001/11_DO Femi Falana vs The African Union (Dissenting Opinion - Sophia Akuffo, Bernard Ngoepe & Elsie Thompson)

African Union

African Court on Human and Peoples' Rights

Case no: 001/2011

In the matter of:

Femi Falana - Applicant

Vs

The African Union - Respondent

Dissenting Opinion

Sophia A.B. AKUFFO, Vice-President;

Bernard M. NGOEPE and Elsie N. THOMPSON - Judges

1. We have read the majority judgment; regrettably, we are unable to agree with it. The history of the case until the conclusion of the hearing is set out in the majority judgment; there is no need to repeat it here.

The Parties:

2. The Applicant:
The Applicant is a Nigerian national, describing himself as a human rights activist. He says he has received some awards in the field of human rights. He is a practicing lawyer, based in Lagos, Federal Republic of Nigeria.

3. The Respondent:
The Respondent is the African Union (the AU), established in terms of Article 2 of the Constitutive Act of the African Union (the Act). It comprises all states in Africa, barring one. In terms of Article 33, the Act replaces the Charter of the Organization of African Unity (the OAU) and makes the AU a successor to the OAU in all relevant material respects. One of the consequences of such a succession is that instruments such as Charters and Protocols thereto adopted, ratified and acceded to under the OAU, are binding on the AU and Member States unless repudiated; these include the African Charter on Human and Peoples' Rights (the Charter) and the protocols to it such as 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). The Charter and the Protocol are central to this case.

The Applicant's case and the remedies sought

4. The Applicant challenges the validity of Article 34(6) of the Protocol. The Article bars individuals and Non-Governmental organizations (NGOs) from accessing this Court, except where a respondent state has made a special declaration accepting to be cited by an individual or an NGO. The Applicant contends that the Article violates various Articles of the Charter and therefore prays the following remedies:

"A. A DECLARATION that Article 34(6) of the Protocol on the Establishment of the African Court is illegal,

null and void as it is inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights."

"B. 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 on Human and Peoples' Rights."

"C.AN ORDER annulling Article 34(6) of the Protocol on the Establishment of the African Court forthwith."

Respondent's case

5. The application is opposed by the Respondent on the grounds which, broadly stated. are, firstly, lack of jurisdiction over the Respondent as well as the Applicant's lack of *locus standi*, and, secondly, that the impugned article is in any case not in conflict with the provisions of the Charter. Under the first point, a number of subsidiary grounds are advanced; they will be dealt with later.
6. Although the Respondent raised as a preliminary objection lack of jurisdiction, the parties were requested by the Court to argue both the preliminary objections and the merits together at the hearing; that was how the hearing was conducted. This was to avoid parties having possibly to come back after the preliminary stage, the intention being to save time, costs and also to avoid inconvenience to the parties.
7. We are aware that not being a signatory to a treaty, a third party may not be sued under that treaty. However, for the reasons which will become apparent later, this case is, in our view, different.
8. As said earlier, a number of related points are raised under lack of jurisdiction.

8.1 It is argued that the Respondent cannot be cited as representing Member States. That may be true; however, Respondent is cited herein on its own, as a legal person, having been established in terms of the Act, Article 2 thereof. The article reads "The African Union is hereby established with the provisions of this Act". We agree with the majority judgment that the Respondent has international legal personality, separate from the legal personality of its Member States. It is therefore not necessary for us to deal with this aspect. We, however, disagree with the majority judgment that the Respondent could not be cited in the case before us.

8.1.1 After holding that the United Nations Organization is an international person, the International Court of Justice, in Reparation for *Injuries Suffered in the Service of the United Nations*, Advisory Opinion, went on to say; *"What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims"*.[1]

It is our view that the right to bring international claims carries with it, as a natural legal consequence, the capacity to be sued. We point out later that one of the duties imposed upon the Respondent, through the Charter, is to protect human and peoples' rights; such an obligation would mean nothing if it could not be enforced against the Respondent.

8.1.2 After establishing the Respondent as a legal entity. Member States went further and conferred certain powers on it; these include the power to deal with the protection of human rights on the Continent. Article 3(h) of the Act states the following as being one of the Respondent's objectives, namely to: *"Promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and the relevant human rights instruments"*.

Furthermore, Article 4 of the Act states: The Union (Respondent) shall function in accordance with the following principles:

.....

(h) The right of the Union to intervene in a member state of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity.....

(m) Respect for democratic principles, human rights, the rule of law and good governance ....."

Respondent's predecessor, the OAU, had likewise been empowered, and charged with the obligation, by Member States to ensure the protection of human and peoples' rights. The Act, the Charter, as well as the Protocol, have empowered the Respondent to exercise the powers, and to execute obligations, conferred on it. These powers can be conferred expressly by a constitutive instrument, or may be implied.[2] Once so empowered, the legal organization is able to carry out the authorized duties and functions independently of the Member States as it is a legal person. It is our view that such has been the case here; accordingly, there was no need to cite individual Member State, which is also why Article 34(6) is not applicable.

8.1.3 One of the indications that an international legal person has been empowered to carry out certain functions independently of Member States is its capacity to take decisions by majority.[3] Such a decision would therefore bind even those Member States who voted against it. In terms of Article 7(1) of the Act, the Respondent does take decisions by majority, consensus failing: "*The Assembly shall take its decisions by consensus or, failing which, by a two- third majority of member states of the Union. However, procedural matters, including the question whether a matter is one of procedure or not, shall be decided by a simple majority*."

8.1.4 As further indication that Respondent has been empowered to deal with human and peoples' rights issues itself, organs such as the African Commission on Human and Peoples Rights (the Human Rights Commission) and this Court, have been created within it to enable it to carry out these duties. The Respondent itself, and not individual Member States, does for example, manage and conduct the election of officials to these organs; approves and provides budgets for their activities relating to the protection of human rights and receives periodic reports from these organs.

8.1.5 As yet a further demonstration of the Respondent's legal personality and that it has been empowered to deal with human rights issues itself, independently of Member States, the Respondent can seize this Court for an advisory opinion in respect of these matters in terms of Article 4 of the Protocol.

8.2 Importantly, none of the remedies sought by the Applicant seeks to impose any obligations on either the Respondent or Member States, particularly the prayer we may be inclined to grant.

8.3 In light of the totality of paragraphs 8.1 and 8.2 above, the argument that the Respondent cannot be cited as it is not a party to either the Charter or the Protocol, or that no case can be brought against it in respect of obligations of Member States and therefore that the Applicant has not shown any traceable causal connection between the Respondent and the Applicant's lack of access to the Court, is irrelevant; so too is the submission that no case can be brought against the Respondent in respect of obligations of Member States. We therefore hold that the Respondent has been properly cited.

8.4 It is also argued that Applicant did not exhaust local remedies before approaching this court, as required by Article 6(2) of the Protocol, read together with Article 56(5) of the Charter. In this respect, it is argued that the Applicant, being a Nigerian national, should have taken his country to his national courts to compel his country to make the declaration in terms of Article 34(6) of the Protocol. Respondent's argument is wrong in two respects. Firstly, the Applicant is not approaching the court as a Nigerian national, nor is he seeking a remedy for himself or Nigerian nationals only. Even if he had succeeded through Nigerian Courts to cause his own country to make the declaration, millions of nationals of the other State Parties to the Protocol which have not made the declaration would still remain barred. That only five State Parties have so far made the declaration, means that the multitude of individuals on the Continent remain barred by Article 34(6). Nigeria's declaration would hardly have made any difference. The logic of Respondent's argument is that nationals of each State Party which has not made the declaration should bring applications in every single national jurisdiction before approaching this court. This is a very theoretical approach, virtually impracticable, as opposed to the pragmatic one adopted by the Applicant. The protection of human rights is too important to be left to the vagrancies of such theoretical solutions,

8.5 Furthermore, Respondent contends that, by virtue of Article 34(6) of the Protocol, the Applicant, being an individual, is barred from approaching this court. Surely, one cannot disqualify the Applicant from approaching this Court by invoking the very article the validity of which the Applicant is seeking to challenge. The Court must first hear the matter and only thereafter, (emphasis) decide whether the impugned article is valid or not. Article 3(2) of the Protocol provides that in "*the event of a dispute as to whether the Court has jurisdiction, the Court shall decide*." For the Court to decide, it must first be seized by an applicant. It is precisely the person who has been shut out who will knock at the door to be heard on the validity of the ouster clause. This Court therefore has jurisdiction to adjudicate on the validity of Article 34(6) at the instance of an individual applicant. Applicant's answer to Respondent's argument is that since he is not citing a member state, but rather the Respondent, Article 34(6) has no application. There is merit in this argument. The Article only requires that State Parties make the declaration, and not non-State Parties. The law is not against an individual *per se*, but is aimed at protecting a State Party which has not made the declaration; that is why even a foreign individual can sue a State Party that has made the declaration.

8.6 Again, it is argued that the Court has, in any event, no power to set aside Article 34(6) of the Protocol. As this argument is capable of being divorced from the strict issue of jurisdiction, it will be dealt with later.
9. By reason of it having been empowered, and charged with the obligation, by Member States to administer, apply and enforce the Charter and the Protocol, both of which form the subject matter of this case, the Respondent has in any case a material and direct interest in the matter and therefore had to be cited.
10. For the reasons given above, the preliminary objections are overruled. That being the case, attention now turns to the merits of the case.

Whether Article 34(6) of the Protocol is inconsistent with the Charter.

11. As already stated, the protection of human and peoples' rights is one of the objectives of the Act, as was indeed the case under the old Charter of the OAU.
12. The Charter: The fundamental objective of the Charter was, and remains, to uphold and protect human and peoples' rights. This objective appears clearly from its preamble, and is cemented in,amongst others, the following Articles relied upon by the Applicant:

Article 1: *"The Member States of the Organisation of African Unity. parties to the present Charter shall recognize the rights, duties and freedom enshrined in that Charter and shall undertake to adopt legislative*

or other measures to give effect to them".

Article 2: *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race. ethnic group, colour; sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status"*

Article 7 *"1. Every individual shall have the right to have his cause heard. This comprises:*
a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

b) The right to be presumed innocent until proven guilty by a competent court or tribunal;

c) The right to defence, including the right to be defended by counsel of his choice;

d) The right to be tried within a reasonable time before an impartial court or tribunal;
2."*No one may be condemned for an act or omission which did not constitute a legal punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."*

Article 26: *"State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the fights and freedoms guaranteed by the present Charter."[*
13. The Protocol:

13.1 Article 66 of the Charter provides for the making of special protocols, if necessary, to supplement (emphasis) the provisions of the Charter towards the protection of human rights. Pursuant to that, the Protocol was made and then adopted on 9 June 1998, and duly ratified, at least by some Member States, and came into operation on 25 January 2004.Being a protocol to the Charter, the Protocol is subservient to the Charter.

13.2 The Protocol aims, through the Court, to give effect to the protection of human rights, including, naturally, the right of individuals, albeit in complementarity with the Human Rights Commission. This is a ringing demand by Article 66 of the Charter.

13.3 The preamble to the Protocol states that Member States are firmly "*convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights*...".

Article 1 establishes the Court. Article 3 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."

13.4 In terms of the Protocol, the mandate of the Court is therefore to protect human rights; and its jurisdiction, which itself decides upon, extends to all cases and disputes concerning human rights.
14. Access to the Court: Article 5 of the Protocol determines as to who can submit cases to the Court; for example the Human Rights Commission, or a State Party. Article 5(3) further provides: *"The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of the Protocol."*

Article 34(6) in turn reads: *"At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration."* Access to the Court is therefore controlled through Articles 5 and 34(6) read together. The latter Article is the one the Applicant contends is inconsistent with the provisions of the

Charter. In determining whether or not the Article is inconsistent with the Charter, it falls to be considered alone, and on its own wording and construction. Secondly, a proper understanding of the relationship between the Charter and the Protocol is vital in resolving the issue of alleged inconsistency between them.

15. The relationship between the Charter and the Protocol

From the above expose, it is clear that, firstly, the Charter ranks higher than the Protocol; a point which, not surprisingly, the Respondent did not dispute. Secondly, the Protocol was brought about solely to enhance the protection of human and peoples' rights through the Court, in complementarity with the Human Rights Commission. These are the very rights recognized and entrenched in the Charter.

16. To the extent that Article 34(6) denies individuals direct access to the Court, which access the Charter does not deny. the Article, far from being a supplementary measure towards the enhancement of the protection of human rights, as envisaged by Article 66 of the Charter, does the very opposite. It is at odds with the objective, language and spirit of the Charter as it disables the Court from hearing applications brought by individuals against a state which has not made the declaration, even when the protection of human rights entrenched in the Charter, is at stake. We therefore hold that it is inconsistent with the Charter. We do so well aware of Article 30

× Application of successive treaties relating to the same subject matter - 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

of the Vienna Convention on the Law of Treaties regarding the application of successive treaties relating to the same subject matter. It is our view that this Article finds no application in the case before us since we are not dealing with two treaties, but with a treaty (the Charter) and a mere protocol to itself (the Protocol).

Whether Article 34(6) should be declared null and void or set aside

17. The question arises whether this Court has the competence to declare Article 34(6) of the Protocol null and void and/or to set it aside. The Court is a creature of the Protocol and its competencies therefore derive from the Protocol. Determining whether or not Article 34(6) is inconsistent with the Charter is a matter of interpretation which the Court is therefore competent to do in terms of Article 3(1) of the Protocol. So too, in holding that this Court has jurisdiction to hear this application, the Court derives its competence from Article 3(2) of the Protocol which empowers it to decide whether or not it has jurisdiction in any particular matter before it. In national jurisdictions where the constitution is the supreme law, any law inconsistent therewith would be liable to be struck down by the Court, the latter deriving the power to do so from the constitution itself. In cast), we find no provision in the Protocol empowering the Court to declare null and void and/or to set aside any Article of the Protocol. Therefore, much as such a move may appear to be the logical thing to do in light of our finding of inconsistency, the applicant's prayer is not competent. It is, however, hoped that the problems raised by Article 34(6) will receive appropriate attention.

18. The following finding is made:

(a) The Court has jurisdiction to hear this application.

(b) Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights is inconsistent with the African Charter on Human and Peoples' Rights.

(c) The Applicant's prayer that Article 34(6) be declared null and void and/or be set aside is denied.

Sophia A.B. AKUFFO, Vice-President:

M. NGOEPE, Judge:

Elsie N. THOMPSON, Judge.

Done at Arusha, this 26th day of June, in the year Two Thousand and Twelve in English and French, the English text being authoritative.

1 I.C.J Reports 1949,, p I 74, at p 179
2 Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports. 1996, p 66 at p.79.
3 The law of International Organisations, p.72 Second Edition, N. D White.