SEPARATE OPINION OF JUDGE FATSAH OUGUERGOUZ

1. I am in agreement with the views of my colleagues in regard to the conclusions reached by the Court on the question of its jurisdiction and on that of the costs and expenses of the case, and consequently I have voted in favor of the said conclusions. However, I believe that these two issues deserved to be developed in a more comprehensive manner.

2. The Applicant indeed has the right to know why it has taken nearly one year between the date of receipt of his application at the Registry and the date on which the Court took its decision thereon. Senegal, on the other hand, has the right to know why the Court chose to make a solemn ruling on the application by means of a Judgment, rather than reject it *de plano* with a simple letter issued by the Registry. The two Parties also have the right to know the reasons for which their prayers in respect of the costs and expenses, respectively, of the case, have been rejected; the Applicant should also know why his prayer in this regard was addressed on the basis of Rule 30 of the Interim Rules of the Court (hereinafter referred to as the "Rules") on Legal Costs, whereas the Court could have equally, if not exclusively, treated this prayer on the basis of Rule 31 on Legal Assistance.

3. However, only the question of the jurisdiction of the Court seems to me to be sufficiently vital, to lead me to append to the Judgment, an *exposé* of my separate opinion in regard to the manner in which this question should have been treated by the Court.

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4. In the present case, the question of the jurisdiction of the Court is relatively simple. It is that of the Court's "personal jurisdiction" or "jurisdiction *ratione personae*" in respect of applications brought by individuals. This is governed by Article 5 (3) 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 "Protocol") and Article 34 (6) of the said Protocol which set forth the modalities by which a State shall accept the said jurisdiction.

5. However, paragraph 31 of the Judgment states, not without ambiguity, 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.

6. If the only issue referred to here is that of the jurisdiction of the Court, then the expression "*inter alia*" introduces confusion because it lends itself to the understanding that the said jurisdiction is predicated on one or several other conditions that have not been spelt out. However, in my view, there are no other conditions to the jurisdiction of the Court in the case than that which has been specified in Article 34 (6) of the Protocol, reference to which was made in Article 5 (3).

7. Nevertheless, if the expression *"inter alia"* also refers to the conditions for admissibility of the application, there would no longer be any logical linkage between paragraph 31 and paragraph 29 of the Judgment in which the Court indicated that it would start by considering the question of its jurisdiction. It would be particularly difficult to understand the meaning of paragraph 39 in which the Court gives its interpretation of the word "receive" as

used in Article 34 (6) of the Protocol. In paragraph 39, the Court indeed points out that the word "receive" as applied to the application should not be understood in its literal meaning as referring to "physically receiving" nor in its technical sense as referring to "admissibility"; rather it refers to the "jurisdiction" of the Court to "examine" the application; that is to say, its jurisdiction to hear the case, as it states very clearly in paragraph 37 *in fine* of the Judgment.

8. Read in light of paragraph 39 of the Judgment, paragraph 31 should therefore be interpreted as referring exclusively to the question of the Court's jurisdiction. Since the meaning of the expression *"inter alia"* is unclear, the Court had better do away with it.

9. Even if the expression is removed therefrom, paragraph 31 of the Judgment, and also paragraph 34 thereof, pose the question of the Court's jurisdiction in terms that do not faithfully reflect the Court's liberal approach to the treatment of the application.

10. In the foregoing two paragraphs of the Judgment, the question of the Court's jurisdiction is indeed posed by the exclusive reference to Article 5 (3) and Article 34 (6) of the Protocol. However, Article 5 essentially deals with the question of "Access to the Court" as the title clearly indicates. Thus, the question of the personal jurisdiction of the Court in this case cannot but receive the response set forth in paragraph 37 of the Judgment, i.e., that since Senegal has not made the declaration provided for in Article 34 (6) of the Protocol, the Court has no jurisdiction to hear cases instituted directly against this State by individuals. This ruling could have been made expeditiously in terms of the preliminary consideration of the Court's jurisdiction as provided for in Rule 39 of the Rules.

11. Though of fundamental importance to the question of the personal jurisdiction of the Court, Article 5 (3) and Article 34 (6) of the Protocol should be read in their context, i.e. in particular in light of Article 3 of the Protocol entitled "Jurisdiction" of the Court.

12. Indeed, although the two are closely related, the issues of the Court's "jurisdiction" and of "access" to the Court are no less distinct, as paragraph 39 of the Judgment in fact suggests[1]; it is precisely this distinction that explains why the Court did not reject *de plano* the application given the manifest lack of jurisdiction, by means of a simple letter issued by the Registry, and why it took time to rule on the application by means of a very solemn Judgment.

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13. The application was received at the Court Registry on 29 December 2008 and it was placed on the general list as No. 001/2008. The application was served on Senegal on 5 January 2009; and on the same day, the Chairperson of the African Union Commission was informed about the filing of the application and through him the Executive Council and the other Parties to the Protocol.

14. Thus, upon submission, the application was subject to a number of procedural acts including its registration on the general list of the Court[2] and its service on Senegal.

15. For their part, applications or communications addressed to the African Commission on Human and Peoples' Rights[3], the defunct European Commission of Human Rights[4], the

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Inter-American Commission of Human Rights[5], the United Nations Human Rights Committee[6] or the International Court of Justice, for example[7], undergo a process of vetting prior to being registered or served on the States against which they were instituted.

16. In this case, the application did not go through this initial procedural phase of vetting. It was treated in the same way as the applications brought before the International Court of Justice before 01 July 1978, date of entry into force of its new Rules[8]. Prior to that date, all cases brought before the Court, including those instituted against States that had not previously accepted the Court's jurisdiction by making the optional declaration accepting the compulsory jurisdiction provided for in Article 36 (2) of the Statute, were indeed placed on the general list and served on the States against which they were instituted, and on the United Nations Secretary General and, through him, on all the other members of the Organization.

17. As indicated in the foregoing paragraph 13, procedural acts similar to the aforesaid were undertaken in connection with Mr. Yogogombaye's application; this was, *inter alia*, served on Senegal under covering letter dated 5 January 2009.

18. Senegal acknowledged receipt thereof by letter dated 10 February 2009 in which it also transmitted the names of those to represent it before the Court. At that stage, Senegal could have limited itself to indicating that it had not made the declaration provided for in Article 34 (6) of the Protocol and that, consequently, the Court had no jurisdiction to deal with the application on the grounds of the provisions of Article 5 (3) of the Protocol. However, by notifying the Court of the names of its representatives, it gave room for the suggestion that it did not exclude appearing before the Court and of participating in its proceedings, with doubts as to the object of its participation: to contest the Court's jurisdiction, contest the admissibility of the application or to defend itself on the merits of the case.

19. By second letter dated 17 February 2009, Senegal requested the Court to extend the time limit for submission of its observations to "enable it to better prepare a reply to the application". By so doing, Senegal signaled its intention to comply with the provisions of Rule 37 of the Rules according to which "the State Party against which an application has been filed shall respond thereto within sixty (60) days provided that the Court may, if the need arises, grant an extension of time". Even in this letter, Senegal did not exclude the eventual acceptance of the Court's jurisdiction. Still at this stage, it could have put up the argument that it has not made the declaration provided for in Article 34 (6) of the Protocol and, on that ground, contested the jurisdiction of the Court.

20. Even though it would not have made the aforementioned declaration, Senegal, by its attitude, left open the possibility, however slim, that it might accept the jurisdiction of the Court to deal with the application.

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21. The fundamental principle regarding the acceptance of the jurisdiction of an international Court is indeed that of consent, a principle which itself is derived from that of the

sovereignty of the State. A State's consent is the condition *sine qua non* for the jurisdiction of any international Court[9], irrespective of the moment or the way the consent is expressed[10].

22. This principle of jurisdiction by consent is also upheld by the Protocol. Thus, in contentious matters, the Court can exercise jurisdiction only in respect of the States Parties to the Protocol. The scope of the Court's jurisdiction in such cases and the modalities of access thereto are defined in Articles 3 and 5, respectively, of the Protocol.

23. By becoming Parties to the Protocol, member States of the African Union *ipso facto* accept the jurisdiction of the Court to entertain applications from other States Parties, the African Commission or African Inter-governmental Organizations. The jurisdiction of the Court in respect of applications from individuals or Non-Governmental Organizations against States Parties is not, for its part, automatic; it depends on the optional expression of consent by the States concerned.

24. This is provided for in Article 34(6) of the Protocol which states 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.

As it is drafted, this provision raises two questions:

25. The first is the meaning to give to the word "shall" used in the first sentence which suggests that filing of the declaration by the State Party is an "obligation" for the State Party and not simply "a matter of choice".

26. Understood in this way, Article 34 (6) would make it obligatory for State Parties to make such a declaration after depositing their instruments of ratification (or accession)[11]. This prescription does not however have any real legal effect because it does not set any time limit. It also does not make much sense when read in light of its context[12] and particularly of Article 5 (3) and the second sentence of 34 (6) which states that "The Court shall not receive any petition under Article 5 (3) involving a State Party which has not made such a declaration". It can thus be said in conclusion that the filing of the declaration is optional; this conclusion is corroborated by an analysis of the "travaux préparatoires" of the Protocol.[13]

27. The second question raised in Article 34 (6) is that of whether the filing of the optional declaration by States Parties is the only means of expressing their recognition of the jurisdiction of the Court to deal with applications brought against them by individuals.

28. In this regard, it should first be noted that Article 34 (6) does not require that the filing of the optional declaration be done "before" the filing of the application; it simply provides that the declaration may be made "at the time of ratification or any time thereafter". Nothing therefore prevents a State Party from making the declaration "after" an application has been introduced against it. In accordance with Article 34 (4) of the Protocol, the declaration, just as ratification or accession, enters into force from the time of submission and takes effect from

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this date. Senegal was therefore free to make such a declaration after the application was introduced.

29. If a State can accept the jurisdiction of the Court by filing an optional declaration "at any time", nothing in the Protocol prevents it from granting its consent, after the introduction of the application, in a manner other than through the optional declaration.[14]

30. Therefore, the second sentence of Article 34 (6) must not, as the first sentence, be interpreted literally. It must be read in light of the purposes and goals of the Protocol and, in particular, in light of Article 3 entitled "Jurisdiction" of the Court. Indeed, Article 3 provides in general manner that: "the jurisdiction of the Court shall extend to all cases and disputes submitted to it"; it also provides that "in the event of dispute as to whether the Court has jurisdiction, the Court shall decide". It therefore lies with the Court to determine in all sovereignty the conditions for the validity of its seizure; and do so only in the light of the principle of consent.

31. Consent by a State Party is the only condition for the Court to exercise jurisdiction with regard to applications brought by individuals. This consent may be expressed before the filing of an application against the State Party, with the submission of the declaration mentioned in Article 34 (6) of the Protocol. It may also be expressed later, either formally through the filing of such a declaration, or informally or implicitly through *forum prorogatum.*[15]

32. *Forum prorogatum* or "prorogation of competence" may be understood as the acceptance of the jurisdiction of an international Court by a State after the seizure of this Court by another State or an individual, expressly or tacitly through decisive acts or an unequivocal[16] behavior. It was in particular this possibility that the letters issued by Senegal dated 10 and 17 of February 2009b led the Court to foresee in this case.

33. Up to 9 April 2009, the date on which the Registry received the written observations of Senegal, there was the possibility that Senegal might accept the jurisdiction of the Court. It was only on this date that it became unequivocally clear that Senegal had no intention of accepting the Court's jurisdiction to deal with the application.

34. It was therefore up to the Court to take into account Senegal's refusal to consent to the jurisdiction of the Court to deal with the application and to draw the consequences thereof by putting an end to the matter and removing the case from the general list.

35. Under the former Rules of the International Court of Justice (before 01 July 1978), when a case was brought against a State which has not previously accepted the jurisdiction of the Court by filing the optional declaration and such a State did not accept the Court's jurisdiction in regard to the case after having been invited to do so by the Applicant State, such a case was closed by the issuance of a succinct order.[17] In the European Court of Human Rights where the problem of jurisdiction occurs less frequently than that of admissibility of

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applications, when there is no serious doubt as to the inadmissibility of an application, the corresponding decision is notified to the applicant through a simple letter. [18]

36. In the present case, Senegal having formally raised preliminary objections in its "statement of defense"[19] dated 9 April 2009, the Court deemed it necessary to comply with the provisions of Rule 52 (7) of its Rules which stipulates that "The Court shall give reasons for its ruling on the preliminary objection"[20].

37. However, consideration by the Court of Senegal's preliminary objections required that it addresses the question of it's jurisdiction in a more comprehensive manner by developing in particular the possibility of a *forum prorogatum*. This possibility is all the more suggested in paragraph 37 of the Judgment where the Court, on the grounds of its ruling that Senegal has not made the optional declaration, concluded that the said State, on that basis, "has not accepted the jurisdiction of the Court to hear cases instituted directly against this State by individuals or non governmental organizations".

38. Nevertheless, it is this possibility of a *forum prorogatum*, however slight, that explains why the application of Mr. Yogogombaye was not rejected right after 10 February 2009; and it is the filing of preliminary objections by Senegal which explains why the Court did not close the case in a less solemn manner by issuing an order or by simple letter by the Registry.

39. The submission of preliminary objections by Senegal may, in turn, be explained by scrupulous compliance by this State with the provisions of Rule 37 and 52 (1) of the Rules.

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40. Today, the question is whether "all" applications filed with the Registry should be placed on the Court's general list, notified to the States against which they are directed, and above all, as provided for under Article 35 (3) of the Rules, notified to the Chairperson of the African Union Commission and, through him, to the Executive Council of the Union, as well as to all the other States Parties to the Protocol. As a judicial organ, once the Court receives an application, it has the obligation to ensure, at least in a *prima facie* manner, that it has jurisdiction in the matter[21]. Certainly, here lies the object of preliminary consideration by the Court of its jurisdiction as provided for in Rule 39 of its Rules. A selection should then be made between individual applications in respect of which, at a glance, the Court has jurisdiction and those in respect of which it has not, which is the case when the State party concerned has not made the optional declaration. In this latter hypothesis, the application should be rejected *de plano* by simple letter by the Registry. It could eventually be communicated to the State Party concerned, but it is only if such a State accepts the jurisdiction of the Court that the application could be placed on the Court's general list[22] and notified to the

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other States Parties. The idea is to avoid giving untimely or undue publicity to individual applications in respect of which the Court clearly lacks jurisdiction.

41. In this regard, it is important to point out that the potential authors of individual applications can in the present circumstances experience difficulties knowing the situation of an African State vis-à-vis the optional declaration. Indeed, only the list of the States Parties to the Protocol is being published on the African Union Commission website and this list does not mention the States that have made the optional declaration. It would therefore be desirable that the list of the States that have made the said declaration be similarly published on the website for the purposes of bringing the information to the knowledge of individuals and non governmental organizations.

42. The Court, for its part, cannot be satisfied with such publication as it does not have official value, and is not a "real time" reflection of the status of participation in the Protocol and in the system of the optional declaration. To date, the list of States Parties to the Protocol and that of the States Parties that have made the optional declaration, while being of primary interest to the Court, are not automatically notified to the Court by the Chairperson of the African Union Commission, depository of the Protocol. The Protocol does not oblige the depository to communicate declarations to the Court Registry, its Article 34 (7) contenting itself with providing that declarations should be deposited with the Chairperson of the African Union Commission "who shall transmit copies thereof to the State parties". The Statute of the International Court of Justice[23] and the American Convention of Human Rights[24], for their part, provide that the depositories of the optional declarations accepting the compulsory jurisdiction of the International Court of Justice and the Inter-American Court, respectively, should file copies thereof in the Registries of the said courts. Although the relevant department of the African Union Commission is not legally bound to do so, it would also be desirable that in future the said department inform the Court of any update of the two above-mentioned lists.

Fatsah Ouguergouz

Aboubakar Diakité
Registrar

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