AFRICAN UNION

الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

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

Application No. 019/2015

In the Matter of Femi Falana v. The African Commission on Human and Peoples' Rights

Separate Opinion of Judge Fatsah Ouguergouz

1. I am of the opinion, same as all my colleagues, that the Court lacks the jurisdiction to hear and to rule on the "*Application*" filed by Mr. Femi Falana against the African Commission on Human and Peoples' Rights (hereinafter the "African Commission").

2. Indeed, according to the Protocol, only States Parties to this instrument may be brougth before the Court (see Articles 3 (1), 5 (1, *littera c*)), 7, 26, 30, 31 and 34 (6)). The African Commission not being a State entity party to the Protocol, the Court manifestly lacks the jurisdiction *ratione personae* to entertain the said request. Furthermore, by virtue of its subject matter, this request does not fall within the jurisdiction *ratione materiae* of the Court as envisaged in Article 3 of the Protocol.

3. Unlike my colleagues, I am however of the view that this request, rather peculiar in nature,[1] cannot in any circumstance be registered in the General List of the Court nor *a fortiori,* be subject to judicial determination by the Court and be dismissed by way of an Order issued by the Court. It ought to have been rejected by way of a simple letter from the Registrar.

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[1] Mr. Falana indeed sets out his request as follows:
"The Applicant therefore seeks the following reliefs from the African Court:
1. *Request the African Commission to refer the Communication against Burundi initiated before it on 4 May 2015 to the African Court.*
2. *Hear the Applicant pursuant to Rule 29 of the Rules of Procedure of the African Court and the inherent jurisdiction of the Honourable Court.*

4. I shall start by noting that, in his request, Mr. Falana makes no reference to the provisions of the Protocol relating to the Court's jurisdiction in contentious matters (Articles 3 and 5); he merely indicates that

> "the Application [is brought] pursuant to Rule 29 of the Rules of the African Court which provides that "the Court may also, if it deems it necessary, hear, under rule 45 of the Rules the individual or NGO that initiated a Communication to the Commission pursuant to Article 55 of the Charter"".

5. This request, which the Registry did not notify to the African Commission nor to other entities listed in Article 35 (3) of the Rules of Court, ought therefore to have been dealt with by way of a simple administrative action, in other words rejected *de plano* by letter from the Registrar same as in all other cases recently dealt with by the Court in which it manifestly lacked jurisdiction.[2]

6. It was indeed by office mail signed by the Registrar or Deputy Registrar that "*Applications*" filed by individuals against non-State entities such as the European Court of Human Rights or the Conférence Interafricaine des Marchés des Assurances (CIMA) were rejected.

7. In his reply to the author of the latter request, the Registrar thus stated as follows:

> "[…] I would like to inform you that the Court has no jurisdiction to hear such an appeal for two main reasons: 1) The Court only receives petitions against States (Article 3 of the Protocol). 2) […]".[3]

8. In the reply to the request filed against the European Court of Human Rights (and France), the Registrat stated that:

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[2] Until the 26 June 2014 decision by the Court dismissing the Application filed against Tunisia (*Baghdadi Ali Mahmoudi v. the Republic of Tunisia*), Applications filed against African States that are not Parties to the Protocol or have not made the optional declaration under Article 34 of the Protocol were subject to judicial determination by the Court and dismissed by a decision of the latter (see my separate opinion appended to this decision of 26 June 2014); after this date, similar Applications were dismissed by way of a simple administrative action (letter from the Registry).

[3] Letter from the Registrar dated 26 June 2015 (Ref AFCHPR/Reg./06/008) in reply to Mr. Roger Kamdem's request against CIMA received at the Registry on 10 June 2015 and dated 19 [sic] June 2015.

"The Registry has decided not to register your Application as it does not meet any of the requirements provided by instruments governing the African Court on Human and Peoples' Rights".[4]

To avoid any ambiguity, the Registrar similarly provided the following clarification:

"To be admitted, an Application must, among other conditions, be filed against an African State that is Party to the African Charter on Human and Peoples' Rights and to the Protocol related thereto".

9. It is quite rightly that such requests, that the Court manifestly lacks jurisdiction to deal with, were dealt with through an administrative channel. It is moreover consistent with the practice in international jurisdictions such as the International Court of Justice where it is an official of the Registry which is entrusted with replying to requests filed by individuals, entities that do not have a *locus standi* before the World Court.[5]

10. It was equally through an administrative channel that the African Court disposed of requests filed by States which are not members of the African Union such as France[6] or Japan.

11. Thus, in his reply to the request filed against Japan, the Deputy Registrar of the Court stated as follows:

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[4] Request filed by Mr. Karim Benadjal against France and the European Court of Human Rights dated 3 January 2015 and rejected by letter from the Registrar dated 7 January 2015 (Ref AFCHPR/Reg./Ext/004.15).

[5] Requests from individuals are indeed rejected by a letter from the Deputy Registrar worded as follows:

"*In reply to your letter dated xx, I regret to inform you that, by virtue of Article 34 of the Statute of the International Court of Justice, "only States may be parties in cases before the Court", and that only international organizations authorized within the meaning of Article 65 of the Statute may request advisory opinions of the Court.*

It follows that neither the Court nor its Members may consider applications from private individuals or groups, provide them with legal advice, or assist them in their relations with the authorities of any country.

That being so, you will, I am sure, understand that no action can be taken on your letter.

Yours sincerely,"

[6] See the abovementioned request by Mr. Karim Benadjal, footnote 4.

> "Please be informed that the subject matter of your Application is manifestly not within the jurisdiction of the Court. Further, since your complaint is being made against a non-State Party to the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, the Court does not have jurisdiction to receive the matter".[7]

12. It was exactly in the same manner that three requests filed against Egypt, a Member State of the African Union but not party to the Protocol, were rejected. In his reply to the latest of these three requests, the Deputy Registrar indeed informed the Applicant as follows:

> "[...] I would like to inform you that Egypt has not yet ratified the Protocol establishing the Court. The Court can only receive Applications related to States which are Parties to the Protocol".[8]

13. It is similarly through an administrative, and not judicial, channel that were rejected Applications filed against States Parties to the Protocol but have not made the optional declaration recognizing as compulsory the Court's jurisdiction to deal with cases filed by individuals or non-governmental organizations, as provided by Article 34 (6) of the Protocol.

14. This is for instance the case of an Application filed against Tunisia, in regard to which the Registrar informed the Applicant of what follows:

> "The Court considered your application and noted that Tunisia, the Respondent against which your Application is filed, has not made the special declaration

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[7] Letter from the Deputy Registrar dated 18 February 2015 (Ref AFCHPR/Reg./02/2015/009) in reply to a request filed by Madam Chie Miyakazi against Japan, dated 18 October 2014.

[8] Letter from the Deputy Registrar dated 29 June 2015 (Ref AFCHPR/Reg./06/011) in reply to an Application filed by Osama Bardeeni against the Arab Republic of Eqypt, dated 1 January 2015. See also the action taken on the Application filed by Mr. Ibrahim Muhammed Agwa and three others against the Arab Republic of Egypt, dated 16 June 2014; this Application was rejected by a letter from the Deputy Registrar dated 20 June 2014 (Ref AFCHPR/Reg./06/2014/006) in which the latter stated as follows: "*As I have already explained to you during our meeting on Wednesday, 18 June 2014, Egypt has not yet ratified the Protocol to the African Charter on Human and Peoples Rights on the establishment of an African Court on Human and Peoples' Rights. As such, the Court does not have jurisdiction to hear the matter*". See finally the letter from the Registrar dated 24 June 2013 in reply to an Application filed on 17 June 2003 by the "Popular Front against the transformation of Egypt into a Muslim Brotherhood State" against the Arab Republic of Egypt.

> provided in Article 34 (6) of the Article. It has therefore directed the Registry to inform you that it does not have jurisdiction to deal with your application".[9]

Applications filed against the Republic of Congo[10] and Lesotho[11] were disposed of in the same manner.

15. I would like to note that none of the abovementioned "*matters*" was registered in the General List of the Court.

16. I wish to further note that the judicial determination by the Court of Mr. Falana's request, filed against an entity which can in any manner whatsoever be brought before the Court, markedly departs from the administrative action decided by the Court, during its 38th Ordinary Session, in the case of Mr. Faustin Uwintije against Rwanda which State is moreover Party to the Protocol and has made the optional declaration recognizing as compulsory the Court's jurisdiction to deal with cases filed by individuals or non-governmental organizations, as provided by Article 34 (6) of the Protocol. This Application, registered in the General List of the Court, was indeed rejected by way of a simple letter from the Registrar to the Applicant,[12] whereas the Court has manifestly jurisdiction *ratione personae* to deal with it and has actually considered whether it was well-founded.

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[9] Letter from the Registrar dated 14 April 2015 (Ref AFCHPR/Reg./04/007) in reply to the Application filed by Mr. Mustapha Nasri against the Republic of Tunisia, dated 18 September 2014.

[10] Letter from the Registrar dated 22 September 2015 (Ref AFCHPR/Reg./09/016) in response to the Application filed by Mr. Jean-Claude Mbango and Others against the Republic of Congo, dated 7 September 2015; in that letter, the Registrar states *inter alia* as follows: "the Republic of Congo not having made the declaration, the Court does not have the jurisdiction to receive your appeal".

[11] Application filed by Mr. Rammutla against Lesotho, dated 25 May 2015, and rejected by letter from the Registrar dated 29 June 2015 (Ref AFCHPR/Reg./06/013): "*I would like to inform you that although the Kingdom of Lesotho has ratified the Protocol establishing the Court, it has not made the declaration under Article 34 (6) thereof, and as such the Court does not have jurisdiction to receive Applications directly from individuals and NGOs against the Kingdom of Lesotho*".

[12] This letter is mainly worded as follows: "*I write to inform you that at its 38th Ordinary Session held from 31 August to 18 September 2015, the Court considered the above Application and instructed the Registrar to inform you that the said Application does not meet the requirements under Rule 34 of the Rules of Court, and as such it cannot be entertained by the Court. I hope you will be able to find another forum where your complaint can be addressed.*

17. In light of the foregoing, it is my view that the Court ought to have spared itself issuing this Order and thus avoided delving into unnecessary considerations in order to dismiss Mr. Falana's request (paragraphs 8-16). In acting as it did, the Court showed some inconsistency in its reasoning as it had concluded that it lacked the jurisdiction *ratione personae* to entertain the request (paragraphs 7, 9 and 17), and yet had ruled on it, that is on the "*merits*" when it concluded that "*pursuant to Article 2 of the Protocol and Rule 29 of the Rules, the Court cannot compel the Respondent to seize it*". (paragraphs 15 and 18).

18. This latter conclusion is all the more inopportune as Article 2 of the Protocol and Rule 29 of the Rules to which the Court refers cannot be used as the legal basis for its conclusion that it cannot compel the Commission to refer the matter to it.

19. Although I do obviously subscribe to this latter conclusion of the Court, I am of the view that the only applicable provision in this case is Article 5 (1) of the Protocol. This provision does indeed allow the Commission to seize the Court; but it does not compel it to do so. This is evident in the French version of paragraph 1 of Article 5, worded as follows: "*Ont qualité pour saisir la Cour* [...]". The English version of this provision is more straightforward as it states: "*The following <u>are entitled</u> to submit cases to the Court* [...]" (emphasis added). On the basis of Article 5 (1) *littera* a) of the Protocol, the Commission is therefore wholly and fully free and independent and cannot in any manner be subject to an injunction from the Court.

20. Article 29 (3) *littera* c) of the Rules, which Mr. Falana refers to, can only apply in the circumstance where the Court is properly seized of an Application filed by the African Commission.

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21. Ultimately, the Court ought not to have dealt with Mr. Falana's request by way of judicial determination. Having opted for that line of action, it ought to have done so in a more straightforward manner and by avoiding to rule on the merits of this request.

22. I wish to recall as a reminder that this is the fourth time that the African Court has dismissed by way of judicial determination "*Applications*" filed

against non-State entities which by definition cannot be brought before it.[13] The Court having rather limited human and financial resources to deal effectively with a number of cases which is on the increase,[14] it would be advisable not to congest its General List and workload with requests similar to the one considered in the present Order.

Fatsah Ouguergouz
Judge

Robert Eno
Registrar

[13] See the Court Judgments of 26 June 2012 and 15 March 2013 in the matters of *Femi Falana v. The African Union* and of *Atabong Denis Atemnkeng v. The African Union* as well as the Decision delivered on 30 September 2011 in the matter of *Efoua Mbozo'o Samuel v. The Pan African Parliament*; see in that regard my separate opinions appended to those three rulings of the Court.

[14] Indeed, as of 20 November 2015, the Court has no less that 29 contentious matters and 3 requests for Advisory Opinion pending before it.