

001/11_SO_JM Femi Falana v. The African Union (Separate Opinion - Jean Mutsinzi)

African Court on Human and Peoples' Rights

Twenty Fifth Ordinary Session
(11- 26 June 2012)

Separate Opinion By Judge Jean Mutsinzi

Joined to: the Judgement of the Court in Application No. 001/2011

Femi Falana versus the African Union

1. According to Article 28 (7) of the Protocol which established the African Court on Human and Peoples' Rights "if the judgment of the Court does not represent, in whole or in part the unanimous decision of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion".
2. The Judgement adopted by the majority of the Members of the Court, was as follows "Declares that, pursuant to Articles 5(3) and 34(6) of the Protocol, read together, it does not have the jurisdiction to hear the Application filed by Mr. Femi Falana against the African Union".
3. In that Judgement, I agree with the conclusion that the Court does not have the jurisdiction to hear the Application filed by MR. FEMI FALANA against the AFRICAN UNION.
4. My disagreement stems from the legal basis for said lack of jurisdiction, which in my opinion, is not addressed in Articles 5(3) and 34(6) of the Protocol.
5. In fact, the said articles provide as follows: "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" (Article 5 (3)), "At the time of the ratification of this Protocol or at 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", (Article 34(6)).
6. A combined reading of the provisions above, points to the fact that they referred to applications filed by individuals or non-governmental organizations against States parties, in which case, the question raised is whether the Respondent State has made the declaration accepting the jurisdiction of the Court to hear cases brought before it by individuals or non-governmental organizations, whereas, the African Union is neither a State nor a State party to the Protocol and, consequently cannot make such declaration as provided for in Articles 5(3) and 34(6) of the Protocol.
7. For my part, I hold the view that the basic Issue that needs to be resolved and which would dictate subsequent action is one of ascertaining whether, as in the instant case, non-State entities may be brought before the Court as respondents.
8. It is my opinion that the provisions of the Protocol as a whole and Articles 3, 30 and 34 (1, 4), in particular, show that, the Respondent before this Court can only be a State party, In that regard, the operative paragraph of the Judgment, ought to have been as follows:

"Declares, that in accordance with the Protocol, only State parties may be brought before the Court as respondents for allegations of Human Rights violations and that, accordingly, the Court does not have the jurisdiction to entertain the Application filed by Mr. FEMI FALANA against The AFRICAN UNION".

- Signed:

- J. MUTSINZI, Judge

- R. ENO, Registrar