

## DECLARATION BY JUDGE RAFAË BEN ACHOUR

1. I fully agree with the grounds for, and operative part of, the above judgment. The Court is absolutely right when it holds that:

“In accordance with Article 3 of the Protocol, the jurisdiction of the Court extends to all cases and disputes submitted to it concerning the interpretation and application of ... relevant human rights instruments ratified by the *States concerned*. It also arises from Article 34(6) of the Protocol that applications to be received by the Court under Article 5 of the Protocol, should be filed against *State Parties* to the Protocol. It follows from these provisions that respondents in applications filed before this Court must be State Parties to the Protocol”.

2. In the operative part, the Court, quite logically, "*Holds* that it manifestly lacks jurisdiction to consider the Application".
3. My disagreement is therefore strictly as to form: Having found that it "manifestly lacks jurisdiction to consider the Application", the Court should not have issued a formal Ruling.
4. The Application should have been dismissed outright *de plano* by a simple letter from the Registrar, without the Court itself having to intervene.
5. Moreover, on receiving the Application on 1 October 2024, the Registrar, on 17 October 2024, informed the Applicant that the Court manifestly lacked jurisdiction to examine an application filed against the AU and the AUC, which are non-state entities. Consequently, he did not register the Application.
6. However, the Applicant was not convinced by the Registrar's response. On 22 October 2024, he wrote to the Court, arguing that the Registrar

neither had the power not register the Application nor to dismiss it for lack of jurisdiction. He insisted that his Application be registered. On 13 November 2024, the Registrar again informed the Applicant that the Court manifestly lacked jurisdiction to hear his Application and that it would not be registered. However, the Applicant persisted. On 18 November 2024, the Applicant again wrote to the Court, asking that his Application be registered.

7. In the face of such insistence, the Registrar finally registered the Application under No. 14/2024 and listed it for consideration by the plenary of the Court during its 75th ordinary session.
8. The Court accepted the Registrar's choice, and decided to confirm its previous consistent jurisprudence on the Court's manifest lack of jurisdiction.<sup>1</sup> In particular, it restated its position in its 2012 *Falana v. African Union* judgment.<sup>2</sup> :

“This interpretation is in accordance with the Court's jurisprudence in *Femi Falana v. Africa Union* where the Court held that: “as far as an international organization is not a party to a treaty, it cannot be subject to legal obligations arising from that treaty. This is in line with Article 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [...] The Court further emphasizes its finding in the above cited *Falana* Ruling that an application filed against an entity other than a State Party to the Protocol falls outside its jurisdiction”.

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<sup>1</sup> See for example the judgments, *Youssef Ababou v. Kingdom of Morocco* (para. 12); *Daniel Amare & Mulugeta Amare v. Mozambique Airlines & Mozambique* (para. 8), *Ekollo Moundi Alexandre v. Republic of Cameroon and Federal Republic of Nigeria* (para. 10), *Convention Nationale des Syndicats du secteur Education (CONASYSED) v. Republic of Gabon* (paras. 11 & 12), *Delta International Investments SA, Mr AGL de Lang and Mrs de Lang v. Republic of South Africa* (paras. 8 & 9), *Emmanuel Joseph Uko v. Republic of South Africa* (paras. 10 & 11) and *Timan Amir Adam v. Republic of Sudan* (paras. 8 & 9).

<sup>2</sup> Judgment of 26 June 2012 1 AfCLR 118, §121

9. Consequently, the Court, as a matter of urgency, adopted and issued a Ruling in due and proper form on 12 February 2025, prior to the commencement of the election of the AUC Chairperson, which was to be held during the African Union Conference of 17 and 18 February 2025 in Addis Ababa.
10. In agreement with the numerous opinions of Judge Fatsah Ouguergouz on this issue, notably in the *Falana* judgment, I believe that such formalism is excessive. Admittedly, the Applicant in the present case was very insistent, if not cumbersome. Nonetheless, the Registrar should not have succumbed to his intransigence, thereby saving the Court the time wasted to hear the Application.
11. The Rules of Court are clear in this respect; they empower the Registrar to reject *de plano* applications filed against States which have not deposited the Declaration accepting the Court's jurisdiction to receive applications from individuals or NGOs having observer status before the African Commission on Human and Peoples' Rights (Banjul Commission), or against non-State entities. Indeed, under Rule 48(2) of the Rules:

“In any case, where the Registry receives an Application from an individual or Non-Governmental Organization, the Registrar shall verify with the AU Commission whether the State against which the Application has been filed is a party to the Protocol or has deposited the Declaration in terms of Article 34(6) of the Protocol. Where the Protocol has not been ratified or the Declaration has not been deposited, the Registrar shall not register the Application, and shall inform the Applicant of the reason(s) thereof”.

