Balancing test (ACtHPR)

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A. The Principle of Proportionality and the Balancing Test in International Human Rights Law

1 The so-called → *balancing test*, a judge-made doctrine (see discussion Alexy, 2003, 141), is an element of the principle of → *proportionality* [MPEPIL]. The principle of proportionality is found in different areas of international and domestic law and many argue that it is a general principle of international law (Christoffersen, 2009, 200). According to the principle of proportionality, a State's acts must be a rational and reasonable exercise of means

towards achieving a permissible goal, without unduly encroaching on the protected rights of either an individual or another State. Proportionality is divided into three elements: suitability, which requires that the measures in question are appropriate to the objective sought; necessity, which stipulates that the objective must only be achievable by the measures in question; and the narrowest sense of proportionality, which entails balancing the effects of the measures chosen against the objective sought, taking into consideration whether those effects are excessive based on the impact on the most affected. The balancing test is the third element of the proportionality principle. The balancing test and the use of the fair balance discourse, in general, are well embedded in international law and may be traced back to the concept of → *reasonableness (of international law)* [MPEPIL] and the principle of → *good faith (bona fide)* [MPEPIL] (Christoffersen, 2009, 200).

2 In international human rights law, the principle of proportionality is ascribed the same meaning and consists of the same elements (Christoffersen, 2009, 200; Gerards, 2013, 468). Domestic authorities and international bodies supervising the implementation of treaties on human rights must assess whether a restriction imposed on a given human right: a) is in accordance with the law; b) pursues a legitimate aim; and c) is proportionate. The → *balancing test*, as an element in the assessment of a restrictive measure's proportionality, is employed to address tensions between two or more legally protected rights or interests. Balancing is a process of weighing up the reasons in favour of the competing rights and interests so as to decide which should prevail in specific circumstances (Layrysen, 2018, 316). The balancing exercise is context-dependent and encompasses a variety of considerations (Christoffersen, 2009, 76; Legg, 2012, 187).

3 The terms *fair balance*, *balancing test* and *proportionality* are often used interchangeably in legal scholarship and international jurisprudence (Christoffersen, 2009, 194; Layrysen, 2018, 316). It may be said that a human rights treaty implies 'a just balance between the protection of the general interest of the [c]ommunity and the respect due to fundamental human rights while attaching particular importance to the latter' (→ *European Court of Human Rights (ECtHR)* [MPEPIL], → *Balancing Test: European Court of Human Rights (ECtHR)* [MPEPIL], *Case 'Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium' v Belgium*, 1968, para B.5). Consequently, the balancing test or fair balance principle transcend, and perform different functions in, legal reasoning.

4 The nature of a given human right determines whether an interference is subject to a proportionality assessment. Absolute human rights (eg prohibition of torture) are subject to neither the principle of proportionality nor the balancing test. In contrast, restrictions imposed on qualified rights, that is, rights that are subject to limitations, must be assessed against the proportionality requirements. Restrictions imposed on rights that are subject to implied limitations, for example the right to a fair trial, may also be subject to a fair balance assessment (Mowbray, 2010, 289).

5 The remainder of this analysis is structured as follows. Section B explains the general approach of the → *African Court on Human and Peoples' Rights (ACtHPR)* [MPEPIL] ['Court', 'ACtHPR'] to scrutinising restrictions imposed on rights under the African Charter on Human and Peoples' Rights (1981) ['ACHPR']. In this way, the discussion of the balancing test is properly placed in the context of the Court's discourse and legal reasoning. Section C examines how the Court applies in contentious cases the balancing test to qualified rights under the ACHPR. Nine prominent criteria applicable in the Court's reasoning are discussed. Section D addresses how the Court applies the balancing test/fair balance principle to implied rights and implied limitations under the ACHPR. Section E concludes by bringing together main themes across the case law, stressing areas in which there is room for improvement and highlighting distinctive features of the Court's reasoning vis-à-vis the practice of other international human rights courts.

B. The General Approach of the African Court on Human and Peoples' Rights regarding Restrictions Imposed on Rights

1. Setting Out the General Framework on Permissive Limitations under the ACHR

6 This section discusses how the Court established and applies its general framework concerning the permissive restrictions that may be imposed on rights under the ACHPR. The ACHPR presents certain specificities compared to other human rights treaties. It lacks clear criteria upon which the rights protected under the ACHPR may be limited. Moreover, certain provisions of the ACHPR contain 'claw-back' clauses. Having explained how the ACtHPR set

out this general framework on permissive limitations, the discussion then highlights how the Court applies this framework.

7 The ACHPR is silent on the requirements for a restriction on a human right to be lawful under the ACHPR. In contrast, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ['ECHR'], the American Convention on Human Rights (1969) ['IACHR'] and the International Covenant on Civil and Political Rights (1966) ['ICCPR'] prescribe, first, the legitimate reasons upon which human rights may be restricted and, second, that said restrictions must be 'necessary in a democratic society' (eg Article 21 ICCPR, Article 8 (2) ECHR, Article 16 (2) IACHR).

8 The Court compensates for the foregoing ACHPR's weak guarantees by using judicial creativity. In 2013, in its first judgment on the merits, it established that restrictions imposed on the exercise of human rights must conform to a three-part test under the ACHPR (ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, 2013 ('*Tanganyika Law Society*'), para 106). Such restrictions must, first, be prescribed by law; second, serve a legitimate aim; and third, be proportionate to the aim pursued (*Tanganyika Law Society*, para 106; ACtHPR, *Lohé Issa Konaté v Burkina Faso*, 2014 ('*Lohé Issa Konaté*'), para 125). In order to ascertain whether a restriction is proportionate, the Court assesses the restrictive measure as to its suitability, necessity and proportionality *stricto sensu* (the balancing test). The ACtHPR inferred and developed these cardinal elements in its legal reasoning by extensively relying upon the practices of the → *African Commission on Human and Peoples' Rights (ACommHPR)* [MPEPIL], the United Nations → *Human Rights Committee* [MPEPIL] ['HRC'], and the case law of the ECtHR and the → *Inter-American Court of Human Rights (IACtHR)* [MPEPIL] (*Tanganyika Law Society*, para 106). In subsequent case law, the three-part test for lawfully limiting human rights under the ACHPR is also embodied in the structure of the judgment (eg *Lohé Issa Konaté*, paras 125–166).

9 However, the Court's justification for incorporating the legitimate purposes and proportionality test under the ACHR is obscure. The Court's reasoning was premised upon Article 27 (2) ACHPR without further elaborating: 'the limitations imposed to the rights and freedoms in the Charter are only those set out in Article 27 (2) of the Charter and such

limitations must take the form of 'law of general application' and these must be proportionate to the legitimate aim pursued. This is the same approach with the European Court […]' (*Tanganyika Law Society*, para 107.1). It is doubtful whether these requirements may be inferred from Article 27 (2) (Viljoen, 2007, 348). The provision was intended to prevent any abuses that individuals might commit in the exercise of their rights, rather than to protect individuals from abusive limitations on their rights imposed by the State (Ouguergouz, 1993, 260). This view is strongly supported by the formulation of the provision and its location in the chapter relating to the duties of the individual (Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society*, para 30). Moreover, the Court's reliance upon the case law of the ECtHR and the IACtHR is not apt since these courts' jurisprudence has been developed in light of the guarantees prescribed in the treaties that they are entrusted to supervise - these guarantees are absent from the ACHPR. Yet, both the ACommHPR and the ACtHPR view Article 27 (2) as a general limitation clause (*Tanganyika Law Society*, paras 107, 112; *Lohé Issa Konaté*, para 134; and ACtHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda*, 2017 ('*Ingabire Victoire Umuhoza*'), para 140). The respondent States before the Court have never challenged the Court's position.

10 Another interesting feature of the general framework on permissive limitations under the ACHPR is the Court's creativity in 'neutalising' the claw-back clauses provided in the ACHPR. Articles 10 and 13 ACHPR provide for one's right to exercise to 'express and disseminate [their] opinion within the law' and to 'participate freely in the government of [their] country … in accordance with the provisions of the law' respectively. Unlike other human rights treaties, these two provisions of the Charter undermine the protection accorded to respective rights by subjecting their exercise to domestic law (Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society*, paras 29-30). The Court, however, ruled that the domestic law pursuant to which Article 13 ACHPR is limited 'ought to be in correspondence with international standards, to which the Respondent is expected to adhere' (*Tanganyika Law Society*, para 108). Such national law may 'not negate the clearly expressed provisions of the Charter' and 'may not be allowed to nullify the very rights and liberties they are to regulate' (*Tanganyika Law Society*, para 109). This position was reasoned by resorting to international law and, in particular, Article 27 Vienna Convention on the Law of Treaties (1969) and Article 32 of the Draft Articles on State Responsibility according to which internal law may not be invoked as a justification for failure to perform a treaty. The same approach

was affirmed with regard to the right to freedom of expression: '… the reference to the "law" in Article 9 (2) Charter […] must be interpreted in the light of international human rights standards, which require that domestic laws on which restrictions to rights and freedoms are grounded must be sufficiently clear, foreseeable and compatible with the purpose of the Charter […]' (*Ingabire Victoire Umuhoza*, para 136; see also *Lohé Issa Konaté*, paras 125-129).

2. Applying the General Framework on Permissive Limitations

11 Having discussed how the Court has set out its general framework on permissive limitations under the ACHPR, the analysis turns to highlight how the Court applies this framework.

12 The Court does not always examine the proportionality of a given interference. This is the case when a restrictive measure does not meet other criteria which precede the proportionality test. In *Tanganyika Law Society*, the ACtHPR found a violation of the right to political participation on account of Tanzania's failure to comply with the legitimacy standard. The Court did not accept Tanzania's claim that its decision not to allow independent candidates to stand in elections, which was purportedly motivated by the country's social needs and historical reality, fell within the legitimate aims under Article 27 (2) ACHPR (*Tanganyika Law Society*, paras 94, 101–104, 107). Similarly, in *Kennedy Gihana and Others*, the Court found a violation of the right to political participation due to the arbitrary revocation of the applicant's passport (ACtHPR, *Kennedy Gihana and Others v Republic of Rwanda*, 2019, paras 114–115). Interestingly, the practice of other regional human rights courts shows that they prefer accepting that a given restriction pursues a legitimate aim and focusing instead on the proportionality assessment (Layrysen, 2018, 314–315) The ACtHPR seems to put equal weight to both steps of the lawfulness of the restriction under the ACHPR.

13 Having affirmed that a restriction on an individual's right is provided by law and serves a legitimate aim, the Court determines whether a restriction is 'strictly necessary in a democratic society and proportional to the legitimate purposes pursued' (*Ingabire Victoire Umuhoza*, para 142; see also *Lohé Issa Konaté*, para 145). Yet in *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire* the Court did not proceed to balance the competing interests and rights in hand. In this instance, the Court concluded that,

by setting up an electoral body that was found to be neither independent nor impartial, the State had breached Article 13 ACHPR. The judgment contains no justification as to why the Court did not examine whether this was a proportionate restriction on the right to political participation. It was simply held that Cote d'Ivoire's legislation was a violation of Article 17 African Charter on Democracy, Elections and Governance (2007) [African Charter on Democracy] which automatically qualified as a violation of Article 13 ACHPR (ACtHPR, *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire*, 2016, paras 135–136).

14 In the *African Commission on Human and Peoples' Rights v Republic of Kenya* case, the Court found that the restrictive measures imposed on the Ogiek population's right to culture and right to property were not suitable or effective for achieving the alleged aim (first leg of the proportionality assessment). It was deemed 'unnecessary to examine further whether the [eviction of the Ogiek population from the Mau Forest area] was necessary and proportional to the legitimate aim invoked by the Respondent' (ACtHPR, *African Commission on Human and Peoples' Rights v Republic of Kenya*, 2017 ('*African Commission v Kenya*'), para 189). The purported reason of preserving the natural environment could not constitute a legitimate justification for the Respondent's interference with the Ogiek's exercise of their cultural rights. The Court was not convinced that the interference was genuinely prompted by the need to protect the common interest (paras 188–189). On the same grounds, the Court dismissed Kenya's claim that the preservation of the natural ecosystem was a proportionate public interest justification for evicting the Ogiek from the Mau Forest and decided that dispossessing them of their land was a violation of their right to property (para 130).

15 Finally, the Court engages with the question of whether a restrictive measure is necessary to achieve the aim pursued, namely whether this measure is the least restrictive means that could be adopted. Although this question formally constitutes the second leg of the proportionality assessment, the Court (as is the case with other regional courts) incorporates these considerations into its balancing test (third leg of the proportionality assessment). Other human rights courts and bodies, such as the HRC, also merge these two different legs of the proportionality assessment (→ *Balancing Test: United Nations Human Rights Bodies* [MPEPIL], para 13). For this reason, necessity will be addressed below as a criterion in the balancing test.

16 To conclude this section, the Court has adopted the three-part test for an interference to be lawful under the ACHPR, including the balancing test. This is despite the fact that the text of the ACHPR does not provide for these criteria. In order to do so, the Court employs a considerable measure of judicial creativity and heavily relies upon comparative human rights law and the case law of the ECtHR and IACtHR as well as the practices of the ACmmHPR and HRC. In certain instances, the Court's reasoning could have been more transparent and rigorous. This also applies to the specific interpretation of Article 27 (2) ACHPR which, even though it does not resonate with the provision's *raison d'être*, seems to have been 'cemented' in the Court's case law. In applying the general framework on permissive limitations, the Court does not hesitate to find a violation of the ACHPR because a given interference did not pursue, or was not genuinely prompted by the need to pursue, a legitimate aim.

C. Applying the Balancing Test to Qualified Rights

17 Cases decided thus far by the Court concern the following qualified rights: the right to political participation (Art 13 ACHPR), freedom of association (Art 10), freedom of religion (Art 8), the right to culture (Art 17), the right to property (Art 14) and freedom of expression (Art 9). In the Court's own words, the balancing test consists of a determination of whether 'a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights' (*Tanganyika Law Society*, para 106). Balancing involves weighing different interests and rights in light of the circumstances in hand in an *ad hoc* fashion. Yet the ACtHPR, as is the case with other standing human rights bodies (Çali, 2007, 254; de Schutter, Tulkens, 2008,191-198), sets out certain criteria so as to somehow systematise the balancing exercise in its case law, even though this attempt to systematise does not guarantee coherence. I identify and discuss nine main criteria that are relevant in the ACtHPR's reasoning, namely 1) the rights involved; 2) the context of a restrictive measure; 3) the severity of interferences with a bearing on the essence of a right; 4) the necessity of a restriction; 5) the chilling effect; 6) the free exercise of rights as a condition for achieving public interests; 7) balancing the competing interests of individuals; 8) States' measure of discretion; and 9) the duties of the individual toward society.

1. Rights Involved

18 The rights involved, and specific aspects falling within their protective scope, are a criterion that the Court factors into its balancing exercise. For instance, in cases of dispossession and encroachment of indigenous land, the Court sets a high threshold for such interferences with the right to property to be necessary and proportionate (Murray, 2019, 378). The cardinal role of the freedom of the press in the exercise of the right to freedom of expression is highlighted in the balancing test (*Lohé Issa Konaté*, para 165). Certain forms of expression, including political speech, deserve a higher degree of tolerance when they are directed towards government officials and public figures (*Ingabire Victoire Umuhoza*, para 142). In line with the practice of the ACommHPR and regional human rights courts, opinions that offend, shock or disturb the State or a section of the population need to be specifically protected (*Ingabire Victoire Umuhoza*, para 143). Consequently, the specific aspect(s) of the protective scope of the right under discussion and the respective margin of discretion that the Court accords to the State are weighed into the balancing test (this issue will be revisited below when discussing States' measure of discretion). The identification of these aspects of the rights' scope that are deemed of a weighty consideration is a constant work-in-progress entailing uncertainty and lack of coherence in balancing (see discussion on coherence and balancing in Smet, 2016, chapter 5).

2. Context of a Restrictive Measure

19 The overall context of a restrictive measure matters: the Court gives regard to the circumstances of a case in a holistic and contextual fashion. This features prominently in cases concerning freedom of expression. Views expressed with the aim of contributing to a public debate are given particular consideration in the Court's assessment (*Lohé Issa Konaté*, para 155). Yet in exceptional circumstances, the context of a public debate may be given a relatively lower weighting. Such circumstances include incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or group of people because of specific criteria such as race, colour, religion or nationality (*Lohé Issa Konaté*, paras 158, 160–161, 165, 169). In these instances, the rights and interests at stake will be balanced in a different way, even if a given expression contributes to a debate of public interest.

20 Emphasis needs to be put to the particular context and nature of the opinions expressed (*Ingabire Victoire Umuhoza*, paras 144, 148). The context in which statements are made 'may imply a different meaning than the ordinary message that they convey' (*Ingabire Victoire Umuhoza*, para 159). For example, context is critical in deciding whether a statement denies genocide or minimises its magnitude or effects. Nevertheless, when a statement is unequivocally clear, context should not be overemphasised. According to the Court, imposing criminal punishment merely on the basis of context would 'create an atmosphere where citizens cannot freely enjoy basic rights and freedoms' (*Ingabire Victoire Umuhoza*, para 159). Examining the nature of a statement in connection to the addressee(s) and speaker(s) is also informative. Even when remarks may be offensive and could have the potential to discredit the integrity of public officials and institutions, such remarks are to be expected in a democratic society and should be tolerated. In *Ingabire Victoire Umuhoza*, the Court found that the applicant's conviction and sentence were in violation of Article 19 ACHPR and Article 19 ICCPR. The fact that, first, the addressees were government institutions and public officials and, second, the speaker was a public figure and, in particular, an opposition political figure were determinative in prioritising freedom of expression over the pursuit of public interest (para 161). Finally, the question of whether it is to be reasonably — rather than hypothetically — expected for a statement to incite strife or threaten State security is pertinent (para 161). It should not go unnoticed that the contextual scrutiny of a restrictive measure may be presented by the Court as an objective and controversy-free exercise but it involves a great measure of subjectivity and interpretation leeway when balancing (Çali, 2007, 254; Smet, 2016, chapter 5).

3. Severity of Interferences with a Bearing on the Essence of a Right

21 Determining whether a given restriction has a bearing on the essence of a right under the ACHPR is a significant criterion in the balancing test. 'The restriction of the right [should not] sweep away the essence of the right in its entirety' (*African Commission v Kenya*, para 188). In the course of balancing the competing interests, namely the maintenance of law and order and public health, against the right to freedom of religion, the eviction of the Ogiek population from the Mau Forest rendered it impossible for the community to continue its religious practices (*African Commission v Kenya*, para 169). Barring independent candidates from standing in elections unreasonably restricted the applicants' right to political participation

(*Tanganyika Law Society*, para 107). In *Lohé Issa Konaté*, the imposition of a custodial sentence affected the essence of the applicant's freedom of expression (paras 163–164).

4. Necessity of the Restriction

22 As mentioned above, although the necessity of a restriction constitutes the second leg of the proportionality principle, the Court tends to examine this as a criterion in the balancing exercise. The core question is whether the respondent State could have taken less restrictive measures to achieve the same objective.

23 The Court acknowledges the relevance of less restrictive available measures when assessing the necessity of an interference. The Court does so by explicitly relying upon existing jurisprudence of the ECtHR and IACtHR (eg *Tanganyika Law Society*, para 107(3); *Lohé Issa Konaté*, paras 158-161). To give some examples, in *Tanganyika Law Society*, the Court alluded to the fact that Tanzania could have served the aim of national unity and solidarity by using less restrictive measures than barring independent candidates to run in the elections (para 107). Similarly, in the *African Commission v Kenya* case, regarding the alleged violation of the right to religion, the Court stated that 'rather than evicting the Ogieks from the Mau Forest, thereby restricting their right to practice their religion, there were other less onerous measures that the Respondent could have put in place that would have ensured their continued enjoyment of this right while ensuring maintenance of law and order and public health' (para 167).

24 According to a view, the weight attached to the possibility that States could have adopted less restrictive means to pursue a legitimate aim should not be overstated (Christoffersen, 2009, 115–135). The availability of less restrictive means is not necessarily a deciding criterion, since States enjoy, in principle, the choice of means for securing compliance with human rights (ECtHR, *Von Hannover v Germany (No. 2)*, 2012 ('*Von Hannover*'), para 104; Harris and others, 2018, 13–14). However, in the two cases mentioned above, the ACtHPR did not explicitly refer to such discretion enjoyed by States. Nonetheless, the Court underscored that the restrictive measures, in addition to not being the least restrictive, also rendered it impossible for the applicants to exercise their rights (*Tanganyika Law Society*, para 107; *African Commission v Kenya*, para 169). In other instances, the availability of less restrictive means is likely to have been a determinative consideration in the Court's reasoning.

This is certainly the case in a strand of judgments pertaining to criminal defamation and freedom of expression. In *Lohé Issa Konaté*, the Court pronounced that criminal defamation should be used only as a last resort and excessively punitive measures and penalties should be avoided (paras 158, 160–161, 169). The custodial sentence imposed on the applicant was a violation of the right to freedom of expression. In the same vein, in *Ingabire Victoire Umuhoza*, the Court underlined that Rwanda could have adopted less restrictive measures to attain the same objectives (para 162). The conviction and sentencing of the applicant, the leader of a political party, for the crime of minimising genocide breached Article 9 ACHPR. In these cases, the Court follows suit the international trend toward constraining the room for criminal defamation to be compatible with human rights – the Court in these cases expressly relied upon the converging approaches of the ECtHR, IACtHR and HRC.

25 To conclude, the availability of less restrictive means is an important criterion when assessing the proportionality of a restriction. The weight of this criterion differs across judgments fostering uncertainty and incoherence. The fact that the ACtHPR includes the necessity of a restriction in the balancing test (even if it forms the second leg of the proportionality test) may give rise to a less transparent and rigorous reasoning thereby conflating the necessity of a measure with other factors. Scrutinising the necessity of a measure as a separate step in the proportionality assessment could also enhance procedural economy since, if a given measure is found to be not necessary, the Court does not have to proceed to balancing: the measure is already disproportionate. Yet the ACtHPR (as well as all international human rights courts and bodies) are inclined toward having a reasoning as comprehensive as possible in order to persuade their addresses (for example, respondent State, applicant) and therefore they generally proceed to the balancing test, even if a measure may not be necessary.

5. Chilling Effect

26 The 'chilling effect' refers to possible ramifications of restricting a human right that go beyond the confines of a specific case and may affect the exercise of this right in the future. The ACtHPR takes the chilling effect into account. Giving due regard to the chilling effect in the balancing test is of interest, since, strictly speaking, the chilling effect does not refer to

resolving a tension between human rights and other interests in an *ad hoc* manner in a specific case but it concerns possible ramifications outside the context of said case. In this sense, the chilling effect as a criterion in balancing reflects an approach which is not typical of a balancing exercise (Çali, 2007, 260-261). Moreover, there is a certain inconsistency in the Court's case law regarding the relevance and weight attached to the chilling effect of an interference. In the circumstances of the *Ingabire Victoire Umuhoza* case, the Court found that imposing criminal punishment merely on the basis of context, while ignoring the ordinary and unequivocally clear meaning of a statement, would 'create an atmosphere where citizens cannot freely enjoy basic rights and freedoms' (para 159). In contrast, in another freedom of expression case the Court did not refer to the possibility of a chilling effect due to the custodial sentence imposed on a journalist in defamation proceedings before domestic courts (*Lohé Issa Konaté*). In a different case, the Court rejected a claim expressly raised by the applicants regarding the murder of an investigative journalist. The applicants maintained that the very fact that the State had failed to expeditiously apprehend and try the perpetrators assassins constituted a violation of the freedom of expression of journalists in general, since they now ran the risk of having to work in an atmosphere of fear, apprehension and intimidation. The Court opined that, even though the State's failure to identify and apprehend the assassins could potentially cause fear and anxiety in media circles, the applicants had not shown proof that the Burkinabe media had not been able to exercise freedom of expression (ACtHPR, *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v Burkina Faso*, 2014, paras 184, 186–187).

27 The Court's approach in requiring applicants to prove a chilling effect is rigid. The likely chilling effect of an interference is a specific factor that the ECtHR examines when assessing the nature and severity of the penalty imposed (ECtHR, *Malisiewicz-Gasior v Poland*, 2006 ('*Malisiewicz-Gasior*'), para 68; ECtHR, *Lyashko v Ukraine*, 2006 ('*Lyashko*'), para 57). The ECtHR does not require specific proof from the applicants concerning the likely chilling effect on the exercise of freedom of expression. This effect is inferred from the overall facts of a case, and it suffices that it is a likely (albeit not certain) outcome. The ECtHR has found that the conviction and sentencing of applicants to imprisonment 'must have had' (*Malisiewicz-Gasior*, para 68) or 'could have had' (*Lyashko*, para 57) a chilling effect on freedom of expression. Even in the case that the penalty imposed on the applicant was relatively light, the conviction was likely not only to discourage the applicant from making similar

criticisms in the future, but also to deter other journalists from contributing to public debates, thereby hampering the press in the performance of its role as public watchdog (ECtHR, *Dabrowski v Poland*, 2006, paras 36–37). Therefore, although one needs to be cautious against drawing general conclusions from the little case law of the ACtHPR thus far, the Court's approach regarding the burden of proof imposed on applicants to demonstrate a chilling effect is set high – certainly higher compared to the case law of the ECtHR.

6. The Free Exercise of Rights as a Condition for Achieving Public Interests

28 The Court furnished an interesting insight in *Ingabire Victoire Umuhoza*. It stated that 'the legitimate exercise of rights and freedoms […] is […] of paramount significance to achieve the purposes of maintaining national security and public order' (para 148). Thus, the Court does not see the exercise of the right to freedom of expression and maintaining public order and national security only as competing and antithetical concepts, but also as mutually reinforcing — or, at least, interdependent. This is an informative and novel consideration for the balancing test, which generally assumes only the need to balance (seemingly) competing interests and rights (Çali, 2007, 257). There may be instances that the exercise of human rights and public interest considerations are not (merely) in competition but they are in a complex relationship. In this way, promoting social cohesion and, in turn, maintaining public order should be also seen as being underpinned and supported by a society in which human rights are freely exercised.

7. Balancing the Competing Rights of Individuals

29 Specific mention should be made to the balancing exercise in disputes that involve the rights of different persons — instead of disputes in which a public interest needs to be balanced against the exercise of a right (see Smet, 2016, chapter 5). Other international bodies accept that States may enjoy a broader margin of appreciation when national courts are balancing competing rights (*Von Hannover*, para 126; Arnardóttir, 2016, 47–48). Typical cases involve *prima facie* conflicts between the exercise of freedom of expression and the right to privacy.

30 The *Lohé Issa Konaté* case is the only instance in the Court's case law thus far that is related to the balancing of competing rights under the ACHPR. The application concerned the

tension between freedom of expression and aspects of the right to privacy. The first relevant factor for the Court to consider in balancing the competing rights was the context of the exercise of freedom of expression. Having taken into consideration the practice of international courts and other bodies on human rights, including the HRC, the IACtHR and the ECtHR, the Court stated that when an interference with the right to freedom of expression occurs in the context of a public debate, 'freedom of expression in a democratic society must be the subject of a lesser degree of interference' (*Lohé Issa Konaté*, para 155). Second, the Court stressed the significance of the function of the person whose honour is being protected. The need for limiting the right varies depending on whether that person is a public figure or not and since, in the case in hand, that person was a prosecutor, a higher degree of tolerance to criticism was expected of him/her. The Court found that the restriction on the right to freedom of expression was disproportionate (*Lohé Issa Konaté*, paras 156–157).

8. States' Measure of Discretion

31 The system of permissive limitations under the ACHPR suggests that States are allowed some measure of discretion in pursuing public interests (*Tanganyika Law Society*, para 112). The Court still retains the task of verifying whether States apply that margin of discretion in good faith and whether the reasons given are relevant and sufficient. The measure of discretion accorded to States is a significant factor in determining whether national authorities struck a fair balance between the general interest of the community and the requirement to protect the individual's fundamental rights (*Tanganyika Law Society*, paras 106, 112). The greater the deference given to national authorities is the lower the degree of the Court's scrutiny of national decisions is. The Court has not outlined (yet) a general framework regarding the discretion accorded to States. It is not easy to discern how the criterion of margin of discretion is applied in the context of the balancing test. One should caution against drawing any definitive conclusions for two main reasons: first, it is premature to do so in light of the early years of the Court's case law and, second, the role and weight of States' margin of discretion in the balancing test are context-specific and they may have different facets depending on the strand of case law under discussion. That being said, the context-specific function of the margin of discretion cannot be a reason (or pretext) for the Court not to pursue and preserve an overall coherence of its application across the case law.

32 *Ingabire Victoire Umuhoza* is an instance in which the Court seemed receptive to giving leeway to the respondent State. Rwanda submitted that the interference with the applicant's freedom of expression intended to minimise the propagation of the idea of 'double genocide' since the applicant incited citizens to turn against the government and spread rumours thereby creating internal strife. Rwanda asked the Court to account for the specificities of its history and social context (paras 125–127, 145). The Court underlined that it was cognisant that Rwanda had suffered the most atrocious genocide in the recent history of mankind and that all possible measures to promote social cohesion among the people should be adopted, including legislation on the minimisation, propagation or negation of genocide. It was reiterated though that said legitimate aims and Rwanda's special circumstances do not leave room for disproportionate restrictions on human rights (*Ingabire Victoire Umuhoza*, para 147).

33 However, *Ingabire Victoire Umuhoza* is not necessarily a case representative of the Court's overall approach thus far. The general trend in the case law shows that the Court is very cautious with giving leeway to States. In *Tanganyika Law Society*, Tanzania argued that the decision to allow independent candidature in elections depended on the social needs and historical reality of the country, including the need to retain the recently introduced multi-party democratic system and reduce tribalism (paras 94, 101–102, 104). The Court found that Tanzania had not sufficiently demonstrated that these aims were served by prohibiting independent candidates from running in the elections. No discretion was granted to the State, even though this is an area where States are generally understood to have considerable room for manoeuvre. In comparison, both the ECtHR and the IACtHR accept that States are subject to a less stringent test of proportionality in similar cases, due to the pronounced political sensitivity of designing and implementing electoral systems (Harris and others, 2018, 923–924, 933; IACtHR, *Castañeda Gutman v Mexico*, 2008, paras 180–181). In a different case, Mali forcefully invoked social, cultural and religious realities as grounds to justify the fact that its domestic legislation set the minimum age for contracting marriage at sixteen for girls. The Court did not accept that Mali had any measure of discretion given its clear international obligations and declared a violation of Article 6 (b) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) [Maputo Protocol] concerning the minimum age for marriage (ACtHPR, *Association Pour le Progrès et la Défence des Droits des Femmes Malienne (APDF) and the Institute for Human Rights and Development in Africa*

(IHRDA) IHRDA v Republic of Mali, 2018 ('*Association Pour le Progrès et la Défence des Droits des Femmes Malienne*'), paras 59, 66).

34 The Court's tendency to leave little room of discretion to States is also discernible in the strand of the case law concerning the right to a fair trial. The analysis herein focuses on certain aspects of the assessment of the probative value of evidence used by domestic courts in criminal trials but other relevant cases are discussed in section D. The Court accepts that it does not function as an appellate body reviewing the evidence on which applicants' convictions were based. It underlines, however, that it falls within its remit to examine whether proceedings before national courts are in accordance with the standards set out in the Charter (ACtHPR, *Alex Thomas v United Republic of Tanzania*, 2015 ('*Alex Thomas*', para 130; ACtHPR, *Kijiji Isiaga v United Republic of Tanzania*, 2018 ('*Kijiji Isiaga*'), para 66). This statement of principle is sound but certain problems come to the fore when the Court (gives the impression that it) substitutes the role of national courts in reviewing the evidence on which the applicants' convictions were based. To give an example, in *Kijiji Isiaga* the onus of the case was whether the applicant's conviction to a heavy prison sentence was based or not on reliable evidence. It was stressed that visual or voice identification evidence needs to be carefully corroborated so that possible mistakes are ruled out (*Kijiji Isiaga*, paras 67-68). The Court scrutinised in great detail how domestic courts used and assessed such evidence and found that their evaluation did not meet international human rights standards (*Kijiji Isiaga*, paras 69-73). The very detailed assessment of domestic courts' use of evidence could also suggest an indirect prescription of the manner in which national courts should evaluate evidence in criminal proceedings.

35 It is notable that respondent States insist on requesting the Court to allow them some room for manoeuvre. In a string of applications brought against Tanzania, the latter consistently raised *ratione materiae* preliminary objections, arguing that the Court cannot consider the evidence on which the applicant's conviction was based without acting as an appellate jurisdiction (eg ACtHPR, *Mohamed Abubakari v United Republic of Tanzania*, 2016 ('*Mohamed Abubakari*'), para 22). The Court, in turn, in an equally consistent fashion, not only declared itself competent to review how domestic criminal courts evaluate evidence but also rigorously reviewed domestic proceedings (ACtHPR, *Kennedy Owino Onyachi and Charles John Mwanini Njoka v United Republic of Tanzania*, 2017 ('*Kennedy Owino*'), paras 37-40; *Kijiji Isiaga*, paras 30-36; ACtHPR, *Kenedy Ivan v United Republic of Tanzania*, 2019

('*Kenedy Ivan*'), paras 18-22; ACtHPR, *Oscar Josiah v United Republic of Tanzania*, 2019 ('*Oscar Josiah*'), paras 21-28). The issue does not lie in whether the Court enjoys jurisdiction to review domestic courts (it certainly does) but in how closely the Court should monitor the functioning of national courts. This is a particularly delicate question especially in connection to an international court which is functioning in its early years, as is the ACtHPR. It is not only that the ACtHPR should not act as a fourth instance jurisdiction but also that it should not appear acting as such either. This is of course subject to how one views what the function of an international court on human rights and, in particular, the ACtHPR should be.

36 The practice of other international courts and bodies play an important role in constructing the margin of discretion accorded to States. The Court's general position on maintaining a balance between not acting as an appellate body and assessing domestic courts' criminal proceedings against the Charter's standards is supported by extensive references to relevant case law of the ECtHR and the practice of the IACmHR (eg *Alex Thomas*, para 130; *Mohamed Abubakari*, para 27). This is arguably an instance cautioning against the automatic, heavy reliance upon, and transposition of the practice of other courts and bodies into, the case law of ACtHPR. It needs to be recalled that the jurisprudence and the respective margin of discretion afforded to States in the context of other bodies were construed gradually over the course of decades. As far as the ECtHR is concerned it is only in its recent case law that it started examining whether a national court's decision was arbitrary or manifestly unreasonable. Until recently, the ECtHR deferred to national authorities and it scrutinised only whether domestic proceedings bore upon compliance with the procedural guarantees of the right to a fair trial (Harris and others, 2018, 371). Therefore, when the ACtHPR relies upon the up-to-date case law of ECtHR it does not give its case law the opportunity to gradually mature and forge the appropriate measure of discretion given to States. The Court is not transparent and does not explain these fundamental differences with the case law of other international courts. It may be equally arguable that the ACtHPR purposefully assumes a close monitoring role and it invokes the practice of other bodies as a legitimising factor. As far as the balancing test is concerned this means that the Court does not adopt a procedural fairness approach (see Çali, 2007, 267; compare de Schutter, Tulkens, 2008, 191-198), as in assessing only whether national courts gave sufficient reasons for their decisions, but moves to substantively scrutinise their decision against fair trial standards.

37 A final issue to be addressed is whether the ACtHPR endorses the → *margin of appreciation* [MPEPIL] doctrine — established by the ECtHR. The Court has expressly referred to *margin of appreciation* in a few cases. The *Ingabire Victoire Umuhoza* case is the first instance when the Court openly referred to *margin of appreciation* (paras 126–127). Rwanda – the respondent State – had specifically invoked the specificities of its history and asked the Court to adopt a margin of appreciation (paras 125–127, 145). Further to this, the Court explicitly mentioned the term *margin of appreciation* in the *Kijiji Isiaga* case. It 'underscore[d] that domestic courts enjoy a wide margin of appreciation in evaluating the probative value of a particular evidence' (*Kijiji Isiaga*, para 65). The Court's reference to *margin of appreciation* in *Kijiji Isiaga* was also quoted in subsequent case law (*Kenedy Ivan*, para 62; *Oscar Josiah*, para 52). However, the Court never elaborated on whether it formally endorses this doctrine and, if yes, how it contextualises it in its case law. This should not come as a surprise, since the concept of margin of appreciation is contested (Neuman, 2013, 375; McGoldrick, 2016, 58). Other international bodies, including the HRC and the IACtHR, have not (not explicitly at least) embraced it either (Stone Sweet and Mathews, 2019, 185–188; Contreras, 2012, 28-29; McGoldrick, 2016, 60; Viljoen, 2007, 352–353; ACommHPR, *Prince v South Africa*, 2004, paras 50–53). Nonetheless, there is the view that the 'Court is moving towards recognising the doctrine of the margin of assessment or appreciation' (Mujuzi, 2017, 223) and that there is an indirect and implicit introduction of the doctrine in the ACtHPR's case law (Mujuzi, 2017, 213-214, 223). According to the present author, it is too soon to draw any definitive conclusions.

9. Duties of the Individual toward Society

38 The ninth criterion that could be a factor in the balancing exercise of the ACtHPR is the duties of the individual toward society. The duties of the individuals are a distinctive feature of the ACHPR *vis-à-vis* other human rights treaties and they hold a prominent position in the ACHPR with Chapter II (Articles 27-29) being devoted to them. Despite this, the place of the individual's duties toward society in the African human rights reasoning and balancing test are unexplored in the case law. The following analysis briefly elaborates on the concept of the duties of the individual and attempts to explain why they are not weighed in the balancing test.

39 An individual's duties toward society are seen as a manifestation and a marker of culture and are linked to national identity, loyalties, tribal lineage and, the community. (Murray, 2019, 579, 593; Mutua, 1995, 339). Although the ACHPR is not the only international instrument acknowledging the existence of an individual's duties toward society (eg the Preamble of the ICCPR, Article 29 (1) Universal Declaration of Human Rights (1948) ['UDHR'], Article 32 (1) IACHR), it is distinctive in fleshing out their content. Article 29 ACHPR contains a long list of duties *vis-à-vis* family, national community, the State and African unity. Article 27 (1) ACHPR stipulates that '[e]very individual shall have duties toward his family and society, the State and other legally recognized communities and the international community' and Article 27 (2) ACHPR provides that 'the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'.

40 The Court has not clarified the role of these duties, if any, in the balancing exercise (Murray, 2019, 580). The *Tanganyika Law Society* is a case in which the Court could have opined whether and, if yes, how the duties of individuals toward the community have legal relevance. The respondent State argued that 'the duty set out in Article 29 (4) of the Charter which requires individuals, to preserve and strengthen social and national solidarity, particularly when the latter is threatened, also limits the enjoyment' of the right to freedom of association under Article 10 ACHPR (para 100). The Court, however, did not discuss the cross-reference of Article 10 (2) to Article 29 ACHPR; instead it applied Article 27 (2) ACHPR as the general limitation clause (paras 107(2), 112). Still, the duties of the individual toward society, where applicable, could be seen and used by the ACtHPR as an autonomous criterion in its balancing test or, in the alternative, could have a legal bearing in the context of other criteria discussed earlier, including the necessity of the restriction, balancing competing interests of individuals or States' measure of discretion.

41 The Court's reluctance to engage with Article 29 ACHPR perhaps reflects the fact that the concept and function of duties are not easily appreciable by human rights law. The vague wording of relevant treaty provisions and the obscure content of such duties hinder not only their concrete elaboration but also a definitive conclusion regarding their legal nature (Murray, 2019, 580, 596). It is equally unclear who the beneficiary of these duties is, or how, if at all, they are to be considered in the balancing test (Brems, 2001, 110-113). Many argue that

communitarian and duty-bound cultures generate values that do not resonate with the Western, individualistic human rights paradigm (see discussion Rajagopal, 2003, 210-213) or that there is the (perceived) risk that duties may be invoked by States as a pretext for imposing far-reaching restrictions on human rights (Viljoen, 2007, 249). Others claim that a duty toward society should not necessarily be construed as being in an antagonistic relationship vis-à-vis individual freedoms (Mutua, 1996, 642–644). Individual duties toward society may arguably offer novel perspectives for conceptualising certain aspects of (African) human rights law (Ouguergouz, 1993, 83-129; Murray, 2019, 579). For purposes of the balancing test, the duties of the individual qualify as considerations which are not typical of a balancing exercise, as was the case with the chilling effect or the Court's criterion that the free exercise of rights may be seen as a condition for achieving public interests, discussed earlier. This is because duties of these criteria do not fit squarely within the assumed scheme of competition between pursuing public interests and free exercise of human rights. The duties of the individual bring to the fore aspects revealing how human rights and other interests may be in a symbiotic, dynamic, interdependent relationship. For the moment, the Court seems to be unwilling to address the concept of individual duties, even though it is a prominent feature of the ACHPR.

D. Applying the Balancing Test/Fair Balance Principle to Implied Rights and Implied Limitations

42 The ACtHPR uses the balancing test to find a fair balance between the general interests of society and the individual's rights in cases of implied rights and implied limitations. The balancing test may not be prominently evident, but in searching and conceptualising the concepts of fairness, reasonableness and arbitrariness, the Court essentially balances a series of criteria and factors (Christoffersen, 2009, 194; Layrysen, 2018, 316; Mowbray, 2010, 308–310). This section discusses the balancing test/fair balance principle, in the context of, first, → *fairness* (the right to a fair trial) and, second, arbitrariness/reasonableness.

1. The Balancing Test and the Fairness of a Trial

43 A considerable part of the ACtHPR's case law concerns alleged violations of the right to a fair trial (Mujuzi, 2017, 187). The balancing test is applied to the constitutive elements —

explicit or implied — of the right to a fair trial, including the right to be tried in a reasonable fashion, the right to free legal aid and the overall fairness of the criminal procedure.

(a) Unreasonable Delay

44 According to Article 7 (1) (d) ACHPR, every individual has 'the right to be tried within a reasonable time by an impartial court or tribunal'. The requirements for determining an unreasonable delay were first set out in *Alex Thomas*. The Court drew upon the standards established in the jurisprudence of the ACommHPR and the IACtHR and the ECtHR's extensive case law on this topic. Three criteria are used to decide whether a trial was conducted within a reasonable time: first, the complexity of the matter; second, procedural activities carried out by the interested party; and third, the conduct of judicial authorities (*Alex Thomas*, paras 102–104; ACtHPR, *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania*, 2016 ('*Wilfred Onyango*'), paras 136, 139–141, 148, 153–154; ACtHPR, *Armand Guehi v United Republic of Tanzania*, 2018 ('*Armand Guehi*'), para 124; ACtHPR, *Ally Rajabu and Others v United Republic of Tanzania*, 2019 ('Ally Rajabu'), para 64).

45 Applying these criteria to the facts of the applications brought to the Court has not given rise to 'hard' cases with respect to balancing these criteria. The respondent State's (in)action qualified, in most instances, as causing obviously unreasonable delays and, thus, led to a breach of Article 7 ACHPR. For example, in *Alex Thomas*, although the criminal proceedings before domestic authorities involved no obvious complexity and the applicant caused no delays, it took eight years for the applicant to be able to file an appeal before the Court of Appeal of Tanzania. This is because the applicant, despite his numerous and systematic efforts, could not gain access to the first instance court records which were indispensable for filing his appeal (*Alex Thomas*, paras 105–110). In *Lucien Ikili*, even though national authorities were well aware of the applicant's status, it took six years and four months to determine that he was an illegal migrant (ACtHPR, *Lucien Ikili Rashidi v United Republic of Tanzania*, 2019, para 108). In another case, a delay of two years and six months to the commencement of an uncomplicated trial meant that the respondent State had not acted in a duly diligent manner (*Armand Guehi*, para 124). However, in *Ally Rajabu*, the Court found that the significant delay for the review process of a judgment was in fact due to the applicants' delay in filing the appropriate paperwork (*Ally Rajabu*, paras 68-72). Overall, in the cases decided thus far, the Court did not

have difficulty finding a violation of the right to a fair trial due to the obviously unreasonable delays on behalf of national authorities. The Court could have been more rigorous in outlining a more detailed legal reasoning and, thus, it remains to be seen how this will affect the quality of future judgments.

46 The *Wilfred Onyango* case brought to the fore the criteria for determining the complexity of a case and their weight in assessing the existence of an unreasonable delay. The Court discerned five factors to be considered when discussing questions of fact and law: the nature of facts to be established; the number of accused and witnesses; the existence of an international element to the case; a possible joinder to other cases; and any intervention in the proceedings by other parties (*Wilfred Onyango*, para 139). A large number of defendants does not automatically render a case complex. The fact that the applicants may have caused certain delays did not demonstrate the extent to which the actions of the counsel delayed the proceedings or whether they had done so deliberately. Even assuming that the defence counsel had been trying to delay the process, a duty of due diligence rests upon the authorities to actively monitor judicial proceedings and avoid unnecessary delays (*Wilfred Onyango*, paras 148–149, 153, 155). The conduct of domestic authorities was material to the Court's reasoning. During the public hearing fifty-five adjournments took place and in the first four years of the case only one witness testified. The Court did not accept the State's claim that the international element of the case justified the delays. The State, by linking prosecutions to cases pending before courts of a foreign jurisdiction, had jeopardised the applicant's rights, since other suspects facing extradition had never appeared. Instead, domestic authorities should have separated the cases and prosecuted *ab initio*. The Court concluded that the delays in hand had nothing to do with the complexity of the case and found a violation of Article 7 ACHPR (*Wilfred Onyango*, para 144).

47 In the *Sébastien Germain* case, the Court adopted a curious line of reasoning in dismissing a complaint over the unreasonable delay of proceedings before national courts (ACtHPR, *Sébastien Germain Ajavon v Republic of Benin*, 2019 ('*Sébastien Germain*'), para 199). The Court held that 'it cannot draw any consequence from a procedure marred by substantial procedural flaws or examine whether [the State] has complied with the requirements of reasonable time' and went on to find the applicant's allegation baseless' (*Sébastien Germain*, para 205). No justification was provided as to why flawed procedures were to be weighed

against the applicant's claims and not as evidence in his favour. The case was also a missed opportunity for the Court to decide whether disruption to the functioning of the judicial system due to strike action can be a valid ground to be relied upon in balancing all factors in order to ascertain whether a delay is reasonable (*Sébastien Germain*, para 202).

(b) Free Legal Aid

48 The question of whether an individual is entitled (and denied) free legal assistance during criminal proceedings is an element that the Court weighs in its assessment on whether a trial is overall fair. The Court has dealt with a good number of cases on this matter. Article 7 (1) (c) ACHPR does not explicitly provide for a right to free legal aid, but the Court reads this as an implied right within the protective scope of the right to a fair trial (*Alex Thomas*, paras 123–125; *Wilfred Onyango*, para 181). By relying upon the practice of the ACommHPR, the HRC and the case law of the ECtHR, certain criteria have been identified and used to determine when the interests of justice require the provision of free legal aid. These criteria are the seriousness of the offence, the severity of the potential sentence, the complexity of the case and the social and personal circumstances of the defendant (*Alex Thomas*, paras 116–121; *Wilfred Onyango*, paras 169–179).

49 Cases of applicants who were accused of serious offences (eg armed robbery or rape) for which a minimum sentence of thirty years was threatened, and who did not have the financial means to afford a lawyer, obviously involved violations of the right to a fair trial on account of the fact that applicants did not receive free legal aid (ACtHPR, *Diocles William v United Republic of Tanzania*, 2018 ('*Diocles William*'), para 86). In instances where an applicant was unrepresented; or the defendant was of ill health and absent during the presentation of his defence; or the authorities were aware that the applicant's counsel had abandoned him/her, it was incumbent upon the authorities to ensure that the applicant was provided with legal aid (*Alex Thomas*, paras 123–125; *Wilfred Onyango*, paras 183–184). Individuals are entitled to legal aid regardless of whether they request it. Moreover, if the interests of justice warranted the provision of legal aid, the applicant does not need to show that the non-provision of legal assistance incurred a disadvantage to them in the course of their trial (ACtHPR, *Jibu Amir alias Mussa and Saidi Ally allas Mangaya v United Republic of*

Tanzania, 2019, paras 78–79). Therefore, if the applicant's request for legal aid was rejected, this weighs heavily in balancing the criteria of fairness (*Wilfred Onyango*, para 182).

50 In *Mohamed Abubakari*, the respondent State argued that legal aid is contingent on the availability of financial resources. The Court noted that the State had failed to adequately demonstrate that it had absolutely no financial capacity to grant free legal assistance to indigent persons, alleged perpetrators of serious crimes (*Mohamed Abubakari*, paras 133, 144). This may imply that the Court leaves the State some room for manoeuvre as long as it can demonstrate financial incapacity. Nonetheless, in subsequent cases, in which the State insisted that a certain margin of appreciation should be available in the implementation of the right to legal aid, the Court decided that this argument was not relevant, if the conditions for the mandatory provision of legal aid had all been met (*Diocles William*, para 87; ACtHPR, *Minani Evarist v United Republic of Tanzania*, 2018, paras 64, 70; ACtHPR, *Majid Goa alias Vedastus v United Republic of Tanzania*, 2019, paras 68-72). The Court's reasoning suggests that there is no room for discretion when the above-mentioned criteria are met even though the right to legal aid is not absolute or the State lacks the requisite financial capacity. The Court did not justify the change of its position from the *Mohamed Abubakari* case to subsequent case law.

(c) Overall Fairness

51 The Court, in light of the facts of a case, assesses the overall fairness of a trial by weighing how procedural deficiencies and/or manifest errors impacted the fairness of the trial as a whole. The cases discussed below pertain to the use of evidence in criminal proceedings and the publicity of a trial.

52 In *Diocles William*, the fact that the defence witnesses were not heard was a decisive factor that seriously affected the overall fairness of the criminal procedure. The non-appearance of defence witnesses weighed heavily, in conjunction with the fact that the applicant was accused of a serious crime and had called witnesses on three different occasions without success. The Court held that the equality of arms dictates that, even if the applicant had given up on calling his witnesses, the authorities should have been proactive and, at least, provided reasons as to why they did not take measures to call these witnesses (*Diocles William*, paras 64–66). In *Kennedy Owino*, the applicants, serving a thirty-year imprisonment sentence,

complained that manifest procedural irregularities had undermined the fairness of their trial and conviction (*Kennedy Owino*, para 83). The testimony of an eyewitness who claimed to have identified the applicants during an identification parade was the only evidence on which they had been convicted. The Court found it disconcerting that the State had not supplied evidence showing that domestic courts had taken measures to verify whether the witnesses had seen the applicants in the media before identifying them in the parade. The safeguards applied in the assessment of the evidence were found to be inadequate, rendering the whole trial unfair (*Kennedy Owino*, paras 84, 88).

53 In a different case, the lack of publicity in delivering the judgment did not constitute, in itself, a violation of the right to a fair trial. The respondent State argued that the judgment was delivered in the chambers of the judge due to space limitations and scarce financial resources. The use of judges' chambers as courtrooms is common practice and the public can be present during the oral pleadings and the delivery of the judgment (*Mohamed Abubakari*, paras 219–221). The Court accepted that the question of whether a judgment is to be delivered in public should be determined with some flexibility. The publicity of the judgment is assured as long as it is rendered in premises to which the public has access and the public is notified of the location. The Court held that, in these circumstances, the above criteria had been met (*Mohamed Abubakari*, paras 224–227). Judge Rafâa Ben Achour and Justice Elsie Thompson disagreed with the majority's assessment of the fairness of the trial. They found the absence of proper publicity in delivering the judgment to be a violation of the right to a fair trial. They argued that the majority did not factor appropriately all relevant considerations into its fairness exercise, such as the facts that, due to local circumstances, the judgment cannot be accessed immediately; judges' chambers do not have enough space to accommodate the public; and a judge's chambers is an intimidating space both for the defendant and the attending public (Mohamed Abubakari, Partly Dissenting Opinion of Justice Elsie N. Thompson, paras 9–10; Mohamed Abubakari, Dissenting Opinion of Jugde Rafâa Ben Achour, para 13). Thus, it may be said that in this case the Court accorded too much manoeuvre to national authorities without taking all the relevant factors into account and without properly explaining why not (Smet, 2016, chapter 5; de Schutter, Tulkens, 2008, 191-198). Interestingly, this generous room of discretion does not correlate with the overall trend in the case law not according discretion to States regarding alleged violations of the right to a fair trial. The very close scrutiny of domestic courts' assessment of visual or voice identification evidence (*Kennedy Owino*, discussed

earlier; *Kijiji Isiaga*, discussed in section C) or the assessment of mandatory provision of free legal aid clearly suggest that the ACtHPR takes a firm – and, on certain occasions, perhaps rigid – position.

2. Balancing Test and Arbitrariness

54 Inherent in the concept of arbitrariness is the need to weigh the reasonable expectations of an individual against restrictive measures taken by the State, even if these measures are lawful under domestic law. In other words, there must be a relationship of proportionality between a restrictive measure and what is reasonably expected of the State. In this context, balancing a series of factors in light of the facts of a case is important. The Court's assessment on whether a given interference with the exercise of a right is reasonable consists of a procedural approach thereby examining only whether authorities furnished sufficient reasons for their (in)actions. Such procedural approach allows considerable deferential space to States. The discussion addresses the right not to be arbitrarily deprived of one's liberty, the right not to be arbitrarily deprived of one's nationality and the right not to be arbitrarily expelled.

(a) The Right to Liberty

55 According to Article 6 ACHPR, 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law.' The provision adds that 'no one may be arbitrarily arrested or detained.' Any deprivation of liberty needs not only to fulfil the conditions specified in the law but also to meet standards protecting individuals from arbitrariness. The notion of arbitrariness relates to the standard of reasonableness; deprivation of liberty needs to be 'just, necessary, proportionate and equitable' (*Kennedy Owino*, para 130). The Court, by way of relying heavily on established human rights jurisprudence, set out three cumulative criteria to determine whether a deprivation of liberty is arbitrary: the lawfulness of the deprivation; the existence of clear and reasonable grounds; and the availability of procedural safeguards (*Kennedy Owino*, para 131). The case of *Kennedy Owino* concerned the re-arrest of the applicant and the filing of new charges against him based on the same facts, after he had been acquitted. The Court found that the applicant's detention may have been lawful, but it was

arbitrary. In the context of criminal proceedings, once an accused is acquitted of a particular crime by a court of law, the fundamental right to liberty and the standard of reasonableness require that he be released. To re-arrest an individual and file new charges based on the same facts renders the right to liberty illusory, and → *due process* ultimately becomes unpredictable (*Kennedy Owino*, paras 132–133, 135, 137).

56 In a different case, concerning deprivation of liberty in pre-trial detention, the applicant complained that denying him bail was arbitrary and a disproportionate restriction under Article 6 ACHPR. The Court clarified that a refusal to grant bail must be provided for by law, be justified by a legitimate reason and be proportionate to the aim of the detention (see Murray, 2019, 184–185). However, when the Court concluded that 'pre-trial detention is undoubtedly the necessary restriction for attainment of the desired objective' (ACtHPR, *Anaclet Paulo v United Republic of Tanzania*, 2018 ('*Anaclet Paulo*'), para 67), it did so without having balanced the interests and rights in hand. The Court did not require domestic courts to demonstrate a robust causal link between detention and one or more of the legitimate grounds to continue detaining the applicant. Neither did the Court require national authorities to assess the *real* risk that the applicant posed on the basis of his past and character (and not only on the basis of the gravity of the crime he was accused of) (*Anaclet Paulo*, paras 65–66). Moreover, the Court neither examined nor required domestic courts to have examined the possibility of whether other preventative measures less restrictive than detention could have achieved the same objective (see discussion of the ECtHR's case law Harris and others, 2018, 346–348).

(b) Arbitrary Withdrawal of Nationality

57 In a different facet of arbitrariness, the applicant complained of the arbitrary withdrawal of his nationality. He alleged that, after having been detained for six days, the authorities withdrew his Tanzanian nationality and deported him to Kenya (ACtHPR, *Anudo Ochieng Anudo v United Republic of Tanzania*, 2018 ('*Anudo Ochieng*'), paras 3–4, 61–67). The Court noted that, in international law, conferring nationality is a sovereign act falling within the ambit of States' domestic jurisdiction. However, the power to deprive a person of their nationality is subject to respect for international human rights standards and States must avoid the risk of statelessness. For a decision to withdraw nationality not to be arbitrary, it must be founded on a clear legal basis, serve a legitimate aim, be proportionate to the interest protected and respect

procedural guarantees allowing the accused to defend him/herself before an independent body (*Anudo Ochieng*, paras 74–78). The Court found the deprivation of the applicant's nationality arbitrary and, thus, contrary to Article 15 (2) UDHR (*Anudo Ochieng*, paras 87–88). The factors that were considered and balanced in light of the facts of the case were: first, that the applicant's citizenship was being challenged thirty-three years after his birth, during which period he lived an ordinary life like every other citizen; second, that Tanzania had not contested the applicant's parents' Tanzanian nationality; and third, that in view of the contradictory witness statements about the applicant's paternity, a DNA test, which was requested by the applicant but rejected by the State, would have provided clarity (*Anudo Ochieng*, paras 84–86).

(c) Arbitrary Expulsion

58 In *Anudo Ochieng*, the Court decided that Tanzania had expelled the applicant in an arbitrary fashion in violation of Article 13 ICCPR. The Court noted that that there are few circumstances in which a ban on entry into one's own country may be reasonable (para 98). Critical factors in the Court's reasoning were, first, that the applicant's expulsion resulted from the arbitrary withdrawal of his nationality by Tanzania; second, that since the applicant had been rejected by both Tanzania and Kenya as a national, he had been made stateless; and third, that even if the respondent State regarded the applicant as an alien, the conditions of his expulsion did not comply with the standards prescribed in Article 13 ICCPR, namely that the decision of expulsion must be reached in accordance with law and the individual must have his case reviewed by the competent authority (paras 99–100, 103, 105).

E. Conclusion

59 Assessing whether domestic authorities have struck a fair balance between the general interest and the requirement to protect individual rights is a difficult judicial task. One should be cautious inferring definitive conclusions on how the Court performs its balancing test given the early years and development of its jurisprudence. The foregoing analysis identified a series of criteria that the Court employs in its legal reasoning. The use of these criteria adds a layer of systematization in the case law which however does not guarantee coherence. The *ad hoc* and context-dependent nature of weighing different interests and rights need to also ensure

coherent, transparent and rigorous reasoning in specific cases and across the case law. The balancing test is considered to be the 'black box' in international jurisprudence. Balancing many times entails inconsistency and incoherence in an international human rights' court's case law (for discussion on the ECtHR see Çali, MPEPIL, 2018, para 4); international bodies adopt brief and obscure reasoning on how the different interests and rights are weighed; and there is confusion over the steps of the balancing test (for discussion on the practice of the UN human rights committees see Keller and Walther, MPEPIL, 2018, para 66; for discussion on the case law of the IACtHR see → *Balancing Test: Inter-American Court of Human Rights (IACtHR)* [MPEPIL], para 29). The Court's legal reasoning in testing the strength of reasons in favour of the respective competing rights and interests is good but there is considerable room for improvement with regard to the following points.

60 There is a notable measure of inconsistency and uncertainty on how the Court applies the balancing test across the case law. This may be seen when the Court gradually identifies the specific aspects of rights' protective scope that are deemed of a weighty protection as a criterion or when the Court changes its position on a matter without thoroughly justifying the underlying reasons. An example of the latter scenario is what it seems to be a shift from the *Mohamed Abubakari* case to subsequent case law with regard to the Court's position that there is no room for discretion accorded to States when the conditions for the mandatory provision of legal aid are all been met - even if the State is able to show that it lacks the requisite financial capacity. Moreover, the Court is not always transparent and comprehensive in its legal reasoning. The strand of case law on fair trial showed a lack of transparency on applying the different steps of the balancing test. This also applies when the majority of Court found that the guarantee of the publicity of the trial was well ensured without bringing in other relevant factors, as the minority dissenting opinion did (*Mohamed Abubakari*). The Court's balancing exercise is not transparent either when discussing the context of an interference: the contextual scrutiny of a restrictive measure may be presented by the Court as an objective and controversy-free but it involves a great measure of subjectivity and interpretation leeway which is not acknowledged. The Court needs to be open and bring all relevant factors relevant to a case into its reasoning.

61 The Court does not elaborate on the weight attached to the different criteria that it considers in the course of the balancing test. The availability of less restrictive means is a

criterion when assessing the proportionality of a restriction but it arguably weighs variably across different judgments thereby fostering uncertainty and incoherence. As discussed earlier, other international courts of human rights treat the availability of less restrictive means as an important but not necessarily deciding criterion since States enjoy, in principle, the choice of means for protecting human rights. The ACtHPR seems to have a different approach on this matter since it has never thus far explicitly referred to such discretion enjoyed by States. There are cases in which the availability of other measures was a criterion taken in conjunction with other factors but there are other cases in which the availability of less restrictive means is likely to have been a determinative consideration in the Court's reasoning. In other instances, which concerned the evaluation of the reasonableness of restrictive measures, the Court neither examined nor required domestic courts to have examined the possibility of whether other preventative measures less restrictive than detention could have achieved the same objective (*Anaclet Paulo*).

62 The ACtHPR factors criteria which fall outside the strictly *ad hoc* approach to balancing and instead concern other, broader ramifications. The consideration of the possible chilling effect of a restrictive measure to the effective exercise of a right in the future is an apt example (notwithstanding the particularly high threshold that the Court sets on the applicants to prove such a chilling effect). The Court also includes/may include in the balancing test criteria that are distinctive of its case law and the ACHPR setting it apart from the practice of other human rights bodies and courts. The free exercise of rights as a condition for achieving public interests and the concept of duties of individuals are such criteria. These criteria do not relate to weighing a given human right against other interests but bring to the fore the complex and interdependent relationship of human rights and other interests. The Court has noted that the free exercise of rights can be a precondition for achieving public interests, including social cohesion and public order. In this way, human rights and other interests are not always seen in competition. This is a significant and novel contribution of the Court in the balancing exercise which is otherwise assumed to cover only the need to balance competing interests and rights. The concept of duties of individuals albeit distinctive of the ACHPR has not been explored by the Court thus far. Yet arguably the duties of the individual toward society, where applicable, could be used by the ACtHPR as an autonomous criterion in its balancing test or, in the alternative, could have a legal bearing in the context of other criteria discussed earlier. Duties do not fit squarely either within the assumed scheme of competition between pursuing public

interests and free exercise of human rights thereby shedding light upon the symbiotic, and dynamic relationship of human rights and other interests.

63 The application of the balancing test is in an interdependent relationship with the margin of discretion accorded to States. If the Court gives broad deferential space to States, this entails that it exercises judicial restraint in assessing whether domestic authorities struck a fair balance. Overall, the Court is not keen on deferring to determinations by domestic authorities, even if States insist on this matter. It accepts, in principle, that it should accord certain leeway to States but, in practice, it closely scrutinises how State authorities weighed different interests and rights in the circumstances in hand. For instance, the Court did not accord room for manoeuvre to Tanzania regarding the requirements for individuals to stand in elections (*Tanganyika Law Society*); or with respect to (perceived) social, cultural and religious specificities in Mali as a justification for allowing girls to marry at sixteen years of age (*Association Pour le Progrès et la Défence des Droits des Femmes Malienne*); or with alleged financial incapacity of States to provide free legal aid. There are certain instances that the Court appears to be, in principle, understanding of circumstances necessitating a margin of discretion to States. Examples include the State's decision to determine the question of whether the judgment was delivered in public (*Mohamed Abubakari*) or the needs of the Rwandese society, in the aftermath of the genocide (*Ingabire Victoire Umuhoza*). The Court's unwillingness to defer to national authorities can also be seen in the Court's choice to not adopt a procedural fairness approach to the right to a fair trial: the ACtHPR substantively scrutinises national courts' decisions against fair trial standards instead of merely checking whether national courts gave sufficient reasons for their decisions. The only area that the Court endorses a procedural approach to balancing is need to weigh the reasonable expectations of an individual against restrictive measures taken by the State (eg the right not to be arbitrarily deprived of one's liberty; the right not to be arbitrarily deprived of one's nationality; or the right not to be arbitrarily expelled). Finally, it should be noted that from the case law, thus far, it is not clear whether the Court (formally) adopts the concept of margin of appreciation. On a few occasions, the Court has explicitly referred to this term (*Ingabire Victoire Umuhoza; Kijiji Isiaga*; *Kenedy Ivan*; *Oscar Josiah*) but there is no consistency throughout the case law. The Court has not elaborated either on what this doctrine means in the African human rights context. It may be the case that the Court uses similar heuristic tools and exercises in order to denote the need to accord a margin of discretion to national authorities' assessment.

64 To conclude, the Court shows discernible signs of judicial creativity in an effort to compensate for weaknesses of the ACHPR or to bring make the latter to life. To do so, reliance upon the practice of other international human rights bodies, such as the ACmmHPR or the HRC, or the case law of the ECtHR and IACtHR is a constant in the ACtHPR's jurisprudence. This is obvious from the setting up of the general framework of permissive restrictions under the ACHPR to detailed criteria to be considered in the balancing test. The case law of international courts witnesses an active dialogue and exchange of ideas (Kibet and Fombad, 2017, 362–363), including the ACtHPR (Mujuzi, 2017, 191-197; Rachovitsa, 2018, 76–86). It could be also said that the proportionality principle and the balancing test form part of an emerging standard of human rights adjudication across domestic and international courts and other bodies (Stone Sweet and Mathews, 2019, 59). Overall, the Court's approach converges with the case law of other human rights courts. This does not mean that this convergence is always advisable or justified. The foregoing analysis highlighted instances in which the ACHPR did not seem to provide the ground for adopting specific interpretations or at least that the Court should have given a more rigorous justification. Examples include the reading of Article 29 (2) as a general limitation clause, or the automatic incorporation of the recent case law of the ECtHR and IACtHR regarding the measure of discretion to States into the ACHPR, even though such case law may to be apt to be imposed (just yet) on States parties to the ACHPR. Interestingly, in a few cases the Court appears to have adopted a different take compared to international human rights jurisprudence, such as the burden of proof set on applicants to demonstrate a chilling effect; or the little, if any, leeway accorded to States when they design and implement electoral systems. Consequently, the balancing test should also be seen as a heuristic tool that provides not only a means to connect the global jurisprudence(s) on human rights but also an opportunity to appreciate the ACHPR's specificities and even give rise to different ways of weighing rights and interests under the ACHPR.

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