AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Judgement
Robert Richard v. United Republic of Tanzania
Application N° 035 / 2016
2 December 2021

Dissenting Opinion
of
Judge Blaise Tchikaya

Introduction

1. ***Richard Robert*, a Judgement consistent with its jurisprudence**

   a) **The *Richard Robert case*, questions and answers**

   b) **Imputation[1] of the prolonged wait for the domestic decision**

2. ***Richard Robert*, the critical problem of reparations**

   a) **A reparation approach already exists in the jurisprudence**

   b) **A «consistent standard » reparation model needs to change**

Conclusion

---

1. I do not fully share the opinion of my dear and honourable colleagues concerning compensation for damages in the *Richard Robert*[2] case, the subject of the Judgment of 2 Decembre 2021. I endorse the Judgement as a whole but I would like to distance myself from its operative part which, in an iterative and indistinct manner,

[1] The Draft articles of the ILC (United Nations -International Law Commission) is quite explicit about the international Responsibility of State. *Article 5 provides that:* "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".
[2] ACtHPR, *Richard Robert v. Tanzania*, 2 December 2021.

awards sums of money as a form of compensation for the breach of due process. Also, the wrongfulness[3] of the violation in question is not disputable either.

2. *Mr Richard*, a Tanzanian national, was accused of sodomizing a one- year and five-month-old female toddler on 22 August 2004. He was found guilty of the act and sentenced to life imprisonment as provided by Tanzanian law. He is being held in Ukonga Central Prison and has brought his case before the Court because the appeals proceedings against his sentence, which started on 15 April 2009, was not decided until 8 June 2016, the date he decided to file the Application. Thus, it took seven years for the judicial decision to be rendered.

3. This is a partly dissenting opinion. The partial dissent is based on the fact that, in the reparation granted to Mr. Richard Robert, the damages awarded are completely dissociated from the original offence and, as far as I am concerned, it appears that the amount to be paid by the Respondent State was set separately from, and independently of the original offence.

4. In the first section, it will be shown how much this Judgement echoes the Court's jurisprudence on reparations and legal issues are resolutely resolved (I). In the second section, I will, strictly speaking, address the problem of reparations with the aim of possibly going beyond the Court's traditional approach (II).

***Richard Robert*, a Judgement consistent with its jurisprudence**

5. In terms of structure, the *Richard Robert* Judgement cannot be challenged. The Court applies its previous jurisdiction to respond to the issues raised.

a) The *Richard Robert case*, questions and answers

6. One of the preliminary issues before the Court was the absence or the default of the Respondent State. This comes in the wake of Tanzania's withdrawal of the optional Declaration accepting the Court's jurisdiction[4]. Therefore it was settled fairly quickly when the Court held

[3] Pellet (A.) The ILC's articles on State Responsibility for Internationally Wrongful Acts (Continuation and conclusion? French Directory of International Law (AFDI), 2002. pp. 1-23 of the French.
[4] Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights of the African Court.

that the Judgement could be delivered by default pursuant to Rule 63(1) of its Rules which provides: "Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings".[5]

7. The withdrawal of the Declaration has no retroactive effect and it will only enter into force 12 months after the deposit of the notice of withdrawal, that is, on 22 November 2020[6]. We approve of the step taken in view of the fact that the Application was filed on 8 June 2016 and notified to the Respondent State on 7 September 2016.

8. There was the issue of the 7-year time lapse after the last domestic decision before referral to the Court. It was explained that domestic courts were deficient and proceedings were unduly prolonged[7]. The Court found that local remedies were clearly exhausted in 2008. As of the time the Application was filed with the Court on 8 June 2016, the appeal lodged before the High Court on 15 April 2009 had not been heard. Given the excessive delay which characterized the case, the Court considered that the principle of filing within reasonable time could not be held against the Applicant.

c) The imputation[8] of the prolonged wait for the domestic decision

9. This issue is crucial since it establishes the responsibility of the State in international law, including its international human rights commitments[9]. It is addressed by the Court and

---

[5] *African Commission on Human and Peoples' Right v. Libya* (merits), (3 June 2016), 1 AfCLR 153, §§ 38 to 42.
[6] *Andrew Ambrose Cheusi v. Tanzania* (merits and reparations), §§ 37 to 39.
[7] *Robert Richard v. Tanzania*, 2 December 2021: "*In light of the foregoing, the Court observes that the appeal in the domestic courts which had not been decided after the lapse of seven (7) years indicates that local remedies were unduly prolonged. In this regard, the Applicant could not have exhausted local remedies and thus falls within the exception under Rule 50(2)(e) of the Rules*"., § 37. See also: *Anudo v. United Republic of Tanzania* (merits), (22 March 2018), 2 AfCLR 248, § 5; *Mgosi Mwita Makungu v. United Republic of Tanzania* (merits), (7 December 2018), 2 AfCLR 550, § 49.
[8] The Draft articles of the ILC (United Nations -International Law Commission) are quite explicit about the international Responsibility of State. *Article 5 provides that:* «The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance».
[9] See Les développements: "When the damage occurs 'how can we doubt that a subjective right may have been infringed - generally an absolute or *erga omnes* right - and that this is objectively unlawful since a result occurs contrary to that intended by the norm that protects the subjective right in question. The imputation to State agent of the wrongfulness is then foreign to any subjective consideration of guilt, since it has not violated the least obligation; it depends exclusively on a causal relationship" Caubet (C. G.),

captured in paragraph 46 of its Judgement. Although I am not against the majority's approach on the matter, it can be noted that the Court seems to settle the question with a single stroke of the pen, notwithstanding its essential nature. It states: " As to whether the delay is attributable to the Respondent State, the Court notes that, as the Respondent State did not submit a brief in response to the Application, there is nothing on record to show why the Applicant's appeal was still pending after seven (7) years" [10]. This is essentially the reasoning of the Court.

10. I agree only partially with the Court's approach because it does not deal with the matter as a whole. Two aspects can be noticed: a) the Court could not substitute itself for the Parties and find an argument in support of their claims and b) the purpose seems to be the same insofar as the State is responsible as long as a violation is found, so that the Applicant should be awarded. My agreement is partial because there is need for the Court to further analyse the charge against the State. The Court's intervention in relation the violation attributed to the State must be on the basis of reparation, not compensation. The difference between the two is not only rhetorical.

11. This is a problem pertinently raised by the *Robert Richard Judgement* rendered on 2 December 2021, clearly on account of its facts, namely, an act of paedophilia involving the sodomizing of a one- and- a- half-year-old toddler. The jurisprudence of the African Court was not entirely devoid of precedent.

12. The Applicant's offence does not interfere with the determination of reparation as the Applicant was found not guilty at the end of the criminal procedure[11]. The Court assessed the reparation independently of the offence that resulted in the *Robert Richard* case. As judge of the violations committed by the State, the Court is well justified to do so. However, the question deserves further probing.

I. *Richard Robert*, the reparations problem

Le droit international en quête d'une responsabilité pour les dommages résultant d'activités qu'il n'interdit pas, *AFDI*, 1983. pp. 99 et s (note 30).
(note 30).

[10]ACtHPR, *Wilfred Onyango Nganyi v. Tanzania* (merits), (18 March 2016), 1 RJCA 507.

[11]The judgement, delivered by the High Court of Tanzania in Dar es Salaam on 26 September 2018 in criminal case No. 84 of 2008, *Robert Richard v. the Republic* (...), granted the appeal, set aside the conviction, and "quashed the life imprisonment sentence" imposed on the Applicant and ordered his release.

13. Given its complexity, the issue requires thorough examination[12] since international courts must apply known provisions of international law[13]on reparations.

14. The Resolution of 2000 quoted above provides that "Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law...". These international provisions are prudent and meticulous.

15. To the credit of the African Court, its jurisprudence is prolific on the matter of reparations. Moreover, in 2018, it decided, when necessary, to render separate judgements on reparations and on the merits. In the Judgement on reparations of 5 June 2015, in *the Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo vs Republic of Burkina Faso,* the Court unanimously found that "that the Judgement of 28 March 2014 on this matter represents a form of reparation for the moral prejudice suffered by the Burkinabé Movement on Human and Peoples' Right". By way of full reparation, the Court, in addition, ordered «the Respondent to pay a token sum of (1) franc to MBDHP, as reparation for the said prejudice". This is a unique approach that is not often adopted.

16. In the 2021 *Amir Ramadhani* case, the Court recalled its **consistent standard** - a notion to which this opinion will return - to determine and structure the reparations it would grant if moral prejudice was established. It was placing itself in a difficult situation in relation the plethora of contentious situations that would follow.

17. It is this approach that has caused the problem and sown the "bad seed".

a) An approach to reparations that already exists in the jurisprudence

18. A reading of Article 27 (1) sufficiently reveals the secondary nature of monetary payment, which the Court has established as automatic. It reads as follows: "If the Court finds

---

[12] See Pellet (A,), The codification of the law of international responsibility: Trial and error, *The International Legal System in Quest of Equity and Universality - Liber amicorum Georges Abi-Saab*, Kluwer, The Hague, 2001, pp. 285-304 of the French.

[13]Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147 adopted by the General Assembly on 16 December 2005. It provides that domestic law must ensure that "their domestic law provides at least the same level of protection for victims as that required by their international obligations."

that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, *including the payment of a fair compensation or reparation"*. The payment of money is only one of the options according to the basic document. Yet this approach has been adopted, at least, since the 2016 in *Abubakari v. Tanzania* Judgement of 3 June 2016. The Court held that "In the instant case, the Court will decide on certain forms of reparation in this judgment, and rule on *other forms* of reparation at a later stage of the proceedings."[14]. This idea of forms of reparations cannot be without a purpose. At the very least, it implies that the Court cannot be locked into a specific nature and scope of reparations awarded to Applicants who are victims of violations.

19. The decision in *Armand Guehi* v. *Tanzania (Republic of Côte d'Ivoire intervening),* Judgement of 7 December 2018 seems to have paved the way for this form of reparations by the Court. In paragraph 205 of the Judgement, while it failed to "grant the Applicant's prayers related to compensation for moral prejudice» and similarly failed to «grant the Applicant's prayer to be paid material damages for monetary loss", it " grants the Applicant the sum of US Dollars Five Hundred ($500) for being subjected to inhuman and degrading treatment; and "Grants the Applicant the sum of US Dollars Two Thousand ($2,000) for not being tried within a reasonable time and the anguish that ensued therefrom".

20. This approach should be weighed against the practice of other courts. Before the European Court of Human Rights [15], applicants against the United Kingdom of Great Britain and Northern Ireland, who do not have British nationality ...

21. The decision in *Minani Evariste v. Tanzania,* Judgement of 21 September 2018 was a landmark on the issue. The Court rightly held that as "... the conditions for the compulsory grant of legal aid are all fulfilled.... the Respondent State has violated Articles 7 (1) of the Charter"[16]. Consequently, the Court awarded "the Applicant an amount of three hundred thousand Tanzania Shillings (TZS 300,000) as fair compensation". This decision is one in the series to be considered.

---

[14] ACtHPR, *Abubakari v. Tanzania,* 3 June 2016.

[15] Article 41 of the European Convention offers this opportunity through just satisfaction: "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

[16] ACtPHR, *Minani Evariste c. Tanzania,* 21 September 2018.

22. The spirit of this reparation is summarized by Judge Ben Achour "In the instant case, the violation as indicated did not "affect the outcome [of] the trial". Reparation for the violation of Article 7(1) (c) of the Charter established by the Court can, in my opinion, only be resolved by pecuniary compensation, and this is what the Court has done for the first time, by awarding the applicant a lump sum compensation, the amount of which was absolute and depended on the material on file and the gravity of the criminal offence, as estimated by the Court"[17].

23. It is well understood that the divergence is partial. This is because we are not discussing the basis for reparation, and we must not forget the seriousness of the originating violation. The Respondent State is obliged to ensure due process both for accused persons who are able to ensure their own defence and those who cannot do so a fortiori for serious offences, The divergence stems from the mode of assessment, that this mode of reparation entails which, in my opinion, is partial. In this type of reparation, the act that is the subject to reparation is totally dissociated from the original offence, and the amount to be paid by the Respondent State is set automatically.

b) A model of reparation as «consistent standard » that must change

24. This reparation model (300.000 TZH) which the Court refers to as « consistent standard » has to change[18]. If the State is clearly responsible for the violation of a right, the reparation that the State provides to a victim of violation must be understood in all its complexity[19]. The reparation, which is its established corollary of the said violation cannot be automatically determined, so that it is limited, in particular to the sole reading of the violation.

---

[17]ACtHPR, Minani Evarist United Republic of Tanzania Application No. 02712015 Separate Opinion of Judge Rafaa Ben Achour, Para. 18.

[18]ACtHPR, Amir Ramadhani v. Tanzania, 25 June 2021: The Court « adopted the *consistent standard* of awarding Tanzanian Shillings Three Hundred Thousand (TZS 300,000). It « awards the Applicant Tanzanian Shillings Three Hundred Thousand (TZS 300,000) for the moral prejudice suffered due to the Respondent State's failure to grant him legal assistance».

[19]As indicated in Article 1 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, (ILC, August 2001): "Every internationally wrongful act of a State entails the international responsibility of that State ». v Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". Resolution 60/147 of 16 adopted by UN General Assembly on 16 December 2005. *V.* The stimulating study by Shelton (D.*), Remedies in International human rights law*, Second Edition, Oxford University, Press, New York, 2005, p. 35-36.

Such an approach, once supported by international law[20], would be too restrictive. Unfortunately, this seems to be the approach adopted by the Court, especially in the instant case, *Robert Richard.*

25. In Article 37, the ILC's Draft article opens a panoply of choices in terms of reparation. It states that "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation", Without excluding the payment of sums of money, the Draft Article further states that "Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality". Understandably, the ILC's list is also not exhaustive as it leaves many possibilities open.

26. In paragraph 56 of the *Robert Richard Judgement,* the Court ruled that "the Applicant's right to be tried within a reasonable time was violated, and finds that the Applicant suffered emotional distress due to the unduly prolonged wait for a decision on his appeal and therefore awards the Applicant the sum of Five Million Tanzanian Shillings (TZS 5,000,000)". It is for moral prejudice that sum was awarded. This should apply in some cases and not automatically[21]. The same approach was adopted in *Majid Goa alias Vedastus v. Tanzania*[22], Judgement of 26 September 2019. This could have been interrogated and improved by taking into consideration all the complexity of the issue.

27. In *Gomes Lund and others (« Guerrilha do Araguaia »)* v. Brazil of 2010, the Inter-American Court held that «"it has set a period of 24 months as of notification of this Judgment, for those interested to present irrefutable evidence, in conformity with the legislation and domestic procedures, regarding (...) so as to allow the State to identify them, and were

---

[20] Contained in the famous reasoning of the Permanent Court of International Justice (PCIJ): « It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form». v. PCIJ, Factory at Chorzów (Claim for Indemnity) (Jurisdiction), Judgement of 26 July 1927, Series A. No 9, p. 21. See also: Barthe (Cl.), Reflections on Satisfaction in International Law, *AFDI*, 2003, pp. 105-128 (of the French).

[21] ACtHPR, *Kenedy Ivan v. Tanzania*, Judgement of 28 March 2019: The Court notes that the violation it established caused moral prejudice to the Applicant. The Court therefore, in exercising its discretion, awards an amount of Tanzania Shillings Three Hundred Thousand (TZS 300,000) as fair compensation». See also: *Wilfred Onyango Nganyi* and *9 others v.* Tanzania, Judgement of 4 July 2019.

[22] The *Vedatus* case also involved an Applicant convicted for rape of a twelve (12) year old minor and sentenced to thirty (30) years imprisonment. In paragraph 98 of the operative part of the Judgement, the Court "Grants the Applicant's prayer for reparation for prejudice suffered and awards him the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300, 000)". See Anaclet *Paulo v. Tanzania*, Judgement of 21 September 2018: the court awarded the Applicant the sum of Tanzanian Shillings Three Hundred Thousand (TZS 300, 000) as fair compensation.

applicable, consider them victims in the terms set by Law No. 9.140/95 and the present ruling, adopting the appropriate reparation measures in their favour". This reasoning of the Inter-American Court includes various financial measures[23].

28. This was the subject of a heated debate before the European Court of Human The doctrine, which was critical, had denounced the *"abusive commercialization of human rights litigation"*, see Flauss (J.-f), *"Le contentieux de la satisfaction équitable devant les organes de la Cour européenne des droits de l'homme. Développements récents* », *Europe,* juin 1992, p. 1. See also, Flauss (J.-F.), « « Réquisitoire contre la mercantilisation excessive du contentieux de la réparation devant la Cour européenne des droits de l'homme. A propos de l'arrêt *Beyeler c. Italie* du 28 mai 2002 », *D.* 2003, p. 227).). In a number of cases, the Court considers that the finding of violation constitutes sufficient satisfaction in respect of non-material damage[24].

29. The European Court considers that, in view of the measures indicated under Article 46 of the Convention, which seek to alleviate the damage resulting from the transfer of applicants to the Iraqi authorities when they risked being sentenced to death death), the findings of a violation constitutes sufficient just satisfaction for the moral damage suffered by the applicants[25]. If the State undertakes to review domestic legislation deemed contrary to the Conventions, the Court may consider that *the findings of a violation constitute sufficient just satisfaction.* (ECHR, Gr. Ch., *Folgeo et al. V. Norway*, 29June 2007).

---

[23] IACHR, *Gomes Lund and others (« Guerrilha do Araguaia »)* v. Brazil, 24 November 2010.

[25]ECHR, Gr. Ch., 17 September 2009, Enea *v. Italy,* 27 September, 2009; ECHR, 2 March 2010, *Al Saadoon and Mufhdi v. United Kingdom*, § 175, *JCP G* 2010, 859, chron. F. Sudre, n°3:

Conclusion

30. The challenge facing the Court is how to move away from its 'consistent standard' as enunciated, in particular, in *Ramadhani* (ACtHPR, *Amir Ramadhani v. Tanzania*, 25 June 2021). This standard seems to set a limiting, inseparable and binding framework. The exercise of the power to determine reparations should be better organized [26] and be more open.

31. It is a known fact that the common law has engendered a punitive system in the international treatment of reparations owed by States. It entails the award of a sum of money, distinct from any reparation *stricto sensu*, as punitive damages to the victim of a violation. The aim is to punish the State responsible, and to prevent any violations. However, this measure is short-sighted. Unfortunately, this could be the cause of Court's situation in the matter of reparation[27].

32. In the practice of the Court, awarding financial compensation appears to be the preferred form of reparation. This should not obscure the sociological and collective nature of other forms of reparation such as full restitution, when necessary. In the instant case, satisfaction gives rise to a variety of possible reparations, regulatory and practical, public or individual. It is up to us, from the outset, to work in this spirit. For, it is known that the solemn pronouncement of the violation and its recognition by the Respondent State may constitute effective means of reparation. Undoubtedly, a decision of the Court already constitutes a sufficient form of reparation.

33. As noted in paragraph 10: "My agreement is partial because there is need for the Court to further analyse the charge against the State" » in order to determine the type of reparations to award. There is need to go further. The issue of how to actually correct violations must be

---

[26]This power has been asserted since its first judgement on the merits in *Reverend Christopher Mtikila v. Tanzania*, on 14 June 2013.

[27] Anzilotti's ancient writings are cited to explain this practice states that, "Nothing prevents, and there are very varied examples of this, that satisfaction consists in the payment of a sum of money that does not tend to remedy material damage actually suffered, ut which represents a sacrifice symbolizing the atonement for the unlawful act committed. Anzilotti (D.), Dionisio Anzilotti's Course on International Law translated by Gilbert Gidel, published in France in 1929. Cours de droit international, traduction française de G Gidel, d'après la 3e édition italienne, Paris, Sirey, 1929 à la p 524.

addressed. To that end, various measures are appropriate and feasible by the State in favour of a victim. The proclamation of the amounts to be paid is only one of them. The aim is to avoid awarding sums of money that often have no impact on the collective and individual outcomes of violations.

34. Simply apply the principle adopted by the United Nations General Assembly in 2005: "Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being ..." (Point VI, Treatment of Victims)

Signed:
Justice Blaise Tchikaya

Done in Dar es Salaam this 02 December 2021