

INTRODUCTORY NOTE TO HOSSOU V. BENIN
(JUDGMENT ON JURISDICTION) (AFR. CT. H.P.R.)
BY SCOTT WOODRUFF LYONS*
[December 2, 2021]

On March 24, 2020, Benin notified the African Union Commission that it was withdrawing from the optional aspect of the African Court on Human and Peoples' Rights (Court) that entitled non-governmental organizations and individuals to bring cases directly to the Court.¹ Benin withdrew due to perceived interference by the Court in a domestic commercial transaction and numerous decisions against Benin involving political opposition, with the state noting "serious incongruities."² Benin also indicated its intention to attempt to reform the Court at the next African Union Summit.

At issue are Articles 5(3) and 34(6) of the Protocol that founded the Court (Protocol).³ Article 5(3) states that "The Court *may* entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it," and Article 34(6) notes that "the State *shall* make a declaration accepting the competence of the Court to receive cases under article 5(3)."⁴ Benin had originally deposited a declaration on February 8, 2016, accepting the extended jurisdiction of the Court. The Protocol is silent about processes and lawfulness of withdrawing a declaration. In *Hossou v. Benin*, two Béninois jurists brought a case against Benin challenging the withdrawal of Benin's declaration that previously permitted the Court's extended jurisdiction.⁵

The *Hossou* decision was based on well-established international law and previous decisions of the Court. The ruling of the Court, in a 10:1 decision, rested on its finding in *Umuhoza v. Rwanda*⁶ that the Vienna Convention on the Law of Treaties⁷ does not apply to withdrawal from an optional declaration by a state consenting to certain jurisdiction of the court.⁸ Therefore, any state can withdraw its previous "declaration" submitted under Article 34(6) of the Protocol without withdrawing from the overall treaty to join the Court.⁹ The Court in *Umuhoza* only imposed narrow limitations on withdrawal. It decided that international human rights norms, even though not discussed anywhere in the Protocol, made clear that the withdrawal of the consent declaration could not apply retroactively to shut down existing cases and, further, that the withdrawal initiated a one-year notice period until it went into effect.¹⁰

The claim in *Hossou v. Benin* was noteworthy and innovative in two respects. The first is that the Applicants in the case did not contend a human rights harm independent from the withdrawal of jurisdiction that limits individuals and nongovernmental organizations from bringing cases against Benin in the future. Previous cases contesting withdrawal of declarations involved an underlying contestable human rights abuse for which the individual sought a forum for redress, such as in *Umuhoza*, in which the appellant filed a claim contending she was imprisoned for her leadership role in a political opposition party before Rwanda's attempted withdrawal. In *Hossou*, the Applicants claimed the harm was the withdrawal of jurisdiction in and of itself as a violation of international human rights norms, and they did not identify an independent human rights abuse that they as individuals suffered from by the government of Benin. The Applicants were entirely focused on preventing the withdrawal of jurisdiction. Moreover, the Applicants raised the novel issue that, by preventing redress for individuals and NGOs in a regional judicial system after prejudice in a domestic system, there was a violation of the human right of access to justice by Benin.¹¹ While the issue of access to justice against a state raises fundamental human rights concerns, the Court's ruling failed to substantively address that issue, and only noted that the matter was "being discussed before it pertains to the right accorded the States," implying that it did not need to address the rights of individuals.¹² Therefore, the Court managed to avoid answering a key question that originally justified the existence of regional human rights courts in the first place, and only answered the question of whether the withdrawal process was lawful under international law.

The dissenting opinion, while focused extensively on the higher standard to protect human rights and whether states should have the ability to withdraw their declaration, also insufficiently addressed whether a lack of access to a

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judicial remedy in a regional court, after having no domestic remedy, constituted a violation of human rights. The dissent notes that the region's fundamental human rights document, the African Charter on Human and Peoples' Rights, in Article 7, conveys a "right to an appeal to competent national organs against acts of violating his fundamental rights,"¹³ and that the Court's mandate is to resolve all disputes related to that Charter.¹⁴ This does not definitively answer whether the absence of an ability to resolve a human rights abuse in a regional court due to withdrawal of jurisdiction therefore neuters the purpose of the Court to ensure access to justice and enforce the right to appeal. The dissent does, however, express its concern regarding the Court's decision regarding the justiciability of human rights.

When the Court came into existence, commentary predicted that the design of the Court would create limitations on individuals and NGOS accessing justice,¹⁵ as that was purposefully designed into the charter of the Court. The design included a two-step process of first joining the Court and then submitting an optional jurisdiction for individuals and NGOs. This differs significantly from the European Court of Human Rights, which provides for NGOs and individuals to bring cases for violations of human rights without requiring states to opt in for jurisdiction, and goes even further by noting that the parties to the relevant convention and protocols "undertake not to hinder in any way the effective exercise of this right."¹⁶ For both the European Court and the African Court, the majority of cases are brought by individuals who suffered perceived harm. Benin is one of several states to recently withdraw from the optional jurisdiction, and the majority of African states never acceded to the optional jurisdiction in the first place.¹⁷ Therefore, the goal of the African Court to be a complete venue to address human rights abuses in Africa is arguably still very limited. African individuals are witnessing a small retrenchment from the Court's successful decisions reaffirming individual rights regarding fair trials, political participation, and freedom of expression. More importantly, instead of states attempting to prevent future human rights violations, they are electing to withdraw from the optional jurisdiction.


Since the *Hossou* case was decided, the Court has reaffirmed the one-year notice aspect of the *Umuhoza* case in application to Benin. In *Adelakoun v. Benin*,¹⁸ the Court confirmed that Benin's withdrawal statement of March 24, 2020 was officially deposited on March 25, 2020, and came into effect on March 26, 2021. Therefore, the Applicants in *Adelakoun* successfully filed for redress on March 22, 2021, for the claimed human rights abuse of shutting down the internet on the day of legislative elections. This was just in time, and the Applicants were therefore entitled to have their claim as individuals adjudicated.

ENDNOTES

- 1 See African Court of Human Rights, Declarations, <https://www.african-court.org/wpafc/declarations>; see also *Hossou v. Benin* (Ruling, Provisional Measures), App. No. 016/2020, 1 Afr. Ct. L. Rep. __ (Sept. 25, 2020) ¶ 2, <https://www.african-court.org/cpmt/storage/app/uploads/public/61af14/11d/61af1411d6766952110768.pdf>.
- 2 See Segnonna Horace Adjolohoun, *A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights*, 20 AFR. H.R.J. 1, 12–16 (2020) (discussing the justification offered by each country that withdrew, including Benin); see also *Retrait du Bénin de la CADHP – Déclaration du ministre de la Justice et de la Législation*, <https://www.gouv.bj/actualite/635/retrait-benin-cadhpcadhp—declaration-ministre-justice-legislation/> (in French).
- 3 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998, Org. Afr. Unity [OAU] (entered into force on June 25, 2004) [hereinafter the Protocol].
- 4 Protocol, art. 5(3) and 34(6) (emphases added).
- 5 *Hossou & Adelakoun v. Benin*, (Judgment) App. No. 016/2020, 1 Afr. Ct. L. Rep. __ (Dec. 2, 2021) ¶ 1.
- 6 *Umuhoza v. Rwanda* (Jurisdiction), App. No. 003/2014, 1 Afr. Ct. L. Rep. 540 (June 3, 2016).
- 7 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).
- 8 *Hossou*, *supra* note 6, ¶¶ 27–33, citing *Umuhoza* paras 54–59.
- 9 *Hossou* para 32.
- 10 *Umuhoza*, *supra* note 7, ¶¶ 65–68.
- 11 *Hossou*, *supra* note 6, ¶ 5.
- 12 *Id.* ¶ 34.
- 13 See *Hossou & Adelakoun v. Benin*, (Opinion Dissidente) App. No. 016/2020, 1 Afr. Ct. L. Rep. __ (Dec. 2, 2021) ¶ 28 (translated from French); see also African Charter on Human and Peoples' Rights, art. 7, Jun. 27, 1981, 21 I.L.M. 58 (1982).
- 14 See *Opinion Dissidente*, *supra* note 13, ¶ 29; see also Protocol, *supra* note 4, art. 3.

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- 15 See, e.g., Scott Lyons, *The African Court on Human and Peoples' Rights*, ASIL INSIGHTS (Sept. 19, 2006), <https://www.asil.org/insights/volume/10/issue/24/african-court-human-and-peoples-rights>.
- 16 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 34., Nov. 4, 1950, E.T.S. No. 005 (entered into force Sept. 3, 1953).
- 17 See Status List, https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS.pdf. There are fifty-four states in Africa. As of September 1, 2022, of the thirty-three African states that have ratified and joined the African Court on Human and Peoples' Rights, only twelve submitted declarations opting into the additional jurisdiction under Article 34(6), and four (Rwanda, Tanzania, Benin, and Cote d'Ivoire) have subsequently withdrawn their declarations.
- 18 Adalakoun v. Benin (Ruling, Provisional Measures), App. No. 012/2021, 1 Afr. Ct. L. Rep. __ (Mar. 24, 2022).

HOSSOU V. BENIN (JUDGMENT ON JURISDICTION) (AFR. CT. H.P.R.)*
[December 2, 2021]

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIA.O AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

THE MATTER OF
GLORY C. HOSSOU AND LANDRY A. ADELAKOUN

V.

REPUBLIC OF BENIN

APPLICATION NO. 016/2020

RULING
2 DECEMBER 2021



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The Court composed of: Imani D. ABOUD, President, Blaise TCHIKAYA, Vice-President; Ben KIOKO, Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BEN-SAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO – Judges, and Robert ENO, Registrar.

In the Matter of:

Glory C. HOSSOU and LANDRY A. ADELAKOUN

Self-represented

Versus

REPUBLIC OF BENIN

Represented by:

Iréné ACLOMBESSI, the Judicial Officer of the Treasury Headquarters of the General

Directorate of Treasury and Public Accounting.

after deliberation,

Renders the following Ruling:

I. THE PARTIES

1. Glory C. Hossou and Landry A. Adalakoun (hereinafter referred to as “the Applicants”) are nationals of the Republic of Benin, jurists by profession and residents of Abomey-Calavi in Benin. They challenge the Republic of Benin’s withdrawal of the Declaration deposited under Article 34(6) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court (hereinafter “the Protocol”).

2. The Application is filed against the Republic of Benin (hereinafter referred to as “the Respondent State”), which became a party to the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”) on 21 October 1986 and to the Protocol on 22 August 2014. On 8 February 2016, the Respondent State deposited the Declaration prescribed under Article 34(6) of the Protocol (hereinafter referred to as “the Declaration”) through which it accepted the jurisdiction of the Court to receive applications from individuals and Non-Governmental Organizations. On 25 March 2020, the Respondent State deposited with the Chairperson of the African Union Commission (hereinafter referred to as “the Commission”) an instrument withdrawing the said Declaration. The Court held that this withdrawal has no bearing, on the one hand, on pending cases, and on the other hand, on new cases filed before the withdrawal came into effect, that is, on 26 March 2021.¹

II. SUBJECT OF THE APPLICATION

A. FACTS OF THE MATTER

3. On 7 May 2020, the Applicants filed an Application before this Court to challenge the Respondent State’s withdrawal of its Declaration accepting the jurisdiction of the Court to receive applications from individuals and

NGOs having observer status before the African Commission on Human and Peoples' Rights. In the Application, the Applicants also pray the Court to order provisional measures.

4. The Applicants state that on 8 February 2016, the Respondent State deposited the Declaration provided for in Article 34(6) of the Protocol allowing individuals and NGOs having observer status before the African Commission on Human and Peoples' Rights to seize the Court directly after exhausting local remedies. The Applicants aver that the Respondent State withdrew the Declaration following a written notice to the African Union Commission dated 25 March 2020.

B. ALLEGED VIOLATIONS

5. The Applicants allege that, in withdrawing the Declaration, the Respondent State:
- i. Violates the Charter and international human rights standards.
 - ii. Prevents its citizens from directly accessing the regional judicial system to initiate proceedings and seek redress for the prejudice they have suffered within their domestic system, which constitutes a regression of rights.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

6. The Application instituting proceedings, together with the request for provisional measures, were received at the Registry on 7 May 2020 and served on the Respondent State on 8 July 2020.

7. The Respondent State was given fifteen (15) days, from the date of receipt, to respond to the request for provisional measures and sixty (60) days, from 1 August 2020, to file its Response to the main Application.²

8. On 26 August 2020, the Respondent State responded to the request for provisional measures.

9. On 25 September 2020, the Court issued a ruling dismissing the request for provisional measures.

10. On 8 October 2020, the Respondent State filed its Response to the main Application and this was served on the Applicants on 19 October 2020 to file the Reply within thirty (30) days of receipt. On 25 November 2020 the Applicants were given an extension of thirty (30) days to file the Reply but they did not do so.

11. Pleadings were closed on 30 March 2021 and the Parties were duly notified.

IV. PRAYERS OF THE PARTIES

12. The Applicant prays the Court to:
- i. Declare the Application admissible;
 - ii. Find that the decision of the Respondent State withdrawing the Declaration violates the Charter and international human rights standards.
 - iii. Declare that the Respondent State violated the right of the citizens to access justice due to its decision to withdraw the Declaration.
13. The Respondent State prays the Court to:
- i. Find that that the Applicants are attempting, on the basis of their Application, to contest the right of the Republic of Benin to withdraw its Declaration of recognition of the Court's jurisdiction.
 - ii. Declare and rule that the Republic of Benin is a sovereign State with power to enter into or withdraw from any convention.
 - iii. Find that the Court lacks material jurisdiction to consider the matter;
 - iv. Verify that the Applicants did not sign the Application filed before this Court.

- v. Find that the lack of signature is a reason for inadmissibility, and consequently declare the Application inadmissible.
- vi. Find that the Applicants have not established how the withdrawal of the said Declaration by the Republic of Benin constitutes a human rights violation.
- vii. Find that the Declaration of jurisdiction is not mandatory and therefore cannot be adhered to.
- viii. Consequently, dismiss the Application.

V. JURISDICTION

14. Article 3 of the Protocol provides:

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

15. The Court notes that in terms of Rule 49(1) of the Rules; “[t]he Court shall conduct preliminary examination of its jurisdiction . . . in accordance with the Charter, the Protocol and these Rules”.

16. Based on the above-mentioned provisions, the Court must, for each application, conduct an assessment of its jurisdiction and dispose of objections thereto, if any.

17. The Court notes that in the instant case the Respondent State raises an objection based on the Court’s lack of material jurisdiction.

18. The Respondent State argues that it is a sovereign entity as can be inferred from basic principles of international law.

19. The Respondent State avers that in international law, and particularly in the area of accepting the jurisdiction of an international court, sovereignty is manifested in the principle of consent. The consent of a State is thus “a sine qua non of the jurisdiction of any international court, regardless of the time and the manner in which such consent is expressed.”³

20. The Respondent State affirms that it is clear from the instruments governing this Court, as well as its jurisprudence, that States are free to decide whether or not to accept the jurisdiction of the Court.

21. The Respondent State further affirms that the Declaration is optional and not binding on any State. Consequently, it cannot be imposed on those States that have recognised its jurisdiction to remain under it, otherwise such act would be an infringement of their sovereignty.

22. The Respondent State further asserts that while the Court, through its jurisprudence, has clarified its jurisdiction with regard to the question of the legal effects of the Respondent State’s withdrawal of the Declaration on the ongoing proceedings, it cannot admit the present application as this would be tantamount to rejecting the sovereign right of the Respondent State to withdraw its Declaration.

23. The Respondent State also submits that the subject matter of this Application falls outside the jurisdiction of the Court which, for the time being, can only decide the legal effects of the withdrawal. It is also the Respondent State’s submission that the Court is fully aware of this position as it has never prevented any State from withdrawing its Declaration.

24. The Applicants did not respond to the Respondent State’s objection based on the lack of material jurisdiction.

25. The Court notes that, in accordance with Article 3 of the Protocol, its jurisdiction “shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned”.

26. The Court also notes that to establish that it has material jurisdiction it suffices that the rights of which a violation is alleged are protected by the Charter or any other human rights instrument ratified by the Respondent State.⁴

27. In the instant case, the Applicants allege that the withdrawal by the State of Benin of the declaration deposited under Article 34 (6) of the Protocol constitutes a violation of human rights protected by the Charter. The Court will examine whether it has jurisdiction to decide if the withdrawal of the declaration constitutes a violation of human rights.

28. In determining the validity of the withdrawal of the declaration by the Respondent State, the Court will be guided by the relevant rules governing declarations accepting jurisdictions as well as by the principle of State sovereignty in international law, in addition to the relevant rules of the law of treaties contained in the Vienna Convention on the Law of Treaties of 23 May 1969 (hereafter The Vienna Convention).

29. As regards the application of the Vienna Convention, the Court notes that while the declaration made under Article 34(6) is provided for in the Protocol, which is governed by the law of treaties, the declaration in itself, is a unilateral act of the State not backed by the law of treaties.

30. Accordingly, the Court finds that the Vienna Convention does not apply to the declaration made under Article 34(6) of the Protocol.

31. Concerning the rules governing the acceptance of the jurisdiction of international courts, the Court notes that similar declarations are optional. This is true for the provisions on the recognition of the jurisdiction of the International Court of Justice⁵, the European Court of Human Rights prior to the coming into force of Protocol No. 11⁶ and the Inter-American Court of Human Rights⁷.

32. The Court notes that, by its nature, the declaration provided for in Article 34(6) is similar to those mentioned above. The reason is that although the Declaration is provided for under Article 34(6) of the Protocol, it is optional. Thus, as a unilateral act, the declaration is an act separable from the Protocol and can, therefore, be withdrawn without leading to a withdrawal or a denunciation of the Protocol.

33. The Court further considers that the optional nature of the declaration and its unilateral character derive from a basic principle of international law, that is, the principle of sovereignty of the States. Indeed, the latter prescribes that States are free to make commitments and that they retain the power to withdraw their commitments in accordance with the relevant rules of each treaty⁸.

34. The Court considers that the matter being discussed before it pertains to the a right accorded the States. This right is the very one by which the States ensure the establishment of mechanisms that complement their domestic human rights implementation mechanisms.

35. The Court finds that the Respondent State is entitled to withdraw the declaration that it deposited under Article 34(6).

36. Consequently, the Court upholds the objection based on lack of material jurisdiction raised by the Respondent State and declares that it has no material jurisdiction to hear the instant case.

VI. COSTS

37. None of the Parties made any prayer in respect of costs.

38. According to Article 32(2) of the Rules⁹, “Unless otherwise decided by the Court, each party shall bear its own costs”.

39. The Court notes that there is nothing in the circumstances of this case that warrants it to depart from this provision. The Court, therefore, decides that each party should bear its own costs.

VII. OPERATIVE PART

40. For these reasons:

THE COURT

By a majority of ten (10) to one (1), Judge *Chafika BENS AOULA dissenting*:

On jurisdiction

- i. *Upholds* the objection to its material jurisdiction;
- ii. *Declares* that it lacks jurisdiction.

On costs

- i. *Orders* each party to bear its own costs.

[Signatures]

In accordance with Article 28(7) of the Protocol and Rule 70(1) of the Rules of Procedure, the dissenting opinion of Judge Chafika Bensaoula is attached to this ruling.

Done at Dar es Salaam, this Second Day of December in the Year Two Thousand and Twenty-One in Arabic, English and French, the French text being authoritative.

[Seal]

ENDNOTES

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| 1 | <i>Houngue Eric Noudehouenou v. Republic of Benin</i> , ACtHPR, Application No. 003/2020, Ruling (Provisional measures), 5 May 2020, §§ 4–5 and Corrigendum of 29 July 2020. | 5 | <i>Seya and Johnson Nguza (Papi Kocha) v. United Republic of Tanzania</i> (merits) (23 March 2018) 2 AfCLR 287, § 35. |
| 2 | By a Press Release issued on 20 May 2020, in response to the COVID-19 Pandemic, the Court had suspended the computation of time limits for all matters, except provisional measures, from 1 May to 31 July 2020. | 6 | See Article 46 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and, before its entry into force, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which restructured the control mechanism established for this purpose. |
| 3 | Individual Opinion of Judge Fatsah OUGUERGOUZ, <i>Michelot Yogogombaye v. Senegal</i> (Jurisdiction) (15 December 2009) 1 AfCLR 1. | 7 | See Article 62 (1) of the American Convention on Human Rights. |
| 4 | See, for example, <i>Kalebi Elisamehe v United Republic of Tanzania</i> , ACtHPR, Application No. 028/2015, Judgment of 26 June 2020 (merits and reparations) § 18, <i>Armand Guehi v. United Republic of Tanzania</i> (merits and reparations) (7 December 2018) 2 AfCLR 477, § 33; <i>Nguza Viking (Babu</i> | 8 | <i>Ingabire Victoire Umuhoza v. Rwanda</i> (Jurisdiction) (3 June 2016) 1 RJCA 540, § 54–59. |
| | | 9 | Formerly Rule 30(2) of the Rules of 2 June 2010. |