DISSENTING OPINION OF JUDGE FATSAH OUGUERGOUZ

1. The purpose of the present dissenting opinion is to explain the reasons which led me to vote against the Court's decision to transfer the matter to the African Commission on Human and Peoples'Rights, pursuant to Article 6 (3) of the Protocol; incidentally, it seeks to clarify my position in regard to the statement made in the first operative paragraph which I voted for.

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2. I am of the opinion that the Court manifestly lacks jurisdiction to consider Mr. Ekollo Moundi Alexandre's Application and I therefore voted for the first operative paragraph of the decision. However, on the Court's manifest lack of jurisdiction, I am of the view that the Court ought not to have considered the Application judicially and should not have adopted a decision on the matter. I have already expounded amply on this issue of procedure which touches on the judicial policy of the Court in my separate opinion attached to the 15 December 2009 Judgement in the matter of Michelot Yogogombaye *vs* The Republic of Senegal.

3. The instant decision of the Court is formally distinct from a "Judgement" by virtue of the fact that it was signed by only the President and the Registrar of the Court and adopted by way of a "simplified" procedure without any involvement of the two States against which the Application was brought.

4. The adoption of the format of a "decision" on its lack of jurisdiction, rather than a judgement, was decided by the Court at its 21st Ordinary Session (6-17 June 2011), when it considered Application No. N° 002/2011 (Soufiane Ababou *vs.* Republic of Algeria), from which I abstained in compliance with the requirements of Article 22 of the Protocol and Rule 8 (2) of the Rules of Court. When it considered this Application, the Court had specifically decided that when an application does not seem, *prima facie,* to stand any chance of success, it should not be referred to the State against which it has been filed.

5. In the present case, the Court decided not to transmit Mr. Ekollo Moundi Alexandre's Application to Cameroon and Nigeria, not even to inform them of the filing of this application. The Court also decided not to inform the President of the African Union Commission and other States parties to the Protocol about the filing of the Application.

6. I am of the view that in the present case the Application ought to have been dismissed *de plano* through a simple letter from the Registry to the

Applicant as of the day after 13 June 2011, when the Legal Counsel of the African Union Commission confirmed to the Court that the Republic of Cameroon was not party to the Protocol and that the Federal Republic of Nigeria, though party to the Protocol, had not made the Declaration as provided in Article 34 (6) of the Protocol.

7. Indeed, the issue of the Court's jurisdiction ought to be devoted, on its own, a formal decision of the Court only in case of a "dispute" within the meaning of Article 3 (2) of the Protocol, in other words when an objection based on jurisdiction is raised pursuant to Rule 52 of the Rules of Court. In all cases of a "manifest" lack of jurisdiction of the Court, found after a judicial handling of the application by a small team of judges (judge-rapporteur or a committee of two or three judges) or which may, *de lege ferenda*, be arrived at after a strictly administrative handling of the Application by the Registry, a simple letter addressed by the latter to the Applicant should suffice. That would enable the Court to spare its resources and, considering that it does not sit on a full-time basis, to expedite action on such applications.

8. Furthermore, the adoption by the Court, as in the instant case, of a decision on the lack of jurisdiction whereas the States concerned have not been served with copies of the Application nor have they been informed of its filing is challengeable in principle; all the more so in the instant case as the Application was mentioned on the Court's website upon receipt. The failure to transmit the Application to the States concerned further deprived Nigeria (Cameroon not being party to the Protocol) of the possibility of accepting the jurisdiction of the Court by way of a *forum prorogatum* (on this matter, see my separate opinion above).

9. In this respect, any application filed against a State party to the Protocol which has not yet made the optional declaration, should be transmitted, for information purposes, to that State to enable it to accept the jurisdiction of the Court to hear the matter[1]. Since the current practice of the Registry is to register on the general list all cases submitted to the Court, logically all applications relating to those cases should systematically be communicated to the States concerned and published on the website of the Court. The registration of a case on the general list of a court means that the latter is validly "seized" and that the case is pending before the said jurisdiction (on this matter, see paragraphs 14, 15 and 16 of my above-mentioned separate opinion).

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[1] In that scenario, the Registry would inform the Applicant that (1) since the State against which the application was filed did not make the optional declaration, the Court cannot entertain his application; (2) the application has been forwarded to this State, for information purposes; (3) the Court may examine the application if the State concerned decides to accept the Court's jurisdiction.

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10. Having declared that it manifestly lacks jurisdiction to consider the Application, the Court decided to transfer the latter to the African Commission relying on Article 6 (3) of the Protocol, which provides that "the Court may consider cases or transfer them to the Commission".

11. The practice of such a transfer was established by the Court in its decision regarding its jurisdiction in respect of the abovementioned Application N° 002/2011. The Court upheld the practice when, at the same session, it dealt with Applications N° 005/2011 (Daniel Amare & Mulugeta Amare *vs* Mozambique Airlines & Mozambique) and N° 006/2011 (Association des Juristes d'Afrique pour la bonne gouvernance *vs* Côte d'Ivoire), and also declared that it manifestly lacks jurisdiction to consider such applications.

12. In my view, the transfer to the African Commission of an application in respect of which the Court found that it manifestly lacks jurisdiction is not founded in law. I hold that this transfer does not appear to be consistent with Article 6 of the Protocol, when interpreted according to the general rules of interpretation as set out in the 1969 Vienna Convention on the Law of Treaties.

13. Indeed, the heading of this Article 6 ("Admissibility of Cases") strongly suggests that the action available to the Court, in paragraph 3, applies primarily to the consideration of the admissibility of a case over which the jurisdiction of the Court has already been established. Unfortunately, the "travaux préparatoires" of the Protocol do not shed any light on the meaning to be attributed to the said paragraph 3; the first version of this paragraph read that "the Court may itself consider cases or transfer them to the Commission".[2]

14. When read in that context, this paragraph allows the Court either to consider, on its own, the admissibility of an application which is within its jurisdiction or to entrust consideration of the said admissibility to the African Commission. In the latter assumption, the Court would be assigning to the Commission a broader responsibility beyond that envisaged in Article 6 (1).

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[2] Article 6 of the Draft Protocol, as adopted by the first meeting of Governmental Legal Experts (Cape Town, South Africa, 6-12 September 1995), see *Draft Protocol to the African Charter on Human and Peoples'Rights on the Establishment of an African Court of Human and Peoples'Rights,* adopted by the Meeting of Government Legal Experts 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 (I) Rev. 1.

15. Indeed, Article 6 (1) only allows the Court to "request the opinion of the Commission" on the admissibility of a "case instituted under Article 5 (3)" of the Protocol. Article 6 (3), for its part, authorizes the Court to ask the Commission to itself make a determination on the admissibility of an application. Absence of any reference to Article 5 (3) of the Protocol further suggests that consideration of admissibility could apply not only to cases filed by an individual or a non-governmental organization but also to those filed by a State Party to the Protocol or an African inter-governmental organization.

16. Apart from this latter proposition, my interpretation of Article 6 (3) is corroborated by Rule 119 of the Rules of the Commission, entitled "Admissibility under Article 6 of the Protocol", and worded as follows:

> "1. Where, pursuant to Article 6 of the Protocol, the Commission is requested to give its opinion on the admissibility of a communication pending before the Court or where the Court has transferred a communication to the Commission, it shall consider the admissibility of this matter in accordance with Article 56 of the Charter and Rules 105, 106 and 107 of the present Rules.
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> 2. Upon conclusion of the examination of the admissibility of the communication referred to it under Article 6 of the Protocol, the Commission shall immediately transmit its opinion or its decision on the admissibility to the Court".

17. This provision of the Rules of the Commission leaves no doubt as to the fact that in both situations envisaged in Article 6 (1) and (3) of the Protocol, the Commission considers that it is in duty bound to establish the admissibility of an application relating to a matter over which the Court has declared that it had jurisdiction; otherwise it would be difficult to understand why Rule 119 (2) provides for the prompt transmission to the Court of the Commission's opinion or "decision". The prompt transmission to the Court of the Commission's decision on the admissibility of an application would indeed be meaningless if the Court were no longer to play any role in the handling of the case; the underlying idea is that once it has deemed an application admissible, the Court may then embark on a consideration of its merits.

18. Unlike those of the Commission, the Rules of the Court do not provide real clarification on the purpose of the transfer envisaged in Article 6 (3) of the Protocol. Rule 29 (5) of the Rules of the Court indeed reads:

> "a) Where the Court decides to transfer a case to the Commission pursuant to Article 6 (3) of the Protocol, it shall transmit to the Commission a copy of

> the entire pleadings so far filed in the matter accompanied by a summary report. At the request of the Commission, the Court may also transmit the original case file.
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> b) The Registrar shall immediately notify the parties who were before the Court about the transfer of the case to the Commission".

19. The language used in this provision ("case", "parties", "the entire pleadings", "summary report") suggests that there is a case pending before the Court. One would also note that where the Court manifestly lacks jurisdiction, there should not be much in the case file. Furthermore, even if the Court's jurisdiction *ratione personae, ratione materiae, ratione loci* or *ratione temporis* were highly questionable and that said jurisdiction had been considered in detail by the Court, the part of the case file pertaining to the establishment of the Court's jurisdiction would be of no particular interest for the Commission and should not therefore be communicated to it.

20. My conclusion is therefore that, by relying on Article 6 (3) of the Protocol in transferring to the African Commission a case over which it has declared it manifestly had no jurisdiction, the Court deviated from the initial purpose of that provision; that same conclusion applies even more to the possible transfer to the Commission of an application in respect of which the Court would find, by way of a judgement, that it lacks jurisdiction following a classical contradictory procedure (see Rule 52 (6) of the Rules of the Court).

21. It is however not on the basis of that conclusion alone that I voted against the decision to transfer the case to the Commission. More fundamental in my view is the fact that the Court gave no reasons to justify its decision in the instant case; the requirement that reasons shall be given for the Court's decisions is indeed consubstantial with its judicial function.

22. In the instant case, as in the three cases mentioned above, the Court was of the opinion that it was "appropriate" to transfer the case in light of "the allegations set out in the Application", without further clarification. It ought to have set out the reasons which led it to consider that the allegations made in the Application warranted such a transfer or to explain why the latter was "appropriate".

23. Article 6 (3) of the Protocol no doubt provides the Court with a choice between two possible solutions but that choice should nonetheless comply with objective criteria. Though it lies within the discretionary powers of the Court, such a choice cannot be made in an arbitrary manner, in other words in a

hazardous and unpredictable way or in a manner bereft of any apparent logical approach.

24. The integrity of the Court's judicial function indeed requires that reasons be provided for decisions adopted under the above-mentioned provision so as to comply with the requirements of predictability and consistency which are the essential ingredients that underpin the principle of legal certainty which should be guaranteed by the Court at all times.

25. In the absence of such objective criteria for the referral to the Commission of cases over which the Court declares that it manifestly has no jurisdiction, there is the huge risk that such a referral would become systematic, which approach seems to be fostered by the current practice.

26. Furthermore, in the absence of objective criteria for transfers of cases to the Commission, a dissenting Judge would not be afforded the opportunity to clarify the reasons for which he objects to the grounds for a transfer unless he mentions elements of fact or of law, which do not appear in the Court's decision and, in so doing, betrays the secrecy of the deliberations of the Court.

27. If the Court were to persevere in the practice of referring to the Commission matters over which it finds that it manifestly lacks jurisdiction, it would be necessary for it to set out clear criteria for such referrals. In so doing, it could for instance be guided by the nature or gravity of the violations brought to its attention in the application in question and thus transfer to the Commission, those applications which "apparently reveal the existence of a series of serious or massive violations of human and peoples'rights", to use the wording of Article 58 (1) of the African Charter.

28. It must be recalled that the criterion of "serious or massive violations of human rights" is one of those that the African Commission used to submit a case to the Court under Article 5 of the Protocol (see Rules 84 (2) and 118 (3) of the Rules of the Commission). Once the case is referred by the Court, it would then lie with the Commission to consider the application and make the findings arising therefrom in accordance with the above-stated provisions of its Rules.

29. If the Court were to embark on this path, it would be following a reasoning that it had recently applied in its practice of transferring to the Commission matters over which it found that it manifestly lacks jurisdiction. It would even be attaching some significance to that practice by setting it aside for exceptional circumstances. Hence, the Court would more or less be playing the role of "an early warning mechanism" for the Commission, similar to the one that may now play individuals and non-governmental organizations before the

Commission, as evidenced in the circumstances that led to the submission by the Commission of its own application against the Great Arab Socialist Peoples' Libyan Jamahiriya.

30. This is obviously a matter of judicial policy requiring mature reflection on the part of the Court. The response to that question will depend on the role that the Court intends to play in the human rights protection system provided in the African Charter and the Protocol establishing the Court; it will depend in particular on the manner in which the Court views synergies with the African Commission based on Articles 2, 4, 5, 6 (1 & 3), 8 and 33 of the Protocol.

31. The Court could in that regard continue to explore the options available under Article 6 (3) of the Protocol and try to ascertain if the transfer of an application to the Commission could not occur after the Court has declared that it "has jurisdiction"; the ultimate goal of the transfer being for the Commission to consider not only the admissibility of the application but also the merits of the case.

32. The verb "consider" used in paragraph 3 and the positioning of that paragraph in Article 6 (immediately after paragraph 2 dealing with the issue of ruling on the admissibility of cases by the Court), indeed suggests that the Court may consider cases on their merit or transfer them to the Commission.

33. Guided by criteria which it would have to determine, the Court could thus choose not to rule on the merits of a case over which it has jurisdiction. This system, known as "pick and choose", is for instance, applied by the U.S Supreme Court. Rule 10 of the Rules of that Court indeed allows it to exercise its appellate jurisdiction in a discretionary manner, in other words when it feels that there are compelling reasons to exercise such a jurisdiction; the same Rule provides criteria for the selection of cases subject to appeal before the Supreme Court (*e.g.* major federal issues, conflicts of jurisprudence between two courts of appeal).

34. In deciding not to rule on the merits of a case over which it has jurisdiction, the African Court could however be opening the door to a veritable denial of justice; the referral of the case to the Commission for determination on the merits would not suffice to forestall such a denial of justice since only the Court does have powers of a judicial nature. That impediment may be surmounted; it would be up to the Court and the Commission to initiate joint discussions on the matter.

35. Here again, it is a matter of judicial policy which arises for the Court touching on the role it intends to play within the African system of protection of

human and peoples'rights. Indeed, one cannot rule out the fact that in the not too distant future, the Court may be flooded with a whole range of applications which it would not be able to dispose of satisfactorily because of the limited material and human resources at its disposal. In that event, the Court would then need to make a choice: either to continue with the systematic consideration of all applications filed before it, with the risk of bottlenecks and the inherent paralysis of its services or to sift the applications using a set of criteria and thus transforming itself into some kind of judicial body regulating the entire African system of human rights protection.

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36. To sum up, I am of the view that in the instant case:

- the lack of jurisdiction *ratione personae* of the Court being manifest, the Application ought to have been dealt with administratively by the Registry and should accordingly not have given rise to a decision of the Court;

- since this is a case where the Court manifestly lacks jurisdiction, this Application should not have been transferred to the African Commission under Article 6 (3) of the Protocol and, at any rate, reasons should have been duly provided for such a transfer;

- it was eventually for the Registry to "direct" the Applicant to the African Commission either in the letter in which it informs the Applicant that the matter is outside the jurisdiction of the Court or, as in the instant case, in the letter under cover of which it transmits to the Applicant the Court's decision on its lack of jurisdiction.

Fatsah Ouguergouz

Robert Eno
Acting Registrar

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Dissenting Opinion of Judge Fatsah Ouguergouz