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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Frank D. Omary and others *v.* The United Republic of Tanzania
(Application No. 001/2012)

Separate Opinion of Judge Fatsah Ouguergouz

1. Though I am also in favour of rejecting the application filed by Mr. Frank David Omary and others against the United Republic of Tanzania, I am of the view that the Court ought to have declared that it does not have jurisdiction *ratione temporis* to deal with the alleged violations of human rights drawn from the non-payment of the totality of their pension and severance benefits and that consequently, it ought to have considered the admissibility of the application only with regard to the alleged violations of the rights of the Applicants in relation to the police brutalities which are said to have taken place after the reading of the judgment of the High Court of Tanzania on 23 May 2011. The only preliminary issue that will be dealt with here will therefore be the temporal jurisdiction of the Court.

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2. The Respondent State deposited its instruments of ratification of the Charter and of the Protocol on 9 March 1984 and 10 February 2006, respectively; it deposited the optional declaration of compulsory jurisdiction of the Court on 9 March 2010. It is therefore this latter date which is critical in determining the jurisdiction of the Court to hear cases of violation under the Charter or any other relevant human rights instrument ratified by the Respondent State.

3. Consequently, if the Court is seized of an individual application against the Respondent State, which alleges the violation of a right founded on facts which occurred before 9 March 2010, it does not in principle have jurisdiction to deal with such an allegation.

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4. The jurisdiction *ratione temporis* of the Court has to be assessed exclusively in relation to the facts which led to the alleged violation; the subsequent failure of the appeals filed in the domestic courts of the Respondent State in order to redress the violation cannot bring this violation under the ambit of the temporal jurisdiction of the Court.

5. This was underscored as follows by the Grand Chamber of the European Court of Human Rights in a judgment delivered on 8 March 2006:

> "An applicant who considers that a State has violated his rights guaranteed under the Convention is usually expected to have resort first to the means of redress available to him under domestic law. If domestic remedies prove unsuccessful and the applicant subsequently applies to the Court, a possible violation of his rights under the Convention will not be caused by the refusal to remedy the interference, but by the interference itself, it being understood that this may be in the form of a court judgment".[1]

6. To establish the temporal jurisdiction of the Court in this matter, it is therefore necessary to look back in time to identify what is the Respondent State's act which led to the alleged violation of its international obligations under the Charter or another legal instrument to which it is a party.

7. When, as in the instant case, the facts in question took place for some before and for others after the critical date (*i.e.* 9 March 2010), it is important to determine whether the alleged violation stems from a fact which occurred prior to this date or one which took place after this date. On that score, it is important to bear in mind the traditional distinction between the acts of State having an «*instantaneous character*»[2]and those having a «*continuous character*».[3]

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[1] Paragraph 78 of the Judgment in the case concerning *Blecic v. Croatia*, Application No. 59532/00.

[2] «The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue», Paragraph 1 of Article 14 *(«Extension in time of the breach of an international obligation»*) of the «Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission on 9 August 2001», *Yearbook of the International Law Commission, 2001*, Volume II (Part Two), *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), p. 27.

[3] «The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation», Paragraph 2 of the same article 14. The Court may also consider facts which occurred before the entry into force of the optional declaration with regard to a Respondent State which is of the view that they are at the origin of a continuous situation which extended beyond that date (see for example the considerations of the Court on this issue in Paragraphs 62 to 83 of its Judgment on the admissibility of Application No. 013/2011, *Beneficiaries of late Nobert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest*

8. In considering its temporal jurisdiction, the Court should take into account not only the complaints of the Applicants but also the scope of the rights guaranteed by an international instrument, the violation of which has been alleged.

9. In the instant case, the Applicants alleged that the non-payment of the totality of their pension and severance benefits by the Respondent State constitutes a violation of Articles 7, 8, 23, 25 and 30 of the Universal Declaration of Human Rights.

10. The first four provisions guarantee, respectively, the right to equality and non-discrimination, the right to an effective remedy by the national competent tribunals, the right to work and to satisfactory working conditions and the right to an adequate standard of living. For its part, Article 30 does not provide the individual with a right as such; it indeed reads as follows: «Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein». This provision enshrines the classical prohibition of abuse of rights.[4]

11. Irrespective of the importance of the rights alleged by the Applicants to have been violated by the Respondent State, because of the failure to pay the totality of their pension and severance benefits, the Court candeal with their alleged violation only if the latter falls within the ambit of its jurisdiction *ratione temporis.*It is therefore important to determine precisely the date of occurrence of the act that led to the alleged violation consisting, in the instant case, in the non-payment of the totality of the pension and severance benefits by the Respondent State.

12. In the instant case, several dates may be taken into consideration to determine the origin of this instigating act.

Zongo and Blaise Ilboudou & The Burkinabe Movement on Human and Peoples' Rights v. Burkina Faso).

[4] Other international legal instruments provide for such a ban, as for example, the International Covenant on Civil and Political Rights (Article 5), the International Covenant on Economic, Social and Cultural Rights (Article 5), the American Convention on Human Rights (Article 29 (a)), the European Convention on Human Rights (Article 17) and the Charter of Fundamental Rights of the European Union (Article 54); for a discussion of this issue, see Sebastien van Drooghenbroeck, «L'article 17 de la Convention européenne des droits de l'homme est-il indispensable ?», *Revue trimestrielle des droits de l'homme*, 2001, pp. 541-566. The above provisions to some extent echo the phrase uttered by Louis Antoine de Saint-Just during the French Revolution: «*No freedom for the enemies of freedom*».

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13. On 20 September 2005, a *Deed of Settlement* was agreed upon between the Applicants and their co-applicants at the time, on the one hand, and the Respondent State on the other. On 21 September 2005, the said deed was registered at the High Court of Tanzania in Dar es Salaam.

14. In terms of Article 3 of this agreement, the Respondent State promised to pay the amount owed the Applicants and to do this between 20 September 2005 and 28 October 2005. In terms of Article 2 of this agreement, it also promised to consider any other request for compensation within six (6) months, as from 28 October 2005.

15. In their application, the Applicants stated that:

> "the Respondents on 21/9/2005 started to pay the applicants only one item (passage). (...) Doing this shows that by paying only one item in the total of 15 the defendants contravened the out of Court settlement" (see their letter of 16 January 2012).

16. On 15 October 2010, the Applicants were of the view that the amount paid by the Respondent State was insufficient, and once again seized the High Court of Tanzania.

17. On 23 May 2011, the High Court of Tanzania dismissed the Applicants' application for the issuance of a *Certificate of payment* by this Court. On page 17 of his Ruling, Judge Fauz Twaib endorsed the interpretation of the *Deed of Settlement* made by Judge Orlyo in 2008 and 2009; it was the latter judge who registered the *Deed of settlement* through a decision dated 21 September 2005. Judge Twaib referred in particular to the following paragraphs of the two decisions taken by Judge Orlyo.

18. In his decision of 19 September 2008, Judge Orlyo noted that:

> "Looked at from an objective angle, by Clause 2, the (Defendant) undertakes to pay all the (Plaintiff's) claims as enumerated at page 3 thereof. But the undertaking by the (Defendant) to pay is qualified and restricted. Whereas ***the claim in the plaint*** and at page 3 of the Settlement Deed are general, it was agreed by the parties that their payments are to be made on the basis of the individual record of each employee (...)" (emphasis added).

19. In his second decision dated 30 January 2009, he noted that:

> "There is no dispute on the content of paragraph 8 (...) and on the rights of the Applicants stated therein. However, the contents of paragraph 8 are not to be taken in isolation of the rest of the paragraphs of the Deed of Settlement. Further, and of cardinal importance, is that the contents of paragraph 8 and the whole Deed of Settlement are subject to the relevant laws".

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20. These two decisions are a clear indication that by 19 September 2008, there was already a complaint and therefore a dispute as to the payment of pension and severance benefits by the Respondent State. This presupposes that by that date, the Respondent State had already violated its obligation towards the Applicants as provided for in the *Deed of settlement* of 20 September 2005. The dispute therefore took place well before the seizure of the High Court of Tanzania by the Applicants on 15 October 2010.

21. Based on the foregoing, one can therefore safely concludes that the act which instigated the alleged violation of certain provisions of the Universal Declaration of Human Rights occurred prior to the entry into force of the optional declaration with regard to the Respondent State and that, consequently, the Court has no jurisdiction *ratione temporis* to examine this allegation.

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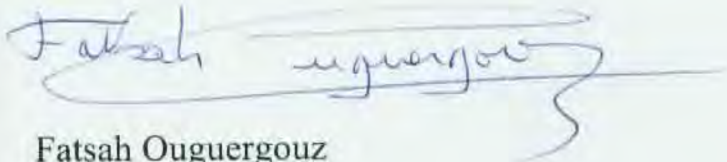
22. Thus, the Court ought to have declared that it lacked jurisdiction with regard to the alleged violations of the rights of the Applicants relating to the non-payment of the totality of their pension and severance benefits; it should have continued with the consideration of the admissibility of the application but only with respect to the alleged violation of the rights of the Applicants resulting from the police brutalities which are said to have taken place on 23 May 2011, and to declare it not admissible, as it did, due to the failure to exhaust local remedies.



Fatsah Ouguergouz
Judge

Robert Eno,
Registrar