

Judge Rafaâ Ben Achour

Partial dissenting opinion

1. The case of *Kennedy Owino Onyachi and Charles Jahm Mwanini Njoka v. the United Republic of Tanzania*, decided by judgment on the merits of 28 September 2017 on jurisdiction, admissibility and merits, is back to the Court, on the issue of reparations, almost six years after it was listed.
2. Indeed, in the above-mentioned judgment the Court had decided to deal with the issue of reparations in a separate judgment, in accordance with its Rules of Procedure (Article 63 of the Rules of 2010¹ and Rules 69 (3) the Rules of 2020²). Indeed, in paragraph 165 of the judgment on the merits, the Court states
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.
3. In point (viii) of the operative part, the Court:
Grants, in accordance with Rule 63 of the Rules of Court, the Applicants to file submissions on the request for reparations within thirty (30) days hereof, and the Respondent to reply thereto within thirty (30) days of the receipt of the Applicant's submissions.
4. Thus, it took the Court practically four years to rule on the requests for reparation, which is excessive and exceeds all reasonable limits.
5. The reasons for the delayed judgment on reparations seem to be the Court's lenient attitude vis-à-vis the Respondent State whereby the latter was granted several extensions of time to file its observations. Indeed, the Registry sent several pressing reminders to the Respondent State to this effect, (7 January 2019; 19 September 2019 and 25 March 2020). This notwithstanding, the Respondent State did not submit its observation on the Applicants' requests.

¹ The Court shall rule on the request for reparation, submitted in accordance with Rule 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' rights or, if the circumstances so require, by a separate decision.

² The Court shall rule on the request for reparation, submitted in accordance with Rule 40(4) of these Rules, by the same decision establishing the violation of a human and/or peoples' right or, if the circumstances so require, by a separate decision.

6. In the instant judgment, the Court dismisses all of the Applicants' requests for reparation for material harm, on the grounds that the Applicants did not produce sufficient evidence in support of their requests.
7. In its judgment the Court either (i) simply ignored some of the evidence submitted by the Applicants or (ii) considered that the said evidence was not submitted at all. I express this dissenting opinion for both of these reasons.

I. Dismissal of affidavits

8. In paragraphs 30 and 31 of the judgment, the Court states:

30. The Court recalls that in order for a claim for material prejudice to be granted, an applicant must show a causal link between the established violation and the loss suffered, and further prove the loss suffered. 7 In the instant case, the Court notes that the Applicants have not established the link between the violations established and the material loss which they claim to have suffered. Furthermore, though they filed affidavits, they did not provide documentary evidence such as business licences, registration with Revenue Authorities, etc. proving the existence of businesses that they alleged to have had before their arrest and conviction.

31. The Court, therefore, dismisses the Applicants' prayers for pecuniary damages for the material prejudice that they allege to have suffered as a result of their conviction and imprisonment.

9. In paragraph 30, the Court admits that the Applicants filed affidavits stating that they lost their businesses as a result of having been imprisoned and that before their arrest they were running registered companies.
10. The Court's attitude of rejecting affidavits is, in my opinion, questionable. In my opinion, the African human rights court should at the very least have examined the probative value of such statements and ensured their veracity, and not treated them as if they were of no value.
11. An affidavit³ is defined as an affirmation, communication or proclamation made by "the person concerned or a witness before the competent domestic

³ "The "Affidavit" is a statement or declaration, made by an individual, which has been reduced to writing and acknowledged by him before a Notary Public or other public official authorized by the State or federal laws of the

authority (bailiff, notary, sworn person, etc.) concerning certain facts or the authenticity of certain documents on which the claim is based"⁴. While it does not constitute authentic evidence, an affidavit can be dismissed only based either on evidence to the contrary provided by the other party to the proceedings, or on contradictory elements that from the docket that disprove the truthfulness of the statement. For example, in the *Amabile* case, which was the subject of the arbitration award of June 25, 1952, the Italian-American Conciliation Commission recognized the admissibility of affidavits in international arbitration proceedings as a custom in international arbitration law (see Appendix).

12. Thus, the Court could have relied on the affidavit to admit that the Applicants were running companies, so that the period spent in detention caused them material harm, i.e., the loss of their life project.

II. Dismissal of the requests for reparations for lack of evidence

13. With regard to the material reparations requested by the Applicants for indirect victims, the Court showed the same attitude by dismissing them on the grounds that when asked produce evidence, the Applicants failed to do so, stating that it was materially impossible to produce evidence owing to Covid 19 pandemic constraints. In this regard, the Court notes in paragraph 36 of the judgment:

[t]o claim reparations for material prejudice, indirect victims have to submit evidence of filiation with an applicant and proof of the 11 alleged prejudice. In the instant Application, the Applicants neither filed evidence of filiation with the aforementioned indirect victims nor adduced any other proof such as medical bills or receipts of payments for transportation, food and legal assistance, to substantiate the claims that the indirect victims indeed sustained material prejudice.⁹ The Applicants also did not demonstrate the existence of a causal link between the established human rights violations and the material prejudice allegedly suffered by the indirect victims.

United States of America to administer an oath and to take an acknowledgment. An "Affidavit" should show the purpose for which it was made and must state the place where and the public official before whom the acknowledgment was taken". Italian-United States Conciliation Commission, *Amabile Case*—Decision N°. 11 25 June 1952, *Reports of international arbitral awards*, Volume XIV pp. 115-132/

⁴ Jean Salmon (Sous la Direction de). Dictionnaire de droit international public, Bruxelles/Paris, Bruylant/AUF, 2001, p : 47.

14. While it is established in doctrine and international jurisprudence that reparation for material harm must be based on certain factual elements, the Court could have accepted the explanations offered by the Applicants and considered that the Covid 19 pandemic circumstances constituted a case of force majeure and thus showed a certain understanding of the situation and even a degree of flexibility towards the Applicants.
15. It should be noted that this case dragged on for more than three years after the judgment on the merits was handed down. As mentioned above, while the Court sent reminders to the Respondent State on three occasions, it did nothing of the sort for the Applicants, which constitutes discriminatory treatment.
16. The Court being responsible for the protection of human and peoples' rights on the African continent, it was expected of it to ask the Applicants to produce evidence of the Applicants' relationship with the indirect victims. By failing to do so and by dismissing the Applicants' request, the Court failed in its mission.
17. In my opinion, the criticisms against the Court regarding the indirect victims are equally valid with regard to the denial of attorney's fees both in the first instance and before the Tanzanian High Court. The Court states in the paragraph of the judgment that:

In the instant Application, the Court recalls its finding in the Judgment on merits that the Applicants were represented by lawyers both at the Resident Magistrate`s Court and the High Court.¹³ The violation of the right to legal assistance was established only in relation to the Applicants' lack of representation at the Court of Appeal.¹⁴ However, the Applicants have not adduced any evidence, such as retainer agreements with their counsel or receipts of payment of legal fees or bank transfers to substantiate their claims.

18. In my view, the Court should have made diligent efforts to request supporting documentation for such expenses from the Applicants. Having failed to do so, and having dismissed the request for reimbursement, it also failed in its mission to protect human rights.
19. Finally, the Court took the same approach with regard to evidence of the marital or family relationship with the members of the Applicants' families.

This attitude is also open to criticism for the same reasons enumerated above. In paragraph 59 the Court states that:

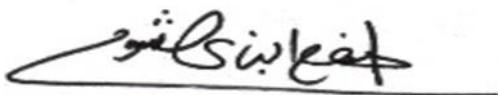
In the instant case, the Applicants have not supplied the Court with any evidence demonstrating their marital or consanguineal relationship with those individuals that they identified by name. The Court emphasises in this regard that it is not sufficient to list the alleged indirect victims for it to award reparations. Apart from this, the Applicants should have provided proof of filiation including birth certificates, marriage certificate or any other document attesting to their relationship with the indirect victims.

20. In conclusion, the Court should pay more attention to the situation of the victims with regard to their claims and, above all, to the system of proof of the damage suffered, when dealing with reparation for material harm resulting from violations of rights guaranteed by the Charter or any other relevant human rights instrument.
21. In this judgment, the Court has tempered all the dismissals of claims for reparations mentioned in this opinion. Indeed, the Court found that the human rights violations found in its judgment on the merits were so significant and fundamental that it decided to order the release of the Applicants, much to the credit of the African Court on Human and Peoples' Rights, which no longer hesitates to order release whenever there is a litany of serious and significant violations. In paragraph 65, the Court states that

The records before the Court also indicate that the Applicants are still in jail and that, having been in prison for the last eighteen (18) years, they have served almost two-thirds of their thirty (30) year sentence.²⁰ Taking these factors into account and the specific circumstances of the case, including the nature of the established violations and the fact that the Applicants are imprisoned in a foreign country far from their homes and families, the Court finds that there are compelling reasons to order the Respondent State to ensure their release.

Done in Tunis, this Eighteenth Day of October in the year Two Thousand and Twenty-One, in the English and French languages, the French text being authentic.

Judge Rafaâ Ben Achour



ANNEXE

Amabile Case (Extraits)⁵

The "*Affidavit*" is a statement or declaration, made by an individual, which has been reduced to writing and acknowledged by him before a Notary Public or other public official authorized by the State or federal laws of the United States of America to administer an oath and to take an acknowledgment. An "*Affidavit*" should show the purpose for which it was made and must state the place where and the public official before whom the acknowledgment was taken. The *Atto di Notorietà* (translated literally as "Act of Notoriety") is a written certification, prepared by a Notary Public or other public official authorized by the laws of the Italian Republic to administer an oath and to execute such a certificate, of the statements or declarations made under oath and in his presence by the four persons named therein. To execute an *Atto di Notorietà*, four persons must appear before the Notary or other public official, assert that they are each qualified to act as a witness, and that they are not otherwise interested in the subject-matter; and thereafter while under oath, separately and in the presence of each other, and before said Notary or other public official, assert that it is public knowledge and notorious, as well as to the personal knowledge of each of them, that certain facts are true, which statements or declarations are then reduced to writing by the public official before whom they were made, and attested to by each of the four witnesses and by the public official. A "Signed Statement", as this term is used in this decision, consists simply of a written instrument which an individual has declared to be his own by affixing his signature thereto in the customary manner. A "Signed Statement" is not made under the legal or moral bonds of an oath administered by any qualified public official. It is pertinent here for the Commission to comment on the many similarities which exist between the form and use of the Affidavit in the legal practice of the United States of America and in the form and use of the *Atto di Notorietà* in the legal practice of Italy. Both an Affidavit and an *Atto di Notorietà* are in the form of an ex parte statement or declaration and, while each is used extensively in the administrative proceedings of the respective countries, neither can be used ordinarily as evidence to establish an allegation of a material fact in a controverted legal proceeding before a domestic court of law either in the United States of America or Italy. It is not disputed that a Notary or other public official only verifies as true that which has actually occurred in his presence, and does not verify that the statements made by the dependents under oath in the Affidavit or in the *Atto di Notorietà* are in fact true. Moreover, the opportunity to challenge the statements of the dependents in an Affidavit or in an *Atto di Notorietà* does not exist at the time such statements are made. The Commission has noted particularly that the Federal laws of the United States of America provide for the criminal punishment of every person wilfully and corruptly committing perjury in an Affidavit by taking a false oath before a duly qualified and commissioned Consular Officer of the United States of America (22 U.S.C.A., Sec. 1203) and of every person knowingly and wilfully swearing or affirming falsely in any proceeding pending before an international tribunal or commission established pursuant to any agreement between the United States of America and any foreign government (22 U.S.C.A., sec. 270); similarly, the laws of the Republic of Italy provide for

⁵ *REPORTS OF INTERNATIONAL ARBITRAL AWARDS ; RECUEIL DES SENTENCES ARBITRALES* ;; Decision No. 11, 25 June 1952, VOLUME XIV, pp. 124-128.

criminal punishment for perjury committed by a private person in a public document, for perjury in a private document, or for the use of a false document (Italian Penal Code, Articles 483, 485 and 489). Obviously, under paragraph 3 of Article 83 of the Treaty of Peace with Italy, *supra*, the Commission is empowered to determine its own procedure and rules of evidence. It has not been the purpose of this Commission to promulgate any new principles or rules of evidence nor to derogate from those principles and rules of evidence generally recognized and accepted in international law. The Commission has noted that the arguments of the Agents of the two Governments on the admissibility of certain evidence reflect in a large measure the fundamental differences in the domestic legal systems and customs of the two Countries. It is an essential fact to be remembered, however, that the Conciliation Commission is an international arbitral body, charged with the duty of performing those functions attributed to it by the Treaty of Peace with Italy and the Agreements supplemental thereto and interpretative thereof. Unlike a domestic court of law, the Commission is not obliged to exclude all evidence which does not meet the criterion recognized by the legal system under which a domestic court of law functions; on the contrary, the Commission has been empowered by the Treaty of Peace to employ the widest possible latitude in receiving and evaluating evidence in its search for the truth; and, in adopting such a criterion, the Commission is only conforming to the customary practice followed in international arbitral claims procedures. No reference in the Treaty of Peace with Italy, or in the Agreements supplemental thereto or interpretative thereof, precludes acceptance by this Commission of *ex parte* testimonial instruments as evidence to document a claim. The Rules of Procedure of the Conciliation Commission not only do not preclude the use of such forms of documentary evidence, but recognize the fact that such documentary evidence will be used. International Claims Commissions have customarily adopted a liberal attitude regarding the form, submission and admissibility of evidence (unless restricted by the arbitral agreements). This Commission knows of no rule of international law which would preclude the claimant's use of Affidavits, *Atti di Notorieta*, signed statements and similar *ex parte* testimonial instruments as documentary evidence, under the applicable agreements between the United States of America and Italy; and none has been cited. It is general knowledge that non-sequestered personal property in Italy belonging to many United Nations nationals was lost or damaged as a result of the war. To accept the contention of the Agent of the Italian Republic in this case would be equivalent to denying to numerous nationals of the United States of America who sustained loss of or damage to non-sequestered personal property in Italy their rights under Article 78 of the Treaty of Peace. Therefore, in order to give effect to Article 78 of the Treaty of Peace, and more particularly to paragraph 4 (a) thereof, the Commission concludes that Affidavits, *Atti di Notorieta*, signed statements and similar *ex parte* testimonial instruments are forms of evidence which may be submitted to the Conciliation Commission to establish the elements of a claim for loss of or damage to personal property in Italy which was not sequestered by the Italian Government, when other forms of evidence are not available. Prompted by the necessity of considering the best available evidence, other international tribunals and commissions have refused to exclude *ex parte* testimonial instruments submitted in support of international claims. The admissibility of such evidence is sometimes specifically provided in the Convention establishing the tribunal or in the Rules of Procedure governing the tribunal or commission. (See *Article VI, Agreement of August 10, 1922 between the United States of America and Germany*, pp. 1-2, *First and Second Report of Robert C. Morris, Agent of the United States before the German-United States Mixed Claims Commission, Washington, 1923*; and *Article 27, Rules of Procedure of the Italian-Mexican Claims Commission adopted December 8, 1930 under the Convention between Italy and Mexico, signed at Mexico City on January 13, 1927*, p. 516, A.

H. Feller, The Mexican Claims Commission, New York, 1935.) When the Convention or Rules of Procedure are silent, the international tribunal or commission itself must decide the question of the admissibility of ex parte testimonial instruments when this question is presented to it. The practice of admitting Affidavits as evidence, in the absence of any provision relating thereto in the arbitral Convention or in the Rules of Procedure, is widely recognized by international legal authorities. In the book, *L'Organisation Judiciaire, La Procedure, et La Sentence Internationales*, Paris, 1937, p. 255, the French Jurist, J. G. Witenberg, says: D'origine anglo-saxonne, l'affidavit s'est introduit très tôt dans la procédure arbitrale internationale. Et, malgré les contestations dont il a fait l'objet, son admissibilité a fini par y être définitivement admise. On peut, actuellement, considérer cette admissibilité comme étant de coutume en droit international arbitral. (Footnotes omitted.) {Translation: "The affidavit, which is of Anglo-Saxon origin, was introduced very early in international arbitral procedure, And, notwithstanding the objections which have been raised against it, its admissibility has finally been completely admitted. This admissibility can now be considered as customary in international arbitral law." (Footnotes omitted.)) Also in the book, *Evidence before International Tribunals*, Chicago, 1939, p. 180, Mr. Durward V. Sandifer states that: "International" Tribunals have uniformly declined to accept the validity of arguments against the admission of affidavits. It seems doubtful whether a tribunal would today refuse to receive affidavits for appropriate consideration unless bound to do so by a provision in the arbitral agreement. . . . The Commission has observed, supra, the many similarities between the Affidavit and the Atto di Notorietà and has noted that questions regarding the admissibility of such ex parte testimonial instruments which have arisen before other international tribunals or commissions have involved particularly Affidavits. Applying the same criterion which permits the use of Affidavits in international arbitral claims proceedings, the Commission finds that there is no logical basis or legal principle in international law which would preclude the use of an Atto di Notorietà as documentary evidence to establish elements of a claim presented under Article 78 of the Treaty of Peace. Therefore, based upon the Treaty of Peace, and the Agreements supplemental thereto and interpretative thereof, and supported by logic and authority, the Commission accepts in evidence the Affidavits, the Atto di Notorietà and the signed statements of witnesses, all of which were submitted in this case as documentary evidence in support of the claimant's sworn Statement of Claim. The Commission has stated, supra, the reason for its acceptance in evidence of the claimant's letter of September 4, 1951, which was attached to Annex A to the Brief of the Agent of the United States of America. Although the Commission holds that it is entitled to receive in evidence and to consider Affidavits, Atti di Notorietà and signed statements when submitted in evidence, it must be emphasized and made very clear that the Commission has not thereby established the probative value which it will give to such ex parte testimonial instruments. The question of the evidentiary weight which the Commission will give to such documentary evidence is a separate matter which must be determined in the light of all the circumstances surrounding a particular case; this question will be considered later in this Decision. It is the contention of the United States of America that the submission of a claim based only on ex parte testimonial instruments creates certain responsibilities on- the Italian Republic under the Agreements between the two Governments. Preliminary to a consideration of any aspect of this subject, it should be observed that, under Article 78 of the Treaty of Peace, there is no presumption in favour of either the claimant or the Government of the Italian Republic. The claimant must submit sufficient documentary evidence in support of his claim to establish the basis of his rights to assert a claim. It is obvious that the nature of the property and the circumstances surrounding the loss or damage will be determinative in most instances of the type and quantity of evidence which the claimant can

furnish to document his claim but, even where the nature of the property and the circumstances surrounding a particular claim have placed a severe limitation on the claimant's means of proof, the claimant is not relieved of the obligation to submit the best available evidence in support of his claim and to make a full and complete disclosure of all the pertinent facts ; where this has not been done, the Commission will be justified in drawing reasonable inferences from the non-production of evidence which it would appear could have been furnished by the claimant, or from the lack of a satisfactory explanation of the claimant's failure to provide such evidence.