

Case summary

by *Barrie Sander*, 7 December 2011

Application No 001/2008 - Michelot Yogogombaye v. the Republic of Senegal

In a week where the UN Committee against Torture has called on Senegal to comply with its obligation to prosecute or extradite Chad's exiled dictator, Hissène Habré (see [here](#)), in this post I take a look back at the first judgment of the African Court on Human and Peoples' Rights ("ACtHPR"), *Yogogombaye v. Senegal*, which concerned a petition filed by Michelot Yogogombaye calling for the dismissal of the charges pending in Senegal against Mr. Habré (the full judgment may be accessed [here](#) and the Separate Opinion of Judge Fatsah Ouguergouz may be accessed [here](#)).

Background – Hissène Habré's 21 years of impunity

On 1 December 1990, when Hissène Habré was removed from power in Chad and fled to Senegal, victims of his regime began their long quest for justice.

Dubbed "Africa's Pinochet" by Human Rights Watch, the crimes alleged to have been committed by Hissène Habré's regime in Chad between 1982 and 1990 are well documented. Following Mr. Habré's fall from power in 1990, a [report](#) of the Commission of Inquiry tasked with investigating "the crimes and misappropriations committed by Mr. Habré, his accomplices and/or accessories" was damning:

"The record of Habré's 8-year reign is terrifying. The Commission still wonders how a citizen, a child of the country, could have committed so much evil, so much cruelty, against his own people. The stereotype of the hard-core revolutionary idealist quickly gave way to that of a shabby and sanguinary tyrant".

The Commission found that Mr. Habré's regime had led to more than 40,000 deaths, more than 80,000 orphans, more than 30,000 widows, and more than 200,000 people left with no moral or material support as a result of his repression.

Despite the findings of the Commission of Inquiry, it was not until 2000 that any formal legal action was initiated. In January 2000, seven Chadian victims filed a criminal complaint against Mr. Habré in Dakar, Senegal and in February 2000, a senior Senegalese judge indicted Mr. Habré on charges of crimes against humanity and torture. However, following interference from the Senegalese government (which was denounced by two UN rapporteurs), the Dakar Appeals Court ruled that Mr. Habré could not be tried since Senegal had not enacted legislation to implement its obligations under the UN Convention against Torture.

The victims next turned to Belgium where in September 2005, after a four-year probe, a Belgian judge issued an international arrest warrant against Mr. Habré and requested his extradition. In response, and after the Dakar Appeals Court ruled that it had no jurisdiction to rule on the extradition request, Senegal approached the African Union to recommend a course of action.

On 2 July 2006, the African Union called on Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for a fair trial" (see [here](#)). President Abdoulaye Wade declared that Senegal would follow the instructions of the African Union

and shortly thereafter, in January 2007, the Senegalese National Assembly amended its constitution and laws to ensure that its courts had competence over international crimes regardless of whether they were committed inside or beyond Senegal's borders.

However, Senegal is yet to re-open the case against Mr. Habré, which has been stifled by disputes over international funding and a general lack of political will in Senegal to ensure that the judicial process moves forward. Faced with Senegal's inaction, in February 2008, Belgium brought a case before the International Court of Justice to order Senegal to prosecute or extradite Mr Habré (see [here](#)), and on 18 November 2010, the Court of Justice of the Economic Community of West African States requested that Senegal must try Mr. Habré through a "special or ad hoc procedure of an international character" (see [here](#)). Unfortunately, as we enter the 22nd year of impunity for Mr. Habré since his fall from power, the prospect that a trial will commence in the near future remains slim.

Application

Amidst the multitude of actions that have been brought in various courts and tribunals in respect of the alleged crimes of Hissène Habré, one of the most striking is the action brought before the ACHPR in the case of *Yogogombaye v. Senegal*.

On 11 August 2008, Mr. Michelot Yogogombaye, a Chadian national, at the time residing in Switzerland, brought a case against Senegal before the ACtHPR "with a view to obtaining suspension of the ongoing proceedings instituted by the Republic and State of Senegal with the objective to charge, try and sentence Hissène Habré, former Head of State of Chad, presently asyllumed in Dakar, Senegal".

Mr. Yogogombaye based his application on 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 (the "**Protocol**"), pursuant to which "[t]he Court may entitle relevant Non Governmental Organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol". In his application, Mr. Yogogombaye claimed that both Senegal and Chad were State Parties to the Protocol and had "made the declaration prescribed in Article 34(6) accepting the competence of the Court to receive applications submitted by individuals".

In respect of the substance of his case, Mr. Yogogombaye referred to the constitutional amendments that had been made by Senegal in 2008, "authorizing retroactive application of its criminal laws, with a view to trying exclusively and solely Mr. Hissène Habré". In so doing, Mr. Yogogombaye alleged that Senegal had violated the principle of non-retroactivity of criminal law and had portrayed its intention "to use in abusive manner, for political and pecuniary ends, the mandate conferred on it by the African Union in July 2006". In addition, Mr. Yogogombaye explained that by opting for a judicial solution rather than an African solution inspired by African tradition, such as the use of the "Ubuntu" institution (which promotes reconciliation through dialogue and reparations), Senegal had sought to use its services as legal agent of the African Union for financial gain.

Beyond denying the merits of Mr. Yogogombaye's case, Senegal's defence centred on two preliminary objections. First, that for the ACtHPR to be able to deal with applications brought by individuals, the respondent State must first have recognised the jurisdiction of the court to receive such applications in accordance with Article 34(6) of the Protocol; since Senegal had not made any

such declaration, it submitted that the Court lacked jurisdiction to hear the case. Second, that Senegal could not identify any “justification for legitimate interest on the part of the Applicant to bring the case against the Republic of Senegal”.

Judgment

On 15 December 2009, the ACtHPR delivered its judgment in *Yogogombaye v. Senegal*, the first since its creation. The judgment broadly followed the pleadings of Senegal, finding that, pursuant to Article 34(6) of the Protocol, an individual is only entitled to lodge cases directly against States that have made special declarations authorizing such cases to be brought before the court.

Having requested the Chairperson of the African Union Commission, depository of the Protocol, to forward a copy of the list of the State Parties to the Protocol that have made such a declaration, the ACtHPR found that Senegal was not on the list and therefore had not accepted the jurisdiction of the court to hear cases instituted against the country by individuals or NGOs. With this in mind, the Court held that it lacked jurisdiction to hear Mr. Yogogombaye’s application and deemed it unnecessary to consider the case on the merits.

Comment

The case of *Yogogombaye v. Senegal* is significant not only because it is the first judgment of the ACtHPR, but also for providing an insight into the jurisdictional limits of the court in respect of applications submitted directly by individuals against State Parties to the Protocol. To hear a case initiated in such circumstances, the requirements of Articles 5(3) and 34(6) of the Protocol must be met. Taken together, these provisions confirm that direct access to the court by individuals is subject to two preconditions:

- (i) First, the State Party must have deposited an Article 34(6) special declaration granting the ACtHPR jurisdiction to hear such cases (Article 34(6) provides that the court “shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”, emphasis added); and
- (ii) Second, the ACtHPR must exercise its discretion under Article 5(3) to hear such cases (Article 5(3) provides that the court “may entitle [...] individuals to institute cases directly before it”, emphasis added).

The case of *Yogogombaye v. Senegal* centred on the simple, but contentious, question as to whether Senegal had submitted a special declaration authorizing individuals to directly bring cases against it before the ACtHPR. Failure to submit such a special declaration limits individuals to bring cases indirectly, either through their home States or the African Commission on Human and Peoples’ Rights. Unfortunately, as one commentator has noted “[b]oth these mechanism have so far languished in desuetude because neither African states nor the Commission has proved willing to refer cases to the Court” (C.C. Jalloh, 104 Am. J. Int’ L. 620, (2010) at 624).

Although the outcome of *Yogogombaye v. Senegal* was somewhat unsurprising, nonetheless the ACtHPR made several significant findings that have informed the court’s future approach to jurisdictional issues.

First, the ACtHPR underscored its judicial primacy in resolving questions of jurisdiction by citing Article 3 of the Protocol, which provides that in the event of a dispute as to whether the court has jurisdiction, “the Court shall decide”.

Second, the ACtHPR noted that the second sentence of Article 34(6) of the Protocol, which provides that “it shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration”, should not be understood in its literal (physical receiving) or technical (admissibility) sense. Rather it should be understood in light of the letter and spirit of Article 34(6) as a whole to denote “the conditions under which the Court could hear such cases” i.e. it refers to the jurisdiction of the ACtHPR to examine the application and does not prevent the court from physically receiving such petitions. In this way, individuals and NGOs are free to attempt to initiate claims directly regardless of whether an Article 34(6) special declaration has been issued by the respondent State. While in most cases, it is likely that the respondent State will (successfully) challenge the court’s jurisdiction on the basis of not having issued an Article 34(6) special declaration, the ACtHPR’s approach leaves open the possibility for States to accept the jurisdiction by issuing the special declaration *after* having received a particular individual’s petition before the court.

This point is further explained in the Separate Opinion of Judge Ouguergouz who explores the different means by which States may submit to the jurisdiction of the ACtHPR in respect of claims brought directly by individuals. Judge Ouguergouz notes that Article 34(6) of the Protocol does not require that the filing of the special declaration be done “before” the filing of the individual’s application; rather, it provides that the declaration may be made “at the time of ratification or any time thereafter”. In this way, there is nothing to prevent a State Party from making a declaration “after” an application has been introduced against it. In addition, there is nothing to prevent a State accepting the jurisdiction of the ACtHPR in a manner other than through a special declaration, for example informally or implicitly through *forum prorogatum* (which may be understood as the acceptance of the jurisdiction of the 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 behaviour). In this light, as one commentator has noted, Judge Ouguergouz interpreted Article 34(6) “in a manner that would encourage litigants to file applications to the Court with the hope that States Parties will make the required declarations after individuals have filed their applications” (J.D. Mujuzi, 10(2) *Human Rights Law Review* 372, (2010) at 378).