



REGIONAL COURSES
IN INTERNATIONAL LAW

Addis Ababa, Ethiopia
1–26 February 2016

INTERNATIONAL HUMAN RIGHTS LAW
JUDGE FATSAH OUGUERGOUZ

Codification Division of the United Nations Office of Legal Affairs

Copyright © United Nations, 2016

INTERNATIONAL HUMAN RIGHTS LAW

Legal Instruments and Documents

1. *The Core International Human Rights Treaties* (United Nations publication, Sales No. E.06.XIV.2)
2. *The New Core International Human Rights Treaties* (United Nations publication, Sales No. E.07.XIV.8)
3. C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, Pretoria University Law Press, Fifth Edition, 2013 - Compendium

Compulsory readings

4. Universal Declaration of Human Rights, 1948
For text, see *The Core International Human Rights Treaties*, p. 3
5. United Nations International Covenant on Economic, Social and Cultural Rights, 1966
For text, see *The Core International Human Rights Treaties*, p. 29
6. United Nations International Covenant on Civil and Political Rights, 1966
For text, see *The Core International Human Rights Treaties*, p. 57
7. Charter of the Organisation of the African Unity (OAU Charter), 1963
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 2
8. Constitutive Act of the African Union, 2000
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 4
9. African Charter on Human and Peoples' Rights, 1981
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 29
10. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 1998 (articles 3, 5, 6 & 34)
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 41
11. *Tanganyika Law Society & The Legal and Human Rights Centre v. The United Republic of Tanzania*, No. 009/2011 and 011/2011, African Court on Human and People's Rights 2011 .

Further readings

12. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969
For text, see “General Reference Book: Regional Human Rights Instruments”, available on the USB
13. African Charter on the Rights and Welfare of the Child, 1990
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 77
14. New Economic Partnership for Africa’s Development (NEPAD), October 2001
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 460
15. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 17
16. Protocol of the Court of Justice of the African Union, 2003
For text, see Study Book *Introduction to African Union Law and Institutions*
17. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 61
18. Convention on Preventing and Combating Corruption, 2003
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 98
19. Arab Charter on Human Rights, 2004
20. African Charter on Democracy, Elections and Governance, 2007
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 131
21. Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009
For text, see C. Heyns and M. Killander (eds.), *Compendium of Key Human Rights Documents of the African Union*, p. 143
22. Malabo Protocol on the African Court of Justice and Human Rights, 2014

African Court on Human and People Rights

Tanganyika Law Society & The Legal and Human Rights Centre

v. The United Republic of Tanzania

Judgment of 14 June 2011

(Including:

Separate Opinion of Vice-President Fatsah Ouguergouz

Separate Opinion of Judge B. M. Ngoepe

Separate Opinion of Judge Gerard Nyungeko)

Applications No. 009/2011 and No. 011/2011



Rev 2

009/2011 - 011/2011

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

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

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

REVEREND CHRISTOPHER R. MTIKILA

V.

THE UNITED REPUBLIC OF TANZANIA

APPLICATION
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 Rights Attorney 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 1st Applicants’ 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 received 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

Temporal 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 organisations 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 that:

“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 arduous. 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. If the 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 GUIINDO, 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. MTKILA

V.

THE UNITED REPUBLIC OF TANZANIA

Separate opinion of Vice-President Fatsah Ouguerouz

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 guaranteed 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”.

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

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.

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.

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 Ougergouz

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

- 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.





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 MITIKILA V. THE UNITED REPUBLIC OF TANZANIA

(APPLICATIONS NO 009/2011 AND 011/2011)

SEPARATE OPINION OF JUDGE GERARD NIYUNGEKO

1. I agree with the decision of the Court in the matter of *Tanganyika Law Society and the Legal and Human Rights Centre & Rev. Christopher Mitikila 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.

1. 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 regard¹. 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.

¹Decisions 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:

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.

Robert ENO, Registrar



Judge Gérard NIYUNGEKO



Arab Charter on Human Rights, 2004

Arab League and United Nations High Commissioner
for Human Rights, CHR/NONE/2004/40/REV.1,
1 January 2004

League of Arab States, Arab Charter on Human Rights, May 22, 2004,

Arab Charter on Human Rights

Based on the faith of the Arab nation in the dignity of the human person whom God has exalted ever since the beginning of creation and in the fact that the Arab homeland is the cradle of religions and civilizations whose lofty human values affirm the human right to a decent life based on freedom, justice and equality,

In furtherance of the eternal principles of fraternity, equality and tolerance among human beings consecrated by the noble Islamic religion and the other divinely-revealed religions, Being proud of the humanitarian values and principles that the Arab nation has established throughout its long history, which have played a major role in spreading knowledge between East and West, so making the region a point of reference for the whole world and a destination for seekers of knowledge and wisdom, Believing in the unity of the Arab nation, which struggles for its freedom and defends the right of nations to self-determination, to the preservation of their wealth and to development; believing in the sovereignty of the law and its contribution to the protection of universal and interrelated human rights and convinced that the human person's enjoyment of freedom, justice and equality of opportunity is a fundamental measure of the value of any society, Rejecting all forms of racism and Zionism, which constitute a violation of human rights and a threat to international peace and security, recognizing the close link that exists between human rights and international peace and security, reaffirming the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and having regard to the Cairo Declaration on Human Rights in Islam,

The States parties to the Charter have agreed as follows:

Article 1

The present Charter seeks, within the context of the national identity of the Arab States and their sense of belonging to a common civilization, to achieve the following aims:

1. To place human rights at the centre of the key national concerns of Arab States, making them lofty and fundamental ideals that shape the will of the individual in Arab States and enable him to improve his life in accordance with noble human values.
2. To teach the human person in the Arab States pride in his identity, loyalty to his country, attachment to his land, history and common interests and to instill in him a culture of human brotherhood, tolerance and openness towards others, in accordance with universal principles and values and with those proclaimed in international human rights instruments.
3. To prepare the new generations in Arab States for a free and responsible life in a civil society that is characterized by solidarity, founded on a balance between awareness of rights and respect for obligations, and governed by the values of equality, tolerance and moderation.
4. To entrench the principle that all human rights are universal, indivisible, interdependent and interrelated.

Article 2

1. All peoples have the right of self-determination and to control over their natural wealth and resources, and the right to freely choose their political system and to freely pursue their economic, social and cultural development.
2. All peoples have the right to national sovereignty and territorial integrity.
3. All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.
4. All peoples have the right to resist foreign occupation.

Article 3

1. Each State party to the present Charter undertakes to ensure to all individuals subject to its jurisdiction the right to enjoy the rights and freedoms set forth herein, without distinction on grounds of race, colour, sex, language, religious belief, opinion, thought, national or social origin, wealth, birth or physical or mental disability.
2. The States parties to the present Charter shall take the requisite measures to guarantee effective equality in the enjoyment of all the rights and freedoms enshrined in the present Charter in order to ensure protection against all forms of discrimination based on any of the grounds mentioned in the preceding paragraph.
3. Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments. Accordingly, each State party pledges to take all the requisite measures to guarantee equal opportunities and effective equality between men and women in the enjoyment of all the rights set out in this Charter.

Article 4

1. In exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.
2. In exceptional situations of emergency, no derogation shall be made from the following articles: article 5, article 8, article 9, article 10, article 13, article 14, paragraph 6, article 15, article 18, article 19, article 20, article 22, article 27, article 28, article 29 and article 30. In addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended.

3. Any State party to the present Charter availing itself of the right of derogation shall immediately inform the other States parties, through the intermediary of the Secretary-General of the League of Arab States, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Every human being has the inherent right to life.
2. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 6

Sentence of death may be imposed only for the most serious crimes in accordance with the laws in force at the time of commission of the crime and pursuant to a final judgment rendered by a competent court. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.

Article 7

1. Sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime.
2. The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.

Article 8

1. No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment.
2. Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.

Article 9

No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances.

Article 10

1. All forms of slavery and trafficking in human beings are prohibited and are punishable by law. No one shall be held in slavery and servitude under any circumstances.

2. Forced labor, trafficking in human beings for the purposes of prostitution or sexual exploitation, the exploitation of the prostitution of others or any other form of exploitation or the exploitation of children in armed conflict are prohibited.

Article 11

All persons are equal before the law and have the right to enjoy its protection without discrimination.

Article 12

All persons are equal before the courts and tribunals. The States parties shall guarantee the independence of the judiciary and protect magistrates against any interference, pressure or threats. They shall also guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels.

Article 13

1. Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights.
2. Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.

Article 14

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest, search or detention without a legal warrant.
2. No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.
3. Anyone who is arrested shall be informed, at the time of arrest, in a language that he understands, of the reasons for his arrest and shall be promptly informed of any charges against him. He shall be entitled to contact his family members.
4. Anyone who is deprived of his liberty by arrest or detention shall have the right to request a medical examination and must be informed of that right.
5. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. His release may be subject to guarantees to appear for trial. Pre-trial detention shall in no case be the general rule.

6. Anyone who is deprived of his liberty by arrest or detention shall be entitled to petition a competent court in order that it may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.

7. Anyone who has been the victim of arbitrary or unlawful arrest or detention shall be entitled to compensation.

Article 15

No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favorable to the defendant shall be applied.

Article 16

Everyone charged with a criminal offence shall be presumed innocent until proved guilty by a final judgment rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:

1. The right to be informed promptly, in detail and in a language which he understands, of the charges against him.

2. The right to have adequate time and facilities for the preparation of his defense and to be allowed to communicate with his family.

3. The right to be tried in his presence before an ordinary court and to defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially.

4. The right to the free assistance of a lawyer who will defend him if he cannot defend himself or if the interests of justice so require, and the right to the free assistance of an interpreter if he cannot understand or does not speak the language used in court.

5. The right to examine or have his lawyer examine the prosecution witnesses and to on defense according to the conditions applied to the prosecution witnesses.

6. The right not to be compelled to testify against himself or to confess guilt.

7. The right, if convicted of the crime, to file an appeal in accordance with the law before a higher tribunal.

8. The right to respect for his security of person and his privacy in all circumstances.

Article 17

Each State party shall ensure in particular to any child at risk or any delinquent charged with an offence the right to a special legal system for minors in all stages of investigation, trial and enforcement of sentence, as well as to special treatment that takes account of his age, protects his dignity, facilitates his rehabilitation and reintegration and enables him to play a constructive role in society.

Article 18

No one who is shown by a court to be unable to pay a debt arising from a contractual obligation shall be imprisoned.

Article 19

1. No one may be tried twice for the same offence. Anyone against whom such proceedings are brought shall have the right to challenge their legality and to demand his release.

2. Anyone whose innocence is established by a final judgment shall be entitled to compensation for the damage suffered.

Article 20

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as unconvicted persons.

3. The aim of the penitentiary system shall be to reform prisoners and effect their social rehabilitation.

Article 21

1. No one shall be subjected to arbitrary or unlawful interference with regard to his privacy, family, home or correspondence, nor to unlawful attacks on his honour or his reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 22

Everyone shall have the right to recognition as a person before the law.

Article 23

Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 24

Every citizen has the right:

1. To freely pursue a political activity.
2. To take part in the conduct of public affairs, directly or through freely chosen representatives.

3. To stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will.
4. To the opportunity to gain access, on an equal footing with others, to public office in his country in accordance with the principle of equality of opportunity.

5. To freely form and join associations with others.

6. To freedom of association and peaceful assembly.

7. No restrictions may be placed on the exercise of these rights other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public health or morals or the protection of the rights and freedoms of others.

Article 25

Persons belonging to minorities shall not be denied the right to enjoy their own culture, to use their own language and to practice their own religion. The exercise of these rights shall be governed by law.

Article 26

1. Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force.

2. No State party may expel a person who does not hold its nationality but is lawfully in its territory, other than in pursuance of a decision reached in accordance with law and after that person has been allowed to submit a petition to the competent authority, unless compelling reasons of national security preclude it. Collective expulsion is prohibited under all circumstances.

Article 27

1. No one may be arbitrarily or unlawfully prevented from leaving any country, including his own, nor prohibited from residing, or compelled to reside, in any part of that country.

2. No one may be exiled from his country or prohibited from returning thereto.

Article 28

Everyone has the right to seek political asylum in another country in order to escape persecution. This right may not be invoked by persons facing prosecution for an offence under ordinary law. Political refugees may not be extradited.

Article 29

1. Everyone has the right to nationality. No one shall be arbitrarily or unlawfully deprived of his nationality.
2. States parties shall take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child.

3. No one shall be denied the right to acquire another nationality, having due regard for the domestic legal procedures in his country.

Article 30

1. Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law.

2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.

3. Parents or guardians have the freedom to provide for the religious and moral education of their children.

Article 31

Everyone has a guaranteed right to own private property, and shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property.

Article 32

1. The present Charter guarantees the right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries.

2. Such rights and freedoms shall be exercised in conformity with the fundamental values of society and shall be subject only to such limitations as are required to ensure respect for the rights or reputation of others or the protection of national security, public order and public health or morals.

Article 33

1. The family is the natural and fundamental group unit of society; it is based on marriage between a man and a woman. Men and women of marrying age have the right to marry and to found a family according to the rules and conditions of marriage. No marriage can take place without the full and free consent of both parties. The laws in force regulate the rights and duties of the man and woman as to marriage, during marriage and at its dissolution.

2. The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, older persons and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development.

3. The States parties shall take all necessary legislative, administrative and judicial measures to guarantee the protection, survival, development and well-being of the child in an

atmosphere of freedom and dignity and shall ensure, in all cases, that the child's best interests are the basic criterion for all measures taken in his regard, whether the child is at risk of delinquency or is a juvenile offender.

4. The States parties shall take all the necessary measures to guarantee, particularly to young persons, the right to pursue a sporting activity.

Article 34

1. The right to work is a natural right of every citizen. The State shall endeavor to provide, to the extent possible, a job for the largest number of those willing to work, while ensuring production, the freedom to choose one's work and equality of opportunity without discrimination of any kind on grounds of race, colour, sex, religion, language, political opinion, membership in a union, national origin, social origin, disability or any other situation.

2. Every worker has the right to the enjoyment of just and favourable conditions of work which ensure appropriate remuneration to meet his essential needs and those of his family and regulate working hours, rest and holidays with pay, as well as the rules for the preservation of occupational health and safety and the protection of women, children and disabled persons in the place of work.

3. The States parties recognize the right of the child to be protected from economic exploitation and from being forced to perform any work that is likely to be hazardous or to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development. To this end, and having regard to the relevant provisions of other international instruments, States parties shall in particular:

- (a) Define a minimum age for admission to employment;
- (b) Establish appropriate regulation of working hours and conditions;
- (c) Establish appropriate penalties or other sanctions to ensure the effective endorsement of these provisions.

4. There shall be no discrimination between men and women in their enjoyment of the right to effectively benefit from training, employment and job protection and the right to receive equal remuneration for equal work.

5. Each State party shall ensure to workers who migrate to its territory the requisite protection in accordance with the laws in force.

Article 35

1. Every individual has the right to freely form trade unions or to join trade unions and to freely pursue trade union activity for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights and freedoms except such as are prescribed by the laws in force and that are necessary for the maintenance of national security, public safety or order or for the protection of public health or morals or the rights and freedoms of others.

3. Every State party to the present Charter guarantees the right to strike within the limits laid down by the laws in force.

Article 36

The States parties shall ensure the right of every citizen to social security, including social insurance.

Article 37

The right to development is a fundamental human right and all States are required to establish the development policies and to take the measures needed to guarantee this right. They have a duty to give effect to the values of solidarity and cooperation among them and at the international level with a view to eradicating poverty and achieving economic, social, cultural and political development. By virtue of this right, every citizen has the right to participate in the realization of development and to enjoy the benefits and fruits thereof.

Article 38

Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.

Article 39

1. The States parties recognize the right of every member of society to the enjoyment of the highest attainable standard of physical and mental health and the right of the citizen to free basic health-care services and to have access to medical facilities without discrimination of any kind.

2. The measures taken by States parties shall include the following:

- (a) Development of basic health-care services and the guaranteeing of free and easy access to the centres that provide these services, regardless of geographical location or economic status.
- (b) efforts to control disease by means of prevention and cure in order to reduce the mortality rate.
- (c) promotion of health awareness and health education.
- (d) suppression of traditional practices which are harmful to the health of the individual.
- (e) provision of the basic nutrition and safe drinking water for all.
- (f) Combating environmental pollution and providing proper sanitation systems;
- (g) Combating drugs, psychotropic substances, smoking and substances that are damaging to health.

Article 40

1. The States parties undertake to ensure to persons with mental or physical disabilities a decent life that guarantees their dignity, and to enhance their self-reliance and facilitate their active participation in society.

2. The States parties shall provide social services free of charge for all persons with disabilities, shall provide the material support needed by those persons, their families or the families caring for them, and shall also do whatever is needed to avoid placing those persons in institutions. They shall in all cases take account of the best interests of the disabled person.

3. The States parties shall take all necessary measures to curtail the incidence of disabilities by all possible means, including preventive health programmes, awareness raising and education.

4. The States parties shall provide full educational services suited to persons with disabilities, taking into account the importance of integrating these persons in the educational system and the importance of vocational training and apprenticeship and the creation of suitable job opportunities in the public or private sectors.

5. The States parties shall provide all health services appropriate for persons with disabilities, including the rehabilitation of these persons with a view to integrating them into society.

6. The States parties shall enable persons with disabilities to make use of all public and private services.

Article 41

1. The eradication of illiteracy is a binding obligation upon the State and everyone has the right to education.

2. The States parties shall guarantee their citizens free education at least throughout the primary and basic levels. All forms and levels of primary education shall be compulsory and accessible to all without discrimination of any kind.

3. The States parties shall take appropriate measures in all domains to ensure partnership between men and women with a view to achieving national development goals.

4. The States parties shall guarantee to provide education directed to the full development of the human person and to strengthening respect for human rights and fundamental freedoms.

5. The States parties shall endeavour to incorporate the principles of human rights and fundamental freedoms into formal and informal education curricula and educational and training programmes.

6. The States parties shall guarantee the establishment of the mechanisms necessary to provide ongoing education for every citizen and shall develop national plans for adult education.

Article 42

1. Every person has the right to take part in cultural life and to enjoy the benefits of scientific progress and its application.

2. The States parties undertake to respect the freedom of scientific research and creative activity and to ensure the protection of moral and material interests resulting from scientific, literary and artistic production.

3. The state parties shall work together and enhance cooperation among them at all levels, with the full participation of intellectuals and inventors and their organizations, in order to develop and implement recreational, cultural, artistic and scientific programmes.

Article 43

Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the states parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.

Article 44

The states parties undertake to adopt, in conformity with their constitutional procedures and with the provisions of the present Charter, whatever legislative or non-legislative measures that may be necessary to give effect to the rights set forth herein.

Article 45

1. Pursuant to this Charter, an "Arab Human Rights Committee", hereinafter referred to as "the Committee" shall be established. This Committee shall consist of seven members who shall be elected by secret ballot by the states parties to this Charter.

2. The Committee shall consist of nationals of the states parties to the present Charter, who must be highly experienced and competent in the Committee's field of work. The members of the Committee shall serve in their personal capacity and shall be fully independent and impartial.

3. The Committee shall include among its members not more than one national of a State party; such member may be re-elected only once. Due regard shall be given to the rotation principle.

4. The members of the Committee shall be elected for a four-year term, although the mandate of three of the members elected during the first election shall be for two years and shall be renewed by lot.

5. Six months prior to the date of the election, the Secretary-General of the League of Arab States shall invite the States parties to submit their nominations within the following three months. He shall transmit the list of candidates to the States parties two months prior to the date the election. The candidates who obtain the largest number of votes cast shall be elected to membership of the Committee. If, because two or more candidates have an equal number of votes, the number of candidates with the largest number of votes exceeds the number required, a second ballot will be held between the persons with equal numbers of votes. If the votes are again equal, the member or members shall be selected by lottery. The first election for membership of the Committee shall be held at least six months after the Charter enters into force.

Article 47

The States parties undertake to ensure that members of the Committee shall enjoy the immunities necessary for their protection against any form of harassment or moral or material pressure or prosecution on account of the positions they take or statements they make while carrying out their functions as members of the Committee.

Article 48

1. The States parties undertake to submit reports to the Secretary-General of the League of Arab States on the measures they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof. The Secretary-General shall transmit these reports to the Committee for its consideration.

2. Each State party shall submit an initial report to the Committee within one year from the date on which the Charter enters into force and a periodic report every three years thereafter. The Committee may request the States parties to supply it with additional information relating to the implementation of the Charter.

3. The Committee shall consider the reports submitted by the States parties under paragraph 2 of this article in the presence of the representative of the State party whose report is being considered.

4. The Committee shall discuss the report, comment thereon and make the necessary recommendations in accordance with the aims of the Charter.

5. The Committee shall submit an annual report containing its comments and recommendations to the Council of the League, through the intermediary of the Secretary-General.

6. The Committee's reports, concluding observations and recommendations shall be public documents which the Committee shall disseminate widely.

Article 49

1. The Secretary-General of the League of Arab States shall submit the present Charter, once it has been approved by the Council of the League, to the States members for signature, ratification or accession.

2. The present Charter shall enter into effect two months from the date on which the seventh instrument of ratification is deposited with the secretariat of the League of Arab States.

3. After its entry into force, the present Charter shall become effective for each State two months after the State in question has deposited its instrument of ratification or accession with the secretariat.

4. The Secretary-General shall notify the States members of the deposit of each instrument of ratification or accession.

6. The Secretary-General shall invite the States parties to a meeting at the headquarters the League of Arab States in order to elect the member of the Committee. The presence of the majority of the States parties shall constitute a quorum. If there is no quorum, the Secretary-General shall call another meeting at which at least two thirds of the States parties must be present. If there is still no quorum, the Secretary-General shall call a third meeting, which will be held regardless of the number of States parties present.

7. The Secretary-General shall convene the first meeting of the Committee, during the course of which the Committee shall elect its Chairman from among its members, for a two-year term which may be renewed only once and for an identical period. The Committee shall establish its own rules of procedure and methods of work and shall determine how often it shall meet. The Committee shall hold its meetings at the headquarters of the League of Arab States. It may also meet in any other State party to the present Charter at that party's invitation.

Article 46

1. The Secretary-General shall declare a seat vacant after being notified by the Chairman of a member's:

- (a) Death;
- (b) Resignation; or
- (c) If, in the unanimous, opinion of the other members, a member of the Committee has ceased to perform his functions without offering an acceptable justification or for any reason other than a temporary absence.

2. If a member's seat is declared vacant pursuant to the provisions of paragraph 1 and the term of office of the member to be replaced does not expire within six months from the date on which the vacancy was declared, the Secretary-General of the League of Arab States shall refer the matter to the States parties to the present Charter, which may, within two months, submit nominations, pursuant to article 45, in order to fill the vacant seat.

3. The Secretary-General of the League of Arab States shall draw up an alphabetical list of all the duly nominated candidates, which he shall transmit to the States parties to the present Charter. The elections to fill the vacant seat shall be held in accordance with the relevant provisions.

4. Any member of the Committee elected to fill a seat declared vacant in accordance with the provisions of paragraph 1 shall remain a member of the Committee until the expiry of the remainder of the term of the member whose seat was declared vacant pursuant to the provisions of that paragraph.

5. The Secretary-General of the League of Arab States shall make provision within the budget of the League of Arab States for all the necessary financial and human resources and facilities that the Committee needs to discharge its functions effectively. The Committee's experts shall be afforded the same treatment with respect to remuneration and reimbursement of expenses as experts of the secretariat of the League of Arab States.

Article 50

Any State party may submit written proposals, though the Secretary-General, for the amendment of the present Charter. After these amendments have been circulated among the States members, the Secretary-General shall invite the States parties to consider the proposed amendments before submitting them to the Council of the League for adoption.

Article 51

The amendments shall take effect, with regard to the States parties that have approved them, once they have been approved by two thirds of the States parties.

Article 52

Any State party may propose additional optional protocols to the present Charter and they shall be adopted in accordance with the procedures used for the adoption of amendments to the Charter.

Article 53

1. Any State party, when signing this Charter, depositing the instruments of ratification or acceding hereto, may make a reservation to any article of the Charter, provided that such reservation does not conflict with the aims and fundamental purposes of the Charter.
2. Any State party that has made a reservation pursuant to paragraph 1 of this article may withdraw it at any time by addressing a notification to the Secretary-General of the League of Arab States.

**Protocol on Amendments to the Protocol on the
Statute of the African Court of Justice and
Human Rights, 2014**

Malabo, 26-27 June 2014



DRAFT PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

First Meeting of the Specialized Technical Committee
on Justice and Legal Affairs
15-16 May 2014
Addis Ababa, Ethiopia

The **Member States** of the African Union parties to the Constitutive Act of the African Union;

RECALLING the objectives and principles enunciated in the Constitutive Act of the African Union, adopted on 11 July 2000 in Lome, Togo, in particular the commitment to settle their disputes through peaceful means;

FURTHER RECALLING the provisions of the Protocol on the Statute of the African Court of Justice and Human Rights and the Statute annexed to it adopted on 1 July 2008 in Sharm-El-Sheikh, Egypt;

RECOGNIZING that the Protocol on the Statute of the African Court of Justice and Human Rights had merged the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single Court;

BEARING IN MIND their commitment to promote peace, security and stability on the continent, and to protect human and people's rights in accordance with the African Charter on Human and Peoples Rights and other relevant instruments;

FURTHER RECOGNIZING the efforts and contribution of the African Commission on Human and Peoples Rights in the promotion and protection of human and peoples rights since its inception in 1987;

NOTING the steady growth of the African Court on Human and Peoples Rights and the contribution it has made in protecting human and people's rights on the African continent as well as the progress towards the establishment of the African Court of Justice and Human and Peoples Rights;

FURTHER BEARING IN MIND the complementary relationship between the African Commission on Human and Peoples Rights and the African Court on Human and Peoples Rights, as well as its successor, the African Court of Justice and Human and Peoples Rights;

FURTHER RECALLING their commitment to the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council;

REITERATING their respect for democratic principles, human and people's rights, the rule of law and good governance;

STC/Legal/Min/7(I) Rev. 1

Original: English

DRAFT PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE
STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

AS AT THURSDAY 15 MAY 2014

FURTHER REITERATING their respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments and acts of aggression;

FURTHER REITERATING their commitment to fighting impunity in conformity with the provisions of Article 4(o) of the Constitutive Act of the African Union;

ACKNOWLEDGING the pivotal role that the African Court of Justice and Human and Peoples Rights can play in strengthening the commitment of the African Union to promote sustained peace, security and stability on the Continent and to promote justice and human and peoples rights as an aspect of their efforts to promote the objectives of the political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of a United States of Africa;

FURTHER RECALLING Assembly Decision Assembly/AU/Dec.213 (XII) adopted by the Twelfth Ordinary Session of the Assembly in Addis Ababa, Federal Democratic Republic of Ethiopia, on 3 February 2009 on the implementation of the Assembly's Decision on the Abuse of the Principle of Universal Jurisdiction;

FURTHER RECALLING Assembly Decision Assembly/AU/Dec.263 (XIII) adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Libya, on 3 July 2009 on the transformation of the African Union Commission to the African Union Authority;

FURTHER RECOGNIZING the need to take the necessary measures to amend the legal instruments of the principal organs of the African Union in the light of the aforementioned Assembly Decisions;

CONVINCED that the present Protocol will complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples rights in keeping with Article 58 of the Charter and ensuring accountability for them wherever they occur;

HAVE AGREED to adopt the present amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and the Statute annexed thereto as follows: -

CHAPTER I

In CHAPTER 1 of the Protocol (MERGER OF THE AFRICAN COURT ON HUMAN AND PEOPLES RIGHTS AND THE COURT OF JUSTICE OF THE AFRICAN UNION) the deletion of the existing title, Articles and their provisions in their entirety and the insertion in their place of the following:

“CHAPTER I

GENERAL PROVISIONS

Article 1 Definitions

In this Protocol:

“Assembly” means the Assembly of Heads of State and Government of the African Union;

“Chairperson” means the Chairperson of the Assembly;

“Charter” means the African Charter on Human and Peoples Rights;

“Commission” means the Commission of the African Union;

“Court” means the African Court of Justice and Human and Peoples Rights;

“Member State” means a Member State of the Union;

“President” means the President of the Court;

“Protocol” means the Protocol on the Statute of the African Court of Justice and Human Rights;

“Single Court” has the same meaning as the Court;

“Statute” means the present Statute;

“Union” means the African Union established by the Constitutive Act of the African Union;

“Vice President” means the Vice President of the Court.

Article 2
Organs of the Court

The Court shall be composed of the following organs:

1. The Presidency;
2. The Office of the Prosecutor;
3. The Registry;
4. The Defence Office.

Article 3
Jurisdiction of the Court

1. The Court is vested with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto.
2. The Court has jurisdiction to hear such other matters or appeals as may be referred to it in any other agreements that the Member States or the Regional Economic Communities or other international organizations recognized by the African Union may conclude among themselves, or with the Union.

Article 4
Relationship between the Court and the African Commission on Human and Peoples Rights

The Court shall, in accordance with the Charter and this Protocol, complement the protective mandate of the African Commission on Human and Peoples Rights.

CHAPTER II
TRANSITIONAL PROVISIONS

Article 5
Term of Office of the Judges of the African Court on Human and Peoples Rights

In Article 4 (Term of Office of the Judges of the African Court on Human and Peoples Rights), replace the existing provision including its title, with:

“Article 4
Term of Office of the Judges of the African Court on Human and Peoples Rights

1. Upon the coming into force of the Protocol on the Statute of the African Court of Justice and Human Rights, the terms and appointment of the Judges of the African Court on Human and Peoples Rights shall terminate.
2. Without prejudice to paragraph 1, the Judges of the African Court on Human and Peoples Rights shall remain in office until the judges of the African Court of Justice and Human and Peoples Rights are sworn in.

Article 6
Pending Cases

At the entry into force of this Protocol, where any matter affecting any State had already been commenced before either the African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights, if in force, such a matter shall be continued before the relevant Section of the African Court of Justice and Human and Peoples' Rights, pursuant to such Rules as may be made by the Court.

Article 6bis
Temporary Jurisdiction

At the entry into force of this Protocol, until a Member State ratifies it, any jurisdiction which has hitherto been accepted by such Member State with respect to either the African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights shall be exercisable by this Court.

Article 7
Registry of the Court

1. The Registrar of the African Court on Human and Peoples Rights shall remain in office until the appointment of a new Registrar for the African Court of Justice and Human and Peoples Rights.
2. The staff of the African Court on Human and Peoples Rights shall be absorbed into the Registry of the African Court of Justice and Human and Peoples Rights, for the remainder of their subsisting contracts of employment.

CHAPTER III

Final Provisions

Article 8 **Nomenclature**

In the Protocol and the Statute wherever it occurs "African Court of Justice and Human Rights" is deleted and replaced with "African Court of Justice and Human and Peoples Rights."

Article 9 **Signature, Ratification and Accession**

1. This Protocol and the Statute annexed to it shall be open for signature, ratification or accession by Member States, in accordance with their respective constitutional procedures.
2. The instruments of ratification or accession to this Protocol and the Statute annexed to it shall be deposited with the Chairperson of the Commission.
3. Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f).

Article 10 **Depositary Authority**

1. This Protocol and the Statute annexed to it, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) texts being equally authentic, shall be deposited with the Chairperson of the Commission, who shall transmit a certified true copy to the Government of each Member State.
2. The Chairperson of the Commission, shall notify all Member States of the dates of deposit of the instruments of ratification or accession, and shall, upon the entry into force of this Protocol, register the same with the Secretariat of the United Nations.

Article 11 **Entry into force**

1. This Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) Member States.

2. For each Member State which shall accede to it subsequently, this Protocol and Annexed Statute shall enter into force on the date on which the instruments of ratification or accession are deposited.
3. The Chairperson of the Commission shall notify all Member States of the entry into force of this Protocol.

Article 12 **Amendments**

1. This Protocol and the Statute annexed to it may be amended if a State Party to the Protocol makes a written request to that effect to the Chairperson of the Commission. The Assembly may adopt, by simple majority, the draft amendment after all the States parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.
2. The Court shall also be entitled to propose such amendments to the present Protocol or the Statute annexed to it as it may deem necessary, through the Chairperson of the Commission.
3. The amendments shall come into force for each State Party which has accepted it thirty (30) days after the Chairperson of the Commission has received notice of the acceptance.

**Adopted by theSession of the Assembly of the African Union held in,
....., on, 20.....**

Annex
Statute of the African Court of Justice and Human and Peoples Rights

Article 1
Definitions

1. In Article 1 of the Statute (Definitions), the deletion from the chapeau of the words “except otherwise indicated, the following shall mean”

3. The insertion of the following words and the definitions ascribed to them

“Chairperson” means the Chairperson of the Commission;

“Child” means any person under eighteen years of age;

“Court” means the African Court of Justice and Human and Peoples Rights;

“Full Court” means the three Sections of the Court sitting together in plenary;

“Person” means a natural or legal person;

“President” means the President of the Court unless otherwise specified;

“Section” means the General Affairs or Human and Peoples’ Rights or International Criminal Law Section of the Court;

“Statute” means the Statute of the African Court of Justice and Human and Peoples Rights;

“Vice President” means the Vice President of the Court.

Article 2
Composition

In Article 3 of the Statute (Composition), add the following paragraph 4:

“
4. The Assembly shall ensure that there is equitable gender representation in the Court.”

Article 3
Qualifications of Judges

Article 4 of the Statute (Qualifications of Judges) is replaced with the following:

“The Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.”

Article 4
List of Candidates

Article 6 of the Statute (List of Candidates) is replaced with the following: -

“
1. For the purpose of election, the Chairperson of the Commission shall establish three (3) alphabetical lists of candidates presented as follows:

- i. List A containing the names of candidates having recognized competence and experience in international law;
- ii. List B containing the names of candidates having recognized competence and experience in international human rights law and international humanitarian law; and
- iii. List C containing the names of candidates having recognized competence and experience in international criminal law.

2. States Parties that nominate candidates possessing the competences required on the three (3) lists shall choose the list on which their candidates may be placed.

3. At the first election, five (5) judges each shall be elected from amongst the candidates on lists A and B, and six (6) judges shall be elected from amongst the candidates of list C respectively.

4. The Chairperson of the Commission shall communicate the three lists to Member States, at least thirty (30) days before the Ordinary Session of the Assembly or of the Council during which the elections shall take place.”

Article 5
Term of Office

Article 8 of the Statute (Term of Office) is replaced with the following: -

“

1. The Judges shall be elected for a single, non-renewable term of nine (9) years. The terms of office of five (5) of the judges elected at the first election shall end after three (3) years, and the terms of another five (5) of the judges shall end after six (6) years.
2. The Judges whose term of office shall end after the initial periods of three (3) and six (6) years shall be determined by lot drawn by the Chairperson of the Assembly or the Executive Council, immediately after the first election.
3. A Judge elected to replace another whose term of office has not expired shall complete the term of office of his or her predecessor.
4. All the Judges, except the President and the Vice President, shall perform their functions on a part-time basis.
5. The Assembly shall, on the recommendation of the Court, decide the time when all the Judges of the Court shall perform their functions on a full time basis."

**Article 6
Structure of the Court**

Article 16 of the Statute (Sections of the Court) is replaced with the following: -

**"Article 16
Structure of the Court**

1. The Court shall have three (3) Sections: a General Affairs Section, a Human and Peoples Rights Section and an International Criminal Law Section.
2. The International Criminal Law Section of the Court shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.
3. The allocation of Judges to the respective Sections and Chambers shall be determined by the Court in its Rules. "

**Article 7
Assignment of matters to Sections of the Court**

Article 17 of the Statute (Assignment of matters to Sections) is replaced with the following:

"Article 17

Assignment of matters to Sections of the Court

1. The General Affairs Section shall be competent to hear all cases submitted under Article 28 of the Statute except those assigned to the Human and Peoples Rights Section and the International Criminal Law Section as specified in this Article.
2. The Human and Peoples Rights Section shall be competent to hear all cases relating to human and peoples rights.
3. The International Criminal Law Section shall be competent to hear all cases relating to the crimes specified in this Statute."

**Article 8
Revision and Appeal**

Article 18 (Referral of matters to the Full Court) is replaced with the following:

**"Article 18
Revision and Appeals**

1. In the case of the General Affairs Section and the Human and People's Rights Section, a revision of a judgement shall be made in terms of the provisions of Article 48.
2. In the case of the International Criminal Law Section, a decision of the Pre-Trial Chamber or the Trial Chamber may be appealed against by the Prosecutor or the accused, on the following grounds:
 - (a) A procedural error;
 - (b) An error of law;
 - (c) An error of fact.
3. An appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.
4. The Appellate Chamber may affirm, reverse or revise the decision appealed against. The decision of the Appellate Chamber shall be final."

**Article 9
Chambers of the Court**

Article 19 of the Statute (Chambers) is replaced with the following: -

"Chambers of the Court

1. The General Affairs Section, Human and Peoples Rights Section or International Criminal Law Section may, at any time, constitute one or more Chambers in accordance with the Rules of Court.
2. A Judgment given by any Chamber shall be considered as rendered by the Court.”

Article 9 Bis
Powers and Functions of the Chambers of the International Criminal Law Section

After Article 19 of the Statute (Chambers) add the following as Article 19 *Bis*:

“Article 19 Bis
Powers and Functions of the Chambers of the International Criminal Law Section

1. The Pre-Trial Chamber shall exercise the functions provided for in Article 46F of this Statute.
2. In addition, the Pre-Trial Chamber may also at the request of the Prosecutor issue such orders and warrants as may be required for an investigation or prosecution.
3. The Pre-Trial Chamber may issue such orders as may be required to provide for the protection and privacy of witnesses and victims, the presentation of evidence and the protection of arrested persons.
4. The Trial Chamber shall conduct trials of accused persons in accordance with this Statute and the Rules of Court.
5. The Trial Chamber shall receive and conduct appeals from the Pre-Trial Chamber in accordance with Article 18 of this Statute.
6. The Appeals Chamber shall receive and conduct appeals from the Trial Chamber in accordance with Article 18 of this Statute.

Article 10
Quorum

Article 21 of the Statute (Quorum) is replaced with the following:

1. The General Affairs Section of the Court shall be duly constituted by three (3) judges.
2. The Human and Peoples Rights Section of the Court shall be duly constituted by three (3) judges.
3. The Pre-Trial Chamber of the International Criminal Law Section of the Court shall be duly constituted by one (1) judge.

4. The Trial Chamber of the International Criminal Law Section of the Court shall be duly constituted by three (3) judges.
5. The Appellate Chamber of the International Criminal Law Section of the Court shall be duly constituted by five (5) judges.

Article 11
Presidency and Vice Presidency

Article 22 (Presidency, Vice-Presidency and Registry) is replaced with the following: -

“Article 22
Presidency and Vice Presidency

1. At its first ordinary session after the election of the Judges, the Full Court shall elect a President and a Vice President of the Court.
2. The President and Vice President shall serve for a period of two (2) years, and may be re-elected once.
3. The President and Vice President shall, in consultation with the Members of the Court and as provided for in the Rules of Court, assign Judges to the Sections.
4. The President shall preside over all sessions of the Full Court. In the event of the President being unable to sit during a session, the session shall be presided over by the Vice President.
5. The President and Vice President shall reside at the seat of the Court.”

Article 12
Presidency and Vice Presidency

After Article 22 (Presidency and Vice-Presidency) add the following as Articles 22A and 22B:

“Article 22A
The Office of the Prosecutor

1. The Office of the Prosecutor shall comprise a Prosecutor and two Deputy Prosecutors.
2. The Prosecutor and Deputy Prosecutors shall be elected by the Assembly from amongst candidates who shall be nationals of States Parties nominated by States Parties.
3. The Prosecutor shall serve for a single, non-renewable term of seven (7) years.

4. The Deputy Prosecutors shall serve for a term of four (4) years, renewable once.
5. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the conduct of investigations, trial and prosecution of criminal cases.
6. The Office of the Prosecutor shall be responsible for the investigation and prosecution of the crimes specified in this Statute and shall act independently as a separate organ of the Court and shall not seek or receive instructions from any State Party or any other source.
7. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses and collect evidence, including the power to conduct on-site investigations.
8. The Prosecutor shall be assisted by such other staff as may be required to perform the functions of the Office of the Prosecutor effectively and efficiently.
9. The staff of the Office of the Prosecutor shall be appointed by the Prosecutor in accordance with the Staff Rules and Regulations of the African Union.
10. The remuneration and conditions of service of the Prosecutor and Deputy Prosecutors shall be determined by the Assembly on the recommendation of the Court made through the Executive Council.

Article 22B
The Registry

1. The Registry shall comprise of a Registrar and three Assistant Registrars.
2. The Court shall appoint the Registrar and Assistant Registrars, in accordance with the Staff Rules and Regulations of the African Union.
3. The Registrar shall serve for a single, non-renewable term of seven years.
4. The Assistant Registrars shall serve for a term of four (4) years, renewable once.
5. The Registry shall be headed by a Registrar who, under the direction of the President, shall be responsible for the non-judicial aspects and servicing of the Court. The Registrar shall be the principal administrative and accounting officer of the Court, and shall ensure that proper books of accounts are kept in accordance with the financial rules and regulations of the African Union.
6. The Registrar and Assistant Registrars shall be persons of high moral character, be highly competent in and have extensive practical managerial experience.

7. The Registrar shall be assisted by such other staff as may be necessary for the effective and efficient performance of the functions of the Registry.
8. The staff of the Registry shall be appointed by the Court in accordance with the Staff Rules and Regulations of the African Union.
9. The Registrar shall set up, within the Registry:
 - a. A Victims and Witnesses Unit, which shall provide, in consultation with the Court and the Office of the Prosecutor, as appropriate, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in the management of trauma.
 - b. A Detention Management Unit, which shall manage the conditions of detention of suspects and accused persons.
10. The salaries and conditions of service of the Registrar, Assistant Registrars and other staff of the Registry shall be determined by the Assembly on the proposal of the Court, through the Executive Council.

Article 22C
The Defence Office

1. The Court shall establish, maintain and develop a Defence Office for the purpose of ensuring the rights of suspects and accused and any other person entitled to legal assistance.
2. The Defence Office, which may also include one or more public defenders, shall act independently as a separate organ of the Court. It shall be responsible for protecting the rights of the defence, providing support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Chamber in respect of specific issues.
3. The Defence Office shall ensure that there are adequate facilities to defence counsel and persons entitled to legal assistance in the preparation of a case, and shall provide any additional assistance ordered by a Judge or Chamber.
4. The Defence Office shall be headed by a Principal Defender, who shall be appointed by the Assembly, and shall be a person of high moral character and possess the highest level of professional competence and extensive experience in the defence of criminal cases. He shall be admitted to the practice of law in a recognised jurisdiction and shall have practised criminal law before a national or international criminal court for a minimum of ten years.

“Article 28A

International Criminal Jurisdiction of the Court

5. The Principal Defender shall, in order to ensure that the fair trial rights of suspects and accused are protected, adopt such regulations and practice directions as may be necessary to effectively carry out the functions of the Defence Office.
6. The Principal Defender shall be assisted by such other staff as may be required to perform the functions of the Defence Office effectively and efficiently. The staff of the Defence Office shall be appointed by the Principal Defender in accordance with the Staff Rules and Regulations of the African Union..
7. The Principal Defender shall, for all purposes connected with pre-trial, trial and appellate proceedings, enjoy equal status with the Prosecutor in respect of rights of audience and negotiations *inter partes*.
8. At the request of a Judge or Chamber, the Registry, Defence or where the interests of justice so require, *proprio motu*, the Principal Defender or a person designated by him shall have rights of audience in relation to matters of general interest to defence teams, the fairness of the proceedings or the rights of a suspect or accused.

Article 12Bis

Conditions of Service of the Registrar and Members of the Registry

Article 24 of the Statute (Conditions of Service of the Registrar and Members of the Registry) is deleted.

Article 13

Under Chapter III (Competence of the Court) In Article 28 of the Statute (Jurisdiction of the Court), the insertion of a new sub-paragraph (d) as follows, with consequential renumbering of the existing paragraphs (d) to (h).

“ ...

(d) The crimes contained in this Statute, subject to a right of appeal.

” ...

Article 14

International Criminal Jurisdiction of the Court

Immediately after Article 28 (Jurisdiction of the Court), the insertion of new Articles 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, 28I, 28J, 28K, 28L, 28M, 28N and 28O as follows:

1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder:

- 1) Genocide
- 2) Crimes Against Humanity
- 3) War Crimes
- 4) The Crime of Unconstitutional Change of Government;
- 5) Piracy
- 6) Terrorism
- 7) Mercenarism
- 8) Corruption
- 9) Money Laundering
- 10) Trafficking in Persons
- 11) Trafficking in Drugs
- 12) Trafficking in Hazardous Wastes
- 13) Illicit Exploitation of Natural Resources
- 14) The Crime of Aggression

2. The Assembly may extend upon the consensus of States Parties the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law.
3. The crimes within the Jurisdiction of the Court shall not be subject to any statute of limitations.

Article 28 B

Genocide

For the purposes of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group;
- f) Acts of rape or any other form of sexual violence.

Article 28 C
Crimes Against Humanity

1. For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- b) Deportation or forcible transfer of population;
- c) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- d) Torture, cruel, inhuman and degrading treatment or punishment;
- e) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- f) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;
- g) Enforced disappearance of persons;
- h) The crime of apartheid;
- i) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.

2. For the purpose of paragraph 1:

- a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- b) 'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

- e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Article 28 D
War Crimes

For the purposes of this Statute, 'war crimes' means any of the offences listed , in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.

- a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - i) Wilful killing;
 - ii) Torture or inhuman treatment, including biological experiments;
 - iii) Wilfully causing great suffering, or serious injury to body or health;
 - iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

- v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- vii) Unlawful deportation or transfer or unlawful confinement;
- viii) Taking of hostages.
- b) Grave breaches of the First Additional Protocol to the Geneva Conventions of 8 June 1977 and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
 - v) Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated;
 - vi) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
 - vii) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
 - viii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
 - ix) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or

- transfer of all or parts of the population of the occupied territory within or outside this territory;
- x) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - xi) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xii) Killing or wounding treacherously individuals belonging to the hostile nation or army;
 - xiii) Declaring that no quarter will be given;
 - xiv) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
 - xv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
 - xvi) Compelling the nationals of the hostile party to take part in the operations of war directed against their own State, even if they were in the belligerent's service before the commencement of the war;
 - xvii) Pillaging a town or place, even when taken by assault;
 - xviii) Employing poison or poisoned weapons;
 - xix) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - xx) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - xxi) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict
 - xxii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - xxiii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - xxiv) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

- xxv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- xxvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- xxvii) Conscripting or enlisting children under the age of eighteen years into the national armed forces or using them to participate actively in hostilities;
- xxviii) Unjustifiably delaying the repatriation of prisoners of war or civilians;
- xxix) Willfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.
- xxx) Making non-defended localities and demilitarised zones the object of attack;
- xxxj) Slavery and deportation to slave labour;
- xxxii) Collective punishments;
- xxxiii) Despoliation of the wounded, sick, shipwrecked or dead;
- c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
 - i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - iii) Taking of hostages;
 - iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- d) Paragraph 1 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- v) Pillaging a town or place, even when taken by assault;
- vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- vii) Conscripting or enlisting children under the age of eighteen years into armed forces or groups or using them to participate actively in hostilities;
- viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- ix) Killing or wounding treacherously a combatant adversary;
- x) Declaring that no quarter will be given;
- xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- xiii) Employing poison or poisoned weapons;
- xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

- xvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies;
 - xvii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - xviii) Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;
 - xix) Making non-defended localities and demilitarised zones the object of attack;
 - xx) Slavery;
 - xxi) Collective punishments;
 - xxii) Despoliation of the wounded, sick, shipwrecked or dead.
- f) Paragraph 1 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
- g) Using nuclear weapons or other weapons of mass destruction

Article 28E

The Crime of Unconstitutional Change of Government

1. For the purposes of this Statute, 'unconstitutional change of government' means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:
- a) A putsch or coup d'état against a democratically elected government;
 - b) An intervention by mercenaries to replace a democratically elected government;
 - c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
 - d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
 - e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;

- f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.
2. For purposes of this Statute, "democratically elected government" has the same meaning as contained in AU instruments.

Article 28F Piracy

Piracy consists of any of the following acts:

- a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private boat, ship or a private aircraft, and directed:
 - i. on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
 - ii. against a boat, ship, aircraft, persons or property in a place outside the jurisdiction of any State
- b) any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;
- c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 28 G Terrorism

For the purposes of this Statute, 'terrorism' means any of the following acts:

- A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union, or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:
 - 1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or

2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 3. create general insurrection in a State.
- B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to(3).
- C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.
- D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.
- E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.

**Article 28H
Mercenarism**

1. For the purposes of this Statute:
 - a) A mercenary is any person who:
 - i. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - ii. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;
 - iii. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
 - iv. Is not a member of the armed forces of a party to the conflict; and
 - v. Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
 - b) A mercenary is also any person who, in any other situation:
 - i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
 2. Assisting a government to maintain power;
 3. Assisting a group of persons to obtain power; or
 4. Undermining the territorial integrity of a State;
 - ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
 - iii. Is neither a national nor a resident of the State against which such an act is directed;
 - iv. Has not been sent by a State on official duty; and
 - v. Is not a member of the armed forces of the State on whose territory the act is undertaken.
2. Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above commits an offence.
 3. A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.

**Article 28I
Corruption**

1. For the purposes of this Statute, the following shall be deemed to be acts of corruption if they are of a serious nature affecting the stability of a state, region or the Union:
 - a) The solicitation or acceptance, directly or indirectly, by a public official, his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
 - b) The offering or granting, directly or indirectly, to a public official, his/family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
 - c) Any act or omission in the discharge of his or her duties by a public official. his/her family member or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
 - d) The diversion by a public official, his/her family member or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or

its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;

- e) The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;
 - f) The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
 - g) Illicit enrichment;
 - h) The use or concealment of proceeds derived from any of the acts referred to in this Article.
2. For the purposes of this Statute "Illicit enrichment" means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.

Article 28I Bis Money Laundering

1. For the purposes of this Statute, 'Money Laundering' means: any act of –
 - i. Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.
 - ii. Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences;
 - iii. Acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences
 - iv. Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. Nothing in this article shall be interpreted as prejudicing the power of the Court to make a determination as to the seriousness of any act or offence.

Article 28J Trafficking in persons

For the purposes of this Statute:

1. "Trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. Exploitation shall include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
3. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (1) of this article shall be irrelevant where any of the means set forth in subparagraph (1) have been used;
4. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (1) of this article;

Article 28K Trafficking in drugs

1. For the purposes of this Statute, trafficking in drugs means:
 - a) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
 - b) The cultivation of opium poppy, coca bush or cannabis plant;
 - c) The possession or purchase of drugs with a view to conducting one of the activities listed in (a);
 - d) The manufacture, transport or distribution of precursors knowing that they are to be used in or for the illicit production or manufacture of drugs.
2. The conduct described in paragraph 1 shall not be included in the scope of this Statute when it is committed by perpetrators for their own personal consumption as defined by national law.

3. For the purposes of this Article:
- a) "Drugs" shall mean any of the substances covered by the following United Nations Conventions:
 - a) the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961;
 - b) The 1971 Vienna Convention on Psychotropic Substances.
 - b) "Precursors" shall mean any substance scheduled pursuant to Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

Article 28L

Trafficking in Hazardous Wastes

1. For the purposes of this Statute, any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted in Bamako, Mali, in January 1991 shall constitute the offence of trafficking in hazardous waste.
2. The following substances shall be "hazardous wastes" for the purpose of this statute:
 - a) Wastes that belong to any category contained in Annex I of the Bamako Convention;
 - b) Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit;
 - c) Wastes which possess any of the characteristics contained in Annex II of the Bamako Convention;
 - d) Hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the State of manufacture, for human health or environmental reasons.
4. Wastes which, as a result of being radioactive, are subject to any international control systems, including international instruments, applying specifically to radioactive materials are included in the scope of this Convention.

5. Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, shall not fall within the scope of this Convention.
6. For the purposes of this Article, "failure to re-import" shall have the same meaning assigned to it in the Bamako Convention.
7. The export of hazardous waste into a Member State for the purpose of rendering it safe shall not constitute an offence under this Article.

Article 28L Bis

Illicit Exploitation of Natural Resources

For the purpose of this Statute, "illicit exploitation of natural resources" means any of the following acts if they are of a serious nature affecting the stability of a state, region or the Union:

- a) Concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources;
- b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned;
- c) Concluding an agreement to exploit natural resources through corrupt practices;
- d) Concluding an agreement to exploit natural resources that is clearly one-sided;
- e) Exploiting natural resources without any agreement with the State concerned;
- f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and
- g) Violating the norms and standards established by the relevant natural resource certification mechanism.

Article 28M

Crime of Aggression

- A. For the purpose of this Statute, "Crime of Aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state or organization, whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party."
- B. The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organizations of States, or non-State actor(s) or by any foreign entity:

1. The use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations.
2. The invasion or attack by armed forces against the territory of a State, or military occupation however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a State or part thereof.
3. The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.
4. The blockade of the ports, coasts or airspace of a State by the armed forces of another State.
5. The attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State.
6. The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the African Union Non-Aggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement.
7. The action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State.

Article 28N

Modes of Responsibility

An offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute:

- i. Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute;
- ii. Aids or abets the commission of any of the offences set forth in the present Statute;
- iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
- iv. Attempts to commit any of the offences set forth in the present Statute.

Article 15

Entities Eligible to Submit Cases to the Court

In paragraph 1(b) of Article 29 of the Statute (Entities Eligible to Submit Cases to the Court), immediately after the words "The Assembly" insert:

"the Peace and Security Council"

Add a new paragraph (d)

(d) "The Office of the Prosecutor"

Article 16

Other Entities Eligible to Submit Cases to the Court

The deletion of paragraph (f) of Article 30 of the Statute (Other Entities Eligible to Submit Cases to the Court), and the insertion of the following new paragraph:

"(f) African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions, but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made a Declaration in accordance with Article 9(3) of this Protocol."

Article 17

Institution of Proceedings before the International Criminal Law Section

UNDER CHAPTER FOUR (PROCEDURE), immediately after Article 34 of the Statute (Institution of Proceedings before the Human Rights Section, the insertion of new Articles 34A and 34B as follows:

"Article 34A

Institution of Proceedings before the International Criminal Law Section

1. Subject to the provisions of Articles 22A and 29, cases brought before the International Criminal Law Section of the Court shall be brought by or in the name of the Prosecutor.
2. The Registrar shall forthwith give notice of the case to all parties concerned, as well as the Chairperson of the Commission.

Article 34B

Institution of Proceedings before the Appellate Chamber

The Court shall define the procedures for appeals in its Rules."

**Article 18
Representation of Parties**

In Article 36 of the Statute (Representation of the Parties), the insertion of a new paragraph (6) as follows, with consequential renumbering of the existing paragraph 6:
“

6. A person accused under the international criminal jurisdiction of this Court shall have the right to represent himself or herself in person or through an agent.
“

**Article 19
Sentences and Penalties**

Immediately after Article 43 of the Statute (Judgments and Decisions) the insertion of a new Article 43A as follows:

**“Article 43A
Sentences and Penalties under the International Criminal Jurisdiction of the Court**

1. Without prejudice to the provisions of Article 43, the Court shall pronounce judgment and impose sentences and/ or penalties, other than the death penalty, for persons convicted of international crimes under this Statute.
2. For the avoidance of doubt, the penalties imposed by the Court shall be limited to prison sentences and/ or pecuniary fines.
3. The sentences and/ or penalties shall be pronounced in public and, wherever possible, in the presence of the accused.
4. In imposing the sentences and/ or penalties, the Court should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
5. In addition to the sentences and/ or penalties, the Court may order the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State.”

**Article 20
Compensation and Reparations to Victims**

Article 45 of the Statute (Compensation), including its title, is deleted in its entirety and substituted with the following:

**“Article 45
Compensation and Reparations to Victims**

1. Without prejudice to the provisions of paragraph (i) of Article 28, the Court shall establish in the Rules of Court principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting.
2. With respect to its international criminal jurisdiction, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
3. Before making an order the Court may invite and take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”

**Article 21
Binding Force and Execution of Judgments**

Paragraph 2 of Article 46 of the Statute (Binding Force and Execution of Judgments) is deleted and substituted with the following: -

- “
2. Subject to the provisions of Article 18 (as amended) and paragraph 3 of Article 41 of the Statute, the judgment of the Court is final.
 3.”

**Article 22
Provisions Specific to the International Criminal Jurisdiction of the Court**

Under Chapter IV (PROCEDURE), immediately at the end of Article 46 (Binding Force and Execution of Judgments), the insertion of a new CHAPTER IVA and new Articles 46A to 46L as follows:

“CHAPTER IVA: PROVISIONS SPECIFIC TO THE INTERNATIONAL CRIMINAL JURISDICTION OF THE COURT

Article 46A
Rights of Accused

1. All accused shall be equal before the Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proven guilty according to the provisions of this Statute.
4. In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
 - a) To be informed promptly and in detail in a language that he or she understands of the nature and cause of the charge against him or her;
 - b) To have adequate time and facilities for the preparation of his or her defence and to communicate freely with counsel of his or her own choosing;
 - c) To be tried without undue delay;
 - d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Court;
 - g) Not to be compelled to testify against himself or herself or to confess guilt.
 - h) To have the judgment pronounced publicly
 - i) To be informed of his /her right to appeal.

Article 46A bis
Immunities

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

Article 46B
Individual Criminal Responsibility

1. A person who commits an offence under this Statute shall be held individually responsible for the crime.
2. Subject to the provisions of Article 46A bis of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to the order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Court determines that justice so requires.

Article 46C
Corporate Criminal Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.
5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

Article 46D
Exclusion of Jurisdiction over Persons under the age of eighteen

The Court shall have no jurisdiction over any person who was under the age of eighteen (18) years at the time of the alleged commission of a crime.

Article 46E
Temporal Jurisdiction

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Protocol and Statute.
2. If a State becomes a Party to this Protocol and Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Protocol and Statute for that State.

Article 46E bis
Preconditions to the exercise of Jurisdiction

1. A State which becomes a Party to this Protocol and Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 28A.
2. The Court may exercise its jurisdiction if one or more of the following conditions apply:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
 - (b) The State of which the person accused of the crime is a national.
 - (c) When the victim of the crime is a national of that State.
 - (d) Extraterritorial acts by non-nationals which threaten a vital interest of that State.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise

Article 46F
Exercise of Jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 28A in accordance with the provisions of this Statute if: -

1. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party;
2. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Assembly of Heads of State and Government of the African Union or the Peace and Security Council of the African Union.

3. The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 46G.

Article 46G
The Prosecutor

1. The Office of the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Office of the Prosecutor shall analyze the seriousness of information received. For this purpose, he or she may seek additional information from States, organs of the African Union or United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony.
3. If the Office of the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, it shall submit to a Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of the Court.
4. If the Pre-Trial Chamber, upon examination of the request and supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Office of the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Office of the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, it shall inform those who provided the information. This shall not preclude the Office of the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 46H
Complementary Jurisdiction

1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.

2. The Court shall determine that a case is inadmissible where:
 - a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;
 - b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute;
 - c) The person concerned has already been tried for conduct which is the subject of the complaint;
 - d) The case is not of sufficient gravity to justify further action by the Court.
3. In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
 - b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
4. In order to determine that a State is unable to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 46I
Non bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court:
 - a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
 - b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Court shall take into account the extent to which any penalty imposed by another Court on the same person for the same act has already been served.

Article 46J
Enforcement of Sentences

1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
2. Such imprisonment shall be as provided for in a prior agreement between the Court and a receiving State and in accordance with the criteria as set out in the Rules of Court.

Article 46Jbis
Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court without prejudice to the rights of bona fide third parties, and in accordance with the procedure provided for in their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. The Court shall determine in its Rules how real or movable property obtained by a State as a result of its enforcement of a judgment or order may be dealt with.

Article 46K
Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Court accordingly. There shall only be pardon or commutation of sentence if the Court so decides on the basis of the interests of justice and the general principles of law.

Article 46L
Co-operation and Judicial Assistance

1. States Parties shall co-operate with the Court in the investigation and prosecution of persons accused of committing the crimes defined by this Statute.
2. States Parties shall comply without undue delay with any request for assistance or an order issued by the Court, including but not limited to:
 - a) The identification and location of persons;
 - b) The taking of testimony and the production of evidence;
 - c) The service of documents;
 - d) The arrest, detention or extradition of persons;
 - e) The surrender or the transfer of the accused to the Court.”
 - f) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.
 - g) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the court.

3. The Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.

Article 46M
Trust Fund

1. The Assembly shall, by a Decision, establish, within the jurisdiction of the Court, a Trust Fund for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly.

Article 23
Annual Activity Report

Article 57 of the Statute (Annual Activity Report) is deleted and substituted with the following:

“The Court shall submit to the Assembly an annual report on its work during the previous year. The report shall specify, in particular, the pending and concluded investigations, prosecutions and decisions and the cases in which a party has not complied with the judgment, sentence, order or penalty of the Court.”