A bundle of mystery? Unpacking the application of the 'bundle of rights and guarantees' in the admissibility of applications before the African Court on Human and Peoples' Rights

*Mwiza Jo Nkhata**
https://orcid.org/0000-0002-7695-5503

ABSTRACT: Starting with its judgment in *Alex Thomas v Tanzania*, the African Court on Human and Peoples' Rights (Court) introduced the 'bundle of rights and guarantees' as a justification for overruling objections to the admissibility of cases on the ground that there had been a failure to exhaust domestic remedies. Although this justification has, subsequently, and with consistency, been applied in several other cases, the Court is yet to properly explain what the 'bundle' entails. This article is an assessment of the Court's jurisprudence dealing with the 'bundle of rights and guarantees'. It explores the possible existence of the 'bundle' approach in international human rights law, generally, after which it focuses on some of the issues that the Court's application of 'bundle of rights and guarantees' implicates. The article notes that the Court's failure to provide comprehensive justification for the 'bundle' approach creates an aura of mystery and undermines the transparency that normally ought to attach to judicial reasoning.

TITRE ET RÉSUMÉ EN FRANCAIS:

Un faisceau de mystère? Évaluation de l'application du «faisceau de droits et garanties» dans la recevabilité des requêtes devant la cour africaine des droits de l'homme et des peuples

RÉSUMÉ: À partir de son arrêt *Alex Thomas c. Tanzanie,* la Cour africaine des droits de l'homme et des peuples (la Cour) a introduit la notion de «faisceau de droits et garanties» pour justifier le rejet des exceptions à la recevabilité des requêtes au motif que les recours internes n'ont pas été épuisés. Bien que cette justification ait, par la suite, et avec constance, été appliquée dans plusieurs autres affaires, la Cour n'a pas encore pleinement expliqué ce qu'implique le «faisceau». Le présent article évalue la jurisprudence de la Cour relative au «faisceau de droits et garanties». Il explore la possibilité de l'existence d'une approche de «faisceau de droits et de garanties» en droit international des droits de l'homme en général, après quoi il s'attarde sur certaines des implications de l'application par la Cour de ladite approche. L'article note que le fait que la Cour n'a pas développé une justification approfondie de la notion de «faisceau» crée une aura de mystère et ne garantit la transparence que devrait normalement revêtir le raisonnement juridique.

* LLB (Hons) (Malawi) PGCHE LLM LLD (Pretoria) Extraordinary Professor, Free State Centre for Human Rights, University of the Free State, South Africa; Principal Legal Officer, African Court on Human and Peoples' Rights; mwizankhata@gmail.com. The views expressed in this article are entirely those of the author and do not represent those of the African Union.

MJ Nkhata 'A bundle of mystery? Unpacking the application of the 'bundle of rights and guarantees' in the admissibility of applications before the African Court on Human and Peoples' Rights'
(2020) 4 *African Human Rights Yearbook* 192-212
http://doi.org/10.29053/2523-1367/2020/v4a10

KEY WORDS: bundle of rights and guarantees, admissibility of applications, African Court on Human and Peoples' Rights, fair trial

CONTENT:

1 INTRODUCTION

In *Alex Thomas v Tanzania*,[1] the African Court on Human and Peoples' Rights (Court or African Court) for the first time invoked the notion of the 'bundle of rights and guarantees' to dismiss an objection to the admissibility of an application on the basis of non-exhaustion of domestic remedies. The Court's articulation of the 'bundle of rights and guarantees' was, however, not expansive and consists of a few terse sentences confirming that the applicant had exhausted domestic remedies. Subsequent to *Thomas v Tanzania*, the Court has relied on the 'bundle of rights and guarantees' in several other judgments. Although the list of cases that have adopted the 'bundle of rights and guarantees' approach has been growing, the Court is yet to more fully explain this approach. Predictably, clarity about the precise contours of this approach remains elusive.

The focus of the analysis in this article is the Court's jurisprudence dealing with the 'bundle of rights and guarantees'. Its aim is to unpack the Court's understanding of the 'bundle of rights and guarantees' and to highlight some of the issues that are implicated by the Court's adoption of the 'bundle of rights and guarantees'.

The article has five parts, of which this introduction is the first. The second part surveys the Court's judgments that have adopted the 'bundle of rights and guarantees' approach and, through this exercise, establishes what the Court has sought to convey by its incorporation of this approach. A survey of the other human rights systems for purposes of determining a similar recourse to the 'bundle of rights and guarantees' is conducted in the third part of the article. The fourth part explores some of the issues that are implicated by the Court's recourse to the 'bundle' approach. The conclusion is the final part of the article.

1 (2015) 1 AfCLR 465 (*Thomas v Tanzania*).

2 A SURVEY OF THE COURT'S 'BUNDLE OF RIGHTS AND GUARANTEES' JURISPRUDENCE

As earlier pointed out, *Thomas v Tanzania* is the first judgment in which the Court made reference to the 'bundle of rights and guarantees'. It is thus apposite that a quick reprise of this judgment be presented. The applicant was convicted of armed robbery by a district court and sentenced to 30 years' imprisonment. He subsequently unsuccessfully appealed against his conviction and sentence before the High Court and later the Court of Appeal. After the Court of Appeal dismissed his appeal, he lodged an application for review of its decision. The outcome of his application for review was still pending by the time he filed his case before the African Court.

Preliminarily, the Court had to deal with an objection by the respondent that the application was inadmissible due to the applicant's failure to exhaust domestic remedies. The respondent argued that although the applicant's appeal had been dismissed by the Court of Appeal, he should have waited for the outcome of his application for review of the Court of Appeal's decision. It was also argued that the applicant should have first filed a petition before the High Court, under the Basic Rights and Duties Enforcement Act of 1994, before approaching the African Court. In dismissing this objection, and finding that the applicant had exhausted domestic remedies, the Court held as follows:[2]

> Regarding the Respondent's contention that the Applicant should have applied for a constitutional petition to vindicate his rights under the Basic Rights and Duties Enforcement Act, the Court finds that the Applicant was not under an obligation to do so. *The alleged non-conformity by the trial court, with the due process, with its bundle of rights and guarantees, formed the basis of his appeals to the High Court and Court of Appeal.* The Court of Appeal decided on the Applicant's appeal with finality therefore he accessed the highest Court in the Respondent State.

Strikingly, there is neither any attempt to further explain the 'bundle of rights and guarantees' nor any further mention of the 'bundle' anywhere else in the judgment.

Overall, however, two broad types of cases where recourse to the 'bundle of rights and guarantees' has been had are discernible. The first category involves cases like *Thomas v Tanzania* where the Court explicitly uses the expression 'bundle of rights and guarantees'. The second category are those cases where the Court does not explicitly use the expression 'bundle of rights and guarantees', but nevertheless employs the same reasoning as that which underlies the 'bundle' approach. In both instances, the cases have almost uniformly revolved around the right to a fair trial. In surveying the Court's jurisprudence, these two broad categories will be utilised for ease of presentation.

2 para 60 (emphasis added).

2.1 Judgments that explicitly rely on the 'bundle of rights and guarantees'

Subsequent to *Thomas v Tanzania,* the first judgment dealing with the 'bundle of rights and guarantees' was *Kennedy Owino Onyachi and Charles John Njoka v Tanzania*.[3] In this case, the African Court conceded that six of the allegations made by the applicants had not been expressly raised by them during the domestic proceedings. Nevertheless, it dismissed the respondent's objection that the applicants had not exhausted domestic remedies by finding that

> [t]hese allegations happened in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence to thirty (30) years' imprisonment. They all form part of the 'bundle of rights and guarantees' that were related to or were the basis of their appeals. The domestic authorities thus had ample opportunities to address these allegations even without the Applicants having raised them explicitly. It would therefore be unreasonable to require the Applicants to lodge a new application before the domestic courts to seek redress for these claims.[4]

In *Onyachi and Njoka v Tanzania*, as contrasted to *Thomas v Tanzania*, an attempt was made, albeit a feeble one, to expound on the 'bundle of rights and guarantees'. The Court, however, referred to *Thomas v Tanzania* as the authority bolstering its conclusion. This is perplexing considering that *Thomas v Tanzania*, insofar as the 'bundle of rights and guarantees' is concerned, is remarkable only for its lack of elaboration. The Court thus engaged in a form of circular reasoning by using a prior cryptic pronouncement to justify yet another similar finding without taking the effort to explain the basis of its position.

Once the 'gates' had been opened, subsequent endorsement of the 'bundle of rights and guarantees' approach has not been lacking. For example, in *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v Tanzania*[5] the Court, in a passage eerily similar to *Onyachi and Njoka v Tanzania,* found as follows:[6]

> With regard to the issues that the Applicants did not raise during domestic procedures but chose to bring before the Court for the first time, the Court, in accordance with the Judgment rendered in *Alex Thomas v Tanzania*, affirms that these allegations happened in the course of the domestic judicial proceedings that led to the Applicants' conviction and sentence to thirty (30) years' imprisonment. They all form part of the 'bundle of rights and guarantees' in relation to the right to a fair trial that were related to or were the basis of their appeals. The domestic judicial authorities thus had ample opportunity to address these allegations even without the Applicants having raised them explicitly. It would therefore be unreasonable to require the Applicants to file a new application before the domestic courts to seek redress for these claims.

The judgment in *Thobias Mang'ara Mango and another v Tanzania*[7] followed the pattern of reasoning in *Onyachi and Njoka v Tanzania* but

3 (2017) 2 AfCLR 65 (*Onyachi and Njoka v Tanzania).*

4 para 54.

5 (2018) 2 AfCLR 287 (*Viking and another v Tanzania*).

6 para 53.

7 (2018) 2 AfCLR 314 (*Mango v Tanzania*).

it attempted to illustrate the contents of the bundle. In this judgment the Court reasoned as follows:[8]

> [I]n *Alex Thomas v United Republic of Tanzania*, the Court also held that the Applicant was not required to exhaust domestic remedies in respect of alleged violations of fair trial rights which were occasioned in the course of his trial and appeals in the domestic court.
>
> In the instant case, the Court notes that allegation relating to the denial of legal assistance, prolonged detention in police custody and illegality and harshness of the sentence imposed on the Applicants constitute part of the 'bundle of rights and guarantees' related to a fair trial which were not required to have been specifically raised at the domestic level. The Court consequently holds that the Applicants are deemed to have exhausted local remedies with respect to these claims.

Notwithstanding the attempt to illustrate some of the items that fall within the 'bundle of rights and guarantees', the Court, again, referred to *Thomas v Tanzania* as supporting its approach. This style of reasoning, especially the manner in which reference is made to a previous judgment, though replicated extensively in relation to the Court's adoption of the 'bundle' approach, is unconvincing. This is because although there has been constant reference to *Thomas v Tanzania*, this judgment never clarified the 'bundle of rights and guarantees' making it an unreliable authority for purposes of undergirding the approach. Unfortunately for the Court, clarity of judicial reasoning does not emerge simply by over-repetition of particular formulations but by deliberate articulation of reasons supporting a position.

In *Diocles William v Tanzania* the Court confirmed that 'legal aid forms part of the "bundle of rights and guarantees" in respect of the right to a fair trial'.[9] The Court thus found that the applicant's case was not inadmissible simply because he chose to plead a violation of the right to legal aid for the first time before it. A similar conclusion was reached in *Anaclet Paulo v Tanzania*[10] where the Court held that the applicant had given domestic courts an opportunity to interrogate various violations of his fair trial rights simply by challenging issues relating to the evidence and his sentence. According to the Court, 'when alleged violations of the right to a fair trial form part of the Applicant's pleadings before domestic courts, the Applicant is not required to have raised them separately to show proof of exhaustion of local remedies'.[11] The case of *Minani Evarist v Tanzania*[12] also involved the right to legal aid and it followed the reasoning in *William v Tanzania*.

The judgment in *Armand Guehi v Tanzania* followed the same pattern as the other judgments discussed above.[13] The Court reiterated its position that domestic remedies should be considered to have been exhausted if the applicant raised allegations covered by the 'bundle of rights and guarantees', which allegations domestic courts ought to have

8 para 45-46.
9 (2018) 2 AfCLR 426 (*William v Tanzania*) para 43.
10 (2018) 2 AfCLR 446 *(Paulo v Tanzania)*.
11 para 42.
12 (2018) 2 AfCLR 402 *(Evarist v Tanzania)* para 35.
13 (2018) 2 AfCLR 477.

considered even if the applicant never expressly raised them.[14] Other cases confirming this position include *Ally Rajabu and others v Tanzania*,[15] *Jibu Amir alias Mussa and Saidi Ally alias Mangaya v Tanzania*,[16] *Livinus Daudi Manyuka v Tanzania*[17] and *Robert John Penessis v Tanzania*.[18]

It is notable that, to date, all judgments that have employed the 'bundle of rights and guarantees', have, without fail, always referenced *Thomas v Tanzania* as an authority. At the same time, however, the later judgments have done very little to clarify the cryptic formulations in *Thomas v Tanzania*.

2.2 Judgments that implicitly rely on the 'bundle of rights and guarantees'

In some of its judgments, the Court has employed the reasoning underlying the 'bundle of rights and guarantees' without making express reference to it. For example, in *Mohamed Abubakari v Tanzania*,[19] in dismissing the objection that the application was inadmissible due to a failure to exhaust domestic remedies, the Court held that

> all of these complaints essentially relate to one and the same right, i.e. the right to a fair trial, which the Applicant has repeatedly demanded before the national courts. It therefore follows that even if the complaints in question had not been submitted in detail to the national courts, the Respondent State would not be justified to argue that all the remedies or some of them have not been exhausted, whereas the Applicant submitted the issue of his right to a fair trial before the said national courts – a right that these courts are supposed to guarantee *proprio motu* in all its aspects, without the Applicant having to specify the particular aspects.[20]

Although no explicit reference to the 'bundle of rights and guarantees' was made in *Abubakari v Tanzania*, it is obvious that the reasoning adopted is the same as that underlying the 'bundle' approach. Similarly, in *George Maili Kemboge v Tanzania*,[21] the Court reasoned that the applicant had exhausted domestic remedies by accessing the highest court in the respondent state thus inviting consideration of all issues related to his complaint on fair trial. The same approach was also employed in *Dismass Bunyerere v Tanzania*.[22] In this case the Court concluded that by accessing the Court of Appeal, which is the highest court in Tanzania, the respondent had been given 'the opportunity to

14 As above, para 50.

15 Application 7/2015, Judgment of 28 November 2019 *(Rajabu and others v Tanzania)* para 41.

16 Application 14/2015, Judgment of 28 November 2019 *(Jibu Amir and another v Tanzania)* para 37.

17 Application 20/2015, Judgment of 28 November 2019 *(Manyuka v Tanzania)* para 44.

18 Application 13/2015, Judgment of 28 November 2019, para 61.

19 (2016) 1 AfCLR 599 *(Abubakari v Tanzania)*.

20 para 76.

21 (2018) 2 AfCLR 369 *(Kemboge v Tanzania)* para 32-35.

22 Application 31/2015, Judgment of 28 November 2019 *(Bunyerere v Tanzania)*.

redress [the applicant's] violations'.[23] Perhaps as a reflection of the centrality of the judgment in *Thomas v Tanzania*, all the above-mentioned judgments refer to this authority. Given that the Court's invocation of the 'bundle of rights and guarantees' has always been in the context of the right to a fair trial, the next section of the article takes a comparative approach and explores the 'bundle' in other human rights systems using the perspective of the right to a fair trial.

3 THE RIGHT TO FAIR TRIAL AND THE 'BUNDLE OF RIGHTS AND GUARANTEES' IN COMPARATIVE JURISPRUDENCE

Although the Court's exposé of the 'bundle of rights and guarantees', this far, only makes an oblique reference to the right to a fair trial, it is within the conceptualisation of the right to a fair trial that a meaningful rendering of the 'bundle' can be found.

The right to a fair trial envisages a boundary beyond which judicial processes cannot go without compromising fairness and effectiveness.[24] It is one of the fundamental pillars meant to protect individuals from arbitrary treatment and ensure the proper administration of justice.[25] The right to a fair trial ensures that state authorities, in adjudicating on an individual's rights, 'will do so using a procedure that provides the necessary means to defend [his or her] legitimate interests and obtain duly reasoned rulings' in order that he or she 'is protected by the law and safeguarded from arbitrariness'.[26] The right to a fair trial, therefore, is central to the rule of law and works to uphold the due process of law.[27]

A number of international instruments provide for the right to a fair trial. For example, article 10 of the Universal Declaration of Human Rights (UDHR), article 14 of the International Covenant on Civil and Political Rights (ICCPR), article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), article 8 of the American Convention on Human Rights (American Convention) and article 7 of the African Charter on Human

23 As above, para 37.

24 S Ismail 'The right to fair trial: Analysing the jurisprudence of member states of the ICCPR' https://www.researchgate.net/publication/325946424_The_Right_to_Fair_Trial_Analysing_the_Jurisprudence_of_Member_States_of_the_ICCPR (accessed 2 June 2020).

25 L Doswald-Beck 'Fair trial, right to, international protection' https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e798 (accessed 20 May 2020).

26 Separate Opinion of Judge Garcia Ramirez, para 4 *Claude Reyes and others v Chile*, Merits, Reparations and Costs, Judgment of Inter-American Court (ser C) No 151 (19 September 2006).

27 *Tadic Dusko* IT-94-1-A, Appeal Judgment 15 July 1999.

and Peoples Rights (Charter).[28] In all these international instruments, the right to a fair trial is often formulated to capture two components: a general one, with application in all relevant proceedings and a specific one involving the rights of the defence in criminal proceedings.[29] As acknowledged by the European Court of Human Rights (European Court), the right to a fair trial holds a prominent place in any democratic society such that there should be no reason for interpreting it restrictively.[30] Perhaps as a measure of its importance, it is generally accepted that this right does not permit derogations even in times of public emergencies.[31]

The right to a fair trial can be said to comprise of the following fundamental but non-exhaustive rights:[32] the right of access to courts which includes the right to be heard by a competent, independent and impartial tribunal; the right to equality of arms; the right to a public hearing; the right to be heard within a reasonable time; the right to legal assistance; the right to interpretation and the prohibition of *ex post facto* laws. Although many international human rights instruments expressly provide for guarantees meant to secure the right to a fair trial, the depth of the detail varies from one instrument to the other.[33] Additionally, across legal systems, provisions on the right to a fair trial have been the subject of sustained judicial construction which has resulted in the expansion of the protections that fall under the general umbrella of the right to a fair trial.[34] The central motif of the various fair trial guarantees is to ensure that individuals involved in proceedings are able to defend themselves and are treated fairly.[35]

Outside of the African Court's jurisprudence, express mention of the 'bundle of rights and guarantees', in the context of the right to fair trial, is not common. The rationale underlying the approach, however, does not seem to be that rare. Many courts seem quite alive to the fact that the right to a fair trial comprises several guarantees which must all be preserved. For example, in *Suarez-Rosero v Ecuador,*[36] the Inter American Court of Human Rights (Inter-American Court) held that

28 In many of these instruments, aspects of the right to a fair trial are also covered in other provisions within the same instruments. For example, article 15 ICCPR, article 7 European Convention, article 9 American Convention and article 26 of the Charter.

29 S Trechsel *Human rights in criminal proceedings* (2005) 85.

30 *Moreira de Azevedo v Portugal*, Judgment of 23 October 1990, para 66; *Belziuk v Poland* Judgment of 25 March 1998 para 37 and *Adolf v Austria,* Judgment of 26 March 1982 para 30.

31 *Civil Liberties Organisation v Nigeria* para 27 and C Medina *The American Convention on Human Rights: crucial rights and their theory and practice* (2016) 242.

32 P Leanza & O Pridal *The right to a fair trial: article 6 of the European Convention on Human Rights* (2014) 6.

33 T Antkowiak & A Gonza *The American Convention on Human Rights: essential rights* (2017) 174-177.

34 Leanza & Pridal (n 32) 6.

35 Medina (n 31) 324.

36 Judgment of 12 November 1997 (merits) para 51 and 77 - http://www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.pdf (accessed 5 August 2020).

some of the minimum guarantees for fair trial include adequate time and means for the preparation of one's defence, the right to conduct a defence in person or to be assisted by counsel of one's choice, the right to communicate freely and privately with counsel, and the right to be provided with counsel at the state's expense. This approach offers an indicative idea of the guarantees that together secure the right to a fair trial.

In the case of *Hilaire, Constantine and Benjamin and others v Trinidad and Tobago*, the Inter-American Court held that

> [i]n order to protect the right to effective recourse, established in Article 25 of the Convention, it is crucial that the recourse be exercised in conformity with the rules of due process, protected in Article 8 of the Convention, which include access to legal aid. Taking into account the exceptionally serious and irreparable nature of the death penalty, *the observance of due process, with its bundle of rights and guarantees*, becomes all the more important when human life is at stake.[37]

The Inter-American Court also alluded to the 'bundle of rights and guarantees' in an advisory opinion in respect of a request by Mexico.[38] According to the Inter-American Court, due process of the law requires that a defendant be allowed to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. The judicial process, the Court argued, is a means to ensure, in so far as is possible, an equitable resolution of differences. The Court expressed the view that the body of procedures commonly referred to as due process are designed to serve this end and ensure that the rights of persons subject to judicial proceedings are adequately protected. The Court concluded that the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances especially in cases where an individual is facing serious charges.[39]

In respect of the European Court, it is apt to begin by acknowledging that it has often used a standard phrase to stress the importance of the right to a fair trial.[40] According to the European Court, 'the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of article 6(1) of the European Convention restrictively'.[41] In rejecting a restrictive interpretation of article 6 of the European Convention, the European Court has conceded that there are many guarantees falling under the umbrella of fair trial which must always be considered in assessing whether proceedings meet the protections in article 6.

37 Judgment of June 21, 2002 (Merits, Reparations and Costs) para 148 (emphasis added).

38 Inter-American Court Advisory Opinion OC-16/99 of 1 October 1999, Requested by the United Mexican States para 117-118.

39 para 135.

40 Trechsel (n 29) 82.

41 *AB v Slovakia,* Judgment of 4 March 2003, para 54 and *Delcourt v Belgium,* Judgment of 17 January 1970, para 25.

The European Court's approach to the right to fair trial often mentions two aspects and these are the principle of equality of arms and the right to adversarial proceedings.[42] These two aspects are applicable both in civil and criminal cases though states are given greater latitude in relation to civil cases.[43] Briefly put, equality of arms requires a comparative analysis of the treatment of litigants to determine if the one party was disadvantaged. The notion of adversarial proceedings requires, among other things, that accused persons be informed of the case against them, in the sense of knowing the evidence or arguments that the court will consider in the disposal of the case and also being accorded the opportunity to challenge the evidence and contradict the arguments.[44] In the jurisprudence of the European Court, it is clear that the right to a fair trial has been interpreted to include many other elements, some of which do not seem to have been expressly canvassed by article 6, for example, the right to a reasoned decision.[45] One of the clearest manifestations of this approach was in *Golder v United Kingdom*.[46] In this case, the European Court concluded that

> ... without needing to resort to 'supplementary means of interpretations' as envisaged at Article 32 of the Vienna Convention, that Article 6 para 1 (art 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para 1 (art 6-1) as regards both the organisation and composition of the court, and the conduct of proceedings. *In sum, the whole makes up the right to a fair hearing*.[47]

Concededly, the European Court, this far, does not seem to have explicitly incorporated the language of 'bundle of rights and guarantees'. Nevertheless, its jurisprudence under article 6 of the European Convention, supports the 'bundle' approach to understanding the right to a fair trial. While some of the guarantees in the right to a fair trial are expressly enumerated in article 6 of the European Convention, the European Court has further expounded on these guarantees through a case by case analysis.[48]

As for the Human Rights Committee (HRC), it has also adopted a wide interpretation of the right to a fair trial. For example, in *Yves Morael v France* it stated that the right to a fair trial includes 'equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in perjus*, and expeditious procedure'.[49] It is

42 *Brandstetter v Austria*, Judgment of 28 August 1991, para 66; and *Jasper v United Kingdom,* Judgment of 16 February 2000, para 51.

43 Trechsel (n 29) 85.

44 *Laukkanen and Manninen v Finland*, Judgment of 3 February 2004, para 34.

45 Trechsel (n 29) 85.

46 [1975] ECHR 1.

47 para 36 (emphasis added).

48 P van Dijk and others *Theory and practice of the European Convention on Human Rights* (2006) 578-580.

49 Communication No 207/1986, UN Doc. Supp. No 40 (A/44/40) at 210 (1989) para 210.

General Comment 32, however, that offers a clear picture of the HRC's approach to understanding the right to a fair trial.[50] In this General Comment, the HRC begins by conceding that article 14 of the ICCPR is particularly complex in nature given that it combines various guarantees with different scopes of application. By way of illustration, General Comment 32 highlights various guarantees which together secure the right to a fair trial including the right to equality before courts and tribunals, the right to a fair and public hearing by a competent, independent and impartial tribunal and the presumption of innocence. While the language of 'bundle of rights and guarantees' is not expressly mentioned in General Comment 32, it is clear that the 'bundle' approach underlies the conceptualisation of the right to a fair trial by the HRC.

The African Commission on Human and Peoples' Rights (Commission) has considerable jurisprudence on the right to a fair trial. For example, it has expounded on the right to be tried by an independent and impartial tribunal as well as the right of accused persons to have counsel.[51] The Commission has also addressed the right to be heard and the effect of laws that purport to oust the jurisdiction of courts.[52] It has also pronounced itself on the right to be tried in a language that one understands as well as the importance of the independence of courts and tribunals.[53] The Commission, however, has never referred to the 'bundle of rights and guarantees' in its jurisprudence. The most that can safely be concluded, about the Commission's fair trial jurisprudence in relation to the 'bundle' approach, is that its decisions also demonstrate that the right to fair trial is made up of several guarantees.

As demonstrated above, with the exception of the Inter-American Court, the European Court, the HRC and the Commission have not expressly used the terminology of 'bundle of rights and guarantees' in their exposé of the right to a fair trial. At the same time, however, it is clear that a common understanding permeates the articulation of the right to a fair trial and this is that the right coalesces around several guarantees which together ensure due process. It is in reference to these several guarantees, therefore, that the language of a 'bundle of rights and guarantees' becomes relevant. The next section the paper engages with some of the issues that the Court's adoption of the 'bundle of rights and guarantees' implicates.

50 https://www.refworld.org/docid/478b2b2f2.html (accessed 26 May 2020).

51 *Egyptian Initiative for Personal Rights and Interights v Egypt* (2011) AHRLR 42 (ACHPR 2011).

52 *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010).

53 *Gunme and others v Cameroon* (2009) AHRLR 9 (ACHPR 2009).

4 MORE THAN A MERE METAPHOR? UNPACKING THE COURT'S ADOPTION OF THE 'BUNDLE OF RIGHTS AND GUARANTEES'

It is important to commence with a summary of the African Court's overall understanding of the 'bundle of rights and guarantees'. The African Court's view seems to be that for there to be a meaningful guarantee of the right to a fair trial, domestic proceedings which generate the cases that come before it, must adhere to all the requirements designed to protect due process. The 'bundle of rights and guarantees', therefore, is the full array of safeguards meant to ensure the realisation of the right to a fair trial. The African Court has thus assumed that litigants who accessed the highest court in a particular country will be deemed to have exhausted domestic remedies if they raised, before the domestic court, any aspect of the right to a fair trial and subsequently allege a violation of the right to a fair trial before it. According to the Court, it does not matter that the particular litigant raises before it new fair trial issues – which were never raised before any domestic court – because it is assumed that once a litigant raises issues pertaining to the right to a fair trial, the court *a quo* was under a duty to consider the entire 'bundle of rights and guarantees' inherent in the right to a fair trial. This is the reasoning established in *Thomas v Tanzania* which has subsequently been replicated in the other cases earlier referred to.

4.1 The Court must explain the 'bundle of rights and guarantees'

In so far as the application of the 'bundle of rights and guarantees' is concerned, the judgment in *Thomas v Tanzania* is pivotal as it marks the genesis of a rather emphatic line of authorities. As earlier pointed out, however, the judgment itself is surprisingly thin on elaboration, particularly in terms of unpacking the 'bundle' and explaining its applicability. As noted by Adjolohoun, the Court's failure to unpack the 'bundle of rights and guarantees' means that notwithstanding the fact that *Thomas v Tanzania* is the first judgment, in a now long line of authorities, it actually is not a 'principle setter'.[54] The judgment fails to expound and justify the approach that the Court adopted to dismiss the respondent's objection on non-exhaustion of domestic remedies. The gravest calamity, however, has been the failure, in successive judgments, to remedy the oversight in *Thomas v Tanzania*. The Court has chosen to blandly cross-reference the judgment in *Thomas v Tanzania* in all its subsequent judgments without offering any

54 S Adjolohoun 'Jurisdictional fiction? A dialectical scrutiny of the appellate competence of the African Court on Human and Peoples Rights' (2019) 6(2) *Journal of Comparative Law in Africa* 1, 18.

additional substantive clarity. Resultantly, although the Court's case law on the 'bundle of rights and guarantees' has been consistent 'it has remained unprincipled and diffuse'.[55]

The duty on the Court, when it is adjudicating on matters that will have a profound influence on the development of its jurisprudence, one would believe, is to employ clear and cogent reasoning.[56] The introduction of the 'bundle of rights and guarantees' was one such occasion requiring the Court to step up and demonstrate its deductive prowess. As may be recalled, the 'bundle approach' has been used to dismiss a preliminary objection that has been raised quite consistently by Tanzania. The nature of this objection is such that had the Court sustained it, the bulk of the Court's fair trial jurisprudence would never have come into existence. Additionally, the fact that the same objection has been raised by the same respondent over and over in different cases, even after the judgment in *Thomas v Tanzania*, should have prompted the Court to, at least, attempt a clarification of the 'bundle of rights and guarantees'.

In terms of explaining the 'bundle of rights and guarantees', and given that the Court has expressly linked it to the right to a fair trial, it is arguable that the intellectual resources for assisting the Court in unpacking the 'bundle' lie, first and foremost, within article 7 of the Charter. Article 7(1) of the Charter provides: '[e]very individual shall have the right to have his cause heard. This comprises …'. The expression, 'this comprises' is a clear indication of the fact that there are other guarantees for fair trial which may not have been expressly stated in article 7. The protections listed in article 7, therefore, are not meant to be an exhaustive list of the fair trial guarantees. As the Court has acknowledged, in interpreting article 7, recourse can be had to, for example, article 14 of the ICCPR, which is more detailed in its fair trial guarantees.[57] The Court's failure to explain the 'bundle of rights and guarantees', therefore, has not been for want of intellectual grounding within its foundational instruments.

It should also be recalled that judgments, generally, tend to have a two-fold effect. First, as determinative of the rights of the particular litigants, and second, as a precedent shaping the future conduct of others. It, therefore, matters how conclusions are reached in a judgment.[58] Judges who, through their pronouncements, change or modify the law must always seriously consider the ramifications of their pronouncements on other patterns in the law. Any distinctions made should therefore be genuine, articulated and sufficiently acceptable.[59] Judicial discipline, in terms of adjudication, requires clear justification

55 As above.

56 S Adjolohoun 'The African Court: need for a system-based approach to jurisprudential affirmation' https://africlaw.com/2017/11/16/the-african-court-need-for-a-system-based-approach-to-jurisprudential-affirmation/ (accessed 26 May 2020).

57 *Thomas v Tanzania* (n 1) para 89.

58 E Levi 'The nature of judicial reasoning' (1965) 32(3) *University of Chicago Law Review* 395, 396.

59 Levi (n 58) 403.

for all findings in a judgment. Good judicial reasoning must be transparent and its logic clear.

In relation to the 'bundle of rights and guarantees' as applied by the African Court, it is clear that the invocation of this approach necessitated further elaboration. For example, and as will be demonstrated later, although the approach has been used to dismiss objections to admissibility of cases yet the precise location of the 'bundle' within the admissibility conditions set out in article 56 of the Charter has never been clarified. Additionally, the Court has applied the 'bundle' approach only in cases involving claims related to the right to a fair trial, which begs the question as to whether the approach has applicability beyond cases involving the right to a fair trial. A failure to clarify these two issues, has meant that the 'bundle of rights and guarantees', though a constant feature in the Court's jurisprudence, remains something of a mystery.

4.2 The propriety of the assumption that matters covered under the 'bundle' ought to have been considered by domestic courts

To understand the assumptions underlying the Court's 'bundle' of rights jurisprudence, close attention must be paid to the reasoning so far adopted by the Court. For example, in *Rajabu and others v Tanzania,* the Court held that '[t]he Court notes that in the instant case, given that the Court of Appeal was in a position to examine several claims of the Applicants with respect to the manner in which the High Court conducted the proceedings, there was ample opportunity to assess whether the right to be heard was upheld by the lower court'.[60] Further, in *Jibu Amir and another v Tanzania*, the Court held:[61]

> Regarding those allegations that have been raised before this Court for the first time, namely, the illegality of the sentence imposed on the Applicants and the denial of free legal assistance, the Court observes that the alleged violations occurred in the course of the domestic judicial proceedings. They accordingly form part of the 'bundle of rights and guarantees' that were related to or were the basis of their appeal, *which the domestic authorities had ample opportunity to redress even though the Applicants did not raise them explicitly.... The Applicants should thus be deemed to have exhausted local remedies with respect to these allegations.* (emphasis provided)

In *Manyuka v Tanzania*, the Court's reasoning was expressed as follows:[62]

> The Court also notes that the alleged violations of his rights relate to the domestic judicial proceedings that led to his conviction and sentence. The allegations raised by the Applicant, therefore, form part of the bundle of rights and guarantees that were related to or were the basis of his appeals and *which the domestic authorities had ample opportunity to redress even though the Applicant did not raise them explicitly*.

60 *Rajabu and others v Tanzania* (n 15) para 42.

61 Application No 14 of 2015, Judgment of 28 November 2019, para 37.

62 *Manyuka v Tanzania* (n 17) para 44 (emphasis added).

Central to the Court's deployment of the 'bundle of rights and guarantees' is the assumption that domestic courts had ample opportunity to resolve the fair trial grievances raised by an applicant as long as he or she questioned anything relating to his or her right to a fair trial. According to the Court, it does not matter that the applicants never raised, before any domestic courts, the specific issues which they raise before it, as long as the grievances fall within the fair trial 'bundle'. The Court's findings, it is argued, are premised on assumptions about the criminal procedure law in Tanzania – since Tanzania has been the only state so far affected by the 'bundle' approach.[63] Ironically, none of the Court's judgments dealing with the 'bundle of rights and guarantees' demonstrates an awareness of the possibilities and limitations within the Tanzanian criminal procedure law. The assumptions made by the Court are, in the circumstances, difficult to sustain.

To begin with, Tanzania, like many other common law jurisdictions, follows the adversarial legal tradition. The adversarial system is a two-sided structure under which criminal trials involve the prosecution and the defence.[64] The duty of the prosecution is to prove the accused guilty while the defence argues for the accused's acquittal. A decision in the case is made by the judge (or jury) who acts as an umpire. The role of the judge is to ensure that the trial proceeds in accordance with established rules.[65] In this system, the judge is supposed to be neutral and a passive fact finder who is, generally, uninvolved in the presentation of the parties' arguments.

The strictures of space permit only a cursory discussion of the applicable regime for criminal appeals in Tanzania. Although the High Court of Tanzania has power to hear appeals from, for example, subordinate courts, this discussion focuses on appeals before the Court of Appeal.[66] The framework for appeals is contained in the Appellate Jurisdiction Act and the Court of Appeal Rules (as amended in 2019). An appeal is instituted by the lodging of a notice of appeal within 30 days of the date of the decision complained of.[67] The notice of appeal must state briefly the 'nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal'.[68] A notice of appeal filed out of time or one that is otherwise defective by failing to state the nature of the conviction, sentence or order against which it is desired to appeal, is liable to be struck out.[69]

63 The Court has yet to directly invoke the 'bundle of rights and guarantees' in a case involving a country other than Tanzania. However, the Court may have adopted the indirect application of the 'bundle of rights' in a non-Tanzania case for the first time in *Sebastien Germain Ajavon v Republic of Benin*, Application 13/2017 (Judgment of 29 March 2019 - Merits) para 124.

64 I Oraegbunam 'The jurisprudence of adversarial justice' (2019) 15 *Ogirisi: A New Journal of African Studies* 27 at 29.

65 As above.

66 See section 4(1) Appellate Jurisdiction Act.

67 Rule 68(1) Court of Appeal Rules.

68 Rule 68(2) Court of Appeal Rules.

69 *Seleman Hassan Mauluka v The Republic,* Criminal Appeal No 7 of 2014 (Court of Appeal, Mtwara).

In Tanzania, while the filing of the notice of appeal institutes the appeal, it is the memorandum of appeal that defines the appeal. The appellant must file a memorandum of appeal within twenty one days of being served with the record of the appeal which 'shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed …'.[70] Under rule 72(5) of the Court of Appeal Rules, an appeal can be dismissed if the memorandum of appeal is not lodged within the prescribed time. However, the court can grant a party leave to file a supplementary memorandum of appeal[71] and during the hearing a party may also be granted leave to argue any ground of appeal not specified in the memorandum of appeal.[72] On a first appeal from the high court, the proceedings take the form of a re-hearing and the Court of Appeal is entitled to re-assess the facts and form its own conclusions.[73] In the case of a second appeal to the Court of Appeal, for proceedings originating in a subordinate court which had been appealed to the High Court, a certificate on the points of law being appealed issued by the High Court is necessary before the Court of Appeal can hear the matter.[74] The absence of the certificate is fatal to the appeal.[75] This brief presentation exposes some of the nuances in the Tanzanian criminal appeals procedure.

Given the above context, a few observations can be made. First, in Tanzania, true to the adversarial tradition, it is the appellants that determine the grounds of their appeal. This is done through the memorandum of appeal. An appellant wishing to enlarge his grounds of appeal can file a supplementary memorandum or even ask the Court of Appeal for leave to address matters not covered in the memorandum. The assumption routinely made by the African Court, that the Court of Appeal would somehow, of itself, address matters not raised by an appellant is, therefore, rather shaky and runs the risk of tainting the role of the Court of Appeal as a neutral arbiter between litigants. Admittedly, the Court of Appeal does have the power to consider some matters *suo motu* but this is limited to matters of law only.[76] This, arguably, does not extend to findings in relation to whether or not there was a violation of a right since this is a mixed question of law and fact.

Second, many of the litigants that took their cases to the Court of Appeal before filing their cases before the African Court had the benefit of counsel in arguing their appeals. Given these litigants access to counsel, they, arguably, would have had a good opportunity to present

70 Rule 72(1) and 72(2), Court of Appeal Rules.

71 Rule 73(1) Court of Appeal Rules.

72 Rule 81 Court of Appeal Rules.

73 *Samwel Marwa @Ogonga v The Republic,* Criminal Appeal 74 of 2013 (Court of Appeal, Mwanza) and *Faki Said Mtanda v The Republic,* Criminal Appeal No 249 of 2014 (Court of Appeal, Dar es Salaam).

74 Section 6(7)(b) Appellate Jurisdiction Act.

75 *Shangwe Mjema v Friday Salvatory and Hamisi Mrisho Mbonde,* Criminal Appeal No 103 of 2017 (Court of Appeal, Dar es Salaam).

76 See *M/s Tanzania - China Friendship Textile Co. Ltd. v Our Lady of the Usambara Sisters* Civil Appeal 84 of 2002 (Court of Appeal, Dar es Salaam).

their appeals before the Court of Appeal. To assume, without taking the time to disaggregate the quality of the service provision, for example, that whatever was never presented by the appellants ought to have been automatically considered by the Court of Appeal is dangerous. For one, counsel may have, as part of his appellate strategy, deliberately left out some matters in a bid to enhance a client's case. To blandly blame the Court of Appeal for not having considered issues that were never raised by an appellant, is rather specious, especially since this may include matters which the appellant deliberately never raised.

Third, the African Court ought to have been slow and deliberate in its consideration of the new issues raised by applicants. The key question here would be to determine whether by reason of the new issues that the applicant has brought to the Court a different case from the one filed before the local courts has been presented to the African Court. If this inquiry were systematically conducted, the African Court would have to reject all fresh issues which have the result of creating a new case for the respondent since, in principle, the applicant would not have exhausted domestic remedies on those issues.[77] As the Court has consistently stated, it is not an appellate court in respect of domestic courts.[78] This means that the African Court, like other supra national courts, has limited leverage to interfere with evidential findings by domestic courts. To avoid converting itself into a 'fourth instance court', the African Court must conscientiously limit its interference with evidence-based findings made by domestic courts. In practice, and despite the Court's refrain that it is not an appellate court, it has struggled to navigate this line in a principled manner.[79] For the reasons highlighted in this section, therefore, the assumptions made by the African Court about domestic appellate procedures in Tanzania, especially in relation to the application of the 'bundle of rights and guarantees', seem rather unfounded.

4.3 Jurisprudential innovation or simply a convenient ruse?

Lawyers conversant with property law are likely to be familiar with the 'bundle of rights' or 'bundle of sticks'. This is an approach that evolved to help define property. The 'bundle of rights' or the 'bundle of sticks' serves to explain that property is a collection of rights in relation to others rather than a right to a 'thing'.[80] As a legal construct, the 'bundle' of rights describes the rights and responsibilities that inhere in property ownership irrespective of the 'thing' that is owned. In the context of property law, the 'bundle of rights' also explains how property ownership can be divided among several subjects even in

77 See *Radomilja and others v Croatia* [2018] ECHR 254 para 116-117.

78 *Ernest Mtingwi v Malawi* (2013) 1 AfCLR 190.

79 See Adjolohoun (n 54).

80 D Johnson 'Reflections on the bundle of rights' (2007) 32 *Vermont Law Review* 247-272 and J Baron 'Rescuing the bundle-of-rights metaphor in property law' (2014) 82(1) *University of Cincinnati Law Review* 57-45.

respect of the same object.[81] One way in which this division is possible is by vesting various incidents of property in different people. For example, in respect of the same object of property, one person may have the nominal title while another may have the control and yet another the beneficial interest. In property law, the novelty of the 'bundle of rights' is that it allows considerable versatility in property ownership. For example, an individual may still be the owner of property even if not all incidents of property are simultaneously vested in him or her thus allowing such an owner to share interests in property without forsaking his or her ownership. Within the domain of property law, therefore, the 'bundle of rights' is fairly well established as a jurisprudential approach for understanding property ownership.

The 'bundle of rights and guarantees' which has been adopted by the Court, and the 'bundle of rights' from property law, though similar in nomenclature, are very different. The similar terminology, however, may be a source of confusion. The similarity between the two approaches provides another compelling reason why the Court should have taken time to deliberately explain its approach, if only to eliminate confusion with the property law approach.

Further, a question may be posed as to whether or not the Court inducted a jurisprudential innovation by having recourse to the 'bundle of rights and guarantees'. The relationship between the 'bundle of rights and guarantees', and the rules on admissibility of applications under the Charter, is addressed in the next section of the article, at the moment it suffices to note that the effect of the Court's adoption of this approach is to admit cases which would otherwise have been inadmissible. This is because admissibility conditions in article 56 of the Charter are cumulative.[82]

In further considering whether the Court is the progenitor of a jurisprudential innovation or not, it may be useful to consider one possible discrepancy. As earlier demonstrated, the 'bundle' approach to the right to a fair trial is fairly common and well-grounded in international human rights law, even if other systems do not consistently adopt the same terminology. Comparative jurisprudence, however, suggests that the 'bundle of rights' approach, in respect of the right to a fair trial, is relevant to resolving claims at the merits and not admissibility stage. In incorporating the 'bundle' approach at the admissibility stage, therefore, the Court was under a duty to justify its choice of approach. Again, the Court seems to have faltered. As must now be clear, there are several dimensions to the failure by the Court to provide proper justification for the adoption of the 'bundle of rights and

81 M Nkhata 'The social trust and leadership roles: revitalising duty bearer accountability in the protection of social and economic rights in Malawi and Uganda' Unpublished LLM thesis, University of Pretoria, 2005, 43-45.

82 *Dexter Johnson v Ghana* (2017) 2 AfCLR 155 para 57.

guarantees' approach.[83] If the adoption of this approach was an attempt at innovation, the rather loose manner in which it was implemented has undermined any value that was meant to be conveyed.

4.4 Does the 'bundle of rights and guarantees' fit within article 56 of the Charter?

The Court has utilised the 'bundle of rights and guarantees' for purposes of establishing that a litigant exhausted domestic remedies. As conceded by the Court, the rule on exhaustion of domestic remedies is an exigency of international law and not a matter of choice for litigants.[84] This means that all litigants must exhaust or at least endeavour to exhaust domestic remedies. The Court is, therefore, bound to consider whether an application lodged before it complies with the requirement for exhaustion of domestic remedies irrespective of whether the respondent raises an objection or not.[85]

As a result, domestic mechanisms get the first option in investigating and dealing with probable human rights violations.[86] This is important because the Court, like many other supra-national courts, does not have the power or resources to be the first line of recourse in cases of alleged human rights violations. The suggestion by Viljoen that article 6(2) of the Protocol to the African Charter on Human and Peoples Rights' on the Establishment of an African Court on Human and Peoples' Rights may be read as suggesting that there is no prescription for the Court to comply with all the conditions listed in article 56 of the Charter is probably incorrect.[87] Rule 50 of the Rules of Court,[88] and the practice of the Court, confirm that the conditions in article 56 are all mandatory. Specifically in relation to the rule on exhaustion of domestic remedies, two broad exceptions are permitted. Litigants are excused from exhausting domestic remedies if the remedies are not available, effective or sufficient, and if the procedure for obtaining them is unduly prolonged.[89]

It is not clear, from the Court's 'bundle of rights' jurisprudence, where exactly, within article 56 of the Charter, the Court has located the

83 It has been argued that the failure to substantiate its positions is a consistent occurrence on the part of the African Court rather than a random one, see H Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1, 30.

84 *Diakite Couple v Mali* (2017) 2 AfCLR 118 para 53.

85 *Urban Mkandawire v Malawi* (2013) 1 AfCLR 283 para 37.

86 FIDH 'Admissibility of complaints before the African Court: Practical guide' https://www.refworld.org/pdfid/577cd89d4.pdf (accessed 28 May 2020).

87 F Viljoen *International human rights law in Africa* (2007) 448.

88 Formerly Rule 40 under the Rules of Court, 2010.

89 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema Alia Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe de Droits de l'Homme et des Peuples v Burkina Faso* (2013) 1 AfCLR 197 and *Lohe Issa Konate v Burkina Faso* (2014) 1 AfCLR 314.

'bundle' approach. To be certain, the Court has not stated that it has carved out a new exception to the rule on the exhaustion of domestic remedies, for example. In all cases where the Court has found the 'bundle' to be applicable, applicants have been deemed to have exhausted domestic remedies even when they have raised fresh issues which were never before any domestic court. As demonstrated earlier, what the 'bundle of rights and guarantees' achieves, in practice, is to allow the Court to make a leap and conclude on the exhaustion of domestic remedies without proof of specifics. The propriety of this leap is questionable given that the exhaustion of domestic remedies is a mandatory requirement under the Charter.[90] Given the mandatory nature of this requirement, and the leap that the Court has been making, it is doubtful whether the respondents have benefited from having the first option for redressing alleged human rights violations domestically. By tackling issues that were never pleaded before domestic courts, and on which no domestic pronouncement was made, the African Court may have allowed itself to wade into matters that should otherwise have been left for domestic courts.

There is another possibility. Almost all cases in which the African Court has adopted the 'bundle' approach involve litigants that had been to the Court of Appeal in Tanzania or at least those who attempted to trigger its jurisdiction. Could it be, therefore, that the African Court has been 'persuaded' to admit some of these cases to rectify manifest violations of human rights where it would have been difficult for the litigants to pursue remedies domestically? This is a complex question and the judgments themselves offer no definite clues as to the answer. However, it is probable that the Court may have been swayed to apply the 'bundle' approach with one eye aimed at fixing possible injustices occasioned to litigants. In this sense, therefore, perhaps the 'bundle of rights and guarantees' has been used by the Court as a means of allowing it to deal with the substantive issues between the parties unfettered by procedural guarantees. Whatever the ultimate merits of this approach, questions of propriety persist especially given the sparse reasoning that the Court has used to support the 'bundle' approach.

5 CONCLUSION

The African Court has converted the 'bundle of rights and guarantees' into a consistent foundation on which to base its decisions on admissibility, especially in cases involving the right to a fair trial. Regrettably, and notwithstanding the constant recourse to this approach, the Court has not taken the time to unpack this bundle. The result has been the insertion of a vague dimension to the resolution of objections to admissibility of cases.

Good jurisprudential developments are not created simply by the repetition of certain formulations but by deliberately justifying conclusions in a process of systematic reasoning. As demonstrated in

90 *Peter Joseph Chacha v Tanzania* (2014) 1 AfCLR para 142.

this article, the Court's articulation of the 'bundle of rights and guarantees' fails seriously on this score. Although a broader theory of the 'bundle of rights and guarantees', in respect of the right to a fair trial, may be identified in international human rights law, on the basis of the Court's jurisprudence alone, it is impossible to state with clarity what this approach comports especially in the context of the requirements for admissibility of applications under the Charter. In the circumstances, the Courts adoption of the 'bundle of rights and guarantees' seems to be mere casuistry especially given the persistent failure to unpack what the 'bundle' entails.