AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Dissenting Opinion of Judge Blaise Tchikaya
in the Case of
Samia Zorgati v. Tunisia
(Application No. 016/2021)
13 November 2024

1. I was unable to share the majority position in the *Samia Zorgati case*. In my view, it was not admissible. I pen this dissenting opinion with regret that I do not share the view of the majority of the Honourable Judges of the Court.

2. In 2011, *Ms Samia Zorgati*, a Tunisian national, challenged the legislative and regulatory decisions and initiatives of local authorities, including those taken by the President of the Republic. She filed an application with this Court on 26 July 2021.[1] The main issue in contention in the case concerns the question of reasonable time. In our opinion, we have an obligation to uphold legal certainty of the rights of individuals and control of the procedure, such that the Court should not have issued a decision on the merits[2] of the application on the grounds of foreclosure, for having been submitted outside reasonable time.[3]

3. This opinion addresses two aspects: firstly, we try to understand how the Court got to the point of such long time-limits for appeals before the courts.

4. The *Zorgati* case in fact reinforces the Court's *stare decisis* in this area (I.). Secondly, we postulate that there is now an urgent need to establish a prior

[1] It was served on the Respondent State on 15 October 2021.
[2] ACtHPR, *Samia Zorgati v. Tunisia,* (Application no. 016/2021), 13 November 2024.
[3] At issue are paragraphs 55 to 57 of the judgment, which states that: "From the foregoing, the Court considers that the duration of four years, one month and 24 days taken by the Applicant in the present case is reasonable within the meaning of Article 56(6) of the Charter and, therefore, holds that the Application complies with Rule 50(f) of the Rules".

framework for the time limit for referral to the Court. There is therefore a need to shorten time limits and to monitor them in order to enhance the judicial protection of human rights on the continent (II.).

I. On reasonable time, the Zorgati case contributes to a debatable *stare decisis*

5. As a result of various precedents set by this Cour, an assessment of the time-limit for referral has been established that is not only outside the usual formal channels but a;sp out of touch with reality. This assessment of time-limit no longer has any bearing on the principles that gave rise to it. The very nature of a time-limit is that it is prescriptive and restrictive.

6. In § 49 of the *Samia Zorgati* judgment, the Court reiterated the principle set out in Rule 50 of the Rules of Procedure. Applications are lodged :

> "... within 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 ".[4]

7. We will discuss the effect of the freedom these provisions on the judge and on the time limit for referral.

8. In the instant case, the Court recalled that:

> "There was no local remedy to exhaust, the Court must determine the start date for calculating the time limit for its referral.[5]

9. The fact that in the present case, as the Court states, there was no remedy to be exhausted does not change the issue raised. It has always been for the Court to determine the date on which it considers that the time-limit for

[4] This is the wording of Article 56.6 of the African Charter on Human and Peoples' Rights.
[5]ACtHPR*, Samia Zorgati, op. cit*, § 50.

bringing a case has begun to run. This has been the case since the Court adopted a liberal approach to the time-limit for referral.

10. If we take into account the findings in the case, namely that:

> "As the Application was filed with the Court on 26 July 2021, a period of four years, one month and 24 days elapsed between the date on which the Declaration was deposited and the date on which the case was filed with the Court. It is, therefore, the reasonableness or otherwise of this duration that the Court must examine".[6]

11. It seems very clear that the Court does not seem to state in its reasoning why it should allow such a time-limit, which clearly seems long. It approaches the question in two stages. First, it seems to rely on the social context of the application[7] and observes that it :

> "Raises allegations that jeopardize public order and social cohesion, which are eminently in the public interest. The Court considers that in such circumstances, the reasonable time requirement should be assessed with circumspection and applied in context".

12. In the second part, the Court focuses on the merits of the case. It ruled that :

> "Even assuming that the Applicant was aware of the filing of the Declaration on the above-mentioned date, she inevitably must have taken time not only to decide whether or not to seize this Court but could have also taken the time required to prepare her application. The process can take a considerable amount of time, which must be taken into account when determining whether or not the time limit for referral is reasonable".

[6] ACtHPR, *Case of Samia Zorgati v. Tunisia, op. cit*, § 51.

[7] Now, every complaint has a social context, because it is fundamentally a claim about interests resulting from a human relationship. It could be said that this aspect does not in itself make the complaint unique.

13. This all-encompassing and, in fact, limited argument used by the Court raises a number of questions. Firstly, it seems that the major problem posed, by the time-limit for referral remains and is far from being resolved, namely the question of time. It must be emphasised that the time taken by the applicant to lodge his or her complaint with the international judge has not been determined. The real issue, above all else, is the time elapsed before the applicant appears before the judge.

14. On this point, the Court appears to be constrained by its *stare decisis*[8] and is methodologically bound by its precedents. A number of judgments bear this out. Apart from the *Libya case in* 2011,[9] two major judgments serve this purpose. One of the first is the *Nzongo* decision,[10] which is the *stare decisis* in this area and which, in our opinion, has often been interpreted only in part. In the judgment, the Court very clearly formulated its liberal approach to the time-limit for referral, excluding any limiting *ratio temporis.* This is what can be understood from the now consecrated formula:

> "The reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis".[11]

[8] SFDI (Société Française pour le Droit International), *Le précédent en droit international*, Pédone, 2016, 497 p.

[9] ACtHPR, *ACHPR (African Commission on Human and Peoples' Rights) v. Libya*, 3 June 2016: the Court simply observed that "by failing to reply to the Application addressed to it and despite extensions of the allowed time limit, the Respondent State did not submit any observations on the question of exhaustion of local remedies and on the time line for seizure of the Court ", § 65.

[10] ACtHPR, *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) (2013)* (preliminary objections), 21 June 2013. v. § 121 : "
The Court will now consider whether or not the time limit of seizure between 20 June 2008 and 11 December 2011, that is, about three years and five months, is reasonable time. In the opinion of the Court, the reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis ". In § 122 the Court adds that: "... any circumstances unknown to the Applicants work in favour of some consideration in the assessment of the nature of reasonable time for seizure ".

[11] ACtHPR*, Beneficiaries of late Norbert Zongo abd othersv. Burkina Faso* (preliminary objections), 21 June 2013.

15. In 2020 came the *Jebra Kambolé* decision.[12] The judicial precedent set by this *Kambolé* decision is well-known. It established the principle that the applicant could not be faulted for having allowed time to elapse before seizing the Court.[13] Although the Court was seized eight years and four months after the Respondent State had deposited the Declaration, the majority of the Court considered that the referral was admissible.

16. The argument raised in the *Kambolé* case was also taken up in subsequent decisions on the same issue.[14] It is based on two ideas: the first idea is to deplore the fact that no remedy was available at the time the violations were committed, and the second idea is to say that the violations in question continued and had never ceased.[15]

17. These ideas seem specious from the outset, because normally, except in exceptional circumstances to be determined, a State is bound only from the date of its ratification or accession, in accordance with the law of treaties.[16] Even in the event of a violation, which is deemed by the Court to be continuous, a reasonable period of time is required for referral.

18. We can therefore see that there is an urgent need to establish a framework so that this aspect of the procedure before the Court is brought under control.

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[12] ACtHPR, *Lucien Ikili Rashidi v. Tanzania*, 28 March 2019; *Jebra Kambole v. Tanzania, 15 July 2020*.

[13] Paragraph 53 of the *Kambolé* decision states: "The Court notes that in this case it took the Applicant eight (8) years and four (4) months to file his case from the time when the Respondent State deposited its Declaration (...) and (...)Given this context, the Court holds that, on the facts of the present case, and within the meaning of the second limb of Rule 40(6), it could have been seized of the matter at any time for as long as the law causing the alleged violation remained in force. ". In other words, the application is admissible despite the length of time that has elapsed since the application was lodged with the Court.

[14] *Jebra Kambole v. Tanzania, 15 July 2020*; ACtHPR, see in particular ACtHPR, *Dexter Eddie Johnson v. Ghana*, 28 March 2019; see also *Alfred Agbesi Woyome v. Ghana*, 28 June 2019 (in which case the Court justified filing the application after two years, five months and seventeen days after the exhaustion of domestic remedies; the same number of years in *Wilfred Onyango Nganyi and 9 others v*. *Tanzania*, 4 July 201); *Tike Mwambipile and Equality Now v. Tanzania*, 1 December 2022.

[15] An application of the now familiar theory of continuing violations. The fact remains that this theory, even when it has to be applied, remains restricted.

16 Article 14. Expression, by ratification, acceptance or approval, of consent to be bound by a treaty, *Vienna Convention*, 23 May 1969 on the Law of Treaties.

II. The urgent need for a framework for assessing referral time-limit

19. The main issue at this stage is methodological. In my view, it is up to the Court to define the two aspects of the referral time-limit. One is known to be reasonable (the case of a referral within six months of the last national decision) and the other when the factual or legal particulars of the violation make the referral so complex that the Court must itself determine the time-limit for its referral

20. At issue, *ratione temporis*, is the jurisdiction or admissibility of a complaint submitted to the Court. In two cases overall, the acts or facts submitted to the Court took place after the date of entry into force of the Protocol. The time between the last domestic decision and the referral falls within an agreed and pre-established period in the instruments applicable by the Court; either it seems so long that the Court must discuss it, which is also what Article 56.6 of the Charter attempts to regulate;[17] or it is so short and reasonable that there is no reason to discuss it.

21. This leads to the idea that the debate on reasonable time essentially relates to cases that are subject to contention, those that exceed the agreed time-limits for referral or those usually applicable to remedies. For proper administration of justice, certain principles must apply: *the first is that of legal certainty while the second principle results from reasonably applicable standards, including the aspects taken into account by the conventionally applicable time-limit.* It is clear that the regulatory urgency in which the Court finds itself is not only well defined but also well circumscribed by a careful reading of the law.

[17] The application must be lodged" within 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 ", Article 56(6) of the Charter.

22. With regard to securing rights,[18] the Court should set itself a reference period, to be included in the Rules of Procedure, which it considers acceptable. At the European Court, this is currently set at 4 months,[19] the Inter-American Court takes account of article 46 of the Convention, which provides that:

> "the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment ".[20]

23. Thus, in this American system, a petition can only be admissible if it is filed within 6 months of the date of notification of the final judicial decision rendered after all domestic remedies have been exhausted. Where the exhaustion of domestic remedies entails special circumstances, the six-month period does not apply. In this case, the petition must be filed within a reasonable time.

24. It seems imperative for the African Court to provide for such a mechanism in order to make its judicial procedure less unpredictable. The *Zorgati* case will be another example. A time-limit for referral to the Court is a *sine qua* non condition, and is the starting point for the process of judicial protection of human rights.

25. It is true that if the Court were to find, first and foremost, that a violation was continuing, it would be justified to extend the time-limit for referral after the last domestic decision.[21] The European Court in Strasbourg has usefully

[18]Piazzon (T.), *La Sécurité juridique*, 2009, 630 p. The content to which it refers (legal certainty) as a value of the law is, on the other hand, timeless and universal. Essentially reduced to the idea of predictability, it presupposes, on the one hand, that the law is accessible to enable individuals to make predictions and, on the other hand, that the law is respectful of predictions that have already been made. However, from both points of view, our positive law contains loopholes that need to be closed" (note on the aforementioned work); Merzouk-Glon (Been E.), *La Sécurité Juridique en droit Positif: Une valeur irréductible à la norme*, Ed. Univ. Européenne, 2010, 676 p.

[19] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, revised, Article 4 states " In Article 35, paragraph 1 of the Convention, the words "within a period of six months" shall be replaced by the words "within a period of four months".

[20] American Convention on Human Rights, San José, Costa Rica, 22 November 1969, Article 46.

[21]For European litigation, the six-month period does not apply to continuous situations. See in particular *Agrotexim Hellos S.A. and Others v. Greece*, Commission Decision, 12 February 1991, DR 72, p. 148, and *Cone v. Romania*, § 22, 24 June 2008. In the event of a continuing infringement, the period in fact

emphasised that the applicant must show that it was impossible for him to seize the international court, as it would be unjustifiable for him to remain passive in the face of a situation that is not evolving.

26. There must be a time-limit for seizing the African Court. The principle often has a conventional source, as in Article 56.6 of the African Charter.[22] As the time-limit already exists, it is up to the Court to ensure that it is applied.

27. For example, once the applicant has realised, or should have realised, that there is no realistic prospect of him regaining access to his property and home in the foreseeable future, and that he risks having his application dismissed as untimely if he delays bringing it before the Court for too long and for no apparent reason. Longer time-limits may be allowed for more difficult domestic situations.

28. The Court undoubtedly has a margin of appreciation regarding this time-limit.[23] It seems that the problem could arise from the provisions of Article 56.6 of the African Charter, which states that applications must be :

> " Submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.

29. The length of this reasonable period is clearly omitted from the text of the Charter. The preposition quoted below gives the Court discretion in as much as it says:

starts to run again each day, and it is only when the situation ceases that the last six-month period actually starts to run (...)".

[22] This reform, provided for in Protocol No. 15, which was ratified by France in 2016 and came into force in 2021, was adopted in view of "the development of faster communication technologies, on the one hand, and the time limits for appeals in force in the Member States of an equivalent duration, on the other". (please, provide reference to enable retrieval of the original English text).

[23] Perelman (Chaîm), "Les notions à contenu variable. Essai de synthèse", in Perelman (CH.) and Vanderelst (R.), (eds.), Les notions à contenu variable en droit, *Travaux du C.N.R.L.*, Bruylant, 1984, p. 365.

"...or from the date chosen by the Commission as the date on which the time limit for its own referral begins to run".

30. *The* above-mentioned *Jebra Kambole case* provides ample evidence of this. There is no doubt, however, that the drafters of the 1981 Convention - the year of the Charter - had in mind that human rights bodies would make more precise use of this prerogative with regard to referrals and be closer to the practice of other existing international human rights courts.

In conclusion

31. The *Samia Zorgati case* provides regrettable confirmation of the Court's *stare decisis* approach to the question of reasonable time for its referral. This approach dates back to the mid-2010s.

32. We need to move away from this *status quo*. The Court cannot continue to have a completely open referral time-limits, with no reference limit. The Rules of Court must lay down a time-limit which will serve as a reference for cases where the time-limit for referral needs to be debated, such as those involving a continuing violation. This would also apply to cases where the exhaustion of local remedies is problematic.

33. Although *the Samia Zorgati case* has renewed the issue, it is no less true that the subject is important in terms of the time-limit for seizing the Court as a condition of access to justice for alleged violations. The time- limit for seizing the Court is not just a procedural burden, but a guarantee of reliable human rights justice. The human rights judge, although he is the protector of violated rights, cannot organise a plethoric justice system; he must rule out dilatory or superfluous manoeuvres, in order to make himself reasonably available for the often-numerous cases that require his attentive intervention.

34. The question of reasonable time is crucial to the effectiveness of the international public service of human rights justice. It is to be hoped that the

Samia Zorgati case will sound the death knell for this approach by the Court. While ee are also aware of the need to review the procedure at Convention level, the Court will be able to use its domestic regulatory powers to this end.

Blaise Tchikaya

Judge at the Court

Done at Arusha, this Thirteenth Day of November two thousand and twenty-four, the French text being authoritative.