AFRICAN UNION
الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

FEMI FALANA

v.

THE AFRICAN UNION

APPLICATION NO. 001/2011

JUDGMENT

The Court composed of: Gérard NIYUNGEKO, President; Sophia A.B. AKUFFO, Vice- President; Jean MUTSINZI, Bernard M. NGOEPE, Modibo T.GUINDO, Fatsah OUGUERGOUZ, Augustino S.L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON and Sylvain ORÉ- Judges; and Robert ENO - Registrar

In the matter of:

Femi Falana Esq.,
appearing in person

v.

The African Union,
represented by:

Mr. Ben KIOKO, Legal Counsel of the African Union Commission
Mr. Bright MANDO, Legal Officer, Office of The Legal Counsel of the African Union Commission
Advocate Bahame Mukirya Tom NYANDUGA

After deliberation,

delivers the following majority judgment:

F.O.

I. THE SUBJECT MATTER OF THE APPLICATION

1. By an application dated 14 February 2011, Femi Falana, Esq. (hereinafter referred to as "the Applicant"), a Nigerian national, who describes himself as a human rights lawyer based in Lagos, Nigeria, seized the Court with an application against the African Union (hereinafter referred to as "the Respondent").

2. In his Application, the Applicant alleges that he has made several attempts to get the Federal Republic of Nigeria (hereinafter referred to as "Nigeria") to deposit the declaration required under Article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol) to no avail. He alleges further, that he has been denied access to the Court because of the failure or refusal of Nigeria to make the declaration to accept the competence of the Court in line with Article 34(6) of the Protocol.

3. He submits in his Application that, since his efforts to have Nigeria make the declaration have failed, he decided to file an application against the Respondent, as a representative of its, then, 53 Member States (now 54), asking the Court to find Article 34(6) of the Protocol as inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") as, according to him, the requirement for a State to make a declaration to allow access to the Court by individuals and Non-governmental Organizations (hereinafter referred to as "NGOs") is a violation of his rights to freedom from discrimination, fair hearing and equal treatment, as well as his right to be heard.

II. THE PROCEDURE

4. The Application was received at the Registry of the Court on 20 February 2011.

5. By a letter dated 18 March 2011, the Registrar acknowledged receipt of the Application.

6. At its 20th Ordinary Session held from 14 to 25 March 2011, in Arusha, Tanzania, the Court decided that the Application should be served on the Respondent. The Court also decided that the notifications required under Rule 35 of the Rules of Court (hereinafter referred to as "the Rules") should be sent.

7. In accordance with Rule 35(2)(a) of the Rules, and by a letter dated 28 March 2011 to the Chairperson of the African Union Commission, the Registrar served a copy of the Application on the Respondent by registered post. The Respondent was advised to communicate the names and addresses of its representatives within thirty (30) days and to respond to the Application within sixty (60) days.

8. In accordance with Rule 35(3) of the Rules, and by a letter, also dated, 28 March 2011, the Application was notified to the Executive Council of the African Union and State Parties to the Protocol, through the Chairperson of the African Union Commission.

9. By a letter dated 29 April 2011, the Respondent acknowledged receipt of the Application and by a notice of the same date, communicated its representative as being the Legal Counsel of the African Union Commission. The Respondent also filed its response dated 29 April 2011. These documents were received at the Registry of the Court on 18 May 2011 and were sent to the Applicant by a letter of the same date.

10. During its 21st Ordinary Session held from 6 to17 June 2011, in Arusha, Tanzania, the Court decided that the Applicant should be notified

that he could reply to the Respondent's response within thirty (30) days, commencing 8 June 2011.

11. By a letter dated 15 June 2011, the Registrar notified the Applicant of the Court's decision that he could reply to the Respondent's response. The Applicant's undated, but signed reply to the Respondent's response was received at the Registry of the Court on 23 June 2011.

12. By a letter dated 24 June 2011, the Registrar sent to the Respondent, the Applicant's reply to the Respondent's response, and therein it was indicated that pleadings had been closed and the Parties would be advised of the dates set down for hearing. This letter was copied to the Applicant.

13. By separate letters, both dated 20 October 2011, the Registrar informed the Parties that, at its 22nd Ordinary Session held from 12 to 23 September 2011, in Arusha, Tanzania, the Court decided that the Parties should be invited to a hearing of the Application during its 23rd Ordinary Session to be held from 5 to16 December 2011. In the said letters, the Registrar informed the Parties that the proposed dates for the hearing were 12 to 13 December 2011 and requested them to confirm their availability for these dates not later than 4 November, 2011.

14. By an email dated 21 October 2011, the Applicant confirmed his availability for the public hearing on the proposed dates.

15. By a letter dated 11 November 2011, The Legal Counsel of the African Union Commission informed the Registry of the Court that the Respondent "could not confirm [its] availability due to intervening circumstances and prior commitments". In the said letter, the Legal Counsel of the African Union Commission further requested that "the hearing of the above matter be postponed/adjourned."

16. By separate letters, both dated 8 December 2011, the Registrar informed the Parties of the Court's decision that, due to the unavailability of

the Respondent, the public hearing on the Application would take place from 22 to 23 March, during the 24th Ordinary Session of the Court to be held from 19 to 30 March 2012, in Arusha, Tanzania, even if only one party were to be present.

17. By an email of 7 February 2012, the Office of the Legal Counsel of the African Union Commission informed the Registry of the Court that, at the hearing, the Respondent would be represented by Advocate Bahame Mukirya Tom NYANDUGA, and the latter would be assisted by officers from the Office of the Legal Counsel of the African Union Commission.

18. By an email dated 18 February 2012, the Applicant confirmed his availability for the public hearing on the dates proposed.

19. By a letter dated 19 March 2012, the Registry received a formal letter from the Office of the Legal Counsel appointing Mr. Bahame Mukirya Tom NYANDUGA "to assist the Office of the Legal Counsel of the Respondent in this matter".

20. The public hearing on the Application took place from 22 to 23 March 2012, in Arusha, Tanzania, at which the Court heard the oral arguments and replies:

For the Applicant: Femi FALANA, Esq.

For the Respondent:
(i) Advocate Bahame Mukirya Tom NYANDUGA

(ii) Mr Bright MANDO, Legal Officer in the Office of The Legal Counsel of the AU Commission

21. At the hearing, questions were put by Members of the Court to the Parties, to which replies were given.

22. After deliberations, the Registry received additional submissions from the Applicant, dated 27 March 2012, in which he indicated that they were submitted in accordance with Rule 47 of the Rules. The Court decided that the submissions were not acceptable as the request was not competent in terms of the Rules, and the Registrar was instructed to communicate this decision to the Parties accordingly.

23. By a letter dated 24 April 2012 the Registrar informed the parties of the Court's decision.

III. THE POSITION OF THE PARTIES

A. THE POSITION OF THE APPLICANT

24. The Applicant starts by noting that by virtue of Article 34(6) of the Protocol enacted by the Respondent, a State Party is required to make a declaration to accept the competence of the Court to hear and determine human rights cases filed by individuals and NGOs.

25. *With regard to the jurisdiction of the Court*, the Applicant submits that, in the present case, it has not been ousted, because the Respondent is not "a Member State of the African Union." The Applicant maintains that it is the Respondent which enacted and adopted the Charter and the Protocol, and that the Respondent has been sued as a corporate community on behalf of its Member States. He adds that it is clear that the African Union as a whole is representing the African people and their governments, and, therefore, it is competent to defend actions brought against the Member States.

26. The Applicant further argues that the ouster of a Court's jurisdiction can only arise if the Court is satisfied by evidence adduced before it, that the right sought to be enforced has been extinguished.

27. The Applicant also contends that it is trite law that a Court has the jurisdiction to determine whether its jurisdiction has been ousted. He points out that the competence of this Court to determine its jurisdiction is guaranteed in Article 3(2) of the Protocol which states that "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

28. The Applicant submits finally that, since Article 34(6) of the Protocol does not require the Respondent or any of its institutions to make a declaration to accept the jurisdiction of the Court, the Court is competent to entertain the Application.

29. *With regard to the admissibility of the Application*, the Applicant asserts that the requirement of exhaustion of local remedies is not applicable in this case since the Respondent cannot be sued in the municipal courts of its Member States. He further submits that the domestication by Nigeria of the Charter and the Constitutive Act of the African Union should be construed as giving him direct access to the Court.

30. *With regard to* his *locus standi*, the Applicant argues that he has standing in public interest litigation since he has a duty to promote public interest litigation in the area of human rights, based on Article 27 (1) of the Charter, which provides that every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community, and Article 29 (7) of the Charter which

provides that the individual shall have the duty to preserve and strengthen positive African cultural values.

31. The Applicant also states that, being a senior lawyer and a civil rights lawyer in his country, he has clients who would like to approach the Court but he is unable to discharge his duties to them because of the requirement of Article 34(6) of the Protocol.

32. The Applicant finally submits that he therefore has *locus standi* to file this Application.

33. *With regard to the merits of the case*, the Applicant maintains that Article 34(6) of the Protocol is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the Charter.

34. Concerning the alleged violation of Article 1 of the Charter (the obligation for State Parties to recognize the rights, duties and freedoms enshrined in the Charter and to adopt legislative or other measures to give effect to them), the Applicant argues that it is undoubtedly clear that Article 34(6) of the Protocol has derogated from Article 1 of the Charter.

35. Regarding the alleged violation of Article 2 of the Charter (the right to freedom from discrimination), the Applicant contends that, unlike nationals of States that have made the declaration, he cannot drag his country to the African Court on account of human rights violations, and that, by denying him access to the Court, his right to freedom from discrimination on the basis of his national origin has been violated.

36. Concerning the alleged violation of Article 7 of the Charter (right to a fair hearing), the Applicant maintains that, by limiting access to the Court to the making of a declaration by Member States of the Respondent, his

right to have complaints of human rights violations heard and determined by the Court has been violated.

37. Regarding the alleged violation of Article 13(3) of the Charter (the right of access to public property and services in strict equality of all persons before the law), the Applicant states that, it is not in dispute that the Court is a public property to which every individual shall have the right of access in strict equality of all persons. He therefore submits that by denying access to the Court to persons whose countries of origin have not made a declaration to accept the competence of the Court, his right to access a public property in strict equality of all persons before the law has been violated without any legal justification.

38. With respect to the alleged violation of Article 26 of the Charter (duty of State Parties to guarantee the independence of the Courts), the Applicant avers that by basing the jurisdiction of the Court on the Respondent's Member States' discretion to accept such jurisdiction, the Respondent has compromised the Court's independence.

39. With regard to the alleged violation of Article 66 of the Charter (the power to adopt special protocols or agreements to supplement the provisions of the Charter), the Applicant states that, in supplementing the provisions of the Charter, any protocol, like the Protocol on the Court, can only enhance the rights guaranteed in the Charter, and that any provision of a supplementary protocol which derogates from the provisions of the Charter shall be declared null and void by the Court.

40. In conclusion;

In his prayer in the Application, the Applicant asks for:

"a. A declaration that Article 34(6) of the Protocol on the Establishment of the African Court is illegal, null and void as it is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights.

b. A declaration that the Applicant is entitled to file human rights complaints before the African Court by virtue of Article 7 of the African Charter on Human and Peoples' Rights.

c. An order annulling Article 34(6) of the Protocol on the Establishment of the African Court forthwith."

In his Reply to the Respondent's response, the Applicant concludes as follows:

"15. In the light of the foregoing, the Applicant avers that the Respondent has no reply to the Applicant's claim. The reliefs sought by him ought to be granted by this Honourable Court.

16. In view of this Reply the Applicant avers that the Respondent has no defence whatsoever to the claim of the Applicant."

In his oral submissions, the Applicant prays the Court:

"... to hold that this case is well founded; it is properly constituted and therefore to grant the relief sought by the Applicant, by annulling Article 34(6) of the Protocol so that all victims of human rights violations in the African continent can access this Court in the interest of justice and fair play."

B. THE POSITION OF THE RESPONDENT

41. In general terms, the Respondent avers that the Application, and each and every allegation thereof, fails to state a claim against the Respondent, either in law or in fact, upon which any relief may be granted.

42. *With regard to the jurisdiction of the Court*, the Respondent denies that the Protocol as well as the Charter and the Constitutive Act of the African Union were adopted by the African Union and submits that these instruments were adopted by Member States of the African Union as is evident from their preambles. He adds that according to Article 63(1) of the Charter and Article 34(1) of the Protocol, the two instruments are open to signature, ratification or accession by African States only.

43. The Respondent states that, in Article 34(6), the Protocol talks about a State and therefore submits that the African Union not being a State cannot ratify the Protocol and that the Protocol cannot be interpreted in a manner which calls in a corporate entity to assume obligations on behalf of the State.

44. The Respondent maintains that it is not a party to the Charter, nor to the Protocol and that therefore, no case can be brought against it for obligations of Member States under the Charter and the Protocol, in its corporate capacity.

45. The Respondent contends that, in the case at hand, ratification of treaties by Member States of the African Union has never been ceded to the African Union by its Member States; that the African Union cannot be held liable for failure by the Member States to ratify them, or failure to make the requisite declaration.

46. In addition, the Respondent avers that the Applicant has not shown any traceable causal connection whatsoever between the African Union and his lack of access to the Court. Therefore, the Respondent submits that there is no case or controversy between the Applicant and the Respondent to be decided by the Court.

47. Finally, the Respondent maintains that the Applicant is not entitled to submit cases to the Court both under the Protocol and the Rules and urges the Court to determine as a preliminary issue, whether the Court can exercise jurisdiction *ratione personae* and *ratione materiae* with respect to the Application.

48. *With regard to the admissibility of the Application*, the Respondent contends that even if the Applicant had a right of access to the Court, which he does not have, he should have exhausted the local remedies in Nigeria, as required by Article 6(2) of the Protocol, Article 56 of the Charter and Rule 40(5) of the Rules, which he has not done.

49. *With regard to the merits of the case*, that is, the issue of inconsistency of Article 34(6) of the Protocol with some provisions of the Charter, the Respondent states in general terms that it is the sovereign right of its Member States to make a declaration at the time of ratification of the Protocol; that the Protocol is valid in all respects under the 1969 Vienna Convention on the Law of Treaties and under customary international law and can only be void if there is a conflict with a peremptory norm of general international law *(jus cogens)*; and that as a consequence, the Respondent denies that Article 34(6) of the Protocol is illegal or invalid.

50. Concerning the alleged violation of Article 1 of the Charter, the Respondent avers that it has no obligations under this Article which is exclusively for Member States to recognize the rights, duties and freedoms enshrined in the Charter and to adopt legislative or other measures to give them effect.

51. Regarding the alleged violation of Article 7 of the Charter, the Respondent submits that this Article does not in any way offer the Applicant unrestricted access to the Court, as alleged, or at all.

52. Concerning the alleged violation of Article 13 of the Charter, the Respondent contends that this Article is on the Applicant's participation in the government of his country, the Applicant's right of equal access to the public service in his country and the right to access to public property and services and it has nothing to do with the obligations of the African Union or access to the Court.

53. On the alleged violation of Article 26 of the Charter, the Respondent avers again that it is not a State Party to the Charter.

54. Finally, with regard to the alleged violation of Article 66 of the Charter, the Respondent submits that this Article applies only to State Parties to the Charter and not to the Respondent.

55. In conclusion;

In its response "the Respondent prays the Court to dismiss the Applicant's Application in its entirety."

In its oral submissions, the Respondent urges "the Court to determine as a preliminary issue whether the Court can exercise jurisdiction *ratione personae* and *ratione materiae* under the application", "prays

that the Application should be dismissed for lack of jurisdiction" and, "denies that Articles 1, 2, 7, 13, 26 and 66 of the Charter have been violated and therefore prays that the Application be dismissed."

IV. THE JURISDICTION OF THE COURT

56. At this stage, the Court has, in accordance with Rules 39(1) and 52(7) of the Rules, to consider the preliminary objections raised by the Respondent and in particular the objection relating to the Court's jurisdiction over the present Application.

57. Article 3(2) of the Protocol and Rule 26(2) of the Rules provide that "in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

58. In order to determine the preliminary objection, it has to be noted that, for the Court to hear an application brought directly by an individual there must be compliance with, *inter alia*, Article 5(3) and Article 34(6) of the Protocol.

59. Article 5(3) of the Protocol provides that:

> "The Court may entitle relevant NonGovernmental 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."

60. For its part, Article 34(6) of the Protocol provides that:

> "At the time of ratification of this Protocol or anytime 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."

61. As the Court stated in *Michelot Yogogombaye v The Republic of Senegal,* Application No 001/2008, paragraph 34, "[t]he effect of the foregoing two provisions, read together, is that direct access to the Court by an individual is subject to the deposit by the Respondent State of a declaration authorizing such a case to be brought before the Court."

62. As mentioned earlier, the Applicant submits first that the requirement of the declaration provided for in Article 34(6) of the Protocol applies only to Member States and not to the African Union itself. He concludes that since the Article does not require the Respondent or any of its institutions to make a declaration to accept the jurisdiction of the Court, the Court is competent to entertain his Application. For its part, the Respondent does not specifically address this argument.

63. In the view of the Court, the fact that a non-state entity like the African Union is not required by Article 34(6) of the Protocol to make the declaration does not necessarily give the Court jurisdiction to accept applications brought by individuals against such entity; there may be other grounds on which the Court may find that it has no jurisdiction. In the present instance, what is specifically envisaged by the Protocol and by Article 34(6) in particular is precisely the situation where applications from individuals and NGOs are brought against State Parties. In this regard, Article 3(1) of the Protocol which deals with the jurisdiction of the Court is referring to interpretation and application of human rights instruments ratified by the "States concerned." Similarly, Article 34(6) of the Protocol itself refers only to a "State Party".

64. Secondly, the Applicant submits that the African Union can be sued before the Court because it was the one which enacted and adopted the Protocol, as a corporate community on behalf of its Member States.

65. On its part, as mentioned earlier, the Respondent submits :

- That the Protocol was not adopted by the African Union as such, but by its Member States, as evidenced in the preamble to the Protocol.
- That the Respondent is not a party to the Protocol and that the Protocol in Article 34(6), talks about a State, and the African Union not being a state, cannot ratify the Protocol.
- That the ratification of treaties by Member States of the African Union has never been ceded to the African Union by its Member States and that the African Union cannot be held liable for failure by the Member States to ratify the Protocol or to make the requisite declaration, and therefore, no case can be brought against it for obligations of Member States under the Charter and the Protocol in its corporate capacity.
- That the African Union cannot assume obligations of sovereign Member States which have sovereign rights when ratifying the Protocol and making the declaration.

66. Concerning the Applicant's submission that the African Union can be sued before the Court, because it was the one which enacted and adopted the Protocol, the Court notes that the Protocol was adopted by the Assembly of Heads of State and Government of the African Union.

The Court also notes however that the Protocol was agreed upon by the Member States of the African Union as is evidenced by the preamble of the Protocol which states as follows:

"The Member States of the Organization of African Unity ... State Parties to the African Charter on Human and Peoples' Rights ... Have agreed as follows:"

67. In the practice of the African Union, although the adoption of treaties is done formally by the Assembly of Heads of State and Government, their signature and ratification are still the exclusive prerogative of its Member States. This is confirmed, *inter alia*, by Article 34 (1) of the Protocol which provides that "it shall be open for signature and ratification or accession by any State Party to the Charter" (see also Article 63(1) of the Charter). Thus, in the view of the Court, the mere fact that the Protocol has been adopted by the Assembly of Heads of State and Government does not establish that the African Union is a party to the Protocol and therefore can be sued under it.

68. Regarding the Applicant's contention that the African Union can be sued as a corporate community on behalf of its Member States, it is the view of the Court that, as an international organization, the African Union has a legal personality separate from the legal personality of its Member States. As the International Court of Justice stated in its Advisory Opinion on *Reparation for injuries suffered in the service of the United Nations:*

"It must be acknowledged that its Members [United Nations], by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal

personality and rights and duties are the same as those of a State. ... What it does mean is that it is a subject of international law and capable of possessing international rights and duties ... ."[1]

69. In this regard, however, in principle, international obligations arising from a treaty cannot be imposed on an international organization, unless it is a party to such a treaty or it is subject to such obligations by any other means recognized under international law.

70. In the present case, the African Union is not a party to the Protocol. As a legal person, an international organization like the African Union will have the capacity to be party to a treaty between States if such a treaty allows an international organization to become a party. As far as an international organization is not a party to a treaty, it cannot be subject to legal obligations arising from that treaty. This is in line with Article 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations which provides:

> "A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization." (see also, Article 34 of the 1969 Vienna Convention on the Law of Treaties).

71. Therefore, in the present case, the African Union cannot be subject to obligations arising from the Protocol unless it has been allowed to become a party to the Protocol and it is willing to do so, both of which do not apply.

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[1] *Reparations for injuries suffered in the service of the United Nations*, Advisory Opinion, *I.C.J. Reports*, 1949, p 179.

In the same vein, the mere fact that the African Union has a separate legal personality does not imply that it can be considered as a representative of its Member States with regard to obligations that they undertake under the Protocol.

72. It is therefore the opinion of the Court that the African Union cannot be sued before the Court on behalf of its Member States.

73. At this juncture, it is appropriate to emphasize that the Court is a creature of the Protocol and that its jurisdiction is clearly prescribed by the Protocol. When an application is filed before the Court by an individual, the jurisdiction of the Court *ratione personae* is determined by Articles 5(3) and 34(6) of the Protocol, read together, which require that such an application will not be received unless it is filed against a State which has ratified the Protocol and made the declaration. The present case in which the Application has been filed against an entity other than a State having ratified the Protocol and made the declaration, falls outside the jurisdiction of the Court. Therefore, the Court has no jurisdiction to entertain the Application.

74. Since the Court has concluded that it does not have jurisdiction to hear the Application, it does not deem it necessary to examine the question of admissibility of the Application and the merits of the case.

75. In view of the foregoing,

THE COURT by a majority of seven votes to three:

Holds that in terms of Articles 5(3) and 34(6) of the Protocol, read together, it has no jurisdiction to hear the case instituted by Femi Falana, Esq. against the African Union.

IN FAVOUR: President NIYUNGEKO; Judges MUTSINZI, GUINDO, OUGUERGOUZ, RAMADHANI, TAMBALA and ORÉ

AGAINST: Vice-President AKUFFO; Judges NGOEPE and THOMPSON

In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules of Court, the separate opinions of Judges MUTSINZI and OUGUERGOUZ and the dissenting opinion of Vice-President AKUFFO and Judges NGOEPE and THOMPSON, are appended to this Judgment.

Signed

- Gérard NIYUNGEKO, President
- Sophia A.B. AKUFFO, Vice-President
- Jean MUTSINZI, Judge
- Bernard M. NGOEPE, Judge
- Modibo T. GUINDO, Judge
- Fatsah OUGUERGOUZ, Judge
- Augustino S.L. RAMADHANI, Judge
- Duncan TAMBALA, Judge
- Elsie N. THOMPSON, Judge
- Sylvain ORÉ, Judge
- and Robert ENO, Registrar

Done at Arusha, this twenty-sixth day of June in the year Two Thousand and Twelve in English and French, the English text being authoritative.

AFRICAN UNION
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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Case no: 001/2011

In the matter of:

Femi Falana — Applicant

VS

The African Union — Respondent

DISSENTING OPINION

Sophia A.B. AKUFFO, Vice-President;
Bernard M. NGOEPE and Elsie N. THOMPSON – Judges

1. We have read the majority judgment; regrettably, we are unable to agree with it. The history of the case until the conclusion of the hearing is set out in the majority judgment; there is no need to repeat it here.

The Parties:

2. The Applicant:

The Applicant is a Nigerian national, describing himself as a human rights activist. He says he has received some awards in the field of human rights. He is a practicing lawyer, based in Lagos, Federal Republic of Nigeria.

3. The Respondent:

The Respondent is the African Union (the AU), established in terms of Article 2 of the Constitutive Act of the African Union (the Act). It comprises all states in Africa, barring one. In terms of Article 33, the Act replaces the Charter of the Organization of

African Unity (the OAU) and makes the AU a successor to the OAU in all relevant material respects. One of the consequences of such a succession is that instruments such as Charters and Protocols thereto adopted, ratified and acceded to under the OAU, are binding on the AU and Member States unless repudiated; these include the African Charter on Human and Peoples' Rights (the Charter) and the protocols to it such as the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol). The Charter and the Protocol are central to this case.

The Applicant's case and the remedies sought

4. The Applicant challenges the validity of Article 34(6) of the Protocol. The Article bars individuals and Non-Governmental organizations (NGOs) from accessing this Court, except where a respondent state has made a special declaration accepting to be cited by an individual or an NGO. The Applicant contends that the

Article violates various Articles of the Charter and therefore prays the following remedies:

"A. A DECLARATION that Article 34(6) of the Protocol on the Establishment of the African Court is illegal, null and void as it is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights.

"B. A DECLARATION that the Applicant is entitled to file human rights complaints before the African Court by virtue of Article 7 of the African Charter on Human and Peoples' Rights.

"C. AN ORDER annulling Article 34(6) of the Protocol on the Establishment of the African Court forthwith."

Respondent's case

5. The application is opposed by the Respondent on the grounds which, broadly stated, are, firstly, lack of jurisdiction over the Respondent as well as the Applicant's lack of *locus standi*, and, secondly, that the impugned article is in any case not in conflict

with the provisions of the Charter. Under the first point, a number of subsidiary grounds are advanced; they will be dealt with later.

6. Although the Respondent raised as a preliminary objection lack of jurisdiction, the parties were requested by the Court to argue both the preliminary objections and the merits together at the hearing; that was how the hearing was conducted. This was to avoid parties having possibly to come back after the preliminary stage, the intention being to save time, costs and also to avoid inconvenience to the parties.

7. We are aware that not being a signatory to a treaty, a third party may not be sued under that treaty. However, for the reasons which will become apparent later, this case is, in our view, different.

8. As said earlier, a number of related points are raised under lack of jurisdiction.

8.1 It is argued that the Respondent cannot be cited as representing Member States. That may be true; however, Respondent is cited herein on its own, as a legal person, having been established in terms of the Act, Article 2 thereof. The article reads "*The African Union is hereby established with the provisions of this Act*". We agree with the majority judgment that the Respondent has international legal personality, separate from the legal personality of its Member States. It is therefore not necessary for us to deal with this aspect. We, however, disagree with the majority judgment that the Respondent could not be cited in the case before us.

8.1.1 After holding that the United Nations Organization is an international person, the International Court of Justice, in *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, went on to say: *"What it does mean is that it is a subject of international law and capable of possessing international rights and*

duties, and that it has capacity to maintain its rights by bringing international claims".[1]

It is our view that the right to bring international claims carries with it, as a natural legal consequence, the capacity to be sued. We point out later that one of the duties imposed upon the Respondent, through the Charter, is to protect human and peoples' rights; such an obligation would mean nothing if it could not be enforced against the Respondent.

8.1.2 After establishing the Respondent as a legal entity, Member States went further and conferred certain powers on it; these include the power to deal with the protection of human rights on the Continent. Article 3(h) of the Act states the following as being one of the Respondent's objectives, namely to: "*Promote and protect human and peoples' rights in accordance with*

[1] I.C.J Reports 1949, p.174, at p.179

the African Charter on Human and Peoples' Rights and the relevant human rights instruments".

Furthermore, Article 4 of the Act states: "*The Union* (Respondent) *shall function in accordance with the following principles:*

.....

(h) The right of the Union to intervene in a member state of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity.....

(m) Respect for democratic principles, human rights, the rule of law and good governance....."

Respondent's predecessor, the OAU, had likewise been empowered, and charged with the obligation, by Member States to ensure the protection of human and peoples' rights. The Act, the Charter, as well as the Protocol, have empowered the Respondent to exercise the powers, and to execute obligations, conferred on it.

These powers can be conferred expressly by a constitutive instrument, or may be implied.[2] Once so empowered, the legal organization is able to carry out the authorized duties and functions independently of the Member States as it is a legal person. It is our view that such has been the case here; accordingly, there was no need to cite individual Member States, which is also why Article 34(6) is not applicable.

8.1.3 One of the indications that an international legal person has been empowered to carry out certain functions independently of Member States is its capacity to take decisions by majority.[3] Such a decision would therefore bind even those Member States who voted against it. In terms of Article 7(1) of the Act, the Respondent does take decisions by majority, consensus failing: "*The Assembly shall take its decisions by consensus or, failing which, by a two-third majority of member states*

[2] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports, 1996, p.66, at p.79

[3] The Law of International Organisations, p.72, Second Edition, N.D White.

of the Union. However, procedural matters, including the question whether a matter is one of procedure or not, shall be decided by a simple majority"

8.1.4 As further indication that Respondent has been empowered to deal with human and peoples' rights issues itself, organs such as the African Commission on Human and Peoples' Rights (the Human Rights Commission) and this Court, have been created within it to enable it to carry out these duties. The Respondent itself, and not individual Member States, does for example, manage and conduct the election of officials to these organs; approves and provides budgets for their activities relating to the protection of human rights and receives periodic reports from these organs.

8.1.5 As yet a further demonstration of the Respondent's legal personality and that it has been empowered to deal with human rights issues itself, independently of

Member States, the Respondent can seize this Court for an advisory opinion in respect of these matters in terms of Article 4 of the Protocol.

8.2 Importantly, none of the remedies sought by the Applicant seeks to impose any obligations on either the Respondent or Member States, particularly the prayer we may be inclined to grant.

8.3 In light of the totality of paragraphs 8.1 and 8.2 above, the argument that the Respondent cannot be cited as it is not a party to either the Charter or the Protocol, or that no case can be brought against it in respect of obligations of Member States and therefore that the Applicant has not shown any traceable causal connection between the Respondent and the Applicant's lack of access to the Court, is irrelevant; so too is the submission that no case can be brought against the Respondent in respect of obligations of Member States. We therefore hold that the Respondent has been properly cited.

8.4 It is also argued that Applicant did not exhaust local remedies before approaching this court, as required by Article 6(2) of the Protocol, read together with Article 56(5) of the Charter. In this respect, it is argued that the Applicant, being a Nigerian national, should have taken his country to his national courts to compel his country to make the declaration in terms of Article 34(6) of the Protocol. Respondent's argument is wrong in two respects. Firstly, the Applicant is not approaching the court as a Nigerian national, nor is he seeking a remedy for himself or Nigerian nationals only. Even if he had succeeded through Nigerian Courts to cause his own country to make the declaration, millions of nationals of the other State Parties to the Protocol which have not made the declaration would still remain barred. That only five State Parties have so far made the declaration, means that the multitude of individuals on the Continent remain barred by Article 34(6). Nigeria's declaration would hardly have made any difference. The logic of Respondent's argument is that

nationals of each State Party which has not made the declaration should bring applications in every single national jurisdiction before approaching this court. This is a very theoretical approach, virtually impracticable, as opposed to the pragmatic one adopted by the Applicant. The protection of human rights is too important to be left to the vagrancies of such theoretical solutions.

8.5 Furthermore, Respondent contends that, by virtue of Article 34(6) of the Protocol, the Applicant, being an individual, is barred from approaching this court. Surely, one cannot disqualify the Applicant from approaching this Court by invoking the very article the validity of which the Applicant is seeking to challenge. The Court must first hear the matter and only thereafter, (emphasis) decide whether the impugned article is valid or not. Article 3(2) of the Protocol provides that in "*the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.*" For the Court to decide, it must first be seized by an applicant. It is precisely the

person who has been shut out who will knock at the door to be heard on the validity of the ouster clause. This Court therefore has jurisdiction to adjudicate on the validity of Article 34(6) at the instance of an individual applicant. Applicant's answer to Respondent's argument is that since he is not citing a member state, but rather the Respondent, Article 34(6) has no application. There is merit in this argument. The Article only requires that State Parties make the declaration, and not non-State Parties. The law is not against an individual *per se*, but is aimed at protecting a State Party which has not made the declaration; that is why even a foreign individual can sue a State Party that has made the declaration.

8.6 Again, it is argued that the Court has, in any event, no power to set aside Article 34(6) of the Protocol. As this argument is capable of being divorced from the strict issue of jurisdiction, it will be dealt with later.

9. By reason of it having been empowered, and charged with the obligation, by Member States to administer, apply and enforce the Charter and the Protocol, both of which form the subject matter of this case, the Respondent has in any case a material and direct interest in the matter and therefore had to be cited.

10. For the reasons given above, the preliminary objections are overruled. That being the case, attention now turns to the merits of the case.

Whether Article 34(6) of the Protocol is inconsistent with the Charter.

11. As already stated, the protection of human and peoples' rights is one of the objectives of the Act, as was indeed the case under the old Charter of the OAU.

12. The Charter: The fundamental objective of the Charter was, and remains, to uphold and protect human and peoples' rights. This

objective appears clearly from its preamble, and is cemented in, amongst others, the following Articles relied upon by the Applicant:

Article 1: *"The Member States of the Organisation of African Unity, parties to the present Charter shall recognize the rights, duties and freedom enshrined in that Charter and shall undertake to adopt legislative or other measures to give effect to them".*

Article 2: *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status"*

Article 7: *"1. Every individual shall have the right to have his cause heard. This comprises:*

a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and

guaranteed by conventions, laws, regulations and customs in force;

b) The right to be presumed innocent until proven guilty by a competent court or tribunal;

c) The right to defence, including the right to be defended by counsel of his choice;

d) The right to be tried within a reasonable time before an impartial court or tribunal;

2. No one may be condemned for an act or omission which did not constitute a legal punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

Article 26: *"State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of*

appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."

Article 66: *"Special protocols or agreements may, if necessary, supplement the provision of the present Charter".*

The above are some of the provisions of the Charter with which the Applicant contends that, by barring individuals from direct access to the Court, Article 34(6) of the Protocol is inconsistent.

13. The Protocol:

13.1 Article 66 of the Charter provides for the making of special protocols, if necessary, to supplement (emphasis) the provisions of the Charter towards the protection of human rights. Pursuant to that, the Protocol was made and then adopted on 9 June 1998, and duly ratified, at least by some Member States, and came into operation on 25 January

2004. Being a protocol to the Charter, the Protocol is subservient to the Charter.

13.2 The Protocol aims, through the Court, to give effect to the protection of human rights, including, naturally, the right of individuals, albeit in complementarity with the Human Rights Commission. This is a ringing demand by Article 66 of the Charter.

13.3 The preamble to the Protocol states that Member States are firmly "*convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights ...*".

Article 1 establishes the Court. Article 3 provides: *"1. 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."*

"2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."

13.4 In terms of the Protocol, the mandate of the Court is therefore to protect human rights; and its jurisdiction, which itself decides upon, extends to all cases and disputes concerning human rights.

14. Access to the Court: Article 5 of the Protocol determines as to who can submit cases to the Court; for example the Human Rights Commission, or a State Party. Article 5(3) further provides: *"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 the Protocol."*

Article 34(6), in turn reads: "*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." Access to the Court is therefore controlled through Articles 5 and 34(6) read together. The latter Article is the one the Applicant contends is inconsistent with the provisions of the Charter. In determining whether or not the Article is inconsistent with the Charter, it falls to be considered alone, and on its own wording and construction. Secondly, a proper understanding of the relationship between the Charter and the Protocol is vital in resolving the issue of alleged inconsistency between them.

15. The relationship between the Charter and the Protocol

From the above exposé, it is clear that, firstly, the Charter ranks higher than the Protocol; a point which, not surprisingly, the Respondent did not dispute. Secondly, the Protocol was brought about solely to enhance the protection of human and peoples' rights through the Court, in complementarity with the Human

Rights Commission. These are the very rights recognized and entrenched in the Charter.

16. To the extent that Article 34(6) denies individuals direct access to the Court, which access the Charter does not deny, the Article, far from being a supplementary measure towards the enhancement of the protection of human rights, as envisaged by Article 66 of the Charter, does the very opposite. It is at odds with the objective, language and spirit of the Charter as it disables the Court from hearing applications brought by individuals against a state which has not made the declaration, even when the protection of human rights entrenched in the Charter, is at stake. We therefore hold that it is inconsistent with the Charter. We do so well aware of Article 30 of the Vienna Convention on the Law of Treaties regarding the application of successive treaties relating to the same subject matter. It is our view that this Article finds no application in the case before us

since we are not dealing with two treaties, but with a treaty (the Charter) and a mere protocol to itself (the Protocol).

Whether Article 34(6) should be declared null and void or set aside.

17. The question arises whether this Court has the competence to declare Article 34(6) of the Protocol null and void and/or to set it aside. The Court is a creature of the Protocol and its competencies therefore derive from the Protocol. Determining whether or not Article 34(6) is inconsistent with the Charter is a matter of interpretation which the Court is therefore competent to do in terms of Article 3(1) of the Protocol. So too, in holding that this Court has jurisdiction to hear this application, the Court derives its competence from Article 3(2) of the Protocol which empowers it to decide whether or not it has jurisdiction in any particular matter before it. In national jurisdictions where the constitution is the supreme law, any law inconsistent therewith would be liable to be struck down by the Court, the latter deriving

the power to do so from the constitution itself. In *casu*, we find no provision in the Protocol empowering the Court to declare null and void and/or to set aside any Article of the Protocol. Therefore, much as such a move may appear to be the logical thing to do in light of our finding of inconsistency, the applicant's prayer is not competent. It is, however, hoped that the problems raised by Article 34(6) will receive appropriate attention.

18. The following finding is made:

(a) The Court has jurisdiction to hear this application.

(b) Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights is inconsistent with the African Charter on Human and Peoples' Rights.

(c) The Applicant's prayer that Article 34(6) be declared null and void and/or be set aside is denied.

Sophia A.B. AKUFFO, Vice-President: .....

Bernard M. NGOEPE, Judge: .....

Elsie N. THOMPSON, Judge: .....

Robert W. Eno, Registrar

Done at Arusha, this 26th day of June, in the year Two Thousand and Twelve in English and French, the English text being authoritative.

AFRICAN UNION
الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

TWENTY FIFTH ORDINARY SESSION
(11 – 26 June 2012)

SEPARATE OPINION BY JUDGE JEAN MUTSINZI

Joined to: the Judgement of the Court in Application No. 001/2011

FEMI FALANA versus THE AFRICAN UNION

1. According to Article 28 (7) of the Protocol which established the African Court on Human and Peoples' Rights "if the judgment of the Court does not represent, in whole or in part, the unanimous decision of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion".

2. The Judgement adopted by the majority of the Members of the Court, was as follows: "Declares that, pursuant to Articles 5(3) and 34(6) of the Protocol, read together, it does not have the jurisdiction to hear the Application filed by Mr. Femi Falana against the African Union".

3. In that Judgement, I agree with the conclusion that the Court does not have the jurisdiction to hear the Application filed by MR. FEMI FALANA against the AFRICAN UNION.

4. My disagreement stems from the legal basis for said lack of jurisdiction, which in my opinion, is not addressed in Articles 5(3) and 34(6) of the Protocol.

5. In fact, the said articles provide as follows: "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" (Article 5 (3)); "At the time of the ratification of this Protocol or at 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". (Article 34 (6)).

6. A combined reading of the provisions above, points to the fact that they referred to applications filed by individuals or non-governmental organizations against States parties, in which case, the question raised is whether the Respondent State has made the declaration accepting the jurisdiction of the Court to hear cases brought before it by individuals or non-governmental organizations, whereas, the African Union is neither a State nor a State party to the Protocol and, consequently cannot make such declaration as provided for in Articles 5(3) and 34(6) of the Protocol.

7. For my part, I hold the view that the basic issue that needs to be resolved and which would dictate subsequent action is one of ascertaining whether, as in the instant case, non-State entities may be brought before the Court as respondents.

8. It is my opinion that the provisions of the Protocol as a whole and Articles 3, 30 and 34 (1, 4), in particular, show that, the Respondent before this Court can only be a State party. In that regard, the operative paragraph of the Judgment, ought to have been as follows:

   "Declares, that in accordance with the Protocol, only State parties may be brought before the Court as respondents for allegations of Human Rights violations and that, accordingly, the Court does not have the jurisdiction to entertain the Application filed by Mr. FEMI FALANA against The AFRICAN UNION".

Signed:

- J. MUTSINZI, Judge

- R. ENO, Registrar

AFRICAN UNION
الاتحاد الأفريقي

UNION AFRICAINE

UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

FEMI FALANA

V.

AFRICAN UNION

(Application N° 001/2011)

SEPARATE OPINION OF JUDGE FATSAH OUGUERGOUZ

1. Mr. Femi Falana's Application against the African Union raises the issue of access to the Court's jurisdiction by individuals and non-governmental organizations. It does so by challenging the legality of Article 34(6) which subjects such access to the deposit of a declaration accepting the jurisdiction of the Court by States Parties. The importance and crucial significance of that issue notwithstanding, I share the opinion of the Majority according to which the Court has no jurisdiction to entertain Mr. Falana's Application. It is however my considered opinion that since the Court manifestly lacks the jurisdiction *ratione personae* to hear and determine the application, it ought not to have disposed of it by way of a Judgment as provided in Rule 52(7) of the Rules; rather, the Application ought to have been rejected without the Court itself intervening, that is *de plano* through a simple letter from the Registrar.

2. I have had the opportunity, on numerous occasions, to explain my position, as a matter of principle, on the way and manner of dealing with individual applications with regard to which the Court manifestly lacks personal jurisdiction; which is the case with applications against States Parties which have not made the optional declaration under Article 34(6) of the Protocol, or against African States which are not Parties to the Protocol or not members of

the African Union or even against an Organ of the African Union (see my separate opinions attached to the Judgments in the cases of *Michelot Yogogombaye v. The Republic of Senegal, Efoua Mbozo'o Samuel v. The Pan African Parliament, the Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. The Republic of Gabon, Delta International Investments S.A., MR. AGL de Lang and Mme. Lang v. The Republic of South Africa, Emmanuel Joseph Uko v. The Republic of South Africa* and *Timan Amir Adam v. The Republic of Sudan, as well as my dissenting opinion attached to the decision in the Case of Ekollo Moundi Alexandre v. The Republic of Cameroon and the Federal Republic of Nigeria).*

3. In all cases where the jurisdiction *ratione personae* of the Court is manifestly lacking, I am indeed of the opinion that the Court should not proceed with the judicial consideration of applications received by the Registry; such applications should rather be processed administratively and rejected *de plano* through a simple letter from the Registrar.

4. The Court has rendered decisions (which it formally distinguishes from "Judgments"[1]) in most cases that it has considered to this day, whereas it had formally acknowledged that it was "manifest" that it lacked the jurisdiction to entertain such applications (see for instance, *Youssef Ababou v. The Kingdom of Morocco* (para. 12), *Daniel Amare & Mulugeta Amare v. Mozambique Airlines & Mozambique* (para. 8), *Ekollo Moundi Alexandre v. The Republic of Cameroon and the Federal Republic of Nigeria* (para. 10), *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. Republic of Gabon* (paras. 11 &12), *Delta International Investments SA, Mr AGL de Lang and Mme de Lang v. The Republic of South Africa* (paras. 8 & 9), *Emmanuel Joseph Uko v. The Republic of South Africa* (paras. 10 & 11) and *Timan Amir Adam v. The Republic of Sudan* (paras. 8 & 9).)

5. On occasions, the Court had even admitted, in its own words, that it was "evident" that it "manifestly lacked the jurisdiction" to entertain the applications in question (see the English version of the Decisions on the *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. The Republic of Gabon,* (para. 11), *Timan Amir Adam v. The Republic of Sudan* (para. 8), *Delta International Investments SA, Mr AGL de Lang and Mme de Lang v. The Republic of South Africa* (para. 8) and *Emmanuel Joseph Uko v. The Republic of South Africa* (para. 10)).

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[1] On the distinction made by the Court between a "Judgment" and a "Decision", see paragraphs 3, 4 and 5 of my dissenting opinion attached to the decision in the case of *Ekollo Moundi Alexandre v. The Republic of Cameroon and the Federal Republic of Nigeria.*

F.O.

6. In the instant case, the Court has also decided to proceed with the judicial consideration of the Application filed by Mr. Falana against the African Union. It however decided to do so not by way of an expedited or summary consideration which would result in the adoption of a simple "decision" but rather through the judicial process as provided in the Rules of Court, in other words by rendering a judgment after an *inter partes* hearing comprising a written and an oral phase. The case of *Michelot Yogogombaye v. The Republic of Senegal* is the only other matter dealt with in this manner.

7. In the following paragraphs, I will provide the reasons why I am of the opinion that Mr. Falana's Application ought not to have been disposed of by way of a judicial process nor, lesser still, through the "full" judicial consideration which it was accorded as from the time it was filed with the Registry slightly more than sixteen (16) months ago.

8. Subsidiarily, I will also state why, having voted for the operative paragraph of the judgment, I do not subscribe to the reasons contained in this judgment particularly with regard to the legal basis on which the Court relies in determining that it lacked jurisdiction. I will in addition be addressing two issues of procedure which are important in my view.

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9. It seems to me obvious that Applications may only be filed against a "State"; which State must as a matter of course be party to the Protocol; this stems from both the letter and the spirit of the Protocol. Thus, Article 2 of the Protocol does provide that the Court shall complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the Charter; whereas, according to the African Charter, only "States" parties to the said Charter may be the subject of communications filed before the African Commission. The Protocol to the African Charter establishing the Court was not meant to deviate from that principle as evidenced in Articles 3(1), 5(1, *littera* c)), 7, 26, 30, 31 and 34(6), all of which make no reference to any other entity but the "State" ("States concerned", "State against which a complaint is filed", "States concerned"[2], "States Parties").

10. Article 5 of the Protocol does make reference, other than the State, to the African Commission, African inter-governmental organizations, individuals and non-governmental organizations, but for the sole purpose of authorizing them to

[2] The expression "States concerned" in the English version of Article 26 (1) of the Protocol was translated "*Etats intéressés*" in the French version of the same Article.

file an application against a State Party and not for them to become potential "Respondents" before the Court.

11. Since the African Union is an Inter-Governmental organization, it is not therefore, according to the Protocol as it is now, an entity against which an Application may be filed before the Court or which might become party to the Protocol. To my knowledge, the only international organization which might, in the near future, be a party before a Court in a matter regarding human rights violations is the European Union; talks are indeed underway to allow the European Union to accede to the European Convention on Human Rights and thus be subject to applications before the European Court of Human Rights.[3]

12. Since the Protocol is unequivocal with regard to entities that may be sued before the Court, it would have sufficed for its provisions to be interpreted in accordance with "the ordinary meaning to be given to the terms (of that instrument) in their context and in the light of its object and purpose" (Article 31(1) of the 1969 Vienna Convention on The Law of Treaties) and to reject the said application *de plano* (that is, without the need for a judicial decision) on the basis of the Court's manifest lack of personal jurisdiction.

13. The Court however chose to hear and rule on the Application by following the process earmarked in the Rules, in other words to consider it via *inter partes* proceedings and rendering a judgment in a public sitting. In so doing, the Court placed itself in a difficult position as evidenced by the relative fragility and circular nature of its reasoning in paragraphs 56 to 73 of the Judgment to which I do not subscribe for the reasons set out in paragraphs 9, 10, 11 and 12 above.

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[3] See the "Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms", adopted by the Steering Committee for Human Rights of the Council of Europe at its Extraordinary Session held on 12-14 October 2011, text *in* Steering Committee for Human Rights, *Report to the Committee of Ministers on the Drafting of the Legal Instruments for the Accession of the European Union to the Convention for the Protection of Human Rights*, Council for Human Rights, Doc. CDDH (2011) 009, Strasbourg, 14 October 2011, pp. 5-13, (website: http://www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_MeetingReports/CDDH_2011_009_fr.pdf). The Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 envisaged by Article 6 (2) of the Treaty on the European Union, dated 7 February 1992, as amended by the Treaty of Lisbon of 13 December 2007.

F.O.

14. Before delving into the reasoning of the Court that led to the finding that it lacked jurisdiction, I would like to consider two issues of procedure which seem of importance to me.

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15. From the procedural standpoint, the first important issue which arises is one of ascertaining why the Court did not consider the Application in two separate phases: one devoted to the consideration of its jurisdiction and the admissibility of the Application and the other, to the merits of the case (in the event it had ruled that it had jurisdiction and had considered the Application admissible). Rule 52(3) of the Rules indeed provide that when preliminary objections are raised with the Court, it shall rule on the objections or incorporate its ruling in its decision on the substantive case; it also provides that "...such objections shall not cause the proceedings on the substantive case to be suspended unless the Court so decides".

16. In the instant case, the Court did not decide to suspend proceedings on the substantive case as the written[4] as well as the oral submissions[5] of the parties dwelt both on issues of the jurisdiction of the Court and on the admissibility of the Application and on matters regarding the merits of the case. Though it did not also formally decide to join consideration of the preliminary objections with that of the merits of the case, it would appear that such joinder actually took place because, as I just indicated, the merits of the case were argued by the parties in their written submissions and during the oral pleadings.

17. Rule 52(3) of the Rules does not specify the circumstances in which proceedings on the substantive case may be suspended nor does it spell out the circumstances in which the joinder to the merits of the case may be ordered; it would therefore be proper for the Court to bridge that gap so as to clear any uncertainty in that regard. The practice at the International Court of Justice, for instance, requires that proceedings on the merits of the case be automatically suspended once a preliminary objection is raised[6] and consideration thereof joined with the merits of the case where such objection "does not possess, in the

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[4] In its submissions, dated 29 April 2011, in answer to Mr. Falana's Application, the African Union indeed dwelt on issues regarding the Court's jurisdiction, the admissibility of the Application as well as the merits of the case; the same applies to Mr. Falana's brief in reply to the submissions of the African Union, dated 23 June 2011.

[5] See the Verbatim Records of Hearings of 22 and 23 March 2012.

[6] Rule 79(5) of the Rules of the International Court of Justice indeed provides that: "upon receipt by the Registry of a preliminary objection, proceedings on the merits shall be suspended".

F.D.

circumstances of the case, an exclusively preliminary character",[7] in other words, when the Hague Court cannot rule on the objection without considering the merits of the case. For purposes of interpretation and application of the second sentence of Rule 52(3) of the Rules, the "not exclusively preliminary" character of an objection could be used as a criteria by the Court in deciding on joining or incorporating its ruling on a preliminary objection in its decision on the substantive case.

18. In the instant case, and based on such a criteria, a joinder was not required as the Court could have ruled on the preliminary objections raised by the African Union without delving into the merits of the case. This clearly emerges *a posteriori* among the grounds for the judgment and specifically in paragraph 73 wherein the Court held the opinion that, having concluded that it does not have the jurisdiction to hear the Application, "it does not seem necessary to examine the |...| merits of the case".

19. To ensure strict compliance with the prescriptions of Rule 52(3) of the Rules, Members of the Court ought therefore to have interrupted its proceedings on the merits of the case as allowed by the above Rule, and pronounced itself firstly on its jurisdiction and on the admissibility of the Application. The main consideration of the written[8] as well as all of the oral submissions ought then to have focused solely on the issue of the jurisdiction of the Court and on the admissibility of the Application.

20. The purpose in having a preliminary phase devoted to the consideration of issues of jurisdiction and admissibility is to avoid arguments on the merits as long as issues regarding the jurisdiction of the Court and the admissibility of the Application had not been resolved. Incidentally, holding such a preliminary phase also allows for the avoidance of a dissenting opinion, which would eventually be attached to the judgment, to deal with issues relating to the merits of the case. It is only when an objection does not have an exclusively preliminary character and when its consideration is joined to the consideration of the merits of the case that a dissenting opinion could deal with issues relating to the merits of the case; in such circumstances, consideration of the substantive case is by definition necessary so as to make a determination on matters of jurisdiction and admissibility.

21. In the light of the foregoing, it seems to me that the Court should revisit Rule 52(3) of the Rules and determine whether its prescriptions really meet the

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[7] Rule 79(9) of the Rules of Court.

[8] In its observations in reply to Mr. Falana's Application, the African Union actually delved into the merits of the case even though it did raise preliminary objections.

F.O.

specific demands of its jurisdiction, in other words if they contribute to the proper administration of justice by a judicial organ charged with hearing and ruling on disputes in the field of human rights essentially pitting individuals against States. If the answer is no, then that Rule ought to be amended.

22. The other matter of procedure which the Court does not seem to have resolved satisfactorily in my opinion is that of the legal status to be given to some of the documents[9] tendered by the parties during the oral proceedings.

23. On 20 March 2012, that is two days before the beginning of the public hearings, the Registrar asked the parties to submit "a copy of their oral pleadings" for the purpose of facilitating the work of the Interpreters.[10] The documents tendered by the parties at the beginning of the public hearings, one of which was titled "Oral Submissions", did not in any manner reflect the content of the arguments presented orally during the hearings. The Rules of Court do not provide for the filing of such a document during the oral hearings; the only documents relating to the oral proceedings mentioned in the Rules are provided for in Rule 48 and are produced by the Registry; these are "Verbatim Records" which, after being signed by the President and the Registrar, are deemed to be a true reflection of the submissions made by the parties during the public hearings.[11]

24. The documents produced by the parties during the hearings may not in any circumstance be considered as the record of the pleadings made by the parties during the oral proceedings; same as they may not be considered as being materials of the written proceedings in that they were tendered after the pleadings had been closed on 24 June 2011 (see paragraph 12 of the Judgment) and whereas they had not been exchanged between the parties as required by the adversarial nature of the proceedings.

25. It therefore seems to me unfortunate that, during its deliberations, the Court made use of documents of uncertain legal status when considering the arguments canvassed by the parties; paragraph 55 of the Judgment further

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[9] The Applicant filed a 21-page document titled "Oral Submissions" dated 21 March 2012; the Respondent, for its part, a filed a 16-page document, undated, as well as another 10-page document dated 23 March 2012 in which it replied to the "Oral Submissions" of the Applicant and to the questions put by the Judges.

[10] See the purport of the email sent by the Registrar to the Parties on 20 March 2012 stating "Please, as we finalize for the hearing, the Registry would be most obliged if we could have a copy of your oral pleadings in the morning of Thursday to facilitate with interpretation".

[11] Rule 48 of the Rules indeed provides that once corrected by the Parties, provided that such corrections do not affect the substance of what was said (para. 2), and signed by the President and the Registrar, the verbatim record shall then "constitute the true reflection of the proceedings" (para.3).

F.O.

reproduces the conclusions of the Respondent as they appear on pages 2 and 3 of the document submitted on 22 March 2012. I am of the opinion that the tendering by the parties of what appears to be a new written document in the course of the oral proceedings is creating confusion and only complicates the task of the Court. These documents differ in content from the Verbatim Records of the hearings and must also be translated into the working languages of the Court; further, the Judges are not in a position to practically acquaint themselves with their contents during the hearings nor consider them seriously for the purpose of the deliberations which follow immediately the oral proceedings.

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26. Let me now consider the reasoning of the Court which led it to conclude that it lacked the jurisdiction to hear and to determine the Application. I would start by observing that in the instant case the Court did not adopt the approach that had hitherto been the case when it considered the Application filed by Mr. Efoua Mbozo'o Samuel against an organ of the African Union namely the Pan African Parliament (see its Decision of 30 September 2011); in that case, the Court indeed avoided pronouncing itself on its personal jurisdiction as it ought to have done and rejected the Application by implicitly relying on its lack of material jurisdiction.

27. The Court's reasoning in paragraphs 58 to 63 of the Judgment are intended to establish that Articles 5(3) and 34(6) of the Protocol, when read together, require that direct access to the Court by an individual be subject to the deposit of a special declaration by the Respondent State; these paragraphs are not therefore of particular interest to the issue at hand considering that the Application had not been filed against a State Party. The Court does clearly concede this when it concludes that "there may be other grounds on which the Court may find that it has no jurisdiction" (paragraph 63). That finding did not however prevent the Court from ultimately invoking Articles 5(3) and 34(6) above in concluding that it lacked the jurisdiction to entertain the Application (see paragraph 73 as well as operative paragraph 75 of the Judgment).

28. The rest of the Court's reasoning is intended to address the Applicant's argument according to which the African Union could be brought before the Court "as it is the one which promulgated and adopted the Protocol as a corporate community on behalf of its Member States" (paragraphs 25 and 64). In so doing, the Court establishes 1) that the African Union is an international organization with a legal personality separate from that of its Member States (paragraph 68) and 2) that it cannot therefore be subject to the obligations under

F.O.

the Protocol as it is not party to that instrument (paragraph 71). Those are two conclusions that are self-evident.

29. The Court however deemed it necessary to add, without explaining why, that "the mere fact that the African Union has a separate legal personality does not imply that it can be considered as a representative of its Member States with regard to obligations that they undertake under the Protocol" (paragraph 71). This assertion, in all likelihood, is intended to address the Applicant's argument according to which "it is clear that the African Union as a whole is representing the African people and their governments and therefore is competent to defend the actions brought against the Member States" (paragraph 25).

30. That assertion by the Court is equally self-evident and adds nothing to the reasoning of the Court; on the contrary, it blurs the reasoning. It is indeed difficult to imagine how the African Union, an international organization with a legal personality separate from that of its Member States, could be "a representative [of the latter] with respect to obligations that they undertake under the Protocol".

31. The main obligation incumbent on States Parties to the Protocol is that of appearing before the Court to answer to alleged violations of human rights as guaranteed by the African Charter or by any other instrument dealing with human rights to which they are parties. How can the African Union be brought before the Court on behalf of one or more Member States Parties to the Protocol to answer for alleged violations of their conventional obligations in the field of human rights?

32. The African Union could only be brought before the Court to answer for its own conduct. For that to happen, however, it would be necessary for it to be allowed to become a party to the Protocol and for it to be willing to do so which would require that it be beforehand allowed to accede to the African Charter and for it to have accepted to do so. As party to the Charter and to the Protocol, the African Union could in any circumstance be brought before the Court to answer for the conduct of its Member States parties to the Protocol.

33. In the final analysis, one might wonder about the need for the Court's reasoning in paragraph 66 to 72 of the Judgment because in paragraph 73, it asserts that "its jurisdiction is clearly prescribed by the Protocol" and that "the present case in which the Application has been filed against an entity other than a State having ratified the Protocol and made the declaration, falls outside the jurisdiction of the Court". That was actually all what the Court needed to state from the outset to reject Mr. Falana's Application.

F.O.

34. I am therefore of the opinion that the Court ought to have spared itself issuing this Judgment which raises more questions than it resolves.

35. Let me further observe that consideration of the "constitutionality" of Article 34(6) of the Protocol, to which the Court was urged by the Applicant so as to declare the said Article "illegal, null and void" as it is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter, does indirectly raise the issue of the sovereign right of the States Parties to the Protocol to accept or not the jurisdiction of the Court to entertain applications from individuals or non-governmental organizations.

36. This debate, no matter how legitimate, should in my view have been raised in some other forum. The Court, for its part, ought not to have accepted to serve as a forum for such debates when it manifestly lacked the jurisdiction to do so; in so doing it took the risk of jeopardizing its credibility.

37. Same as Mr. Falana, I am in favour of the automatic access to the Court by individuals and non-governmental organizations; it is my view however that it is a matter that comes within the exclusive jurisdiction of Member States of the African Union. I hold the opinion that this important matter is more likely to be discussed by the Court as part of its advisory jurisdiction at the initiative of the entities mentioned in Article 4 of the Protocol or as part of the procedure of amendment of that instrument considering the possibility availed to the Court under Article 35(2) to make proposals in that regard "if it deems it necessary".

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38. For all the above reasons, I am of the view that, given the Court's manifest lack of jurisdiction *ratione personae*, Mr. Falana's Application ought to have been rejected *de plano* through a simple letter from the Registrar.

39. Subsidiarily, I am also of the view that the Court having decided to hear and rule on this Application, it should have provided clearer reasons for rejecting it (see my reasoning in paragraphs 9, 10, 11 and 12 above) and not by invoking, in a contradictory manner, Articles 5(3) and 34(6) of the Protocol.

40. To conclude, I again invite my colleagues to revisit the current practice of the Court which consists in systematically issuing "Judgments" or "Decisions" on its lack of jurisdiction whereas it "manifestly" lacks the jurisdiction to entertain an Application. The only advantage in my view of such a practice of the Court is to draw public opinion to issues as those raised in the instant case or to alleged violations of human rights; but is that truly the mission of the Court ?

Fatsah Ouguergouz
Judge

Robert Eno
Registrar