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

Declaration by Blaise Tchikaya, Judge

The Matter of
***Habyalimana Augustino and Muburu Abdulkarim v. Tanzania*,**
(Application No. 015/2016)

3 September 2024

1. On 3 September 2024, the Court handed down a decision on the death penalty. It was handed down in the case of *Habyalimana Augustino and Muburu Abdulkarim,* Tanzanian nationals who seized the Court on 8 March 2016. This judgment[1] followed the Court's Order of 3 June 2016 in which, *suo motu*, it ordered provisional measures directing the Respondent State to stay execution of the death penalty pending consideration of the Application.

2. The judgment, which is the subject of this Declaration, was preceded by lengthy deliberations essentially focusing on whether the Applicants rightly held the Respondent State responsible for the undue prolongation of the domestic proceedings.[2]

3. This question arises solely in respect of temporal and objective aspects. The Applicants were detained for six years, ten months and nineteen days before the commencement of their trial. Thus, they were held for a total of almost 7 years without a trial. As the Respondent State did not provide evidence that the Applicants were responsible for the delay, the issue could have been quickly resolved. The Respondent

[1] ACtHPR, *Habyalimana Augustino and Muburu Abdulkarim v. Tanzania*, Judgment, 3 September 2024.
[2] The record shows that the Applicants were arrested on 8 May 1999 and formally charged with murder on 18 April 2001. The second preliminary hearing was held on 2 March 2006 and the trial before the Bukoba High Court commenced on 27 March 2006. The trial before the High Court ended on 31 May 2007. see Judgment, §§ 117 and 118.

State could not exonerate itself by blaming the delay on its internal criminal justice system or the way it operated.[3]

4. While we were not on the bench when the Court handed down the Order of 3 June 2016, we would have approved its operative part and voted in favour of it.

5. In fact, the Court already noted in the said Order that the question at issue was of extreme gravity and that the Respondent State had to be injuncted to wait and not to carry out the death sentence pronounced by domestic courts. The Court stated, in a recital accompanying all measures ordered in respect of death sentences, that :

> "the situation raised in the present Application is of extreme gravity and represents a risk of irreparable harm to the rights of the Applicants as protected by Article 7(1) of the Charter, if the death sentence were to be carried out".[4]

6. The purpose of this declaration in connection with the judgment on the merits in *Habyalimana Augustino and Muburu Abdulkarim v. Tanzania* is, in particular, to convey disapproval of the fact that the Court did not go any further in the reasoning already contained in the grounds of the Order. The Court recognised that there was :

> "a risk of irreparable harm to the rights of the Applicants as protected by Article 7(1) of the Charter, if the death sentence were to be carried out".

7. While distinguishing between the provisional measures regime and that of decisions on the merits, it is worth pointing out that the Court, for a very long time, has been silent on the need to reject the death penalty. It retains this jurisprudential posture which it adopted almost a decade ago. The risk of the death penalty was recognised as far back as the *Armand Guehi* case.[5] The Court held that the death penalty :

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[3] ICJ., *Vapeur Wimbledon*, Allemagne v. France and others, CPJI, 17 August 1923; ICJ., *LaGrand*, Allemagne V. United States, ICJ, Order for the indication of provisional measures, 3 March 1999, *ECR* 1999, p. 7; judgment, 27 June 2001: these judgments express the principle. See in this sense the ECHR judgment, *Malone v. United Kingdom*, 2 August 1984.

[4] ACtHPR, *Habyalimana Augustino and Muburu Abdulkarim v. Tanzania*, Order, June 3, 2016

[5] ACtHPR, *Armand Guehi v. Tanzania,* Order, 18 March 2016: Incarcerated in Dar-es-Salaam prison (Tanzania), the Applicant*, Mr Guehi*, was sentenced to death for murder on 30 March 2010. On 28 February 2014, the Court of Appeal upheld the death sentence. Before this Court, the Applicant claims,

> "where there is risk of execution of the death penalty which will jeopardise the enjoyment of the rights guaranteed under Article 7 of the Charter and Article 14 of the ICCPR".[6]

8. We disapprove of the Court's majority attitude of elevating the death penalty by merely denouncing the mandatory death penalty in its reasoning . Any death sentence is a death sentence, whether it is mandatory or not. It is this iniquitous and useless sanction that must be disapproved of and repudiated from the social order. The Court could help States that are slow to achieve this.

9. We will not return to the question of how the death penalty is carried out. The Court's ruling is in line with international law, insofar as it has held that hanging :

> "Violates the applicant's right to dignity, protected by Article 5 of the Charter, by virtue of the manner in which the sentence imposed on them was carried out, namely by hanging".[7]

10. It therefore seems incomprehensible that, after underscoring that the mandatory imposition of the death penalty:

> "Violates the right to life due to its arbitrary nature, the Court holds that, as the method of implementation of that sentence, that is hanging, encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment".[8]

11. The Court should have concluded long ago that there is no longer any room for according the death penalty any legal validity in any form.[9] Not to mention the death

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in particular, that his conviction did not the result from a fair and equitable trial. According to him, his right to a fair trial was violated and that several of his rights were infringed during the proceedings.

[6] ACtHPR, *Armand Guehi v. Tanzania,* Idem, § 19.

[7] *Idem*, point XV of the operative part.

[9] Ibid, § 58.

[9] See in addition to the bases provided by the African Charter: the International Covenant on Civil and Political Rights, with 171 States parties and 6 signatory States, which entered into force on 23 March 1976; the First Optional Protocol to the International Covenant on Civil and Political Rights; the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by the General Assembly in its resolution 44/128 of 15 December 1989; the Convention on the Rights of the Child, with 196 States parties, which entered into

row, the methods of execution, including hanging, the infamous guillotine or the uncontrollable electrocution and lethal dose, all border on torture.

Blaise Tchikaya, Judge

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

force on 2 September 1990; see also the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States on 8 September 1990. Also, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organisation of American States on 8 June 1990; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 28 April 1983; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, 3 May 2002.