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

Declaration by Judge Blaise Tchikaya

The Matter of
Ladislaus Chalula v. Tanzania

Application No. 003/2018

5 February 2025

1. I disagreed with the operative part of the *Ladislaus Chalula*[1] decision handed down on 5 February 2025. This decision against Tanzania come after many others[2] which do not reject the elimination of life and remains judicially silent on the death penalty. This decision is concerned only with the freedom of the judge as regards the mandatory death penalty. The unfortunate Ladislaus Chalula is still on death row awaiting execution.

2. This Declaration has a two-fold objective essentially: firstly, I do not understand why, for so long, the Court has gone out of its way to distinguish between forms of death penalty. In our view, whether it was mandatory or not makes no difference.[3] The death penalty, which has already been banished from international human rights law, must be repudiated. On the other hand, the Court's approach to analysis of the mandatory death penalty only focuses on its impact on the powers of judges. This Declaration sanctions this analysis as unacceptable. This approach has always struck us as parialistic.

3. However, the unity of international human rights law means that there cannot be one death penalty applicable to Ladislaus Chalula, subject of African international law, and another death penalty regime applicable to

[1] AfCHPR, *Ladislaus Chalula v. Tanzania* (Req. No. 003/2018): The Applicant, *Ladislaus Chalula*, who was travelling with a friend to the Kanyega gold mine on 31 March 1991 murdered Selemani Abdulla Rai whom they met on the way, and robbed him. They were subsequently arrested and charged with murder. The friend is not party to the present proceedings.
[2] v. Opinions under AfCHPR, *Ally Rajabu and others v. United Republic of Tanzania*, 28 November 2019, §§ 104 to 114; *Amini Juma v. United Republic of Tanzania*, §§ 120 to 131 and Gozbert *Henerico v. United Republic of Tanzania*, AfCHPR, 10 January 2022, § 160.
[3] Opinion under AfCHPR, *Ally Rajabu and others v. Tanzania*, § 5.

other subjects of international law. The current worldwide trend in the majority of States is towards abolition, in fact or in law. The European system, as we shall recall,[4] provides for abolition in all circumstances. In any case, as the International Court of Justice emphasised in its judgment of 5 February 1970 in the *Barcelona Traction* case, States have a "legal interest"[5] in the protection of fundamental human rights.

4. The *Chalula judgment* reiterates the grounds on which so many objections have already been raised. It states:

> "The Court recalls its well-established jurisprudence that the mandatory nature of the death penalty constitutes a violation of the right to life, as guaranteed under Article 4 of the Charter". [6]

5. This disagreement concerns the rejection of the death penalty solely on the grounds of its mandatory nature and its method of enforcement, and not on the grounds of its unfairness, notwithstanding that Article 4 of the Charter allows for total repudiation of the death penalty. In present case, the Court should not confine itself to ruling on the judge's power.[7]

6. It has been said that the Court's approach is flawed. It does not sufficiently denounce the death penalty in the legal sphere of human rights. This approach aims to protect the judge's freedom to decide, who should pronounce this penalty in a non-mandatory manner. The Court's position is as ambivalent as ever with regard to the preservation of life, which the death penalty so openly subverts.

7. The *Chalula* decision reiterates a somehow ambiguous idea from previous

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[4] See *Infra*. § 13 *et seq.*
[5] ICJ, *Barcelona Traction Ligth and Power Company*, *Canada v. Spain*, February 5, 1970, *Rec.* 1970, p. 32
[6] AfCHPR, *Ally Rajabu et al v. United Republic of Tanzania* (28 November 2019) 3 AfCLR 539, §§ 104 to 114; *Amini Juma v. United Republic of Tanzania* (merits and reparations), §§ 120 to 131 and Gozbert *Henerico v. United Republic of Tanzania*, AfCHPR, Application No. 056/2016, judgment of 10 January 2022 (merits and reparations), § 160.
[7] The trend goes back to AfCHPR, in *Rajabu and others v. Tanzania*, 8 December 2019, § l4-53, *supra*.

cases[8] against the same state, namely,

> "[The Applicant] was mandatorily sentenced to death under a law that does not allow any discretion to the judicial officer. The Court, in these circumstances, reiterates its finding in its previous decisions that the mandatory imposition of the death penalty is a violation of the right to life under Article 4 of the Charter".

8. As far as the death penalty is concerned, the Court's position remains to be seen, given the lack of the judge's personal discretion that results from the mandatory penalty. There is a grey area here, a kind of non-decision that needs to be highlighted.

9. The Court should accentuate the strong abolitionist trend that upholds the primordial right to life in Africa. As noted in similar cases, the continent is joining the international movement working to achieve the total abolition of the death penalty. Nearly twenty of the 55 African Union Member States no longer execute death row inmates, and nearly forty countries are abolitionist in law or in practice.[9]

10. The *Ladislaus Chalula* judgment once again provides an opportunity to reflect on the unity of the legal regime governing the death penalty. The question of abolishing the death penalty does not fall solely within the domestic jurisdiction of States, as we have said.[10] Human rights cannot be the exclusive domain of States, especially when these States adhere to the international system.

11. When a clear trend emerges, as in the case of the abolition of the death penalty, there is no justification for outlier states not to follow suit. This is

[8] AfCHPR, *Lameck Bazil v. Tanzania*, 13 November, 2024, § 55; see also AfCHPR, *Gozbert Henerico v. Tanzania*, judgment of 10 January 2022, § 160; *Romward William v. Tanzania*, 13 February 2024, § 59 to 65.
[9] AfCHPR, *Marthine Christian Msuguri v. Tanzania*; Ghati *Mwita v. Tanzania*; *Igola Iguna v. Tanzania*, 1 December 2022.
[10] AfCHPR, *Thomas Mgira v. Tanzania*; *Umalo Mussa v. Tanzania*, 13 June 2023. See Partial dissenting opinion.

unacceptable, even in the name of sovereignty. An individual position is no longer tenable. Herein lies the full meaning of what Jean-Claude Bonichot called “the necessary reconciliation of the law with international commitments”[11] as the bedrock of harmonious development in the protection of rights.

12. The landmark 2 March 2010 ruling by the European Court in *Al-Saadoon and Mufdhi v. United Kingdom and Northern Ireland,*[12] established a final ban on the death penalty in all circumstances and in all forms. This ruling closes the debates whose outcome was in fact known beforehand, namely, there is no such thing as a mild death penalty, all forms of the death penalty constitute a deprivation of life and therefore, an annihilation of the human being. This annihilation of humanity cannot be a magic wand to the failures of public policy.

13. We should even say, with regret, that in *Chalula* the Court does not deal with the death penalty although the case raises the issue of the death penalty. The Court, in line with its own thinking, simply deplores the judge’s lack of independence. The question of the death penalty is relegated to the background

14. According to statistics, three quarters of the world’s states no longer impose capital punishment, having abolished it in law or in fact. The Court should take note of this and, in the name of human rights protection, follow up this irreversible trend.

[11] Bonichot (Jean-CL.), l'influence au droit international sur les organes juridictionnels français, in *Les compétences de l'État en droit international*, Ed. Pédone, 2006, pp. 263 et seq.
[12]ECHR, *Al-Saadoon and Mufdhi v. United Kingdom and Northern Ireland, 2* March 2010: “Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable ... form of punishment that is no longer permissible under Article 2”., § 119.

Blaise Tchikaya, *Judge*

Done at Arusha, this Fifth Day of February in the Year Two Thousand and Twenty-Five, the French version being authoritative.