

014/2011
15/03/2013
(000334-000314)DR 000334

AFRICAN UNION

UNION AFRICAINE

الاتحاد الأفريقي



UNIÃO AFRICANA

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

IN THE MATTER OF
ATABONG DENIS ATEMNKENG
v.
THE AFRICAN UNION
APPLICATION 014/2011

JUDGMENT



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The Court comprising: Sophia A. B. AKUFFO, President ; Fatsah OUGUERGOUZ, Vice-president; Bernard M. NGOEPE, Gerard NIYUNGEKO, Augustino S L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON, Sylvain ORÉ and El Hadji GUISSSE Judges; and Robert ENO – Registrar.

In the matter of:

Atabong Denis ATEMNKENG

Represented by Chief Charles TAKU, Counsel for the Applicant

v.

The African Union

Represented by: Mr. Ben KIOKO, then Legal Counsel of the African Union

After deliberations,
and by majority

delivers the following judgment:

F.O.

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 A signature to the right of the middle signature.
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 Initials 'a' and 'B' in the center.
 Initials 'NG' at the bottom center.
 Initials 'cf.' on the right.
 Initials 'Dum' on the far right.

I. SUBJECT OF THE APPLICATION

1. By Application dated 18 October 2011, which reached the Registry on 1 December 2011, Mr. Atabong Denis ATEMKENG, a Cameroonian national (here-in-after referred to as "the Applicant") and staff member of the African Union Commission brought the African Union (here-in- after referred to as "the Respondent") before the African Court on Human and Peoples' Rights (here-in-after referred to as "the Court") to obtain a judgement stating that Article 34(6) of the Protocol which established an African Court on Human and Peoples' Rights (here-in-after referred to as the "Protocol"), is inconsistent with the Constitutive Act of the African Union (here-in-after referred to as the "Constitutive Act") and the African Charter on Human and Peoples' Rights (here-in after referred to as "the Charter") and that it should on those grounds be declared null and void.

II. PROCEDURE

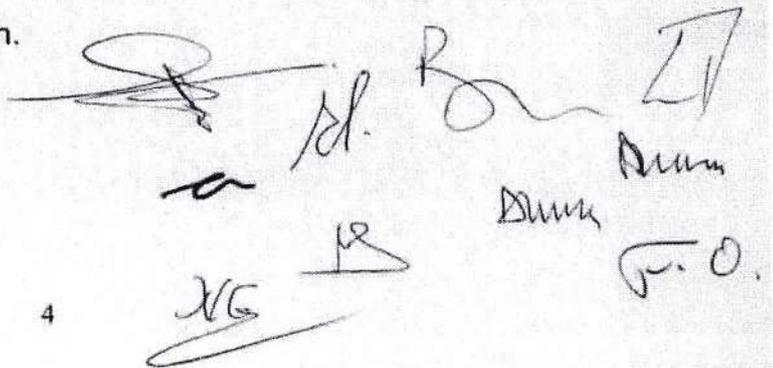
2. The Application was received at the Registry of the Court on 1 December 2011 and registered as Application 014/2011.
3. By letter dated 5 January 2012, the Registrar acknowledged receipt of the Application, pursuant to Rule 34(3) of the Rules.
4. Pursuant to Rule 5(1) of the Rules, the Registrar forwarded copies of the letter to the President and to the other members of the Court.
5. Pursuant to Article 22 of the Protocol and Rule 8(2) of the Rules of Court, (here-in-after referred to as "the Rules"), Judge Ben KIOKO,

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member of this Court, who was involved in this case as the then Legal Counsel of the Respondent, recused himself.

6. By letter dated 15 February 2012 and pursuant to Rule 35(2) of the Rules of Court, the Registrar sent a copy of the Application to the Respondent requesting it to submit the names of its representatives within 30 days and to respond to the Application within 60 days.
7. Pursuant to Rule 35(3) of the Rules and by letter dated 15 February 2012, the Registrar informed the Chairperson of the African Union Commission as well as State Parties to the Protocol of the filing of the Application.
8. By e-mail dated 1 April 2012, the Applicant made additional submissions.
9. By letter dated 27 April 2012, received the Registry on 20 May 2012, the Respondent submitted to the Registry the name of its legal representative and its response to the Application in question.
10. By letter dated 21 May 2012, the Registry communicated the said response to the Applicant.
11. By letter dated 22 May 2012, the Registry forwarded to the Respondent an addendum to the Application.

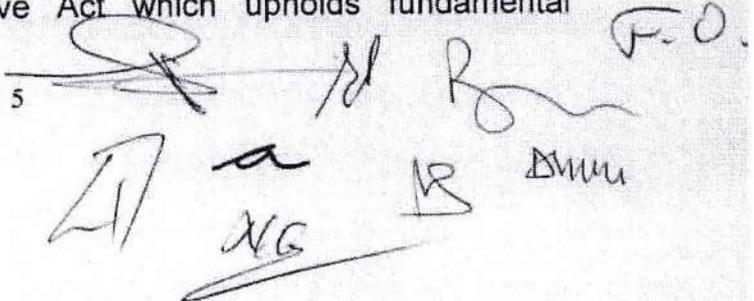
A collection of handwritten signatures and initials in black ink. There are several distinct signatures, some appearing to be initials like 'AD', 'RG', and 'Dumy'. One signature on the right is enclosed in a rectangular box. Below the signatures, there are some faint handwritten notes and a small number '4'.

12. On 11 June 2012, the Registry received the Applicant's response dated 6 June 2012. It acknowledged receipt thereof on the same day and forwarded it immediately to the Respondent.
13. By letter dated 25 June 2012, the Registry informed the parties that the written procedure had ended and that they could ask for leave to make additional submissions, if necessary.
14. By letter dated 27 June 2012, the Applicant submitted an application for leave to make additional submissions.
15. Without waiting for the said leave of the Court, the Applicant filed the said additional submissions. The Registrar acknowledged receipt on 2 July 2012.
16. By Order dated 7 December 2012, the Court rejected the Applicant's request for leave to make additional submissions as baseless and filed in violation of Rule 50 of the Rules of Court which provide that "*No party may file additional evidence after the closure of pleadings except by leave of Court*".

III. THE SUBMISSIONS OF THE PARTIES

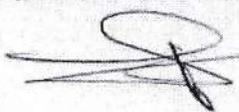
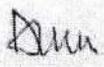
A. THE SUBMISSION OF THE APPLICANT

17. In his initial Application, the Applicant alleges that Article 34(6) of the Protocol is inconsistent with the Treaty which established the African Union, namely, the Constitutive Act which upholds fundamental

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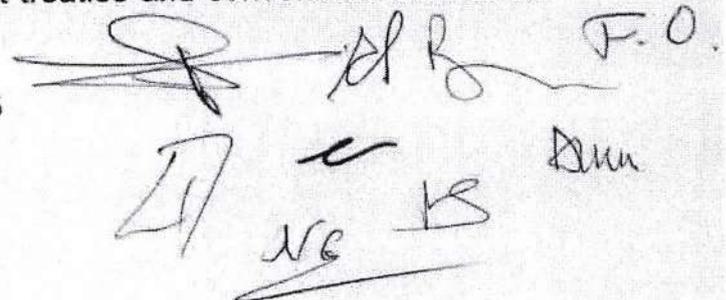
principles such as the rule of law, condemnation, rejection of impunity and promotion of human rights as enshrined in the African Charter. The Applicant is of the view further that Article 34(6) of the Protocol is an impediment to justice as it prevents African citizens from having access to the Court, especially victims of human and peoples' rights violations who are unable to secure remedy from national Courts or from the African Commission on Human and Peoples' Rights.

18. He also claims that this same Article 34(6) gives violators of human and peoples' rights, especially the States, powers to prevent their victims from making their voices heard and from obtaining justice.
19. The Applicant contends that the African Union cannot afford to be viewed by Africans as an institution which adopts provisions preventing African citizens from obtaining justice or places human rights violators above the law.
20. In the addendum to his Application, the Applicant raises three issues: the obligation for the African Union to ensure that its rules are consistent with the Constitutive Act and the Charter, the jurisdiction of the Court as a core factor ensuring that Member States honour their obligations as set out in the Constitutive Act and the Charter and the capacity of the Applicant to seize the Court.
21. In regard to the first issue: the Applicant evokes the role of the African Union as coordinator in ensuring that the decisions of the Union are in conformity with the provisions of the Constitutive Act, other legal instruments of the Union and draft treaties and conventions as well as

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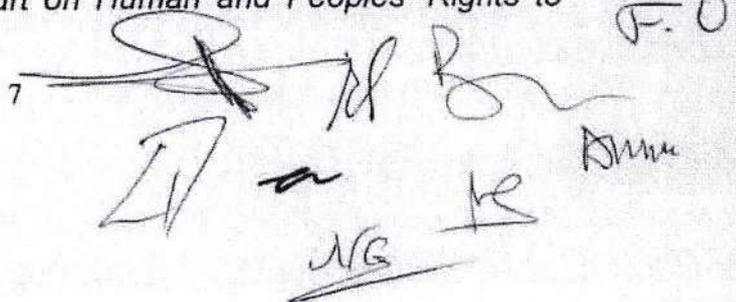
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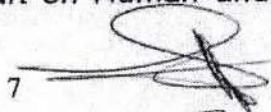
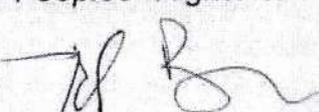
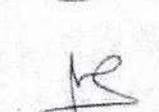
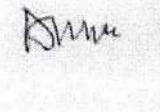
cooperation agreements signed between the African Union and Member States or other institutions.

22. On the second issue, the Applicant contends that Article 34(6) excludes jurisdiction being exercised by the only continental body charged with considering allegations of Member State violations of their obligations under treaties they had signed. In his view, it is difficult to imagine that States would make declarations and/or enter some reservations that undermine the obligations they had previously agreed to observe willingly thus depriving the continental Court of any authority to hear and determine cases of violations alleged by individuals and NGOs against the States concerned.
23. On the last issue: the Applicant submits that every African worthy of the name has the obligation to defend the Constitutive Act of the African Union in the same manner as every citizen should defend the constitution of his or her country. Referring to the provisions of Article 34(6), the Applicant is of the view that since the Application was not directed against any Member State, it should not be rejected under the said Article.
24. Furthermore, the Applicant alleges that Article 34(6) is at variance with the Constitutive Act of the African Union because it is a violation of the principles and objectives enshrined in the said Act. In that regard, he quotes part of the Preamble of the Protocol according to which Member States of the Organization of African Unity, State Parties to the Charter were, *"Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights require the establishment of an African Court on Human and Peoples' Rights to*

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complement and reinforce the functions of the African Commission on Human and Peoples' Rights". The Applicant concludes therefrom that all the principles enshrined in the Constitutive Act and the rights enumerated in the Charter will be completely meaningless if they cannot be recognized and defended before a competent Court.

25. In conclusion:

The Applicant prays the Court to:

- Declare that Article 34(6) of the Protocol is contrary to the spirit and letter of the Constitutive Act and the Charter and is therefore null and void.
- Declare that Article 34(6) is null and void because it is already so in light of the *jus cogens* laws set out in the Charter.

B. THE SUBMISSIONS OF THE RESPONDENT

26. As a preliminary objection, the Respondent raises the issue of the admissibility of the Application on the grounds that it is baseless, frivolous, vexatious and amounts to an abuse of process; the Applicant has no capacity to seize the Court being a national of a State which has not yet made the declaration contained in Article 34(6) of the Protocol; it is neither party to the Constitutive Act of the African Union, the Charter nor the Protocol. It cites Article 34 of the Vienna Convention on the Law of Treaties in support of its allegations.¹

¹A treaty does not create either obligations or rights for a third State without its consent.

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27. On the merits of this case, notably, the inconsistency of Article 34(6) of the Protocol with the Constitutive Act of the African Union and the Charter, the Respondent submits that Member States have the sovereign right to negotiate, adopt, sign and ratify any treaty or accede to it. It further states that all the provisions of the Protocol, including Article 34(6), conform to the Vienna Convention on the Law of Treaties and to international customary law.

28. The Respondent argues that in international law, a treaty cannot be null and void unless it contradicts an imperative norm in international law, it rejects the idea that Article 34(6) of the Protocol is at variance with all the instruments adopted by the Organization of African Unity or the African Union.

29. The Respondent further argues that Member States have the sovereign right at the time of ratification of the Protocol or at any time thereafter to make the declaration accepting the jurisdiction of the Court to receive Applications directly from individuals or non-governmental organizations which have observer status before the Commission.

30. In conclusion,

the Respondent prays the Court to:

- Reject the Application on the basis of Article 38 of the Rules of Court or for lack of jurisdiction and
- Order the Applicant to bear the costs.

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IV. JURISDICTION OF THE COURT

31. Under Rules 39(1) and 52(7) of the Rules, the Court is required to consider the objections raised by the Respondent and in particular, that regarding the jurisdiction of the Court to hear and determine the present Application.
32. Articles 3(2) of the Protocol and Rule 26 (2) of the Rules of Court provide that *"in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."*
33. To resolve the issue raised in the preliminary objection, it should be understood that, for the Court to entertain an Application submitted directly by an individual, the said Application should inter-alia meet the requirements of Articles 5(3) and 34(6) of the Protocol.
34. Article 5(3) of the Protocol provides as that: *"The Court may entitle relevant Non-Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol."*
35. Article 34(6) of the Protocol for its part provides that *"at the time of the ratification of this protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration"*.

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36. A combined reading of the above-mentioned provisions show that the direct seizure of the Court by an individual can only be against a State Party which has made a declaration authorizing such seizure.
37. As stated supra, the Applicant submits that his Application is not directed against any State in particular, but against the African Union and therefore, Article 34(6) should not apply in the present case.
38. The Court is the opinion that the fact that a non-State entity like the African Union is not bound under Article 34(6) of the Protocol to make the declaration does not necessarily confer on the Court, the jurisdiction to receive Applications brought by individuals against it. At any rate, the Court would have to consider its jurisdiction vis-a-vis the Respondent.
39. The Court notes however that the Application is not filed against a State Party to the Protocol but against the African Union which is party neither to the Charter nor to the Protocol on which the Applicant relies.
40. It should be underscored that the Court was established by the Protocol and that its jurisdiction is clearly enshrined in the Protocol. When an Application is brought before the Court, the jurisdiction *rationae personae* of the Court is set out in Articles 5(3) and 34(6), read jointly. In the present case where the Application is brought against a body which is not a State which has ratified the Protocol and/or made the required declaration, it falls outside the jurisdiction of the Court. Consequently, the Court lacks the jurisdiction to hear and determine the said Application.


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