

AFRICAN UNION

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF

FEMI FALANA

V.

THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

APPLICATION No 019/2015

ORDER



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The Court composed of: Augustino S. L. RAMADHANI, President, Elsie N. THOMPSON, Vice-President, Fatsah OUGUERGOUZ, Duncan TAMBALA, Sylvain ORÉ, El Hadji GUISSÉ, Ben KIOKO, Rafâa BEN ACHOUR, Solomy Balungi BOSSA, Angelo Vasco MATUSSE – Judges; and Robert ENO - Registrar.

In accordance with Rule 8 (4) (d) of the Rules of Court (hereinafter referred to as “the Rules”), Justice Gérard Niyungeko a national of Burundi, requested to be recused and did not hear the Application.

In the matter of:

FEMI FALANA

V.

THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS

After deliberations,

Makes the following order:

Nature of the Application

1. The Court received, on 7 September 2015, an Application by Femi Falana, (hereinafter referred to as “the Applicant”) instituting proceedings against the African Commission on Human and Peoples’ Rights (hereinafter referred to as “the Respondent”).
2. The Applicant is a Senior Advocate of Nigeria (SAN), with offices in Lagos, Abuja and Ekiti states of the Federal Republic of Nigeria. He has filed the Application in his personal capacity and on behalf of the victims of alleged human rights violations in Burundi.

3. The Applicant alleges that;
- a) He filed a Communication with the Respondent on 4 May 2015 regarding the systematic and widespread violations of human rights in Burundi, in which he requested the Respondent to refer the Communication to the Court;
 - b) The Communication before the Respondent related to the alleged continuing human rights violations by the government of Burundi, in particular the attacks against peaceful protesters, journalists and human rights activists following protests over President Pierre Nkurunziza's decision to run for a third term;
 - c) To date, the Respondent has failed and/or neglected to refer the Communication to the Court despite the request being brought pursuant to Rules 84(2) and 118(3)(4) (sic) of the Rules of Procedure of the Respondent; and
 - d) The failure and/or refusal of the Respondent to refer the Communication to the Court has continued to deny access and effective remedies of the victims of human rights violations in Burundi.
4. The Applicant requests the Court to grant him the following reliefs:
- a) Request the Respondent to refer the Communication against Burundi initiated before it on 4 May 2010 (sic) to the Court; and
 - b) Hear the Applicant pursuant to Rule 29 of the Rules and the inherent jurisdiction of the Court.

The Position of the Court,

5. The Court notes that the Respondent against which the Application is filed is an Organ of the African Union established under the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").
6. Pursuant to Article 3(1) of the Protocol, the Court's jurisdiction extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant Human Rights instrument ratified by the State concerned.

7. The Court notes that while the facts giving rise to the Application make reference to alleged violations of human rights in Burundi, the Applicant has filed the Application against the Respondent, an entity which is not a State Party to the Charter or Protocol.
8. The Court further notes that the Applicant has filed the Application in his personal capacity against the Respondent. Pursuant to Article 5(3) and Article 34(6) of the Protocol, applications can only be brought to the Court by individuals where the State against which the application is filed has deposited a declaration under Article 34(6) of the Protocol.
9. Considering that the Respondent is not a State Party to the Charter and has not filed a declaration pursuant to Article 34(6), the Court finds that the Applicant has no standing to bring the Application against the Respondent in terms of Article 5(3) and Article 34(6) of the Protocol.
10. In bringing this Application, the Applicant has also relied on Rule 29 of the Rules. Further, the Applicant states that the Communication initiated before the Respondent was brought under Rules 84(2) and 118(3)(4) (sic) of the Rules of Procedure of the Respondent.
11. Rule 29 of the Rules which should be read together with Article 2 and 8 of the Protocol, guide the relationship between the Court and the Respondent.
12. Pursuant to Article 2 of the Protocol, the Court shall complement the protective mandate of the Respondent bearing in mind the provisions of the Protocol.
13. Pursuant to Article 8 of the Protocol, the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Respondent and the Court.
14. Further, pursuant to Article 5(1)(a) of the Protocol, the Respondent is entitled to submit cases before the Court, while under Article 6(3), the Court may transfer cases to the Respondent.

15. An examination of Article 2 of the Protocol and Rule 29 of the Rules as well as the related provisions of the Protocol cited above shows that while the Respondent is entitled to seize the Court, the Court cannot compel the Respondent to seize it.
16. The relationship between the Court and the Respondent is based on complementarity. Therefore, the Court and the Respondent work as independent yet mutually reinforcing partner institutions with the aim of protecting human rights on the whole continent. Neither institution has the mandate to compel the other to adopt any measures whatsoever.

For these reasons, the Court unanimously:

17. Finds that, in terms of Article 3(1), 5(3) and 34(6) of the Protocol, it has no jurisdiction to hear the case and dismisses the Application.
18. Finds that pursuant to Article 2 of the Protocol and Rule 29 of the Rules, the Court cannot compel the Respondent to seize it.

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

Done at Arusha, this 20th day of November in the year 2015, in English and French, the English version being authoritative.

Signed:

Augustino S. L. RAMADHANI, President

Elsie N. THOMPSON, Vice President

Fatsah OUGUERGOUZ, Judge

Duncan TAMBALA, Judge

Sylvain ORÉ, Judge

Ben KIOKO, Judge

El Hadji GUISSÉ, Judge

Augustino S. L. Ramadhani
Elsie N. Thompson
Fatsah Ouguerkouz

Duncan Tambala

Sylvain Oré
Ben Kioko
El Hadji Guissé

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Rafâa BEN ACHOUR, Judge

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Solomy Balungi BOSSA, Judge

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Angelo Vasco MATUSSE, Judge; and

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Robert ENO, Registrar.



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F.O.