AFRICAN UNION
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

FRANK DAVID OMARY AND OTHERS

V.

THE UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 001/2012

RULING

The Court composed of: Sophia A. B. AKUFFO, President; Bernard M. NGOEPE, Vice-President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Elsie N. THOMPSON, Sylvain ORÉ, El Hadji GUISSÉ, Ben KIOKO, Kimelabalou ABA, Judges; and Robert ENO, Registrar.

Pursuant to Article 22 of the Protocol to the African Charter on Human and Peoples' Rights, on the establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 8 (2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Augustino S. L. Ramadhani, Member of the Court of Tanzanian nationality, did not hear the Application.

In the matter of

Frank David Omary and Others

Represented by Advocate Pius L Chabruma - Counsel

v.

The United Republic of Tanzania

Represented by:

- Ms. Irene F. M. Kasyanju
  Ambassador and Assistant Director of Legal Affairs Unit
  Ministry of Foreign Affairs and International Cooperation.

- Mr. Nixon N Ntimbwa
  Principal State Attorney and Director – Constitutional Affairs and Human Rights
  Attorney General's Chambers

- Ms Sarah Mwaipopo,
  Acting Director – Principal State Attorney
  Division of Constitutional and Human Rights.
  Attorney General's Chambers

- Ms.Nkasori Sarakikya
  Principal State Attorney
  Division of Constitutional and Human Rights.
  Attorney General's Chambers

- Mr. Gabriel Malata
  Principal State Attorney
  Assistant Director - Litigation
  Attorney General's Chambers

- Mr. Mark Mulwambo
  Senior State Attorney
  Attorney General's Chambers

- Mr. Richard Kilanga
  State Attorney
  Attorney General's Chambers

- Mr. Benedict Msuya
  Second Secretary/Legal Officer
  Ministry of Foreign Affairs and International Cooperation.

After deliberations,

Renders the following majority ruling:

I- SUBJECT OF THE APPLICATION

1. The Court was seized with an Application entitled Karata Ernest and Others v. Attorney General, dated 16 January 2012, and signed by Mr. Ahmad Kimaro, on behalf of a group of ex-employees of the East African Community (hereinafter referred to as "the Applicants"), against the United Republic of Tanzania, (hereinafter referred to as "the Respondent").

A. THE PARTIES

2. The Applicants are all nationals of the Respondent State. On 27 September, 2013, the Court amended the name of the Applicants from Karata Ernest and Others to Frank David Omary and Others.

3. The Respondent is a State Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") as well as the Protocol . The Respondent has also made the declaration required under Article 34(6) of the Protocol, recognizing the jurisdiction of this Court to receive cases from individuals, and NGOs with observer status before the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission").

4. At its 27th Ordinary Session, the Court decided to amend the title of the Application, by substituting the United Republic of Tanzania as the Respondent for the Attorney General, who had originally been cited by the Applicants as the Respondent. (See infra paragraph 35)

B. FACTS OF THE CASE AS PRESENTED BY THE APPLICANT

5. According to the Application, on 17 May 1984, following the dissolution of the East African Community (hereinafter referred to as the "EAC"), the Presidents of Tanzania, Uganda and Kenya signed a Mediation Agreement which required, among others, the payment of reparations on the assets and liabilities of the EAC, as well as the pensions and benefits of the ex-employees.

6. The Applicants allege that in 2003, due to the failure of the Respondent to implement these commitments, they seized the High Court of Tanzania, but on 20 September 2005, the case was withdrawn after they concluded an amicable settlement, endorsed by the Court, with the Respondent.

7. The Applicants argue that they repudiated this amicable settlement because it was not fully respected by the Respondent.

8. The Applicants also claim that after being seized of the matter following the repudiation of the amicable settlement, the High Court "found out that there were two groups of Applicants and advised each group to prepare its payroll list, of which at the end they would add

their sum to get a single sum, and that was done. To that effect, the lawyers of the two sides prepared a joint affidavit and proceeded to other measures".

9. The presiding Judge in the High Court named the two groups of the ex-employees, 5,598 in number, as List 3A and List 3A1. The Applicants belong to List 3A1.

10. The Applicants aver that in the High Court, the Respondent challenged the Statement of Claim submitted by the two groups under the pretext that the stated amount had already been paid to them. They claim that their Counsel refuted these assertions by the Respondent, noting that only transport allowances, of the entire 15 items in the Deed of Settlement had been paid. They argue further that the Respondent could not show proof of any other payments made.

11. According to the Applicants, Justice Mwaikugile later recused himself from the case, and Justice Utamwa was appointed to handle the case, and to make a decision on the possibility of issuing the Applicants with a Certificate of Payment, on the payments which they had to receive from the Respondent. The Applicants claim further that in December 2010, Justice Utamwa dismissed the case in a rapidly conducted trial, on the grounds that it was incompetent.

12. Given the tension generated by the case nationally, the Court of Appealof Tanzania, in accordance with section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, took up the matter and rendered a decision in which it declared that the High Court had been properly seized to issue the Certificate requested, and ordered that the matter be re-examined and disposed of by another Judge of the High Court.

13. According to the Applicants, the case was assigned to Justice Fauz Twaib. They claim that when they appeared before Justice Twaib, their colleagues listed under List 3A adopted a different approach. According to them, their colleagues submitted an amount which was higher and requested the Judge to substitute it for the one which had been taken into account by the Court of Appeal.

14. In his judgement dated 23 May 2011, Justice Fauz Twaib dismissed the application entirely, on the grounds that there was no outstanding amount to be paid.

15. The Applicants aver further that following this decision, they left the Courtroom in anger but stayed in front of the Court premises. They later sent their representatives to see the Chief Justice of Tanzania to direct them as to the way forward.

16. According to the Applicants, while waiting for the answers, the Respondent sent an elite force of the Tanzania Police to disperse them. Pandemonium ensued since the complainants wanted to leave

the Court premises only after the Chief Justice gave them a hearing. At this stage, the special policemen started to beat them severely, by using police batons while spraying them with itching water.

17. The Applicants claim that several persons were injured, amongst them, a man aged 80 and a lady of more than 75 years old, both of whom were ready to testify before this Court.

18. The Applicants allege that in June and July 2011, their colleagues on List 3A applied for leave from the High Court to file an appeal before the Court of Appeal, in order to file their new application in place of the initial one. This application for leave was denied on 14 December 2011 on the grounds that it was not submitted within reasonable time and that it contained procedural errors.

C. ALLEGED VIOLATIONS

19. The Applicants allege that the non-payment of their entire pension and severance benefits by the Respondent, based on the Mediation Agreement of 1984, is a violation of provisions of the Universal Declaration of Human Rights (hereinafter referred to as "the Declaration"), in particular, Article 7 on the right not to be discriminated against, Article 8 on the right to an effective remedy, Article 23 on the right to work and just pay, Article 25 on the right to adequate standard of living and Article 30 on the State duty not to

engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth in the Declaration.

20. Without mentioning any particular provision, the Applicants also allege that the brutality and humiliation they endured at the hands of the police is also a violation of the Declaration.

21. In its Response dated 6 March 2013, the Respondent denies Applicants' claim that it has violated their rights. The Respondent objects to the application of the Declaration in this case. With respect to the allegation of police brutality, the Respondent avers that "the Government has not violated any human right of the Applicants nor has it committed any brutal acts to them. The police only discharged their duty of preserving order and peace without causing any harm to the Applicants...".

D. RELIEF SOUGHT

22. In their original Application dated 16 January 2012, their submission of 30 March, 2012, as well as their Reply to the Respondent's Response, the Applicants pray the Court to:

- "Declare that the Respondent violated Articles 7, 8, 23, 25 and 30 of the Declaration, to which the Respondent is a signatory.
- Declare that the Applicants were not paid all their claims by the Respondent.
- Certify to the Applicants payment of severance allowance with effect from 1 October 2009.

- Order that the Rule of Law be reinstated and the Respondent be ordered to pay the amounts approved by the Court of Appeal.
- Call on the Court of Appeal of Tanzania to issue a decision to facilitate these payments.
- Draw the attention of the Respondent on the need to desist from the use of force and humiliation against citizens who only wish to exercise their legitimate rights.
- Pay compensation to the victims of Police brutality;
- Declare the Deed of Settlement null and void".

23. In its Response dated 6 March, 2013, the Respondent prays the Court to declare that:

- "As a preliminary, it should not have been seized with the matter for want of compliance of admissibility criteria stipulated under rule 40 sub-rule 1-6, as well as article 6(2) of the Protocol...and article 56 of the Charter.
- The Application has not invoked the jurisdiction of the Court.
- The Application be dismissed in accordance with rule 38 of the Rules of Court".

24. The Respondent also prays for the following orders with respect to the merits of the Application:

- "That the Government of Tanzania has not violated articles 7, 8, 23, 25 and 30 of the Universal Declaration of Human Rights, consequently, no compensation/reparation should be awarded to the applicants.

- That the applicants were paid all their claims by the Government.
- That the Deed of Settlement was and is still valid.
- That there was no police brutality committed to the applicants by the Government of Tanzania, consequently, no compensation should be awarded to the applicants.
- That the cost of this application be borne by the applicants.
- Any other relief(s) the Court may deem fit to grant".

II- PROCEEDINGS BEFORE THE COURT

25. The Application, dated 27 January, 2012, was accompanied by what the Applicants considered to be evidence of exhaustion of local remedies.

26. By email of 8 February, 2012, the Applicants applied to the Registrar of the Court for legal aid. The Registrar replied by letter dated 10 February 2012, indicating that the Court did not have a legal aid programme and that staff members were not allowed to represent parties.

27. By letter dated 30 April, 2012, the Registry requested the Applicants to show how the Application meets the requirements under Rule 34 of the Rules.

28. By letter dated 11 May, 2012, the Applicants forwarded to the Registry a series of documents, including judgments.

29. By letter dated 28 June, 2012, the Registrar requested additional information with respect to the Application, in particular, evidence of exhaustion of local remedies in relation to the allegation of police brutality. In the same letter, the Registrar also requested that the said information should be submitted to the Registry of the Court within thirty (30) days from the date of receipt of the notification.

30. By letter dated 16 July 2012, the Applicants submitted what they considered to be evidence of exhaustion of local remedies with respect to the allegation of police brutality.

31. By letter dated 10 October, 2012, the Registry notified the Respondent of the Application, pursuant to Rule 35(2)(a) of the Rules. In accordance with Rule 35(4)(a) of the Rules, the Respondent was requested to indicate the names of its representatives within thirty (30) days and pursuant to Rule 37 of the Rules, to respond to the Application within sixty (60) days, from the date of receipt of the notification.

32. By letter dated 10 October, 2012, the Registry informed the Chairperson of the African Union Commission (AUC), pursuant to Rule 35(3) of the Rules, of the receipt of the Application.

33. By letter dated 25 October, 2012, Mr. Ernest Karata and six others informed the Court that he has learned that a civil suit in his name was before the African Court, as the Application before this Court is said to be connected to Civil Case No. 95/2003. He stated

that as legal representatives in Civil Case No. 95/2003 which was still pending before the High Court at the time, they had not filed any case nor authorized any one to file any case on their behalf, before this Court.

34. By letter dated 13 December, 2012, the Registry notified the Applicants of Mr. Karata's letter of 25 October, 2012.

35. By letter dated 17 December, 2012, the Registry informed Counsel for the Applicants that at its 27th Ordinary Session, the Court decided to amend the title of the Respondent from Attorney General to the United Republic of Tanzania, and in view of that decision, the Application will read as Application No.001/2012-Karata Ernest & Others v. The United Republic of Tanzania.

36. By letter dated 17 December, 2012, the Registry re-forwarded to the Respondent, the Chairperson of the AUC and Counsel for the Applicants, the application and all annexes thereto.

37. By Note Verbale dated 30 January 2013, the Respondent filed preliminary objections to the Application and the list of the names and addresses of its representatives in respect of the Application, pursuant to Rule 35(4)(a) of the Rules.

38. By letter dated 1 February 2013, the Registry notified the Applicants of the Respondent's Preliminary Objections, and invited the Applicants to file their Reply, if any, within thirty (30) days of receipt of the notification.

39. By letter dated 18 February 2013, the Applicants submited their comments to the preliminary objections raised by the Respondent.

40. By letter dated 21 February 2013, the Registrar forwarded to the Respondent the Applicants' response to its preliminary objections, and requested the Respondent to file its comments, if any, within thirty (30) days, from the date of receipt of the notification.

41. By Note Verbale dated 7 March 2013, the Respondent submitted to the Registry, its Response to the Application, pursuant to Rule 37 of the Rules.

42. By letter dated 12 March 2013, the Registry transmitted the Respondent's Response to the Applicants, and invited the latter to file its Reply within thirty (30) days of receipt of the notification.

43. By letter dated 4 April 2013, the Applicants filed their Reply to the Respondent's Response, including a request for the said Response to be expunged from the proceedings as time barred.

44. By letter dated 9 April 2013, the Registry forwarded the Reply of the Applicants to the Respondent.

45. By letter dated 3 July 2013, the Registrar notified the parties of the close of pleadings.

46. By letter of 2 October, 2013, the Registrar transmitted to the parties, the Court order amending the name of the Applicants to Frank David Omary and Others.

III- PRELIMINARY OBJECTIONS RAISED BY THE RESPONDENT

A- Objection to the *ratione materiae* jurisdiction of the Court

47. According to the Respondent, the Applicants based their Application on Articles 7, 8, 23, 25 and 30 of the Declaration. The Respondent submits that, pursuant to Article 3(1) of the Protocol "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instruments ratified by the States concerned". It avers that these provisions give the Court the jurisdiction to deal with matters concerning the violation of human rights instruments mentioned therein provided these instruments have been ratified by the government of Tanzania.

48. The Respondent submits that a direct and detailed analysis of the Application reveals that it does not concern the interpretation and application of any human rights instrument ratified by Tanzania.

49. The Respondent argues that the Application therefore does not fall within the provisions of Article 3(1) of the Protocol and Rule 26 of the Rules, and concludes that this Court should declare itself incompetent in terms of its *ratione materiae* jurisdiction.

B- Objection to the admissibility of the Application due to non-compliance with Rule 40 of the Rules of Court

50. According to the Respondent, the Application should be declared inadmissible because it is at variance with conditions of admissibility under Rule 40 of the Rules, read together with Article 56 of the African Charter.

1.) **The identity of the Applicants – Article 56(1) of the Charter**

51. The Respondent raises an objection to the admissibility of the Application on the grounds that the real identity of the Applicants is not known, contrary to Article 56(1) of the Charter.

52. The Respondent submits that the Application before this Court is brought under the name of Karata Ernest and Others v. Tanzania, but the same was signed by other persons, not including Karata Ernest himself. The Respondent argues that the Application is based on Suit No. 95/2003, bearing the title Karata Ernest and Others v. Attorney General, which was pending before the High Court of Tanzania. The Applicants allege that Mr Karata had informed this

Court by letter of 25 October, 2012 that "as legal representatives in the Civil Case No. 93/2005, which was then pending in the High Court of Tanzania, they have never filed any case nor have they authorized anyone to file a case on their behalf or in their name. Further that they informed the Court that they are not party to the Application No. 001/2012 currently pending before the Court, and that they have therefore exonerated themselves of any legal liability connected to Application No. 001/2012, as it may prejudice their desire to do so when a need arises. That their letter to the Court has been written on behalf of 17,746 Ex EAC employees in Court record and all other Tanzanians who were employees of the defunct East African Community...".

53. The Respondent submits further that the attempt by the Applicants to amend the name of the Application is not a proper way, as, according to the Respondent, "a defective Application cannot be cured by an amendment". They submit that "the best way is for the Applicants to withdraw their Application and start afresh if indeed they are serious in pursuing this matter".

54. The Respondent concludes that "based on the foregoing, we submit that, going by the letter from Karata Ernest and Others, there is currently no case pending in the African Court bearing the same name...".

2.) **Compatibility of the Application with the Constitutive Act of the African Union and the Charter – Article 56(2) of the Charter**

55. According to the Respondent, the rights mentioned in support of this Application are only enshrined in the Declaration. It argues that by failing to cite the provisions of the Constitutive Act of the African Union (hereinafter referred to as "the Constitutive Act") or the Charter, "the Applicants are inviting the Court to deal with an issue which falls outside of its competent jurisdiction".

3.) Application based exclusively on information disseminated from the mass media – Article 56(4) of the Charter

56. The Respondent argues that regarding the allegations of Police brutality, the Applicants' claim is based on news disseminated through the mass media. According to the Respondent, no proof of physical violence was adduced.

4.) Exhaustion of local remedies – Article 56(5) of the Charter

57. The Respondent argues that the Applicants have neither exhausted local remedies in relation to their claim for compensation nor have they tried to exhaust local remedies in relation to alleged Police brutality.

58. On claims for compensation, the Respondent avers that after the dismissal of their application by the High Court in May 2011, the Applicants filed an application for leave to appeal before the Court of

Appeal on 6 June, 2011. According to the Respondent, the application was struck out for procedural errors and the Applicants later filed another application, this time for an extension of time by the High Court, to file an appeal. The Respondent claims that this application was also struck out with cost to the Applicants on 11 October 2012, and that they filed another application for the extension of time to appeal.

59. Regarding allegations relating to Police brutality, the Respondent argues that the Applicants showed no proof that the presumed victims sued the government in the domestic Courts. The Respondent also argues that a letter produced by the Applicants was baseless.

5.) **Reasonable time – Article 56(6) of the Charter**

60. According to the Respondent, the judgment to dismiss the Applicants' compensation claim was issued in May 2011 and the Applicants seized this Court only in January 2012, eight (8) months after the pronouncement of the judgment. Regarding the alleged Police brutality, the Respondent argues that the facts took place on 13 October 2010, whereas this Court was seized in January 2012, that is, one (1) year and three (3) months after the alleged violence. It adds that even if the Court does not give an indication of what should be reasonable time, the Commission, as well as other regional bodies, recognized a six (6) months period as reasonable time.

61. The Respondent consequently calls on the Court to declare the Application inadmissible both with respect to alleged violations relating to the claim for compensation as well as that of Police brutality.

IV- POSITION OF THE APPLICANTS WITH REGARD TO THE PRELIMINARY OBJECTIONS RAISED BY THE RESPONDENT

Arguments against objections raised under Article 56 of the Charter and Rule40 of the Rules

1.) *Identity of the Applicants*

62. The Applicants on their part submit in their Reply to the Respondent's Response that "the Applicants in the present Application are not claiming to represent all the ex-EAC employees... The Applicants in the present Application are not claiming any mandate from Karata Ernest and his colleagues. So it is not understood why Karata Ernest and his colleagues are pulling out and dissociating themselves from the present Application. The proper case from which they could pull out would be Civil Case No. 93/2003. But this case was extinguished by the Deed of Settlement. For this reason to rename Application No. 001/2012 as Frank David Omary and Others v. The Government of the United Republic of Tanzania is quite proper".

2.) Exhaustion of local remedies

63. According to the Applicants, to date, there is no issue pending before the High Court concerning the Civil suit No. 95/2003, that is, the Application deposited by the ex-employees of List 3A, for an extension of the time to appeal. They argue that on 11 October 2012, the said application was struck out and the Applicants ordered to pay cost. They aver that it was the second time that an application from the former employees listed on List 3A was struck out by the High Court.

64. On the exhaustion of local remedies relating to Police brutality, the Applicants, without substantiating, simply cite their letter of 16 July 2012 to this Court. In the said letter, the Applicants relate the facts which led to the intervention of the Police, describing the scenes of Police brutality and submitting a list of persons who were injured as a result of this brutality, and the humiliation they suffered.

65. The Applicants claim further that the process at domestic level has been unduly prolonged. They claim that since the signing of the Mediation Agreement in 1984, both Kenya and Uganda have settled the claims of their citizens, but the Respondent has not.

3) Other admissibility requirements

66. The Applicants do not make any submission with respect to the Respondent's objection to the compatibility of the Application with the Constitutive Act and the Charter (Article 56(2), the Application being exclusively based on information disseminated by the mass media (Article 56(4), and the Application not being filed within reasonable time in accordance with Article 56(6) of the Charter.

V. APPLICANTS REQUEST TO EXPUNGE RESPONDENT'S RESPONSE FROM THE PLEADINGS

67. The Applicants submit that the Response of the Respondent is time barred, having been submitted contrary to the provisions of Rule 37 of the Rules. Rule 37 provides that "The State Party against which an Application has been filed shall respond thereto within sixty (60) days provided that the Court may, if the need arises, grant an extension of time".

68. The Applicants claim that the Respondent's Response was filed on 11 March 2013 instead of 7 March 2013, and that the Respondent did not apply for leave for an extension of time. They therefore call on the Court to expunge this Response from the pleadings.

VI- ANALYSIS BY THE COURT

A. Jurisdiction

i. Court's Jurisdiction ratione materiae

69. Respondent submits that the Court lacks jurisdiction to hear this Application as the Applicants have cited only provisions of the Declaration and no provision of the Constitutive Act or the Charter. The Respondent argues further that Article 3(1) of the Protocol limits the jurisdiction of the Court to deal only with human rights instruments "ratified by the States concerned".

70. Article 3(1) of the Protocol confers on the Court the jurisdiction to hear all cases concerning alleged human rights violations. This Article states as follows: "*the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned*". It should be noted that Article 3(2) of the Protocol further empowers the Court to decide on its jurisdiction. It provides that *"In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide"*.

71. The issue at stake in this Application is to determine whether or not, the Universal Declaration is a human rights instrument for the protection of human rights to be taken into consideration within the meaning of Article 3(1) of the Protocol.

72. The Court first of all recalls that the Universal Declaration of Human Rights is a resolution adopted by the United Nations General Assembly. The Court notes further that even though the Declaration is one of the prime human rights instruments whose objective is to protect the rights of individuals, it is not ratified by States.

73. The Court recognizes however that although the Declaration is not a treaty that should be ratified by States for it to enter into force, it has attained the status of customary international law and a *grund-norm.*[1] It represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that everyone is born free and equal in dignity and rights.[2] It was proclaimed as the common standard of achievement for all peoples and all nations, and over the years, has inspired the development of human rights instruments at national, regional and global levels. One such instrument is the Charter. Article 60 of the Charter empowers the Court to "draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, ...".

[1] Jorge E. Sánchez-Cordero Grossmann, "Promoting human rights as an international policy for world peace", Mexican Law Review, Number 2 January - June 2009.

[2] www.un.org/en/documents/udhr/hr_law.shtml

74. It is true that Rule 34(4) of the Rules provide that the Application "shall specify the alleged violation". However, there is no insistence with regard to a formal indication in an application of the instrument from which the provision of the alleged violation is based. The Court therefore rules that reference by the Applicants to the Declaration to allege a violation has no effect on its jurisdiction as long as the alleged violation is also provided for by a treaty ratified by the State concerned.

75. The Court has the power to exercise its jurisdiction over alleged violations, in relation to the relevant human rights protection instruments ratified by the Respondent.

76. The Court notes that all the rights alleged by the Applicants to have been violated by the Respondent, are guaranteed in the Charter, notably: the right not to be discriminated against (Article 2 and 3), the right to an effective remedy (Article 7), the right to work and fair remuneration (Article 15), the right to life and personal integrity (Article 4); and with respect to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which the Respondent ratified on 11 June 1976, the right to an adequate standard of living is guaranteed under Article 11.

77. The Court therefore rules that it has jurisdiction *ratione materiae* to hear the case and overrules the Respondent's objection to its jurisdiction.

ii. Court's Jurisdiction *ratione personae and temporis*

78. The parties did not address the Court on these two aspects of its jurisdiction. Rule 39(1) of the Rules however requires the Court to "... conduct preliminary examination of its jurisdiction and the admissibility of the application in accordance with articles 50 and 56 of the Charter, and Rule 40 of these Rules".

79. In conformity with Rule 39(1) of its Rules therefore, the Court will proceed to examine its jurisdiction *ratione personae* and r*atione temporis*.

80. With respect to its personal jurisdiction, the Protocol requires that a State against which an action is brought should not only have ratified the Protocol and the other human rights instruments mentioned in Article 3(1) thereof, but should also, with respect to applications from individuals, have made the declaration required under Article 34(6) of the Protocol, recognising the jurisdiction of this Court to hear cases from individuals. In the instant case, the status of ratification of African Union Instruments indicates that the United Republic of Tanzania became a party to the Protocol on 7 February 2006, and deposited the declaration under Article 34(6) on 29 March 2006. The Court also observes that the Applicants, all nationals of the Respondent State, are individuals. On these bases, the Court holds that it has jurisdiction *ration personae.*

81. Regarding the *ratione temporis* jurisdiction of the Court, it is important to make a brief summary of the origin of the procedure. On 9 May 2003, the ex-employees of the defunct East African Community seized the High Court of Tanzania to obtain the execution of commitments made by the Tanzanian government within the framework of a Mediation Agreement in relation to the payment of their pension and other benefits. On 20 September 2005, the Applicants withdrew the matter from the High Court after reaching an amicable settlement with the Respondent. On 15 October 2010, the Applicants seized the High Court to compel the Respondent, this time, to honour the amicable agreement reached with the latter. On 27 January 2012, they seized the African Court on the issue of the non-execution of the amicable settlement which had been filed with Tanzanian Courts since October 2010 as stated earlier.

82. The Court notes that according to the Applicants, the non-execution of the agreement was tantamount to a violation of their rights which they were pleading before the Court. The Court is of the view that the alleged violations which are said to have resulted from the non-payment of their benefits and compensation is situated from October 2010, when the High Court was seized of the matter for the first time. The Court also notes that the police brutality alleged by the Applicants is said to have been committed following the judgment of the Court on 23 May 2011.

83. The Court further notes that both the alleged violations which resulted from the non-payment of their compensation benefits and the alleged police brutality took place after the ratification of the Protocol (7 February 2006) and the making of the declaration under Article 34 (6) of the Protocol (9 March 2010) by the Respondent.

84. On these grounds, the Court concludes that it has the *ratione temporis* jurisdiction to hear the matter.

B. Admissibility of the Application

85. The Court recalls that every Application has to meet the requirements under Article 56 of the Charter, read jointly with Article 6(2) of the Protocol. Article 56 of the Charter provides that "[Applications] relating to human and peoples' rights ...shall be considered if...", and then goes on to enumerate seven (7) requirements that must be fulfilled for an Application to be admissible. Article 6(2) of the Protocol on its part provides that "*The Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter*".

86. The Respondent claims that six of the requirements under Article 56 have not been met by the Applicants. It must be stated at this juncture that the seven requirements under Article 56 are cumulative, thus, if one of them is not met, the Application cannot be admissible.

87. The Court will now proceed to analyse the arguments put forward by the Respondent in this regard.

1.) **Identity of the Applicants**

88. Article 56(1) of the Charter provides that Applications shall "Indicate their authors even if the latter request anonymity". The Respondent submits that the Application before this Court is brought under the name of Karata Ernest and Others v. Tanzania, and not the Applicants.

89. The Court admits that the Application was filed in the name of Karata Ernest and Others. However, the Court amended the name to Frank David Omary and Others. The fact that Karata Ernest dissociated himself from the Application does not render the identity of the other Applicants void.

90. The Court therefore rules that the Applicants have been properly identified and thus the Application complies with the requirement under Article 56(1) of the Charter.

2.) **Compatibility of the Application with the Constitutive Act of the African Union and the Charter**

91. Article 56(2) of the Charter provides that Applications "Are compatible with the [Constitutive Act of the African Union] or with the present Charter". According to the Respondent, the Application violates the applicable rules of admissibility because it only cites provisions of the Declaration and does not cite provisions from either the Constitutive Act or the Charter. On this issue, the Court has already stated that its jurisdiction is not adversely affected by the reference made to the Declaration in this Application, and that it will look at the violations alleged by the Applicants to determine its jurisdiction.

92. As indicated earlier, the Respondent has ratified the Charter and other UN human rights instruments, including the ICESCR. To this end, the Court notes that all the provisions of the Declaration alleged to have been violated by the Respondent have corresponding provisions in the Charter.

93. The fact that the provisions of the Charter are not specifically mentioned in an Application does not mean the Application is inadmissible, as long as the rights alleged to have been violated are guaranteed in the Charter or any other human rights instrument ratified by the state concerned.

94. The Court holds therefore that the objection raised on the compatibility of the Application with the Constitutive Act and the Charter is unfounded and is hereby overruled.

3.) **Objection to the admissibility of the Application on the grounds that it is based exclusively on news disseminated from the mass media**

95. Article 56(4) of the Charter requires that Applications "Are not based exclusively on news disseminated through the mass media". The Respondent argues that the Applicants have included pages from newspapers as the only proof of allegations of police brutality, thereby basing their Application exclusively on news disseminated from the mass media. The Court observes that the Applicants did provide excerpts of newspaper clippings to support their allegation of police brutality. It notes that the production of these newspaper excerpts by the Applicants has as its only objective to support the allegationswhich they made in the Application.

96. It should be added that apart from the newspaper clippings, the Applicants submitted to the Court, the names of persons who they claim were both witnesses and victims of the alleged brutality, some of whom were hospitalized as a result of the alleged brutality, and in their letter of 16 July 2012, to the Court, the Applicants described the scenes of the alleged police brutality which occured.

97. The Court therefore holds that the Application is not exclusively based on news from the mass media and overrules the objection.

4.) **Exhaustion of local remedies**

98. One of the requirements for admissibility mentioned under Article 56 is exhaustion of local remedies. Article 56(5) requires that applications relating to human and peoples' rights shall be considered, if they"...*are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged*".

99. In its judgment in *Tanganyika Law Society and The Legal and Human Rights Centre & Rev. Christopher Mtikila v. The United Republic of Tanzania, Consolidated Application 009/2011 and 011/2011, para 82.1,* the Court ruled that "remedies envisaged in Article 6(2) of the Protocol and Article 56(5)of the Charter are judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence". It is for the Court therefore to ascertain if the Applicants have exhausted local remedies or whether they were faced with a procedure that was unduly prolonged.

100. With respect to the current Application, there are two questions this Court is called upon to determine in relation to exhaustion of local remedies. The first is whether or not the Applicants have exhausted local remedies with respect to their claim for compensation. The second is whether or not they have exhausted local remedies with

respect to their claim of police brutality. The Court will consider each of them separately.

101. Regarding alleged violations relating to claims for compensation, the Applicants maintain that they have exhausted local remedies and argue that no action concerning them is pending before Tanzanian Courts. The Respondent argues on the other hand that the Application before this Court is still pending before the domestic Courts of the Respondent State, and therefore the Applicants have not exhausted local remedies.

102. It is important at this stage to recount the judicial actions that have taken place at the domestic level.

103. According to the material submitted to this Court by the parties, on 9 May 2003, one Ernest Karata and six others, on behalf of themselves and ex-employees of the defunct EAC, instituted Civil Case No. 95 of 2003 before the High Court of Tanzania. On 20 September 2005, as a result of out of court negotiations, the parties reached an amicable settlement, and signed a Deed of Settlement.

104. The preamble to the Deed of Settlement provides, among others, that "...and whereas in the course of negotiations it was realized that the number of all former Tanzanian employees of the defunct East African Community were not only the plaintiffs but a total of Thirty One Thousand Eight Hundred Thirty One (31, 831), whom

the Government has decided to pay them all according to the terms and conditions of this Deed of Settlement".

105. Paragraphs 2 and 3 of the Deed of Settlement are worth quoting here. Paragraph 2 provides that "...the Plaintiffs agree to withdraw all claims contained in the High Court Civil Case No. 95 of 2003 against the Defendant...".Paragraph 3 provides that "... the Defendant agrees to pay the Plaintiffs, and all former Employees of the defunct East African Community who are not party to this Case, all their aforesaid claims, according to their individual records and such payments shall constitute final settlement of all claims arising from the Tanzanian ex-employees of the defunct East African Community. Be it understood that upon payment of these claims the Defendant shall have no other liabilities of whatsoever nature to the Plaintiffs and any other persons arising from their employment by the Defunct East African Community".

106. The Deed of Settlement was duly filed in the High Court on 21 September, 2005, (before Justice Oriyo), and a Consent Judgment was entered for the plaintiffs (including the Applicants before this Court), in the form of a Decree. In the Decree, the Court made the following orders:

"By consent of the parties, judgment is hereby entered for the Plaintiffs as follows:

1. The Plaintiffs do and hereby do withdraw the claims and all the claims contained therein against the defendant.

2. The defendant do pay to the 7 plaintiffs, the other beneficiaries on Court record and to all other persons who were on the staff of the former East African Community and its institutions and Corporations on 30June 1977, all claims as stated in page 3 of the Deed of Settlement to be made on the basis of the plaintiff's and other said payees' employment record".

107. It is alleged that when the Respondent began to pay the ex-employees, based on what "the Government considered to be their lawful entitlements in accordance with the Deed of Settlement, and therefore the orders of the Court", a dispute arose between the parties, as 5,598 of the 31,831 ex-employees, including the Applicants before this Court. Those ex-employees "felt that the payments made to them did not fully reflect what they were entitled to under the Deed of Settlement". The parties confronted each other in the High Court on several occasions.

108. On 15 October 2010, the 5,598 ex-employees filed an application before the High Court as they claim they were not satisfied in the manner the Deed of Settlement was executed by the Respondent, claiming that some of the 15 claims in the Deed were not settled by the Respondent. The 5, 598 claimants, who include the Applicants before this Court, returned to the High Court and applied for a Certificate of Payment, for the execution of the Deed. The matter was heard by Justice Mwaikugile, but before he could deliver ruling, he recused himself.

109. It is important to state here that by the time the matter went before Justice Mwaikugile, the claimants were already divided into two groups, due to internal differences. In paragraph 7 of their Reply to the Respondent's Response dated 4 April, 2013, the Applicants provide this Court with the cause of the division, stating that "while Karata Ernest and 6 others represented all the ex-EAC employees in Civil Case No. 95/2003, they did not have the mandate of such employees to negotiate a deed of settlement and withdraw Civil Case No. 95/2003, this means that the Deed of Settlement was signed without the consent of all ex-EAC employees. That is what caused the division of the complainants into two groups".

110. The Applicants argue that there was a difference in the relief sought by the two groups. In view of this, Justice Mwaikugile, decided to name the two groups as payroll List 3A,comprising 2,681 ex-employees, with a total claim of 416,166,090,304.30 Tanzanian Shillings (TZSH), and payroll List 3A1 comprising 2,917 ex-employees, with a total claim of 2,178,558,653,941TZSH. According to the Applicants, "while claimants of List 3A were claiming underpayment, List 3A1 were claiming their basic entitlements, what was paid by the Government was only one item, i.e. transportation".

111. Following the recusal of Justice Mwaikugile, the case was assigned to Justice Utamwa of the same Court. Justice Utamwa heard the matter and on 9 November 2010, struck it out as being incompetent.

112. In the Applicants' Application dated 16 January 2012, they submit that "the decision [of Justice Utamwa] was not well received by the Applicants. The heat, anger, mistrust and frustration it generated was plainly reflected in the public statements to the media".

113. Acting under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, the Court of Appeal called for the records of the High Court on the case, "in order to satisfy itself as to the correctness, legality or propriety of the findings or orders of the learned High Court Judge or as to the regularity of the proceedings". The Court of Appeal considered the case as Civil Revision No. 10 of 2010.

114. After hearing counsel for Respondent and Plaintiffs, the Court of Appeal "quashed that part of the High Court ruling striking out the application and ordered the substantive application to be heard on merit as soon as possible but by another Judge... All said and done, we find and hold that the High Court had been properly moved to issue a Certificate under s.16 of the Act. The learned Judge therefore, erred in law in failing to exercise his jurisdiction to hear and determine the application on merit. That is why we did set aside his order striking out the application for being incompetent and we restore it and ordered that it be heard and determined forthwith by another Judge". It is important to state here that the Court of Appeal did not examine the merits of the case.

115. After the Court of Appeal Ruling, the case was assigned to Justice Fauz Twaib of the High Court. In his ruling of 23 May 2011, Justice Twaib stated that "... where there is proof that the full payment according to the Court's order has been made, no certificate should be issued... The rationale for this is clear: issuing a certificate for amounts not currently due would not only be academic...but may confuse matters and even result in wrongful payments being made...".The learned Judge went on to state that "from the foregoing, and on the basis of the material made available to me in this application, there is no entitlement that remains unpaid by the Respondent...If anything, there was an overpayment to those whose house allowance was wrongly included in their Annual Pensionable Emoluments...". He concluded by stating that "since my findings are that there is no shortfall, the applicants cannot get what they are seeking. This Court cannot issue the certificate sought. Therefore, I hereby dismiss this application in its entirety".

116. According to the Respondent, after the ruling of Justice Twaib of23 May 2011, the Applicants applied for leave of the High Court on 6 June 2011 to appeal to the Court of Appeal, and the application was struck out on the basis of a defective affidavit. The Applicants again applied to the High Court for leave for extension of time to file an appeal, and the same was also struck out with cost, on 11 October, 2012. The Respondent submits further that, on 25 October 2012, the Applicants filed another application for extension of time to

file their appeal to the Court of Appeal, and this was scheduled for mention on 19 March, 2013.

117. On 27 November, 2013, the Court wrote to the parties requesting them to provide information on the status of the case at domestic level. The Applicant informed the Court by letter of 12 December that it has provided to the Court all relevant information relating to the Application. The Respondent on its part informed the Court by letter of 30 December, 2013, that it was still tracing the information requested.

118. The Applicants maintain that "there are no cases pending at the High Court of the Tanzania relating to miscellaneous Civil Case No. 95.2003". They claim that the application filed by members of List 3A have been struck out twice, the last time being on 11 October, 2012.

119. The Applicants argue further that when they appeared before Justice Twaib, members of List 3A "came before the Judge with a fresh payroll with a bigger sum asking him to substitute it for the one that had passed through the bench of appeal court judges. The Judge told them that he was not there to rule on a new thing other than what was in the pact received from the Supreme Court...In his ruling, the Honourable Judge dismissed this fresh Application...". They argue that "the ruling of Justice Fauz shows clearly that he only dismissed the new payroll list delivered to him by Applicants of List 3A to be substituted with the one in the pact presented to him by the Court of Appeal bench to be determine forthwith. Since he did not dismiss

what was in the pact from the Appeal Court, the Government ought to pay our terminal benefits as the ruling of Supreme Court directed in page 15...".

120. The Applicants aver that they have written three letters to the Court of Appeal seeking the issuance of a certificate of payment, and the Court of Appeal responded that they should be patient. This Court does not attach any weight to these letters.

121. The Court notes that the Applicants before this Court are part of a group of former employees of the defunct East African Community who were involved in Suit No. 95/2003 against the Respondent. The Deed of Settlement which was filed in the High Court on 21 September, 2005 clearly states that "the defendant do pay to the 7 plaintiffs, the other beneficiaries on Court record *and to all other persons who were on the staff of the former East African Community and its institutions and Corporations on 30th June 1977...".*

122. There is nothing before this Court to suggest that the Applicants have dissociated themselves from the Suit. The Applicants brought this Application before this Court as Karata Ernest and others v the Attorney General of Tanzania, the same title of Suit No. 95/2003 which Respondent claims is still pending before Tanzanian Courts. It is only when Mr. Karata Ernest dissociated himself from the case before this Court that Applicants sought to change the title to Frank David Omary and Others.

123. They have appeared before the Courts in Tanzania under one suit – Suit No. 95/2005 since 2005. The division of the claimants at the domestic level into two groups does not mean that the claimants in the two lists were not part of the same case. The cause of action remained the same, the parties remained the same and the reliefs sought were identical.

124. The Applicants acknowledged in paragraph 7 of their Reply to the Respondent's Response that the division was as a result of internal bickering. For reasons of proper administration of justice the Court classified the two groups as List 3A and List 3A1, but within one case. For all intents and purposes, this Court holds that the Applicants are, and continue to be, part of Suit No. 95/2003.

125. This Court observes that the Applicants do not show proof of an end of the action before domestic Courts. Even if this Court were to accept their arguments that they are a separate group and have a different claim from the other claimants in Suit 95/2003, there is no indication that they have exhausted local remedies. They argue that although they appeared together before Justice Twaib, the latter's ruling of 23 May 2011, "only dismissed the new payroll list delivered to him by Applicants on List 3A...", suggesting that the Judge did not rule on the claim by claimants on List 3A1.

126. Even if this assertion is true, the Court is of the view that while employees listed as List 3A have applied for leave to appeal to the Court of Appeal, ex-employees listed as List 3A1, who are Applicants

before this Court, have not demonstrated what action they have taken or attempted to take to either have the High Court rule on their own claim or appeal to the Court of Appeal. In fact, Applicants do not seem inclined to approach the Court of Appeal. On page 5, paragraph1 of their Reply to the Respondent's Response, they state clearly that "the present Applicants did not find it useful to revert to the Court of Appeal which had previously ruled on the matter. Moreover, the Applicants found it fit to resort to the African Union through this Honourable Court which, they believe is in the best position to see that justice is not only done but also seen to be done". They add that "in another surprising turn of events, Karata Ernest have recently filed yet another Chamber Application (No. 165/2012) purporting to prolong the life span of Civil Suit No. 95/2003. What is even more intriguing is the fact that the Affidavit filed in support of Chamber Summons No. 165/2012 bears the reference to Civil Case No. 95/2003".

127. The above statement moves this Court to draw two conclusions: if the Applicants are part of Suit No. 95/2003, the same is still pending before domestic Courts and as such local remedies have not been exhausted; if the Applicants are not part of Suit No. 95/2003 pending at the domestic Court, they have not taken their matter to the Court of Appeal, after the ruling of the learned Justice Twaib, on 23 May 2011. Their submission that they do not find it useful to revert to the Court of Appeal on the grounds that the Court had previously ruled on the matter is wrong because the Court of Appeal did not rule on the merits of the matter.

128. The Court of Appeal simply "quashed that part of the High Court ruling striking out the application and *ordered the substantive application to be heard on merit as soon as possible but by another Judge*... All said and done, we find and hold that the High Court had been properly moved to issue a Certificate under s.16 of the Act. The learned Judge therefore, erred in law in failing to exercise his jurisdiction to hear and determine the application on merit. That is why we did set aside his order striking out the application for being incompetent and we restore it and ordered that it be heard and determined forthwith by another Judge".

129. It is clear from the above quotation that the Court of Appeal did not examine the merits of the case.

130. This Court therefore concludes that, either way, be it as part of Suit No. 95/2003 or separately, the Applicants have not complied with the requirement under Article 56(5) with respect to claims for compensation.

131. On the question of undue prolongation of the process, the Applicants allege that the process has been unduly prolonged at the domestic level. They claim in their Reply to the Respondent's Response that the Mediation Agreement for the payment of the defunct EAC ex-employees was signed in 1984, and both Kenya and Uganda had since paid their citizens.

132. The Respondent did not address this point in its Response of 7 March, 2013. However, the Court takes the view from the pleadings that the matter commenced in the High Court in 2003 and was finalised in 2005 by the conclusion of a consent judgment between the parties. In the opinion of the Court, the merits of the case was determined in 2005, and what took the claimants back to Court was the execution of the Deed of Settlement.

133. From the pleadings before this Court, it is clear that since 2003 when the case began in the domestic Courts, and especially after the signing of the Deed of Settlement in 2005, the delay in the process has been occasioned by internal bickering among the claimants. Their Reply to the Respondent's Response, paragraph 18 supports this conclusion. They submit that " ...in fact, for reasons explained below...we would come to the conclusion that bearers of payroll 3A, under the umbrella Ernest Karata and six others are subject to factor of undue prolong delay, and one would wonder whether our honourable Government had no hand on this".

134. There is no indication that proceedings at any stage of the case have been unduly prolonged in the domestic Courts, and the Applicants did not adduce any evidence to prove collusion between the Respondent and the claimants of List 3A to 'prolong the procedure'. When the Court of Appeal realised the tension the case had generated, it invoked its power under the Appellate Jurisdiction Act to intervene, and when the case was referred back to the High Court, Justice Twaib disposed of it within two weeks, and the

Applicants themselves were surprised at the speed with which he disposed of the matter.

135. The Court therefore rules that the local procedure in respect this case has not been unduly prolonged by the Respondent.

136. On the allegation of police brutality, the Respondent submits that "there is no evidence to show whether these alleged victims or applicants have pursued any available local remedy against the Government regarding allegations of police brutality which they have complained about. Their letter to court dated 16th July, 2012...does not point towards this direction".

137. The Applicants did not demonstrate any measures they took, or attempted to take to exhaust local remedies. In their Reply to the Respondent's Response, they cite their submission of 16 July 2012 to justify their exhaustion of local remedies. The said submission simply described the incidents that took place on that day, and nothing is said about any process initiated in Court. The Court therefore holds that the Applicants have not exhausted local remedies with respect to the allegations of police brutality.

138. On both counts therefore, that is, the claim for compensation as well as allegation of police brutality, the Court holds that the Applicants have not exhausted local remedies.

5.) **Objection to the admissibility of the Application on the grounds of unreasonable delay in filing the Application**

139. Article 56(6) of the Charter requires that Application "Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter".

140. Having concluded that the Applicants have not exhausted local remedies, in accordance with Article 56(5) of the Charter, this Court does not find it necessary to pronounce itself on condition of reasonable delay laid down under Article 56(6).

C.) Applicants' request to expunge the Respondent's Response from the pleadings

141. On the Applicants request to expunge the Respondents Response from the pleadings, the Court notes that the Respondent's Response was received at the Registry of the Court on 11 March, 2013, four (4) days after the deadline set by the Court. The Court however, notes that the Response is dated 7 March 2013 and only arrived the Registry four days later by courier. For this reason, although received four days later than the time set, the Court considers the Response as properly filed.

142. The Court, having concluded that the Application is inadmissible on the grounds that Applicants have not exhausted local remedies, decides that this matter will not be considered on its merits.

On Costs

143. The Respondent prays this Court to order the Applicants to pay its cost.

144. The Court notes that Rule 30 of the Rules of Court provides that "unless otherwise decided by the Court, each party shall bear its own costs". Taking into account all the circumstances of this case, the Court is of the view that each party shall bear its cost.

145. On these grounds,

The Court:

1. On its jurisdiction, by majority of nine (9) to one (1), Justice Ouguergouz dissenting:
   i. Overrules the Respondent's objection to its jurisdiction;
   ii. Declares that it has jurisdiction to hear the Application;

2. Unanimously, declines the Applicants' request to expunge from the pleadings, the Respondent's Response to the Application on the grounds that it was filed out of time.

3. On the admissibility of the Application, unanimously:

i. Overrules the Respondent's objection to the admissibility of the Application based on the identity of the Applicants;

ii. Overrules the Respondent's objection to the admissibility of the Application based on the incompatibility of the Application with the Constitutive Act of the African Union and the Charter;

iii. Overrules the Respondent's objection to the admissibility of the Application on the grounds that the Application is based exclusively on information disseminated from the mass media;

iv. Sustains the Respondent's objection to the admissibility of the Application due to Applicants' failure to exhaust local remedies with respectto alleged violations relating to claims forcompensation;

v. Sustains the Respondent's objection to the admissibility of the Application due to failure to exhaust local remedies with respect to the alleged police brutality;

4. Declares this Application inadmissible.

5. In accordance with Rule 30 of the Rules of Court, each party shall bear its own cost.

Signed:

Sophia A.B. AKUFFO, President

Bernard M. NGOEPE, Vice- President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ Judge

Duncan TAMBALA, Judge

Elsie N. THOMPSON, Judge

Sylvain ORE, Judge

El Hadji GUISSE, Judge

Ben KIOKO, Judge

Kimelabalou ABA, Judge; and

Robert ENO, Registrar

Done in Arusha, this Twenty-Eighth dayof the month of March, in the year Two Thousand and Fourteen, in English and French, the English text being authoritative.

Pursuant to Article 28(7)of the Protocol and Rule 60(5)of the Rules of Court, the individualal opinion of Justice Ouguergouz is appended to this Judgment.

Frank D. Omary and others *v.* The United Republic of Tanzania
(Application No. 001/2012)

Separate Opinion of Judge Fatsah Ouguergouz

1. Though I am also in favour of rejecting the application filed by Mr. Frank David Omary and others against the United Republic of Tanzania, I am of the view that the Court ought to have declared that it does not have jurisdiction *ratione temporis* to deal with the alleged violations of human rights drawn from the non-payment of the totality of their pension and severance benefits and that consequently, it ought to have considered the admissibility of the application only with regard to the alleged violations of the rights of the Applicants in relation to the police brutalities which are said to have taken place after the reading of the judgment of the High Court of Tanzania on 23 May 2011. The only preliminary issue that will be dealt with here will therefore be the temporal jurisdiction of the Court.

*

2. The Respondent State deposited its instruments of ratification of the Charter and of the Protocol on 9 March 1984 and 10 February 2006, respectively; it deposited the optional declaration of compulsory jurisdiction of the Court on 9 March 2010. It is therefore this latter date which is critical in determining the jurisdiction of the Court to hear cases of violation under the Charter or any other relevant human rights instrument ratified by the Respondent State.

3. Consequently, if the Court is seized of an individual application against the Respondent State, which alleges the violation of a right founded on facts which occurred before 9 March 2010, it does not in principle have jurisdiction to deal with such an allegation.

F.O.

4. The jurisdiction *ratione temporis* of the Court has to be assessed exclusively in relation to the facts which led to the alleged violation; the subsequent failure of the appeals filed in the domestic courts of the Respondent State in order to redress the violation cannot bring this violation under the ambit of the temporal jurisdiction of the Court.

5. This was underscored as follows by the Grand Chamber of the European Court of Human Rights in a judgment delivered on 8 March 2006:

> "An applicant who considers that a State has violated his rights guaranteed under the Convention is usually expected to have resort first to the means of redress available to him under domestic law. If domestic remedies prove unsuccessful and the applicant subsequently applies to the Court, a possible violation of his rights under the Convention will not be caused by the refusal to remedy the interference, but by the interference itself, it being understood that this may be in the form of a court judgment".[1]

6. To establish the temporal jurisdiction of the Court in this matter, it is therefore necessary to look back in time to identify what is the Respondent State's act which led to the alleged violation of its international obligations under the Charter or another legal instrument to which it is a party.

7. When, as in the instant case, the facts in question took place for some before and for others after the critical date (*i.e.* 9 March 2010), it is important to determine whether the alleged violation stems from a fact which occurred prior to this date or one which took place after this date. On that score, it is important to bear in mind the traditional distinction between the acts of State having an «*instantaneous character*»[2]and those having a «*continuous character*».[3]

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[1] Paragraph 78 of the Judgment in the case concerning *Blecic v. Croatia*, Application No. 59532/00.

[2] «The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue», Paragraph 1 of Article 14 (*«Extension in time of the breach of an international obligation»*) of the «Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission on 9 August 2001», *Yearbook of the International Law Commission, 2001*, Volume II (Part Two), *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), p. 27.

[3] «The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation», Paragraph 2 of the same article 14. The Court may also consider facts which occurred before the entry into force of the optional declaration with regard to a Respondent State which is of the view that they are at the origin of a continuous situation which extended beyond that date (see for example the considerations of the Court on this issue in Paragraphs 62 to 83 of its Judgment on the admissibility of Application No. 013/2011, *Beneficiaries of late Nobert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest*

8. In considering its temporal jurisdiction, the Court should take into account not only the complaints of the Applicants but also the scope of the rights guaranteed by an international instrument, the violation of which has been alleged.

9. In the instant case, the Applicants alleged that the non-payment of the totality of their pension and severance benefits by the Respondent State constitutes a violation of Articles 7, 8, 23, 25 and 30 of the Universal Declaration of Human Rights.

10. The first four provisions guarantee, respectively, the right to equality and non-discrimination, the right to an effective remedy by the national competent tribunals, the right to work and to satisfactory working conditions and the right to an adequate standard of living. For its part, Article 30 does not provide the individual with a right as such; it indeed reads as follows: «Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein». This provision enshrines the classical prohibition of abuse of rights.[4]

11. Irrespective of the importance of the rights alleged by the Applicants to have been violated by the Respondent State, because of the failure to pay the totality of their pension and severance benefits, the Court candeal with their alleged violation only if the latter falls within the ambit of its jurisdiction *ratione temporis*.It is therefore important to determine precisely the date of occurrence of the act that led to the alleged violation consisting, in the instant case, in the non-payment of the totality of the pension and severance benefits by the Respondent State.

12. In the instant case, several dates may be taken into consideration to determine the origin of this instigating act.

Zongo and Blaise Ilboudou & The Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso).

[4] Other international legal instruments provide for such a ban, as for example, the International Covenant on Civil and Political Rights (Article 5), the International Covenant on Economic, Social and Cultural Rights (Article 5), the American Convention on Human Rights (Article 29 (a)), the European Convention on Human Rights (Article 17) and the Charter of Fundamental Rights of the European Union (Article 54); for a discussion of this issue, see Sebastien van Drooghenbroeck, «L'article 17 de la Convention européenne des droits de l'homme est-il indispensable ?», *Revue trimestrielle des droits de l'homme*, 2001, pp. 541-566. The above provisions to some extent echo the phrase uttered by Louis Antoine de Saint-Just during the French Revolution: «*No freedom for the enemies of freedom*».

13. On 20 September 2005, a *Deed of Settlement* was agreed upon between the Applicants and their co-applicants at the time, on the one hand, and the Respondent State on the other. On 21 September 2005, the said deed was registered at the High Court of Tanzania in Dar es Salaam.

14. In terms of Article 3 of this agreement, the Respondent State promised to pay the amount owed the Applicants and to do this between 20 September 2005 and 28 October 2005. In terms of Article 2 of this agreement, it also promised to consider any other request for compensation within six (6) months, as from 28 October 2005.

15. In their application, the Applicants stated that:

> "the Respondents on 21/9/2005 started to pay the applicants only one item (passage). (...) Doing this shows that by paying only one item in the total of 15 the defendants contravened the out of Court settlement" (see their letter of 16 January 2012).

16. On 15 October 2010, the Applicants were of the view that the amount paid by the Respondent State was insufficient, and once again seized the High Court of Tanzania.

17. On 23 May 2011, the High Court of Tanzania dismissed the Applicants' application for the issuance of a *Certificate of payment* by this Court. On page 17 of his Ruling, Judge Fauz Twaib endorsed the interpretation of the *Deed of Settlement* made by Judge Orlyo in 2008 and 2009; it was the latter judge who registered the *Deed of settlement* through a decision dated 21 September 2005. Judge Twaib referred in particular to the following paragraphs of the two decisions taken by Judge Orlyo.

18. In his decision of 19 September 2008, Judge Orlyo noted that:

> "Looked at from an objective angle, by Clause 2, the (Defendant) undertakes to pay all the (Plaintiff's) claims as enumerated at page 3 thereof. But the undertaking by the (Defendant) to pay is qualified and restricted. Whereas ***the claim in the plaint*** and at page 3 of the Settlement Deed are general, it was agreed by the parties that their payments are to be made on the basis of the individual record of each employee (...)" (emphasis added).

19. In his second decision dated 30 January 2009, he noted that:

> "There is no dispute on the content of paragraph 8 (...) and on the rights of the Applicants stated therein. However, the contents of paragraph 8 are not to be taken in isolation of the rest of the paragraphs of the Deed of Settlement. Further, and of cardinal importance, is that the contents of paragraph 8 and the whole Deed of Settlement are subject to the relevant laws".

20. These two decisions are a clear indication that by 19 September 2008, there was already a complaint and therefore a dispute as to the payment of pension and severance benefits by the Respondent State. This presupposes that by that date, the Respondent State had already violated its obligation towards the Applicants as provided for in the *Deed of settlement* of 20 September 2005. The dispute therefore took place well before the seizure of the High Court of Tanzania by the Applicants on 15 October 2010.

21. Based on the foregoing, one can therefore safely concludes that the act which instigated the alleged violation of certain provisions of the Universal Declaration of Human Rights occurred prior to the entry into force of the optional declaration with regard to the Respondent State and that, consequently, the Court has no jurisdiction *ratione temporis* to examine this allegation.

*

22. Thus, the Court ought to have declared that it lacked jurisdiction with regard to the alleged violations of the rights of the Applicants relating to the non-payment of the totality of their pension and severance benefits; it should have continued with the consideration of the admissibility of the application but only with respect to the alleged violation of the rights of the Applicants resulting from the police brutalities which are said to have taken place on 23 May 2011, and to declare it not admissible, as it did, due to the failure to exhaust local remedies.

Fatsah Ouguergouz
Judge

Robert Eno,
Registrar