

**African Court on Human and Peoples' Rights**

**Application N°016/2020**

**GLORY C. HOSSOU AND LANDRY ADELAKOUN**

**v.**

**REPUBLIC OF BENIN**

**Dissenting Opinion**

I totally refute the reasoning and the operative part of the above-mentioned judgement delivered in the case of *Glory C. HOSSOU et Landry ADELAKOUN* by a majority of ten (10) votes to one (1). The operative part reads as follows

"On jurisdiction,

- i. [...]
- ii. *Declares that it lacks jurisdiction.... "*

In the instant case, the Applicants challenge the withdrawal by the Republic of Benin of its Declaration made under Article 34/6 of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court and request the Court to

- 1) Declare the application admissible,
- 2) Find that the decision of the Respondent State withdrawing the Declaration violates the Charter and international human rights standards.

3) Find that the Respondent State prevents its citizens from directly accessing the regional judicial system to initiate proceedings and seek redress for the prejudice they have suffered within their domestic system, which constitutes a regression of rights.

In its judgement, the Court upheld the Respondent State's objection based on the Court's lack of material jurisdiction and found that it lacked material jurisdiction, holding that the Respondent State has the right to withdraw the Declaration it made under Article 34/6 of the Protocol and that the withdrawal does not constitute a violation of human rights.

I am not satisfied with this decision for the following reasons:

- i. It contradicts the Court's previous jurisprudence,
- ii. The Court finds that the withdrawal of the Declaration does not violate the Charter or international human rights instruments and, therefore, does not constitute a violation of human rights.
- iii. The finding did not take the African context into account;
- iv. The Court's finding with respect to the justiciability of human rights
- v. The Court only ruled on the Applicants' second request without addressing the others.

**i. The Court's decision contradicts its previous jurisprudence:**

1. In my view, the Court's decision in the instant case is totally at variance with what it has previously stated in its settled jurisprudence.
2. Indeed, in the case of *Ingabire Victoire Umuhoza v. Republic of Rwanda*, (Application No. 003/2014), the Applicant seised the Court for alleged human rights violations. In the course of the proceedings, the State of Rwanda withdrew the Declaration it had made under Article 34/6 of the Protocol and requested the Court to suspend all cases involving it.
3. The Court, ruling on its jurisdiction over the issue of withdrawal, and relying on Articles 3 (1) and 34 (6) of the Protocol, clearly stated that it notes that the Republic of Benin is a State Party to the Protocol, of which it deposited the instrument of

ratification on 6 June 2003, and made the Declaration provided for in Article 34(6) of the Protocol on 22 June 2013. The Court considers that under Article 3 (1), it has jurisdiction to interpret and apply the Protocol, holding that in accordance with Article 3(2), the Court has the power to decide in case its jurisdiction is disputed. Accordingly, the Court considers that it has jurisdiction to hear the application in the instant case regarding the withdrawal of the Declaration of the Respondent State<sup>1</sup> (Paragraphs 51 and 52).

4. In other words, the Court declared that it has jurisdiction because the subject of the allegation is set out and protected by human rights instruments, in application of the Articles referred to, which define the scope of jurisdiction in all human rights matters, although withdrawal of the Declaration is not mentioned in the Protocol!
5. In the application that is the subject of this Opinion, it is clear that the Applicants pray the Court to declare that the withdrawal violates the Charter and international human rights standards, which constitutes a violation of human rights.
6. The contradiction, in my view, lies in the Court's interpretation of the Applicants' request in the *Ingabire* case and in the instant case. Indeed, although the applicant in the *Ingabire* case dwelt on the effects of the withdrawal of the Declaration in relation to his filed and pending application, the Court, well before examining the request, first considered whether or not it had jurisdiction in the matter and, therefore, whether the withdrawal was a right protected by a human rights instrument. Having made a determination, the Court declared that it had jurisdiction. (Paragraph 48).
7. This finding is certainly binding on the Court. This is because if in the instant case the request clearly relates to the withdrawal being qualified as a violation of human rights, the Court could not judge differently, especially since the withdrawal is not mentioned in the Protocol! Moreover, in the above-mentioned *Ingabire*<sup>2</sup> case, the

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<sup>1</sup> § 51 and 52 of the judgement

<sup>2</sup> § 61 of the judgement

Court clearly stated that the requirement of prior notice is necessary in the event of a withdrawal, considering in particular that the Declaration deposited under Article 34(6) of the Protocol is not only an international commitment made by the state but also, more importantly, a means by which it creates subjective rights for individuals and groups. (Paragraph 61).

8. In my opinion, the Court should have retained its material jurisdiction and proceeded to the admissibility stage and the merits if the Application was declared admissible.
9. On the other hand, in its Ruling of 25 September 2020, where Applicants Glory Cyriaque Hossou and other, requested the Court to take provisional measures by revoking Benin's decision to withdraw the Declaration pending judgement on the main application, the Court retained its *prima facie* jurisdiction by stating in paragraph 14 that, a) the alleged violations relate to rights protected in instruments to which the Respondent State is a Party, b) the applicants specifically alleged that the withdrawal is a violation of the Charter and that it deprives citizens of access to regional judicial mechanisms. Accordingly, the Court has jurisdiction to consider the application<sup>3</sup>.
10. Prima facie jurisdiction assumes that the Court has found presumptions that the case was within its jurisdiction and that the allegations were *a fortiori* well-founded until proven otherwise. Except that in this same Ruling the Respondent State clearly emphasised in its reply on the fact that the Court had in previous decisions (*Ingabire victory against Rwanda* quoted above and in the Ruling of 6 May 2020 *Houngue Eric versus the Republic of Benin*)<sup>4</sup> dismissed the request and made it null and void because it had already been definitively decided by the Court.
11. By declaring that it has *prima facie* jurisdiction, the Court could not be content with giving reasons for its lack of material jurisdiction in the case on the merits, but

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<sup>3</sup> § 14 of the judgement

<sup>4</sup> Ruling on provisional measures of 6 May 2021

rather could proceed to the merits and dismiss the request, since its jurisprudence on the subject was established.

12. Moreover, in its Ruling, it could declare that it lacked jurisdiction because the subject of the request had been settled in its previous jurisprudence and that it therefore did not have prima facie jurisdiction, since it was clear that the subject of the request had been settled by consistent jurisprudence and that it clearly lacked jurisdiction with regard to the case on the merits.

**ii. The withdrawal of the Declaration violates the Charter and international human rights instruments**

13. Still in the *Ingabire* judgement, the Court, while recognizing the right of states to withdraw the Declaration, considered it as a unilateral act. It however confirmed that the withdrawal was not absolute because the Declaration created rights for third parties, the enjoyment of which requires legal security<sup>5</sup>. By this reasoning, the Court confirms that the Protocol does not only create a system but creates rights as well!

14. Thus, the Court declared that states are obliged to give notice of their intention to withdraw the Declaration, considering in particular that the Declaration constitutes not only an international commitment of the state but more importantly creates subjective rights for individuals and groups.

15. It is therefore clear that although the Court recognised the right of states to withdraw, it imposed a requirement for the withdrawal, namely, the notice period, which it qualified as essential to ensure legal certainty and prevent the sudden suspension of rights<sup>6</sup>!

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<sup>5</sup> § 60 of the *Ingabire judgement*

<sup>6</sup> § 62 of the judgement

16. Moreover, the Court clearly qualified the Protocol as an instrument for the application of the Charter, which guarantees the protection and enjoyment of human and peoples' rights enshrined in the Charter and in other relevant human rights instruments, and concluded that an abrupt withdrawal without notice is likely to weaken the human rights protection regime provided for by the Charter, and that therefore the notice period is obligatory in the event of a withdrawal of the Declaration<sup>7</sup>

17. Consequently, the Court should have maintained its jurisprudence in its judgement that is the subject of this opinion and, although it recognised the right of the States to withdraw the Declaration, it should have declared the withdrawal invalid because it was not preceded by a notice period.

18. By this jurisprudence the Court has not only amended the Protocol by adding the right of withdrawal but has also linked this withdrawal to a condition *sine qua non*, namely, the notice period.

19. Consequently, having clearly stated that the Declaration is not only an international commitment of the state but, more importantly, that it creates subjective rights for individuals and groups. The enjoyment of which requires legal security and that the Protocol does not only create a system but rights as well. The Court could only declare in the subject matter of the dissenting opinion, that the withdrawal is a human rights violation!

### **iii. The reasoning excludes the African context**

20. According to the preamble of the Universal Declaration of Human Rights, human rights are an ideal to be achieved by all peoples and all nations and as such are a work in progress and never finished. Therefore, States and the international community are called upon and urged to do more, and to refrain from lowering the levels of protection afforded to individuals.

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<sup>7</sup> § 64 of the judgement

21. Through the preamble of the Charter, African States adhere to this vision of an ideal to be achieved since it is clearly stated "that the African States ... parties to the present Charter reaffirm the pledge they solemnly made in Article 2 of the said Charter .... to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa ... having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights". This clearly reflects a twofold commitment to go the extra mile when it comes to the rights and welfare of Africans.

22. The principle that States have an obligation to maintain ever higher standards when it comes to the protection of human rights is affirmed and the Court has already recalled it in its jurisprudence. Indeed, in the judgement of 4 December 2020, *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*, the Court endorsed the opinion of the Committee on Economic, Social and Cultural Rights in paragraph 9 of General Comment No. 3, 1990 on Article 2(1) of the ICESCR, which states that "The corollary of the principle of non-regressive measures is the idea that States Parties to the Covenant must take steps with a view to "achieving progressively the full realisation of the rights". The concept of progressive realisation implies that full realisation of the rights will generally not be achieved in a short period of time but "should not be misinterpreted as depriving the obligation of all meaningful content".<sup>8</sup>. Better still, the Court explained that it "considers that when a state party recognises a fundamental right, any regressive measure, i.e., "any measure which directly or indirectly marks a step backwards with regard to the rights recognized in the Covenant is a violation of the ICESCR itself".

23. While Article 1 of the Charter states the commitment of the States to recognize the rights, duties and freedoms it guarantees and to adopt legislative and other measures to implement them, Article 7 clearly recognizes "the right to an appeal

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<sup>8</sup> Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin, Application No. 062/2019, Judgement of 4 December 2020, § 136.

to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”.

24. Article 3 of the Protocol establishes a regional court whose jurisdiction "shall extend to all ... 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 " Better still, Article 2 of the Protocol provides that "the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the by the African Charter on Human and Peoples' Rights". Moreover, it confers on individuals and NGOs the right of remedy before the Court, just as it did with the Commission. The Protocol therefore reinforces the right to remedy established by the Charter, even though the Protocol requires the States to first make the declaration accepting the jurisdiction of the Court.

25. As for the Court's characterisation of the Declaration as "optional in nature"<sup>9</sup>, it is clear from Article 34(6) of the Protocol that any State that has ratified the Protocol has the option to make a Declaration accepting accepting the Court's jurisdiction, but does not specify the time limit within which this Declaration must be made after ratification of the Protocol.

26. This leeway granted to the States only concerns the time limit within which they can make the declaration, and is not an exemption from the obligation to do so. In my view, the fact that the legislator did not mention the right to withdraw the declaration is neither an oversight nor an omission but a choice based on the simple reason that while many international and regional human rights conventions provide for the possibility of withdrawal and clarify the relevant rules, a reading of the various African human rights instruments shows that all of them, unlike the

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<sup>9</sup> § 32 of the judgement



situation of the instruments cited, do not have provisions on withdrawal or denunciation.

27. In my view, this clearly indicates that African states have chosen to adopt a particular approach that would offer an additional guarantee for human rights, which could support the assertion that the issue was not simply one of neglect or omission, especially since the preliminary draft of the Charter had mentioned withdrawal or denunciation of the Charter, although this provision was not captured in the final version<sup>10</sup>. I should add that the ratification of an international text is a source of domestic law and, for the respect of the parallelism of forms, it is a well-established principle that the rules and procedures followed in depositing an instrument must be the same for its withdrawal.

28. Thus, the Court did not have to rule on the withdrawal of the Declaration without taking into account the provisions of Article 35(1) of the Protocol, which confers exclusive power on another authority to make any changes to the Protocol. Without considering the provisions of Article 35(1) of the Protocol, the Court believed that it was considering the withdrawal as a separate act and added a possibility that was not provided for in the Protocol.

#### **iv. The Court's finding with regard to the justiciability of human rights**

29. Without any doubt, the human rights that are universally claimed today emanate from treaties (Conventions, Covenants, Charters or Protocols...) adopted between States which commit to recognise and guarantee rights and freedoms to their citizens. Thus, it is through human rights that the individual found space in the sphere of international law, which was, and remains by essence, a right of the States. Thanks to human rights, the individual has become fully and entirely a "subject of international law" who can avail himself of the commitments made by

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<sup>10</sup> See Article 61 of the draft resolution of the African Charter on Human and Peoples' Rights, which states that States Parties to the Charter may denounce it five years after its entry into force by sending a notice one year before the denunciation comes into force. This notice shall be addressed to the Secretary General of the Organization of African States, who shall inform the other States Parties. This denunciation does not affect the obligations of the State for the violations that occurred before the entry into force of this denunciation.

the States under certain international instruments, in this case human rights instruments.

30. The first consequence of this prerogative conferred on the individual by international human rights law is that in this matter, the States have given up part of their "sovereignty", given that henceforth in international law, the prerogatives recognized to the States are partly shared with the individual, as was established by the International Court of Justice (ICJ) when it held that certain principles of international law are exorbitant from the common law of human rights<sup>11</sup>, including the obligation to continue protecting human rights even when a contracting state does not respect human rights or when it violates the rights of citizens of another state, which replaces the principle of reciprocity.<sup>12</sup>

31. The second consequence is the possibility offered to the individual or to groups of individuals to demand that the State respect its international obligations. The individual now has a right to justice against States or a right of remedy against States when the latter do not fulfil their obligations or only do so partially. The individual is thus authorised to demand that the State implement the rights guaranteed in the instruments to which it is a Party, and even to claim compensation for prejudice suffered as a result of the failure or the shortcomings of the States in the implementation of the rights guaranteed in the human rights instruments that they have ratified. Consequently, this is the genesis of the

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<sup>11</sup> See ICJ, Barcelona Traction case, Judgement of 5 February 1970 Para. 33: "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved [the human rights of individuals, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".

<sup>12</sup> ICJ, Interhandel Case (Switzerland V. United States of America) (Preliminary Objections) Judgement of 21<sup>st</sup> March 1959, page 21 "Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration".

justiciability of human rights, and ratification is the expression of the States' willingness to submit to it.

32. The phenomenon of the justiciability of human rights at domestic and international levels develops and imposes itself over time since it emanates from texts that guarantee individuals rights and freedoms.
33. In addition to the obligations to promote, protect and defend human rights, States have the obligation to set up mechanisms to protect the rights of individuals and to provide remedies against human rights violations.
34. At the international level, these mechanisms, whether quasi-judisdictional or judicial, follow both horizontal and vertical procedures; the procedure is horizontal when a state can complain of a human rights violation against another State, it is vertical when it is the individual who exercises this prerogative against one or more States. Except that when the remedy exercised by a State against another State for violation of human rights is exempted from particular requirements in relation to individuals, international law imposes certain requirements on the exercise of such a remedy, including the requirement to exhaust local remedies and time limits within which the individual can exercise his remedy.
35. However, Article 2 of the Protocol provides that the African Court complement human rights protection mandate that the Charter conferred on the African Commission on Human and Peoples' Rights, and added an exception to the practice before the Commission, namely, the Declaration!
36. Indeed, Article 5(3) of the Protocol provides: "the Court may entitle relevant Non-Governmental Organization (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article(6) of this Protocol". Article 34(6) provides: "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”.

37. In the case of Application **No. 016/2020: *Glory Cyriaque Housou and Another v. Republic of Benin*** submitted to the Court, the question that arises is whether the fact that a State made this Declaration confers a human right on individuals, so that the withdrawal of the Declaration constitutes a violation of the right conferred.

38. Many are of the view that in the African human rights system, the Protocol is not considered as an instrument intended to guarantee human and peoples' rights. However, the fact remains that beneath the letter of the Protocol is an underlying human right, which the Court clearly articulated in the above-mentioned judgement and stated in bold in one of the paragraphs of my opinion.

39. First, when Article 5(3) speaks of "... the Court may entitle relevant Non-Governmental Organization (NGOs) with observer status before the Commission, and individuals to institute cases directly before it ... ..", it does not create a new right. Rather, it restates the principle of the justiciability of the rights enshrined in the Charter and the right of remedy open to individuals and NGOs, the only difference being that this right of remedy is fully exercisable before the Commission, whereas its exercise before the Court is subject to prior deposition of the Declaration. Now, it is precisely because the Declaration confers a prerogative on the individual that the Protocol does not make it an admissibility requirement but an element of the Court's jurisdiction. The Court's jurisprudence is totally consistent with this. Individuals and NGOs therefore have a human right conferred by the Declaration because it is the latter that makes the right of individuals and NGOs effective.

40. Thus, the obligation of States to offer remedies to citizens is not limited to the establishment of domestic human rights protection mechanisms, since there is a right of remedy before recognized international jurisdictions. This assertion is all

the more valid because the exercise of the right of remedy before international human rights protection mechanisms is subject to requirements, as we present under the heading "admissibility requirements for applications".

41. Individuals and NGOs derive this right directly and simultaneously from the Charter and the Protocol, and it is not surprising that Article 6(2) of the Protocol, which deals with the admissibility of applications, refers to the provisions of Article 56 of the Charter. Now, if by making the Declaration, States recognize the right of individuals and NGOs to bring cases before the Court, can they withdraw their Declaration without infringing this right?

42. I cannot conclude without referring to the preamble of the Universal Declaration of Human Rights which holds that human rights are an ideal to be attained by all peoples and all nations and as such, they are a work in progress and never finished. Therefore, States and the international community are called upon and urged to do more and to refrain from lowering the levels of protection afforded to individuals.

43. Through the preamble of the Charter, African States have adhered to this vision of an ideal to be achieved since it is clearly stated that "the African States ... parties to the present Charter reaffirm the pledge they solemnly made in Article 2 of the said Charter .... to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa [...] having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights". This clearly reflects a twofold commitment to go the extra mile when it comes to the rights and welfare of Africans.

44. The principle that States have an obligation to maintain ever higher standards when it comes to the protection of human rights is affirmed. The Court is not unaware of this since it has already recalled it in its jurisprudence. Indeed, in the judgement of 4 December 2020, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, the Court endorsed the opinion of the Committee on Economic,

Social and Cultural Rights in paragraph 9 of General Comment No. 3, 1990 on Article 2(1) of the ICESCR, which states that "The corollary of the principle of non-regressive measures is the idea that States Parties to the Covenant must take steps with a view to "achieving progressively the full realisation of the rights". The concept of progressive realisation implies that full realisation of the rights will generally not be achieved in a short period of time but "should not be misinterpreted as depriving the obligation of all meaningful content".<sup>13</sup>. Better still, the Court explained that it "considers that when a state party recognises a fundamental right, any regressive measure, i.e., "any measure which directly or indirectly marks a step backwards with regard to the rights recognized in the Covenant is a violation of the ICESCR itself".

45. While Article 1 of the African Charter on Human and Peoples' Rights states the commitment of the States to recognize the rights, duties and freedoms it guarantees and to adopt legislative and other measures to implement them, Article 7 clearly recognizes "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".

46. Article 3 of the Protocol establishing an African Court has established a regional court whose jurisdiction "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 " (Article 3). Better still, when Article 2 of the Protocol provides that "the Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights conferred upon it by the by the African Charter on Human and Peoples' Rights", it confers on individuals and NGOs the right of remedy before the Court, just as it did with the Commission. The Protocol has therefore reinforced the right to remedy established by the Charter,

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<sup>13</sup> Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin, Application No. 062/2019, Judgement of 4 December 2020, § 136.

even though the Protocol requires prior deposition of the declaration by the States accepting the jurisdiction of the Court.

47. As for the Court's characterisation of the Declaration as "optional in nature" (para. 32), it is clear from Article 34(6) of the Protocol that the legislator obliges the State to make a declaration accepting the Court's jurisdiction, but does not specify the time limit within which this Declaration must be made after ratification of the Protocol.

**iv. The Court adjudicated one allegation only without addressing the Applicant's other requests**

48. In their application, the Applicant's prayed the Court to declare that their application was admissible and that, by the Respondent State's decision to withdraw the Declaration, it violated the right of citizens to access the judicial system.

49. The Court, in deciding on its material jurisdiction, only examined the question of the violation of the Charter and international human rights instruments without examining the rest of the applicants' requests.

50. In my opinion, the Court should have addressed these requests either by declaring them to be subservient to the main request and therefore lacking material jurisdiction, or by simply stating that the requests had become moot.



Judge Bensaoula Chafika