AFRICAN UNION
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Rev 2

009/2011 - 011/2011

APPLICATIONS No. 009/2011 and No. 011/2011

REQUÊTES No. 009/2011 and No. 011/2011

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE CONSOLIDATED MATTER OF

1. TANGANYIKA LAW SOCIETY

2. THE LEGAL AND HUMAN RIGHTS CENTRE

V.

THE UNITED REPUBLIC OF TANZANIA

APPLICATION No. 009/2011

REVEREND CHRISTOPHER R. MTIKILA

V.

THE UNITED REPUBLIC OF TANZANIA

APPLICATION No. 011/2011

The Court composed of: Sophia A.B. AKUFFO, President; Fatsah OUGUERGOUZ, Vice - President; Jean MUTSINZI, Bernard M. NGOEPE, Modibo TOUNTY GUINDO, Gérard NIYUNGEKO, Duncan TAMBALA, Elsie N. THOMPSON and Sylvain ORÉ, Judges; and Robert ENO, Registrar.

In accordance with 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 ("the Protocol") and Rule 8 (2) of the Rules of Court ("the Rules"), Judge Augustino S.L. Ramadhani, Member of the Court and a national of Tanzania, did not hear the application.

In the matter of:

Tanganyika Law Society and The Legal and Human Rights Centre

represented by:

Tanganyika Law Society

v.

The United Republic of Tanzania,

represented by:

- Mr George M. Masaju, Deputy Attorney General

  Attorney General's Chambers

Mr Mathew M. Mwaimu, Director of Constitutional Affairs and Human RightsAttorney General's Chambers

- Mrs Irene F.M. Kasyanju, Assistant Director and Head of Legal Affairs Unit

  Ministry of Foreign Affairs and International Cooperation

- Mr Yohane Masara, Principal State Attorney

  Attorney General's Chambers

- Ms Sarah Mwaipopo, Principal State Attorney

  Attorney General's Chambers

- Mrs Alesia Mbuya, Senior State Attorney

  Attorney General's Chambers

- Miss Nkasori Sarakikya, Senior State Attorney

  Attorney General's Chambers

- Mr Edson Mweyunge, Senior State Attorney

  Attorney General's Chambers

- Mr Benedict T. Msuya, Second Secretary/Legal Officer

  Ministry of Foreign Affairs and International Cooperation

AND

In the matter of:

Reverend Christopher R. Mtikila,

represented by:

- Mr Setondji Roland Adjovi, Counsel
- Mr Charles Adeogun-Phillips, Counsel
- Mr Francis Dako, Counsel

- *v*.

- The United Republic of Tanzania,

  represented by the same persons as set out above

After deliberation,

delivers the following judgment:

The Parties

1. The Tanganyika Law Society and The Legal and Human Rights Centre ("the 1st Applicants) describe themselves as Non-Governmental Organizations ("NGO's) with Observer Status before the African Commission on Human and Peoples' Rights ("the Commission"). They are both based in the United Republic of Tanzania. They state their objectives as representing the interests of its members, the

administration of justice, and upholding and advising the Government and the public on all legal matters, including human rights, rule of law and good governance; and the promotion and protection of human and peoples' rights, respectively.

2. Reverend Christopher R. Mtikila ("2nd Applicant"), is a national of the United Republic of Tanzania. He brings his application in his personal capacity, as a national of the Republic.

3. The Respondent is the United Republic of Tanzania and is cited herein because the Applicants contend that it has ratified the African Charter on Human and Peoples' Rights ("the Charter"), and also the Protocol. Furthermore, the Respondent has made a declaration in terms of Article 34(6) of the Protocol, accepting to be cited before this Court by an individual or an NGO with Observer Status before the Commission.

Nature of the Applications

4. On 2 June 2011 and 10 June 2011, respectively, the 1st Applicants and the 2nd Applicant filed in the Registry of the Court applications instituting proceedings against the Respondent, claiming that the Respondent had, through certain amendments to its Constitution, violated its citizens' right of freedom of association, the right to participate in public/governmental affairs and the right against discrimination by prohibiting independent candidates to contest Presidential, Parliamentary and Local Government elections. The Applicants also allege that the Respondent violated the rule of law by

initiating a constitutional review process to settle an issue pending before the courts of Tanzania.

Procedure

5. The Application by the 1st Applicants ("the 1st Application") was received at the Registry of the Court on 2 June 2011; by a letter of the same date, the Registrar acknowledged receipt of the Application and informed the Applicants that their Application had been registered as Application No. 009/2011.

6. At its 21st Ordinary Session, held from 6 to 17 June 2011, the Court directed the Registrar to enquire from the Commission whether the 1st Applicants had Observer Status before the Commission and decided that only if it was confirmed that the 1st Applicants had Observer Status, would the Application be served on the Respondent.

7. By a letter dated 17 June 2011 to the Executive Secretary of the Commission, the Registrar, as instructed by the Court, enquired whether the 1st Applicants had Observer Status before the Commission.

8. By a letter dated 15 July 2011 and received at the Registry on the same date, the Executive Secretary of the Commission responded that the 1st Applicants had Observer Status before the Commission.

9. In accordance with Rule 35 (2) (a) of the Rules, and by a Note Verbale dated 18 July 2011 to the Respondent, the Registrar served a

copy of the application by the 1st Applicants on the Respondent by registered post. The Respondent was informed of the registration of the 1st Application and, in accordance with Rule 35 (4) (a) of the Rules, was asked to communicate to the Court the names and addresses of its representatives within thirty (30) days and, in accordance with Rule 37 of the Rules, to respond to the Application within sixty (60) days. This Note Verbale was copied to the 1stApplicants' representative, the Tanganyika Law Society.

10. In accordance with Rule 35 (3) of the Rules and by a letter dated 18 July 2011, the 1st Application was notified to the Executive Council of the African Union and State Parties to the Protocol through the Chairperson of the African Union Commission.

11. By a Note Verbale dated 19 August 2011 and received at the Registry of the Court on the same date, the Respondent communicated the names of its representatives. This list of representatives was copied to the Applicants.

12. The Respondent sent its Reply to the 1st Application by a Note Verbale dated 16 September 2011, which was received at the Registry of the Court on the same date.

13. By a Note Verbale dated 16 September 2011, the Registrar acknowledged receipt of the Respondent's Response to the 1st Application.

14. The Application by the 2nd Applicant ("the 2nd Application") was received at the Registry on 10 June 2011; in his Application, the 2nd Applicant informed the Registrar of the names of his Counsel.

15. By a letter dated 20 June 2011 to the 2nd Applicant's Counsel, the Registrar acknowledged receipt of the Application, informed Counsel that the Application had been registered number as Application No. 011/2011 and that service on the Respondent would be effected.

16. At its 21st Ordinary Session held from 6 to 17 June 2011, the Court directed the Registrar to serve the 2nd Application on the Respondent.

17. In accordance with Rule 35(2) (a) of the Rules, and by a Note Verbale dated 17 June 2011 to Respondent, the Registrar served a copy of the 2nd Application on the Respondent by registered post. The Respondent was informed of the registration of the Application, and also that, in accordance with Rule 35(4) (a) of the Rules, Respondent had to communicate the names and addresses of its representatives within thirty (30) days and further that, in accordance with Rule 37 of the Rules, Respondent had to respond to the Application within sixty (60) days.

18. In accordance with Rule 35(3) of the Rules and by a letter dated 18 July 2011, the 2nd Application was notified to the Executive Council of the African Union and States Parties to the Protocol, through the Chairperson of the African Union Commission.

19. By a Note Verbale dated 27 July 2011 and received at the Registry of the Court on the same date, the Respondent communicated the names and addresses of its representatives.

20. By a Note Verbale dated 23 August 2011 and received at the Registry of the Court on 24 August 2011, the Respondent filed its Response to the 2nd Application.

21. By a Note Verbale dated 25 August 2011, the Registrar acknowledged receipt of the Respondent's Response to the 2nd Application.

22. By a letter dated 25 August 2011, the Registrar served the 2nd Applicant's Counsel with the Respondent's Response to the 2nd Application and informed Counsel that he if he wished to file a Reply to the Respondent's Response he was to do so within thirty (30) days of receipt of the Respondent's Response.

23. At its 22nd Ordinary Session held from 12 to 23 September 2011, and by an Order dated 22 September 2011, the Court decided that the proceedings in the two cases be consolidated.

24. On 3 October 2011, the Registrar received the 2nd Applicant's Reply to the Respondent's Response to Application 011/2011; the Reply was dated 30 September 2011.

25. By a letter dated 3 October 2011, the Registrar acknowledged receipt of the 2nd Applicant's Reply to the Respondent's Response to the 2nd Application.

26. By separate letters dated 17 October 2011, the Registrar informed the Parties of the Court's decision to consolidate the Applications, and sent them the Order for Consolidation. In the letter to the Respondent, the Registrar also forwarded the 2nd Applicant's Reply to the Respondent's Response to the 2nd Application.

27. On 28 October 2011, the 1st Applicants filed with the Registry of the Court their Reply to the Respondent's Response to the 1st Application.

28. By a letter dated 1 November 2011, the Registrar acknowledged receipt of the 1st Applicants' Reply to the Respondent's Response to the 1st Application.

29. By a letter dated 5 November 2011, the Registrar served the Respondent with a copy of the 1st Applicants' Reply to the Respondent's Response to the 1st Application.

30. At its 23rd Ordinary Session held from 5 to 16 December 2011, the Court decided that the pleadings in the consolidated applications were closed and that a public hearing on the applications would be held during

its 24th Ordinary Session from 19 to 30 March 2012. The actual dates proposed for the public hearing were 26 to 27 March 2012.

31. By a letter dated 21 December 2011, the Registrar informed the Parties of the proposed dates for the public hearing and requested them to confirm their availability, and also whether the proposed dates would suit them; they were asked to do so no later than 20 January 2012.

32. By a Note Verbale dated 19 January 2012 and received at the Registry of the Court on 7 February 2012, the Respondent informed the Registrar that the dates proposed for the hearings were not convenient and requested that the hearings be rescheduled to 11 and 12 April 2012.

33. By a letter dated 3 February 2012, the Registrar acknowledged receipt of the Respondent's letter of 19 January 2012.

34. By a letter dated 20 January 2012 and received at the Registry of the Court on 7 February 2012, the 1st Applicants informed the Registry of their availability for the public hearing on the dates proposed by the Court.

35. By a letter dated 8 February 2012, the Registrar acknowledged receipt of the 1st Applicants' letter of 20 January 2012.

36. By separate letters both dated 13 March 2012, the Registrar informed the Parties that the public hearing would take place during the

25th Ordinary Session of the Court scheduled for June 2012 and that, in due course, they would be informed of the actual dates.

37. On 2 April 2012, the Registry rceived an electronic mail from the 2nd Applicant's Counsel, forwarding submissions dated 31 March 2012, regarding the postponement of the public hearing.

38. By a letter dated 3 April 2012, the Registrar acknowledged receipt of the 2nd Applicant's Counsel's submissions on the postponement of the public hearing.

39. By separate letters all dated 12 April 2012, the Registrar informed the Parties of the Court's decision taken at its 24th Ordinary Session held from 19 to 30 March 2012, that the public hearing on the case would be held on 14 and 15 June 2012 and that the matters would be heard on both the preliminary objections and the merits.

40. On 13 April 2012, the Registry of the Court received an electronic mail from the 2nd Applicant's Counsel acknowledging receipt of the Registrar's letter dated 12 April 2012 informing the Parties of the new dates for the public hearing.

41. By a letter dated 4 May 2012, the Registry informed the Executive Council of the African Union and State Parties to the Protocol, through the Chairperson of the African Union Commission, of the dates for the public hearing of the Applications.

42. By a letter dated 16 May 2012, the Respondent requested the Court for leave to submit additional documents to be appended to its pleadings.

43. By a letter dated 16 May 2012 to the Respondent, the Registrar acknowledged receipt of the letter from the Respondent requesting leave to submit additional documents to be appended to its pleadings, and that the Respondent would be informed accordingly regarding its request.

44. By separate letters dated 22 May 2012, the Registrar requested the Parties to confirm and/or indicate the names of their representatives and names of witnesses and/or experts, if any that they intended to call during the public hearing.

45. On 25 May 2012, the Registry received an electronic mail from Counsel for the 2nd Applicant that they would all attend the public hearing. He also advised the Registrar that he would be making a request for legal aid. The request was subsequently made by a letter dated 1 June 2012 applying for legal aid to facilitate the trip of the 2nd Applicant and two of his Counsel to attend the public hearing. The Registrar informed Counsel that the Court could not grant the requested legal aid as the Court had no legal aid policy in place.

46. By a letter dated 23 May 2012 and received at the Registry on 28 May 2012, Respondent communicated the names of its representatives who would be present at the public hearing.

47. On 28 May 2012, the Respondent submitted the additional documents which it had requested be appended to its pleadings.

48. By separate letters dated 29 May 2012, to the Respondent, the Registry acknowledged receipt of the Respondent's letter submitting the names of its representatives at the public hearing and the Respondent's letter submitting the additional documents which it had requested be appended to its pleadings.

49. By a letter dated 30 May 2012, the Registrar acknowledged receipt of the electronic mail from Counsel for the 2nd Applicant, dated 25 May 2012 confirming that the 2nd Applicant's Counsel's would attend the public hearing.

50. By an electronic mail of 3 June 2012, the 2nd Applicant's Counsel confirmed receipt of the Registrar's letter to him dated 30 May 2012.

51. By separate letters dated 31 May 2012, the Registrar served on the Applicants, copies of the additional documents which the Respondent had requested be appended to its pleadings; the Registrar also requested the Applicants to submit their comments, if any, by 7 June

2012, or, in the alternative, to include any comments in their oral submissions during the public hearing.

52. By separate letters dated 31 May 2012, the Registrar requested the Parties to submit written copies of their oral submissions by 7 June 2012.

53. On 4 June 2012, the 2nd Applicant's Counsel sent to Registry an electronic mail acknowledging receipt of the Registrar's letter dated 31 May 2012 which was informing the Applicants of their right to submit comments on the additional documents which the Respondent had requested be appended to its pleadings.

54. By a Note Verbale dated 4 June 2012, the Registrar informed the Respondent that the 25th Ordinary Session of the Court would be from 11 to 26 June 2012 and reminded it that the public hearing of the Applications would be held on 14 and 15 June 2012.

55. By separate letters dated 6 June 2012, the Registrar forwarded to the 1st Applicants and the Respondent, the submissions of the 2nd Applicant's Counsel, dated 31 March 2012, on the postponement of the public hearing of the Application.

56. By an electronic mail of 7 June 2012, the 1st Applicants filed with the Registry, the written copy of their oral submissions, also dated 7

June 2012. In the electronic mail, they informed the Registrar of their representatives at the hearing.

57. By a letter dated 8 June 2012, the Registrar acknowledged receipt of the electronic mail of the 1st Applicants dated 7 June 2012.

58. By a Note Verbale dated 7 June 2012, the Respondent submitted the written copy of its oral submissions for the Consolidated Applications.

59. By a letter dated 11 June 2012 to the Respondent, the Registrar acknowledged receipt of the written copy of the Respondent's oral submissions.

60. By separate letters dated 12 June 2012, the Parties were informed of the practical arrangements relating to the hearing of the Application.

61. By an electronic mail of 14 June 2012, the 2nd Applicant's Counsel informed the Registrar of the issues the 2nd Applicant would be raising during the public hearings.

62. Public hearings were held, at the seat of the Court in Arusha, Tanzania, on 14 and 15 June 2012, during which oral arguments were heard on both the preliminary objections and the merits. The appearances were as follows:

For the 1st Applicants:

- Mr Clement Julius Mashamba, Advocate;
- Mr James Jesse, Advocate; and
- Mr Donald Deya, Advocate

For the 2nd Applicant:

- Mr Setondji Roland Adjovi, Counsel

For the Respondent:

- Mr Mathew M. Mwaimu, Director of Constitutional Affairs and Human Rights, Attorney General's Chambers;
- Ms Sarah Mwaipopo, Principal State Attorney, Attorney General's Chambers;
- Mrs Alesia Mbuya, Principal State Attorney, Attorney General's Chambers;
- Ms Nkasori Sarakikya, Principal State Attorney, Attorney General's Chambers;
- Mr Edson Mweyunge, Senior State Attorney, Attorney General's Chambers; and
- Mr Benedict T. Msuya, Second Secretary/Legal Officer, Ministry of Foreign Affairs and International Cooperation

63. At the hearing, questions were also put by Members of the Court to the Parties; the replies were given orally.

64. By separate letters dated 31 July 2012, the Registrar forwarded to the Parties copies of the verbatim record of the public hearings and

informed them that their comments on the same, if any, had to be sent within thirty (30) days.

65. By a Note Verbale dated 31 August 2012 and received at the Registry by electronic mail of the same date and in hard copy on 3 September 2012, the Respondent transmitted to the Registrar its comments on the verbatim record of the public hearings; however, no comments were received from the Applicants.

Historical and factual background to the applications

66. The Court briefly sets out below the historical and factual background to the two applications.

67. In 1992, the National Assembly of the United Republic of Tanzania ("the Tanzanian National Assembly") passed the Eighth Constitutional Amendment Act, which entered into force in the same year. It required that any candidate for Presidential, Parliamentary and Local Government elections had to be a member of, and be sponsored by, a political party.

68. In 1993, Reverend Christopher R. Mtikila, the 2nd Applicant, filed a Constitutional Case in the High Court of the United Republic of Tanzania ("the High Court") in *Rev Christopher Mtikila v The Attorney General, Civil Case No.5 of 1993* (*"Civil Case No.5 of 1993"*), challenging the amendment to Articles 39, 67 and 77 of the Constitution of the United Republic of Tanzania and to Section 39 of the Local Authorities

(Elections) Act 1979 (as later amended by the Local Authorities (Elections) Act No. 7 of 2002) through the Eighth Constitutional Amendment Act referred to above. The 2nd Applicant contended in the High Court, that the amendment conflicted with the Constitution of the United Republic of Tanzania and was therefore null and void.

69. On 24 October 1994, the High Court delivered its judgment in *Civil Case No.5 of 1993* in favour of the 2nd Applicant, declaring as unconstitutional the amendment which sought to bar independent candidates from contesting Presidential, Parliamentary and Local Government elections.

70. In the meantime, the Government had on 16 October 1994, tabled a Bill in Parliament (Eleventh Constitutional Amendment Act No. 34 of 1994) seeking to nullify the right of independent candidates to contest Presidential, Parliamentary and Local Government Elections.

71. On 2 December 1994, the Tanzanian National Assembly passed the Bill (Eleventh Constitutional Amendment Act No. 34 of 1994) whose effect was to restore the Constitutional position before *Civil Case No.5 of 1993* by amending Article 21(1) of the Constitution of the United Republic of Tanzania. This Bill became law on 17 January 1995 when it received Presidential assent. This law negated the High Court's judgment in *Civil Case No.5 of 1993.*

72. In 2005, 2nd Applicant instituted another case in the High Court *Christopher Mtikila v The Attorney General, Miscellaneous Civil Cause No. 10 of 2005,* again challenging the amendments to Articles 39, 67 and 77 of the Constitution of the United Republic of Tanzania as contained in the Eleventh Constitutional Amendment Act of 1994. On 5 May 2006, the High Court once more found in his favour, holding that the impugned amendments violated the democratic principles and the doctrine of basic structures enshrined in the Constitution. By this judgment, the High Court again allowed independent candidates.

73. In 2009, the Attorney General appealed to the Court of Appeal of the United Republic of Tanzania ("the Court of Appeal"), in *The Honourable Attorney General v Reverend Christopher Mtikila Civil Appeal No.45 of 2009 ("Civil Appeal No. 45 of 2009"),* against the above judgment of the High Court. In its Judgment of 17 June 2010, the Court of Appeal reversed the High Court's judgment, thereby disallowing independent candidates for election to Local Government, Parliament or the Presidency.

74. The Court of Appeal ruled that the matter was a political one and therefore had to be resolved by Parliament. Afterwards, Parliament set in motion a consultative process aimed at obtaining the views of the citizens of Tanzania on the possible amendment of the Constitution. At the hearing, it was confirmed to the Court that the process was still ongoing.

75. As the municipal legal order currently stands in the United Republic of Tanzania, candidates who are not members of or sponsored by a political party cannot run in Presidential, Parliamentary or Local Government elections.

Remedies sought by the Applicants

76. The 1st Applicants pray the Court to:

> "(a) Declare that the Respondent is in violation of Articles 2 and 13(1) of the African Charter on Human and Peoples' Rights and Articles 3 and 25 of the ICCPR (International Covenant on Civil and Political Rights);
>
> (b) Make an order that the Respondents put in place the necessary constitutional, legislative and other measures to guarantee the rights provided under Articles 2 and 13(1) of the African Charter and Articles 3 and 25 of the ICCPR;
>
> (c) Make an Order that the Respondent report to the Honourable Court, within a period of twelve (12) months from the date of the judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders;
>
> (d) Any other remedy and/or relief that the Honourable Court will deem to grant; and
>
> (e) The Respondent to pay the Applicants' costs."

77. The 2nd Applicant prays the following remedies:

"(a) That the Court make a finding that the United Republic of Tanzania has violated and continues to violate his rights,

(b) That the United Republic of Tanzania ought to provide appropriate compensation to him for the continuous violation of his rights that forced him to endure long and costly judicial proceedings.

(c) That he reserves the right to substantiate the legal analysis for claiming compensation and reparations."

Nature of the Applicants' case

78. The 1st and 2nd Applicants have substantially the same case. They challenge the validity of the amendments, referred to earlier, to the Constitution of the United Republic of Tanzania, the effect of which is, briefly stated, to bar independent candidates to stand for the Presidential, Parliamentary and Local Government elections; the amendments require that candidates have to belong to or be sponsored by a registered political party. The Applicants contend that the prohibition of independent candidature violates an aspirant's rights to participate in public affairs in their country, which rights are protected under various international human rights instruments.

Respondent's preliminary objections

79. The Respondent raises certain preliminary objections on both admissibility and jurisdiction.

80. The preliminary objections on admissibility:

80.1 Lack of exhaustion of local remedies

Article 6(2) of the Protocol, read together with Article 56 (5) of the Charter, requires that for an application to this Court to be admissible, an applicant must have exhausted local remedies. Article 6(2) of the Protocol reads: *"The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."* In its turn, Article 56(5) of the Charter requires that applications shall be considered if they *"Are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged ."* The Respondent contends that the Applicants have not done so. This is because, according to the Respondent, the judgment of the Court of Appeal stated that the issue relating to the prohibition of independent candidates had to be settled by Parliament. Respondent also argues that the Government has prepared and tabled the Constitutional Review Bill dated 11 March 2011, with a view to setting up a mechanism for the constitutional review process. At the time of the Applications the bill was awaiting its second and third reading, before being enacted into law. Respondent argued that the Appellate judgment of 17 June 2010, did not substantively deal with the issue of independent candidates; the matter was left to Parliament and this avenue has not yet been exploited. Respondent adds that Parliament is yet to convene and deliberate on the matter. It further

argues that there has been a significant development with the process of reviewing the Constitution of the United Republic of Tanzania. To this end, a commission has been set up, and mandated, to be in charge of the reviewing process. The Respondent argues that, since the commission is to collect the views of the public, the 2nd Applicant will have an opportunity to give his views on the issue of independent candidacy. There shall also be a Constituent Assembly which will deliberate on the provisions of the new Constitution. The Respondent therefore argues that the matter has been left to the people of Tanzania.

80.2 Unreasonable delay in filing the applications

The second preliminary objection raised by Respondent on admissibility is based on Article 56(6) of the Charter, which requires that applications be *"... submitted within a reasonable period from the time local remedies are exhausted or from the date the [Court] is seized with the matter"*. The Respondent contends that the Applicants took unreasonably too long to bring their applications. It argues that whereas the Court of Appeal handed down its judgment on 17 June 2010, it was not until 2 June 2011 and 10 June 2011 that the 1st Applicants and 2nd Applicant, respectively, filed their applications.

80.3 Lack of jurisdiction

The other preliminary objection raised by the Respondent relates to the issue of jurisdiction. Respondent argues that at the time of the alleged

violation of the rights in question, the Protocol had not yet come into operation. The Court therefore has no jurisdiction to hear the matter.

The Applicants' Response to the Preliminary Objections

81. The Applicants responded to the above preliminary objections raised by the Respondent.

81.1 Alleged lack of exhaustion of local remedies

The Applicants contend that the constitution review process and Parliament do not constitute a viable local remedy required to be exhausted in terms of Article 6(2) of the Protocol, read together with Article 56(5) of the Charter. According to the Applicants, what constitutes a viable remedy which must first be exhausted is a judicial remedy.

81.2 Alleged unreasonable delay in filing the applications

Regarding the objection that the Applicants took unreasonably long to bring their Applications:

The Applicants contend that there has not been any undue delay. Firstly, within four months of the judgment, there were general elections, and functionaries were preoccupied with those elections. Secondly, the Applicants say that they had to wait for Parliament to deal with the matter in the wake of the judgment of the Court of Appeal. They contend that the lapsed time must be reckoned from the time Parliament failed to act.

81.3 Alleged lack of jurisdiction

The objection based on lack of jurisdiction on the ground that the Protocol was not yet operational at the time of the alleged violation of the 2nd Applicant's rights:

The 2nd Applicant argues that a distinction has to be made between normative and institutional provisions. The rights sought to be protected were enshrined in the Charter to which Respondent was already a party at the time of the alleged violation; although the Protocol came into operation later, it was merely a mechanism to protect those rights. The Charter sets out rights while the Protocol provides an institutional framework for enforcement of those rights. The Applicant stated that it is not the ratification of the Protocol that establishes the rights, rather these rights existed in the Charter and the Respondent has violated them and continues to do so. The issue of retroactivity therefore does not arise.

The Court's Ruling on admissibility.

82. Lack of exhaustion of local remedies.

82.1 The Court is of the view that, in principle, the remedies envisaged in Article 6(2) of the Protocol read together with Article 56(5) of the Charter are primarily judicial remedies as they are the ones that meet the criteria of availability, effectiveness and sufficiency that has been elaborated in jurisprudence

Thus, in *Communication Nos 147/95, 147/96 Sir Dawda K. Jawara v The Gambia,* Thirteenth Annual Activity Report (1999-2000) at paragraph 31, the African Commission stated that:

> *"Three major criteria could be deduced in determining [the exhaustion] rule, namely: the remedy must be available, effective and sufficient."*

In *Communication No 221/98 Alfred B. Cudjoe v Ghana,* Twelfth Annual Activity Report (1998-1999) at paragraph 13, the Commission had earlier stated that:

> *"[T]he internal remedy to which Article 56(5) [of the Charter] refers entails a remedy sought from courts of a judicial nature."*

In the Case of *Velásquez-Rodríguez v. Honduras,* Judgment of July 29 1988, Series C No 4 paragraph 64, the Inter-American Court of Human Rights stated that:

> *"Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific date, it obviously need not be exhausted."*

In a similar vein, the European Court of Human Rights in *Akdivar and Others v Turkey* Application no. 21893/93 Judgment of 16 September 1996 Reports of Judgments and Decisions 1996 IV page 1210 paragraph 66 stated that:

"To meet the exhaustion requirement normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness."

82.2 The 2nd Applicant contends that he has exhausted local judicial remedies since the judgment of the Court of Appeal, which is the final court, set aside the judgments of the High Court that had declared the prohibition of independent candidates unconstitutional. The 1st Applicants argued that it was not necessary for them to institute an action challenging this prohibition as the outcome would have been the same. The Respondent did not join issue on the 1st Applicants' argument. However, the Respondent argues that the parliamentary process with which the constitutional review process is connected, is also a remedy which the Applicants should have exhausted.

82.3 The term local remedies is understood in human rights jurisprudence to refer primarily to judicial remedies as these are the most effective means of redressing human rights violations. That the 2nd Applicant has exhausted local judicial remedies is not in dispute.

The Respondent, having not joined issue on the 1st Applicants' argument that they need not have instituted an action challenging the

prohibition of independent candidates, is deemed to have admitted the position of the 1st Applicants.

In the circumstances, the Court accepts that there was no need for the 1st Applicants to go through the same local judicial process the outcome of which was known. The parliamentary process, which the Respondent states should also be exhausted is a political process and is not an available, effective and sufficient remedy because it is not freely accessible to each and every individual; it is discretionary and may be abandoned anytime; moreover, the outcome thereof depends on the will of the majority. No matter how democratic the parliamentary process will be, it cannot be equated to an independent judicial process for the vindication of the rights under the Charter. In conclusion, we find that the Applicants have exhausted local remedies as is envisaged by Article 6(2) of the Protocol read together with Article 56(5) of the Charter.

83. Alleged delay in filing the applications

The Court agrees with the applicants that there has not been an inordinate delay in filing the applications; because after the judgment of the Court of Appeal, the Applicants were entitled to wait for the reaction of Parliament to the judgment. In the circumstances, the period of about

three hundred and sixty (360) days, which is about one year from the date of the judgment of the Court of Appeal until the applications were filed was not unreasonably long.

The Court's Ruling on the preliminary objection on jurisdiction

Temoporal jurisdiction of the Court

84. The only point on which the Court's jurisdiction is challenged is based on the fact that the conduct complained of, namely, the barring of independent candidates, occurred before the Protocol came into operation. This argument cannot be upheld. The rights alleged to be violated are protected by the Charter. By the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it, The Charter was operational, and there was therefore already a duty on the Respondent as at the time of the alleged violation to protect those rights.

At the time the Protocol was ratified by the Respondent and when it came into operation in respect of the Respondent, the alleged violation was continuing and is still continuing: independent candidates are still not allowed to stand for the position of President or to contest Parliamentary and Local Government elections. Furthermore, the alleged violations continued beyond the time the Respondent made the declaration in terms of Article 34(6) of the Protocol.

Material and Personal Jurisdiction of the Court

85. Article 3(1) of the Protocol confers jurisdiction on this Court to hear matters concerning the alleged violation of human rights; the Article reads:

> *"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 appears that the alleged violations fall within the scope of this provision.

86. Article 5(3) of the Protocol read together with Article 34(6) of the Protocol sets out the jurisdiction of the Court to consider applications from individuals and NGOs.

Article 5(3) reads:

> *"The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol."*

Article 34(6) provides:

> *"At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration."*

From the record, the Respondent has ratified the Protocol and made the declaration under Article 34(6) thereof, thus the Court can consider applications from individuals and NGOs brought against it; the 1st

Applicants have Observer Status before the Commission therefore the Court has jurisdiction *ratione personae*.

87. Apart from the point of the temporal jurisdiction of the Court dealt with above which was raised by the Respondent, no other point challenging the jurisdiction of the Court was raised; there is no issue which deprives the Court of its jurisdiction. It therefore has jurisdiction to hear the matter.

88. As the applications are admissible, and the Court has jurisdiction, the Court proceeds to consider the merits of the case which, as said earlier, were argued together with the Respondent's preliminary objections.

The Merits of the Case

89. The Applicants' Case On The Merits.

89.1 The case and arguments of the 1st Applicants and the 2nd Applicant on the merits are substantially the same; therefore, they will be dealt with together, except where it is necessary to make a distinction.

89.2 The gist of the Applicants' case, set out earlier in more details, is that the Eleventh Constitutional Amendment passed by the Tanzanian National Assembly on 2 December 1994 and assented to by the President of the United Republic of Tanzania on 17 January 1995, violates rights under Articles 2, 10 and 13(1) of the Charter , which articles are referred to later in detail, inasmuch as it bars independent

candidates from contesting Presidential, Parliamentary as well as Local Government elections.

89.3 It is contended, firstly, that the prohibition constitutes discrimination against independent candidates. Secondly, that it violates the right to freedom of association and also the right to participate in public or government affairs in one's country. It is argued that the requirements for forming a political party are onerous; for example, a political party must have certain quota numbers by regions; it must also have members not only from the Mainland, but also from Zanzibar. One could not enjoy the exercise of one's political rights unless one belonged to a political party; the Applicants, therefore argue that there is no freedom of association.

90. Respondent's Case On The Merits

90.1 The Respondent argues that the prohibition of independent candidates is a way of avoiding absolute and uncontrolled liberty, which would lead to anarchy and disorder; the prohibition is necessary for good governance and unity. Therefore the qualifications for election to the positions of President of the United Republic of Tanzania, Member of Parliament and in Local Government has been regulated by articles 39(1) and 67(1) (b) of the Constitution of the United Republic of Tanzania 1977, and section 39(f) of the Local Authorities (Elections) Act, Cap 292, respectively. The prohibition on independent candidates for positions of government leadership is necessary for national security, defence, public order, public peace and morality. Respondent further argues that the

requirements for the registration of a political party, such as the need to include regional representation, are necessary to avoid tribalism.

90.2 Regarding the alleged discrimination, the Respondent argues that the relevant constitutional amendments were not targeted at any particular individuals, but apply to all Tanzanians equally; therefore the amendments are not discriminatory.

90.3 With regard to the alleged violation of the right to freedom of association, the Respondent argues that standing for a political position is a matter of personal ambition; one is not forced to do so if one does not want to. Referring to 2nd Applicant in particular, Respondent argues that he has never been prevented from participating in politics; he belongs to a political party and has stood for the position of President but lost.

90.4 The Respondent therefore prays the Court to dismiss the applications.

The Decision of The Court On The Merits.

The right to participate freely in the government of one's country

91. The Applicants, as stated earlier, contend that the Respondent is in violation of article 13 (1) of the Charter. They argue that the violation is still continuing as it pertains to constitutional and statutory provisions which are still in force.

92. They are also relying on Articles 3 and 25 of the International Covenant on Civil and Political Rights (ICCPR) and Article 21(1) of the Universal Declaration of Human Rights (UDHR).

93. In summary, they contend that the judgment of the Tanzanian Court of Appeal, Articles 39, 47, 67 and 77 of the Constitution of the United Republic of Tanzania 1977, and the Local Authorities (Election) Act No. 7 of 2002, which collectively require that candidates for Presidential, Parliamentary and Local Government elections must be members of and be sponsored by a Political Party, constitute a violation of Articles 2, 10 and 13 of the Charter and Articles 3 and 25 of the ICCPR.

94. The Respondent, on its part, states that the decision on whether or not to introduce independent candidature in Tanzania is dependent on the social needs of the country, based on its historical reality. The Respondent argues that the issue of independent candidature is political and not legal. This argument is in line with the decision of the Tanzanian Court of Appeal.

95. The Respondent contends further that the restriction on independent candidature is a means for avoiding absolute and uncontrolled liberty “whole and free from restraint which would lead to anarchy”.

96. The Respondent also points out that the 2nd Applicant has formed his own political party and, effectively, has not been prevented from participating in politics.

97. In considering this alleged violation of Article 13 (1) of the Charter by the Respondent, it is necessary for the Court to consider critically the Article relied on.

Article 13 (1) of the Charter, which is the main provision on political participation, states that:

> *"1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."*

98. It is imperative to state here that the rights guaranteed under the Charter as stated in Article 13 (1) are individual rights. They are not meant to be enjoyed only in association with some other individuals or group of individuals such as political parties. Therefore, in an application such as the instant one, what is of paramount significance is whether or not an individual right has been placed into jeopardy, or otherwise violated, not whether or not groups may enjoy the particular right.

99. In view of the patently clear terms of Article 13(1) of the Charter, which gives to the citizen the option of participating in the governance of her country directly or through representatives, a requirement that a candidate must belong to a political party before she is enabled to

participate in the the governance of Tanzania surely derogates from the rights enshrined in Article 13 (1) of the Charter. Although, the exercise of this right must be in accordance with the law.

100. The enjoyment of this right is also restricted by article 27(2) of the Charter which provides that:

> *"The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."*

Further, the duty set out in Article 29(4) of the Charter which requires individuals, *"To preserve and strengthen social and national solidarity, particularly when the latter is threatened;"* also limits the enjoyment of this right.

101. The Respondent, in support of the said restrictions calls in aid the principle of necessity based on the social needs of the people of Tanzania. What are these social needs?

102. In response to the questions put by the Court during the hearing, the Respondent stated that the circumstances prevailing in Tanzania demand that the prohibition of independent candidates be maintained. According to the Respondent, this is in view of the structure of the Union, the United Republic of Tanzania comprising Mainland Tanzania and Tanzania Zanzibar. They contended that the restriction that there should be at least a minimum number of members of a party from the Mainland and from Zanzibar is justifiable and that the requirements to be

met regarding the registration of political parties have resulted in no tribalism in Tanzania. The Respondent argues that the law merely sets out the procedure of exercising the right but does not restrict it and that the procedure merely sets out the minimum obligations one has to discharge in order to enjoy the rights and that these are reasonable.

103. The Respondent reiterated the position of the the Court of Appeal in *Civil Appeal No. 45 of 2009* which was similar to the decision in the Inter – American Court of Human Rights *Castañeda Gutman v Mexico,* Judgment of 6 August 2008 Series C No 184 to the effect that the decision to introduce independent candidates depends on the social needs of each state based on its historical reality. The Respondent cited paragraphs 192 and 193 of the judgment in the *Castañeda Gutman v Mexico* case as follows:

> *"192. The systems that accept independent candidates can be based on the need to expand and improve participation and representation in the management of public affairs and to enable a greater rapprochement between the citizens and the democratic institutions; while the systems that opt for the exclusivity of candidacies through political parties can be based on different social needs, such as strengthening these organisaitons as essential instruments of democracy, or the efficient organization of the electoral process. These needs must ultimately respond to a legitimate purpose in accordance with the American Convention.*

"193. The Court considers that the State has justified that the registration of candidates exclusively through political parties responds to compelling social needs based on diverse historical, political and social grounds. The need to create and strengthen the party system as a response to an historical and political reality; the need to organize efficiently the electoral process in a society of 75 million voters, in which everyone would have the same right to be elected; the need for a system of predominantly public financing to ensure the development of genuine free elections, in equal conditions and the need to monitor efficiently the funds used in the elections, all respond to essential public interest. To the contrary, the representatives have not provided sufficient evidence that, over and above their statements regarding the lack of credibility of the political parties and the need for independent candidates, would nullify the arguments put forward by the State."

104. The Respondent elaborated on what it described as the historical and social realities leading to the prohibition of independent candidates. According to the Respondent, after independence, Tanzania had a multi-party system but the one-party system was instituted to cement national unity. Multi-party democracy was reintroduced in the early 90s and through the Eighth Amendment to the Constitution, particularly Articles 39, 47 and 67, independent candidacy was prohibited. These provisions were enacted at a time when Tanzania was a young democracy and were necessary so that multi-party democracy is strengthened.

105. The Respondent also elaborated on the alleged mischief which sought to be addressed by the Eleventh Constitutional Amendment. They stated that prior to the passing of Eleventh Constitutional Amendment, a reading of Article 21 of the Constitution dealt exclusively

with the right to participate in national public affairs, while the qualifications for party affiliation for Presidential, Parliamentary, as well as Local Government posts, were enshrined in Articles 39, 47 and 67 of the Constitution. Therefore, Article 21 of the Constitution was read in isolation from the provisions dealing with the requirement of party affiliation for participation in national public affairs. This was a mischief which was caused by non-harmonisation of the two sets of provisions. The Eleventh Constitutional amendment was meant to cure this mischief by harmonizing and cross referring the provisions dealing with party sponsorship, that is, Articles 39, 47 and 67 to Article 21 which deals with the right to participate in public affairs. They also maintained the already existing provisions by solidifying and concretizing them. Similarly, the intention of the government was to allow participation in public affairs through political parties, bearing in mind that the amendments were only made two years after the enactment of the Political Parties Act in 1992 and Tanzania was still in the throes of establishing a multiparty democracy. The country, at the time, was as yet to hold its very first general election under the multi-party system, and it was still at its infant stage of multiparty democracy, and there was not any compelling social need for independent candidature.

106. Jurisprudence

106.1 Jurisprudence regarding the restrictions on the exercise of rights has developed the principle that, the restrictions must be necessary in a democratic society; they must be reasonably proportionate to the legitimate aim pursued. Once the complainant has established that there is a *prima facie* violation of a right, the respondent state may argue that

the right has been legitimately restricted by "law", by providing evidence that the restriction serves one of the purposes set out in Article 27(2) of the Charter. In Communications *No* 105/93, 128/94, 130/94, 152/96 (*Consolidated Communications) Media Rights Agenda and others v Nigeria* Fourteenth Activity Report (2000-2001) and *Communication No 255/2002 Gareth Anver Prince v South Africa* Eighteenth Activity Report *(July 2004 –December 2004),* the Commission has stated that the *"only legitimate reasons for limitations to the rights and freedoms of the African Charter"* are found in Article 2 (7 (2) of the Charter. After assessing whether the restriction is effected through a *"law of general application"*, the Commission applies a proportionality test, in terms of which it weighs the impact, nature and extent of the limitation against the legitimate state interest serving a particular goal. The legitimate interest must be *"proportionate with and absolutely necessary for the advantages which are to be obtained"*.

106.2 The European Court of Human Rights ("European Court") also adopts a similar approach. In *Handyside vs. United Kingdom, Application No 5493/72* Judgment of 7 December 1976, Series A no. 24 at paragraph 49, the Court stated th*at:*

> *“The Court's supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". … This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed …must be proportionate to the legitimate aim pursued.”*

This approach was restated in *Gillow v United Kingdom Application No 9063/80* Judgment of 24 November 1986 Series A no. 109 at paragraph 55:

> *“As to the principles relevant to the assessment of the "necessity" of a given measure "in a democratic society", reference should be made to the Court's case-law. The notion of necessity implies a pressing social need; in particular, the measure employed must be proportionate to the legitimate aim pursued. In addition, the scope of the margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the right involved.”*

106.3 Concerning the social need, the European Court does not only verify if the State applied the principle of margin of appreciation in good faith, it also assesses whether the reasons given are*“relevant and sufficient”*, as the Court specified in *Olsson vs. Sweden Application no.*10465/83 Judgment of 24 March 1988 Series A no. 130 at paragraph 68.

106.4 Next, in accordance with the specification set out in *Sporrong and Lonnroth vs. Sweden Applications no 7151/75, 7152/75* Judgment

of 23 September 1982 Series A no. 52, the European Court assesses if the interference is proportionate to the legitimate aim, in doing so it *"must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."*

106.5 In order to determine whether the restriction of rights is legal, the Inter-American Court of Human Rights is guided by Articles 30 and 32(2) of the American Convention on Human Rights (ACHR) which sets out the scope of restrictions on rights. Article 30 of the ACHR provides that:

> *"The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established."*

On its part, Article 32(2) provides that:

> *"The rights of each person are limited by the rights of others, by the security of all and by the just demands of the general welfare, in a democratic society."*

A restriction on rights is authorized only if the legal basis is a legislative act and if the law's content conforms to the ACHR. The Court requires that the restrictions be legal and legitimate. This approach is settled in *Baena Ricardo and others against Panama* (Judgment of 2 February 2001).

The Court's finding

107.1 The Court agrees with the African Commission, that the limitations to the rights and freedoms in the Charter are only those set out in Article 27(2) of the Charter and that such limitations must take the form of "law of general application" and these must be proportionate to the legitimate aim pursued. This is the same approach with the European Court, which requires a determination of whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

107.2 Article 27(2) of the Charter allows restrictions on the rights and freedoms of individuals only on the basis of the rights of others, collective security, morality and common interest. The needs of the people of Tanzania, to which individual rights are subjected, we believe, must be in line with and relate to the duties of the individual, as stated in Article 27(2) of the Charter, requiring considerations of security, morality, common interest and solidarity. There is nothing in the Respondent's arguments set out earlier, to show that the restrictions on the exercise of the right to participate freely in the government of the country by prohibiting independent candidates falls within the permissible restrictions set out in Article 27(2) of the Charter. In any event, the restriction on the exercise of the right through the prohibition on independent candidacy is not proportionate to the alleged aim of fostering national unity and solidarity.

107.3 The Respondent has relied heavily on the *Castañeda Gutman v Mexico* case. In that case, the Inter-American Court found that individuals had other options if they wished to seek public elective office. Thus, apart from having to be a member of and being sponsored by a political party, one could be sponsored by a political party without being a member of that party and also one could form one's own political party particularly since the requirements for doing so were not ardouos. In the instant case, Tanzanian citizens can only seek public elective office by being members of and being sponsored by political parties; there is no other option available to them.

105.4 The United Nation's Human Rights Committee's General Comment No. 25 on [*T]he right to participate in public affairs, voting rights and the right of equal access to public service (Art.25)*, at paragraph 17 thereof, provides that:

> *"The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election."*

The Court agrees with this General Comment, as it is an authoritative statement of interpretation of Article 25 of the ICCPR, which reflects the spirit of Article 13 of the Charter and which, in accordance with Article 60

of the Charter, is an *"instrument adopted by the United Nations on human and peoples' rights"* that the Court can *"draw inspiration from"* in its interpretation of the Charter.

108. Furthermore, it is the view of the Court that the limitation imposed by the Respondent ought to be in consonance with international standards, to which the Respondent is expected to adhere . This is in line with the principle set out in Article 27 of the Vienna Convention on the Law of Treaties which provides that: *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."* Additionally, Article 32 of the International Law Commission Articles on State Responsibility 2001 provides that *"the Responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations".*

109. The Respondent relies on article 13(1) of the Charter, that the enjoyment of the rights thereunder must be in accordance with the law, that is, the Respondent's national law. It is pertinent to note that such limitations as may be placed by national law may not negate the clearly expressed provisions of the Charter. The Court agrees with the Commission's finding in *Communication No 212/98 Amnesty International v Zambia* Twelfth Activity Report (1998 – 1999) paragraph 50 that:

> *"The Commission is of the view that the "claw-back" clauses must not be interpreted against the Charter. Recourse to*

> *them shouldn't be used as a means of giving credence to violations of the express provisions of the Charter …. It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause."*

Having ratified the Charter, the Respondent has an obligation to make laws in line with the intents and purposes of the Charter. Thus it is the view of the Court that whilst the said clause envisages the enactment of rules and regulations for the enjoyment of the rights enshrined therein, such rules and regulations may not be allowed to nullify the very rights and liberties they are to regulate. Wherein lies any freedom if in order to even choose a representative of one's choice one is compelled to choose only from persons sponsored by political parties, however unsuitable such persons might be. To the extent that the said provision reserves to the citizen the right to participate directly or through representatives in government, any law that requires the citizen to be part of a political party before she can become a presidential candidate is an unnecessary fetter that denies to the citizen the right of direct participation, and amounts to a violation.

110. Finally on the issue that the 2nd Applicant has now formed his own political party, the Court finds that it does not in any way absolve the Respondent from any of its obligations. Ifthe 2nd Applicant in his eagerness to participate in politics as a responsible citizen forms his own party to cross the hurdle set up by the Respondent, he should not be forced to continue if he finds himself unable to cope with the burden of

establishing and maintaining a political party. It cannot be said he has not been prevented from freely participating in the government of his Country. He tried it once and if he no longer wishes to go that route, he has the right to seek to insist on the strict observance of his Charter rights. And having chosen not to form his own party, must he be excluded? Certainly not. Indeed, it is even arguable that, even if the Applicant has successfully formed a political party, he cannot be stopped from challenging the validity of the laws in question and from asserting that the same amounts to a violation of the Charter. A matter such as this one cannot and must not be dealt with as though it were a personal action, and it would be inappropriate for this Court to do so. If there is violation, it operates to the prejudice of all Tanzanians; and if the

Applicants' application succeeds, the outcome inures to the benefit of all Tanzanians.

111. The Court therefore finds a violation of the right to participate freely in the government of one's country since for one to participate in Presidential, Parliamentary or Local Government elections in Tanzania one must belong to a political party. Tanzanians are thus prevented from freely participating in the government of their Country directly or through freely chosen representatives.

The right to freedom of association.

112. It is the contention of the Applicants that the restriction requiring affiliation to a political party has impaired the freedom of association for

Tanzanians wishing to participate in politics. They contend further that freedom of association is a core democratic principle which is meant to allow citizens to monitor the State so as to ensure appropriate discharge of public functions and demand government compliance with legislations thus ensuring transparency and accountability. They placed reliance on Article 10 of the African Charter, Article 20 of the Universal Declaration of Human Rights and Article 22 of the ICCPR.

Article 10 (2) of the Charter indeed states that:

> *"2. Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association".*

The relevant cross reference to Article 29 of the Charter is article 29 (4) thereof which imposes a duty on the individual to" *preserve and strengthen social and national solidarity, particularly when the latter is threatened "*

Article 27(2) of the Charter, being the general limitation clause is pertinent to the consideration of this matter. For ease of reference it is cited again. It provides that:

> *" The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."*

This provision means that State Parties to the Charter are allowed some measure of discretion the freedom of association in the interest of collective security, morality, common interest and the rights and freedoms of others.

113. It is the view of the Court that freedom of association is negated if an individual is forced to associate with others. Freedom of association is also negated if other people are forced to join up with the individual. In other words freedom of association implies freedom to associate and freedom not to associate.

114. The Court therefore finds that by requiring individuals to belong to and to be sponsored by a political party in seeking election in the Presidential, Parliamentary and Local Government posts, the Respondent has violated the right to freedom of association. This is because individuals are compelled to join or form an association before seeking these elective positions.

115. The Court is not satisfied that the social needs argument raised by the Respondent , which has already been dealt with, meets the exceptions in Articles 29(4) and 27 (2) of the Charter to such an extent that it justifies the limitation of the right to freedom of association .

The right not to be discriminated against and the right to equality

116. The Applicants allege that the constitutional provisions which prohibit independent candidature have the effect of discriminating against the majority of Tanzanians, therefore violating the right to freedom from discrimination enshrined in Article 2 of the African Charter. The Article provides:

> *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter*

without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

117. The Applicants argued that though the law prohibiting independent candidature applies to all Tanzanians equally, its effects are discriminatory because only those who are members of and are sponsored by political parties can seek election to the Presidency, Parliament and Local Government positions. The Applicants referred the Court to the jurisprudence of the African Commission in Communication No 211/98 *Legal Resources Foundation v Zambia* Fourteenth Activity Report (2000 – 2001) at paragraph 64 where the Commission held *inter alia* that any" *measure which seeks to exclude a section of the citizenry from participating in the democratic processes is discriminatory and falls foul of the Charter"*.

118. The Respondent maintained that the law prohibiting independent candidature is not discriminatory as it applies equally to all Tanzanians.

119. It appears that the Applicants are alleging discrimination stemming from the above mentioned constitutional amendments between Tanzanians belonging to political parties on one hand, and Tanzanians not belonging to political parties to the other, as the former can contest presidential, legislative and local elections while the latter are not so permitted.

In that understanding, the right not to be discriminated is related to the right to the equal protection by the law as guaranteed by Article 3.2 of

the Charter, which stipulates that "[e]very individual shall be entitled to equal protection of the law".

In the light of Article 2 of the Charter above quoted, the alleged discrimination might be related to a distinction based on "political or any other opinion".

To justify the difference in treatment between Tanzanians, the respondent has, as already mentioned, invoked the existence of social needs of the people of Tanzania based, *inter alia,* on the particular structure of the State (Union between Mainland Tanzania and Tanzania Zanzibar) and the history of the country, all requiring a gradual construction of a pluralist democracy in unity.

The question then arises whether the grounds raised by the Respondent State in answer to that difference in treatment enshrined in the above mentioned constitutional amendments are pertinent, in other words reasonable, and legitimate.

As the Court has already indicated, those grounds of justification cannot lend legitimacy to the restrictions introduced by the same constitutional amendments to the right to participate in the Government of one's country, and the right not to be compelled to be part of an association (supra, paragraphs 107 – 11 and paragraphs 114 -115).

It is the view of the Court that the same grounds of justification do not legitimise the restrictions to not be discriminated against and the right to equality before the law. The Court therefore concludes that there has been violation of Articles 2 and 3(2) of the Charter.

Alleged breach of the rule of law

120. The 2nd Applicant argues that by initiating a Constitutional amendment to settle a legal dispute that was pending before the Courts, the effect of which was to nullify the judicial settlement of the matter, the Respondent abused the distinctive process of constitutional amendment and therefore the principle of the rule of law. The 2nd Applicant contended that the rule of law is a principle of customary international law.

The Respondent submitted that the Government of Tanzania fully adheres to principles of the rule of law, separation of powers and independence of the judiciary as provided for under the Constitution of the United Republic of Tanzania. In response to the 2nd Applicant's argument that the 11th constitutional amendment was in violation of the rule of law, Respondent argued that constitutional review and amendment is not a new phenomenon in Tanzania and that the Constitution of the United Republic of Tanzania has, so far, undergone fourteen (14) constitutional amendments. Article 98(1) of the Constitution provides that the Constitution can be amended at any time when the need arises and this is what happened in 1994; therefore, the issue of the rule of law being violated does not arise at all.

121. The Court is of the view that the concept of the rule of law is an all-encompassing principle under which human rights fall and so cannot be treated in abstract or wholesale. Furthermore the Applicants' claim that the rule of law has been violated is not related to a specific right;

therefore the Court finds that the issue of the violation of the principle of the rule of law does not properly arise in this case.

Alleged violations of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights

122. The Court notes that it has jurisdiction to interpret the said Treaties vide Article 3(1) of the Protocol which provides that *"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"*.

123. The Court, having considered the alleged violations under the relevant provisions of the Charter, does not, however,deem it necessary in this case to consider the application of these treaties.

Compensation and Reparation

124. The Court has the power to make orders for compensation or reparation on the basis of Article 27(1) of the Protocol which reads:

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

Rule 63 of the Rules of Court allows the Court to:

> *"… rule on the request for the reparation, submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."*

The 2nd Applicant in his prayer reserved his right to elaborate on his claim for compensation and reparation. He has not done so nor did the parties address the Court on this issue. As a result, the Court cannot in this judgment make a pronouncement on compensation and reparation. The Court decides to call upon the 2nd Applicant, if he so wishes, to exercise his rights in this regard.

Costs

125. The 1st Applicants prayed the Court to order that the Respondent pay their costs. The Respondent prayed that the Court orders the Applicants to pay its costs.

The Court notes that Rule 30 of the Rules of Court states that "[U]nless 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 there is no reason to depart from the provisions of this Rule.

On the prayers:

126. In Conclusion:

Having found the applications admissible and that the Court has jurisdiction to consider the applications, the Court by majority finds:

1. In respect of the 1st Applicants the Court holds:

That the Respondent has violated Articles 2, 3, 10 and 13(1) of the Charter .

2. In respect of the 2nd Applicant, the Court holds:

That the Respondent has violated Articles 2, 3, 10 and 13(1) of the Charter.

3. The Respondent is directed to take constitutional, legislative and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken.

4. In accordance with Rule 63 of the Rules of Court, the Court grants leave to the 2nd Applicant to file submissions on his request for reparations within thirty (30) days hereof and the Respondent to reply thereto within thirty (30) days of the receipt of the 2nd Applicant's submissions.

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

Done at Arusha, on this Fourteenth day of the month of June in the year Two Thousand and Thirteen in English and French, the English text being authoritative.

Signed by:

Sophia A.B. AKUFFO, President

Fatsah OUGUERGOUZ, Vice-President

Jean MUTSINZI, Judge

Bernard M. NGOEPE, Judge

Modibo Tounty GUINDO, Judge

Gérard NIYUNGEKO, Judge

Duncan TAMBALA, Judge

Elsie N. THOMPSON, Judge

Sylvain ORÉ, Judge

and Robert ENO, Registrar.

In accordance with Article 28 (7) of the Protocol and Rule 60 (5) of the Rules of Court, the separate opinion of Judges Fatsah OUGUERGOUZ, Bernard M. NGOEPE and Gérard NIYUNGEKO has been attached to this judgment.

AFRICAN UNION
الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

APPLICATIONS No. 009/2011 and No. 011/2011

TANGANYIKA LAW SOCIETY & THE LEGAL AND HUMAN RIGHTS CENTRE, AND REV. CHRISTOPHER R. MTIKILA

V.

THE UNITED REPUBLIC OF TANZANIA

Separate opinion of Vice-President Fatsah Ouguergouz

1. I am of the view that there is a violation by the Respondent State of the rights guaranteed under Articles 2, 3 (2), 10 and 13 (1) of the African Charter; however, I do not think that the reasons invoked in arriving at

such a conclusion have been articulated with sufficient clarity in this Judgment. Moreover, the Court should have first pronounced itself on the issue of its jurisdiction to deal with the two applications before considering the issue of the admissibility of the said applications; it should equally have set aside more substantial developments to the treatment of these two important issues.

I) Jurisdiction of the Court

2. The Court has first to ensure that it has the jurisdiction to deal with an Application before considering its admissibility. It has to do so *proprio motu* even if the Respondent State has not raised a preliminary objection in that regard. In the exercise of its contentious function, the Court can indeed only use its jurisdictional powers against State Parties to the Protocol and within the limits set by that instrument regarding the status of entities entitled to refer matter to it and the type of disputes that can be submitted to it. It is only when an application is filed against a State Party to the Protocol and within the limits set by the said Protocol that its admissibility could be considered by the Court. Besides, it is in that chronological order that issues of jurisdiction and admissibility are dealt with in the Protocol (Articles 3 (1), 5 and 6; see also Rule 39 of the Rules of Court).

3. In the Brief in Response to the Application of the 1st Applicants, the Respondent raised two objections on the admissibility of the Application; in its Brief in Response to the Application of the 2nd Applicant, the

Respondent raised five objections on the admissibility of the Application. In its Briefs in Response to the two Applications, the Respondent however addressed both issues of admissibility and merits. For reasons related to the proper administration of justice, the Court therefore decided not to suspend the proceedings on the merits of the case but to join consideration of the objections raised by the Respondent to that of the merits in both Applications, as allowed under Rule 52 (3) of the Rules. The Rejoinders of both Applicants as well as the oral pleadings of all the Parties thus dealt with the jurisdiction of the Court and the admissibility of both Applications as well as with the merits of the case.

4. It should be noted here that the Respondent did not formally raise any objection to the jurisdiction of the Court. Although in its Brief in Response to the second Applicant (pages 9-11, par. 19-23), it presented its five preliminary objections as objections to the admissibility of the Application, its 3rd, 4th and 5th objections should in fact be considered as objections relating to the jurisdiction of the Court.

5. The Court's jurisdiction to deal with an application brought against a State party and originating directly from an individual or a non-governmental organisation is mainly governed by Articles 3 (1) and 5 (3) of the Protocol. This jurisdiction must be considered both at the personal level (*ratione personae*) and at the material (*ratione materiae*), temporal (*ratione temporis*) and geographical (*ratione loci*) levels.

1) Personal jurisdiction

6. Article 3 of the Protocol, entitled "Jurisdiction", deals with the general jurisdiction of the Court, whereas Article 5, entitled "Access to the Court", deals specifically with the personal jurisdiction of the Court. Though they are different in form, the issues of the "jurisdiction" of the Court and "access" to the Court are closely related in the context of the Protocol. The Court's jurisdiction is also treated under Article 34 (6) of the Protocol, to which makes reference Article 5 (3) mentioned above.

7. Articles 5 (3) and 34 (6) of the Protocol, read together, show that direct access to the Court by an individual or a non-governmental organization is subject to the deposit by the Respondent State of a special declaration authorizing such access.

8. In the instant case, the Court has first ensured that the Respondent State is one of the State Parties to the Protocol which have made the declaration under Article 34 (6). As the 1st Applicants are two non-governmental organizations, the Court has similarly ensured that they enjoyed an observer status with the African Commission on Human and Peoples' Rights. The Court has then concluded that, these two cumulative conditions being met, it has jurisdiction *ratione personae* to deal with the two Applications.

9. The issue of the jurisdiction *ratione loci* of the Court was not raised by the Respondent and there can be no dispute in that regard considering the nature of the violations alleged by the Applicants. The Court did not therefore need to consider the issue of its jurisdiction *ratione loci*.

10. It is not however the case of the jurisdiction *ratione materiae* and *ratione temporis* of the Court even if the Respondent did not raised a formal objection challenging the Court's jurisdiction; these objections were indeed implicitly raised in the submissions on the Preliminary objections to the admissibility of the Application from the 2nd Applicant.

2) Material jurisdiction

11. In its Brief in Response to the Application of the 2nd Applicant, the Respondent argues in its 3rd, 4th, and 5th objections to the admissibility, respectively, that the "Application contains provisions inconsistent with Rule 26 (1) (a) of the Rules of Court (...) and Article 7 of the Protocol (...)", that it is "relying on the Treaty establishing the East African Community which was not in existence at the time the Applicant took the Government of Tanzania to Court in 1993" and that "it is retrospective with regard to the Protocol" (see also the Public Hearing of 14 June 2012, *Oral Hearing Verbatim Record*, p. 26, lignes 36-37, p. 27, lines 1-9, and p. 27, lines 15-26, respectively).

12. In support of its 3rd Preliminary objection, the Respondent argues that the Treaty establishing the East African Community of 30 November 1999, is not "a human rights instrument" within the meaning of Article 7 of the Protocol and Rule 26 (1) (a) of the Rules of Court and that, as a result, "it is extraneous to this case" (Paragraphs 19-20 of the Brief in Response; see also the Public Hearing of 14 June 2012, *Oral Hearing Verbatim Record*, p. 26, lines 19-20). In its Rejoinder, the 2nd Applicant noted that

"Article 3 (1) of the Protocol (...) does not specify which instrument should be considered as a human rights instrument" and argues further "that any Treaty containing provisions on the protection of human rights should be considered as relevant and within the jurisdiction of the Court" (Paragraph 13). At the Public Hearing of 15 June 2012, the second Applicant indicated that "the East African Treaty (...) does have in Article 6 a provision that protects the human rights" and "that provision not the entire treaty but that particular provision (...) is part of applicable law before the Court" (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 12, lines 20-23).

13. Therefore, contrary to what it indicated in Paragraph 87 of the Judgment, the Court had also to determine whether the Treaty establishing the East African Community was applicable in the light of Articles 3 (1) and 7 of the Protocol, as well as Rule 26 (1) (a) of the Rules of Court.

14. These three provisions make mention of "any other relevant human rights instrument ratified by the States concerned" and direct reference to three requirements: 1) The instrument in question must be an international treaty, hence the requirement that it be ratified by the State concerned, 2) this international treaty must "relate to human rights" and 3) it must have been ratified by the State concerned. These three requirements are cumulative and, if met, the Court would again have had to ensure that the said treaty is "relevant" to the treatment of the matter.

15. On the issue of whether a particular treaty can be considered as "a human rights instrument", the Court could, for instance, have suggested that some distinction be made between treaties which deal mainly with the protection of human rights and those which address other issues but

which contain provisions related to human rights. Treaties of the first category which are crafted in such a manner as to give "subjective rights" to individuals could beyond any doubt be considered as human rights instruments; they are human rights instruments *par excellence*. Treaties of the first category providing essentially for undertakings by States Parties and no subjective rights to individuals could also be considered as human rights instruments. For treaties of the second category, that is treaties the main purpose of which is not the protection of human rights but which contain provisions relating to human rights, their case is more problematic insofar as the said provisions generally do not grant subjective rights to individuals within the jurisdiction of States Parties. The Court possessing «*la compétence de sa compétence*» (Article 3 (2) of the Protocol), it is for it to determine which are the treaties relating to human rights falling within its material jurisdiction, taking due consideration of their «relevance» for the examination of a case (Article 3 (1) of the Protocol).

16. Such a weighty issue as the applicable law required consideration by the Court especially as the latter had asserted in Paragraphs 122 and 123 of the Judgment, that its jurisdiction extends to the interpretation and application of both the 1966 International Covenant on Civil and Political Rights and the 1948 Universal Declaration of Human rights. This assertion of the Court raises questions in relation to the first instrument which is a treaty providing for an international monitoring body, the Human Rights Committee of the United Nations; the risk of fragmentation of the international jurisprudence should indeed not be overlooked. Such an assertion also raises questions in relation to the

second instrument which is in fact a resolution of the United Nations General Assembly.

3) Temporal jurisdiction

17. In its written submissions, the Respondent did not raise any Preliminary objection to the temporal jurisdiction of the Court, other than that on the Treaty establishing the East African Community. At the Public Hearing of 15 June 2012, the Respondent however challenged the temporal jurisdiction of the Court as follows: "our contention with retrospectivity is hinged only on the aspect of the Eleventh Constitutional Amendment Act No. 34 of 1994, which was enacted before the Government of the United Republic of Tanzania ratified the Protocol to the African Charter establishing the African Court. The Court cannot adjudicate on matters which transpired prior to Tanzania having ratified the instruments and placing the United Republic of Tanzania under the jurisdiction of this Court, hence the issue is retrospective" (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 27, lines 16-21); the Respondent added as follows: "the international principle is that international treaties are not retrospective. [...] This principle is applicable to the United Republic of Tanzania with regard to Article 34 (6) of the Protocol to the African Charter establishing an African Court" (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record*, p. 27, lines 30-31 and p. 28, lines 1-5).

18. At the same Public Hearing, the 2nd Applicant for his part stated that: "the violations that were alleged goes before the setting up of the Charter

and the issue of retroactivity that Tanzania raises is not relevant. And we would like to refer to what we have already argued that violation existed in the past, it continues to exist" (Public Hearing of 15 June 2012, *Oral Hearing Verbatim Record,* p. 13, lines 11-14).

19. Since it had to ensure that it had jurisdiction to deal with the matter before it, the Court, as required, considered the merits of the 6th Preliminary objection of the Respondent, even though it was raised belatedly, that is, during the second round of oral pleadings.

20. I am however of the view that in dealing with this objection, the Court should have made a clearer distinction between the obligations of the Respondent under the African Charter and its obligations under the Protocol and the optional declaration. The 2nd Applicant indeed mixed up these two kinds of obligations (see Paragraph 81 (3) of the Judgment) and the Court should have lifted any ambiguity in this matter by clearly indicating that in the instant case its personal jurisdiction is solely based on the Protocol and the optional declaration.

21. On the basis of the non-retroactivity of treaties, a well-established principle in international law, the Court cannot be seized of allegations of violations of human and people's rights by an individual or by a non-governmental organization unless such alleged violations occurred after the entry into force for the State concerned, not only of the African Charter but also of the Protocol and, more important, of the optional declaration; Article 34 (6) of the Protocol does not suffer any ambiguity in this regard since it provides that "the Court shall not receive any petition under Article 5 (3) involving a State Party which has not made such a declaration".

22. In the instant case, the critical date for determining the jurisdiction of the Court to deal with the Applications cannot therefore be the date of entry into force for Tanzania of the sole African Charter or the Protocol; the only date to be considered is that of the deposit by Tanzania of the declaration under Article 34 (6) of the Protocol, that is 29 March 2010. It is therefore clear, on this basis, that any alleged violation of the African Charter by Tanzania occurring before that date would not fall within the temporal jurisdiction of the Court unless in circumstances where such violation bears a continuous character.

23. In Paragraph 84 of the Judgment, the Court should have clearly indicated that the only date to be considered in the instant case is the date of entry into force of the optional declaration for the Respondent State and not the date of entry into force of the Charter or the Protocol for the said State; it should then have focused its attention on the sole issue of the continuous character of the alleged violations beyond the critical date of 29 March 2010.

II) Admissibility of the Applications

24. The Court should have considered, even in a summary manner, the issue of the legal interest to act of the Tanganyika Law Society and the Legal Human Rights Center, the two non-governmental organizations which lodged the first applications.

25. Indeed, a distinction needs to be made between the "capacity to act" and "the interest to act" before the Court. The capacity of an entity to act relates to its authority to appear before the Court and therefore comes

within the personal jurisdiction of the Court in relation to the Applicant. The interest to act, for its part, refers to the notion of legitimate interest, in other words the legally recognized or protected interest, the existence of which the Court has to independently determine in each case. In other words the capacity to act deals with the applicant whereas the interest to act relates to the action that he or she undertakes.

26. An action before the Court is indeed only allowed if the applicant justifies his or her own interest in initiating it. To show proof of such interest, the applicant must accordingly demonstrate that the action or abstention of the Respondent State applies to a right which the applicant has or the right of an individual on behalf of which it wishes to seize the Court.

27. In the instant case, since Mr. Mtikila, whose rights have allegedly been violated, is party to the case, the issue at stake is one of ascertaining if a non-governmental organization is also allowed to file an application based on the same allegations. It would have been a different situation if Mr. Mtikila had not initiated an action before the Court and that both non-governmental organizations had acted for Mr. Mtikila and initiated action on his behalf.

III) Merits

28. I am of the view that barring independent candidates from certain elections and the correlative obligation to belong to a political party are not in themselves violations of Articles 10 and 13 (1) of the African Charter; they can only be violations of those provisions if they are

considered as unreasonable or illegitimate limitations to the exercise of the rights enshrined in the said provisions (see, on a similar matter, the findings of the Inter-American Court of Human Rights in Paragraphs 193 and 205 of its judgment of 6 August 2008 in the case *Castañeda Gutman v. Mexico*).

29. Unlike Articles 22 and 25 of the International Covenant on the Civil and Political Rights, Articles 10 and 13 (1) of the African Charter do not provide in a satisfactorily manner for the freedom of association and the right of the citizen to freely participate in the government of his or her country.

30. The main weakness of these two provisions of the Charter lies in the claw-back clause they contain. Both articles indeed provide that the freedom of association and the right of the citizen to freely participate in the public life of his or her country must be exercised "in conformity with the rules laid down by law". That clause does not appear in Article 25 of the Second Covenant which, for its part, provides that the guaranteed rights should be exercised "without discrimination and unreasonable restrictions". This provision consequently allows for "reasonable" restrictions, such as those based on the age of the person for instance. It is our view that Articles 10 and 13 (1) of the Charter should be interpreted in the same spirit. The limitations that the lawmaker could provide to the exercise of those guranteed rights must be reasonable or legitimate, that is they would need to comply with a number of objective criteria. Since Articles 10 and 13 (1) are silent, one could usefully refer to the criteria set out in the second Paragraph of Article 27 of the Charter even though this provision is *a priori* intended to prevent the abuse that the individual might likely commit in the exercise of his or her rights and freedoms

rather than to protect the individual from abusive limitations to his or her rights and freedoms by the State, as it is emphatically suggested in the formulation of this article and its location in the Chapter relating to the duties of the individual.

31. At any rate, in the final analysis, and as stated by the African Commission and confirmed by the Court in Paragraph 112 of the Judgment, this provision may be viewed as a general claw-back clause which restricts the margin of maneuver of States Parties as far as limitations are concerned. The only limitations to the exercise of the freedom of association and the right of citizens to freely participate in the government of their countries would consequently be those required to ensure "respect for the right of others, collective security, morality and common interest".

32. One can thus conclude that, according to the African Charter, the freedom of association and the right to freely participate in the government of a country are not absolute as the exercise of such rights is subject to limitations by the States Parties. One can equally conclude that the powers of limitation by States Parties are also not absolute in that they must comply with certain requirements: the restrictions must be provided by law and should be necessary to ensure "respect for the rights of others, collective security, morality and common interest".

33. Consequently, it lies with the Respondent State to show that the restrictions it has applied to the freedom of association and the right to freely participate in the government of the country were not only provided by law but also necessary to ensure "respect for the rights of others, collective security, morality and common interest".

34. Such proof has, however, not been forthcoming from the Respondent State. That is what the Court ought to have expressed in a clearer manner particularly with regard to the right to freely participate in the government of the country. Paragraphs 109 *in fine,* 111, 113 and 114 of the Judgment indeed suggest that the barring of independent candidates from certain elections and the correlative obligation to belong to a political party are in "themselves" violations of Articles 10 and 13 (1) of the Charter, whether or not such limitations are reasonable. The reasoning of the Court would had been clearer if its various sequences and the corresponding paragraphs of the Judgment were positioned in a more coherent manner so to show that it is the fact that the limitation to the rights concerned were unreasonable that led the Court to the conclusion that the said rights had been violated. Paragraph 109, in particular, is not at its right place in the reasoning of the Court (it should be located upstream) and Paragraph 108, for its part, addresses issues which are extraneous to the instant case.

35. Having found that Articles 10 and 13 (1) of the Charter had been violated, the Court could only have concluded that there was violation of the principles of non-discrimination and of the equal protection of the law as enshrined in Articles 2 and 3 (2), respectively.

36. The principle of non-discrimination, on one hand, and the principles of equality before the law and of equal protection of the law, on the other, are in close relationship. They are so to say the two sides of the same coin, the first principle being the corollary of the second ones. Their main difference under the African Charter lies in their respective scope.

Indeed, according to Articles 2 and 3 of the Charter, the principle of non-discrimination applies only to the rights guaranteed in the Charter, whereas the principles of equality apply to all the rights protected in the municipal system of a State party even if they are not recognized in the Charter.

37. In the instant case, the Court should have started its reasoning by clearly indicating this distinction and stating that the alleged discriminations actually relate to two rights guaranteed in the Charter. After having established that there actually exists a violation of these two rights and that various groups of peoples were given a different treatment, the Court should have underlined that any difference of treatment does not necessarily constitute a discrimination. Indeed, as the Human Rights Committee of the United Nations indicated in its General Comment of Article 26 of the Second International Covenant, "differentiation is not discrimination if it is based on objective and reasonable criteria and if the aim is legitimate in light of the Covenant" [1] (see a similar statement of the European Court of Human Rights in the case *Lithgow v. United Kingdom*[2]).

38. It is only after having laid down these premises, that the Court should have dealt, as it did in Paragraph 119 of the Judgment, with the objective

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[1] *General Comment No.18, Non-Discrimination,* adopted by the Committee on 10 November 1989 during its 37th Session, Paragraph 13; see also, for example, its Views adopted on 15 July 2002 and relating to Communication No. 932/2000, Human Rights Committee, *Doc. CCPR/C/75/D/932/2000*, 26 July 2002, pp. 21-24, Paragraphs 12.2-13.18.

[2] According to the European Court, for the purpose of Article 14 of the European Convention, a difference of treatment is discriminatory if it «has no objective or reasonable justification», that is, if it does not pursue a «legitimate aim», *Application No 9063/80,* Judgment of 8 July 1986, Series A, No. 102, Paragraph 177, *European Human Rights Report*, 1986, No. 8, p. 329.

and reasonable nature of the limitations introduced by the Tanzanian constitutional amendments, and ruled that the aim of the difference of treatment is not legitimate in light of the Charter.

Judge Fatsah Ouguergouz

Vice-President

Dr. Robert Eno

Registrar

In the Consolidated Matter of

1. Tanganyika Law Society
2. The Legal and Human Rights Centre
v.
The United Republic of Tanzania
Application No. 009/2011

And

Reverend Christopher R. Mtikila
v.
The United Republic of Tanzania
Application no. 011/2011

Separate opinion: B. M. Ngoepe, Judge

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1) I agree with the majority judgment, of which I am part, in all respects. It is a judgment which, to any seriously diligent reader, whether they agree with it or not, has been written with sufficient clarity and lucidity of thought. I have, however, felt the need to write a separate opinion on a conundrum which has been vexing this Court for some time and which has manifested itself in this judgment differently from the way it has done in the past. It is this: in writing a judgment, should this Court **always**, in every matter, deal with admissibility first and only thereafter with jurisdiction, or vice-versa? Unlike in previous judgments,

this judgment has this time round elected to first deal with the issue of admissibility, and then jurisdiction.

2) There has never been, in any matter, a unanimous decision that the Court must every time start with jurisdiction, or with admissibility. Views have on every single occasion differed on this aspect, with strong arguments advanced in support of each view. I have likened this debate to the infamous age-old one: the chicken or the egg first? Personally I do not, at this stage, subscribe to any one of the two approaches as I do not see the need for rigidity. My problem is therefore not as to which one should be dealt with first, but with a rigid approach that one must always start with the one and never with the other.

3) In wrestling with the above issue, as indeed with others from time to time, it is, admittedly, not only desirable but also necessary for this Court to learn from other international jurisdictions. At the same time though, it must be borne in mind that this Court is not only beginning, as it is entitled to and indeed obliged, to develop its own jurisprudence and practices. It cannot therefore afford to compromise its own capacity to do so by enslaving itself to any form of rigidity or to any mechanical approach; things should not be cast in stone. Being pragmatic is a virtue. I would have grave reservations with a mechanical approach to, and application of, the law. In my view, heavens would not fall merely because in a given matter, the Court started with admissibility and not with jurisdiction, or vice-versa. A further problem is that adherence to the rigidity sometimes gives rise to a secondary time-consuming debate, namely, whether a particular point falls

under admissibility or jurisdiction. This happens when such a point appears to be overlapping. As I do not subscribe to any view that the Court must always start with the one and not the other, I discuss the matter no further.

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

TANGANYIKA LAW SOCIETY AND THE LEGAL AND HUMAN RIGHTS CENTRE & REV. CHRISTOPHER MTIKILA V. THE UNITED REPUBLIC OF TANZANIA

(APPLICATIONS NO 009/2011 AND 011/2011)

SEPARATE OPINION OFJUDGE GERARD NIYUNGEKO

1. I agree with the decision of the Court in the matter of *Tanganyika Law Society and the Legal and HumanRights Centre & Rev. Christopher Mtikila v. the United Republic of Tanzania* as set out in paragraph 126 of its judgment of 14 June 2013. I however do not share its views on the two following issues: the order of treatment of the issues regarding the Court's jurisdiction and the admissibility of the application on the one hand, and the Court's grounds and reasoning in deciding whether or not, it had *ratione temporis* jurisdiction on the other.

I. The order of treatment of issues relating to the jurisdiction of the Court and the admissibility of the application

2. After summarising the respective submissions of the parties on the admissibility of the application and on the *ratione temporis* jurisdiction of the Court (paragraphs 80 and 81), the Court ruled in the same order on the two issues (paragraphs 82 to 88). In like manner, the Court presented its decisions on these issues, following the same order (paragraph 126 of the judgment).

3. It should be noted that it is the first time in *the practice of the Court* that it is dealing with a matter by first considering the admissibility of the application. In all its earlier decisions since 2009, it had always endeavoured to ensure *in limine* that it had jurisdiction to hear the matter, whether or not a party raised an objection in that regard[1]. In the circumstances, one would have expected that, in the judgment on this matter, the Court would have explained, be it in passing, the reasons for this change in approach. Failure to do so would leave the impression of inconsistency and lack of coherence. Unfortunately, nothing is explained in this regard in the judgment. One of the consequences will be that with the unexplained changes or fluctuation in the Court's practice, parties will be in the dark as to which legal issue to begin with henceforth, when they have to file an application or make submissions before the Court. This may create unnecessary confusion.

4. In any case, this change in approach poses *a problem of principle*: is it possible for the Court to begin with the consideration of the admissibility of an application before ensuring that it does have the jurisdiction to deal with the application? In our opinion, the answer to this question is 'no' and for a certain number of reasons.

Firstly, one should not lose sight of the fact *that the jurisdiction of the Court is neither all-embracing nor automatic in nature; it is a jurisdiction that has been attributed, subject to conditions, and therefore limited by definition*. A judge vested with such jurisdiction cannot start considering any aspect of an application without ascertaining whether or not he or she does have jurisdiction.

Secondly, it should be realised that *whereas jurisdiction relates to the powers of the judge, the admissibility of the application is one limb of the application same as the merits*. In such circumstances, can a judge embark on the consideration of an aspect of an application before determining whether he or she is in a position to consider the entire application? Is there any sense in dealing with what he or she is requested to do before finding out whether he or she can or cannot do it? Logic and common sense would require that the Court should first and foremost ensure that it has jurisdiction before considering the admissibility of the application.

5. This position is further buttressed, if need be, by *the manner in which Rule 39 of the Rules of Court is crafted*. That Rule prescribes that the Court should deal with these issues in this order: 'Preliminary examination of the *competence* of the Court and of *admissibility* of applications' » (italics added). This provision clearly shows what was the initial intent of the Court on the order of consideration of issues relating to jurisdiction and admissibility.

[1]Decisions of the Court can be found on the Court's website : www.african-court.org

6. In actual fact, the only stage in the procedure which should take precedence over the determination of the Court's jurisdiction is the *receipt and registration of the application by the Registry*, after ensuring that its contents comply with the provisions of Rule 34 of the Rules of Court. *Receiving* the application should not however be equated to the *admissibility of the application* which lies within the jurisdiction of the Court and is therefore considered later by the latter, pursuant to Article 56 of the Charter and Rule 40 of the Rules of Court.

7. In the light of the above considerations, the Court ought to and should in future dispose of its jurisdiction before dealing with the application submitted for consideration, except cogent reasons exist for it to deviate from that normal procedure.

II. Determining the *ratione temporis* jurisdiction of the Court

8. On the jurisdiction of the Court, the Respondent State had challenged the *ratione temporis* jurisdiction of the Court, drawn from the fact that the alleged violation (prohibition of independent candidates in presidential, legislative and local elections) occurred, in its case, before the entry into force of the Protocol establishing the Court (paragraph 80(3) of the judgment).

9. As stated in the judgment of the Court, the 2nd Applicant objects to the above submissions of the Respondent as follows:

"...a distinction has to be made between normative and institutional provisions. The rights sought to be protected were enshrined in the Charter to which Respondent was already a party at the time of the alleged violation; *although the Protocol came into operation later, it was merely a mechanism to protect those rights.* The Charter sets out rights while the Protocol provides an institutional framework for enforcement of those rights. The Applicant stated that it is not the ratification of the Protocol that establishes the rights, rather these rights existed in the Charter and the Respondent has violated them and continues to do so. The issue of retroactivity therefore does not arise" (italics added) (Paragraph 81(3)).

10. Relying apparently on those arguments of the 2nd Applicant to counter that objection, the Court dismissed it notably on the two grounds set out below:

« The rights alleged to be violated are protected under the Charter. By the time of the alleged violation, the Respondent had already ratified the Charter and was therefore bound by it. The Charter was operational and there was therefore a duty on the Respondent as at the time of the alleged violation to protect those rights.

At the time the Protocol was ratified by the Respondent and when it came into operation in the respect of the Respondent, the alleged violation was continuing and is still continuing:

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independent candidates are still not allowed to stand for the position of President or to contest Parliamentary and Local Government elections...» (paragraph 84 of the judgment).

11. The second reason advanced by the Court (the continuing nature of the violation) is in order and raises no particular difficulty. However, the first reason (the prior ratification of the Charter) is difficult to grasp and creates confusion when considered against the specific objection raised by the Respondent State. In fact, whereas the objection by the Respondent State is based, as far as it was concerned, on *the date of entry into force of the Protocol* to establish the Court, the Court's response is to invoke *the date of entry into force of the Charter* which was not an issue for the Respondent State. And one does not quite see what the Court draws as conclusion from the date of entry into force of the Charter, regarding the Respondent State's argument of non-retroactivity of the Protocol.

12. In my opinion, in order to fully address the argument raised by the 2nd Applicant, the Court ought to have been unequivocal on this point and should have indicated that though the Respondent State was already bound by the Charter, the Court lacked temporal jurisdiction with respect to it as long as the Protocol conferring jurisdiction on it was yet to become operational (unless of course the argument of the alleged continuing violation is invoked). That clarification is all the more necessary as, in regard to the application of the principle of the non-retroactivity of treaties, the 2nd Applicant seems to be making a distinction between treaties of a normative nature and those of an institutional nature (*supra*, paragraph 9).

13. Such distinction however- which seems to suggest that only the date of entry into force of treaties guaranteeing substantial rights is relevant (as opposed to treaties setting up monitoring institutions)-, is not grounded anywhere in international law. Indeed, to take the instant case as an example, even though the Protocol establishes an institutional mechanism for the protection of substantial rights guaranteed under the Charter, it still remains « a treaty » within the meaning of the Vienna Convention on the Law of Treaties of 23 May 1969. Article 2. 1 a) of this Convention provides that « 'treaty' means an *international agreement concluded between States* in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and *whatever its particular designation* »(italics added). As can be seen, on the one hand, any international agreement in written form between States can be considered as a treaty regardless of whether they set substantive norms or establish institutional mechanisms; on the other, its name is of no consequence.

14. Given that the Protocol establishing the Court is a treaty within the meaning of the Vienna Convention, all provisions of the convention are therefore applicable to it. The relevant provision applicable to the issue under consideration is Article 28 which deals with the principle of non-retroactivity of treaties as follows: « Unless a different intention

appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that

party ».

To circumvent the application of the principle of non-retroactivity of the treaties in the instant case, the 2nd Applicant relies neither on a different intention of the parties arising from the Protocol itself, nor on a different intention otherwise established.

15. In fact, to determine the *ratione temporis* jurisdiction of the Court, in a matter such as this one, there must be *cumulative* consideration of the dates of entry into force in regard to the Respondent State, of the African Charter on Human and Peoples' Rights, the Protocol establishing the Court and the optional declaration recognizing the jurisdiction of the Court to receive applications from individuals and non-governmental organizations as provided for in Article 34(6) of the Protocol. If the alleged violation had occurred prior to any of these crucial dates, the principle of non-retroactivity would have applied in full force, regardless of whether the alleged violation took place after the other dates.

16. In the instant case, and in relation to the issue under consideration, the need to take into account the date of entry into force of the Protocol with regard to the Respondent State is all the more crucial as it is indeed the Protocol that specifically conferred the contentious jurisdiction on the Court (See Articles 3 and 5 of the Protocol). How could one consider an objection challenging the jurisdiction of the Court while disregarding the date of entry into force of the Protocol conferring the said jurisdiction on the Court? To me, that is simply inconceivable.

17. Once again, in my opinion, to adequately respond to the specific argument raised by the 2nd Applicant, the Court ought to have clearly endorsed the Respondent's position, and indicated that the relevant date to be considered with regard to the Respondent in determining its *ratione temporis* jurisdiction in this matter, should be that of the entry into force of the Protocol establishing the Court, then subsequently rely on the continuing nature of the alleged violation in order to determine its jurisdiction.

Judge Gérard NIYUNGEKO

Robert ENO, Registrar

2011

In the Consolidated Matter of 1. Tanganyika Law Society 2. the Legal and Human Rights Centre V. the United Republic of Tanzania (Application no. 009/2011) Reverend Christopher R. Mtikila V. the United Republic of Tanzania (Application no. 011/2011)