 56(6) of the Charter. The Court has therefore adopted a case-by-case approach to assessing what constitutes a reasonable time limit, within the meaning of Article 56(6) of the Charter.[7]

43. The Court considers that, in accordance with its established jurisprudence on the assessment of reasonable time, the determining factors are, *inter alia*, the status of the Applicant,[8] the conduct of the Respondent State[9] or its officials. Furthermore, the Court assesses the reasonableness of the time limit on the basis

6 *Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and Mouvement Burkinabé des droits de l'homme et des peuples v Burkina Faso* (preliminary objections) (2013) 1AfCLR 197, § 121.

7 *Norbert Zongo ibid*. See also *Alex Thomas v Tanzania* (merits) *op.cit*, §§ 73 and 74.

8 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465, § 74.

9 *Anudo Ochieng Anudo v Tanzania* (merits) (2018), § 58.

of objective considerations.[10]

44. In the case of *Mohamed Abubakari v Tanzania*, the Court held as follows: the fact that an Applicant was in prison; he indigent; unable to pay for a lawyer; did not have the free assistance of a lawyer since 14 July 1997; was illiterate; could not have been aware of the existence of this Court because of its relatively recent establishment; are all circumstances that justified some flexibility in assessing the reasonableness of the timeline for seizure of the Court. [11]

45. Furthermore, in *Alex Thomas v Tanzania*, the Court justified its position as follows:

> Considering the Applicant's situation, that he is a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records, and his attempt to use extraordinary measures, that is, the Application for review of the Court of Appeal's decision, we find that these constitute sufficient grounds to explain why he filed the Application before this Court on 2 August 2013, being three (3) years and five (5) months after the Respondent made the declaration under Article 34(6) of the Protocol. For these reasons, the Court finds that the Application has been filed within a reasonable time after the exhaustion of local remedies as envisaged by Article 56(5) of the Charter.[12]

46. It is also clear from the Court's case-law that the Court declared admissible an application brought before it three (3) years and six (6) months after the Respondent State deposited the Declaration under Article 34(6) of the Protocol accepting the Court's jurisdiction, having concluded that: "the period between the date of its referral of the present case, 8 October 2013, and the date of the filing by the Respondent State of the Declaration of recognition of the Court's jurisdiction to hear individual applications, 29 March 2010, is a reasonable time within the meaning of Article 56(6) of the Charter.[13]

47. In the instant case, the Applicant was not imprisoned and his freedom of movement was not restricted after exhaustion of local remedies; he is not indigent and his level of education not only enabled him to defend himself, as evidenced by this Application filed on24 February 2017, but also enabled him to be aware of the existence of the Court and the procedure for bringing the case within a reasonable time. Moreover, the Respondent State

10 As the date of deposit of the Declaration recognising the Court's jurisdiction, in accordance with Article 34(6) of the Protocol.

11 *Mohamed Abubakari v Tanzania* (merits) *op.cit*, § 92.

12 *Alex Thomas v Tanzania op.cit*, § 74.

13 *Mohamed Aubakari v Tanzania* (merits), § 93

deposited the Declaration recognising the Court's jurisdiction two (2) years and three (3) months before the exhaustion of local remedies. Finally, during this period, the Applicant has not pursued any extraordinary judicial remedies, such as an application for review.

48. In light of the foregoing, the Court concludes that the period of two (2) years and three (3) months that elapsed before the Applicant brought his Application is unreasonable within the meaning of Article 56(6) of the Charter and Rule 40(6) of the Rules.

VIII. Costs

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

50. Taking into account the circumstances of this case, the Court decides that each party shall bear its own costs.

IX. Operative part

51. For these reasons,

The Court:

Unanimously and in default,

i. *Declares* that it is has jurisdiction;

ii. *Declares* the Application inadmissible;

iii. *Declares* that each party shall bear its own costs.

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Separate opinion: BEN ACHOUR AND TCHIKAYA

1. We concur with the position adopted by the Court on admissibility, jurisdiction and operative provisions in the four *Mulindahabi v Rwanda* decisions adopted by unanimous decision of the judges sitting on the bench.

2. By this Opinion, we wish to express a position on a point of law. This opinion clarifies a point relating to the Court's subject-matter jurisdiction on which our Court has often proceeded by economy

of argument.

3. In our view, Article 3 of the Protocol, while taking account of the general framework of jurisdiction it lays down, should also be understood in terms of the scope given to it by Article 7 of the same Protocol. Since the *Mulindahabi* species do not pose any particular problems of jurisdiction, there were no a priori reasons for the emergence of such a debate. However, the question did emerge and therefore required clarification which would be valid for other judgments delivered or to be delivered by the Court.

4. A breadcrumb trail structures the analysis. These are two waves of decisions that characterize the Court's jurisprudence. The cut-off point is generally in 2015, when the Court delivered its *Zongo*[1] judgment. The decision on jurisdiction in this case is given in 2013. It can be supported because a reflection seems to be beginning on the choices in terms of procedure with the *Mohamed Abubakari* judgment in 2016[2]. The Court begins to work, as noted by Judges Niyungeko and Guissé, more "distinctly: first on all questions relating to its jurisdiction (both the preliminary objection and the question of its jurisdiction under the Protocol), and then on all questions relating to the admissibility of the application"[3].

5. Thus, in the first part, we shall examine the state of the matter, i.e., the envisaged readings of Articles 3 and 7 of the Protocol in determining the Court's subject-matter jurisdiction. In the second part, devoted to the second wave of decisions, the use of Articles 3 and 7 will evolve.

I. Article 3 and 7 of the Protocol through the Court's doctrine and case-law

6. In our view, the two Articles 3 and 7 of the Protocol should be read together, as one sheds light on the other. They are complementary. For the reasons that follow, they cannot be separated. The Court's subject-matter jurisdiction is therefore based on both the first paragraph of Article 3 and Article 7 of the Protocol. We shall first present a restrictive reading of these provisions (A) before turning to their reference in certain decisions of the Court which

1 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabè Human and Peoples' Rights Movement v Burkina Faso, Judgment on Reparations*, 5 June 2015.

2 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29

3 Dissenting opinion of Judges Gérard Niyungeko and El Hajji Guissé in the *Urban Mkandawire v Republic of Malawi* judgment, 21 June 2013.

we describe as first wave (B).

A. A restrictive reading of Articles 3 and 7 of the Protocol

7. Article 3(1) of the Protocol, on the jurisdiction of the Court, reads as follows:
"1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned".

Article 7, on applicable law, states in one sentence that:
"The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned".

8. Different readings of these two Articles have emerged. Reading them separately, some have argued that their functions should not go beyond the title given to them by the successive drafters of the Convention. Article 3(1) applying strictly and exclusively to the jurisdiction of the Court and the other, Article 7, referring solely to the applicable law. This approach is restrictive and, in fact, does not correspond, on closer inspection, to the approach which the Court itself has followed through its case-law since 2009.

9. It was also noted that Article 7 would be a mere repetition of Article 3(1) and is, in this respect, superfluous. Professor Maurice Kamto supports this reading in particular when he states that "Articles 3 and 7 are a legal curiosity"[4]. They would have no equivalent in the statutes of other regional human rights jurisdictions. The "Ouagadougou Protocol should have confined itself to this provision, which makes Article 7 all the more useless as its content is likely to complicate the Court's task"[5].

10. It is not clear whether the drafters of the Protocol intended to exclude certain categories of legal rules, such as custom, general principles of law, etc., from the scope of the Protocol. The use of the phrase "ratified by the States concerned" in both Articles might lead one to believe[6] that the Court should only take into account

4 Commentary on Article 7 of the Protocol, *The African Charter on Human and Peoples' Rights and the Protocol on the Establishment of an African Court, article-by-article commentary*, edited by M. Kamto, Ed. Bruylant, 2011, pp. 1296 et seq.

5 *Idem*.

6 Professor Maurice Kamto tends towards this appreciation. He states that "The restriction of the law applicable by the Court to the Charter and the said legal instruments creates an effect of implicit amputation of the scope of the relevant rules applicable by that jurisdiction. It deprives the Court and the parties brought before it of the application or invocation of "African practices in conformity with international standards relating to human and peoples' rights, customs generally

conventions ratified by States. It would be difficult to explain why the next paragraph, 3(2), recognizes the Court's "jurisdiction". It is well known that for the purpose of establishing the grounds for its jurisdiction, the scope of the applicable law should be opened up. The Court cannot, as will be discussed below, be limited in the reasons for its jurisdiction when it is challenged. In the latter case there is a clear manifestation of the link between Article 3 and Article 7 of the Protocol.

11. This was, in short, the interpretation adopted by the Court on the reading of Rule 39 of its Rules:

"1. The Court shall conduct a preliminary examination of its jurisdiction and the admissibility of the application [...].

2. … the Court may request the parties to submit any factual information, documents or other material considered by the Court to be relevant".

In calling for "the submission of any information relating to the facts, documents or other materials which it consider to be relevant", the Court wishes to inquire into all aspects of the applicable law, as noted in the heading of Article 7.

12. The other reading is to regard the two Articles as complementary and, where the conflict so requires, as being necessary for the Court to further develop its jurisdiction. This was not the case in the *Mulindahabi* decisions, but the Court has done so on various occasions.

B. The Court's reading of Articles 3 and 7 in its first wave of decisions

13. The first phase of the Court considered in the interest of the analysis ranges from the *Michelot Yogogombaye*[7] judgment (2009) to the *Femi Falana*[8] judgment (2015). This breakdown shows the evolution of the Court and its judicial involvement on the one hand, and on the other, it makes it possible to periodize its commitments as to the bases of its jurisdiction.

14. The Court has always accepted that the provisions of Articles 3 and 7 provide a firm basis for its jurisdiction to respond to human

accepted as law, general principles of law recognised by African nations, as well as case law and doctrine", referred to in Article 61 of the ***ACHPR, v Idem***, 1297.

7 AfCHPR, ***Michelot Yogogombaye v Republic of Senegal***, 15 December 2009; see also, Loffelman (M.), ***Recent jurisprudence of the African Court on Human and Peoples' Rights***, Published by Deutshed Gesellschaft...GIZ, 2016, p. 2.

8 AfCHPR, ***Femi Falana v African Commission on Human and Peoples' Rights***, Order, 20 November 2015.

rights disputes. It has done so from its earliest years. It had perceived the openings left by its jurisdiction as formulated in the Protocol. The former Vice-President of the African Court, Judge Ouguergouz, states in his study that: "Article 3 (1) of the Protocol provides for a very broad substantive jurisdiction of the Court [...]. The liberal nature of this provision is confirmed by Article 7, entitled ''Applicable law"[9].

15. Two issues are apparent in the provisions of Articles 3(1) and 7 of the Protocol: first, the case where the disputes in question are based from the outset on provisions of the Charter; second, where the Court, not having a clearly defined rule, would have to seek them in conventions ratified by the Respondent States. In reality, the Court has always used both approaches. It has always found itself drawn into international law whenever it is part of the law accepted by States.

16. What the Court is seeking to do from 2011 in the case of *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*:

The Court also had to rule on the issue of applicabilitý of the Treaty establishing the East Africa Community, in the light of Articles 3(1) and 7 of the Protocol, as well as Article 26(1)(a) of the Rules of Court. These three provisions contain the expression "any other relevant human rights instrument ratified by the States concerned" which expressly refers to three conditions: 1) the instrument in question must be an international treaty, hence the requirement of ratification by the State concerned, 2) the international treaty must be "human rights related" and 3) it must have been ratified by the State Party concerned[10].

17. The 2015 *Femi Falana* case, which completes the first wave of the Court's decisions, expresses in all cases the Court's two-step reasoning on its jurisdiction. In the first stage, it states the basis of its jurisdiction (Article 3(1)) and in the second stage, it gives, through the applicable law (Article 7), the reasons for its choice.

18. In this case, the application was directed against an organ of the African Union, established by the African Charter on Human and Peoples' Rights, namely, the African Commission on Human and Peoples' Rights. Under Article 3(1) of the Protocol, the Court first states that it has jurisdiction to hear and determine all cases

9 Ouguergouz (F.), La Cour africaine des droits de l'homme et des peuples - Gros plan sur le premier organe judiciaire africain à vocation continentale, *Annuaire français de droit international*, volume 52, 2006. pp. 213-240;

10 AfCHPR, *Tanganyika Law Society and The Legal And Human Rights Centre v United Republic of Tanzania and Reverend Christopher Mtikila v United Republic of Tanzania*, Order, 22 September 2011, §§ 13 and 14.

and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned. It goes on to say that, although the facts giving rise to the complaint relate to human rights violations in Burundi, it was brought in the present case against the Respondent, an entitý which is not a State party to the Charter or the Protocol. Finally, in its reasoning in § 16 of the judgment, the Court bases itself on a consideration of general applicable law.

The relationship between the Court and the Respondent is based on the complementaritý. Accordingly, the Court and the Respondent State are autonomous partner institutions but work together to strengthen their partnership with a view to protecting human rights throughout the continent. Neither institution has the power to compel the other to take any action.

The Court's application of general law reflects the complementarity between that law and the law that governs its substantive jurisdiction.

19. The same approach is found in the discussion of jurisdiction in the *Zongo* (2013)[11] case. The Court states that: "Under Article 3(1) of the Protocol ... and Article 3(2) of the same Protocol, "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide ...". It goes on to state, appropriately, that :

The Court goes on to note that the application of the principle of the non-retroactivitý of treaties, enshrined in Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969, is not in contention between the Parties. What is at issue here is whether the various violations alleged by the Applicants would, if they had occurred, constitute "instantaneous" or "continuing" violations of Burkina Faso's international human rights obligations.

20. It is apparent that the Court's reasoning does not focus strictly on the rules concerning its jurisdiction, but also extends it to the law applied by it.

II. The relationship between Articles 3 and 7 of the Protocol as regards the Court's subject-matter jurisdiction: confirmation in the second wave of decisions

21. The drafters of the Protocol provided judges with a kind of "toolbox"

11 AfCHPR, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo and the Burkinabe Human and Peoples' Rights Movement v Burkina Faso*, Decision on Preliminary Objections, 21 June 2013, § 61, 62, 63.

through these two articles, which they would make good use of. They are only bound by the consistency and the motivation of their choice. Indeed, quite obviously, the two articles have often been used together in the Court's second decade of activity. It will first be shown that the Court's approach is also present in international litigation.

A. The Court's approach is confirmed by the practice in international litigation

22. This approach is known from international litigation even before the African Court was established. It is, in fact, consistent with the logic of law. Its manifestation can be found in jurisprudential work as old as that of the Permanent Court of International Justice (PCIJ), confirmed by the jurisprudence of the International Court of Justice (ICJ).

23. It was by reasoning on its applicable law that the PCJI extended its jurisdiction to human rights issues long before the wave of such law following the Second World War. The august Court was already doing its job of protecting fundamental rights in well-known cases[12].

24. There has been a known shift in the jurisdiction of arbitral tribunals in this area. The jurisdiction of these courts is strictly fixed within conventional limits, but they have integrated human rights issues by making a specific reading of their applicable law[13].

25. The African Court already applies this methodology, which is well known in international law. In addition to generally having the "competence of jurisdiction" in the event of a dispute, the international courts and the international instruments establishing them often give them the legal basis to deploy their jurisdiction. In a complex argumentation the ICJ recalled that it has :

"an inherent power which authorizes it to take all necessary measures, on the one hand, to ensure that, if its jurisdiction on the merits is established,

12 CPJI, Advisory Opinion, M*inority Schools in Albania*, 6 April 1935; Advisory Opinion, German Settlers in Poland, 10 September 1923; Advisory Opinion, ***Treatment of Polish Nationals and Other Persons of Origin***, 4 February 1932

13 Cazala (J.), Protection des droits dc l'homme et contentieux international de l 'investissement, ***Les Cahiers de l'Arbitrage***, 2012-4, pp. 899-906. v in particular, Tribunal arbitral CIROI (MS), S.A., 29 May 2003, ***Tecnicas Medioambientales Teemed SA v Mexico***, §§ 122-123; S.A., CIRDI, ***Azurix Corporation v Argentina***, 14 July 2006, §§ 311-312; see S.A., ICSID (MS), ***Robert Azinian & ors v Mexico***, ARB(AF)/97/2, 1 November 1999, §§ 102-103.

the exercise of that jurisdiction does not prove futile, and, on the other hand, to ensure the regular settlement of all points in dispute...."[14] .

Professors Mathias Forteau and Alain Pellet saw this as a kind of implicit jurisdiction within the competence of the International Court of Justice[15].

26. Sometimes the international judge, in order to clarify a position or to explore other aspects inherent in its jurisdiction, uses the applicable law rather than the strict rules which conventionally define and frame its jurisdiction.

27. The affirmation of the role of the ICJ in international human rights law provides an example of this. In 2010, the Court in The Hague rendered its judgment on the merits in the case of *Ahmadou Sadio Diallo - Guinea v Congo-Kinshasa*[16]. The Court ruled on claims of violations of human rights treaties. This case showed that, in addition to having general jurisdiction over the rights of States, the International Court of Justice could without hindrance to its jurisdiction, deal with the question of human rights.

28. In this sense, it may be observed that an increasing number of international courts have specialized in human rights, without having an initial mandate to do so. On closer inspection, this is mainly due to their *applicable law*. The cross-cutting nature of the rules of international law has a clear impact on the deployment of jurisdiction. It is thus understandable that in addition to the provisions framing the jurisdiction, the Protocol establishing the

14 *Nuclear Tests Case (New Zealand v France)*, Judgment of 20 December 1974, ECR 1974, pp. 259-463

15 Forteau (M.) and Pellet (A.), *Droit international public*, Ed. LGDJ, 2009, p. 1001; Visscher (Ch. De), Quelques aspects récents du droit procédural de la CIJ, Ed. Pédone, 1966, 219 p.; Santulli (C.), Les juridictions de droit international : essai d'identification, AFDI, 2001, pp. 45-61.

16 The ICJ states that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights", or that "having regard to the conditions under which Mr. Diallo was expelled from Congolese territory on 31 January 1996, the Democratic Republic of the Congo violated Article 13 of the International Covenant on Civil and Political Rights and Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights". Diallo was arrested and detained in 1995-1996 with a view to his deportation, the Democratic Republic of the Congo violated article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 of the African Charter on Human and Peoples' Rights. This case showed that the general jurisdiction enjoyed by the ICJ, which relates to "any matter of international law" under Article 36 §2 (b) of its Statute, can be extended to human rights.

African Court has taken them over in terms of applicable law.

29. The same analysis can be made with regard to the European Court of Human Rights. In the *Nicolaï Slivenko*[17] judgment of 2003, the Court stated that it should not "re-examine the facts established by the national authorities and having served as a basis for their legal assessment" by reviewing the "findings of the national courts as to the particular circumstances of the case or the legal characterization of those circumstances in domestic law", but at the same time recognized that it was part of its task "to review, from the Convention perspective, the reasoning underlying the decisions of the national courts". The doctrine derived from this idea that the Court was increasing the intensity of its review of judicial decisions. This can only be achieved through a broad reading of the law which the Court is mandated to apply. It can thus be said that the applicable law and jurisdiction stand together, the latter is undoubtedly a common thread.

B. Links established between Articles 3 and 7 in the second wave of Court decisions

30. Where the Court finds a difficulty or possible challenge to its jurisdiction, it shall combine the two Articles 3(1) and 7. It uses these two complementary texts. It does not, however, feel bound to indicate explicitly the use thus made of Article 7, and that is what we regret.

31. In its *Abubakari*[18] judgment, the Court emphasizes :

> 28. More generally, the Court would only act as an appellate court if, inter alia, it applied to the case the same law as the Tanzanian national courts, i.e., Tanzanian law. However, this is certainly not the case in the cases before it, since by definition it applies exclusively, in the words of Article 7 of the Protocol, "the provisions of the Charter and any other relevant human rights instruments ratified by the State concerned".

In the following paragraph, it concludes:

> On the basis of the foregoing considerations, the Court concludes that it has jurisdiction to examine whether the treatment of the case by the Tanzanian domestic courts has been in conformity with the requirements laid down in particular by the Charter and any other applicable international human rights instruments. Accordingly, the Court rejects the objection raised in this regard by the Respondent State.

32. In the 2016 case, *Ingabire Victoire Umuhoza v Republic of*

17 ECHR, *Nicolai Slivenko v Latvia*, 9 October 2003.

18 AfCHPR, *Mohamed Abubakari v United Republic of Tanzania*, 3 June 2016, §§ 28 and 29.

Rwanda,[19] the Court states, once again, without citing Article 7, that :

As regards the application of the Vienna Convention to the present case, the Court observes that while the declaration made under Article 34(6) emanates from the Protocol, which is governed by the law of treaties, the declaration itself is a unilateral act which is not governed by the law of treaties. Accordingly, the Court concludes that the Vienna Convention does not apply directly to the declaration, but may be applied by analogy, and the Court may draw on it if necessary. (...) In determining whether the withdrawal of the Respondent's declaration is valid, the Court will be guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law. With regard to the rules governing the recognition of jurisdiction of international courts, the Court notes that the provisions relating to similar declarations are of an optional nature. This is demonstrated by the provisions on recognition of the jurisdiction of the International Court of Justice,4 the European Court of Human Rights5 and the Inter-American Court of Human Rights", §§ 55 and 56.6.

33. However, the Court says that it is guided by the relevant rules governing declarations of recognition of jurisdiction as well as by the principle of the sovereigntý of States in international law, it is a recourse to Article 7 of the Protocol. In that the latter article allows it to rely on any relevant human rights instrument.

34. On its jurisdiction in the *Armand Guehi*[20] case in 2016, the Court proceeds in the same way. It cites Article 3(1), but resorts to other texts. One wonders whether the Court simply finds its jurisdiction in respect of interim measures or whether it simply applies provisions outside the Charter to do so. It says:

"Having regard to the particular circumstances of the case, which reveal a risk that the death penalty might be imposed, thereby infringing the Applicant's rights under Article 7 of the Charter and Article 14 of the International Covenant on Civil and Political Rights, the Court decides to exercise its jurisdiction under Article 27(2) of the Protocol", § 19.

35. The complementarity between these two Articles, which should be cited together, is expressed. For in Article 3(1) the Court finds its jurisdiction without difficulty and bases it on it; and in Article 7 the Court, by having recourse to other texts, is also founded in law by virtue of the fact that its applicable law authorizes it to do so. Accordingly, in the *Actions for the Protection of Human Rights*

19 AfCHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Decision on the Withdrawal of the Declaration, 5 September 2016

20 AfCHPR, *Armand Guehi v United Republic of Tanzania*, Interim Measures Order, 18 March 2016

(APDH) v Republic of Côte d'Ivoire[21] judgment also delivered in 2016, from § 42 to § 65, the Court sets out a reasoning for establishing its jurisdiction. This can only be understood by reading the two articles, 3(1) and 7 together. In particular, it says that :

"The African Institute of International Law notes that the link between democracy and human rights is established by several international human rights instruments, including the Universal Declaration of Human Rights, Article 21(3), (...) The Institute further maintains that the African Charter on Democracy is a human rights instrument in that it confers rights and freedoms on individuals. According to the Institute, the Charter explains, interprets and gives effect to the rights and freedoms contained in the Charter on Human Rights, the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action (1999), the Declaration on the Principles Governing Democratic Elections in Africa and the 2003 Kigali Declaration".

36. The Conclusion on jurisdiction that follows from this series of instruments in § 65 is suggestive:

"The Court concludes that the African Charter on Democracy and the ECOWAS Protocol on Democracy are human rights instruments, within the meaning of Article 3 of the Protocol, and that it is therefore competent to interpret and apply them.

37. It follows that the Court in its first decade uses Article 3(1) to determine its jurisdiction as set out in the Protocol. As in established judicial practice, the Court uses the applicable law recognized by the "States concerned" to extend or further establish its jurisdiction. In this case, it makes use of Article 7 of the Protocol. The question of priority between the two Articles does not arise, as it is a matter of the particular case and of the choice made by the Court. The two Articles are equally involved in the general question of the Court's jurisdiction to hear cases.

38. In its judgment in Jonas (2017), at paragraphs 28, 29 and 30, the Court goes beyond Article 3 on its own motion, stating that:

"Article 3 of the Protocol does not give the Court the latitude to decide on the issues raised by the Applicant before the domestic courts, to review the judgments of those courts, to assess the evidence and to reach a conclusion", § 25.

39. It concludes that it has jurisdiction as follows:

The Court reiterates its position that it is not an appellate body in respect of decisions of the domestic courts. However, as the Court emphasised in its judgment in *Alex Thomas v the United Republic of Tanzania*, and confirmed in its judgment in *Mohamed Abubakari v the United Republic*

21 CAfDHP, *Actions for the Protection of Human Rights (APDH) v Republic of Côte d'Ivoire (Merits)*, 18 November 2016.

of Tanzania, this circumstance does not affect its jurisdiction to examine whether proceedings before national courts meet the international standards established by the Charter or other applicable human rights instruments. The Court therefore rejects the objection raised in this regard by the Respondent State and concludes that it has subject-matter jurisdiction[22]. The Court does not appear to be taking a position on the question of which of the two Articles is the basis for its jurisdiction.

40. In order to refute the Respondent State's contention and to establish its jurisdiction in the *Nguza*[23] Judgment, the Court begins by relying first on its own jurisprudence[24]. It goes on to have recourse to the applicable law in general, namely:

"as it stressed in the judgment of 20 November 2016 in the case of *Alex Thomas v United Republic of Tanzania* and confirmed in the judgment of 3 June 2016 in the case of *Mohamed Abubakari v United Republic of Tanzania*, this does not exclude its jurisdiction to assess whether proceedings before national courts meet the international standards established by the Charter or by other applicable human rights instruments to which the respondent State is a party", §§ 33 et seq.

It then infers jurisdiction from this and refers to Article 3 of the Protocol:

Accordingly, the Court rejects the objection raised by the Respondent State, ….". It has subject-matter jurisdiction under Article 3(1) of the Protocol, which provides that the Court "shall have jurisdiction in all cases and disputes submitted to it ...", § 36.

41. This reversal of logic by the Court is not in vain. It makes it possible to appreciate how the applicable law is not external to the determination of jurisdiction, which is well defined by the Protocol.

42. Orders for the indication of provisional measures do not present the same difficulties. It may be observed, as in the *Ajavon*[25] Case, that the Court's *prima facie* decision does not require recourse to

22 AfCHPR, *Christopher Jonas v United Republic of Tanzania*, Judgment, 28 September 2017: Convicted and sentenced for robbery of money and various other valuables, Mr. Christopher Jonas filed this application alleging a violation of his rights during his detention and trial. The Court found that the evidence presented during the domestic proceedings had been assessed according to the requirements of a fair trial, but that the fact that the applicant had not received free legal aid constituted a violation of the Charter.

23 AfCHPR, *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Republic of Tanzania*, 23 March 2018.

24 CAfDHP, 15/3/2013, *Ernest Francis Mtingwi v Republic of Malawi*, 15 March 2013, § 14; *Alex Thomas v United Republic of Tanzania*, 20 November 2015, §; 28/3/2014, *Peter Joseph Chacha v United Republic of Tanzania*, 28 March 2014, § 114; *Ernest Francis Mtingwi v Republic of Malawi*, 15 March 2013, § 14.

25 AfCHPR, *Sébastien Germain Ajavon v Republic of Benin*, Order, 7 December 2018.

its applicable law (7 Article). This is stated in paragraph 28:
"However, before ordering interim measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but merely that it has *prima facie* jurisdiction".

The Court does not have such jurisdiction.

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43. Article 3, in particular the first paragraph, sets out the scope of the Court's jurisdiction. However, this cannot be understood without the law which the Court applies, that is, Article 7, with which it should be more regularly associated in its decisions. This scope of jurisdiction is not limited...as long as the Court is within its applicable law, it is within its jurisdiction. This place of applicable law is also present when discussing the Court's jurisdiction to hear a case under Article 3(2). The links between these articles are at the root, they are ontological.