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AFRICAN UNION

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

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## IN THE MATTER OF

## INGABIRE VICTOIRE UMUHOZA

## V.

## REPUBLIC OF RWANDA

## APPLICATION NO. 003/2014

## DISSENTING OPINION OF JUDGE RAFÂA BEN ACHOUR

I do not subscribe to the Order issued by the Court in Application 003/2014 (Victoire Ingabire Umuhoza). I indeed believe, on the one hand, that the Court was not obliged to make an Order at this stage of the proceedings and, on the other, that the reasons advanced by the Court do not, in my view, seem to be relevant, even assuming that the Order is well grounded and appropriate.

I - It should be recalled that the said Application was filed before the Court on 3 October 2014 by Ms. Victoire Ingabire Umohoza, relying on Articles 5(3) and Article 34(6) of the Protocol and on the declaration made by Rwanda on 22 January 2013, accepting the competence of the Court.

It goes without saying that a State making such a declaration has the discretionary competence to make or not to make such a declaration, or to make a declaration accompanied with temporal, material and territorial[1] reservations.

Rwanda's declaration did not come with any reservation, consequently, at the time of submission of the Application, there was no limit to the acceptance of the Court's competence with respect to Applications from individuals. In this matter, Rwanda even submitted a response to the Application, and this, on 23 January 2015. In its response, Rwanda did not challenge the competence of the Court. Subsequently, and considering the facts of the case, the Court decided to hold a public hearing. Both parties were notified on 4 January 2016 that the Court would hold the said public hearing on 4 March 2016.

A few days prior to the public hearing, that is, on 1 March 2016, Rwanda notified the Court of the withdrawal of the declaration. On the eve of the public hearing, the Legal Counsel of the African Union officially notified the Court[2] accordingly. In the said notification, Rwanda maintained that the withdrawal of its declaration had the effect of suspending all matters affecting it and pending before the Court. It also requested a hearing on the issue of its withdrawal before the Court, before the Court makes a ruling on the case filed before it. Despite this notification, the Court rightly held the public hearing as previously decided. It heard the Applicant's representative, whereas the respondent State did not appear.

At this point, the Court should have taken notice of this failure to appear and continued with the procedure. As noted by the ICJ: "A State which does not appear must accept the consequences of its decisions, the first of which is that the case will continue without its participation."[3] For its part, the Institute of International Law in its resolution on "non-appearance before the ICJ" indicated in the same vein that: "A State's non-appearance

[1] *Cf.* GHARBI (Fakhri): "The status of declarations of acceptance of the compulsory jurisdiction of the International Court of Justice", *Les Cahiers du Droit*, vol.43, n°2, 2002, p. 213 – 274. Available on : http://id.erudit.org/iderudit/043707ar

[2] Strictly speaking, notification of the withdrawal should have been addressed to AU Commission, and this by virtue of the parallelism of the forms, because under Article 34 (7) of the Protocol : "Declarations made under sub-article 6 above shall be deposited with the Secretary-General, who shall transmit copies thereof to the State Parties".

[3] ICJ : *Case concerning military and paramilitary activities in and against Nicaragua, Judgment of 27 June 1986, Rec, 1986,* page 24, § 28

before the Court is, in itself, no obstacle to the exercise by the Court of its functions under Article 41 of the Statute"[4]. But such was not the attitude of this Court. It did not go into deliberation on the matter after the public hearing and decided to issue an Order partly acceding to the Respondent State's prayer by ordering "the Parties to file written submissions on the effect of the Respondent's withdrawal of its declaration made under Article 34 (6) of the Protocol." In that Order, the Court has included the Applicant in an exclusive relation between her and the Respondent State. The Applicant has nothing to do with the declaration.

**II** - It is necessary at this juncture to dwell a little on the nature of Rwanda's declaration.

It is unanimously accepted in jurisprudence and in doctrine, that the declaration of acceptance of jurisdiction is a unilateral act of a State, and which falls within its discretionary competence[5]. In terms of international, and indeed, unilateral commitment, this is subject to the general principle *"pacta sunt servanda"* as codified in the Vienna Convention on the Law of Treaties of 1969[6]. In this regard, the Court should have continued with the proceedings, taken note of the non-appearance of the Respondent State and set forth the necessary consequences in case of non-appearance. Even if the Applicant's representatives expressed the wish to make a submission on the withdrawal of Rwanda's declaration, the Court should not have allowed this, should not have required both parties to submit written observations on the issue and should not have deferred the matter to its 41st session[7].

**III** - Similarly, in its Order, the Court "decides that the decision on the effects of withdrawal of the Respondent will be made at its 41st ordinary session."

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[4] I.D.I. Matter of non-appearance before the ICJ, Art. 5, Basle session, *Yearbook*, 1991, vol. 64, t. II, page 378.

[5] "A discretionary act by which a State subscribes to an obligatory jurisdiction commitment, unilaterally conferring competence to a court for categories of cases defined in advance, Entry : " Optional declaration of obligatory jurisdiction" *In*, SALMON (Jean), (Dir), *Dictionary of International Public Law*, Bruylant, 2001, p. 303) (Registry translation).

[6] In its preamble, the Vienna Convention on the Law of Treaties notes that "the principles of free consent and of good faith and the *pacta sunt servada* rule are universally recognized". This principle is codified in Article 26 of the said Convention.

[7] Regarding the legal effect in time, of the withdrawal of the declaration, I refrain from commenting thereon for now. I will make my comments possibly when th e Court takes decision on the matter at its 41st session.

In my view, the Court did not have to take a specific decision on the withdrawal. It should do so in its final decision, just as the ICJ did in its judgments in the cases: Corfu Channel[8], nuclear tests[9] and military and paramilitary[10] activities.

For all the aforesaid reasons, I believe that the Order was not necessary and that the reasons advanced by the Court are not founded in law.

[signature]

18 March 2016

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[8] *Corfu Channel case,* Judgment of 15 December 1949, *Rec*, 1949, pp. 4 et s.

[9] *Nuclear Tests Case (Australia v. France and New Zealand v France,* Judgements of 20 December 1974, Rec, 1974, pp. 253 et s and 457 et s.

[10] Case already cited *supra*.