AFRICAN UNION

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER

EMMANUEL JOSEPH UKO AND OTHERS

V.

REPUBLIC OF SOUTH AFRICA

(Application N° 004/2012)

SEPARATE OPINION OF JUDGE FATSAH OUGUERGOUZ

1. I am of the opinion that the application filed by Mr Emmanuel Joseph Uko and others against the Republic of South Africa must be rejected. However, the lack of jurisdiction *ratione personae* of the Court being manifest, the application should not have been dealt with by a decision of the Court; rather, it should have been rejected *de plano* by a simple letter of the Registrar (see my reasoning on this matter in my separate opinions appended to the decisions in the cases of *Michelot Yogogombaye v. Republic of Senegal*, *Effoua Mbozo Samuel v. Pan African Parliament*, *National Convention of Teachers'Trade Union (CONASYSED) v. Republic of Gabon*, *Delta International Investments S.A. & Mr and Mrs AGL de Lang v. Republic of South Africa*, as well as my dissenting opinion appended to the decision rendered in the matter *Ekollo Moundi Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*.

2. Indeed, I am not in favour of the judicial consideration of an application filed against a State Party to the Protocol which has not made the declaration accepting the compulsory jurisdiction of the Court to receive applications from individuals and non-governmental organizations, or against any African State which is not party to the Protocol or which is not a member of the African Union, as was the case in several applications already dealt with by the Court.

3. By proceeding with the judicial consideration of the present application lodged against the Republic of South Africa, the Court failed to take into account the interpretation, in my view correct, which it initially gave of Article 34(6) of the Protocol in paragraph 39 of its very first judgment in the case concerning *Michelot Yogogombaye v. Republic of Senegal*. In that judgment, the Court indeed stated what follows:

> "the second sentence of Article 34 (6) of the Protocol provides that [the Court] "shall not *receive* any petition under article 5 (3) involving a State Party which has not made such a declaration" (emphasis added). The word "receive" should not however be understood in its literal meaning as referring to "physically receiving" nor in its technical sense as referring to "admissibility". It should instead be interpreted in light of the letter and spirit of Article 34 (6) taken in its entirety and, in particular, in relation to the expression "declaration accepting the competence of the Court to receive applications [emanating from individuals or NGOs]" contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned Article 34 (6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned".

4. It is evident that by giving a judicial treatment to an application and delivering a decision on the said application, the Court actually "received" the application in the sense that it interpreted the verb "receive" in the abovementioned paragraph 39, that is that the Court has actually examined[1] the application even though it concluded that it does not have jurisdiction to entertain it; however, according to its interpretation of Article 34 (6), the Court should not examine an application if the State Party concerned has not made the optional declaration.

5. It should further be observed that the Court gave a judicial consideration to the application filed by Mr. Emmanuel Joseph Uko and others without transmitting it to South Africa, nor even informing this State that an application had been lodged against it. The adoption by the Court of a judicial decision under such circumstances amounts to a violation of the adversarial principle

[1] The French text of the last sentence of paragraph 39 of the Yogogombaye Judgment, which is the authoritative one, refers to the examination of the applications («pour que la Cour puisse connaître de telles requêtes») and not to the «hearing of the cases» as it is mentioned in the English text («conditions under which the Court could hear such cases»).

(*Audiatur et altera pars*), which principle must apply at any stage of the proceedings. This breach of fairness and equality of arms is all the more remarkable given that the application lodged by Mr Emmanuel Joseph Uko and others was, upon receipt, publicized on the website of the Court.

6. Failure to transmit the application to South Africa also deprived that State of the possibility to accept the jurisdiction of the Court by way of *forum prorogatum* (on this question, see my separate opinion in the case concerning *Michelot Yogogombaye v. Republic of Senegal)*.

Judge Fatsah Ouguergouz

Robert Eno
Registrar