AFRICAN UNION
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

THE MATTER OF

ASSOCIATION POUR LE PROGRÈS ET LA DÉFENSE DES DROITS DES FEMMES MALIENNES (APDF)

AND

THE INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA (IHRDA)

V.

REPUBLIC OF MALI

APPLICATION No. 046/2016

JUDGMENT

11 MAY 2018

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The Court composed of: Sylvain ORÉ, President, Ben KIOKO, Vice-President; Gérard NIYUNGEKO, El Hadji GUISSÉ, Rafâa BEN ACHOUR, Angelo V. MATUSSE, Ntyam O. MENGUE, Marie-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Judges; and Robert ENO, Registrar,

In the Matter of:

1. *Association pour le progrès et la défense des droits des femmes maliennes (APDF)* and

2. The Institute for Human Rights and Development in Africa (IHRDA)

represented by:

i. Advocate Lassana DIAKITÉ, and

ii. Advocate Eric BIZIMANA

versus

REPUBLIC OF MALI,

represented by:

i. Mr. Youssouf DIARRA, Director-General of State Litigations

ii. Mr. Ibrahima TOUNKARA,
Sub-Director of Civil, Commercial and Social Matters
General Directorate for State Litigations

iii. Advocate Moustapha S.M. CISSÉ
Cabinet "Le Sankoré"
Société Civile Professionnelle d'Avocats

after deliberation,

delivers the following Judgment:

I. THE PARTIES

1. L'*Association pour le progrès et la défense des droits des femmes maliennes* (The Association for the Advancement and Defence of Women's Rights) – *APDF,* presents itself as a Malian organisation with Observer Status before the African Commission on Human and Peoples' Rights (herein-after referred to as "the Commission"), with the mission to encourage women's groups to defend their rights and interests against all forms of violence and discrimination.

2. The Institute for Human Rights and Development in Africa (IHRDA) for its part, presents itself as a pan-African Non-Governmental Organisation based in Banjul, The Gambia, with the mission to assist victims of human rights violations in their quest for justice using national, African and international instruments. It declares that it also has Observer Status before the Commission.

3. The two afore-mentioned entities are herein-after referred to as "the Applicants".

4. The Respondent State, the Republic of Mali, became a Party to the African Charter on Human and Peoples' Rights (herein-after referred to as "the Charter") on 21 October 1986; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (herein-after referred to as "the Protocol") on 25 January 2004; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (herein-after referred to as "the Maputo Protocol") on 25 November 2005; and to the African Charter on the Rights and Welfare of the Child (herein-after referred to as "the Children's Charter"") on 29 November 1999. The Respondent State also deposited the Declaration prescribed under Article 34(6) of the Protocol, allowing individuals and Non-Governmental Organisations (NGOs) to directly seize the Court, on 19 February 2010. The Respondent State became a Party to the Convention on the Elimination of All Forms of Discrimination against Women (herein-after referred to as "CEDAW") on 10 September 1985.

II. SUBJECT OF THE APPLICATION

A. Context and facts as related by the Applicants

5. In a bid to modernise its legislation by bringing it in line with the evolving international human rights law, the Government of Mali launched, in 1998, a vast operation to codify the rights of individuals and the family. This project, which was subject to broad popular consultation, received expert input prior to the drafting of Law No. 2011-087 establishing the Persons and Family Code (herein-after referred to as the "Family Code") which was adopted by the National Assembly of Mali on 3 August 2009.

6. This Law which was well received by a broad section of the population as well as human rights organisations, could not be promulgated because of widespread protest movement by Islamic organisations.

7. Submitted for a second reading, the impugned law in the end culminated in the drafting of a new Family Code which was adopted on 2 December 2011 by the National Assembly and promulgated on 30 December 2011 by the Head of State.

8. The Applicants submit that the law as promulgated violates several provisions of international human rights instruments ratified by the Respondent State as referred to in paragraph 4 above.

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B. Alleged violations

9. The Applicants allege the following violations:

" i. Violation of the minimum age of marriage for girls (Article 6(b) of the Maputo Protocol and Articles 1(3), 2 and 21 of the African Charter on the Rights and Welfare of the Child (ACRWC);

ii. Violation of the right of consent to marriage (Article 6.(a) of the Maputo Protocol and Article 16(a) and (b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);

iii. Violation of the right to inheritance Article 21(2) of the Maputo Protocol and Articles 3 and 4 of ACRWC;

iv. Violation of the obligation to eliminate traditional practices and conduct harmful to the rights of women and children (Articles 2(2) of the Maputo Protocol, 5(a) of the CEDAW and 1 (3) of the ACRWC".

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

10. The Registry received the Application on 26 July 2016.

11. By a letter dated 26 September 2016, the Registry served the Application on the Respondent State. The latter was requested to communicate the name (s) and address(es) of its representative(s) within thirty (30) days as well as its Response to the Application within sixty (60) days pursuant to Rules 35(4) and 37 of the Rules of Court (hereinafter referred to as "the Rules").

12. By notice dated 18 October 2016, the Registry communicated the Application to the State Parties and the other entities in accordance with the Court's directives.

13. On 28 November 2016, the Respondent State filed its Response to the Application, which was transmitted to the Applicants on 13 December 2016.

14. On 1 February 2017, the Applicants filed their Reply which the Registry transmitted to the Respondent State on 2 February 2017, for information.

15. By notice dated 25 April 2017, the Parties were informed that the Court would hold a public hearing on 16 May 2017.

IV. PRAYERS OF THE PARTIES

16. The Applicants pray the Court to order the Respondent State to :

" i. Amend its Persons and Family Code by bringing back the minimum age of marriage for girls to 18;

ii. Eliminate the provisions of the **Family Code** which allow for age exemptions;

iii. Introduce a sensitisation programme for the population on the dangers of early marriage;

iv. Amend Articles 283 to 287 of the **Family Code** to establish similar conditions of consent for marriages contracted before a religious minister;

v. Amend Article 287 to impose the same sanctions on a religious minister who contracts a marriage without having ascertained the consent of the parties;

vi. Add to Section II titled : "Celebration before a religious minister" a provision requiring the latter to ascertain the consent of the parties;

vii. Insert in the **Family Code** a provision requiring an officially recorded Power of Attorney from the man and the woman where they are not present for the religious marriage;

viii. Translate and disseminate the **Family Code** in the languages accessible to religious ministers;

ix. Introduce a training programme for religious ministers on the procedure for contracting a marriage;

x. Introduce a sensitisation and educational programme for the population on the use of the provisions of the **Family Code** to ensure equal share of inheritance between the man and the woman;

xi. Develop a strategy to eradicate unequal share of inheritance between the man and the woman ;

xii. Develop a programme that ensures that people in the rural areas have access to a notary;

xiii. Develop a sensitisation programme for the population on the use of the provisions of the **Family Code** which ensure equal share of inheritance between legitimate children and children born out of wedlock."

17. In the Response to the Application, the Respondent State raises two preliminary objections; one, on the Court's jurisdiction and, the other, on the admissibility of the Application on the ground that it was not filed within a reasonable timeframe, in accordance with Article 6 of the Protocol. The Respondent State prays the Court to:

" i. Examine the objections raised;

ii. Declare that it does not have jurisdiction given that the Applicants' claims relate more to the sensitisation, popularisation and harmonisation of national laws with the African Charter on Human and Peoples' Rights rather than to the issue of application and interpretation of the Charter and other conventions which exist neither technically nor in reality, and have never been proven in the judicial practice of Mali;

iii. Declare the Application inadmissible for having not been submitted within a reasonable timeframe."

18. As regards the merits of the case, the Respondent State prays the Court to dismiss outright the Application as being baseless.

V. JURISDICTION

19. In terms of Rule 39(1) of its Rules, "the Court shall conduct preliminary examination of its jurisdiction...."

A. Objection to the material jurisdiction of the Court

20. The Respondent State contends that the subject of the Application does not relate to any of the five areas of the Court's jurisdiction set out in Rule 26(1) of the Rules.

21. The Respondent State maintains that it is evident that the areas in question enumerated in Rule 26(1)(a) [1] do not correspond to the subject of the Application which invokes cases of violations of human rights conventions. For the Respondent State, the Application does not pose a problem of interpretation of the Charter or other international human rights instruments.

22. The Respondent State further contends that the said instruments have no application difficulties in the legal and judiciary system of Mali, proof thereof being the fact that Article 116 of the Malian Constitution provides that treaties duly ratified or approved by the State have, upon publication, superior authority over that of laws; that the **Family Code** cannot therefore pose an obstacle to the interpretation and application of the provisions of duly ratified international conventions.

23. The Respondent State also argues that, in the instant case, only simple technical issues of harmonisation of the **Family Code** with the said international instruments may be taken into account to make the application of national laws more consistent.

24. The Respondent State maintains, lastly, that the Application is more concerned with issues of sensitisation and popularisation rather than those of interpretation and application of the Charter and other international instruments ratified by Mali, and consequently prays the Court to declare that it does not have jurisdiction.

[1] "The Court shall have jurisdiction to deal with all cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned."

25. In their Reply, the Applicants contend that the jurisdiction of the Court is defined by Article 3(1) of the Protocol which provides that the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned; that in promulgating the **Family Code**, some provisions of which are inconsistent with the ratified treaties, the Respondent State violates the said treaties; that, in other words, the Court is prayed to elucidate the implications for domestic laws, of the ratification of treaties by a State; that the Court is further prayed to make a determination on the application of the said treaties in Mali.

26. The Applicants maintain, in conclusion, that, by virtue of Article 3(1) of the Protocol, the Court is vested with the jurisdiction to interpret and apply the treaties ratified; and therefore pray the Court to dismiss the objection to its material jurisdiction raised by the Respondent State.

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27. The Court notes that its material jurisdiction is based on Article 3(1) of the Protocol and that, in the instant case, the alleged violation of rights relates to the human rights guaranteed by the Charter and other instruments ratified by the Republic of Mali.

28. Consequently, the Court holds that its material jurisdiction is established, and dismisses the objection in this respect.

B. Other aspects of jurisdiction

29. The Court notes that its personal, temporal and territorial jurisdiction is not contested by the Respondent State, and that nothing on file indicates that it does not have jurisdiction. Consequently, it holds that:

i. it has personal jurisdiction given that the Respondent State is a Party to the Protocol and has filed the Declaration prescribed under Article 34 (6) of the Protocol; and that the Applicants have Observer Status before the Commission;

ii. It has temporal jurisdiction given the fact that the alleged facts occurred subsequent to the entry into force, for the Respondent State, of the aforementioned international instruments;

iii. It has territorial jurisdiction given the fact that the alleged violations occurred in the territory of the Respondent State.

30. In view of the foregoing considerations, the Court holds in conclusion that it has jurisdiction to hear this case.

VI. ADMISSIBILITY OF THE APPLICATION

31. In terms of Article 6(2) of the Protocol, "The Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter".

32. Pursuant to Rule 39 of its Rules, the Court "shall conduct preliminary examination of ... the admissibility of the application in accordance with Articles 50 and 56 of the Charter, and Rule 40 of these Rules".

33. Rule 40 of the Rules, which substantially reproduces the content of Rule 56 of the Charter, provides as follows:

"Pursuant to the provisions of article 56 of the Charter to which article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. comply with the Constitutive Act of the Union and the Charter;
3. not contain any disparaging or insulting language;
4. not be based exclusively on news disseminated through the mass media;
5. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. not raise any mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the

Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union".

34. Whereas some of these conditions are not in contention between the Parties, the Respondent State raised two objections: the first, concerning the exhaustion of local remedies and, the other, the period within which the Court is to be seized of the Application.

A. Conditions in contention between the Parties

i. Objection to admissibility of the Application on grounds of failure to exhaust local remedies

35. The Respondent State maintains that the Applicants did not exhaust local remedies before seizing the Court with the matter. It argues that the Applicants had all the opportunities to bring the matter before the national judicial authorities; that the Malian Judiciary is totally independent because it is separate from the Executive and the Legislative arms; that the Applicants however, did not make any effort to submit their alleged violations to the national courts.

36. At the public hearing of 16 May 2017, the Respondent State responding to questions put by the Court, contended, *inter alia,* that the Applicants acted too hastily given that they did not adduce any specific evidence to justify the alleged violations; and that they should have gone to court on the basis of Articles 115 and 116 of the Respondent State's Constitution prior to bringing the case before this Court.

37. The Respondent State in conclusion prays the Court to rule that the Applicants have not exhausted local remedies and consequently, dismiss the Application outright.

38. In their Reply, the Applicants submit that no remedy exists at the national level; that the Respondent State only argues that the Applicants have the opportunity

to seize the Malian justice system with the matter without specifying the jurisdiction competent to determine such an action.

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39. The Court notes that the only remedy which the Applicants could have utilised is that of filing a Constitutional Petition against the impugned law.

40. In that regard, Article 85 of the Constitution of Mali provides that "The Constitutional Court is the judge of the constitutionality of the laws and it shall guarantee the fundamental rights of the individual and public liberties..."

41. Article 88 of the same Constitution provides that "Organizational laws shall be submitted by the Prime Minister to the Constitutional Court before their promulgation. Other categories of laws, before their promulgation, may be referred to the Constitutional Court either by the President of the Republic, the Prime Minister, the President of the National Assembly, one tenth of the deputies of the National Assembly, the President of the High Council of Collectives or one tenth of the National Counsellors, or by the President of the Supreme Court".

42. The above provision is reproduced *in extenso* by Article 45 of Law No. 97-010 of 11 February 1997 establishing an organic law that defines the organisational and operational rules of the Constitutional Court of Mali as well as the procedure to be followed before it.

43. The above provisions show that human rights NGOs are not entitled to seize the Constitutional Court with applications concerning the unconstitutionality of laws.

44. In view of the aforesaid, the Court finds that no remedy was available to the Applicants.

45. Consequently, the Court dismisses the objection to the admissibility of the Application for non-exhaustion of local remedies raised by the Respondent State.

ii. Objection to admissibility of the Application for failure to file the Application within a reasonable time

46. The Respondent State, in its Response, affirms that the impugned law was enacted on 30 December 2011 and that it is only on 26 July 2016 that the Applicants brought the matter before this Court, that is, about five (5) years after the promulgation of the impugned law; that the Applicants in their Reply did not adduce any argument to justify this particularly long timeframe in filing the case before the Court.

47. The Applicants, in their Reply, submit that the alleged violations are "continuing" and that, in the circumstances, the period can start to count only after the cessation of the said violations.

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48. The Court notes that Article 56 (6) of the Charter and Rule 40 (6) of the Rules specify that Applications shall be filed within a reasonable time counting from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time within which it shall be seized with the matter.

49. As has been indicated (paragraphs 46 and 47), whereas for the Respondent State the period for seizure of the Court must be reckoned from the date of promulgation of the impugned law; for the Applicants, this period will start to count only after the cessation of the alleged violations, that is, after the abrogation or review of the impugned law.

50. The Court is however of the opinion that, in the instant case, in which no remedy was available to the Applicants at domestic level, the date from which the reasonableness of filing the Application before this Court should be assessed is that on which the Applicants acquired knowledge of the impugned law.

51. The European Court of Human Rights adopted this same position in *Dennis and Others v. United Kingdom.* It held that, where it is clear from the outset that

no effective remedy is available to the applicant, the period runs from the date of the act at issue, or from the date of knowledge of that act or its effect on or prejudice to the applicant".[2]

52. The question here is therefore whether the period of four (4) years, six (6) months and twenty-four (24) days in which the Applicants seized the Court, that is, between 30 December 2011 (date of promulgation of the impugned law) and 26 July 2016 (date of seizure of the Court), is reasonable within the meaning of Article 56(6) of the Charter.

53. The Court in its previous judgments established that the reasonableness of the time within which the Application was filed at this Court depends on the particular circumstances of each matter and must be examined on a case-by-case basis[3].

54. In the instant case, in order for this Court to determine the reasonableness of the period of seizure, it is necessary to take into account two important elements: first, that the Applicants needed time to properly study the compatibility of the law with the many relevant international human rights instruments to which the Respondent State is a Party; and secondly, given the climate of fear, intimidation and threats that characterised the period following the adoption of the law on 3 August 2009, it is reasonable to expect the Applicants to have been affected by that situation as well. The country found itself in a situation of exceptional crisis with a vast protest movement of the religious forces which, according to the Respondent State, could even be "fatal for peace, harmonious living and social cohesion."

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[2] The European Court of Human Rights in the matter of *Dennis and Others v. United Kingdom (No. 76573/01)* Judgment of 2 /7/2002, page 6.

[3] Application No. 013/2011, *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablassé, Ernest Zongo and Blaise Ilboudo & Burkinabè Movement on Human Rights v. Burkina Faso,* Ruling of 21/06/2013 (Preliminary Objections) (Norbert Zongo v . Burkina Faso Ruling), para. 121; Application No. 005/2013, Judgment of 20/11/2015, *Alex Thomas v. United Republic of Tanzania, para. 73;* and Application No. 007/2013, Judgment of 03/06/2016 Mohamed *Abubakari v. United Republic of Tanzania,* para. 91, www.african-court.org

55. The Court accordingly dismisses the objection to the admissibility of the Application for failure to abide by a reasonable time limit in submitting the Application to the Court.

B. Conditions not in contention between the Parties

56. The Court notes that the compliance with Sub-rules 1, 2, 3, 4, and 7 of Rule 40 of its Rules is not contested and that nothing on record shows that these sub-rules have not been respected. The Court therefore holds that the said conditions have been met.

57. In light of the foregoing, the Court holds that this Application fulfils all the admissibility requirements listed in Article 56 of the Charter and Rule 40 of its Rules and, consequently, declares the Application admissible.

VII. MERITS

58. In the Application, it is alleged that the Respondent State violated Articles 2(2), 6(a) and (b) and 21(2) of the Maputo Protocol; Articles 3 and 4 of the Children's Charter and Articles 1(3) and 5(a) of CEDAW

A. Alleged violation relating to the Minimum Age of Marriage

59. The Applicants aver that Article 281 of the impugned law establishing the **Family Code** sets the minimum age for contracting marriage at eighteen (18) for boys and sixteen (16) for girls, whereas Article 6(b) of the Maputo Protocol sets that age at 18 for girls.

60. The Applicants further indicate that the impugned law allows for special exemption for marriage as from fifteen (15) years, with the father's or mother's consent for the boy, and only the father's consent, for the girl.

61. The Applicants also aver that according to the World Bank survey conducted in Mali between 2012 and 2013, 59.9% of women aged 18 and 22 were married before the age of 18, 13.6% at 15 years and 3.4% before the age of

12; that despite these alarming statistics on child marriage, Mali has not taken appropriate measures to eradicate this phenomenon.

62. The Applicants recall the relevant provisions of the Children's Charter, namely, Article 1(3) thereof, which provides that "Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency, be discouraged"; Article 2 thereof, defines a child as "every human being below the age of 18 years" and Article 21, which provides that "State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular those customs and practices prejudicial to the health or life of the child; and those customs and practices discriminatory to the child on the grounds of sex or other status".

63. The Respondent State, in its Response, submits that the National Assembly of Mali, on 3 August 2009, enacted the **Family Code** which contains provisions compliant with the international commitments of Mali, but that this Code could not be promulgated following a "*force majeure*" which affected the process.

64. The Respondent State argues that, prior to the promulgation of the text by the President of the Republic, a mass protest movement against the **Family Code** halted the process; that the State was faced with a huge threat of social disruption, disintegration of the nation and upsurge of violence, the consequence of which could have been detrimental to peace, harmonious living and social cohesion; that the mobilisation of religious forces attained such a level that no amount of resistance action could contain it.

65. The Respondent State further argues that, in the circumstances, the Government was obliged to submit the text for a second reading, always involving Islamic organisations, which culminated in the Family Code of 2011, enacted by the National Assembly on 2 December 2011 and promulgated by the President of the Republic on 30 December 2011; that it was therefore unjustified to accuse the State of violating rights whereas the State was only revising the initial text in order to garner consensus and avoid unnecessary disruptions; and that the said revision comprises flexibilities which do not in

any way detract from the rights protected by the Charter and other human rights instruments to which the State is a Party.

66. With regard to the allegation of violation of the minimum age of marriage, the Respondent State maintains that the established rules must not eclipse social, cultural and religious realities; that the distinction contained in Article 281 of the Family Code should not be seen as a lowering of the marriage age or a discrimination against girls, but should rather be regarded as a provision that is more in line with the realities in Mali; that it would serve no purpose to enact a legislation which would never be implemented or would be difficult to implement to say the least; that the law should be in harmony with socio-cultural realities; that it would serve no useful purpose creating a gap between the two realities, especially as, according to the Respondent State, at the age of fifteen (15), the biological and psychological conditions of marriage are in place, and this, in all objectivity, without taking sides in terms of the stance adopted by certain Islamist circles.

67. The Respondent State in conclusion asserts that the question is not that of violation of international obligations or maintenance of practices that should be discouraged but rather that of adapting the said obligations to social realities and that for these reasons, the Applicants' argument should be dismissed as unfounded.

68. In their Reply, the Applicants argued that by ratifying the Charter, the Maputo Protocol and the Children's Charter, the Respondent State committed itself fully to the relevant instruments; that the threats generated by the protests cannot justify derogation from the commitments imposed on it as a State Party to the said instruments.

69. Concerning the minimum age for marriage, the Applicants submit that the limitations on which the Respondent State relies to exempt itself from its international obligations are not permitted under Article 6(b) of the Maputo Protocol which, without exemption, sets the minimum age of marriage for girls at eighteen (18) years.

70. With regard to the Respondent State's allegation that the biological and psychological conditions of marriage are in place at age 15 for the girl, the Applicants submit that these assertions are contrary to the jurisprudence of the African Committee of Experts on the Rights and Welfare of the Child[4], the Committee on the Elimination of Discrimination against Women[5] and the research conducted into the disadvantages of early marriage.

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71. Article 2 of the Children's Charter defines a child as "every human being below the age of 18 years".

72. Article 4(1) stipulates that "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".

73. Article 21 of the same Charter stipulates that: "State Parties ...shall take all appropriate measures to eliminate harmful social and cultural practices ... and those customs and practices discriminatory to the child on the grounds of sex or other status".

74. Article 6(b) of the Maputo Protocol provides that: "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: b) the minimum age of marriage for women shall be 18 years..."

75. The Court notes that the afore-mentioned provisions focus on the obligation for States to take all appropriate measures to abolish negative practices and customs as well as practices discriminatory to children born out of wedlock for reasons of their gender, especially measures to guarantee the minimum age for marriage at 18 years.

76. The Court further notes that, as indicated in paragraphs 67, 68 and 69 above, the Respondent State implicitly admits that the present Family Code, adopted in

[4] *Centre for Human Rights and Rencontre Africain pour la Défense des Droits de l'Homme v.* Senegal (2014), ACRWC 003/12, para. 71.
[5] General Recommendations No. 21,1994 (Committee 21), para. 36.

a situation of *"force majeure"* is not consistent with the requirements of International Law.

77. The Court also notes that Article 281 of the impugned Family Code effectively sets the marriage age at 18 for men and 16 for women. Furthermore, the Article also includes the possibility for the administrative authorities to grant special exemption for girls to be married at 15 years for "compelling reasons".

78. The Court holds in conclusion that it lies with the Respondent State to guarantee compliance with the minimum age of marriage, which is 18 years, and the right to non-discrimination; that having failed to do so, the Respondent State has violated Article 6 (b) of the Maputo Protocol and Articles 2, 4 (1) and 21 of the Children's Charter.

B. Alleged violation of the right to consent to marriage

79. The Applicants allege that the impugned law, in its Article 300, entitles religious ministers, alongside civil registry officials to perform marriages but that no provision of this law provides for verification of the parties' consent by the religious ministers.

80. The Applicants further aver that Article 287 of the impugned law prescribes sanctions against any civil registry official who performs marriage without verifying the consent of the parties, but no sanctions are prescribed against defaulting religious ministers who fail to perform the verification.

81. The Applicants also submit that Article 283 of the same law specifies that consent must be given orally and in person before the civil registry official by each party but that, that provision was not prescribed for religious ministers; the conditions that must be fulfilled by the civil registry official to be able to celebrate a marriage without the presence of the parties are similarly not required of religious ministers.

82. The Applicants contend that the way religious marriages are performed in Mali poses considerable risk, given that the marriages are forced, in as much as they

are generally celebrated without the presence of the parties; that the marriages consist in the two families exchanging kola nuts in the presence of a specialist of the Muslim religion; that even if these marriages are performed in the mosque, the presence of women is not required; that this practice, combined with traditional attitudes which encourage the marriage of the girl at puberty, is fraught with considerable risk as the marriages are performed without the consent of the girl.

83. The Applicants conclude from the foregoing that by enacting a law that permits the maintenance of the marriage customs and traditions that do not allow for the consent of the parties, the Respondent State has violated its commitment under Article 6(a) of the Maputo Protocol and Article 16 (a) and (b) of CEDAW.

84. In its Response, the Respondent State refutes this allegation. It argues that paragraph 1 of section 283 of the Family Code makes it clear that there is no marriage when there is no consent; that furthermore, section 300 of the same Family Code makes it clear that marriage is publicly celebrated by the religious minister subject to compliance with the substantive conditions of marriage and the prohibitions enshrined by the Family Code; that these constitute guarantees of compliance with the obligation to ensure the consent of prospective spouses before any marriage celebration.

85. With regard to the practical organisation of marriage celebration, the Respondent State indicates that, at any place and at any time, it is left to the discretion of the prospective parties who may celebrate their marriage inside a mosque, in their families or at a civil centre with the sole condition to respect public order and the law.

86. The Respondent State further contends that another guarantee of compliance with the conditions is laid down in Sections 303 (3) and (304) which regulate the validity of the marriage celebrated by a religious minister, the transmission of the marriage certificate to the civil registrar and its registration in the Civil Register.

87. In their Reply, the Applicants recall that the criticisms against the extant 2011 Family Code are that: (1) it does not prescribe that consent be given orally and

in person before the religious minister, (2) it does not provide for sanctions against a religious minister who performs marriage without verifying the parties' consent, (3) it is silent on the verification of consent by the religious minister in the event of the inability of either of the parties to do so and, (4) it does not lay down, for the religious minister, the procedures for verifying the consent of the parties.

88. The Applicants contend that the Respondent State confines itself to stating that the practical organisation of marriage celebration is left at any place and at any time to the discretion of the parties without adducing any argument to counter the above criticisms.

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89. Article 6 (a) of the Maputo Protocol stipulates that: "States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that: a) no marriage shall take place without the free and full consent of both parties."

90. The Court notes that the Maputo Protocol in its Articles 2 (1) (a) and 6 and CEDAW in its Article 10 and 16 set down the principles of free consent in marriage.

91. The Court also notes that despite the fact that the said instruments are ratified by Mali, the extant Family Code envisages the application of Islamic law (Article 751) and entitles religious ministers to celebrate marriages, but does not require them to verify the free consent of the parties.

92. Furthermore, while sanctions are prescribed against the civil status officer for non-verification of the consent of the parties, no sanction is provided against a religious minister who does not comply with this obligation. Verification of consent given orally and in person is required before the civil status officer in accordance with Article 287 of the Family Code, whereas this obligation to verify is not required of a religious minister.

93. The Court also notes that one condition that must be fulfilled by a civil status officer to celebrate a marriage without the presence of the parties, is the deposition by the absent party, of an act drawn up by the civil status officer of his area of abode, a condition not required in the marriage celebrated by a religious minister.

94. The Court further notes that the way in which a religious marriage takes place in Mali poses serious risks that may lead to forced marriages and perpetuate traditional practices that violate international standards which define the precise conditions regarding age of marriage and consent of the parties, for a marriage to be valid.

95. The Court notes that, in the procedure for celebration of marriage, the impugned law allows for the application of religious and customary laws on the consent to marriage. It also allows for different marriage regimes depending on whether it is celebrated by a civil officer or a religious minister - practices not consistent with international instruments, namely: the Maputo Protocol and CEDAW.

C. Alleged violation of the right to inheritance for women and natural children

96. In the Application, it is argued that the impugned law enshrines religious and customary law as the applicable regime, by default, in matters of inheritance, in as much as the provisions of the new Family Code apply only "where religion or custom has not been established in writing, by testimony, experience or by common knowledge or where the deceased, in his life time, has not manifested in writing or before witnesses his wish that his inheritance should be distributed otherwise" (Article 751 of the Family Code).

97. As regards women, the Applicants maintain that in Mali, Islamic law gives a woman half of what a man receives. They also point out that the majority of the population lacks the capacity to use the services of a notary to authenticate a will; that, besides, notaries estimated at 40 in number in the whole country cannot serve the population of over 15 million Malians.

98. The Applicants submit from the aforesaid that, in adopting the impugned law, the Respondent State violated Article 21 of the Maputo Protocol which provides that:

"A widow shall have the right to an equitable share in the inheritance of the property of her husband...Women and men shall have the right to inherit, in equitable shares, their parents' properties".

99. The Applicants state that the Committee on the Elimination of Discrimination against Women has also declared that practices which do not give women the same share of inheritance as men constitute a violation of CEDAW[6].

100. As regards the child, the Applicants submit that, according to the new Family Code, children born out of wedlock do not have the right to inheritance and that they may be accorded inheritance only if their parents so wish and the conditions set out in Article 751 of the Family Code have been met (see *supra* paragraph 97).

101. The Applicants further submit that the Respondent State also violated Article 4(1) of the Children's Charter, and Article 3 thereof which prohibits all forms of discrimination.

102. The Applicants contend that although the new Code provides for equal share of inheritance between the legitimate child and the child born out of wedlock where inheritance is governed by the provisions of the Family Code, this right is rendered illusory by the application of the customary or religious regime as the law applicable in the absence of a will to the contrary; that the regime applicable to most children born out of wedlock in Mali remains the customary or religious law, and that in the circumstances, the right to inheritance is no longer a right but a favour for children born out of wedlock in Muslim families.

103. In its Response, the Respondent State indicates that, until recently, Mali did not have an inheritance legislation that was entirely customary; that by a commitment entered into, the State of Mali regulated inheritance in the Family Code of 2009 by enshrining equal share for men and women with the participation of the children born out of wedlock in the devolution of estate on

[6] See Matter of *A.T versus Hungary* (2005) CEDAW 2/2005, para. 9.3

the same footing as the legitimate child; but that, under the pressure and for fear of social unrest, the State had to consent to a re-drafting of this text.

104. The Respondent State further submits that the Family Code promulgated in 2011 has the advantage of being flexible in the sense that it allows for reconciliation of entrenched positions, offering each citizen the possibility of determining his mode of inheritance; that anyone who does not wish his succession to be arranged according to customary or religious rules simply expresses his will to have his inheritance devolved according to Family Code rules or his will; that the legislator has simplified the mode of expression of this choice which can be made even by testimony.

105. Based on the above considerations, the Respondent State concludes that it must be recognised that Mali's Family Code offers immense possibilities to every citizen and, therefore, does not violate the right to inheritance.

106. In their Reply, the Applicants maintain the arguments developed in their Application that under Islamic law, granting equal inheritance shares to men and women is a favour and not a right; and also that equal share between children born in wedlock and children born out of wedlock is similarly a favour.

107. The Applicants therefore pray the Court to rule that, by legalising discrimination against women and children born out of wedlock, the Respondent State violated Article 21 of the Maputo Protocol, Article 4 of the Children's Charter and Article 16(h) of the CEDAW.

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108. With regard to women, Article 21 of Maputo Protocol stipulates that:

> "A widow shall have the right to an equitable share in the inheritance of the property of her husband.... Women and men shall have the right to inherit, in equitable shares, their parents' properties".

109. Regarding the child, Article 3 of the Children's Charter (paragraph 105) recognises for the child, all rights and freedoms and proscribes all forms of discrimination regardless of the basis. The Children's Charter therefore does

not make any distinction between children and they all have the right to inheritance.

110. The Court notes from the foregoing provisions (paragraph 105) that in matters of inheritance a predominant place is accorded to the rights of the woman and the child, given that the widow and the children born out of wedlock have the same rights as the others. These guarantee equality of treatment for women and for children without any distinction.

111. The Court notes that in the instant case, the Family Code applicable in Mali enshrines religious and customary law as the applicable regime in the absence of any other legal regime or a document authenticated by a notary. Article 751 of the Family Code stipulates that: "Inheritance shall be devolved according to the rules of religious law or the provisions of this Code ... ".

112. The documents on record also show that in matters of inheritance, Islamic law gives to the woman half of the inheritance a man receives, and that children born out of wedlock are entitled to inheritance only if their parents so desire.

113. The Court notes that the superior interest of the child required in matters of inheritance as stipulated under Article 4 (1) of the Children's Charter in any procedure, were not taken into account by the Mali legislator at the time of elaboration of the Family Code.

114. The Court finds that the Islamic law currently applicable in Mali in matters of inheritance and the customary practices are not in conformity with the instruments ratified by the Respondent State.

115. The Court therefore holds that the Respondent State has violated Article 21(2) of the Maputo Protocol and Articles 3 and 4 of the Children's Charter.

D. Alleged violation of the obligation to eliminate practices or traditions harmful towards women and children

116. The Applicants submit that by adopting the impugned law, the Respondent State has demonstrated a lack of willingness to eliminate the traditional practices that undermine the rights of women and girls, and children born out of wedlock, especially early marriage, the lack of consent to marriage, the unequal inheritance - all in contravention of Article 1 (3) of the Children's Charter.

117. The Applicants assert that the impugned law makes early marriage of girls easier compared to the 1962 Family Code which permits the marriage of girls aged between 15 and 17 only with the consent of their parents, whereas the 2011 law permits the marriage of girls aged between 16 and 17 without parental consent. They further submit that the 1962 Code sets the special exemption for marriage at 15 years for girls with the consent of their father and mother, whereas the impugned law allows for the marriage of 15-year-old girls even where the mother is opposed to it since only the father's consent suffices.

118. In conclusion, the Applicants maintain their arguments and reiterate their prayers in this regard (see supra paragraph 16).

119. In the Response, the Respondent State contends that it is excessive to assert that Mali does not deploy efforts to eliminate the said practices; and that the Family Code of 2009 provides an adequate illustration of this contention. The Respondent State recalls the efforts deployed on this issue, particularly the launch of programmes for sensitisation and promotion of the rights of women and children, and the various laws enacted to guarantee the protection of these rights.

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120. Article 2 (2) of the Maputo Protocol provides that: "States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."

121. Article 5 (a) of CEDAW stipulates that: "States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

122. Article 16(1) (a) and (b) of CEDAW stipulates that:

"State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent."

123. Article 21(1) of the Children's Charter provides that:

"State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status."

124. Having established the violation of the ~~rules~~ provisions governing the minimum age for marriage, the right to consent to marriage and the right to inheritance for women and children born out of wedlock, the Court holds in conclusion that, by adopting the Family Code and maintaining therein discriminatory practices which undermine the rights of women and children, the Respondent State has violated its international commitments.

125. In view of the foregoing, the Court holds that the Respondent State has violated Article 2 (2) of the Maputo Protocol, Articles 1 (3) and 21 of the Children's Charter and Article 5 (a) of CEDAW.

VIII. REPARATIONS

126. In the Application, the Applicant prays the Court to order the measures listed in paragraph 16, aimed at amending the law, on the one hand, and the adoption of measures to enlighten, sensitise and educate the population, on the other.

127. In its Response, the Respondent State sought the outright dismissal of the Application as being unfounded.

128. Article 27(1) of the Protocol provides that "If the Court finds that there has been a violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

129. In this respect, Rule 63 of the Rules stipulates that "The Court shall rule on the request for the reparation ... by the same decision establishing the violation of a human and peoples' right or, if the circumstances so require, by a separate decision."

130. With respect to the measures requested by the Applicants in paragraph 16 (i), (ii), (iv), (v), (vi) and (vii), relating to the amendment of the national law, the Court holds that the Respondent State has to amend its legislation to bring it in line with the relevant provisions of the applicable international instruments.

131. As regards the measures requested in paragraph 16 (iii), (viii), (ix), (x), (xii) and (xiii), the Court notes that Article 25 of the Charter stipulates that State Parties have the duty "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as the corresponding obligations and duties are understood". The Respondent State has the obligation to comply with the commitments under Article 25 of the Charter.

132. In the instant case, neither the Applicants nor the Respondent State has raised the issue of costs.

133. The Court notes, in this respect, that Rule 30 of the Rules stipulates that: "Unless otherwise decided by the Court, each Party shall bear its own costs."

134. Considering the circumstances of this case, the Court decides that each Party shall bear its own costs.

X. OPERATIVE PART

135. For these reasons,

THE COURT,

Unanimously:

i. *Dismisses* the objection to the Court's jurisdiction;

ii. *Declares* that it has jurisdiction;

iii. *Dismisses* the objection to the admissibility of the Application;

iv. *Declares* that the Application is admissible;

v. *Holds* that the Respondent State has violated Article 6(b) of the Maputo Protocol, and Articles 2 and 21 of the African Charter on the Rights and Welfare of the Child, on the minimum age for marriage;

vi. *Holds* that the Respondent State has violated Article 6 (a) of the Maputo Protocol and Article 16 (1) (b) of the Convention on the Elimination of All Forms of Discrimination against Women on the right to consent to marriage;

vii. *Holds* that the Respondent State has violated Article 21 (1) and (2) of the Maputo Protocol, and Article 3 of the African Charter on the Rights and Welfare of the Child, on the right to inheritance for women and children born out of wedlock;

viii. *Holds* that the Respondent State has violated Article 2 (2) of the Maputo Protocol, Articles 1(3) and 21 of the African Charter on the Rights and Welfare of the Child, and Article 5 (a) of the Convention on the Elimination of All Forms of Discrimination against Women on the elimination of traditional and cultural practices harmful to the rights of women and children;

ix. *Holds* consequently that the Respondent State has violated Article 2 of the Maputo Protocol, Articles 3 and 4 of the African Charter on the Rights and Welfare of the Child, and Article 16 (1) of the Convention on the Elimination of All Forms of Discrimination against Women on the right to non-discrimination for women and children;

x. *Orders* the Respondent State to amend the impugned law, harmonise its laws with the international instruments, and take appropriate measures to bring an end to the violations established;

xi. *Declares* that the finding of the violations above-mentioned constitutes in itself a form of reparation for the Applicants;

xii. *Requests* the Respondent State to comply with its obligations under Article 25 of the Charter with respect to information, teaching, education and sensitisation of the populations.

xiii. *Orders* the Respondent State to submit to it a report on the measures taken in respect of paragraphs x and xii within a reasonable period which, in any case, should not be more than two (2) years from the date of this Judgment;

xiv. *Decides* that each Party shall bear its own costs.

Signed:

Sylvain ORÉ, President

Ben KIOKO, Vice-President

Gérard NIYUNGEKO, Judge

El Hadji GUISSÉ, Judge

Rafâa BEN ACHOUR, Judge

Angelo V. MATUSSE, Judge

Ntyam O. MENGUE, Judge

Marie-Thérèse MUKAMULISA, Judge

Tujilane R. CHIZUMILA, Judge

Chafika BENSAOULA, Judge;

and Robert ENO, Registrar.

Done at Arusha, this Tenth Day of May, in the year Two Thousand and Eighteen, in English and French, the French text being authoritative.