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

BERNARD ANBATAAYELA MORNAH **APPLICANT**

V.

REPUBLIC OF BENIN,
BURKINA FASO,
REPUBLIC OF CÔTE D'IVOIRE,
REPUBLIC OF GHANA,
REPUBLIC OF MALI,
REPUBLIC OF MALAWI,
UNITED REPUBLIC OF TANZANIA,
REPUBLIC OF TUNISIA
RESPONDENT STATES

AND

SAHRAWI ARAB DEMOCRATIC REPUBLIC
REPUBLIC OF MAURITIUS
INTERVENERS

APPLICATION N° 028/2018

JUDGMENT
22 SEPTEMBER 2022

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

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The Court composed of: Blaise TCHIKAYA, Vice-President; Ben KIOKO, Suzanne MENGUE, M.-Thérèse MUKAMULISA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA – 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"), Justices Imani D. ABOUD, Rafaâ BEN ACHOUR, Tujilane R. CHIZUMILA and Modibo SACKO nationals of Tanzania, Tunisia, Malawi and Mali, respectively did not hear the Application.

In the Matter of:
Bernard Anbataayela MORNAH

represented by:
Femi Falana, SAN (Senior Advocate of Nigeria)

Versus

i. Republic of Benin represented by Madame Iréné ACLOMBESSI, Judicial Agent of the Treasury;

ii. Burkina Faso, Mr. Lamoussa YAO, Judicial Agent of the Treasury;

iii. Republic of Côte d'Ivoire represented by Madame Kadiatou LY SANGARE, Judicial Agent of the Treasury;

iv. Republic of Ghana represented by Mrs. Dorothy AFRIYIE-ANSAH, Chief State Attorney, Office of the Attorney General and Ministry for Justice;

v. Republic of Mali represented by Mr. Youssouf DIARRA, Director General, State Litigation;

vi. Republic of Malawi represented by Mr. Pacharo KAYIRA, Chief State Advocate for Human Rights, Ministry of Justice and Constitutional Affairs;

vii. United Republic of Tanzania represented by Mr Gabriel P. MALATA, The Solicitor General, Office of the Solicitor General;

viii. Republic of Tunisia represented by Mr. Chedly, RAHMANI, The Officer-in-Charge of State Litigation;

Interveners

ix. Sahrawi Arab Democratic Republic, represented by Mr. Ahmed Sidi ALY, Legal Adviser of the Presidency and Mr. Manuel Devers, Advocate, Member of Legal Team;

x. Republic of Mauritius represented by Ambassador H. Dillum, Secretary for Foreign Affairs;

after deliberation

renders the following Judgment:

I. THE PARTIES

1. Bernard Anbataayela Mornah (hereinafter referred to as “the Applicant”) is a Ghanaian national and the National Chairman of the Convention People’s Party, a political party registered in Ghana. The Applicant alleges violations of human rights of the Sahrawi people as a result of the failure of the Respondent States to safeguard the territorial integrity and independence of the Sahrawi Arab Democratic Republic.

2. The Application is filed against the Republic of Benin, Burkina Faso, the Republic of Côte d’Ivoire, the Republic of Ghana, the Republic of Mali, the Republic of Malawi, the United Republic of Tanzania and the Republic of Tunisia, (hereinafter referred to as “the Respondent States”).

3. The Respondent States became Parties to the African Charter on Human and Peoples’ Rights (hereinafter “the Charter”) on various dates as follows: Benin, 21 October 1986; Burkina Faso, 21 October 1986; Côte d’Ivoire, 31 March 1992; Ghana, 1 March 1989; Mali,21 October 1986; Malawi 17 November 1989; Tanzania, 21 October 1986; and Tunisia, 21 October 1986.

4. The Respondent States all became Parties to the Protocol as follows: Benin, 22 August 2014; Burkina Faso, 25 January 2004; Côte d’Ivoire, 25 January 2004; Ghana, 25 January 2004; Mali, 25 January 2004; Malawi, 9 September 2008; Tanzania, 10 February 2006; Tunisia, 21 August 2007.

5. All the Respondent States deposited the Declaration under Article 34(6) of the Protocol permitting individuals and Non-governmental Organisations to bring cases against them before the Court (hereinafter “the Declaration”) as follows: Benin, 8 February 2016; Burkina Faso, 28 July 1998; Côte d’Ivoire, 23 July 2013; Tanzania, 29 March 2010; Ghana, 10 March 2011; Malawi, 9 October 2008; Mali, 19 February 2010; and Tunisia, 2 June 2017.

6. The following Respondent States deposited instruments withdrawing the aforementioned Declaration with the Chairperson of the African Union Commission: Tanzania on 21 November 2019, Benin on 25 March 2020 and Côte d'Ivoire, on 29 April 2020, respectively. The Court held that the withdrawal had no bearing on pending cases and new cases filed before the withdrawal came into effect, that is, on 22 November 2020,[1] 26 March 2021[2] and 30 April 2021,[3] respectively, for these States.

7. The Sahrawi Arab Democratic Republic (hereinafter "the SADR" or "Western Sahara") and the Republic of Mauritius filed applications to intervene in the proceedings on 23 June and 31 August 2020, respectively, on the basis that they have an interest in the matter. On 25 September 2020, the Court issued orders granting both the SADR and leave to intervene.

II. SUBJECT OF THE APPLICATION

A. Facts of the matter

8. The Applicant alleges that the subject of his Application relates to violations of the human rights of the Sahrawi people as a result of the erosion of the sovereignty, territorial integrity and independence of Western Sahara, due to the continued occupation of its territory by the Kingdom of Morocco.

9. The Applicant states that the territory known as Western Sahara was colonised by Spain until 1976. After Spain's departure in February 1976, according to the Applicant, Morocco and Mauritania occupied Western Sahara but were met with resistance from the Sahrawi people. As a result, Mauritania relinquished its claim to any part of Western Sahara. The

[1] *Andrew Ambrose Cheusi v. United Republic of Tanzania*, ACtHPR, Application No. 004/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39.
[2] *Houngue Éric Noudehouenou v. Republic of Benin,* ACtHPR, Application No. 003/2020, Order of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.
[3] *Suy Bi Gohore Émile and Others v. Republic of Côte d'Ivoire*, ACtHPR, Application No.044/2019, Judgment of 15 July 2020 (Merits and reparations), § 67; *Ingabire Victoire Umuhoza v. Republic of Rwanda* (Jurisdiction) (3 July 2016) 1 AfCLR 562, § 69.

Applicant argues that Morocco, still remains in occupation of the territory of the SADR.

10. The Applicant elaborates that in 1984, the SADR was admitted as a member of the Organisation of African Unity (hereinafter referred to as "the OAU") and subsequently became a founding Member of the African Union (hereinafter referred to as "the AU"). In protest against SADR's admission as a Member of the OAU, Morocco left the Organisation in the same year.

11. The Applicant further states that in 1992, a UN-supervised referendum on independence of the SADR was promised but it was aborted when Morocco objected to the proposed electoral register, which it alleged was biased in favour of secession. The Applicant alleges that Morocco occupies the part of Western Sahara that harbours one of the world's richest fisheries stock, abundant phosphate rock mines and oil reserves which it has been exploiting to the detriment of the Sahrawi people.

12. The Applicant also alleges that in 2017, Morocco applied for membership to join the AU and was admitted. The Applicant avers that Morocco's admission to the AU was not based on a unanimous decision.

13. According to the Applicant, notwithstanding its admission to the AU, Morocco has not shown any intention of giving up its occupation of the Western Sahara. Furthermore, although the SADR has been recognised by the AU as the legitimate government in exile and no less than eighty-four (84) countries have accorded it diplomatic recognition, parts of Western Sahara remain occupied by Morocco.

14. The Applicant contends that the unconditional admission of Morocco to the AU also contradicts the established practice with regard to admission of members to the AU and its predecessor, the OAU. He recalls that apart from condemning illegal and unconstitutional change of governments, the OAU and AU have in the past refused to admit colonial powers as members. In this regard, the Applicant refers as examples, the OAU's refusal to admit

South Africa during the Apartheid regime and more recently, AU's suspension from its membership, of Côte d'Ivoire, Niger, Burkina Faso and Egypt based on the unconstitutional removal of regimes by coup leaders.

B. Alleged violations

15. According to the Applicant, the admission of Morocco to the AU is inconsistent with the objectives and principles of the Union enshrined in Articles 3, 4 and 23 of its Constitutive Act; Articles 1 and 2 of the African Charter on Democracy, Elections and Governance (hereinafter, "the ACDEG") and Articles 1,2, 7, 13, 19,20, 21, 22 23 and 24 of the Charter.

16. The Applicant further alleges that "even if the Respondent States did not protest the admission of Morocco to the AU" at the time the Assembly made the admission decision, the Court should still hold them responsible for their failure, individually and/or collectively to defend the sovereignty, territorial integrity and independence of the SADR and the right of its people to dispose of their wealth and natural resources.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

17. The Application was filed at the Registry on 14 November 2018.

18. On 25 March 2019, the Registry served the Application on the Respondent States, requesting them to file their list of representatives and Responses to the Application within thirty (30) days and sixty (60) days, respectively, from the date of receipt of the notification. By a separate notice of the same date, the Registry notified all Member States of the AU, including the Kingdom of Morocco of the Application and invited those Member States which wished to intervene to do so as soon as possible, but before the close of pleadings.

19. Some of the Respondent States filed their Responses to the Application on the following dates: Mali on 3 June 2019, Burkina Faso on 24 June 2019, Tunisia on 4 July 2019, Côte d'Ivoire on 17 September 2019 and Ghana on 7 October 2019.

20. On 16 October 2019, the Registry transmitted these Responses to the Applicant with a request to file the Reply thereto within sixty (60) days of receipt of the Responses.

21. By the same notice, the Registry also informed the Parties of the Court's decision to grant *suo motu,* an extension of thirty (30) days to Malawi, Benin, and Tanzania to file their Responses.

22. At its 56th Ordinary Session, held from 2 to 20 March 2020, the Court decided to *suo motu* grant another thirty (30) days extension of time to those Respondent States that had not filed their Responses to do so. The Court also decided to send a reminder to Member States of the AU that wished to intervene in the matter to do so within thirty (30) days of receipt of the reminder. The Court further instructed the Registry to request for *amicus curiae* submissions from institutions that may have knowledge in the subject matter of the Application.

23. On 23 April 2020, the Registry sent a letter to African Commission on Human and Peoples' Rights, African Institute of International Law (AIIL), Pan African Lawyers' Union (PALU), Centre for Human Rights of the University of Pretoria, the Unrepresented Nations and Peoples Organization (UNPO), Liechtenstein Institute on Self-Determination, and the International Commission of Jurists (ICJ) inviting them to file *amicus curiae* briefs.

24. By letters dated 10 May 2020 and 11 May 2020, UNPO and PALU, requested extension of time to file their *amicus curiae* briefs, citing the challenges posed by the COVID-19 pandemic.

25. On 15 May 2020, the Registry sent a notice to both PALU and UNPO indicating that the Court had granted a sixty (60) days extension of time to file their *amici curiae* briefs from the date of receipt of the notice.

26. On 23 July 2020, the SADR filed an application to intervene indicating that it had vested interests in the matter.

27. On 18 August 2020, Tanzania filed its Response.

28. On 31 August 2020, Mauritius filed a request for intervention together with its intervener's submissions.

29. On 4 September 2020, the Registry transmitted the request of Mauritius for leave to intervene to the Parties for their observations, if any, within fifteen (15) days of receipt of the notice. The Parties did not file submissions.

30. On 25 September 2020, the Court issued orders granting leave to the SADR and Mauritius to intervene and with respect to the latter, the Court deemed its submissions as having been properly filed.

31. On 2 January 2021, the SADR filed its submissions as an intervening State.

32. Morocco, which may have an interest in the subject matter of this Application, did not request to intervene in spite of having been served with the notification from the Registry addressed to all Member States as indicated above.

33. On 4 March 2021, the Parties were notified that the Application was set down for a virtual public hearing on 10 and 11 June 2021. By the same notice, the Parties were requested to confirm their participation in the hearing before 4 May 2021.

34. On 1 May 2021, the Applicant confirmed his availability to participate in the public hearing.

35. On 25 May 2021, SADR and Benin confirmed their participation in the hearing and sent the names of their representatives.

36. On 4 June 2021, Mauritius notified the Registry that its intervention in the case would be restricted to its written submissions and that it would not participate in the public hearing.

37. On 9 June 2021, PALU filed its *amicus curiae* briefings with a note indicating that it will participate in the public hearing and make oral submissions.

38. Public hearings were held virtually on 10 and 11 June 2021 with the attendance of the Applicant, and representatives of Mali, Tanzania, Malawi, the SADR and PALU. On 17 June 2021, the Registry sent copies of the Verbatim Record of the hearings for the Parties to make editorial corrections, if any, within fifteen (15) days of receipt. SADR subsequently made its observations.

39. On 22 February 2022, both written and oral pleadings were closed and this was duly notified to the Parties, and to the entities that had been invited to file *amicus curiae* briefs.

IV. PRAYERS OF THE PARTIES

40. The Applicant prays the Court to issue:

    a. A declaration that the failure of the Defendants individually and/or collectively to defend the sovereignty, territorial integrity and independence of Western Sahara is illegal as it directly violates Articles 3 and 4 of the Constitutive Act of the African Union; Articles 1, 13 and 20 of the African Charter on Human and Peoples Rights; Articles 1 and 2 of the International Covenant on Civil and Political Rights and Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights.

b. A declaration that the failure of the Defendants individually and/or collectively to prevent Morocco from violating the human rights of the people of Western Sahara to dispose of their wealth and natural resources, to their economic, social and cultural development and peace guaranteed by Articles 19, 22, 23 and 24 of the African Charter on Human and Peoples Rights, and similar provisions in common Article 1 of both the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights in itself violates these rights; and

c. An order compelling and mandating the Defendants individually and/or collectively to call an emergency session of the Assembly of the African Union and to sponsor a resolution for the adoption of legal, political and other measures by the African Union to restrain Morocco from further occupying parts of the territory of Western Sahara in any manner whatsoever and howsoever [as well as] sponsor a motion for the immediate expulsion of Morocco from the African Union until it is prepared and ready to recognise the right of the Sahrawi people to self-determination.

41. Mali, Burkina Faso, Tunisia, Côte d'Ivoire and Ghana pray the Court to:

i. Declare that it lacks jurisdiction
ii. Declare that the Application is inadmissible for the Applicant has not demonstrated that he has locus standi and for failing to meet admissibility conditions specified under Article 56 of the Charter.
iii. Dismiss the Application as baseless
iv. Order the Applicant to bear the entire cost

42. Tanzania and Malawi pray the Court to dismiss the Application for lack of jurisdiction. Tanzania also prays that the Court should declare the Application inadmissible for failing to meet the admissibility conditions specified in the Charter. It further prays the Court to order that:

i. [it] is not in violation of Articles 3 and 4 of the Constitutive Act
ii. [It] is not in violation of Articles 1, 2, 7, 13, 19, 20, 21, 22 and 23 of the Charter, Articles 1 and 2 of the ICCPR; as well as Articles 1 and 2 of the ICESCR; and

iii. A declaration that the admission of Morocco to the AU was in accordance with the Constitutive Act of the AU, thus, lawful.
iv. Dismiss the Application with costs.

43. The SADR as intervener, prays the Court to:

i. Declare that it has jurisdiction
ii. Declare the application admissible
iii. Rule that the application is well-founded and justified

44. Benin did not make any submissions or prayers.

V. ON THE DEFAULT OF THE REPUBLIC OF BENIN

45. Rule 63(1) of the Rules provides that:

> Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings.

46. The Court notes that the afore-mentioned provision sets out three cumulative conditions for judgment in default, namely: i) the notification to the defaulting party of both the application and the documents pertaining to the proceedings; ii) the default of a party; and iii) a request made by the other party or the court acting on its own motion.[4]

47. With regard to the first and second requirements of notification and default by a party, the Court notes that the Application was served on the Republic of Benin and all the Respondent States on 25 March 2019. The Republic of

[4] *Léon Mugesera v. Republic of Rwanda*, ACtHPR, Application No. 012/2017, Judgment of 27 November 2020 (merits and reparations), § 14.

Benin filed the names and addresses of its representatives on 14 May 2019. Subsequently, several reminders and extensions of time to file their responses were sent to the Respondent States, including on 5 July 2019, 16 October 2019, and 23 April 2020.

48. Despite receiving all the communications, the Republic of Benin failed to file its written pleadings within the prescribed time. On 25 May 2021, it confirmed its participation in the public hearing that was held on 10-11 June 2021 but did not appear during the hearing. Furthermore, the Registry transmitted to the Respondent State all additional documents that were filed during and after the public hearing. In this regard, the Court also notes from the record the proofs of delivery of all those notifications. It is thus evident that the Respondent State failed to defend itself despite being served with all the documents pertaining to the Application and having full knowledge of the proceedings.

49. As far as the third requirement is concerned, the Court notes that the instant Application involves seven other States which have participated in the proceedings except Benin. The latter knowingly failed to pursue and hence, defaulted within the terms of Rule 63(1) of the Rules to defend its case.

50. Consequently, the Court decides, on its own motion, to proceed with the examination of the Application.[5]

VI. JURISDICTION

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

[5] *African Commission on Human and Peoples' Rights v. Libya* (merits) (3 June 2016) 1 AfCLR 153, §§ 38-43. See also *Léon Mugesera v. Republic of Rwanda*, ACtHPR, Application No. 012/2017, Judgment of 27 November 2020 (merits and reparations), § 18. See *also Yusuph Said v. United Republic of Tanzania*, ACtHPR, Application 011/2019, Judgment of 30 September 2021 (Jurisdiction and Admissibility), § 18.

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

52. In accordance with Rule 49(1) of the Rules, "[t]he Court shall conduct preliminary examination of its jurisdiction … in accordance with the Charter, the Protocol and these Rules".

53. On the basis of the above-cited provisions, the Court must conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

54. The Respondent States raise objections to the material, personal, territorial and temporal jurisdiction of the Court.

A. Objections to material jurisdiction

55. The Court notes that under Article 3(1) of the Protocol, it has jurisdiction to examine any application submitted to it provided that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.

56. The Court further notes from the totality of submissions of the parties on material jurisdiction that there are four main issues for determination: i) Whether the Application raises issues of political and diplomatic nature that divest the Court of its competence to examine the same; ii) Whether the Application is based mainly or only on the Constitutive Act of the African Union; iii) Whether the Application is like a request for advisory opinion and deals with a dispute over "ownership" of a territory; and iv) Whether the AU Assembly has transferred the SADR's matter to the United Nations.

a) Whether the Application raises issues of a political and diplomatic nature which are against the principles of state sovereignty and non-intervention?

i. Respondent States' submissions

57. The first contention of the Respondent States is that the Court lacks competence to examine the Application, considering that it raises issues of a political and diplomatic nature, not a legal one. In this regard, Mali, Burkina Faso, Tunisia, Côte d'Ivoire, Ghana and Tanzania assert that the Application relates to issues of sovereignty, international relations and diplomacy and the principle of non-intervention, matters which the Court does not have the competence to adjudicate. Côte d'Ivoire stresses that the Court lacks competence to examine an application which asks it to oblige sovereign States to interfere in the internal affairs of another sovereign State, namely, Morocco in the dispute between it and another sovereign State, the SADR.

58. Similarly, Mali submits that the issues the Application raises are essentially political, the solution of which lies in a political process rather than a judicial settlement. Accordingly, it asserts that the subject matter of the Application does not fall within the competence of the Court as enshrined in Articles 3 and 4 of the Protocol according to which the Court can only receive applications or requests for advisory opinions relating to the interpretation and application of human rights treaties.

59. Ghana also avers that the Application does not have any legal questions to be resolved by the Court but if the Court is minded to hear the matter, it may only render an advisory opinion in accordance with Rule 29 of the Rules.[6]

60. Furthermore, Tanzania submits that the Court lacks material jurisdiction to entertain the Application since its subject matter does not establish a *prima*

[6] Rule 24 of the Rules of Court of 2010.

facie case on the violation of any of the rights protected in the Charter. It further submits that the Court's jurisdiction should be determined not merely by allegations of human rights violations contained in an application but rather on the basis of the nature of the application and the redress sought, which in the instant case are political.

ii. Applicant's submissions

61. The Applicant requests the Court to interpret the Constitutive Act of the AU, the Charter and other international human rights instruments. He submits that the Court has material jurisdiction in accordance with Article 3 of the Protocol to examine allegations of violations of Articles 1, 13, 19, 20, 21, 22, 23, and 24 of the Charter, Articles 1 and 2 of the ICCPR, as well as Articles 1 and 2 of ICESCR. The Applicant also contends that the Court has competence to interpret and apply Articles 3 and 4 of the Constitutive Act of the AU, which according to him, correspond materially to the Respondent States' rights and obligations under the Charter, ICCPR and ICESCR. In this regard, citing the judgment of the Court in *Actions pour la Protection de Droits de l'Homme (APDH) v. Côte d'Ivoire*, the Applicant submits that a treaty may be considered a human rights instrument even if its main purpose is not the protection of human rights. According to him, the Constitutive Act of the AU is a human rights instrument in so far as it contains human rights provisions.

iii. Intervener's submissions

62. The SADR, as intervener, concurs with the Applicant's submissions that the Court has material jurisdiction to consider the Application, as it raises allegations of violations of Article 3 and 4 of the Constitutive Act of the AU, Articles 1, 13, 19, 20, 21, 22, 23, and 24 of the Charter, Articles 1 and 2 of the ICCPR and Articles 1 and 2 of ICESCR. The SADR avers that in accordance with the Court's jurisprudence on the concept of a "human rights

instrument",[7] Articles 3 and 4 of the Constitutive Act of the AU form part of the law applicable before the Court since the stated objectives and principles relate substantively to the rights guaranteed by the Charter, the ICCPR and the ICESCR, including the right to self-determination and the independence of peoples, their right to territorial integrity and their right to peace and security. The SADR also submits that Articles 3 and 4 of the Constitutive Act of the AU conversely sets out the obligation of State Parties to take necessary measures to guarantee their effective observance.

iv. Amicus curiae submissions

63. Citing the jurisprudence of the Court in *Wilfred Onyango & 9 Others v. Tanzania*, the Pan-African Lawyers' Union (PALU), similarly argues that the Court has material jurisdiction to examine the Application since the rights alleged to be violated are protected by the Charter, the ICCPR and the ICESCR to which all the Respondent States are parties.

v. The Court's Position

64. The Court notes that an application may raise issues of a political or diplomatic nature or may seek reliefs that may require political decisions or diplomatic solutions. An application may also contain allegations that relate to a State's conduct in the arena of international relations, including its commitments or undertakings in international organisations. However, the mere fact that an application contains issues relating to State sovereignty or that it touches on political or diplomatic issues does not automatically remove the Court's competence to consider an application.

65. The Court observes in general terms that, international law is essentially a product of the consensual undertaking of States and its consensual nature is the highest manifestation of their sovereignty and independence. Nevertheless, once States have willingly ceded their consent to the

[7] *Actions Pour la Protection des Droits de l'Homme (APDH) v. Côte d'Ivoire* (merits) (8 November 2016) 1 AfCLR 668, §§ 57-65.

jurisdiction of an international tribunal to interpret and apply specific instruments, they cannot raise sovereignty as a defence or justification to preclude the tribunal from exercising its jurisdiction over a dispute insofar as the dispute relates to issues that fall within the scope of the tribunal's statutory competence.

66. In this vein, the Court refers to its established position on this point that it exercises its jurisdiction over an application as long as the application contains allegations of violations of human rights protected by the Charter or any other human rights instrument to which a respondent state is a party.[8] In the instant case, the Application alleges violations of the right to freedom from non-discrimination; the right to a fair trial; the right to participate in public affairs of one's country, the right to equality of all peoples, the right to self-determination; the right to dispose of natural resources, the right to development, the peoples' right to peace, and the right to satisfactory environment contrary to Articles 2, 7, 13, 19, 20, 21, 22, 23, and 24 of the Charter. The Court accordingly dismisses the Respondent States' objection in this regard.

b) Whether the Application is based mainly or only on the Constitutive Act of the African Union?

67. The Court notes that the Respondent States have raised two interrelated objections to its material jurisdiction in connection with the Constitutive Act of the AU (hereinafter, the Constitutive Act).

[8] See *Kalebi Elisamehe v. United Republic of Tanzania*, ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations), § 18; *Joseph Mukwano v. United Republic of Tanzania*, ACtHPR, Application No. 021/2016, Judgment of 24 March 2022 (merits and reparations), § 22; *Kenedy Ivan v. United Republic of Tanzania* (merits and reparations) (28 March 2019) 3 AfCLR 48, § 20; *Shukrani Masegenya Mango and Others v. United Republic of Tanzania* (merits and reparations) (26 September 2019) 3 AfCLR 439, § 29.

i. Respondent States' submissions

68. The first objection is that the instant Application relies on the Constitutive Act, which according to some of the Respondent States, is not among instruments that the Court has the power to interpret. Tanzania and Malawi specifically contend that the present Application is "mainly and (only)" based on the Constitutive Act, the interpretation and application of which is outside the competence of the Court.

69. In its observations to the submissions of the SADR, Tanzania elaborates that pursuant to Article 26 of the Constitutive Act, only the Assembly of Heads of State and Government (hereinafter, the AU Assembly) is empowered to interpret the Constitutive Act, pending the establishment of the African Court of Justice and Human Rights.

70. Furthermore, Tanzania raises its objection to the material jurisdiction of the Court on the basis that the Constitutive Act is not a human rights instrument. In support of this, it cites the caselaw of the Court in *APDH v. Côte d'Ivoire* where the Court held that for the determination of whether a convention is a human rights instrument, it is necessary to refer to the purposes of such convention. On this basis, it submits that the Constitutive Act was adopted for the furtherance of economic and political integration of the AU Member States and fostering the AU's institutional development in achieving the goals for which it was established.

71. Tanzania finally argues that even though the Constitutive Act may be regarded as a human rights instrument as it provides for the promotion and protection of human rights as one of the AU's objectives, such interpretation cannot apply in the instant Application since the basis of the complaint is the admission of Morocco, a matter governed by Article 29 of the Constitutive Act of the AU, and human rights are not provided in this provision.

72. Secondly, some Respondent States, Tunisia, Tanzania and Republic of Côte d'Ivoire assert that since the Application exclusively relies on the admission of Morocco to the African Union, the determination of its compatibility with the Constitutive Act remains within the power of the AU Assembly, and not the Court. They contend that the alleged human rights violations relate to the admission of Morocco to the AU, a decision which was democratically taken by the AU Assembly and not the Respondent States. They aver that the decisions of the AU are democratically taken at the level of the AU Assembly and once they are taken, they bind all Member States.

73. Côte d'Ivoire also asserts that the Applicant's decision to challenge the admission of Morocco to the AU also "tramples, in good or bad faith", on the provisions of the Constitutive Act and the Protocol.

ii. Intervener's submissions

74. The SADR, as intervener, underscores that the present action does not, as such, concern the AU Assembly decision to admit Morocco into the AU, which has a legal personality distinct from those of its Member States, but exclusively concerns the behaviour or attitude of the Respondent States on the occasion of the admission. The SADR stresses that the wrongful act on the side of the Respondent States does not lie in the admission of Morocco but in their failure to act on that occasion, which began when Morocco officially submitted its application for admission on 23 September 2016. It points out that from that moment onwards, the Respondent States should have acted, as the application put them in a position to enforce the right to self-determination of the Sahrawi people.

75. However, SADR argues, that for six months, while they could have engaged in consultations and interactions, the Respondent States remained passive and on 31 January 2017, the Assembly admitted Morocco to the AU. The SADR alleges that the Respondent States have taken no measures as required by their obligations under the said Constitutive Act of the AU, the

Charter, the ICCPR, the ICESCR and the law of international responsibility, with regard to the Morocco's admission to ensure respect for the sovereign rights and fundamental freedoms of the people of the SADR. Therefore, SADR submits that the wrongful act was not manifest just on the date of admission but it had already existed for six (6) months prior to that.

76. It is also the SADR's submission that even if it were to be assumed that the Court lacks the competence to interpret the Constitutive Act, the reference to provisions of the Act within the Application does not automatically divest the Court of its jurisdiction. In fact, according to the SADR, the principles enshrined in Article 3 and 4 of the Constitutive Act in terms of obligations of States generate corresponding rights to be enjoyed by peoples and as such, the Act could be characterised as a human rights instrument.

77. The SADR substantiates its contentions by referring to the AU's submissions in the International Court of Justice's *Advisory Opinion on the Status of Chagos Archipelagos,* and to the judgments of the European Court of Justice in *Western Sahara Campaign UK v. Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco.*

iii. The Court's Position

78. As regards the first objection, the Court notes that its jurisdiction to interpret the Constitutive Act of the AU is ousted by Article 26 of thereof[9] and as such, issues exclusively requiring the interpretation of the Constitutive Act are outside its competence. In view of this, the Court does not deem it necessary to determine whether or not the Constitutive Act, to the extent it contains provisions pertinent to the protection of human rights, may be considered as a human rights instrument.

[9] According Article 26 of the Constitutive Act of the African Union, "The Court [of Justice] shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the Assembly of the Union, which shall decide by a two-thirds majority." See also Rule 4(1)(s) of the Rules of Procedure of the Assembly of the African Union (2002).

79. However, apart from the Constitutive Act, the Application is also based on *other* conventions to which the Respondent States are Parties. As indicated above, it contains allegations of violations of several rights of the Sahrawi people, including their right to self-determination, the right to dispose of their natural resources, the right to participation in the political affairs of their country, their right to a fair trial and their right to peace contrary to Articles 1, 2, 7, 13, 19, 20, 21, and 23 of the Charter.

80. The Court also notes the Applicant's allegation of violations of Articles 1 and 2 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which all the Respondent States have ratified.[10] In addition, Benin, Côte d'Ivoire, Mali, Malawi, Ghana and Burkina Faso are also Parties to the African Charter on Election, Democracy and Good Governance (ACEDG),[11] which the Applicant further alleges to have been violated.[12]

81. The examination of these allegations of violations falls within the jurisdiction of the Court in accordance with Article 3 of the Protocol. Accordingly, the Court dismisses the Respondent States' objection in this regard.

82. With regard to the second objection, that the Application exclusively relies on the admission of Morocco to the AU, the Court observes that if the Application was solely grounded on the said admission, its consideration would in fact be outside its material jurisdiction. As it has already established in its caselaw, the AU and its member States have separate legal personalities, bearing their own rights and duties in international law,

[10] Benin became a State Party to ICCPR and ICESCR on 12 March 1992, Burkina Faso on 4 January 1999, Côte d'Ivoire 26 March 1992, Ghana 7 September 2000, Malawi on 22 December 1993, Mali 16 July 1974, Tanzania 11 June 1976 and Tunisia on 18 March 1969.

[11] In the case of Application No. 001/2014, the Court held that "the African Charter on Democracy and the ECOWAS Protocol on Democracy and Governance are human rights instruments within the meaning of Article 3 of the Protocol, and therefore that it has jurisdiction to interpret and apply the same". (1 AfCLR 668, § 65).

[12] The Republic of Benin ratified ACDEG on 11 July 2012, Burkina Faso on 6 July 2010, Côte d'Ivoire on 28 November 2013, Ghana on 18 October 2010, Mali on 2 September 2013 and Malawi on 24 October 2012.

despite the fact that the Union is collectively created by its individual Member States.[13] The admission as such is the decision of the supreme organ of the Union,[14] that is, the Assembly and it cannot in principle be considered as the act of the individual Member States.

83. The Court notes in this regard that Article 26 of the Constitutive Act of the AU is clear that the interpretation and application of the Act is beyond the remit of the Court's jurisdiction. Accordingly, it does not have the competence to examine whether the AU's decision to admit Morocco is compatible with the Constitutive Act. As the Office of the Legal Counsel of the AU has rightly concluded in its Legal Opinion on the issue of the admission:

> Articles 3 and 4 of the Constitutive Act ought to guide the actions of the organs of the Union and the decisions they are required to take in the exercise of their powers. It is therefore within the powers of the Assembly to determine whether the admission of the Kingdom of Morocco would be in violation of the principles and objectives of the Union relating to decolonization, defending the sovereignty and territorial integrity of all member states and respecting its own and other member states' internationally recognised borders. In conclusion, the Office of Legal Counsel reiterates that the power to determine the admissibility of a request to join the Union and to make a final decision on such request is ultimately vested in the Assembly of the Union in conformity with Article 9(c) of the Constitutive Act and Rule 4(1)(h) of the Rules of procedure of the Assembly.[15]

84. Nonetheless, the Court notes from the record that the instant Application is not exclusively based on the Assembly's decision to admit Morocco to the AU but also on the alleged general behaviour or attitude of the Respondent

[13] *Femi Falana v. African Union* (jurisdiction) (26 June 2012) 1 AfCLR 118, § 68.
[14] Article 6(2) of the Constitutive Act declare that "the Assembly shall be the supreme organ of the Union".
[15] The Legal Counsel of the African Union, Legal Opinion on the Request of the Kingdom of Morocco's for Admission into the African Union, January 2017, paras. 45-46.

States towards the suffering of the Sahrawi people as a result of the continued occupation of their territory by Morocco.

85. The Court also takes note of the Applicant and SADR's submissions in this connection, that the admission and the Respondent States' decision to vote in favour of it, which was allegedly taken before the voting in the Assembly, were rather coincidental with and just an indication of the Respondent States' purported acquiescence to the erosion of SADR's sovereignty and territorial integrity and the resultant violations of human rights of the Sahrawi people contrary to their obligation in the Charter, the ACDEG, the ICCPR, and the ICESCR.

86. In other words, the Applicant's main contention is on the Respondent States' alleged failure to ensure that the Sahrawi peoples' right to self-determination is respected by Morocco, citing the admission process as just one manifestation of such failure.

87. Consequently, the Application can neither be said to have been exclusively based on the fact of admission of Morocco to the AU nor on the Constitutive Act and therefore the objection is dismissed.

c) Whether the Application is like a request for advisory opinion and deals with a dispute over "ownership" of a territory?

i. Respondent States' submissions

88. Côte d'Ivoire objects to the Court's material jurisdiction alleging that the Application is akin to a request for an advisory opinion rather than a contentious claim regarding the purported violation by the Respondent States of their obligations towards a State Party or to the Union itself. As a request for an advisory opinion, it asserts that the Application should be dealt with differently in accordance with Article 4 of the Protocol.

89. Furthermore, Côte d'Ivoire alleges that the instant Application concerns a dispute between two Member States of the AU over a part of Western Sahara, which both claim to be a part of their own territory. According to Côte d'Ivoire, the issue is therefore no longer about the rights and freedoms of the population of the said territory but a question of "ownership" of the territory, a substantive question which falls outside the jurisdiction of the Court. It submits that the onus is on the AU Assembly to hear and determine the status of this territory and until that time, it is the occupying power which is responsible for any human rights violations committed in the disputed territory.

ii. The Court's position

90. Regarding the first limb of the objection, the Court notes that although the Applicant mentions Article 4 of the Protocol, the provision dealing with requests for an advisory opinion, he clearly states in his Application that he filed his complaints against the Respondent States. The Court also infers from the entirety of the Applicant's submissions that the Applicant was not in any way intending to file a request for advisory opinion, rather a contentious Application. Consequently, the Court will treat the Application as such and exercise its jurisdiction to determine the issues raised thereof.

91. Concerning the second limb of Côte d'Ivoire's objection, the Court notes that the instant Application indeed relates to Western Sahara, which Morocco claims to be its own territory. However, the fact that an application alludes to the "ownership" of 'a disputed territory' does not prevent the Court from exercising its jurisdiction with respect to human rights violations alleged to have been committed against the peoples living in that territory.

92. In this regard, the Court underscores that the enjoyment of some group rights such as the right to self-determination may relate to the existence of a specific territory on which a group of people lay claim. As a human rights court, it is also true that the Court has no jurisdiction to rule on a dispute

between two Member States of the AU over the “ownership” of a particular territory.

93. However, the determination of whether some rights of individuals or a group of people living in a particular territory are being trampled upon by a respondent State does not necessarily require the Court to delve into the issue of “ownership” of such territory. The Court is thus competent to determine whether the Respondent States in the instant case are responsible for the alleged violations of the rights and freedoms of the people of the SADR, notwithstanding that such violations may relate to ‘territorial disputes’. Accordingly, the Court dismisses the Respondent State’s objection in this regard.

d) Whether the AU Assembly has transferred the SADR’s matter to the United Nations?

94. The other objection to the Court’s jurisdiction is that the AU Assembly, the supreme organ of the Union, has concluded on and decided to leave the matter to the United Nations and thus, it is no longer within the prerogative of the AU organs to consider and make determination. In this regard, Tunisia recalls that during the AU Summit of July 2018, held in Nouakchott, Mauritania, the Assembly adopted a resolution (No. 693), by which it limited the competence of the Union to consider and discuss the dispute on Western Sahara and decided to leave the matter to the UN. Accordingly, Tunisia submits that the subject matter of the current Application is no longer within the prerogative of the AU organs, including the Court, as it was concluded upon by a decision of the Assembly, which in accordance with Article 6 of the Constitutive Act is the supreme organ of the AU.

95. The Court notes that at its 31st Ordinary Session, held from 1 to 2 July 2018, in Nouakchott, Mauritania, the Assembly of the AU considered and adopted its decision on the Report of the Chairperson of the Commission on the issue of Western Sahara. The relevant paragraphs of the decision are reproduced below for ease of reference.

The AU Assembly:

REITERATES ITS DEEP CONCERN at the continued stalemate in the conflict in Western Sahara and the resulting consequences on the ground and in the region, as well as its impact on the functioning of the AU and the implementation of its priorities;

STRESSES THE NEED for renewed efforts to overcome the current impasse in the negotiation process and to find a just, lasting and mutually acceptable political solution which will provide for the self-determination of the people of Western Sahara, in line with the relevant AU decisions and UN Security Council resolutions. (…)

AGREES ON THE NEED for the AU to actively contribute to the search for solution, through renewed support to the efforts led by the UN Secretary-General and his Personal Envoy. In this respect, the Assembly:

a) DECIDES to establish an African mechanism comprising the AU Troika, namely the outgoing, the current and the incoming Chairpersons, as well as the Chairperson of the Commission, to extend effective support to the UN-led efforts, by encouraging the parties to demonstrate flexibility, mobilizing as large support as possible for the United Nations led-efforts, and reflecting, in close consultation with the UN, on the substance of the desired compromise. This mechanism shall report regularly on the implementation of its mandate to the Assembly of the Union and, as necessary, to the Peace and Security Council at the level of the Heads of State and Government. (…)
b) REQUESTS the Chairperson of the Commission to initiate the required consultations for the reactivation of the AU Office in Laayoune to the UN Mission for the Referendum in Western Sahara, in order to facilitate operational coordination with the UN;
c) APPEALS to all AU Member States, in particular the neighbouring countries, to support the UN-led efforts[16]

96. The Court observes from the foregoing that the AU Assembly has not, as was alleged by some of the Respondent States, decided to disengage itself

[16] Decision on the Report of the Chairperson of the Commission of the African Union on the Issue of Western Sahara, Assembly/AU /Dec.693(XXXI), §§ 4-6

and entirely transfer the matter to be exclusively resolved under the auspices of the UN. Nor did the Assembly obliquely or categorically decide to preclude other organs from dealing with the issue. In fact, the Assembly decided to establish "an African mechanism comprising the AU Troika", which shall report regularly "to the Assembly of the Union and, as necessary, to the Peace and Security Council". This clearly reflects the Assembly's "deep concern" (…) "at the current impasse in the negotiation process and to find a just, lasting and mutually acceptable political solution which will provide for the self-determination of the people of Western Sahara".[17] More importantly, it demonstrates the Assembly's interest to remain seized of the matter and the AU's general commitment to finding a final settlement to the dispute.

97. There is also nothing in the Assembly's decision indicating that it seeks to oust the Court's competence to consider any application relating to the issue of Western Sahara. Even though the Court was to accept the Respondent States' contention that the AU Assembly has totally relinquished the matter for the UN's consideration, a decision pertaining to a political process that aims to find a political solution, cannot be invoked to exclude a judicial determination of a matter.

98. In this regard, the Court is cognisant of the fact that as an organ of the African Union, it is operating within the Union's general institutional framework. However, as far as its jurisdiction is concerned, it is guided by the Protocol, the Charter and other human rights instruments ratified by State Parties to the Protocol on the basis of which it is empowered to consider an application alleging the violations of human and peoples' rights. The Court therefore rejects the Respondent States' objection that its jurisdiction is ousted by the abovementioned decision of the Assembly.

99. In view of the foregoing, the Court finds that it has material jurisdiction to consider the Application.

[17] Ibid, §§ 3-4.

B. Objection to personal Jurisdiction

i. Respondent States' submissions

100. Mali, Burkina Faso, Tunisia, and Tanzania assert that the Court lacks jurisdiction on the grounds that the Applicant does not have *locus standi* before the Court as he has neither demonstrated interest in the issues that he raised in the Application nor claimed to be a victim of the alleged human rights violations.

101. Mali specifically asserts that the right to individual remedy is subordinate to the *locus* of the victim and only an individual who is a victim of human rights violation can exercise the right to seek remedy. This, according to Mali, requires the existence of a direct link between the individual and the alleged violation. Mali asserts that the Applicant should adduce reasonable and convincing evidence, not mere suspicions and conjectures, of the responsibility of the Respondent States and the violation as far as he is concerned personally, which is not the case in the instant Application. It adds that the violation of a human right is assessed not in abstract but in *concerto* and established after it has taken place; yet the Applicant in this regard fails to demonstrate in any way how the situation of Western Sahara affects him personally.

102. Similarly, Tunisia submits that the seizure of national and international courts is an entitlement to a person who has the right to file an application. According to Tunisia, an individual can exercise this right upon showing interest in a matter and a judge, before considering an application, must always examine and confirm that this precondition is met.

103. Tunisia further expounds that the interest prompting the seizure of a court should be based on a right subsisting and valid at the time of filing the application, that is, the right must have already been violated or harm has been sustained by the applicant, and finally, the interest should be direct and personal in the sense that the applicant or whoever represents him

owns the right to be protected. It contends that the Applicant is a Ghanaian citizen, making a claim based on Morocco's occupation of the SADR, which is not his country of nationality, and he fails to demonstrate that he is being directly affected by such occupation. It is Tunisia's view that the Applicant's allegation that he is being indirectly affected as an African citizen is not sufficient for him to seize the Court.

104. Tanzania also asserts that the Applicant is suing the wrong party. It submits that his Application is based on the AU Assembly's decision to admit Morocco to the Union, which is the function of the Assembly itself and not that of the Member States. Tanzania contends that the AU and its Members have distinct legal personalities and if the Applicant is aggrieved by the decision of the Assembly, he should sue the AU not the individual Member States.

105. Ghana concedes that the Court has personal jurisdiction given that the Applicant is its national and that it has ratified the Charter and the Protocol and deposited the Declaration required under Article 34(6) of the Protocol. Similarly, Côte d'Ivoire accepts that the Court has personal jurisdiction to consider the Application given that it has ratified the Protocol and deposited the Declaration. It also submits that pursuant to the Protocol, the Applicant has standing before the Court.

ii. Applicant's submissions

106. The Applicant avers that he is a Ghanaian national whose country ratified the Protocol and deposited the Declaration accepting the competence of the Court to hear and determine cases involving human rights abuse by a Member State of the African Union.

107. The Applicant emphasises that he is not suing the AU and although the Respondent States are individual members thereof, the AU is not a party to the case. He submits that the SADR is a Member State of the AU and under the Charter, the Sahrawi people are entitled to all the rights enshrined

therein, including the universally recognised right to self-determination. The Applicant asserts that it is the duty of the Respondent States to ensure that these rights are protected. According to the Applicant, this duty emanates from Articles 3, 4 and 17 of the Constitutive Act, which embody the guiding principles of the AU that all Member States should comply with, including respect for human rights, the rule of law and good governance.

108. The Applicant further adds that he filed his Application in discharge of the duty imposed on all individuals towards their family, society and the State under Article 27(1) and Article 28 of the Charter to ensure respect for fellow human beings without discrimination and to maintain relations aimed at promoting, safeguarding and reinforcing mutual understanding and tolerance.

109. The Applicant asserts that in accordance with Article 29(7) and (8) of the Charter, he also owes the duty 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 well-being of the society and to the African Unity to the best of his abilities. The Applicant argues that by seeking to enforce the human rights of the people of Western Sahara, he is performing his aforementioned duty as part of a coalition of civil society organisations fighting for the independence of the SADR and respect for the right to self-determination of the Sahrawi people.

110. In response to the objection that he lacks personal interest or that he is not a victim of the alleged violations, the Applicant contends that his Application is prompted by the desire to protect a public, but not personal, interest. Citing the Court's decision in Application No. 009/2011, *Tanganyika Law Society and Another v. United Republic of Tanzania*, he asserts that to properly file his Application, what is required of him is to show that the action or omission of the Respondent States applies to a right that the Applicant has or the right of an individual on behalf of which he wishes to seize the Court. In this vein, he claims that he has demonstrated how the omission of

the Respondent States applies to the rights of the Sahrawi people on whose behalf he is seizing the Court.

111. In conclusion, the Applicant submits that the Court has personal jurisdiction to determine his Application.

iii. Intervening State's submissions

112. The SADR submits that the Court has personal jurisdiction over the instant matter, as all the Respondent States are parties to the Charter and to the Protocol, and have deposited the Declaration prescribed under Article 34(6) of the Protocol allowing individuals to bring cases against them before the Court. It argues that the Application is not directed against the African Union, which has a legal personality distinct from the Member States but rather concerns the behaviour of the Respondent States.

113. In this regard, SADR emphasises that the question in issue does not concern, even indirectly, the behaviour of the African Union. It submits that the issue of concern is rather the attitude of the Respondent States which have taken no measures in regard to the Morocco's admission to the AU to ensure respect for the sovereign rights and fundamental freedoms of the people of the SADR, in accordance with their obligations under the said Constitutive Act, the Charter, the ICCPR, the ICESCR and the law of international responsibility.

114. Furthermore, the SADR avers that in comparison with other human rights protection systems, the system established by the Charter does not require that the Applicant also be a victim of the alleged violation. Citing the jurisprudence of the African Commission on Human and Peoples' Rights (*hereinafter*, the African Commission), it argues that the principle of *actio popularis* applies to the African context and Article 56(1) of the Charter only requires a disclosure of the identity of the author of the communication, irrespective of him/her being the actual victim of the alleged violation. The SADR also refers to the judgments of the Court in *XYZ v. Benin* and *Ajavon*

v. Benin, and asserts that the interest to act in the African human rights system does not depend on the existence of harm to a personal interest.

115. The SADR also agrees with the Applicant that Articles 27(1) and 29(8) of the Charter impose duties on African citizens towards the international community to contribute to the promotion and achievement of African Unity. It is the SADR's contention that these obligations form the basis of the Applicant's legal interest in seeing the right to self-determination respected.

iv. Amicus curiae's submissions

116. In its *amicus curiae* brief, PALU asserts that the Application has been filed by an individual, Mr. Bernard Mornah and in accordance with Article 5 of the Protocol, he is entitled to directly seize the Court considering that all the Respondent States have ratified the Protocol and deposited the requisite Declaration under Article 34(6) of the same.

v. The Court's position

117. The Court observes that its personal jurisdiction is governed by Article 5 and 34(6) of the Protocol with regard to applications brought to it by individuals or Non-Governmental Organisations. Pursuant to these provisions, there are three (3) cumulative conditions that must be fulfilled for the Court to assume jurisdiction over a particular matter filed by an individual; namely, the State against which an application has filed must have ratified the Charter or any other human rights instrument; second, it must be a party to the Protocol and thirdly, this State must have deposited a Declaration allowing individuals to have direct access to the Court.

118. In the instant Application, the Court notes that all the Respondent States are parties to the Charter and the Protocol and have deposited the Declaration required under Article 34(6) of the Protocol.[18]

[18] The Republic of Benin, Burkina Faso, Côte d'Ivoire, the Republic of Ghana, Malawi, Mali, Tanzania and Tunisia ratified the Charter on 25 February 1986, 21 September 1984, 31 March 1992, 1 March

119. The Court notes that some of the Respondent States in the instant Application have withdrawn their Declaration. However, it reiterates its position that the withdrawal of a Declaration deposited pursuant to Article 34(6) of the Protocol does not have any retroactive effect and it also has no bearing on matters pending prior to the entry into force of the instruments of withdrawal of the Declarations, as is the case with the present Application.[19]

120. On the objection to the Applicant's *locus standi*, based on his alleged lack of interest in the matter or his status as not being a victim of the alleged violations, the Court recalls its jurisprudence that:

> […] [Articles 5(3) and 34(6) of the Protocol] do not require individuals or NGOs to demonstrate a personal interest in an Application in order to access the Court, especially in the case of public interest litigation. The only precondition is that the Respondent State, in addition to being a party to the Charter and the Protocol, should have deposited the Declaration allowing individuals and NGOs to file a case before the Court. This is also in cognisance of the practical difficulties that ordinary African victims of human rights violations may encounter in bringing their complaints before the Court, thus allowing any person to bring applications to the Court on others' behalf without a need to demonstrate victimhood or a direct vested interest in the matter.[20]

121. Similarly, in the instant Application, the Applicant's purported lack of interest or the fact that he is not a victim of the alleged human rights violations does not bar him from accessing the Court. Nor does this fact alone divest the Court of its competence to consider the Application. This notwithstanding, the Court emphasises that the issues raised in the Application, including the

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1989, 23 February 1990, 22 January 1982 and 09 March 1984, respectively. They became State Party to the Protocol and deposited the Declaration on 22 August 2014 and 8 February 2016, 23 February 1999 and 28 July 1998, 21 March 2003 and 23 July 2013, 16 August 2005 and 10 March 2011, 9 October 2008 and 9 October 2008, 20 June 2000 and 19 February 2010, 10 February 2006 and 29 March 2010, and 5 October 2007 and 2 June 2017, respectively.

[19] See paragraph 6 above.

[20] *XYZ v. Republic of Benin*, ACtHPR, Application No. 010/20220, Judgment of 27 November 2020 (Merits and Reparations), §§ 47-48.

right to self-determination, have particular importance to the African society considering the continent's history of colonialism and military occupation. This is reflected in the Charter which, among others, stipulates self-determination as one element of the right to existence of all peoples and categorically rejects foreign domination, be it political, economic or cultural.[21] The Application may as such be considered to contain matters in which African citizens, including the Applicant, have vested interest, thus, allowing them to seize the Court.

122. As regards the objection that the Applicant is suing the wrong party as his allegations are based on the decision of the AU to admit Morocco to the AU, the Court reiterates that the Application is not grounded on the fact of the said admission, at least not exclusively, but rather on the alleged omission of the Respondent States to ensure that Morocco respects the right to self-determination of the people of the SADR. Therefore, the Application is properly filed against the Respondent States in accordance with Articles 5(3) and 34(6) of the Protocol.

123. In view of the foregoing, the Court dismisses the Respondent States' objection in this regard and holds that it has personal jurisdiction to examine the present Application.

C. Objection to temporal jurisdiction

i. Respondent States' submissions

124. Tanzania asserts that even though the admission of Morocco to the AU took place after the Respondent States became parties to the Protocol and deposited the Declaration allowing individual and NGO' access, this alone does not give the Court jurisdiction to entertain the matter. It asserts that the temporal jurisdiction of the Court should also be examined *vis-à-vis*, the fact that the allegations by the Applicant stem from the decision by the AU

[21] See Article 20 of the Charter.

Assembly made in accordance with Article 29 of the Constitutive Act, the interpretation of which is the function of the Assembly itself, not the Court.

ii. The Applicant's submissions

125. The Applicant did not make submissions in response to this objection.

iii. Intervening State's submissions

126. The SADR alleges that the Applicant's allegations against the Respondent States, which coincided with the admission of Morocco to the AU, occurred subsequent to the entry into force, with respect to those States, of the Protocol establishing the Court and of the Declaration deposited by them under Article 34(6) of the Protocol. It adds that the violations committed by the Respondent States constitute a continuous wrongful act having begun at the time of the Moroccan application for admission to the AU and has continued to this day. Consequently, the Court has jurisdiction *ratione temporis* to hear the present Application.

iv. Amicus curiae's submissions

127. PALU also contends that the Court has temporal jurisdiction over the instant Application to the extent that the Applicant impugns acts of the Respondent States on or about January 2017. It cites the Court's judgment in *Peter Chacha v. Tanzania*, and asserts that the Court's temporal jurisdiction can be properly invoked in view of the fact that the alleged violations of human rights of the Sahrawi people are of a continuing nature.

v. The Court's position

128. As regards its temporal jurisdiction, the Court has held that the relevant dates are the ones when a respondent State became a Party to the Charter and the Protocol, as well as, where applicable, the date of deposit of the Declaration under Article 34(6) of the Protocol through which it accepts the

jurisdiction of the Court to receive Applications from individuals and NGOs, with respect to the Respondent State.[22] Where an alleged violation of human rights has occurred before the entry into force of the Charter and the Protocol with respect to the respondent State and prior to deposit of the said Declaration, the Court lacks temporal jurisdiction except when the alleged violations are continuing in nature.[23]

129. In the instant case, the Applicant's contention relates to the Respondent States' alleged omission of protecting the rights and freedoms of the people of Western Sahara, including the right to self-determination. The alleged omission is said to have started, at least, from the moment the Morocco notified the AU of its intention to join the organisation on 22 September 2016, that is, after all the Respondent States, with the exception of Tunisia**,** became Party to the Charter and the Protocol and deposited the Declaration required under Article 34(6) of the Protocol.[24]

130. With respect to Tunisia, the Court recalls that it became a party to the Charter on 21 October 1986 and to the Protocol on 21 August 2007 but deposited its Declaration under Article 34(6) of the Protocol on 2 June 2017, that is, after Morocco's admission processes was completed. However, the Court observes that the human rights alleged to have been violated as a result of such omission are continuing in nature given that the people of Sahrawi are still living under Morocco's occupation. The Applicant thus could have seized the Court at any time as long as the violations continue to occur.[25]

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[22] *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v. Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197, §§ 71 – 77; *Jebra Kambole v. United Republic of Tanzania*, ACtHPR, Application No. 018/2018, Judgment of 15 July 2020 (merits), § 22.

[23] Ibid.

[24] See **"**Morocco officially requests to join the African Union" AU Press Release, 23 September 2016 <https://au.int/en/pressreleases/20160923> [accessed April 2022].

[25] Jebra Kambole v. United Republic of Tanzania, ACtHPR, Application No. 018/2018, Judgment of 15 July 2020 (merits and reparations), § 50; Yusuph Said v. United Republic of Tanzania, ACtHPR, Application No. 011/2019, Judgment of 30 September 2021 (jurisdiction and admissibility), § 42.

131. In view of the above, the Court therefore holds that it has temporal jurisdiction to determine the instant Application.

D. Objection to territorial jurisdiction

i. The Respondent States' submissions

132. Tanzania submits that the Court lacks territorial jurisdiction. It argues that pursuant to Article 29 of the Vienna Convention on the Law of Treaties, a State is bound by a treaty in respect of its entire territory and cannot be held liable for an action or omission that has occurred outside its jurisdiction, unless such actions or omissions are perpetrated by the State in question or its agents.

133. In this regard, Tanzania avers that there is lack of causal link between the obligations of the Respondent States and the acts allegedly committed by Morocco towards Western Sahara's sovereignty, and its peoples' rights and freedoms as guaranteed in the Charter, ICCPR and ICESCR. According to Tanzania, the mere fact of participation in the decision to admit Morocco to the AU does not suffice to establish violations by the Respondent States. To support its contention, it cites the jurisprudence of the Court in the matter of *African Commission on Human and Peoples' Rights v. Libya*.

134. Mali also asserts that the obligation that the Respondent States have assumed to protect human and peoples' rights has territorial limits. It specifically contends that States' undertaking in the Charter does not impose on them the duty to protect rights and freedoms of individuals such as the right to vote anywhere in the world. According to Mali, each State has its own organised political system and in accordance with the principle of state sovereignty and non-interference in internal affairs, one State cannot for example, intervene in the electoral system of another State to ensure the protection of the right to vote. Consequently, it submits that the Court's jurisdiction must be limited to the territory of the State where the violations of rights was committed.

135. In the same way, Côte d'Ivoire contends that a Respondent State can only be responsible for human rights violations committed by itself or by its subjects on its territory. Therefore, it submits that the territorial jurisdiction of the Court should be limited to alleged human rights violations committed in the territory of the concerned Respondent State by virtue of the principle of non-interference of a Member State in the internal affairs of another as enshrined under Article 4(g) of the Constitutive Act of the African Union.

ii. The Applicant's submissions

136. The Applicant contends that the Charter has not defined any territory in terms of its scope of application. The Applicant asserts that when it comes to fighting against foreign domination, colonialism and Apartheid, the practice of the AU has been that all Members of the AU have a collective obligation. In this regard, he recalls that during Apartheid and the process of decolonisation in Southern Africa, all Member States of the OAU acted together despite the fact that the violations of human rights occurred outside their respective territories. Furthermore, the Applicant asserts that the AU Member States acted in tandem to ensure that the Ex-President of Chad, Mr. Hissène Habré, was tried in Senegal for alleged human rights violations committed during his presidency in Chad, notwithstanding that none of the violations took place in Senegal.

iii. Intervening State's submissions

137. The SADR avers that the violations committed relate to acts and omissions directly attributable to the authorities of the Respondent States which, therefore, can be located in their national territory where the said authorities are to be found. According to the SADR, for the Court to have jurisdiction, it is sufficient that the alleged violations have taken place within the juridical space of the Court, that is, in the territory of a State Party to the Protocol, which may factually be that of the Respondent States but not necessarily limited to their national boundaries.

138. The SADR contends that in the present case, the violations took place “in the territory of a State Party to the Protocol”, regardless of whether these violations are localised in relation to the damage suffered or to the event causing it. In this regard, it submits that as to the place of the damage suffered, the SADR is a State Party to the Protocol, and accordingly, the Court’s jurisdiction extends to the whole of the Sahrawi territory including the occupied zone.

139. Secondly, as regards the event causing the damage, the SADR alleges that it took place in the territories of the Respondent States, where the seat of their Presidency, Ministry of Foreign Affairs –“their nerve and decision–making centre”, are located. It is SADR’s submission that, the violations committed happened there as it is where the choice to remain silent and to look away, was made in direct violation of the right to self-determination of the Sahrawi people, while Morocco was seeking admission to the African Union.

140. Furthermore, the SADR argues that the notion of territorial jurisdiction should not apply to the right to self-determination and independence. According to the SADR, Article 1 common to both the ICCPR and ICESCR, which concerns the “right of peoples”, does not include a reference to the notion of “jurisdiction” in contrast to Article 2(1) of the ICCPR. Secondly, the SADR asserts that the notion of jurisdiction is foreign to the Charter, while Article 1 of the corresponding European and Inter-American Conventions of Human Rights, contains the term “jurisdiction”. It alludes that this difference stems from the fact that the Charter protects “human and *peoples’* rights” while the European and Inter-American human rights Conventions only guarantee “the rights of *individuals*”.

141. Thirdly, the SADR relies on General Comment 12 of the Human Rights Committee where the latter emphasised that the obligation of States to act in favour of the realisation of the right to self-determination exist irrespective of “whether a people entitled to self-determination depends on a State Party to the Covenant or not”. In view of this, SADR avers that the obligation is

not limited to the administering powers that temporarily control the territory of colonised peoples but rather applies to all.

142. Finally, the SADR submits that in its advisory opinions on the *Wall* and *Chagos*, the International Court of Justice (hereinafter, the ICJ) did not differentiate between States that actually control the territory of peoples entitled to self-determination and other States. On the contrary, SADR contends that, the ICJ "emphasise[d] the *erga omnes* nature of the right to self-determination, stressing that it is an obligation of all States".

iv. Amicus curiae's submissions

143. PALU agrees with the submission of the SADR and asserts that the facts which gave rise to the alleged violations, including the occupation of the SADR, spoliation of its resources and impeding of its popular government are occurring in the territory of a party to the Charter and the Protocol, that is, the SADR, the Court has, therefore, territorial jurisdiction to consider the matter.

144. PALU nevertheless concedes that the Court needs to specify the location to ascribe the violations and impute them to the Respondent States. In this vein, PALU asks at what point did the respective Respondent States make the decision: on whether or not to raise the issue of SADR and on whether and/or how to vote on the unconditional admission of Morocco to the AU. PALU requests the Court to determine whether this was done in the capital city of each Respondent States or should be limited to the site of the meetings of the AU policy organs where the admission decision was made.

145. PALU further avers that some of the alleged violations in the Application are continuing in nature and the potential remedial actions that could be taken by the Respondent States are also very broad, they potentially could be taken in any or multiple parts of the Respondent States. PALU also argues that Article 20(3) of the Charter, which provides for the right of the Sahrawi

people to get assistance from all the State Parties in their liberation struggle expands the territorial jurisdiction of the Court literally to the entire continent.

v. The Court's position

146. The Court notes that unlike its European and Inter-American counterparts,[26] the Charter does not specify the territorial scope of its application. Neither does the Protocol define the territorial domain of the Court's competence. However, the Court has always examined its territorial jurisdiction as part of other aspects of its competence.[27]

147. The Court notes that the determination of the territorial jurisdiction of international tribunals has traditionally been confined to the national boundaries of the States. This stems from the general belief that a State's capacity to enact and enforce laws is *de jure* restricted to its national boundaries. As spelt out in Article 29 of the Vienna Convention on the Law of Treaties (1980), "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." On this basis, international courts have also established their territorial competence only with respect to those matters which are said to be committed within the national territories of a State.

[26] Article 1 of the European Convention on Human Rights (1950) declares that "The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined…in this Convention". Similarly, the American Convention on Human Rights under its Article 1(1) stipulates that "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their jurisdiction* the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition".

[27] In *ACHPR v. Libya*, it held that "…the Court notes that with regard to territorial jurisdiction (*ratione loci*), there is no shadow of doubt that the facts of the case occurred in the territory under the authority of Libya", § 58; in *Anaclet Paulo v. United Republic of Tanzania*, the Court held that "It has territorial jurisdiction because the facts took place in the territory of a State Party to the Protocol, that is, the Respondent State.", § 29; see also *Minani Evarist v. United Republic of Tanzania*, Application No. 027/2017, 21 September 2018, § 22; *Werema Wangoko Werema & Another v. United Republic of Tanzania*, Application 024/2015, 21 September 2018, § 33; *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Application No. 003/2014, § 57. In *Kennedy Ivan v. United Republic of Tanzania*, the Court further found that "it has territorial jurisdiction given that the facts of the matter occurred within the territory of a State Party to the Protocol, that is, the Respondent State."

148. However, in recent times, with the increasing extra-territorial undertakings of States and the erosion of the defence of sovereignty with respect to violations of human rights, the classical notion of territorial jurisdiction has seen some changes. International human rights jurisprudence has also continuously expanded the territorial application of international human rights conventions beyond the physical national boundaries to areas where States have effective control and to acts and omissions committed by their agents or persons under their military, political, and economic influence.[28]

149. Regional and international judicial and quasi-judicial human rights institutions have also engaged State's responsibilities with respect to acts and omissions committed within their national territories but generating extraterritorial effects.[29] This jurisprudential development is compatible with the purposes and objects of human rights treaties, that is, the protection of human and peoples' rights in view of which "there is no *a priori* reason to limit a state's obligation to respect human rights to its national territory."[30] Accordingly, there is a growing consensus that the obligation to protect or at least, not to violate human rights extends beyond the traditional confines of State territories.

150. In addition, there are some rights such as the right to self-determination with respect to which States' obligation cannot be limited to their national boundaries. In this regard, the United Nations Human Rights Committee in its *General Comment 12* on the right to self-determination emphasised that:

[28] *Ilaşcu and Others v. Republic of Moldova and Russia 8 July 2004 (*European Court of Human Rights, *Grand Chamber – judgment)*; see *Ivanţoc and Others v. the Republic of Moldova and Russia* 15 November 2011 (judgment); *Catan and Others v. the Republic of Moldova and Russia* 19 October 2012 (Grand Chamber – judgment); Inter-American Commission of Human Rights, Cuban military intervention in international airspace – Report No. 86/99, Case No. 11.589, Cuba, September 29, 1999; US military intervention in Grenada – Report No. 109/99, Case No. 10.951 United States, September 29, 1999.

[29] For example, in cases of expulsions/extraditions to places where individuals face a risk of torture or other serious human rights violation, the European Human Rights Court and the United Nations Human Rights Committee held that the expelling State incurs responsibility; *Soering v. the United Kingdom*, ECtHR, judgment of 7 July 1989, UN Human Rights Committee (HRC), *Communication No. 2104/2011: Human Rights Committee: Decision adopted by the Committee at its 110th session (10-28 March 2014)*, 29 April 2014, CCPR/C/110/D/2104/2011.

[30] Theodore Meron, "Extraterritoriality of Human Rights Treaties" 89 AJIL 78, 80 (1995).

> [The Covenant] imposes specific obligations on State parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history…The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all State parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination…, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.[31]

151. The Court observes that by its very nature and the manner in which the right to self-determination is stipulated in the Charter, it is clear that the obligation of States extends beyond their national territories and also applies extraterritorially towards other people whose right to self-determination is yet to be fully respected. Article 20(3) of the Charter imposes a corresponding obligation on State Parties to offer their help to oppressed or colonised people by declaring that "*All peoples* shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural".

152. The examination of whether State Parties are discharging their obligation towards the oppressed or colonised people therefore remains within the scope of the Court's territorial competence, notwithstanding the fact that the said people are outside the States' national territory.

153. The Court further stresses that as far as its territorial jurisdiction is concerned, it is immaterial whether State Parties breached their obligations by way of commission or omission.

154. In the instant case, the Court notes that the Applicant alleges violations by the Respondent States of the right to self-determination and other related

[31] UN Human Rights Committee (HRC), *CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, 13 March 1984, § 6.

rights of the Sahrawi people as a result of their failure or omission to take action against the continued occupation of Western Sahara or to prevent Morocco from joining the AU without any commitment or condition to respect the rights of the Sahrawi people.

155. The Court observes that the alleged human rights violations have been committed against the Sahrawi people in the territory of the SADR, a State Party to the Protocol but outside the Respondent States' national boundaries. The Court notes that it cannot automatically assume jurisdiction over an Application simply because alleged violations are said to have happened in the territory of *any* State Party to the Protocol. In order to exercise its territorial competence, the Court must also establish that such alleged violations must have occurred in the territory of a State Party against which an application is filed or by persons under its control.

156. In the present case, the Court notes that it is the alleged conduct of the Respondent States, that is, their failure to protect the sovereignty, territorial integrity and independence of the SADR that is said to have engendered the aforementioned violations of the rights of the Sahrawi people. The actual violations are thus alleged to have been committed in the SADR's territory, strictly speaking, not in the territories of the Respondent States. However, it is evident that it is the Respondent States' purported omission that has had an extraterritorial effect, that is, the continued violation of the rights and freedoms of the people of SADR

157. Accordingly, in view of the nature of the right to self-determination and the obligation that the Respondent States' owe towards the Sahrawi people, it is the Court's position that it has territorial competence to examine the Application. The Court underscores that its territorial jurisdiction remains unaffected irrespective of whether the alleged failure or omission of the Respondent States is said to have occurred in the diplomatic precincts or headquarters of the respective Ministries of Foreign Affairs of the Respondent States or elsewhere. What is rather important is that the

alleged violations are purportedly occasioned by such omission of the Respondent States.

158. The Court thus finds that it has territorial jurisdiction to examine the Application.

159. In view of the foregoing, the Court concludes that it has material, personal, temporal and territorial jurisdiction, and thus, is competent to determine the Application.

VII. ADMISSIBILITY

160. In terms of 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."

161. 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 the following conditions:
>
> a. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
> b. Comply with the Constitutive Act of the Union and the Charter;
> c. Not contain any disparaging or insulting language;
> d. Not based exclusively on news disseminated through the mass media;
> e. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
> f. Be filed 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;

g. Not raise any matter or issues previously 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.

162. The Respondent States have raised objections to the admissibility of the Application based on Rule 50(2)(a)-(b) and (d)-(g) of the Rules.

A. Objections to admissibility

i. Objection based on the identity of the Applicant

a. Respondent States' Submissions

163. Burkina Faso asserts that although the Applicant alleges that he is filing his Application as part of a coalition of civil societies defending the rights of the Sahrawi people, the Applicant failed to mention the non-governmental organisation which mandated him to file this Application and which he is defending. Burkina Faso contends that if the Applicant is from a non-governmental organisation, it is that organisation which would have the status of an Applicant. According to Burkina Faso, this would introduce the additional requirement in Article 5(3) of the Protocol of having observer status before the Commission as a requisite that the Applicant should fulfil to access the Court.

b. Applicants' submissions

164. The Applicant contends that his identity is clear as he disclosed his name, nationality and current role. In this regard, he recalls that he is Bernard Anbataayela Mornah, a Ghanaian citizen and the National Chairman of the Convention of People's Party, a political party in Ghana, which is committed to the struggle for the total decolonisation of the African continent including Western Sahara.

c. Interveners' Submissions

165. In support of the Applicant's contention, SADR avers that in comparison with other human rights protection systems, the system established by the Charter does not require that the Applicant be a victim of the alleged violation. Citing the jurisprudence of the African Commission,[32] it argues that the principle of *actio popularis* applies to the African context and Article 56(1) of the Charter only requires a disclosure of the identity of the author of the communication, irrespective of whether they are the victim of the alleged violation.

166. The SADR further asserts that Rule 1(a) of the Rules provides that "Applicant" means any entity or individual who initiates proceedings before the Court under Article 5 of the Protocol", but does not provide that the author of the applicant must be a victim of a violation of the Charter. Conversely, it argues that Rule 41(7) of the Rules refers to cases where an Applicant is also the victim of a human rights violation" which implies on the contrary that the applicant does not necessarily have to be a victim of the alleged violation to seize the Court, as the adverb "also" indicates.

d. Amicus Curiae Submissions

167. PALU also contends that the author of the Application, as well as his address for service, which is through his Counsel on record, is clearly stated and hence, the Application meets the requirement specified under Article 56(1) of the Charter.

[32] African Commission decision 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)/Nigeria*, adopted at the 30th session ordinary, held in Banjul, The Gambia, from 13 to 27 October 2000, § 49, African Commission decision 260/02, *Bakweri Land Claims Committee/Cameroon*, adopted at the 36th ordinary session held in Dakar, Senegal, from 23 to 7 December 2004, § 46.

e. The Court's position

168. The Court notes that pursuant to Rule 50(2)(a) of the Rules, an applicant must vouchsafe his or her identity to the Court in the absence of which the Court shall declare an application inadmissible. Disclosure of identity to the Court is a minimum requirement though an applicant may still request anonymity with respect to the public. The rationale behind this requirement is to maintain the integrity of the Court's proceedings by precluding individuals who might wish to abuse the judicial platform by filing frivolous applications hiding behind the veil of anonymity.

169. In the instant Application, the Court notes that the Applicant has through his Counsel, identified himself by his name, Mr. Bernard Anbataayela Mornah, and disclosed his nationality, profession and address. Although the Applicant indicates that he filed his Application as part of a coalition of civil society organisations fighting for the independence of the SADR and respect for the right to self-determination of the Sahrawi people, it is clear from his submissions that he was not acting on behalf of the said coalition. Neither has the Applicant also claimed to represent nor of having been mandated by a particular civil society to bring his Application.

170. In view of the above, the Court dismisses the objection of Burkina Faso and holds that the identity of the Applicant is sufficiently disclosed as required under Rule 50(2)(a) of the Rules.

ii. Objection based on non-compliance with the Constitutive Act and the Charter

a. Respondent States' Submissions

171. Tanzania asserts that the determination of compatibility of an application with the Constitutive Act and the Charter needs to take into account the provisions of the two instruments as a whole. On this basis, it submits that as Article 26 of the Constitutive Act of the AU ousts the jurisdiction of the

Court in relation to the interpretation of its provisions, the Applicant's invocation of the Constitutive Act as an enabling instrument to his Application renders the Application not compatible with the Constitutive Act.

b. Applicant's Submissions

172. The Applicant did not file submissions on this issue.

c. Intervener's submissions

173. With respect to compatibility with the Constitutive Act of the AU and the Charter, the SADR relying on the Court's jurisprudence on its jurisdiction,[33] submits that the violations alleged by the Applicant -which are all related to the right to self-determination and independence of the people of the SADR fall within the scope of the Charter, which guarantees these rights in its Articles 19 to 23; and of the Constitutive Act which, in its Articles 3(a), 3(b), 3(f), 3(g) and 3(h) as well as 4(a)-(b), 4(e) 4(f)-(j), and 4(m), enshrines, as objectives and fundamental principles of the Continental Organization.

d. *Amicus Curiae* submissions

174. PALU similarly asserts that *prima facie*, the Application is compatible with both the Constitutive Act and the Charter; and in fact, the Application lists the specific provisions of both legal instruments which it relies upon.

e. The Court's position

175. The Court notes that in accordance with Rule 50(2)(a) of the Rules, an application must be compatible with the Constitutive Act and the Charter. The Court further notes that this requirement must be assessed in the light of the principles and objectives of the Act and the Charter. In this regard,

[33] Application 007/2013. Judgment of 3/06/2016, *Mohamed Abubakari v. Tanzania,* § 50; Application 038/2016. Judgment of 22/03/2018, *Gombert v. Côte d'Ivoire,* § 45.

Articles 3 and 4 of the Constitutive Act set out the objectives and principles of the AU, respectively.

176. Article 3(h) of the Act particularly specifies that one of the principal objectives of the Union is "to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments". Pursuant to Article 4(m) of the same, the Union shall achieve its objectives, among others, on the basis of the principles of "respect for democratic principles, human rights, the rule of law and good governance".

177. The Court notes that the instant Application, having been filed with a view to protecting the rights and freedoms of the people of the SADR, is compatible with the objective and principles of the Union.

178. The Court concedes that the Application makes reference to the provisions of the Constitutive Act and requests the Court to find that the Respondent States have breached their obligation under the afore-cited provisions of the Act. However, the Court rejects the submission that this fact alone makes the Application inadmissible.

179. The Court is of the view that the mere fact that an application invokes provisions of the Constitutive Act, does not necessarily render the application incompatible with the Act or the Charter as long as its subject matter is consistent with the general objectives and principles of the AU and relates to the purpose of the Charter, that is, the protection of human and peoples' rights.[34]

180. Consequently, the Court dismisses the objection of Tanzania in this regard and finds that the Application meets the requirement set out under Rule 50(2)(b) of the Rules.

[34] See *Chacha v. Tanzania* (admissibility) (2014) 1 AfCLR 398, § 124.

iii. Objection based on the fact that the Application is exclusively grounded on news disseminated through the mass media

a. Respondent States' Submissions

181. Ghana argues that the Applicant is neither a citizen nor a resident in Western Sahara or Morocco and does not have first-hand knowledge about the Western Sahara conflict. It asserts that his arguments are to a large extent based on information obtained from the internet and media. In this regard, Ghana refers to a paragraph in the Application where the Applicant cites information obtained from a website which publishes news and information regarding Western Sahara.

b. Applicant's Submissions

182. The Applicant responds that the illegal occupation of the territory of Western Sahara is a notorious fact, which the Respondent States themselves have not disputed. The Applicant asserts that his complaint is not based exclusively on media reports but also relies on AU and UN resolutions on the status of Western Sahara. Accordingly, he submits that in view of the celebrated 1975 Advisory Opinion of the ICJ on the same, this Court should take judicial notice of this fact and make its determination.

c. Intervener's Submissions

183. The SADR also argues that the Application is not solely based on media reports but formal decisions and deliberations of the UN and the AU.

d. *Amicus curiae* submissions

184. PALU contends that the Application dealing with a known fact, is not exclusively based on media reports. Citing the jurisprudence of the African Commission in *Dawda Jawara v. The Gambia*, it asserts that the issue

under Article 56(4) of the Charter “should not be whether the information was gotten from the media, but whether the information is correct”.

e. The Court’s position

185. The Court notes that Rule 50(2)(c) of the Rules requires that an application must not be based exclusively on news disseminated through the mass media. This condition of admissibility requires applicants to base their complaints on credible information other than the ones available on the media. The Rule seeks to save the Court’s resources from being expended on applications that are solely grounded in media reports, which may be unverified, incomplete or are mixed with or influenced by individual editorial opinions.

186. The Court observes that Rule 50(2)(c) does not absolutely proscribe any reference to media reports in an application. The term “exclusively” in this provision makes it clear that what is prohibited is the complete reliance of an application on news obtained from the media. Furthermore, there are facts whether or not reported in the media, that an applicant may rely on in his application or that the Court itself should take judicial notice.

187. In the instant case, the Applicant substantially relies on the various resolutions and decisions of organs of the UN and decisions of the AU. The decisions and resolutions and the realities on which they are based are facts that the Court also takes judicial notice and are not mere media reports. Accordingly, the instant Application cannot be said to be exclusively based on news disseminated through the media.

188. The Court therefore holds that the Application fulfils the admissibility requirement under Rule 50(2)(c) of the Rules.

iv. Objection based on failure to exhaust local remedies

a. Respondent States' submissions

189. Burkina Faso, Ghana and Côte d'Ivoire raise the issue of lack of exhaustion of local remedies. Burkina Faso specifically argues that its domestic law allows foreigners to seize its courts but the Applicant has never done so. It contends that the Applicant has not properly justified why this requirement should be waived for him nor has he explained why he did not approach its domestic courts or the unavailability or ineffectiveness of the remedy before them. Côte d'Ivoire also asserts that it has civil courts that adjudicate human rights and freedoms but the Applicant has not submitted that he took his matter before the said courts prior to seizing this Court.

190. On the other hand, Tanzania submits that the requirement of exhaustion of local remedies does not apply in the present Application. According to Tanzania, the Application itself is before a body with no competence to hear the same.

191. Furthermore, Tanzania reiterates that the impugned acts or omissions in the instant Application relate to State's obligations and liability in international treaty. It notes that Tanzanian courts do not generally have a mandate to determine a dispute between State parties or third parties that arise out of implementation of a certain treaty. Accordingly, it is Tanzania's submission that considering the nature of the matter, there is no possibility for the Applicant to exhaust local remedies within its jurisdiction.

b. Applicant's submissions

192. The Applicant submits that his Application should be treated as falling within the exception to the rule of exhaustion of local remedies. He contends that domestic remedies would be unusually delayed if he had to move from one Respondent State to the other seeking reliefs for his application. The Applicant notes that if he was to do that, he would have to engage the

service of numerous lawyers to prosecute the suits in all the Respondent States thereby not only negating the very essence of "re-establishing the African Court of Justice and Human Rights (ACHJ) but also fostering the multiplicity of jurisdiction".

193. The Applicant further asserts that the instant case involves a plurality of Respondent States whose behaviour is closely linked given their collective responsibility to act to ensure respect for the rights of the Sahrawi people. In this regard, the Applicant notes that the African Commission in similar cases agreed to disregard the application of the rule of exhaustion of local remedies on the grounds that the national judge of a Respondent State, taken in isolation, will not have jurisdiction over the other Respondent States, and besides, it would be unfair to expect the victim to institute parallel suits in the national courts of the States involved, separately.

194. The Applicant also notes that he would not have been able to sue the Respondent States in Ghana as all of them except the latter enjoy sovereign immunity in his country. In this vein, the Applicant cites the decision of the Court of Justice of the Economic Community of West African States (ECOWAS) in *Starcrest Investment Ltd. v. The President of the ECOWAS Commission* (2010) CCJLR (PT 3) 99. The Applicant contends that the ECOWAS Court in this case held that the question of exhaustion of local remedies "does not arise in matters involving persons enjoying diplomatic immunity from the national Courts".

c. Interveners' submissions

195. The SADR similarly argues that this rule does not apply to this Application given that the violations committed by the Respondent States concern the sovereign rights of the Sahrawi as a people whose State is a party to the Charter. In this regard, recalling the case-law of the ICJ,[35] it asserts that the obligation to exhaust domestic remedies does not apply to requests made

[35] *Avena and Other Mexican Nationals (Mexico v. United States of America),* Judgment, ICJ Reports 2004, p. 36, § 40.

by a State, in its own name, even when there is an interdependence between the rights of that state and the individual rights it intends to protect. According to SADR, in accordance with the principle of par in *parem non habet imperium*, a sovereign State cannot be forced to submit to the jurisdiction of another State, particularly as regards *jure imperii* activities which directly relate to its sovereignty. It further asserts that it is clearly contrary to Article 19 of the Charter and the right which it guarantees, to require a State Party to exhaust the domestic remedies of another State Party to demonstrate the violation of its sovereign rights, as a prerequisite for referral to the Court.

196. In addition, the SADR alternatively asserts that any recourse before the national courts of the Respondent States would have had no chance of prospering. This is firstly, because the present case involves facts which, under domestic law, concerns the domain of external relations to which the theory of acts of government applies. According to SADR, in almost all States, such acts are outside the scope of review by the national judge and any referral to the national judge would have been doomed to fail since, in any event, the courts concerned would have refused to pronounce themselves on the conformity of the behaviour of the Respondent States with their international obligations towards the Sahrawi people.

197. Secondly, the SADR contends that the Applicant's claim involves a plurality of Respondent States, whose behaviour is closely linked given their collective responsibility to act to ensure respect for the rights of the Sahrawi people. In such circumstances, it argues that in conformity with the decision of the African Commission,[36] the application of the rule of exhaustion of remedies should not apply in this case on the grounds that the national

[36] African Commission, decision No. 157/96*, Association for the Safeguarding of Peace in Burundi/ Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia*, adopted at the 33rd session ordinary held in Niamey, Niger, from 15 to 29 May 2003, § 65, ACHPR, decision n ° 409/12, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v. Zimbabwe and thirteen others,* adopted during the 54th ordinary session, held in Banjul (The Gambia) from October 22 to November 5, 2013, §§ 103-105. 527 AHPR Commission, decision n ° 338/07*, Socio-Economic Rights and Accountability Project (SERAP) v. Federal Republic of Nigeria,* adopted at the 48th Ordinary Session, held in Banjul (The Gambia) from 10 to 24 November 2013, § 67.

judge of a Respondent State, taken in isolation, will not have jurisdiction over the other Respondent States. Furthermore, it would be unfair to expect the victim of human rights abuses to pursue multiple proceedings in the national courts of each of the States involved, separately.[37]

198. Finally, SADR submits that in accordance with the established jurisprudence of the African Commission, the rule of exhaustion of domestic remedies does not apply to cases of serious and massive violations of human rights.

d. *Amicus Curiae* submissions

199. On its part, PALU contends that the rule of exhaustion of local remedies should not apply to the instant Application. First, it argues that the Application involves about nine (9) countries, including SADR which potentially also concerns a tenth non-party State of Morocco. The multiplicity of parties, in and of itself, makes it appropriate to consider the case in a single international tribunal to which all the Respondent States are party. According to PALU, the alternative would be to lodge a separate case in each of the eight Respondent States' national courts, which would not be an effective way of addressing this matter.

200. Secondly, PALU asserts that some of the Respondent States have conceded that the potential domestic remedy in their jurisdiction is ineffective – given that the Application deals with matters of international relations. In this connection, PALU notes that the instant Application indeed involves the international responsibility of different Respondent States on which national courts have no jurisdiction.

201. Furthermore, citing the African Commission's decision in *Dawda Jawara v. The Gambia,*[38] it submits that considering that the Respondent States have been aware of existing violations but have not taken any actions, it is not

[38] *Jawara v. Gambia* (Communication No. 147/95, 149/96) [2000] ACHPR 17; (11 May 2000).

necessary to take the matter to them for redress. As long as a State was aware of a violation and had a chance to remedy but failed to do so, the rule of exhaustion of local remedies does not apply.

202. Finally, PALU submits that the Court should adopt the position of the African Commission that the requirement of exhaustion of local remedies is waived when a series of serious or massive violations of human rights in terms of Article 58 of the Charter occur, which is the case in the instant Application.

e. The Court's position

203. The Court notes that Rule 50(2)(e) of the Rules provides that an application filed before it must fulfil the requirement of exhaustion of local remedies. The rule of exhaustion of local remedies offers States the opportunity to deal with human rights violations at the domestic level before an international human rights body determines their responsibility for the same.[39] On several occasions, the Court has emphasised that the requirement of exhaustion of local remedies can only be dispensed with if local remedies are manifestly unavailable, ineffective, insufficient or the proceedings to pursue them are unduly prolonged.[40]

204. The determination of the existence of a circumstance that warrants dispensing with the rule of exhaustion local remedies is made on a case-by-case basis taking into account*, inter alia*, the nature of the case, parties involved, alleged human rights violations, the reliefs sought and the likelihood that an applicant may be able to utilise local remedies without considerable difficulty.

[39] *African Commission on Human and Peoples' Rights v. Republic of Kenya* (merits) (26 May 2017), 2 AfCLR 9, §§ 93-94, see also *Stephen John Rutakikirwa v. United Republic of Tanzania*, ACtHPR, Application No. 013/2016, judgment of 24 march 2022 (merits), § 36.
[40] *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*, Application No. 030/2017, judgment of 24 March 2022 (merits), § 43.

205. The Court acknowledges that in comparison to all cases that it has previously entertained, the instant Application is the first of its kind both in terms of the number of parties and the nature of the submissions filed. The Application is filed against eight (8) Respondent States "individually and/or collectively" and involves allegations of human rights violations arising from their "individual and/or collective obligation" to protect the sovereignty, territorial integrity and independence of the SADR. The Applicant also seeks reliefs that require the Respondent States to act individually and/or severally.

206. Furthermore, while some of the Respondent States, namely, Burkina Faso, Ghana and Côte d'Ivoire assert that judicial remedies are available in their domestic jurisdictions, others, notably, Tanzania, aver that their domestic courts do not have competence to rule on disputes arising out of implementation of their obligations in international treaties.

207. The question that arises here is whether the Applicant should have attempted to pursue local remedies in at least, those countries which claim to have judicial avenues to determine and engage their responsibility for violating international obligations.

208. The Court is alive to the fact some national courts have recently scrutinised the international conduct of their governments and granted reliefs on the basis of the findings of such scrutiny.[41] It would thus be casting aspersions if one is to conclude that domestic remedies would be unavailable, insufficient or ineffective or their proceedings unduly prolonged simply because an application relates to treaties or international wrongful act of a State.

[41] For example, the High Court of South Africa sitting in Pretoria ordered the government to revoke the country's October 2016 notice to the United Nations to withdraw from the Rome Statute of the ICC based on the government's failure to obtain prior parliamentary approval. *Democratic Alliance v. Minister of International Relations and Cooperation et.al*, High Court of South Africa (Gauteng Division, Pretoria), judgment of 22 February 2017
< http://www.saflii.org/za/cases/ZAGPPHC/2017/53.pdf >.

209. Nonetheless, considering that the current Application is directed against several Respondent States and that the reliefs sought require their individual and/or collective action, the Court finds it unreasonable to require the Applicant to sue all the Respondent States either in his country, which as he rightly points out is barred by sovereign immunity, or before their respective domestic remedies. It would not only be cumbersome but also occasion foreseeable undue prolongation resulting from the multiplicity of the Respondent States.

210. Furthermore, the Court takes note of the submissions of some of the Respondent States, particularly, Tanzania, that the domestic courts do not have the competence to entertain matters related to their obligations arising from international treaties. It would therefore be futile for the Applicant to take his case to domestic courts in a situation where such courts lack jurisdiction to consider his complaints. It is also important to emphasise that the Applicant is suing the Respondent States individually and/or severally. Consequently, even if he had decided to approach the domestic courts of some of the Respondent States, where it is claimed that the municipal courts have the competence to consider international obligations, the general principle of sovereign equality of States would have prevented them from deciding on the case in a holistic manner with respect to the joint responsibility of all Respondent States.

211. The Court finally recalls the decision of the African Commission that when an application involves an allegation of a series of serious and massive violations of human rights, the rule of exhaustion of local remedies becomes inapplicable.[42] In view of the fact that the instant Application contains allegations of several serious violations of the rights and freedoms of the people of SADR continuing for decades, the Court considers that there is sufficient ground to dispense with the rule of exhaustion of remedies in the present case.

[42] Communications 25/89, 47/90, 56/91 & 100/93, World Organisation against Torture and Others v Zaire (Zaire mass violations case), Ninth Annual Activity Report, para 3.

212. Accordingly, the Court holds that the instant Application is deemed to have met the requirement of exhaustion of local remedies.

v. Objection based on failure to file the Application within a reasonable time

a. Respondent States' submissions

213. The Republic of Ghana contends that the Application does not fulfil the requirement of Rule 50(6) of the Rules relating to filing of an Application within a reasonable time. On the other hand, Tanzania reiterates that this Application is before a wrong forum and thus, this requirement of filing within a reasonable time does not arise in the present case.

b. Applicant's submissions

214. The Applicant did not make any submissions on the question of filing within reasonable time.

c. Interveners' submissions

215. Similarly, the intervening States did not file any submissions on this objection.

d. *Amicus Curiae* submissions

216. PALU contends that some of the alleged violations commenced in 1976 when Morocco occupied parts of Western Sahara and some from January 2017, when Morocco was admitted to the African Union both of which are continuing to date. Accordingly, PALU submits that it is for the Court to set a time limit which it shall be seized of the matter, bearing in mind the continuous and massive nature of the violations.

e. The Court's position

217. The Court notes that Rule 50(2)(f) of the Rules which in substance restates the contents of Article 56(6) of the Charter, requires an Application to be filed within: "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

218. The Court recalls its jurisprudence that: "…the reasonableness of the timeframe for seizure depends on the specific circumstances of the case and should be determined on a case-by-case basis."[43] The Court has also held that in situations of continuing violations, the requirement of filing an application within a reasonable time becomes inapplicable in view of the fact that such violations renew themselves every day as long as a State fails to take steps to remedy them.[44]

219. The Court further recalls its earlier position that by the nature of his Application, multiplicity of the parties involved and reliefs sought, the Applicant was not required to exhaust local remedies in the instant case. Accordingly, the Court shall specify the date from which the reasonableness of time for filing under Rule 50(2)(f) of the Rules shall be computed. In this regard, the Court recalls the submissions of the Applicant and the SADR that the Respondent States have failed to protect the right to self-determination and other rights of the people of Sahrawi since the beginning of Morocco's occupation on 6 November 1975, or at least, from 19 September 2016, that is, the date on which the latter officially notified the AU of its intention to join the Organisation.

220. The Court notes that considering the continuing nature of the Respondent States' alleged failure to safeguard the independence and territorial integrity of the SADR and as a result, the alleged violation of the rights and freedoms

[43] *Norbert Zongo v. Burkina Faso* (merits), op. cit, § 92; *Alex Thomas v. United Republic of Tanzania* (merits) (20 November 2015), 1 AfCLR 465, § 73.
[44] *Jebra Kambole v. United Republic of Tanzania* (merits), § 52.

of its people, it matters little whether the relevant date to compute reasonableness is 6 November 1975 or 19 September 2016. The alleged breach of their obligation under the Charter renews itself every day and hence, an application may be filed at any time as long as the Respondent States do not take actions in the discharge of their obligations.

221. The Court thus holds that the Application is filed within a reasonable period of time and complies with the requirement of Rule 50(2)(f) of the Rules.

vi. Objection based on the contention that the Application raises issues previously settled by the Parties

a. The Respondent States' submissions

222. Burkina Faso, joined by Tunisia, Côte d'Ivoire and Ghana, asserts that the Application fails to fulfil the requirement of Article 56(7) of the Charter, as the case of Western Sahara was the subject of a report presented by the Chairperson of the AU at the Nouakchott Summit in July 2018, which was unanimously adopted by the Assembly. Burkina Faso notes that this report fell within the purview of the implementation of Decision No. 653 of the 29th Session of the AU Assembly held in July 2018.

223. Furthermore, Ghana contends that the issue of independence of the Western Sahara Territory has been settled by the ICJ in its Advisory Opinion of Western Sahara on 16 October 1975. According to Ghana, it is based on this resolution that the UN and the AU are working on a referendum for the independence of Western Sahara.

b. Applicant's submissions

224. The Applicant did not make any submissions on this objection.

c. Interveners' Submissions

225. With respect to the *non bis in idem* principle, the SADR recalls the Court's jurisprudence where it held that the "the notion of 'settlement'" requires the combination of three main conditions: (i) the identity of the parties; (ii) the identity of the applications or their supplemental or alternative nature or if a case derives from an application filed in an initial case; and (iii) the existence of a first decision on the merits". It further cites the case law of the African Commission that "The mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations".[45]

226. Relying on the above, the SADR submits that the instant Application was never brought before another judicial or quasi-judicial body by the Applicant before seizing this Court. Consequently, it argues that it has not yet been settled in accordance with the principles of the UN Charter, the Constitutive Act or the provisions of the Charter. As for the scope of decision Dec. 693 (XXXI), SADR recalls that the African mechanism created by the Assembly is part of AU's contribution to the search for a "political solution". It also aims to "provide effective support to UN led efforts deployed "between the two parties to the conflict, namely, the SADR and the Kingdom of Morocco. As such, it asserts that as a political mechanism, it does not operate at the same level as the Court.

d. *Amicus Curiae* submissions

227. PALU submits that both the Applicant and the Respondents concur that the matter of SADR has not been resolved and that serious and massive violations of human and peoples' rights are taking place there. According to PALU, some of the Respondent States detail measures that they allege to

[45] See, in this regard, by analogy, African Commission, Decisions Nos. 279/03, 296/05*, Sudan Human Rights Organization and Center on Housing Rights and Evictions (COHRE) v. Sudan*, adopted at the 45th ordinary session held in Banjul, The Gambia, from 13 to 27 May 2009, § 105.

have taken but concede that there has been no resolution of the matter and that the matter continues to occupy the attention of both the UN and AU.

e. The Court's position

228. In accordance with Rule 50(2)(g) of the Rules, an application filed before the Court shall "not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the UN, the Constitutive Act, the provisions of the Charter or of any legal instrument of the African Union". The Court notes that the examination of compliance with this provision requires it to ascertain that an application has not been settled "in accordance with the principles" of the UN Charter or the Constitutive Act or the provisions of the Charter.[46]

229. The Court observes that the nature of the settlement envisaged in Rule 50(2)(g) may cover judicial or quasi-judicial, diplomatic or any other solution, as long as the parties in question willingly accept it and it follows some basic principles of due process of law and is potentially capable of offering the reliefs sought thereof by parties.

230. The Court further recalls that a matter is considered as "settled" within the meaning of Rule 50(2)(g) of the Rules only if three cumulative conditions are fulfilled: (i) the identity of the parties is the same; (ii) the issues for determination are identical or substantially similar as ones before the Court; and (iii) there already exists a decision on the substance or merits.[47] In other words, there must be a final resolution of the matter. When an application is "settled" as such, it has the effect of making the Court's determination superfluous and unjustified.

231. In the instant case, the Court takes note of the Respondent States' objections that the matter is already settled by the Advisory Opinion of the

[46] *Gombert v. Côte d'Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270, § 44.
[47] *Johnson v. Ghana* (jurisdiction and admissibility) (2019) 3 AfCLR 99, § 47.

ICJ on Western Sahara of 16 October 1975 and the African Union Assembly's decision during the Nouakchott Summit of July 2018.

232. The Court notes that the substance of the instant Application concerns the responsibility of the Respondent States with respect to the violations of the rights and freedoms of the people of SADR. This is distinct from the issues determined by the ICJ in the said Advisory Opinion and the decision adopted by the Assembly of the African Union in Nouakchott in July 2018. Furthermore, whereas the Advisory Opinion is by nature not binding on anyone, the AU Assembly in its decision did not make a final resolution of the matter but rather provided direction towards the finding of an amicable political solution to the conflict between the SADR and Morocco.[48]

233. The Court also points out that in both the ICJ's Advisory proceedings and the AU Assembly meetings of Nouakchott, the instant Parties, particularly the Applicant, were not involved in the process nor were the reliefs sought in the instant Application addressed. In view of this, the matter cannot be considered to have been 'settled' to render the instant proceedings unnecessary.

234. Accordingly, the Court finds that the Application is compatible with the admissibility condition specified under Rule 50(2)(g) of the Rules.

B. Other conditions of admissibility

a. Respondent States' submissions

235. None of the Respondent States allege that the Application contains disparaging or insulting language.

[48] See paragraph 95 above.

b. Applicant's submissions

236. The Applicant did not make submissions concerning the compatibility of his application with the requirement that it should not contain disparaging or insulting language.

c. Interveners' submissions

237. The SADR nevertheless submits that the Application does not contain terms that are outrageous or insulting towards the States concerned, their institutions or the African Union. Moreover, as regards the nature of the evidence, the Applicant relies on official UN documents.

d. *Amicus curiae* submissions

238. PALU contends that it has not identified any disparaging language in the Application nor does any of the submissions of the Respondent States allege any disparaging or insulting language.

e. The Court's position

239. The Court notes that pursuant to Rule 50(2)(c) of the Rules, applications filed before it shall not have any disparaging or insulting language. The Court recalls that an application is said to be disparaging or insulting if it contains remarks or a particular language "calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence…"[49]

240. In the instant case, the Court observes that the Application does not contain any language or remarks that could be considered as offensive or insulting. Thus, the Court finds that the Application is consistent with the requirements of Rule 50(2)(c) of the Rules.

[49] *APDH v. Côte d'Ivoire* (2016) 1 AfCLR 668, § 81.

241. In view of the foregoing, the Court finds that the Application meets all the admissibility conditions specified under Rule 50(2) of the Rules. The Court therefore declares that the Application is admissible.

VIII. MERITS

242. The Court will now decide on the merits of the case after first having set out the various submissions and observations of the parties.

A. Applicant's submissions

243. The Applicant asserts that when Morocco applied for admission to the AU, it was not required to end its "colonization and occupation" of Western Sahara. According to the Applicant, this is despite the Respondent States' individual and collective obligation to defend the sovereignty, territorial integrity and independence of Western Sahara under Articles 3 and 4 of the Constitutive Act.

244. The Applicant alleges that the Respondent States' failure to discharge their obligation and prevent Morocco from continuing to occupy the territory of the SADR has resulted in the violation of the right to self-determination, right to freedom from discrimination, the right to a fair trial; the right to participation in political activities; the right to equality of all peoples, right to peace, the right to satisfactory environment and the right to dispose of wealth and natural resources, and the right to economic, social and cultural development of the people of Western Sahara contrary to Articles 1, 2, 7, 13, 19, 20, 21, 22, 23 and 24 of the Charter, and common Article 1 of both the ICCPR and ICESCR. The Applicant further alleges that the Respondent States have also violated Articles 1 and 2 of the African Charter on Democracy, Elections and Good Governance of the African Union.

245. By way of illustration, the Applicant alleges that the Respondent States were aware that the Sahrawi people are entitled to the right to self-determination

and the right to freely determine their political status and pursue their economic, social and cultural development. Regardless, he asserts that the Respondent States supported the admission of Morocco as a Member State of the AU despite its illegal occupation of Western Sahara deliberately ignoring the over hundred (100) resolutions of the UN and the AU itself on the planned referendum to determine the desire of the Sahrawi people.

246. According to the Applicant, this conduct by the Respondent States contravenes the principles of the Constitutive Act of the AU, the Charter, ICCPR and ICESCR as well as the many resolutions that they should have considered before allowing an occupying power to join the AU for which the Respondent States should be held individually and/or collectively liable.

247. The Applicant avers that there are several provisions in the Charter that impose a legal obligation on himself and the Respondent States to be their "brother's keeper". In this regard, he indicates that Article 20 of the Charter provides for the right to self-determination and is opposed to colonisation. The same provision goes further to impose a legal duty on the Respondent States to give assistance to the colonised people of Western Sahara in their liberation struggle against foreign domination by Morocco.

248. The Applicant also cites Article 21(1), (4) and (5) of the Charter, which provide that all peoples shall freely dispose of their wealth and natural resources and their right shall be exercised in the exclusive interest of the people. According to the Applicant, a legal obligation is imposed on the Respondent States individually and collectively to protect the right of the Sahrawi people to exercise the right to freely dispose of their wealth and natural resources with a view to strengthening African unity and solidarity.

249. The Applicant reiterates that the Respondent States are individually and/or collectively under a duty to defend the sovereignty, territorial integrity and independence of Western Sahara in accordance with Articles 3 and 4 of the Constitutive Act of the African Union; Article 1, 13 and 20 of the Charter and Articles 1 and 2 of the ICCPR and ICESCR. According to the Applicant, the

Respondent States breached their abovementioned obligations by admitting Morocco to the AU and doing nothing to prevent Morocco's continued occupation of the territory of the Sahrawi people.

250. The Applicant substantiates his allegations by citing the ICJ Advisory Opinion[50], the UN General Assembly Resolution 1514 (XV)[51], resolution 3292(XXIX) on Western Sahara[52] and resolution 34/37 of 1979, UN Security Council Resolution on the mandate of the UN Mission for Referendum in Western Sahara[53], AU General Assembly Decision AU/Dec. 583 (XXV) of 2015, as well as the African Commission's Resolution on the human rights situation in the Sahrawi Arab Democratic Republic, ACHPR/Res. 340 (LVIII) of 20 April 2016.

B. Respondent States' Submissions

251. Burkina Faso, Mali, Tunisia, Tanzania and Côte d'Ivoire argue that they do not have responsibility for a decision made by the AU or have powers to interfere in matters between sovereign States and that the violations that were alleged to have occurred are outside their own jurisdiction. In this regard, Burkina Faso and the Republic of Mali specifically assert that pursuant to Articles 3 and 4 of the Constitutive Act, they have the duty to respect the sovereignty of other Member States and to refrain from intervening in their internal affairs.

a. Burkina Faso's submissions

252. Burkina Faso asserts that the Applicant himself admits that SADR is a sovereign country recognised by the AU since 1984. Rather, it is the issue of international recognition which has been posed as the UN refers it as a

[50] ICJ Advisory Opinion on Western Sahara (1975).
[51] Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960.
[52] UN General Assembly, *Question of Spanish Sahara*, 10 December 1975, A/RES/3458.
[53] UNSC resolutions 377 (1975) of 22 October 1975, 379 (1975) of 2 November 1975 and 380 (1975) of 6 November 1975 on the situation concerning Western Sahara.

non-self-governing territory. Together with the international community, Burkina Faso avers that the Respondent States are working towards holding a referendum to settle the dispute between SADR and Morocco. However, it contends that the referendum has not happened because of differences between the parties on the composition of the electoral body and this cannot be imputed to the Respondent States.

253. Burkina Faso also submits that the Constitutive Act, the Charter, the ICCPR and the ICESCR all require States to acknowledge the rights of their citizens as well as foreigners residing in their territory. To that end, Article 4 of its Constitution recognises that all Burkinabè and every individual residing in Burkina Faso have equal rights of protection. It submits that the Applicant however failed to show any violation of the rights of the Sahrawi citizen in Burkina Faso territory.

254. Regarding the decision of the AU Assembly to admit Morocco to the AU, Burkina Faso, also joined by Mali, recalls that the African Union never excluded Morocco in which case its return would have been subject to a prior meeting to discuss the conditions that led to the exclusion. It avers that Morocco voluntarily withdrew from the institution in 1984 but in 2016, made known its intention to return and its admission was accepted by an overwhelming majority.

255. According to Burkina Faso, in matters of responsibility, be it civil, or contractual, it is necessary to justify the combination of three issues: namely, guilt, prejudice and causal link between the two. With regard to guilt specifically, it avers that the Court should examine alleged human rights violations *in concreto* and not in *abstracto* and the Applicant being unable to impute any accusation to any of the Respondent States in the instant case, the Court should find that it was not seized of any alleged violation of human rights.

b. Republic of Mali's Submission

256. According to Mali, as a member to the AU and the United Nations, it has always abided by the Resolutions and Decisions of these organisations, which have always called for the peaceful settlement of the Sahrawi conflict. In addition, Mali asserts that the defence of the sovereignty, territorial integrity and independence of Member States, enshrined in the Constitutive Act, is the function of the Union and that only a decision from the AU Assembly, if necessary, at the request of the oppressed country, or the President of the AU could initiate such procedure. As such, Mali submits that it cannot take measures aimed at preventing Morocco from occupying the territory of Western Sahara. It further points out that the AU in its July 2018 Summit in Nouakchott, mandated a troika of Heads of State and the Chair of the AUC to attempt to resolve the conflict under the supervision of Assembly.

257. Mali also contends that the exercise of the right to self-determination as protected in Articles 1 and 2 of ICCPR and ICESCR is linked to the existence of a specific State, whose sovereignty is often envisaged as a manifestation of the totality of this right. However, it asserts that Western Sahara, being a non-autonomous territory, the Covenants encourage the State which has the responsibility to administer it, that is, Morocco, not Mali, to facilitate the right of the people to govern themselves. Mali stresses that it behoves the people concerned, namely, those of Morocco and Western Sahara to fight for the respect for their right to self-determination by all available legal means and only Morocco can facilitate this.

258. In this regard, Mali further avers that the UN Charter has a partially supra national or supra state character and accordingly, it should be the reference framework for the legality and legitimacy of international intervention. Noting that negotiations to resolve the conflict are at the moment taking place under the auspices of the UN, Mali submits that it is in favour of this approach.

259. Finally, Mali emphasises that it has neither taken any steps nor adopted any measures to restrict the rights and freedoms of the Sahrawis nor has it impeded any procedure aimed at the self-determination of Western Sahara.

c. The United Republic of Tanzania's submissions

260. On its part, Tanzania reiterates its position that "the re-admission of Morocco back to the AU was not done by the Respondent State, rather by the AU Assembly." It argues that there is lack of a causal link between the obligations of the Respondent States, their membership to the AU or participation in the decision of the Assembly to admit Morocco to the AU and the acts allegedly committed by Morocco towards SADR and its people's rights and freedoms guaranteed in the Charter. Given that the "admission of Morocco back to the AU" was a result of a decision made by the AU's Assembly, not by the Respondent States, Tanzania contends that the Applicant has wrongly instituted an Application against eight (8) Respondent States, who obviously cannot be the AU Assembly.

261. Tanzania further elaborates that the decision of admission was taken pursuant to Article 29 of the Constitutive Act, which allows any African State to notify the AU of its intention to be admitted as a member of the Union. Accordingly, Morocco, on 19 September 2016, notified its intention to join the Union and this was forwarded by the AUC to all 54 Member States for their consideration and decision at the Assembly. Tanzania notes that Article 9 of the Act provides for the functions of the Assembly, including considering "requests for Membership of the Union".

262. Citing the Court's jurisprudence in *Femi Falana v. the African Union*, Tanzania asserts that the AU has its own legal personality, possesses international rights and duties and carries out functions independently of its Member States. In this regard, it emphasises that once a decision is taken by the AU Assembly, it is binding on all Member States including those which voted against it. Consequently, it submits that any person who is

aggrieved by such a decision cannot proceed to claim redress against certain Member States, which could not even make “a simple majority”.

263. Furthermore, Tanzania notes that the majority of the AU Assembly (39 Member States) decided to admit Morocco after the latter fulfilled all the requirements for membership specified in Articles 27(3) and 29 of the Protocol. According to Tanzania, a majority of the Member States was also of the view that the return of Morocco to the AU gives room for a peaceful resolution of the conflict between Morocco and Western Sahara from within as both are members of the AU.

264. In conclusion, Tanzania submits that there is lack of causal link between the obligations of the Respondent States and the acts allegedly committed by Morocco towards Western Sahara’s sovereignty and its peoples’ rights and freedoms. According to Tanzania, the mere fact that the Respondent States are Member States of the AU and that they participated in the decision to admit Morocco back to the Union does not suffice to establish violation of the alleged rights and freedoms as set out in the Constitutive Act, the Charter, the ICCPR, ACDEG and the ICESCR.

d. Republic of Côte d’Ivoire’s submissions

265. Côte d’Ivoire submits that it has no obligation towards the SADR and the Applicant’s complaints reveal no concrete fact constituting the breach of any obligation incumbent upon the State of Côte d’Ivoire. In addition, Côte d’Ivoire submits that its decision to vote in favour of the admission of Morocco to the AU does not entail any responsibility. It emphasises that voting is a right and means of practising democracy and facilitating decision-making in cases where it is difficult or even impossible to reach a consensus and it is in accordance with this democratic principle that the decision on admission was decided.

266. In addition, Côte d’Ivoire questions how the mere fact of Morocco’s admission to the AU violates the rights of the Sahrawi people. According to

Côte d'Ivoire, both Morocco and SADR claim the disputed territory in Western Sahara as their own and it would be showing bias to call it "SADR territory". In any event, it submits that by voting for admission, the Respondent States cannot be held accountable for alleged violations of the human rights of Sahrawi people. In this respect, Côte d'Ivoire reiterates that voting was not a commission of human rights violation, rather an act of a political nature done in compliance with the principle of state sovereignty and non-interference in the internal affairs of other States.

e. Republic of Ghana's Submissions

267. The Republic of Ghana avers that the issue of self-determination is a political question and should be resolved politically. It asserts that, as it is treated as a political right in the ICCPR and the ICESCR, the right to self-determination is of "a transient nature than a legal obligation" the application of which is confined to a colonial context. In this regard, it recalls that many of the Western Powers opposed the inclusion of an article on self-determination in ICCPR and ICESCR on the ground that it was a political problem which ought to be tackled by political machinery rather than by a judicial body.

268. Ghana further notes that contrary to the Applicant's assertion that the Respondent States have failed to protect the sovereignty and territorial integrity of SADR, the AU has made several concrete efforts to bring closure to the issue of the sovereignty of SADR and Morocco's occupation of its territory through AU's collaboration with the UN.

269. In this connection, Ghana refers to the AU Assembly's decision during its 31st Ordinary Session held in Nouakchott and the Communique of the 496th Peace and Security Council Meeting of 27 March 2015 where it emphasised its determination to resolve the conflict. In those decisions, Ghana stresses that the AU charged the UN with the mandate to find resolution to the issue in line with international law and appealed for enhanced and coordinated international action towards the early organisation of a referendum. In

addition, the Chairperson of the AUC and the Personal Envoy of the UN Secretary General for Western Sahara in a meeting held on 28 September 2018, expressed their support and the commitment of the AU to the UN led process in arriving at a just, lasting and mutually acceptable political solution to the conflict.

270. Furthermore, it is the view of Ghana that the admission of Morocco to the AU was done with a view to achieving greater unity and solidarity between African countries and the people of Africa in accordance with the Constitutive Act. Ghana avers that in fact, Morocco is bound by the provisions of the Constitutive Act and thus, its admission to the AU is a step towards ensuring such compliance.

271. In conclusion, Ghana submits that given the political nature of the right to self-determination, it is not under a legal obligation to defend the sovereignty, territorial integrity and independence of the Western Sahara. It is rather committed to promote progressively the fight for the right to self-determination which the AU itself is also positively doing in a progressive manner through concrete actions to achieve the same.

f. Republic of Tunisia's Submissions

272. Tunisia submits that international relations operate on the basis of the principle of sovereignty by virtue of which each State has the supreme authority over its territory, its institutions and its political, legal, economic and social options and in managing its foreign relations. In support of its submission, Tunisia cites Article II (7) of the UN Charter which states that "Nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters for settlement under the present Charter…".

273. It argues that the essence of non-intervention is the prohibition of interference in what is considered to be the business of the State's internal

authority and it is the foreign policy that it adopts in international relations as a sign of its independence and sovereignty. Nevertheless, according to Tunisia, in the instant case, the Applicant is asking the Court to compel the Respondent States to submit a request forcing the AU to suspend, place on probation or terminate the membership of Morocco in the organisation, contrary to this principle and against the independence and sovereignty of States.

C. Interveners' Submissions

a. Sahrawi Arab Democratic Republic's Submissions

274. The SADR asserts that the Respondent States have failed in their obligations towards the Sahrawi people at the time of admission of Morocco into the AU. In this regard, relying on the jurisprudence of the ICJ and the Court of Justice of the European Union,[54] it submits that the right to self-determination is a fundamental human right and a peremptory norm of international law which imposes an obligation *erga omnes* on all States to ensure its respect.[55]

275. In view of the said fundamental nature, the SADR submits that the rights to self-determination and independence entails two types of legal consequences for third States: to refrain from recognizing and rendering aid or assistance in the maintenance of a situation arising from a serious

[54] ICJ Judgment of 30 June 1995*, East Timor (Portugal v. Australia), ICJ Reports 1995*, p. 102, s. 29, ICJ, Advisory Opinion on the legal effects of the separation of the Chagos archipelago from Mauritius in 1965, General roll No. 169, February 25, 2019, p. 139, § 144 (hereinafter, "ICJ, Advisory Opinion on Chagos Archipelago" (2019)).

[55] Arbitration Commission of the Conference for the Peace in Yugoslavia, Opinion No. 1, 29 Nov 1991, RGDIP 1992, p. 265 and Opinion No. 9, 4 July. 1992; *Guinea Bissau v. Senegal*, Sentence of 31 July 1989, RIAA, vol XX, pp. 119-213, §§ 37- 50. See, also, the comments of the International Law Commission relative to the Vienna Convention on the Law of Treaties (Doc. No. A/CN.4/SER.A/1966/Add. 1, p.270, § 3), to the draft articles on responsibility under international law (Doc. No. A/56/10, pp. 305-306), to the draft articles on international organizations (Ann. CDI, 2011, vol. II (2), pp. 57-58), and the individual opinion of Judge Ammoun, in the opinion of the ICJ of June 21, 1971, Legal Consequences for the States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding resolution 276 (1970), ICJ Reports 1971, p. 90, §. 12.

violation of this right and to allow its effective realization including by adopting positive acts, material and legal.

276. According to the SADR, this obligation is also reflected in Article 20(3) as read together with the preamble of the Charter which enshrines a real "obligation of solidarity" towards peoples struggling for the actualization of their right to self-determination and independence. In the same vein, it submits that Article 23 of the Charter expressly stipulates that "the principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern the relations between States".

277. The SADR asserts that the right to self-determination imposes an obligation on States not to give recognition and assistance in the event of its violation. As part of their *erga omnes* obligation, it alleges that "States shall not recognize as lawful, a situation created by a serious breach of international law, nor render aid or assistance in maintaining that situation".

278. Furthermore, the SADR contends that customary international law requires that reservations that are incompatible with the objectives and purposes of a treaty cannot be made and this is codified in Article 19 of VCLT. In this regard, SADR stresses that Article 3 and 4 of the Constitutive Act are fundamental provisions in that they define the objectives and principles of the Union and as such, cannot be the subject of any derogation. It is thus the submission of SADR that a State wishing to join the AU must fully comply with the letter and spirit of these provisions.

279. In the instant Application, SADR submits that that the Respondent States have failed in their obligations towards the Sahrawi people since, before and at the time of admission of Morocco, they took no measures, nor made even the slightest declaration, to accompany this admission, in compliance with international and African legality. It contends that the Respondent States could have, for example, individually and/or collectively, supported the development of a differentiation policy likely to guarantee the consent of

the Sahrawi people, with regard to their national territory and their resources, and to respect the separate and distinct status of Western Sahara, in their bilateral and intra-community relations with Morocco in the AU.

b. Submissions by the Republic of Mauritius

280. On its part, the Republic of Mauritius citing ICJ's Advisory Opinion on *the Legal Consequences of the Separation of the Chagos. Archipelago from Mauritius*, underscores that the respect for the right to self-determination is an obligation *erga omnes* which all States have legal interests in protecting it. Again, relying on the Advisory Opinion of the same Court on Western Sahara,[56] it submits that the UN Declaration on the Granting of Independence to Colonial Countries and Peoples Resolution 1514 (XV) (1960) should be applicable to the SADR.

281. Mauritius further contends that the complete decolonisation of the African continent cannot be achieved without the elimination of the remnants of colonialism still existing in a few territories on the continent. In this regard, it submits that Mauritius supports the right of the Sahrawi people to self-determination including their right to dispose of their natural resources; recognizes SADR as a sovereign and independent State; pledges its continued solidarity with the Sahrawi people in their struggle for self-determination; and backs the implementation of all UN resolutions and AU decisions pertaining to SADR.

D. *Amicus Curiae*'s Submissions

282. PALU avers that the right to self-determination imposes an obligation *erga omnes* on the Respondent States and in determining the scope of such obligation, the Court should look at the various resolutions of the AU and its predecessor, the OAU.

[56] *Western Sahara*, Advisory Opinion, ICJ GL No 61, [1975] *ICJ* Rep 12, ICGJ 214 (*ICJ* 1975), 16th October 1975.

E. The Court's position

283. The Court notes that at the core of the instant Application lies the Applicant's allegation that the admission of Morocco to the AU was not opposed by Respondent States in spite of their individual and collective obligation to defend the sovereignty of Western Sahara. According to him, this resulted in a violation of the rights and freedoms of the Sahrawi people contrary to the principles of the Constitutive Act, and the provisions of the Charter, the ICCPR, the ICESCR as well as the numerous resolutions which they should have taken into account before allowing the admission of an occupying power.

284. The Court further notes that the Applicant alleges violations of several rights of the Sahrawi people, including the right to non-discrimination, the right to a fair trial, the right to participation in political activities of one's own country; the right to equality of all peoples, the right to self-determination; the right to dispose of natural resources, the right to development, the right to peace and the right to satisfactory environment.

285. Considering the facts of the case and the submissions of the Parties, the Court is of the view that the present Application is essentially and firmly linked to the right to self-determination, particularly, the right of the Sahrawi people to obtain assistance in their struggle for freedom from foreign occupation.

286. Although the other rights are autonomous by their nature, their violation in the instant case basically flows from the alleged denial of the right to self-determination of the people of Western Sahara. It is the occupation of the SADR and the deprivation of its people of their right to self-determination that have occasioned and facilitated the alleged violations of their other rights, including their right to development, right to disposal of their natural resources, their right to peace and to non-discrimination. In these particular circumstances, the Court therefore deems it unnecessary to deal with them

and thus, limits its determination to the alleged violation of the right to self-determination of the people of the SADR and the putative responsibility of the Respondent States with regard to such violation.

287. At the outset, the Court observes that the eight Respondent States are in no way alleged to have collectively or individually engaged in undertakings to conquer or annex the territory of the SADR. However, the Applicant asserts that in conducting their international affairs, particularly, while voting to admit Morocco to the AU, the Respondent States did not take into account their obligation to support and protect the Sahrawi people against violations resulting from Morocco's occupation.

288. Accordingly, in the application of Article 20 of the Charter, which relates to the right to self-determination, the conduct of these eight States with regard to the SADR should be distinguished from that of Morocco, which is alleged to have directly violated the rights of the Sahrawi people through occupation. However, the alleged Morocco's conduct is not subject to the Court's determination as Morocco is not a party in this case. It is therefore the view of this Court that the conduct of the Respondent States should be determined in the light of their obligation arising from Article 20(3) of the Charter, which declares that:

> All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

289. The Court also finds pertinent that such determination of the Respondent States' responsibility under the above provision should consider the nature of the right of self-determination in general, and its unique place and relevance in the African continent and to the African society, in particular.

290. In this regard, the Court observes that the notion of self-determination has strong resonance with Africa and carries a special and deep meaning to its people. Colonisation, Apartheid, military occupation and various forms of

foreign oppressions that the continent experienced has defined the African identity and history as inherently and inextricably intertwined with the struggle for self-determination. It is for this reason that when the OAU was established in 1963, the Assembly, having been "convinced that it is the inalienable right of all people to control their own destiny", expressed their determination "to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neo-colonialism in all its forms".[57]

291. The Charter establishing the OAU also stipulated that the eradication of all forms of colonialism from Africa was one of the principal purposes of the organization. In the subsequent years, the OAU took steps to ensure the total decolonisation of the continent and repeatedly reaffirmed the importance of guaranteeing the "inalienable right to self-determination" to oppressed people in Africa and elsewhere.[58] Outside the OAU framework, African States have also consistently exhibited unwavering commitment to the right to self-determination by supporting or sponsoring resolutions adopted in the United Nations and other regional and international fora.[59]

292. Despite the fact that the Constitutive Act of the AU, did not explicitly mention the right to self-determination, the defence of "the sovereignty, territorial integrity and independence of its Member States" is specified as one of the objectives of the Union. The Constitutive Act also makes the promotion and protection of "human and peoples' rights in accordance with the African

[57] The OAU Charter (1963), *Preambular* paragraphs 2 and 7.
[58] See Resolution on the Namibian Question, Imposition of the Unilateral Sanctions Against South Africa, Council of Ministers CM/Res.855 (XXXVII) (1981); Resolution on the Palestinian Question, CM/Res.858 (XXXVII) (1981), Abuja Declaration on South Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity at its twenty-seventh ordinary session held at Abuja, Nigeria, from 3 to 5 June 1991.
[59] See resolution 1514 (XV), 14 December 1960, UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), General Assembly Resolution GA 47/82, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights (16 December 1992).

Charter on Human and Peoples' Rights, and other relevant human rights instruments" its additional objective.[60]

293. The Charter guarantees the right to self-determination under its Article 20 as follows:

> All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

294. The Court notes that as clearly spelt out in its preamble, State Parties agreed to adopt the Charter being "conscious of their duty to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, Apartheid, Zionism and to dismantle aggressive foreign military bases and all forms of discrimination, language, religion or political opinions".[61]

295. In comparison with the corresponding provisions of the ICCPR and ICESCR,[62] Article 20 of the Charter offers broader and stronger protection to the right to self-determination, again reflecting the importance African States attach to self-determination. Unlike the ICCPR and ICESCR, the Charter weaves the right to self-determination into the *right to existence of peoples*, something that denotes a wholesale entitlement or right to survival as people. The Charter further explicitly embodies the right of colonized or

[60] Article 3(b) and (h) Constitutive Act of the African Union.
[61] Preambular paragraph 9 of the Charter.
[62] Article 1 common to both ICCPR and ICCR declares that:
1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

oppressed peoples to free themselves from the bonds of domination and the right to the get assistance of the State Parties in their struggle for freedom.

296. The Court will now consider the nature of the obligation of States in international law, arising from the right to self-determination and determine the status of the people of Sahrawi and the Respondent States' purported responsibility with respect to the alleged human rights violations committed against these people.

1. Nature of the obligation arising from the right to self-determination

297. The Court notes that the right to self-determination imposes both positive and negative obligations on State Parties.[63] Positive obligations comprise the duty to protect, promote, and fulfil conditions for the realization of the right. States are required to take actions individually and jointly to facilitate the realization of the right to self-determination, including by offering assistance to people struggling for independence and freedom from domination. On the other hand, negative obligations involve the duty to respect the right, that is, abstaining from engaging in acts or taking measures that adversely affect people from fully enjoying their right to self-determination.

298. The Court also observes that in international law, the right to self-determination has achieved the status of *jus cogens* or a peremptory norm; thereby, generating the corollary obligation *erga omnes on all States*. As such, no derogation is permitted from the right and "all States have a legal interest in protecting that right".[64] Where a peremptory norm is breached, States are also under an obligation not to recognize the illegal situation

[63] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev1/Add.13, § 6.
[64] ICJ, Advisory Opinion on Chagos Archipelago" (2019), § 180; see also Barcelona Traction, Light and Power Company, Lirnited, Second Phase, Judgment, ICJ Reports 1970, § 33; *East Timor (Portugal v. Australia)* case, ICJ Reports 1995, p. 102, § 29.

resulting from such breach and not to render aid or assistance in maintaining the situation.[65]

299. Furthermore, the Court recalls that the obligations resulting from the right to self-determination are owed by States not only towards those who are under their jurisdiction but also to all other peoples who are not able to exercise or have been deprived of their right to self-determination.[66] In line with this, Article 20 of the Charter confers the right to get assistance on "all peoples" without geographical or temporal limitations.

2. The status of the People of SADR and their right to self-determination

300. The Court notes that according to the Applicant, the people of the SADR have been deprived of their right to self-determination as a result of the continued occupation of part of its territory by Morocco.

301. The Court observes that the right to self-determination is essentially related to peoples' right to ownership over a particular territory and their political status over that territory. It is inconceivable to materialise the free enjoyment of the right to self-determination in the absence of any territory that peoples could call their homeland. In this regard, the Court notes that both the UN and the AU recognise the situation of SADR as one of occupation and consider its territory as one of those territories whose decolonisation process is not yet fully complete.[67] As a result, both organisations have consistently called for Morocco and SADR to engage in direct negotiations

[65] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion Of 9 July 2004, § 163.
[66] See *CCPR General Comment No. 12,* paragraph 150 above.
[67] See UN General Assembly Resolution 2983 (XXVII) on the Question of Spanish Sahara adopted on 14 December 1972; UNGA resolution 61/123 adopted on 14 December 2006 on Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories; UNSC Resolution 1979 (2011) adopted on 27 April 2011; ICJ Advisory Opinion on Western Sahara of 16 October 1975; 50th Anniversary Solemn Declaration of the OAU/AU (Assembly/AU/Decl.3.(XXI), adopted by the twenty first AU Summit held from 26-27 May 2013 in Addis Ababa, Ethiopia).

in good faith with a view to conducting a referendum to ensure the right to self-determination of the people of Western Saharawi.[68]

302. The Court recalls that although Morocco has always laid claim on the territory it occupies, its assertion has never been accepted by the international community. In fact, in its 1975 Advisory Opinion, the ICJ found no evidence to establish any historical tie of territorial sovereignty between the territory of Western Sahara and Morocco and concluded that "Morocco had no legal ties of such a nature with Western Sahara to affect the application of the UN General Assembly resolution 1514 (XV) (1960)[69] in the decolonization of Western Sahara and, in particular, the respect for the principle of self-determination through the free and genuine expression of the will of the people of the Territory".[70] Accordingly, as far as the SADR's sovereignty over the occupied territory is concerned, it is a settled fact that the Court should take judicial notice of in its assessment of the instant Application.

303. The Court stresses that the continued occupation of the SADR by Morocco is incompatible with the right to self-determination of the people of SADR as enshrined in Article 20 of the Charter. The question here is whether the Respondent States should be held responsible for such violation. The Parties disagree on this point.

3. Determination of the Responsibility of the Respondent States

304. The Court recalls that in international law, a State incurs international responsibility where three cumulative conditions are proven to have existed: *an act or omission violating international law*, that is, *an internationally wrongful act*; *the act must be attributed to a State (attribution)*; and the *act must cause a damage or loss (causal link)*.[71] In addition, there should not

[68] See UN Security Council 2218 (2015).
[69] Declaration on the Granting of Independence to Colonial Countries and Peoples General Assembly resolution 1514 (XV) adopted on 14 December 1960.
[70] ICJ Advisory Opinion on Western Sahara (1975), § 162.
[71] Articles 1-3, ILC Draft Articles on State Responsibility (2001).

be *circumstances precluding responsibility*.[72] These conditions are spelt out in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts and have been generally considered as reflecting customary international law.

305. The Court also reiterates that the right to self-determination under Article 20 of the Charter imposes an international obligation on all State Parties to take positive measures to ensure the realisation of the right, including by giving assistance to oppressed peoples in their struggle for freedom and refraining from engaging in actions that are incompatible with the nature or full enjoyment of the right.

306. The Court will now consider whether the Respondent States in the instant case should be held responsible for failing to end the occupation of Western Sahara, or to make the admission of the Morocco to the AU conditional on respect for the territorial integrity, independence and sovereignty of the SADR, as well as the right to self-determination of the Sahrawi people.

307. The Court notes that, in view of the fact that part of the SADR's territory is still under occupation by Morocco, there is no question that State Parties to the Charter have an obligation, individually and collectively, towards the people of SADR to protect their right to self-determination, particularly, by providing assistance in their struggle for freedom and by not recognising Morocco's occupation and any human rights violation that might have resulted from such occupation.

308. The issue for determination is whether the Respondent States, contrary to the said obligation, have shirked their responsibility in the Charter by either failing to give assistance to the people of SADR or by recognising the illegal occupation by Morocco of the SADR's territory contrary to the peoples' right to self-determination, that is, whether they have engaged in conduct that would amount as internationally wrongful act.

[72] See Chapter V., ibid.

309. The Court recalls the Applicant's allegation on this point that, by deciding to vote in favour of the admission of Morocco to the AU without putting any preconditions requiring the latter to respect the right to self-determination of the people of SADR, the Respondent States have failed in their obligation to assist the Sahrawi people, and consequently, gave legitimacy to Morocco's occupation. The Court further recalls the submission of the SADR that the process of admission of Morocco showed the Respondent States' behaviour towards the suffering of its people and their reluctance to do their part to end the suffering.

310. The Court observes that, although both the Applicant and the SADR assert that the fact of admission in and of itself is not the basis of their Application, the conduct of the Respondent States that they are complaining about is basically related to the said admission.

311. The Court accordingly notes that in order to establish the internationally wrongful act of the Respondent States, it is imperative to examine the overall context of the decision of Morocco's admission as a member to the AU and the role of the Respondent States in the process. The Court shall, particularly, ascertain whether the Respondent States have complied with their obligation under the Charter. Furthermore, the Court should establish whether there is any wrongful act that could be imputed to the Respondent States and whether there is a casual link between such wrongful act and the violation of the right to self-determination of the people of the SADR.

312. The Court recollects that Morocco withdrew from the OAU in 1984 protesting the seating of a delegation of the Polisario Front, representing the SADR, an independent State, which was admitted into the organisation in 1982. It is to be noted that Morocco's departure was its own decision and not as a result of the decision of the organisation, for instance, in the form of sanction for violating the territorial integrity of the SADR or the right to self-determination of the people of Western Sahara. Thirty-two (32) years later, on 22 September 2016, Morocco officially made its request to join the African Union, the successor to the OAU and on 31 January 2017, the AU

Assembly admitted Morocco as Member to the AU. None of the Respondent States dispute that they voted in favour of the admission.

313. It is evident from the preceding that the Respondent States were aware of Morocco's request to join the AU as early as September 2016. It is also true that, from that moment on, the Respondent States in their individual capacity could have taken certain steps such as attempts to galvanise support from other State Parties to the Charter to object to Morocco's admission or make its admission conditional on its respect for the right to self-determination of the people of Western Sahara.

314. However, it is the considered view of this Court that, there is no evidence before it showing that the Respondent States did or failed to take certain steps to object to Morocco's admission or make the admission conditional on respect for the rights of the Sahrawi people. In any event, even if evidence existed that the Respondent States' failed to do so, this would not in itself amount to a violation of their international obligation arising from the Charter. Firstly, Article 20 of the Charter imposes on the Respondent States the duty to assist the people of the SADR in their struggle to realize the full enjoyment of their right to self-determination but it does not require States to take a list of specific actions or measures of a particular nature. Therefore, it is up to the Respondent States to choose the kind of positive measures that they consider appropriate for the realisation of the right for the said people.

315. In this vein, the Court takes note of the Respondent States' submissions that they are supporting diplomatic efforts under the aegis of the AU and the UN to find political solutions. Although one may still question the adequacy of their measures, the Respondent States cannot therefore be considered to have failed to discharge their obligation to assist the people of the SADR or take positive steps required in the Charter to ensure the full realisation of the right to self-determination of the Sahrawi people.

316. Secondly, as some of the Respondent States have rightly pointed out, the process of admission of a State to the AU is not the exclusive role of one or more of the Respondent States. Certainly, individual Member States of the AU can in the exercise of their right of membership, vote in favour or against the admission. However, such act of voting by a Member State cannot in itself *a priori* constitute a breach of its international obligation or in the instant Application, a violation of the right to self-determination of Sahrawi people. Furthermore, in the present case, the Court has no cogent evidence on record showing how the Respondent States voted.

317. Thirdly, the decision to admit a State as a member to the AU, including the inspection of whether the candidate State complies with the objectives and principles of the Constitutive Act, which includes the protection and promotion of human rights in accordance with the Charter or whether its admission should be attached to certain conditions is the decision of the Assembly, not the individual Member States. In this regard, the Court considers appropriate to refer to Article 29 of the Constitutive Act, which declares that:

> 1. Any African State may, at any time after the entry into force of this Act, notify the Chairman of the Commission of its intention to accede to this Act and to be admitted as a member of the Union.
>
> 2. The Chairman of the Commission shall, upon receipt of such notification, transmit copies thereof to all Member States. Admission shall be decided *by a simple majority of the Member States.* The *decision of each Member State* shall be transmitted to the Chairman of the Commission who shall, upon receipt of the required number of votes, communicate the decision to the State concerned. [Emphasis provided]

318. As it can be discerned from this provision, the admission of a State as a member to the Union depends both on the decision of each Member State as well as the collective decision of the Member States constituting a simple

majority within the Assembly. Accordingly, the Respondent States' individual decision to support or oppose the admission of Morocco does not alone necessarily determine the final outcome. Nor could the Respondent States, individually or collectively, determine the admission of a candidate State or subject it to conditions requiring it to respect the right to self-determination of the people of the SADR. The Court stresses that their inability to do so cannot constitute a breach of their international obligation in the Charter or violation of the right to self-determination of the people of the SADR.

319. Furthermore, the Court reiterates its earlier position that ultimately, the admission of Morocco is essentially the decision of the Assembly, which has a distinct legal personality, and not of its individual Member States.[73] Consequently, the decision of admission cannot as such be imputed to the Respondent States so as to engage their international responsibility.

320. The Court wishes to point out that the admission of Morocco might be challenged as incompatible with the Constitutive Act, the determination of which is outside the competence of this Court.[74] However, the Respondent States' individual decision to vote in favour of Morocco's admission to the Union *per se* cannot be taken as a recognition of Morocco's occupation of the territory of the SADR or giving legitimacy to the resulting violations of the right to self-determination of the people thereof.

321. With regard to the alleged human rights violations directly ensuing from Morocco's occupation of Western Sahara, the Court finds it unnecessary to examine or pronounce itself on them, as Morocco is not a party to this case. As far as the responsibility of Respondent States' is concerned, there is no evidence available before it to attribute these violations to them. There is also no demonstrated causal link between the complained conduct of the Respondent States and such violations.

[73] See paragraph 74 above.
[74] See paragraph 83 above.

322. In view of the foregoing, the Court holds that the Respondent States have not, individually or collectively, violated the right to self-determination of the people of the SADR guaranteed under Article 20 of the Charter and [consequentially], Article 1 common to ICCPR and ICESCR.

323. Having held that the Respondent States have not violated the rights of the Sahrawi people, the Court nevertheless reiterates that the Respondent States, and indeed, all State parties to the Charter and the Protocol, as well as all Member States of the AU, have the responsibility under international law, to find a permanent solution to the occupation and to ensure the enjoyment of the inalienable right to self-determination of the Sahrawi people and not to do anything that would give recognition to such occupation as lawful or impede their enjoyment of this right.

IX. REPARATIONS

A. Applicant's submissions

324. The Applicant prays the Court to issue an order compelling the Respondent States to individually and/or collectively call an emergency session of the Assembly of the AU and to sponsor a resolution for the adoption of legal, political and other measures by the AU to restrain Morocco from further occupying parts of the territory of Western Sahara in any manner whatsoever and howsoever. He also requests that such resolution should place Morocco on probation until it respects the rights of the Sahrawi people or be expelled from the Union.

B. Respondent States' Submissions

a. Burkina Faso's submissions

325. Burkina Faso asserts that the Respondent States are not individually and/or collectively, legally obliged to summon an extraordinary meeting of

the AU Assembly to sponsor the resolution that the Applicant is requesting. It submits that regardless of the nature of the relief the Applicant is asking the Court to grant, be it a report or a resolution, the whole objective is for the Union to examine the case on Western Sahara. It contends that this is what the AU has been doing including at its meeting in July 2018, where it decided to join efforts with the international community in a bid to resolve the conflict.

b. Republic of Ghana's submissions

326. Ghana asserts that the relief sought by the Applicant is not tenable as it may not necessarily result in a vote in favour of adopting pragmatic measures aimed at resolving the issue in view of the requirement of two-thirds majority needed for decision making in the AU. According to Ghana, the eight Respondent States represent less than one-fifth of the Assembly. Ghana also notes that as per Rule 11 of the Rules of Procedure of the Assembly, Extraordinary Sessions can be held only if approved by two-thirds majority of the Member States. Given that the Respondent states are only eight, Ghana submits that they cannot collectively or individually be ordered to call for an Extraordinary Session and sponsor a resolution and any order to this effect would be incapable of enforcement.

c. Republic of Tunisia's submissions

327. Tunisia reiterates that the Court cannot issue a decision compelling the Respondent States to suspend or terminate the membership of Morocco to the AU. According to Tunisia, doing so will affect the sovereignty of States and their independence to make foreign policy decisions.

d. Republic of Mali's submissions

328. Mali reiterates that the issue of whether Member States are required to convene an Extraordinary Session of the Assembly is the concern of the AU's policy organs and not of the Member States. It also recalls that at the

2018 AU Summit in Nouakchott, the AU Assembly adopted a decision that reaffirmed the UN as the sole framework to resolve the West Sahara conflict. In accordance with this, Mali notes that discussions between Morocco and the Polisario Front –the group representing SADR have resumed on 21 March 2019 under the supervision of the UN Secretary General's Special Envoy, Horst Köhler.

e. United Republic of Tanzania's submissions

329. Tanzania, joined by Côte d'Ivoire, submits that there is no obligation on the Member States of the AU to convene an extraordinary session in terms of Article 58 of the Charter. It contends that Article 58 provides for the mandate of the African Commission to refer a case that reveal the existence of a series of serious or massive violations of human and peoples' rights to the AU Assembly. According to Tanzania, the Court is distinct from the Commission and thus, is not empowered to invoke this provision and refer the matter to the Assembly or order the Respondent States to convene an extra-ordinary session of the Assembly.

330. In addition, Tanzania argues that the holding of an extra-ordinary session of the Assembly at the request of the Member States is subject to the approval of two-thirds majority, hence, it is discretionary. In view of this, Tanzania stresses that the Court does not have the power to order the Respondent States to individually and/or collectively to call the said session.

f. Republic of Malawi's submissions

331. Malawi asserts that although the right to self-determination creates an *erga omnes* obligation, this does not extend to the obligation to convene an Assembly of parties or sponsor a resolution. According to Malawi, the obligation is subject to the principle of state sovereignty and the discretion of States. It submits that international law also prescribes the principle not to intervene in matters within the domestic jurisdiction of another State. In view of this, Malawi avers that the Court may not compel a State to sponsor

or co-sponsor a resolution, for this is within the sovereign power of the State. Accordingly, it stresses that Malawi cannot be held responsible for violating the right to self-determination of the Sahrawi people for not exercising its sovereign right (not) to sponsor or co-sponsoring a resolution.

C. Intervening State's Submissions

332. The SADR prays that the Court should hold that the Application is well-founded and justified and declare the Respondent States' responsible for the violations of the right to self-determination of its people.

D. *Amicus curiae* submissions

333. PALU has not made any specific submissions on the issue of reparations.

E. The Court's Position

334. Article 27(1) of the Protocol provides that:

> If the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

335. The Court has consistently held that reparations are only awarded when the responsibility of the Respondent State for an internationally wrongful act is determined and a causal link is established between the wrongful act and the alleged harm.[75]

[75] *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin,* ACtHPR, Application No. 062/2019, Judgment of 4 December 2020 (Meritsand Reparations), § 139; *Houngue Eric Noudehouenou v. Republic of Benin*, ACtHPR, Application No. 003/2020, Judgment of 4 December 2020 (Merits and Reparations), § 117.

336. The Court has also adopted the position that it cannot order reparation measures based on allegations for which no human rights violation has been found.[76]

337. In the instant Application, the Court has not found any violations of human rights of the people of the SADR by the Respondent States and, thus the issue of reparations does not arise.

338. Accordingly, the Court dismisses the Applicant's prayers for reparations.

X. COSTS

339. The Applicant has not made submissions on costs.

340. Tanzania argues that the Application is frivolous and vexatious, and prays the Court to dismiss the Application with costs. Mali, Burkina Faso, Tunisia, Côte d'Ivoire and Ghana also similarly pray that the Court should order the Applicant to bear the costs. The other Respondent States have not made submissions on costs.

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341. The Court notes that under Rule 32(2) "Unless otherwise decided by the Court, each party shall bear its own costs, if any"

342. In the instant case, the Court sees no reason to depart from the above general principle and accordingly, it decides that each party shall bear its own costs.

[76] *Omar Mariko v. Republic of Mali*, Application No. 029/2018, Judgment of 24 March 2022 (merits and Reparations), § 175.

XI. OPERATIVE PART

343. For these reasons

THE COURT

Unanimously:

On Jurisdiction

i. *Dismisses* the objections to its jurisdiction
ii. *Declares* that it has jurisdiction.

On Admissibility

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

On Merits

v. *Finds* that the Respondent States have not violated the right to self-determination guaranteed under Article 20 of the Charter and, other related rights alleged to have been violated by the Applicant.

On Reparations

vi. *Dismisses* the Applicant's request for reparations

On Costs

vii. *Orders that* each party shall bear its own costs.

Signed:

Blaise TCHIKAYA, Vice-President;

Ben KIOKO, Judge;

Suzanne MENGUE, Judge;

M.-Thérèse MUKAMULISA; Judge

Chafika BENSAOULA, Judge;

Stella I. ANUKAM; Judge

Dumisa B. NTSEBEZA, Judge; and

Robert ENO, Registrar

In accordance with Article 28 (7) of the Protocol and Rule 70(1) of the Rules, the Separate Opinion of Judge Blaise TCHIKAYA is appended to this Judgment.

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