AFRICAN UNION		UNION AFRICAINE
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

LEGAL & HUMAN RIGHTS CENTRE AND TANZANIA HUMAN RIGHTS DEFENDERS COALITION

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 039/2020

JUDGMENT

13 JUNE 2023

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The Court composed of: Blaise TCHIKAYA; Vice President, Ben KIOKO, Rafaậ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO, Dennis D. ADJEI – 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 (hereinafter referred to as "the Protocol") and Rule 9(2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the matter of

Legal & Human Rights Centre and Tanzania Human Rights Defenders Coalition

Represented by:

Jebra Kambole, Law Guards Advocates

Versus

UNITED REPUBLIC OF TANZANIA

Represented by:

i. Dr. Boniphace Nalija LUHENDE, Solicitor General, Office of the Solicitor General;
ii. Ms. Sarah Duncan MWAIPOPO, Deputy Solicitor General, Office of the Solicitor General; and
iii. Mr. Hangi M. CHANG'A, Assistant Director, Constitution, Human Rights and Election petitions; Office of the Solicitor General.

After deliberation,

Renders this Judgment,

I. THE PARTIES

1. The Legal & Human Rights Centre and the Tanzania Human Rights Defenders Coalition, (hereinafter referred to as "Applicants") are Non-Governmental Organisations registered and operating in the United Republic of Tanzania having observer status with the African Commission on Human and Peoples' Rights (hereinafter referred to as "Commission"). They challenge Section 148(5) of the Criminal Procedure Act 1985 (hereinafter referred to as "the CPA") as being incompatible with international human rights standards.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court has held that this withdrawal has no bearing on pending and new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period of one (1) year after its deposit.[1]

[1] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (26 June 2020) (merits and reparations) 4 AfCLR 219, §§ 37-39.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. According to the Applicants, the Respondent State enacted the CPA on 1 November 1985. They aver that Section 148(5) of the CPA violates various provisions of the Charter, the Universal Declaration of Human Rights (hereinafter referred to as "the UDHR"), the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") and the Constitution of the United Republic of Tanzania (hereinafter referred to as "the Constitution").

4. The Applicants submit that these human rights instruments and the Constitution proscribe discriminatory laws. Furthermore, that, the instruments require the Respondent State to guarantee all citizens the right to equal protection of the law, and other rights attendant to the right to a fair trial.

5. The Applicants assert that Section 148(5) of the CPA, however, violates the above enumerated rights by unreasonably restricting bail to individuals charged with certain offences. In this regard, the Applicants submit that by prescribing unbailable offences, Section 148(5) of the CPA affects two categories of entities: individuals and the judiciary. The former are deprived of their basic rights enshrined in the Constitution and relevant international instruments, while the latter, as a result of the mandatory nature of the provision are denied any discretion in bail applications pertaining to the said section.

6. The Applicants contend that despite several cases having been filed in the domestic courts challenging Section 148(5) of the CPA, the provision has still been upheld as being constitutional and consistent with international human rights instruments.

B. Alleged violations

7. The Applicants allege the violation of the following:

    i. The duty to recognise the rights and freedoms and adopt legislative or other measures protected under Article 1 of the Charter;
    ii. The right to non-discrimination protected under Article 2 of the Charter;
    iii. The right to liberty and security protected under Article 6 of the Charter;
    iv. The right to be presumed innocent protected under Article 7 (1)(b) of the Charter; and
    v. The rights protected under Articles 2, 9(1), (3), (4), 14(1), (2), 3(c) and 26 of ICCPR; Articles 1, 2, 3, 6, 7, 10, and 11(1) of the Universal Declaration of Human Rights; and Articles 13(1), (2), (3), (4), 13(6)(a), (b), 15(1), (2) (a) and (b) and Article 29(1) and (2) of the Respondent State's Constitution.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

8. The Application was filed on 18 November 2020 and served on the Respondent State on 3 December 2020. The Respondent State filed its Response on 11 March 2021.

9. The parties filed their pleadings on the merits and reparations of the Application within the time prescribed by the Court.

10. Pleadings were closed on 29 July 2021 and the parties were notified thereof.

IV. PRAYERS OF THE PARTIES

11. The Applicants pray the Court as follows:

    i. The Respondent state, by enacting section 148(5) of the CPA (CAP 20 R.E.2019) is in violation of Art 1, 2, 6 and 7 of the Charter.

ii. The Respondent state, through enactment of section 148(5) has violated Art 2, 9(1), (3), (4), 14(1), (2), 3(c) and 26 of ICCPR, and, 1, 2, 3, 6, 7, 9, 10 and 11(1) of UDHR.
iii. That the Respondent State puts in place Constitutional and Legislative measures to guarantee the rights provided for under Article 1, 2, 6 and 7 of the Charter and other international human rights instruments.
iv. Make an order that all suspects and accused persons charged with unbailable offences, be released on bail within one month from the date of the decision under the bail conditions set by the Respondents Courts, based on circumstances of each case.
v. Make an order that the Respondent reports to the Honourable Court, within a period of twelve (12) months from the date of judgment issued by the Honourable Court, on the implementation of this judgment and consequential orders.
vi. Any other remedy and/or relief that the Honourable Court will deem to grant; and
vii. The Respondent to pay the Applicant's costs.

12. With respect to jurisdiction and admissibility, the Respondent State prays the Court to find that:

i. The Applicants' Application has not met the admissibility conditions under Article 56(2), (5), (6) and (7) of the Charter;
ii. The Application be declared inadmissible for contravening Rule 41(3)(e) of the Rules of Court; and
iii. The Application be declared inadmissible for contravening Article 56(7) of the Charter and Article 6(2) of the Protocol.

13. With respect to the merits of the Application, the Respondent State prays the Court to find that:

1. The Section 148(5) of CPA does not violate the provisions of Articles 1, 2, 6 and 7 of the Charter; Articles 1, 2, 3, 6, 7, 9, 10 and 11(1) of the UDHR; Article 2, 9(1), 9(3), 9(4), 14(1), 14(2), 14(3)(c) and 26 of the ICCPR and Article 13(1), 13(2), 13(3), 13(4), 13 (6)(a) and (b), 15(1), 15(2) and (b) of the Constitution;

2. The Application is devoid of merits; and
3. Costs be borne by the Applicants.

V. JURISDICTION

14. The Court observes that Article 3 of the Protocol provides as follows:

> 1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
> 2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. The Court further recalls that pursuant to Rule 49(1) of the Rules, it "shall preliminarily ascertain its jurisdiction… in accordance with the Charter, the Protocol and these Rules."[2]

16. On the basis of the above-cited provisions, the Court must preliminarily establish its jurisdiction and dispose of objections thereto, if there are any.

17. In the instant case the Respondent State objects to the personal jurisdiction of the Court. The Court will therefore examine the said objection before considering other aspects of jurisdiction, if necessary.

A. Objection to the personal jurisdiction of the Court

18. The Respondent State contends that the Applicants did not attach documentary evidence proving that they have observer status before the Commission. It argues, therefore, that they do not have a right to file the Application before the Court as this was a breach of Article 5(3) of the Protocol as read together with Article 34(6) of the Protocol.

[2] Rule 39(1), Rules of Court, 2 June 2010.

19. To fortify its objection, the Respondent State relies on Rule 41(3)(e) of the Rules in arguing that annexure of documents proving observer status with the Commission is obligatory. That in fact, Rule 41(9) of the Rules is explicit on the legal ramifications of any attempt to circumvent Rule 41(3)(e) of the Rules, which is that, the Application would be rejected.

20. The Respondent State contends further that, the Applicants did not give any explanation as to why they could not provide any proof of their observer status.

21. The Applicants in their rejoinder averred that the failure to attach documents proving their observer status before the Commission was not fatal to the consideration of their Application. In fact, they argue that they furnished the Court with their respective observer status numbers, that is, no. 244 for the Legal and Human Rights Centre and no. 470 for the Tanganyika Human Rights Defenders Coalition.

22. In addition, the Applicants argue that any omission as regards proof of observer status could be remedied by Article 6(1) of the Protocol which empowers the Court to request the opinion of the Commission on the observer status of NGOs.

23. Furthermore, the Applicants contend that they adduced a letter of observer status before the Commission and requested the Court to admit it as evidence and to thus form part of the record.

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24. Regarding the observer status of the Applicants before the Commission, the Court notes that the Applicants, on 9 February 2021, filed a letter confirming the observer status of the Legal and Human Rights Centre while the observer status of the Tanzanian Human Rights Defenders Coalition is indicated in the Commission's website.

25. In light of the foregoing, the Court dismisses the Respondent State's objection and finds that it has personal jurisdiction to determine this Application.

B. Other aspects of jurisdiction

26. The Court notes that its material, temporal and territorial jurisdiction are not disputed by the Respondent State. Nevertheless, the Court must confirm its jurisdiction in every Application before proceeding to consider it. In this regard, it finds that its material jurisdiction has been met because the Application alleges violation of rights protected under the Charter and ICCPR both of which have been ratified by the Respondent State.[3]

27. As regards temporal jurisdiction, the Court observes admittedly, that the impugned law, that is, Section 148(5) of the CPA was enacted in 1985, which is before the Respondent State ratified the Charter, the Protocol and deposited its Declaration provided for under Article 34(6) of the Protocol. However, the CPA has been revised repeatedly subsequently with the latest revision taking place on 22 June 2022 and Section 148(5) of the CPA still prevails in the Respondent State to date.

28. The Court underscores in accordance with the principle of non-retroactivity, that, it cannot consider allegations of human rights violations that occurred before the Respondent State's obligations were triggered under the human rights instruments that it had ratified, unless the violations are continuing in nature. In the present case, even though the alleged violations predated the ratification of the Charter, the Protocol and the deposit of the Declaration,

[3] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 45 ; *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 34-36 ; *Jibu Amir alias Mussa and Another v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 629, § 18; *Masoud Rajabu v. United Republic of Tanzania*, ACtHPR, Application No. 008/2016 Judgment of 25 June 2021 (merits and reparations), § 21.

the alleged violations persist to date. Resultantly, the Court finds that it has temporal jurisdiction.[4]

29. The Court also notes that it has territorial jurisdiction given that the alleged violations occur in the Respondent State's territory.

30. In light of the foregoing, the Court holds that it has jurisdiction to hear this Application.

VI. ADMISSIBILITY

31. Article 6(2) of the Protocol provides that: "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter."

32. Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

33. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. indicate their authors even though the latter requests anonymity;
> b. are compatible with the Constitutive Act of the African Union and the Charter;
> c. are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;

[4] *Igola Iguna v. United Republic of Tanzania*, ACtHPR, Application No. 020/2017, Judgment of 1 December 2022 (merits and reparations), § 18; *Jebra Kambole v. United Republic of Tanzania*, (15 July 2020) (merits and reparations) 4 AfCLR 460, § 24; *Dismas Bunyerere v. United Republic of Tanzania*, (merits and reparations) (28 November 2019) 3 AfCLR 702, § 28(ii); *Norbert Zongo and Others v. Burkina Faso* (preliminary objections) (25 June 2013) 1 AfCLR 197, §§ 71-77.

d. are not based exclusively on news disseminated through the mass media;
e. are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
f. are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
g. do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter.

A. Objections to the admissibility of the Application

34. The Respondent State raises four objections to the admissibility of the Application, namely: on the non-exhaustion of local remedies, on the basis that the Application was not filed within a reasonable time, on the basis that the matter has already been settled and on non-compliance with the Constitutive Act of the African Union. The Court will therefore examine the said objections before considering other aspects of admissibility if necessary.

i. Objection based on non-exhaustion of local remedies

35. The Respondent State avers that the Applicants have not exhausted local remedies as mandated by Article 56(5) of the Charter and Rule 50(2)(e) of the Rules.

36. It contends that a case challenging Section 148(5) of the CPA at the domestic courts was filed by Dickson Paul Sanga at the High Court of Tanzania. The Respondent State further contends that the aforementioned case was decided by the High Court in favour of Dickson Paul Sanga but it was reversed on appeal by the Court of Appeal. Dickson Paul Sanga subsequently filed a petition for review of the Court of Appeal case (*Dickson*

Paul Sanga v. Attorney General, Civil Application No. 429/01 of 2020) whose determination was pending at the time the Applicants filed their Application.

37. The Respondent State argues that the petition for review of the decision of the Court of Appeal judgment was on the constitutionality of Section 148(5) of the CPA and because its determination is pending, the Applicants have not exhausted all local remedies.

38. Furthermore, the Respondent State contends that the Court is proscribed from the consideration of this Application, given the fact that it is not a court of appeal as elucidated in the matter of *Ernest Francis Mtingwi v. Malawi.*

39. In light of the foregoing, the Respondent State prays the Court to dismiss the Application for failing to comply with the requirement of exhaustion of local remedies.

40. According to the Applicants, there are a number of cases decided by the Court which articulate that the requirement of exhaustion of local remedies is fulfilled through a final decision of the Court of Appeal of Tanzania and not a decision on review. To reinforce their argument, the Applicants cite the decision of the Court in the matters *of James Wanjara and 4 Others v. Tanzania* and *Alex Thomas v. Tanzania*.

41. The Applicants submit that one of the key elements of the requirement of exhaustion of local remedies is that there must be a final decision by the highest court in the Respondent State which can confirm or reverse the decision of the lower court. They buttress their submission with the decision of the Inter-American Court in *Cantoral Benavides v. Peru* that a petition for review of a judgment of a Supreme Court of Justice is extra-ordinary in character.

42. The Applicants accordingly aver that the Respondent State's submission that filing a petition for review of the Court of Appeal's decision is a

mandatory step for exhaustion of local remedies is inconsistent with the Court's jurisprudence.

43. Furthermore, the Applicants argue that they are not appealing against the decision of the Court of Appeal, but are challenging the validity of Section 148(5) of the CPA in light of the provisions of the Charter and the ICCPR.

44. The Applicants aver that the last stage of appeal from the decision of the High Court of the Respondent State is the Court of Appeal, which is its highest court. Furthermore, that, the decision in the matter of Dickson Paul Sanga was "delivered on 5 August 2020" in favour of the Respondent State, before this Application was filed, and thus, local remedies have been exhausted.

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45. The Court notes pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, that, any application filed before it has to fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies is paramount and aims at providing States the opportunity to deal with human rights violations within their jurisdictions before an international human rights body is called upon to determine the State's responsibility for the same.[5]

46. For local remedies to be exhausted, they must be available, effective, sufficient and must not be unduly prolonged.[6] The Court recalls that the rule of exhaustion of local remedies does not in principle require that a matter filed before it must also have been filed before the domestic courts by the same Applicant especially in a public interest case.[7] What must rather be demonstrated is that prior to the seizure of the Court, the Respondent State

[5] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.
[6] *Ibid.*
[7] *Ibid*, § 94.

has had an opportunity to deal with the substance of the matter through the appropriate domestic proceedings.

47. In the instant case, the Court notes that some individuals filed cases at the national courts[8] challenging the constitutionality of Section 148(5) of the CPA, with the latest at the time of filing the application being the public interest case filed by *inter alia* Jebra Kambole, the Applicants' advocate herein on behalf of *Dickson Paul Sanga*.[9] This case was decided by the Court of Appeal on 5 August 2020 whereby it held that the impugned law was constitutional.

48. In this regard, the Court holds that the Applicants could not have been expected to seize the national courts on a public interest case regarding the same subject matter already decided by the Court of Appeal, as there would have been no prospect of success, making the remedy ineffective. Therefore, the Court of Appeal being the highest court in the Respondent State, its decision confirms the exhaustion of local remedies.

49. Indeed, the Respondent State's claim is not that the issues raised by the Applicants have not been decided at the national courts but that the case of *Dickson Paul Sanga* had not yet been decided on review. In that regard, the Court reiterates that the review procedure is an extra-ordinary remedy which Applicants are not required to have exhausted prior to seizing this Court.[10]

50. As regards the objection that the Court is not an appellate court, the Court reiterates its jurisprudence, that even though it is not a court of appeal to decisions of domestic courts, "this does not preclude it from examining relevant proceedings in the national courts in order to determine whether

[8] See *Director of Public Prosecutions (DPP)* v. *Daudi Pete* 1993 TLR 22 (CA), Civil Appeal No. 65 of 2016 (CA) [2018] TZCA 347 (31 January 2018); *Mariam Mashaka Faustine v. Attorney General*, Consolidated Misc. Civil Causes No. 88 and 95 of 2020 (HC)*;Gedion Wasonga* v. *Attorney General,* Miscellaneous Civil Cause No. 14 of 2016 (HC).

[9] *Attorney General* v. *Dickson Paulo Sanga*, Miscellaneous Civil Cause No. 29 of 2019 (CA) (Unreported).

[10] See *Alex Thomas v. Tanzania* (merits)*, op. cit*. § 65; *Mohamed Abubakari v. Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Christopher Jonas v. Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44.

they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State concerned."[11]

51. In this regard, the Court holds that the Applicants have complied with the requirement of exhaustion of local remedies under Article 56(5) of the Charter. Consequently, the Court dismisses the objection herein.

ii. Objection on the basis that the Application was not filed within a reasonable time

52. According to the Respondent State, the Applicants have not met the requirement of Article 56(6) of the Charter in relation to the filing the Application within a reasonable time after exhaustion of local remedies "since the Applicants did not exhaust local remedies".

53. The Respondent State contends that there is a pending application for review before its Court of Appeal which negates the assertion by the Applicants that they have exhausted local remedies.

54. The Applicants argue that in spite of the impediments occasioned by the coronavirus, they filed the Application on 18 November 2020, which constitutes a period of "two months" after exhaustion of local remedies on 5 August 2020, the date of the Court of Appeal's decision in the Dickson Paul Sanga's case.

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55. The Court notes that Rule 50(2)(f) of the Rules which in substance restates Article 56(6) of the Charter, requires an Application to be filed within: "a reasonable time from the date local remedies were exhausted or from the

[11] *Kenedy Ivan v. United Republic of Tanzania* (merits) (March 2019) 3 AfCLR 48, § 26; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

56. The Court recalls, that: "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[12]

57. In the instant Application, the Court observes that the judgment of the Court of Appeal on the merits in Civil Appeal no. 175, *The Attorney General v. Dickson Paul Sanga*[13] was delivered on 5 August 2020. The Court notes that three (3) months and fifteen (15) days elapsed between 5 August 2020 and 18 November 2020 when the Applicants filed the Application before this Court. The issue for determination, therefore, is whether the period that the Applicants took to file the Application before the Court is reasonable.

58. The Court notes that the filing of the Application within three (3) months and fifteen (15) days after exhaustion of local remedies was expeditious and therefore reasonable. Resultantly, the Court rejects the objection herein based on non-filing of the Application within a reasonable time and holds that the Application has complied with the requirement of Rule 50(2)(f) of the Rules.

iii. Objection on the basis that the matter has already been settled

59. The Respondent State submits that the viability of Section 148(5) of the CPA, was heard and determined in the case *of Anaclet Paulo v*. *Tanzania* and that therefore, the present Application contravenes the provision of Article 56(7) of the Charter.

60. The Respondent State cites the Commission's decision in *Amnesty International v. Tunisia*, arguing that the communication was declared inadmissible owing to the fact that the same subject matter was pending at

[12] *Zongo v. Burkina Faso* (merits), *supra*, § 92. See also *Thomas v. Tanzania* (merits) *supra*, § 73**.**
[13] *Supra* note 13.

the United Nations Human Rights Commission under the ECOSOC Resolution 1503 proceedings.

61. Furthermore, the Respondent State also references the Commission's decision in *Bob Ngozi v. Egypt,* that, the Commission noted that a similar matter had been submitted before the United Nations Sub-Commission on the Prevention and Protection of Minorities.

62. The Applicants aver that in the *Anaclet Paulo* case, the issue for determination was Mr. Paulo's detention, while the contentious issue in the instant case is the provisions of Section 148(5) of the CPA and therefore, the issues in the two cases are different.

63. The Applicants further contend that the Respondent State has cited the decision in the matter of *Anaclet Paulo v. Tanzania*, "out of context", noting that Mr. Paulo did not pray for a declaration that Section 148(5) of the CPA is an infringement to Articles 1,2,6 and 7 of the Charter.

64. In addition, the Applicants submit that the Parties in the instant case are distinct from the Applicant in the *Anaclet Paulo* case.

65. Lastly, the Applicants aver that the cases cited in support of the Respondent State's case do not bind this Court. They aver that, unlike the cases cited by the Respondent State, the instant case provides the opportunity for the Court to consider an issue *de novo* that has never been raised in any other international tribunal which is the compatibility of Section 148(5) of the CPA with the Charter.

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66. Article 56(7) of the Charter and Rule 50(2)(g) of the Rules stipulate that Applications will be considered by the Court if they: "do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union or the provisions of the Charter."

67. The Court recalls that the concept of "settlement" implies the convergence of three major conditions: (i) the identity of the parties; (ii) the identity of the applications or their supplementary, consecutive or alternative nature or whether the case flows from a request made in the initial case and (iii) the existence of a first decision on the merits.[14]

68. The Court observes that the Respondent State contends that the alleged violations in the present case have already been settled by the Court in the matter of *Anaclet Paulo v. Tanzania*. The Court must, therefore, decide whether its decision in the aforementioned case settles the issues raised in the present Application.

69. On the "identity of the parties", the Court notes that the Respondent State is the same in both the *Anaclet Paulo* case and the present case. The Applicant in the *Paulo case* was a convict of armed robbery serving a sentence of thirty (30) years who sought to protect individual rights allegedly violated in his trial before the national courts. On the other hand, the Applicants in the instant case are NGOs seeking to protect the rights of the public at large, arising from a public interest case before the national courts. The Court therefore finds that the requirement of identity of the parties is not met.

70. Having said that, the Court recalls that, as it has held in the past, when determining whether an Application was previously settled, the Applicants need not always be exactly the same, as long as they are pursuing the same interest. In this regard, the Court observes that the Applicants in the instance case are clearly pursuing different interests than in the *Paulo case* but the convergence of their interests is only on Section 148(5)(a) of the CPA. Therefore, the identity of the parties in the two Applications are similar only to the extent that they both refer to Section 148(5)(a) of the CPA.

[14] See *Jean-Claude Roger Gombert v. Côte d'Ivoire* (jurisdiction and admissibility) (22 March 2018) 2 AfCLR 270, § 44; *Dexter Johnson v. Republic of Ghana* (jurisdiction and admissibility) (28 March 2019) 3 AfCLR 99, § 45; See *Suy Bi Gohore v. Côte d'Ivoire*, (15 July 2020) (merits and reparations) 4 AfCLR 406, § 104.

71. With regard to the “identity of the applications”, the Court must decide whether the legal and factual basis of the claims are the same by examining the alleged violations and the prayers of the Applicants. In this respect, the Applicant in the *Paulo case* alleged that he was denied bail in violation of his right to a fair trial; that he was sentenced based on a crime that did not exist; that he was not heard on appeal in the national courts; and that he was denied the right to legal assistance. On the other hand, the Applicants in the present Application allege that Sub-sections 148(5)(a)-(e) of the CPA are a violation of the right to non-discrimination, the right to liberty and the right to a fair trial especially because they curtail the discretion of the judicial officer and denies accused persons the right to be heard.

72. Consequently, the Court observes that the convergence of the alleged violations of the Applicants is only on Section 148(5)(a) of the CPA and its alleged violation of the right to liberty. In other words, Mr. Paulo did not allege violations related to Sub-sections 148(5)(b)-(e) of the CPA, which concern accused persons who have served a sentence exceeding three years; accused persons who have absconded bail; accused persons who are kept in custody for their own safety and accused persons of offences involving property valued at more than ten million Tanzanian shillings (Tzs 10,000,000). To this end, the alleged violations are clearly different except on Section 148(5)(a) of the CPA.

73. With regards to the prayers of the parties, the Court observes that Mr. Paulo prayed the Court to: declare it has jurisdiction and the case is well founded; find in his favour regarding the alleged violations; grant him legal aid and grant him reparations and other reliefs as the Court deems fit.

74. In the instant case, the Applicants pray the Court to: find the violations as alleged; order the Respondent State to put in place constitutional and legislative measures to guarantee the rights under the Charter; order that all suspects and accused persons charged with unbailable offence to be released on bail within one month, based on circumstances of each case; and order the Respondent State to report on the implementation of the

judgment within twelve (12) months. It is therefore evident that Mr Paulo sought remedies to alleviate personal alleged violations, while in the instant case, the Applicants seek remedies that include constitutional and legislative amendments to cater for the public's interest.

75. Furthermore, the Court's finding in the Paulo case "… that the Applicant's detention pending trial was not without reasonable grounds and that the refusal to grant him bail does not constitute a violation of his right to liberty", expressly limited the decision of the Court to the claim of the Applicant on the application of Section 148(5)(a)(i) of the CPA vis-a-vis the right to liberty. It thus did not touch on Sub-sections 148(5)(b)-(e) of the CPA, which were not raised by Mr. Paulo as it did not concern him.

76. As regards a first decision on the merits, the Court emphasizes that a finding on the subject matter of a case requires an analysis of arguments and evidence adduced and a 'demonstration' of why the said arguments and evidence is sufficient or not. In the *Paulo case*, the Court was presented with an argument concerning the denial of bail for a person charged with armed robbery. However, it did not receive any arguments regarding any other accused persons, nor did it consider arguments regarding the ousting of the judicial discretion of the Court and the right to be heard due to the operation of Section 148(5) of the CPA. Therefore, it only made a decision as regards Section 148(5)(a) of the CPA but it could not have made a binding decision the other arguments mentioned above.

77. In light of the foregoing, the Court finds that, the Applicants' claim under Section 148(5)(a) of the CPA has been settled in accordance with the principles of the Charter. However, the claims under Sub-Sections 148(5)(b)-(e) of the CPA have not been settled and thus the present Application complies with Rule 50(2)(g) of the Rules in respect of the said provisions of the CPA.

iv. Objection based on non-compliance with the Charter

78. The Respondent State submits that the Application does not comply with the requirement under Article 56(2) of the Charter because it fails to comply with the requirements under Article 56(5), 56(6) and 56(7) of the Charter.

79. The Applicants aver that Article 56(2) of the Charter requires an Application to be compatible with the Constitutive Act of the African Union. In this vein, they submit that the alleged violations are enshrined in the Charter and are on-going within the territory of a Member State of the African Union and a party to the Charter. Consequently, they argue that the Application complies with Article 56(2) of the Charter.

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80. Rule 50(2)(b) of the Rules which restates Article 56(2) of the Charter provides that, applications filed before the Court will be considered if they are compatible with the constitutive Act of the African Union or with the Charter.

81. The Court recalls its jurisprudence that one of the objectives of the Constitutive Act of the African Union as stated in Article 3(h) thereof is the promotion and protection of human and peoples' rights. In the instant case, the Applicants seek to protect the rights guaranteed under the Charter and have alleged violation of Articles 1, 2, 6 and 7 of the Charter. Therefore, the Application is in compliance with Rule 50(2)(b) of the Rules. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union.

82. From the foregoing, the Court dismisses the objection based on the non-compliance of the Application with the requirement of Rule 50(2)(b) of the Rules.

B. Other conditions of admissibility

83. The Court notes that there is no contention regarding the compliance with the conditions set out in Rule 50(2)(a), (c) and (d) of the Rules. Even so, it must satisfy itself that these conditions have been met.

84. From the record, the Court notes that, the Applicants have been clearly identified by name in fulfilment of Rule 50(2)(a) of the Rules.

85. The Court also finds that the language used in the Application is not disparaging or insulting to the Respondent State or its institutions in fulfilment of Rule 50(2)(c) of the Rules.

86. The Court holds that the Application is not based exclusively on news disseminated through mass media as it is founded on the CPA in fulfilment with Rule 50(2)(d) of the Rules.

87. The Court, therefore, finds that all the admissibility conditions have been met and holds that this Application is admissible.

VII. MERITS

88. The Applicants allege the violation of Articles 1, 2, and 7 of the Charter, with regard to the constitutionality of Sections 148(5)(b), (c) and (e) of the Respondent State's CPA.

A. Alleged violation of Article 2 of the Charter

89. The Applicants allege the violation of Article 2 of the Charter by virtue of the enactment of Sub-Sections 148(5)(b) and (e) of the CPA.

90. The Applicants contend that the right to non-discrimination, as protected by the Charter is countenanced by Article 7 of the UDHR and Article 26 of the

ICCPR. They cite the Court's decision in the matter of *African Commission on Human and Peoples' Rights v. Kenya*, that "… a distinction or differential treatment becomes discrimination and hence contrary to Article 2 of the Charter, when it does not have objective and reasonable justification and, in the circumstances where it is not necessary and proportional."

91. They further submit that in the matter of *Jebra Kambole v. Tanzania*, the Court stipulated that discrimination may be occasioned directly or indirectly. Furthermore, that indirect discrimination is "an effects-based concept".

92. The Applicants argue that Section 148(5)(b) of the CPA does not specify the kind of offences it envisions and that it discriminates against a person who has already served a sentence of three (3) years imprisonment.

93. The Applicants also contend that Section 148(5)(e) of the CPA violates the right to non-discrimination. They argue that Section 148(5)(e) of the CPA discriminates against accused persons for offences involving money or property exceeding Tanzanian shillings ten million (TZS 10,000,000) and who cannot deposit half the amount or value of the property and the other half through a secured bond.

94. The Applicants argue that the discrimination they are referring to is further evidenced by the fact that bail is available to all accused persons in Zanzibar which is in contrast to what obtains in Tanzania mainland.

95. The Applicants lastly submit that the Respondent State has not furnished the Court with evidence that accused persons who have been granted bail under the criteria set out in Section 148(5)(b), (c), (d) and (e) of the CPA have caused insecurity to the society, breach of peace, interfered with on-going investigation or killed witnesses.

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96. On its part, the Respondent State contends that the rights and duties of all citizens are guaranteed under its Constitution and that all laws have to comply with its Constitution. It avers, however, that the constitutional guarantees do not absolve the individual from his or her duty to abide by the law and comply with their constitutional duties.

97. According to the Respondent State, the submission of the Applicants of the discriminatory effect of the impugned law has not been substantiated and is "unfounded". While conceding that the CPA provides differential treatment, the Respondent State avers that, such differential treatment is justified by the objectives it seeks to achieve, that is, appearance of the accused in court, public peace and security.

98. Citing the case of *Mahender Chawla and others v. Union of India*, the Respondent State avers that Section 148(5) of the CPA not only serves a legitimate aim but also ensures the proper administration of justice.

99. Citing also the matter of *African Commission on Human and Peoples' Rights v. Kenya,* the Respondent State submits that differential treatment is not generally proscribed but only becomes discriminatory when it is not objective or reasonably justified.

100. The Respondent State argues that the Applicants did not furnish the Court with empirical evidence to substantiate their assertion that accused persons denied bail under Section 148(5) of the CPA are treated differently in order to arrive at the conclusion that Section 148(5) of the CPA perpetuates indirect discrimination.

101. Citing the decision in the matter of *Alex Thomas v. Tanzania*, the Respondent State contends that the allegation in relation to the right to non-discrimination and the right to equality has not been proved and thus should be dismissed for lack of merit.

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102. The Court recalls that Article 2 of the Charter provides as follows:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

103. The Court notes the provision of Section 148(5)(b) of the CPA as follows:

> A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years.

104. As regards Section 148(5)(e) of the CPA, the Court notes that it stipulates:

> A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if … the offence with which the person is charged involves actual money or property whose value exceeds ten million (10,000,000) shillings unless that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond.

105. As the Court noted in its jurisprudence,[15] the right to freedom from discrimination is related to the right to equality before the law and equal protection of the law as guaranteed under Article 3 of the Charter. However, the scope of the right to non-discrimination extends beyond the right to equal treatment before the law and also has practical dimensions in that individuals should, in fact, be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.

[15] *African Commission on Human and Peoples' Rights v. Kenya* (merits), § 138.

106. The Court recalls its jurisprudence that, discrimination is "a differentiation of persons or situations on the basis of one or several unlawful criterion/criteria."[16] This understanding of discrimination, however, is what is often referred to as direct discrimination. In cases where the discrimination is indirect, the key indicator is not necessarily different treatment based on visible or unlawful criteria but the disparate effect on groups or individuals as a result of specified measures or actions.[17]

107. In the instant case, by virtue of Sub-sections 148(5)(b) and (e) of the CPA out rightly barring the Courts from considering an application for bail by accused persons who have served a sentence exceeding three years and those who have been charged with offences relating to property worth over ten million shillings, it in effect, treats such accused persons less favourably as compared to accused persons charged with other offences which fall out of the ambit of Section 148(5) of the CPA.

108. The Court notes the Respondent State's submission that the aim of Section 148(5)(b) and (e) of the CPA is to guarantee the "appearance of the accused, public peace and security." However, the Respondent State has not given the details as to how the impugned law provides the guarantees it claims. Furthermore, it has not given cogent reasons as to why the law is not of general application, that is, why some accused persons under Section 148(5)(b) and (e) of the CPA can benefit from the possibility of being granted bail while others cannot.

109. In light of the foregoing, the court is of the view that the discrimination occasioned by virtue of the operation of Sub-Sections 148(5)(b) and (e) of the CPA violates Article 2 of the Charter to the extent that certain categories of accused persons are barred from receiving bail, irrespective of their personal or other circumstances.

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[16] *Actions pour la Protection des Droits de l'Homme (APDH) v. Republic of Côte d'Ivoire* (merits) (2016) 1 AfCLR 668, §§ 146-147; *Kambole v. Tanzania* (merits), § 68.
[17] *Kambole v. Tanzania*, *ibid*, § 68.

B. Alleged violation of Article 7 of the Charter

110. The Applicants challenge the application of Sub-Sections 148(5)(b) and (c) of the CPA with respect to two aspects of the right to a fair trial, namely, the right to be presumed innocent and the right to be heard.

i. Right to be presumed innocent

111. The Applicants aver that Sub-Sections 148(5)(b) and (c) of the CPA are blanket provisions which fail to factor in the character of the accused, their circumstances or even their economic status. Furthermore, that as a matter of law, an accused person should be presumed innocent of the charges preferred against him or her and bail should be granted as of right.

112. The Applicants submit that Article 7(1)(b) of the Charter guarantees the presumption of innocence which is also reflected under Article 13(6)(b) of the Respondent State's Constitution.

113. The Applicants contend that the freedom of an individual is sacrosanct and should only be curtailed under exceptional circumstances in order to avert the possibility of incarcerating an innocent person.

114. The Respondent State in riposte argues that the limitation imposed by Section 148(5)(b) and (c) of the CPA is underpinned by its Court of Appeal in the case of *George Eliawony and 3 Others v. R,* that an impugned law must be lawful and not arbitrary, it must provide safeguards against arbitrary application and provide effective controls by those in authority when using the law. Furthermore, that the law must not be more than what is reasonably necessary to achieve a legitimate aim.

115. The Respondent State citing the decision in *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v. Tanzania* reiterates that under Article 27(2) of the Charter, restriction of rights and

freedoms is permissible on the basis of "…collective security, morality and common interest …".

116. The Respondent State avers that the Applicants' claim has no merit as Section 148(5) of the CPA is "saved by the Constitution, the UDHR, ACHPR and ICCPR" and therefore the limitation is justified and serves a legitimate purpose. It emphasizes that this purpose is to protect witnesses "who are the eyes and ears of justice."

117. In this regard, the Respondent State avers that Section 148(5) of the CPA is reasonable as it does not restrict bail for each and every offence but for a selected few.

118. The Respondent State contends that the Applicants' allegation is untenable especially as the common interest of the general public should be guarded against individuals who are in conflict with the law.

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119. Article 7(1)(b) of the Charter provides: "every individual shall have the right to have his cause heard. This comprises … (b) the right to be presumed innocent until proved guilty by a competent court or tribunal."

120. The Court recalls the provision of Sub-section 148(5)(b) of the CPA which stipulates that an accused person who has previously served a prison term exceeding three years would not be granted bail.

121. The Court notes that Sub-section 148(5)(c) of the CPA provides that an accused person should not be granted bail, if, "…it appears that the accused person has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded."

122. The Court recalls that the essence of the presumption of innocence is for an accused person to be considered innocent throughout all the phases of the trial until the delivery of judgment.[18]

123. The presumption of innocence espouses that the burden of proof beyond a reasonable doubt rests on the prosecution and any doubt should benefit the accused. In this regard, in procedures such as an application for bail, the presumption of innocence favours the granting of bail as a general rule while denial of bail should be the exception.

124. The Court observes that the presumption of innocence requires procedural guarantees including the right against self-incrimination and premature expressions by the trial court or other officials of the guilt of the accused person.[19]

125. The Court notes the decision of Supreme Court of Ghana, that,

> …[t]he grant of bail is one of the tools available to the court to ensure that a suspect or an accused, as the case may be, is guaranteed his innocence until the court has found him guilty. The presumption of innocence embodies freedom from arbitrary detention and also serves as a safeguard against punishment before conviction…[20]

126. The Court also notes the Respondent State's argument that the aim of the limitation under Section 148(5) of the CPA is to safeguard security, health, public interest and rights and freedoms of innocent persons.

127. The Court does not dispute the objectives of the enactment of Section 148(5)(b) and (c) of the CPA as submitted by the Respondent State. However, the Court notes that the risk of absconding bail should not be based solely on the severity of the offence or a previous sentence. The

[18] *Victoire Ingabire Umuhoza v. Republic of Rwanda* (merits) (24 November 2017), 2 AfCLR 165, § 83.
[19] ECtHR *Allenet de Ribemont v. France*, Judgment, Merits and Just Satisfaction, App No 15175/89, A/308, (1995) 20 EHRR 557.
[20] *Supra*, note 30.

Court underscores that there should be other "factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted"[21] which would either minimize or exacerbate the risk of absconding bail. The combination of these factors would then determine whether the accused should be released on bail or detained.

128. Likewise, the peril that the accused will interfere with investigation should be buttressed with evidence adduced by the prosecutor. Therefore, it should neither be presumed nor pre-set by law. The Court affirms the decision of the Supreme Court of Ghana that, "any legislation, outside the Constitution, that takes away or purports to take away, either expressly or by necessary implication, the right of an accused to be considered for bail would have pre-judged or presumed him guilty even before the court has said so."[22]

129. The Court therefore finds that the outright denial of bail provided for under Section 148(5) of the CPA is neither necessary nor proportionate to the aim that it seeks to achieve.

130. In light of the foregoing, the Court holds that Sub-sections 148(5)(a), (b) and (c) of the CPA violate the presumption of innocence under Article 7(1)(b) of the Charter.

ii. Right to be heard

131. The Applicants aver that the Section 148(5) of the CPA is an impediment to an accused's motion for bail and consequently is a breach of the right to be heard before an impartial and independent tribunal under Article 7(1) of the Charter.

[21] ECtHR, *Neumeister v. Austria*, 27 June 1968, § 10, Series A no. 8.
[22] *Supra* note 30.

132. Citing the decision in *Anudo Ochieng Anudo v. Tanzania*, the Applicants submit that the right of an accused to be heard on an application for bail and also on appeal is contravened by Section 148(5) of the CPA.

133. The Applicants contend that Section 148(5) of the CPA impinges on the discretion of judicial officers who have the onus to weigh factors for or against granting of bail. They argue further that the judiciary is established by Article 107A(1) of the Constitution of the Respondent State "as the authority with the final decision in dispensation of justice in Tanzania."

134. Citing the Ghanaian Supreme Court case of *Martin Kpebu v. Attorney General,* the Applicants submit that the decision as to whether to deprive a person of his or her liberty is the domain of the judiciary and not the executive and especially that "… liberty is too priceless to be forfeited through the zeal of an administrative agent."

135. According to the Applicants, Section 148(5) of the CPA amounts to an ouster of the jurisdiction of the Respondent State's Courts to determine bail and thus a violation of Article 7(1) of the Charter. In addition, the Applicants aver that the ouster of the jurisdiction of the courts to determine bail is an affront to the dispensation of justice.

136. According to the Applicants, Section 148(5) of the CPA which proscribes the granting of bail to an accused person who has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded is a violation of the right to be heard.

137. The Applicants contend that Section 148(5) of the CPA "does not consider any justifications that one might or could have had and which led to his failure of complying with the bail conditions." Furthermore, that the accused has the right to be heard despite his previous behaviour.

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138. The Respondent State argues that the offences enumerated in Section 148 (5) of the CPA are “strictly not bailable” because of their nature and “the danger it poses to the society, the threat to the national peace and security as well as the need to protect non-derogable rights guaranteed in the Constitution and other International Human Rights instrument” to which Tanzania is a party.

139. Citing the decision of its Court of Appeal in *Silvester Hillu Dawi v. Director of Public Prosecutions*, the Respondent State contends that even though the judiciary has the final say in the administration of justice, it “does not have unbridled powers.” Rather “the courts must operate within the parameters of the Constitution.” Furthermore, that if the courts disregard clear provisions of law, then that would be tantamount to not only anarchy but also the disdainful disregard of the Respondent State’s Constitution.

140. According to the Respondent State, all offences listed under Section 148(5) of the CPA have the effect of loss of life or subjecting a person or groups of persons to continuous suffering or loss of dignity. Furthermore, that “… these crimes are against humanity and are universally criminalized as organized crimes.”

141. The Respondent State maintains that Section 148(5) of the CPA is provided by law, and is justifiable as its aim is to safeguard national security, law and order and public health. The Respondent State furthermore contends, that the elements which constitute the offences enumerated under Section 148(5) of the CPA have been clearly defined in the Penal Code and that this dispenses with the likelihood of abuse.

142. The Respondent State contends that it is best placed to “to justify as to why the right to bail is restricted”, contrary to the assertion of the Applicants that all states should apply uniform standards. Relying on the decision in *Handy side v. UK*, it argues that it is in a better position than the international judge to give an opinion on the necessity of a restriction or penalty intended to accomplish a moral objective.

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143. Article 7(1) of the Charter provides that: "[e]very individual shall have the right to have his cause heard."

144. The Court observes that the right to have one's cause heard, as enshrined under Article 7(1) of the Charter, bestows upon individuals a wide range of entitlements pertaining to due process of law, including the right to be given an opportunity to express their views on matters and procedures affecting their rights, the right to file a petition before appropriate judicial and quasi-judicial authorities for violations of these rights and the right to appeal to higher judicial authorities when their grievances are not properly addressed by the lower courts.[23]

145. The Court also notes that the right to have one's cause heard does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place.[24]

146. The Court reiterates that: "… Article 7 of the Charter permits every person who feels that his/her rights have been violated to bring his/her case before a competent national court. In the realization of this right, the position or status of the victim or the alleged perpetrator of the violation are irrelevant and every complainant is entitled to an effective remedy before a competent and impartial judicial body…"[25]

147. The Court notes that it is the Respondent State's argument that Section 148(5) of the CPA has defined the offences which are not subject to bail and that their elements are known thus it leaves no room for abuse. It has further

[23] *Werema Wangoko Werema v. United Republic of Tanzania* (merits) (2018) 2 AfCLR 520, §§ 68-69.
[24] *Kambole v. Tanzania* (merits), *supra*, § 96.
[25] *Ibid*.

submitted that it is in a better place to justify the necessity of the restriction to bail than the international judge.

148. The Court recalls that, it is trite law that a State cannot invoke its domestic laws to justify a breach of its international obligations. Resultantly, if a State relies on a provision of its domestic law to justify restriction of a right, such a State must be able to demonstrate that the provision(s) in its domestic law do not infringe the Charter.[26]

149. Furthermore, the Court has previously held that "…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.[27] Moreover, that the margin of appreciation must be applied in good faith".[28]

150. The Court finds that the ousting of the jurisdiction of the judiciary in relation to the offences mentioned in Section 148(5)(a) of the CPA curtails the right to be heard. It divests the judiciary of their role as independent and impartial interpreters of the law.

151. In the instant case, the nature of Section 148(5) of the CPA does not give the judicial officer any choice as to the grant of bail once an accused person falls under one of the categories enumerated under Section 148(5) of the CPA. This effectively denies an accused person his right to be heard and especially to present his or her own unique circumstances that might allow the judicial officer to grant bail.

152. The Court recalls its jurisprudence that the adversarial principle and the principle of equality of arms require that all parties to a proceedings are given an equal chance to present their arguments and evidence and for an impartial arbiter to decide as to which party has proved their case according

[26] *Ibid*, § 102.
[27] *Christopher R. Mtikila v. Tanzania* (merits) (14 June 2013) 1 AfCLR 34, § 106.2.
[28] *Mtikila v. Tanzania* (merits), *supra*, § 106.3.

to the standard of proof for the particular dispute. A statute that interferes with the process and effectively hands power to one of the parties to predetermine the outcome of the dispute, encroaches on the equality of arms and goes against due process.[29]

153. The Court notes that its position herein above has been reflected in the European Court of Human Rights' (hereinafter referred to as "ECHR") case law, which has held that the automated refusal of bail by virtue of the operation of a law in the absence of judicial discretion is a violation of Article 5(3) of the European Convention of Human Rights.[30] The ECHR stipulated that the granting of bail cannot be formalistic which qualifies as arbitrary detention.

154. Furthermore, a number of countries have dispensed with provisions similar to Section 148(5) of the CPA owing to its limit of judicial control whenever an application of bail is submitted.[31]

155. The Court, as already noted, does not take issue with the desired objective of the Respondent State, that is, to protect witnesses, guarantee security among others. Even so, as succinctly elucidated by various courts in different jurisdictions, the legislature should not play the role of the judicial officers by tying the hands of the court and dictating to it the specific outcome, in this regard, the denial of bail. It is incumbent on the legislature to provide guidelines in relation to different circumstances which the learned judicial officer would take into account and which would militate against or in favour of release.

[29] *Kambole v. Tanzania* (merits and reparations) *supra*, § 97.
[30] ECtHR, *Piruzyan v. Armenia,* Application No. 33376/07, § 105.
[31] See Constitutional Court of Ghana, *Supra*, note 30, *Per Justice Akamba*; Constitutional Court of South Africa, *Bongani v. the State*, *Vusi Dladla, Angel Khumalo, Willy Sindane, John Sibonyoni and Philip Mogabudi v. the State*, *the State v. Mark David Joubert* and the *State v. Jan Johannes Schietekat* 3 June 1999, § 10; High Court of Kenya, *Republic v. Robert Zippor Nzilu,* Criminal case 14 of 2018 [2018] eKLR; High Court of the United Kingdom, *Secretary of State for the Home Department v. MB (FC)* 2006] EWHC 1000 (Admin).

156. As already indicated, the severity of a crime or a sentence cannot by themselves determine the proclivity to abscond bail. Therefore, in the absence of judicial control of the granting or denial of bail, the Court holds that Section 148(5) of the CPA violates the right to be heard under Article 7(1) of the Charter.

C. Alleged violation of Article 1 of the Charter

157. The Applicants contend that Section 148(5) of the CPA is a violation of Article 1 of the Charter. They argue that Section 148(5) of the CPA does not afford accused persons the enjoyment of fundamental rights and the right to equal protection under the laws of Tanzania.

158. The Respondent State argues that rights and freedoms under the Charter, UDHR, ICCPR and the Tanzanian Constitution are not absolute and conversely are subject to limitations. Furthermore, that the limitation imposed under Section 148(5) of the CPA is reasonably necessary to achieve a legitimate object for which are justifiable under the standards set out in International Human Rights instruments and Article 30(2) of the Constitution of the Respondent State.

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159. Article 1 of the Charter provides:

> The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

160. The Court notes that the Respondent State has "an obligation to make laws in line with the intents and purposes of the Charter." And "… whilst the said clause envisages the enactment of rules and regulations for the enjoyment

of rights enshrined therein, such rules and regulations may not be allowed to nullify the very rights and liberties they are to regulate."[32]

161. The Court reiterates as it has held in its earlier judgments, that, examining an alleged violation of Article 1 of the Charter involves a determination not only of whether the measures adopted by the Respondent State are available but also if these measures were implemented in order to achieve the intended object and purpose of the Charter. [33]

162. Consequently, whenever a substantive right of the Charter is violated due to the Respondent State's failure to meet these obligations, Article 1 of the Charter will be found to have been violated as well.

163. In the present case, the Court has found that the Respondent State has violated Articles 2, 7(1) and 7(1)(b) of the Charter. Consequently, the Court holds that the Respondent State has also violated Article 1 of the Charter.

VIII. REPARATIONS

164. The Applicants pray the Court to order the Respondent State to put in place constitutional and legislative measures so as to guarantee the rights provided for in the Charter and other international human rights instruments.

165. Furthermore, the Applicants seek an order that all suspects and accused persons charged with unbailable offences be released on bail within one (1) month from the date of this decision under bail conditions to be set by the Respondent State's courts, based on the circumstance of each case.

[32] *Mtikila v. Tanzania* (merits), *supra*, § 109.
[33] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477, §§ 149-150 and *Ally Rajabu and Others v. United Republic of Tanzania,* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 124.

166. Lastly, the Applicants pray the Court to order the Respondent State to report within a period of twelve (12) months from the date of the judgment on the measures taken towards the implementation of this judgment.

167. The Respondent State prays the Court to dismiss the Applicants' prayers.

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168. Article 27(1) of the Protocol stipulates that "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

169. The Court recalls its earlier judgments and restates its position that, "to examine and assess Applications for reparation of prejudices resulting from human rights violations, it takes into account the principle according to which the State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim".[34]

170. The Court also restates that reparations "… must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed."[35]

171. The measures that a State may take to remedy a violation of human rights include: restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations taking into account the circumstances of each case.[36]

[34] *Abubakari v. Tanzania* (merits), *supra*, § 242 (ix), *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 19.
[35] *Mohamed Abubakari v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 334, § 21; *Alex Thomas v. United Republic of Tanzania*, (reparations) (4 July 2019) 3 AfCLR 287, § 12; *Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania*, (reparations) (4 July 2019) 3 AfCLR 308, § 16.
[36] *Umuhoza v. Rwanda* (reparations), *supra*, § 20.

172. The Court reiterates that the general rule with regard to material prejudice is that there must be a causal link between the established violation and the prejudice suffered by the Applicant and the onus is on the Applicant to provide evidence to justify his prayers.[37] With regard to moral prejudice, the Court exercises judicial discretion in equity.

173. In the instant case, the Court has established that the Respondent State violated the rights under Article 1, 2, 7(1) and 7(1)(b) of the Charter through the application of Sections 148(5) of the CPA.

174. It is against these findings that the Court will consider the Applicant's prayers for reparation.

A. Constitutional and legislative measures

175. The Applicants pray the Court to order the Respondent State to put in place constitutional and legislative measures so as to guarantee the rights provided for in the Charter and other international human rights instruments.

176. Furthermore, the Applicants seek an order that all suspects and accused persons charged with unbailable offences, as per the law of the Respondent State, be released on bail within one (1) month from the date of the decision, under bail conditions to be set by the Respondent State's courts, based on the circumstance of each case.

177. The Respondent State prays for the dismissal of the prayers for reparations.

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178. The Court having found that Section 148(5) of the CPA violates Articles 1, 2, 7(1) and 7(1)(b) of the Charter, orders the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time

[37] *Christopher Mtikila v. Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 40; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, § 15.

not exceeding two (2) years, to ensure Sub-Sections 148(5)(a), (b), (c), (d) and (e) of the CPA are amended and aligned with the provisions of the Charter so as to eliminate, among others, any violation of the Charter and other instruments ratified by the Respondent State.

179. As regards the prayer, for the release of all persons charged with unbailable offences within one (1) month from the date of this Judgment under bail conditions to be set by the Respondent State's courts, the Court notes that, notwithstanding its earlier findings herein, there is a wide variety of circumstances in which the offences for which bail was denied were committed. Although the Court has re-affirmed the need to avail all accused persons of bail, it considers that whether bail should be granted in specific cases and the conditions thereof, is a decision best left for national authorities to be decided on a case-by-case basis. In the circumstances, the Court cannot make an omnibus order for the release of all persons previously charged with unbailable offences without considering their individual circumstance. In light of the foregoing, the Court rejects the Applicants' prayer.

B. Publication

180. The Court recalls that Article 27(1) of the Protocol gives it power to "make appropriate orders to remedy" violations. In the circumstances, the Court reaffirms that it can, by way of reparations, order publication of its decisions *suo motu* where the circumstances of the case so require.

181. In the instant case, the Court notes that the violations that it has established affect a significant section of the population in the Respondent State by reason of the fact that they relate to the exercise of several rights in the Charter, key among which is the right to a fair trial guaranteed under Article 7 of the Charter.

182. In the circumstances, the Court deems it proper to make an order *suo motu* for publication of this Judgment. The Court, therefore, orders the

Respondent State to publish this Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

C. Reporting on the implementation of the judgment

183. The Applicants pray the Court to order the Respondent State to report on the implementation of this judgment. The Court notes that the order on reporting of the measures taken by a Respondent State is a matter of judicial practice and therefore, orders the Respondent State to report on measures taken to implement this judgment within twelve (12) months of notification of the judgment.

IX. COSTS

184. Both Parties pray the Court to order the other to bear costs.

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

186. The Court does not see any reason to depart from the above Rule and thus orders that each party shall bears its own costs.

X. OPERATIVE PART

187. For these reasons,

THE COURT,

Unanimously,

On Jurisdiction

i. *Dismisses*, the objection to its personal jurisdiction;
ii. *Declares* that it has jurisdiction.

On Admissibility

iii. *Dismisses* the objections to the admissibility of the Application under Articles 56(2), 56(5), 56(6), and 56(7) of the Charter except in relation to Sub-Section 148(5)(a) of the CPA;
iv. *Declares* the Application admissible in relation to the claims under Sub-Sections 148(5)(b)-(e) of the CPA.

On Merits

v. *Finds* the violation of Article 2 of the Charter by virtue of the operation of Sub-Sections 148(5)(b) and (e) of the CPA;
vi. *Finds* the violation of Article 7(1) and 7(1)(b) of the Charter by virtue of the operation of Sub-section 148(5)(b) and (c) of the CPA;
vii. *Finds* the violation of Article 1 by virtue of the operation of Sub-sections 148(5)(b), (c) and (e) of the CPA.

On Reparations

viii. *Dismisses* the request for an order for release of all persons charged with unbailable offences;

ix. *Orders* the Respondent State to take all necessary constitutional and legislative measures, within a reasonable time, and in any case not exceeding two (2) years, to ensure that Section 148(5) of the CPA is amended and aligned with the provisions of the Charter to eliminate, violations of the Charter;

x. *Orders* the Respondent State to publish this judgment, within a period of three (3) months from the date of notification, on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs, and ensure that the text of the judgment is accessible for at least one (1) year after the date of publication.

On the Implementation of judgment and Reporting

xi. *Orders* the Respondent state to submit to it within twelve (12) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On Costs

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

Signed:

Blaise TCHIKAYA, Vice President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Modibo SACKO, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

Done at Arusha, this Thirteenth Day of June in the Year Two Thousand and Twenty-Three in English and French, the English text being authoritative.