

Iguna v Tanzania (judgment) (2022) 6 AfCLR 826

Application 020/2017, *Igola Iguna v United Republic of Tanzania*

Judgment, 1 December 2022. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA, SACKO and ADJEI

Recused under Article 22: ABOUD

The Applicant, a citizen of the Respondent State, was in prison awaiting execution of a death sentence when he brought this Application. He had been tried, convicted, and sentenced to death for murder. The Applicant alleged that the entire process leading to his conviction and sentencing before the national courts was in violation of his human rights. The Court found that the Respondent State had not violated any of the rights claimed by the Applicant. The Court, therefore, dismissed the claim for reparations.

Admissibility (exhaustion of local remedies, 30-31; reasonable time to file, 32-39)

Fair trial (assessment of evidence, 46; right to have cause heard, 48-49)

Non-discrimination (onus to prove, 53)

Life (mandatory death penalty, 55)

Separate Opinion: TCHIKAYA

Life (mandatory death penalty, 8, 34-36)

Joint Dissenting Opinion: KIOKO, CHIZUMILA and ADJEI

Admissibility (filing within a reasonable time, 5-6, 19-20)

I. The Parties

1. Igola Iguna (hereinafter referred to as “the Applicant”), is a national of the United Republic of Tanzania, who at the time of filing the Application, was incarcerated at Uyui Prison in the Tabora region, having been convicted of the offence of murder and sentenced to death. He challenges the proceedings in the national courts that led to his conviction and sentence.
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, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, one (1) year after its deposit, which is on 22 November 2020.¹

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the records, that, on 22 April 1993, the Applicant and another not before the Court, broke into the house of Nkwimba Lumiki, then attacked and wounded her with a *machete*. Ms Lumiki’s son having been awoken by his mother’s screams, ran to her aid. In the course of the attack, he was also injured by the Applicant, after which the Applicant escaped. Ms Lumiki was later rushed to the hospital, where she died from her wounds.
4. The Applicant and his accomplice were arrested four (4) months after the attack on Ms Lumiki and charged with murder. On 27 March 2001, they were convicted before the High Court of Tanzania sitting at Tabora and sentenced to death by hanging. The Applicant filed an appeal against the decision of the High Court and the appeal was dismissed by the Court of Appeal on 28 June 2003.

B. Alleged violations

5. The Applicant alleges the following violations:
 - a. The right to non-discrimination protected under Article 2 of the Charter in relation to the judgment of the Court of Appeal and
 - b. The right to a fair trial protected under Article 7(1) of the Charter in relation to the evaluation of evidence in the Court of Appeal.

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

III. Summary of the Procedure before the Court

6. The Application was filed on 13 June 2017. On 16 June 2017, the Registry requested the Applicant to provide copies of the Judgment of the Court of Appeal which he submitted on 8 May 2018.
7. The Application was served on the Respondent State on 2 October 2018.
8. The Respondent State failed to file a Response to the merits even after several reminders by the Court to do so.
9. The Applicant filed his submissions on reparations on 13 May 2019 and this was served on the Respondent State on 14 May 2019 which filed its Response on 18 March 2021.
10. Pleadings were closed on 8 November 2022 and the parties were notified thereof.

IV. Prayers of the Parties

11. The Applicant prays the Court to:
 - a. Make an Order quashing both conviction and sentence;
 - b. Order his release from custody;
 - c. Grant him reparations to the tune of Tanzanian shillings Fifty-Nine Million, One Hundred and Thirty-Six Thousand (59,136,000) pursuant to Article 27(1) of the Protocol;
 - d. Grant any other legal remedy that the Court may deem fit in the circumstances of the Applicant's complaints.
12. The Respondent State prays the Court for the following:
 - a. A Ruling dismissing the Applicant's Application for reparations in its entirety;
 - b. A Declaration that the Respondent has not violated the provisions of the Charter and that the Applicant was treated fairly by the Respondent State;
 - c. Any Order this Hon. Court may deem right and just to grant under the prevailing circumstances.

V. Jurisdiction

13. The Court notes 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.

14. The Court underscores the provision of Rule 49(1) of the Rules that, “[t]he Court shall conduct preliminarily examination of its jurisdiction...in accordance with the Charter, the Protocol and these Rules.”
15. The Court notes that, even though nothing on record indicates that it lacks jurisdiction, it is obligated to determine if it has jurisdiction to consider the Application. In view of this, with regards to its personal jurisdiction 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 with the African Union Commission. Subsequently, on 21 November 2019, it deposited an instrument withdrawing its Declaration.
16. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect one (1) year after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.² Resultantly, the Court finds that it has personal jurisdiction.
17. As regards its material jurisdiction, the Court notes that the Applicant alleges violation of Articles 2 and 7(1) of the Charter to which the Respondent State is a party and therefore its material jurisdiction has been satisfied.
18. With respect to its temporal jurisdiction, the Court underscores, in accordance with the principle of non-retroactivity that it cannot consider allegations of human rights violations that occurred before the Respondent State’s obligations were triggered unless the violations are continuing in nature.
19. In the instant case, the Court notes that the alleged violations are based on the alleged denial of the right to a fair trial in the national courts, which occurred between 1993 and 2003. In this regard, the alleged violations occurred after the Respondent State had ratified the Charter but prior to the ratification of the Protocol and the deposit of the Declaration on 29 March 2010. However, the alleged violations continued thereafter since the Applicant is on death-row based on his conviction by the national courts from procedures that he considers to be unfair.³ Consequently, the Court finds that it has temporal jurisdiction.

2 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 37-39.

3 *Jebra Kambole v United Republic of Tanzania*, ACtHPR, Application No 018/2018, Judgment of 15 July 2020 (merits and reparations), § 24; *Dismas Bunyerere v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 702, § 28(ii); *Norbert Zongo and Others v Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77.

20. The Court also notes that it has territorial jurisdiction, given that the facts of the case occurred in the Respondent State's territory.
21. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. Admissibility

22. Article 6(2) of the Protocol provides: "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."
23. 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."
24. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:
Applications filed before the Court shall comply with all of the following conditions:
 - a. Indicate their authors even if the latter request anonymity;
 - b. Are compatible with the Constitutive Act of the African Union and with the Charter;
 - c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
 - d. Are not based exclusively on news disseminated through the mass media;
 - e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
 - f. Are submitted 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 seised with the matter; and
 - g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union, or the provisions of the Charter.
25. The Court notes that the conditions of admissibility set out in Rule 50(2) of the Rules are not in contention between the parties. However, pursuant to Rule 50(1) of the Rules, the Court is obligated to determine the admissibility of the Application.
26. From the record, the Court notes that, the Applicant has been identified by name in fulfilment of Rule 50(2)(a) of the Rules.
27. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed by the Charter. It also notes that one of the objectives of the Constitutive Act of the African Union as

stipulated under Article 3(h), is to promote and protect human and peoples' rights. The Court, therefore, holds that the Application is compatible with the Constitutive Act of the African Union and the Charter and thus meets the requirements of Rule 50(2)(b) of the Rules.

28. The Court finds that the Application does not contain any disparaging or insulting language and therefore, meets the admissibility requirement of Rule 50(2)(c) of the Rules.
29. 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 of Rule 50(2)(d) of the Rules.
30. The Court notes that, in accordance with Article 56(5) of the Charter, Rule 50(2)(e) of the Rules and as it has established in its case law that "the local remedies that must be exhausted by the Applicants are ordinary judicial remedies",⁴ unless they are manifestly unavailable, ineffective and insufficient or the proceedings are unduly prolonged.⁵
31. In the instant case, the Court notes that, the Applicant was convicted of murder by the High Court and sentenced to death on 27 March 2001. He appealed against this decision to the Court of Appeal, the highest judicial organ in the Respondent State, which upheld the decision of the High Court by its judgment of 28 June 2003. The Court, therefore, holds that the Applicant exhausted the available local remedies.
32. With regard to the condition of filing an Application within a reasonable time after exhaustion of local remedies, 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 an 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 seised with the matter."
33. In computing the time to be assessed against the requirement under Article 56(6) of the Charter, two elements are of relevance. Firstly,

4 *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599, § 64. See also *Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 64; and *Wilfred Onyango Nganyi and 9 Others v Tanzania* (merits) (18 March 2016) 1 AfCLR 507, § 95.

5 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 77. See also *Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, § 40.

the reckoning of time within which to assess reasonableness in filing the Application should have been the date when the Court of Appeal rendered its judgment that is on 28 June 2003. However, in the instant case, the actual starting date for computing the time is 29 March 2010, that is, when the Respondent State filed its Declaration because that is when individuals could seise the Court with claims against the Respondent State.

34. Secondly, the Court observes that the period between 2007 and 2013 were the formative years of its operation. As the Court has previously held, during the stated period, members of the general public, let alone persons in the situation of the Applicant in the present case, could not be presumed to have had sufficient awareness of the existence of the Court.⁶ Consequently, the period to be assessed in the present case, is that between 2013, when the public would be expected to have become aware of the Court and 2017, the year when the Application was filed, which is a period of four (4) years. The issue for consideration is whether such a period of time is reasonable within the meaning of Article 56(6) of the Charter.
35. The Court recalls its jurisprudence, 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."⁷ Some of the circumstances that the Court has taken into consideration include: imprisonment, being lay without the benefit of legal assistance,⁸ indigence, illiteracy, lack of awareness of the existence of the Court, incarceration at the death-row⁹ and the use of extraordinary remedies.¹⁰
36. The Court notes that in the present Application, the Applicant is self-represented before this Court. Also, proceedings involving him before domestic courts and the alleged violations occurred between 2001 and 2003 before the Court came into existence.

6 *Sadick Marwa v United Republic of Tanzania*, ACTHPR, Application No 005/2016, Judgment of 2 December 2021, § 52.

7 *Norbert Zongo v Burkina Faso* (merits), *op. cit.*, § 92. See also *Alex Thomas v Tanzania* (merits) *op. cit.*, § 73.

8 *Alex Thomas v Tanzania* (merits), *op. cit.*, § 73; *Christopher Jonas v Tanzania* (merits) *op. cit.*, § 54; *Amir Ramadhani v United Republic of Tanzania* (merits) (11 May 2018) 2 AfCLR 344, § 83.

9 *Evodius Rutechura v United Republic of Tanzania*, ACTHPR, Application No 004/2016, Judgment of 26 February 2021, § 48.

10 *Armand Guehi v United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 56; *Werema Wangoko v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 520, § 49 *Alfred Agbes Woyome v Republic of Ghana* (merits and reparations) (28 June 2019) 3 AfCLR 235, §§ 83-86.

37. The Court further notes that the Applicant was incarcerated and was therefore limited in movement and with limited flow of information which this Court has held in previous similar instances could cause delays in filing applications.¹¹ The latter factor is compounded by the Applicant's incarceration on death row.
38. This situation of seclusion from the general population has without any doubt caused the Applicant to be cut off from possible information flow, and be restricted in his movements. The Court notes that these extenuating factors mitigate in his favour.
39. In view of these circumstances, the Court finds that the period of four (4) years that it took the Applicant to file the present Application, was reasonable within the meaning of Article 56(6) of the Charter and Rule 50(2)(f) of the Rules.
40. The Court further notes that 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.
41. The Court, therefore, finds that all the admissibility conditions have been met and that this Application is admissible.

VII. Merits

42. The Applicant alleges the violations of Articles 2 and 7 of the Charter in relation to the following allegations:
 - i. His conviction was based on unreliable evidence; and
 - ii. The assessment of the evidence leading to the conviction was discriminatory.

A. Allegation that the conviction was based on unreliable evidence

43. The Applicant alleges that the Court of Appeal erred in its decision as it did not properly examine and evaluate the identification evidence adduced by "PW2". He submits further that the Court of Appeal did not consider his arguments regarding the said "identification evidence" which caused a miscarriage of justice. The Applicant, therefore, alleges that the Court of Appeal violated his rights under Article 7 of the Charter.

11 *Supra* note 8.

44. The Respondent State did not file a response.

45. Article 7(1) of the Charter provides: “Every individual shall have the right to have his cause heard ...”.

46. 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.¹²

47. In the instant case, the record before this Court shows that the national courts convicted the Applicant on the basis of evidence tendered by two (2) prosecution witnesses. The Court of Appeal in determining the evidence tendered by PW2 (the deceased’s son) relied on its jurisprudence especially the case of *Waziri Amani v Republic* which enumerates the guidelines on the identification of witnesses. Among the considerations a judge must consider in assessing identification evidence are:

- a. the distance at which the witness observed the incident;
- b. the time at which the crime was witnessed;
- c. the conditions in which such observations occurred including the lighting at the scene; and
- d. Whether the witness knew or had seen the accused before.

48. The Court notes, that the Court of Appeal assessed the circumstances in which the crime was committed and considered the arguments by both the Respondent State and the Applicant, who was duly represented by counsel, in order to eliminate possible errors as to the identity of the perpetrator of the murder. Furthermore, the Court of Appeal particularly noted that the Applicant was at the crime scene and thus his *alibi* was fabricated, that he was well known to the victim and PW2, that a torch was used in the commission of the crime, that it was possible for PW2 to identify the Applicant and further that PW2 himself was injured by the Applicant’s accomplice and therefore they were in close proximity. On the basis of the evidence adduced by the witnesses,

12 *Kijiji Isiaga v Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65.

the national courts convicted the Applicant and sentenced him to death.

49. The Court finds that the manner in which the domestic courts evaluated the evidence relating to the Applicant's identification does not disclose any manifest error or miscarriage of justice to the Applicant. The Court therefore dismisses this allegation.

B. Allegation relating to the discriminatory assessment of evidence

50. The Applicant alleges that the manner in which the Court of Appeal arrived at his conviction through assessing the evidence tendered, violated his right to non-discrimination.
51. The Respondent State did not file a response.

52. Article 2 of the Charter provides:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.
53. The Court observes that the onus lies on the Applicant to prove his claim but that he failed to substantiate it.¹³ The Court also notes that nothing on the record demonstrates that the Applicant suffered any discrimination in the proceedings before the Court of Appeal. The Court notes that the Court of Appeal applied its law and jurisprudence in its assessment of the case to avert any peril of injustice. In this regard, the Court is satisfied that the Applicant has not proven that he was discriminated against and thus dismisses the claim.
54. The Court holds that the Respondent State did not violate Article 2 of the Charter as alleged herein.
55. Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its

13 *Alex Thomas v Tanzania* (merits) (2015) 1 AfCLR 465, § 140.

previous cases¹⁴ that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial officer.¹⁵

VIII. Reparations

56. The Applicant prays the Court to grant him reparations for the violations he suffered including quashing his conviction and sentence and ordering his release.
57. The Respondent State prays the Court to dismiss the Applicant's request for reparations.

58. 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.
59. In the instant case, given that no violation has been established, the issue of reparations does not arise. The Court, therefore, dismisses the Applicant's prayer for reparations.

IX. Costs

60. The Parties did not make any submissions on costs.

14 *Ally Rajabu and Others v United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 104-114. See also, *Amini Juma v United Republic of Tanzania*, ACtHPR, Application No 024/2016, Judgment of 30 September 2021, §§ 120-131; *Gozbert Henerico v United Republic of Tanzania*, ACtHPR, Application No 056/2016, Judgment of 10 January 2022, § 160.

15 *Ally Rajabu and Others v Tanzania* (merits and reparations), § 171. See also, *Amini Juma v Tanzania* (merits and reparations), § 174; *Gozbert Henerico v Tanzania* (merits and reparations), § 217.

61. The Court notes that Rule 32(2) of its Rules provides that “unless otherwise decided by the Court, each party shall bear its own costs, if any.”
62. Consequently, the Court decides that each Party shall bear its own costs.

X. Operative part

63. For these reasons,

The Court

On jurisdiction

Unanimously,

- i. *Declares* that it has jurisdiction;

On admissibility

By a majority of seven (7) for, and three (3) against, Justices Ben KIOKO, Tujilane R. CHIZUMILA and Dennis D. ADJEI, dissenting:

- ii. *Declares* the Application admissible;

On merits

Unanimously,

- iii. *Finds* that the Respondent State did not violate the right to a fair trial protected under Article 7 of the Charter in relation to its evaluation of evidence;
- iv. *Finds* that the Respondent State did not violate the right to non-discrimination protected under Article 2 of the Charter in relation to its decision.

On reparations

- v. *Dismisses* the prayer for reparations

On costs

- vi. *Orders* each that each Party shall bear its own costs.

Separate Opinion: TCHIKAYA

1. The sixty-seventh session of the African Court was the session of “the death penalty”.

2. Despite the increasingly abolitionist, continental and universal position, the African Court, by three judgments, confirmed its position in its earlier decision in *Ally Rajabu and others v Tanzania* of 8 December 2019. I was unable to share the position taken by the majority of the honourable judges through these three judgments on the issue of the death penalty.
3. Since the beginning of the third millennium, 146 states have been classified as either abolitionist or *de facto* abolitionist¹ including the Respondent State in the three cases, namely: *Marthine Christian Msuguri*, *Igola Iguna* and *Ghati Mwita*, all dated 1 December 2022.²
4. *Marthine Christian Msuguri* was the first case examined by the Court. After committing murder, the Applicant in the aforementioned case was incarcerated at the central prison of Butimba (Mwanza) having been found guilty of the offence and sentenced to death. The second case involved Mr. *Igola Iguna*, who was incarcerated at Uyui Prison (in the Tabora Region). He was sentenced to death for murder. Finally, the third case involved *Ghati Mwita*, a woman convicted of murder, sentenced to death and incarcerated at the same Butimba Central Prison.
5. All in all, these three applicants challenged before this Court, *mutatis mutandis*, the violation of their rights in the proceedings before domestic courts, which resulted in the death penalty.
6. This opinion reformulates and supports the idea that the death penalty is vacuous in socio-human terms on the one hand, and on the other hand, highlights the wait-and-see attitude of the Court. This wait-and-see attitude is due to the fact that it denounces the irregular nature of the mandatory penalty imposed by the Respondent State without questioning the underlying principle. Having stated the grounds of the judgments, the Court does not seem to dwell on the death penalty legal regime.
7. As in its 2019 decision in *Rajabu et al.*,³ the Court in these three judgments invalidates Tanzania's mandatory death penalty provisions but allows the death penalty to persist in the Respondent State's system. It should have taken the opportunity to strengthen international law on this issue. This assessment of

1 The death penalty is enshrined in domestic law, but it is not applied.

2 ACtHPR, *Marthine Christian Msuguri v Tanzania; Igola Iguna v Tanzania, Ghati Mwita v Tanzania*, 1 December 2022. A fourth case, *Thomas Mgira v Tanzania* (Application No 003/2019), relating to the death penalty, was on the Court's list for this 67 session, but was deferred for further consideration.

3 See The Individual Opinions in the 2019 *Ally Rajabu et al.* decision, Justices Bensaoula Chafika and B. Tchikaya.

the law on the death penalty, which makes a distinction between crime and offence, should no longer be supported because of the evolution of international human rights law. The Court, a human rights court, should keep pace with the evolution of international law.

8. As long as it is the task of international jurisdictions to develop the clarity of human rights, it seems useful to recall that *the right to life and the sanctity of human life* are not associated with the death penalty, of which they are the strict antidotes. For this reason, it seems unfortunate that the three decisions of the Court have maintained the old legal regime that apply a variant of the death penalty (I.). Next, it will be clarified that the current situation in which Article 4 of the Charter operates and the evolution of human rights, imposes an interpretation that rejects any form of death penalty (II.).

I. “Keeping the death penalty alive” through three judgments/decisions

9. Three judgments have just been delivered by the Court. Common to all three is the fact that they recall the 2019 *Rajabu and Others v Tanzania* decision and by doing so, they keep the death penalty alive.

A. Confirmation of the 2019 precedent

10. The operative part of its 2019 decision in *Ally Rajabu and others* states:
 - § 8: Finds that the Respondent State violated 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;
 - § 9: Finds that the Respondent State has violated the right to dignity protected under Article 5 of the Charter in relation to the provision for the execution of the death penalty imposed in a mandatory manner.
11. By these grounds, the Court deplores various infringements of fundamental rights, but, as it does in the judgments that follow, it does not reject the empire of the death penalty. This approach is once again the focus of attention in the three cases.
12. In the *Marthine Christian Msuguri* judgment of 2022 the Court states in its operative part that:
 - “v Finds that the Respondent State has violated the right to life protected 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;

...

vii. Finds that the Respondent State has violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter in relation to the lengthy pre-trial detention, detention in the death row, and confinement".⁴

13. There is one particular element in this provision. The Court rejects and condemns the fact that the applicant was subjected to long pre-trial detention, detention on death row and confinement. This is somewhat contradictory, as the death penalty is indirectly validated. The death penalty has often been synonymous with death row and confinement.
14. *Last but not least*, the Court, once again, made a point of recalling its constant jurisprudence. In the instant case, the legality of the mandatory death penalty under international law is challenged.⁵ The United Nations Human Rights Committee had declared that the mandatory death penalty: "constitutes an arbitrary deprivation of life, in violation of article 6 of the *International Covenant on Civil and Political Rights*".⁶ It is clear that:
"the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence".⁷
15. These words are repeated in the *Igola Iguna* decision. Paragraph 55 states that:
"Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does

4 ACTHPR, *Marthine Christian Msuguri v Tanzania*, *op. cit.* at § 143.

5 ACTHPR, *Rajabu et al.*

6 Human Rights Committee, *Pagdayawon Rolando v Philippines*, Communication No 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, 8 December 2004, § 5.2. 99; UN Doc. E/CN.4/1999/39, 6 January 1999, § 63. 100; UN Doc. E/CN.4/2005/7, 22 December 2004, § 80. See also *Woodson v North Carolina*, 428 U.S. 280 (1976).

7 Human Rights Committee, PACE document 12223 on the situation in Belarus, 27 April 2010.

not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial officer”.⁸

16. The Court typifies the Applicant *Iguna* in demonstrating the need to comply with international law. Thus, Mr. *Igola Iguna* was the subject of an erroneous procedure and should not have been sentenced to death.

B. The specificity of the Ghati Mwita judgment

17. The *Ghati Mwita* case does not depart from this. The operative part states:
“xiii. Finds that the Respondent State has violated the right to life of the Applicant, protected by Article 4 of the Charter by reason of the mandatory nature of the death penalty;
“ix. Finds that the respondent state has violated the right to dignity under Article 5 of the Charter by prescribing hanging as the method of execution of the death penalty”.⁹
18. As a result, the state “violated the right to life” and acted contrary to international law and its evolution.
19. Two violations of fundamental rights are involved: the violation of life and the violation of human dignity.
20. The *Ghati Mwita* decision introduces the idea that hanging is unacceptable, unlike other methods of enforcing the death penalty, without saying which.¹⁰ Moreover, no execution technique humanizes the death penalty or makes it lawful. The same goes for hanging. Europe was not mistaken in adopting a set of Rules that is mandatory for all European States, which prohibit trade of instruments used in the enforcement of the death penalty.¹¹
21. The Court confirmed its displeasure in *Amini Juma v Tanzania* in 2021,¹² a case that was of particular interest to the Court. In that case, on 15 December 2003, the Applicant was charged with murder and sentenced to life imprisonment. The Applicant appealed the conviction and sentence, and the Respondent State also appealed, seeking an upward review of the sentence. The Applicant’s appeal was dismissed and his sentence of life

8 ACTHPR, *Igola Iguna v Tanzania*, op. cit. at § 55.

9 ACTHPR, *Ghati Mwita v Tanzania*, op. cit. at § 184.

10 Points ix of the operative part.

11 EU, Regulation No 2019/125 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, 5 April 2019.

12 ACHPR, *Amini Juma v Tanzania*, 30 September 2021.

imprisonment was replaced by a sentence of death by hanging, thus granting the Respondent State's appeal.

22. In the 2021 *Amini Juma* case, like the three 2022 cases, and regarding the Appeal Court substituting life imprisonment for capital punishment by hanging, the Court found that the Respondent State violated Article 5 of the Charter insofar as it allowed the death penalty to be carried out "through a brutal manner, that is, by hanging" (§ 132).¹³
23. This decision also emphasises that hanging a person is [...] inherently degrading. Furthermore, [...] the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature [...], the method of implementation of that sentence, that is, hanging, inevitably encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment.¹⁴
24. This reasoning was also found in *Rajabu et al*:
The Court observes that many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto. In line with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should therefore be that, in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible.
25. The central question of respect for the right to life and the strict observance thereof, enshrined in international human rights law, is once again raised.

II. The right to life and the end of the death penalty are already enshrined in international law

26. The question of the death penalty regime in Africa and its inevitable demise is considered. The fact that the current regime is contrary to Article 4 of the African Charter on the right to life gives rise to this reflection. This last aspect, mentioned earlier, deserves to be updated.

13 v AU Commission on Human and Peoples' Rights, *Case of Interights and Ditshwanelo v Republic of Botswana*, 18 November 2015: "where the death penalty is applied by a state party for the most serious crimes, it must be carried out in such a way as to cause the least possible physical and mental suffering".

14 ACTHPR, *Amini Juma v Tanzania*, 30 September 2021, § 136.

A. Human rights and the death penalty

27. We can detail the bumpy path of the Arusha Court on this issue. The death penalty has evolved, before becoming contrary to international rules and fundamental freedoms, for example, Article 2 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that “No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law”. While the death penalty regime is still contrasted in the Inter-American system,¹⁵ the jurisprudence of the ECHR has followed the trend towards the abolition of the death penalty in Council of Europe member states, thereby following the footsteps of the European Court of Human Rights.¹⁶ Protocol No 13 is clear in its reference. It speaks of abolition of the death penalty “in all circumstances”.¹⁷
28. It seems reasonable to discuss the death penalty in relation to other human rights. This was the approach of the Inter-American Court when it examined the death penalty regime with the right to life, in *the Case of Martínez Coronado v Guatemala* of 10 May 2019.¹⁸ The Inter-American Court showed its leaning towards an “abolitionist tendency” in its interpretation of this form of punishment, which implies that the use of the death penalty is exceptional.¹⁹ Clearly, this represents progress on the part of

15 The death penalty is maintained in one-third of OAS member states. Of the 14 states that apply it, 12 are now in the English-speaking Caribbean. However, none of them has carried out executions for more than a decade. The United States is the only OAS country that carries out executions.

16 ECHR, *Al-Saadoon and Mufdhi v United Kingdom*, 2010, § 116: Following the opening for signature of Protocol No 6 to the Convention, the Parliamentary Assembly of the Council of Europe established a practice whereby states wishing to join the Council of Europe had to commit themselves to an immediate moratorium on executions, to abolish the death penalty in their domestic legislation, and to sign and ratify Protocol No 6.

17 Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on the abolition of the death penalty in all circumstances. All member states of the Council of Europe have now signed this protocol, and ratified it, except Russia. Article 1 on the abolition of the death penalty states that “The death penalty is abolished. No one shall be condemned to such a penalty or executed”.

18 IACHR, *Martínez Coronado v Guatemala*, merits, reparations and costs, 10 May 2019, Series C, n° 376, § 62. v *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, 8 June 1990, OASTS no 73. v also *Restrictions to the Death Penalty* (1983), Advisory Opinion, OC-3/83, IACHR (Ser A) no 3; L. Hennebel, *The American Convention on Human Rights: Mechanisms of Protection and Scope of Rights and Freedoms*, Bruylant, 2007, Pref.

19 The wording of Article 4: on the right to life states that “Every person has the right to have his life respected. This right shall be protected by law and, in general,

the said court.

29. The Court, therefore, remained committed to its position expressed in the judgment, *Ally Rajabu and others* (28 November 2019). It did not take a new position. While impugning the laws of Tanzania on the mandatory death penalty, it allows the death penalty to continue; it only rejects and challenges the so-called mandatory death penalty in the three decisions under discussion.
30. In this, the Court says:
“Given the framing of Article 4 of the Charter, and the broader developments in international law in relation to the death penalty, the Court holds that this type of punishment should exceptionally be reserved only for the most heinous of offences committed in seriously aggravating circumstances”.²⁰
31. Thus, deplorably, the death penalty is maintained.
32. It is of interest to note that in *Marthine Christian Msuguri*, the Court is persuaded that although the applicant’s arguments are admissible, they cannot prosper because of domestic legislation. The Court refrains from going further.
33. The Court noted that:
In this respect, this Court recalls its position in *Gozbert Henerico v United Republic of Tanzania*²¹ where it found that the failure of the High Court to consider the medical evaluation report of the Applicant’s mental health status, constituted a grave procedural irregularity that resulted in a violation of the Applicant’s right to a fair trial, as guaranteed under Article 7(1) of the Charter.²²
In sum, the Court finds the insanity argument valid, but it cannot defeat the argument of the current death penalty legislation. One might think of the image of the *Wolf and the Lamb*, so dear to the fabulists.

B. Article 4 of the African Charter and total abolition of the death penalty

34. Relying on Article 4, which protects the right to life by declaring it

from the moment of conception. No one shall be arbitrarily deprived of his life”. And, paragraph 6 adds that “Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority. The Convention gives elements of maintenance and attachment to life”.

20 ACTHPR, *Ghati Mwita*, § 66.

21 ACTHPR, *Gozbert Henerico v Tanzania* (merits and reparations), § 160.

22 ACTHPR, *Msuguri v Tanzania*, § 72.

sacred and inviolable,²³ the Court, in *Ghati Mwita*,²⁴ acknowledged the two trends, global and African, towards abolition of the death penalty. It acknowledged that

“[...] a global trend towards the abolition of the death penalty, including the adoption of the Second Option Protocol to the International Covenant on Civil and Political Rights (ICCPR)”²⁵ § 64.

However, the Court supports its position by arguing that:

“At the same time, [...] the death penalty remains on the statute books of some states and that no treaty, on the abolition of the death penalty has gained universal ratification.²⁶ Presently, the Second Optional Protocol to the ICCPR, the Court notes, has ninety (90) State Parties out of the one hundred-seventy three (173) State Parties to the ICCPR”, § 64.

35. The Court takes up the same idea in *Igola Iguna* where stands as an *obiter dictum* protecting the right to life:

“Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial office”.²⁷

36. The African continent is joining the international movement whose goal is the total abolition of the death penalty. 20 out of the 55 member states of the African Union (AU), no longer execute those sentenced to death, and nearly forty countries are abolitionist in law or in practice. It is possible to say that the majority of these states refuse this ultimate sanction.²⁸ It is well known that “the

23 Trindade Antonio Augusto Cançado, The Inter-American Human Rights Protection System: Current Status and Prospects for Evolution at the Dawn of the 21st Century, *AFDI*, 2000, p. 548.

24 *Ghati Mwita* judgment, §§ 64 and 65.

25 *Amini Juma v United Republic of Tanzania*, ACTHPR, Application No 024/2016, Judgment of 30 September 2021 (merits and reparations), § 122 and *Ally Rajabu and others v United Republic of Tanzania*, ACTHPR, Application No 007/2015, Judgment of 28 November 2019 (merits and reparations), § 96. It should be noted that the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

26 For more comprehensive information on developments relating to the death penalty, see, United Nations General Assembly, Secretary-General's report on a moratorium on the use of the death penalty 8 August 2022.

27 Judgment, *Igola Iguna v Tanzania*, § 55.

28 As of this date, Congo-Brazzaville and Madagascar having abolished capital punishment in 2015 and Guinea in 2016 are the last African abolitionist states.

Respondent State violated Article 1 of the Charter by failing to amend its Penal Code which permits the mandatory death sentence as well as execution by hanging”.²⁹ It was, therefore, up to the Court to place this violation in its legal context: in addition to the right to life, the application of the death penalty was at stake.

37. This issue falls under the ambit of individual states, which determine their criminal policy and the hierarchy of penalties enshrined in their criminal law. As has already been written, the concept of reservation takes on its full meaning in international law. It applies to those “matters which are essentially within the domestic jurisdiction of a State”, within the meaning of Article 2(7) of the Charter,³⁰ and which are subject to their international commitments. The Court, using its praetorian power, should give impetus to this movement in order to uphold the right to life.
38. The European system, which, through Article 3 of its last Protocol prohibiting the death penalty, excludes reservations, sets the tone. It states that “No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol”. The Protocol takes care to emphasise that “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”³¹ It is further states that this constitutes a “final step in order to abolish the death penalty in all circumstances”.³²
39. In support of this opinion, it is useful to recall that the superiority of international law is a principle applicable to all categories of internal procedural and material rules. This commitment is sovereignly negotiated and fixed by the State with its peers. It is therefore up to the States to adapt their legal system. It is not certain that, for the law of treaties, States lose their sovereignty by their international commitment.³³

29 *Idem*, § 14.

30 W Schabas *The abolition of the death penalty in International Law*, Grotius, Cambridge, 1993, 384 p.

31 Article 1, Protocol No 13, *Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, Vilnius, 3 May 2002

32 *Idem*, preamble to the Protocol

33 Whatever its relationship with international law, a State only commits itself to rights and duties which, when accepted by other States, become the law in force. This law takes precedence, otherwise it is unlawful. This also applies to its supranational relations in the field of human rights. A well-known formula of the Permanent Court underlines this. *v P.C.I.J., A.C., Pecuniary claims of Danzig railway employees who have entered Polish service against the Polish railway administration* (jurisdiction of the Danzig courts), 3 March 1928, *Rec. Serie B*, No 15, pp. 18. In this same case, the Hague Court laid down the principle of the non-invocability of constitutional provisions against international law: “a State cannot,

III. Conclusion

40. If the Court fails to keep up with the advances in international law, it is bound to be “caught up” by the international law patrol. Human rights doctrine and jurisprudence will note this. While listening to the majority position of my honourable colleagues, a question deserves to be asked: How can we understand that the Court maintains its jurisprudence behind the evolution of the applicable international law. There would be two regimes: one favourable to the full protection of the right to life³⁴ and the other less favourable.³⁵ A harmonization is necessary.

Joint Dissenting Opinion: KIOKO, CHIZUMILA and ADJEI

1. In the above-mentioned matter, the Court properly addressed itself to the admissibility requirements specified in Rule 50(2) of the Rules, which substantially reproduces the provisions of Article 56 of the Charter. The majority opinion is that all admissibility conditions have been met and therefore the Application is admissible.
2. While we fully agree generally with the assessment and findings of the majority with regard to most of the admissibility conditions,

vis-à-vis another State, rely on the constitutional provisions of the latter but only on international law and international commitments validly entered into, on the other hand, and conversely, a State cannot invoke vis-à-vis another State its own Constitution in order to evade the obligations imposed upon it by international law”, *Treatment of Polish Nationals in Danzig*, 4 February 1932, Series A/B, No 44, pp. 24.

34 D Breillat ‘L’abolition mondiale de la peine de mort, A propos du 2e Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques visant à abolir la peine de mort’, *RSC*, 1991, p. 261.

35 The 2019 *Rajabu et al.* decision, and other 2022 decisions from this perspective, reflect a limited reading of Article 4 of the Charter.

we have parted ways in respect of the requirement of filing an application within a reasonable time enshrined in Rule 50(2)(f) of the Rules. We believe that the majority erred in interpreting and applying this condition to the present case, hence this dissenting opinion made pursuant to the provisions of Rule 70(2) of the Rules of Procedure of the Court. We have reached this decision in order to ensure consistency in the decision of the Court, even though we strongly believe that a human rights court should as much as possible understand and take into account the challenges faced by Applicants.

3. We believe that the text of a law must be given effect unless it is established that its application would render the text absurd. Furthermore, a Court has the right to depart from its established jurisprudence when it deems it fit to do so but must give cogent reasons for the departure. In the instant case, what is disturbing is that the Court is fixing a specific date (year and not month) when the public should be presumed to have become aware of the existence of the Court without offering any empirical evidence to that effect. It is as a result of the foregoing and other reasons that we will delve into hereinbelow that we hold the firm opinion that there was no basis to declare the application admissible.

I. Filing of an Application within a reasonable time

4. Article 56(6) of the Charter provides that applications will not be received by the Court, unless they “are submitted 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 seised with the matter.” Article 56(6) of the Charter does not provide a specific time limit and therefore, the Court has resorted to a case-by-case approach.¹
5. The requirement of filing an application within a reasonable time is an important admissibility criterion recognised in international human rights law.² It is a counterpart of the provision relating to prescription recognised in municipal jurisdictions. The principle is that applicants who wish to seize an international tribunal should do so within a reasonable time from the date they exhausted local

1 *Norbert Zongo v Burkina Faso* (merits), *op. cit.*, § 92. See also *Alex Thomas v Tanzania* (merits) *op.cit.*, § 73.

2 See Article 35(1) of the European Convention on Human Rights (1950), Article 46 American Convention on Human Rights

remedies at the national level.

6. It is important to note that the rule seeks to ensure that applicants show diligence in pursuing their case and do not sleep on their rights. This is dictated by pragmatic considerations, particularly, when applicants take unreasonably long time to institute their case, the Respondent State would no doubt face difficulties in responding to the allegations and more so, before an international tribunal that needs to properly determine the case. As the Court has previously held:

the purpose of Rule [50(2)(f)] of the Rules is to guarantee “[j]udicial security by avoiding a situation where authorities and other concerned persons are kept in a situation of uncertainty for a long time”. Also, “to provide the Applicant with sufficient time for reflection to enable him appreciate the opportunity of bringing a matter to court if necessary” and finally, “to enable the Court to establish the relevant facts relating to the matter”.³

7. Other international courts also have a time limit in which applications should be filed at those Courts. Article 30(2) of the Treaty Establishing the East African Community provides that an application should be filed within two (2) months of the date that an applicant became aware of the complaint. The East Africa Court of Justice has held that “[t]he Treaty does not contain any provision enabling the Court to disregard the time limit of two months and that Article 30(2) does not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action comes to the knowledge of the Claimant.”⁴

8. The European Court of Human Rights (ECHR) require Applications to be filed no later than four (4) months after exhaustion of local remedies. The ECHR was of the view that:

The primary purpose of the four-month rule is to maintain legal certainty by ensuring that cases raising issues under the Convention are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time (*Lopes de Sousa Fernandes v Portugal* [GC], § 129). It also affords the prospective applicant time to consider whether to lodge an application and, if so, to decide on the specific complaints and arguments to be raised and facilitates the establishment of facts in a case, since with the passage of time, any fair examination of the

3 *Godfred Anthony and another v United Republic of Tanzania*, ACtHPR, Application No 015/2015, Ruling of 26 September 2019 (jurisdiction and admissibility), § 45.

4 *Professor Nyamoya Francois v Attorney General of the Republic of Burundi and the Secretary General of the East African Community*, EACJ, Reference 8 of 2011.

issues raised is rendered problematic (*Ramos Nunes de Carvalho e Sá v Portugal* [GC], §§ 99-101; *Sabri Güneş v Turkey* [GC], § 39.⁵

9. Article 46(1)(b) of the American Convention on Human Rights provides “that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment”.

II. Consideration of reasonable time in the present case

10. We are unable to join the majority of the Court in their decision, as the position taken by them does not accord with the jurisprudence of the Court. We do not intend to reproduce the facts of the case which have been well outlined in the decision of the majority and will only discuss the relevant part of the same when necessary.
11. In the present case, the Applicant was convicted of murder on 27 March 2001 and sentenced to death by hanging. He appealed to the Court of Appeal and it dismissed his appeal on 28 June 2003. The Court of Appeal being the highest judicial organ in the Respondent State means that the available local remedies were exhausted on 28 June 2003.⁶
12. Given that the Applicant could only seize the Court from 29 March 2010 as that is the date when the Respondent State filed its Declaration then the period for computation of reasonable time would be between this date and 13 June 2017, the date when the Application was filed before the Court. The period for consideration therefore, is seven (7) years, two (2) months and fifteen (15) days.
13. We note that the Court had held that between 2007 and 2013, during the early years of the Court, members of the general public in Tanzania did not know of the existence of the Court and that this period should be given to them as a moratorium.⁷ The moratorium does not suggest that time shall not run against a potential applicant, but where an applicant whose right accrued to file an application within that time but could not file because he or she did not know of the existence of the Court is required to file it within a reasonable time from that date. Conversely, an Applicant who does not prove that he did not know about the existence of the Court would not benefit from the moratorium.

5 ECHR, *Mocanu and Others v Romania* [GC], § 258.

6 Paragraph 4 of the judgment.

7 *Sadick Marwa Kisase v United Republic of Tanzania*, AfCHPR, application No 005/2016 Judgment of 2 December 2021 (merits and reparations) §§51-52.

14. It is therefore not true that time did not run, as stated by the majority, against applicants between 2007 and 2013, especially after the Respondent State deposited its Declaration. The majority seems to construe the period between 2007 to 2013 as a period within which time shall not run, which interpretation will lead to absurdity and should not be adhered to. Applicants who filed their applications after 2013 shall be at the mercy of the Court to determine whether they were filed within a reasonable time or not.
15. Despite the six-year moratorium given to individuals who filed their cases against Tanzania to assert their rights within a reasonable time, the Applicant slept on his rights until 13 June 2017, when he filed this application.
16. It is important to recall that the Court has been consistent in its jurisprudence that the determination of reasonableness “depends on the specific circumstances of the case and should be determined on a case-by-case basis.”⁸ Accordingly, the Court has taken into consideration circumstances such as imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisal and the use of extra-ordinary remedies as relevant factors to consider whether the delay of an applicant in seizing the Court is justified.⁹ This approach has allowed the Court to employ some flexibility.
17. However, the Court has also, albeit implicitly, adopted a strict standard of proof to the effect that the longer an applicant delays to file his application, particularly for periods of over five (5) years, the stricter the Court’s demand for justification with sufficient substantiation. For instance, in *Godfred Anthony and Ifunda Kisite v Tanzania*, the Court held that a delay of five (5) years and four (4) months was unreasonable despite the fact that the Applicants were “also incarcerated and thus restricted in their movement”. The Court noted in this case that apart from simply describing themselves as “indigent”, the applicants did not assert or provide “any proof that they were illiterate, lay, or had no knowledge of the existence of the Court”. The Court further observed that “the Applicants were represented by legal counsel in their trial and appeals at the domestic level but they did not file for review of their final judgments”.

8 *Norbert Zongo v Burkina Faso* (merits), op. cit, § 92; *Alex Thomas v United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, § 73.

9 See paragraph 35 of the judgment.

18. In a similar fashion, in *Yusuph Said v Tanzania*, the Court held that a period of eight (8) years and three (3) months was an unreasonable lapse of time before the filing of an application. The Court held that “even though, he is incarcerated, the Applicant did not indicate how his incarceration impeded him in filing his application earlier than he did.”¹⁰ Moreover in *Chananja Luchagula v Tanzania*, the Applicant was a death-row inmate, who filed his case after six (6) years, five (5) months and fifteen (15) days and it was found to be inadmissible for failure of filing it within a reasonable time.¹¹
19. In assessing reasonableness, the majority, for the first time, found it important to consider the fact that the applicant was “a convicted inmate on death row, is secluded from the general population and cut off from possible information flow, and restricted in his movements”.¹² The majority neither provided reasons nor specified circumstances unique to the instant case that justified a departure from the Court’s earlier position, especially the two cases mentioned above, that of, *Yusuph Said* and *Chananja Luchagula*.
20. Furthermore, we are of the view that different treatment should not be given to the Applicant on the sole ground that he is on death row and cannot access information about the Court as the majority seem to adopt in the instance case. The Court differentiated between persons in prison custody serving different custodial sentences from the applicant and other persons in condemned cells as they have their freedoms curtailed to an equal extent and should be treated equally.
21. The treatment by the Court of persons serving different prison terms differently from those on death row and to make application filed by those on death row automatically admissible irrespective of the time the application is filed is discriminatory and unfair. The position taken by the majority favours persons in death-row as opposed to other persons serving life or lesser prison terms and therefore failed to treat the two categories of persons in lawful custody equal before the law.
22. We are mindful that this Court is a human rights court and should exercise flexibility within the law to persons who allege that their

10 *Yusuph Said v United Republic of Tanzania*, ACTHPR, Application No 011/2019, Ruling of 30 September 2021 (jurisdiction and admissibility), § 44.

11 *Chananja Luchagula v United Republic of Tanzania*, ACTHPR, Application No 011/2016, Ruling of 25 September 2020 (jurisdiction and admissibility), § 60.

12 Paragraph 40 of the judgment.

human rights have been violated. However, the right to invoke human rights jurisdiction is time-bound in every jurisdiction as demonstrated above and therefore this benefits the vigilant and not the indolent. A person should not be permitted to keep a Respondent State in an uncertain situation as to whether a person whose case was heard by a domestic court would seek relief from a continental or regional court for human rights violations or not.

23. It is therefore our considered opinion that the majority should have, in line with the Court's previous decisions, computed reasonableness from the date of the deposit of the Declaration, not from the date that the public supposedly found out about the operations of the Court. In addition, the majority should have clearly stated what distinguished this case from the two others mentioned above which were found to be inadmissible because the Applicants therein did not justify why it took them so long to seize the Court. Additionally, even if it was justified to treat those on death row differently, which we refute, we think that there cannot possibly be any justification to fix a specific time when such persons could be taken to have become aware of the Court's existence, in the absence of empirical evidence.
24. The African Commission on Human and Peoples' Rights considered twenty-two months that it took an Applicant who was fleeing persecution to be unreasonable, arguing that it was "beyond a reasonable man's understanding of a reasonable period of time."¹³ In our humble view, the seizing of the Court after seven (7) years, two (2) months and fifteen (15) days without any justification cannot be considered reasonable in the understanding of a reasonable man.
25. Whereas the Court has all the power to depart from its own jurisprudence, such departure must be warranted by cogent reasons and necessitated by the peculiar circumstances of the case, neither of which was present in the instant case. The majority's position risks causing unjustified jurisprudential inconsistency and hence, gravely jeopardize legal certainty.

13 ACHPR, *Majuru v Zimbabwe*, Communication No 308/2005) [2008] ACHPR 95; (24 November 2008)