

**States — Sovereignty — States' withdrawal of declaration under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court, 1998 — Right of a State with respect to treaties — Right to enter and right to withdraw**

**International tribunals — African Court on Human and Peoples' Rights — Direct connection of case's merits to provisional measures request — Whether an application to institute proceedings before the Court void if unsigned**

**International tribunals — Jurisdiction — Whether the African court having jurisdiction to decide on/revoke State's decision to withdraw its declaration under Article 34(6) of the Protocol — Whether State declarations accepting the jurisdiction of the African Court optional**

**Treaties — Interpretation — Withdrawal — Whether State's withdrawal an act of sovereignty and a unilateral act — Whether State's withdrawal matter of treaty law — Consent — Rights of States**

**Human rights — Whether State's withdrawal of its declaration under Article 34(6) of the Protocol constituting a regression of rights — Whether depriving State's citizens of a regional judicial redress mechanism through its withdrawal a human rights violation — Whether State declarations under Article 34(6) of the Protocol conferring subjective rights on individuals and non-governmental organizations**

HOSSOU AND ADELAKOUN *v.* REPUBLIC OF BENIN<sup>1</sup>

(Application No 16/2020)

*African Court on Human and Peoples' Rights*

*Provisional Measures. 25 September 2020*

(Kioko, *Vice-President*; Ben Achour, Matusse, Mengue, Mukamulisa, Chizumila, Bensaoula, Tchikaya, Anukam and Aboud, *Judges*)

<sup>1</sup> The applicants were self-represented. The respondent State was represented by the Judicial Agent of the Treasury Headquarters of the General Directorate of Treasury and Public Accounting.

*Jurisdiction. 2 December 2021*

(Aboud, *President*; Tchikaya, *Vice-President*; Kioko, Ben Achour, Mengue, Mukamulisa, Chizumila, Bensaoula, Anukam, Ntsebeza and Sacko, *Judges*)

**SUMMARY:**<sup>2</sup> *The facts:*—Mr Hossou and Mr Adalakoun (“the applicants”) were lawyers and nationals of the Republic of Benin (“the respondent State” or “the respondent”). They brought a suit challenging the respondent State’s withdrawal of its declaration under Article 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court, 1998 (“the Protocol”), through which it had accepted the jurisdiction of the African Court on Human and Peoples’ Rights (“the Court”) to receive applications from individuals and non-governmental organizations (“NGOs”).

The applicants alleged that the respondent State’s withdrawal violated the African Charter on Human and Peoples’ Rights, 1981 (“the Charter”) and international human rights standards. They also contended that the withdrawal declaration constituted a regression of rights, as it deprived the State’s citizens of direct access to the regional judicial system through which they could seek redress for prejudice suffered within their domestic system. The applicants requested that the Court revoke the respondent State’s decision to withdraw, as a matter of urgency, pending a ruling on the principal application.

The respondent State contended that the applicants’ request was inadmissible, as it was unsigned, contrary to the provision of the Rules of the Court. The respondent State argued that the applicants were contesting the right of a sovereign State to enter into or withdraw from any convention as it deemed fit, and stressed that in international law, and particularly in accepting the jurisdiction of an international court, sovereignty was manifested through consent. The respondent maintained that it was clear from the Court’s instruments and its jurisprudence that States were free to decide whether or not to accept its jurisdiction.

The respondent maintained that the applicants had not established how its withdrawal constituted a violation of human rights. The respondent State asserted that the subject matter of the application fell outside the jurisdiction of the Court, as the court only had jurisdiction regarding the legal effect of its withdrawal. The respondent emphasized that admitting the application would have been equivalent to the rejection of its sovereign right to withdraw its declaration. The respondent requested that the Court dismiss the application as it lacked material jurisdiction.

<sup>2</sup> Prepared by Ms N. Mazi.

*Ruling on Provisional Measures (25 September 2020)*

*Held:*—The Court had *prima facie* jurisdiction to hear the application. The applicants' request for provisional measures was dismissed.

(1) For a request on provisional measures, the Court only needed to ensure that it had *prima facie* jurisdiction. The respondent State was a Party to the Charter and the Protocol, and had accepted the Court's jurisdiction to receive applications from individuals and non-governmental organizations. The applicants' allegations concerned instruments over which the Court had jurisdiction under Article 3(1) of the Protocol,<sup>3</sup> and the alleged violations also related to rights protected by instruments to which the respondent State was a Party. A State's withdrawal of its declaration regarding Article 34(6) of the Protocol had no retroactive effect on cases under consideration at the time of the deposit of the instrument, as was the situation in this case. The respondent State's withdrawal did not affect the Court's personal jurisdiction in any way (paras. 10-16).

(2) Although Rule 34(1) of the Rules of Court<sup>4</sup> provided that the application be signed, the Court adopted a flexible approach with regard to the form and modality of how it is seised, taking into account the circumstances of each application to determine its validity. The applicants filed their application via email, and although no signature was included, they duly endorsed their names and fully disclosed their particulars. The applicants' identities were also well established, notwithstanding the absence of signatures within their application. The respondent State's preliminary objection on this basis was dismissed (paras. 17-21).

(3) The applicants did not present evidence of extreme gravity or urgency which necessitated their request for provisional measures. Neither did the circumstances reveal a situation of urgency or extreme gravity which risked causing irreparable harm to the applicants. Notably, the applicants' request also touched on the merits of the application, and if ordered, would grant the very reliefs they sought in their main application. The applicant's request for provisional measures was therefore dismissed. The Court's ruling was provisional and in no way prejudged its decision regarding its jurisdiction, admissibility or the merits of the case (paras. 22-32).

*Ruling on Jurisdiction (2 December 2021)*

*Held:*—The Court did not have material jurisdiction over the application.

(1) Article 3 of the Protocol provided that the Court had jurisdiction over cases and disputes concerning the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned; as well as any dispute regarding whether the Court had jurisdiction. If the rights alleged to have been violated were protected by

<sup>3</sup> For the text of Article 3(1) of the Protocol, see para. 10 of the judgment.

<sup>4</sup> For the text of Rule 34(1) of the Rules of the Court, see para. 19 of the judgment.

the Charter or any other human rights instrument ratified by a State party, it would suffice to establish the Court's material jurisdiction. (paras. 14-27).

(2) Although the declaration made under Article 34(6) of the Protocol was provided for in the Protocol which was governed by the law of treaties, the declaration itself was a unilateral act of a State which was not supported by the law of treaties. Consequently, the Vienna Convention on the Law of Treaties, 1969 did not apply to the declaration made under Article 34(6) of the Protocol (paras. 28 and 29-30).

(3) State declarations accepting the jurisdiction of international courts were optional. This was true for similar declarations by States recognising the jurisdiction of the International Court of Justice, the European Court of Human Rights (before Protocol No 116) and the Inter-American Court of Human Rights. The declaration provided under Article 34(6) of the Protocol was similar to them, and though contained within the Protocol, it was optional. The declaration was a unilateral act separable from the Protocol, which could be withdrawn from solely, without leading to a withdrawal from or denunciation of the Protocol itself. The optional nature of the declaration and its unilateral characteristic was derived from the principle of sovereignty through which States were free to make commitments and withdraw their commitments in accordance with the relevant rules of the applicable treaty (paras. 31-3).

(4) The matter before the Court pertained to a right accorded to States, the very right through which States ensured the establishment of mechanisms to complement their domestic human rights implementation mechanisms. The respondent State was therefore entitled to withdraw its declaration under Article 34(6) of the Protocol. The respondent State's objection based on the Court's lack of material jurisdiction was upheld (paras. 34-6 and 40).

*Dissenting Opinion of Judge Bensaoula:* (1) The decision completely differed from the Court's previously established jurisprudence, specifically in *Umuhaza v. Republic of Rwanda*.<sup>5</sup> The Court's retention of *prima facie* jurisdiction in its ruling on provisional measures indicated that it had jurisdiction to consider the application, as it found presumptions that the case was within its jurisdiction until proven otherwise (paras. 1-12).

(2) The Court should have declared the withdrawal invalid, as it was not preceded by a notice period. The Protocol did not only create a system, but rights. The declaration, apart from being an international commitment of the State, created subjective rights for individuals and groups, the enjoyment of which required legal security. The Court should have declared the withdrawal a human rights violation (paras. 13-19).

(3) The Court's reasoning excluded the African context. Articles 1 and 2 of the Charter reflected a twofold commitment by African States regarding the rights and welfare of its citizens. The Court had also emphasized in

<sup>5</sup> *Umuhaza v. Republic of Rwanda*, 186 ILR 169.

*Ajavon v. Republic of Benin*<sup>6</sup> that any regressive measure by a State Party which already recognized a fundamental right was a violation. Article 34(6) of the Protocol granted States leeway as to the time-limit within which to make their declaration, rather than an exemption from the obligation to make a declaration. The absence of a provision regarding the right to withdraw within the Protocol supported this. Although many international and regional human rights conventions provided for the possibility of withdrawal, African human rights instruments did not have provisions on withdrawal or denunciation. The rules and procedures for depositing an instrument had to be the same for its withdrawal. The Court could not rule on the withdrawal of the Declaration without taking into account the provision of Article 35(1) of the Protocol, which conferred the exclusive power to make changes to the Protocol on another authority. The absence of such consideration made the Court consider the withdrawal as a separate act, consequently making it include a possibility which was not provided for within the Protocol (paras. 20-8).

(4) Article 5(3) of the Protocol, though subject to States' declarations, reinforced the principle of justiciability of rights, and the right to remedy, established by the Charter. The declaration by States conferred a prerogative on the individual which the Protocol did not make an admissibility requirement, but rather, an element of the Court's jurisdiction. Individuals and NGOs had a human right conferred by States' declarations under Article 34(6) of the Protocol, as it was the declaration which made their rights effective. The obligation of States to offer remedies to citizens was not limited to the establishment of domestic human rights protection mechanisms. Although the Court characterized declarations as optional, the provision of Article 34(6) of the Protocol was clear that States were obliged to make a declaration accepting the Court's jurisdiction, although a time limit was not specified (paras. 29-47).

(5) In deciding its material jurisdiction, the Court should have addressed all the requests raised by the applicants (paras. 48-50).

The text of the ruling on jurisdiction commences at p. 99. The following is the text of the ruling on provisional measures:

## JUDGMENT ON PROVISIONAL MEASURES

### I. THE PARTIES

1. Glory Cyriaque Hossou and Angelo Adalakoun (hereinafter referred to as "the Applicants"), are nationals of the Republic of

<sup>6</sup> *Ajavon v. Republic of Benin*, African Court on Human and Peoples' Rights (Application No 62/2019) (Merits), 4 December 2020.

Benin who are lawyers by profession. They challenge the Respondent State's withdrawal of the Declaration deposited under Article 34(6) of the Protocol.

2. The Respondent State is the Republic of Benin, which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") on 22 August 2014. On 8 February 2016, it also deposited the Declaration provided for under Article 34(6) of the Protocol by which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organisations (NGOs). On 25 March 2020, the Respondent State deposited with the African Union Commission an instrument of withdrawal of the said Declaration.

## II. SUBJECT OF THE APPLICATION

3. On 7 May 2020, the Applicants filed an Application before this Court complaining about the Respondent State's withdrawal of the Declaration filed under Article 34(6) of the Protocol. In the same Application, the Applicants also prayed the Court to order provisional measures.

4. The Applicants state that on 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol which allows individuals and NGOs to directly seize the Court after exhausting local remedies. The Applicants aver that the Respondent State withdrew the Declaration pursuant to a written notice dated 25 March 2020.

5. In so doing, the Applicants allege that the Respondent State violated the Charter and international human rights standards. It is also the Applicants' contention that by withdrawing its Declaration, the Respondent State has deprived its citizens from directly accessing the regional judicial system to litigate and seek redress for the prejudice they have suffered within their domestic system, which constitutes a regression of rights.

6. With regard to the provisional measures, the Applicants pray the Court "to revoke, as a matter of urgency and in accordance with the provisions of the Protocol on the Establishment of the Court, Benin's decision to withdraw the Declaration filed under Article 34(6), pending a ruling on the principal Application."

### III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

7. The Application instituting proceedings, together with the request for provisional measures, was served on the Respondent State on 8 July 2020. The Respondent State was given fifteen (15) days, from the date of receipt, to respond to the request for provisional measures and sixty (60) days, from 1 August 2020, to file its Response to the main Application.

8. On 5 August 2020, the Court granted the Respondent State an additional fifteen (15) days to respond to the request for provisional measures.

9. On 26 August 2020, the Court received the response of the Respondent State to the request for provisional measures.

### IV. *PRIMA FACIE* JURISDICTION

10. Article 3(1) of the Protocol provides that “the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned”.

11. Rule 39(1) of the Rules of Court (hereinafter referred to as “the Rules”) stipulates that “the Court shall conduct preliminary examination of its jurisdiction. . .”. However, with regard to provisional measures, the Court need [not] ensure that it has jurisdiction over the merits of the case, but simply that it has *prima facie* jurisdiction.<sup>1</sup>

12. Accordingly, the Court will ascertain whether it has *prima facie* jurisdiction.

13. The Court notes that the Respondent State is a Party to the Charter and the Protocol, and it also accepted the Court’s jurisdiction to receive applications from individuals and NGOs by virtue of Article 34(6) of the Protocol read together with Article 5(3) thereof.

14. The Court also notes that the violations alleged by the Applicants relate to rights protected in instruments to which the Respondent State is a Party. The Applicants specifically allege that the withdrawal is a violation of the Charter and international human rights instruments and also that it amounts to depriving citizens from

<sup>1</sup> *Komi Koutche v. Republic of Benin*, ACtHPR Application No 020/2019, Ruling of 2 December 2019 (provisional measures), § 14; *Amini Juma v. United Republic of Tanzania* (provisional measures) (3 June 2016) 1 AfCLR, 658, § 8; *African Commission on Human and Peoples’ Rights v. Libya* (provisional measures) (15 March 2013) 1 AfCLR 193 § 21.

accessing regional judicial mechanisms. The Applicants' allegations, therefore, cover instruments over which the Court has jurisdiction under Article 3(1) of the Protocol. Accordingly, the Court concludes that it has jurisdiction to consider the Application.

15. The Court also recalls that it has held that the withdrawal of a Declaration filed in accordance with Article 34(6) of the Protocol has no retroactive effect on cases under consideration at the time of the deposit of the instrument of withdrawal,<sup>2</sup> as is the case in the present matter. The Court reiterated this position in *Houngue Eric Noudehouenou v. Republic of Benin*,<sup>3</sup> and held that the Respondent State's withdrawal of the Declaration will take effect on 26 March 2021. Accordingly, the Court concludes that said withdrawal does not in any way affect its personal jurisdiction in the present case.

16. From the foregoing, the Court concludes that it has *prima facie* jurisdiction to hear the present Application.

## V. ADMISSIBILITY OF THE REQUEST FOR PROVISIONAL MEASURES

17. The Respondent State raises a preliminary objection to the admissibility of the request based on the Applicants' failure to sign the request for provisional measures.

18. The Respondent State contests the admissibility of the request for provisional measures based on Rule 34(1) of the Rules which requires that an Application should be signed by the Applicant. The Respondent State submits that the request filed by the Applicants in the instant matter is not signed.

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19. The Court notes that Rule 34(1) of the Rules provides that:

The Applicant shall file in the Court Registry, one (1) copy of the Application containing a summary of the facts of the case and of the evidence intended to be adduced.

The said Application shall be signed by the Applicant or by his/her representative.

The Registrar shall acknowledge receipt of the application.

<sup>2</sup> *Ingabire Victoire Umuhoya v. Rwanda* (jurisdiction) (3 June 2016) 1 AfCLR, 562 § 67.

<sup>3</sup> *Houngue Eric Noudehouenou v. Republic of Benin*, ACtHPR, Application No 003/2020 Ruling of 5 May 2020 (provisional measures), §§ 4-5 and corrigendum of 29 July 2020.



20. The Court recalls that with regard to the form and modality of seizure, it has always adopted a flexible approach.<sup>4</sup> Overall, the Court always takes into account the specific conditions of each Applicant and the circumstances of each application in determining the validity of the application.

21. In the present case, the Court notes that the Application containing the request for provisional measures was filed via email. The Court also notes that although no signature was included at the end of the Application, the Applicants duly endorsed their names to the Application. Further, the Applicants have fully disclosed their particulars in the Application and have been able to maintain contact with the Registry of the Court through their email addresses. In the circumstances, the Court holds that the identity of the Applicants is well established notwithstanding the lack of signatures on their Application. The Court, therefore, dismisses the Respondent State's objection on this point.

## VI. PROVISIONAL MEASURES REQUESTED

22. In their request for provisional measures, the Applicants pray the Court to: "revoke Benin's decision to withdraw the Declaration deposited under Article 34(6) of the Protocol, pending the determination of the principal Application by the Court." Furthermore, the Applicants submit that the Respondent State's decision to withdraw the Declaration constitutes a claw-back of rights and a deprivation of its citizens' right to access the regional judicial mechanism to litigate and seek redress for the damage they suffered within their domestic system.

23. In its Response, the Respondent State submits that the issue of suspending the decision to withdraw the Declaration filed in accordance with Article 34(6) of the Protocol had previously been decided by the Court in the case of *Ingabire Victoire Umuhuza v. Rwanda*, as well as in the order issued by the Court on 5 May 2020 in the matter of *Houngue Eric Noudehouenou v. Republic of Benin*. The Respondent State further submits that according to the jurisprudence of the Court a State's decision to withdraw its Declaration does not take effect until 12 months after the date of the deposit of the instrument of withdrawal. According to the Respondent State, the requested procedure in the present case is inappropriate and baseless, and the Court must dismiss it.

<sup>4</sup> *Robert John Penesis v. United Republic of Tanzania*, ACtHPR, Application No 012/2015, Judgment of 28 November 2019 (merits and reparations), §§ 44-6.

24. Specifically, the Respondent State prays the Court to:

- (i) Find that the two Applicants did not sign the Application filed before it;
- (ii) Declare that the failure to sign is reason for inadmissibility of the Application;
- (iii) State that this inadmissibility also affects the admissibility of the requested provisional measures;
- (iv) Accordingly, declare the request for provisional measures inadmissible.

25. The Respondent State additionally, prays the Court to:

- (i) Note that the issue of revoking the State of Benin's decision to withdraw the declaration deposited in accordance with Article 34(6) of the Protocol has been decided by the Court on 5 May 2020 in the Order on request for provisional measures in the matter of *Houngue Eric Noudehouenou v. Republic of Benin*;
- (ii) Find that the provisional measures requested by the Applicants in the present case are aimed at the same issue;
- (iii) Rule that the subject matter of the request is immaterial since it has been voided of its content;
- (iv) Consequently, the request for provisional measures is dismissed.

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26. The Court recalls that in accordance with Article 27(2) of the Protocol and Rule 51(1) of the Rules, it is empowered:

at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application.

27. It thus always lies with the Court to decide, given the specific circumstances of each case,<sup>5</sup> where the alleged situation of extreme gravity and urgency necessitates the exercise of the jurisdiction conferred upon it under the earlier-mentioned provisions. Nevertheless, the Court must always be convinced of the existence of a very serious situation before it orders provisional measures.

<sup>5</sup> *Armand Guehi v. United Republic of Tanzania* (provisional measures) (18 March 2016), 1 AfCLR, 587, § 17.

28. In the present case, the Court observes that the request for provisional measures touches on the merits of the Application. Issuing an order for provisional measures at this stage, especially given the manner in which the Applicants have formulated the request, would, in principle, grant the very reliefs that the Applicants are seeking in their main Application.

29. The Court also notes that the Applicants did not present evidence of the extreme gravity or urgency in this case to support the request for provisional measures.

30. The Court considers, therefore, that the circumstances of this case do not reveal a situation of extreme gravity or urgency, which could cause irreparable harm to the Applicants and, consequently, dismisses the request for provisional measures.

31. For the avoidance of doubt, this Ruling is provisional in nature and in no way prejudices the decision the Court might take regarding its jurisdiction, the admissibility and the merits of the Application.

## VII. OPERATIVE PART

32. For these reasons,

THE COURT:

*Unanimously,*

- (i) *Dismisses* the Respondent State's objection to the admissibility of the Application.
- (ii) *Dismisses* the Applicants' request for provisional measures.

The following is the text of the judgment on jurisdiction:

## RULING ON JURISDICTION

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## I. THE PARTIES

1. Glory C. Hossou and Landry A. Adelokoun (hereinafter referred to as “the Applicants”) are nationals of the Republic of Benin, jurists by profession and residents of Abomey-Calavi in Benin. They challenge the Republic of Benin’s withdrawal of the Declaration deposited under Article 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court (hereinafter “the Protocol”).

2. The Application is filed against the Republic of Benin (hereinafter referred to as “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”) through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations. On 25 March 2020, the Respondent State deposited with the Chairperson of the African Union Commission (hereinafter referred to as “the Commission”) an instrument withdrawing the said Declaration. The Court held that this withdrawal has no bearing, on the one hand, on pending cases, and on the other hand, on new cases filed before the withdrawal came into effect, that is, on 26 March 2021.<sup>1</sup>

## II. SUBJECT OF THE APPLICATION

### A. *Facts of the matter*

3. On 7 May 2020, the Applicants filed an Application before this Court to challenge the Respondent State’s withdrawal of its Declaration accepting the jurisdiction of the Court to receive applications from individuals and NGOs having observer status before the African Commission on Human and Peoples’ Rights. In the Application, the Applicants also pray the Court to order provisional measures.

4. The Applicants state that on 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol allowing individuals and NGOs having observer status before

<sup>1</sup> *Houngue Eric Noudebouenou v. Republic of Benin*, ACtHPR, Application No 003/2020, Ruling (Provisional measures), 5 May 2020, §§ 4-5 and Corrigendum of 29 July 2020.

the African Commission on Human and Peoples' Rights to seize the Court directly after exhausting local remedies. The Applicants aver that the Respondent State withdrew the Declaration following a written notice to the African Union Commission dated 25 March 2020.

*B. Alleged violations*

5. The Applicants allege that, in withdrawing the Declaration, the Respondent State:

- (i) Violates the Charter and international human rights standards.
- (ii) 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.

III. SUMMARY OF THE PROCEDURE BEFORE  
THE COURT

6. The Application instituting proceedings, together with the request for provisional measures, were received at the Registry on 7 May 2020 and served on the Respondent State on 8 July 2020.

7. The Respondent State was given fifteen (15) days, from the date of receipt, to respond to the request for provisional measures and sixty (60) days, from 1 August 2020, to file its Response to the main Application.<sup>2</sup>

8. On 26 August 2020, the Respondent State responded to the request for provisional measures.

9. On 25 September 2020, the Court issued a ruling dismissing the request for provisional measures.

10. On 8 October 2020, the Respondent State filed its Response to the main Application and this was served on the Applicants on 19 October 2020 to file the Reply within thirty (30) days of receipt. On 25 November 2020 the Applicants were given an extension of thirty (30) days to file the Reply but they did not do so.

11. Pleadings were closed on 30 March 2021 and the Parties were duly notified.

<sup>2</sup> By a Press Release issued on 20 May 2020, in response to the COVID-19 Pandemic, the Court had suspended the computation of time limits for all matters, except provisional measures, from 1 May to 31 July 2020.

## IV. PRAYERS OF THE PARTIES

12. The Applicant prays the Court to:

- (i) Declare the Application admissible.
- (ii) Find that the decision of the Respondent State withdrawing the Declaration violates the Charter and international human rights standards.
- (iii) Declare that the Respondent State violated the right of the citizens to access justice due to its decision to withdraw the Declaration.

13. The Respondent State prays the Court to:

- (i) Find that that the Applicants are attempting, on the basis of their Application, to contest the right of the Republic of Benin to withdraw its Declaration of recognition of the Court's jurisdiction.
- (ii) Declare and rule that the Republic of Benin is a sovereign State with power to enter into or withdraw from any convention.
- (iii) Find that the Court lacks material jurisdiction to consider the matter.
- (iv) Verify that the Applicants did not sign the Application filed before this Court.
- (v) Find that the lack of signature is a reason for inadmissibility, and consequently declare the Application inadmissible.
- (vi) Find that the Applicants have not established how the withdrawal of the said Declaration by the Republic of Benin constitutes a human rights violation.
- (vii) Find that the Declaration of jurisdiction is not mandatory and therefore cannot be adhered to.
- (viii) Consequently, dismiss the Application.

## V. JURISDICTION

14. Article 3 of the Protocol 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.

15. The Court notes that in terms of Rule 49(1) of the Rules; “[t]he Court shall conduct preliminary examination of its jurisdiction . . . in accordance with the Charter, the Protocol and these Rules”.

16. Based on the above-mentioned provisions, the Court must, for each application, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

17. The Court notes that in the instant case the Respondent State raises an objection based on the Court’s lack of material jurisdiction.

18. The Respondent State argues that it is a sovereign entity as can be inferred from basic principles of international law.

19. The Respondent State avers that in international law, and particularly in the area of accepting the jurisdiction of an international court, sovereignty is manifested in the principle of consent. The consent of a State is thus “a sine qua non of the jurisdiction of any international court, regardless of the time and the manner in which such consent is expressed.”<sup>3</sup>

20. The Respondent State affirms that it is clear from the instruments governing this Court, as well as its jurisprudence, that States are free to decide whether or not to accept the jurisdiction of the Court.

21. The Respondent State further affirms that the Declaration is optional and not binding on any State. Consequently, it cannot be imposed on those States that have recognized its jurisdiction to remain under it, otherwise such act would be an infringement of their sovereignty.

22. The Respondent State further asserts that while the Court, through its jurisprudence, has clarified its jurisdiction with regard to the question of the legal effects of the Respondent State’s withdrawal of the Declaration on the ongoing proceedings, it cannot admit the present application as this would be tantamount to rejecting the sovereign right of the Respondent State to withdraw its Declaration.

23. The Respondent State also submits that the subject matter of this Application falls outside the jurisdiction of the Court which, for the time being, can only decide the legal effects of the withdrawal. It is also the Respondent State’s submission that the Court is fully aware of this position as it has never prevented any State from withdrawing its Declaration.

24. The Applicants did not respond to the Respondent State’s objection based on the lack of material jurisdiction.

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<sup>3</sup> Individual Opinion of Judge Fatsah OUGUERGOUZ, *Michelot Yogogombaye v. Senegal* (Jurisdiction) (15 December 2009)1 AfCLR 1.

25. The Court notes that, in accordance with Article 3 of the Protocol, its 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”.

26. The Court also notes that to establish that it has material jurisdiction it suffices that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.<sup>4</sup>

27. In the instant case, the Applicants allege that the withdrawal by the State of Benin of the declaration deposited under Article 34(6) of the Protocol constitutes a violation of human rights protected by the Charter. The Court will examine whether it has jurisdiction to decide if the withdrawal of the declaration constitutes a violation of human rights.

28. In determining the validity of the withdrawal of the declaration by the Respondent State, the Court will be guided by the relevant rules governing declarations accepting jurisdictions as well as by the principle of State sovereignty in international law, in addition to the relevant rules of the law of treaties contained in the Vienna Convention on the Law of Treaties of 23 May 1969 (hereafter The Vienna Convention).

29. As regards the application of the Vienna Convention, the Court notes that while the declaration made under Article 34(6) is provided for in the Protocol, which is governed by the law of treaties, the declaration in itself, is a unilateral act of the State not backed by the law of treaties.

30. Accordingly, the Court finds that the Vienna Convention does not apply to the declaration made under Article 34(6) of the Protocol.

31. Concerning the rules governing the acceptance of the jurisdiction of international courts, the Court notes that similar declarations are optional. This is true for the provisions on the recognition of the jurisdiction of the International Court of Justice,<sup>5</sup> the European Court

<sup>4</sup> See, for example, *Kalebi Elisamehe v. United Republic of Tanzania*, ACtHPR, Application No 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18; *Armand Guehi v. United Republic of Tanzania* (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania* (merits) (23 March 2018) 2 AfCLR 287, § 35.

<sup>5</sup> See Article 36(2) of the Statute of the International Court of Justice.



of Human Rights prior to the coming into force of Protocol No 11<sup>6</sup> and the Inter-American Court of Human Rights.<sup>7</sup>

32. The Court notes that, by its nature, the declaration provided for in Article 34(6) is similar to those mentioned above. The reason is that although the Declaration is provided for under Article 34(6) of the Protocol, it is optional. Thus, as a unilateral act, the declaration is an act separable from the Protocol and can, therefore, be withdrawn without leading to a withdrawal or a denunciation of the Protocol.

33. The Court further considers that the optional nature of the declaration and its unilateral character derive from a basic principle of international law, that is, the principle of sovereignty of the States. Indeed, the latter prescribes that States are free to make commitments and that they retain the power to withdraw their commitments in accordance with the relevant rules of each treaty.<sup>8</sup>

34. The Court considers that the matter being discussed before it pertains to a right accorded the States. This right is the very one by which the States ensure the establishment of mechanisms that complement their domestic human rights implementation mechanisms.

35. The Court finds that the Respondent State is entitled to withdraw the declaration that it deposited under Article 34(6).

36. Consequently, the Court upholds the objection based on lack of material jurisdiction raised by the Respondent State and declares that it has no material jurisdiction to hear the instant case.

## VI. COSTS

37. None of the Parties made any prayer in respect of costs.

38. According to Article 32(2) of the Rules,<sup>9</sup> “Unless otherwise decided by the Court, each party shall bear its own costs”.

39. The Court notes that there is nothing in the circumstances of this case that warrants it to depart from this provision. The Court, therefore, decides that each party should bear its own costs.

<sup>6</sup> See Article 46 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and, before its entry into force, Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which restructured the control mechanism established for this purpose.

<sup>7</sup> See Article 62(1) of the American Convention on Human Rights.

<sup>8</sup> *Ingabire Victoire Umuhoya v. Rwanda* (Jurisdiction) (3 June 2016) 1 RJCA 540, § 54-9.

<sup>9</sup> Formerly Rule 30(2) of the Rules of 2 June 2010.

## VII. OPERATIVE PART

40. For these reasons:

THE COURT

*By a majority of ten (10) to one (1), Judge Chafika BENSAOULA dissenting:*

*On jurisdiction*

- (i) *Upholds* the objection to its material jurisdiction;
- (ii) *Declares* that it lacks jurisdiction.

*On costs*

- (iii) *Orders* each party to bear its own costs.

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules of Procedure, the dissenting opinion of Judge Chafika BENSAOULA is attached to this ruling.

DISSENTING OPINION OF JUDGE BENSAOULA<sup>[1]</sup>

[1] I totally refute the reasoning and the operative part of the above-mentioned judgment delivered in the case of *Glory C. HOSSOU and 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.

[2] 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:

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

[<sup>1</sup>] The paragraph numbers have been inserted by the editors.]

[3] In its judgment, 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.

[4] 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*

[5] 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.

[6] Indeed, in the case of *Ingabire Victoire Umuhuza 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.

[7] 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>2</sup> (Paragraphs 51 and 52).

<sup>2</sup> §§ 51 and 52 of the judgment.

[8] 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!

[9] 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.

[10] 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).

[11] 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>3</sup> case, the 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).

[12] 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.

[13] 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 judgment 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

<sup>3</sup> § 61 of the judgment.

deprives citizens of access to regional judicial mechanisms. Accordingly, the Court has jurisdiction to consider the application.<sup>4</sup>

[14] *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.

[15] Except that in this same Ruling the Respondent State clearly emphasized in its reply on the fact that the Court had in previous decisions (*Ingabire Victoire Umuhoza v. Rwanda* quoted above and in the Ruling of 6 May 2020 *Houngue Eric v. the Republic of Benin*)<sup>5</sup> dismissed the request and made it null and void because it had already been definitively decided by the Court.

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

[17] 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*

[18] Still in the *Ingabire* judgment, the Court, while recognizing the right of states to withdraw the Declaration, considered it as a unilateral act. It confirmed however that the withdrawal was not absolute because the Declaration created rights for third parties, the enjoyment of which requires legal security.<sup>6</sup> By this reasoning, the Court confirms that the Protocol does not only create a system but creates rights as well!

[19] 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.

<sup>4</sup> § 14 of the judgment.

<sup>5</sup> Ruling on provisional measures of 6 May 2021.

<sup>6</sup> § 60 of the *Ingabire* judgment.

[20] It is therefore clear that although the Court recognized 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>7</sup>

[21] 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>8</sup>

[22] Consequently, the Court should have maintained its jurisprudence in its judgment that is the subject of this opinion and, although it recognized 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.

[23] 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.

[24] 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*

[25] 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.

[26] 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

<sup>7</sup> § 62 of the judgment.

<sup>8</sup> § 64 of the judgment.

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.

[27] 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 judgment 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-regression is the idea that States Parties to the Covenant must take steps with a view to achieving progressively the full realization of the rights. The concept of progressive realization implies that full realization 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>9</sup> Better still, the Court explained that it “considers that when a state party recognizes 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”.

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

[29] 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 African Charter on Human and Peoples’ Rights”. Moreover, it confers on individuals and NGOs

<sup>9</sup> *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Application No 062/2019, Judgment of 4 December 2020, § 136.

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.

[30] As for the Court's characterization of the Declaration as "optional in nature",<sup>10</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 the Court's jurisdiction, but does not specify the time limit within which this Declaration must be made after ratification of the Protocol.

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

[32] 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>11</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.

[33] 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

<sup>10</sup> § 32 of the judgment.

<sup>11</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.



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*

[34] 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 recognize 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 the States under certain international instruments, in this case human rights instruments.

[35] 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>12</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>13</sup>

[36] The second consequence is the possibility offered to the individual or to groups of individuals to demand that the State respect

<sup>12</sup> See ICJ, *Barcelona Traction* case, Judgment 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>13</sup> ICJ, *Interhandel* case (*Switzerland v. United States of America*) (Preliminary Objections) Judgment of 21 March 1959, page 6: "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".

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

[37] 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.

[38] 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.

[39] At the international level, these mechanisms, whether quasi-judicial 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.

[40] However, Article 2 of the Protocol provides that the African Court complement [the] 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!

[41] Indeed, Article 5(3) of the Protocol 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 (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".

[42] In the case of Application No 016/2020: *Glory Cyriaque Hossou 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.

[43] 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 judgment and stated in bold in one of the paragraphs of my opinion.

[44] First, when Article 5(3) speaks of "... the Court may entitle relevant Non-Governmental Organizations (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.

[45] 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".

[46] 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?

[47] 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.

[48] 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.

[49] 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 judgment 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-regression is the idea that States Parties to the Covenant must take steps with a view to achieving progressively the full realization of the rights. The concept of progressive realization implies that full realization of 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>14</sup> Better still, the Court explained that it “considers that when a state party recognizes 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”.

[50] 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”.

<sup>14</sup> *Sébastien Germain Marie Aïkoué Ajavon v. Republic of Benin*, Application No 062/2019, Judgment of 4 December 2020, § 136.

[51] 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 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, even though the Protocol requires prior deposition of the declaration by the States accepting the jurisdiction of the Court.

[52] As for the Court’s characterization 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.<sup>[15]</sup>

*v. The Court adjudicated one allegation only without addressing the Applicant’s other requests*

[53] In their application, the Applicants 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.

[54] 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.

[55] 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.

[Report: Transcript]

<sup>[15]</sup> Paragraph numbers 47-52, which are included in the English version of this Opinion, appear to repeat paragraph numbers 25-30 of the Opinion.]