Case Summary

By Marie O'Leary and Katherine Iliopoulos, 6 February 2013

Application No 001/2011 - Femi Falana v. African Union

Background

One of the first applications before the *African Court on Human and People's Rights* ("AfCHPR"), *Femi Falana v. African Union* (Application No. 001/2011), seeks wider access to the court for citizens of African Union ("AU") nations.

Femi Falana, former President of the West African Bar Association and a human rights lawyer based in Lagos, Nigeria, made several attempts to get Nigeria to deposit the declaration required under Article 34(6) of the Protocol to the African Charter on Human and Peoples Rights (the Protocol), to no avail. Falana has clients who will like to approach the Court but he is unable to discharge his duties to them because of the requirement of Article 34(6) of the Protocol.

Application

Having failed to persuade the Nigerian government, Falana decided to sue the African Union to challenge the validity of Article 34(6) of the Protocol.

The Applicant sought the following remedies: (i) a declaration that Article 34(6) of the Protocol is null and void and inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the *African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* ("African Charter"); (ii) a declaration that the Applicant is entitled to file human rights complaints before the African Court by virtue of Article 7 of the African Charter; (iii) an order annulling Article 34(6) of the Protocol.

In arguing that the Court has *jurisdiction* to entertain the Application, the Applicant submitted that the Respondent, the African Union, which enacted and adopted the Charter and Protocol, is not a Member State of the AU, and may be sued as a corporate community on behalf of its Member States.

The African Union Commission, as Respondent, opposed the Application on the grounds of lack of jurisdiction and the Applicant's lack of *locus standi*; and on the merits, that Article 34(6) is not in conflict with the provisions of the Charter.

Decision (Majority 7:3)

On the issue of jurisdiction, the Court held that, citing the *Reparations* Case (ICJ, 1949) the AU is an international person: a subject of international law capable of possessing international rights and duties. It stated that international obligations arising from a treaty cannot be imposed on an international organization, unless it is a party to such a treaty or it is subject to such obligations by any other means recognized under international law. In line with Article 34 of the VCLT, the Court held that as far as an international organization is not a party to a treaty, it cannot be subject to legal

obligations arising from that treaty. It concluded that the AU cannot be sued before the Court on behalf of its Member States, and that an application filed against an entity other than a State having ratified the Protocol and made the declaration, falls outside the jurisdiction of the Court. The Court concluded that it was therefore unnecessary to examine the admissibility of the Application and the merits of the case.

Dissenting Opinion of Vice-President Akuffo (Ghana) and Judges Ngoepe (South Africa) and Thompson (Nigeria)

In considering that the AU can be sued and therefore the Court has jurisdiction, the dissenting judges cite the ICJ *Reparations* case (as was cited by the majority), but interpreted the relevant passage to mean that, the right to bring international claims carries with it the capacity to be sued. They stated that one of the duties imposed upon the AU, through the Charter, *is empowered to protect and promote human and peoples' rights independently of Member States*: such an obligation would have no meaning if it could not be enforced against the Respondent. Other duties imposed under the Constitutive Act of the African Union (Articles 3 and 4) include: the right to intervene in respect of war crimes, genocide, and crimes against humanity; and respect for democratic principles, human rights, the rule of law and good governance.

The dissenting judges also considered that it would have made little practical difference if the Applicant had 'exhausted local remedies' by taking Nigeria to its national courts to compel it to make the declaration and in any case, the Applicant is not approaching the Court as a Nigerian, nor is he seeking a remedy for himself and Nigerians only.

On the issue of *locus standi*, the dissenting judges considered that the Applicant cannot be disqualified by invoking the very article the validity of which the Applicant is seeking to challenge. The Court must first hear the matter and thereafter decide whether the impugned article is valid or not.

The dissenting judges held that Article 34(6) is inconsistent with the Charter. In doing so, the dissenting judges first considered: the relevant provisions of the Charter (Articles 1, 2, 7, 26, and 66, which provides for protocols to *supplement* the Charter) and the Protocol (preamble, Articles 1, 3, 5, 34(6)). They then examined the relationship between the Charter and the Protocol. They concluded that it is clear that the Charter ranks higher than the Protocol, with the latter brought about to enhance the protection of human rights through the Court. Therefore, to the extent that Article 34(6) denies direct access by individuals, which the Charter does not do, Article 34(6) is far from being a supplementary measure towards the enhancement of the protection of human rights: in fact, it does the opposite. They considered that Article 30 of the Vienna Convention on the Law of Treaties (VCLT), which deals with the application of successive treaties relating to the same subject matter, of no application, since they were not dealing with two treaties, but rather a treaty and a protocol.

The dissenting judges held that there is no provision in the Protocol empowering the Court to declare null and void any Article of the Protocol, but stated that it is "hoped that the problems raised by Article 34(6) will receive appropriate attention".

Separate Opinion of Judge Mutsinzi (Rwanda)

Judge Mutsinzi agreed with the majority that the Court does not have jurisdiction but disagreed on the legal basis for the said conclusion. He concluded that a reading of the relevant provisions of the

Protocol shows that the Respondent before the Court can only be a State Party. Since the AU is not a State Party, the Court does not have jurisdiction over the matter.

Separate Opinion of Judge Ouguergouz (Morocco)

Judge Ouguergouz agreed with the majority that the Court has no jurisdiction to entertain the Application but held that given that jurisdiction *ratione personae* was "manifestly lacking", the Application ought not to have been disposed of by way of judicial process nor, lesser still, through the full judicial consideration which it was accorded.

Like Judge Mutsinzi, Judge Ouguergouz disagreed on the legal basis for the finding and held that since the AU is not a State Party, the Court does not have jurisdiction. He stated that the only international organization which might, in the near future, be a party before a human rights Court is the European Union, and referred to talks underway to allow the EU to accede to the ECHR and thus be subject to applications before the European Court of Human Rights.

Judge Ouguergouz stated that he is in favour of the automatic access to the Court by individuals and NGOs but considers it a matter that comes within the exclusive jurisdiction of Member States of the AU and that such an important matter is more likely to be discussed by the Court as part of its advisory jurisdiction at the initiative of the entities mentioned in Article 4 of the Protocol.

Comment:

Ultimately, the judgment in this case represents a denial of access to justice. Furthermore, the issues raised in this case provided the African Court with an opportunity to address some of the persistent jurisdictional problems that have been stymieing the operation of the Court since its inception and to make recommendations for reform in order to make the Court accessible to its intended beneficiaries: the most vulnerable and disadvantaged.

Specifically, the case has raised the following issues:

1. The ability of individuals to directly access the Court and the legality of Article 34(6), the interpretation of and relationship between the Charter and Protocol and whether the African Court can annul a provision of the Protocol; and
2. The African Union as a party before the Court and the issue of accession to the African Charter on Human and Peoples' Rights.

Unfortunately, the Court by a majority decision took a narrow view of the broad issues involved and failed to take advantage of the opportunity provided to push for an evolution in the Court's jurisprudence.

To date, only five African countries have made the Article 34(6) declaration. Indeed, in the first judgement of the AfCHPR, *Yogogombaye v. Senegal* (15 December 2009), the Court held that the Applicant, as a Senegalese citizen, did not have standing before the Court as Senegal had not made the Article 34(6) declaration.

The minority opinion is considered by the authors to be sound in law. Not only is Article 34(6) inconsistent with the provisions of the Charter, it also violates basic tenets of natural justice. It follows

that the Court should not consider itself bound to apply that provision. It is lamentable however that the minority opinion stopped short of declaring the provision null and void, although it acknowledged that "such a move may appear to be the logical thing to do in light of our finding of inconsistency". The reason for such reluctance is unclear.

The majority also forewent an opportunity to examine the merits of the case, despite its finding on jurisdiction, given the fundamental importance of the question of the legality of Article 34(6). Unfortunately, the Court has no appellate jurisdiction – itself a major denial of the right to access to justice - so the matter has essentially been finalised.

However, an alternative to litigation could be a request to the Court for an advisory opinion. Under Article 4(1) of the Protocol, "[r]equests for advisory opinions pursuant to article 4 of the Protocol may be filed with the Court by a Member State, by the African Union, by any organ of the African Union or by an African Organization recognized by the African Union". If the advisory opinion found that Article 34(6) is indeed inconsistent with the Charter, the Court could potentially propose an amendment to the Protocol – the removal of the provision – in accordance with Article 35(2) of the Protocol. However, Article 35(3) of the Protocol provides that the "amendment shall come into force for each State Party which has accepted it", meaning that any amendment that does not serve the interests of a particular State will not come into force for that State. While this seems to present an obvious obstacle to removing the requirement for a declaration, an advisory opinion may provide the necessary impetus for much-needed change.

Indeed, the *2010 Activity Report of the African Court on Human and Peoples' Rights* addressed this conundrum, specifically citing this "disturbing situation" whereby so few countries have made the special declaration which creates "*a paradoxical situation where Member States of the African Union have established a human rights court and allocated minimum resources for its operation, and yet have considerably limited access to the Court by those mainly concerned, namely the individuals and nongovernmental organizations involved in the defence of human rights*" (para. 32). The Report notes that the continuation of such a situation would seriously affect "the entire system of judicial protection of human rights at the continental level." (para. 32)

During the African Court's sensitization visit to Nigeria in December 2011, Attorney General Prof. Peter Akper made a commitment to facilitate the process of Nigeria's acceptance to make the declaration under Article 34(6). To date, this commitment has not been realized.

Note on Recusal of Judges

It is interesting to note that the bench included a Nigerian judge, Judge Thompson. It appears that no application for recusal was lodged. This is in contrast to what occurred in *Ekollo Moundi Alexandre v Cameroon and Nigeria* (008/2011), where she was recused on the basis of Article 22 of the Protocol and Article 8(2) of the Rules of the Court. The latter case represents a clear case for recusal, given that Nigeria was a party to the case (in contrast to the present case where the African Union was a party). However, given the background to the case and Falana's nationality, he may have been able to seek recusal based on Rule 8(4)(d) which provides that no Member of the Court shall take part in the consideration of any case if "for any other reason, his/her independence or impartiality may, legitimately, be called into doubt". In hindsight however, the non-recusal of Thompson proved to be in his favour.

For more on the case, see:

http://www.african-court.org/en/index.php/2012-03-04-06-06-00/list-cases/2-home/170-application-no-001-2011-femi-falana-v-african-union

http://saharareporters.com/article/falana-vs-african-union-new-conundrum-access-justice-kayode-oladele

For more on European Union accession to the European Convention on Human Rights:

http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention