AFRICAN UNION
الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

FEMI FALANA

V.

AFRICAN UNION

(Application N° 001/2011)

SEPARATE OPINION OF JUDGE FATSAH OUGUERGOUZ

1. Mr. Femi Falana's Application against the African Union raises the issue of access to the Court's jurisdiction by individuals and non-governmental organizations. It does so by challenging the legality of Article 34(6) which subjects such access to the deposit of a declaration accepting the jurisdiction of the Court by States Parties. The importance and crucial significance of that issue notwithstanding, I share the opinion of the Majority according to which the Court has no jurisdiction to entertain Mr. Falana's Application. It is however my considered opinion that since the Court manifestly lacks the jurisdiction *ratione personae* to hear and determine the application, it ought not to have disposed of it by way of a Judgment as provided in Rule 52(7) of the Rules; rather, the Application ought to have been rejected without the Court itself intervening, that is *de plano* through a simple letter from the Registrar.

2. I have had the opportunity, on numerous occasions, to explain my position, as a matter of principle, on the way and manner of dealing with individual applications with regard to which the Court manifestly lacks personal jurisdiction; which is the case with applications against States Parties which have not made the optional declaration under Article 34(6) of the Protocol, or against African States which are not Parties to the Protocol or not members of

the African Union or even against an Organ of the African Union (see my separate opinions attached to the Judgments in the cases of *Michelot Yogogombaye v. The Republic of Senegal, Efoua Mbozo'o Samuel v. The Pan African Parliament, the Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. The Republic of Gabon, Delta International Investments S.A., MR. AGL de Lang and Mme. Lang v. The Republic of South Africa, Emmanuel Joseph Uko v. The Republic of South Africa* and *Timan Amir Adam v. The Republic of Sudan, as well as my dissenting opinion attached to the decision in the Case of Ekollo Moundi Alexandre v. The Republic of Cameroon and the Federal Republic of Nigeria).*

3. In all cases where the jurisdiction *ratione personae* of the Court is manifestly lacking, I am indeed of the opinion that the Court should not proceed with the judicial consideration of applications received by the Registry; such applications should rather be processed administratively and rejected *de plano* through a simple letter from the Registrar.

4. The Court has rendered decisions (which it formally distinguishes from "Judgments"[1]) in most cases that it has considered to this day, whereas it had formally acknowledged that it was "manifest" that it lacked the jurisdiction to entertain such applications (see for instance, *Youssef Ababou v. The Kingdom of Morocco* (para. 12), *Daniel Amare & Mulugeta Amare v. Mozambique Airlines & Mozambique* (para. 8), *Ekollo Moundi Alexandre v. The Republic of Cameroon and the Federal Republic of Nigeria* (para. 10), *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. Republic of Gabon* (paras. 11 &12), *Delta International Investments SA, Mr AGL de Lang and Mme de Lang v. The Republic of South Africa* (paras. 8 & 9), *Emmanuel Joseph Uko v. The Republic of South Africa* (paras. 10 & 11) and *Timan Amir Adam v. The Republic of Sudan* (paras. 8 & 9).)

5. On occasions, the Court had even admitted, in its own words, that it was "evident" that it "manifestly lacked the jurisdiction" to entertain the applications in question (see the English version of the Decisions on the *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. The Republic of Gabon,* (para. 11), *Timan Amir Adam v. The Republic of Sudan* (para. 8), *Delta International Investments SA, Mr AGL de Lang and Mme de Lang v. The Republic of South Africa* (para. 8) and *Emmanuel Joseph Uko v. The Republic of South Africa* (para. 10)).

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[1] On the distinction made by the Court between a "Judgment" and a "Decision", see paragraphs 3, 4 and 5 of my dissenting opinion attached to the decision in the case of *Ekollo Moundi Alexandre v. The Republic of Cameroon and the Federal Republic of Nigeria.*

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6. In the instant case, the Court has also decided to proceed with the judicial consideration of the Application filed by Mr. Falana against the African Union. It however decided to do so not by way of an expedited or summary consideration which would result in the adoption of a simple "decision" but rather through the judicial process as provided in the Rules of Court, in other words by rendering a judgment after an *inter partes* hearing comprising a written and an oral phase. The case of *Michelot Yogogombaye v. The Republic of Senegal* is the only other matter dealt with in this manner.

7. In the following paragraphs, I will provide the reasons why I am of the opinion that Mr. Falana's Application ought not to have been disposed of by way of a judicial process nor, lesser still, through the "full" judicial consideration which it was accorded as from the time it was filed with the Registry slightly more than sixteen (16) months ago.

8. Subsidiarily, I will also state why, having voted for the operative paragraph of the judgment, I do not subscribe to the reasons contained in this judgment particularly with regard to the legal basis on which the Court relies in determining that it lacked jurisdiction. I will in addition be addressing two issues of procedure which are important in my view.

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9. It seems to me obvious that Applications may only be filed against a "State"; which State must as a matter of course be party to the Protocol; this stems from both the letter and the spirit of the Protocol. Thus, Article 2 of the Protocol does provide that the Court shall complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the Charter; whereas, according to the African Charter, only "States" parties to the said Charter may be the subject of communications filed before the African Commission. The Protocol to the African Charter establishing the Court was not meant to deviate from that principle as evidenced in Articles 3(1), 5(1, *littera* c)), 7, 26, 30, 31 and 34(6), all of which make no reference to any other entity but the "State" ("States concerned", "State against which a complaint is filed", "States concerned"[2], "States Parties").

10. Article 5 of the Protocol does make reference, other than the State, to the African Commission, African inter-governmental organizations, individuals and non-governmental organizations, but for the sole purpose of authorizing them to

[2] The expression "States concerned" in the English version of Article 26 (1) of the Protocol was translated "*Etats intéressés*" in the French version of the same Article.

file an application against a State Party and not for them to become potential "Respondents" before the Court.

11. Since the African Union is an Inter-Governmental organization, it is not therefore, according to the Protocol as it is now, an entity against which an Application may be filed before the Court or which might become party to the Protocol. To my knowledge, the only international organization which might, in the near future, be a party before a Court in a matter regarding human rights violations is the European Union; talks are indeed underway to allow the European Union to accede to the European Convention on Human Rights and thus be subject to applications before the European Court of Human Rights.[3]

12. Since the Protocol is unequivocal with regard to entities that may be sued before the Court, it would have sufficed for its provisions to be interpreted in accordance with "the ordinary meaning to be given to the terms (of that instrument) in their context and in the light of its object and purpose" (Article 31(1) of the 1969 Vienna Convention on The Law of Treaties) and to reject the said application *de plano* (that is, without the need for a judicial decision) on the basis of the Court's manifest lack of personal jurisdiction.

13. The Court however chose to hear and rule on the Application by following the process earmarked in the Rules, in other words to consider it via *inter partes* proceedings and rendering a judgment in a public sitting. In so doing, the Court placed itself in a difficult position as evidenced by the relative fragility and circular nature of its reasoning in paragraphs 56 to 73 of the Judgment to which I do not subscribe for the reasons set out in paragraphs 9, 10, 11 and 12 above.

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[3] See the "Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms", adopted by the Steering Committee for Human Rights of the Council of Europe at its Extraordinary Session held on 12-14 October 2011, text *in* Steering Committee for Human Rights, *Report to the Committee of Ministers on the Drafting of the Legal Instruments for the Accession of the European Union to the Convention for the Protection of Human Rights*, Council for Human Rights, Doc. CDDH (2011) 009, Strasbourg, 14 October 2011, pp. 5-13, (website: http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_MeetingReports/CDDH_2011_009_fr.pdf). The Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 envisaged by Article 6 (2) of the Treaty on the European Union, dated 7 February 1992, as amended by the Treaty of Lisbon of 13 December 2007.

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14. Before delving into the reasoning of the Court that led to the finding that it lacked jurisdiction, I would like to consider two issues of procedure which seem of importance to me.

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15. From the procedural standpoint, the first important issue which arises is one of ascertaining why the Court did not consider the Application in two separate phases: one devoted to the consideration of its jurisdiction and the admissibility of the Application and the other, to the merits of the case (in the event it had ruled that it had jurisdiction and had considered the Application admissible). Rule 52(3) of the Rules indeed provide that when preliminary objections are raised with the Court, it shall rule on the objections or incorporate its ruling in its decision on the substantive case; it also provides that "...such objections shall not cause the proceedings on the substantive case to be suspended unless the Court so decides".

16. In the instant case, the Court did not decide to suspend proceedings on the substantive case as the written[4] as well as the oral submissions[5] of the parties dwelt both on issues of the jurisdiction of the Court and on the admissibility of the Application and on matters regarding the merits of the case. Though it did not also formally decide to join consideration of the preliminary objections with that of the merits of the case, it would appear that such joinder actually took place because, as I just indicated, the merits of the case were argued by the parties in their written submissions and during the oral pleadings.

17. Rule 52(3) of the Rules does not specify the circumstances in which proceedings on the substantive case may be suspended nor does it spell out the circumstances in which the joinder to the merits of the case may be ordered; it would therefore be proper for the Court to bridge that gap so as to clear any uncertainty in that regard. The practice at the International Court of Justice, for instance, requires that proceedings on the merits of the case be automatically suspended once a preliminary objection is raised[6] and consideration thereof joined with the merits of the case where such objection "does not possess, in the

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[4] In its submissions, dated 29 April 2011, in answer to Mr. Falana's Application, the African Union indeed dwelt on issues regarding the Court's jurisdiction, the admissibility of the Application as well as the merits of the case; the same applies to Mr. Falana's brief in reply to the submissions of the African Union, dated 23 June 2011.

[5] See the Verbatim Records of Hearings of 22 and 23 March 2012.

[6] Rule 79(5) of the Rules of the International Court of Justice indeed provides that: "upon receipt by the Registry of a preliminary objection, proceedings on the merits shall be suspended".

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circumstances of the case, an exclusively preliminary character",[7] in other words, when the Hague Court cannot rule on the objection without considering the merits of the case. For purposes of interpretation and application of the second sentence of Rule 52(3) of the Rules, the "not exclusively preliminary" character of an objection could be used as a criteria by the Court in deciding on joining or incorporating its ruling on a preliminary objection in its decision on the substantive case.

18. In the instant case, and based on such a criteria, a joinder was not required as the Court could have ruled on the preliminary objections raised by the African Union without delving into the merits of the case. This clearly emerges *a posteriori* among the grounds for the judgment and specifically in paragraph 73 wherein the Court held the opinion that, having concluded that it does not have the jurisdiction to hear the Application, "it does not seem necessary to examine the |...| merits of the case".

19. To ensure strict compliance with the prescriptions of Rule 52(3) of the Rules, Members of the Court ought therefore to have interrupted its proceedings on the merits of the case as allowed by the above Rule, and pronounced itself firstly on its jurisdiction and on the admissibility of the Application. The main consideration of the written[8] as well as all of the oral submissions ought then to have focused solely on the issue of the jurisdiction of the Court and on the admissibility of the Application.

20. The purpose in having a preliminary phase devoted to the consideration of issues of jurisdiction and admissibility is to avoid arguments on the merits as long as issues regarding the jurisdiction of the Court and the admissibility of the Application had not been resolved. Incidentally, holding such a preliminary phase also allows for the avoidance of a dissenting opinion, which would eventually be attached to the judgment, to deal with issues relating to the merits of the case. It is only when an objection does not have an exclusively preliminary character and when its consideration is joined to the consideration of the merits of the case that a dissenting opinion could deal with issues relating to the merits of the case; in such circumstances, consideration of the substantive case is by definition necessary so as to make a determination on matters of jurisdiction and admissibility.

21. In the light of the foregoing, it seems to me that the Court should revisit Rule 52(3) of the Rules and determine whether its prescriptions really meet the

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[7] Rule 79(9) of the Rules of Court.

[8] In its observations in reply to Mr. Falana's Application, the African Union actually delved into the merits of the case even though it did raise preliminary objections.

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specific demands of its jurisdiction, in other words if they contribute to the proper administration of justice by a judicial organ charged with hearing and ruling on disputes in the field of human rights essentially pitting individuals against States. If the answer is no, then that Rule ought to be amended.

22. The other matter of procedure which the Court does not seem to have resolved satisfactorily in my opinion is that of the legal status to be given to some of the documents[9] tendered by the parties during the oral proceedings.

23. On 20 March 2012, that is two days before the beginning of the public hearings, the Registrar asked the parties to submit "a copy of their oral pleadings" for the purpose of facilitating the work of the Interpreters.[10] The documents tendered by the parties at the beginning of the public hearings, one of which was titled "Oral Submissions", did not in any manner reflect the content of the arguments presented orally during the hearings. The Rules of Court do not provide for the filing of such a document during the oral hearings; the only documents relating to the oral proceedings mentioned in the Rules are provided for in Rule 48 and are produced by the Registry; these are "Verbatim Records" which, after being signed by the President and the Registrar, are deemed to be a true reflection of the submissions made by the parties during the public hearings.[11]

24. The documents produced by the parties during the hearings may not in any circumstance be considered as the record of the pleadings made by the parties during the oral proceedings; same as they may not be considered as being materials of the written proceedings in that they were tendered after the pleadings had been closed on 24 June 2011 (see paragraph 12 of the Judgment) and whereas they had not been exchanged between the parties as required by the adversarial nature of the proceedings.

25. It therefore seems to me unfortunate that, during its deliberations, the Court made use of documents of uncertain legal status when considering the arguments canvassed by the parties; paragraph 55 of the Judgment further

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[9] The Applicant filed a 21-page document titled "Oral Submissions" dated 21 March 2012; the Respondent, for its part, a filed a 16-page document, undated, as well as another 10-page document dated 23 March 2012 in which it replied to the "Oral Submissions" of the Applicant and to the questions put by the Judges.

[10] See the purport of the email sent by the Registrar to the Parties on 20 March 2012 stating "Please, as we finalize for the hearing, the Registry would be most obliged if we could have a copy of your oral pleadings in the morning of Thursday to facilitate with interpretation".

[11] Rule 48 of the Rules indeed provides that once corrected by the Parties, provided that such corrections do not affect the substance of what was said (para. 2), and signed by the President and the Registrar, the verbatim record shall then "constitute the true reflection of the proceedings" (para.3).

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reproduces the conclusions of the Respondent as they appear on pages 2 and 3 of the document submitted on 22 March 2012. I am of the opinion that the tendering by the parties of what appears to be a new written document in the course of the oral proceedings is creating confusion and only complicates the task of the Court. These documents differ in content from the Verbatim Records of the hearings and must also be translated into the working languages of the Court; further, the Judges are not in a position to practically acquaint themselves with their contents during the hearings nor consider them seriously for the purpose of the deliberations which follow immediately the oral proceedings.

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26. Let me now consider the reasoning of the Court which led it to conclude that it lacked the jurisdiction to hear and to determine the Application. I would start by observing that in the instant case the Court did not adopt the approach that had hitherto been the case when it considered the Application filed by Mr. Efoua Mbozo'o Samuel against an organ of the African Union namely the Pan African Parliament (see its Decision of 30 September 2011); in that case, the Court indeed avoided pronouncing itself on its personal jurisdiction as it ought to have done and rejected the Application by implicitly relying on its lack of material jurisdiction.

27. The Court's reasoning in paragraphs 58 to 63 of the Judgment are intended to establish that Articles 5(3) and 34(6) of the Protocol, when read together, require that direct access to the Court by an individual be subject to the deposit of a special declaration by the Respondent State; these paragraphs are not therefore of particular interest to the issue at hand considering that the Application had not been filed against a State Party. The Court does clearly concede this when it concludes that "there may be other grounds on which the Court may find that it has no jurisdiction" (paragraph 63). That finding did not however prevent the Court from ultimately invoking Articles 5(3) and 34(6) above in concluding that it lacked the jurisdiction to entertain the Application (see paragraph 73 as well as operative paragraph 75 of the Judgment).

28. The rest of the Court's reasoning is intended to address the Applicant's argument according to which the African Union could be brought before the Court "as it is the one which promulgated and adopted the Protocol as a corporate community on behalf of its Member States" (paragraphs 25 and 64). In so doing, the Court establishes 1) that the African Union is an international organization with a legal personality separate from that of its Member States (paragraph 68) and 2) that it cannot therefore be subject to the obligations under

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the Protocol as it is not party to that instrument (paragraph 71). Those are two conclusions that are self-evident.

29. The Court however deemed it necessary to add, without explaining why, that "the mere fact that the African Union has a separate legal personality does not imply that it can be considered as a representative of its Member States with regard to obligations that they undertake under the Protocol" (paragraph 71). This assertion, in all likelihood, is intended to address the Applicant's argument according to which "it is clear that the African Union as a whole is representing the African people and their governments and therefore is competent to defend the actions brought against the Member States" (paragraph 25).

30. That assertion by the Court is equally self-evident and adds nothing to the reasoning of the Court; on the contrary, it blurs the reasoning. It is indeed difficult to imagine how the African Union, an international organization with a legal personality separate from that of its Member States, could be "a representative [of the latter] with respect to obligations that they undertake under the Protocol".

31. The main obligation incumbent on States Parties to the Protocol is that of appearing before the Court to answer to alleged violations of human rights as guaranteed by the African Charter or by any other instrument dealing with human rights to which they are parties. How can the African Union be brought before the Court on behalf of one or more Member States Parties to the Protocol to answer for alleged violations of their conventional obligations in the field of human rights?

32. The African Union could only be brought before the Court to answer for its own conduct. For that to happen, however, it would be necessary for it to be allowed to become a party to the Protocol and for it to be willing to do so which would require that it be beforehand allowed to accede to the African Charter and for it to have accepted to do so. As party to the Charter and to the Protocol, the African Union could in any circumstance be brought before the Court to answer for the conduct of its Member States parties to the Protocol.

33. In the final analysis, one might wonder about the need for the Court's reasoning in paragraph 66 to 72 of the Judgment because in paragraph 73, it asserts that "its jurisdiction is clearly prescribed by the Protocol" and that "the present case in which the Application has been filed against an entity other than a State having ratified the Protocol and made the declaration, falls outside the jurisdiction of the Court". That was actually all what the Court needed to state from the outset to reject Mr. Falana's Application.

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34. I am therefore of the opinion that the Court ought to have spared itself issuing this Judgment which raises more questions than it resolves.

35. Let me further observe that consideration of the "constitutionality" of Article 34(6) of the Protocol, to which the Court was urged by the Applicant so as to declare the said Article "illegal, null and void" as it is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter, does indirectly raise the issue of the sovereign right of the States Parties to the Protocol to accept or not the jurisdiction of the Court to entertain applications from individuals or non-governmental organizations.

36. This debate, no matter how legitimate, should in my view have been raised in some other forum. The Court, for its part, ought not to have accepted to serve as a forum for such debates when it manifestly lacked the jurisdiction to do so; in so doing it took the risk of jeopardizing its credibility.

37. Same as Mr. Falana, I am in favour of the automatic access to the Court by individuals and non-governmental organizations; it is my view however that it is a matter that comes within the exclusive jurisdiction of Member States of the African Union. I hold the opinion that this important matter is more likely to be discussed by the Court as part of its advisory jurisdiction at the initiative of the entities mentioned in Article 4 of the Protocol or as part of the procedure of amendment of that instrument considering the possibility availed to the Court under Article 35(2) to make proposals in that regard "if it deems it necessary".

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38. For all the above reasons, I am of the view that, given the Court's manifest lack of jurisdiction *ratione personae*, Mr. Falana's Application ought to have been rejected *de plano* through a simple letter from the Registrar.

39. Subsidiarily, I am also of the view that the Court having decided to hear and rule on this Application, it should have provided clearer reasons for rejecting it (see my reasoning in paragraphs 9, 10, 11 and 12 above) and not by invoking, in a contradictory manner, Articles 5(3) and 34(6) of the Protocol.

40. To conclude, I again invite my colleagues to revisit the current practice of the Court which consists in systematically issuing "Judgments" or "Decisions" on its lack of jurisdiction whereas it "manifestly" lacks the jurisdiction to entertain an Application. The only advantage in my view of such a practice of the Court is to draw public opinion to issues as those raised in the instant case or to alleged violations of human rights; but is that truly the mission of the Court ?

Fatsah Ouguergouz
Judge

Robert Eno
Registrar