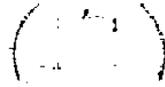


AFRICAN UNION

الاتحاد الأفريقي



UNION AFRICAINE

UNIÃO AFRICANA

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IN THE MATTER OF  
**ATABONG DENIS ATEMNKENG**  
v.  
**THE AFRICAN UNION**  
  
**APPLICATION 014/2011**

**JUDGMENT**



Atabong  
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F.O.

**The Court comprising:** Sophia A. B. AKUFFO, President ; Fatsah OUGUERGOUZ, Vice-president; Bernard M. NGOEPE, Gerard NIYUNGEKO, Augustino S L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON, Sylvain ORÉ and El Hadji GUISSSE Judges; and Robert ENO – Registrar.

In the matter of:

**Atabong Denis ATEMNKENG**

*Represented by Chief Charles TAKU, Counsel for the Applicant*

v.

**The African Union**

*Represented by: Mr. Ben KIOKO, then Legal Counsel of the African Union*

After deliberations,  
and by majority

*delivers the following judgment:*

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## I. SUBJECT OF THE APPLICATION

1. By Application dated 18 October 2011, which reached the Registry on 1 December 2011, Mr. Atabong Denis ATEMKENG, a Cameroonian national (here-in-after referred to as "the Applicant") and staff member of the African Union Commission brought the African Union (here-in- after referred to as "the Respondent") before the African Court on Human and Peoples' Rights (here-in-after referred to as "the Court") to obtain a judgement stating that Article 34(6) of the Protocol which established an African Court on Human and Peoples' Rights (here-in-after referred to as the "Protocol"), is inconsistent with the Constitutive Act of the African Union (here-in-after referred to as the "Constitutive Act") and the African Charter on Human and Peoples' Rights (here-in after referred to as "the Charter") and that it should on those grounds be declared null and void.

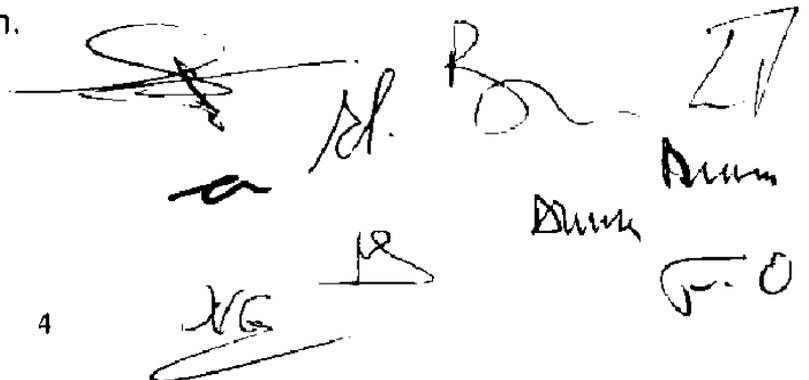
## II. PROCEDURE

2. The Application was received at the Registry of the Court on 1 December 2011 and registered as Application 014/2011.
3. By letter dated 5 January 2012, the Registrar acknowledged receipt of the Application, pursuant to Rule 34(3) of the Rules.
4. Pursuant to Rule 5(1) of the Rules, the Registrar forwarded copies of the letter to the President and to the other members of the Court.
5. Pursuant to Article 22 of the Protocol and Rule 8(2) of the Rules of Court, (here-in-after referred to as "the Rules"), Judge Ben KIOKO,

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member of this Court, who was involved in this case as the then Legal Counsel of the Respondent, recused himself.

6. By letter dated 15 February 2012 and pursuant to Rule 35(2) of the Rules of Court, the Registrar sent a copy of the Application to the Respondent requesting it to submit the names of its representatives within 30 days and to respond to the Application within 60 days.
7. Pursuant to Rule 35(3) of the Rules and by letter dated 15 February 2012, the Registrar informed the Chairperson of the African Union Commission as well as State Parties to the Protocol of the filing of the Application.
8. By e-mail dated 1 April 2012, the Applicant made additional submissions.
9. By letter dated 27 April 2012, received the Registry on 20 May 2012, the Respondent submitted to the Registry the name of its legal representative and its response to the Application in question.
10. By letter dated 21 May 2012, the Registry communicated the said response to the Applicant.
11. By letter dated 22 May 2012, the Registry forwarded to the Respondent an addendum to the Application.



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12. On 11 June 2012, the Registry received the Applicant's response dated 6 June 2012. It acknowledged receipt thereof on the same day and forwarded it immediately to the Respondent.
13. By letter dated 25 June 2012, the Registry informed the parties that the written procedure had ended and that they could ask for leave to make additional submissions, if necessary.
14. By letter dated 27 June 2012, the Applicant submitted an application for leave to make additional submissions.
15. Without waiting for the said leave of the Court, the Applicant filed the said additional submissions. The Registrar acknowledged receipt on 2 July 2012.
16. By Order dated 7 December 2012, the Court rejected the Applicant's request for leave to make additional submissions as baseless and filed in violation of Rule 50 of the Rules of Court which provide that "*No party may file additional evidence after the closure of pleadings except by leave of Court*".

### III. THE SUBMISSIONS OF THE PARTIES

#### A. THE SUBMISSION OF THE APPLICANT

17. In his initial Application, the Applicant alleges that Article 34(6) of the Protocol is inconsistent with the Treaty which established the African Union, namely, the Constitutive Act which upholds fundamental

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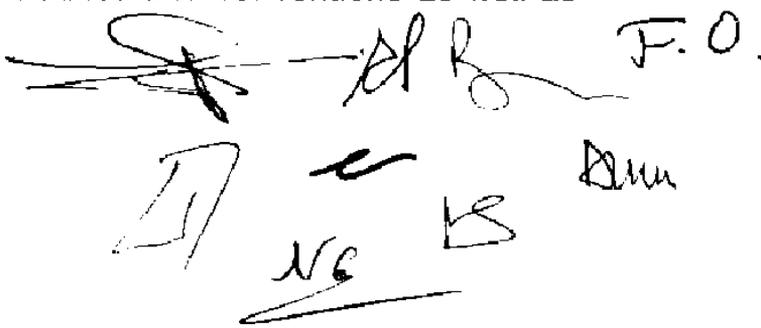
principles such as the rule of law, condemnation, rejection of impunity and promotion of human rights as enshrined in the African Charter. The Applicant is of the view further that Article 34(6) of the Protocol is an impediment to justice as it prevents African citizens from having access to the Court, especially victims of human and peoples' rights violations who are unable to secure remedy from national Courts or from the African Commission on Human and Peoples' Rights.

18. He also claims that this same Article 34(6) gives violators of human and peoples' rights, especially the States, powers to prevent their victims from making their voices heard and from obtaining justice.

19. The Applicant contends that the African Union cannot afford to be viewed by Africans as an institution which adopts provisions preventing African citizens from obtaining justice or places human rights violators above the law.

20. In the addendum to his Application, the Applicant raises three issues: the obligation for the African Union to ensure that its rules are consistent with the Constitutive Act and the Charter, the jurisdiction of the Court as a core factor ensuring that Member States honour their obligations as set out in the Constitutive Act and the Charter and the capacity of the Applicant to seize the Court.

21. In regard to the first issue: the Applicant evokes the role of the African Union as coordinator in ensuring that the decisions of the Union are in conformity with the provisions of the Constitutive Act, other legal instruments of the Union and draft treaties and conventions as well as

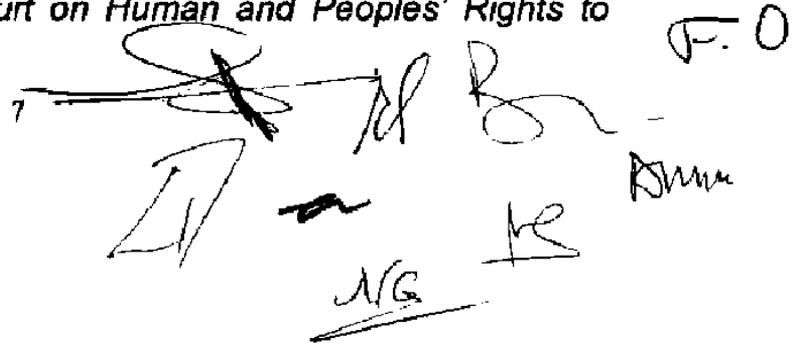
6  F.O.  
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cooperation agreements signed between the African Union and Member States or other institutions.

22. On the second issue, the Applicant contends that Article 34(6) excludes jurisdiction being exercised by the only continental body charged with considering allegations of Member State violations of their obligations under treaties they had signed. In his view, it is difficult to imagine that States would make declarations and/or enter some reservations that undermine the obligations they had previously agreed to observe willingly thus depriving the continental Court of any authority to hear and determine cases of violations alleged by individuals and NGOs against the States concerned.

23. On the last issue: the Applicant submits that every African worthy of the name has the obligation to defend the Constitutive Act of the African Union in the same manner as every citizen should defend the constitution of his or her country. Referring to the provisions of Article 34(6), the Applicant is of the view that since the Application was not directed against any Member State, it should not be rejected under the said Article.

24. Furthermore, the Applicant alleges that Article 34(6) is at variance with the Constitutive Act of the African Union because it is a violation of the principles and objectives enshrined in the said Act. In that regard, he quotes part of the Preamble of the Protocol according to which Member States of the Organization of African Unity, State Parties to the Charter were, *"Firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights require the establishment of an African Court on Human and Peoples' Rights to*

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*complement and reinforce the functions of the African Commission on Human and Peoples' Rights*". The Applicant concludes therefrom that all the principles enshrined in the Constitutive Act and the rights enumerated in the Charter will be completely meaningless if they cannot be recognized and defended before a competent Court.

25. In conclusion:

The Applicant prays the Court to:

- Declare that Article 34(6) of the Protocol is contrary to the spirit and letter of the Constitutive Act and the Charter and is therefore null and void.
- Declare that Article 34(6) is null and void because it is already so in light of the *jus cogens* laws set out in the Charter.

## **B. THE SUBMISSIONS OF THE RESPONDENT**

26. As a preliminary objection, the Respondent raises the issue of the admissibility of the Application on the grounds that it is baseless, frivolous, vexatious and amounts to an abuse of process; the Applicant has no capacity to seize the Court being a national of a State which has not yet made the declaration contained in Article 34(6) of the Protocol; it is neither party to the Constitutive Act of the African Union, the Charter nor the Protocol. It cites Article 34 of the Vienna Convention on the Law of Treaties in support of its allegations.<sup>1</sup>

<sup>1</sup>A treaty does not create either obligations or rights for a third State without its consent.

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27. On the merits of this case, notably, the inconsistency of Article 34(6) of the Protocol with the Constitutive Act of the African Union and the Charter, the Respondent submits that Member States have the sovereign right to negotiate, adopt, sign and ratify any treaty or accede to it. It further states that all the provisions of the Protocol, including Article 34(6), conform to the Vienna Convention on the Law of Treaties and to international customary law.

28. The Respondent argues that in international law, a treaty cannot be null and void unless it contradicts an imperative norm in international law, it rejects the idea that Article 34(6) of the Protocol is at variance with all the instruments adopted by the Organization of African Unity or the African Union.

29. The Respondent further argues that Member States have the sovereign right at the time of ratification of the Protocol or at any time thereafter to make the declaration accepting the jurisdiction of the Court to receive Applications directly from individuals or non-governmental organizations which have observer status before the Commission.

30. In conclusion,

the Respondent prays the Court to:

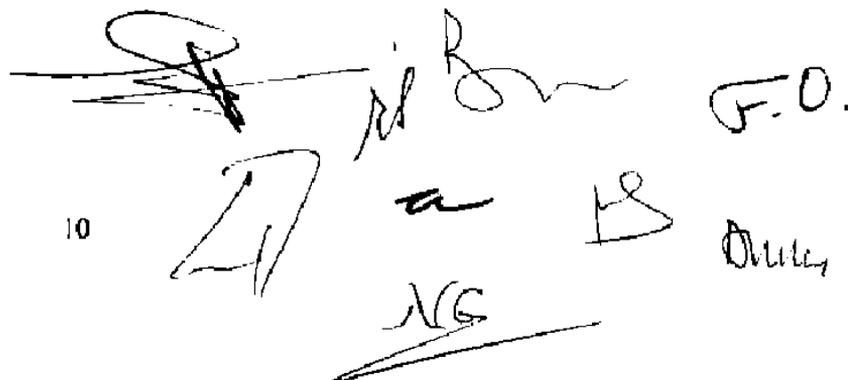
- Reject the Application on the basis of Article 38 of the Rules of Court or for lack of jurisdiction and
- Order the Applicant to bear the costs.

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#### IV. JURISDICTION OF THE COURT

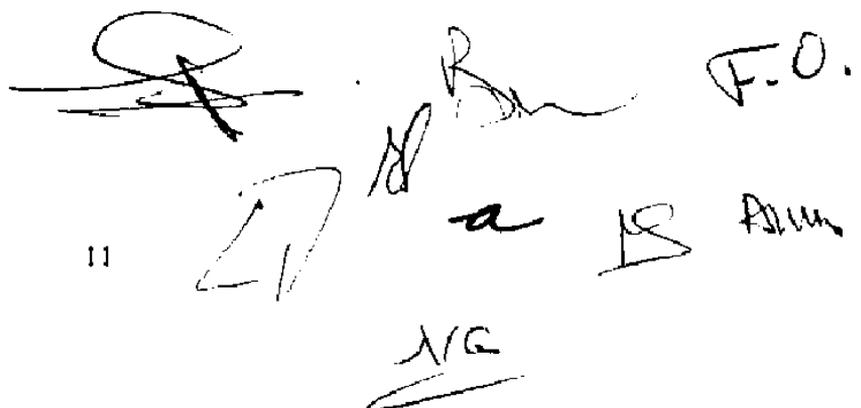
31. Under Rules 39(1) and 52(7) of the Rules, the Court is required to consider the objections raised by the Respondent and in particular, that regarding the jurisdiction of the Court to hear and determine the present Application.
32. Articles 3(2) of the Protocol and Rule 26 (2) of the Rules of Court provide that *"in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide."*
33. To resolve the issue raised in the preliminary objection, it should be understood that, for the Court to entertain an Application submitted directly by an individual, the said Application should inter-alia meet the requirements of Articles 5(3) and 34(6) of the Protocol.
34. Article 5(3) of the Protocol provides as 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."*
35. Article 34(6) of the Protocol for its part provides that *"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"*.

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36. A combined reading of the above-mentioned provisions show that the direct seizure of the Court by an individual can only be against a State Party which has made a declaration authorizing such seizure.
37. As stated supra, the Applicant submits that his Application is not directed against any State in particular, but against the African Union and therefore, Article 34(6) should not apply in the present case.
38. The Court is the opinion that the fact that a non-State entity like the African Union is not bound under Article 34(6) of the Protocol to make the declaration does not necessarily confer on the Court, the jurisdiction to receive Applications brought by individuals against it. At any rate, the Court would have to consider its jurisdiction vis-a-vis the Respondent.
39. The Court notes however that the Application is not filed against a State Party to the Protocol but against the African Union which is party neither to the Charter nor to the Protocol on which the Applicant relies.
40. It should be underscored that the Court was established by the Protocol and that its jurisdiction is clearly enshrined in the Protocol. When an Application is brought before the Court, the jurisdiction *rationae personae* of the Court is set out in Articles 5(3) and 34(6), read jointly. In the present case where the Application is brought against a body which is not a State which has ratified the Protocol and/or made the required declaration, it falls outside the jurisdiction of the Court. Consequently, the Court lacks the jurisdiction to hear and determine the said Application.

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41. Having concluded that it lacks the jurisdiction to hear the case, the Court holds that it is not necessary for it to consider the issue of the admissibility of the Application or the merits of the case.
42. Considering that the Respondent alluded to costs in its submissions, the Court must now rule on that issue.
43. In its reply, the Respondent had asked that the Applicant be ordered to bear the cost.
44. The Court notes that Rule 30 of the Rules provides that: "Unless otherwise decided by the Court, each party shall bear its own costs".
45. Considering all of the above, the Court is of the opinion that it should not depart from the provisions of Rule 30 of its Rules.
46. On those grounds,

THE COURT by a majority vote of six (6) to three (3)

- a) *Declares that, pursuant to Articles 5(3) and 34(6) of the Protocol read together, it does not have the jurisdiction to hear and determine the Application brought by Atabong Denis ATEMKENG against the African Union ; and*
- b) *Decides that each party shall bear its cost.*

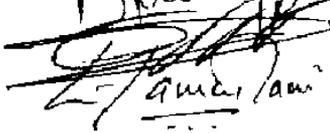
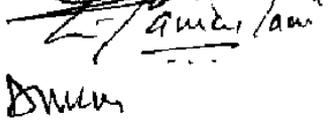
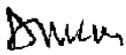
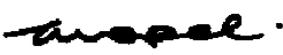
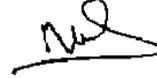
VOTES FOR: Vice-president OUGUERGOUZ; Judges  
NIYUNGEKO, RAMADHANI, TAMBALA, ORÉ and GUISSÉ

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**VOTES AGAINST: President AKUFFO; Judges NGOEPE and THOMPSON**

Pursuant to Article 28(7) of the Protocol and Rule 60(5) of the Rules, the Individual Opinion of Vice President OUGUERGOUZ and the dissenting opinion of President AKUFFO and Judges NGOEPE and THOMPSON are attached to this judgement.

Signed:

- Sophia A.B.AKUFFO, President 
- Fatsah OUGUERGOUZ, Vice-president 
- Bernard M. NGOEPE, Judge 
- Gérard NIYUNGEKO, Judge 
- Augustino S.L. RAMADHANI 
- Duncan TAMBALA, Judge 
- Elsie N. THOMPSON, Judge 
- Sylvain ORÉ, Judge 
- El Hadji GUISSSE, Judge 
- and Dr. Robert ENO, Registrar 

Done in Arusha, this Fifteenth day of the month of March in the year Twenty Thirteen, in English and French, the English version being authoritative.



## SEPARATE OPINION OF VICE-PRESIDENT FATSAH OUGUERGOUZ

I fully subscribe to the decision on the Court's lack of jurisdiction to hear the Application filed against the African Union by Mr. Atabong Denis Atemnkeng. The Protocol establishing the Court indeed provides that only States Parties to the said Protocol may be brought before the Court (see Articles 3 (1), 5 (1, *littera c*)), 7, 26, 30, 31 and 34 (6)). The African Union not being a State entity party to the Protocol, the Court manifestly lacks the jurisdiction to hear this Application. Consequently, I am of the opinion that the Application ought not to have given rise to a judgment *per se* on the basis of Article 52 (7) of the Rules, relating to preliminary objections; it ought to have been dismissed *de plano* by a simple letter from the Registrar (see *mutatis mutandis* my separate opinion attached to the Court's judgment of 26 June 2012 in a similar case namely *Femi Falana v. The African Union*; see also my separate opinion attached to the decision of 30 September 2011 in the case of *Efoua Mbozo'o Samuel v. Pan African Parliament*).

Besides, the fact that the Court manifestly lacks the jurisdiction to hear this Application is clearly exhibited in the relative brevity of the reasons for the judgement (see paragraphs 36 to 40, and more specifically paragraphs 36 and 39).

Hon. Fatsah Ouguergouz  
Vice President

Robert Eno  
Registrar



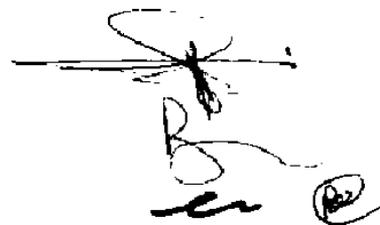


The facts of the case have been succinctly outlined in the majority judgment, we adopt them as ours.

We have read the reasoning in the majority judgment and unfortunately do not agree with it. In Application N° 001/11 Femi Falana vs African Union we dissented - Akuffo, Ngoepe and Thompson JJ. We adopt the dissenting opinion in that case as if the reasoning is herein reproduced, and are indeed fortified all the more by the submissions made by the Applicant herein.

The Applicant contended that 'With respect to the promotion of human and peoples' rights *in accordance with the ACHPR* (African Charter on Human and Peoples' Rights) Article 34(6) particularly violates Articles 2, 3 and 7 of the ACHPR. ... In all these provisions, the Charter stresses the right of *every individual* to have access to justice; it stresses the equality of parties before the law. However, by operation of Article 34(6) of the Protocol, all victims of human and peoples' rights in countries which have not expressed their acceptance of the Court's competence for cases brought against them are without access to any justice whatever.'

He argued that, 'This restriction placed on the enforcement of human and people' rights by Article 34(6) should further be placed in the light that human rights are not rights granted by states, but rights that attach to each individual person by virtue only that he

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or she is human. States may articulate them, but states are not their origin. Therefore not even states have the right to obstruct the enjoyment of those rights, and worse, to be given the right to do so under the instruments of a continental organization purporting to stand for justice. Given that human rights are not derived from states but from our status as human beings, every state that violates those rights ought to be held accountable.'

Further, that 'Anyone reading the Protocol would wonder how the true subjects of human and peoples' rights law could be so systematically excluded from access to a Court purportedly created to implement and enforce human and peoples' rights. '

The Applicant maintains that 'It is a gross violation of the basic principles of law for violators to decide whether their victims shall have access to the courts of law or not. Article 34(6) effectively grants State Parties the right to decide whether their victims shall have access to the African Court or not, contrary to the fundamental principles of Law. '

We agree with the Applicant in his argument that Article 34 (6) of the Protocol to the African Charter of Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol) is incompatible with the Protocol

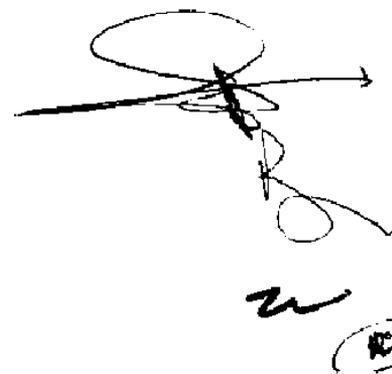
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itself and inconsistent with the African Charter on Human and Peoples' Rights (the Charter). It also violates the fundamental right of the Peoples' of Africa to ventilate their grievances in a Court established for that purpose.

Member States must not only create institutions for the protection of human rights but they must ensure that the instruments used by the institutions meet international standards and do not derogate from the protective mandate, enshrined for the Peoples of Africa in the Charter. They cannot and should not be allowed to abandon their responsibility and to approbate and reprobate. And where they have purported to do so, the African Union, the body they have established to facilitate their collective will and action, can and should be amenable to being held liable for such failure and or abandonment.

The right of access to justice is a peremptory norm- jus cogens. This right is in the African Charter and other International Human Rights instruments to which State parties are signatories. The instruments have been properly stated by the Applicant at page 11 of his rejoinder on June 6, 2012. See

- i. Article 7 of the African Charter on Human and Peoples' Rights
- ii. Article 8 of the Universal Declaration of Human Rights
- iii. Article 2(3) of the International Covenant on Civil and Political Rights and;
- iv. Article 10(3) of the African Charter on Democracy, Elections and Governance

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We agree with the applicant on this assertion. It is for this reason that we distinguish our position in Femi Falana v African Union as enunciated in our Dissenting Opinion therein.

The State Parties have the duty to ensure that the Peoples of Africa have access to judicial protection of their rights and this cannot be achieved with the clog of Article 34(6) of the Protocol. The right to access the Court is an essential element in the protection of human rights. In ensuring access to Court, the Court is competent to set aside any impediment. It is for the above reasons, together with the reasons we have already articulated in the aforesaid case of Femi Falana v. the African Union, that we have no hesitation declaring Article 34 (6) null and void.

  
**Justice Sophia A.B. Akuffo – President**

**Justice Bernard M. Ngoepe**

**Justice Elsie N. Thompson**

**Dated in Arusha this fifteenth day of March in the year Two Thousand an Thirteen.**

