Rutechura v Tanzania (judgment) (2021) 5 AfCLR 7

Application 004/2016, *Evodius Rutechura v United Republic of Tanzania*

Judgment, 26 February 2010. 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's domestic appeal against his conviction and sentence to death for murder was unsuccessful. He brought this Application alleging that the refusal of his Application for extension of time to apply for a review of that decision and indeed his trial and conviction was a violation of several aspects of his charter protected right to a fair trial. The Court held that the Respondent State had not violated any of the rights claimed. In his separate opinion, Judge Tchikaya agreed with the operative part of the Court's judgment but argued that the Court ought to make a pronouncement of the evolution and legality of the death penalty.

Jurisdiction (material jurisdiction, 22, 25; effect of withdrawal of article 34(6) declaration, 27)

Admissibility (exhaustion of local remedies, 39; reasonable time, 46-50)

Procedure (citation of wrong provision, 62, 81)

Fair trial (access to municipal courts, 63; manifest error or miscarriage of justice, 67; free legal assistance, 72-74)

Evidence (margin of appreciation of municipal courts, 64)

Separate Opinion: TCHIKAYA

Procedure (*ultra petita*, 24-28)

Life (death penalty, 37-39)

I. The Parties

1. Mr. Evodius Rutechura (hereinafter referred to as "the Applicant") is a national of Tanzania, who at the time of the filing of this Application, was on death row at the Butimba Prison having been convicted of the offence of murder. He alleges the violations of his right to a fair trial.

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 Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the

Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission (hereinafter referred to as "AUC"), an instrument withdrawing its Declaration under Article 34(6) of the Protocol. The Court held that this withdrawal had no bearing on pending cases and new cases filed before the withdrawal came into effect, one year after its deposit, that is, on 22 November 2020.[1]

II. Subject of the Application

A. Facts of the matter

3. The record before the Court, indicates that on 13 May 2003 at 8pm, the Applicant in the company of two individuals were involved in a burglary of the house of Erodia Jason in Mwanza. In the course of the burglary, the daughter of Erodia Jason named Arodia, was shot dead as she tried to flee the house. Subsequently, on 15 May 2003, the Applicant was arrested and charged with the murder of Arodia Jason. On 19 November 2008, he was convicted and sentenced to death by hanging at the High Court in Mwanza.

4. The Applicant being dissatisfied with the conviction and sentence from the High Court of Mwanza, filed an appeal on 25 November 2008 to the Court of Appeal of Tanzania sitting at Mwanza, judgment to which was delivered on 18 June 2010, dismissing his appeal.

5. On 10 December 2012, the Applicant filed an application for review of the Court of Appeal's judgment but before the matter was listed for hearing he discovered that he was out of time. On 20 March 2015, he withdrew his application for review requesting instead for extension of time to file the application for review. The request for extension of time was denied by the Court of Appeal on 8 June 2015, because the Applicant did not "show good cause."

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations) §§ 37-39.

B. Alleged violations

6. The Applicant alleges the following:

i. That the Court of Appeal violated his rights under the Charter by dismissing his request for extension of time to file the application for review;

ii. That the High Court and Court of Appeal violated his rights under the Charter by failing to provide him with free legal representation of his choice during his trial and appeal;

iii. That the Court of Appeal erred by relying on the visual identification evidence adduced by the prosecution witnesses who were related;

iv. That the Court of Appeal "overlooked the law relevant to admission of documentary evidence", thereby violating his rights under Articles 3(1) and (2) of the Charter.

III. Summary of the Procedure before the Court

7. The Application was filed on 13 January 2016, served on the Respondent State on 18 February 2016 and transmitted to the entities listed under Rule 35(3) of the Rules[2] on 18 March 2016.

8. On 18 March 2016, the Court issued an order for provisional measures *proprio motu*, in consideration of the situation of extreme gravity and the risk of irreparable harm associated with the death penalty. The Court ordered the Respondent State to "refrain from executing the death penalty against the Applicant pending the determination of the Application."[3]

9. The Parties filed their pleadings within the time stipulated by the Court.

10. On 26 September 2018, the Applicant filed a request for amicable settlement under the auspices of the Court, requesting the Court to facilitate a settlement which would result in the determination of his application for review in his favour. On 26 September 2018, the request was served on the Respondent State for its response within (30) thirty days.

11. The Respondent State did not file any observations on the proposal for amicable settlement and thus the Court decided to close written pleadings on the 3 September 2020 and the Parties were notified thereof.

2 Rule 42(4) of the Rules of Court, 25 September 2020.

3 *Evodius Rutechura v United Republic of Tanzania* (provisional measures) (18 March 2016), 1 AfCLR 596 § 20.

IV. Prayers of the Parties

12. The Applicant prays the Court to:

i. Quash both the conviction and sentence imposed upon him;

ii. Order his release from Custody;

iii. Grant him reparations pursuant to Article 27(1) of the Protocol; and

iv. Grant him any other orders or reliefs that the Court may deem fit in the circumstances.

13. The Respondent State prays the Court to grant the following orders:

i. That, the Honourable Court is not vested with jurisdiction to adjudicate the Application;

ii. That, the Application has not met the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;

iii. That, the Application has not met the admissibility requirements stipulated under Rule 40(6) of the Rules of Court;

iv. That, the costs of the Application be borne by the Applicant;

v. That, the Applicant's conviction and sentence be maintained;

vi. That, the Application lacks merit;

vii. That, the Applicant's prayers be dismissed;

viii. That, the Application be dismissed with costs;

ix. That, the Applicant not be granted reparations.

14. Furthermore, the Respondent State prays the Court to declare that it has not violated any of the rights alleged by the Applicant.

V. Jurisdiction

15. The Court observes that Article 3 of the Protocol provides 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 instrument ratified by the States concerned.

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

16. In accordance with Rule 49(1) of the Rules, "the Court shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."

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

18. The Respondent State raises an objection to the material jurisdiction of the Court.

A. Objection to material jurisdiction

19. The Respondent State raises an objection to the material jurisdiction of the Court, in that, the Applicant is asking the Court to sit as an appellate court on matters that have already been concluded by its Court of Appeal, the highest Court in its judicial system.

20. According to the Respondent State, Rule 26 of the Rules[4] does not provide the Court with "unlimited jurisdiction", rather, it limits the Court's jurisdiction to the interpretation and application of the Charter and other human rights instruments ratified by the State concerned.

21. The Applicant, citing *Alex Thomas v Tanzania*, submits that the Court has jurisdiction to consider this Application, as it raises alleged violations of his rights which are protected by the Charter.

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22. The Court notes in accordance with its established jurisprudence that, it is competent to examine relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other instruments related to human rights ratified by the State concerned.[5]

23. Furthermore, the alleged violations relating to the procedures at the domestic courts are of rights provided for in the Charter. Thus, the Court is not being required to sit as an appellate court but to act within the confines of its powers.

24. The Court notes that the Applicant raises allegations of violations of the human rights enshrined in Articles 3 and 7 of the Charter, whose interpretation and application falls within its jurisdiction.

4 Rule 29(1)(a) of the Rules of Court, 25 September 2020.

5 *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 190 § 14.; *Kenedy Ivan v United Republic of Tanzania*, ACtHPR, Application No. 25/2016, Judgment of 28 March 2019 (merits and reparations) § 26; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 247 § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018), 2 AfCLR 287 § 35.

The Respondent State's objection in this respect is therefore dismissed.

25. Consequently, the Court holds that it has material jurisdiction.

B. Personal jurisdiction

26. Although, the Respondent State has not objected to the personal jurisdiction of the Court, the Court notes, as earlier stated in this Judgment, that, the Respondent State is a party to the Protocol and on 29 March 2010, it deposited the Declaration provided for under Article 34(6) of the Protocol with the AUC. On 21 November 2019, it deposited an instrument withdrawing the Declaration with the AUC.

27. The Court recalls that, 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 prior to the deposit of the instrument of withdrawal of the Declaration, as is the case with the present Application. The Court also confirmed that any withdrawal of the Declaration takes effect twelve (12) months after the notice of withdrawal is deposited, in this case, on 22 November 2020.[6]

28. In view of the above, the Court finds that it has personal jurisdiction.

C. Other aspects of jurisdiction

29. The Court notes that the temporal and territorial aspects of its jurisdiction are not disputed by the Respondent State and that nothing on the record indicates that the Court lacks such jurisdiction. The Court accordingly holds that:

i. that it has temporal jurisdiction on the basis that the alleged violations are continuing in nature, in that the Applicant remains convicted and is on death row on grounds which he considers are wrong and indefensible;[7]

ii. It has territorial jurisdiction given that the facts of the case occurred in the Respondent State's territory.

30. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

6 *Ingabire Victoire Umuhoza v Rwanda* (juridiction) (3 June 2016) 1 AfCLR 540 § 67; *Cheusi v Tanzania* (merits), *op.cit*, §§ 5-39.

7 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013), 1 AfCLR 197 §§ 71 - 77.

VI. Admissibility

31. In terms of Article 6(2) of the Protocol, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter." Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

32. Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

a. Applications filed before the Court shall comply with all the following conditions:

b. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;

c. comply with the Constitutive Act of the Union and the Charter;

d. not contain any disparaging or insulting language;

e. not based exclusively on news disseminated through the mass media;

f. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

g 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;

h. 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.

A. Conditions of admissibility in contention between the Parties

33. The Respondent State submits that the Application does not comply with Rule 40(5)[8] and 40(6)[9] of the Rules in relation to admissibility requirements, namely, regarding exhaustion of local remedies and on the requirement to file applications within a reasonable time after exhaustion of local remedies.

8 Rule 50(2)(e) of the Rules of Court, 25 September 2020.

9 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

i. Objection on non- exhaustion of local remedies

34. The Respondent State contends that the Applicant has raised some allegations of human rights violations in this Court, for the first time. It is of the view, that the Applicant only raised one ground in his appeal at the Court of Appeal, that is; that the High Court erred in law and facts in finding that he was correctly identified at the scene of the crime. Therefore, it argues that, the Applicant did not utilize the remedy of the Court of Appeal to address the other grievances that he raises before this Court.

35. The Respondent State citing the decision of the African Commission on Human and Peoples' Rights of *Southern African Human rights NGO Network and others v Tanzania* submits that the exhaustion of local remedies is an essential principle in international law and that the principle requires a complainant to "utilise all legal remedies" in the domestic courts before seizing the International body like the Court.

36. Referring to *Article 19 v Eritrea* filed before the Commission, the Respondent State submits that the onus is on the applicant to demonstrate that he took all the steps to exhaust the domestic remedies and not merely to cast aspersions on the effectiveness of those remedies. It submits that, "in this regard, it cannot be said that the Applicant has exhausted legal remedies in light of the fact that he never took his grievances to the Court of Appeal for redress. The Respondent further states that these remedies were never prolonged and (*sic*) always accessible to the Applicant."

37. The Applicant submits that his Application should be found admissible **"**according to Articles 5(3) and 6(1) and (2) of the Protocol.**"**

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38. The Court notes that pursuant to Article 56(5) of the Charter and Rule 50(2)(e) of the Rules, in order for an application to be admissible, local remedies must have been exhausted, unless the remedies are not available, they are ineffective, insufficient or the procedure to pursue them is unduly prolonged.[10] The rule aims at providing States with the opportunity to remedy the human rights

10 *Zongo and Others v Burkina Faso* (preliminary objections) *op. cit.* § 84.

violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations.[11]

39. In the instant case, the Court notes from the record that the Applicant filed an appeal against his conviction and sentence before the Court of Appeal of Tanzania, the highest judicial organ of the Respondent State, and on 18 June 2010, the Court of Appeal upheld the judgment of the High Court. The Respondent State thus had the opportunity to redress the alleged violations but failed to do so. It is therefore clear that the Applicant has exhausted all the available domestic remedies.

40. For these reasons, the Court dismisses the objection that the Applicant has not exhausted local remedies.

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

41. The Respondent State submits that the Applicant has not complied with the requirement under Rule 40(6)[12] of the Rules, that an application must be filed before the Court within a reasonable time after the exhaustion of local remedies. It asserts that the Applicant's case at the Court of Appeal was concluded on 13 September 2012, and it took "three (3) years and four (4) months" for the Applicant to seize this Court. The Respondent State also contends that the Court of Appeal dismissed the Applicant's Application to file for review out of time on 13 February 2015, that is "one (1) year and two (2) months" before the Applicant seized the Court and that this was also unreasonable delay on the part of the Applicant.

42. Noting that Rule 40(6)[13] of the Rules does not prescribe the time limit within which individuals are required to file an application, the Respondent State draws this Court's attention to the fact that the African Commission has held a period of six (6) months to be the reasonable time.[14]

11 *African Commission on Human and Peoples' Rights v Kenya* (merits) (26 May 2017), 2 AfCLR 9 §§ 93-94; *Dismas Bunyerere v United Republic of Tanzania,* ACtHPR, Application No. 031/2015, Judgment of 28 November 2019 (merits and reparations) § 35.

12 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

13 Rule 50(2)(f) of the Rules of Court, 25 September 2020.

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

43. The Respondent State argues that the Applicant filed his Application **"**more than six (6) months**"** after the Court of Appeal decision of 13 September 2012. Thus, the Application is improper and should be dismissed.

44. The Applicant submits that reasonable time has not been defined and that it should be assessed on a case-to-case basis according to the Court's jurisprudence in *Zongo v Burkina Faso*.

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45. The Court notes that Article 56(6) of the Charter does not specify any time frame within which a case must be filed before this Court. Rule 50(2)(f) of the Rules, which in substance restates Article 56(6) of the Charter, only requires: "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."

46. In the instant case, the Court observes that the judgment of the Court of Appeal was delivered on 18 June 2010. The Court notes that about five (5) years, six (6) months and twenty-four (24) days elapsed between 18 June 2010 and 13 January 2016 when the Applicant filed the Application before this Court. The issue for determination is whether the five (5) years, six (6) months and twenty-four (24) days that the Applicant took to file the Application before the Court is reasonable.

47. The Court recalls that: "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[15] Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,[16] indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal[17] and the

15 *Zongo and others v Burkina Faso* (merits), *op. cit.* § 92; See also *Thomas v Tanzania (*merits) *op.cit* § 73;

16 *Thomas v Tanzania* (merits) *op.cit*, § 73; *Christopher Jonas v Tanzania* (merits) (28 September 2017), 2 AfCLR 101 § 54; *Ramadhani v Tanzania* (merits) (11 May 2018), 2 AfCLR 344 § 83.

17 *Association Pour le progress et la Defense des droit des Femme Maliennes and the Institute for Human Rights and Development in Africa v Mali* (merits) (11 May 2018), 2 AfCLR 380 § 54.

use of extra-ordinary remedies.[18]

48. From the record, the Applicant is a death-row inmate, incarcerated, restricted in his movements and with limited access to information. Further, the Applicant tried to use the review procedure twice, with the last attempt being on 8 June 2015, that is, seven (7) months and five (5) days before seizing the Court. The Court has held that an Applicant using a review procedure even though an extra-ordinary remedy should not be penalised for exercising it.[19]

49. The Court notes that the above mentioned circumstances delayed the Applicant in filing his claim before this Court. Taking into account the applications for review filed by the Applicant, the time taken to seize the Court would no longer be considered to be five (5) years and six (6) months, but rather seven (7) months and five (5) days. The Court thus finds that the seven (7) months and five (5) days taken to file the Application before this Court is reasonable.

50. Accordingly, the Court dismisses the objection of the Respondent State and holds that the Application was filed within a reasonable time.

B. Other conditions of admissibility

51. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2) (a), (b), (c), (d) and (g) of the Rules. Even so, the Court must satisfy itself that these conditions have been met.

52. From the record, the Court notes that, the Applicant has been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

53. The Application is in compliance with the Constitutive Act of the African Union and the Charter because it raises alleged violations of human rights in fulfilment of Rule 50(2)(b) of the Rules.

54. The language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of

18 *Armand Guehi v Tanzania* (merits and reparations) *op.cit* § 56; *Werema Wangoko v Tanzania* (merits) (7 December 2018), 2 AfCLR 520 § 49; *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits) § § 83-86.

19 *Werema Wangoko v Tanzania* (merits) § 49; *Alfred Agbesi Woyome v Republic of Ghana*, ACtHPR, Application No. 001/2017, Judgment of 28 June 2019 (merits) § § 83-86.

Rule 50(2)(c) of the Rules.

55. The Application is not based exclusively on news disseminated through mass media as it is founded on court documents from the municipal courts of the Respondent State in fulfilment with Rule 50(2)(d) of the Rules.

56. Further, the Application 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 in fulfilment of Rule 50(2)(g) of the Rules.

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

VII. MERITS

58. The Applicant avers the violations of Article 3(1) and (2), 7(1)(c) and (d) of the Charter in relation to the following allegations:

i. Court of Appeal's dismissal of the Application for leave to file for review;

ii. The denial of the right to free legal representation;

iii. Assessment of evidence in the Court of Appeal.

A. Allegation relating to the application for leave to file for review

59. The Applicant argues that the Court of Appeal erred in rejecting his application for leave to file his review application out of time as he had communicated to the Court of Appeal that he was unwell and thereby unable to comply with the time limits. According to the Applicant, this violated his right under Article 7(1)(d) of the Charter.

60. The Respondent State submits that the Applicant did not give good reasons as to why his application for leave to file out of time should be granted. It avers that the Court of Appeal dismissed the Application in accordance with Rule 66 of its Rules, because the application for leave did not demonstrate a prospect of success.

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61. Article 7(1)(a) of the Charter provides:

> 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…

62. The Court notes that the Applicant erroneously relied on Article 7(1)(d) of the Charter, as his allegation is properly suited to Article 7(1)(a) of the Charter, that is, the right to have his cause heard. The Court will thus consider this allegation in light of Article 7(1)(a) of the Charter.

63. The Court observes that the Respondent State is mandated to ensure that its municipal courts are accessible to individuals and that due process is observed in all its proceedings. Notwithstanding this mandate, individuals are also required to abide by rules of procedure and the laws enacted by the Respondent State.

64. The Court reiterates its jurisprudence that:

> …domestic courts enjoy a wide margin of discretion in evaluating the probative value of a particular evidence. As an international human rights court, the Court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[20]

65. In the instant case, the Applicant alleges that the Court of Appeal erroneously dismissed his application to file for review out of time. Nevertheless, he did not substantiate this allegation or demonstrate with evidence the alleged violation of his right owing to the error of the Court of Appeal. He has simply asserted that he was sick.

66. Further, the Court observes from the record that the Court of Appeal dismissed his application to file for review out of time because the application did not demonstrate prospect of success in accordance with Rule 66(1) of its Court of Appeal Rules.[21]

67. The Court finds that the manner in which the Court of Appeal dismissed the Applicant's application to file an application

20 *Kijiji Isiaga v Tanzania*, (merits) (21 March 2018), 2 AfCLR 218 § 65; *Majid Goa v United Republic of Tanzania*, ACtHPR, Application No.025/2015, Judgment of 26 September 2019 (merits and reparations) § 86.

21 Rule 66(1)(a-e), "The Court may review its judgment or order, but no application for review will be entertained except on the following grounds: namely, that: (a) The decision was based on a manifest error on the face of the record resulting in miscarriage of justice or (b) a party was wrongly deprived of an opportunity to be heard; or (c) the Court's decision is a nullity; or (d) The Court has no jurisdiction to entertain the case; or (e) The judgment was procured illegally or by fraud or perjury." The Court of Appeal's Ruling - "no good cause has been shown, the application is hereby dismissed"

for review out of time, does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation and finds that the Respondent State has not violated Article 7(1)(a) of the Charter.

B. Allegation related to the right to free legal assistance

68. The Applicant contends that he was not provided with a free legal representative of his choice during the proceedings in the national courts because the Respondent State chose all the lawyers that represented him. He therefore claims that this is a violation of Article 7(1)(c) of the Charter.

69. The Respondent State submits that the Applicant was represented by "Advocates Bantulaki, Muna and Kitwala in the High Court and Advocate Deya Paul Outa at the Court of Appeal", therefore he was duly represented throughout the national courts' proceedings.

70. Consequently, the Respondent State submits that the allegation herein is "frivolous, lacks merit and should be duly dismissed."

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71. Article 7(1)(c) of the Charter provides as follows: "[e]very individual shall have the right to have his cause heard. This comprises: […] c) The right to defence, including the right to be defended by counsel of his choice."

72. The Court has interpreted Article 7(1)(c) of the Charter in light of Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR),[22] and determined that the right to defence includes the right to be provided with free legal assistance.[23]

73. The Court notes, in line with the jurisprudence of the European Court of Human Rights, that the right to be defended by counsel of one's choice is not absolute when the counsel is provided through a free legal assistance scheme.[24] In this circumstance,

22 The Respondent State became a State Party to ICCPR on on 11 June 1976.

23 *Thomas v Tanzania* (merits) *op.cit* § 114; *Isiaga v Tanzania* (merits) *op.cit* § 72; *Kennedy Onyachi and Njoka v Tanzania* (merits) (28 September 2017) 2 AfCLR 65 § 104.

24 ECHR, *Croissant v Germany* (1993) App No.13611/89 § 29, *Kamasinski v Austria* (1989) App No. 9783/82, § 65.

the important consideration is whether the accused was given effective legal representation rather than whether he or she was allowed to be represented by a lawyer of their own choosing.[25]

74. Therefore, the duty of the Respondent State is to provide adequate representation to an accused and intervene only when the representation is not adequate. [26]

75. The Court notes from the record, that the Applicant was represented throughout the proceedings in the national courts by advocates provided for by the Respondent State at its own expense. The Court further notes that there is nothing on the record to the effect that the Applicant was not adequately represented or that he raised this issue in the proceedings at the national courts. Moreover, the Applicant did not substantiate his claim herein.

76. Consequently, the Court finds that the Respondent State has not violated Article 7(1)(c) of the Charter by failing to provide free legal assistance.

C. Allegation relating to the manner of the evaluation of evidence in the Court of Appeal

77. The Applicant contends that the decision of the Court of Appeal was based on the visual evidence of relatives who were serving their own interest and that there were no "independent witnesses" who testified. He also submits that he was arrested as a result of "mere suspicion" because they had been prior complaints about him at the police station.

78. He avers that the Court of Appeal did not abide by the rules of documentary evidence; notably, giving him an opportunity to object to the evidence that was tendered in. Further, that this evidence was not supported by oral evidence of its "maker". He claims that these "errors" violated his rights under Article 3(1) and (2) of the Charter.

79. According to the Respondent State, the Court of Appeal not only considered the conditions of identification but also the credibility of the witnesses. It further submits that the evidence presented in the High Court was **"**water-tight**"** and left no doubt that it was the Applicant who murdered the deceased.

25 ECHR, *Lagerblom v Sweden* (2003) App no 26891/95, §§ 54 - 56.

26 ECHR, *Kamasinski v Austria* (1989) App No. 9783/82, § 65.

80. The Respondent State contends that the Applicant was represented by legal counsel at the trial at the High Court and his counsel did not object to the tendering in of the exhibits which was in compliance with the Criminal Procedure Act.

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81. The Court notes that the Applicant has relied on Article 3(1) and (2) in his allegation herein. Nevertheless, the allegations raised by the Applicant concern, the right to a fair trial and especially the right to defence. Therefore, the Court will consider this allegation in the light of Article 7(1) of the Charter.

82. Article 7(1) of the Charter provides: "Every individual shall have the right to have his cause heard…"

83. The Court reiterates its position according to which, it held that:

> … domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence, and as an international court, this court cannot take up this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[27]

84. In the instant case, the record before this Court shows that the national courts convicted the Applicant on the basis of visual identification evidence tendered by three (3) prosecution witnesses who were at the scene of the crime. The Court notes that the witnesses being related, cannot on its own put doubt on the credibility of their testimonies especially since the Applicant was represented by counsel who had the opportunity to challenge their credibility. The Court further notes, that the national courts assessed the circumstances in which the crime was committed, in order to eliminate possible errors as to the identity of the perpetrator and found that the Applicant was guilty.

85. As regards the documentary evidence tendered, the Court notes that the Applicant was represented by counsel and he did not object to the said exhibits. Further, the record shows that the national courts followed the procedures according to its laws in assessing the probative value of the said evidence.

86. The Court finds that the manner in which the domestic courts evaluated the evidence relating to the Applicant's identification

27 *Isiaga v Tanzania* (merits) *op.cit.* § 65.

does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation.

VIII. Reparations

87. The Applicant prays that the Court grant him reparations for the violations he suffered including quashing his conviction and sentence and ordering his release.

88. The Respondent State prays the Court to deny the Applicant's request for reparations.

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89. Article 27(1) of the Protocol provides that:

> if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

90. In the instant case, no violation has been established and thus the issue of reparations does not arise. The court, therefore, dismisses the Applicant's prayer for reparations.

IX. Costs

91. The Respondent State prays the Court to order the Applicant to bear the costs of the Application.

92. Pursuant to Rule 32(2) of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."

93. In light of the foregoing, the Court rules that each party shall bear its own costs.

X. Operative part

94. For these reasons:

The Court

Unanimously,

On jurisdiction

i. *Dismisses* the objection to material jurisdiction.

ii. *Declares* that it has jurisdiction.

On admissibility

iii. Dismisses the objections on admissibility.

iv. *Declares* the Application admissible.

On merits

v. *Finds* that Respondent State has not violated Article 7(1) of the Charter as regards the manner of evaluation of evidence;
vi. *Finds* that the Respondent State has not violated Article 7(1)(a) of the Charter as regards the application for leave to file for review;
vii. *Finds* that the Respondent State has not violated Article 7(1)(c) of the Charter as the Applicant was provided with free legal assistance.

On reparations

viii. *Dismisses*, the prayer for reparations.

On costs

ix. *Orders* each party to bear its own costs.

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Separate Opinion: Tchikaya

1. International human rights law, through its most advanced jurisprudence, *has already derived from the prohibition of torture, cruel, inhuman or degrading treatment or punishment* the international prohibition of the death sentence.[1] The question of the legal basis for this prohibition no longer arises.

2. Like my honourable colleagues, I approved the operative part

1 The Strasbourg Court's reading of Articles 2 and 3 of the European Convention on Human Rights (4 November 1950) (the judgments on ***Ocalan v Turkey***, 12 May 2005 and ***Al-Saadoon and Mufdhi v the United Kingdom***, 2 March 2010) allows the Court to characterise a death sentence imposed following an unfair trial as inhuman treatment. It describes the death sentence as an "unacceptable punishment" prohibited by Article 2 and considers, in the light of State practice, that the enforcement of the death penalty in all circumstances now constitutes inhuman and degrading treatment contrary to Article 3. Recall that the US Supreme Court decision in ***Roper v Simmons***, 13 October 2004 invoked the Eighth Amendment to the Constitution prohibiting cruel and unusual punishment. It held that the execution of persons under the age of 18 at the time of the trial constituted cruel and unusual punishment, contrary to the 8th and 14th amendments.

of the *Evodius Rutechura v Republic of Tanzania*[2] decision of 26 February 2021.[3] However, it would have been desirable for the said operative part to have been supplemented by one of the aspects relating to the evolution of the sentence in question: the death penalty. The death penalty was not the main focus of this judgment, nor was it its legal issue. However, this penalty is undoubtedly the cause of Mr Evodius Rutachura's procedural challenges before the Court. Evodius limits his complaints before the Court of Appeal to the dismissal of his request for additional time to file a request for review, the lack of legal aid during his trial and appeal, and the insufficiency of evidence.[4]

3. In the same proceedings, the Applicant requested for provisional measures on his death sentence. In order to avoid irreparable harm despite the *de facto* moratorium adopted by the Respondent State and the fact that no execution had taken place for a long time, the Court granted these provisional measures in a decision rendered in 2016.[5] The operative part of the said decision was limited in scope. It was not intended to make a pronouncement on the death penalty regime.

4. The practice of executing people for 'serious' offences, although in decline, still exists on the continent. Although this is not the place for an analysis, the so-called "legal" death penalty pronounced by judges, is an extension of the power of the rule of law. A death sentence in this case results from the construction of the State itself. The etymology of the word *potency* derives from the latin word *potentia*, meaning 'power' in the public and political sense. This is precisely the Roman position,[6] which held that the death penalty would protect society, because it would be an exemplary punishment and would serve as deterrence to criminals. This position, although widely held, has not been

2 On 21 November 2019, this State notified the Chairperson of the AU Commission of its withdrawal of its Declaration accepting the Court's jurisdiction to receive applications filed directly by individuals and non-governmental organisations. The Court, taking into account the applicable law and its jurisprudence (*Ingabire Victoire Unuhoza v Rwanda*, 3 June 2016, 1 AfCLR 584, § 67; *Andrew Ambrose Cheusi v Tanzania*, 26 June 2020, §§ 37-39), decided that the withdrawal had no bearing on cases pending before the Court as well as on cases filed before the withdrawal took effect, one year after the deposit of the instrument of withdrawal, i.e., on 22 November 2020. The Court thus retained admissibility and jurisdiction over the case.

3 AfCHPR., *Evodius Rutechura v Tanzanie,* udgement, 26 février 2021.

4 *Idem*., § 6.

5 AfCHPR, Order, *Evodius Rutechura v Tanzania,* 18 March 2018.

6 Gaudemet (J), *Les institutions de l'Antiquité*, Paris, Montchrestien, coll. « Domat Droit public », 5e éd., 1998, p. 511.

sociologically proven. It has been considered an absolute denial of human rights, a premeditated and cold-blooded State murder or an act of barbarism. Since 1973, more than 160 death row inmates have been exonerated or released in the United States after being proven innocent.[7] Other prisoners have been executed even though there were serious doubts about their guilt.[8]

5. The question – the relevance of which remains to be demonstrated – is whether human law affirms or negates the outlawing of the death sentence. The Evodius case has given the Court the opportunity to reflect further on the subject. Once again, the continental court noted the opportunity given it to recall, as an incentive, to clarify an increasingly universal doctrine on the abolition of the death sentence. The case of Evodius Rutechura comes after the Second Additional Protocol to the International Covenant on Civil and Political Rights, which abolishes the death sentence for States that are party to it. On 17 November 2020, the General Assembly called on "States that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death sentence".[9]

6. In the operative part of the Evodius Rutechura decision, which we endorsed, the Court shows strict compliance with the applicable law (1). However, the Court could, on this occasion, have clarified and prompted the States of the region to pay more attention to the human rights developments that are taking place before them on the issue of the death penalty (2).

1. *Evodius Rutechura*, a *lex lata* decision

7. As recalled, the Applicant and two acolytes, undertook to rob the home of Erodia Jason in Mwanza on 13 May 2003. Erodia Jason's daughter, Arodia, was shot while trying to escape from the house.

7 Badinter (R.), *Contre la peine de mort*, Ed. Poche, 320 p. ; *L'abolition,* Ed. Poche, 2002, p 288.

8 https://www.amnesty.org/fr/what-we-do/death-penalty/

9 AGONU, Resolution. No. °73/175, *Moratorium on the Use of the death penalty*, 17 December 2018 (Report of the 3rd Commission (A/73/589/Add.2), § 10. 123 UN Member States voted in favour of the resolution, including Djibouti, Jordan, Lebanon and South Korea, who support the proposal for the first time. The Democratic Republic of Congo, Guinea, Nauru and the Philippines, Yemen and Zimbabwe also supported the Resolution. The UN Commission on Human Rights held that "States that no longer apply the death penalty but maintain it in their legislation to abolish it" (Point 6) of the Resolution of the Commission on Human Rights 2004/67 adopted by a recorded vote of 29 to 19, with 5 abstentions. Chap. XVII E/2004/23-E/CN.4/2004/127], 21 April 2004

On 15 May 2003, the Applicant was arrested. He was convicted on 19 November 2008 and sentenced to death by hanging by the High Court sitting in Mwanza.[10]

1.1 The Evodius case, issues and solutions

8. The Applicant is a Tanzanian national sentenced to death by hanging for murder. He challenged the proceedings and ultimately the sentence imposed on him. In the operative part of the judgment, the Court rightly concludes that the Respondent State did not violate Article 7 of the Charter as regards the manner in which the evidence was assessed, nor did it violate the right to free legal assistance to which the Applicant was entitled. While adhering to its decision, it would have been desirable for the Court to take a position on the issue of the death sentence which was the essence of the judgment. This would have been a welcome extension of the Court's praetorian power in this matter of such concern.

9. The Respondent State's arguments could not prosper. The Court, committed to its principles, unanimously held that it has jurisdiction to assess the relevant proceedings before domestic courts to the extent of the international instruments ratified by the State. It relied on case law that is now established.[11] It also rightly pointed out that the withdrawal of the Declaration deposited pursuant to Article 34(6) of the Protocol has no retroactive effect and has no bearing on the Evoduis case insofar as it was pending at the time the Respondent State deposited its instrument of withdrawal. The latter does not take effect until twelve (12) months after this deposit (22 November 2020).[12]

10. The Court declared the case admissible, as it appeared that the Applicant had appealed his conviction and sentence to the Tanzanian Court of Appeal, the highest court, on 18 June 2010, which court upheld the judgment of the High Court of Justice. The Respondent State was thus given the opportunity to cure the alleged violations. The Applicant had therefore previously

10 AfCHPR, *Evodius Rutechura v Tanzanie*, Judgment, § 3.

11 AfCHPR, *Ernest Francis Mtingwi v Malawi* (jurisdiction) (15 March 2013), 1 AfCLR 197, § 14; *Kenedy Ivan v Tanzania*, Application No. 25/2016, 28 March 2019, § 26; *Armand Guéhi v Tanzania* (merits and reparations) (7 December 2018), 2 AfCLR 493, §33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania* (merits) (23 March 2018) 2 AfCLR 297, § 35.

12 AfCHPR, *Ingabire Victoire Unuhoza v Rwanda* (merits) (2016) 1 AfCLR 584, § 67; *Cheusi v Tanzania* (merits), §§ 35 à 39.

exhausted all available local remedies. This position of the Court was defensible and of established jurisprudence.[13] It should be recalled that the admissibility of the Application is subject to the principle of prior exhaustion of local remedies. This principle prescribes that persons challenging a State in a human rights dispute before an international body are, in principle, under an obligation to make prior use of the remedies available under their country's legal system.

11. The Court was therefore faced with the question of whether the referral was made within a reasonable time. As in many previous cases, "the determination as to whether the duration of the procedure in respect of local remedies has been normal or abnormal should be carried out on a case-by-case basis depending on the circumstances of each case".[14] In the Evodius case, the Court found that the Applicant was detained and sentenced to death, imprisoned and restricted in his movements with limited access to information. On two occasions, he attempted to apply for a review, the last attempt being on 8 June 2015, i.e., seven (7) months and five (5) days before the case was brought before the Court. It further held that the circumstances mentioned delayed the filing of the Application before it. The Application was therefore deemed to have been filed within a reasonable time.

12. The operative part of the judgment was unanimous. On the whole, the Court did not uphold the Applicant's claims, except for the aspect relating to the Respondent State's failure to provide free legal assistance to the Applicant under Article 7(1)(c) of the Charter.

1.2 The relationship of the *Evodius decision* with previous case law

13. It should be recalled that the Court has handed down numerous decisions on the issue of the death penalty. Although this particular Evodius case did not make it a point of law, it was fundamentally

13 ECHR, *Akdivar et al. v Turkey*, 16 September 1996; JDJ, 1996,239, obs. E. Decaux; RTDH. 1998, p. 27, note P. Legros and P. Coenraets. It is clearly understood that States are not accountable to an international body before they have had the opportunity to rectify the situation in their domestic legal order, *Interhandel Case*, *Switzerland v United States*, Preliminary Objections, ICJ 21 March 1959, ICJ Reports 1959, p. 27; Wiebringhaus (H.), La règle de l'épuisement préalable des voies de recours internes dans la jurisprudence de la Commission européenne des Droits de l'Homme, AFDI, 1959. pp. 685-704.

14 AfCPHR., *Zongo and Others v Burkina Faso* (merits), *op. cit.,* § 92; See also *Thomas v Tanzania* (merits) *op. cit*., § 73.

at the root of the proceedings before the African Court. In the *Armand Guehi* case (2018),[15] its first and most important case on the matter, the Court, in accordance with the reasons contained in its judgment, ruled against the requested release. It said, without further provision on the death sentence, that it dismissed "the Applicant's prayer for the Court to quash his conviction and sentence, and order his release".[16] The Court thus went no further than to rule on the Applicant's claims.

14. The Arusha Court has been seized with various cases involving the death penalty.[17] From 2015 to 2020, the Court has heard almost 20 cases involving the death sentence. They come to the Court on the basis of Article 7 (1) of the African Charter which protects the right to a fair trial. The typical argument in the 2019 *Oscar Joshia* case,[18] for example, is as follows:

> "The Court of Appeal's judgment was rendered on the basis of evidence derived from statements of the Prosecution Witness which were marred by inconsistencies and "manifest errors patent in the face of the records (...) the Court of Appeal misdirected itself by dismissing his grounds of appeal without giving them due consideration by relying on incriminating evidence obtained from an "untruthful witness. The Court of Appeal's wrongful dismissal of his Appeal violates his rights under sections 3(1) and (2) and 7(1)(c) of the Charter".[19]

15. This argument cannot be assessed *a priori*, but it can be noted, as here in Evodius, that it is almost always used in death sentence cases.

15 AfCHPR., ***Armand Guehi v Tanzania***, 3 June 2016 (jurisdiction and admissibility) and 7 December 2018 (merits).

16 *Idem*., 205, point X of the operative part.

17 These include ***John Lazaro v Tanzania***, Order 18 March 2016; ***Habiyalimana Augustino and Mburo Abdukarim v Tanzania***, Order, 3 June 2016*; Deogratius Nicholaus Jeshi v Tanzania*, Order, 3 June 2016; ***Cosma Faustin v Tanzania***, 3 June 2016; ***Joseph Mukwano v Tanzania***, 3 June 2016 and; ***Oscar Josiah v Tanzania***, Provisional Measures, 3 June 2016; ***Dominick Damian v Tanzania***, 3 June 2016; ***Chrizant John v Tanzania***, 18 November 2016; ***Crospery Gabriel and Ernest Mutakyawa v Tanzania***, Provisional Measures,18 November 2016; ***Nzigiyimana Zabron v Tanzania***, interim measures (2016); ***Marthine Christain Msuguri v Tanzania***, Provisional measures, 18 November 2016; ***Gozbert Henerico v Tanzania***, interim measures, 28 November 2016, ***Mulokozi Anatory v Tanzania***, Provisional measures, 28 November 2016; ***Amini Juma v Tanzania***, 18 November 2016.

18 CAfDHP., ***Oscar Josiah,*** merits, 28 November 2019

19 *Idem*., § 7 and 8.

16. The Ally Rajabu case has attracted a great deal of attention from the Court.[20] In this case, Ally Rajabu and four other Tanzanian nationals were sentenced to death for murder. They alleged, as already mentioned, that they had been convicted without a full hearing of their case and that the fact that they were

> convicted in violation of Section 235(1) of the Criminal Procedure Act and therefore should be given the benefit of the doubt.[21]

17. The operative part of the judgment made no reference to the death sentence regime at issue, which was contested by the Applicants. Rather, the Court stated that:

> "the Respondent State has not violated the Applicants' right to be tried within a reasonable time, under Article 7(1) (d) of the Charter, (nor)(...) the right to life guaranteed under Article 4 of the Charter, in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer".[22]

18. Thus, the Court in *Evodius Rutechera* simply recalls its established jurisprudence on the issue of the death sentence, resolutely steering clear of the current debates applicable to the law in force, an approach that will be followed in the *Dexter* case.

1.3 *The Evodius case* and the particularities of *the Dexter case*

19. The case of *Dexter Eddie Johnson v the Republic of Ghana*[23] followed the same line of reasoning, albeit with some peculiarities, but the Court of Appeal maintained its jurisprudential stance.

20. On 27 May 2004, this Applicant, who has dual Ghanaian and British nationality, killed an American national in the Greater Accra region of Ghana. When brought to court, he denied the offence. On 18 June 2008, the Accra High Court, in a fast-track procedure, found him guilty of the murder and sentenced him to death. In addition to the issue of due process, the right to life and the prohibition of inhuman or degrading treatment or punishment, the problem in Dexter's case is that the only sentence for this offence under Ghanaian law is capital punishment, which has

20 AfCHPR., *Ally Rajabu, Angaja Kazeni, Geofrey Stanley, Emmanuel Michael and Julius Michael v Tanzania*, Order. 18 March 2016; admissibility and jurisprudence, 4 July 2019.

21 *Idem*., § 6.

22 *Ibidem*., § 171 – vii and viii.

23 AfCHPR, *Dexter Eddie Johnson,* Order. 28 September 2017 and Judgment on the merits, 28 November 2019.

been called the mandatory death sentence.[24] Dexter is currently awaiting execution.

21. In this precedent, the Court reiterates its jurisprudence, *lex lata*. Pursuant to Rule 56(7) of its Rules of Court, it ruled that the case was not admissible because it had been heard by another body, the Human Rights Committee, and was therefore a "*non bis in idem*". In this case, the Court did not rule on the merits. From paragraphs 33 to 57 of the Dexter judgment, the Court perceives the issue of the mandatory death sentence, but in this 2018 decision it complies with the procedural restriction of *non bis in idem*.

22. The Court was right not to add incentives to its operative part in *Dexter*, at least for two reasons. The first reason was that the case was declared inadmissible; the second reason was that once it had held that the United Nations Human Rights Committee had disposed of the substance of the dispute, it would have seemed prudent to focus more on the merits than to add incentives to its decision to dismiss the case. The Court's position in Dexter on this point, clearly seems consistent.

23. The question of the form of these incentives already arises, as does the question of their basis.

2. Evodius Rutechura, the death sentence and incentives

24. The Court's attention was rightly drawn to the enactment of the death sentence incentives. It was noted that the Court could deal with this only if it is a principal issue of law in the case or if it was not a request in the Application.

25. At the margin, a question therefore arose for the Court as to a specific extension of the operative part of the judgment on the attitude of the Respondent State to the law applicable to the death sentence. Was this possible, given the content of the terms of the dispute? In short, could the Court include in its operative part a statement, which it would consider appropriate, for the purpose of advancing human rights, even though it was not among the Applicant's requests? Would the Court not be ruling *ultra petita*? This question deserves to be addressed.

2.1 Should the specter of *ultra petita* therefore limit the Court's creative function?

24 UN Human Rights Committee, Communication *Dexter Eddie Johnson v Ghana*, 18 July 2012.

26. The issue at hand is arguably one of the most important and sensitive in human rights: the death sentence. When the Court is seized of this issue, directly or indirectly, its jurisdictional function should be carried out in the normal way, while taking strict account of the essential counterpart of this right: the right to life.[25]

27. It is accepted that a court can only rule on the findings submitted to it because its judicial function is the application of the law. It must provide the resulting interpretation. The *Evodius* judgment in its operative part, by the principle of lex lata, is limited to the Applicant's claims. The question to be asked is whether the spectre of *ultra petita* should limit the Court's jurisdictional function from the outset. This point is so important that it requires clarification. Three arguments suggest that the Court can go further.

28. The first argument is that the Court has, when it is in the interests of human rights, a broad power of interpretation. It cannot limit it in order to safeguard its jurisdictional function. It may consider that this was induced by the claims or by the facts in dispute.[26] In sum, it is known in international law that the judge can establish himself the meaning of his judgment on the points referred to in the submissions, because the procedure for interpreting the law is always specific to a Court.[27] This would mean that the Court could not be considered to have ruled *ultra petita*.

29. In its *Papamichalopoulos* judgment,[28] the ECHR recalled that its power to sanction is not confined within narrow limits. On

25 This argument may seem relative in the context of peremptory rights, certain human rights, including the prohibition of the death penalty.

26 The right to life has been rightly invoked to protect the citizen against "legal murder", i.e., the death penalty. It is conventionally known that "No one shall be arbitrarily deprived of his life", Articles 5 and 7 of the American Convention on Human Rights, which guarantee the right to life, physical integrity and personal liberty. See IACHR, Velasquez Rodrigez case, Preliminary objection, 26 June 1987; merits, 29 July 1988. Cohen-Jonathan (G.), RGDIP, 1990, pp. 145-465 ; Cerna (Ch.), AFDI, 1996, pp. 715-732 ; Frumer (Ph.), RBDIP, 1995/2, p. 515 ; Hennebel (L.) and Tigroudja (J.), Revue trimestrielle des droits de l'Homme, 2005, No. 66, pp. 277-329 ; Tigroudja (H.), AFDI, 2006, pp. 617-640 ; Burgorgue-Larsen (L.) and Úbeda de Torres (A.), Les grandes décisions de la CIDH, Ed. Bruylant, 2008, p.996

27 See in particular, I.C.J., Order, Case of the *Free zones of Haute-Savoie and Pays de Gex, France v Switzerland*, 19 August 1929: "having regard to the fact that the Court cannot as a general rule be compelled to choose between constructions determined beforehand none of which may correspond to the opinion at which it may arrive". p. 15.

28 See also (CPIJ, Interpretation of Judgments Nos. 7 and 8 (Chorzów Factory), 16 December 1927, pp. 15-16: "In so doing, the Court does not consider itself as bound simply to reply "yes" or "no" to the propositions formulated in the submissions of the German Application. It adopts this attitude because, for the purpose of the interpretation of a judgment, it cannot be bound by formulæ chosen by the Parties concerned, but must be able to take an unhampered decision".

the contrary, the adjective "equitable" and the phrase "where appropriate" would indicate the latitude it has in its exercise.[29] It is clear that the Court has a significant margin of discretion in the exercise of its powers. This corresponds, moreover, to the very idea of implicit, non-contestable jurisdictions established in general international law.[30]

30. The second argument is that the Court itself, and rightly so, has been in the habit of attaching binding measures to its orders that are not included in the requests of the Parties. While this is the very meaning of the Court's injunctions, it provides a basis for justifying any incentive measures. They could have allowed the inclusion of incentives on the death sentence in line with current international human rights law.[31]

31. Such measures are found in various judgments. They are neither contained in the actual terms of the Protocol establishing the Court nor in the reasons for the judgments in which they are included. Two examples: a) In the *Ajavon case*, the Court orders:

> "Respondent State to publish the operative part of the present Judgment within a period of one (1) month from the date of notification of the present Judgment, on the websites of the Government, the Ministry of Foreign Affairs, the Ministry of Justice and the Constitutional Court, and for six (6) months."[32]

b) In the *Mugesera case*, the Court ordered:

> "the Respondent State to pay the amounts indicated in paragraphs xi, xii and xviii above, free of tax, within six (6) months from the date of notification of this judgment, failing which it shall also pay default interest calculated on the basis of the applicable rate set by the Central Bank of the Republic of Rwanda, throughout the period of late payment and until the sums due have been paid in full".[33]

29 ECHR, *Papamichalopoulos v Greece,* 31 October 1995.

30 ECHR., *Comingersoli SA v Portugal,* 6 April 2000, § 29.

31 The concept of implied jurisdiction is well established in international law. It is the result of a confirmed and internationally recognised analysis. The CJEU has recognised it in the Community system (29 November 1956, Fédéchar, Case 8/55, ECR 291; 31 March 1971, *Commission v Council* (AETR), ECR 1971, p. 1263; 26 April 1977, Opinion 1/76, ECR 754). However, it was the ICJ that applied at the international level the reasoning that led to the finding of implicit jurisdiction (ICJ, ILO Jurisdiction, Opinion, 23 July 1926, Series B, No. 13, p. 18). The Court has consistently applied the theory of implied competence. See in particular: ICJ, South West Africa, 11 July 1950, p. 128; Opinion, Certain United Nations Expenditures, 20 July 1962, p. 151; Opinion, Legal Consequences of the Continued Presence of South Africa in Namibia, [1971] ECR 16; Judgment, *Cameroon v United Kingdom of Great Britain and Northern Ireland*, Northern Cameroon, 2 December 1963, [1963] ECR 15.

32 AfCHPR., *Ajavon v Benin*, 4 December 2020, § 369, XXVII.

33 AfCHPR., *Léon Mugesera v Rwanda*, 27 November 2020, § 177, XIX.

32. These measures certainly provide the conditions for the effectiveness of the operative part in question. They also remain guarantees of effectiveness in the protection of human rights. In this respect, the Court can only resort to them, notwithstanding the Protocol's silence to this effect. This silence is relative, because Article 27 of the Protocol on the measures to be taken by the Court when it considers that there has been a violation refers to "all appropriate measures". This article leaves it open to the Court to take all measures "to remedy the situation",[34] including incentives to adapt domestic laws.

33. The third argument relates to the number of applications relating to the death sentence or referring to it. The Court should assist and consider those countries that still retain the death sentence. The protection of the right to life depends on it. In five (5) years, at least twenty (20) cases have been repeatedly brought before the Court. This last circumstance alone justifies the Court's taking incentives in its judgments to bring domestic legislation into line with international law.

34. This relates even to the way in which the function and material jurisdiction of the Court's should be understood as established by Articles 3, 7 and 27 of the Protocol. The Court has consistently held that for it to have jurisdiction,

> "As long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter. (...)".[35]

35. In addition to opening up the jurisdiction to hear the case, the Court has full jurisdiction to inquire into all aspects of the dispute in order to examine all aspects that make the protection of the rights concerned effective.

2.2 Judicial proscription of the death sentence

36. Judicial proscription of the death sentence is possible. It is compatible with international human rights law. Notwithstanding the framework set by cases such as *Evodius*, the Court can become involved through its case law. With the support of numerous international laws that aim to prohibit the death

34 Article 27 of the Protocol establishing the Court provides: "If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

35 The Court has recalled this in various cases, including: *Alex Thomas v United Republic of Tanzania* (merits), 20 Nov 2015, Application No. 005/2013, 1 RJCA, p. 491.

sentence,[36] the Court can contribute in this respect to more dynamic judicial protection.

37. It has been pointed out that human rights jurisprudence has deduced from the prohibition of torture, cruel, inhuman or degrading treatment or punishment the international prohibition of the death sentence.[37] The question of the legal basis for this prohibition no longer arises. The relatively widespread idea that human rights judges have normative limits in this respect no longer stands up to criticism. Many fundamental rights are at stake: the prohibition of torture, inhuman and degrading treatment, the right to life, etc.

38. The prohibition of torture is a peremptory norm of international law, yet the death sentence is, if not similar, at least close to torture. Death row falls, quite sensibly, under this same prohibition. This constitutes *erga omnes* obligations, opposable to all, outside any law.

39. In its 1996 Advisory Opinion on the Legality of Nuclear Weapons,[38] the International Court of Justice described many rules of humanitarian law applicable in armed conflict as "intransgressible principles of international customary law", which are known to include a prohibition on torture. This is possible for inhuman and degrading treatment. The *Al-Adsani* decision[39] had indeed clarified the answer to the question of whether a State could

36 Recall that the United Nations General Assembly, through various resolutions, has called for the establishment of a universal moratorium on the use of the death penalty. These resolutions were adopted in 2007, 2008, 2010, 2012, 2014, 2016 and 2018 with increasing majorities. In 2018, this Resolution received 121 votes in favour, 35 votes against and 32 abstentions, i.e., 8 more votes in favour and 2 fewer votes against than in 2016. This is a notable progress and a growing support from African countries, members of the African Union. The Human Rights Council, through the Resolution adopted in June 2014, for the first time in a United Nations text, noted the grave human rights violations arising from the use of the death penalty. Additional Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (May 2002), provides for the abolition of capital punishment in all circumstances, including in time of war or imminent threat of war. The aim is "to take the ultimate step towards abolishing the death penalty in all circumstances". The Charter of Fundamental Rights, in its Article 2, prohibits the death penalty as well as the expulsion or extradition of a person to a country where he or she would face the death penalty.

37 ECHR, *Ocalan v Turkey*, 12 May 2005 and *Al-Saadoon and Mufdhi v United Kingdom*, of 2 March 2010. The death penalty is an "unacceptable punishment" prohibited by Article 2 and considers, in the light of State practice, that the enforcement of the death penalty in all circumstances now constitutes inhuman and degrading treatment contrary to Article 3.

38 *Legality of the threat or use of nuclear weapons (UN and WHO), Advisory Opinion, 8 July 1996: P. H. F. Bekker, AJIL 1997, p. 126; see Coussirat-Coustère, AFDI 1996, p. 337; G. Kohen, JEDI 1997, p. 336. See also CHR, Kindler v Canada, 30/07/1993, RUDH 1994*.

39 ECHR, Al-*Adsani v United Kingdom,* 21 November 2001.

claim sovereign immunity from the prescriptions of international law. The answer is now clear: it is no. Even if, in the case under consideration (Al-Adsani), the conditions for such an application were not met for the ECHR.

40. The same question then arose at the ECHR in rather eloquent terms. Is Russia obliged to forgo the Applicant's removal in order to protect his life? On 16 August 2015, the Court unanimously held that such an obligation arose from Articles 2 and 3 of the Convention. Extradition to China would expose the Applicant to a real risk of being sentenced to death for murder. The Court upheld its provisional measures to prohibit the Applicant's removal until its judgment became final (§ 101). In this case,[40] the ECHR gave full effect to provisions not ratified by Russia.

41. Another question insidiously raised is that of the formal enforceability of the principle of the international abolition of the death sentence against those States that have not ratified the texts enshrining the abolition of the death sentence.

2.3 The primacy of the international death sentence regime notwithstanding the non-ratification of texts by certain States

42. The known fact that many States do not execute their death row inmates speaks volumes about the ineffectiveness of this criminal sanction on its sociological flaws. In a monistic approach,[41] some States argue that they have not ratified or signed the international instruments condemning the death sentence.

43. It should be noted that in this sense the analysis of the International Court of Justice in *North Sea Continental Shelf*, which was correct, should be highlighted. The Court held that the argument of the Netherlands and Denmark could be accepted provided that Germany's conduct was "absolute and consistent" but that, even in this case, the German position would have to be further examined by specifically examining the reasons for which it did not ratify the Convention (§ 28), i.e., to carry out the unilateral acts (ratification, accession, etc.) which are required for the treaty

40 ECHR., *A.L. (X.W.) v Russia*, 16 August 2015.

41 Alain Pellet rightly said that "Intellectually, monism is not without attraction, if only because it should - in theory at least - avoid conflicts between legal rules, each one, to whatever 'system' it belongs, finding its foundation in a higher rule up to a higher axiomatic norm which would make it possible to resolve *in fine* all problems of incompatibility between two or more rules", Repenser les rapports entre ordres juridiques ? Oui, mais pas trop ! in B. Bonnet (ed.), Traité des rapports entre ordres juridiques, BLGDJ / Lextenso, Paris, 2017, pp. 1781-1789.

regime to be applicable. The ICJ went on to say that "the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way".[42] This analysis applies a fortiori, in specific cases, to all treaty provisions that preserve fundamental rights of the highest order.

44. These provisions can be applied to a State that has not ratified the provisions outlawing the death sentence. Ratification of a convention is only one of the ways in which it can be enforced. This application can be obtained because of objective reasons relating to the content of the text. The Court says this quite clearly for humanitarian rights in its advisory opinion on the *Legalitý of the Threat or Use of Nuclear Weapons*:

> a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Covfu Channel case (1. C. J Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by al1 States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

45. The jurisprudence of the Human Rights Council has made it possible to move forward resolutely on the subject of the death sentence and to keep pace with developments in international treaty law. The Council has, in fact, focused on analysing the enforcement of the death sentence in relation to Article 7 of the Covenant on Civil and Political Rights more than Article 6 and the right to life and Protocol 2, when it held that detaining the condemned person causes intense psychological stress and a deterioration in the state of health, particularly mental health, of the condemned person, the violation of Article 7 is established.[43]

46. The Human Rights Council recognises that the majority of Member States are moving towards the abolition of the death sentence. It even points out that States are evolving the International

42 ICJ, North Sea Continental Shelf, ***Denmark and the Netherlands v Germany***, ICJ, 20 February 1969: B. Conforti, RDI, 1969, p. 509; F. Eustache, RGDIP, 1970, p. 590; L. Goldie, RGDIP RFA), ICJ, 20 February 1969: B. Conforti, RDI, 1969, p.509; F. Eustache, RGDIP, 1970, p. 590; L. Goldie, AJIL, 1970, p.536; E. Grisel, AJIL, 1970, p.562; J. Lang, LGDJ, 1970, 169 p.; J. Marck, RBDI, 1970, p.44; F. Monconduit, AFDI, 1969, p. 213; A. Renaud, LGDJ, 1975, p. 263 p. See the reflections of Barberis (Julio A.), Réflexions sur la coutume internationale, AFDI, 1990, pp. 9- 46.

43 HRC, ***Pratt and Morgan v Jamaica***, 6 April 1989, RUDH, 1989.

Covenant on Civil and Political Rights. In the decision against Canada, it states that any abolitionist State extraditing an alien to a country where a person risks the death sentence violates Article 6 of the Covenant.

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47. I have shared the Court's unanimous decision in the *Evoduis Retuchera case* with my honourable colleagues. The decision on the merits is in accordance with the state of the law. The issue of the death sentence at the origin of the facts in dispute required that the operative part be reinforced. Sociologically speaking, there is only one weak argument left to support the death sentence as a criminal sanction: the fear it would instill in potential criminals. The emptiness of this argument, if it was ever an argument, is demonstrated by the fact that most crimes are crimes of passion or spontaneous acts. Finally, it should be remembered that intellectuals used to say, at the end of the Second World War, that universal peace will only be possible when legal death is definitively outlawed.