

AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

001698

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

003/2014
03/06/2016
(001698-001680) ON

IN THE MATTER OF

INGABIRE VICTOIRE UMUHOZA

V.

REPUBLIC OF RWANDA

APPLICATION 003/2014

RULING ON JURISDICTION



The Court composed of: Augustino S. L. RAMADHANI; President, Elsie N. THOMPSON, Vice-President; Gérard NIYUNGEKO, Fatsah OUGUERGOUZ, Duncan TAMBALA, Sylvain ORÉ, El Hadji GUISSÉ, Ben KIOKO, Rafâa BEN ACHOUR, Solomy B. BOSSA, Angelo V. MATUSSE – Judges; and Robert ENO - Registrar.

In the matter of:

Ingabire Victoire UMUHOZA

represented by:

- i. Mr. Gatera GASHABANA – Counsel
- ii. Dr. Caroline BUISMAN – Counsel

V.

The Republic of Rwanda

represented by:

Mr. Rubango Kayihura EPIMAQUE, Senior State Attorney, Republic of Rwanda.

After deliberation,

delivers the following Ruling:

I. Subject of the Application

1. The Court received, on 3 October 2014, an Application by Ingabire Victoire Umuhoza, (hereinafter referred to as “the Applicant”), instituting proceedings against the Republic of Rwanda (hereinafter referred to as “the Respondent”).
2. The Applicant is a Rwandan citizen and leader of the opposition party *Forces Democratiques Unifiées*, (FDU Inkingi).
3. The Application is brought against the Attorney General of the Republic of Rwanda as the representative of the Respondent.
4. The Applicant prays the Court for the following orders and remedies;
 - i) Find violations of Articles 1, 7, 10 and 11, 18 and 19 of the Universal Declaration of Human Rights; Articles 7, 3, 9 and 15 of the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”); and Articles 7, 14, 15, 18 and 19 of the International Covenant on Civil and Political Rights.
 - ii) Repeal, with retroactive effect, sections 116 and 463 of Organic Law N° 01/2012 of 2 May 2012, relating to the Penal Code, as well as that of Law N° 84/2013 of 28 October 2013, relating to the punishment of the crimes of the ideology of the Genocide;
 - iii) Review of the Case;
 - iv) Annul all the decisions that had been taken since the preliminary investigation up till the pronouncement of the last judgment;
 - v) Release on parole; and
 - vi) Grant her costs and reparations.

II. Summary of the facts

5. The Applicant contends that when the genocide in Rwanda started in April 1994, she was in the Netherlands to further her university education in economics and business administration.
6. The Applicant avers that in 2000, she became the Leader of a Political Party known as the "*Rassemblement républicain pour la démocratie au Rwanda*". The Applicant states that she had been a member of the party since 1998.
7. According to the Applicant, sometime later, the party merged with two other political parties, to form the "*Force démocratique Unifies*" (FDU) headed by the Applicant.
8. The Applicant contends that in 2010, after spending nearly 17 years abroad, she decided to return to Rwanda to contribute to nation-building, and among her priorities was the registration of the political party, FDU Inkingi.
9. The Applicant adds that she did not attain this objective because as from 10 February 2010, charges were brought against her by the judicial police, the Prosecutor and Courts and Tribunals of the Respondent. The Applicant alleges that she was charged with spreading the ideology of genocide, aiding and abetting terrorism, sectarianism and divisionism, undermining the internal security of a state, spreading rumours which may incite the population against political authorities, establishment of an armed branch of a rebel movement and attempted recourse to terrorism.
10. On 30 October 2012 and 13 December 2013, the Applicant was sentenced to 8 and later 15 years of imprisonment by the High Court and the Supreme Court of Rwanda.

11. The Applicant submits that all local remedies have been exhausted.

III. Procedure

12. By a letter dated 3 October 2014, Counsel for the Applicant seised the Court with the Application and by letter dated 19 November 2014, the Registry of the Court served the Application on the Respondent.
13. By a letter dated 6 February 2015, the Registry transmitted the Application to all State Parties to the Protocol, the Chairperson of the African Union Commission (hereinafter referred to as "the AUC") and the Executive Council of the African Union.
14. By a letter dated 23 January 2015, the Respondent filed its Response to the Application and by a letter dated 14 April 2015, the Applicant filed her Reply to the Respondent's Response to the Application.
15. By a letter dated 4 January 2016, the Court notified the Parties that the Application had been set down for public hearing on 4 March 2016.
16. By letters dated 10 February 2015, 26 January 2016 and 1 March 2016, Advocate Gatera Gashabana, one of the representatives of the Applicant, wrote to the Court inquiring whether the Applicant could physically attend the public hearing and testify as a witness and whether video conferencing technology could be used to allow the Applicant to follow the proceedings of the Court in the Application. By letters dated 26 January 2016 and 2 March 2016, the Registry of the Court informed the Applicant that the Court did not deem the presence of the Applicant at the public hearing necessary and declined the Applicant's request to be heard as a witness and that it did not have the capacity to facilitate the use of video conferencing technology.

17. By letters dated 29 February 2016 and 1 March 2016, representatives of the Applicant wrote to the Registry of the Court, requesting an adjournment of the public hearing. In the letter of 1 March 2016, the representative of the Applicant however requested to be heard on procedural matters.
18. By a letter dated 1 March 2016, received on 2 March 2016, the Respondent notified the Court of its deposition of an instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"). The letter further stated:

"The Republic of Rwanda requests that after deposition of the same, the Court suspends hearings involving the Republic of Rwanda, including the case referred above until review is made to the Declaration and the Court is notified in due course."
19. By a letter dated 2 March 2016, the Registry confirmed receipt of the Applicant's letters of 29 February 2016 and 1 March 2016. It informed the Applicant that the public hearing would proceed as scheduled for 4 March 2016, and that the Court did not have the capacity to allow the participation of the Applicant by video-conferencing technology. It further served on the Applicant, the Respondent's letter dated 1 March 2016.
20. By a letter dated 2 March 2016, the Registry confirmed receipt of the Respondent's letter of 1 March 2016. It informed that Respondent that the public hearing would proceed as scheduled for 4 March 2016. It further served on the Respondent the Applicant's letters dated 29 February 2016 and 1 March 2016.
21. By a letter dated 3 March 2016, the Office of Legal Counsel and Directorate of Legal Affairs of the AUC notified the Court of the submission of the

Respondent's instrument of withdrawal of its declaration made under Article 34(6) of the Protocol, which was received at the AUC on 29 February 2016.

22. By a letter dated 3 March 2016, the Respondent acknowledged receipt of the Court's letter of 2 March 2016. The Respondent stated that it found the Applicant's reasons to request adjournment of the public hearing compelling. The Respondent further requested to be allowed to be heard on its request of 2 March 2016, to suspend pending cases before the Court involving the Respondent.
23. At the public hearing on 4 March 2016, the Applicant was represented by Advocate Gatera Gashabana and Dr. Caroline Buisman. The Respondent did not appear.
24. At the request of the Applicant, the Court heard the representatives of the Applicant on procedural matters in which they requested the Court to take the following measures:
“
 - i. Reject the *amicus curiae* brief submitted by the National Commission for the Fight Against Genocide.
 - ii. Order the Respondent to facilitate access to the Applicant by her representatives.
 - iii. Order the Respondent to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court on this matter.
 - iv. Order the Respondent to comply with the Court's Order of 7 October 2015 to file pertinent documents.”
25. Following the public hearing, on 18 March 2016, the Court issued an Order as follows:

“

- i. Orders that the Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol, within fifteen (15) days of receipt of this Order.
 - ii. Decides that its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Protocol shall be handed down at a date to be duly notified to the Parties.
 - iii. Orders the Applicant to file written submissions on the procedural matters stated in paragraph 15 above, within fifteen (15) days of receipt of this Order.”
26. By a letter dated 29 March 2016, the Court notified the Parties of the Court's Order of 18 March 2016.
 27. By a letter dated 13 April 2016, the Respondent submitted its observations on the Court's Order of 18 March 2016.
 28. By a *Note Verbale* dated 4 April 2016, and with copy to the Registrar of the Court, the Office of Legal Counsel and Directorate of Legal Affairs of the AUC notified all Member States of the African Union of the submission of the Respondent's instrument of withdrawal of its Declaration made pursuant to Article 34(6) of the Protocol.
 29. By a letter dated 15 April 2016 and received on 16 April 2016, the Coalition for an Effective African Court (hereinafter “the Coalition”) applied to the Court to be *amicus curiae* in the Application.
 30. By a letter dated 15 April 2016 and received on 18 April 2016, the Applicant submitted its observations on the Court's Order of 18 March 2016.

31. By a letter dated 4 May 2016, the Registry served the observations of the Respondent on the Court's Order of 18 March 2016 on the Applicant, and requested her observations, if to submit her observations if any, within 15 days.
32. By a letter dated 4 May 2016, the Registry served the observations of the Applicant on the Court's Order of 18 March 2016 on the Respondent, and requested the Respondent to submit its observations if any, within 15 days.
33. By a letter dated 4 May 2016, the Registry transmitted to the Coalition with copy to the Parties, the Court's Decision granting it *amicus curiae* status and requesting it to submit its observations by 13 May 2016.
34. By a letter dated 13 May 2016, the Coalition submitted its observations.
35. This Ruling is with respect to the jurisdiction of the Court in light of the Respondent's withdrawal of its declaration pursuant to Article 34(6) of the Protocol.

IV. Positions of the Parties

36. In the Respondent's written submissions of 13 April 2016, on the question of the effects of its withdrawal, the Respondent avers that by virtue of the principle of parallelism of forms, it is only the AUC that is empowered to decide on the withdrawal and its effects. The Respondent argues that the Court and Parties to the Application have nothing to do with the decision regarding the withdrawal of its declaration once it was deposited with the AUC. The Respondent further indicates that in its letter dated 3 March 2016, it was only requesting to be heard by the Court on its request to suspend hearings and not on the question of the withdrawal.

37. The Respondent prays the Court to take judicial notice that debate regarding the withdrawal for review, was a matter within the purview of the African Union.
38. In her written submissions of 15 April 2016, the Applicant argues that in the absence of provisions for withdrawal of the declaration pursuant to Article 34(6) of the Protocol, Article 56 of the Vienna Convention on the Law of Treaties (hereinafter referred to as “the Vienna Convention”) should be applied in the interpretation of the Protocol. The Applicant further argues that prohibiting States from withdrawing from a treaty or declaration that they made voluntarily may be too radical a position and would interfere with State sovereignty. The Applicant argues however, that this should not be viewed as allowing States to withdraw at any moment or in any manner. The Applicant urges the Court to be guided by the principle of *pacta sunt servanda*, which requires parties to a treaty to perform their duties in good faith.
39. The Applicant argues further that the principle of good faith requires a reasonable time for withdrawal to serve as a cooling off period.
40. To this end, the Applicant cites the case of Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) *Jurisdiction and Admissibility, Judgment of 26 November 1984*, in which the International Court of Justice held that:

“But 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.”¹

¹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) *Jurisdiction and Admissibility, Judgment of 26 November 1984, ICJ Reports 1984 p. 420, para. 63.*

41. The Applicant argues further that “the goal of demanding advance notice of withdrawal is to discourage opportunistic defections that may cause treaty-based cooperation to unravel.” The Applicant cites the examples of the European Convention on Human Rights and the American Convention on Human Rights which provide for notice periods of six months and one year, respectively. The Applicant requests the Court to consider these comparative treaties and apply their principles by analogy.
42. The Applicant takes the view that the Respondent’s withdrawal has no effect on pending cases based on the principle of non-retroactivity. The Applicant argues further that allowing the Respondent to withdraw from proceedings before the Court at this stage would offend the principle of legality. In support of this argument, the Applicant cites Article 70(1)(b) of the Vienna Convention which provides that the termination of a treaty, unless otherwise agreed, does not affect any preexisting obligation or legal situation. The Applicant states that complaints submitted after the withdrawal would still be admissible to the extent that they address State action during the period when the State was still bound by the convention.

V. Submission of the Coalition

43. The Coalition focused on two issues, namely: whether the Respondent was entitled to withdraw its declaration and the legal effects on pending proceedings of such withdrawal. The Coalition is of the view that in the absence of express provisions for withdrawal of declarations in the Protocol, the provisions of Article 56 of the Vienna Convention may apply. The Coalition asserts that the rules that govern treaties also apply to the acceptance of the jurisdiction of courts, and as such, the Court should interpret the Respondent’s withdrawal in light of the provisions of the Vienna Convention.

44. The Coalition is also of the view that even though the declaration of acceptance of the Court's jurisdiction is a sovereign unilateral act of a State, the said declaration creates international obligations for the accepting State. The Coalition asserts that in the event the Respondent reviews its declaration to include some reservations, pursuant to Article 19(c) of the Vienna Convention, they must not be incompatible with the object and purpose of the treaty.
45. The Coalition further notes that none of the four legal instruments establishing the judicial organs of the African Union provides for denunciation and/or withdrawal², and that the same applies to the main legal instruments governing human rights in Africa. As a result, the Coalition argues that the withdrawal does not appear to be consistent with the spirit set out in the human rights legal instruments adopted by the African Union.
46. On the second issue of the legal effects of the Respondent's withdrawal, the Coalition is of the view that the Respondent would be required to serve notice of its intention to withdraw at least twelve months in advance in compliance with Article 56(2) of the Vienna Convention.
47. Finally, the Coalition takes the view that the Respondent's request to suspend pending cases before the Court breaches the provisions of international law on treaties, the Charter and Protocol. The Coalition notes that the role of the Court is to preserve, complement and reinforce progress made in the protection of human rights by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") and other institutions and developments in African and international legal instruments. This specifically includes ensuring compliance with the criteria on the equality of parties to a trial,

² These are the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, the Protocol of the Court of Justice of the African Union, the Protocol on the Statute of the African Court of Justice and Human Rights and Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

regardless of whether or not a Party is a sovereign State. The Coalition also states that the Court should aim at ensuring observance of the right of any victim to seek effective legal remedy in conformity with Article 7 of the Charter and the "*Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*³" adopted by the Commission.

VI. Decision of the Court

48. From the submissions of the Parties, three main issues emerge in relation to the Respondent's withdrawal. First, whether the Respondent's withdrawal is valid. Secondly, if it is valid, what are the applicable conditions for such a withdrawal? Thirdly, what are the legal effects of the withdrawal? Before considering these issues, the Court has to ascertain that it has jurisdiction to deal with the issue of withdrawal.

A. Jurisdiction of the Court to deal with the withdrawal

49. Article 3(1) of the Protocol provides that: "The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument **ratified** by the States concerned." (Emphasis added).
50. Article 34(6) of the Protocol provides that at the time of the ratification of the Protocol or anytime thereafter, the State Party shall make a declaration accepting the competence of the Court. The provision continues by stating that "The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration."

³ Adopted by the Commission at its 33rd Session in Niamey, Niger, 29 May 2003.

51. The Court notes that the Respondent is a State Party to the Protocol having deposited its instrument of ratification on 6 June 2003. The Respondent also deposited its Declaration pursuant to Article 34(6) of the Protocol on 22 June 2013.
52. The Court notes that pursuant to Article 3(1) it is empowered to interpret and apply the Protocol. Further, pursuant to Article 3(2) of the Protocol, in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide. Therefore, the Court holds that it has jurisdiction in this matter regarding the withdrawal of the declaration by the Respondent.

B. Whether the Respondent's withdrawal is valid

53. It is not in dispute that the Protocol does not contain provisions for denunciation of the Protocol or withdrawal of the declaration under Article 34(6). Similarly, the Charter does not contain any provisions for denunciation. The Applicant, in her submission argues that in the absence of express provisions in the Protocol for withdrawal, the Vienna Convention applies. The Coalition shares the same opinion. The Respondent made no arguments on this.
54. Regarding the applicability of the Vienna Convention in the instant matter, the Court notes that while the declaration pursuant to Article 34(6) emanates from the Protocol which is subject to the law of treaties, the declaration itself is a unilateral act that is not subject to the law of treaties. The Court therefore holds that the Vienna Convention does not apply to the declaration under Article 34(6) of the Protocol.
55. In dealing with whether the Respondent's withdrawal is valid, the Court is guided by relevant rules governing declarations of recognition of jurisdiction as well as the international law principle of state sovereignty.

56. Regarding the rules governing recognition of jurisdiction of international courts, the Court notes that related declarations are generally optional in nature. This is illustrated by the provisions relating to the recognition of jurisdiction of the International Court of Justice⁴, the European Court of Human Rights⁵ and the Inter-American Court of Human Rights⁶.
57. The Court is of the view that the declaration provided under Article 34(6) is of a similar nature to those mentioned above. This is because although the declaration emanates from the Protocol, its making is optional in its nature. As such, and being unilateral, the declaration is separable from the Protocol and is therefore subject to withdrawal independently of the Protocol.
58. The Court is also of the view that the optional nature of the declaration and its unilateral character stem from the international law principle of state sovereignty. As far as unilateral acts are concerned, state sovereignty commands that states are free to commit themselves and that they retain discretion to withdraw their commitments.
59. As a consequence, the Court holds that the Respondent is entitled to withdraw its declaration pursuant to Article 34(6) and that such withdrawal is valid under the Protocol.

C. Conditions of the withdrawal

60. In respect to conditions of withdrawal, the Court notes that even if withdrawal of the declaration under Article 34(6) is unilateral, the discretionary character of the withdrawal is not absolute. This is so particularly regarding acts that create rights to the benefit of third parties, the enjoyment of which require legal certainty.

⁴ See Article 36(2) of the Statute of the International Court of Justice.

⁵ See Article 46 of the European Convention on Human Rights of 1950 and before the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby.

⁶ See Article 62(1) of the American Convention on Human Rights.

61. In such circumstances and when they are allowed to withdraw, states should be required to give prior notice. The requirement of notice is necessary in the instant case especially as the declaration pursuant to Article 34(6) once made constitutes not only an international commitment on the part of State, but more importantly, creates subjective rights to the benefit of individuals and groups.
62. 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.⁷ 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 in other relevant human rights instruments. The suddenness of a withdrawal without prior notice therefore has the potential to weaken the protection regime provided for in the Charter.
63. In a matter similar to the one at hand, the Inter-American Court of Human Rights made a determination on the basis of the principle of legal certainty by holding in the case of *Ivcher Bronstein v Peru* that:

“A unilateral action by a State cannot divest an international court of jurisdiction it has already asserted; [where] a State [is allowed to] withdraw its recognition of the Court’s contentious jurisdiction, formal notification would have to be given one year before the withdrawal could take effect, for the sake of juridical security and continuity.”⁸

⁷ See Frans Viljoen *International Human Rights Law in Africa* (2007) Oxford at page 256 and Laurence R. Helfer, Terminating Treaties in Duncan Hollis (ed.) *The Oxford Guide to Treaties* Oxford University Press, 2012 at pages 634-649.

⁸ *Ivcher Bronstein v Peru* at paragraph 24(b).

64. Considering the foregoing, the Court holds that the provision of notice is compulsory in cases of withdrawal of the declaration under Article 34(6) of the Protocol.
65. Regarding the period of notice, the Court is inspired by two main practices which converge to the minimum requirement of one year. The first example is the practice of the Inter-American Court of Human Rights as provided in Article 78 of the American Convention on Human Rights and applied in the Ivcher Bronstein case referred to earlier. The second illustration is the notice period provided for pursuant to Article 56(2) of the Vienna Convention.
66. In light of the foregoing and in the view of the Court, a notice period of one year shall apply to the withdrawal of the Respondent's declaration.

D. Legal effects of the withdrawal

67. The Court considers that the legal effects of the withdrawal are two-fold. On the one hand, and considering that a notice period of one year applies, the act of withdrawal will have effect only after the expiry of that period. As a consequence, the Court holds that the withdrawal of the Respondent's declaration under Article 34(6) of the Protocol shall take effect after a period of one year, that is, from 1 March 2017.
68. On the other hand, the Parties have raised the issue of the possible effect of withdrawal on pending cases. In the view of the Court, an act of the Respondent cannot divest the Court of jurisdiction it had to hear the matter. This position is supported by the legal principle of non-retroactivity which stipulates that new rules apply only to future situations. The Court therefore holds that the Respondent's notification of intention of withdrawal has no legal effect on cases pending before the Court.

69. For these reasons,

THE COURT,
Unanimously:

- i) Rules that the Court has jurisdiction to consider the issue of withdrawal of the declaration.
- ii) Rules that the Respondent's withdrawal of its declaration pursuant to Article 34(6) of the Protocol is valid.

By majority of nine for and two against, Judge Augustino S. L. RAMADHANI and Judge Gérard NIYUNGEKO, dissenting:

- iii) Rules 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.

Unanimously:

- iv) Rules that the Respondent's withdrawal of its declaration has no effect on this Application, and so it has jurisdiction to continue with the hearing of the Application.

Done at Arusha, this 3rd Day of June in the year 2016, in English and French, the English version being authoritative.

Signed:

Augustino S. L. RAMADHANI, President

Elsie N. THOMPSON, Vice-President

Gérard NIYUNGEKO, Judge

Fatsah OUGUERGOUZ, Judge

Duncan TAMBALA, Judge

Sylvain ORÉ, Judge

El Hadji GUISSÉ, Judge

Ben KIOKO, Judge

Rafâa BEN ACHOUR, Judge

Solomy B. BOSSA, Judge

Angelo V. MATUSSE, Judge

Robert ENO - Registrar.



In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the dissenting opinions of Judges Augustino S. L. RAMADHANI and Gérard NIYUNGEKO, as well as the separate opinion of Judge Fatsah OUGUERGOUZ, are attached to this Ruling.