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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES
P.O Box 6274 Arusha, Tanzania Telephone: +255 27 205 0111 Fax. +255 27 205 0112

IN THE MATTER OF

MICHELOT YOGOGOMBAYE

versus

THE REPUBLIC OF SENEGAL

APPLICATION No. 001/2008

JUDGMENT

The Court composed of: Mr. MUTSINZI, President; Ms. AKUFFO, Vice-President; Ms. MAFOSO-GUNI, Messrs NGOEPE, FANNOUSH, GUINDO, NIYUNGEKO, OUGUERGOUZ and MULENGA - Judges; and Mr. DIAKITÉ - Registrar

In the matter of:

Mr. Michelot Yogogombaye,
representing himself

versus

the Republic of Senegal,
represented by:

- Mr. Abdoulaye Dianko, State Legal Officer,
- Mr. Mafall Fall, State Legal Department, Ministry of Economy and Finance,
- His Excellency Mr. Cheikh Tidiane Thiam, Ambassador,
- Mr. Mamadou Mbodj, Legal and Consular Affairs Department, Ministry of Foreign Affairs,
- Mr. Moustapha Kâ, Criminal and Mercy Affairs Department, Ministry of Justice,

After deliberation on the matter,

makes the following ruling:

1. By an application dated 11th August 2008, Mr. Michelot Yogogombaye (hereinafter referred to as “the Applicant”), a Chadian national, born in 1959 and currently residing in Bienne, Switzerland, brought before the Court a case against the Republic of Senegal (hereinafter referred to as “Senegal”), “with a view to obtaining suspension of the ongoing proceedings instituted by the Republic and State of Senegal with the objective to charge, try and sentence Mr. Hissein Habré, former Head of State of Chad, presently asyllumed in Dakar, Senegal”.

2. In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol"), and Rule 8 (2) of the Interim Rules of Court (hereinafter referred to as "the Rules"), Judge El Hadj Guissé, Member of the Court, and a national of Senegal, recused himself.

3. The Applicant sent his application to the Chairperson of the African Union Commission by electronic mail dated 19th August 2008. This application was received in the Court Registry on 29th December 2008, with a covering correspondence from the Legal Counsel of the African Union Commission dated 21st November 2008.

4. The Registry acknowledged receipt of the application, and notified the Applicant by letter dated 2nd January 2009, that all communications meant for the Court must be addressed directly to it, at its Seat in Arusha, Tanzania.

5. In accordance with Rule 34 (6) of the Rules, the Registry served a copy of the application on Senegal by registered post on 5th January 2009; also in accordance with Rule 35 (4) (a) of the Rules, the Registry invited Senegal to communicate to it, within 30 days, the names and addresses of its representatives.

6. Pursuant to Rule 35 (3) of the Rules, the Registry also informed the Chairperson of the African Union Commission about the application by letter of that same date.

7. The Applicant informed the Registry, by letter dated 30th January 2009 received at the Registry on 5th February 2009, that he would represent himself in the matter that he had brought before the Court.

8. Senegal acknowledged receipt of the application and transmitted to the Court, the names of its representatives mandated to represent it before the Court, by letter of 10th February 2009 received by the Registry on the same day, by fax.

9. By another faxed letter dated 17th February 2009 received in the Registry on the same day, Senegal requested the Court to extend the time limit “to enable it to better prepare a reply to the application”.

10. By an order dated 6th March 2009, the Court granted the request of Senegal and extended, up to 14th April 2009, the period within which to submit its reply to the application.

11. A copy of the order was served on the Applicant, and on Senegal, by facsimile transmission dated 7th March 2009.

12. Senegal submitted its statement of defence within the time limit indicated in the aforesaid order, in which it raised preliminary objections regarding the jurisdiction of the Court and admissibility of the application, and also addressed substantive issues.

13. The Registry served on the Applicant, under covering letter of 14th April 2009, a copy of the statement of defence by Senegal.

14. The Applicant having failed to respond to the said statement, the Registry by another letter dated 19th June 2009, notified the Applicant that if he failed to respond within 30 days, the Court would assume that he did not want to present any submission in reply to the statement of defence, in accordance with Rule 52 (5) of the Rules.

15. On 29th July 2009, the Applicant acknowledged receipt of the statement of defence and submitted that: “the afore-mentioned reply did not introduce any new element likely to significantly modify the views I expressed in my initial application. I therefore maintain the said views in their entirety, and resubmit myself to the authority of the Court.”

16. In view of the facts, the Court did not deem it necessary to hold a public hearing and, consequently, decided to close the case for deliberation.

17. In his application, the Applicant averred, among other things, that “the Republic and State of Senegal and the Republic and State of Chad, members of the African Union, are parties to the Protocol [establishing the African Court on Human and Peoples’ Rights] and have, respectively, made the declaration prescribed in Article 34 (6) accepting the competence of the Court to receive applications submitted by individuals”.

18. With regard to the facts, the Applicant submitted that Hissein Habré, former President of Chad, is a political refugee in Senegal since December 1990, and that in 2000, he was suspected of complicity in crimes against humanity, war crimes and acts of torture in the exercise of his duties as Head of State, an allegation based on the complaints by the presumed victims of Chadian origin.

19. The Applicant further averred that, by decision of July 2006, the African Union had mandated Senegal to “consider all aspects and implications of the Hissein Habré case and take all appropriate steps to find a solution; or that failing, come up with an African option to the problem posed by the criminal prosecution of the former Head of State of Chad, Mr. Hissein Habré...”

20. He also submitted that, on 23rd July 2008, the two chambers of the Parliament of Senegal adopted a law amending the Constitution and “authorizing retroactive application of its criminal laws, with a view to trying exclusively and solely Mr. Hissein Habré”.

21. He alleged that by so doing, Senegal violated the “sacrosanct principle of non-retroactivity of criminal law, a principle enshrined not only in the Senegalese Constitution but also in Article 7 (2) of the African Charter on Human and Peoples’ Rights” to which Senegal is a party.

22. According to the Applicant, the action of Senegal also portrayed that country’s intention “to use in abusive manner, for political and pecuniary ends, the mandate conferred on it by the African Union in July 2006”. Further, according to the Applicant, in opting for a judicial solution rather than an African solution inspired by African tradition, such as the use of the “Ubuntu” institution (reconciliation through dialogue, truth and reparations), Senegal sought to use its services as legal agent of the African Union for financial gain.

23. In conclusion, the Applicant prayed the Court to:

- “ 1) Rule that the application is admissible;*
- 2) Declare that the application has the effect of suspending the ongoing execution of the July 2006 African Union’s mandate to the Republic and State of Senegal, until such time that an African solution is found to the case of the former Chadian Head of State, Hissein Habré, currently a statutory political refugee in Dakar in the Republic and State of Senegal;*
- 3) Rule that the Republic and State of Senegal has violated several clauses of the Preamble and the Articles of the African Charter on Human and Peoples’ Rights;*
- 4) Rule that the Republic and State of Senegal has violated the African Charter on Human and Peoples’ Rights and, in particular, the 10 September 1969 OAU[AU] Convention Governing the Specific Aspects of Refugee Problems in Africa, which came into force on 26 June 1974;*
- 5) Rule that the case is politically motivated and that the Republic and State of Senegal violated the principle of universal jurisdiction in the ongoing proceedings instituted with a view to indicting and trying Mr. Hissein Habré;*
- 6) Rule that, in the said procedure instituted with a view to indicting and trying Mr. Hissein Habré, there is political motivation, pecuniary motivation and the abuse of the said principle of universal jurisdiction, application of which will become, de facto, lucrative for the respondent (estimated to cost 40 billion CFA Francs). This cannot but create precedents in*

other African countries in which former Heads of State would possibly take refuge;

- 7) Rule that the charges brought against Mr. Hissein Habré have been abused and abusively used by the Republic and State of Senegal, the French Republic and State and the humanitarian organization, Human Rights Watch (HRW), particularly in view of the media publicity given to, and the media hype into which they turned, the said allegations;*
- 8) Rule that the said abuse of the principle of universal jurisdiction has destabilizing effect for Africa, that it could impact negatively on the political, economic, social and cultural development of not only the State of Chad but also all other African States, and on the capacity of these States to maintain normal international relations;*
- 9) Suspend the July 2006 African Union mandate to Senegal and hence the current proceedings instituted by the Republic and State of Senegal with a view to indicting and eventually trying Mr. Hissein Habré;*
- 10) Order the Republic and State of Chad and the Republic and State of Senegal to establish a national "Truth, Justice, Reparations and Reconciliation" Commission for Chad, on the South African model derived from the philosophical concept of "Ubuntu" for all the crimes committed in Chad between 1962 and 2008; and in so doing, resolve in African manner the problematic case of the former Chadian Head of State, Hissein Habré;*
- 11) Recommend that other Member States of the African Union assist Chad and Senegal in establishing and putting into operation the said "Truth, Justice, Reparations and Reconciliation" Commission;*

12) *With regard to costs and expenses, grant the Applicant the benefit of free proceedings.”*

24. In its statement of defence, Senegal for its part submitted, *inter alia*, that for the Court to be able to deal with applications brought by individuals, “the respondent State must first have recognized the jurisdiction of the Court to receive such applications in accordance with Article 34 (6) of the Protocol establishing the Court”.

25. In this regard, Senegal “strongly asserted that it did not make any such declaration accepting the jurisdiction of the African Court on Human and Peoples’ Rights to deal with applications brought by individuals”.

26. Alternatively, Senegal averred that the Applicant “was wrong to meddle in a matter that is the exclusive concern of Senegal, Hissein Habré and the victims” as *per* the obligations arising from the Convention against Torture; and that it does not see any “justification for legitimate interest on the part of the Applicant to bring the case against the Republic of Senegal”.

27. In addition, Senegal denied the allegations made by the Applicant in regard to the “purported violation [by it] of the principle of non-retroactivity of criminal law”, and the “purported violation of African Union mandate” of July 2006.

28. In conclusion, Senegal prayed the Court to:

“On matters of procedure:

Rule that Senegal has not made a declaration accepting the jurisdiction of the Court to hear applications submitted by individuals;

Rule that the Applicant has no interest to institute the application;

Therefore, declare that the application is inadmissible.

On the merits:

Declare and decide that the evidence adduced by Mr. Michelot Yogogombaye is baseless and incompetent;

Therefore, strike out the pleas submitted by the Applicant as baseless;

Rule that Mr. Michelot Yogogombaye should bear the costs incurred by the State of Senegal in regard to the application”.

29. In accordance with Rules 39 (1) and 52 (7) of the Rules, the Court has at this stage, to first consider the preliminary objections raised by Senegal, starting with the objection to the Court’s jurisdiction.

30. Article 3 (2) of the Protocol and Rule 26 (2) of the Rules provide that “in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide”.

31. To resolve this issue, it should be noted that, for the Court to hear a case brought directly by an individual against a State Party, there must be compliance with, *inter alia*, Article 5 (3) and Article 34 (6) of the Protocol.

32. Article 5 (3) provides that:

“The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34 (6) of this Protocol”.

33. For its part, Article 34 (6) of the Protocol provides that:

“At the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5 (3) of this Protocol. The Court shall not receive any petition under Article 5 (3) involving a State Party which has not made such a declaration”.

34. The effect of the foregoing two provisions, read together, is that direct access to the Court by an individual is subject to the deposit by the respondent State of a special declaration authorizing such a case to be brought before the Court.

35. As mentioned earlier, the Applicant in his submission averred that “the Republic and State of Senegal and the Republic and State of Chad, both members of the African Union, are Parties to the Protocol and have, respectively, made the declaration as *per* Article 34 (6) of the Protocol accepting the competence of the Court to receive cases from individuals”. For its part, Senegal in its statement of defence “strongly asserted that it did not make any such declaration accepting the jurisdiction of the African Court on Human and Peoples’ Rights to hear applications brought by individuals”.

36. In order to resolve this issue, the Court requested the Chairperson of the African Union Commission, depository of the Protocol, to forward to it a copy of the list of the States Parties to the Protocol that have made the declaration prescribed by the said Article 34 (6). Under covering letter dated 29 June 2009, the Legal Counsel of the African Union Commission transmitted the list in question, and the Court found that Senegal was not on the list of the countries that have made the said declaration.

37. Consequently, the Court concludes that Senegal has not accepted the jurisdiction of the Court to hear cases instituted directly against the country by individuals or non-governmental organizations. In the circumstances, the Court holds that, pursuant to Article 34 (6) of the Protocol, it does not have jurisdiction to hear the application.

38. The Court notes, in this respect, that although presented by Senegal in its written statement of defence as an objection on the ground of “inadmissibility”, its first preliminary objection pertains, in reality, to lack of jurisdiction by the Court.

39. The Court further notes that the second sentence of Article 34 (6) of the Protocol provides that “it shall not *receive* any petition under Article 5 (3) involving a State Party which has not made such a declaration” (emphasis added). The word “receive” should not however be understood in its literal meaning as referring to “physically receiving” nor in its technical sense as referring to “admissibility”. It should instead be interpreted in light of the letter and spirit of Rule 34 (6) in its entirety and, in particular, in relation to the expression “declaration accepting the competence of the Court to receive applications [emanating from individuals or NGOs]” contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned Rule 34 (6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned State Party, and to set forth the consequences of the absence of such a deposit by the State concerned.

40. Since the Court has concluded that it does not have jurisdiction to hear the case, it does not deem it necessary to examine the question of admissibility.

41. Each of the parties having made submissions regarding costs, the Court will now pronounce on this issue.

42. In his pleadings, the Applicant prayed the Court, “with respect to the costs and expenses of the case”, to grant him “the benefit of free proceedings”.

43. In its statement of defence, Senegal, on the other hand, prayed the Court to “order Mr. Michelot Yogogombaye to bear the cost incurred by the State of Senegal in this case”.

44. The Court notes that Rule 30 of the Rules states that “Unless otherwise decided by the Court, each party shall bear its own costs”.

45. Taking into account all the circumstances of this case, the Court is of the view that there is no reason for it to depart from the provisions of Rule 30 of its Rules.

46. In view of the foregoing,

THE COURT, unanimously:

- 1) *Holds* that, in terms of Article 34 (6) of the Protocol, it has no jurisdiction to hear the case instituted by Mr. Yogogombaye against Senegal;
- 2) *Orders* that each party shall bear its own costs.

Done at Arusha, this fifteenth day of December in the year Two Thousand and Nine in French and English, the French text being authentic.

Signed:

- Jean MUTSINZI, President
- Sophia A.B. AKUFFO, Vice-President
- Justina K. MAFOSO-GUNI, Judge
- Bernard M. NGOEPE, Judge
- Hamdi Faraj FANNOUSH, Judge
- Modibo Tounty GUINDO, Judge

- Gérard NIYUNGEKO, Judge

- Fatsah OUGUERGOUZ, Judge

- Joseph N. MULENGA, Judge

- and Aboubakar DIAKITE, Registrar

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