

Mwambipile & Anor v Tanzania (ruling) (2022) 6 AfCLR 925

Application 042/2020, *Tike Mwambipile and Equality Now v United Republic of Tanzania*

Ruling, 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 Applicants, a female citizen of the Respondent State and a non-governmental organisation with observer status before the African Commission on Human and Peoples' Rights, filed this Application. They alleged that the Respondent State's policy that bans pregnant and parenting girls from having access to public schools and education violates some Charter protected rights. In response to communication from the Court, the African Committee of Experts on the Rights and Welfare of Children in Africa informed the Court that a similar matter against the Respondent State was pending before it. In this ruling, the Court held that the Application was inadmissible because the matters in contention had been settled by another international forum.

Jurisdiction (material jurisdiction, 26-27)

Admissibility (settlement in accordance with AU principles, 43-61; cumulative nature of requirements 63)

Dissenting Opinion: TCHIKAYA

Admissibility (settlement in accordance with AU principles, 8-10)

Dissenting Opinion: BEN ACHOUR

Admissibility (settlement in accordance with AU principles, 3-4, 10)

Separate Opinion: BENSAOULA

Admissibility (settlement in accordance with AU principles, 5-7)

I. The Parties

1. The Applicants are Tike Mwambipile, a female national of the United Republic of Tanzania and Equality Now, a Non-Governmental Organisation (NGO) with Observer Status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the African Commission"). They challenge the Respondent State's policies that exclude pregnant and parenting girls from public schools.
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 provided for under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”), by virtue of 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 of the Application

A. Facts of the matter

3. The Application concerns an alleged ban by the Respondent State of pregnant girls from attending public primary and secondary schools and preventing them from re-accessing the schools even after delivery. The Applicants allege that the ban violates the rights to education and non-discrimination.

B. Alleged violations

4. The Applicants allege that the Respondent State violated the rights of all girls in the Respondent State, notably:
 - i. The right to education protected by:
 - a. Articles 1 and 17(1) of the Charter;
 - b. Article 11 of the African Charter on the Rights and Welfare of the Child (hereinafter referred to as “the African Children’s Charter”);
 - c. Article 12 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (hereinafter referred to as “the Maputo Protocol”);
 - d. Articles 13 and 23 of the African Youth Charter;
 - e. Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as “CEDAW”);

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

- f. Articles 28 and 29 of the Convention on the Rights of the Child (hereinafter referred to as “the CRC”);
 - g. Article 13 of the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as “ICESCR”);
 - h. Article 18(4) of the International Covenant on Civil and Political Rights (hereinafter referred to as “ICCPR”);
 - i. Articles 1, 3 and 4 of the United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education (hereinafter referred to as “the Convention against Discrimination in Education”); and
 - j. Article 26 of the Universal Declaration of Human Rights.
- ii. The right to non-discrimination protected by:
- a. Articles 1, 2, 17(1) and 18(3) of the Charter;
 - b. Articles 1, 3, 4, 11 and 24 of the African Children’s Charter;
 - c. Articles 2 and 12 of the Maputo Protocol; and
 - d. Articles 1, 2, 3 and 4 of the Convention against Discrimination in Education.

III. Summary of the Procedure before the Court

- 5. The Application was filed on 19 November 2020 together with a request for provisional measures.
- 6. On 22 December 2020, the main Application together with the request for provisional measures and additional evidentiary documents were served on the Respondent State.
- 7. On 23 April 2021, the Registry wrote to the African Committee of Experts on the Rights and Welfare of the Child (hereinafter referred to as “the ACERWC”) and to the African Commission to seek confirmation whether the subject matter of this Application is related to a matter being examined by them. It also requested whether the ACERWC or the Commission, or through any of their Special Mechanisms, would be interested to act as *amicus curiae* in the case.
- 8. On 29 July 2021, the ACERWC informed the Court that it had received a similar communication as the present Application which was pending determination. The ACERWC further informed the Court that it had already declared the Communication submitted to it admissible and had communicated to the Applicants and the Respondent State that it would hold a hearing of the case in its upcoming Session to be held in November 2021. The hearing was scheduled during its previous 37th Session, however, it was deferred to the 38th Session due to the sudden passing of the late president of the Respondent State in the week of the hearing.

The ACERWC also informed the Court that since it was already considering the matter under its jurisdiction, it had decided that it would not be in the position to act as *amicus curiae*.

9. The African Commission did not respond to the Court's request.
10. On 24 September 2021, the Court wrote to the Registrar of the East African Court of Justice to seek confirmation whether the subject matter of this Application was related to a matter being examined by the East African Court of Justice.
11. On 4 October 2021, the Registrar of the East African Court of Justice informed the Court that there was a reference filed with the East African Court of Justice on the same subject matter as the present Application challenging the expulsion of pregnant girls backed by the Education (Expulsion and Exclusion of Pupils from Schools) Regulations which was pending determination.
12. On 29 November 2021, the Court decided to consider the request for provisional measures together with the merits of the Application.
13. On 21 February 2022, the Court requested the Respondent State to inform the Court about recent developments, if any, relating to this matter since the submission of its Response.
14. On 22 July 2022, the Respondent State filed submissions on the measures it had taken to address the issues raised by the Applicants in the present Application.
15. The Parties filed their pleadings within the time stipulated by the Court.
16. On 16 September 2022, the ACERWC submitted to the Court its decision in *Communication No: 0012/Com/001/2019 in the matter between Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) against the United Republic of Tanzania*, regarding the expulsion of pregnant girls and mothers from schools in the Respondent State, which it adopted during its 39th Ordinary Session held from 21 March to 1 April 2022.
17. During the proceedings before this Court, seven (7) organisations filed *amicus curiae* briefs which were duly notified to the Parties. These are: (i) Tanzanian Commission for Human Rights and Good Governance; (ii) Amnesty International; (iii) UNESCO; (iv) Tanzania Women Lawyers Association (TAWLA); (v) Msichana Initiative; (vi) Clooney Foundation for Justice; and (vii) a joint brief by the Initiative for Strategic Litigation in Africa (ISLA), Human Rights Watch (HRW) and Women's Link Worldwide.

18. Pleadings were closed on 22 September 2022 and the parties were duly notified.

IV. Prayers of the Parties

19. The Applicants pray the Court to:

- i. Declare that the expulsion and exclusion of pregnant girls and adolescent mothers from accessing public education in the Respondent State violates their right to education.
- ii. Declare that the current policy implemented by the Respondent State that prohibits pregnant girls and adolescent girls from attending school both in written policy and in State declarations is grossly unlawful, discriminatory, not in the best interest of the child and that it violates their right to non-discrimination.
- iii. Order the Respondent State to immediately revoke the prohibitive policy (both the expulsion regulation and implementation of declarations) and amend its legislation to protect the right to education.
- iv. Order the Respondent State to immediately repeal Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002 to remove “wedlock” as a ground for expulsion and amend the Marriage Act of 1971 to harmonize the age of marriage to 18 for both boys and girls.
- v. Order the Respondent State to develop strategies, programmes and nationwide campaigns that focus on addressing the issue of teenage pregnancies through public education or awareness on sexual and reproductive health and rights as well as on ending child marriages, as this increased community knowledge on family planning and contraceptives will support efforts to address the high rate of teenage pregnancies.
- vi. Order the Respondent State to develop strategies and nationwide campaigns to enable teenage mothers to attend school. This may range from providing subsidies to enable girls with children to attend school, to developing alternative schooling offering the same quality and standard of education as offered in mainstream schools as well as developing and implementing relevant re-entry policies for girls who have given birth.
- vii. Order the Respondent State to put in place constitutional, legislative and administrative measures to guarantee the right to education, including its enforceability domestically, as well as a right to remedies, including reparations, and eradicate discriminatory laws and policies that impede the right to education within six (6) months.
- viii. Order the Respondent State to report to the Court within a period of six (6) months from the date of judgment on the implementation of this judgment and consequential orders.

- ix. Order the Respondent State to publish the judgment in this matter on the official website of its judiciary and of the Ministry responsible for legal affairs, within two (2) months from date of notification of the decision.
 - x. Declare violations of other human rights which were not specifically mentioned by the Applicants in this Application.
 - xi. Issue any other remedy and/or relief that the Court will deem necessary to grant.
 - xii. Order the Respondent State to pay the Applicants' costs.
- 20.** In its Response, with regard to the Court's jurisdiction and admissibility of the Application, the Respondent State prays the Court to order as follows:
- i. That the African Court on Human and Peoples' Rights is not vested with jurisdiction to adjudicate the Application.
 - ii. The Application has not met the admissibility requirements provided by Article 56 of the Charter and Rule 50 of the Rules.
 - iii. The Application be declared inadmissible.
 - iv. That the Application be dismissed.
- 21.** The Respondent State prays the Court to grant the following orders with respect to the merits of the Application:
- i. That the Respondent State has not violated Article 17(1) of the Charter, Article 11 of the African Children's Charter, and Article 12 of the Maputo Protocol.
 - ii. That the Application be dismissed for want of merit.
 - iii. That the cost of the Application be borne by the Applicants.

V. Jurisdiction

- 22.** 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.
- 23.** The Court further observes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction [...] in accordance with the Charter, the Protocol and these Rules."
- 24.** In view of the foregoing, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.
- 25.** The Court notes that the Respondent State claims that it is not vested with jurisdiction to adjudicate this application because the

Applicants are aggrieved with the public declarations issued by some of the Respondent State's officials and Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002 which are both challengeable under the national courts of the Respondent State in accordance with the provision of the Law Reform (Fatal Accident and Miscellaneous Provision) Act.

26. The Court recalls that by virtue of Article 3 of the Protocol, it has material jurisdiction so long as "the Application alleges violations of provisions of some of the international instruments to which the Respondent State is a party".² In the instant matter, the Applicants allege violations of rights guaranteed in the Charter and in other international human rights instruments ratified by the Respondent State.³
27. In light of the above, the Court dismisses the Respondent State's objection and holds that it has material jurisdiction.
28. Noting that nothing on record shows that it does not have jurisdiction in respect of other aspects of its jurisdiction, the Court holds that it has:
 - i. Personal jurisdiction, given that the Respondent State is a party to the Protocol and had deposited the Declaration under Article 34(6) thereof, which entitled the Applicants to access the Court in terms of Article 5(3) of the Protocol. In reference to paragraph 2 of this judgment, the Court recalls that it has held that the withdrawal of the Declaration does not have any retroactive effect and has no bearing on matters pending prior to the filing of the instrument withdrawing the Declaration, or on new cases filed before the withdrawal takes effect.⁴ This Application, having been filed before the withdrawal took effect, is thus not affected by it.
 - ii. Temporal jurisdiction, given that the alleged violations took place after the ratification of the Charter, the Protocol and the depositing of the Declaration by the Respondent State.
 - iii. Territorial jurisdiction, given that the facts on which the alleged violations are based occurred in the territory of the Respondent State.

2 See *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 36.

3 The Respondent State became a State Party to the Charter on 21 October 1986, to the African Children's Charter on 9 May 2003, to the Maputo Protocol on 7 May 2007, to the African Youth Charter on 21 March 2013, to CEDAW on 19 September 1985, to CRC on 10 July 1991, to ICESCR on 11 September 1976, to ICCPR on 3 April 1979.

4 *Andrew Ambrose Cheusi v United Republic of Tanzania*, §§ 35-39.

29. In light of the above, the Court holds that it has jurisdiction to hear the present Application.

VI. Admissibility

30. Pursuant to Article 6(2) of the Protocol, “The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter”.

31. In line with Rule 50(1) of the Rules, “the 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. The Court notes that 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 seized 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 African Union or the provisions of the Charter.
33. The Court notes that the Respondent State raises three objections to the admissibility of the Application. The Court will, therefore, consider first (A) the said objections, and then examine (B) other conditions of admissibility, as applicable.

A. Objections to the admissibility of the Application

34. The Respondent State raises three objections to the admissibility of the Application. The first objection relates to the contention that similar applications are already pending before the ACERWC and

the East African Court of Justice. The second objection relates to the requirement of exhaustion of local remedies and the third one concerns the question whether the Application was filed within a reasonable time.

35. Concerning the first objection, the Respondent State contends that a communication which raises similar allegations to the instant Application had been filed before the ACERWC, namely, *Communication No: 0012/Com/001/2019 in the matter between Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) against the United Republic of Tanzania*.
36. The Respondent State submits that the communication before the ACERWC raises allegations with respect to the right to education and non-discrimination as protected by the Charter and other regional and international instruments, including the African Children's Charter. The Respondent State refers to some of the allegations in the said communication, including the allegation that girls in primary and secondary school who are found to be pregnant are expelled from school with no possibility of re-admission.
37. Furthermore, the Respondent State refers to another Application instituted before the East African Court of Justice, namely *Reference No 10 of 2020 Inclusive Development for Citizens and Center for Strategic Litigation versus the Attorney General of the United Republic of Tanzania*, which it claims also raises similar allegations to the instant Application.
38. The Respondent State argues that under the circumstances, the instant Application cannot be admissible as similar allegations have been raised and are awaiting determination before another international forum with jurisdiction to determine it. The Respondent State submits that this Application is a fit case to apply the doctrine of *res subjudice* so as to prohibit two international courts of competent jurisdiction to simultaneously determine a matter raising similar allegations.

39. The Applicants claim that the Rules do not recognise *res subjudice* as per Rule 50(2)(g) of the Rules which restates in substance Article 56(7) of the Charter.

40. The Applicants submit that the question of the illegality of the education ban premised on Regulation No 4 of the Education Regulation (Expulsion and Exclusion of Pupils from Schools) and cemented by the public declarations as a government policy are yet to be determined by any forum of equivalent jurisdiction to the Court.
41. The Applicants maintain that the cases at issue were lodged by different parties, that they deal with distinguishable matters, are founded on different arguments and that no decision has been made by another body on the merits of the cases.
42. The Applicants, therefore, contend that since there are no similar applications that have been settled before courts of equivalent jurisdiction, that the Application before the Court does not fall within Article 56(7) of the Charter and is for that reason admissible.

43. The Court notes that the Respondent State avers that the applicable admissibility rule in the instant matter is that of *res subjudice*. However, the Court notes from the record that the ACERWC has already adopted its decision No 002/2022 in *Communication No: 0012/Com/001/2019 in the matter between Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) against the United Republic of Tanzania* during its 39th Ordinary Session held from 21 March to 1 April 2022.
44. The Court is, therefore, of the view that the issue at hand is no longer a question of *res subjudice*, but rather whether the matter has been settled in accordance with the principles of one of the instruments invoked in Article 56(7) of the Charter.
45. The Court notes that pursuant to Article 56(7) of the Charter, whose provisions are restated in Rule 50(2)(g) of the Rules, any application filed before it shall fulfil the requirement that they “[d]o 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 African Union or the provisions of the Charter”.
46. The Court recalls that the rationale behind the rule in Article 56(7) of the Charter is to prevent States from being asked to account more than once in respect of the same allegations of human

rights.⁵

47. The Court further recalls that in its earlier decisions in *Gombert Jean-Claude Roger v Republic of Côte d'Ivoire*⁶ and *Dexter Eddie Johnson v Republic of Ghana*,⁷ it developed three cumulative criteria to determine whether the admissibility criteria established in Article 56(7) of the Charter and Rule 50(2)(g) of the Rules have been met.
48. The Court stated in *Dexter Eddie Johnson v Republic of Ghana* that:

the notion of “settlement” implies the convergence of three major conditions: (1) the identity of the parties; 2) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and 3) the existence of a first decision on the merits.⁸
49. Regarding the first criterion, “identity of the parties”, the Court notes that the Respondent State in the proceedings before the ACERWC and in the present Application is the same. The Court notes, however, that the Applicants in the proceedings are different.⁹ Before the ACERWC, the Communication was filed by two NGOs, namely, the Legal and Human Rights Center and the Center for Reproductive Rights. Before the Court, the Application was filed by an individual and a different NGO, that is, Tike Mwambipile and Equality Now.
50. The Court considers, however, that both cases can be qualified as instances of public interest litigation. As the Court has established in its jurisprudence, the identity of parties in different Applications can be considered as being similar to the extent that they both aim to protect the interest of the public at large, rather than only

5 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 55.

6 *Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270, § 45.

7 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 48.

8 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 48.

9 Before the ACERWC, the Application was brought on 17 June 2019 by two NGOs, the *Legal and Human Rights Center and the Center for Reproductive Rights*. Before the East African Court of Justice, the Application was brought on 24 April 2020 by two NGOs, *Inclusive Development for Citizens* and *Center for Strategic Litigation*. Before the African Court on Human and Peoples' Rights, the Application was brought on 19 November 2020 by a female national and an NGO, *Tike Mwambipile and Equality Now*.

specific private interests.¹⁰

51. Accordingly, the Court holds that the criterion of “same identity” of the parties has been met.
52. The second criterion concerns the similarity of the subject-matter of the applications. When considering the subject-matter of the applications, it becomes apparent that both applications challenge the same law, that is Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from School) of 2002, and the same practice of excluding pregnant and young mothers from schools as well as other associated discriminatory practices, including mandatory pregnancy testing.
53. In the application before the ACERWC, the Applicants also claim, among others, that the right to non-discrimination and the right to education, is violated, as enshrined in Articles 3 and 11, respectively, of the African Children’s Charter. In their Communication they also argue that, in accordance with Article 46, the African Children’s Charter should be interpreted with reference to the African Charter, the Maputo Protocol, the CRC as well as other international human rights instruments. Specifically, and in relation to the present Application, the Applicants before the ACERWC refer to Article 2 (right to non-discrimination) and 17 (right to education) of the Charter as corresponding Articles to guarantee children’s right to non-discrimination and to education.
54. From these applications it also emerges that the same reliefs are sought, namely the establishment of a violation of the same provisions enshrined in the above-mentioned human rights treaties; orders to change the same legal and policy frameworks governing the issue of exclusion of pregnant girls and young mothers; orders to address the underlying issue of teenage pregnancies and inadequate sexual and reproductive education and health services.
55. The Court notes, in particular, the ACERWC’s decision in paragraph 109 where it is stated as follows:
109. Based on the foregoing analysis, the Committee finds the Respondent State in violation of its obligations under article 1 (obligation of states parties), article 3 (non-discrimination), article 4 (best interests of the child), Article 10 (protection of privacy) article 11 (education), Article 14 (health and health services), Article 16 (protection against child abuse and torture), and article 21 (protection against harmful social and cultural practices). The Committee, therefore, recommends for the Respondent State to:

10 *Suy Bi Gohoré Emile & 8 Others v Republic of Côte d’Ivoire*, ACTHPR, Appl. No 044/2019, Judgment of 15 July 2020 (merits and reparations), § 105.

- Immediately prohibit mandatory pregnancy testing in schools and health facilities and publicly announce the prohibition;
- Review the Education (Expulsion and Exclusion of Pupils from School) Regulations, 2002 G.N. No 295 of 2002 and in doing so remove wedlock as a ground of expulsion and provide an indication that the moral ground of expulsion should be interpreted narrowly and should not apply in cases of pregnancy of schoolgirls;
- Undertake concrete steps to prevent the expulsion of pregnant and married girls from schools including by providing laws and policies on the same;
- Remove any policy of non-re-entry of schoolgirls including girls who have drop-out of school due to pregnancy or wedlock;
- Immediately re-admit schoolgirls who have been expelled due to pregnancy and wedlock and provide special support programmes to compensate for the lost years and ensure better learning outcomes for the returned girls;
- Provide clear guidance to school administrators that girls who drop out of school due to pregnancy or wedlock with their preference are allowed to come back to school with no preconditions;
- Investigate the cases of detention of pregnant girls and immediately release detained pregnant girls who are being interrogated to reveal who impregnated them and stop such kinds of illegal arrests of pregnant girls;
- Provide sexuality education for adolescent children and provide child friendly sexual reproductive and health services;
- Undertake extensive sensitization of teachers, health care providers, police and other actors with regards to the protection that should be accorded to pregnant and married girls;
- Undertake proactive measures towards the elimination of child marriage and other harmful practices that affect girls including by taking measures to address the underlying factors such as gender-based discrimination, poverty, and negative customary and societal norms;
- Create a conducive reporting and referral mechanism for survivors of sexual violence including child marriage, and provide psychosocial support, rehabilitation and reintegration services for the survivors;
- Investigate and prosecute perpetrators of sexual violence and child marriage;
- Take action against any actors who conduct forced pregnancy testing of any kind, or who discriminate against girls on the grounds of their pregnancy or marital statuses such as expulsion and detention; and

- Provide special support to pregnant and married girls to continue their education in a school of their choice and based on their consent.
56. The Court further notes that the ACERWC in its communication only found violations of the African Children's Charter and not of the Charter and of the other international legal instruments to which the Respondent State is a party. However, the Court also notes that the principles contained in the African Children's Charter, on which the ACERWC gave its views, overlap with the principles provided for in the provisions of the Charter and other human rights instruments referenced by the Applicants.¹¹
 57. Substantively, therefore, the Court considers that the ACERWC adjudicated on the same issues that the Applicants have brought before this Court.¹² The Court, therefore, finds that the second criterion has been met.
 58. Concerning the third criterion which interrogates whether a first decision on merits exists, the Court notes that the ACERWC, as an "institution that is legally mandated to consider the dispute at international level",¹³ has delivered a decision on merits.
 59. The Court, therefore, finds that this criterion has been met.
 60. In sum, the Court finds that the cumulative criteria set out in the cases *Gombert Jean-Claude Roger v Republic of Côte d'Ivoire* and in *Dexter Eddie Johnson v Republic of Ghana* relating to the admissibility requirement established in Article 56(7) have been fulfilled.
 61. For this reason, the Court finds that the instant Application raises issues that have already been settled within the meaning of Article 56(7) of the Charter and holds that this admissibility requirement has not been met.

B. Other conditions of admissibility

62. The Court recalls that the conditions of admissibility of an application filed before it are cumulative, such that if one condition

11 By way of example, Article 3 of the African Children's Charter provides for the right to non-discrimination, and this is mirrored by Article 2 of the Charter; and Article 11 of the African Children's Charter provides for the right to education and this is captured in Article 17 of the Charter.

12 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 52.

13 *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 51.

is not fulfilled then the application becomes inadmissible.¹⁴ In the present case, since the Application has already been settled, the Court finds that the Application is inadmissible. The Court, therefore, dismisses it without needing to examine the other objections to admissibility raised by the Respondent State and the other admissibility requirements set out under Article 56 of the Charter and Rule 50 of the Rules.

VII. On the request for provisional measures

- 63. The Court recalls that on 29 November 2021, it had decided that it would consider the Applicants' request for provisional measures together with the merits of the Application.
- 64. The Court notes, however, that the present decision renders the said request moot.

VIII. Costs

- 65. The Applicants pray that the Court orders the Respondent State to pay their costs.
- 66. The Respondent State prays that costs be borne by the Applicants.

- 67. The Court notes that Rule 32(2) of the Rules of Court provides that: "unless otherwise decided by the Court, each party shall bear its own costs, if any".
- 68. The Court finds that there is nothing in the instant case warranting it to depart from this provision.
- 69. Consequently, the Court orders that each party shall bear its own costs.

¹⁴ *Jean Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270, § 61; *Dexter Eddie Johnson v Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 57.

IX. Operative part

70. For these reasons,

The Court

On jurisdiction

Unanimously,

i. *Declares* that it has jurisdiction.

On admissibility

By a majority of Eight (8) for, and Two (2) against, Justice Blaise TCHIKAYA and Justice Rafaâ BEN ACHOUR Dissenting

ii. *Declares* that the Application is inadmissible.

On costs

Unanimously,

iii. *Orders* that each Party shall bear its own costs.

Dissenting Opinion: TCHIKAYA

1. Regretfully, I am unable to agree with my honourable colleagues regarding the outcome of this case. The majority position did not seem to me to be well-founded.
2. It would have been more appropriate for the Court to render a decision on this major rights issue, unless there was a better reason for not doing so. This Opinion deplores the fact that it did not, although there was reason and cause to do so.
3. I regret that I cannot associate myself with the majority decision of the Court rendered by my Honourable Colleagues. The decision delivered on 1 December 2022 in the case of *Tike Mwambipile and Equality Now v Tanzania* does not seem to me to be sufficiently reasoned.

I. A partial perception

4. *Madam Tike Mwambipile*, a Tanzanian applicant associated with *Equality Now*, a non-governmental organization (NGO), challenged the Respondent State's rules and guidelines expelling

pregnant girls and adolescent mothers from public schools.¹

5. As is often the case in human rights matters, major rights are at stake in the instant case, which, we stress, requires the Court to decide accordingly.² In addition to the African Charter on Human and Peoples' Rights, this dispute over young children deprived of education is at the confluence of at least four international human rights instruments. The first is the *African Charter on the Rights and Welfare of the Child* (1990, Article 11); the second is the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (2003, Article 12 of the Maputo Protocol); the third is the *African Youth Charter* (2006, Articles 13 and 23); and last but not least, the *Convention on the Elimination of All Forms of Discrimination against Women* (1979, Article 10). The Court could therefore not have failed to appreciate the legal gravity of the subject.
6. In the deliberations that followed the close of pleadings, the Court considered a question that relates to one of the three objections to admissibility raised by the Respondent State, namely, whether the case before the Court did not fall under the ambit of Article 56.7 of the African Charter on Human and Peoples' Rights in the sense that the Court's jurisdiction does not extend to:
(...) matters which have been settled by the States concerned in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union or the provisions of the Charter.

II. A partial assessment of Article 56(7)

7. In § 46 of the judgment, the Court rightly recalls that the purpose of Article 56(7) of the Charter is to prevent a case being brought against member states more than once for the same human rights violations. The result is twofold: a) the Court finds a violation of human rights; b) it decides if the Respondent State is legally liable for the said violations. It is worth recalling here that the Committee on the Rights and Welfare of the Child (ACERWC) issues well-advised communications but does not bring proceedings against States.

1 Pregnant girls were barred from attending public primary and secondary schools, even after giving birth, which, in the view of the Applicant, is discriminatory and violates the right to education.

2 No less than seven (7) organizations filed *amicus curiae* briefs: (i) the Tanzanian Commission for Human Rights and Good Governance; (ii) Amnesty International; (iii) UNESCO; (iv) Tanzania Women Lawyers Association (TAWLA); (v) Msichana Initiative; (vi) Clooney Justice Foundation; and (vii) Initiative for Strategic Litigation in Africa (ISLA), Human Rights Watch (HRW) and Women's Link Worldwide who submitted joint comments. See § 7 of the Judgment.

8. In paragraph 47, the Court recalls its previous decisions³ in which it set out three cumulative criteria for determining whether the admissibility requirements under Article 56(7) of the Charter and Rule 50(2)(g) of the Rules have been met. It would appear that the Court does not interpret them in a meaningful way. The outcome and settlement of this dispute does not appear to have taken into account key issues. Article 56(7) clearly provides that the jurisdiction of the Court does not extend to “[...]cases which have been settled by these States involved [...]”. For the sake of clarity, it would have been useful under Article 56(7) to demonstrate how the case could be considered settled.
9. While the Committee “shall draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples’ Rights [...]”,⁴ the Committee’s mandate and procedures under Article 42 of the Charter are to “promote and protect the rights enshrined” in the Charter. The idea of promotion goes hand in hand with the idea of protection. There is no binding decision-making authority conferred on the Committee, other than its power to make proposals. However, this latter power does not in any way settle the instant case.
10. While the Committee produces Reports and Communications, it does not initiate legal proceedings against States. It does not produce the category of proceedings referred to in Article 56(7) of the Charter. It must be understood that international customary law recognises and approves all international dispute settlement initiatives.⁵ But this is another matter altogether. Such an initiative does not invalidate the proceedings before a court properly seized.
11. In any case, I fully agree with the finding that: “the ACERWC did indeed deliver [a] decision⁶ [...] the latter is merely a recommendation which does not decide the case or, to use the terms of Article 56 § 7 of the Charter, does not ‘settle’ the case

3 *Dexter Eddie Johnson v Ghana* (28 March 2019) 3 AfCLR 99, § 55; *Gombert v Côte d’Ivoire* (2018) 2 AfCLR 200, § 45.

4 Article 46 of the African Charter on the Rights and Welfare of the Child, 1990.

5 For this reason, the International Court of Justice (ICJ) recognizes that “before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations”, ICJ, *Concessions in Palestine and Jerusalem, Greece v United Kingdom*, 30 August 1924, p. 15. See also ICJ, *Right of Passage in Indian Territory*, 26 November 1957. It is indeed specified that it is not excluded that any other procedure is subject to prior negotiation which is a treaty or customary obligation.

6 Decision No 0012/Com/001/2019.

within the meaning of Article 56 § 7 of the Charter.”⁷

12. As for the East African Court of Justice, this Court was simply informed that a case on the same matter had been filed with that court concerning the expulsion of pregnant girls in line with the Education (Expulsion and Exclusion from Schools) Regulations. The case was still pending.⁸
13. Recent developments in the Respondent State could possibly have been the ground for the Court declaring the case inadmissible. For, intermittently, it is noted that significant regulatory and legislative work has been done.⁹ In my opinion, a well-founded decision could have been rendered on this account.
14. There was no reason to withhold any decision as long as the issue of “girls expelled from schools” was pending and has not been settled judicially. Moreover, the Court does not cite any body vested with jurisdiction on such a judicial provision as a matter of substantive law.

7 Dissenting Opinion of Judge Rafea Ben Achour attached to the *Tike Mwambipile v Tanzania* (2022) decision.

8 ACtHPR, *Judgment cited above*, § 11. See The East African Court of Justice, an application was filed on 24 April 2020 by two NGOs, namely, Inclusive Development for Citizens and Center for Strategic Litigation.

9 Tanzania Secondary Education Quality Improvement Project (SEQUIP) approved on 31 March 2020 for the United Republic of Tanzania.

Dissenting Opinion: BEN ACHOUR

1. Regretfully, I strongly disagree with the majority of my colleagues who found the Respondent State's first objection to the admissibility of the Application well-founded¹ and accordingly declared inadmissible Application No 04/2020, *Tike Mwanbipile and Equality Now v United Republic of Tanzania*, received at the Registry on 19 November 2020.
2. My interpretation of Article 56 § 7 of the Charter, restated *verbatim* in Rule 50(2)(g) of the Rules of Court, according to which any application filed with the Court "[shall] 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", differs from the interpretation adopted by the majority of the Court.
3. To begin with, Article 56(7) of the Charter and Rule 50(2)(g) of the Rules of Court are intended to preserve legal certainty by preventing a situation where a case of human rights violations is decided by several international bodies at the same time, thereby resulting in divergent or even contradictory outcomes. It should be noted that the two provisions do not mention the bodies before which the *ne bis in idem* principle must be applied. They merely frame it in very laconic terms, referring to the principles of the United Nations Charter, the Constitutive Act of the African Union or the provisions of the [African] Charter. The term "principle" used in the text does not refer to anything specific.
4. Commentators on the Charter consider that neither the Charter nor the Rules "[d]eal with the important question of *lis pendens* that might arise in connection with an inter-State communication considered by the Commission, the subject-matter of which is already under consideration by another international body, such as the United Nations Human Rights Committee. Further, by not enshrining the *non bis in idem* principle, the two instruments do not address the issue of a possible re-examination of a case already examined by the Commission or another international

1 The Respondent State submitted that a communication raising allegations similar to those raised in the present Application was filed before the ACERWC, namely Communication No 0012/Com/001/2019 in the case of *Legal and Human Rights Centre and Centre for Reproductive Rights* (on behalf of Tanzanian girls) v the United Republic of Tanzania. In its view, the Application cannot be admissible insofar as the same allegations have been raised and are still pending before another international body with jurisdiction to deal with them. The Respondent State further submitted that the present Application is subject to the doctrine of *res subjudice* which prohibits two competent international jurisdictions from adjudicating concurrently on a case involving similar allegations.

body.”²

5. In response to this Application, which alleged a number of violations of the African Charter on Human and Peoples’ Rights (the Charter) and several other relevant human rights instruments to which the Respondent State is a party,³ by the Respondent State’s regulations and directives, which exclude pregnant girls and adolescent mothers from public primary and secondary schools and from being readmitted even after childbirth, the Court held that “[...] the instant Application raises issues that have already been settled within the meaning of Article 56(7) of the Charter and holds that this admissibility requirement has not been met.”⁴
6. Indeed, the Court found that the matter was settled by the Committee of Experts on the Rights and Welfare of the Child (ACERWC)⁵ before which a communication⁶ was brought on 17 June 2019 alleging that girls in primary and secondary schools are subjected to forced pregnancy tests and expelled from schools in the event that they are found to be pregnant or married.
7. In my opinion, not only was (II) the case not settled on the merits by the ACERWC, as the Court considers, but also (I) the formal conditions necessary for such a settlement were not met.

I. The necessary requirements of similarity are not met

8. In several previous decisions, the Court has set out the formal requirements that must be met in order to declare an application filed before the Court similar to one or more applications filed before other courts or human rights protection bodies. In its previous decisions, in particular in the cases of *Gombert*

2 F. Ouguergouz. *La Charte africaine des droits de l’homme et des peuples, une approche juridique des droits de l’homme entre tradition et modernité*, Geneva, Graduate Institute Publications, 1993, Chapter VIII, § 105.

3 African Charter on the Rights and Welfare of the Child; Maputo Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; African Youth Charter; United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); United Nations Convention on the Rights of the Child; The International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education; and the Universal Declaration of Human Rights.

4 § 61 of the Ruling.

5 Decision No 012/Com/001/2019 adopted at the 39th Ordinary Session of the Committee held virtually from 21 March to 1 April 2022.

6 Communication No 001/2022.

*Jean-Claude Roger v Republic of Côte d'Ivoire*⁷ and *Dexter Eddie Johnson v Republic of Ghana*,⁸ the Court set out three cumulative criteria for concluding that various applications filed before it are similar to those filed before other courts or bodies. These are:

- Identity of the parties;
- Whether the requests are identical or whether they are supplementary or alternative in nature or whether the case arises from a request made in the original case; and
- The existence of a first decision on the merits.

9. In the case that is the subject of this dissenting opinion, and contrary to the Court's findings, none of these requirements were met by the Communication filed before the ACERWC in relation to the Application filed before this Court.

A. The “identity of the parties” criterion

10. First of all, as regards the first criterion, namely, the identity of the parties, although it is clear that the Respondent State before the Court is the same as the Respondent before the ACERWC, the Applicants before the Court and the complainants before the ACERWC are not the same. The Applicants before the Court are Tike Mwambipile, a Tanzanian national, and Equality Now, a non-governmental organization (NGO) with observer status before the African Commission on Human and Peoples' Rights. The complainants before the ACERWC are the Centre for Human and Legal Rights and the Centre for Reproductive Rights (on behalf of Tanzanian girls). The Court itself makes this point when it notes in paragraph 49 of the Ruling that “the Respondent State in the proceedings before ACERWC and in the present Application is the same, [but] however, that the Applicants in the proceedings are different”. However, the Court, instead of admitting that the parties in the two proceedings are different, ignores this fact and changes its position by “considering, however, that both cases can be qualified as instances of public interest litigation”.⁹ Instead of focusing on the identity of the parties, the Court invokes the nature of the two cases by stating that they are “public interest litigation” without, however, explaining what it means by this expression, which, in

7 *Gombert v Côte d'Ivoire*, Ruling of 22 March 2018, 2 *AfCLR*, 270, § 45.

8 *Dexter Eddie Johnson v Republic of Ghana*, Ruling of 28 March 2019, 3 *AfCLR*, 99, § 48.

9 § 50 of the Ruling.

any case, has nothing to do with the identity of the parties. The Court settles for a tautology by stating that “the identity of parties in different Applications can be considered as being similar to the extent that they both aim to protect the interest of the public at large, rather than only specific private interests”; and quite surprisingly it concludes from the public interest nature of the two proceedings that “[t]he criterion of “same identity” of the parties” is fulfilled, which objectively and factually is totally wrong.

B. The “identity of the applications” criterion

11. The criterion of identity of the applications refers to the similarity of applications filed with the same court or with two different bodies. Where two or more similar applications are filed with the same court, the latter may, of its own motion or at the request of the parties, join the two applications and render a single decision, notwithstanding the fact that the applications are filed by two or more different applicants. This principle is provided for in Rule 62 of the Rules of Court¹⁰ and has been applied by the Court on several occasions.¹¹ When two or more similar applications are filed with two or more different courts or bodies and have not yet been decided, the aim is to avoid *lis pendens*. This situation, which raises a risk of conflict of jurisdiction, is normally resolved by the court or body last seized declining jurisdiction, if one of the parties raises an objection as to jurisdiction or a declination of jurisdiction. If the first court or body seized decides the case, the objection of *lis pendens* becomes an objection of *res judicata*.¹²
12. Rule 37(1) of the Rules of Court expressly provides for the rule of litispence only in respect of cases pending before the African

10 “The Court may, at any stage of the proceedings, either on its own accord or upon an Application by any of the parties, order the joinder or disjoinder of cases and pleadings as it deems appropriate”.

11 The first case joinder decision adopted by the Court: *Tanganyika Law Society and The Legal Human Rights Centre* (Application 009/2011) and *Reverend Christopher Mtikila* (Application 011/2011). Order of 22 September 2011, 1 AfCLR, 32.

12 In its judgment of 25 August 1925, *Certain German Interests in Polish Upper Silesia (Preliminary Objections)*, the PCIJ stated that “it is clear that the essential elements which constitute litispence are not present. There is no question of two identical actions: the action still pending before the Germano-Polish Mixed Arbitral Tribunal at Paris seeks the restitution to a private company of the factory of which the latter claims to have been wrongfully deprived; on the other hand, the Permanent Court of International Justice is asked to give an interpretation of certain clauses of the Geneva Convention. The Parties are not the same, and, finally, the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character, and, a fortiori, the same might be said with regard to the Court and the Polish Civil Tribunal of Kattowitz”. Series A, No 6, p. 20.

Commission on Human and Peoples' Rights, by providing that "[t]he Court shall, not consider any application or request for advisory opinion relating to a matter pending before the Commission, unless the matter has been formally withdrawn". However, this principle, which is highly controversial, cannot be applied whenever a case is pending before another court or human rights body, especially when the court and the body seized (in this case the ACTHPR and the ACERWC) are not, in the words of the PCIJ, "of the same order."¹³ It should be recalled that in the *Gombert v Côte d'Ivoire* ruling of 22 March 2018, the Court rightly applied Article 56(7) of the Charter because the case had been settled by a regional international court, namely, the ECOWAS Court of Justice, unlike the case of *Dexter Eddie Johnson v Republic of Ghana*, which was the subject of Views by a quasi-judicial body, the UNHRC, whose "decisions" do not have res judicata authority.¹⁴

13. Regardless of these considerations, the application before the Court and the communication before the ACERWC are undoubtedly similar, but not identical. In the application before the Court, the violations alleged are not reproduced *in extenso* before the Committee. Indeed, some of the violations alleged before the Court (§19 of the Ruling) were not alleged before the Committee. This is the case for Violations Nos. (iii) to (ix)¹⁵ and Violation No (xi).

13 See note 11 above.

14 See my dissenting opinion on *Dexter Eddie Johnson v Republic of Ghana*, Ruling of 28 March 2019, 3 *AFCLR*, 99.

15 "iii. Order the Respondent State to immediately revoke the prohibitive policy (both the expulsion regulation and implementation of declarations) and amend its legislation to protect the right to education.
iv. Order the Respondent State to immediately repeal Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from Schools) of 2002 to remove "wedlock" as a ground for expulsion and amend the Marriage Act of 1971 to harmonize the age of marriage to 18 for both boys and girls.
v Order the Respondent State to develop strategies, programmes and nationwide campaigns that focus on addressing the issue of teenage pregnancies through public education or awareness on sexual and reproductive health and rights as well as on ending child marriages, as this increased community knowledge on family planning and contraceptives will support efforts to address the high rate of teenage pregnancies.
vi. Order the Respondent State to develop strategies and nationwide campaigns to enable teenage mothers to attend school. This may range from providing subsidies to enable girls with children to attend school, to developing alternative schooling offering the same quality and standard of education as offered in mainstream schools as well as developing and implementing relevant re-entry policies for girls who have given birth.
vii. Order the Respondent State to put in place constitutional, legislative and administrative measures to guarantee the right to education, including its enforceability domestically, as well as a right to remedies, including reparations, and eradicate discriminatory laws and policies that impede the right to education within six (6) months.

14. Thus, the applications are only partially identical. Unfortunately, the Court found that there was complete similarity between the application before it and the complaint before the Committee. It begins by noting that “[i]t becomes apparent that both applications challenge the same law, that is Regulation No 4 of the Education Regulations (Expulsion and Exclusion of Pupils from School) of 2002, and the same practice of expelling pregnant and young mothers from schools as well as other associated discriminatory practices, including mandatory pregnancy testing.”¹⁶ While this is the general tenor of the two cases, a court cannot be satisfied with general impressions. It then further held “[t]hat the ACERWC in its communication only found violations of the African Children’s Charter and not of the Charter and of the other international legal instruments to which the Respondent State is a party”.¹⁷ Thus, the Court expressly admits that only the Charter on the Rights and Welfare of the Child was invoked before the Committee. This is perfectly logical since the Committee only has jurisdiction to interpret and apply the said Charter. Curiously, after this observation, the Court backtracked by stating “[H]owever, the Court also notes that the principles contained in the African Children’s Charter, on which ACERWC gave its views, overlap with the principles provided for in the provisions of the Charter and other human rights instruments referenced by the Applicants” .¹⁸ Finally the Court held that, “[S]ubstantively, therefore, the Court considers that the ACERWC adjudicated on the same issues that the Applicants have brought before this Court” ¹⁹ and found that “the second criterion has been met”, which, as we have shown, is partially true.

viii. Order the Respondent State to report to the Court within a period of six (6) months from the date of judgment on the implementation of this judgment and consequential orders.

ix. Order the Respondent State to publish the judgment in this matter on the official website of its judiciary and of the Ministry responsible for legal affairs, within two (2) months from date of notification of the decision.

[...]

xi. Issue any other remedy and/or relief that the Court will deem necessary to grant.”

16 § 52 of the Ruling.

17 § 56 of the Ruling.

18 *Id.*

19 § 58 of the Ruling.

C. The “existence of a first decision on the merits” criterion

15. As to the last criterion, namely, the existence of a first decision on the merits, the Court noted that “[...]the ACERWC, “as an institution that is legally mandated to consider the dispute at international level”, has delivered a decision on merits”. However, while it is true that the Court notes that the ACERWC did indeed deliver Decision No 0012/Com/001/2019, the latter is merely a recommendation which does not decide the case or, to use the terms of Article 56 § 7 of the Charter, does not “settle” the case within the meaning of Article 56 § 7 of the Charter, which will be the subject of the second part of this opinion.

II. ACERWC did not “settle” the case

16. After finding that the three criteria of similarity between Application No 042/2020 and Communication 001/2019 are met,²⁰ the Court, relying on Decision No 0012/Com/001/2019 of the ACERWC, the Court notes that the ACERWC, and in particular in its § 109 (actually § 105), which it quotes *in extenso* without any analysis, concludes peremptorily that “the instant Application raises issues that have already been settled within the meaning of Article 56(7) of the Charter and holds that this admissibility requirement has not been met”. The Court did not take the trouble to compare the issues dealt with by the Committee with those raised in the application and, at the very least, to rule on the issues mentioned in paragraph 14 above, which were not raised before the Committee.
17. In my opinion, the case has not been “settled” by the ACERWC. Indeed, the document issued by the ACERWC, which is legally called “Decision”, and without wishing to underrate it, is adopted by a body that can at most be qualified as a quasi-judicial body,²¹ exactly like the African Commission on Human and Peoples’ Rights

20 § 60 of the judgment: “In sum, the Court finds that the cumulative criteria set out in the cases *Gombert Jean-Claude Roger v Republic of Côte d’Ivoire* and in *Dexter Eddie Johnson v Republic of Ghana* relating to the admissibility requirement established in Article 56(7) have been fulfilled”.

21 In international law, a quasi-judicial body is a body that is not formally a court.... This term refers to bodies that are empowered to receive claims relating to a legal dispute, such as the various United Nations commissions of experts, the Dispute Settlement Body of the World Trade Organization, or, on the black continent, the African Commission on Human and Peoples’ Rights (ADHP Commission).

or the United Nations treaty bodies.²² The Committee's "Decision" is not binding on the Respondent State. It merely "*recommends*" to the United Republic of Tanzania a certain number of actions likely to put an end to the violations of the Charter on the Rights and Welfare of the Child. The verb "*recommend*" is expressly used in the ACERWC decision, and it is most unfortunate that the Court did not discuss the legal status of the ACERWC decision. Indeed, in paragraph 109 of the decision, "[ACERWC] recommends for the Respondent State [...]". How then can it be considered that the case has been settled or, in other words, that there has been *res judicata*.

18. As I argued in my dissenting opinion on the *Dexter Eddie Johnson* case, only a decision of a judicial nature "settles" a case, that is, it closes the legal debate and orders the State to take a number of measures and actions likely to put an end to the violations of the law. This is what happened in the *Jean Claude Gombert* case, which was effectively settled by the ECOWAS Court of Justice.
19. A judicial decision settles the dispute, stating the law and imposing on the State a real legal obligation of result²³ to put an end to the violation. In case of non-compliance with the jurisdictional decision, the State commits a wrongful international act which engages its international responsibility. In the case of the ACERWC, the decision is a recommendation which only imposes on the State a simple obligation of means²⁴ which it must certainly fulfil in good faith, but which does not lead to its international responsibility being called into question.

22 Committee on the Elimination of Discrimination; Committee on Economic, Social and Cultural Rights; Human Rights Committee; Committee on the Elimination of Discrimination against Women; Committee against Torture; Subcommittee on Prevention of Torture; Committee on the Rights of the Child; Committee on the Rights of Migrant Workers; Committee on the Rights of Persons; Committee on Enforced Disappearances.

23 In the obligation of result, the service provider does not merely undertake to do their best to achieve the expected result, but *to provide the creditor with a precise, concrete and determined result from the outset*. Unlike the obligation of means, the means used by the debtor to achieve the result are not taken into consideration, only the result counts. The obligation of result is stricter; it *leaves no room for doubt or uncertainty*. The debtor has control over the things, events or persons entrusted to their care.

24 By the obligation of means, the debtor undertakes to use *all the means at his disposal* to perform the contract. The debtor is not bound to achieve a specific result, but they promise to take *all necessary steps* to fulfil their contractual obligation. In short, the must do "their best".

20. By declaring the application inadmissible on the ground that the case was settled by the ACERWC, the Court unfortunately left several issues relating to the right to education, women's rights, children's rights, non-discrimination, etc. unresolved, while it could have given the important ACERWC decision *res judicata* authority.

Separate Opinion: BENSAOULA

1. In this opinion, I would like to state my support for the grounds stated by the Court in its above-mentioned Ruling, in which it declared the application inadmissible on the basis that the measures sought by the Applicants are identical to those sought in the complaint brought before the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), which issued a decision in this regard at its 39th Session held from 21 March to 1 April 2022. However, I also raise a few issues that remain unaddressed and are food for thought.

I. My support for the Ruling

2. In its Ruling, the Court found that the Applicants in their Application filed with the Court on 19 November 2020, alleged violations of certain rights of pregnant girls in connection with the fact that they were barred from attending public primary and secondary schools both during pregnancy and after childbirth. According to the Applicants, such a restriction constitutes a flagrant violation of the affected girls' rights to education and non-discrimination.
3. However, it was noted during the course of the proceedings that other entities had filed applications before the ACERWC and the East African Community Court of Justice (EACJC) alleging the same violations.
4. It then became clear that while the application pending before the EACJC has not yet been decided, the application before the ACERWC was decided by decision issued in its 38th session, mentioned above, hence the Ruling that is the subject of this opinion. In the said Ruling, the Court decided to apply the admissibility requirement laid down in Article 56(7) of the African

Charter on Human and Peoples' Rights (the Charter), restated in Rule 50(2) of the Rules of Court (the Rules), and to declare the Application inadmissible on the ground that the claims have already been settled.

5. I fully agree with this finding for the good reason that paragraph 7 of Article 56 of the Charter in its French version clearly specifies that the application filed with the Court shall not concern cases that have been "settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter".
6. It is clear that the legislator did not, at any time, specify the entity that settles the case, but rather focused on the instruments applied in the settlement. The requirement is therefore related to the human rights jurisdiction of the entity concerned and to its jurisdiction to apply the relevant instrument, in the instant case, the Protocol.
7. It is important to remember that settling a dispute or a difference is not the exclusive jurisdiction of the judicial authorities. However, the settlement can take place after the intervention of any entity vested with jurisdiction to settle disputes (e.g., mediator, administration, conciliator, arbitrator, committees ...). If the definition of settlement is "to give a final solution to a question", the term "final" is unambiguous as regards the solution decided by entities other than judicial bodies, insofar as they are vested with the jurisdiction to settle disputes and enforce the proposed solutions will, in any case, depend on the will of the parties!
8. Even if Article 56 paragraph 7 of the Charter includes the words "settled by the States" – as is the case in the English version of the Charter – the Court specified in paragraphs 45 and 73 of the Ruling the reasons for this rule on the basis of a communication from the African Commission on Human and Peoples' Rights in which it was decided that the State could not be prosecuted and convicted more than once for the same alleged violation of human rights, on the one hand, and that the ACERWC is an institution with the legal mandate to examine the dispute at the international level, on the other.
9. It follows that the ACERWC, being an organ established by the African Union to monitor the implementation of the African Charter on the Rights and Welfare of the Child, can only render decisions that are binding on states. The principles of effectiveness and good faith execution of treaties enshrine this position in international law. Reference can be made in this respect to Article 26 of the Vienna Convention on the Law of Treaties and the judgment of

the Inter-American Court of Human Rights in *Loayza Tamayo v Peru* (17 September 1997 – merits). *Peru* (17 September 1997 – merits).

II. The remaining grey area

10. However, it appears from the Applicants' requests before the Court that, in addition to the allegations of human rights violations, they have specifically requested that the Respondent State be ordered to:
 - "Take constitutional, legislative and administrative measures to guarantee the right to education..... as well as a right to reparations...
 - Order the Respondent State to report to the Court within six months [...]
 - Order the Respondent State to publish the judgment in this matter on the official website [...]
 - Find a violation of human rights that were not specifically mentioned by the Petitioners...
 - to grant such other measures as the Court may deem necessary in the circumstances ..." (paragraph 19, subparagraphs 7, 8, 9, 10, 11 and 12 of the Application? (Paragraph 19 subparagraphs 7, 8, 9, 10, 11 and 12 of the Application)
11. In my opinion, the Court should have discussed jurisdiction and admissibility in respect of these requests, since they are not identical to those made before the ACERWC. On the other hand, and consequently, the Court had to address them, since the said requests would not have been settled.
12. The complementarity between these two African human rights bodies and the fact that they have the same sources of law, is not in doubt.
13. For the sake of this complementarity, the Court should have adjudicated these requests either by referring to the decision of the ACERWC to complete its findings and addressed the new claims cited above filed before it.
14. Alternatively, the Court should have dismissed the said requests on the ground that they had already been made and considered before the ACERWC.