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

THE MATTER OF

HABYALIMANA AUGUSTINO AND MUBURU ABDULKARIM

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION NO. 015/2016

JUDGMENT

3 SEPTEMBER 2024

TABLE OF CONTENTS

The Court composed of: Modibo SACKO, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Blaise TCHIKAYA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, 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"),[1] Justice Imani D. ABOUD, President of the Court and a national of Tanzania, did not hear the Application.

In the Matter of:

Habyalimana AUGUSTINO and Muburu ABDULKARIM

Represented by lawyers instructed by Cornell University, Law School:

Advocate William Ernest KIVUYO,
C/O Bill and Williams Advocates (representing Habyalimana AUGUSTINO); and

Advocate Mashaka MFALA (representing Muburu ABDULKARIM)

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;

[1] Rule 8(2) of the Rules of Court of 2 June 2010.

iii. Mr. Baraka LUVANDA, Ambassador, Head of Legal Unit, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation;
iv. Ms. Nkasori SARAKIKYA, Assistant Director, Human Rights, Principal State Attorney, Ministry of Justice and Constitutional Affairs, Attorney General's Chambers;
v. Ms Sylvia MATIKU, Principal State Attorney, Ministry of Justice and Constitutional Affairs, Attorney General's Chambers; and
vi. Ms Blandina KASAGAMA, Legal Officer, Ministry of Foreign Affairs, East Africa, Regional and International Cooperation.

After deliberation,

Renders this Judgment:

I. THE PARTIES

1. Habyalimana Augustino and Muburu Abdulkarim (hereinafter referred to as "the First Applicant", and "the Second Applicant" respectively; and "the Applicants" jointly) are Burundian nationals and refugees in Tanzania, who at the time of filing this Application were incarcerated at Butimba Central Prison in Mwanza in Tanzania. The Applicants were convicted and sentenced to death by hanging on 31 May 2007 by the High Court of Tanzania at Bukoba for the offence of murder and are currently awaiting execution. They allege the violation of their rights in the course of the proceedings before domestic courts.

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 the Protocol on 10 February 2006. It deposited, on 29 March 2010, the Declaration under Article 34(6) of the Protocol through which it accepted the jurisdiction of the Court to receive cases from individuals and Non-Governmental Organisations (hereinafter

referred to as “the Declaration”). On 21 November 2019, the Respondent State deposited, with the Chairperson of the African Union Commission, an instrument withdrawing its Declaration. The Court held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit.[2]

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

3. It emerges from the file that on the night of 8 May 1999, at about 10 pm, the Applicants shot and killed Ms. Adela Shirima, the wife of a high-ranking Commanding Officer. Records on file indicate that the Applicants were allegedly hired by a Tanzanian woman named Mama Mboya to commit the murder, after she suspected the deceased of having an illicit love affair with her husband.

4. The High Court convicted the Applicants for the offence of murder and sentenced them to death by hanging on 31 May 2007, following which they appealed to the Court of Appeal, the highest court in the Respondent State. On 2 March 2012, the Court of Appeal dismissed their appeal and upheld the decision of the High Court.

B. Alleged violations

5. The Applicants jointly allege violations of the similar provisions of the Charter, namely Articles 2, 3, 4, 5, and 7(1)(c) read jointly with Article 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) and Article 36(1) of the Vienna Convention on Consular Relations (VCCR), namely:

[2] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, § 38.

i. The right not to be discriminated against on the basis of national origin and immigration status, protected under Article 2 of the Charter;
ii. The right to equal protection of the law protected under Article 3 of the Charter, as read together with Article 14(3)(d) of the ICCPR;
iii. The right to life, protected under Article 4 of the Charter;
iv. The right to freedom from torture, cruel and degrading treatment, protected under Article 5 of the Charter;
v. The right to a fair trial, protected under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR;
vi. The right to be tried within a reasonable time, protected by Article 7 of the Charter; and
vii. The right to consular services, protected by Article 7(1)(c) of the Charter as read together with Article 36(1) of the VCCR.

6. In addition to the joint allegations made above, the Second Applicant alleges that the Respondent State violated his rights as follows:

i. The right not to be discriminated against on the basis of national origin;
ii. That he suffers from mental illness and therefore should have been ineligible for the death penalty; and
iii. That the District Magistrate failed to conduct prompt investigations following his report that he was tortured by the police authorities.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application was filed on 8 March 2016 and served on the Respondent State on 21 April 2016.

8. On 12 May 2016, the Court notified the Application to the Embassy of the Republic of Burundi in Ethiopia, and requested it to intervene in the matter, if it so wished.

9. On 3 June 2016, the Court issued a *suo motu* Order for provisional measures directing the Respondent State to stay execution of the sentence

pending determination of the Application. The Order was transmitted to the Parties on 7 June 2016 and subsequently to the Embassy of Burundi in Ethiopia. The Embassy did not respond. After several reminders, the Respondent State filed its observations on the Order for provisional measures and its response to the main Application on 12 April 2017, which were transmitted to the Applicants on 19 April 2017.

10. On 16 June 2017, the Applicants filed their reply to the Respondent State's response to the Application, which was transmitted to the Respondent State on 22 June 2017.

11. Pleadings were closed on 22 January 2018 and the Parties were duly notified.

12. On 5 March 2018, Cornell University Law School wrote to the Court requesting to provide pro bono representation to applicants who were facing the death penalty in Tanzania and who had filed cases before the Court. The Court granted the request on 16 May 2018 and allocated them nine (9) cases including the present Application.

13. On 14 November 2018, the Applicants, through Cornell University International Human Rights Law Clinic, filed a motion for leave to amend their Application. They sought leave to file two different Applications in the interest of justice; to amend the Application and file additional evidence; to have oral proceedings following the re-opening of pleadings; and to be allowed to file submissions on reparations.

14. On 31 January 2019, the Court issued an Order in which it declined to separate the Application and decided to consider the Application as registered as a single case; granted the request to re-open pleadings to allow for amendment of the Application and filing of new evidence and submissions on reparations and; decided to consider the request for a public hearing after the Parties had filed their amended pleadings.

15. On 22 March 2019, the Applicants, through the two lawyers allocated to each of them by Cornell University Law School and in collaboration with the University, furnished a joint submission on jurisdiction and admissibility only. However, on the same day, the Applicants' lawyers in collaboration with Professor Sandra L. Babcock of the Cornell University International Human Rights Law Clinic and Director, Cornell Centre on the Death Penalty Worldwide also filed separate amended submissions on the merits, which were transmitted to the Respondent State on 27 March 2019.

16. On 17 November 2020 and 20 November 2020, Professor Sandra L. Babcock filed a supplementary memorandum in relation to the Second Applicant's mental health status, which was transmitted to the Respondent State on 27 November 2020.

17. Despite several reminders, the Respondent State did not file its response to the amended pleadings.[3]

18. On 18 November 2022, the Parties were informed that the Court had rejected the request for a public hearing and that pleadings had been closed with effect from 14 November 2022.

IV. PRAYERS OF THE PARTIES

19. The First Applicant prays the Court to:

    i. Make a declaration that the Respondent violated the Applicant's rights under Articles 3, 4, 5, 6, and 7 of the African Charter;
    ii. Make appropriate orders to remedy the violations of the Applicants' rights under the Charter;
    iii. Set aside the death sentence imposed on the Applicant and remove him from death row;

[3] 8 June 2019, 10 November 2020 and 16 November 2022.

iv. Order the Respondent State to amend its penal code and related legislation concerning the death sentence to make it compliant with Article 4 of the African Charter;
v. Release the Applicant from prison; and
vi. Order the Respondent State to pay reparations as it deems fit.

20. The Second Applicant prays the Court to:

i. Order his release;
ii. Grant reparations; and
iii. Order the Respondent State to make appropriate constitutional and legislative changes to address the systemic factors that led to the violations of the Applicant's rights.

21. The Respondent State prays the Court to:

i. Find that it is not vested with the jurisdiction to adjudicate on this matter;
ii. Find that the Application does not meet the admissibility requirements stipulated under Rule 40(5) of the Rules of Court;
iii. Declare the Application inadmissible and dismiss it;
iv. Find that the Second Applicant's conviction was based on the evidence proved beyond a reasonable doubt;
v. Dismiss the Application for lacking merit;
vi. Deny the Applicants prayer for reparations; and
vii. Order the Applicants to bear the costs of this Application.

V. JURISDICTION

22. Pursuant to Article 3 of the Protocol:

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 instruments ratified by the States concerned.

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

23. The Court also notes that pursuant to Rule 49(1) of the Rules, it "shall conduct a preliminary examination of its jurisdiction […] in accordance with the Charter, the Protocol and these Rules."[4]

24. The Court observes that the Respondent State raises an objection to material jurisdiction which is based on this Court being asked to sit as a court of first instance; as an appellate court and; to quash and set aside the Applicants' conviction and sentence. The Court will therefore consider this objection before examining other aspects of jurisdiction, if necessary.

A. Objection to material jurisdiction

25. The Respondent State submits that this Court has no jurisdiction to sit as a court of first instance or to act as an appellate court and as such, it lacks jurisdiction to determine the matter.

26. It further avers that this Court does not have jurisdiction to quash and set aside the Applicants' conviction and sentence, since both orders were upheld by the Court of Appeal, its highest court. Finally, it contends that this Court is not empowered to order the release of the Applicants from prison.

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27. The Applicants assert that the material jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant human rights instruments ratified by the State concerned. Citing the case of *Kijiji Isiaga v. Tanzania*, they aver that the Court has jurisdiction over an application as long as the subject matter of the application involves alleged violations of

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

rights protected by the Charter or any other international human rights instruments ratified by a Respondent State.

28. The Applicants argue that there is no question as to the other aspects of the Court's jurisdiction, namely: personal jurisdiction, given that the Respondent State is a party to the African Charter and the Protocol; temporal jurisdiction, since the alleged violations are continuous in nature as they remain convicted and subject to the death sentence as a result of the breach of their rights; and territorial jurisdiction, given that the violations of the Applicants' rights occurred in the territory of the Respondent's State, which is a party to the Charter and the Protocol.

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29. The Court recalls that under Article 3(1) of the Protocol, it has jurisdiction to examine "all cases and disputes submitted to it concerning the interpretation and application of the Charter, th[e] Protocol and any other relevant Human Rights instrument ratified by the States concerned".[5]

30. The Court notes that the Respondent State's objection to material jurisdiction is framed in three limbs that this Court is being asked to sit as a court of first instance; as an appellate court and; as well as to quash and set aside the Applicants' conviction and sentence.

31. With regard to the first limb of the objection, the Court observes that the claims[6] made in the present Application also arose in substance before the national courts, where the Applicants challenged the processes leading to their conviction. The Respondent State thus had the opportunity to redress

[5] *Cheusi v. Tanzania* (judgment), *supra*, §§ 37-39; *Kalebi Elisamehe v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 265, § 18; *Gozbert Henrico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022 (merits and reparations), §§ 38-40.
[6] Conviction based on circumstantial evidence; defence of alibi not being considered; trial not conducted within a reasonable time; failure to observe the right to consular services; coercion to record a statement through torture; failure to observe the right to equal protection of the law; and conviction of a mentally ill person.

the alleged claims during the said proceedings. The Court reiterates its jurisprudence that:

> "... where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights breaches. This is because the alleged human rights violations form part of the bundle of rights and guarantees that were related to or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.[7]

32. This Court is of the view that, in the circumstances of the present Application, the issues alleged as being raised for the first time before this Court should be considered as part of the "bundle of rights and guarantees" relating to the right to a fair trial that led to the Applicants' appeal. Furthermore, the alleged violations relate to rights protected by the Charter, as such, the Applicants did not need to go back to the High Court, since the Respondent State already had the opportunity to address the potential human rights breaches before the domestic courts.[8] The first limb of the objection is consequently dismissed.

33. With regard to the second limb of the objection, the Court reiterates its established case-law that "although it is not an appellate body with respect to decisions of national courts,[9] this does not preclude it from examining proceedings of the said courts in order to determine whether they were conducted in accordance with the standards set out in the Charter or any

[7] *Jibu Amir alias Mussa and Another v. United Republic of Tanzania*, (merits and reparations) (28 November 2019) 3 AfCLR 629, § 37; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 60-65, *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Ernest Karatta and 1744 Others v. United Republic of Tanzania* (judgment) (merits and reparations) (30 September 2021) 5 AfCLR 465), § 57.
[8] *Thomas v. Tanzania* (merits), *supra*, § 60.
[9] *Ernest Francis Mtingwi v. Republic of Malawi* (jurisdiction) (15 March 2013) 1 AfCLR 190, § 14.

other human rights instruments ratified by the State concerned."[10] Therefore, in the present Application, the Court would not be sitting as an appellate court, if it were to examine the allegations made by the Applicants merely because they relate to the assessment of evidentiary issues. Consequently, the second limb of the objection is also dismissed.

34. With regard to the third limb of the objection, the Court reiterates that pursuant to Article 27(1) of the Protocol, it is empowered to make appropriate orders on reparations, if it finds a violation of the rights guaranteed by the Charter or any instrument ratified by the Respondent State. Furthermore, the Court may make an order for release as a measure of restitution, where it finds that the Applicants have demonstrated specific and compelling circumstances warranting such an order.[11] Consequently, the Court considers that issuing an order for release where the requirements are met is well within its jurisdiction. The third limb of the objection is thus equally dismissed.

35. In light of all the above, the Court dismisses the Respondent State's objection and holds that it has material jurisdiction to consider the present Application.

B. Other aspects of jurisdiction

36. The Court notes that the Respondent State does not contest its personal, temporal and territorial jurisdiction. Nonetheless, in line with Rule 49(1) of the Rules,[12] it must satisfy itself that all aspects of its jurisdiction are fulfilled before proceeding.

[10] *Mtingwi v. Malawi*, *ibid*; *Kennedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 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.
[11] See *Amir and Ally v. Tanzania*, *supra*, § 97; *Elisamehe v. Tanzania*, *supra*, § 112 and *Minani Evarist v. United Republic of Tanzania* (merits) (21 September 2018) 2 AfCLR 402, § 82.
[12] Rule 39(1) of Rules of Court, 2 June 2010.

37. In relation to its personal jurisdiction, the Court recalls, as indicated in paragraph 2 of the present Judgment, that the Respondent State is a party to the Protocol and deposited the Declaration. Subsequently, on 21 November 2019, it deposited with the Chairperson of the African Union Commission an instrument withdrawing its Declaration. The Court recalls its jurisprudence that the withdrawal of the Declaration does not apply retroactively and only takes effect twelve (12) months after the notice of such withdrawal has been deposited, in this case, on 22 November 2020.[13] This Application, having been filed before the Respondent State deposited its notice of withdrawal, is thus not affected by it. Consequently, the Court holds that it has personal jurisdiction to hear this Application.

38. In respect of its temporal jurisdiction, the Court notes that all the violations alleged by the Applicants are based on proceedings arising from the judgments of the High Court and Court of Appeal rendered on 31 May 2007 and 2 March 2012, respectively, that is, after the Respondent State had ratified the Charter and the Protocol, as well as deposited the Declaration. Furthermore, the alleged violations are continuing in nature since the Applicants remain convicted on the basis of what they consider to be an unfair process. Consequently, the Court holds that it has temporal jurisdiction to examine this Application.

39. As for its territorial jurisdiction, the Court notes that the violations alleged by the Applicants happened within the territory of the Respondent State. In the circumstances, the Court finds that its territorial jurisdiction is established.

40. In light of all the above, the Court finds that it has jurisdiction to determine the present Application.

[13] *Cheusi v. Tanzania* (judgment), *supra*, §§ 35-39.

VI. ADMISSIBILITY

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

42. In line with Rule 50(1) of the Rules, “the Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6(2) of the Protocol and these Rules.”

43. The Court notes that Rule 50(2) of the Rules, which in substance restates the content of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all of the following conditions:
>
> a. Indicate their authors even if the latter request anonymity;
> b. Are compatible with the Constitutive Act of the African Union and with the Charter;
> c. Are not written in disparaging or insulting language directed against the State concerned and its institutions or the African Union;
> d. Are not based exclusively on news disseminated through the mass media;
> e. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f. Are submitted within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
> g. Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Constitutive Act of the African Union, or the provisions of the Charter.

44. The Court observes that although the Respondent State raises an objection to admissibility based on the Applicants' failure to file the Application within a reasonable time, the arguments made in support of this objection relate to the exhaustion of local remedies, as does the Applicants' response. The Court will therefore first consider this objection under the non-exhaustion of local remedies, before examining other conditions of admissibility, if necessary.

A. Objection based on the non-exhaustion of local remedies

45. Citing the jurisprudence of this Court in *Urban Mkandawire v. Malawi* and *Peter Joseph Chacha v. Tanzania* and the decision of the African Commission on Human and Peoples' Rights in *Article 19 v. Eritrea,* the Respondent State submits that the Application does not meet the admissibility requirement provided under Rule 40(5) of the Rules of Court, since the Applicants never attempted to exhaust all local remedies prior to filing the present Application, contrary to Article 56(5) of the Charter.

46. In particular, the Respondent State avers that the Applicants did not raise the allegations that their conviction was based on circumstantial evidence before the Court of Appeal; and did not expound on the circumstantial evidence they alluded to before this Court. The Respondent State contends that the Applicants are raising for the first time the defence of alibi, whilst they had the opportunity to raise it during the proceedings before the High Court and the Court of Appeal. It further contends that the Applicants had the possibility of requesting for a review under Rule 66 of the Court of Appeals Rules on the grounds that the decision was based on a manifest error which resulted in a miscarriage of justice.

47. Finally, the Respondent State argues that the Applicants should have first filed a constitutional petition for violation of their rights under the Basic Rights and Duties Enforcement Act, Cap 3 of the Laws. It is the Respondent State's contention that Section 4 of the Basic Right and Duties Enforcement Act Cap 3 of the Laws outlines the procedure for enforcing constitutional

basic rights for duties and related matters;[14] and the Applicants' failure to pursue that remedy makes the Application inadmissible as it is premature.

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48. The Applicants refute the Respondent States claim that some of their grounds of appeal are inadmissible because they should have filed a Constitutional Petition. They observe that this claim has been rejected by this Court on previous occasions. Citing the case of *Kijiji Isiaga v. Tanzania,* the Applicants contend that this Court has held that Applicants are only required to exhaust ordinary judicial remedies, and that filing a constitutional petition "is an extraordinary remedy which the Applicant was not required to exhaust prior to filling his application."

49. It is also the Applicants' contention that, as this Court has previously held, local remedies are exhausted once an Applicant has gone through the required criminal trial process up to the Court of Appeal, which is the highest Court in the Respondents State.

50. The Applicants further aver that the Respondent State's submission that they failed to file an application for review of the Court of Appeal's judgment, is manifestly incorrect, since a copy of their' application for review pursuant to Rule 66(1)(a) of the Tanzania Court of Appeal Rules 2009 was filed at the Respondent State's sub-registry at Bukoba on 20 December 2012. Additionally, a copy of the application for review was also annexed to the Application before this Court, and served on the Respondent State.

51. The Applicants surmise that they exhausted ordinary judicial remedies before applying to this Court, and therefore, their Application is admissible.

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[14] "if any person alleges that any of the provisions of sections 12 to 29 of the constitution has been, is being or is likely to be contravened in relation to him, he may without prejudice to any other action with respect to the same matter that is lawfully available, apply to the high court for redress".

52. The Court notes that pursuant to Article 56(5) of the Charter, whose provisions are restated in Rule 50(2)(e) of the Rules, any application filed before it shall fulfil the requirement of exhaustion of local remedies, unless the same are unavailable, ineffective and insufficient or unless the domestic proceedings thereof are unduly prolonged.[15] The rule of exhaustion of local remedies aims at providing states the opportunity to resolve cases of alleged human rights violations within their jurisdiction before an international human rights body is called upon to determine the State's responsibility for same.[16] Moreover, for local remedies to be exhausted, the Applicant must have presented before domestic courts, at least in substance, the claims that he raises before this Court.

53. The Court reiterates its jurisprudence that:

> ... where an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights breaches. This is because the alleged human rights violations form part of the bundle of rights and guarantees that were related to or were the basis of the proceedings before domestic courts. In such a situation it would, therefore, be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek relief for such claims.[17]

54. The Court observes that the Applicants' allegations all revolve around issues relating to the proceedings before the domestic courts. These are: being convicted based on circumstantial evidence; the defence of alibi being disregarded; not being tried within a reasonable time; not being afforded the right to consular services; being coerced through torture to record a

[15] *Peter Joseph Chacha v. United Republic of Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, §§ 142-144; *Almas Mohamed Muwinda and Others v. United Republic of Tanzania*, ACtHPR, Application No. 030/2017, Judgment of 24 March 2022 (merits and reparations), § 43.
[16] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9, §§ 93-94.
[17] *Amir and Another v. Tanzania*, *supra*, § 37; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, §§ 60-65, *Kennedy Owino Onyachi and Another v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 65, § 54; *Karatta and Others v. Tanzania*, *supra*, § 57.

statement; not being afforded equal protection of the law; and being convicted while he was a mentally ill person.

55. This Court further observes that both the High Court and Court of Appeal, which is the highest Court of the Respondent State, considered and ruled on the issues of circumstantial evidence, defence of alibi, statement obtained through torture, and trial within a reasonable time. The Respondent State thus had the opportunity to address the alleged human rights breaches before the domestic courts in respect of these issues.[18] However, the Court notes that the issues of access to consular assistance and the imposition of the mandatory death sentence on a mentally ill person did not expressly arise in any of the proceedings before domestic courts.

56. Having said that, this Court considers that the allegations of failure to provide consular assistance substantively revolve around fair trial rights namely the rights to an interpreter, to communicate with family members, and to obtain support from one's country of origin during detention and trial.[19] Further, as this Court has previously held, the mental health status of a person accused of murder is an irrelevant factor in respect of sentencing as far as the Respondent State's criminal law is concerned. This is so because the accused cannot possibly challenge his death sentence on the grounds of his mental illness owing to the fact that the judicial officer is totally deprived of discretion in the sentencing process for the crime of murder, being obligated to impose the death penalty.[20] As such, this Court is of the view that both the issue of consular assistance and that of mental health are part of a bundle rights and guarantees bearing on the Respondent State's

[18] *Thomas v. Tanzania* (merits), *supra*, § 60.
[19] *Nzigiyimana Zabron v. United Republic of Tanzania*, ACtHPR, Application No. 051/2016, Judgment of 4 June 2024 (merits and reparations), §§ 174-181; *Niyonzima Augustine v. United Republic of Tanzania*, ACtHPR, Application No. 058/2016, Judgment of 13 June 2023, §§ 78-88; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (2018) 2 AfCLR 477, §§ 87-96.
[20] *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (2019) 3 AfCLR 539, §§ 107-112*; Ibrahim Yusuf Calist Bonge and Others,* ACtHPR, Application No. 036/2016, Judgment of 4 December 2023, §§ 78-81*; Ghati Mwita v. United Republic of Tanzania,* ACtHPR, Application No. 012/2019, Judgment of 1 December 2022, § 122*; Amini Juma v. United Republic of Tanzania* (judgment) (30 September 2021) 5 AfCLR 431, §§ 124-131.

judicial system.[21] It also follows that there was no remedy for the Applicants to exhaust given that they had no room in the sentencing process to raise their mental illness as a mitigating factor. As a consequence, this Court finds that local remedies have been exhausted in the present Application in respect of the two issues being considered.

57. Regarding the filing of a constitutional petition before the Respondent State's High Court, as provided for under Article 13 of the Respondent State's Constitution, the Court has consistently held that this remedy in the Tanzanian judicial system is an extraordinary remedy that the Applicants are not required to exhaust prior to seizing this Court.[22]

58. Consequently, the Court finds that local remedies were exhausted in the present Application as envisaged under Article 56(5) of the Charter and Rule 50(2)(e) of the Rules and therefore, dismisses the Respondent State's objection.

B. Other conditions of admissibility

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

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

61. The Court notes that the claims made by the Applicants seek to protect their rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union as stated in Article

[21] *Alex Thomas v. United Republic of* Tanzania (merits) (2015) 1 AfCLR 465, §§ 60-65; *Shukrani Masegenya Mango and Others v. United Republic of Tanzania* (merits and reparations) (2019) 3 AfCLR 439, § 56; *Onyachi and Njoka v. United Republic of Tanzania* (merits) (2017) 2 AfCLR 65, § 54.
[22] *Thomas v. Tanzania*, *ibid*, §§ 60-62; *Mohamed Abubakari v. United Republic of Tanzania* (merits) (3 June 2016) 1 AfCLR 599, §§ 66-70; *Christopher Jonas v. United Republic of Tanzania* (merits) (28 September 2017) 2 AfCLR 101, § 44.

3(h) thereof is the promotion and protection of human and peoples' rights. Furthermore, nothing on file indicates that the Application is incompatible with the Constitutive Act of the African Union. It follows that the Application fulfils the requirement set out in Rule 50(2)(b) of the Rules.

62. 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.

63. The Court notes that the Application is not based exclusively on news disseminated through mass media as it is founded on legal documents, in fulfilment of Rule 50(2)(d) of the Rules.

64. In relation to filing the Application within a reasonable time, the Court notes that the Applicants filed this Application before the Court on 8 March 2016, after the Court of Appeal had dismissed their appeal for lack of merit on 2 March 2012, that is, four (4) years and six (6) days, after the dismissal. The issue, therefore, is whether the period between the exhaustion of local remedies and the filing of the present Application constitutes a reasonable time within the meaning of Rule 50(2)(f) of the Rules. In line with its jurisprudence,[23] the Court considers that this time frame for filing an application before it is reasonable in the circumstances and therefore in compliance with Rule 50(2)(f) of the Rules.

65. Furthermore, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.

[23] *Bernard Balele v. United Republic of Tanzania,* (judgment) (30 September 2021) 5 AfCLR 338; *Hamis Shaban alias Hamis Ustadh v. United Republic of Tanzania* (judgment) (2 December 2021) 5 AfCLR 842, §§ 59-60*; Mussa Zanzibar v. United Republic of Tanzania* (26 February 2021) (judgment) 5 AfCLR 39, § 44.

66. The Court, therefore, finds that all the admissibility conditions of Rule 50(2) of the Rules are met and declares the Application admissible.

VII. MERITS

67. The Applicants allege the following violations:

i. The right to a fair trial protected, under Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR and Article 36(1) of the VCCR;
ii. The right to freedom from torture, cruel and degrading treatment, protected under Article 5 of the Charter;
iii. The right not to be discriminated against on the basis of national origin and immigration status, protected under Article 2 of the Charter;
iv. The right to equal protection of the law, protected under Article 3(2) of the Charter; and
v. The right to life, protected under Article 4 of the Charter.

A. Alleged violation of the right to a fair trial

68. The Applicants aver that the Respondent State violated their right to a fair trial as protected under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR. The Court observes that the claims relevant to this allegation are:

i. Failure to facilitate the provision of consular services as provided under Article 7(1)(c) of the Charter, as read together with Article 36(1) of the VCCR;
ii. Failure to provide interpretation services as provided under Article 7(1)(c) of the Charter, as read together with Article 14(3)(a) of the ICCPR;
iii. Failure to provide the Applicants with effective legal representation as envisaged under Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR;

iv. Failure to try the Applicants within a reasonable time;
v. Using a coerced confession to convict and sentence the Applicants to death; and
vi. Failure of the District Magistrates to conduct prompt investigations into the alleged cruel, inhumane and degrading treatment of the Applicants.

i. On the failure to facilitate consular services

69. The Applicants allege that the Respondent State violated their rights as provided under Article 7(1)(c) of the Charter as read together with Article 36(1) of the VCCR insofar as it failed to notify the Embassy of the Republic of Burundi in Tanzania of their arrest so they could benefit from consular services.

70. They aver that the Embassy of the Republic of Burundi in Tanzania only became aware of their case in 2018, when it was alerted by the lawyer of the First Applicant. Therefore, the Respondent State failed to comply with its obligation, under Article 36(1)(b) of the VCCR and Article 34 of the *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* adopted by the African Commission, to inform them that they had the right to (a) have the Burundian Embassy informed of their arrest, and (b) communicate with the Embassy in relation to their case. The Applicants further aver that the Respondent's State's obligations as a matter of international law should be felt most strongly by those vulnerable members of society most in need of protection. Instead, they suffered serious prejudice as a result of their status as refugees and foreign nationals.

71. Additionally, they contend that had the Respondent State notified the Burundian Embassy, the Ambassador of Burundi to Tanzania could have, inter alia: (a) arranged for them to be provided with an interpreter, (b) facilitated contact with their family members and potential defence witnesses to testify in the original proceedings; and (c) provided consular

assistance to the Applicants during their detention. The failure to do so contributed significantly to the lack of a fair trial.

72. The Applicants submit that since they are refugees, separated from their families and indigent, they were unable to retain the services of a lawyer. They also reported having not received any information about the charges preferred against them until nearly a year and a half after their arrest, when they were brought to court and formally charged. They aver that because the Respondent State failed to notify them of their consular rights, they had no access to a consular officer from their embassy who could explain the judicial process to them in their native languages and inform their families about their detention.

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73. The Respondent State did not make any submission on this allegation.

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74. This Court has held that the rights accruing from Article 36(1) of the VCCR are also protected under Article 7(1)(c) of the Charter.[24] As the Court stated in *Niyonzima Augustine v. United Republic of Tanzania,* "consular services are critical to the respect for the right to a fair trial of foreign detained nationals. Article 36(1) of the VCCR, explicitly requires State Parties to facilitate consular services to foreign nationals detained within their jurisdiction".[25] The Court notes that while Article 7 of the Charter does not explicitly provide for the right to consular assistance, the VCCR, to which the Respondent State is a party, does.[26] Article 36(1) of the VCCR provides for the consular rights of the detained persons and duties and obligations of the State. Accordingly, the determination of this allegation will be made in light of Article 36(1) of the VCCR.

[24] *Guehi v. Tanzania* (merits and reparations), *supra,* §§ 95-96.
[25] *Augustine v. Tanzania* (judgment), *supra,* § 81.
[26] Ratified by the Respondent State on 18 May 1977.

75. The Court recalls that under Article 36(1) of the VCCR, consular assistance is facilitated in two ways. First, the host State must inform the Applicant of this right and second, the Applicant should be able to request for consular assistance at the time of arrest. In the instant case, the Court will determine the Second Applicant's claim in light of the two aforementioned aspects.

76. On the first aspect, as to whether the Respondent State informed the Applicants of their right to consular assistance, the Court notes from the record of the proceedings, that both Applicants were not notified of their right to consular assistance, although the Respondent State was aware of their foreign status. Records on file illustrate that during the preliminary hearing, the prosecution informed the trial court that both Applicants "were refugees from Burundi, living at the Lukole Refugee Camp in Ngara District".[27]

77. On the second aspect, the Court notes that the records on file do not reveal that the Applicants made any request for consular assistance that was considered or denied by the Respondent State. In this regard, the Court recalls its jurisprudence that an applicant's failure to request for consular assistance does not absolve the Respondent State from its duty of informing them of their right as prescribed by Article 36(1) of the VCCR.[28]

78. In light of the above, the Court finds that the Respondent State violated the Applicants' rights to access consular assistance by failing to inform them of their right to access the said services thereby violating Article 7(1)(c) of the Charter as read together with Article 36(1) of the VCCR.

ii. On the failure to provide interpretation services

79. The Applicants submit that the right to an interpreter is implicit in Article 7 of the Charter on the right to have one's cause heard. This right cannot be exercised without the ability to understand the utterances of the prosecution,

[27] Record of Proceedings: Preliminary Hearing page 3.
[28] *Niyonzima Augustine v. United Republic of Tanzania,* ACtHPR, Application No. 058/2016, Judgment of 13 June 2023 (merits and reparations), § 84.

witnesses, counsel, assessors and the judge. It is therefore an essential part of judicial proceedings.

80. The First Applicant avers that he instructed his counsel to make provision for an interpreter prior to the original proceedings but the trial courts rejected the request on the grounds that it would cause confusion. He also avers that the Court acknowledged his request for an interpreter but failed to arrange for one.[29]

81. The Second Applicant avers that during his arrest the terminology used required a high level of fluency, far beyond the basic transactional Kiswahili that he had mastered in the refugee camp. He, therefore, struggled to understand the police interrogations and the proceedings. He adds that during the "Trial within a trial proceeding" he was asked whether he spoke Kiswahili to which, he informed the Court that he did not speak it properly and was a refugee from Burundi. The second Applicant further avers that by the time his case went to trial, seven years after his arrest, he had learned to speak Kiswahili fluently in prison and did not hide his fluency at the time of his trial, which unfortunately, worked against his interest. He argues that the Court, in *Armand Guehi* case, also recognised the significance of the right to an interpreter during the interrogation phase. He draws from various jurisprudence to support his arguments.[30]

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82. The Respondent State disputes this allegation and puts the Applicants to the strict proof thereof. It avers that the trial was conducted in both English and Swahili languages to enable the Applicants and court assessors to

[29] Applicants' submission pursuant to Rule 50 of the Rules of Court.
[30] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018), § 78; Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (2002), at 400; *John Murray v. United Kingdom* ECtHR, App. No. 18731/91, (1996), §§ 45, 47-58; HRC Concluding Observations; France, UN Doc. CCPR/C/FRA/CO/4 (2008) § 14; N(6)(d)(ii) of the Principles on Fair Trial in African, Article 55(2)(b) of the ICC Statute, Rule 42(A)(iii) of the Rwanda Rules, Rule 42(A)(iii) of the Yugoslavia Rules; Amnesty International Fair Trial Manual, ed. 2, 83); *Singarasa v. Sri Lanka*, UN Doc, CCPR/C.81/D/1033/2001 (H.R.C. 2004), § 7.2; *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgement, § 3 (27 May, 2008).

understand, with J. Kasenene providing interpretation in both languages, as illustrated in the Record of Proceedings. It calls upon the Court to dismiss this allegation for lack of merit. It did not address the rest of the claims raised by the Applicants under this allegation.

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83. On the issue of interpretation, the Court has previously considered this and held that "even though Article 7(1)(c) of the Charter does not expressly provide for the right to be assisted by an interpreter, it may be interpreted in the light of Article 14(3)(a) of the ICCPR", which provides:

> "… everyone shall be entitled to … (a) be promptly informed and in detail in a language which he understands of the nature and cause of the charge against him; and (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."[31]

84. It is, therefore, evident from a joint reading of the two provisions that every accused person has the right to an interpreter if they are unable to understand the language in which the proceedings are being conducted. Furthermore, this Court has also held that "it is practically necessary that where an accused person is represented by Counsel, that the need for interpretation is communicated to the Court".[32] As such, if an applicant does not object to the continuance of proceedings in a language other than his own, they will be deemed to understand the processes and to have agreed to the manner in which they were being conducted.[33]

85. In the instant case, this Court notes from the record that the First Applicant, reported at the preliminary hearing that he got to know Swahili when he went to prison on 13/5/1999.[34] On the other hand, the lawyer for the Second

[31] *Guehi v. Tanzania, ibid*; *Gozbert Henerico v. United Republic of Tanzania*, ACtHPR, Application No. 056/2016, Judgment of 10 January 2022 (merits and reparations), §§ 126-127; *Yahaya Zumo Makame v. United Republic of Tanzania* (merits and reparations) (25 June 2021) 5 AfCLR 257, § 93.
[32] *Makame v. Tanzania*, *ibid*.
[33] *Guehi v. Tanzania, supra*, § 77.
[34] Page 62/47.

Applicant, during the preliminary hearing, objected to the caution statement being tendered as evidence on the ground that his client did not speak Kiswahili at the time of its recording and had been beaten and forced to sign it. The trial court then ordered that a trial within a trial be conducted to determine whether the Applicant recorded the statement voluntarily. Furthermore, the Applicant recounted this concern during the trial.[35]

86. This Court observes that although the assessors determined that the Applicants recorded the extra judicial statements voluntarily, the Magistrate took note of the wounds on the bodies of the two Applicants, in particular on specific parts of the body where they allege to have been hit by police, as *prima facie* evidence of police brutality. This observation supports the Applicants' claims that they were beaten and forced to sign statements recorded in Kiswahili, which they did not understand and which were never read back to them.

87. This Court observes that at different stages of the proceedings, the Applicants informed the police authorities, their lawyers and the trial court that they did not fully understand Kiswahili well, the language in which their interrogation and trial was conducted, and that, as a result, they were unable to participate meaningfully in those proceedings. However, they were instead beaten up by the police authorities and forced to sign the statements.

88. Consequently, the Court finds that the Respondent State violated Article 7(1)(c) of the Charter, as read together with Article 14(3)(a) of the ICCPR, with regard to the alleged failure to provide the Applicants with interpretation services during their arrest, interrogation, detention and trial.

[35] Record of proceedings, page 35/20.

iii. On the failure to provide effective legal representation

89. The Applicants aver that they were not afforded effective legal representation from their counsel for various reasons. They submit that their lawyers never visited them for the duration of their detention in prison before the commencement of the trial to receive instructions from them; never discussed their defence strategy, and did not identify potential witnesses to call on their behalf to corroborate or speak to their character, in particular, Mama Mboya, who allegedly hired them to commit the murder.

90. The First Applicant avers that his defence of alibi was not considered as his counsel refused to raise it on account that this information would confuse the Court. Furthermore, that the counsel faced a conflict of interest in representing both the First and Second Applicants because the Second Applicant allegedly confessed to the murder while at the same time maintaining his innocence. He argues, that in the circumstances, it would be impossible for the same legal counsel to provide effective legal assistance and to act in the best interests of both Applicants. Relying on a host of cases from various courts,[36] he surmises that legal aid is not just about providing free legal representation; but such representation must be effective. He argues that, in his case, the lack of adequate communication with his counsel was exacerbated by the fact that he was represented by a number of defence counsel throughout the course of the proceedings.

[36] See, e.g., *Hendricks v. Guyana* (*supra*) § 6.4; and Communication No. 775/1997, *Brown v. Jamaica*, views adopted on 11 May 1999, § 6.6; See HRC Communications No. 985/2001, *Aliboeva v. Tajikista*, judgment of 16 November 2005, § 6.4; No. 964/2001, *Saidova v. Tajikista*, Judgment of 20 August 2004 § 6,8; No. 781/1997, *Aliev. v. Ukraine*, judgment of 29 August 2003, § 7.3; No. 554/1993, LaVende v. *Trinidad and Tobago*, Judgment of 14 January 1998, § 58); See e.g., *Ocalan v. Turkey* (*supra*), §§ 146-147 and 153-154); *Kelly v. Jamaica*, Communication No. 537/1993, UN, Doc A/51/40, Vol. II, § 98; *Nechiporuk and Yonkalo v. Ukraine*, ECtHR, Judgement of 21 April 2011, Application No. 42310/04, § 263); *Salduz v. Turkey* (ECtHR, judgment of 27 November 2008, Application No. 36391/01, §§ 58-63) ; *Reid v. Jamaica*, Communication No. 250/1987, UN. Doc A/45/40, Vol. II, § 85 (HRC 1990), (See *Artico v. Italy*, ECtHR, judgment of 13 May 1980, Application No 6694/74, §§ 29-41); (Communication 319/06 – *Interights & Ditshwanelo v. the Republic of Botswana*, § 69); *Kamasinski v. Austria*, Judgment of 19 December 1989, § 29; *Sannino v. Italy*; *Czekalla v. Portugal*, ECtHR, judgment of 10 October 2002, Application No. 38830/97, § 68); See *Falcao dos Santos v. Portugal*, ECtHR, judgment of 3 July 2012, Application No. 50002/08, §§ 44-46), etc.

91. The Second Applicant on his part submits that, based on the case-law of this Court, although the Respondent State "cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes, it is for the competent authorities to take steps to ensure that the Applicant effectively enjoys the right [to counsel] in any particular circumstances."[37] He avers that State-provided attorneys in Tanzania are paid the equivalent of Thirty United States Dollars ($ 30) USD, which is not even enough to cover the cost of travel to the prison.

92. The Second Applicant further argues that he was significantly less culpable because witnesses observed that he was unarmed, and the proof against him was weaker. He asserts that an enterprising advocate would have exploited the relative differences in culpability and strength of evidence between the two co-accused to secure an acquittal, a lesser charge or a lesser sentence. However, his lawyer, having the same ethical obligation in respect of the first Applicant, was unable to present a vigorous defence. He surmises that in *Abubakari v. Tanzania*, the Court found a violation of the Charter when the domestic court did not push for further investigation into a conflict of interest that may "have affected the impartiality of the prosecution".

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93. The Respondent State on its part submits that the Applicants were afforded legal representation as reflected in the proceedings of the trial and furthermore, represented by two different Advocates one at the preliminary hearing and the other during the trial.

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[37] *Ghati Mwita v. United Republic of Tanzania*, ACtHPR, Application No. 012/2019, Judgment of 1 December 2022 (judgment), §§ 122-123; *Henerico v. Tanzania* (merits and reparations), *supra*, § 106-109 and *African Commission on Human and Peoples' Rights v. The Republic of Libya* (merits) (3 June 2016) 1 AfCLR 153, § 93.

94. Article 7(1)(c) of the Charter provides that:

> 1. Every individual shall have the right to have his cause heard. This comprises: …
>
> (c) The right to defence, including the right to be defended by counsel of his choice.

95. The Court has held that Article 7(1)(c) of the Charter, as read together with Article 14(3)(d) of the ICCPR, guarantees anyone charged with a criminal offence the right to be automatically assigned a counsel free of charge where he cannot afford to hire a lawyer, whenever the interests of justice so require.[38]

96. In *African Commission on Human and Peoples' Rights v. Libya*, the Court held that "every accused person has a right to be effectively defended by a lawyer, which is at the heart of the notion of a fair trial".[39] The Court has also previously considered the issue of effective representation in *Evodius Rutechura v. United Republic of Tanzania*[40] where it held that the right to free legal assistance comprises of the right to be defended by counsel. However, the Court emphasizes that the right to be defended by counsel of one's choice is not absolute when counsel is provided through a free legal assistance scheme.[41] In such a case, the important consideration is whether the accused is provided with effective legal representation rather than whether he or she is allowed to be represented by a lawyer of their own choosing.[42]

97. The Court considers that, "effective assistance of counsel" comprises two aspects.[43] First, defence counsel should not be restricted in the exercise of representing his client. Second, counsel should not deprive a client of

[38] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 124.
[39] *African Commission on Human and Peoples' Rights v. Libya* (merits) (2016) 1 AfCLR 153, § 95.
[40] *Evodius Rutechura v. United Republic of Tanzania* (merits and reparations) (26 February 2021) 5 AfCLR 7, § 73.
[41] ECHR, *Croissant v. Germany* (1993) App No.13611/89, § 29*, Kamasinski v. Austria* (1989) App No. 9783/82, § 65.
[42] ECHR, *Lagerblom v. Sweden* (2003) App No. 26891/95, §§ 54-56.
[43] HRI/GEN/1/Rev.9 (Vol. I) page 256, §§ 333-335.

effective assistance by failing to provide competent representation that is adequate to ensure a fair trial or, more broadly, a just outcome.[44]

98. The Court has also previously held that a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes. The quality of the defence provided is essentially a matter between the client and his representative and the State should intervene only where the lawyer's manifest failure to provide effective representation is brought to its attention.[45]

99. This Court observes, with regard to effective legal representation through a free legal assistance scheme, that it is not sufficient for a State to simply provide free legal assistance. States must also ensure that lawyers appointed to provide legal assistance under such scheme, have enough time and facilities to prepare an adequate defence, and to provide robust representation at all stages of the legal process starting from the arrest of the individual for whom such representation is being provided.

100. In the instant case, the Court notes that the Applicants were both represented by a counsel during the arraignment and by another during the trial. The Court observes that there is nothing on the record to demonstrate that the Respondent State impeded counsel from accessing the Applicants and consulting them on the preparation of their defence, or denied the designated Counsel adequate time and facilities to enable the Applicants to prepare their defence.

101. The Court has held in its jurisprudence that allegations relating to counsel not raising or objecting to certain evidentiary issues in relation to his/her clients defence, should not, in these circumstances, be imputed to the Respondent State.[46] More importantly, there is nothing on the record to

[44] ECHR, *Strickland v. Washington*, 466 U.S. 668 336; 686 (1984), 336; *Lafler v. Cooper*, 566. No 10-209 slip. op. (2012) (erroneous advice during plea bargaining).
[45] ECHR, *Vamvakas v. Greece* (no. 2), 2870/11, § 36; *Czekalla v. Portugal*, §§ 65 and 71; *Czekalla v. Portugal*, App. No. 38830/97, ECHR 2002-VIII).
[46] *Henerico v. Tanzania*, *supra*, § 113.

demonstrate that the Applicants informed the domestic courts of the alleged shortcomings in their Counsel's conduct in relation to their defence.

102. In view of the above, the Court finds that the Respondent State discharged its obligation to provide the Applicants with effective free legal assistance and also finds that the Respondent State did not violate Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

iv. On the failure to try the Applicants within a reasonable time

103. The Applicants submit that the unduly long delay during their trial is a clear violation of the Respondent State's Criminal Procedure Act[47] and their rights to a fair trial guaranteed by Article 14 of the ICCPR and Article 7 of the Charter, particularly when the conditions of detention are exceptionally harsh. They aver that this Court has appreciated the irreparable harm that ensues as a result of delays between arrest and trial, and has held that certain delays may justify a more lenient sentence on account of the psychological torment that results from keeping an accused person in a state of anxious uncertainty as to their future. According to them, the wait alone constituted weighty punishment that courts have recognized as requiring a remedy. The Applicants further submit that the right to be tried within a reasonable time has been identified by this Court as one of the cardinal principles of the right to a fair trial.

104. They argue that their case is not a complex one. It involves an allegation of murder based on eyewitness testimonies, including testimonies by lay witnesses, investigators, a ballistics expert, a post-mortem report and the statements of the co-accused. They aver that all this evidence was available to the prosecution within two months of the arrest and there is nothing to suggest the prosecution was awaiting the results of further investigations.

[47] Act, Parts II and VI (Criminal and Penal Law Act, No. 09 of 1985 Part II, IV. (1985) (Tanz.)

105. The Applicants surmise that they did not raise multiple applications before the trial court and the Respondent State did not justify the delays between the various stages of the proceedings. There is simply no explanation on record to demonstrate why the Applicants were not accorded a preliminary hearing for nearly two years after their arrest, which resulted in substantial prejudice as witness memories fade over time, including their memories of how a person appeared, the timing of events and statements that were made.

106. The First Applicant adds that the Prosecution filed an application to have him examined for competency to stand trial, to which his lawyer did not object. According to him, this process at the most takes a period of a few weeks to finalise as the evaluator is a state employee.

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107. In response to this allegation, the Respondent State merely submits that the Applicants' trial was held within a reasonable time.

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108. Article 7(1)(d) of the Charter provides that:

> "Every individual shall have the right to have his cause heard. This comprises the right to be tried within a reasonable time …".

109. In *Wilfred Onyango Nganyi and Others v. United Republic of Tanzania,* this Court has held that the right to be tried within a reasonable time is an important aspect of fair trial.[48] The Court further held that the right to a fair trial also includes the principle that judicial proceedings should be finalised within a reasonable time.[49] In determining the right to be tried within a

[48] *Nganyi and Others v. Tanzania* (merits), *supra*, § 127; and *Benedicto Daniel Mallya v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 482, § 48.
[49] *Cheusi v. Tanzania* (judgment), *supra*, § 117.

reasonable time, the Court has adopted a case-by-case approach whereby it considered, among others, factors such as the complexity of the case, the conduct of the Parties, and that judicial authorities must exercise due diligence especially where the applicant faces severe penalties.[50]

110. In assessing the complexity of the case, the Court, among other factors, considered the number of witnesses who testified, availability of evidence, the level of investigations, and whether specialised evidence such as DNA samples was required.[51]

111. In the instant case, the Court observes, that although the Applicants are complaining about the "unduly long delay during their trial" the contested issue emerging from their submission is the pre-trial detention period. The Court will therefore, determine, whether the said period of six (6) years, ten (10) months and nineteen (19) days that elapsed from the date of arrest, 8 May 1999, to the date of commencement of the trial on 27 March 2006, is reasonable.

112. Regarding the nature and complexity of the case, this Court notes that, as it arises from the records, the prosecution only presented oral testimony of three (3) prosecution witnesses. As far as the investigations are concerned, the records show that Mama Mboya, the wife of the Commanding Officer, whom the Applicants considered as the most culpable actor was interviewed but never charged or called to testify as a witness. As such, the case cannot be considered as a complex one to merit such a delay on investigation.

113. With regard to the conduct of the Parties, this Court notes that there is nothing on the record to show that the Applicants impeded the progress of the investigations before their arraignment at the High Court. The case on the conduct of the Parties therefore boils down to whether the judicial

[50] *Msuguri v. Tanzania* (merits and reparations), *supra*, § 83; *Cheusi v. Tanzania* (judgment), *supra*, § 117; *Amini Juma v. United Republic of Tanzania* (merits and reparations) (30 September 2021) 5 AfCLR 431, § 104 and *Guehi v. Tanzania* (merits and reparations), *supra,* §§ 122-124.
[51] *Cheusi v. Tanzania*, *ibid.*, § 117; *Guehi*, *ibid.*, § 112; *Nganyi and Others v. Tanzania* (merits), § 115.

authorities of the Respondent State exercised due diligence in handling processes involving the Applicants.

114. The Respondent State does not provide justification for the time and instead, generically submits that the Applicants' case was heard within a reasonable time.

115. With regard to due diligence, the Court notes that pursuant to Section 32(2) of the Criminal Procedure Act (CPA), an accused must be brought before a court as soon as practicable when the offence is punishable by death.[52] Further, Section 244, as read together with Section 245 of the CPA, provides that committal proceedings should be held as soon as practicable.[53] Finally, Section 248(1) of the CPA provides that proceedings may be adjourned, from time to time by warrant, and the accused person be remanded for a reasonable time, not exceeding fifteen (15) days at any one time.[54]

[52] Section 32(2) – Where any person has been taken into custody without a warrant for an offence punishable with death, he shall be brought before a court as soon as practicable.
[53] Section 244 – Whenever any charge has been brought against any person of an offence not triable by a subordinate court or as to which the court is advised by the Director of Public Prosecutions in writing or otherwise that it is not suitable to be disposed of upon summary trial, committal proceedings shall be held according to the provisions hereinafter contained by a subordinate court of competent jurisdiction.
Section 245(1) – After a person is arrested or upon the completion of investigations and the arrest of any person in respect of the commission of an offence triable by the High Court, the person arrested shall be brought within the period prescribed under section 32 of this Act before a subordinate court of competent jurisdiction within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act.
[54] Section 248(1) – Where for any reasonable cause, to be recorded in the proceedings, the court considers it necessary or advisable to adjourn the proceedings it may, from time to time by warrant, remand the accused person for a reasonable time, not exceeding fifteen days at any one time, to a prison or any other place of security.
Section 248(2) – Where the remand is for not more than three days, the court may, by word of mouth, order the officer or person in whose custody the accused person is, or any other fit officer or person, to continue to keep the accused person in his custody and to bring him up at the time appointed for the commencement or continuance of the inquiry.

116. This Court also notes that the High Court of the Respondent State is empowered pursuant to Sections 260(1),[55] and 284(1)[56] of the CPA to postpone the trial of any accused person to the subsequent session where there is sufficient cause for the delay including the absence of witnesses. However, the same provisions are to the effect that the delay should be "reasonable".

117. In the present Application, the records indicate that the Applicants were arrested for the offence of murder on 8 May 1999 and three (3) years, four (4) months and sixteen (16) days later, the preliminary hearing before the High Court was held on 24 September 2002. On 21 April 2004, which is one (1) year, six (6) months and twenty-eight (28) days later, the Parties again appeared before the High Court and requested it to set a trial date, to which the High Court ordered the Magistrate Court to commit the Applicants but no action was taken. On 13 February 2006, that is one (1) year, nine (9) months and twenty-three (23) days later, the Parties again appeared before the High Court, and the "prosecution" observed that the Magistrate Court had yet to commit the Applicants for trial. In response, the High Court once again ordered the Magistrate Court to commit the Applicants. On 2 March 2006, two (2) weeks and three (3) days later, the Parties appeared before the High Court after they were committed.

118. The trial commenced twenty-five (25) days later at the High Court at Bukoba on 27 March 2006 in Criminal Session, Case No 34 of 2002 and was concluded on 31 May 2007, eight (8) years and twenty-three (23) days later from the date of arrest and one (1) year, two (2) months and twenty-nine (29) days later from the date of committal.

[55] Section 260(1) – It shall be lawful for the High Court upon the application of the prosecutor or the accused person, if the court considers that there is sufficient cause for the delay, to postpone the trial of any accused person to the next session of the court held in the district or at some other convenient place, or to a subsequent session.

[56] 284(1) – Where, from the absence of witnesses or any other reasonable cause to be recorded in the proceedings, the court considers it necessary or advisable to postpone the commencement of or to adjourn any trial, the court may from time to time postpone or adjourn the trial on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused person to a prison or other place of security.

119. With regard to the committal proceedings, the Court observes that the Magistrate delayed to conduct the committal proceedings to facilitate the Applicants' trial as soon as practicable as provided under the law. In fact, following the Magistrates delay to commit the Applicants the first-time round, the High Court Judge had to remind and order the District Magistrate twice to conduct committal proceedings, which resulted in prolonging the trial before the High Court.

120. The Court observes that the Applicants raised the defence of alibi during the trial, however, the trial judge "considered that defence and pursuant to the provisions of section 194(6) of the Criminal Procedure Act (the CPA), he took cognizance of it but proceeded to hold that in view of the strong prosecution evidence, he accorded no weight to that defence of alibi." This Court further notes that the Court of Appeal referencing its own jurisprudence[57] agreed with the trial Judge's assessment.[58]

121. The Court observes that there is no justifiable reason as to why following the Applicants' arrest, their committal was held three (3) years, four (4) months and sixteen (16) days later after the preliminary hearing. To exacerbate the situation, it was the Parties who had to twice remind the High Court that the committal proceedings had not been finalised and a trial date set. Additionally, the Court notes that there is nothing on the record to show that the Applicants impeded the progress of the investigations before their arraignment at the High Court, the case was not a complex one, there were no multiple applications filed or adjournments requested as observed from the record of proceedings. The Applicants were committed on 2 March 2006 and trial at the High Court commended on 27 March 2006. In the circumstances, the Court finds that the time of six (6) years, ten (10) months and nineteen days (19) days from the date of arrest to the commencement of the trial, cannot be considered as reasonable.

[57] *Mwita Mhene and Another v. Republic* (Unreported).
[58] Court of Appeal Judgment, page 4.

122. Consequently, the Court finds that the Respondent State violated the Applicants right to be tried within a reasonable time as provided for under Article 7(1)(d) of the Charter.

v. On the use of a coerced confession for conviction

123. The Second Applicant submits that under international law, a coerced confession is inadmissible at trial and may not be admitted as evidence. Therefore, the decision of the High Court to accept his statement as part of evidence and to rely on it to convict and sentence him gives rise to violations of Article 5 and 7 of the Charter, and Article 7 of the ICCPR. To illustrate this argument, he relies on various jurisprudence of the Human Rights Committee and other courts,[59] and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

124. He avers that he testified about the torture during the "trial within a trial" before the presiding judge and his testimony was corroborated by the Magistrate Judge who recorded his extra judicial statement. He claims that despite the *prima facie* evidence that the statement was not recorded voluntarily, the Judge still admitted it as part of the evidence. He surmises that in his case, there was overwhelming evidence of the physical assault and psychological pressure applied to extract the incriminating statement, therefore, there can be no doubt that the Respondent State violated its obligations under Article 5 and 7 of the Charter, and Article 6, 7 and 14 of the ICCPR.

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125. The Respondent State submits that the Applicants were convicted and sentenced based on evidence which proved their guilt beyond a reasonable doubt.

[59] *Cabrera-Garcia and Montiel Flores v. Mexico*, Preliminary Objection, Merits, Reparations and Costs, Judgment, IACtHR (ser. C) No. 220, § 166 (26 Nov. 2010)); *Singarasa v. Sri Lank,* European Court of Human Rights in *Saman v. Turkey* is instructive in this regard. The Saman and Singarasa judgments underscore the unreliability of coerced confessions, whether by torture or by other forms of manipulation or exploitation.

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126. Pursuant to Article 7(1)(c) of the Charter, every individual has the right to have his cause heard and the right to be presumed innocent until proven guilty by a competent court or tribunal.

127. The Court recalls its position in *Kijiji Isiaga v. United Republic of Tanzania* where it held that domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular piece of evidence. As an international human rights court, the Court cannot usurp this role from the domestic courts and investigate the details and particularities of evidence used in domestic proceedings.[60]

128. Having noted that, the Court also highlights its position that while it does not have the power to evaluate matters of evidence that were settled in national courts, it is vested with jurisdiction to determine whether the assessment of the evidence in the national courts complies with relevant provisions of international human rights instruments.[61]

129. The Court further notes that upholding the right to a fair trial "requires that the imposition of a sentence in a criminal offence, and in particular, a heavy prison sentence, should be based on strong and credible evidence".[62] As this Court has also held in *Diocles William v. United Republic of Tanzania,* the principle that a criminal conviction should be "established with certitude" is a crucial principle in cases where the death penalty is imposed.[63]

[60] *Kijiji Isiaga v. United Republic of Tanzania* (merits) (21 March 2018) 2 AfCLR 218, § 65 and *James Wanjara & 4 Others v. United Republic of Tanzania* (judgment) (25 September 2020) 4 AfCLR 673, § 78.
[61] *Kennedy Ivan v. United Republic of Tanzania* (merits) (28 March 2019) 3 AfCLR 48, § 61; *Elisamehe v. Tanzania* (judgment), *supra*, § 66 and *Jonas v. Tanzania* (merits), *supra,* § 69.
[62] *Abubakari v. Tanzania* (merits), *supra,* § 174; *Juma v. Tanzania* (judgment), *supra,* § 70 and *Isiaga v. Tanzania* (merits), *supra,* § 67.
[63] *Wiliam v. Tanzania* (merits), *supra*, § 72.

130. In the instant case, the Court observes that the Applicant's contention is the Respondent State's use of the "coerced caution statement" to convict and sentence him. Records on file indicate that the Second Applicant has consistently alleged throughout the proceedings that he was forced to sign this statement after severe beatings. The bruises and marks on his body were also observed by the Magistrate who recorded the extra judicial statement. This depicts a *prima farcie* case that corroborates his allegations that the statement was recorded under duress.

131. The Court however also notes that there were other pieces of evidence used to convict and sentence the Applicant including witness statements, the trial within the trial, the identification parade, the fact that he showed the police authorities where to find the alleged murder weapon that and the ballistics report. Although, the method of extracting the confession and recording the statement poses a major procedural irregularity, it cannot be said that the Second Applicant was convicted and sentenced solely on the strength of the disputed caution statement.

132. Accordingly, this Court holds that the Respondent State did not violate the Applicant's right to fair trial as enshrined under Article 7(1)(c) of the Charter with regard to the Second Applicant's conviction and sentence solely on the basis of a disputed coerced statement.

vi. On the failure of the District Magistrate to order investigations into the alleged cruel inhumane degrading treatment

133. Although this allegation was made by the Second Applicant, it affects the First Applicant as well, since both Applicants were subjected to similar treatment by the District Magistrate and subjected to similar treatment. The Court will therefore include the First Applicant in its assessment.

134. The Second Applicant avers that the District Magistrate failed to carry out a prompt medical evaluation to corroborate his allegations of torture. He further avers that he failed to order that his injuries be photographed,

interview the police officers who participated in the beatings and order that an investigation be carried out. Instead, seven (7) years later, after the wounds and the resulting scars had become imperceptible, the High Court purported to weigh his testimony against that of a police officer who was one of his torturers.

135. He claims the High Court rejected his testimony and admitted his coerced confession as evidence at trial, thereby denying him a remedy for the torture he suffered, and thereby allowing the authorities to profit from their abuse. He argues that this compounded the violation of his right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, and calls for a remedy from this Court.

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136. The Respondent State did not pronounce itself on this issue.

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137. Pursuant to Article 7(1)(b) of the Charter, every individual has the right to have his cause heard and the right to be presumed innocent until proven guilty by a competent court or tribunal.

138. The Court observes that this allegation relates to the Magistrate's failure to conduct an investigation after the Applicants reported ill-treatment by the State authorities.

139. In light of the submissions made by the Applicants and the Respondent State's lack of submissions thereon, the Court considers that the determination of the Applicants allegation has a bearing on the evidence. In this regard, the Court restates its position in the earlier cited case of *Kennedy Owino Onyachi and Charles John Mwanini Njoka v. United Republic of Tanzania* that in circumstances where the Applicants are in custody and unable to prove their allegations because the means to verify the same are likely to be in the control of the State, the burden of proof will

shift to the Respondent State as long as the applicant makes a *prima facie* case of violation.[64]

140. The Court observes from the record of proceedings that when recording the extra judicial statement, the District Magistrate observed that,[65] the First Applicant "had small wounds on his fingers, on his hands, on his face and on the knees. They were healing. They remain, after he was beaten by the police of Benacco, when he was arrested." When it came to the Second Applicant, the Court observes from the record of proceedings that he reported the torture to the District Magistrate who observed that the Applicant, "had small wounds and that he was beaten by the Police during the arrest. He had wounds on his back and hands."

141. The Court further notes that the only action the District Magistrate took to address his observations and the report of torture, was to record his observations on the Applicants appearance. He did not go further to order for an investigation into how the wounds were sustained or for them to undergo a medical examination. Furthermore, once the Applicants adduced *prima facie* evidence of ill-treatment or torture, the burden automatically shifted to the Respondent State to prove the contrary. This Court asserts that the District Magistrate bore the duty to provide the Applicants with adequate protection upon being arrested as suspected criminals, and to conduct an investigation into how they sustained the injuries and, finally, to bring the culprits to book.

142. Given that the District Magistrate failed to order prompt investigations into the alleged abuse, the Court considers that the Respondent State failed in its duty to investigate allegations of abusive cruel, inhumane and degrading treatment, provided for under Article 5 of the Charter, due to the inactions of its agent, the District Magistrate.

[64] See *Onyachi and Charles Njoka v. Tanzania*, *supra*, §§ 142-145.
[65] Record of Proceedings, page 57/42.

B. Alleged violation of the right to freedom from torture, cruel and inhumane degrading treatment

143. Under this violation, the Applicants make four (4) claims, which they consider as amounting to cruel, inhuman and degrading treatment as follows:

    i. Police brutality;
    ii. Execution of the death penalty by hanging;
    iii. Exposure to the "death row phenomenon"; and
    iv. Subjection to deplorable prison conditions.

144. The claims will be considered in the order stated above.

i. Allegation on Police brutality

145. The Applicants aver that as soon as the police learned that the wife of their commanding officer had been killed, they descended upon the refugee camps to search for suspects.[66] They rounded up people, beat them up and forced them into their cars. Some managed to flee while others were arrested, including the two co-accused. The Applicants aver that their testimony is corroborated by independent reports on police brutality and on the deteriorating security situation.[67]

[66] See Record of Proceedings at page 24 (Testimony of PW4) and Testimony of PW2 at p. 21.
[67] Turner, S. (2005). 'Suspended Spaces: Contesting Sovereignties in a Refugee Camp,' in *Sovereign Bodies; Citizens, Migrants and States in the Postcolonial World*, ed. T.B Hansen and F. Stepputat. Princeton University Press, p. 318). In 1997, the Tanzanian government conducted a mass round-up of Burundian refugees that had settled in villages near the border, separating them from their spouses and evicting them from their homes (BURUNDIAN REFUGEES IN TANZANIA: The Key Factor to the Burundi Peace Process, ICG Central Africa Report N^{0} 12 30 November 1999); (Turner, S. (2005). 'Suspended Spaces: Contesting Sovereignties in a Refugee Camp,' in Sovereign Bodies: Citizens, Migrants and States in the Postcolonial World, ed, T.B Hensen and F. Stepputat. Princeton University Press, p. 315). The refugee Act of 1998 granted broad powers of arrest and even authorized the use of force against refugees (Khoti Kamanga, "The (Tanzania) Refugees Act of 1998: Some Legal and Policy Implications," in 18 Journal of Refugee Studies (2005), pp.110-113).

146. Furthermore, the Applicants submit that during the interrogation at the police station, they were beaten with “fists, rungu, kicks, butts of guns” and forced to sign confession statements they did not agree with recorded in a language they did not understand (Kiswahili). The Second Applicant also avers that following a second interrogation after the identification parade, he was shown three skulls and taunted that they belonged to people killed by police, and that a similar fate would befall him if he refused to sign the statement.

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147. The Respondent State did not address this allegation.

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148. Article 5 of the Charter provides as follows:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

149. The Court recalls its jurisprudence on the definition of torture in *Alex Thomas v. United Republic of Tanzania*, [68] and set out in Article 1 of the United Nations Convention Against Torture that:

> “…For purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of

[68] *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015) 1 AfCLR 465, § 144.

or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions…"

150. Furthermore, Article 12 provides that "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".

151. The Court takes into consideration, the African Commission's *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa,*[69] which states that torture can take various forms and determining whether a right was breached will depend on the circumstances of each cause.[70]

152. Furthermore, it recalls its jurisprudence that the prohibition of cruel, inhuman and degrading treatment under Article 5 of the Charter is absolute.[71] It notes that the allegations being examined relate to the alleged beatings by the police authorities during and after the arrest to force a confession of guilt and death threats of death by the same State authorities.

153. The Court notes from the record of proceedings, that counsel for the First Applicant informed the Court that his client was a refugee, that he was beaten and that he did not speak Kiswahili.[72] The Court further notes that the police brutality was reported to the District Magistrate by the Applicants, who examined the Applicants and took a record of the wounds and body scars.

[69] The African Commission adopted these guidelines in 2008; the Guidelines are commonly known as the *Robben Island Guidelines.* See also Application 288/04 *Gabriel Shumba v. Zimbabwe* Decision of 2 May 2012, §§ 142 to 166.
[70] *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 131.
[71] See *Huri-Laws v. Nigeria* Communication 225/98 (2000) AHRLR 273 (ACHPR 2000) para 41; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 131.
[72] Record of Proceedings, page 31/16.

154. In light of the above, this Court holds that the Respondent State violated the Applicants right not to be subjected to cruel inhuman and degrading treatment as provided under Article 5 of the Charter through the actions of the police authorities who are agents of the State.

ii. Allegation on execution of the death penalty by hanging

155. The Court notes that although this claim was made by the First Applicant, it affects the Second Applicant as well, since he faces the same penalty and method of execution, which the Respondent State does not dispute. As such, the Court will address the claim in relation to both Applicants.

156. They allege that hanging, which is the method of enforcing the death penalty, constitutes cruel, inhuman and degrading treatment. They submit that in *Ally Rajabu and Others v. United Republic of Tanzania*, this Court observed that many methods used to enforce the death penalty potentially amounts to torture, as well as cruel, inhuman and degrading treatment, given the suffering inherent thereto.

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157. The Respondent State did not address this violation

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158. The Court also recalls its position in the matter of *Amini Juma v. United Republic of Tanzania* where it held that the execution of the death penalty by hanging encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment.[73]

159. The Court reiterates its position that in accordance with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, methods of execution must exclude suffering or

[73] *Juma v. Tanzania* (judgment)*, supra,* § 136.

cause the least possible suffering in cases where the death penalty is permissible.[74] Having found that the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature, the Court holds that, as method of enforcing the death sentence, hanging inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment.[75]

160. In the circumstances, the Court holds that the Respondent State violated the Applicants right to dignity enshrined in Article 5 of the Charter with regard to the method of execution by hanging.

iii. Allegation relating to the exposure to death row phenomenon

161. The Applicants avers that they have been subjected and exposed to the "death row phenomenon" during their extended detention of nineteen (19) years for the First Applicant and eighteen (18) years for the Second Applicant, of which eleven (11) were on death row in deplorable conditions.

162. The Applicants contend that during that time, they were subjected to the psychological torment of living in constant fear of impending death, known as the "death row phenomenon", a term that the courts use to describe the anxiety, dread, fear, and psychological anguish that often accompany long-term incarceration on death row.[76] They argue that although the death row phenomenon itself is not a medical diagnosis, the underlying symptoms may be detected through a clinical interview.

163. They further submit that in recent capital sentencing hearings, the High Courts of Malawi have reinforced the principle that prolonged confinement on death row amounts to cruel and degrading inhumane punishment.[77] According to them, the existence of a *de facto* moratorium on the death penalty does not mitigate the risk of death row phenomenon because during

[74] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* § 118.
[75] *Ibid,* §§ 119-120.
[76] A cruel and unusual punishment, 57 Lowa L. Rev. 814, 814 (1972).
[77] *Republic v. Yale Maonga*, sentence rehearing cause No. 29 of 2015 (unreported).

this period, the Respondent State continues to expose them to the very real and ever-increasing risk of death row phenomenon.

164. The Applicants observe that at Butimba prison where they are held, the gallows are situated in the first room of the corridor where death row prisoners are confined. The psychological torture associated with the anticipation of one's execution worsens with time and is often aggravated by prison conditions such as isolation, cramped environments, harassment and arbitrary or severe rules. They rely on several cases from various courts to support their arguments.[78]

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165. The Respondent State did not address this violation.

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166. This Court has previously held in *Marthine Christian Msuguri v. United Republic of Tanzania*,[79] that the death row has the inherent potential to cause an adverse impact on an individual's psychological state due to the fact that the person involved may be executed at any time.[80] In the *Rajabu* judgment referred to earlier, the Court also held that during their time on death row, the Applicants lived a life of uncertainty in the awareness that they could be executed at any time and that such waiting not only prolonged but also aggravated their anxiety.[81]

[78] *Pratt & Morgan v. The Attorney General of Jamaica*, 43 WIR 340 (1993); *Kigula & Others v. Attorney General, Constitutional Appeal* No. 03 of 2006, [2009]UGSC 6, §§ 56-57 (21 Jan 2009) (Uganda); *Catholic Comm'n For Justice & Peace In Zimbabwe v. Attorney General*, (2001) AHRLR 248, 277 – 78 (ZwSC 1993); *Soering v. United Kingdom(*161 Eur. Ct. H.R (Ser. a) (1989)); *Masangano v. Republic*, Constitutional Case No. 15 of 2007, [2009] MWHC 31 (Malawi)); *Republic v. Chiliko* ; *United States v. Burns*. [2001] 1 S.C.R 283 (Can. S.C.C.); *Al Saadoon and Mufdhi v. United Kingdom* (see 2010 ECtHR; U.S. State Department, Tanzania 2016 Human Rights Report Country Reports on Human Rights Practices For 2016, https://www.state.gov/documents/organization/265522.pdf

[79] *Msuguri v. Tanzania* (merits and reparations), *supra*, § 112 and *Mwita v. Tanzania* (judgment), *supra,* § 87.

[80] *Ibid*.

[81] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* § 148.

167. In the instant case, the Court notes that the Applicants were sentenced to death by hanging by the High Court of Tanzania at Bukoba on 31 May 2007 and were still on death row on 8 March 2016, when they filed their Application before this Court, that is, eight (8) years, nine (9) months and eight (8) days spent on death row in Butimba Prison.

168. The Court recalls its own jurisprudence in the *Rajabu* case where it held that eight (8) years on the death row constituted cruel, inhuman or degrading treatment or punishment.[82] The Court also takes cognisance of the trend set by international jurisprudence that a delay of more than three (3) years between the confirmation of a prisoner's death sentence on appeal and execution, constitutes cruel, inhuman or degrading treatment or punishment.[83]

169. In light of the foregoing, The Court holds that the Respondent State violated the Applicants' right to dignity enshrined in Article 5 of the Charter insofar as it kept the Applicants on death row for an extended period of (8) years, nine (9) months and eight (8) days which amounts to cruel, inhuman or degrading treatment or punishment.

iv. Allegation on being subjected to deplorable prison conditions

170. The Second Applicant avers that his being on death row is compounded by the deplorable conditions in Tanzanian's Butimba prison, to which he is exposed. He avers that this violates his right to be treated humanely and with dignity as provided for under Article 5 of the Charter and under the Nelson Mandela Rules.[84]

[82] *Ibid*.
[83] *Attorney-General v. Susan Kigula & 17 Others* (Constitutional Appeal 3 of 2006) UGSC 6 (21 January 2009) (Supreme Court of Uganda) and *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General of Zimbabwe and Others*, Zimbabwe: Supreme Court, 24 June 1993.
[84] Rule 13 "[a]ll accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation."

171. The Second Applicant states that prisoners on death row at Butimba can only interact with other death row prisoners and cannot participate in any sports, classes, lectures, or trainings, neither do they receive any newspapers. He also avers that the prison authorities intentionally exclude them from occupational training and educational opportunities, effectively conveying the message that such opportunities would be wasted on people who are condemned to die. According to the Second Applicant, prisoners receive one meal a day, which rarely contains meat and when it rains, water runs into their cells. He states that few prisoners receive family visits because their families are too far away, and even If the family could make the trip, they would need permission from the district warden.

172. The Second Applicant further submits that he is particularly susceptible to the death row phenomenon because of his fragile and vulnerable mental state as he is already exposed to trauma. He buttresses his submissions with jurisprudence and reports from various sources; and surmises that his living conditions fall far short of the minimum requirements. The Second Applicant reiterates the First Applicant's graphic description of the conditions faced by prisoners on death row in Tanzania, as illustrated in the judgment of the *Republic v. Mbushuu alias Dominic Mnyaroge*.[85]

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173. The Respondent State did not address this issue.

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[85] *Gable Masangano v. Republic*, Constitutional Case No. 15 of 2007, [2009] MWHC 31 (Malawi)); *Republic v. Chiliko*, Sentence Rehearing Cause No. 25 of 2015, (unreported) (Malawi); *Achuthan v. Malawi*, Communication Nos. 64/92-68/92-78/92-BAR, Afr. Comm'n H.P.R., § 7. (22 March 1995)); Rule 13 of the Nelson Mandela Rules; United States Department of State Report on Tanzania 2016, which reports that the Respondent's States prisons describe extreme overcrowding and the prison system as "harsh and life threatening. Inadequate food, overcrowding, poor sanitation, and insufficient medical care [are] pervasive." The gallows are situated in the first room of the corridor on which death row prisoners are continually confined; See also Report of the International Federation For Human Rights, Tanzania: The Death sentence institutionalized? No. 414/2. at 37 (2005).

174. The Court observes that although this allegation was made by the Second Applicant, it also affects the First Applicant. Accordingly, it will examine the present issue in respect of both Applicants.

175. The Court notes that it has held in *Leon Mugesera v. Republic of Rwanda* that Article 5 of the Charter "can be interpreted as extending to the broadest possible protection against abuse, whether physical or mental".[86] This Court also held that the cruelty or inhumanity of the treatment must be assessed on a case-by-case basis and must involve a certain degree of physical or mental suffering on the part of the prisoner, taking into account the duration of the treatment, the physical or psychological effects of the treatment and state of health of the person.[87] The Court has also held that States have an obligation to provide prisoners with "necessary conditions of a dignified life, including food, water, adequate ventilation, an environment free from disease, and the provision of adequate healthcare."[88]

176. The Court observes that the Applicants buttresses their allegations with published reports, while the Respondent State does not provide any information in rebuttal. In the absence of contrary information debunking these allegations, the Court considers that these allegations are well-founded.

177. Given the above, the Court holds that the Respondent State violated the Applicants' right to dignity guaranteed under Article 5 of the Charter by subjecting the Applicants to anguish and living in deplorable conditions of detention.

[86] *Leon Mugesera v. Republic of Rwanda* (judgment) (27 November 2020) 4 AfCLR 834, § 80.
[87] *Ibid*, § 81.
[88] *Ibid,* § 103.

C. Alleged violation of the Second Applicant's right not to be discriminated against

178. The Second Applicant claims that his right not to be discriminated against on the basis of national origin, as provided under Article 2 of the Charter, was violated when:

    i. He was not provided with interpretation services;
    ii. He was exposed to a hostile police environment by being interrogated in Kiswahili, a language he did not understand, to extract a confession: and
    iii. Police made inconvenient and inaccurate assumptions about him, because of his refugee status.

179. The Court has already addressed the claims related to the right to be provided with interpretation services and on police brutality. It will, therefore, focus on the third claim, relating to the police making inaccurate assumptions based on his refugee status.

180. The Second Applicant avers that the police made inaccurate presumptions because of his status as a refugee, precipitated by the increasing intolerance of refugees to the "Open door policy toward refugees from Congo, Rwanda and Burundi".

181. He further avers that the Respondent State's failure to investigate or prosecute Mama Mboya, a Tanzanian national and the wife of a police officer, who allegedly orchestrated the murder, demonstrates the authority's preferential treatment towards her based on national origin. He argues that under the prosecution's theory, Mama Mboya was arguably the most culpable of all actors and yet the prosecution never charged her or called her to testify as a witness, which is in stark contrast to the manner in which the two impoverished Burundian refugees, were prosecuted and tortured. According to him, this preferential treatment violates the Respondent State's obligation to ensure equal treatment under the law.

182. The Second Applicant submits that in considering the violations alleged, the Court should take notice of the contemporaneous developments in Tanzania's Refugee Policy at the time of his arrest. He argues that in 1998, Tanzania ended its open-door policy towards refugees in the face of increased hostility to waves of refugees coming from Rwanda, the Democratic Republic of Congo and Burundi.

183. He submits that under the 1998 Refugee Act, more restrictions were placed on refugees' movements within Tanzania.[89] As such, according to the Second Applicant, newly arriving refugees were prohibited from working outside the UNHCR camps in western Tanzanian and from moving freely in the country, as they were perceived as a threat to national security.[90] He states that a more aggressive law enforcement response was set in place in late 1998, where the Tanzanian army tried to 'flush out' anyone living in villages along the border with Burundi who was not in possession of the resident permits. He avers that, as a result, Tanzania-Burundian married couples were split.[91]

184. The Second Applicant surmises that the Respondent State thus violated Article 2 and 3 of the Charter by exploiting his vulnerability as a refugee in a foreign criminal legal system, and by failing to remedy the disadvantages he faced as a result of his inability to speak the language or understand the law.

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185. The Respondent State did not respond to this allegation.

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[89] Kamanga, K. (2009). *Trying to understand the Tanzania National Refugee Policy of 2003*, Int'l refugee Law News, Vol. 2, Issue 2, p. 5.
[90] Landau, L. B., *Challenge without transformations: Refugees, Aid and Trade in Western Tanzania*, J. of modern African Studies, 42(1), pp. 31-59 (2004).
[91] Turner, S. (2005), 'Suspended spaces: Contesting sovereignties in a refugee camp', in *Sovereign bodies: Citizens, migrants and states in the postcolonial world*, T.B Hansen and F. Stepputat (ed.), Princeton University Press, pp. 32-322.

186. The Court notes that, Article 2 of the Charter provides that:

> "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, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

187. The Court also notes that Article 3(2) provides that: "Every individual shall be entitled to equal protection of the law".

188. The Court notes the Second Applicant's claim that he was discriminated against while being prosecuted and tried because of his national origin and status as a refugee and yet Mama Mboya, a Tanzanian national and the main culprit who orchestrated the murder, was neither investigated nor arrested.

189. However, the Court observes from the record of proceedings before the High Court and during the trial-within-the-trial, that both Applicants allegedly averred that they were hired by Mama Mboya to commit the murder.[92] The records indicate that ASP G.B Jimbuko, a police officer, reported that he was requested to assist with the investigation together with RCO-SSP Tarimo, OC Benaco ASP Triphone amongst others totalling up to about eight officers. During the interrogation, ASP G.B Jimbuko reported that he met Mama Mboya who was under further interrogation although he did not participate in her interrogation and therefore could not determine the motive for the murder.

190. From the foregoing, the Court observes that Mama Mboya was apprehended and investigated, although the extent and result of the investigation is not elaborated in the pleadings. Apart from the First

[92] Statement of PW5 ASP Mohammed Mbonde, a police officer.

Applicant's assertions that she hired them to commit the murder,[93] and the police belief that she hired the Applicants to commit the murder, no link has been established between them and Mama Mboya. The Court therefore finds no basis for the Second Applicant's claim that he was discriminated against on account of his nationality and refugee status.

191. Accordingly, the Court holds that the Respondent State did not violate the Second Applicant's right not to be discriminated against on the basis of national origin and refugee status, provided for under Article 3(2) of the Charter on equal protection of the law.

D. Alleged violation of the right to equal protection of the law

192. Under this claim, the Applicants allege that their right to equal protection of the law was violated by the Respondent State when it:

i. Failed to provide them with consular services.
ii. Failed to provide interpretation services during the trial
iii. Failed to provide them with effective legal representation as envisaged under (Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR.

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193. The Respondent State on its part avers that the Applicants were treated with equality before the law and afforded equal protection before the law. Their trial was held within a reasonable time and they were afforded the right to be represented by two different counsel, during the preliminary hearing and during the trial, as reflected in the record of proceedings of the trial.

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[93] Unsigned Accused's Confession Before a Justice of Peace dated 10th May 1999. Habyalimana averred that Abdulkarim "told me that he had a deal and he asked me if I can do it. He told me openly that the wife of Mboya wants my help to kill someone. I asked him what his tribe was and what misunderstanding was there. He said that Mboya was about to chase him away because of their relationship with that woman. I asked him how much money did they agree to pay, he told me it was TSH 400,000".

194. The Court observes that the Applicants made similar claims under the right to a fair trial, which have already been addressed under this tittle head. The Court does not therefore deem it necessary to examine the present claims any further.

E. Alleged violation of the right to life

195. Under this allegation, the Applicants make the following claims:

i. Imposition of the mandatory death penalty without considering the circumstances; and
ii. Imposition of the death penalty on a person suffering from mental illness.

196. The Court will examine these claims in turn.

i. Allegation on the mandatory imposition of the death penalty

197. The Applicants submit that the mandatory imposition of the death sentence usurped the judicial officer's discretion to impose a sentence and denied him the opportunity to consider standards of fairness. They contend that there was no evidence of extreme violence or cruelty and neither was there a motive for the killing. Furthermore, they state that there were neither multiple victims nor any evidence that the victim was vulnerable and that the evidence was so tenuous that a court would not conclude that they had committed a crime capable of falling into such a heinous category.

198. Relying on the jurisprudence of several domestic and international regional courts,[94] the Applicants assert that the death penalty should be imposed

[94] *Moise v. The Queen*, (unreported), Crim, App. No. 8 of 2003, Eastern Caribbean Court of Appeal, § 17; *Mitcham & Ors v. DPP*, Crim. App. Nos 10-12 of 2002; *Pipersburgh v. R*, *Councilins v. Mawkanyane*, Case No. CCT/3/94, judgment of 6 June 1995, § 46, *Trimmingham v. The Queen* [2009] UKPC 25, § 21, Communication No. 390/1990, *Luboto v. Zambia*, view adopted on 31 Oct. 995, § 7.2; Communication No. 1132/2002, *Chisanga v. Zambia*, view adopted on 18 Oct. 2005, § 7.4; Communication 1421/2005, *Larranaga v. Philippines*, views adopted on 24 July 2005, § 7.2; Communication 1077/2002, *Carpo v. Philippines* adopted on 6 May 2002, § 8.3, *Boyce v. Barbados* (Inter-American Court of Human Rights judgment of November 20, 2007, §§ 50-53), *Kigula & Others v.*

only in the most exceptional and extreme cases of murder. Furthermore, citing the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions and other authorities, they contend that proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality on the part of judges and juries, in accordance with the pertinent international legal instruments.[95] According to the Applicants, imposing a death sentence after an unfair trial, such as when the defendant has been deprived of adequate legal representation, constitutes an arbitrary deprivation of life.[96] Moreover, they aver that imposing the death sentence after an unfair trial violates Article 6(2) of the ICCPR. They surmise that the sentencing court should have been allowed discretion to take into account the character of the offender and any other relevant circumstances.

199. The First Applicant specifically avers that he suffered severe hardship, including living and growing up in extreme poverty, not having been afforded the opportunity to receive basic education, witnessing the violence of the Burundian Civil War, being forced to flee his home out of fear for his life, and spending six years in Lukole, a refugee camp in Tanzania. He submits that, these mitigating social factors ought to have been taken into consideration when sentencing him.

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200. The Respondent State contends that the Applicants were accorded due process and sentenced according to the laws of the land.

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Attorney General, Constitutional Appeal No. 03 of 2006 (21 January 2009), *Kafantayeni and Others v. Attorney General*, Constitutional Case No. 12 of 2005 (unreported), *Republic v. Felix Madalits Kake*, Confirmation Case N. 404 of 2010 (unreported), *Locket v. Ohio*, 438 US 585 (1978), *Mulla & Another v. State of UP*, Criminal Appeal No. 396 of 2008, §§ 53-59.

[95] *Johnson v. Jamaica* No. 588/1994, H.R. Comm. {1999}, § 8.9; *Reid v. Jamaica* [*supra*], § 11.5; {See Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, UN Document E/CN. 4/2001/9 {11 January 2001}, §§ 81, 86}.

[96] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/G/36, § 36 (H.R.C. 30 Oct. 2018).

201. The Court notes that, Article 4 of the Charter provides that: "[H]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

202. The Court recalls its observation on the global trends towards the abolition of the death penalty, represented, in part, by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR Second Optional Protocol).[97] At the same time, however, it notes that the death penalty remains on the statute books of some States and that no treaty on the abolition of the death penalty has gained universal ratification.[98] The Court further notes that as at 28 June 2023, the ICCPR Second Optional Protocol has ninety (90) State Parties out of the one hundred-seventy-three (173) State Parties to the ICCPR.[99]

203. The Court reiterates its position that despite the global trend towards the abolition of the death penalty, including the adoption of the Second option Protocol to the ICCPR, the prohibition of the death sentence in international law is still not absolute.[100] It recalls the well-established international human rights case-law on the criteria to apply in assessing arbitrariness of a death sentence,[101] that is (i) whether the death sentence is provided for by law, (ii) whether the sentence was passed by a competent court and (iii) whether due process was followed in the proceedings leading to the death sentence. The Court will therefore make its assessment based on these criteria.

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[97] *Juma v. Tanzania*, *supra*, § 122, and *Rajabu and Others v. Tanzania*, *supra*, § 96. Notably, the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

[98] For a comprehensive statement on developments in relation to the death penalty, see, United Nations General Assembly Moratorium on the use of the death penalty – A/77/247: Report of the Secretary General on a moratorium on the use of the death penalty, published on 8 August 2022. See https://www.ohchr.org/en/node/103842.

[99] https://indicators.ohchr.org/

[100] *Rajabu and Others v. Tanzania*, *supra*, § 96.

[101] See *International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria,* Communications 137/94 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), §§ 1-10 and 103; *Forum of Conscience v. Siena Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), § 20; See Article 6(2), ICCPR; and *Eversley Thompson v. St. Vincent & the Grenadines*, Comm. No. 806/1998, U.N. Doc. CCPR/C70IO/806/1998 (2000) (U.N.H.C.R.), § 8.2; See also *Ally Rajabu and Others v. Tanzania*, *supra*, § 104.

204. In relation to the first criterion, namely, that the death sentence should be provided by law, the Court notes that the punishment is provided for in Section 197 of the Respondent State's Penal Code CAP 16. RE.2002, as the mandatory punishment for the offence of murder.[102] The said condition is therefore met.

205. Regarding the second criterion, on whether the sentence was passed by a competent Court, this Court observes that the High Court is the competent Court in the Respondent State to deal with offences that carry a death penalty. It has both appellate and original powers on civil and criminal matters as provided for under Section 3(2)(a) of the Criminal Procedure Act and Article 107(1)(a) of the Tanzania Constitution. As such, the sentence was imposed by a competent court. It follows that this second requirement is equally met.

206. In relation to the third criterion, on whether due process was followed in the proceedings leading to the pronouncement of the death sentence, the Court notes that the Applicants were not presumed guilty before the trial, were represented jointly by Counsel even though they complain that they should have been represented by different counsel to avoid any conflict of interest. However, as arises from the record and expounded on earlier in the present judgment, when dealing with issues of fair trial, the specific circumstances of the Applicants were not taken into account during the sentencing.

207. The Court has previously held in *Ally Rajabu and Others v. United Republic of Tanzania,* that the death penalty as imposed by the courts of the Respondent State in instances of murder, such as is the case in the present Application, does not abide by due process as it does not allow the judicial officer discretion to consider alternative forms of punishment.[103]

[102] "A person convicted of murder shall be sentenced to death."
[103] *Rajabu and Others v. Tanzania*, *supra*, § 110.

208. Consequently, the Court holds that the Respondent State violated the Applicants' right to life as provided under Article 4 of the Charter,[104] by imposing the mandatory death penalty, thereby limiting the discretion of the judicial officer to sentence the accused.

ii. Allegation on the imposition of the death penalty on persons suffering from mental illness or disorders

209. The Applicants both submit before this Court that they suffer from post-traumatic stress disorder (PTSD), which is a severe mental illness thereby making them ineligible for the death penalty. While the First Applicant does not provide a medical report to substantiate his claim the Second Applicant does. The Second Applicant avers that he suffers from mental illness,[105] which the domestic courts failed to identify as they did not take any steps to ascertain whether he was mentally fit to stand trial through a psychiatric evaluation prior to imposing the death penalty. Furthermore, that, the medical evaluation done by trained psychologists engaged by his counsel for purposes of determining his mental status before this Court, Dr. Lema and Dr. Susan Knight, confirmed the diagnosis.

210. Relying on various jurisprudence, the Applicants argue that persons suffering from severe mental disability, mental retardation or extremely

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[104] The United Nations Human Rights Committee has stated that "the mandatory and automatic imposition of the death penalty constitutes an arbitrary deprivation of life in violation of article 6, § 1, of the [ICCPR], in circumstances where capital punishment is imposed without any possibility of taking into account the personal circumstances of the accused or the circumstances surrounding the crime in question". The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "in no case should the law make capital punishment mandatory, regardless of the facts of the case" and the Special Rapporteur, that "the mandatory imposition of the death penalty, which excludes the possibility of imposing a lighter sentence in any circumstances, is incompatible with the prohibition of cruel, inhuman or degrading treatment or punishment". In its resolution 2005/59, adopted on 20 April 2005, the United Nations Human Rights Committee urged States that continue to apply the death penalty to "ensure that … the death penalty is not imposed … as a mandatory sentence".

[105] The 1st Medical report by Dr Isaac Lema, a Clinical Psychologist & Assistant Lecturer at Muhimbili University of Health and Allied Sciences (MUHAS) in Tanzania, concludes that Abdul the 2nd Applicant, Abdul Karim suffers from Post Traumatic Stress Disorder (PTSD). The 2nd Medical Report by Dr. Susan C. Knight, a clinical psychologist with a specialization in forensic psychology, and is board certified in Forensic Psychology through the American Board of Professional Psychology (ABPP), specializing in criminal and civil forensic psychological evaluations including the assessment of legal competencies, criminal responsibility and mental state supported the findings in Dr Lema's report.

limited mental competence, whether at the stage of sentence or execution are exempted from facing the death penalty.[106]

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211. The Respondent State did not address this allegation.

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212. This Court notes that the issue for determination is whether the mandatory imposition of the death penalty on persons suffering from mental illness or disorder is in violation of the right to life under Article 4 of the Charter.

213. The Court recalls that in the judicial system of the Respondent State, the mandatory imposition of the death sentence violates Article 4 of the Charter as the judicial officer is not allowed to take into account circumstances that are peculiar to the accused or the commission of the offence.[107] It is therefore immaterial whether the accused person raised the issue of their mental illness during the sentencing process as the decision on conviction irretrievably binds the judicial officer in terms of sentencing. It follows that in the present Application, even if the Applicants had raised the issue of their mental illness at the stage of sentencing, doing so would not have changed their fate.

[106] The third of the UN Safeguards; William A Schabs, "International Norms on Execution of the Insane and the Mentally Retired", 4 CRIM. L. FORUM 95, 113 (1993); UN Economic and Social Counsel Res. 1989/64, § 1(d), implementation of the safeguards guaranteeing protection of rights of those facing the death penalty (24 may 1989); *Francis v. Jamaica* (Communication no. 606/1994, UN Doc. CCPR/C/54/D/606/1994, § 9.2 (H.R.C. 3 Aug., 1995)); *Sahadath v. Trinidad and Tobago* (Communication No. 684/1996, UN Doc. CCPR/C/74/D/684/1996, § 7.2 (H.R.C 15 April, 2002)); UN Commission On Human Rights Res. 1999/61, questions of the death penalty (28 Arp. 1999) (available at: http://www.refworld.org/docid/3b00f3e40.html); UN commission on human rights res. 2005/65, question of the death penalty (27 apr. 2000) (emphasis added) available at https://www.refoworld.org/publisher,UNCHR,RESOLUTION,3b00f29a13,0.html); See Asma Jahangir (Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions), Report On Extrajudicial, Summary Or Arbitrary Executions, § 97, UN Doc. E/CN.4/2000/3, (2000); BACRE Waly Ndiaye; Gen. Comment No. 3 on the African Charter on Human Peoples Rights: The right to life (Art. 4); Afr. Comm'n H.P.R, § 25 (NOV. 2015), etc.

[107] *Rajabu and Others v. Tanzania*, *supra*, §§ 99-111*; Bonge and Others v. Tanzania*, *supra,* § 80; *Zabron v. Tanzania*, *supra*, § 140; *Damian v. Tanzania*, *supra*, §§ 128-132.

214. This Court considers that the fact that the domestic courts were deprived of the discretion in respect of sentencing did not allow them to examine the very possibility of the Applicants in the present Application having suffered from mental illnesses during the domestic proceedings. As such, the imposition of the death sentence on the Applicants in the present Application is in violation of the right to life under Article 4 of the Charter for the same reason as has consistently been stated by this Court in all other similar instances. This is because the criminal law of the Respondent State did not allow the Applicants in this case to raise any issue concerning their mental health as the judicial officer would have dismissed the said issues.

215. In the circumstances, this Court finds that the Respondent State violated the Applicants right to life as guaranteed under Article 4 of the Charter owing to the domestic courts not been afforded discretion to consider the mental health of the Applicants in imposing the death sentence.

VIII. REPARATIONS

216. Both Applicants, pray the Court to:

    i. Order the Respondent State to release them from prison;
    ii. Vacate the conviction and sentence of the death penalty imposed on them and accordingly to remove them from death row, however, the Second Applicant in the alternative specifically prays that the mandatory death penalty be commuted;
    iii. Amend the law to remove the mandatory death penalty for the statues;
    iv. Compensate them for the loss of earnings from their livelihood; and
    v. Pay appropriate reparations for all the suffering and harm caused.

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217. On its part, the Respondent State prays the Court to dismiss the Applicant's prayers for reparations in their entirety on the grounds that they are

baseless since the Court has no jurisdiction to quash and set aside the conviction.

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218. The Court notes that 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."

219. As it has consistently held, for reparations to be granted, the Respondent State found guilty of an internationally wrongful act is required to make full reparation for the damage caused to the victim.[108] Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the full damage suffered. Finally, the Applicant bears the onus to justify the claims made.[109]

220. The Court also restates that the measures that a State could take to remedy a violation of human rights can include restitution, compensation and rehabilitation of the victim, as well as measures to ensure non-repetition of the violations and taking into account the circumstances of each case.[110]

221. The Court reiterates that the onus is on the Applicant to provide evidence to justify his prayers.[111] With regard to moral damages, the Court has held

[108] *Sadick Marwa Kisase v. United Republic of Tanzania*, ACtHPR, Application No. 005/2016, Judgment of 2 December 2021, § 88; *Wilfred Onyango Nganyi and 9 others v. United Republic of Tanzania* (reparations) (4 July 2019) 3 AfCLR 308, § 13; *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 19; *Munthali v. Republic of Malawi*, *supra*, § 108.
[109] *Norbert Zongo and Others v. Burkina Faso* (reparations) (5 June 2015) 1 AfCLR 258, §§ 20-31; *Lohé Issa Konaté v. Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, §§ 52-59; and *Reverend Christopher R. Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, §§ 27-29.
[110] *Ingabire Victoire Umuhoza v. Republic of Rwanda* (reparations) (7 December 2018) 2 AfCLR 202, § 20. See also *Elisamehe v. Tanzania*, *supra*, § 96.
[111] *Kennedy Gihana and Others v. Republic of Rwanda* (merits and reparations) (28 November 2019) 3 AfCLR 655, § 139; See also *Mtikila v. Tanzania* (reparations), *supra*, § 40; *Konaté v. Burkina Faso* (reparations), *supra*, § 15(d); and *Elisamehe v. Tanzania*, *supra*, § 97.

that the requirement of proof is not strict[112] since, it is presumed that there is prejudice caused when violations are established.[113]

222. The Court has also previously held that a judgment finding violation of rights protected in the Charter forms part of reparations.[114]

223. In the instant case, the Court has found that the Respondent State violated the Applicants rights by:

i. Denying them access consular assistance as Article 7(1)(c) of the Charter as read with Article 36(1) of the VCCR;
ii. Failing to provide them with interpretation services during their trial, as provided under Article 7(1)(c) of the Charter as read together with Article 14(3)(a) of the ICCPR;
iii. Failing to try them within a reasonable time, as provided for under Article 7(1)(d) of the Charter;
iv. Failing to treat them with dignity and subjecting them to inhumane, cruel and degrading treatment, protected under Article 5 of the Charter; and
v. Imposing the mandatory death penalty contrary to the provisions of Article 4 of the Charter.

A. Pecuniary reparations

i. Material prejudice

224. The Applicants seek compensation for the loss of income and pray for appropriate reparations.

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[112] *Zongo and Others v. Burkina Faso* (reparations), *supra*, § 55. See also *Elisamehe v. Tanzania*, *supra*, § 97.
[113] *Rajabu and Others v. Tanzania*, *supra*, § 136; *Guehi v. Tanzania*, *supra*, § 55; *Lucien Ikili Rashidi v. United Republic of Tanzania* (28 March 2019) (merits and reparations) 3 AfCLR 13, § 119; *Zongo and Others v. Burkina Faso* (reparations), § 55; and *Elisamehe v. Tanzania*, *supra*, § 97.
[114] *Andrew Ambrose Cheusi v. United Republic of Tanzania* (judgment) (26 June 2020) 4 AfCLR 219, § 173; *Armand Guéhi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 194; *Reverend Christopher Mtikila v. United Republic of Tanzania* (reparations) (13 June 2014) 1 AfCLR 72, § 45.

225. The Respondent State prays that the prayer for reparations be dismissed.

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226. The Court recalls that for a claim for material prejudice to be granted, an applicant must show a causal link between the established violation and the loss suffered, and further prove the loss suffered.[115] Furthermore, the Applicant must provide justification for the amounts claimed.[116] The Applicant must also provide acceptable evidence to prove expenses allegedly incurred, such as receipts for the payments.[117]

227. In the instant case, the Court notes that the Applicants did not pray for a specific amount of pecuniary reparation for adequate compensation, and furthermore, did not establish a causal link between the established violations and the loss suffered. The Court considers that it is not necessary to take measures in this regard as the claim is unjustified and therefore rejects it.

ii. Moral prejudice suffered by the Applicants

228. The Applicants aver that they have suffered and endured severe hardships starting from the moment they were arrested which continued through their detention, including beatings, lack of adequate food, medicines, isolation, not being visited by their loved ones, psychological and mental torture owing to the fact that they are death row inmates, and the prolonged delay in being tried etc.

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[115] See *Guehi v. Tanzania*, *supra*, § 181; *Zongo and Others v. Burkina Faso* (reparations), § 62; *Henerico v. Tanzania, supra*, § 180.
[116] *Zongo and Others v. Burkina Faso*, *ibid*, § 81; and *Mtikila v. Tanzania* (reparations), *supra*, § 40.
[117] *Christopher Jonas v. United Republic of Tanzania* (reparations) (25 September 2020) 4 AfCLR 545, § 20, *Guehi v. Tanzania*, *supra*, § 18.

229. The Respondent State prays that the Applicants' prayer for reparations be dismissed.

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230. The Court recalls its jurisprudence in *Armand Guehi v. United Republic of Tanzania*, where, due to a delay in the commencement of the Applicant's trial, it held that "in the circumstances of this case where the Applicant was accused of murder and faced the death sentence, such delay is also likely to have caused anguish. The prejudice that ensued warrants compensation, which the Court has discretion to evaluate based on equity."[118]

231. The Court further recalls its jurisprudence in *Ally Rajabu and Others v. United Republic of Tanzania*,[119] in which it observed that:

> [t]he prolonged period of detention awaiting execution causes the sentenced persons to suffer: … severe mental anxiety in addition to other circumstances, including, …: the way in which the sentence was imposed, lack of consideration of the personal characteristics of the accused; the disproportionality between the punishment and the crime committed; … the fact that the judge does not take into consideration the age or mental state of the condemned person; as well as continuous anticipation about what practices their execution may entail.

232. Regarding the Applicants claim that the years of incarceration caused them severe distress and anguish and significantly affected their physical and mental wellbeing, the Court observes that this was occasioned during the pre-trial detention period of six (6) years, ten (10) months and nineteen (19) days. The Court is of the view that, had the Applicants been tried in a timelier manner, considering their status as refugees facing the death penalty, the mental distress and anguish they experienced could possibly have

[118] *Guehi v. Tanzania*, *supra*, § 181.
[119] *Rajabu and Others v. Tanzania, supra,* §§ 149-150.

mitigated. The anguish and torment suffered warrant compensation, which the Court has discretion to evaluate based on equity.

233. However, given the circumstances of the case, and in light of the Court's jurisprudence that a judgment in favour of a victim is in itself a form of satisfaction and a reparation for moral damages,[120] including the fact that the Applicants have also not indicated any sums for adequate compensation, the Court in its discretion awards to the Applicants, an amount of Five Hundred Thousand Tanzanian Shillings (TZS 500,000) each for moral damages suffered.

B. Non-pecuniary reparations

i. Amendment of the law to ensure respect for life

234. The Applicants pray the Court to order the Respondent State to amend its laws to ensure respect of the right to life under Article 4 of the African Charter by removing the mandatory death sentence for the offence of murder.

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235. The Respondent State prays for dismissal of this prayer.

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236. The Court recalls its position in previous judgments dealing with the mandatory imposition of the death penalty where it has ordered the Respondent State to undertake all necessary measures to remove from its Penal Code the provision for the mandatory imposition of the death sentence.[121] The Court notes that to date it has issued several identical

[120] *Mtikila v. Tanzania* (reparations), *supra*, § 45.
[121] *Mwita v. Tanzania* (judgment), *supra,* § 166; *Msuguri v. Tanzania* (merits and reparations), *supra*, § 128; *Henerico v. Tanzania* (merits and reparations), *supra,* § 207 and *Juma v. Tanzania* (judgment), *supra,* § 170.

orders for the removal of the mandatory death penalty which were delivered in 2019, 2021, 2022, 2023, and 2024; yet, as at the date of the present judgment, the Court does not have any information to the effect that the Respondent State has implemented the said orders.

237. The Court notes that in the present judgment it has found that the mandatory imposition of the death penalty violates the right to life guaranteed under Article 4 of the Charter and therefore holds that the said sentence ought to be removed from the books of the Respondent State within six (6) months of the notification of the present Judgment.

238. Similarly, in its previous judgments,[122] this Court has held that a finding of violation of the right to dignity owing to the use of hanging as a method of execution of the death penalty warranted an order that the said method be removed from the books of the Respondent State. In light of its finding in this Judgment, the Court orders the Respondent State to take all necessary measures to remove "hanging" from its laws as the method of execution of the death sentence, within six (6) months of the notification of the present Judgment.

ii. Rehearing

239. The Applicants do not make any prayer for rehearing.

240. The Court considers however that it is in the interest of justice to make an order regarding rehearing to give effect to the correlated order that the domestic provision on the mandatory death sentence be removed. The Court reiterates its earlier position that the violations in the case of the Applicants did not impact on his guilt and conviction, and that the sentencing

[122] *Deogratius Nicholaus Jeshi v. United Republic of Tanzania*, ACtHPR, Application No. 017/2016, Judgment of 13 February 2024 (merits and reparations), §§ 111, 112, 118; *Romward William v. United Republic of Tanzania*, ACtHPR, Application No. 030/2016, Judgment of 13 February 2024 (merits and reparations), § 94.

is affected only to the extent of the mandatory nature of the penalty. The Court holds that a remedy is warranted in that respect.

241. The Court, therefore, orders the Respondent State to take all necessary measures for the rehearing of the case on the sentencing of the Applicants through a process that does not allow a mandatory imposition of the death penalty, while upholding the full discretion of the judicial officer.

iii. Request to set aside the sentence and release the Applicants

242. The Applicants pray the Court to set aside the death sentence and order their release from prison. They submit that the restoration of their liberty is the most feasible way in which adequate reparations could be realised, given the harrowing circumstances of their imprisonment and continued detention.

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243. The Respondent State prays that no reparations be awarded in favour of the Applicants.

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244. On the prayer that the sentence be revoked, the Court has held that orders such as vacating the death sentence are to be determined on a case-by-case basis having due consideration mainly to proportionality between the measure sought and the extent of the violation established.[123]

245. In the present case, the Court has found that the provision for the mandatory imposition of the death sentence in the Respondent State's legal framework violates the right to life under Article 4 of the Charter. The Court, therefore, orders the Respondent State to vacate the death sentence in the case of

[123] *Rajabu and Others v. Tanzania* (merits and reparations), *supra,* § 156.

the Applicants and remove them from death row pending the rehearing ordered above.

246. With respect to the prayer for release, the Court recalls its position in *Gozbert Henerico v. United Republic of Tanzania* where it held that:

> 'The Court can only order a release if an Applicant sufficiently demonstrates or if the Court by itself establishes from its findings that the Applicant's arrest or conviction is based entirely on arbitrary considerations and that his continued detention would occasion a miscarriage of justice.'[124]

247. The Court notes that the violations found in the present Judgment do not affect the Applicants' guilt and conviction, and the sentencing is affected only to the extent of the mandatory nature of the penalty. The commission of the offence as adjudicated by domestic courts has thus remained unaffected in the proceedings before this Court. Further, the order made above for a rehearing of the Applicants' case on sentencing demands that they remain in custody pending the said proceedings. The prayer for release is consequently declined.

iv. Publication of the Judgment

248. Though the Applicants did not seek orders for publication of this judgment, pursuant to Article 27 of the Protocol and the inherent powers of the Court, the Court will consider this measure.

249. The Court recalls its position that "a judgment, *per se,* can constitute a sufficient form of reparation for moral damages."[125] Nevertheless, in its

[124] *Henerico v. Tanzania* (merits and reparations), *supra,* § 202; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550, § 84; *Minani Evarist v. United Republic of Tanzania* (merits and reparations) (21 September 2018) 2 AfCLR 402, § 82 and *Juma v. Tanzania* (judgment)*, supra,* § 165. See also, *Dominick Damian v. United Republic of Tanzania*, ACtHPR, Application No. 048/2016, Judgment of 4 June 2024 (merits and reparations), §§ 163-166.
[125] See *Mtikila v. Tanzania* (reparations), *supra*, § 45.

previous judgments, the Court has *suo motu* ordered the publication of its judgments where the circumstances so require.[126]

250. The Court observes that, in the present case, the violation of the right to life by the provision on the mandatory imposition of the death penalty goes beyond the individual case of the Applicants and the violation of the right to consular services seem to be systemic in nature.

251. In light of the above, the Court orders the publication of this Judgment on the websites of the Judiciary, and the Ministry for Constitutional and Legal Affairs within three (3) months of the notification of this Judgment.

v. Implementation and reporting

252. The Parties did not make specific prayers in respect of implementation and reporting.

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253. The justification provided earlier in respect of the Court's decision to order publication of the judgment, notwithstanding the absence of express prayers by the Parties, is equally applicable in respect of implementation and reporting. Specifically in relation to implementation, the Court notes that in its previous judgments issuing the order to repeal the provision on the mandatory death penalty, the Respondent State was directed to implement the decisions within one (1) year of issuance of the same.[127] In subsequent judgments, the Court has granted the Respondent State a period of six (6) months to implement the same order.[128]

[126] *Guehi v. Tanzania*, *supra*, § 194; *Mtikila v. Tanzania* (reparations), *supra*, § 45 and 46(5); and *Zongo and Others v. Burkina Faso* (reparations), § 98.
[127] *Crospery Gabriel and Another v. United Republic of Tanzania*, ACtHPR, Application No. 050/2016, Judgment of 13 February 2024 (merits and reparations), §§ 142-146; *Rajabu v. Tanzania* (merits and reparations), *supra*, § 171 and *Henerico v. Tanzania* (merits and reparations), *supra*, § 203.
[128] *Damian v. Tanzania*, *supra*; *Zabron v. Tanzania, supra; Crospery Gabriel v. Tanzania*, *ibid; William v. Tanzania*, *supra; Jeshi v. Tanzania*, *supra*.

254. The Court observes that, in the present case, the violation of the right to life by the provision on the mandatory imposition of the death penalty goes beyond the individual case of the Applicants and is systemic in nature. The same applies to the violation in respect of execution by hanging.

255. In view of this, therefore, the Court deems it necessary to order the Respondent State to periodically report on the implementation of this judgment in accordance with Article 30 of the Protocol. The report should detail the steps taken by the Respondent State to remove the impugned provision from its Penal Code.

256. The Court notes that the Respondent State has not provided any information on the implementation of its judgments in any of the earlier cases where it was ordered to repeal the mandatory death penalty and the deadlines that the Court set have since lapsed. In view of this fact, the Court still considers that the orders are warranted both as an individual protective measure, and a general restatement of the obligation and urgency behoving on the Respondent State to scrap the mandatory death penalty and provide alternatives thereto. The Court holds, therefore, that the Respondent State is under an obligation to report on the steps taken to implement this judgment within six (6) months from the date of notification of this judgment.

IX. COSTS

257. The Applicants pray the Court to order that the Respondent State bare costs.

*

258. The Respondent State prays the Court to order the Applicants to pay the costs of this Application.

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259. Rule 32(2) of its Rules of the Court provides that “unless otherwise decided by the Court, each party shall bear its own costs.

260. Given the circumstances of the present Application, the Court finds no reason to depart from the above provision. Consequently, it rules that each party shall bear its own costs.

X. OPERATIVE PART

261. For these reasons:

THE COURT,

Unanimously,

On jurisdiction

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

On admissibility

iii. *Dismisses* the objection to the admissibility of the Application;
iv. *Declares* that the Application is admissible.

On merits

Unanimously

v. *Holds* that the Respondent State did not violate the Second Applicant’s right not to be discriminated against on the basis of national origin and refugee status as provided under Article 3(2) of the Charter;

vi. *Holds* that the Respondent State did not violate Article 7(1)(c) of the Charter as read together with Article 14(3)(d) of the ICCPR with regard to providing effective legal representation to the Applicants;

vii. *Holds* that the Respondent State did not violate the right to a fair trial as enshrined under Article 7(1)(c) of the Charter with regard to the Second Applicant's conviction and sentence solely on the basis of a coerced disputed statement;

viii. *Holds* that the Respondent State violated the Applicants' right to access consular assistance thereby violating Article 7(1)(c) of the Charter as read with Article 36(1) of the VCCR;

ix. *Holds* that the Respondent State violated Article 7(1)(c) of the Charter as read together with Article 14(3)(a) of the ICCPR, with regard to the alleged failure provide the Applicants with interpretation service during their trial;

x. *Holds* that the Respondent State violated the Applicants' right to be tried within a reasonable time as provided for under Article 7(1)(d) of the Charter;

xi. *Holds* that the Respondent State violated the Applicants' right not to be subjected to cruel, inhumane and degrading treatment, protected under Article 5 of the Charter, through the actions of the police authorities and failure of the District Magistrate to order an inquiry into the visible injuries of the Applicants during trial;

xii. *Holds* that the Respondent State violated the Applicants right to dignity enshrined in Article 5 of the Charter with regard to the extended duration of keeping the Applicants on death row;

xiii. *Holds* that the Respondent State violated the Applicants' right to dignity guaranteed under Article 5 of the Charter by subjecting them to deplorable conditions of detention.

By a majority of eight (8) Judges for, and two (2) Judges against,

xiv. *Holds* that the Respondent State violated the Applicants right to life protected under Article 4 of the Charter in relation to the mandatory imposition of the death penalty by failing to allow the judicial officer discretion to take into account the nature of the offence and the circumstances of the offender;

xv. *Holds* that the Respondent State violated the Applicants right to dignity enshrined in Article 5 of the Charter with regard to with regard to the method of execution by hanging.

On reparations

Pecuniary reparations

xvi. *Does not grant* reparations for material prejudice;

xvii. *Grants* Tanzanian Shillings Five Hundred Thousand (TZS 500,000) to each Applicant for moral damage;

xviii. *Orders* the Respondent State to pay the amount indicated above free from taxes within six (6) months, effective from the notification of this judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

xix. *Does not grant* the Applicants' prayer for release;

xx. *Orders* the Respondent State to revoke the death sentence imposed on the Applicants and remove them from death row;

xxi. *Orders* the Respondent State to take all necessary measures, within six (6) months from the notification of this Judgment to remove the mandatory imposition of the death penalty from its laws;

xxii. *Orders* the Respondent State to take all necessary measures, within six (6) months from the notification of this Judgment to

remove “hanging” from its laws as a method of execution of the death penalty;

xxiii. *Orders* the Respondent State to take all necessary measures, within one (1) year of the notification of this judgment, for the rehearing of the case on the sentencing of the Applicant through a procedure that does not allow the mandatory imposition of the death sentence and upholds the discretion of the judicial officer;

xxiv. *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 implementation and reporting

xxv. *Orders* the Respondent State to submit to it, within six (6) 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

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

Signed:

Modibo SACKO, Vice-President;

Ben KIOKO, Judge;

Rafaâ BEN ACHOUR, Judge;

Suzanne MENGUE, Judge;

Tujilane R. CHIZUMILA, Judge;

Chafika BENSAOULA, Judge;

Blaise TCHIKAYA, Judge;

Stella I. ANUKAM, Judge;

Dumisa B. NTSEBEZA, Judge;

Dennis D. ADJEI, Judge;

and Robert ENO, Registrar.

In accordance with Article 28(7) of the Protocol and Rules 70(2) and (3) of the Rules, the Separate Opinion of Justice Ben KIOKO; and the Declarations of Justice Rafaâ BEN ACHOUR, Blaise TCHIKAYA and Justice Dumisa B. NTSEBEZA are appended to this Judgment.

Done at Arusha, this Third Day of September in the Year Two Thousand and Twenty-Four in English and French, the English text being authoritative.