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

Separate Opinion of Judge Blaise Tchikaya

The Matter of

Centre for Human Rights and Others v. Tanzania
Application No. 019/2018

5 February 2025

In a consolidated application, three associations, *the Centre for Human Rights* (based in Pretoria, South Africa), *the Institute for Human Rights and Development in Africa* (based in Banjul, Gambia) and *the Legal and Human Rights Centre* (based in Dar es Salaam, Tanzania), requested the Court to rule on albinism, a systemic African issue. The Court completed its deliberations and handed down a decision against Tanzania, the Respondent State, on 5 February 2025.[1]

1. I pen this this Separate Opinion to convey our disagreement with the Court's decision. I believe that while the overall trajectory of the Court's decision in the case of persons with albinism (PWA) is defensible, the fact remains that part of the decision invites further analysis and conclusions.

2. While I was unable to win over the majority of the honourable judges, I am of the view that the Court, in its judgment, should have roped in additional analyses and conclusions, particularly in paragraphs 152 to 190 relating to the right to life and the responsibility of the Respondent State. I therefore have serious reservations about the operative part, insofar as the Court holds:

> "The Respondent State has violated the right to life protected under Article 4 of the Charter and Article 6 of the ICCPR by failing to take

[1] AfCHPR, *Centre for Human Rights and others v. United Republic of Tanzania*, 5 February 2025.

sufficient preventive measures, effectively investigate and punish the perpetrators of killings of PWA".[2]

3. Bound by its investigative techniques, the Court, despite having taken the full measure of the question, did not complete examination and exchange of pleadings until 2024, even though the case was brought before to it on 26 July 2018. The PWA case therefore remained pending before the Court for six good years. However, it should be noted that this is in line with the average duration of proceedings before international bodies.[3] The parties participated actively, and on three occasions, the Court had to extend its time-limits to grant the Respondent State additional time to file its submissions, although it never did so. It was the Court's initiative to hold a public hearing, that, on 31 May 2024[4], it re-opened the exchange of pleadings.

4. The public hearing, which took place on 10 and 11 September 2024, was marked by various submissions and statements from the Applicants, the Respondent State, the *amici curiae* and their representatives. The Parties raised numerous preliminary objections and various preliminary issues, including the Respondent State challenging the calling of witnesses by *amici curiae.*

5. My observations in this opinion seek to express an overall position on the judgment. In fact, the Court holds *the Respondent State fully liable for the*

[2] *Idem*, point VIII of the operative part. The same reservations apply to point IV of the same operative part, which states that: "the Respondent State violated the right to dignity under Article 5 of the Charter as well as the freedom from torture, degrading and inhumane treatment under Article 5 of the Charter and 7 of the ICCPR by failing to protect PWA […].

[3] What international human rights law requires of national systems applies *mutatis mutandis* to the international system. See, in particular, the fact that France was condemned for violating Article 6 § 1 of the European Convention for an investigation that lasted more than seven years between placement in police custody and the dismissal of the case. In this case, "reasonable time" was exceeded. See ECHR, *H. Goetschy v. France*, 8 February 2018 There appears to be latitude for the settlement of inter-state disputes. ICJ, *Land and Maritime Dispute*, *Cameroon v. Nigeria*, 10 October 2002. This ruling put an end to a procedure that had lasted almost eight and a half years before the said Court. See D'Argent Pierre, Des frontières et des peuples : l'affaire de la Frontière terrestre et maritime entre le Cameroun et le Nigeria, *AFDI*, 2002, p. 281; Practically the same length of time elapsed in *Barcelona Traction Light and Power Company* (*Belgium v. Spain*) following the filing of a new application by Belgium on 19 June 1962, the judgment on the merits was delivered on 5 February 1970, *ECR* 1970, p. 3.

[4] AfCHPR, *Centre for Human Rights and others v. Tanzania*, § 17.

situation of the PWA without providing sufficient legal grounding for this sanction and its consequences (I). It should also be noted that *the Court's application of Article 4 of the Charter is, in our view, inappropriate in this case* (II). Finally, it is our contention that the Court missed the opportunity to *optimise the horizontal effect of the African Charter on Human and Peoples' Rights* (III).

I. The Court should have better justified holding the Respondent State liable for violations suffered by PWA

6. The Applicants allege the violation of various rights.[5] Based on the case file and the various investigative acts, the Court had to establish the grounds for holding the Respondent State liable. This is the prerequisite for assigning any responsibility. In this case, the charges and reparations or the presumed satisfaction[6] may carry considerable weight.

7. As stated in our opinion in the *LIDHO* case,[7] the liability incurred by the State for harm caused individuals cannot be established mechanically. Nor is it established in terms that are "general or absolute", to use an expression from the area of administrative litigation in reference to the extra-contractual liability of the State.[8]

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[5]AfCHPR, *Centre for Human Rights and others v. Tanzania*, § 12. A set of rights corresponding to claims. These include individual subjective rights: The right to non-discrimination, protected by Article 2 of the Charter; the right to life, guaranteed by Article 4 of the same Charter; the right to respect for the dignity of the human person (Article 5 of the Charter); and rather collective public rights, such as the right to bring an action before the competent national courts under Article 7 of the Charter; the prohibition of the abduction, sale or trafficking of children, enshrined in article 29 of the African Children's Charter; the right not to be subjected to physical or moral torture or inhuman or degrading treatment or punishment (articles 5 of the Charter, 7 of the International Covenant on Civil and Political Rights and article 16 of the African Charter on the Rights and Welfare of the Child.

[6]Andriantsimbazovina (J.) et al., *Les grands arrêt de la Cour européenne des droits de l'homme*, Dalloz, 9th ed. 2019, p. 939: it is useful to read that: "Just satisfaction is intended to put the parties back in the situation in which they would have found themselves had there not been a violation of the Convention, including in inter-State cases in which the complaints are "comparable in substance" to those raised in an individual application. The analysis cited the ECHR case of *Cyprus v Turkey*, Gr. Ch.,12 May 2014, § 44. The State is responsible for distributing the sums among the individuals directly affected by the violations. It must enable the infringement to be brought to an end and erased.

[7] Dissenting opinion in *Ligue ivoirienne des droits de l'homme (LIDHO) et autres c. Côte d'Ivoire*, Application 041/2016 Judgment, 5 September 2023.

[8]Long (M.) et autres, *Les grands arrêts de la Jurisprudence administrative*, Dalloz, 16 éd. 2007, p. 5 et seq. see TC 8 février 1873, *Agnès Blanco*, conclusions David D. 1873.3.20. See also *Supra*, III.

> The principles governing liability and the obligation to make reparation, even in the field of human rights, are strict, and liability is not automatic.[9]

8. In this case, two elements should be highlighted. The first is to determine clearly where the event giving rise to liability lies when it has not been proven that it was negligent. The Respondent State explains that it took measures and had carried out investigations in order to curb incidental abuses against PWA. It insists that it did not violate the right to life and security of the person, protected by Article 4 of the Charter. The judgment states – and this has not been debunked - that:

> "The Respondent State contends that it has led the continental response to the attacks inflicted on PWA. It argues that since the murders were reported in the press around 2006, it has taken a proactive and strategic approach to the protection and empowerment of this vulnerable population".[10]

9. The second element should be the failure of the State to comply with the law, which resulted in a punishable fault based on the law of liability. However, the Court confined itself to a statement drawn from its previous jurisprudence:

> "The Court notes that the right to life holds an unparalleled status as the most sacred and fundamental of all rights, as it serves as the

[9]ICJ, *Corfu Channel, United Kingdom of Great Britain and Northern Ireland v. Albania*, 10 April 1949, ECR 4, p. 24; *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America*, 27 June 1986, 14, § 283; ICJ, *Gabčikovo-Nagymaros Project*, *Hungary v. Slovakia*, 25 November 1997, ECR. 7.§ 47. See Separate opinion in *Ligue ivoirienne des droits de l'homme (LIDHO) et autres v. Côte d'Ivoire*, 5 September 2023.

[10] AfCHPR, *Centre for Human Rights and others v. Tanzania*, 5 February 2025, § 160. Further evidence of this nature can be found in the evidence given by the Respondent State's representatives at the public hearing on 10 and 11 September 2024, namely that between 2006 and 2018, "its National Prosecution Services (hereinafter referred to as "NPS") prosecuted perpetrators of physical attacks against PWA in which in 42 cases […] while in seven cases, the accused were charged with manslaughter. See *Judgment*, 5 February 2025, § 165. Two cases involving Mwigulu Mwatonange and Baraka Cosmos were referenced. The "defendants were charged, prosecuted and convicted for assaulting PWA". During the public hearing, "the Respondent State's Witness No.1 testified that […] The State created an emergency hotline in 2018 where crimes can be reported by the public and that the hotline had received more than 350,000 calls". See. *Judgment*, 5 February 2025, § 167.

> bedrock of human dignity and the essence of existence. Deprived of this right, all other rights lose their significance and feasibility. It provides the very foundation upon which individuals can cherish their freedoms, exercise their liberties, and pursue their dreams and aspirations".[11]

10. It is clear that, here the Court is careful not to give a detailed and precise content to the very general statement, which is limited only to the existence of damage:

> "When we are deprived of this right, all other rights lose their meaning and can no longer be realised".

11. It would have been necessary to know who deprives PWA of this right on behalf of the State, how and by what process. This is because, legally speaking, the State has enough evidence to demonstrate the determinism of its actions and public policies so that it cannot be faulted.

12. Without a solid basis in fact and in law, I cannot say with any measure of credibility that:

> "The Court observes that the violations herein especially relate to the Respondent State's failure to comply with its obligations to promote and protect the rights of PWA as set out in those Articles of the Charter, including through legislative and other measures".[12]

13. This, at least, is because the promotion and protection of PWAs is a real and necessary issue, but one that has yet to be developed in our countries. This is a public action that most African countries[13] are struggling to identify and implement.

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[11] AfCHPR, Judgment, *Makungu Misalaba v. United Republic of Tanzania,* 7 November 2023, § 145; *Ghati Mwita v. United Republic of Tanzania,* 1 December 2022, § 66.
[12] AfCHPR, *Centre for Human Rights and others v. Tanzania*, 5 February 2025, § 359.
[13]Avom (D.) et Ongo Nkoa(B. Em.), *Pertinence des politiques publiques de développement en Afrique subsaharienne*, Ed. L'Harmattan, 2021, p. 391 the public issue of health, stifled in Africa by irrational beliefs, is central in many respects. The two authors of the book cited above have contextualised

14. It is not certain that the Court put to good use the judgment of the Inter-American Court of Human Rights in *Velasquez Rodrigues v. Honduras.*[14] The Court should have laid out in greater detail the actions and measures taken by the Respondent State in dealing with the situation of PWA. While it is true that the State is responsible for ensuring public tranquillity by virtue of its sovereign and regalian powers, its obligation to do so is limited when, despite all reasonable efforts, it fails to do so.

15. Since no one is bound to do the impossible, any non-state actors, such as the perpetrators of violations against PWA in this case, should be held more accountable for their criminal acts.

16. I also considered that the application of Article 4 of the African Charter was inappropriate in this case.

II. Application of Article 4 of the African Charter is inappropriate in this case

17. As long as Article 4 of the African Charter is used to denounce death sentences, its use in the instant case is very surprising.

18. As regards the invocation of this article by the Applicants[15], we are of the opinion that the provisions of Article 4 of the African Charter in relation to the protection of life cannot be used against the Respondent State in the present case. This article states that:

development policies in Africa by placing them in a number of fields, including education and health, which are at the heart of the PWA issue.

[14]IACtHR, *Velasquez Rodrigues v. Honduras,* 29 July 1988, §§ 175 to 177*:* States have an obligation to conduct investigations in every situation involving the violation of protected rights, and where the violation is not punished and the full enjoyment of the rights by the victims is not restored as soon as possible, the State will have failed in its duty to ensure the free and full exercise of those rights to the persons under its jurisdiction.

[15] AfCHPR, *Centre for Human Rights and Others v. Tanzania*, cited above, § 12.

> "Human 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."[16]

19. There have been complaints of deliberate criminal practices perpetrated against PWA, with clear intent to harm them. There is no doubt that, while the State has regalian obligations to ensure the well-being of individuals and to protect them, the fact remains that this "duty to protect" only gives rise to international responsibility when the State fails to fulfil an obligation and when the resulting damage is not caused by another subject of law. These rules of public liability law are designed to ensure that the State is held liable only after it has been found to have caused harm.

20. The relevant rules were summarised in Article 1 of the Responsibility of States for Internationally Wrongful acts, (2001) drawn up by the International Law Commission provides:

> "Every internationally wrongful act of a State entails the international responsibility of that State".

21. Article 2 of the same text adds that:

> "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State".

22. Thus Article 31 of the Articles of the ILC states that:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State".

[16]Article 4 of the African Charter on Human and Peoples' (1981).

23. This detailed stipulation is not without interest. It aims to establish the conditions of liability, whatever the field of application. The State is only responsible when it causes injury on the basis of an internationally wrongful act. However, the State, as a subject of law, does not escape the rules of liability arising from the event giving rise to the harm before any liability. No one ever said that international human rights law would ignore this state of the law. The heart of the matter, as it were, is clearly encapsulated in Article 4 of the Charter:

> "No one may be arbitrarily deprived of this right".[17]

24. In general liability law, a kind of special State liability has developed, which has flourished above all in national law. For example, there has been talk of no-fault liability on the part of the State.[18] It is a form of insurance under which the State is under obligation to provide adequate compensation. While all this needs to be clarified, in this paradigm there is no demonstrated breach by the State of its international treaty obligations. Neither has it been shown that it failed to fulfil its obligations as a public authority. In present case, the Court considered, not without overreach, that in the context of the criminal acts suffered by the PWA, "the Respondent State violated Article 4 of the Charter".

25. Moreover, in the Court's reasoning, the so-called horizontal effects standard of the Human Rights Conventions, which would have been relevant to explore, was not explored, but surprisingly disregarded.

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[17] *Idem*.

[18] This responsibility is resolutely called into question and can be qualified as such when the State, for reasons of public order, breaks equality between citizens or takes disproportionate risks to respond to a situation. Subject to international provisions, its liability may be engaged. See numerous writings by legal scholars: Asso (B.), Monera (F.), with Hillairet (J.) and Bousquet (A), *Contentieux administratif*, Levallois-P., Studyrama, 2006, 463 p.; Chapus (R.), *Droit du contentieux administratif*, Paris, Montchrestien, 2006,[12th] ed., paperback; Jean-Claude Bonichot (J.-Cl.), Cassia (P.), Poujade (B.), *Les Grands Arrêts du contentieux administratif*, Paris, Dalloz, 2006,[2nd] ed., 1182 p.

III. Operationalising the horizontal effect of the African Charter

26. The Court still seems stuck in a traditional approach. However, the African Charter leaves open the possibility of recognising the consequent responsibility of private individuals who have failed to fulfil their obligations under the African Charter. Articles 27 to 29 of the African Charter set out clearly formulated obligations[19]that must be met. They are relevant for establishing horizontal effects in the application of these rights.

27. The *LIDHO et al.* case (2023) and the present case are similar to the extent that they reflect this crisis of responsibility which has become increasingly acute in the field of human rights.

28. In *LIDHO et al.* we pointed out that the concept of horizontal effect, inspired by the German doctrine of *drittwirkung*, referred to the effect produced by a rule on relations between private individuals, as opposed to the vertical effect. This technique initially relates to the application of constitutional standards of domestic law, their "radiation effect" in the interpretation of private law rules.[20]

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[19]See Chapter II of the Charter - Duties (...): "Article 27- 1. "Every individual shall have duties towards his family and society, the State and other
legally recognized communities and the international community [...] The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest". Article 28: Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance". Article 29: "The individual shall also have the duty: 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need; 2. To serve his national community by placing his physical and intellectual abilities at its service; 3. Not to compromise the security of the State whose national or resident he is; 4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened; 5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defense in accordance with the law; 6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society; 7. To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral wellbeing of society; 8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity". It has also been said that this is a particular feature of the African Charter. See Ouguergouz (F.), *La Charte africaine des droits de l'homme et des peuples - Une approche juridique des droits de l'homme entre tradition et modernité*, Graduate Institute Publications, 1993, 482 p.

[20]Rigaux (F.), *La protection de la vie privée et des autres biens de la personnalité*, Bruylant, LGDJ, 1990, n° 601-608; Capitant (D.), *Les effets juridiques des droits fondamentaux en Allemagne*, LGDJ, 2001.

29. The PWA case is yet another example of the State being held fully responsible for abuses caused by a structural socio-human anomaly (albinism) and by criminal behaviour. The European Court is not reluctant to give horizontal effect to the European Convention for the Protection of Human Rights.[21] As Béatrice Moutel sums up:[22]

> "This is a development in jurisprudence, which extends the enforceability of human rights to interpersonal relationships" is commonly referred to as the "horizontal effect"

30. The horizontal effect of guaranteed rights is part of the current human rights protection legal framework. The other Courts recognise this, as does the European Court. The latter stated in particular that:

> "Although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life […]. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves".[23]

31. The PWA case raises the fundamental question of the privacy protection, as it should be in relations between individuals.[24] Hennette Vauchez (S.) and Roman (D.) point out that:

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[21] ECHR, *Sovtransavto Holding v. Ukraine,* 25 July 2002, req. 48553/99, § 96; JCP 2003, I, 109, no. 24, obs. Sudre (F.); AJDA 2004, p. 534, obs. J.-F. Flauss. v. Pauliat (H.) and Saint-James (V.), "L'effet horizontal de la CEDH", in Marguénaud (J._P.) (dir.), *CEDH et droit privé, L'influence de la jurisprudence de la Cour européenne des droits de l'Homme sur le droit privé français*, La Documentation française, coll. Perspectives on Justice, 2001, p. 77.

[22] Moutel (B.), Les "effets horizontal" de la Convention européenne des droits de l'homme en droit privé français. *Essai sur la diffusion de la Convention européenne des droits de l'homme dans les rapports entre personnes privées*, PhD thesis, Limoges, 595 p.

[23] ECHR, X and Y v. the Netherlands, 26 March 1985, § 23.

[24] The European Court therefore accepted the applicability of the Convention to inter-individual relations in its decision *Young, James and Webster v. the United Kingdom*, 13 August 1981 (ECHR, 1982, 226,

> "The horizontal effect of fundamental rights thus has the consequence of disseminating fundamental rights throughout all legal relationships".

32. Therefore, certain developments in support of their accusations[25] should be considered excessive and unacceptable. This is because they do not make any distinction between the particulars for which the Respondent State is actually responsible and those for which it is not, namely:

> "The Applicants aver that investigation and prosecution in relation to cases of human trafficking are inadequate, leading to a thriving cross-border market for PWA body-parts that sustain high demand and prices. This economic environment, in turn, encourages individuals inside the Respondent State to violate human rights of PWA to supply the said demand". § 261.

33. It is clear that while the State retains "a monopoly on the legitimate use of force", its responsibility, at least in its entirety, is limited to any failure to use the means at its disposal. Those who violate the rights of PWA cannot escape conviction.

34. In 2006, victims brought a complaint against the State of Peru before the Inter-American Court of Human Rights (IACtHR) for massive acts of pollution. The IACtHR, which handed down its decision on 22 March 2024, structured it around two aspects: firstly, it found the State of Peru liable,[26] and secondly, it ordered that the multinational involved be prosecuted for the pollution and that it provides free medical care to the victims, including compensation for all the harm suffered.

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chron. G. Cohen-Jonathan, *JDI*, 1982, 220, obs. P. Rolland. When the infringement of the protected right is not directly attributable to the State but is caused by a third party - a private person. -the "horizontal effect" of the Convention allows the State to be held liable if its legislation makes it possible to violate a right guaranteed by that private person (...). See Sudre (F.), *Droit européen et international des droits de l'homme*, PUF, 1989, p. 257.

[25] See *udgment cited above*, § 264.

[26] Peru is responsible for the lack of protection afforded to the inhabitants of the Andean town of La Oroya, who are suffering from the toxic pollution emitted by a foundry that had been operating unchecked for a century.

35. The PWA case is so emotionally charged that it does not lend itself to calm treatment. In my view, there is no defensible global condemnation of the Respondent State's public policy.[27] At best, I will agree with the findings on sectoral shortcomings, such as greater risk to PWA in schools.

36. The truth is that this dispute is as much about the State's conduct during major epidemics or natural disasters as it is about its conduct in the matter of albinism. What can the State do? It can only reasonably use the means at its disposal to respond in an appropriate manner. This is the whole point of its obligation of means in the present case.[28] The criminal exactions, traditional beliefs and witchcraft that make the handicap of PWA even more unbearable should, as I said, lead us to look further into the matter.

37. It is on account of all these limitations contained in the Court's approach that I pen this Separate Opinion.

Blaise Tchikaya, *Judge*

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

[27] I therefore do not agree with the finding of a violation of Article 1 of the African Charter against the Respondent State (point 6 of the operative part of the Judgment).
[28] The obligation of means can generate significant liabilities. However, these are not analysed in the same way, and the system is different, even more so in public law. Hocquet-Berg (S.), *Obligation de moyens ou obligation de résultat*, PU du Septentrion, 1996, 416 p.