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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

# INGABIRE VICTOIRE UMUHOZA

# V.

# REPUBLIC OF RWANDA

## APPLICATION 003/2014

## ORDER

**The Court composed of:** Augustino S. L. RAMADHANI; President, Elsie N. THOMPSON, Vice-President; Gérard NIYUNGEKO, 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 the matter of:

**INGABIRE VICTOIRE UMUHOZA**

*V.*

**THE REPUBLIC OF RWANDA**

after deliberation,

delivers the following Order:

**Subject Matter of the Application**

1. The Court received, on 3 October 2014, an Application by Ingabire Victoire Umuhoza, (hereinafter referred to as "the Applicant"), instituting proceedings against the Republic of Rwanda (hereinafter referred to as "the Respondent").

2. The Applicant is a Rwandan citizen and leader of the opposition party *Forces Democratiques Unifiées,* (FDU Inkingi).

3. The Applicant alleges, *inter alia*:

    a. That in 2010, after spending nearly 17 years abroad, she decided to return to Rwanda to contribute in nation-building, and among her priorities was the registration of the political party, FDU Inkingi.

b. That she did not attain this objective because as from 10 February 2010, charges were brought against her by the judicial police, the Prosecutor and Courts and Tribunals of the Respondent.

c. That she was charged with spreading the ideology of genocide, aiding and abetting terrorism, sectarianism and divisionism, undermining the internal security of a state, spreading rumours which may incite the population against political authorities, establishment of an armed branch of a rebel movement and attempted recourse to terrorism.

4. On 30 October 2012 and 13 December 2013, the Applicant was successively sentenced to 8 and later 15 years imprisonment by the High Court and the Supreme Court of Rwanda, respectively.

**Procedure**

5. By letter dated 23 January 2015, the Respondent filed its Response to the Application and by letter dated 14 April 2015 the Applicant filed her Reply to the Respondent's Response to the Application.

6. By letter dated 4 January 2016, the Court notified Parties that the Application had been set down for public hearing on 4 March 2016.

7. By letters dated 10 February 2015, 26 January 2016 and 1 March 2016, respectively, Advocate Gatera Gashabana, the representative of the Applicant, wrote to the Court inquiring whether the Applicant could physically attend the public hearing and whether video conferencing technology could be used to allow the Applicant to follow the proceedings of the Court in the Application. By letters dated 26 January 2016 and 2 March 2016, the Registry of the Court informed the Applicant that the Court did not deem the presence of the Applicant at the public hearing necessary and that it did not have the capacity to facilitate the use of video conferencing technology, respectively.

8. By letter dated 29 February 2016, Advocate Gatera Gashabana, the representative of the Applicant wrote to the Registry of the Court requesting an adjournment of the public hearing.

9. By letter dated 1 March 2016, Dr. Caroline Buisman, the representative of the Applicant reiterated the Applicant's request for adjournment of the public hearing, adding however that the representatives of the Applicant were willing to discuss procedural matters.

10. By letter dated 1 March 2016 received on 2 March 2016, the Respondent notified the Court of its deposition of an instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"). The letter further stated:

> "The Republic of Rwanda requests that after deposition of the same, the Court suspends hearings involving the Republic of Rwanda including the case referred above until review is made to the Declaration and the Court is notified in due course."

11. By letter dated 2 March 2016, the Registry of the Court served on the Applicant the Respondent's letter dated 1 March 2016, and served on the Respondent the Applicant's letters dated 29 February and 1 March 2016 respectively. The Registry of the Court further informed the Parties that the public hearing scheduled for 4 March 2016 would proceed as earlier indicated.

12. By letter dated 3 March 2016, the Office of Legal Counsel and Directorate of Legal Affairs of the African Union Commission notified the Court of the submission of the Respondent's instrument of withdrawal of its Declaration made under Article 34(6) of the Protocol, which was received at the African Union Commission on 29 February 2016.

13. By letter dated 3 March 2016, the Respondent acknowledged receipt of the Court's letter of 2 March 2016. The letter further stated:

"Without prejudice to the foregoing, I respectfully request the Hon. Court, if not granting the Respondent's request made on 2nd March 2016, to allow the Respondent being heard on its request before a Court Order can be made."

14. At the public hearing on 4 March 2016, the Applicant was represented by Advocate Gatera Gashabana and Dr. Caroline Buisman. The Respondent did not appear.

15. The Court heard the representatives of the Applicant on procedural matters in which they requested the Court to:

i. Reject the *amicus curiae* brief submitted by the National Commission for the Fight Against Genocide.
ii. Order the Respondent to facilitate access to the Applicant for her representatives.
iii. Order the Respondent to facilitate access to video conferencing technology for the Applicant to follow the proceedings of the Court on this matter.
iv. Order the Respondent to comply with the Court's Order of 7 October 2015 to file pertinent documents.

16. The representatives of the Applicant also expressed their willingness to submit arguments on the issue of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol.

**The Decision of the Court**

17. The Court expresses regret that the Respondent did not appear before it at the public hearing to put forward its arguments.

18. The Court notes that both Parties have requested to be heard on the issue of the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol.

19. The Court also notes that the Applicant at the public hearing requested the Court to issue Orders on the procedural matters stated in paragraph 15 above.

**For these reasons, the Court by majority of nine to two, Justices Fatsah OUGUERGOUZ and Rafâa Ben ACHOUR dissenting:**

20. **Orders** that the Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34(6) of the Protocol, within fifteen (15) days of receipt of this Order.

21. **Decides** that its ruling on the effect of the Respondent's withdrawal of its Declaration under Article 34(6) of the Protocol shall be handed down at a date to be duly notified to the Parties.

22. **Orders** the Applicant to file written submissions on the procedural matters stated in paragraph 15 above, within fifteen (15) days of receipt of this Order.

In accordance with Rule 60(5) of the Rules of Court, the dissenting opinions of Justices Fatsah OUGUERGOUZ and Rafâa Ben ACHOUR, are appended to this Order.

Done at Arusha, this Eighteenth Day of March in the year 2016, in English and French, the English version being authoritative.

**Signed**:

Augustino S. L. RAMADHANI, President

Robert ENO, Registrar.

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**AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**
**COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES**

*Application 003/2014*

*In the matter of Ingabire Victoire Umuhoza v. Republic of Rwanda*

## Dissenting Opinion of Judge Fatsah Ouguergouz

1. I voted against the adoption of this Order because I consider that it was not justified and the three measures ordered by the Court (paragraphs 20-22) are jeopardizing the integrity of the judicial function and authority of the Court. The Court has indeed acted as if it has sided with the Respondent State, thereby breaking with the principle of equality of the parties.

2. In my view, the Court was duty bound to draw the legal consequences from the non-appearance of the Respondent State at the hearing. I also believe that it behoved the Court to pronounce itself on the legal effects, for the examination of the instant case, of the Respondent State's withdrawal of its declaration without having to organize a procedural phase for the purpose of consulting the Parties on this matter. I believe further that it is pointless to order the Applicant to submit written observations on the four "procedural matters" mentioned in paragraph 15 of the Order, whereas Counsels for the Applicant had already made ample submissions on all the said matters at the public hearing and on two of these procedural matters in their previous correspondence. The Court should then have made a ruling on these four procedural matters in this Order as requested by the Applicant (see paragraph 19 of the Order).

3. Lastly, but no less important, the Order robs the public hearing of 4 March 2016 of its very objective, thus making it totally needless.

4. Since the Court has not yet ruled on the question of the legal effects of the Respondent State's withdrawal of its declaration for the examination of the instant case, it does not seem to me desirable to express my opinion on this question in the context of this dissenting opinion.

5. Before expatiating on the reasons for my dissent, it seems to me necessary to briefly provide an update on the exchange of correspondence between the Parties and the Court during the past two months.

* *

6. I would start by recalling that, at its 37th Ordinary Session (18 May/5 June 2015), the Court decided that, given the circumstances of the case and pursuant to Rule 27 of its Rules, it was necessary to organize an oral phase to hear the pleadings of the Parties on the totality of the case. It was against this backdrop that the principle of a public hearing was agreed and the date thereof set for 4 March 2016.

7. By letter dated 4 January 2016, the Registrar of the Court accordingly notified the Parties of the holding of a public hearing on 4 March 2016 for the purpose of hearing the Parties' pleadings on the preliminary objections raised by the Respondent State as well as on the merits of the case.[1]

8. By letter dated 26 January 2016, Counsel for the Applicant, *inter alia,* requested the Court to grant his client leave to physically attend the public hearing. By letter of the same day, the Registrar, in reply to the Counsel for the Applicant, indicated that the Court had decided that the presence of his client at the hearing was not necessary and that his Application had consequently been rejected.

9. Counsel for the Applicant subsequently transmitted to the Court's Registry copy of a letter dated 15 February 2016 which he had addressed to the President of the Rwanda Bar Association drawing his attention to the

[1] "Take notice that this Application has been set down for Public Hearing (of legal arguments on the preliminary objections and the merits) on Friday the 4th day of March 2016 at 09.00 hours", *Application No. 003/14 Ingabire Victoire Umuhoza v. Republic of Rwanda, Notice of Public Hearing (Rule 42);* a copy of this letter was also addressed to the representative of the *amicus curiae (Executive Secretary of the National Commission for the Fight Against Genocide),* the African Commission on Human and Peoples' Rights, the Chairperson of the African Union Commission and to all the States Parties to the Protocol establishing the Court.

difficulties he was facing in the exercise of his right to visit his client. He indicated in particular that: "*The public hearing before the African Court on Human and Peoples' Rights will be held in three weeks and under such conditions, it is difficult for us to prepare our defence without prior consultation with the client*".

10. By letter dated 26 February 2016, Counsel for the Applicant informed the Registrar of the Court, *inter alia,* that he has "*up to now been deprived of any contact with his client*" and that none of the documents which the Registry recently transmitted to him could be brought to the attention of his client; Counsel for the Applicant also informed the Registrar that his client decided to appoint a second Counsel and that "*discussion between members of the defence team and, above all, their contact with the client was absolutely necessary to harmonize the defence strategy*". Counsel for the Applicant therefore requested adjournment of the public hearing to a future date.

11. By letter dated 1 March 2016, the Applicant's second Counsel informed the Registrar that she was yet to obtain a visa to travel to Rwanda and that it would therefore be difficult to meet with her client before the public hearing set down for 4 March 2016. The second Counsel therefore reiterated the request to adjourn the public hearing indicating that both Counsels were ready to discuss "procedural matters" on 4 March but requested adjournment of any discussion on "the merits" of the case to a future date, that is, after having had an opportunity of speaking with their client.[2]

12. By letter dated 1 March 2016, the Respondent State, for its part, notified the President of the Court of the withdrawal of the optional declaration it made under Article 34 (6) of the Protocol and, at the same time, requested suspension of the consideration of cases filed against it, including the matter instituted by Ingabire Victoire Uhumoza (see paragraph 10 of the Order).

13. By letter dated 3 March 2016, the Respondent State acknowledged receipt of the letter from the Registrar dated 2 March 2016 notifying the two Parties that the Court had decided to proceed with the public hearing set down for 4 March; the Respondent State also took note of the request for postponement of the public hearing presented by the Applicant, and indicated that it had no objection to the request. The Respondent State further requested to be heard in relation to its request submitted on 1 March 2016[3] for suspension of

[2] "We are willing to discuss procedural matters on 4th March but request that you adjourn any discussion on the substance to a date when we have had an opportunity to speak with Mrs. Ingabire".

[3] The Respondent State mentions 2 March 2016 in error.

consideration of cases instituted against it before the Court takes a decision on the matter (see paragraph 13 of the Order).

14. Also on 3 March 2016, the Registrar received a letter from the Legal Counsel of the African Union notifying him of the Respondent State's withdrawal of its optional declaration recognizing the compulsory juridisdiction of the Court; the Legal Counsel deemed it necessary to specify that, if at all valid, such a withdrawal would not affect consideration of cases already instituted before the Court before 29 February 2016.[4]

15. Essentially, the aforementioned exchanges of correspondence show that:

1) The Court set a public hearing for 4 March 2016 for the purpose of hearing the observations of the Parties on the preliminary objections and on the merits of the matter;
2) Each Party, for different reasons, requested postponement of the date of the public hearing;
3) The Court received official notification of Rwanda's withdrawal of its declaration;
4) The Court decided not to accept the request for postponement of the public hearing submitted by the Parties and maintained the hearing for the date initially set.

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16. I would now expatiate on the reasons as to why I regard the adoption of this Order as not justified and even dangerous for the integrity of the judicial function and authority of the Court.

17. In its Response to the Application filed on 23 January 2015, the Respondent State raised objections of inadmissibility of the Application (in particular the non-exhaustion of local remedies) and made submissions on the merits of the case. It however did not raise any objection on lack of jurisdiction.

18. On this score, it seems to me important to point out that, going by its formulation, the request made by the Respondent State on 1 March 2016 (see paragraph 10 of the Order) cannot in any way be perceived as preliminary objection for lack of jurisdiction. The Respondent State indeed requested the

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[4] "The Office of the Legal Counsel (OLC), which performs depositary functions regarding all treaties of the African Union on behalf of the Chairperson of the Commission, wishes to advise that the withdrawal, if at all valid, does not affect the hearing of any applications already filed with the Court before 29 February 2016".

suspension of consideration of the cases involving it, including the case instituted by Ungabire Victoire Umuhoza, until it has reviewed its declaration.

19. Even if this request could be considered as a genuine preliminary objection regarding lack of jurisdiction, it would be inadmissible on the grounds of having been submitted out of time. Rule 52 (2) of the Rules of Court indeed provides that "*preliminary objections shall be raised at the latest before the date fixed by the Court for the filing of the first set of pleadings to be submitted by the Party who intends to raise the objections*". This timeline however expired over one year ago; indeed, the Respondent State submitted its Response on 23 January 2015 and had not as at that date raised any objection on lack of jurisdiction.

20. In any case, the public hearing of 4 March 2016, which was intended to hear the pleadings of the Parties both on preliminary objections and on the merits of the case, was maintained and, if the Court so desired, could have afforded the Parties the opportunity to also present their oral observations on the question of the possible legal effects on the consideration of the instant case by the Court, of the Respondent State's withdrawal of its declaration.

21. Having decided not to postpone the public hearing, the Court should have exhibited consistency and heard the pleadings of the Parties on the entirety of the case and possibly also on the question of its jurisdiction.

22. On 4 March 2016, the Respondent State was not represented at the public hearing even though it had expressed the wish to be heard (see paragraph 13 of the Order). The Respondent State therefore chose not to present its arguments on the issues debated at that hearing, and thus took the risk of seeing the Court accept the Applicant's submissions on the said issues.[5]

23. The Applicant, for her part, was represented at the hearing, and her Counsels had the opportunity to present their observations on the four procedural matters. However, they were refused the opportunity to express their views on the question of the legal consequences of the Respondent State's withdrawal of its optional declaration recognizing as compulsory the jurisdiction of the Court.

24. Indeed, at the hearing, the President of the Court instantly asked the Counsels for the Applicant to limit their pleadings to the presentation of

[5] The non-appearance of the Respondent State at the hearing cannot, on its own, trigger the proceedings in default prescribed by Rule 55 of the Rules of Court.

observations on only the procedural matters which they had expressed the wish to address in their letter dated 1 March 2016.[6] Thus, when the second Counsel for the Applicant wanted to speak on the issue of the Respondent State's withdrawal of its declaration, the President did not allow her to do so, justifying the refusal by saying that the issue could not be regarded as one of the "procedural matters" which the Counsel had requested to speak about in her letter of 1 March 2016, since the withdrawal of the declaration was brought to the latter's notice only after the aforementioned date.[7]

25. The same Counsel insisted, saying that she had understood that the President would allow her to speak on that particular issue even though the said issue was new.[8] The President responded that he had perhaps actually given that impression at the meeting they had held in his office prior to the public hearing, but that immediately afterwards, the Court decided, in a private session, to hear the Counsels for the Applicant only on matters of procedure about which the latter had expressed the wish to speak as at the time they wrote their letter of 1 March 2016.[9] Counsel for the Applicant then expressed the hope that the opportunity would arise in future to pronounce herself in writing or orally on this issue which she considers important.[10]

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[6] "We received your communication in which you said that you were going to address us on procedural matters. We did not understand what those are here. So if you could tell us what these procedural matters are and then we shall make our decision", Public Hearing of 4 March 2016, *Verbatim Records* (Original English), p. 3, lines 16-18.

[7] "Excuse me Doctor, all that we wanted to hear today, this morning is what you had requested us and that is to discuss procedural matters on the 4th of March. Some of these things which you are dealing with are matters which have come to your knowledge after you had written to us", Public Hearing of 4th March 2016, *Verbatim Records* (Original English), p. 8, lines 15-18.

[8] "Mr. President, I had understood from earlier on, maybe just my mistake, that we could also address you on this particular issue even if it is new. I thought we could address you on that", Public Hearing of 4th March 2016, *Verbatim Records* (Original English), p. 8, line 22-24.

[9] "Well, I might have given you that feeling when I was briefing you but when we Judges discussed the matter just before we came into the Court, we thought that no; we just hear you on the procedural matters as you had asked for", Public Hearing of 4th March 2016, *Verbatim Records* (Original English), p. 8 lines 26-29.

[10] "I am guided Mr. President, I hope at some point that in writing or orally before you, I hope we will have an opportunity to address you on it because it is very important to this case", Public Hearing of 4th March 2016, *Verbatim Records* (Original English), p. 9, lines 1-3.

26. I find it regrettable that the Court did not allow the Counsels for the Applicant to present their observations on this issue, on grounds which I consider as purely that of formality (see paragraphs 24 and 25 above). By so doing, the Court deprived the public hearing to which it had invited the Parties, of every purpose; it did not also draw any legal consequences from the Respondent State's non-appearance at that public hearing, contenting itself with simply expressing "regret" on this issue (see paragraph 17 of this Order).[11]

27. In the Order, the Court *"orders that the Parties file written submissions on the effect of the Respondent's withdrawal of its Declaration made under Article 34 (6) of the Protocol"* within fifteen (15) days of receipt of this Order (paragraph 20); it also decided that *"its ruling on the effects of the Respondent's withdrawal of its Declaration under Article 34 (6) of the Protocol shall be handed down at a date to be duly notified to the Parties"* (paragraph 21).

28. Having decided to consult the Parties, the Court should have been more precise in its demand and should have ordered the latter to address it on the "legal effects" of the Respondent's withdrawal of its declaration "on the instant case". The question of the legal effects of the said withdrawal on the ongoing procedure is the only relevant one in the instant case; it should be distinguished from the more general question of the legal validity of the said withdrawal and its effects for the future.

29. By ordering the two measures mentioned in paragraph 27 above, the Court somehow decided to enter into debates on the request made by the Respondent in its letter of 1 March 2016 (suspension of the consideration of cases filed against it) and, *de facto,* decided to accord to that request a treatment similar to that meant for a preliminary objection. The Court indeed asked the Parties to present written observations on the effects of the Respondent's withdrawal of its declaration, implicitly suspending the procedure on the merits of the case, thereby using its prerogatives under paragraphs 3 and 5 of Rule 52 of its Rules.

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[11] The Inter-American Court of Human Rights, for its part, held the view that the non-appearance of the Respondent State at a public hearing tantamounts to a violation of its international obligations under the American Convention on Human Rights, see paragraph 13 of its Order on Provisional Measures dated 29 August 1998, in the matter of *James and Others v. Republic of Trinidad,* (http://www.corteidh.or.cr/docs/medidas/james_se_06_ing.pdf ).

30. The Court which under Article 3 (2) of the Protocol is empowered to decide on its own jurisdiction ("*competence-competence*" principle),[12] thus seems to have lost control of the procedure in favour of one of the Parties which, despite everything, did not appear at the public hearing. This also deprives the public hearing of 4 March 2016 of its very objective, the holding of which had been decided for the purpose of hearing the Parties both on the preliminary objections and merits of the case.

31. Duly represented at the hearing, the Applicant found herself doubly penalized. The Court did not allow her Counsels to address the question of the legal effects of the Respondent's withdrawal of the optional declaration (jurisdiction of the Court) and did not also make any ruling on their request regarding the four procedural matters raised at the hearing[13] and, in particular, the issues relating to the organization of the hearing by video conference and the transmission of certain documents by the Respondent State, requests which had already been the subject of an exchange of correspondence between the Parties and the Court.[14] As indicated by the Court in paragraph 19 of its Order, the Applicant had however "*requested the Court to issue Orders on the procedural matters stated in paragraph 15 above*".

32. For its part, the Respondent State obtained from the Court a suspension of the consideration of the admissibility of the Application and the merits of the case, without making an appearance at the hearing or presenting any form of pleadings whatsoever. Having solicited written observations from the Applicant on the four procedural matters raised above, the Court decided to defer its decision on the aforesaid matters, apparently with intent to safeguard the adversarial principle in favour of the Respondent State; the only apparent reason

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[12] See in this regard the interpretation of this principle by the Inter-American Court of Human Rights in its judgement in the matter brought by Ivcher Bronstein against the Republic of Peru, a State which had withdrawn its declaration accepting the jurisdiction of the Court during an ongoing procedure, *Ivcher Bronstein Case, Jurisdiction, Judgement of 24 September 1999,* Series C, No. 54 (1999), paragraphs 32 et seq. (http://www.corteidh.or.cr/docs/casos/articulos/seriec_54_ing.pdf ).

[13] See the Report of the Public Hearing of 4 March 2016, *Verbatim Records* (Original English), 11 pages.

[14] As regards the transmission of a number of documents by the Respondent State, see for example the letter dated 7 October 2015 addressed to the latter by the Registrar of the Court (Ref: AFCHPR/Reg./APPL.003/2014/014), the reminder note dated 14 December 2015 (Ref: AFCHPR/Reg./APPL.003/2014/017) and the Respondent State's letter in reply dated 17 December 2015, forwarded under cover of a Note Verbale of the same date (No. 2564.09.01/CAB/PS/LA/15) received at the Registry on 23 December 2015.

for this deferral would indeed be to offer the Respondent State a possible right of response to the Applicant's written observations.

33. Therefore, the Court appears to have sided with the Respondent State which has made the deliberate choice not to appear at the hearing. By giving preferential treatment to one of the Parties to the detriment of the other, the Court breaks with the principle of equality of the parties which should prevail in the exercise of its judicial function.

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34. In conclusion, it is my opinion that the adoption of this Order was not justified. This Order is also dangerous for the integrity of the judicial function and authority of the Court. Furthermore, it needlessly prolongs the procedure in a matter whereby, lest we forget, the Applicant is currently serving a term of imprisonment and is challenging the legality of that sentence before this Court.

35. Lastly, I would like to observe that the Order was signed by only the President of the Court (and countersigned by the Registrar), whereas it was adopted at a session of the Court and put to vote by all the members of the Court in attendance. Like all other Orders adopted during sessions of the Court, as well as all judgements and advisory opinions, the Order should have been signed by all the Judges in attendance. A greater degree of consistency should therefore be observed in the practice of the Court, except considering that Court Orders carry with them different authority depending on whether they are signed by only the President or by all members of the Court.

36. In the Inter-American Court of Human Rights, for example, there are two types of Order: Orders issued by the Court and signed by all the Judges that participated in their adoption[15], and Orders issued by the President of the Court and signed only by the latter[16]; judgments[17] and advisory opinions[18] are also signed by all members of the Court. In the International Court of Justice, there are similarly two types of Order: Orders issued by the Court, the introductory part of which bears the names of all the Judges who participated in their

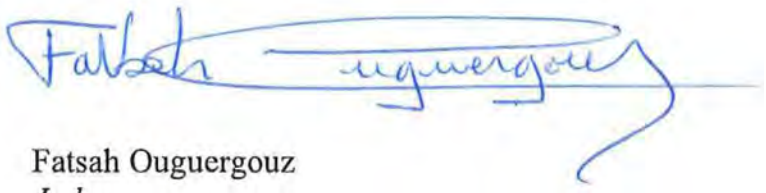
[15] For example, see: http://www.corteidh.or.cr/docs/medidas/fleury_se_03_fr.pdf.

[16] For example, see: http://www.corteidh.or.cr/docs/asuntos/solicitud_21_05_15_fr.pdf.

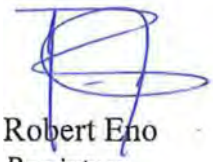
[17] For example, see: http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf.

[18] For example, see: http://www.corteidh.or.cr/docs/opiniones/seriea_21_end.pdf.

adoption,[19] and Orders issued by only the President of the Court in which the names of the other Judges are not mentioned;[20] these two types of Order, just like judgements and advisory opinions, are signed by only the President of the Court (and countersigned by the Registrar).



Fatsah Ouguergouz
*Judge*



Robert Eno
*Registrar*

[19] For example, see: http://www.icj-cij.org/docket/files/161/18881.pdf.

[20] For example, see: http://www.icj-cij.org/docket/files/161/18383.pdf.

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# IN THE MATTER OF

# INGABIRE VICTOIRE UMUHOZA

# V.

# REPUBLIC OF RWANDA

# APPLICATION NO. 003/2014

## DISSENTING OPINION OF JUDGE RAFÂA BEN ACHOUR

I do not subscribe to the Order issued by the Court in Application 003/2014 (Victoire Ingabire Umuhoza). I indeed believe, on the one hand, that the Court was not obliged to make an Order at this stage of the proceedings and, on the other, that the reasons advanced by the Court do not, in my view, seem to be relevant, even assuming that the Order is well grounded and appropriate.

1 - It should be recalled that the said Application was filed before the Court on 3 October 2014 by Ms. Victoire Ingabire Umohoza, relying on Articles 5(3) and Article 34(6) of the Protocol and on the declaration made by Rwanda on 22 January 2013, accepting the competence of the Court.

It goes without saying that a State making such a declaration has the discretionary competence to make or not to make such a declaration, or to make a declaration accompanied with temporal, material and territorial[1] reservations.

Rwanda's declaration did not come with any reservation, consequently, at the time of submission of the Application, there was no limit to the acceptance of the Court's competence with respect to Applications from individuals. In this matter, Rwanda even submitted a response to the Application, and this, on 23 January 2015. In its response, Rwanda did not challenge the competence of the Court. Subsequently, and considering the facts of the case, the Court decided to hold a public hearing. Both parties were notified on 4 January 2016 that the Court would hold the said public hearing on 4 March 2016.

A few days prior to the public hearing, that is, on 1 March 2016, Rwanda notified the Court of the withdrawal of the declaration. On the eve of the public hearing, the Legal Counsel of the African Union officially notified the Court[2] accordingly. In the said notification, Rwanda maintained that the withdrawal of its declaration had the effect of suspending all matters affecting it and pending before the Court. It also requested a hearing on the issue of its withdrawal before the Court, before the Court makes a ruling on the case filed before it. Despite this notification, the Court rightly held the public hearing as previously decided. It heard the Applicant's representative, whereas the respondent State did not appear.

At this point, the Court should have taken notice of this failure to appear and continued with the procedure. As noted by the ICJ: "A State which does not appear must accept the consequences of its decisions, the first of which is that the case will continue without its participation."[3] For its part, the Institute of International Law in its resolution on "non-appearance before the ICJ" indicated in the same vein that: "A State's non-appearance

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[1] *Cf.* GHARBI (Fakhri): "The status of declarations of acceptance of the compulsory jurisdiction of the International Court of Justice", *Les Cahiers du Droit*, vol.43, n°2, 2002, p. 213 – 274. Available on : http://id.erudit.org/iderudit/043707ar

[2] Strictly speaking, notification of the withdrawal should have been addressed to AU Commission, and this by virtue of the parallelism of the forms, because under Article 34 (7) of the Protocol : "Declarations made under sub-article 6 above shall be deposited with the Secretary-General, who shall transmit copies thereof to the State Parties".

[3] ICJ : *Case concerning military and paromilitary activities in and against Nicaragua, Judgment of 27 June 1986, Rec, 1986,* page 24, § 28

before the Court is, in itself, no obstacle to the exercise by the Court of its functions under Article 41 of the Statute"[4]. But such was not the attitude of this Court. It did not go into deliberation on the matter after the public hearing and decided to issue an Order partly acceding to the Respondent State's prayer by ordering "the Parties to file written submissions on the effect of the Respondent's withdrawal of its declaration made under Article 34 (6) of the Protocol." In that Order, the Court has included the Applicant in an exclusive relation between her and the Respondent State. The Applicant has nothing to do with the declaration.

**II** - It is necessary at this juncture to dwell a little on the nature of Rwanda's declaration.

It is unanimously accepted in jurisprudence and in doctrine, that the declaration of acceptance of jurisdiction is a unilateral act of a State, and which falls within its discretionary competence[5]. In terms of international, and indeed, unilateral commitment, this is subject to the general principle *"pacta sunt servanda"* as codified in the Vienna Convention on the Law of Treaties of 1969[6]. In this regard, the Court should have continued with the proceedings, taken note of the non-appearance of the Respondent State and set forth the necessary consequences in case of non-appearance. Even if the Applicant's representatives expressed the wish to make a submission on the withdrawal of Rwanda's declaration, the Court should not have allowed this, should not have required both parties to submit written observations on the issue and should not have deferred the matter to its 41st session[7].

**III** - Similarly, in its Order, the Court "decides that the decision on the effects of withdrawal of the Respondent will be made at its 41st ordinary session."

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[4] I.D.I. Matter of non-appearance before the ICJ, Art. 5, Basle session, *Yearbook*, 1991, vol. 64, t. II, page 378.

[5] "A discretionary act by which a State subscribes to an obligatory jurisdiction commitment, unilaterally conferring competence to a court for categories of cases defined in advance, Entry : " Optional declaration of obligatory jurisdiction" *In*, SALMON (Jean), (Dir), *Dictionary of International Public Law*, Bruylant, 2001, p. 303) (Registry translation).

[6] In its preamble, the Vienna Convention on the Law of Treaties notes that "the principles of free consent and of good faith and the *pacta sunt servada* rule are universally recognized". This principle is codified in Article 26 of the said Convention.

[7] Regarding the legal effect in time, of the withdrawal of the declaration, I refrain from commenting thereon for now. I will make my comments possibly when the Court takes decision on the matter at its 41st session.

In my view, the Court did not have to take a specific decision on the withdrawal. It should do so in its final decision, just as the ICJ did in its judgments in the cases: Corfu Channel[8], nuclear tests[9] and military and paramilitary[10] activities.

For all the aforesaid reasons, I believe that the Order was not necessary and that the reasons advanced by the Court are not founded in law.

18. March 2016

[8] *Corfu Channel case,* Judgment of 15 December 1949, *Rec,* 1949, pp. 4 et s.

[9] *Nuclear Tests Case (Australia v. France and New Zealand v France,* Judgements of 20 December 1974, Rec, 1974, pp. 253 et s and 457 et s.

[10] Case already cited *supra.*