DECISIONS OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: AN APPRAISAL OF SEPARATE OPINIONS OF JUDGE FATSAH OUGUERGOUZ

Written by ***Leonard Chimanda***

LL.B (University of Dar es salaam), LL.M (University of Dar es Salaam), Tutorial Assistant in Law-University of Dodoma

ABSTRACT

While some legal systems do not allow separate opinions of judges to be published there is a substantial number of countries and legal systems whose practices evidence the contrary. Human rights courts present a first-rate example of legal fields which allow separate opinions to be published. Taking into consideration of their nature and purpose, separate opinions are perceived as inferior to majority decisions since among other things they do not change or influence any modification to the majority decision however beautiful, persuasive and colourful they may be presented. It is however undisputed that separate opinions particularly in the human rights field for the purpose of this paper, have proved to be 'unsung heroes' as far as their contribution to the development of human rights principles and interpretations is concerned. This work aims at appraising the contribution that separate opinions by Judge Fatsah Ouguergouz have made in the development of human rights jurisprudence in the African Court on Human and Peoples' Rights. Such appraisal will be made from selected separate opinions that Judge Fatsah Ouguergouz gave in various decisions of the African Court on Human and Peoples Rights.

The work reveals that, separate opinions though do not form part of the Court's decision, they contribute in inter alia the clarification of the judgment and lay a basis for future legal change. The author opines that, despite the existence of two schools of thoughts debating on whether separate opinions should be published or not, the author recommends for their publication.

Keywords**:** Judge Fatsah Ouguergouz, Separate Opinions, Dissenting Opinions, African Court on Human and Peoples' Rights.

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INTRODUCTION

A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.[i]

The above cited excerpt is from Charles Evans Hughes. Hughes was an Associate Justice of the Supreme Court of the United States from 1910 to 1916 and Chief Justice of the United States from 1930 to 1941.[ii] He was also at one period in the 1920s a judge in the Court of Appeals of New York.[iii] While a judge in the Court of Appeals in 1927 he delivered six lectures at the University of Columbia. The excerpt which has been cited above comes from Hughes' second lecture concerning the Supreme Court in which he addressed not only the importance of dissenting opinions but also the importance of judicial civility.[iv] Dissenting opinions form one arm of separate opinions, the other arm being concurring opinions.

The present work appraises separate opinions of Judge Fatsah Ouguergouz in the development of human rights jurisprudence of the African Court on Human and Peoples' Rights (herein referred to as the Court). The paper will present some of his separate opinions and state the contribution they made in the development of human rights principles and interpretations. During the exposition, the work will also present schools of thoughts regarding the general significance of separate opinions.

In fact the selection of the separate opinions by Judge Fatsah Ouguergouz based on their contribution they made over interpreting some rules and principles which could not be understood by reading only the African Charter on Human and Peoples Rights (herein referred to as the Charter), Court Rules of Procedure or even the Protocol establishing the Court. Judge Fatsah Ouguergouz is preferably used in this paper because up to 2017 he had given 22 separate opinions; the number which was higher than any Judge of the Court at the time this paper was written. The author further believes that the separate opinions by Judge Ouguergouz are very vital in the development of not only the Court but also the interpretation of various human rights principles and rules.

Judge Fatsah Ouguergouz is a national of Algeria born in France. He is one amongst the inaugural Judges of the Court as he was firstly elected in 2006 for a four year term and thereafter re-elected in 2010 for a term of six years.[v] From 2012 to 2013 he served as Vice-

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President of the Court.[vi] He is currently no longer a Judge of the Court albeit at the time this paper was written he was a commissioner of the International Commission of Jurists (Geneva).[vii] Judge Ouguergouz is a PhD holder in International Law from the Graduate Institute of International Studies of Geneva, Switzerland. He is the author of various publications particularly in the field of international law.

Although he is no longer a Judge of the Court, his buoyant works he did in the Court still breathe and this work aims at appraising his separate opinions he gave in various judgments of the Court.

THE CONCEPT OF SEPARATE OPINION

From the onset it is important to note that an opinion as far as administration of justice is concerned refers to a position of a judge or a court on a particular framed legal issue in a case which includes an explanation of the reasoning behind such a position.[viii] The opinion subscribed by majority is what constitutes a court judgment while the minority opinion is what may constitute a separate opinion.[ix] A minority opinion may be written by either one judge or more than one judge. A judgment which is pronounced without any minority opinion is called a unanimous judgment.[x]

Therefore, a separate opinion is simply an opinion written separately from the majority judgment or decision of a court of law.[xi] This separately written opinion may either agree or disagree with the majority decision. It is on this basis there are two types of separate opinions.[xii] These are dissenting opinions and concurring opinions. While the former disagrees with the majority decision, the latter agrees with the majority decision but using different reasoning.[xiii] It should also be noted that, it is a possible for a judge who formed part of the majority decision to also write a separate concurring opinion. This is what is called pivotal concurring opinion.[xiv]

While all legal systems and countries allow separate opinions to be given by judges, not all countries and/or legal systems allow separate opinions to be published. There are some countries and legal systems which either limit separate opinions or totally prohibit them from being published. For instance, separate opinions are never published in Belgium, France, Italy, Luxembourg, Malta, The Netherlands and Austria.[xv] A keen observation may find out that, publication of separate opinions is more encouraged in countries which follow the Anglo-

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American legal system while are discouraged in countries which follow Civil Law legal system. In both systems there are reasons behind such positions.

However, in the African Court on Human and Peoples' Rights, concurring opinions are used strictly to mean separate opinion while dissenting opinions are treated as distinct from separate opinions. The author had limited time to conduct a research as to why that is a position. In this paper, the term "separate opinions" is used to mean either concurring opinion or dissenting opinion.

ARGUMENTS IN FAVOUR OF PUBLISHING SEPARATE OPINIONS

Various scholars have aired their views in subscription to the idea of publishing separate opinions. The following are some of the arguments made in support of publishing separate opinions:

One, it is argued that, publishing separate opinions acts as a pulse and compass of legal change.[xvi] That is to say, a separate opinion whether it be concurring or dissenting although do not form part of the court's decision, it may influence policy and law makers in the future. This is on the fact that, when the law makers are in a discussion concerning enacting a law whose content was once adjudicated, the consideration of these policy and law makers will not only base on the majority decision but also to any separate opinion that was made in that case.

Second, it is also argued that, albeit separate opinions do not form part of the court's decision, they tend to influence court's decisions in the future.[xvii] This is because, judges when deciding a case are not prohibited from subscribing to a separate opinion made in previous cases. Separate opinions are persuasive authorities when a court of law is faced with a task of determining on a particular legal issue. A court of law may depart from what was decided by the majority and decide to follow what was opined in a separate opinion.

Third, publishing separate opinions is viewed as a tool for safeguarding independence and freedom of expression of judges.[xviii] It is argued that every judge possesses autonomy from other judges forming part of the bench. He is therefore at liberty to depart in both reasoning and conclusion regarding a particular legal issue. It is therefore highly encouraged that separate opinions be published for the purpose of exposing to the public the intellectual integrity and

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position that a particular judge had concerning a particular legal issue.[xix] It is the protection of the intellectual integrity of a judge which brings in the concept of protecting judges' right to freedom of expression. As human beings, they have this human right of freedom of expression to enable them express their separate opinions regarding a legal issue.

Fourth, separate opinions may ensure clarity of the majority decision.[xx] Clarity is amongst the orthodox principles governing interpretation of law. The law is supposed to be clear and free of any ambiguities. Indeed, clarity as a point may be used as both a sword against publication of separate opinions and as a shield towards publication of separate opinions. Decisions of courts of law form part of the law and jurisprudence. It is therefore important to allow separate opinions, especially concurring opinions which do not disagree to the majority decision but they explain it more using a different reasoning which the judge thinks it is correct and right. It is argued that, a separate opinion acts as a corrective hoping that the court will mend the error in a later case.[xxi] Separate opinions serve to ensure that the court and its judges are free of errors and ambiguities. Such clarity should not be shadowed by the majority decision (the judgment). Justice Rush in *Purviance v. Angus*[xxii] uttered:

> *"However disposed to concur with my brethren in this cause, I have not been able to do it. Unanimity in courts of justice, though a very desirable object, ought never to be attained at the expense of sacrificing the judgment".*

Another argument which is put forward in favour of publishing separate opinion is the need to preserve collegiality and to pursue democracy and transparency. It is argued that, if the minority's opinions are never published, minority judges may develop a feeling of frustration since they become unable to make their views to the public.[xxiii] Non-publication of minority opinions may jeopardize the collegiality of the deliberations. Stemming from this point is the issue of transparency in a democratic society. The Court being a public institution should not hide the opinions given by minority judges who are trusted by the public to dispense justice. With this inclination, it becomes imperative to publish separate opinions.

ARGUMENTS AGAINST PUBLISHING SEPARATE OPINIONS

As it has already been presented, publication of separate opinions is not universally applied. In addition to countries and legal fields which prohibit publication of separate opinions, there are

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also scholars who also do not subscribe to publication of separate opinions. The following are some of the opinions which are raised against publication of separate opinions.

First and foremost is the need for muddying the clarity of law.[xxiv] It is a notorious position in law that decisions of courts forms part of the law. This is even more imperative in the common law legal system. The judgments are courts are not only read by lawyers but also by laymen who in most cases do not know the difference between a majority decision and a minority opinion. It is therefore obvious that when a judgment is published containing separate dissenting opinions it may come out unclear to the public regarding what is the actual position of the law. Clarity may therefore be used as both a sword against publication of separate opinions and a shield protecting the need for publication of separate opinions.

It is also argued by scholars that, allowing separate opinions to be published is like fracturing the court. The court as a unit ought to move together as an entity not only in terms of a court building but also in reaching to its conclusion. Judges forming part of the decision making entity in the court are supposed to be guided by a spirit of cooperation and collaboration.[xxv] It is reported that, in countries or legal systems where separate opinions are published, minority judges stop participating in the deliberation when they find that their position is not supported and wait for spitting what they have through a separate opinion.[xxvi] As a result, these minority judges stop working on improving the quality of the decision of the majority and focus on writing their separate opinions in order to make their opinions known to the public and being appreciated as the best opinions.[xxvii] It is of no surprising to find that in systems where separate opinions are forbidden like in the Court of Justice of the European Union, judges work closely together to improve the quality of the court's decision.

Separate opinions are also viewed by some scholars as diminishing authoritative voice of the majority.[xxviii] The Court being an entity with mass respect and trust ought to render decisions which are short of any doubt. Separate opinions which are written against the majority decision tend to undermine the authoritative character of the judgment and hence shake its credibility to the public who reads the judgment coupled with separate opinions. It has been of no surprising to find that loosing parties get their grounds of appeal from the reasoning that have been made in a separate opinion. It is argued that, allowing separate opinions to be published turns the administration of justice in courts to a show ("*justice-spectacle*").[xxix] As a result, individual judges may develop an individualistic canon being greedy to obtain mass publicity by adopting

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separate opinions against the majority decision. It is said that one amongst the reasons of prohibiting publication of separate opinions in the Court of Justice of the European Union was to protect its authority at the time when it was still a growing institution with totally new set of legislation.[xxx]

It is also argued against publication of separate opinions that non-publication of separate opinions is underscored by the need to ensure speediness of trials and economic costs.[xxxi] Indeed this argument is practical than theoretical. Allowing individual judges to write long and time-consuming separate opinions than participating in the improvement of the quality of the majority decision slows down the judicial deliberation process. Cost implications arise especially in courts which need to translate the decisions into more than one language. In this situation cost will be inevitable in terms of resources and time.

A DISCUSSION OF SELECTED SEPARATE OPINIONS OF JUDGE FATSAH OUGUERGOUZ IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

As it has been seen from the foregoing, there is still a debate on whether or not separate opinions should be published. The aim of this paper is not to dwell into discussing such a debate. The debate was just rose for the purpose of understanding various scholarship ideas on separate opinions. The aim of this paper is to appreciate the contribution of separate opinions by Judge Fatsah Ouguergouz in the jurisprudence of human rights. This section therefore, presents and discusses selected separate opinions of Judge Ouguergouz with a view of assessing the contribution they made in the interpretation of various rules and principles related to human rights.

A. In the Matter of Femi Falana v. The African Commission on Human and Peoples Rights (Application No. 019/2015)

In this case the judgment of the African Court on Human and Peoples Rights (the Court) was coupled with a separate concurring opinion by Judge Fatsah Ouguergouz. This separate opinion has been preferred by the author as it clarified the question whether the Court can reject *de plano* an application which from its face it is clear that the Court lacks jurisdiction. Rejecting

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an application *de plano* means dismissing an application administratively by a simple letter of a Registrar without judicially hearing it. Before dwelling into details of the separate opinion it is important to briefly state what happened in this case.

Summary of Facts

The Applicant who was an Advocate in Nigeria filed an application in the African Commission on Human and Peoples Rights (herein referred as the Commission) on 4th May, 2015. In that application, he alleged the government of Burundi for being responsible for systematic and widespread violations of human rights in Burundi. He alleged that the government of Burundi under President Pierre Nkurunziza undertook attacks against peaceful protesters, journalists and human rights activists who were protesting over President Nkurunziza's decision to contest for a third term. The Applicant requested the Commission to refer the matter to the African Court on Human and Peoples Rights (herein referred as the Court). Until 7th September, 2015 the Commission had not referred the matter to the Court. The Applicant therefore on 7th September, 2015 decided to lodge an application to the Court against the Commission. He alleged that, the delay or refusal by the Commission to refer the matter to the Court constituted denial of access of justice and remedies for the victims of human rights violations in Burundi. He therefore requested the Court to order the Commission to refer the claimed matter to it and personally hear the applicant against the State (the Republic of Burundi) pursuant to Rule 29 of the Court Rules and the inherent Jurisdiction of the Court.

Court's Observation

The Court upon deliberation dismissed the application. The court was of the view that it had no jurisdiction to hear and determine such an application. The Court observed that under Article 3 (1) of the Protocol it only had jurisdiction to hear and determine matters brought against a State.[xxxii] It was observed that, the Commission is not a State rather an organ of the African Union established under the African Charter on Human and Peoples' Rights (the Charter).[xxxiii]

Regarding hearing the Applicant on personal capacity pursuant to Rule 29 of the Court Rules and the inherent Jurisdiction of the Court, the Court observed that the State against which the application was made against is neither a State Party to the Charter nor State Party to the Court's Protocol.[xxxiv] The court further observed that, for individuals to be competent to bring applications against a State, such State should have deposited a declaration accepting

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jurisdiction of the Court on individual complaints.[xxxv] The Court stated that, the State against which the application was made had not deposited a declaration as required by Articles 34 (6) and 5 (3).[xxxvi] On this basis, the Court found the Applicant with no legal stand of bringing the application against the State (the Republic of Burundi).

Separate Concurring Opinion by Judge Fatsah Ouguergouz

In this case, Judge Ouguergouz made a very significant separate concurring opinion which helped to cure the dilemma which existed regarding the opined subject. This separate opinion had various issues but the author is interested in the Judge's clarification regarding the question whether the Court can reject an application *de plano* by a simple letter of the registrar.[xxxvii] The Judge answered this question to the affirmative that, it is possible for the Court to reject the application *de plano* (that is, without even hearing the Applicant). The Judge cautioned the Court not to repeat the practice which it had been experiencing before 26 June 2014 in which applications filed against African States not parties to the Court's Protocol or have not deposited the required declaration under Article 34 of the Court's Protocol were judicially determined and then dismissed.

In the 26 June 2014 Court's decision in *Baghdadi Ali Mahmoudi v. the Republic of Tunisia*[xxxviii] in which the Court judicially dismissed the Application, Judge Ouguergouz made a separate concurring opinion observing that such application ought to be rejected *de plano* since it was made against a State not Party to the Charter and had not deposited the required declaration. Since 26 June 2014, the Court had been rejecting *de plano* various applications administratively and not judicially simply by a letter of the registrar. The Judge was emphasizing this stand as he viewed it as the proper position since the same has been done by other international courts such as the International Court of Justice.[xxxix]

The Judge also opined that, in the kinds of applications made against non-State entities such as the European Court of Human Rights or the *Conference Interafricaine des Marches des Assurances (CIMA)*, those applications are to be rejected simply by office mail signed by the Registrar or Deputy Registrar as the case may be.[xl] He emphasized that the Court until the application at hand (since 26th June 2014) had rejected *de plano* various applications made against States not Party to the Court's Protocol.[xli] He gave examples of applications made against Egypt, Tunisia, Republic of Congo and Lesotho.[xlii] He also added that those kind of

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applications are not even supposed to be registered in the General List of the Court upon being rejected *de plano.*[xliii]

In fact, this observation by Judge Ouguergouz held very vital concerns having positive contribution to the wellbeing of the Court. This is because in kind of cases like this application which was made by the Applicant normally the Party against which the application is made is even not notified. It is therefore unfounded to judicially determine the matter fearing jeopardizing the right to be heard that everyone has. It should be emphasized that, the right to be heard was never intended to apply even to unfounded applications which are erroneous from their face. It is a known fact that one amongst the challenges facing the African Court on Human and Peoples Rights is human resources and having a bulk of cases pending. Therefore, instead of judicially determining some unfounded applications, the Court should use its resources to determine genuine and founded cases which are pending. Cases like the application by Femi Falana should simply be dismissed administratively by simple letter of the Registrar or Deputy Registrar.

B. *In the Matter of Baghdadi Ali Mahmoudi v. The Republic of Tunisia (Application No. 007/2012)*

The author has decided to present this case as it supplements the separate opinion given by Judge Fatsah Ouguergouz in the preceding case. Judge Ouguergouz even cited this case when giving his separate opinion in the preceding case.

Summary of Facts

In this case, the Applicant made an application against the Republic of Tunisia accusing the latter as responsible in committing human rights violations contrary to the provisions of the African Charter on Human and Peoples Rights. As a supplement to the application the Applicant submitted copies of judgments of the Court of Appeals of Tunisia proving exhaustion of local remedies.[xliv]

Court's Observation

After the inquiry made by the Registrar from the Legal Counsel of the Commission of the African Union, it was discovered that, the Republic of Tunisia had not made a declaration accepting the competence of the Court to receive individual complaints against it pursuant to

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Article 34 (6) of the Court's Protocol. The Court then dismissed the application on the ground that it lacked jurisdiction in view of Articles 5 (3) and 34 (6) of the Court's Protocol.[xlv]

Separate Concurring Opinion by Judge Fatsah Ouguergouz

In this opinion, Judge Ouguergouz was not happy with the Court's judicial determination of the matter. He was of the view that such application ought to be rejected *de plano* by simple letter of a Registrar.[xlvi] He was of the view that it was manifest from the face of the application that the Court lacked jurisdiction since the Republic of Tunisia though is Party to the Court's Protocol, had never deposited the declaration accepting the competence of the Court receiving applications from Individuals and Non-Governmental Organizations.[xlvii]

The Judge opined that, the Court by judicially determining the matter it contradicted its own judgment it made in the case of *Michelot Yogogombaye v. Republic of Senegal*.[xlviii] The Judge presented that, in the Yogogombaye case, the Court in paragraph 39 of the judgment interpreted the meaning of the word "receive" as used in the second sentence of Article 34 (6) of the Court's Protocol. The provision reads:

> *"[The Court] shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration".*

The Court interpreted the word "receive" as meaning judicially hearing the matter and not the act of physically receiving the application.[xlix] Therefore Judge Ouguergouz was of the opinion that, the Court, by judicially hearing the matter actually "received" the application while the Respondent had never made a declaration accepting the competence of the Court to receive individual complaints against it.[l] The Judge further opined that the Court judicially determined the matter without even informing the State against which it was made, something which was against the adversarial principle of *Audiatur et altera pars.*[li] He was of the view that, if the Court could have informed the Respondent of this application possibly the latter would have accepted the competence of the Court by making a declaration by way of *forum prorogatum*.[lii] He therefore emphatically concluded that, such a matter ought to be rejected *de plano.*

C. *Michelot Yogogombaye v. Republic of Senegal (Application No. 001/2008)*

Observing the separate opinion in the preceding case, it is lucid that this case has been cited by Judge Ouguergouz in substantiating his opinion. In fact this was the first case to be judicially

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determined by the African Court on Human and Peoples' Rights. The major contribution that the separate opinion attached to this judgment made, is its address to the question at what time should the State validly make a declaration accepting the Court's jurisdiction to receive applications from individuals and NGOs. The opinion also addressed the question whether making the said declaration by the State is mandatory or optional. Before appraising the separate opinion which was attached to this judgment, it a matter of good sense to know what happened in this case.

Summary of Facts

The Applicant lodged this application alleging that the Republic of Senegal had instituted proceedings against the former President of Chad, Mr. Hissein Habre, the proceedings which violate various human rights. Mr. Hissein Habre before the institution of the proceedings was a political refugee in Senegal. The Applicant stated that those proceedings were preceded by amendments of the laws of Senegal including its Constitution whose effect was to authorize retroactive application of its criminal laws with the aim of exclusively and solely trying Mr. Hissein Habre. He stated that such amendments violated *inter alia* Article 7 (2) of the African Charter on Human and Peoples' Rights (the Charter) which embodies in the principle of non-retroactivity of criminal law. He therefore requested the Court to suspend the ongoing proceedings.

Court's Observation

After hearing both Parties the Court found that it had no jurisdiction to hear and determine the matter and hence dismissed the matter. It reached such conclusion after finding out that the Republic of Senegal had not made a declaration accepting the jurisdiction of the Court to receive applications brought by individuals and Non-Governmental Organizations (NGOs) with observer status before the African Union Commission pursuant to Articles 5 (3) and 34 (6) of the Protocol establishing the Court.[liii]

Separate Concurring Opinion by Judge Fatsah Ouguergouz

Before discussing this separate opinion, it is important to critically note that this was the first case to be judicially determined by the Court. No wonder it may be found that, the Court instead of doing self scrutiny to find out whether the party against which the application was filed had made the declaration pursuant to Article 34 (6) of the Court's Protocol it waited until hearing

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submission of the Respondent. As it may be seen, after this case, in all the cases which came after, the Court was able to conduct prior inquiries to determine whether the required declaration has been made or not. It is prior inquiries which may enable the Court to even reject the application *de plano* the concept which has been well addressed in the two preceding cases. It is possible that, since the Court was at its early stages of growing, it was likely to make these procedural blunders as part of fortifying its jurisprudence.

Turning to the separate concurring opinion by Judge Ouguergouz, the author is interested in the interpretation that the Judge made regarding the question when a State should validly make the declaration accepting the competence of the Court to receive applications from individuals and Non-Governmental Organizations with observer status at the African Union Commission. The author is also interested in the opinion that the Judge made regarding the question whether making such a declaration is mandatory for a State. Judge Ouguergouz in this opinion also addressed the issue of rejecting the matter *de plano.*[liv] The author will however not discuss the matter as it has been well discussed in the two preceding cases.

Regarding the question of the time of making the declaration, the Judge was interpreting Article 34 (6) of the Court's Protocol which in verbatim is reproduced here under:

> *"At the time of ratification of the Protocol or any time thereafter (emphasis added), the State shall (emphasis added) 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".*[lv]

Before giving answer to the question at what time should a State make such a declaration, the Judge firstly interpreted the meaning of the word "shall" as used in the provision whether it gives mandatory obligation to the State to make such a declaration.[lvi] Reading from its wording and using the literal rule of statutory interpretation, the Judge stated that it may make one conclude that making such a declaration is mandatory and not an option.[lvii] The Judge however opined that digging beyond the ordinary meaning of the word "shall" it is clear that making such a declaration is optional and not mandatory.[lviii] The Judge reached such a conclusion because there is no time limit set for the State to make such a declaration. He also cemented that, the *travaux preparatoires* of the Court's Protocol reveals that making of such a declaration was never intended to be mandatory rather optional.[lix]

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After addressing the preceding question, it is matter of prudence to now turn to the question when the State should make such a declaration as opined by Judge Fatsah Ouguergouz. The Judge was of the view that, reading Article 34 (6) nowhere within its provision it can be found requiring the declaration to be made "before" the time of filing of the application.[lx] The provision simply provides that the declaration may be made at the time of ratification or at any other time thereafter. On this basis, the Judge stated that, nothing prevents the State from making such a declaration after the application has been already filed.[lxi] This situation is what the Judge referred as consent *forum prorogatum* or "prorogation of competence".[lxii]

The above opinion by the Judge is supplemented by the reasoning of the majority decision in the same case under paragraph 39 of the judgment. In such paragraph the Court reasoned that the word "receive" as used in Article 34 (6) of the Court's Protocol does not mean physically receiving it rather it means judicial hearing. That being the case it is therefore evident that the Court may allow the application to be lodged, and subsequently request a State against which the application has been brought to make the declaration accepting the competence of the Court to receive applications from individuals and NGOs.

D. In the Consolidated Matter of Tanganyika Law Society and The Legal and Human Rights Centre v. The United Republic of Tanzania (Application No. 009/2011) & Reverend Christopher R. Mtikila v. The United Republic of Tanzania (Application No. 011/2011)

In these cases, Judge Oguergouz made a separate concurring opinion whose effect *inter alia* was to clarify the question at what time a State may be subjected to Jurisdiction of the Court with regard to applications from individuals and NGOs? Upon making of the declaration under Article 34 (6) of the Court's Protocol, will the State be bound to jurisdiction of the Court by virtue of its obligations under the African Charter on Human and Peoples' Rights regarding human rights violations it perpetuated before making such a declaration? Is the Court duty bound to determine whether or not it has jurisdiction *proprio motu*? Before discussing the reasoning of Judge Ouguergouz on these questions, below is the summary of the facts of the cases.

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Summary of Facts

The two applications albeit lodged differently were consolidated since they had the same claim against the same Respondent. Majorly, the claims alleged that the Respondent had made some constitutional amendments whose result violated human rights. The rights alleged of being violated are right of freedom of association, right to participate in public/governmental affairs and the right against discrimination by prohibiting independent candidacy for Presidential, Parliamentary and Local Government elections. The Applicants claimed violations of *inter alia* Articles 2 and 13 (1) of the African Charter on Human and Peoples' Rights as well as Articles 3 and 25 of the International Covenant on Civil and Political Rights.

Court's Observation

The Court found the prohibition of private candidacy to be in violation of the right to freedom of association and right to participate freely in the government of one's own country.[lxiii] The Court observed that the prohibition was disproportionate to the purpose of such prohibition since there was no any other means of a person contesting for Presidential, Parliamentary and Local Government elections other than being a member of a political party. The Court distinguished this case with the Mexican case of *Castaneda Gutman v. Mexico* since in that case the Inter-American Court found that there were other options for individuals to be elected other than relying solely on being a member of a political party.[lxiv]

Separate Concurring Opinion by Judge Fatsah Ouguergouz

Judge Ouguergouz interpreted various issues which are critical to the understanding of human rights principles and procedures of the Court. He gave his interpretations because he was of the view that the majority decision was not articulate enough in addressing them.

He firstly gave his view regarding the Court's determination of whether it has jurisdiction or not. He was of the view that, the Court has a duty to determine that it has jurisdiction regardless of whether or not there has been a preliminary objection by the Respondent regarding jurisdiction of the Court in that matter.[lxv] This clarification was very important in understanding issues pertaining to procedures of the Court. This is because the position is not clearly postulated in the Protocol establishing the Court and in the Court Rules.[lxvi]

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The Judge also addressed the issue of temporal jurisdiction of the Court. He opined that, the Court was not eloquent in addressing how the State violations of human rights done before making the declaration under Article 34 (6) could still fall within jurisdiction of the Court. He opined that, primarily it is only the violations which occurred after a State had made a declaration under Article 34 (6) can make it subject to jurisdiction of the Court on applications from individuals and NGOs.[lxvii] He stated that, the State can never be said to fall under jurisdiction of the Court over applications from individuals and NGOs simply because it is party to the African Charter on Human and Peoples' Rights and the Protocol establishing the Court.[lxviii] He however qualified that, violations done prior to making of the declaration can only fall within jurisdiction of the Court if they bear continuous character.[lxix]

E. In the Matter of Peter Joseph Chacha v. The United Republic of Tanzania (Application No. 003/2012)

In this case, Judge Ouguergouz gave a separate dissenting opinion making the number of dissenting opinions attached to that judgment be three. His opinion is very key to understanding the concept of exhaustion of local remedies. Although the author puts some critics to the conclusion of this opinion at the end but still the Judge's analysis of the concept of exhausting local remedy was well addressed.

Summary of Facts

In the last quarter of year 2007, the Applicant in this case was charged of various criminal charges of conspiracy, robbery, murder, armed robbery, rape and kidnapping in the Respondent State. During the arrest and institution of proceedings against him, some of his properties were seized and he was put under custody. Most of his cases never commenced pending finalization of investigations. He made applications to the High Court requesting for orders that his cases commence to hearing stage and restitution of his property but his applications were either dismissed or withdrawn for procedural irregularities. He also made applications to the High Court alleging violations of his numerous constitutional rights but yet even those applications failed for being improperly filed. In addition, he also sent some correspondences to various Ministries and the Commission on Human Rights and Good Governance requesting for his complaint to be addressed but no action was taken.

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The Applicant alleged violation of various provisions of the Tanzania Criminal Procedure Act [Cap. 20, R.E 2002] and Constitutional rights. In his Application he never mentioned violation of the African Charter on Human and Peoples' Rights (the African Charter) or any other international human rights instruments. The Respondent made preliminary objections to jurisdiction of the Court and admissibility of the application. The respondent asserted inter alia, that the Applicant did not exhaust local remedies and that the Court lacked subject matter jurisdiction because the application did not allege violation of the African Charter or any other international human rights instruments. The Respondent also alleged that the application was not filed within reasonable time as it was filed nine months since the alleged violations occurred.

Court's Observation

The court dismissed the application for falling short of admissibility requirements. The Court was of the opinion that, the Applicant did not exhaust some local remedies which were still available to him. The Applicant had an avenue of appealing to the Court of Appeal but he never exhausted such a remedy.[lxx] He also had an avenue of applying for restitution of his withdrawn cases but he never made those applications.[lxxi] The Court emphatically stated that exhaustion of local remedies by an Applicant is not an option rather a mandatory requirement under international law.[lxxii]

However the Court declined the preliminary objections of the Respondent regarding the application not being filed within a reasonable time and that the application did not indicate the violations under the African Charter on Human and Peoples' Rights. The Court stated that there is no fixed time within which an application should be lodged to the Court after exhaustion of local remedies.[lxxiii] The Court further stated that where only national law or constitution has been cited by the Applicant, the Court will look for corresponding articles in the African Charter or any other human rights instrument and base its decision thereon.[lxxiv] It emphasized that as long as the rights violated are also protected by the African Charter the Court will have jurisdiction over such a matter.[lxxv] To cement its position the Court cited Article 55 (2) of the African Charter on Human and Peoples' Rights.

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Separate Dissenting Opinion by Judge Fatsah Ouguergouz

As already stated earlier, this opinion is very vital in interpreting various principles relating to exhaustion of local remedies.

In this opinion, Judge Ouguergouz was of the view that the Applicant exhausted the local remedies and his application ought not to be dismissed by the Court.[lxxvi] He stated that, in assessing whether local remedies have been exhausted, the yarding stick should be the nature of the rights which have been violated not merely the availability of those remedies.[lxxvii]

He strongly argued that, in the context of human rights protection, the requirement of exhausting local remedy should be applied with positive degree of flexibility doing away with excessive formalism.[lxxviii] On this basis, there are some circumstances which may free a person from the duty to exhaust local remedies available to him.[lxxix] It is within this spirit the concept of "constructive exhaustion of local remedies" comes in. He was of the view that consideration to the personal situation may be an additional to the elements of availability, sufficiency and effectiveness of the local remedies to be exhausted.[lxxx]

He also stated that the burden of proof on exhaustion or non exhaustion of local remedies should be equally distributed between the Applicant and the Respondent.[lxxxi] When a State raises an objection of non-exhaustion of local remedies, it has a duty to prove that those remedies are available, effective and sufficient.[lxxxii] It should not only assert in vain their availability. The State should show how those remedies are able to redress the grievance in question and it should provide the reasonable chances of success to the victim.[lxxxiii]

The Judge also opined that total passiveness of the national authorities when approached for redressing a claim over human rights violations may exempt a person from exhausting the local remedies.[lxxxiv] Furthermore, the judge was of the view that, the test in exhausting local remedy is that of a reasonable man; that is to say, considering all the facts and circumstances available, has the Applicant done what could be possibly expected of him to exhaust local remedies available?.[lxxxv] The Judge recalled how for a long time in the Respondent State, the Applicant exchanged letters and documents with the courts and authorities without any successful story on his side.[lxxxvi] This was enough to show that the State unduly prolonged the remedy and was passive to act in favour of the Applicant. In the Judge's view, the Applicant in this case effectively did all what could be reasonably expected of him to exhaust local remedies taking

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also into consideration that, the applicant acted alone for a long time without a counsel and he was illiterate.[lxxxvii]

The Judge finally concluded that, taking into consideration of the pertained circumstances the application by the Applicant, Mr. Peter Joseph Chacha met all the conditions for admissibility under Article 56 of the African Charter and ought to be determined on merits by the Court.[lxxxviii]

At this juncture it is important to emphasize that, this separate dissenting opinion by Judge Fatsah Ouguergouz exposes very essential principles pertaining to construction of the term "exhaustion of local remedies". However it should be read with caution since if wholly applied may lead to devastation of the way international law operates. International Courts are always in existence to complement national courts save for where there is a supranational Regional Integration. That being the case exhaustion of local remedy is very important to respect sovereignty of States.[lxxxix] The availability of exceptions to exhaustion of local remedies should not be interpreted too broadly to the extent of defeating the purpose of their existence and end up protecting individuals who never approached them out of their recklessness frustrations.

In the case at hand, the Applicant never (even with a simple attempt) approached the Court of Appeal which could hear and determine his appeal from the High Court. Under this situation it is very difficult to subscribe to Judge Ouguergouz's conclusion that the Applicant did all what could be reasonably expected for him to exhaust local remedies. Be what it may be, the Judge's analysis of various principles pertaining to the concept of local remedies is something to appraise.

CONCLUSION

This work has discussed five separate opinions by Judge Fatsah Ouguergouz that he made during the time when he was a Judge of the African Court on Human and Peoples' Rights. The aim was while pursuing the nature, types and nature of separate opinions, to appraise the contribution that the separate opinions by Judge Ouguergouz made in development of the African Court on Human and Peoples' Rights as well as in the interpretation of various rules and principles which are pertinent in the human rights field.

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The work has besides revealed that, separate opinions albeit do not form part of the Court's decision, they contribute in *inter alia* the clarification of the judgment (especially with regard to separate concurring opinions) and lay a basis for future legal change. The author opines that, despite the existence of two schools of thoughts debating on whether separate opinions should be published or not, the author recommends for their publication. The author is of the view that, separate opinions if made candidly, give a room to critical indulgent of the judgments of various courts of law. Although Judge Ouguergouz is no longer a Judge of the African Court on Human and Peoples' Rights his separate opinions will still breathe and any human rights lawyer would be stirred to read them.

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[xxxiii] Para 5 of the Judgment.
[xxxiv] Para 7 of the Judgment.
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[xliii] Para 15 of the Opinion.
[xliv] Para 4 and 5 of the Judgment.
[xlv] Para 11 of the Judgment.
[xlvi] Para 1 of the Opinion.
[xlvii] Para 2 of the Opinion.
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[li] Para 5 of the Opinion.
[lii] Para 6 of the Opinion.
[liii] Para 40 of the Judgment.
[liv] Para 12 of the Opinion.
[lv] See Para 24 of the Opinion.
[lvi] Para 25 of the Opinion.
[lvii] Para 25 of the Opinion.
[lviii] Para 26 of the Opinion.
[lix] Para 26 of the Opinion.
[lx] Para 28 of the Opinion.
[lxi] Para 28 of the Opinion.
[lxii] Para 32 of the Opinion.
[lxiii] Paras 111, 114 and 115 of the Judgment.

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[lxiv] Para 107.3 of the Judgment.
[lxv] Para 2 of the Opinion.
[lxvi] Reading Articles 3 (1), 5 and 6 of the Protocol establishing the Court and Rule 39 of the Court Rules, the question of whether the Court is duty bound to *proprio motu* determine whether it has jurisdiction is not clearly provided.
[lxvii] Para 22 of the Opinion.
[lxviii] Para 23 of the Opinion.
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[lxx] Para 141 of the Judgment.
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