

Minani EVARIST

V.

UNITED REPUBLIC OF TANZANIA

APPLICATION No. 027/2015

SEPARATE OPINION

OF

JUDGE RAFÂA BEN ACHOUR



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1. I voted for the entire Judgment in the Matter of *Minani Evarist v. United Republic of Tanzania* captioned above, and I agree with all the reasoning of the Court as well as the entire operative part. However, I have reservations regarding the reasons developed in paragraph 81 of the Judgment.

2. The Court's refusal to order the Applicant's release, in my opinion, reposes on questionable reasons. Indeed, the Court states in paragraph 81 that "*the Court reiterates its decision that it is not an appellate Court*". This is more than obvious in as much as we are in the presence of a continental court whose "*jurisdiction ... shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter ... Protocol, and any other relevant Human Rights instrument ratified by the States concerned*". And the Court justifies this assertion by adding that "*for the simple reason that it does not belong to the same judicial system as the national courts, it does not apply the same law as the Tanzanian courts; that is, Tanzanian law, and it does not examine the detail of the issues of fact and law that national courts are entitled to deal with*". Here again, the justification does not tally with what the Court will say to argue the reasons for its refusal to order release. The latter in fact reposes on the reasons outlined in paragraph 82, which for the first time in the jurisprudence of the AfCHPR, gives a list, albeit not exhaustive, of "*exceptional or compelling circumstances*" which could lead the Court to pronounce a release, reasons unrelated to the fact that the African Court is not a Tanzanian appellate court. By adopting this line of argument, it could be said that the Court forever closes the possibility of it ordering the release of an applicant in detention or in arbitrary imprisonment.

3. This notwithstanding, I agree with the Court's decision to reject the prayer for release. Indeed, and in this case, the Court rightly took into account only one complaint against the Respondent State, namely, the violation of Article 7(1)(c) on the Applicant's right to defence with the use of legal aid<sup>2</sup>.

4. This violation is certainly as important as any violation of a human right. There is indeed no violation of human rights that is not important. But the consequences of violation are variable when the issue comes to that of reparation.

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<sup>1</sup> Article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

<sup>2</sup> See paras. 65 to 69 of the Judgment

5. The violation established by the Court in this case does not concern a fundamental<sup>3</sup> or intangible human right<sup>4</sup>. Moreover, there has not been a cascade of violations in this case. The only violation established by the Court was not decisive in terms of the lawfulness of the proceedings against the Applicant for the crime of rape of a 10-year-old girl. The Court expressly says so in paragraph 84:

6. According to the 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<sup>5</sup>, restitution as a form of reparation seeks to restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred, and includes: *"restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property"*<sup>6</sup>.

7. The Permanent Court of International Justice has pointed out that *"It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary*

<sup>3</sup> According to the generally accepted meaning, *"Fundamental rights refer to all the essential subjective rights of the individual that are protected within the rule of law and democracies. Fundamental rights are also called fundamental freedoms, and are inherent in the very notion of individual"* <https://droit-finances.commentcamarche.com/faq/23746-droits-fondamentaux-definition>.

In the context of the European Union, the notion of fundamental right has been enshrined in *The Charter of Fundamental Rights of the European Union* which was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the Nice European Council on 7 December 2000. See L. Burgogue-Larsen, A. Levade, F. Picod (eds.), *Treaty Establishing a Constitution for Europe*. Part II. *The Charter of Fundamental Rights of the European Union - Article by Article Commentary*, Brussels, Bruylant, 2005, page 837.

<sup>4</sup> In international human rights law, intangible rights are those excluded by Article 4 of the International Covenant on Civil and Political Rights (ICCPR) from any derogation, namely:

- Right not to be discriminated against based solely on race, color, sex, language, religion or social origin (Article 4 (1) ICCPR)
- Right to life (Art 6. ICCPR)
- Right not to be subjected to torture or to cruel, inhuman or degrading treatment (Article 7 ICCPR)
- Right not to be held in slavery or servitude (Articles 8 (1) and 2 ICCPR)
- Right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11 ICCPR)
- Right not to apply criminal law retroactively (Article 15 ICCPR)
- Right to be recognized as a person everywhere before the law (Article 16 ICCPR)
- Freedom of thought, conscience and religion (Article 18 ICCPR).

<sup>5</sup> *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*; 60/147 Resolution adopted by the General Assembly on 16 December 2005

<sup>6</sup> Principle 19

to international law"<sup>7</sup>, a position reiterated by the European Court of Human Rights which held that "a judgment in which the Court finds a violation entails for the Respondent State the legal obligation to put an end to the violation and to erase the consequences so as to restore as much as possible the situation that existed before the violation"<sup>8</sup>. Further, the august Court adds that: "The essential principle, which stems from the very notion of an unlawful act and which seems to emerge from international practice, in particular from the jurisprudence of arbitral tribunals, is that reparation must as far as possible erase all the consequences of the unlawful act and restore the state that would presumably have existed if the act had not been committed. Restitution in kind, or, if it is not possible, payment of an amount corresponding to the value of restitution in kind; allowance, if any, for damages for losses suffered which are not covered by the refund in kind or the payment which takes the place of it"<sup>9</sup>.

8. For its part, the African Commission recognized the importance of restitution, and has held that a State in violation of the rights set forth in the African Charter must "take measures to ensure that victims of human rights abuses are given effective remedies, including restitution and compensation"<sup>10</sup>. A restitution order should specify precisely which rights of the victim should be restored so as to indicate to the State the best way to correct the violation and put the victim in the situation prior to the commission of the violation, as far as possible

9. In its basic principles and guidelines, the United Nations refers to a variety of violations that require specific forms of restitution, including restoration of the right to a fair trial, restoration of freedom, restoration of citizenship and return to one's place of residence, etc.

10. In the event that the violations found by the Court do not require a full restitution measure, such as release or re-opening of proceedings, it goes without saying that

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<sup>7</sup> CPJI, 13 September 1928, *Matter of the Factory at Charzów (Claim for Indemnity)*, Série A – No. 77.

<sup>8</sup> CEDH, *Papamichalopoulos and Others v. Greece*, Application No. 14556/89, Judgment of 31 October 1995, para 34.

<sup>9</sup> Page 47

<sup>10</sup> African Commission: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE), Sudan, Operative Part (para. 229(4))*

the appropriate compensation is pecuniary compensation; and this is the solution chosen by the Court in the instant case.

11. Article 27(1) of the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") states that: "*If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation*". It is clear from that article that the Court has full discretion to determine measures of reparation such that can "*remedy the situation*".

12. Compared with similar Articles of the European Convention (Article 41) and the Inter-American Convention (Article 63 § 1), the afore-cited Article 27 of the Protocol is rather generous and is very similar to Article 61 of the Inter-American Convention<sup>11</sup>. As we indicated earlier, Article 41 of the European Convention does not confer on the European Court of Human Rights the possibility of pronouncing "just satisfaction" save where "the domestic law allows for the erasure of the consequences of a violation and, even in such a case, only " if it is necessary " to do so. In other words, the award of just satisfaction does not flow automatically from the finding by the European Court of Human Rights that there has been a violation of a right guaranteed by the European Convention on Human Rights. For this reason, the European Court very rarely pronounced an Applicant's release. In contrast, Article 63(1) of the Inter-American Convention is quite liberal in as much as it states that: "*When it recognizes that a right or freedom protected by this Convention has been violated, the Court shall order that the party injured be granted the enjoyment of the rights or freedoms infringed. It will also order, where appropriate, the reparation of the consequences of the measure or the situation which gave rise to the violation of the said rights and the payment of fair compensation to the injured party.*"

13. Even if the Protocol does not speak, like the Inter-American Convention, of the possibility for the Court "*to order that the injured party be guaranteed the enjoyment of the right or freedom violated*", Article 27 speaks of "*appropriate measures to remedy the violation*", which amounts to the same thing.

14. It is generally accepted in doctrine<sup>12</sup> and in jurisprudence that release or re-opening of proceedings is necessary only where the Court is of the view that there is no proportionality between the full reparation sought and the violation found, especially if it concerns only one aspect of the right to a fair trial which could not, in

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<sup>11</sup> See in this sense TIGOUJDA (Helen). "The Reparation of Human Rights Violations: the Practice of Regional and Universal Bodies". Audiovisual Library of International Law, [http://legal.un.org/avl/ls/Tigroudja\\_HR.html#](http://legal.un.org/avl/ls/Tigroudja_HR.html#)

<sup>12</sup> SHELTON (Dinah), *Remedies in International Human Rights law*, Oxford University Press, 2nd edition, 2009.

view of the elements on file, vitiate the whole of the trial at its various stages. But in the event of a series of substantial violations, the condition of "*exceptional or compelling circumstances*" is met and the full restitution order should be made in the form of an order for release or resumption of the trial in accordance with the norms and international standards of fair trial.

15. The violation of the Applicant's right to legal aid, in addition to not fundamentally vitiating the outcome of the trial, is not, in my opinion, an "*exceptional or compelling circumstance*" which could have led to the Court to order restitution such as release of the Applicant or resumption of the trial.

16. In my opinion, there are "*exceptional or compelling circumstances*" if, and only if, the violation affects a fundamental human right or if there is a cascade of violations, which would have had irreparable consequences which would have substantially vitiated the outcome of the trial. In the remedies ordered by the Court, there must always be proportionality between the seriousness of the human rights abuses, the nature, the magnitude and scope of the remedies. The Court took the welcome initiative in the present judgment to offer some examples of "*exceptional or compelling circumstances*". For the Court, and I fully agree, "*this would be the case, for example, if the applicant sufficiently demonstrates or the Court itself establishes, from these circumstances that the arrest or conviction of the applicant is based fully on arbitrary considerations and that his continued imprisonment would result in a denial of justice*" (§ 82).

17. In my opinion, the crucial criterion for determining the nature and magnitude of reparation measures is the proportionality between the violations found, and the remedy or measures determined. The more serious the violations, or more numerous the violations, the more the reparation must come closer to full restitution such as an order for release or the reopening of proceedings, etc.

18. In 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 offense, as estimated by the Court.

19. For all these reasons, I was in agreement with certain nuances in the solution advocated by this Judgment. I remain convinced that the Court, by virtue of Article 27(1) of the Protocol, has the full latitude to determine the nature of "*appropriate measures capable of remedying the situation*".

Done at Arusha, this Twenty-First Day of the Month of September 2018.



**Judge Rafâa Ben Achour**

A handwritten signature in blue ink, appearing to read "Rafâa Ben Achour", written over a horizontal line.