

SEPARATE OPINION OF JUDGE FATSAH OUGUERGOUZ

1. I am in agreement with the views of my colleagues in regard to the conclusions reached by the Court on the question of its jurisdiction and on that of the costs and expenses of the case, and consequently I have voted in favor of the said conclusions. However, I believe that these two issues deserved to be developed in a more comprehensive manner.

2. The Applicant indeed has the right to know why it has taken nearly one year between the date of receipt of his application at the Registry and the date on which the Court took its decision thereon. Senegal, on the other hand, has the right to know why the Court chose to make a solemn ruling on the application by means of a Judgment, rather than reject it *de plano* with a simple letter issued by the Registry. The two Parties also have the right to know the reasons for which their prayers in respect of the costs and expenses, respectively, of the case, have been rejected; the Applicant should also know why his prayer in this regard was addressed on the basis of Rule 30 of the Interim Rules of the Court (hereinafter referred to as the "Rules") on Legal Costs, whereas the Court could have equally, if not exclusively, treated this prayer on the basis of Rule 31 on Legal Assistance.

3. However, only the question of the jurisdiction of the Court seems to me to be sufficiently vital, to lead me to append to the Judgment, an *exposé* of my separate opinion in regard to the manner in which this question should have been treated by the Court.

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4. In the present case, the question of the jurisdiction of the Court is relatively simple. It is that of the Court's "personal jurisdiction" or "jurisdiction *ratione personae*" in respect of applications brought by individuals. This is governed by Article 5 (3) 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 "Protocol") and Article 34 (6) of the said Protocol which set forth the modalities by which a State shall accept the said jurisdiction.

5. However, paragraph 31 of the Judgment states, not without ambiguity, that for the Court to hear a case brought directly by an individual against a State Party, there must be compliance with, *inter alia*, Article 5 (3) and Article 34 (6) of the Protocol.

6. If the only issue referred to here is that of the jurisdiction of the Court, then the expression "*inter alia*" introduces confusion because it lends itself to the understanding that the said jurisdiction is predicated on one or several other conditions that have not been spelt out. However, in my view, there are no other conditions to the jurisdiction of the Court in the case than that which has been specified in Article 34 (6) of the Protocol, reference to which was made in Article 5 (3).

7. Nevertheless, if the expression "*inter alia*" also refers to the conditions for admissibility of the application, there would no longer be any logical linkage between paragraph 31 and paragraph 29 of the Judgment in which the Court indicated that it would start by considering the question of its jurisdiction. It would be particularly difficult to understand the meaning of paragraph 39 in which the Court gives its interpretation of the word "receive" as

other States Parties. The idea is to avoid giving untimely or undue publicity to individual applications in respect of which the Court clearly lacks jurisdiction.

41. In this regard, it is important to point out that the potential authors of individual applications can in the present circumstances experience difficulties knowing the situation of an African State vis-à-vis the optional declaration. Indeed, only the list of the States Parties to the Protocol is being published on the African Union Commission website and this list does not mention the States that have made the optional declaration. It would therefore be desirable that the list of the States that have made the said declaration be similarly published on the website for the purposes of bringing the information to the knowledge of individuals and non governmental organizations.

42. The Court, for its part, cannot be satisfied with such publication as it does not have official value, and is not a “real time” reflection of the status of participation in the Protocol and in the system of the optional declaration. To date, the list of States Parties to the Protocol and that of the States Parties that have made the optional declaration, while being of primary interest to the Court, are not automatically notified to the Court by the Chairperson of the African Union Commission, depository of the Protocol. The Protocol does not oblige the depository to communicate declarations to the Court Registry, its Article 34 (7) contenting itself with providing that declarations should be deposited with the Chairperson of the African Union Commission “who shall transmit copies thereof to the State parties”. The Statute of the International Court of Justice²³ and the American Convention of Human Rights²⁴, for their part, provide that the depositories of the optional declarations accepting the compulsory jurisdiction of the International Court of Justice and the Inter-American Court, respectively, should file copies thereof in the Registries of the said courts. Although the relevant department of the African Union Commission is not legally bound to do so, it would also be desirable that in future the said department inform the Court of any update of the two above-mentioned lists.

Fatsah Ouguergouz

Aboubakar Diakité
Registrar



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