Richard v Tanzania (judgment) (2021) 5 AfCLR 822

Application 035/2016, *Robert Richard v United Republic of Tanzania*

Judgment, 2 December 2021. Done in English and French, the English text being authoritative.

Judges: TCHIKAYA, KIOKO, BEN ACHOUR, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, ANUKAM, NTSEBEZA and SACKO

Recused under Article 22: ABOUD

The Applicant was tried, convicted, and sentenced to life imprisonment by a domestic court of the Respondent State for an offence against a minor. In his Application before the Court, he claimed that the domestic legal processes and outcomes, especially his appeal which was pending at the time of filing the Application, were in violation of his right to be tried within a reasonable time. After he filed the Application, the High Court of the Respondent State quashed Applicant's conviction and ordered his release. The Respondent State did not participate in these proceedings before the Court. The Court held that the Respondent State had violated the Applicant's right to be tried within a reasonable time.

Procedure (criteria for decision in default, 14-18)

Jurisdiction (personal jurisdiction, 21-22)

Admissibility (exhaustion of local remedies, 36-38)

Fair trial (right to be tried within a reasonable time, 46-50)

Reparations (state responsibility to make reparation, 53; moral prejudice, 55-56; non-pecuniary reparations, 59-60)

Dissenting opinion: TCHIKAYA

Reparations (scope and purpose of reparations, 13-16, 18-21)

I. The Parties

1. Robert Richard (hereinafter referred to as "the Applicant"), is a national of Tanzania, who at the time of filing the Application, was imprisoned at Ukonga Central Prison having been convicted of sodomy and sentenced to life imprisonment. He alleges the violation of his right to be tried within a reasonable time.

2. The Application is filed against the United Republic of Tanzania (hereinafter referred to as "the Respondent State"), which became a Party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol on 10 February 2006. Furthermore, the Respondent State, on 29 March 2010, deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter

referred to as "the Declaration"), through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations. On 21 November 2019, the Respondent State deposited an instrument withdrawing its Declaration with the Chairperson of the African Union Commission. The Court held that this withdrawal did not have any effect on pending cases as well as new cases filed before 22 November 2020, which is the day on which the withdrawal took effect, being a period one (1) year after its deposit. [1]

II. Subject matter of the Application

A. Facts of the matter

3. It emerges from the record that the Applicant was charged on 22 August 2004 with sodomizing a child who was one (1) year and five (5) months old. He was convicted and sentenced to the statutory penalty of life imprisonment.

4. The Applicant alleges that he appealed against his conviction and sentence at the High Court of Tanzania at Dar es Salaam in Criminal Appeal No. 84 of 2008. He contends that the hearing of his appeal began on 15 April 2009 but was pending at the time of filing of the Application on 8 June 2016.

5. On 26 September 2018, the High Court of Tanzania sitting in Dar es Salaam, delivered its judgment in Criminal Appeal No. 84 of 2008, *Robert Richard v the Republic* in which the judge allowed the appeal, quashed the conviction, "set aside the sentence of life imprisonment" meted out to the Applicant and ordered his release.

B. Alleged violations

6. The Applicant alleges the violation of his right to be tried within a reasonable time as guaranteed under Article 7(1)(d) of the Charter.

III. Summary of the Procedure before the Court

7. The Application was filed on 8 June 2016 and served on the Respondent State on 7 September 2016.

1 *Andrew Ambrose Cheusi v United Republic of Tanzania,* ACHPR, Application No. 004/2015, Judgment of 26 June 2020 § 38.

8. On 1 September 2017, the Respondent State transmitted its list of representatives, but failed to file its Response despite the fact that it was sent reminders in that regard, on 24 January 2017, 7 December 2017, 6 August 2018, 25 September 2018, 26 November 2018, 20 February 2019 and 9 July 2020. In addition, the Respondent State was informed on 25 September 2018 and 20 March 2019 that if it failed to file a Response within the stipulated time, the Court would proceed to deliver judgment in default.

9. On 6 August 2018, the Court requested the Applicant to file submissions on reparations but the Applicant failed to do so, despite having being sent reminders on 26 November 2018, 29 January 2019, 19 February 2019 and 30 July 2020.

10. The pleadings were closed on 6 May 2021 and the parties were duly notified.

IV. Prayers of the Parties

11. The Applicant prays the Court to find in his favour and grant the appropriate relief.

12. The Respondent State did not participate in these proceedings and therefore did not make any prayers.

V. On the default of the Respondent State

13. Rule 63(1) of the Rules of Court provides that:

> 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 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.

14. The Court notes that the afore-mentioned Rule 63(1) of the Rules sets out three conditions, namely: i) the notification to the Respondent State of both the application and the documents on file; ii) the default of the Respondent State; and iii) application by the other party or the Court on its own motion.

15. With regards to the first condition, namely, the notification of the Respondent State, the Court recalls that the Application was filed on 8 June 2016. The Court further notes that from 7 September 2016, the date of service of the Application on the Respondent State, to the date of the close of pleadings, the Registry notified the Respondent State of all the pleadings submitted by the Applicant. In this regard, the Court also notes from the record, the

proof of delivery of those notifications. The Court concludes thus that the Respondent State was duly notified.

16. In respect of the second condition, the Court notes that, in the notice of service of the Application, the Respondent State, was granted sixty (60) days to file its Response. However, it failed to do so within the time allocated. The Court further sent seven (7) reminders to the Respondent State on the following dates: 24 January 2017, 7 December 2017, 6 August 2018, 25 September 2018, 26 November 2018, 20 February 2019 and 9 July 2020. Notwithstanding these reminders, the Respondent State did not file its Response. The Court thus finds that the Respondent State has failed to defend its case within the prescribed time.

17. Finally, on the third condition, the Court notes that it can render judgment in default either *suo motu* or on request of the other party. The Applicant having not requested for a default judgment, the Court decides *suo motu*, for the proper administration of justice to render the judgment by default**.**

18. The required conditions having thus been fulfilled, the Court enters this judgment by default.[2]

VI. Jurisdiction

19. Article 3 of the Protocol provides as follows:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

20. In accordance with Rule 49(1) of the Rules "[t]he Court shall conduct preliminary examination of its jurisdiction ... in accordance with the Charter, the Protocol and these Rules".

21. The Court notes that, even though nothing on the record indicates that it lacks jurisdiction, it is obligated to determine if it has jurisdiction to consider the Application. In this regard, the Court notes, as earlier stated in this judgment, that, the Respondent State is a party to the Protocol**,** and that, on 29 March 2010, it deposited the Declaration with the African Union Commission. However, on 21 November 2019, it deposited an instrument withdrawing its Declaration.

2 *African Commission on Human and Peoples' Rights v Libya* (merits) (2016) 1 AfCLR 153 §§ 38-42.

22. In accordance with the Court's jurisprudence, the withdrawal of the Declaration does not apply retroactively. It only takes effect twelve (12) months after the notice of such withdrawal has been deposited. In this case, the effective date was 22 November 2020.[3]

23. In view of the above, the Court holds that it has personal jurisdiction.

24. As regards its material jurisdiction, the Court notes that the Applicant alleges violation of Article 7(1)(d) of the Charter to which the Respondent State is a party. Therefore, its material jurisdiction has been satisfied.

25. With respect to its temporal jurisdiction, the Court notes that the alleged violations occurred after the Respondent State ratified the Charter and the Protocol. Consequently, the Court holds that it has temporal jurisdiction to consider the Application.[4]

26. The Court further holds that it has territorial jurisdiction as the facts of the case occurred in the Respondent State's territory.

27. From the foregoing, the Court finds that it has jurisdiction to hear the instant case.

VII. Admissibility

28. Article 6(2) of the Protocol provides that, "the Court shall rule on the admissibility of cases taking into account the provisions of article 56 of the Charter." Pursuant to Rule 50(1) of the Rules, "[t]he Court shall ascertain the admissibility of an Application filed before it in accordance with Article 56 of the Charter, Article 6 (2) of the Protocol and these Rules."

29. Rule 50(2) of the Rules, which in substance restates the provisions of Article 56 of the Charter, provides as follows:

> Applications filed before the Court shall comply with all the following conditions:
>
> a. disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
>
> b. comply with the Constitutive Act of the Union and the Charter;
>
> c. not contain any disparaging or insulting language;
>
> d. not be based exclusively on news disseminated through the mass media;

3 *Andrew Ambrose Cheusi v Tanzania* (merits and reparations), §§ 37-39.

4 *Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (preliminary objections) (21 June 2013) 1 AfCLR 197 §§ 71 - 77.

e. be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

f. be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and

g. Not raise any matter or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

30. The Court notes that the conditions of admissibility set out in Rule 50(2) of the Rules are not in contention between the Parties, as the Respondent State did not to take part in the proceedings. However, pursuant to Rule 50(1) of the Rules, the Court is required to determine if the Application fulfils all the admissibility requirements as set out in Rule 50(2).

31. The Court notes that the Applicant has indicated his identity, and holds that the condition set out in Rule 50(2)(a) of the Rules has been met.

32. The Court notes that the claims made by the Applicant seek to protect his rights guaranteed under the Charter. It further notes that one of the objectives of the Constitutive Act of the African Union stated in Article 3(h) is the promotion and protection of human and peoples' rights. The Court therefore considers that the Application is compatible with the Constitutive Act of the African Union and the Charter, and thus holds that it meets the requirement of Rule 50(2)(b) of the Rules.

33. The Court further notes that the Application does not contain any disparaging or insulting language with regard to the Respondent State, which makes it consistent with the requirement of Rule 50(2)(c) of the Rules.

34. With respect to the requirement set out under Rule 50(2)(d) of the Rules, the Court notes that the Application is not based exclusively on news disseminated through the mass media.

35. With regard to Rule 50(2)(e) of the Rules on the exhaustion of local remedies, the Court reiterates what it has established in its case law that "the local remedies that must be exhausted by the Applicants are ordinary judicial remedies",[5] unless they are manifestly unavailable, ineffective and insufficient or the

5 *Mohamed Abubakari v Tanzania* (merits) (3 June 2016) 1 AfCLR 599 § 64. *See also Alex Thomas v Tanzania* (merits) (20 November 2015) 1 AfCLR 465 § 64; and *Wilfred Onyango Nganyi and 9 others v Tanzania* (merits) (18 March 2016) 1 AfCLR 507*, § 95.*

proceedings are unduly prolonged.[6]

36. Referring to the facts of the matter, the Court notes that the Applicant pursued local remedies by appealing against his conviction and sentence to the High Court in 2008, after which, through letters sent to the High Court Registry on 7 June 2012, 10 May 2013, 20 September 2013, 3 October 2013, 18 November 2013, 16 September 2014 and 3 August 2015, he made a follow-up on his case.

37. From the record, the Applicant received a response from the Deputy Registrar of the High Court on 12 August 2015 indicating that he "should be patient" and that the High Court would find a solution to his grievance. However, at the time of filing his Application, that is 8 June 2016, his appeal had not been determined**.** The Court notes that this is about seven (7) years later. Furthermore, the Respondent State did not take part in the proceedings before this court and consequently did not respond as to why it took so long for the Applicant's appeal to be determined, and there is nothing on record to indicate that the matter was fraught with complexity. It is evident that, the delay cannot be attributable to the Applicant since he sent seven letters of enquiry to the Respondent State regarding the delay **in** the finalisation of his appeal.

38. 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 these circumstances, the Applicant could not have exhausted local remedies and thus falls within the exception under Rule 50(2)(e) of the Rules.

39. With regard to Rule 50(2)(f) of the Rules, which in substance restates Article 56(6) of the Charter, the Court notes that the Rule only requires an application to be filed within: "a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter."

40. As the Court has established, the reasonableness of the period for seizure of the Court depends on the particular circumstances of each case and must be determined on a case-by-case basis.[7]

41. In the present Application, the Court notes that the Applicant was unable to exhaust local remedies because they were

6 *Lohé Issa Konaté v Burkina Faso* (merits) (5 December 2014) 1 AfCLR 314, § 77. *See also Peter Joseph Chacha v Tanzania* (admissibility) (28 March 2014) 1 AfCLR 398, § 40.

7 *Anudo v United Republic of Tanzania* (merits) (22 March 2018) 2 AfCLR 248 § 57.

unduly prolonged, the Court thus finds that the issue of filing the application within a reasonable time does not arise.[8]

42. Furthermore, the Application does not concern a case which has already been settled by the Parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union in fulfilment of Rule 50(2)(g) of the Rules.

43. The Court, therefore, finds that this Application is admissible.

VIII. Merits

44. The Applicant argues that his right to be tried within a reasonable time was curtailed as his appeal filed in 2008 had not been determined at the time of filing his Application. He avers that seven (7) years had lapsed without his appeal being determined. This was despite the fact that he sought for an explanation, and a resolution to the matter, by transmitting seven (7) letters of enquiry on the status of his appeal to the Deputy Registrar and the Judge of the High Court.

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45. Article 7(1)(d) of the Charter provides that everyone has "the right to be tried within a reasonable time by an impartial court or tribunal".

46. The Court notes that various factors need to be considered when assessing whether justice was dispensed within a reasonable time, in accordance with Article 7(1)(d) of the Charter. These factors include the complexity of the matter, the behaviour of the parties, and the conduct of the judicial authorities who bear a duty of due diligence.[9]

47. The Court notes that the Applicant filed his appeal in 2008. The hearing commenced on 15 April 2009 but was not finalised until 26 September 2018. This amounts to a period of almost ten (10) years**.** With respect to the complexity of the case, the Court notes that there is nothing on record to show that his case involved

8 See *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 550 § 49.

9 See *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477 §§ 122-124. See also *Alex Thomas v Tanzania* (merits) § 104; *Wilfred Onyango Nganyi and Others v Tanzania* (merits) § 155; and *Norbert Zongo and Others v Burkina Faso* (merits) (28 March 2014) 1 AfCLR 219, §§ 92-97, 152.

complex issues that require such a long time to finalise his appeal.

48. The Court also notes that nothing on the record shows that the Applicant contributed to the delay. If anything, he demonstrated due diligence by requesting a quick resolution to his case through transmitting seven (7) letters of enquiry on 7 June 2012, 10 May 2013, 20 September 2013, 3 October 2013, 18 November 2013, 16 September 2014 and 3 August 2015 to the Deputy Registrar and the High Court Judge responsible for his appeal. Thus, the delay cannot be attributed to him.

49. As to whether the delay was attributable to the Respondent State, the Court notes that since the Respondent State did not respond to the Application, there is nothing on the record to explain why it took almost ten (10) years to determine the Applicant's appeal. When the Deputy Registrar of the High Court replied to the Applicant's seventh letter of enquiry on 12 August 2015, that is, at least six (6) years after the Applicant's first letter of enquiry about the status of his appeal, he urged the Applicant to be patient and that his matter would be resolved. Thus, the period of almost ten (10) years which the High Court took to determine the appeal of the Applicant is unreasonable because of lack of due diligence on the part of the national authorities.[10]

50. The Court thus finds that the Respondent State has violated the Applicant's right to be tried within a reasonable time, contrary to Article 7(1)(d) of the Charter.

IX. Reparations

51. The Applicant prays the Court to find in his favour and grant the appropriate relief.

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52. Article 27(1) of the Protocol provides 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."

53. As it has consistently held, the Court considers that, for reparations to be granted, the Respondent State should first be intentionally

10 *Wilfred Onyango Nganyi v Tanzania* (merits)(18 March 2016) 1 AfCLR 507 155.

responsible for the wrongful act. Second, causation should be established between the wrongful act and the alleged prejudice. Furthermore, and where it is granted, reparation should cover the prejudice suffered. Finally, the Applicant bears the onus to justify the claims made.[11]

54. The Court has earlier found that the Respondent State violated the Applicant's right to be tried within a reasonable time guaranteed under Article 7(1)(d) of the Charter. Based on these findings, the Respondent State's responsibility and causation have been established. The prayers for reparation are therefore being examined against these findings.

A. Pecuniary reparations

55. The Court observes, with respect to moral prejudice, that quantum assessment must be undertaken in fairness, and by looking at the circumstances of the case.[12]

56. The Court notes its finding that the Applicant's right to be tried within a reasonable time was violated, and observes 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 Tanzanian Shillings Five Million (TZS 5,000,000).

B. Non- Pecuniary reparations

57. The Court notes that the Applicant requested for a decision in his favour and requested to be granted appropriate relief. The Court further notes that, in accordance with Article 27(1) of the Protocol, it has the power to order appropriate measures to remedy situations of human rights violations, including ordering the Respondent State to take the necessary measures to vacate the Applicant's conviction and sentence as well as to release him.[13]

58. In the instant case, the Court has found that the Respondent State violated the Applicant's right to be tried within a reasonable

11 See *Armand Guehi v Tanzania* (merits and reparations) § 157. See also, *Norbert Zongo and Others v Burkina Faso* ((reparations) (5 June 2015) 1 AfCLR 258 §§ 20-31; *Lohé Issa Konaté v Burkina Faso* (reparations) (3 June 2016) 1 AfCLR 346, §§ 52-59; and *Reverend Christopher R. Mtikila v Tanzania* (reparations), §§ 27-29.

12 See *Norbert Zongo and Others v Burkina Faso* (reparations) § 61. *Armand Guehi v Tanzania* (merits and reparations) § 177.

13 *Alex Thomas v Tanzania* (merits) § 157; *Diocles William v Tanzania* (merits) (21 September 2018) 2 AfCLR 426 § 101; *Minani Evarist v Tanzania* (merits) (21 September 2018) 2 AfCLR 402 § 82; *Jibu Amir Mussa and Saidi Ally alias*

time as the High Court did not deliver judgment on his appeal until 26 September 2018. The Court notes however, that by the judgment of 26 September 2018, the High Court, allowed his appeal, quashed his conviction, and ordered his release.

59. Nevertheless, the Court observes that given the extent of the time which the Applicant waited for his exoneration, a duration of almost ten (10) years, it is appropriate for the Respondent State to publish this judgment.

60. In the circumstances, therefore, the Court orders the Respondent State to publish this Judgment within a period of three (3) months from the date of notification, on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

X. Costs

61. The Applicant did not make any submissions on costs.

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62. The Court notes that Rule 32(2) of its Rules provides that "unless otherwise decided by the Court, each party shall bear its own costs."

63. Thus, the Court decides that each Party shall bear its own costs.

XI. Operative part

64. For these reasons,

The Court,

Unanimously and in default:

On jurisdiction

i. *Declares* that it has jurisdiction.

On admissibility

ii. *Declares* that the Application is admissible.

Mangaya v United Republic of Tanzania, ACtHPR, Application No. 014/2015, Judgment of 28 November 2019 (merits) § 96; *Mgosi Mwita Makungu v United Republic of Tanzania* (merits) (7 December 2018) 2 AfCLR 570 § 84.

On merits

iii. *Finds* that the Respondent State violated the right of the Applicant to be tried within a reasonable time protected under Article 7(1)(d) of the Charter.

By a majority of Ten (10) for and One (1) against, Justice Blaise TCHIKAYA dissenting,

On reparations

Pecuniary reparations

iv. *Grants* Tanzanian Shillings Five Million (TZS 5,000,000) as reparations for moral prejudice in relation to the inordinate delay of the Applicant's appeal.

v. *Orders* the Respondent State to pay the amount indicated under sub-paragraphs (iv) free from taxes within six (6) months, effective from the notification of this Judgment, failing which it will pay interest on arrears calculated on the basis of the applicable rate of the Bank of Tanzania throughout the period of delayed payment and until the accrued amount is fully paid.

Non-pecuniary reparations

vi. *Orders* the Respondent State to publish this Judgment on the websites of the Judiciary and the Ministry for Constitutional and Legal Affairs within a period of three (3) months from the date of notification, and to ensure that the text of the Judgment remains accessible for at least one (1) year after the date of publication.

On implementation and reporting

vii. *Orders* the Respondent State to submit to it within six (6) months from the date of notification of this judgment, a report on the status of implementation of the decision set forth herein and thereafter, every six (6) months until the Court considers that there has been full implementation thereof.

On costs

viii. *Orders* each party to bear its own costs.

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Dissenting Opinion: Tchikaya

1. I do not fully share the opinion of my dear and honourable colleagues concerning compensation for damages in the Richard Robert case, the subject of the Judgment of 2 December 2021. I endorse the Judgment as a whole but I would like to distance myself from its operative part which, in an iterative and indistinct manner, awards sums of money as a form of compensation for the breach of due process. Also, the wrongfulness 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 Judgment 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).

I. Richard Robert, a Judgment consistent with its jurisprudence

5. In terms of structure, the Richard Robert Judgment 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. Therefore it was settled fairly quickly when

the Court held that the Judgment 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".

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. 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. 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.

B. The imputation 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 . It is addressed by the Court and captured in paragraph 46 of its Judgment. 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" . 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 to 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 Judgment 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 . 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.

II. Richard Robert, the reparations problem

13. Given its complexity, the issue requires thorough examination since international courts must apply known provisions of international law 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 judgments on reparations and on the merits. In the Judgment on reparations of 5 June 2015, in the *Beneficiaries of the late Norbert - Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v Republic of Burkina Faso*, the Court unanimously found that "that the Judgment 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 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* Judgment 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." . 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), Judgment of 7 December 2018 seems to have paved the way for this form of reparations by the Court. In paragraph 205 of the Judgment, 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 , 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*, Judgment 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" . 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.

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" .

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 . 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 . 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. Such an approach, once supported by international law , 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 Judgment, 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 . The same approach was adopted in *Majid Goa alias Vedastus v Tanzania* , Judgment 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 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 .

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 .

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 . 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).

III. 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 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 .

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 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)