

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

Application No. 003/2014

The Matter of Ingabire Victoire Umuhoza v. Republic of Rwanda

Individual Opinion of Judge Fatsah Ouguergouz

1. I concur with the Court's findings regarding its jurisdiction to determine the issue of Rwanda's withdrawal of the optional declaration accepting the compulsory jurisdiction of the Court deposited pursuant to Article 34(6) of the Protocol. I also agree with its conclusions concerning the validity of that withdrawal, the requirement of a twelve-month notice period before the withdrawal takes effect, and the absence of any impact of the withdrawal on the consideration of the pending case. I nevertheless consider that the reasons given in the Judgment regarding the validity of the withdrawal and the requirement for a twelve-month notice period before it takes effect (paragraphs 54–66) are insufficiently developed (paragraphs 54-66).
2. In my view, the Court ought to have placed greater emphasis on the distinctive legal nature of the optional declaration, articulated more clearly the conditions governing the legal validity of its withdrawal, and more fully explained the rationale underlying the requirement of a twelve-month notice period. It is, in my opinion, precisely because of the distinctive nature of the optional declaration that Rwanda's withdrawal can only take effect upon the expiry of a twelve-month period of notice.

I. Distinctive Purpose of the Optional Declaration: International Legal Subjectivity of Individuals and Non-Governmental Organisations

3. In paragraph 57 of the Judgment, the Court observes that “by its nature, the declaration provided for under Article 34(6) is similar to those [relating to the recognition of the jurisdiction of the International Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights]”.
4. With respect, I consider that the optional declaration accepting the compulsory jurisdiction of the Court under Article 34(6) of the Protocol is *sui generis*. It differs in significant respects from the declarations provided for under the Statute of the International Court of Justice (Article 36 (4)),¹ the European Convention (Article 46), prior to its amendment by Protocol No. 11,² and the American Convention (Article 62).³
5. The purpose of those three declarations is to enable a “State Party”, and not an “individual” or a “non-governmental organisation”, to seise the courts concerned. Within the European system prior to its reform by Protocol No. 11, individuals possessed no right to bring cases directly before the European Court; that right belonged to the former European Commission and, optionally, to States Parties. The same remains true within the Inter-

¹ “The declarations referred to above may be made unconditionally or subject to reciprocity.

² 1. Each of the High Contracting Parties may, at any time, declare that it recognises as binding, ipso jure and without any special agreement, the jurisdiction of the Court in all matters concerning the interpretation and application of this Convention. 2. The declarations referred to above may be made unconditionally or subject to reciprocity on the part of several or certain other Contracting Parties, or for a specified period. 3. Such declarations shall be submitted to the Secretary General of the Council of Europe, who shall forward a copy thereof to the High Contracting Parties.

³ “1. Any State Party may, at the time of depositing its instrument of ratification or accession to this Convention, or at any later date, declare that it recognises as binding, ipso jure and without any special agreement, the jurisdiction of the Court to hear all cases relating to the interpretation or application of the Convention. 2. The declaration may be made unconditionally, or subject to reciprocity, or for a specified period, or in respect of specific cases. It shall be submitted to the Secretary-General of the Organisation, who shall forward a copy to the other Member States of the Organisation and to the Registrar of the Court. 3. The Court shall have jurisdiction to hear any case relating to the interpretation and application of the provisions of this Convention, provided that the States concerned have recognised or recognise its jurisdiction, either by a special declaration, as set out in the preceding paragraphs, or by a special convention”.

American system, where only the Inter-American Commission and, optionally, States Parties may seize the Inter-American Court. Similarly, before the International Court of Justice, only States have standing to appear as parties to proceedings pursuant to Article 34 of its Statute.

6. In each of the three systems referred to above, the deposit of an optional declaration by a State Party entails recognition of the jurisdiction of the court concerned vis-à-vis any other State Party having made a corresponding declaration. The declaration thus serves to create reciprocal rights and obligations among States Parties. It confers rights both upon the State making the declaration and upon those States that have already accepted the same jurisdiction, while simultaneously constituting a standing offer to other States that have yet to do so. The International Court of Justice has repeatedly affirmed this understanding with respect to declarations made under Article 36(2) of its Statute.
7. As the International Court of Justice has observed, such a declaration “establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute, and “makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance”.⁴
8. Within the systems of the International Court of Justice and the two regional courts - the European Court (prior to the entry into force of Protocol No. 11) and the Inter-American Court - reciprocity therefore plays, or historically played, a vital role. The jurisdiction of those three courts is, or was, contingent upon acceptance by the States Parties and only to the extent defined by their respective declarations, including any reservations that may have been attached thereto.⁵

⁴ *Fisheries Jurisdiction in Fisheries Matters (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, *I.C.J. Reports 1998*, p. 453, paragraph 46.

⁵ See, for example, the following rulings of the International Court of Justice: “[...] under the Statute, the right to bring a case before the Court by way of an application is not automatically available to every State Party to the Statute; it is available only to the extent defined by the applicable declarations”, *Nottebohm Case (Preliminary Objection)*, judgment of 18 November 1953, *I.C.J. Reports 1953*, p. 122; “the Court’s jurisdiction depends on the declarations made by the parties in

9. By contrast, under the Protocol establishing the African Court on Human and Peoples' Rights, the declaration provided for in Article 34(6) is intended not to confer rights upon other States Parties but rather to enable individuals and non-governmental organisations to seise the African Court directly. Reciprocity is therefore wholly inapplicable in this context. States Parties do not, through the declaration, confer reciprocal rights upon one another. Such reciprocal rights already arise by virtue of their ratification of the Protocol, which authorises one State Party to institute proceedings against another pursuant to Article 5(1) of the Protocol. The clearest indication that reciprocity has no relevance within the framework of the Protocol lies in the fact that the beneficiaries of the declaration - namely individuals and non-governmental organisations - are themselves incapable of making such a declaration.
10. The optional declaration under Article 34(6) of the Protocol must therefore be distinguished from those operating within the frameworks of the International Court of Justice, the European Court (prior to the entry into force of Protocol No. 11), and the Inter-American Court. It bears a closer resemblance to the declaration envisaged under the Protocol establishing the Arab Court of Human Rights (Articles 19⁶ and 20). It is also similar to the declaration provided for under Article 25 of the European Convention (prior to its amendment by Protocol No. 11), concerning applications by individuals⁷ to the former European Commission of Human Rights, and to

accordance with Article 36, paragraph 2, of the Statute, subject to the condition of reciprocity: [...] By these declarations, jurisdiction is conferred on the Court only to the extent that they coincide in conferring it upon the Court', *Anglo-Iranian Oil Company Case (Jurisdiction)*, Judgment of 22 July 1952, I.C.J. Reports 1952, p. 103.

⁶ "2. State Parties can accept, when ratifying or acceding to the Statute or at any time later, that one or more NGOs that are accredited and working in the field of human rights in the State whose subject claims to be a victim of a human rights violation has access to the Court".

⁷ "1. A petition may be submitted to the Commission, addressed to the Secretary General of the Council of Europe, by any natural person, non-governmental organisation or group of individuals who claim to be victims of a violation by one of the High Contracting Parties of the rights recognised in this Convention, provided that the High Contracting Party concerned has declared that it recognises the Commission's competence in this matter. The High Contracting Parties which have made such a declaration undertake not to take any measures which would impede the effective exercise of this right. 2. Such declarations may be made for a specified period. 3. They shall be deposited with the Secretary General of the Council of Europe, who shall transmit copies thereof to the High Contracting Parties and ensure their publication. 4. The Commission shall exercise the jurisdiction conferred upon it by this article only when at least six High Contracting Parties are

the declaration provided for under Article 56(4) of the European Convention (following its amendment by Protocol No. 11), concerning the deposit of an optional declaration authorising the European Court to receive applications from any natural person, non-governmental organisation, or group of individuals in respect of a territory for whose international relations the State Party is responsible and to which the Convention has been extended.⁸

11. In this regard, it should be recalled that Article 34 of the European Convention, as amended by Protocol No. 11, and Article 4 of Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 of 6 July 1991 relating to the Court of Justice of the Economic Community of West African States (ECOWAS), confer upon individuals a direct and automatic right of access to the European Court of Human Rights and the ECOWAS Court of Justice, respectively.
12. By providing only an optional right of direct access for individuals and non-governmental organisations, the African human rights protection system occupies an intermediate position between the Inter-American system, under which individuals possess no right to seise the Inter-American Court directly, and the current European system, under which individuals enjoy direct and automatic access to the European Court of Human Rights.
13. By granting individuals and non-governmental organisations the right to vindicate their rights before the African Court, the optional declaration by a State Party to the Protocol has the essential effect of conferring upon those entities a measure of international legal subjectivity. Individuals and non-governmental organisations thereby acquire an autonomous right of access to the Court and may directly assert at the international level the rights guaranteed by the African Charter and other relevant human rights

bound by the declaration referred to in the preceding paragraphs”.

⁸ “4. Any State which has made a declaration in accordance with the first paragraph of this article may, at any time thereafter, declare, in respect of one or more of the territories referred to in that declaration, that it accepts the jurisdiction of the Court to hear applications from natural persons, non-governmental organisations or groups of individuals, as provided for in Article 34 of the Convention.”

instruments binding upon the States concerned.

14. Within the protective framework established by the Protocol, the State no longer constitutes an absolute juridical barrier between the individual and the international legal order. That barrier is pierced by the declaration provided for under Article 34(6). Individuals and non-governmental organisations, once regarded merely as “objects” of international law, have progressively acquired the status of genuine “subjects” of international law. The African Charter first accorded them the right to seize the African Commission on Human and Peoples’ Rights, a quasi-judicial body, and subsequently, the Protocol extended the process by granting them, subject to the conditions prescribed therein, the optional right to directly seize the African Court, a judicial organ.
15. This development does not imply, however, that individuals and non-governmental organisations have attained the same legal status as States within the international legal order. As the International Court of Justice observed, “subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights.”⁹
16. Within the framework of the Protocol, individuals and non-governmental organisations may therefore be regarded as derivative or secondary subjects of international law, their international legal personality having been recognised through the consent of African States, which remain the original or primary subjects of the international legal order. As a pure manifestation of State sovereignty, the international legal subjectivity thus conferred upon individuals and non-governmental organisations by the Protocol cannot, however, be regarded as immutable; what sovereign States, as primary subjects of international law, have established, they can certainly modify or withdraw, subject to compliance with certain conditions.

⁹ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949, p. 178*

II. Withdrawal of the optional declaration: the requirement of reasonable notice

17. Rwanda's instrument of ratification of the Protocol, dated 5 May 2003, was deposited on 6 May 2003. Its optional declaration is dated 22 January 2013 and was notified to the Chairperson of the African Union Commission on 6 February 2013. The declaration provides as follows:

“[The Republic of Rwanda] declares that the African Court on Human and Peoples’ Rights may receive petitions involving the Republic of Rwanda, filed by Non-Governmental Organizations (NGOs) with observer status before the African Commission of Human and Peoples’ Rights and individuals, subject to the reservation that all local remedies will have been exhausted before the competent organs and jurisdictions of the Republic of Rwanda.”

18. The declaration carries no indication concerning its duration. Nor does the Protocol provide for the possibility of its withdrawal. In order to determine the conditions under which it may be withdrawn by Rwanda; it is necessary first to ascertain its legal character.
19. The declaration provided for under Article 34(6) of the Protocol constitutes an optional declaration recognising the compulsory jurisdiction¹⁰ of the African Court. In my view, it may properly be characterised as a unilateral act operating within the framework of a treaty regime. It is a unilateral act¹¹ in nature because it embodies the State's autonomous undertaking to accept a legal obligation, namely, to recognise the Court's jurisdiction in respect of applications submitted by individuals or non-governmental organisations. At the same time, it is a unilateral act linked to a treaty provision because it is provided for by a treaty - namely, Article 34(6) of the Protocol - and the category of cases that may be submitted to the Court is

¹⁰ “A discretionary act by which a State enters into a binding jurisdictional commitment, unilaterally conferring jurisdiction on a court or tribunal for categories of disputes defined in advance,” Jean Salmon (ed.), *Dictionnaire de droit international public*, Bruylant/AUF, Brussels, 2001, p. 303.

¹¹ A unilateral act may be defined as a “manifestation of will attributable to a single subject of international law and capable of producing legal effects in the international order,” *ibid.*, p. 31.

defined by that treaty.

20. In this regard, the International Court of Justice has observed that:

“Declarations accepting the compulsory jurisdiction of the Court are optional undertakings of a unilateral character, which States are entirely free to make or not to make.”¹²

21. The World Court further indicated that the withdrawal of such declarations is possible but subject to certain conditions. It held that:

“the right of immediate termination of declarations of indefinite duration is far from established. The requirement of good faith appears to require that they be treated by analogy with the law of treaties, which prescribes a reasonable period for the withdrawal or denunciation of treaties containing no provision regarding duration.”¹³

22. For its part, the Inter-American Court of Human Rights, in its Judgment of 24 September 1999, held that a State Party to the American Convention could withdraw its optional declaration recognising the Court’s jurisdiction only through denunciation of the Convention itself pursuant to Article 78 thereof, which requires one year’s prior notice.¹⁴ It was only in the alternative, and for the purpose of excluding any possibility of withdrawal of

¹² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, I.C.J. Reports 1984, p. 418, paragraph 59; *Jurisdiction in Fisheries Matters (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 456, paragraph 54.

¹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, I.C.J. Reports 1984, p. 418, paragraph 59; *Jurisdiction in Fisheries Matters (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 456, paragraph 54.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment of 26 November 1984, I.C.J. Reports 1984, p. 420, paragraph 63; *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment of 11 June 1998, I.C.J. Reports 1998, p. 295, paragraph 33. A few years later, the International Court of Justice clarified the following: “The rules governing the interpretation of declarations made under Article 36 of the Statute are not identical to those established for the interpretation of treaties by the Vienna Convention on the Law of Treaties. [...] The Court notes that the provisions of the Vienna Convention may apply only by analogy in so far as they are compatible with the *sui generis* nature of the unilateral acceptance of the Court’s jurisdiction”, *Jurisdiction in Fisheries Matters (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 453, paragraph 46.

¹⁴ *Ivcher-Bronstein v. Peru*, Judgment of 24 September 1999 (Jurisdiction), paragraph 40.

the declaration with “immediate effect”, that the Inter-American Court referred to the above-cited Judgment of the International Court of Justice and concluded that the withdrawal of an optional declaration is governed by the relevant principles of the law of treaties, which clearly preclude withdrawal taking effect immediately.¹⁵

23. Endorsing in this respect the approach adopted by the European Court of Human Rights as expressed in its Judgment in *Loizidou v. Turkey*,¹⁶ the Inter-American Court firmly rejected any analogy between State practice under the optional clause system established under Article 36(2) of the Statute of the International Court of Justice and that relating to the optional clause system under the American Convention on Human Rights, having regard to the distinctive nature, object and purpose of that Convention.¹⁷ In this regard, the Inter-American Court stated as follows:

“In effect, international settlement of human rights cases (entrusted to tribunals like the Inter-American and European Courts of Human Rights) cannot be compared to the peaceful settlement of international disputes involving purely interstate litigation (entrusted to a tribunal like the International Court of Justice); since, as is widely accepted, the contexts are fundamentally different, States cannot expect to have the same amount of discretion in the former as they have traditionally had in the latter”.¹⁸

24. In the present case, neither the African Charter nor the Protocol establishing the Court contains a denunciation clause comparable to those found in the American Convention on Human Rights¹⁹ and the European Convention on Human Rights.²⁰

25. In this regard, an examination of the preparatory work of the African Charter

¹⁵ *Ivcher-Bronstein v. Peru*, judgment of 24 September 1999, paragraph 53.

¹⁶ *Loizidou v. Turkey (Preliminary Objections)*, judgment of 23 March 1995, paragraphs 84 and 85.

¹⁷ *Ivcher-Bronstein v. Peru*, judgment of 24 September 1999, paragraphs 47 and 48.

¹⁸ *Ibid.*, paragraph 48.

¹⁹ Article 78

²⁰ Article 58

reveals that several States, including Congo, Niger and the Central African Republic, proposed the insertion of a denunciation clause.²¹ That proposal was, however, ultimately rejected by the Conference of OAU Ministers during its second session in Banjul, The Gambia.

26. In the absence of any express provision in the African Charter, it is necessary to have recourse to relevant rules of general international law, as codified in the Vienna Convention on the Law of Treaties of 23 May 1969, Article 56 of which subjects the denunciation or withdrawal of a treaty containing no denunciation clause to particularly stringent conditions. Such withdrawal is permissible only where it is established that the parties intended to admit the possibility of denunciation or withdrawal, or where such a right may be implied by the nature of the treaty. It is far from evident that the States Parties intended to permit denunciation of the African Charter. On the contrary, the rejection of the proposed denunciation clause may reasonably be interpreted as reflecting an intention to confer a particular permanence and solemnity upon the obligations undertaken thereunder. Nor does the nature of the African Charter lend itself to an implication that denunciation was intended to be permissible.
27. In this regard, I would observe that the following three human rights instruments adopted by African States do contain denunciation clauses: the OAU Convention Governing Specific Aspects of Refugee Problems in Africa of 10 September 1969 (Article 13), which was adopted prior to the African

²¹ "The aforementioned delegations have the honour of submitting the following proposals to the OAU Conference of Ministers, which, whilst recognising the right of OAU Member States to enter reservations, to withdraw such reservations and to denounce the Convention, specify the limits of the right to enter reservations and the procedure for denunciation. These proposals, which do not call into question any of the provisions already adopted, are intended, on the contrary, to supplement them and to remove any ambiguity. They are as follows: Article 1 (new Article 69) 1. The Secretary-General of the OAU shall receive and communicate to all States which are, or may become, parties to this Charter, the text of any reservations made at the time of accession. 2. No reservation incompatible with the object and purpose of this Charter shall be permitted. 3. Reservations may be withdrawn at any time by notification addressed to the Secretary-General of the OAU. Such notification shall take effect on the date of receipt. Article 2 (Article 70). Any State Party may denounce this Charter by notification addressed to the Secretary-General of the OAU. The denunciation shall take effect one year after the date on which the Secretary-General of the OAU receives such notification," OAU, Doc, Amendment No. 7, 2nd session, Banjul, 7–21 January 1981.

Charter; as well as the African Union Convention on Preventing and Combating Corruption of 11 July 2003 (Article 26) and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 23 October 2009 (Article 19), both adopted after the African Charter. By contrast, the African Charter on the Rights and Welfare of the Child of 1 July 1990, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 1 July 2003, and the African Charter on Democracy, Elections and Governance of 30 January 2007 are, like the African Charter itself, silent on the question of denunciation. Such silence may reasonably be understood as evidencing an intention on the part of the States Parties not to permit denunciation of those instruments. A similar interpretation has also been advanced in relation to the International Covenant on Civil and Political Rights of 1966, which also contains no denunciation clause.²²

28. Since the Protocol contains no denunciation clause, a State Party cannot be bound indefinitely by its optional declaration without any possibility of withdrawing that declaration.²³ In my view, the declaration provided for under Article 34(6) is “severable” from the Protocol itself and may therefore be withdrawn by the State concerned (see paragraph 57 of the Judgment).
29. I further consider that, in order to determine the conditions under which the declaration may be withdrawn, reference should be made “by analogy” to the law of treaties (see paragraphs 54 and 65 of the Judgment), as codified by the 1969 Vienna Convention on the Law of Treaties.²⁴ Since the Republic

²² On this point, see the very firm position of the Human Rights Committee, General Comment No. 26 on issues relating to the continuity of obligations under the International Covenant on Civil and Political Rights, United Nations, Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, p. 2. See also the aide-mémoire from the Secretary-General of the United Nations, dated 23 September 1997, addressed to the Democratic People's Republic of Korea following its notification of denunciation of the Covenant; the Secretary-General, in his capacity as depositary, had considered that, in the absence of a denunciation clause in the Covenant, the consent of all other States Parties was required for such denunciation to take effect; see United Nations, Doc. CN/1997/CN.467.1997.

²³ With regard to the declaration provided for in Article 25 of the European Convention prior to its amendment by Protocol No. 11 (individual right to bring a case before the European Commission), it has been argued that the only way to end it was to denounce the Convention; see Ronny Abraham, “Article 25”, in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henry Imbert (Dir.), *The ECHR - Article-by-Article Comments*, Paris, Economica, 1995, p. 581

²⁴ Paragraph 2 of Article 56 of the Convention, entitled ‘Denunciation or withdrawal in the case of a treaty containing no provisions relating to termination, denunciation or withdrawal’, provides that:

of Rwanda is a party to that Convention (having acceded to it on 3 January 1980), its procedural provisions are applicable to it.²⁵ I do not, however, regard the reference in paragraph 65 of the Judgment to the “practice” of the Inter-American Court, as reflected in *Ivcher Bronstein v. Peru*, to be entirely apposite. As I have demonstrated above (see paragraph 22), the position adopted by the Inter-American Court is considerably more nuanced than such a reference might suggest.²⁶

30. It is also significant that, in its Commentary to the *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, adopted in 2006,²⁷ the United Nations International Law Commission observed that “there can be no doubt that unilateral acts may be revoked or modified in certain specific circumstances.” The Commission further identified a number of factors relevant to determining whether the revocation of a unilateral undertaking would be arbitrary:

“A unilateral declaration which has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:

- i) the precise terms of the statement relating to the withdrawal;
- ii) the extent to which the persons to whom the obligations are owed have relied on those obligations;
- iii) the extent to which there has been a fundamental change in circumstances.”

31. In the present case, Rwanda’s declaration contains no reference to the possibility of its withdrawal, and there has manifestly been no fundamental

“A Party must give at least twelve months’ notice of its intention to denounce a treaty or to withdraw from it in accordance with the provisions of paragraph 1”.

²⁵ The twelve-month time limit is a procedural requirement that is not laid down by customary law.

²⁶ I would point out in particular that paragraph 24(b) of the judgment in the case of *Ivcher-Bronstein v. Peru*, to which the Court refers in paragraph 63 of the present judgment, does not reflect the position of the Inter-American Court but that of the Inter-American Commission.

²⁷ Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly with its report on the work of that session (A/61/10). The report, which also contains comments on the draft articles, is reproduced in the Yearbook of the International Law Commission, 2006, vol. II (2).

change of circumstances within the meaning of Article 62 of the Vienna Convention on the Law of Treaties. What remains to be considered is the prejudice that Rwanda's withdrawal of its declaration might cause to the beneficiaries thereof, namely individuals and non-governmental organisations.

32. In this regard, Rwanda's withdrawal of its declaration simply deprives individuals and non-governmental organisations of the right previously available to them to bring applications before the African Court against that State. As explained in the first part of this Opinion, it likewise removes the procedural capacity that they derived from the declaration for the purposes of accessing the Court. This consequence is of considerable significance for individuals and non-governmental organisations that occupy a central position within the judicial protection mechanism established by the Protocol. It is for this reason that the withdrawal of Rwanda's declaration would be arbitrary were it to take effect immediately: it would take by surprise, and leave without recourse, individuals and non-governmental organisations on the verge of instituting proceedings against Rwanda.
33. In order to avoid such arbitrariness, the withdrawal of the declaration must therefore be accompanied by a reasonable period of notice. Such an approach is consistent with the jurisprudence of the International Court of Justice concerning the withdrawal of the optional declaration provided for under Article 36(2) of its Statute.²⁸ The notion of "reasonableness" is mainly informed by considerations of "fairness", "equity" and "necessity".²⁹ In the circumstances of the present case, the twelve-month notice period prescribed by Article 56(2) of the Vienna Convention and adopted by the Court appears to me fair, equitable and necessary, having regard to the significant adverse consequences that withdrawal of the declaration entails for the rights of individuals and non-governmental organisations within the

²⁸ See paragraph 21 above.

²⁹ On the definition of "reasonable," see Olivier Corten, *L'utilisation du "raisonnable" par le juge international – Discours juridique, raison et contradictions*, Editions Bruylant – Editions de l'Université de Bruxelles, Brussels, 1997, pp. 495–526 (paragraphs 439–463)

framework of the system established by the Protocol.

34. The Protocol, which strengthens the system of collective guarantees for individual rights enshrined in the African Charter, must be regarded as a fundamental pillar of that system by reason of the judicial character of the procedures it establishes and, in particular, the right of individual access to the Court. The Court must therefore seek to preserve, to the greatest extent possible, the integrity and effectiveness of this mechanism of individual access by maintaining a fair balance between the interests of States Parties and those of individuals and non-governmental organisations. In discharging that responsibility, the Court must remain guided by the object and purpose of both the African Charter and the Protocol, as well as by the central place now accorded by the Pan-African Organisation to the protection of the human person, as reflected in several provisions of Article 4 of the Constitutive Act of the African Union.

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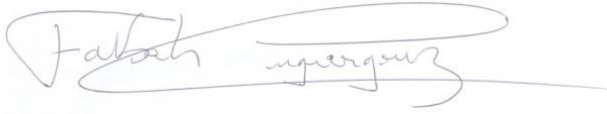
35. In conclusion, it is my hope that the present Judgment will not discourage the many States that have not yet deposited the optional declaration provided for under Article 34(6) of the Protocol from doing so. States Parties to the Protocol that remain hesitant to deposit the declaration may wish to consider the possibility of attaching temporal limitations to their declarations, as was formerly permitted under the European Convention (prior to its amendment by Protocol No. 11) in relation to applications lodged by individuals before the European Commission (Article 25)³⁰ and inter-State proceedings before the Court (Article 46).³¹ A comparable possibility remains available under the American Convention with respect to declarations recognising the jurisdiction of the Inter-American Court by States (Article 62).³² While such temporal limitations are not, in principle, an ideal solution, they would nevertheless be preferable to the present unsatisfactory

³⁰ See footnote 7.

³¹ See footnote 2.

³² See footnote 3.

situation in which only slightly fewer than one quarter of the 30 States Parties to the Protocol have deposited the declaration.

A handwritten signature in blue ink, appearing to read 'Fatsah Ouguergouz', with a long horizontal flourish extending to the right.

Fatsah Ouguergouz

Judge