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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

AFFAIRE INGABIRE VICTOIRE UMUHOZA

V.

REPUBLIQUE DU RWANDA

APPLICATION NO 003/2014

RULING ON JURISDICTION [INCLUDING A *CORRIGENDUM*]

DISSENTING OPINION OF JUDGES GERARD NIYUNGEKO AND AUGUSTINO S.L. RAMADHANI

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
LE GREFFIER
ARUSHA TANZANIA

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1. We share the majority view within the Court that the latter has jurisdiction to rule on the issue of the withdrawal by the Respondent State of its declaration made under Article 34(6) of the Protocol establishing the Court; that the withdrawal in the instant case is valid; but that it has no effect on the application under consideration. We also agree with the majority on all the references contained in the *corrigendum* attached to the judgment, with regard both to the title of the judgment, the corresponding wording of item (iv) of the operative provisions, and, with respect to paragraph 54 of the judgment.

2. We however disagree with the majority on the Court's decision stating that "...the Respondent's withdrawal of its declaration pursuant to Article 34(6) will take effect one year after the deposit of the notice, that is, on 1 March 2017" [paragraph 69] (II). Furthermore, with regard to the reasons given in the judgment, it is our opinion that despite the adjustment made in the *corrigendum* to paragraph 54 of the judgment, the majority's position on the applicability of the Vienna Convention of 23 May 1969 on the Law of Treaties remains ambiguous (I).

I. On the applicability of the Vienna Convention on the Law of Treaties on unilateral acts

3. In considering whether the Respondent State had the right to withdraw its declaration made under Article 34 (6) of the Protocol establishing the Court, the latter rightly held in the *corrigendum*, that "...the Vienna Convention does not apply directly, but can be applied by analogy, and [that] the Court can draw inspiration from it when it deems it appropriate" [paragraph 54]. This position is in tandem with that of the International Court of Justice (ICJ), in the *Fisheries Jurisdiction Case (Spain v. Canada)*. Referring to the application of the Vienna Convention in the interpretation of declarations of acceptance of the compulsory jurisdiction of the Court, the latter held as follows:

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"The Court observes that the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction."[1]

4. However, deciding on the issue of the date from which the withdrawal of the declaration takes effect – an issue which we will later consider -, the majority states tersely and without any explanation, that, they are inspired, *inter alia,* by the practice of "the notice period [of one year] provided for, pursuant to Article 56 (2) of the Vienna Convention" [paragraph 65][2].

5. In so doing, the Court gives no indication as to the "analogical" application which it postulates in amended paragraph 54 of the judgment. Even if it states that it is simply "inspired" by Article 56 (2) of the Vienna Convention, it still gives the strong impression that the said Article applies *directly*. This is in contradiction with its principled position expressed in the amended paragraph 54 of the judgment.

6. From our point of view, in reaching its conclusion, the Court should have explained how the situation relating to the withdrawal of a declaration is analogous to that of withdrawal from an inter-State convention with regard to the period of notice, which it absolutely failed to do.

7. Therefore, the least that can be said is that the Court has not cleared all the ambiguities with regard to the applicability of the Vienna Convention on the Law of Treaties to unilateral acts of States, such as the optional declaration recognizing the jurisdiction of the Court to receive applications from individuals and NGOs. It failed to provide the necessary clarifications on a subject on which it was supposed to establish case-law.

II. On the date of entry into force of the withdrawal of the declaration

8. The Court is of the view that the withdrawal of the declaration must be subject to a period of notice, and the majority adds that in this case the applicable period of notice shall be one year from the date of deposit of the withdrawal.

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[1] Judgment of 4th December 1998, Jurisdiction of the Court, *ICJ Reports* 1998, p.453, paragraph 46.
[2] This article states as follows: "2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1".

9. As regards the requirement of prior notice, the Court rightly invokes the need to ensure juridical security for the beneficiaries of the said declaration, as well as protection of the human rights system embodied in the African Charter on Human and Peoples' Rights:

"In the view of the Court, the provision of a notice period is essential to ensure juridical security by preventing abrupt suspension of rights which inevitably impact on third parties, in this case, individuals and groups who are rights- holders... This is more so as the Protocol is an implementing instrument of the Charter that guarantees the protection and enjoyment of human and peoples' rights contained therein as well as other relevant human rights instruments. The suddenness of withdrawal without prior notice therefore has the potential to weaken the protection regime provided for in the Charter" [paragraph. 62. See also paragraphs 60 and 61].

10. With regard to the period of notice, the majority holds that it is inspired by Article 78 of the Inter-American Convention on Human Rights, which prescribes a one year notice, and by the corresponding jurisprudence of the Inter-American Court of Human Rights, and equally -as we saw-, by Article 56 (2) of the Vienna Convention on the Law of Treaties, which also provides for a one year notice (paragraphs 65 and 66].

11. Though we agree with the majority view with regard to the need for a period of notice that safeguards the rights of the beneficiaries of the Respondent State's declaration, which rights might be affected by an abrupt interruption, it remains rather difficult to understand why the majority prescribed a one year period for that purpose.

12. In our opinion, this is an excessive deadline which does not find justification under any principle or any particular circumstance, and the reasons adduced by the Court are not convincing.

13. The conventional practice and jurisprudence of the Inter-American human rights system is, like many others, a practice from which we can indeed draw inspiration, but it cannot be applied without prior discussion at the African Court. In Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms, for

example, provides for a six month notice period[3]. At the universal level, the Optional Protocol to the International Covenant on Civil and Political Rights for its part provides for a three-month notice period[4]. The Court does not explain why it prefers to be guided by the practice in the Inter-American system rather than by the practices in the United Nations system or the European system, which are different.

14. As for the Vienna Convention on the Law of Treaties, it was noted above that the Court in fact applied it directly without any prior discussion on the possible analogy between the withdrawal from a convention and the withdrawal from a unilateral act [paragraph 5 *supra*].

15. Considering the silence of the applicable instruments and in particular, of the Protocol establishing the Court, on the withdrawal of the declaration and the period of notice, the Court in fact, ought to have retained the criterion of reasonable period set by the ICJ in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, instead of the fixed deadlines that are not applicable before it, with respect to the withdrawal of optional declarations of acceptance of the compulsory jurisdiction of the Court:

> "...the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a "reasonable time"[5].

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[3] Article 58 of the Convention, 4th November 1950, as amended.
[4] Article 12 of the Optional Protocol, 16th December 1966.
[5] Judgment of 26th November 1984 (Jurisdiction of the Court and Admissibility of the Application) *ICJ Reports* 1984, p.420 paragraph 63. Even if the Court makes reference to the Vienna Convention on the Law of Treaties which provides, as mentioned above, a notice of one year, it insists on and applies the criterion of "a reasonable time"

16. A commentator has sustained a similar view:

"Concerning the customary status of Article 56 (2) [of the Vienna Convention], it is possible to sustain, with relative certitude, that its fixed period of 12 months does not reflect customary law. Nevertheless, the latter seems to impose the obligation of advance notice to be given within a 'reasonable time'; and this appears to be based on the principle of good faith..."[6].

17. In the instant case, the Court ought to have pondered on what could be considered as reasonable time in this situation. And in answering this question, the Court ought to have asked itself, in line with its reasoning on the need to ensure the legal protection of the beneficiaries of the declaration made by the Respondent State under Article 34(6) of the Protocol establishing the Court, which persons or entities could be aggrieved by a sudden withdrawal of the declaration.

18. In our opinion and from a pragmatic point of view, it can be considered that those who can be aggrieved by a withdrawal without notice of the declaration are individuals and NGOs that were about to submit an application to the Court, building on the declaration to establish this Court's *ratione personae* jurisdiction. Along the same lines, such individuals or NGOs could be those who were on the verge of exhausting or had just exhausted local remedies, or were considering invoking the abnormal prolongation of such remedies or even their ineffectiveness.

19. If we go along with this reasoning, it becomes evident that a one-year period is excessive and therefore unreasonable. Indeed, it cannot reasonably be expected that potential Applicants in the situation described above should need one year to file their application.

20. We are of the view that a period of six months from the publication of the withdrawal should be sufficient to file an application before the Court, since any application will always be followed at a later stage by an exchange of more elaborate written

[6] Theodore Christakis, "Article 56 ", *The Vienna Conventions on the Law of Treaties, a Commentary*, Olivier Corten & Pierre Klein, ed., vol II, Oxford University Press, 2011, p.1257.

submissions between the parties, in accordance with the provisions of the Rules of Court.

21. In that regard, even the Applicant refrained from making a firm request for a one-year period of notice. In the Submissions dated 15 April 2016, one of her lawyers indeed refers to a reasonable period of notice [paragraph 29] and after indicating that periods of notice in international practice have been set at one year, six months or even three months [paragraph 32], he opines that Rwanda's withdrawal should not have an immediate effect but should at least enter into force only after a certain number of months [paragraph 33]. On this point, he concludes by requesting that Rwanda's withdrawal takes effect only after "a cooling off period" [paragraph 53]. This goes to show that, even in the view of the Applicant, there should be no automatic and mechanical application of the one year notice provided for by the Vienna Convention on the Law of Treaties.

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22. In conclusion, it seems to us that, in a judgment in which it was certainly going to make case-law, the Court did not sufficiently grasp the different facets of the legal issues raised and all the implications of its position, not only with regard to the applicability of the Vienna Convention on the Law of Treaties to unilateral acts derived from treaties, but also with regard to the issue of the notice period in the event of withdrawal.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS ★ COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES ★ The Registrar LE GREFFIER ARUSHA TANZANIA

Robert ENO

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Juge Gérard NIYUNGEKO

Juge Augustino S.L. RAMADHANI

3 February 2017