Judicial Activism at the African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights (hereafter the Court) is responsible for ensuring that there is respect of human and peoples' rights on the African Continent. The Court has both a contentious jurisdiction (resolving disputes concerning interpretation and application of human rights instruments) and advisory role (providing opinion on any legal matter relating to the Charter or any other relevant human rights instruments). In exercising these duties, the Court complements the protective function of the African Commission on Human and Peoples' Rights (hereafter the Commission). Originally, for contentious cases, the Court could only be seized by the Commission, State Parties and Inter-governmental Organisations, it is until recent that individuals and Non-Governmental Organisations (NGOs) have started gaining direct access – and such access is still limited to a few countries that have made a declaration allowing their citizens and NGOs to submit complaints directly to the Court.

On 22 January 2013, the Government of Rwanda accepted the jurisdiction of the Court to receive applications from individuals and NGOs, a declaration it withdrew three years later (on 29 February 2016). However, the Court determined that the withdrawal of the declaration would have effect from 1 March 2017. In this short lived relationship, the Court has dealt with fourteen (14) contentious cases brought against the Republic of Rwanda. Out of these 14, eight (8) were brought by one applicant, Fidèle Mulindahabi. In all these 14 cases, twelve (12) were either dismissed, inadmissible, irrelevant or unfounded. It is only in two (2) cases that the Court found the Republic of Rwanda to have violated the applicant's individual human rights (*Ingabire Victoire Umuhoza v. Republic*

of Rwanda (Application no.003/2014), and *Léon Mugesera v. Republic of Rwanda, (*Application no. 012/2017)), and it awarded reparations to the applicants.

In the 2 cases, the Republic of Rwanda partly participated in the proceedings concerning one case: *Ingabire Victoire Umuhoza v. Republic of Rwanda*, and did not participate at all in the second case (*Léon Mugesera v. Republic of Rwanda*). This is because, immediately after the submission of its withdrawal, it also stopped appearing and submitting written responses. This left the Court with one choice: to render the judgment in default *suo motu*. Any lawyer reading a judgment would be disappointed when he or she finds out that one of parties did not participate, as it undermines the right of defense and the threshold of evidence which are both important in the process of truth finding. Even if the Court might have attempted to examine evidences in relation to claims made by applicants, the fact is that a judgment in default is going to be limited on a minimum standard of evidence – *prima facie*. Having said that, refusal to participate in court proceedings is a common practice especially when a state deems the process to be either frivolous or spiteful. As Louis Henkin famously notes: 'Almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.' However, States will observe those laws and law enforcing mechanisms that appear to be fair and just – legitimacy of the law and the process.

Having set out the background, let me introduce the main argument: that judgments concerning the 2 cases reflect a certain degree of judicial activism. As Lino Graglia notes, judicial activism is 'the practice by judges of disallowing policy choices by other governmental officials or institutions that the constitution does not clearly prohibit.' To understand it, let us take it together with judicial self-restraint, which is its opposite. As Richard Posner notes, one of the ways of judicial self-restraint is where the 'judges

are highly reluctant to declare legislative or executive action unconstitutional – deference is at its zenith when action is challenged …' Judicial activism is therefore when judges do not understand when to defer to other officials or institutions, especially when they are dealing with matters of public policy – lack of deference. As Posner further notes, deference to other branches of government is 'based on a belief that legislature do policy better than courts do, which is a form of judicial modesty.' Deference that comes from judicial self-restraint is critical to the success of balance of power, a fundamental principle of rule of law, and it helps in protecting a democratic society against judicial imperialism. In the following paragraphs, I will demonstrate how the Court has failed to restrain itself where it could.

In the case of *Ingabire Victoire Umuhoza v. Republic of Rwanda*, the Court held that Rwanda violated the applicant's freedom of expression and opinion because she was convicted of minimising the genocide against the Tutsi. The Court reached this determination after acknowledging the fact that freedom of expression and opinion are important rights but not absolute ones. It is interesting to note that the determination of this violation was neither based on the argument that the law prohibiting the said crime does not 'satisfy the requirements of ''the law'' – so that it could be discredited on the ground that the applicant was unable to foresee the consequences of her conduct – nor on the argument that the law does not serve a legitimate purpose, because the Court concluded that the law restricting the applicant's freedom of expression served the legitimate interests of protecting national security and public order.' At this point, the Court was in favour of the Republic of Rwanda: It had determined that freedom of expression and opinion is not absolute, the law prohibiting genocide ideology fulfils all the requirements allowing the applicant to foresee the consequences of her conduct, and that the law had a legitimate purpose. Contraire, the decision was based on a single

determination that ‘the applicant’s punishment was not proportionate to the legitimate purposes which the conviction and sentence seek to achieve.’ And it goes ahead to note (without providing examples) that Rwanda ‘could have adopted other less restrictive measures to attain the same objectives.’ Certainly, this is a policy determination, which does not belong particularly to the powers of the Court. This is where the Court ought to have shown some respect to other institutions. The Court should have understood that the Government of Rwanda is under a constitutional obligation (see the Constitution of the Republic of Rwanda as adopted in 2003 and Revised in 2015, in its Preamble and Article 10(1)) to prevent and punish genocide ideology and all its manifestations. This combined with the understanding of hierarchy of norms and laws in Rwanda, the Court should have taken a moment to (at least) reflect on its decision. Combined with the minimum evidence the Court examined (*prima facie*), it is fair to argue that assessing proportionality was/is a slippery slope, and a very subjective one, of which I am persuaded to suggest that any reasonable trier would hesitate to make a judgment based solely on it, unless it is clearly obvious. Another determination is minor, it concerns a procedural error where a defense witness after his testimony in Court, through routine searches in prison, was found with a document that was later submitted to Court.

In the case of *Léon Mugesera v. Republic of Rwanda*, the Republic of Rwanda was found to have violated the applicant’s right against cruel, inhuman and degrading treatment. This determination was reached on the claim that ‘his meals are often forgotten and his fruit based diet is not respected and that he does not receive the whole wheat bread required by his diet.’ In addition to allegations of receiving threats from prison guards, poor lighting in his room, limited access to a doctor and medication, and non-provision of an orthopaedic pillow. Every year (since 2011), together with international scholars on transitional justice, I have been visiting Mpaga

prison and in particular Delta Wing, where the applicant and other internationally extradited suspects and convicts are incarcerated. Even if I cannot speak to his particular daily treatment, a mere comparison to other prison wings makes one conclude that his prison conditions cannot reach the threshold of cruel, inhuman and degrading treatment. In fact, most of visitors have wondered why some prisoners are given preferential treatment – I will explain diplomatic assurances in extradition cases another time.

Let me assume that these alleged conditions are indeed true. In the case of *Öcalan v. Turkey*, Abdullah Öcalan, former leader of the PKK (Kurdistan Workers' Party), complained to the European Court of Human Rights (ECHR) that the conditions of his detention and transfer from Kenya to Turkey, and his imprisonment at Imrali Island amounted to cruel, inhuman and degrading treatment. The Grand Chamber of ECHR, even if it recommended that the applicant be given 'access to the same facilities as other high security prisoners in Turkey, it found that the general conditions in which the applicant was being detained had not reached the minimum level of severity required to constitute inhuman or degrading treatment (…).'

The question is how could such a spoiled applicant manage to convince the Court to believe those mischievous allegations against the State? The answer is probably found in three related reasons: the first reason is the state's refusal to participate in the proceedings, which allowed the Court to use minimum evidence where the applicant simply had to reverse the burden of proof. Second reason is the Court's lack of knowledge about the context and realities in the situation country. And the third reason is the already explained judicial activism of the Court. The reason understanding national context and realities is important in deciding on matters of human rights is that human rights law is about the relationship between the state and its citizens. The Court should have endeavored to understand national realities since

Africa is a diverse continent with specific historical, political and security challenges requiring specific policy decisions – it is unrealistic to claim that Africa has reached a common ground on all issues of human rights.

Let me assume that the alleged violations occurred and were indeed founded. However, given the serious nature of crimes the applicants were accused of, and the minimum severity of the alleged violations of their rights, combined with the minimum evidence examined, the Court could have restrained itself during the award of reparations. The determination of the violations alone could have been enough. As I describe it elsewhere, we can take the example of *McCann and Others v. the United Kingdom*, a case concerning the team of UK Special Forces that shot and killed the suspected terrorists (McCann, Farrel and Savage) for allegedly planning to detonate a bomb in Gibraltar, but later found out that at that moment the suspects were not in possession of explosives. The ECHR determined that 'their right to life was violated in the process of planning and organising of the operation because of (i) failure to stop the suspects from travelling to the target area and (ii) errors in the assessment of intelligence information. Nevertheless, the European Court did not award compensation to the victims after determining that there was a violation of their right to life.' In another case of *Beghal v. the United Kingdom*, the ECHR found the UK boarder officials to have violated Sylvie Beghal's rights after she had been stopped and questioned on her way back from visiting her husband in prison for terrorism in France. However, the ECHR did not award damages because it found that the determination of a violation was sufficient.

I understand that sometimes aggressive pursuit of judicial review to protect fundamental rights can be good, but it might not the right thing to do for a nascent Court that is still struggling to attract membership. I do not think that countries would be persuaded to subject their constitutional

obligations to a small group of ‘activist’ regional judges. Human rights protection mechanisms are supposed to compliment – and often expected not to contradict – the constitution. As Jan Velaers notes international human rights mechanisms ‘were in no way intended to take the place of national constitutional protections, let alone to abolish them.’ As a lecturer of public security and rule of law, I tend to remind my students that human rights protection is not a trump card that overrides everything else. It is as important as national security, national unity, peaceful co-existence and many other values, because as Gregory Keating argues ‘Maximal security extinguishes liberty and maximal liberty devastates security.’ The answer is therefore ‘found in balancing the freedom to achieve our desired ends and the need to protect the security of others.’