15 December 2009
File No. 001/2008

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

MICHELOT YOGOGOMBAYE
v.
SENEGAL

JUDGMENT

BEFORE: President: Mr. Mutsinzi
Vice-President: Ms. Akuffo
Judges: Ms. Mafoso-Guni; Mr. Ngoepe; Mr. Fannoush; Mr. Guindo; Mr. Niyungeko; Mr. Ouguergouz; Mr. Mulenga

Represented By: Applicant: Self-Represented
Respondent: Mr. Abdoulaye Dianko, State Legal Officer; Mr. Mafall Fall, State Legal Department, Ministry of Economy and Finance; His Excellency Mr. Cheikh Tidiane Thiam, Ambassador; Mr. Mamadou Mbodj, Legal and Consular Affairs Department, Ministry of Foreign Affairs; Mr. Moustapha Kâ, Criminal and Mercy Affairs Department, Ministry of Justice

Citation: Michelot Yogogombaye v. Senegal, Appl. No. 1/2008, ACtHPR, Judgment (15 Dec. 2009)

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1. By an application dated 11th August 2008, Mr. Michelot Yogogombaye (hereinafter referred to as "the Applicant"), a Chadian national, born in 1959 and currently residing in Bienne, Switzerland, brought before the Court a case against the Republic of Senegal (hereinafter referred to as "Senegal"), "with a view to obtaining suspension of the ongoing proceedings instituted by the Republic and State of Senegal with the objective to charge, try and sentence Mr. Hissein Habré, former Head of State of Chad, presently asylumed in Dakar, Senegal".

2. In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), and Rule 8 (2) of the Interim Rules of Court (hereinafter referred to as "the Rules"), Judge El Hadj Guissé, Member of the Court, and a national of Senegal, recused himself.

3. The Applicant sent his application to the Chairperson of the African Union Commission by electronic mail dated 19th August 2008. This application was received in the Court Registry on 29th December 2008, with a covering correspondence from the Legal Counsel of the African Union Commission dated

21st November 2008.

4. The Registry acknowledged receipt of the application, and notified the Applicant by letter dated 2nd January 2009, that all communications meant for the Court must be addressed directly to it, at its Seat in Arusha, Tanzania.

5. In accordance with Rule 34 (6) of the Rules, the Registry served a copy of the application on Senegal by registered post on 5th January 2009; also in accordance with Rule 35 (4) (a) of the Rules, the Registry invited Senegal to communicate to it, within 30 days, the names and addresses of its representatives.

6. Pursuant to Rule 35 (3) of the Rules, the Registry also informed the Chairperson of the African Union Commission about the application by letter of that same date.

7. The Applicant informed the Registry, by letter dated 30th January 2009 received at the Registry on 5th February 2009, that he would represent himself in the matter that he had brought before the Court.

8. Senegal acknowledged receipt of the application and transmitted to the Court, the names of its representatives mandated to represent it before the Court, by letter of 10th February 2009 received by the Registry on the same day, by fax.

9. By another faxed letter dated 17th February 2009 received in the Registry on the same day, Senegal requested the Court to extend the time limit "to enable it to better prepare a reply to the application".

10. By an order dated 6th March 2009, the Court granted the request of Senegal and extended, up to 14th April 2009, the period within which to submit its reply to the application.

11. A copy of the order was served on the Applicant, and on Senegal, by facsimile transmission dated 7th March 2009.

12. Senegal submitted its statement of defence within the time limit indicated in the aforesaid order, in which it raised preliminary objections regarding the jurisdiction of the Court and admissibility of the application, and also addressed substantive issues.

13. The Registry served on the Applicant, under covering letter of 14th April 2009, a copy of the statement of defence by Senegal.

14. The Applicant having failed to respond to the said statement, the Registry by another letter dated 19th June 2009, notified the Applicant that if he failed to respond within 30 days, the Court would assume that he did not want to present any submission in reply to the statement of defence, in accordance with Rule 52 (5) of the Rules.

15. On 29th July 2009, the Applicant acknowledged receipt of the statement of defence and submitted that: "the afore-mentioned reply did not introduce any new element likely to significantly modify the views I expressed in my initial application. I therefore maintain the said views in their entirety, and resubmit myself to the authority of the Court."

16. In view of the facts, the Court did not deem it necessary to hold a public hearing and, consequently, decided to close the case for deliberation.

17. In his application, the Applicant averred, among other things, that "the Republic and State of Senegal

and the Republic and State of Chad, members of the African Union, are parties to the Protocol [establishing the African Court on Human and Peoples' Rights] and have, respectively, made the declaration prescribed in Article 34 (6) accepting the competence of the Court to receive applications submitted by individuals".

18. With regard to the facts, the Applicant submitted that Hissein Habré, former President of Chad, is a political refugee in Senegal since December 1990, and that in 2000, he was suspected of complicity in crimes against humanity, war crimes and acts of torture in the exercise of his duties as Head of State, an allegation based on the complaints by the presumed victims of Chadian origin.

19. The Applicant further averred that, by decision of July 2006, the African Union had mandated Senegal to "consider all aspects and implications of the Hissein Habré case and take all appropriate steps to find a solution; or that failing, come up with an African option to the problem posed by the criminal prosecution of the former Head of State of Chad, Mr. Hissein Habré…"

20. He also submitted that, on 23rd July 2008, the two chambers of the Parliament of Senegal adopted a law amending the Constitution and "authorizing retroactive application of its criminal laws, with a view to trying exclusively and solely Mr. Hissein Habré".

21. He alleged that by so doing, Senegal violated the "sacrosanct principle of non-retroactivity of criminal law, a principle enshrined not only in the Senegalese Constitution but also in Article 7 (2) of the African Charter on Human and Peoples' Rights" to which Senegal is a party.

22. According to the Applicant, the action of Senegal also portrayed that country's intention "to use in abusive manner, for political and pecuniary ends, the mandate conferred on it by the African Union in July 2006". Further, according to the Applicant, in opting for a judicial solution rather than an African solution inspired by African tradition, such as the use of the "Ubuntu" institution (reconciliation through dialogue, truth and reparations), Senegal sought to use its services as legal agent of the African Union for financial gain.

23. In conclusion, the Applicant prayed the Court to:

1) Rule that the application is admissible;
2) Declare that the application has the effect of suspending the ongoing execution of the July 2006 African Union's mandate to the Republic and State of Senegal, until such time that an African solution is found to the case of the former Chadian Head of State, Hissein Habré, currently a statutory political refugee in Dakar in the Republic and State of Senegal;
3) Rule that the Republic and State of Senegal has violated several clauses of the Preamble and the Articles of the African Charter on Human and Peoples' Rights;
4) Rule that the Republic and State of Senegal has violated the African Charter on Human and Peoples' Rights and, in particular, the 10 September 1969 OAU[AU] Convention Governing the Specific Aspects of Refugee Problems in Africa, which came into force on 26 June 1974;
5) Rule that the case is politically motivated and that the Republic and State of Senegal violated the principle of universal jurisdiction in the ongoing proceedings instituted with a view to indicting and trying Mr. Hissein Habré;
6) Rule that, in the said procedure instituted with a view to indicting and trying Mr. Hissein Habré, there is political motivation, pecuniary motivation and the abuse of the said principle of universal jurisdiction, application of which will become, de facto, lucrative for the respondent (estimated to cost 40 billion CFA Francs). This cannot but create precedents in other African countries in which former Heads of State would possibly take refuge;

7) Rule that the charges brought against Mr. Hissein Habré have been abused and abusively used by the Republic and State of Senegal, the French Republic and State and the humanitarian organization, Human Rights Watch (HRW), particularly in view of the media publicity given to, and the media hype into which they turned, the said allegations;
8) Rule that the said abuse of the principle of universal jurisdiction has destabilizing effect for Africa, that it could impact negatively on the political, economic, social and cultural development of not only the State of Chad but also all other African States, and on the capacity of these States to maintain normal international relations;
9) Suspend the July 2006 African Union mandate to Senegal and hence the current proceedings instituted by the Republic and State of Senegal with a view to indicting and eventually trying Mr. Hissein Habré;

10) Order the Republic and State of Chad and the Republic and State of Senegal to establish a national "Truth, Justice, Reparations and Reconciliation" Commission for Chad, on the South African model derived from the philosophical concept of "Ubuntu" for all the crimes committed in Chad between 1962 and 2008; and in so doing, resolve in African manner the problematic case of the former Chadian Head of State, Hissein Habré;
11) Recommend that other Member States of the African Union assist Chad and Senegal in establishing and putting into operation the said "Truth, Justice, Reparations and Reconciliation" Commission;
12) With regard to costs and expenses, grant the Applicant the benefit of free proceedings."

24. In its statement of defence, Senegal for its part submitted, inter alia, that for the Court to be able to deal with applications brought by individuals, "the respondent State must first have recognized the jurisdiction of the Court to receive such applications in accordance with Article 34 (6) of the Protocol establishing the Court".

25. In this regard, Senegal "strongly asserted that it did not make any such declaration accepting the jurisdiction of the African Court on Human and Peoples' Rights to deal with applications brought by individuals".

26. Alternatively, Senegal averred that the Applicant "was wrong to meddle in a matter that is the exclusive concern of Senegal, Hissein Habré and the victims" as per the obligations arising from the Convention against Torture; and that it does not see any "justification for legitimate interest on the part of the Applicant to bring the case against the Republic of Senegal".

27. In addition, Senegal denied the allegations made by the Applicant in regard to the "purported violation [by it] of the principle of non-retroactivity of criminal law", and the "purported violation of African Union mandate" of July 2006.

28. In conclusion, Senegal prayed the Court to: "On matters of procedure: Rule that Senegal has not made a declaration accepting the jurisdiction of the Court to hear applications submitted by individuals; Rule that the Applicant has no interest to institute the application; Therefore, declare that the application is inadmissible.

On the merits:

Declare and decide that the evidence adduced by Mr. Michelot Yogogombaye is baseless and incompetent; Therefore, strike out the pleas submitted by the Applicant as baseless; Rule that Mr. Michelot Yogogombaye should bear the costs incurred by the State of Senegal in regard to the application".

29. In accordance with Rules 39 (1) and 52 (7) of the Rules, the Court has at this stage, to first consider the preliminary objections raised by Senegal, starting with the objection to the Court's jurisdiction.

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

31. To resolve this issue, it should be noted 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.

32. Article 5 (3) provides that: "The Court may entitle relevant Non- Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34 (6) of this Protocol".

33. For its part, Article 34 (6) of the Protocol provides that: "At the time of 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".

34. The effect of the foregoing two provisions, read together, is that direct access to the Court by an individual is subject to the deposit by the respondent State of a special declaration authorizing such a case to be brought before the Court.

35. As mentioned earlier, the Applicant in his submission averred that "the Republic and State of Senegal and the Republic and State of Chad, both members of the African Union, are Parties to the Protocol and have, respectively, made the declaration as per Article 34 (6) of the Protocol accepting the competence of the Court to receive cases from individuals". For its part, Senegal in its statement of defence "strongly asserted that it did not make any such declaration accepting the jurisdiction of the African Court on Human and Peoples' Rights to hear applications brought by individuals".

36. In order to resolve this issue, the Court requested the Chairperson of the African Union Commission, depository of the Protocol, to forward to it a copy of the list of the States Parties to the Protocol that have made the declaration prescribed by the said Article 34 (6). Under covering letter dated 29 June 2009, the Legal Counsel of the African Union Commission transmitted the list in question, and the Court found that Senegal was not on the list of the countries that have made the said declaration.

37. Consequently, the Court concludes that Senegal has not accepted the jurisdiction of the Court to hear cases instituted directly against the country by individuals or non-governmental organizations. In the circumstances, the Court holds that, pursuant to Article 34 (6) of the Protocol, it does not have jurisdiction to hear the application.

38. The Court notes, in this respect, that although presented by Senegal in its written statement of defence as an objection on the ground of "inadmissibility", its first preliminary objection pertains, in reality, to lack of jurisdiction by the Court.

39. The Court further notes that the second sentence of Article 34 (6) of the Protocol provides that "it shall not receive any petition under Article 5 (3) involving a State Party which has not made such a declaration" (emphasis added). The word "receive" should not however be understood in its literal meaning as referring to "physically receiving" nor in its technical sense as referring to "admissibility". It should instead be interpreted in light of the letter and spirit of Rule 34 (6) in its entirety and, in particular,

in relation to the expression “declaration accepting the competence of the Court to receive applications [emanating from individuals or NGOs]” contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned Rule 34 (6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned.

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

41. Each of the parties having made submissions regarding costs, the Court will now pronounce on this issue.

42. In his pleadings, the Applicant prayed the Court, “with respect to the costs and expenses of the case”, to grant him “the benefit of free proceedings”.

43. In its statement of defence, Senegal, on the other hand, prayed the Court to “order Mr. Michelot Yogogombaye to bear the cost incurred by the State of Senegal in this case”.

44. The Court notes that Rule 30 of the Rules states that “Unless otherwise decided by the Court, each party shall bear its own costs”.

45. Taking into account all the circumstances of this case, the Court is of the view that there is no reason for it to depart from the provisions of Rule 30 of its Rules.

46. In view of the foregoing,

THE COURT, unanimously:

1) Holds that, in terms of Article 34 (6) of the Protocol, it has no jurisdiction to hear the case instituted by Mr. Yogogombaye against Senegal;
2) Orders that each party shall bear its own costs. Done at Arusha, this fifteenth day of December in the year Two Thousand and Nine in French and English, the French text being authentic.

Signed:

Jean MUTSINZI, President
Sophia A.B. AKUFFO, Vice-President
Justina K. MAFOSO-GUNI, Judge
Bernard M. NGOEPE, Judge
Hamdi Faraj FANNOUSH, Judge
Modibo Tounty GUINDO, Judge
Gérard NIYUNGEKO, Judge Fatsah OUGUERGOUZ, Judge Joseph N. MULENGA, Judge and Aboubakar DIAKITE, Registrar

In accordance with Article 28 (7) of the Protocol and Rule 60 (5) of the Rules of Court, the separate opinion of Judge Fatsah OUGUERGOUZ is appended to this Judgment.

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 used in Article 34 (6) of the Protocol. In paragraph 39, the Court indeed points out that the word "receive" as applied to the application should not be understood in its literal meaning as referring to "physically receiving" nor in its technical sense as referring to "admissibility"; rather it refers to the "jurisdiction" of the Court to "examine" the application; that is to say, its jurisdiction to hear the case, as it states very clearly in paragraph 37 in fine of the Judgment.

8. Read in light of paragraph 39 of the Judgment, paragraph 31 should therefore be interpreted as referring exclusively to the question of the Court's jurisdiction. Since the meaning of the expression "inter alia" is unclear, the Court had better do away with it.

9. Even if the expression is removed therefrom, paragraph 31 of the Judgment, and also paragraph 34 thereof, pose the question of the Court' s jurisdiction in terms that do not faithfully reflect the Court's liberal approach to the treatment of the application.

10. In the foregoing two paragraphs of the Judgment, the question of the Court's jurisdiction is indeed posed by the exclusive reference to Article 5 (3) and Article 34 (6) of the Protocol. However, Article 5 essentially deals with the question of "Access to the Court" as the title clearly indicates. Thus, the question of the personal jurisdiction of the Court in this case cannot but receive the response set forth in paragraph 37 of the Judgment, i.e., that since Senegal has not made the declaration provided for in Article 34 (6) of the Protocol, the Court has no jurisdiction to hear cases instituted directly against this State by individuals. This ruling could have been made expeditiously in terms of the preliminary consideration of the Court's jurisdiction as provided for in Rule 39 of the Rules.

11. Though of fundamental importance to the question of the personal jurisdiction of the Court, Article 5 (3) and Article 34 (6) of the Protocol should be read in their context, i.e. in particular in light of Article 3 of the Protocol entitled "Jurisdiction" of the Court.

12. Indeed, although the two are closely related, the issues of the Court's "jurisdiction" and of "access" to the Court are no less distinct, as paragraph 39 of the Judgment in fact suggests; [FN1] it is precisely this distinction that explains why the Court did not reject de plano the application given the manifest lack of jurisdiction, by means of a simple letter issued by the Registry, and why it took time to rule on the application by means of a very solemn Judgment.

[FN1] On this point, see for example, Rosper Weil who notes as follows: "jurisdiction and seizure are not only distinct, conceptually; they are separate in time. Normally, jurisdiction preceeds seizure [...]. In certain cases, however, the sequence may be reversed", [Translation by the Registry] "Competence et saisine: un nouvel aspect du principe de la jurisdiction consensuelle", in Jenzy Makarczyk (Ed.), Theory of International Law at the Threshold of the 21st Century – Essay in Honour of Krzysztof Skubiszewski, Kluwer Law International, The Hague/London/Boston, 1996, p. 839.

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13. The application was received at the Court Registry on 29 December 2008 and it was placed on the general list as No. 001/2008. The application was served on Senegal on 5 January 2009; and on the same day, the Chairperson of the African Union Commission was informed about the filing of the application and through him the Executive Council and the other Parties to the Protocol.

14. Thus, upon submission, the application was subject to a number of procedural acts including its registration on the general list of the Court [FN2] and its service on Senegal.

[FN2] The registration of an application on communication on the general list of a judicial or quasi-judicial organ may be defined as an "act of recognition which establishes that such a communication is indeed a seizure and, as of the date of receipt, actualizes the introduction of the case", [Translation by the

Registry] Carlo Santulli, Droit du contentieux international, LGDJ-Montchrestien, Paris, 2005, p. 400.

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15. For their part, applications or communications addressed to the African Commission on Human and Peoples' Rights,[FN3] the defunct European Commission of Human Rights,[FN4] the Inter-American Commission of Human Rights, [FN5] the United Nations Human Rights Committee [FN6] or the International Court of Justice, for example, [FN7] undergo a process of vetting prior to being registered or served on the States against which they were instituted.

[FN3] Rule 102 of the Rules of Procedure of the African Commission, as adopted on 6 October 1995, is worded as follows: "Pursuant to these Rules of Procedure, the Secretary shall transmit to the Commission the communications submitted to him for consideration by the Commission in accordance with the Charter. 2. No communications concerning a State which is not a party to the Charter shall be received by the Commission or placed in a list under Rule 103 of the present Rules" (emphasis added); see http://www.achpr.org/francais_/info/rules_fr.html (site consulted on 9 December 2009). When member States of the African Union had not all become parties to the African Charter, and the Commission received a communication against a State that was not a party to the Charter, the Commission limited itself to writing to the Applicant informing him/her that it has no jurisdiction to deal with the communication. It did not serve the communication on the State concerned, Evelyn A. Ankumah, The African Commission on Human and Peoples' Rights – Practice and Procedures. Martinus Nijhoff Publishers, The Hague/London/Boston, 1996, p. 57.

[FN4] "When an application is filed by simple letter, even where such application is complete, the practice of the Commission is to address an application form to the Applicant. The various points detailed in this form facilitate effective consideration of the admissibility of the application. The Applicant is requested to return this form duly completed and accompanied with the requisite annexes. The answers to some of the points could mention the elements already contained in the application. As a general rule (except in case of emergency), it is only after the receipt of the duty completed form that the application is entered on the Commission's list and given a serial number […]. It is said that the entry on the list transforms a "petition" into an application in terms of Article 25 of the Convention" (emphasis added). Michel Melchior, "La procedure devant la Commission europeenne des droits de l'Homme" Michel Melchior (and others), Introduire un recours a Strasbourg? Een Zaak Aanhangig Maken te Straastsburg? Nemesis Editions, Brussels, 1986, p. 24.

[FN5] The jurisdiction of the Inter-American Commission in regard to communications from individuals now lies as of right in regard to all member States of the Organization of American Stales irrespective of whether or not they are parties to the American Convention on Human Rights, see Rules 27, 49 and 50 of the Rules of Procedure of the Commission as amended in July 2008; Rule 26 of the Rules however provides for an initial procedural stage that can be equated to the stage of consideration of prima facie admissibility of the application. It is described by an author in the following terms: "the Commission receives the petition and registers it. In practice, it is the responsibility of the Executive Secretariat of the Commission to ascertain whether the petition is admissible prima facie. If so, it registers the petition and opens a file [...]. If the correct format has not been followed, [it] may request the petitioner to correct any deficiencies". Ludovic Hennebel. La Convention americaine des droits de l'homme – Mecanismes de protection et etendue des droits et libertes, Bruylant, Bruxelles 2007, p. 163.

[FN6] The UN Secretary General maintains on a permanent basis a register of the communications that he submits to the Committee; however, under no circumstance can he enter in the register a communication made against a State that is not a party to the Optional Protocol to the International Covenant on Civil and Political Rights, see Rules 84 and 85 of the Rules of Procedure of the Human Rights Committee, United Nations Doc. CCPR/C/3/Rev.7, 4 August 2004, see http://www.unhchr.ch/tbs/doc.nsf(Symbol)/CCPR.C.3.Rev.7.Fr?Opendocument When he receives such

communication, the Secretary General limits himself to informing its author that the communication cannot be received owing to the fact that the State against which it was instituted is not a party to the Optional Protocol, Manfred NowaK, U.N. Covenant on Civil and Political Rights – CCPR Commentary, 2nd Revised Edition, N.P. Engel Publisher, Kehl am Rhein, 2005, pp. 824-825.
[FN7] It should be mentioned that the reference to the practice of the European Court of Human Rights and the Inter-American Court of Human Rights is of limited interest in this regard, given that the question of personal jurisdiction is posed in different terms before these two Courts. In the Inter-American Court, individuals having no direct access to the Court, the question of personal jurisdiction indeed arises only in regard to State Parties; in the European Court where individuals have direct access to the Court, it has automatic jurisdiction solely on the ground of the participation of the member States of the Council of Europe in the European Convention on Human Rights.
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16. In this case, the application did not go through this initial procedural phase of vetting. It was treated in the same way as the applications brought before the International Court of Justice before 01 July 1978, date of entry into force of its new Rules.[FN8] Prior to that date, all cases brought before the Court, including those instituted against States that had not previously accepted the Court's jurisdiction by making the optional declaration accepting the compulsory jurisdiction provided for in Article 36 (2) of the Statute, were indeed placed on the general list and served on the States against which they were instituted, and on the United Nations Secretary General and, through him, on all the other members of the Organization.

[FN8] Rule 38, paragraph 5, of the current Rules of Procedure of the International Court of Justice states that: "When the Applicant State proposes to found the jurisdiction of the Court upon a consent yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purpose of the case" (emphasis added).
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17. As indicated in the foregoing paragraph 13, procedural acts similar to the aforesaid were undertaken in connection with Mr. Yogogombaye's application; this was, inter alia, served on Senegal under covering letter dated 5 January 2009.

18. Senegal acknowledged receipt thereof by letter dated 10 February 2009 in which it also transmitted the names of those to represent it before the Court. At that stage, Senegal could have limited itself to indicating that it had not made the declaration provided for in Article 34 (6) of the Protocol and that, consequently, the Court had no jurisdiction to deal with the application on the grounds of the provisions of Article 5 (3) of the Protocol. However, by notifying the Court of the names of its representatives, it gave room for the suggestion that it did not exclude appearing before the Court and of participating in its proceedings, with doubts as to the object of its participation: to contest the Court's jurisdiction, contest the admissibility of the application or to defend itself on the merits of the case.

19. By second letter dated 17 February 2009, Senegal requested the Court to extend the time limit for submission of its observations to "enable it to better prepare a reply to the application". By so doing, Senegal signaled its intention to comply with the provisions of Rule 37 of the Rules according to which "the State Party against which an application has been filed shall respond thereto within sixty (60) days provided that the Court may, if the need arises, grant an extension of time". Even in this letter, Senegal did not exclude the eventual acceptance of the Court's jurisdiction. Still at this stage, it could have put up

the argument that it has not made the declaration provided for in Article 34 (6) of the Protocol and, on that ground, contested the jurisdiction of the Court.

20. Even though it would not have made the aforementioned declaration, Senegal, by its attitude, left open the possibility, however slim, that it might accept the jurisdiction of the Court to deal with the application.

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21. The fundamental principle regarding the acceptance of the jurisdiction of an international Court is indeed that of consent, a principle which itself is derived from that of the sovereignty of the State. A State's consent is the condition sine qua non for the jurisdiction of any international Court, [FN9] irrespective of the moment or the way the consent is expressed. [FN10]

[FN9] "It is a well established principle of International Law that no State can be compelled to submit its disputes with other States to mediation, arbitration or to any method of peaceful solution without its consent", Permanent Court of International Justice, Statute of Eastern Carelia, Advisory Opinion of 23 July 1923, Series B, p. 27.
[FN10] "Such consent may be given once and for all in the form of a freely accepted obligation: it may however be given in a specific case beyond any pre-existing obligation". Id.
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22. This principle of jurisdiction by consent is also upheld by the Protocol. Thus, in contentious matters, the Court can exercise jurisdiction only in respect of the States Parties to the Protocol. The scope of the Court's jurisdiction in such cases and the modalities of access thereto are defined in Articles 3 and 5, respectively, of the Protocol.

23. By becoming Parties to the Protocol, member States of the African Union ipso facto accept the jurisdiction of the Court to entertain applications from other States Parties, the African Commission or African Inter-governmental Organizations. The jurisdiction of the Court in respect of applications from individuals or Non-Governmental Organizations against States Parties is not, for its part, automatic; it depends on the optional expression of consent by the States concerned.

24. This is provided for in Article 34(6) of the Protocol which states that: "At the time of 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. As it is drafted, this provision raises two questions:

25. The first is the meaning to give to the word "shall" used in the first sentence which suggests that filing of the declaration by the State Party is an "obligation" for the State Party and not simply "a matter of choice".

26. Understood in this way, Article 34 (6) would make it obligatory for State Parties to make such a declaration after depositing their instruments of ratification (or accession). [FN11] This prescription does not however have any real legal effect because it does not set any time limit. It also does not make much sense when read in light of its context and particularly of Article 5 (3) and the second sentence of 34 (6) which states that "The Court shall not receive any petition under Article 5 (3) involving a State Party

which has not made such a declaration". It can thus be said in conclusion that the filing of the declaration is optional; this conclusion is corroborated by an analysis of the "travaux préparatoires" of the Protocol. [FN12]

[FN11] Paragraph 6 of the English version, unlike the French, provides that the declaration may be freely made on two different occasions: "at the time of the ratification of this Protocol or any time thereafter" (emphasis added); the Arab and Portuguese versions of the said Paragraph 6 are identical to the English version.

[FN12] See Article 6(1) (Special jurisdiction) of the Cape Town draft (September 1995), Draft Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, Government Legal Experts Meeting on the establishment of an African Court on Human and Peoples' Rights, 6-12 September 1995, Cape Town, South Africa, Doc. OAU/LEG/EXP/AFC/HPR/PRO (1) Rev. 1, Article 6(1), of the Nouakchott Draft (April 1997), Draft (Noukchott) Protocol to the African Charter on Human and Peoples' Rights, on the establishment of an African Court on Human and Peoples' Rights, Second Government Legal Experts Meeting on the establishment of an African Court on Human and Peoples' Rights, 11-14 April 1997, Nouakchott, Mauritania, Doc. OAU/LEG/EXP/AFCHPR/PROT (2), paragraphs 21, 23, 24 and 25 of the Report of this Second Experts Meeting. Report – Second Government Legal Experts Meeting on the establishment of an African Court on Human and Peoples' Rights, 11-14 April 1997, Nouakchott, Mauritania, Doc. OAU/EXP/JUR/CAFDHP/RAP (2), Article 34(6) of the Addis Ababa Draft (December 1997), Draft Protocol to the African Charter on Human and Peoples' rights on the establishment of an African Court of Human and Peoples' Rights, Third Government Experts Meeting (including Diplomats) on the establishment of an African Court on Human and Peoples' Rights, 8/13 December 1997, Addis Ababa, Ethiopia, Doc. OAU/LEG/EXP/AFCHPR/PRO (111) and paragraph 35 of the report of this Third Meeting of Experts, Report – Third Government Legal Experts Meeting including Diplomats on the establishment of an African Court on Human and Peoples' Rights, 8/11 December 1997, Addis Ababa, Ethiopia, Doc. OAU/LEG/EXP/AFCHPR/RPT (111), Rev. 1.

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27. The second question raised in Article 34 (6) is that of whether the filing of the optional declaration by States Parties is the only means of expressing their recognition of the jurisdiction of the Court to deal with applications brought against them by individuals.

28. In this regard, it should first be noted that Article 34 (6) does not require that the filing of the optional declaration be done "before" the filing of the application; it simply provides that the declaration may be made "at the time of ratification or any time thereafter". Nothing therefore prevents a State Party from making the declaration "after" an application has been introduced against it. In accordance with Article 34 (4) of the Protocol, the declaration, just as ratification or accession, enters into force from the time of submission and takes effect from this date. Senegal was therefore free to make such a declaration after the application was introduced.

29. If a State can accept the jurisdiction of the Court by filing an optional declaration "at any time", nothing in the Protocol prevents it from granting its consent, after the introduction of the application, in a manner other than through the optional declaration. [FN13]

[FN13] Such a possibility is for instance codified under Article 62, paragraph 3, of the American Convention on Human Rights as well as in Article 48 of the European Convention on Human rights before the Convention was amended by Protocol 11.

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30. Therefore, the second sentence of Article 34 (6) must not, as the first sentence, be interpreted literally. It must be read in light of the purposes and goals of the Protocol and, in particular, in light of Article 3 entitled “Jurisdiction” of the Court. Indeed, Article 3 provides in general manner that: “the jurisdiction of the Court shall extend to all cases and disputes submitted to it”; it also provides that “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide”. It therefore lies with the Court to determine in all sovereignty the conditions for the validity of its seizure; and do so only in the light of the principle of consent.

31. Consent by a State Party is the only condition for the Court to exercise jurisdiction with regard to applications brought by individuals. This consent may be expressed before the filing of an application against the State Party, with the submission of the declaration mentioned in Article 34 (6) of the Protocol. It may also be expressed later, either formally through the filing of such a declaration, or informally or implicitly through forum prorogatum. [FN14]

[FN14] "Normally jurisdiction precedes seizure. […] In some cases, however, the sequence may be reversed. Such is the essence of the theory of forum prorogatum according to which the Court may have been properly seized of an application whereas its jurisdiction may not have existed at the time the application was filed and may only have been assumed subsequently because of the consent of the defendant”, Prosper Weil, op. cit., p. 839. [Translation by the Registry]
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32. Forum prorogatum or “prorogation of competence” may be understood as the acceptance of the jurisdiction of an international Court by a State after the seizure of this Court by another State or an individual, expressly or tacitly through decisive acts or an unequivocal [FN15] behavior. It was in particular this possibility that the letters issued by Senegal dated 10 and 17 of February 2009b led the Court to foresee in this case.

[FN15] "Forum proragahim: Latin expression usually translated by the expression "prorogated jurisdiction". Acceptance by a State of the jurisdiction of an international judicial body, such as the International Court of Justice, after a matter has been referred thereto, either by an express declaration to that effect, or by a decisive act implying tacit acceptance. The decisive acts may consist in effective participation in the proceedings, either by pleading on the merits, or by making findings on the merits or any other act implying lack of objection against any future decision on the merits. In the opinion of the International Court of Justice, such conduct can be tantamount to tacit acceptance of its jurisdiction, which cannot subsequently be revoked, by virtue of the bona fide or estoppel principle, Jean Salmon (Ed.). op. cit., p. 518. On this doctrine, see Mohammed Bedjaoui & Fatsah Ouguergouz, “Le forum prorogatum devant la Cour international de Justice: les resources d’une institution ou la face cache du consensualism” in African Yearbook of International Law, 1998, Vol. V, pp. 91-114.
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33. Up to 9 April 2009, the date on which the Registry received the written observations of Senegal, there was the possibility that Senegal might accept the jurisdiction of the Court. It was only on this date that it became unequivocally clear that Senegal had no intention of accepting the Court’s jurisdiction to deal with the application.

34. It was therefore up to the Court to take into account Senegal’s refusal to consent to the jurisdiction of

the Court to deal with the application and to draw the consequences thereof by putting an end to the matter and removing the case from the general list.

35. Under the former Rules of the International Court of Justice (before 01 July 1978), when a case was brought against a State which has not previously accepted the jurisdiction of the Court by filing the optional declaration and such a State did not accept the Court's jurisdiction in regard to the case after having been invited to do so by the Applicant State, such a case was closed by the issuance of a succinct order. [FN16] In the European Court of Human Rights where the problem of jurisdiction occurs less frequently than that of admissibility of applications, when there is no serious doubt as to the inadmissibility of an application, the corresponding decision is notified to the applicant through a simple letter. [FN17]

[FN16] See for example, "Treatment in Hungary of Aircraft and Crew of the United State of America", Order of 12 July 1954, I.C.J. Report 1954, p. 100 or "Aerial Incident of 7 October 1952", Order of 14 March 1956, I.C.J. Report 1956, p. 10.
[FN17] Personal jurisdiction of the European Court in matters of individual communications is indeed automatic; the Court must therefore first deal with the issue of admissibility of applications and, in this respect, Article 53 of its Interim Rules, entitled "Proceedings before a Committee", provides in its paragraph 2 that "in accordance with Article 28 of the Convention, the Committee may, unanimously, declare an application to be inadmissible or strike it off the cause list, when such a decision can be made without any further examination. The decision shall be final and shall be brought to the attention of the applicant by letter". (emphasis added).

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36. In the present case, Senegal having formally raised preliminary objections in its "statement of defense" [FN18] dated 9 April 2009, the Court deemed it necessary to comply with the provisions of Rule 52 (7) of its Rules which stipulates that "The Court shall give reasons for its ruling on the preliminary objection". [FN19]

[FN18] Expression used in the testimonium clause on page 17 of Senegal's written observations.
[FN19] The reference to Article 39 of the Rules in Paragraph 29 of the Judgment is not timely as this provision concerns preliminary examination by the Court of its jurisdiction, i.e. a stage of the proceedings during which it must ensure that it has at least prima facie jurisdiction to entertain an application. At the stage of examining a preliminary objection for lack of jurisdiction, the Court must make a definitive ruling on its jurisdiction.

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37. However, consideration by the Court of Senegal's preliminary objections required that it addresses the question of it's jurisdiction in a more comprehensive manner by developing in particular the possibility of a forum prorogatum. This possibility is all the more suggested in paragraph 37 of the Judgment where the Court, on the grounds of its ruling that Senegal has not made the optional declaration, concluded that the said State, on that basis, "has not accepted the jurisdiction of the Court to hear cases instituted directly against this State by individuals or non governmental organizations".

38. Nevertheless, it is this possibility of a forum prorogatum, however slight, that explains why the application of Mr. Yogogombaye was not rejected right after 10 February 2009; and it is the filing of preliminary objections by Senegal which explains why the Court did not close the case in a less solemn manner by issuing an order or by simple letter by the Registry.

39. The submission of preliminary objections by Senegal may, in turn, be explained by scrupulous compliance by this State with the provisions of Rule 37 and 52 (1) of the Rules.

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40. Today, the question is whether “all” applications filed with the Registry should be placed on the Court’s general list, notified to the States against which they are directed, and above all, as provided for under Article 35 (3) of the Rules, notified to the Chairperson of the African Union Commission and, through him, to the Executive Council of the Union, as well as to all the other States Parties to the Protocol. As a judicial organ, once the Court receives an application, it has the obligation to ensure, at least in a prima facie manner, that it has jurisdiction in the matter. [FN20] Certainly, here lies the object of preliminary consideration by the Court of its jurisdiction as provided for in Rule 39 of its Rules. A selection should then be made between individual applications in respect of which, at a glance, the Court has jurisdiction and those in respect of which it has not, which is the case when the State party concerned has not made the optional declaration. In this latter hypothesis, the application should be rejected de plano by simple letter by the Registry. It could eventually be communicated to the State Party concerned, but it is only if such a State accepts the jurisdiction of the Court that the application could be placed on the Court’s general list [FN21] and notified to the 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.

[FN20]h On this issue, see for example Gerard Niyungeko, La prevue devant les jurisdictions internationals, Editions Bruylant, Editions de l’Universite de Bruxelles, Brussels, 2005, p. 55. Thus, according to the International Court of Justice: “In accordance with its Statute and established jurisprudence, the Court must, nonetheless, examine proprio motu the issue of its own jurisdiction in order to entertain the request of the Government of Greece”, Aegean Continental Shelf, Judgment, ICJ Report 1978, p. 7, para. 15. With regard to practice at the Inter-American Court, see Ludovic Hennebel, La Convention americaine des droits de l’homme – Mecanismes de protections et etendue des droits et libertes Bruylant, Brussels, 2007, p. 238, para. 277, or the practice of quasi-judicial organs such as the Human Rights Committee for example, see Ludovic Hennebel La jurisprudence du Comite des droits de l’homme des Nations Unies – Le Pacte international relative aux droits civils et politiques et son mecanisme de protection individuelle, Bruylant, Brussels, 2007 p. 346.
[FN21] As has been rightly emphasized by an author, registration of an application on the general list of a judicial organ “is in essence a means of eliminating frivolous correspondence or other irrelevant communications that cannot be considered as application”, Carlo Santulli. op. cit., p. 400.
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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 Justice [FN22] and the American Convention of Human Rights, [FN23] 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.

[FN22] Article 36 paragraph 4.
[FN23] Article 62 paragraph 2.

Fatsah Ouguergouz

Aboubakar Diakité Registrar