SEPARATE OPINION OF JUSTICE FATSAH OUGUERGOUZ

1. Like my colleagues, I am of the opinion that the application filed by Mr. Efoua Mbozo'o Samuel against the Pan-African Parliament must be dismissed. However, since this is a case of manifest lack of jurisdiction of the Court, I consider that the application should not have given rise to a ruling by the Court; it should have been dismissed *de plano* by a simple letter from the Registry (on this point, see my separate opinion attached to the 15 December 2009 Judgement in the case *Michelot Yogogombaye vs. Republic of Senegal*, as well as my dissenting opinion attached to the recent decision in the case *Ekollo Moundi Alexandre vs. Republic of Cameroon and Federal Republic of Nigeria*).

2. Considering that Mr. Efoua Mbozo'o Samuel's Application has been considered judicially by the Court, it should, in any event, have been dismissed on a more explicit legal basis.

3. The reasons of the decision are contained in paragraph 6 which reads as follows:

> "On the facts of this case and the prayers sought by the Applicant, it is clear that this application is exclusively grounded upon breach of employment contract in accordance with Article 13 (a) and (b) of the OAU Staff Regulations, for which the Court lacks jurisdiction in terms of Article 3 of the Protocol. This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the Ad hoc Administrative Tribunal of the African Union. Further, in accordance with Article 29 (1) (c) of its Protocol, the Court with jurisdiction over any appeals from this Ad hoc Administrative Tribunal is the African Court of Justice and Human Rights. The present Court therefore concludes that, manifestly it doesn't have the jurisdiction to hear the application."

4. The Court is thus first concerned with the material basis of the application, *i.e.* with the nature of the right allegedly violated, rather than with the entity against which the application is lodged. By so doing, the Court starts by examining the application first from the angle of its material jurisdiction and not, as it ought to, from that of its personal jurisdiction.

5. Indeed, the Court recalls the "terms of Article 3 of the Protocol" to state that it "lacks jurisdiction" to deal with an application "exclusively grounded upon breach of employment contract in accordance with Article 13 (a) and (b) of the OAU Staff Regulations". It thus concludes implicitly that the matter submitted to it does not concern, as required under Article 3 (1) of the Protocol,

"the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned".

6. However, the Court should first of all consider its personal jurisdiction or *ratione personae*; it is only after establishing its personal jurisdiction that it can look at its material jurisdiction (*ratione materiae*) and/or, if the case arises, its temporal (*ratione temporis*) and geographical (*ratione loci*) jurisdiction. Since its jurisdiction is not compulsory,[1] the Court must first of all ascertain that it has jurisdiction *ratione personae* to consider the application.[2]

7. This personal jurisdiction of the Court must in it turn be looked at from two different angles: at the level of the defendant (against whom an application may be lodged ?) and at the level of the applicant (who may lodge an application ?).

8. Under the Protocol, applications may be filed only against a "State" and such a State must of course be party to the Protocol. Article 2 of the Protocol indeed provides that the Court shall complement the protective mandate that the African Charter on Human and Peoples' Rights has conferred upon the African Commission. However, the African Charter clearly stipulates that only "States", which are party to the Charter, may be the subject of a communication lodged before the African Commission. The Protocol does not intend to derogate from this principle, as it provides in Articles 3 (1), 5 (1, *subparagraph* c)), 7, 26, 30, 31 and 34 (6), none of which refers to an entity other than the "State" ("States concerned",[3] "State against which a complaint has been lodged", "States Parties").

9. In addition to the State, Article 5 of the Protocol clearly mentions the African Commission, African Intergovernmental Organizations, the individuals and non-governmental organizations, but only to authorize them to institute proceedings against a State Party and not to make them potential "defendants" before the Court.[4]

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[1] The States concerned must indeed be parties to the Protocol and, where necessary, must have deposited the optional declaration.

[2] For example see the approach followed by the International Court of Justice, which does not have either compulsory jurisdiction, in its judgement of 11 July 1996 in the case relating to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, ICJ Report 1996,* pp. 609, 612, 613, 614 and 617, paragraphs 16, 23, 26, 27 and 34.

[3] The expression "Etats intéressés" in the French version of Article 26 (1) of the Protocol is translated by "States concerned" in the English version of the same provision.

[4] To my knowledge, the European Union is the only non-State entity that could, in the near future, be dragged before a human rights court; talks are indeed underway to allow the

10. As an organ of the African Union (see Article 5 of the Constitutive Act of the African Union), the Pan-African Parliament is therefore not, in the current state of the Protocol, an entity against which a complaint can be lodged before the Court. That is simply what the Court should have clearly indicated.

11. That is in fact what the Court seems to say, but in a tortuous way, in the second and third sentences of paragraph 8 of its decision, which read as follows: "This is therefore a case which, in terms of the OAU Staff Regulations, is within the competence of the *Ad hoc* Administrative Tribunal of the African Union. Further, in accordance with Article 29 (1) (c) of its Protocol, the Court with jurisdiction over any appeals from this *Ad hoc* Administrative Tribunal is the African Court of Justice and Human Rights".

12. It does not seem that the Court intended to conclude that a breach of an employment contract *per se* does not fall within its material scope of jurisdiction. That would indeed be a hasty conclusion given that such an issue is closely related to the right of every individual "to work under equitable and satisfactory conditions", guaranteed in particular by Article 15 of the African Charter. It is only because this breach relates to an employment contract concluded between the Applicant and the Pan-African Parliament that the Court considers that the matter does not fall within its scope of jurisdiction, without however specifying whether that is a case of material or personal lack of jurisdiction.

13. In the present case, the Court should have adopted the approach it has always followed in examining applications, namely to start by verifying that it has personal jurisdiction.

14. By focussing right from the start on its material jurisdiction, as it did in the present case, the Court runs the risk of addressing issues the answer of which is not necessary for the purpose of establishing its jurisdiction to consider the case. Indeed, if the Court were to start by examining the question, not always easy to elucidate, whether an alleged violation actually concerns a human right guaranteed by the African Charter or another relevant international human rights instrument and that its answer turns out to be affirmative, its research and conclusions on the matter could prove to be vain if it later realizes that the entity against which the complaint is lodged cannot be brought before the Court, either because it is not party to the Protocol, or because it has not made the declaration

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European Union to become party to the European Convention on Human Rights and, consequently, be subject of complaints before the European Court of Human Rights (see the website: http://www.touteleurope.eu/fr/organisation/droit-communautaire/charte-des-droits-fondamentaux/presentation-copie-1.html; site consulted on 3 October 2011).

provided for in Article 34 (6) of the Protocol, or because it is not party to the relevant international treaty referred to.

15. May I also note that the Court makes an incomplete examination of its material jurisdiction because it seems to me peremptory to say, as the Court says in paragraph 6 of the decision, that the application "is exclusively grounded upon breach of employment contract in accordance with Article 13 (a) and (b) of the OAU Staff Regulations".

16. In his application, as supplemented by his letter of 22 August 2011, the Applicant indeed draws the attention of the Court to an appeal which he reportedly lodged before the *Ad Hoc* Administrative Tribunal of the African Union on 29 January 2009. On 15 April 2009, this appeal is reported to have been declared admissible by the Acting Secretary of the Tribunal and on 29 September 2010, after many reminders addressed to the latter, the Applicant is said to have been informed that the Tribunal "had not been able to sit for the last 10 (ten) years due to inadequate financial means and due to the fact that the Tribunal did not have any Secretaries". The Applicant purports that two years and four months after his appeal was declared admissible, the Tribunal was still to sit and that it is due to the "silence" of the latter that he decided to refer the matter to the Court.

17. Although the Applicant did not explicitly make allegations of violation of his "right to have his cause heard", the Court could also have tried to find out if such a right falls within its jurisdiction; this is indeed a right guaranteed by the African Charter (Article 7), instrument referred to in Article 3 (1) of the Protocol. The Court could not however answer this question without first identifying the debtor or passive subject of the right in question; by so doing, it would have been compelled to address the question of its personal jurisdiction.

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18. For all the above-mentioned reasons, I consider that in the present case the Court should have clearly declared: 1) that the Protocol authorizes the lodging of complaints only against States Parties thereto, 2) that the Pan-African Parliament cannot therefore be brought before it, and 3) that it consequently manifestly lacks jurisdiction *ratione personae* to consider the application. At any rate, the lack of jurisdiction of the Court being manifest, the application should not have been considered judicially by the Court but should have been dismissed *de plano* by a simple letter from the Registry.

Fatsah Ouguergouz

Robert Eno
Acting Registrar

Separate Opinion of Justice Fatsah Ouguergouz